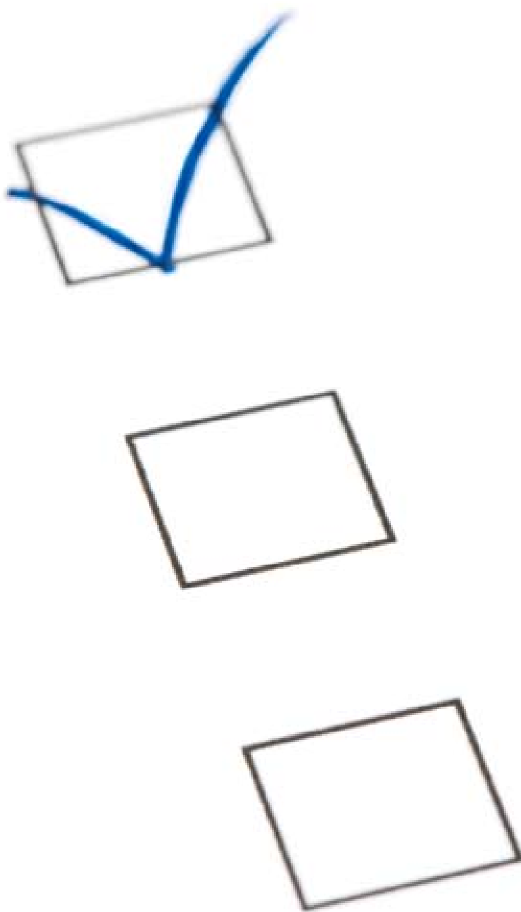
No 51 September 2008

IPBA Journal

IPBA NEWS AND LEGAL UPDATE



Arbitration and Dispute Resolution

LexisNexis
(a division of Reed Elsevier
(Greater China) Ltd)

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An imprint of
LexisNexis
(a division of Reed Elsevier
(Greater China) Ltd)

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ISSN 1469-6495

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The Official Publication of the Inter-Pacific Bar Association

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The President's Message

Dear Colleagues,

The calendar for the new IPBA year reflects the ever-increasing level of IPBA programming activity, as well as important institutional developments in the organization of our association.

Together with the Hong Kong International Arbitration Centre and the Hong Kong Corporate Counsel Association, the IPBA presented the "ADR in Asia" Conference for 2008, on the subject of "Arbitration & Mediation—Global Platforms for Dispute Resolution", on September 12. The leading role in organizing this traditional event was played by Christopher To, who has just stepped down after completing a term as Chair of our Dispute Resolution Committee, and this event brought together a roster of leading arbitration and mediation specialists from throughout the Asia-Pacific region.

Then on October 24 we offer a program in Tokyo on the "Japanese In-House Legal Department and Its Relationship with Outside Law Firms", featuring Kazumichi Matsuki, Assistant to the Senior Executive Vice President in Charge of Legal and Compliance, and General Manager of the Compliance Department, of Mitsubishi Corporation. This will be merely the latest in the regular series of programming and social events offered by the IPBA's highly active group of Japanese members.

In November the IPBA's Mid-Year Council Meeting will be held in Hanoi, the first time the IPBA will ever hold one of its regular seasonal meetings in Vietnam. After the Council's business meetings, we offer a day of educational programs, on November 10, some in collaboration with the Vietnam Lawyers Association. The morning will feature a program on "Equitization and Privatization: Vietnam, China and Indonesia", organized by the Cross-Border Investment Committee, one of our largest and most active committees, under the leadership of one of its Co-Chairs, Roger Saxton, and Sandor "Sandy" Schick, an IPBA member from Singapore. An outstanding roster of lawyers, investment bankers and government officials will participate in this banner event. In the afternoon we will present two programs organized together with the Vietnam Lawyers Association, one on "Current Legal Ethics Issues in Selected Asian Jurisdictions", and the other on "the Role and Regulation of Foreign Lawyers in Vietnam". All programs in Hanoi on November 10 are open to IPBA members. We are pleased to note the increasing number of IPBA members from Vietnam, and at this point it seems likely that Vietnam will be the next jurisdiction to be represented on our Council by a Jurisdictional Council Member, by virtue of having 25 or more IPBA members.

March of 2009 will bring one of the highlights of the IPBA programming year, our traditional "Asia M&A Forum", organized in cooperation with the International Financial Law Review. The 2009 Asia M&A Forum, to be held in Hong Kong as in the past, will undoubtedly again draw keen interest, and participation, from throughout the Asia-Pacific region, and indeed elsewhere as well. And the IPBA year will conclude with the 2009 Annual Conference in Manila, where the Manila Host Committee is in the process of organizing a remarkable roster of educational programs, under the leadership of Jose Rosell and Kevin Qian, our Program Coordinator and Deputy Program Coordinator, respectively.

The IPBA is committed to continued educational programs of direct relevance to business lawyers in the Asia-Pacific region. No other organization offers so rich and so varied a schedule of such programs in this region, and as the IPBA continues to grow one can only be optimistic regarding the future development of the IPBA's programming agenda. And perhaps most important of all, our programming is intended, first and foremost, to be a resource for IPBA members. Discounted registration fees will be available to IPBA members at all our programs during this new IPBA year, and the way to participate in our programs, as a speaker, moderator or program organizer, and to keep abreast of our program development and our program agenda, is to become an IPBA member.

Our committee structure remains the core of our programming and educational efforts. Our eighteen committees, which cover specific areas of substantive law practice, are the place to be for staying current on developments in the law and in practice in the Asia-Pacific Region, and for participating in a program on one or another of those areas. And we are excited to be in the process of creating a new Competition Law Committee, which will address important new developments in competition and anti-trust law in the Asia-Pacific region in recent years, and trends in that area of law which appear likely to unfold in the future.

Stay current, stay involved, stay "in the loop", by joining the IPBA if you are not already a member.

Gerold W Libby
President

The Secretary-General's Message

Dear IPBA Members,

Your Officers, led by Jerry Libby, our President, have been working on overdrive recently. Our goals differ little from those set by our predecessors. They are growth, quality, relevance, and IPBA's place amongst the premier international law associations around the globe.

Some of us in leadership are wondering whether the familiar IPBA, with its emphasis on a successful Annual Conference, may not be doing enough to face the challenge of staying relevant to its members. The thinking is that if IPBA does not change, it may find itself a laggard amongst most premier international law associations that have energetic committees staging programs at any time of the year. Some of IPBA's year round activities are already well-established and are of the highest standard. We hold a successful annual Merger and Acquisition Conference in Hong Kong each spring in conjunction with Euromoney. We also have an active program in hosting regional conferences. Recently, we completed a successful tour of several cities in Australia, and the next one is being planned for some South American cities. Our Journal continues to keep everyone in touch throughout the year. But somehow some of us feel it in our bones that we have to do more.

For the next chapter, we need to look more closely at our in-house resources. The most obvious would be our own Jurisdictional leadership. Some JCMs are more active than others in terms of organizing social events and educational programs. What we have done till now gives us no cause to be satisfied that IPBA has done all it can in each of the jurisdictions where we have a sizeable membership. There is no reason why there cannot be a greater commitment by JCMs across the board to do more for our members, and to reach out to more lawyers

I am also pleased to report to you my recent visit to Ho Chi Minh City, as a representative of our President, in attending the Presidents of Law Association Conference from 22-23 August 2008. This conference had the theme on "Discussion on Legal Reform and Development of Legal Practice in the context of International Economic Integration". This is the most interesting and best POLA conference I have attended. It was organized by the HCMC Bar, led by its President Mr Nguyen Dang Trung, a former JCM of IPBA for Vietnam and an avid IPBA supporter. IPBA is greatly obliged to the HCMC Bar for the honor they accorded IPBA, and to me as its representative, in both word and action.

On 24 August 2008, which was a Sunday, I was invited to the HCMC Bar headquarters, and met with about 20 lawyers who were ready and eager to hear me speak to them about IPBA and about my personal experience as an international lawyer. The meeting was organized by President Nguyen and some resident IPBA members, including a former IPBA Scholar who spoke with great feeling about IPBA's recognition of her through the Scholarship and how it impacted her life. The relevance of IPBA to young lawyers in the developing countries was brought home to me in a most moving way. It underscored how relevant IPBA continues to be in countries like Vietnam and China if we get it right. It also showed to me the wisdom of IPBA's past Officers who had the vision and generosity to provide IPBA with the opportunity to be the platform for young lawyers who aspire to have an international practice.

I would therefore urge each JCM to understand what their member needs are, whether it is to be given the chance to acquire more knowledge and skills for international law practice, or, in the case of JCMs from the developed countries such as Japan, France, United States, etc to expose their members to a altruistic experience of imparting their knowledge and skills to young lawyers from the third world, and see how their efforts will flower in a decade or two. If IPBA brings good and changes lives, then all the goals that I mentioned at the top of this page will, naturally, fall into place.

Arthur Loke
Secretary-General

Publications Committee Guidelines for Publication of Articles in the IPBA Journal

The IPBA Publications Committee is soliciting quality articles for the Legal Update section of the December 2008 and March 2009 issues of the IPBA Journal. If you are interested in contributing an article, please contact **Mr Kap-You (Kevin) Kim**, Publications Committee Chair, at kyk@bkl.co.kr or **Mr Hideki Kojima**, Publications Committee Vice-Chair, at kojima@kojimalaw.jp and/or submit articles by email to Mr Kim or Mr Kojima at the foregoing addresses.

Proposed themes for upcoming editions:

- Legal Markets and Practices in Asia-Pacific Region (December 2008)
  Deadline for submissions: December 1, 2008

- Bankruptcy and Insolvency in the Asia-Pacific Region (March 2009)
  Deadline for submissions: March 1, 2009

The requirements for publication of an article in the IPBA Journal are as follows:

1. The article has not been previously published in any journal or publication;
2. The article is of good quality both in terms of technical input and topical interest for IPBA members;
3. The article is not written to publicize the expertise, specialization, or network offices of the writer or the firm at which the writer is based;
4. The article is concise (2,500 to 3,000 words) and, in any event, does not exceed 3,000 words; and
5. The article is written by an IPBA member.

Arbitration Agreements in China

This article discusses key issues and considerations arising under Chinese law in relation to the drafting of arbitration clauses

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I. Introduction

While arbitration clauses generally only make up a very small part of a contract, the words contained within these clauses are an important and often neglected aspect of the future relationship between contractual parties. It serves as the architectural framework for the resolution process of potential disputes in setting up what issues are to be settled under arbitration, process, and payment of fees, among other considerations. Every clause and word in a contract can be impacted upon by the arbitration agreement. It influences how the contract is interpreted, the applicable law, and whether provisions are declared invalid. It is also relevant to the fairness, efficiency, and effectiveness of arbitration adjudication. The content within these clauses assumes greater importance in countries like China with a developing legal system as courts may lack the experience in helping to fix or clarify poorly written arbitration provisions and are generally inclined to have disputes settled by litigation, as opposed to arbitration, whenever possible.

Moreover, unlike more flexible legal jurisdictions, Chinese law and judicial interpretations of the law by the People's Supreme Court mandate specific items which must be included in the arbitration agreement. This article will give a brief overview of certain mandatory and optional features while also describing choice of law clauses, scope of agreements, and enforcement issues in connection with an agreement for arbitration between two or more parties.

II. Mandatory Terms within an Arbitration Agreement

1. Written Agreement

The Arbitration Law of China imposes several conditions on arbitrations. First, there must be a written arbitration agreement between the parties which can be entered into in advance or after the dispute arises. The written agreement necessity is fairly basic and it encompasses a wide scope of emails, letters, and other forms of correspondence between parties. An application to an arbitration commission cannot be accepted without providing proof of a written agreement. In addition, the decision to arbitrate should be clearly made to deny any perception of ambiguity.

2. Arbitral Institution

Secondly, specification of an arbitral institution is a necessity. Unlike the practice in most countries, an arbitration agreement which states that the parties will conduct arbitration without including a named institutional body is invalid. Consequently, this mandatory feature of the law denies the opportunity for ad hoc arbitration, where parties have more freedom to craft their own rules, or to utilize already crafted rules (for example, the UNCITRAL Model Rules) and avoid paying institutional fees for use of an institution's facilities for arbitration.

3. Defined Scope

Defining the overall scope of the agreement for arbitration is essential. In other words, the arbitration clause must define which matters are considered arbitrable or how many issues will be covered for arbitration dispute resolution. The arbitration law stipulates that the items to be arbitrated must be included within the arbitration agreement, but it is up to the parties to choose the

scope of arbitration or under what circumstances arbitration will be employed as the applicable method of dispute resolution. A broad clause encompassing a wide girth might include "all disputes between the parties" or "all disputes arising out of or relating to the contract." Such a clause could even be interpreted as covering previous or future contracts between parties. A narrow clause might stipulate that the arbitration is applicable to issues arising under the contract or a section of the contract.

Many countries provide for the doctrine of comp tence-comp tence, in which arbitrators are authorized to make their own determination on whether they should have jurisdiction to decide the dispute. The practical impact of this doctrine is that arbitrators will generally rule in favor of jurisdiction, and ruling that they have jurisdiction, will proceed with the arbitration regardless of a court decision on the jurisdiction of the tribunal.

China, by contrast, has a different system in place and does not recognize this doctrine. Article 20 of the Arbitration Law provides that a court or arbitration commission (CIETAC, for example) shall decide whether or not a case can be heard by an arbitration tribunal, with the court's judgment to prevail in case of a conflict between the two bodies. There are no other provisions within the Arbitration Law which empower the arbitration tribunal to make this determination. And in practice, this means that arbitration commissions and courts are the sole authorities for decisions on the jurisdiction of a tribunal.

Not applying comp tence-comp tence may result in arbitration clauses being given a narrower scope than would normally be expected in most countries. The general view is that arbitrators tend to take a more expansive view of their own authority to resolve a dispute than a court. Therefore, arbitration agreements in China should take into account this factor during the drafting process. As Chinese courts have the highest authority to rule upon a tribunal's competence, disputes that would be covered by an arbitration clause in the United States or Europe may not be covered in China.

Photo: Pali Rao

III. Optional Terms within an Arbitration Agreement

1. Language of the Arbitration Proceedings

In addition to mandatory terms, preferable optional provisions include the language of the arbitration, choice of arbitrators, and confidentiality. Express language provisions may be infrequently used in domestic transactions, but are often included within arbitration clauses for international transactions in China because there may be uncertainty as to which language will be used during the arbitration proceedings. The fact that the arbitration agreement is drafted in one language does not preclude the possibility that the resolution of the dispute will be in another language. Where there is no agreement between the parties, the arbitrators will have the power to choose the language to be used. This may result in expensive translation costs and inability to understand the proceedings for a party who does not speak the language being used. A party can avoid this problem or at least plan ahead to make accommodations if the language of arbitration proceedings is specified in the arbitration agreement.

2. Selection of Arbitrators

Although an optional requirement, the selection of arbitrators is one of the most important decisions to be made by the parties as these are the individuals who will ultimately decide the dispute. This is why the procedure for the selection of arbitrators is often included within the arbitration clause. Chinese law allows for either one or three arbitrators to be selected to adjudicate the dispute from the panel of arbitrators of the institution selected. General practice is to provide for both parties to choose one arbitrator and, thereafter, for the chosen arbitrators to agree upon another individual who will serve as the chief arbitrator. It also gives each side the advantage of choosing an arbitrator of their own choosing. This may prove helpful, especially to a foreign party in a dispute with a Chinese party, to avoid local favoritism which may benefit the domestic party. Further, the parties may also stipulate certain conditions for the arbitrators used. For instance, it can be stipulated that a certain amount of expertise is needed or that a selected

arbitrator must have expertise in a specified area.

3. Confidentiality

Confidentiality is one of the main reasons why parties choose arbitration and it is preferable to add provisions on confidentiality in the arbitration agreement. Chinese law stipulates that arbitrations are not to be held openly unless the parties elect to do so. Other relevant rules on confidentiality are usually set forth in the procedural rules of the arbitration institution selected. Despite these rules establishing the confidentiality of the proceedings, it is advisable to re-confirm this in an agreement and also set forth under what circumstances the agreed upon confidentiality can be broken without it being considered a breach. Common exceptions include written consent from other contractual parties, compliance with an order of the court or other legal requirement, and any confidential information given to lawyers, accountants, or other advisors as long as the requirement of confidentiality attaches to these individuals as well.

4. Choice of Law

While arbitration provides parties with more options in structuring the dispute resolution process, arbitration adjudication does not take place beyond the reach of the law. Flexibility does not mean unfettered choice. In all arbitrations the principle of "Lex Arbitri" is applicable. This is the notion that the national law of the seat of the arbitration is binding for the adjudication of the dispute. In practice, this means that there is not a one-size-fits-all arbitration agreement that is interchangeable in arbitrations for every country. This is particularly relevant for countries like China which, unlike other countries that give more freedom to parties' decisions, mandate that certain items be included in any valid arbitration agreement, as well as require that the arbitration take place in China in certain circumstances.

The general rule is that the law of the country most related to the contract between the parties will prevail with certain exceptions for the mandatory application of Chinese law, as is described below. However, the parties can also provide for a choice of law provision in an arbitration agreement. The basic relationship between these rules is that the Lex Arbitri provides the procedural rules, whereas, the choice of law covers substantive laws excluding any such mandatory substantive rules set forth in the national law. While choice of law provisions are accepted in most countries, there are often specific rules concerning their application. China now offers more flexibility for choice of law provisions than was previously allowed, including an option for model rules (For example, United Nations Convention on Contracts for the International Sale of Goods, or CISG). Many specific prohibitions, however, are still applicable.

First, non-Chinese law can only be applied to disputes involving "foreign interests" (涉外 in Chinese). As is set forth in greater detail in the section below on restrictions on arbitrations outside of China, the definition of "foreign interests" likely does not include foreign invested enterprises in China. Additionally, there are express rules prescribing the application of Chinese law in the following circumstances:

- Chinese-foreign equity and contractual joint venture contracts
- Chinese-foreign contracts for the exploration and exploitation of natural resources
- Foreign party management contracts in a Chinese-foreign equity or cooperative joint venture
- Foreign party's purchase of the equity in a domestic enterprise
- Foreign party's subscription to the capital increase of a domestic enterprise
- Foreign party's purchase of the assets of a domestic enterprise
- Contracts for the assignment of equity in a foreign investment enterprise

Besides express prohibitions clearly enunciated within the law, there also are separate all-encompassing rules for any aspect of a foreign law chosen that harms the social or public interest or violates any other provision mandating the specific application of Chinese law. Overall, this significantly limits the opportunities when non-Chinese law can be applied, particularly as to Chinese foreign-invested enterprises which might be the most likely to choose different laws to govern disputes. Choice of law provisions in arbitrations offer the parties an opportunity to transcend the normal territoriality of law into disputes in other jurisdictions for strategic, familiarity, or other purposes, but such provisions are subject to limits both in usage and in scope. In practice, probably the best advice is to exercise caution in the selection process. Law in China has developed rapidly and is generally able to provide adequate rules for the adjudication of disputes. Thus, when in doubt, it is advisable to select Chinese Law so as to ensure that an arbitration agreement's choice of law provision is not invalidated.

IV. Restrictions on Arbitrations outside of China

Similar to the demarcation provided in choices of law, arbitration law also provides that only parties in disputes that involve "foreign interests" are permitted to conduct arbitrations outside of

China. Thus, an arbitration conducted outside of China in a case that is not considered to involve a "foreign interest"would be considered as invalid, not recognizable, and unenforceable. There is some disagreement among legal practitioners as to whether the term "foreign interest" includes foreign-invested enterprises which are incorporated in China. The generally held view is that wholly foreign-owned companies, branch offices of foreign companies, and other similar companies recognized as foreign-invested enterprises are not regarded as having a "foreign interest" and thus are required to arbitrate disputes in China if no other foreign party is involved. In order to err on the side of caution, it is advisable to provide for arbitration within China for all arbitration agreements which might be considered as being domestic in nature, whether a wholly domestic company or a wholly foreign-owned enterprise registered as a company in China.

V. Focus on Enforcement as well as Adjudication

In taking into account these aspects of arbitration, consideration of enforcement is as important as adjudication when drafting an agreement. Fear of adjudication in China, lack of understanding of the applicable rules, and dissatisfaction with China's laws on arbitration may cause contractual parties to conduct arbitration elsewhere. If, however, an arbitration decision may ultimately need to be enforced in China, then certain applicable requirements of Chinese law cannot be circumvented by arbitration in another jurisdiction. Although as a party to the 1958 New York Convention on the Enforcement of Arbitral Awards (New York Convention) China has committed to enforcing awards made in other jurisdictions, these treaty provisions contain exceptions in which enforcement can be declined. Enforcement requests to Chinese courts will be denied if the arbitration agreement did not comport with Chinese law. Disputes without a "foreign interest" arbitrated outside of China cannot be enforced in a Chinese court, nor can an award from a dispute by domestic parties that choose foreign law to govern the dispute. Even with the flexibility afforded to arbitration, there are occasions when parties must select China as the seat of the arbitration and/or Chinese law as the governing law. Without the ability to enforce the award received, the arbitration agreement loses its usefulness as a method to resolve disputes. This is why consideration of enforcement during the drafting stage is imperative.

VI. Conclusion

This article is not meant to downplay the benefits of arbitration in China. It offers many advantages in comparison with litigation. As in many other countries, the benefits of this form of dispute resolution include flexibility, confidentiality, efficiency, and transnational enforcement under the New York Convention. Perhaps more importantly for China, however, is the power to choose the adjudicator of the dispute who may have significant experience as an arbitrator, be an expert in a relevant field, and/or possess a similar background or native language as a party or parties. This is as opposed to litigation, where the parties are not free to choose the adjudicator who, as a judge, may not have significant legal training, may be unfamiliar with the subject matter, and/or may be pre-disposed to favoritism for local parties.

By contrast, main purpose of this article is to emphasize the importance of the content of the arbitration agreement and to suggest that the flexibility and other benefits offered have limitations. Because the agreement has such a significant influence upon the whole relationship between the parties, its drafting should not be taken lightly, nor should the applicable rules which may apply to the seat of the arbitration and any country where an award may be enforced. As is illustrated above, each jurisdiction has different rules for arbitration and there is not a "one-size-fits-all" agreement which can be used in every circumstance. Many problems can be avoided by taking into account all applicable rules which, if included, can provide an effective basis for resolving future disputes. However, the failure to abide by the applicable rules can have a negative impact upon the adjudication process and/or decision making during the arbitration. It can also cause the agreement to be invalidated or not enforced, resulting in the parties having to restart dispute resolution negotiations in a much more contentious environment. In practice, adequate preparation should include deference as well as knowledge of all the applicable laws. The scope of the agreement should be clearly set forth to avoid an unfavorable interpretation by a court or commission. When in doubt, Chinese law should govern the dispute to avoid risking invalidation. And maybe most importantly, foresight as to enforcement should be a fundamental consideration at the beginning. In sum, it is essential to have the right terms in an arbitration agreement before disputes occur and not be forced to re-negotiate an invalid or ineffective arbitration clause in the middle of a dispute.

Global Engineering and Construction ADR: Meeting an Industry's Demand for Specialized Expertise, Innovation and Efficiency

This article describes the development of alternative dispute resolution methods in the global engineering and construction industry and identifies specific ADR methods that parties to a construction dispute may wish to consider

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For over 100 years the American engineering and construction industry has demanded a legally enforceable dispute resolution process capable of fairly addressing and resolving complex construction disputes. As early as 1905 the "Uniform Contract", drafted by the American Institute of Architects and endorsed by the predecessor of the Associated General Contractors of America, provided for resolution of disputes between the owner and contractor by a "Board of Arbitration to consist of one person selected by the Owner, and one person selected by the Contractor, these two to select a third. The decision of any two of this Board shall be final and binding on both parties hereto. Each party shall pay one-half of the expense of such reference."[1] This industry vision was brought to fruition by Congressional enactment of the Federal Arbitration Act of 1925, enactment by most states of the Uniform Arbitration Act of 1955, and the promulgation in 1958 of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[2] In the last half of the 20th century, however, the competing tension between efficiency and due process lead arbitration proceedings to assume many of the trappings of judicial proceedings. This "judicialization" of arbitration has produced a new round of construction industry demands for more efficient and innovative arbitration and other ADR approaches that invoke highly specialized expertise.

Specialized expertise is a hallmark of construction ADR. The field of construction law long has been viewed as extraordinarily complex, as invoking the "law and customs of the shop" more frequently than of the "law of the court", and as constituting a "separate breed of animal".[3] Thus, submission of disputes for decision to and by selected peers knowledgeable in industry customs and practices universally has been viewed as an option far superior to submission of disputes to judges and juries who knew little about the construction process. Many judges themselves have recognized the wisdom of submitting complex construction disputes to arbitrators or mediators rather than to the courts. Illustrative is the sage advice offered by a federal judge to the parties during a pretrial conference:

> "Being trained in this field [of construction], you are in a far better position to adjust

> your differences than those untrained in [its] related fields. As an illustration, I, who have no training whatsoever in engineering, have to determine whether or not the emergency generator system proposed to be furnished ... met the specifications, when experts couldn't agree. This is a strange bit of logic. ... The object of litigation is to do substantial justice between the parties' litigant, but the parties' litigant should realize that, in most situations, they are by their particular training better able to accomplish this among themselves."[4]

Another federal judge with years of experience as a federal district judge and federal appellate judge offered this anecdote about juries:

> "I have a favorite quote about a juror who talked about what the jury tried to do on a case: 'Judge, we couldn't really make heads or tails of the case. We really couldn't follow all the objections of the lawyers. None of us believed a lot of the witnesses so we made up our minds to disregard the evidence and decide the case on its merits.'"[5]

The trend toward ADR in the United States began in earnest in the last half of the 20th Century as the litigation process gained the merited reputation as being inefficient and costly, and as a forum that encouraged lawyers to demonstrate their prowess in "fighting to their client's last dollar".[6] Although the American judiciary in the early 20th century had been somewhat hostile to arbitration and other private dispute resolution forums outside of their courts, judges have accepted the practical wisdom of allowing parties to select and design their own dispute resolution processes and of offering judicial enforcement of parties' dispute resolution agreements. Twenty-three years ago Warren E Burger, Chief Justice of the United States Supreme Court, offered this advice to the American legal profession:

> "The obligation of the legal profession is, or has long been thought to be, to serve as healers of human conflicts. To fulfill that traditional obligation means that there should be mechanisms that can produce an acceptable result in the shortest possible time, with the least possible expense and with a minimum of stress on the participants. That is what justice is all about. ...
>
> My overview of the work of the courts from a dozen years on the Court of Appeals and now sixteen in my present position, added to twenty years of private practice, has given me some new perspectives on the problems of arbitration. *One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way....*
>
> *My own experience persuades me that in terms of cost, time, and human wear and tear, arbitration is vastly better than conventional litigation for many kinds of cases.* In mentioning these factors, I intend no disparagement of the skills and broad experience of judges. *I emphasize this because to find precisely the judge whose talents and experience fit a particular case of great complexity is a fortuitous circumstance. This can be made more likely if two intelligent litigants agree to pick their own private triers of the issues.* This is not at all to bypass the lawyers; they are key factors in this process. They acceptance of this concept has been far too slow in the United States."[7] (Emphasis added.)

One thing the construction industry has learned over the last century is that "one size" of dispute resolution process does not "fit all disputes." Particularly in the last quarter century, a host of new and innovative alternate dispute resolution methods (really, "improved" dispute resolution methods) have come into common use in the construction industry. The industry continuum of informal and formal alternate dispute resolution methods short of "litigation war" number at least ten, and have caused some astute observers to note a trend toward the "vanishing trial."[8] These ten ADR options are as follows:

1. Informal Discussions: The "Hot Tub" Approach. Used for centuries, this approach in fact is the beginning point in every effort to resolve a dispute. Whether this beginning takes place between disputing parties on the golf course, the ski slopes, the skeet shooting range, or in a health club's "hot tub", the objective is to encourage senior authorized persons to talk through their disputes and to settle them promptly. There are no rules applicable to this option other than patience, good humor, careful listening, and a reasoned evaluation of risks. Encouraging this informal process is the concept of "partnering".[9] Prompt resolution of disputes is a fundamental precept of the "spirit of partnership," a philosophy expressed in 1990 by the Commanding General of the US Army Corps of Engineers, as follows:

"The Corps of Engineers must be part of a partnership among the people we work with and those we serve. In the spirit of partnership, we must emphasize common interests, cooperative working relations, communication, and understanding. This calls for new ways to deal with conflict. I believe that ADR offers management tools for dealing effectively with conflict while avoiding expense and delay of adversarial proceedings."[10]

2. Structured Negotiations. Not infrequently, an ADR clause in large construction contracts is drafted to require the parties to enter into "structured negotiations" beginning with authorized persons at the project level. If disputes aren't settled at the lowest level, they work their way successively to higher levels among senior management and ultimately to the chief executive officers of the disputing parties.[11] Successful negotiators seek always for a "win/win solution" and to "keep the high road."[12]

Structured negotiation provisions sometimes mandate exchanges of documents and information prior to commencement of negotiations. As noted by commentators:

"A prime cause of construction disputes is insufficient knowledge held by either or both parties to the dispute. The more facts that can be placed on the table, the more discernable the solution to the problem. In fact, information exchange is at the heart of construction dispute resolution because, in most instances, the truth of the matter will usually be found in the contemporaneous documentation. The starting place to provide for the exchange and communication of data relative to the dispute is in the construction contract itself. The contract may require that the parties prepare, maintain, and preserve certain categories of records and other sources of information with respect to the project – for example, tender estimates, accounting records, job meeting minutes, change order logs, reports of weather conditions, and test reports. More to the point, the contract can require that these categories of documents be presented to the other party as a contractual condition to assert a claim. It will be easier and far more economical for the parties to exchange information and documents at this early stage of the dispute rather than under the formal requirements of discovery in the context of a lawsuit or even arbitration."[13]

3. Mediation. Where neither informal nor structured negotiations result in settlement, parties frequently invoke the assistance of a third-party mediator to assist them in the dispute resolution process. The world's administrators and judiciary have been supportive of this trend.[14] Success frequently depends upon the quality of the mediator selected. Mediators who practice mere "shuttle diplomacy" are viewed as less effective than "evaluative mediators" – those who understand the construction industry and offer meaningful insight and risk analysis to the parties based on the relevant facts, applicable law and practical considerations. The mediation process allows the parties themselves to retain control over settlement but affords the parties to benefit from the perspectives brought to the process by the mediator.[15]

4. Conciliation. Although in the United States "mediation" and "conciliation" frequently are deemed to be synonymous and used interchangeably, the concept of "conciliation" in international construction clearly contemplates an "evaluative" rather than "shuttle diplomacy" process.[16] As explained by a British commentator:

"[T]he difference between mediation and conciliation lies in the role played by the neutral party. In one, he simply performs the task of persuading the parties in dispute to change their respective positions in the hope of reaching a point at where those positions coincide, a form of shuttle diplomacy without actively initiating any

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ideas as to how the dispute might be settled. In the other method, the neutral party takes a more active role probing the strengths and weaknesses of the parties' cases, making suggestions, giving advice, finding persuasive arguments for and against each of the parties' positions, and creating new ideas which might induce them to settle their dispute. In this latter method, however, if the parties fail to reach agreement, the neutral party himself is then required to draw up and propose a solution which represents what, in his view, is a fair and reasonable compromise of the parties. This is the fundamental difference between mediation and conciliation."[17]

5. Standing Project Neutral. The concept of a "standing project neutral" contemplates that an individual or a board of individuals shall be identified in the contract or appointed pursuant thereto, and shall be "on call" to assist the parties in agreeing upon dispute resolution procedures, mediating disputes, rendering recommended proposals for settlement, and otherwise relentlessly pushing settlement. The trend in favor of a standing project neutral constitutes a rejection of the historic role of the design professional as the key party to whom disputes should be initially referred for a nonbinding decision. Illustrative is the significant change made by the American Institute of Architects ("AIA") in its A201-2007 General Conditions of the Contract for Construction, in which the AIA substituted for the architect of record an "initial decision maker" as the party to whom disputes initially will be submitted. Only if the parties fail to appoint an "initial decision maker," will the architect remain in that role. Section 15.2 invites the parties to appoint an "initial decision maker" in the contract and provides that the architect will serve as the initial decision maker unless otherwise indicated. All "claims" are to be presented to the initial decision maker, who may take action to request additional supporting data, reject the claim, approve the claim, suggest a compromise or advise the parties to utilize another dispute resolution process.

6. Standing Dispute Review Board. Under the impetus of the American Society of Civil Engineers and the Dispute Review Board Foundation, many civil projects in the United States today are awarded under contract provisions that require the parties to establish, at the beginning of the project, a standing dispute review board to which all disputes arising on the project will be submitted for nonbinding determinations. According to the Dispute Review Board Foundation (www.drb.org), the dispute review board process has achieved extraordinary results in which 99 percent of over a thousand projects on which the DRB process has been involved were complete without resorting to arbitration or litigation.[18]

7. Expert Determination. Even where "standing neutrals" may not be appropriate, expert recommendation and determination of disputes may still be appropriate on an ad hoc basis. This concept has been advocated for over thirty years by the International Chamber of Commerce.[19] According to one commentator:

> "The expert should, as soon as possible after ... consulting with the parties, prepare a provisional time table for the conduct of the expertise proceedings. ... The ultimate task of the expert is to issue a written expert's report in which he denoted the findings that he made within the limits of his mission statement. This report can only be issued once the expert has heard the parties and/or allowed the parties to make written submissions. The expert's report will not be binding upon the parties unless the parties agree otherwise."[20]

This expert determination process bears similarities to court appointment of experts under Rule 706 of the Federal Rules of Evidence, and to court appointment of a special master under Rule 53 of the Federal Rules of Civil Procedure to, *inter alia*, hold trial proceedings and make or recommend findings of fact and conclusions of law on issues to be decided by the court without a jury.

8. Adjudication. The "adjudication" dispute resolution process has its origins in the United Kingdom's Housing, Grants, Construction and Regeneration Act of 1996, which required construction disputes to be submitted promptly to an "adjudicator" for an initial decision that would be binding until completion of the project. Adjudication thus has been described as the "pay now, argue later" approach. It has had a highly satisfactory reception in the United Kingdom and is being recommended in some quarters for adoption in the United States.[21] The perceived advantages of "adjudication" are its ability to keep money flowing pending completion of the project, the relatively low monetary costs involved, and the high frequency of acceptance of recommendations of respected adjudicators and the significant reduction in litigation.

9. Mini-Trials/Mini-Arbitrations. Parties may agree to participate in nonbinding "mini-proceedings" in which judges or arbitrators offer recommended decisions based on limited admission of evidence and arguments of counsel. Like all other "evaluative" recommendations of third party neutrals, the mini-trial or mini-arbitration offers a nonbinding third party perspective on matters in dispute.

10. Arbitration. Arbitration has been the dominant construction industry dispute resolution process for over a hundred years.[22] Critical to the satisfactory use of arbitration is (1) the selection of arbitrators in whom the parties have trust and will respect whatever decision is reached, (2) the description of arbitrator powers and parameters of the arbitration process, and (3) the careful delineation of issues to be submitted to and decided by arbitration. Today, counsel for parties intending to arbitrate large and expensive matters typically follow the "party appointment" process, under which each party selects one arbitrator, and the selected arbitrators appoint a third as chair (all three arbitrators being deemed and treated as "neutrals" throughout the proceedings). Counsel also take care in defining the process parameters (*eg* high/low limitations on awards, "baseball" arbitration, *etc*), powers of the arbitrators and the issues to be decided. Arbitration agreements sometimes place limits on damages or other remedies that can be awarded by the arbitrators. Where damages or remedies are not limited, and the arbitrators are empowered to decide all disputes under the contract or arising out of the breach thereof, the arbitrators are accorded extremely broad discretion.[23]

In conclusion, the global engineering and construction industry has been a major factor in demanding efficient and innovative ADR in all of its many evolving varieties and in promoting ADR approaches that compel the application of specialized expertise in the resolution of disputes. At the heart of these approaches has been competent peer involvement, carefully structured processes, efficient case administration and highly expert impartial third parties to serve as arbitrators, project neutrals, adjudicators and mediators. Although some industry participants in the US can still be found taking their disputes to court (typically only those whose last ADR was unsuccessful), ADR has served the industry well. Those who regard ADR as less attractive than court litigation are those who were unwise in selecting suitable processes and procedures, third-party experts and efficient case administrators. Ultimately those who anticipate choosing litigation as their dispute resolution option of choice should bear in mind the words of US Supreme Court Chief Justice Warren E Burger: "One thing an appellate judge learns very quickly is that a large part of all litigation in the courts is an exercise in futility and frustration. A large proportion of civil disputes in the courts could be disposed of more satisfactorily in some other way. ...My own experience persuades me that in terms of cost, time and human wear and tear, arbitration [and all ADR] is vastly better than conventional litigation for many kinds of cases". *Supra p 12*. And of those "many kinds of cases" the premier kinds of such cases are large and complex engineering and construction cases.

Notes:

1. *See* The American Institute of Architects form 19642-PL, the Uniform Contract, art XIII (1905).
2. *See* Philip L Bruner and Patrick J O'Connor, Jr, 6 *Bruner & O'Connor on Construction Law 20.2 and 20:141*; John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* (2008).
3. *See* Philip L Bruner, The Historical Emergence of Construction Law, 34 William Mitchell L Rev 1 (2007); *Paul Hardeman, Inc v Ark Power & Light Co*, 380 F Supp 298, 317 (ED Ark 1974)("Construction contracts are a separate breed of animal; and, even if not completely *sui generis*, still...[the] law must be stated in principles reflecting underlying economic and industry realities. Therefore it is not safe to broadly generalize.")
4. *EC Ernst, Inc v Manhattan Construction Co*, 387 F Supp 1001, 1006 (SD Ala 1974).
5. *Comments before the 2004 Joint Meeting of The American College of Construction Lawyers and the Canadian College of Construction Lawyers (February 28, 2004), in 39 Constr L Rev 3d (Carswell) 4, 13-15 (Feb 2005).*
6. *See* Philip M Armstrong, *Why We Still Litigate*, 8 Pepp Disp Resol L J 379 (2008).
7. Warren E Burger, Chief Justice of the US

Supreme Court, Remarks before the American Arbitration Association and the Minnesota State Bar Association: Using Arbitration to Achieve Justice (August 21, 1985), in 40 Arb J 3, 6 (1985).

8 *See* Thomas J Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev LJ 427 (Fall 2007); Thomas J Stipanowich, *ADR and the "Vanishing Trial": The Growth and Impact of "Alternate Dispute Resolution"*, 1 J Emp L Studies 843-912 (November 2004); Thomas J Stipanowich, *Beyond Arbitration: Innovation and Evolution in the United States Construction Industry*, 31 Wake Forest L Rev 65 (Spring 1996).

9 *See* Skeggs, *Project Partnering in the International Construction Industry*, 20 Int'l Constr L Rev 456 (2003); *Partnering Manual of the Associated General Contractors of America* (1995).

10 US Army Corps of Engineers, *Commander's Policy Memorandum No 11* (August 1990). For an interesting article on informal negotiation, *see* Jay Folberg, *Negotiation Lessons From the Pawn Shop*, 8 JAMS Dispute Resolution Alert (Spring 2008) (written by the former dean of the University of San Francisco Law School, and discussing what the author learned by watching his father run a pawn shop in East St Louis).

11 See James Groton, *The Progressive or "Stepped" Approach to ADR: Designing Systems to Prevent, Control, and Resolve Disputes*, in Construction Dispute Resolution Handbook (1997).

12 *See generally* 5 Contract Pricing Reference Guide § 1.2 (2000) (the Department of Defenses' Guidance to Government Negotiators); Ava Abramowitz, *Architect's Essentials of Contract Negotiation* (2002) (a comprehensive guide to negotiation principles, tools, and techniques); Frascogna and Hetherington, *The Lawyer's Guide to Negotiation: The Strategic Approach to Better Contracts and Settlements* (2001); Robert A Rubin, *The Ethical Negotiator: Ethical Dilemmas, Unhappy Clients, and Angry Third Parties*, 26 Constr Law 12 (Summer 2006).

13 John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* § 1:8 (2008). *See* also *ICDR Guidelines for Arbitrators Concerning Exchanges of Information* (May 2008).

14 *See*, *eg*, the new European Union Mediation Directive (IP/08/628: Brussels, 23 April 2008). See also the 29 March 2008 speech of England's Lord Chief Justice (Lord Phillips)("It is madness to incur the considerable expense of litigation...without making a determined attempt to reach an amicable settlement. The idea that there is only one just result of every dispute, which only the court can deliver is, I believe, often illusory....Parties should be given strong encouragement to attempt mediation before resorting to litigation".)

15 *See The Secrets of Successful (and Unsuccessful) Mediators*, 8 JAMS Dispute Resolution Alert (Winter 2008); Belhorn, *Settling Beyond the Shadow of the Law: How Mediation Can Make the Most of Social Norms*, 20 Ohio St J on Disp Resol 981 (2005); Gomez, *Mediating Government Contract Claims: How Is It Different*, 32 Pub Cont LJ 63 (Fall 2002). *See also* John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* § 1:9 (2008).

16 *See* ICC ADR Rules (July 2001); UNCITRAL Conciliation Rules (December 1989).

17 *See* Nael G Bunni, *The FIDIC Forms of Contract* 443 (3d ed 2005). *See also* John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* § 1:9 (2008).

18 *See* John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* § 1:10 (2008). *See also* Daniel McMillan and Robert A Rubin, *Dispute Review Boards: Key Issues, Recent Case Law and Standard Agreements*, 25 Constr Law 14 (Spring 2005) ("expanding use of DRBs on major construction projects requires that construction lawyers become more familiar with the DRB process, standard DRB agreements, and the varied roles lawyers may play in the DRB process").

19 *See* ICC Rules for Expertise, ICC Pub 649 (effective 1 January 2003). *See also* Donald Marston, *Final and Binding Expert Determinations as an ADR Technique*, 18 Int'l Constr L Rev 213 (April 2001); John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* § 1:16 (2008).

20 Nael G Bunni, *The FIDIC Forms of Contract* 460 (3d ed 2005).

21 *See* Jaffe and McHugh, *US Project Disputes: Has the Time to Consider Adjudication Finally Arrived?*, 62 Disp Resol J 51 (July 2007).

22 *See Bruner & O'Connor on Construction Law* § 20:2. For an overview of the Construction industry arbitration process, *see generally* 6 *Bruner & O'Connor on Construction Law* 20:1 et seq; John W Hinchey and Troy L Harris, *International Construction Arbitration Handbook* (2008); *The College of Commercial Arbitrators Guide to Best Practices in Commercial Arbitration* (2006).

23 *See David Co v Jim W Miller Constr, Inc*, 444 NW 2d 836 (Minn 1989) (upholding an arbitration award that required the contractor to buy a defectively built project from the owner/ developer at the full resale price that the owner/ developer would have received if the project had been properly constructed).

Resisting Enforcement of a Foreign Arbitral Award under the New York Convention

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This article explores issues and considerations that may arise in connection with a challenge to the enforcement of an arbitral award under the New York Convention

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1. Introduction: the Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the "New York Convention" or "Convention"), which sets out the basic legal framework for the recognition and enforcement of foreign arbitral awards, has been described as the "[t]he mortar in the edifice of international commercial arbitration".[1] Indeed, the enforcement regime created by the Convention is "almost universal",[2] as all major jurisdictions are parties to the Convention, including the key Asian jurisdictions.[3] The Convention focuses on the recognition and enforcement of arbitral awards, whereas annulment proceedings fall outside its scope. It sets out a restrictive list of grounds on which the enforcement of foreign awards can be refused. Grounds for annulment of awards, on the other hand, are provided for in domestic law, and it is generally recognized that the annulment of an award cannot be sought in a jurisdiction other than the place of arbitration.[4]

The **grounds** on which enforcement of an award can be refused are provided for in article V of the Convention. The list is an exhaustive one,[5] as has been confirmed by the jurisprudence interpreting the Convention.[6] Article V(1) sets out five grounds which, in order to be successful, must be proven by the party contesting enforcement: (a) the invalidity of the arbitration agreement, (b) violation of due process, (c) the arbitrator exceeded his or her authority, (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure, and (e) the award is not binding or has been set aside. The grounds in article V(2) can be examined *ex officio*, and therefore can be examined even if the request for enforcement is unopposed.[7] They are: (a) the non-arbitrability of the subject-matter of the award, and (b) the violation of public policy. An important feature of the Convention is that the grounds in article V do not permit any review of the merits of the arbitral award.[8]

The New York Convention is considered to have a "pro-enforcement" bias. Indeed, it sets out only a minimum standard for the recognition and enforcement of foreign awards,[9] allowing for the application of other international instruments and

municipal law where they are more favourable to recognition. *The Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States* is an example of such an instrument, as it provides for automatic recognition and enforcement of awards from the International Center for the Settlement of Investment Disputes. This pro-enforcement bias has been reflected in the courts' application of the New York Convention. Indeed, cases in which enforcement has been refused have been quite rare, representing roughly ten percent of the cases reported in the *Yearbook Commercial Arbitration*, which compiles New York Convention decisions.[10]

While parties to arbitration agreements are generally expected to comply with any award rendered by the arbitral tribunal, there may be valid grounds to resist enforcement. Yet, the outlook appears to be bleak for any party seeking to resist enforcement of a prejudicial award. Enforcement can, however, successfully be challenged in certain cases, and parties must be cognizant of a number of issues in order to maximize their chances of success in this respect. This article identifies and elaborates on certain of these key issues. We will first briefly deal with the formal and procedural requirements for seeking enforcement, which can at times provide fertile ground for resisting an award. We will then explore the risk a party runs of losing or waiving the already limited grounds they can invoke for challenging enforcement, and what parties can do to prevent that risk from materializing. Lastly, we will provide some examples of grounds for challenging enforcement which have been successful in the relatively rare cases in which enforcement has been refused by a court.

It is generally accepted that the multinational instrument that is the New York Convention should be applied in a **uniform** manner. While no signatory state is bound by the case law of another signatory state, courts should not apply the Convention without taking note of what other courts have decided in similar circumstances.[11] Parties wishing to enforce or resist enforcement of an award are therefore well advised to search for New York Convention precedents in other jurisdictions that might support their case.

2. Limitations on the Scope of the New York Convention

It is useful to recall that the Convention is applicable only to arbitral awards, and therefore is not applicable to procedural orders and decisions on interim measures, or decisions rendered by bodies other than arbitral tribunals. The Convention does not define what constitutes an award. Essentially, what is relevant to such a determination is the content of the decision, not the terms that are used to designate it.[12] Two requirements must be met in order for a decision to qualify as an award: (1) the decision must have been rendered by an arbitral tribunal, *ie* a private body, offering sufficient guarantees of independence and impartiality, and (2) it must decide on a legal dispute between the parties in a final and binding manner.[13] The decision need not, however, be a final award on the *entire* dispute. Preliminary awards are also enforceable.[14]

Many States, including China, Indonesia, Malaysia, Korea and Japan, reserve the application of the Convention to awards made in other Contracting States. The **reciprocity** requirement is explicitly reserved in Article 1(3).

3. Formal and Procedural Requirements for Seeking Enforcement

While the burden of proving that one of the grounds in article V(1) is applicable in a given case falls on the party challenging the enforcement of an award, it is first incumbent on the party seeking enforcement to ensure that certain formal and procedural requirements are satisfied. First, the party *seeking* enforcement must produce to the court the duly authenticated original award and the original arbitration agreement, or a duly certified copy of those documents.[15] What law governs

Photo: Christine Balderas

authentication or certification is not specified by the Convention, although it appears that if the authentication or certification is valid either pursuant to the law at the place of arbitration or the law at the place of enforcement, it will be considered as valid by the court.[16] Indeed, such an approach is consistent with "the purpose of Article IV to ease as much as possible the conditions to be fulfilled by the party seeking enforcement."[17] Where the language of either the award or the arbitration clause is not an official language of the country in which enforcement is sought, a certified translation or a translation by a sworn translator must also be produced.[18] These requirements are the only conditions which must be fulfilled pursuant to the New York Convention by the party seeking enforcement,[19] and thereafter the onus shifts to the opposing party.

A number of court decisions applying the New York Convention have relied on the requirements of article IV to refuse enforcement. These include a 2005 decision of the Spanish Supreme Court refusing to enforce an award that had been rendered in London on the basis that the party seeking enforcement had failed to supply a valid arbitration agreement as it was required to do under article IV(1)(b) of the New York Convention.[20] In a recent decision of the Swiss Federal Supreme Court, enforcement of an award was refused on the basis that the arbitration clause on which it was based did not bind the defendant.[21] In a third such case, a German court refused enforcement because the applicant had failed to show that the parties had concluded a valid arbitration agreement.[22] The court found that if the party applying for enforcement does not prove there is an arbitration agreement that satisfies the requirements of article II(2) of the Convention, "the further question whether there is one of the grounds for refusal of art. V(1) is not dealt with."[23] These cases could suggest an uneasy co-existence between articles IV and V(1)(a) of the Convention, and it has been argued that they "may lead to the mistaken belief that a petitioner must not only submit the original arbitration agreement or a certified copy thereof, but also prove that the agreement is valid."[24]

Ambiguities in the operative part of the award may also prove to be a source of problems for a winning party to secure enforcement. Indeed, in many jurisdictions, enforcement courts request that the operative part of an arbitral award set out clearly the specific acts that the award debtor is ordered to perform or refrain from for the award to be enforceable.[25] Declaratory relief granted in the award may thus pose problems.[26]

The party seeking enforcement must also be careful to respect **time limits** for enforcement of arbitral awards. As the New York Convention is silent on the question, these periods of limitation are governed by domestic law and vary greatly from country to country. For example, the time limit imposed under the US Federal Arbitration Act is three years from when the award is made.[27] In England, enforcement of an award becomes time-barred six years after the refusal of the debtor to honour it,[28] while in Switzerland, the period appears to be ten years.[29] In China, the time limit is much shorter. It used to be one year from the date of the award if at least one of the parties was a natural person, and only six months if neither party was a natural person. With the recent amendment of the Civil Procedural Law, the time limit was extended to two years for both individual persons and legal entities.[30] Depending on the jurisdiction, winning parties must therefore act rapidly once an award is issued in order to avoid the expiration of the statute of limitations, and losing parties should always be mindful of the potential argument that an action in enforcement is time-barred.

4. Can a Party Lose Grounds on which the Enforcement of an Award Can Be Challenged?

A party must be mindful that its conduct throughout the proceedings and after the issuance of the award in the place of arbitration may affect its ability to subsequently enforce or resist enforcement of the award. First, the manner in which it couches

its relief sought will be reflected in the arbitral award. The relief sought should therefore be drafted carefully. Ambiguities may entail difficulties in enforcing an award. Second, while the jurisprudence on the question is by no means unanimous, courts in a number of jurisdictions have ruled that parties contesting the enforcement of an award are precluded from invoking grounds set out in the New York Convention as a result of their prior conduct. Although the New York Convention does not deal expressly with the prohibition of contradictory conduct, such a prohibition is considered to be inherent in the Convention as a result of the principle of good faith, and because contradictory conduct "would violate the goal and purpose of the Convention, that is, the summary procedure to expedite the recognition and enforcement of the arbitration process."[31]

Depending on the jurisdiction, a party runs the risk of waiving or otherwise losing a ground for contesting enforcement, or may even be estopped from contesting enforcement altogether, in three different situations: (i) if it does not raise the ground during the arbitration itself, (ii) if the award is not challenged in the place of arbitration, or (iii) if the ground was raised but proved unsuccessful in annulment or enforcement proceedings elsewhere.

(i) Failure to raise the ground for challenging enforcement during the arbitration itself

The situations contemplated in a number of the grounds provided for in the *New York Convention* could already be objected to during the arbitration proceedings themselves. These include invalidity of the arbitration agreement, breach of due process (if, of course, the prejudiced party had the opportunity to take part in the proceedings notwithstanding the breach), improper composition of the arbitral tribunal, and failure of the arbitral procedure to conform to the parties' agreement. With this in mind, courts have precluded parties who failed to raise objections during the arbitration itself from raising them for the first time during enforcement proceedings, relying on the doctrine of estoppel or its equivalent.

A Hong Kong court, for example, applied the doctrine of estoppel against a party invoking the invalidity of the arbitration agreement because it failed to contest the jurisdiction of the tribunal during the arbitration even though it was aware that the constitution of the tribunal may have been improper.[32] The Higher Court of Appeal of Bavaria came to the same conclusion in the *K Trading Co v Bayerische Motoren Werke AG* case, in which BMW argued that the signatory of the arbitration agreement did not have the power to conclude an agreement on its behalf, even though it failed to raise an objection during the arbitration. The court set out a general principle that "[w]here, in violation of good faith, the formal invalidity of the arbitration agreement is raised [by a party which has] participated in the arbitration without raising any objection, this objection is not to be examined."[33] Although the doctrine of estoppel is not explicitly set out in the New York Convention, the court ruled that "[i]t appears from the interpretation of [article II] that the prohibition of contradictory behaviour is a legal principle implied in the Convention."[34] In another more recent German case, the party resisting enforcement on the basis of the invalidity of the arbitration agreement had itself initiated the arbitration proceedings, prompting the court to find that it was estopped from raising the ground.[35] The case law therefore shows that parties must be careful to raise any concerns they may have with respect to the validity of the arbitration clause in the arbitration proceedings themselves.

The warning also extends to the other grounds identified above. In an enforcement proceeding in Singapore, for example, a judge rejected the argument that the award was not in accordance with proper arbitral procedure when it was made by a party which had refused to participate in the arbitration and against which a default award had been issued as a result. Although the judge in the case also relied on other considerations to reject the argument, he noted:

> The defendants ... themselves were given every opportunity by the Commission to present their case in reply to the claim. They chose deliberately to reject that opportunity. It appeared to me that having chosen not to attend they had very little right to criticise the way in which the arbitration had been conducted.[36]

In the above-mentioned *K Trading Co v Bayerische Motoren Werke AG* case, the court also rejected the argument that the arbitral tribunal had exceeded the time limit for rendering its award on the basis that the procedural defect could have been, but was not, raised during the arbitration itself.[37]

Timely objections during the arbitration itself may therefore be considered a *sine qua non* condition for subsequently raising certain of the New York Convention grounds to resist enforcement. Courts in many jurisdictions will not accept a party waiting until enforcement of a prejudicial award is sought to raise arguments which could already be identified and addressed at an earlier stage.

(ii) Failure to challenge the award at the place of arbitration

As was set out above, annulment of an arbitral award cannot be sought in a jurisdiction other than the place of arbitration. The decision of whether to challenge the award at the place of arbitration may however affect a party's ability to successfully resist enforcement in secondary jurisdictions. In Germany, jurisprudence has gone so far as to hold that the grounds in the New York Convention for resisting enforcement may only be invoked if the award can still be challenged at the seat of arbitration and if there is "at least a likelihood of success on the merits".[38] In a case involving an award issued in Taiwan, a German court did however note that the jurisprudence to that effect was controversial. Ultimately, however, the court's ruling was equally unfavourable to parties seeking to resist enforcement. Indeed, the court held that the statutory rule, applying to domestic awards, that courts may not refuse to enforce an award if the party resisting enforcement has failed to seek to have the award set aside in a timely fashion, is also applicable to international awards governed by the New York Convention.[39] As the losing party had failed to petition a Taiwanese court to annul the award within the thirty day time limit imposed by Taiwanese law, its enforcement could not be challenged. In a recent case, however, the German Supreme Court ruled that the mere fact that a party resisting enforcement of an award did not challenge an award in the country where it was rendered is not tantamount to contradictory behaviour. The court acknowledged that there may be legitimate reasons not to seek the annulment of the award, and ruled that the setting aside of an award and the request for enforcement are two different causes.[40]

Even partial awards on jurisdiction may have to be challenged at the seat of arbitration in order to avoid being estopped from challenging the enforcement of the subsequent award on the merits. In a 2005 case in which a party had contested the jurisdiction of the tribunal in the arbitration proceedings but had not challenged the arbitral tribunal's unfavourable interim award on jurisdiction, the Hamm Court of Appeal ruled that the party was estopped from resisting enforcement on the basis of the invalidity of the arbitration agreement.[41]

If the jurisdiction where enforcement is likely to take place requires that awards be challenged in the country where they were rendered, a party that considers resisting the enforcement may therefore have to seek annulment in order not to forfeit its chances to oppose enforcement.

Ongoing annulment proceedings before the competent court are not a ground to refuse enforcement. Under the Convention, the enforcement courts may but are not obliged to suspend enforcement proceedings until a decision on annulment is issued.[42]

(iii) Grounds already raised unsuccessfully in annulment or enforcement proceedings elsewhere

The situations set out above highlight how the conduct of a party during and after the arbitration proceedings can have an impact on its ability to resist enforcement of an award; however, other considerations beyond its control may also prejudice that ability. Indeed, courts in a number of jurisdictions have ruled that a party is estopped from relying on grounds for resisting enforcement if those grounds have already been unsuccessfully relied on in annulment or enforcement proceedings elsewhere.

For example, a Singapore court ruled that a party resisting enforcement should not be given "two bites at the cherry" by being permitted to contest the enforcement of an award on the same grounds that were rejected by a court at the place of arbitration in annulment proceedings.[43] In that case, the losing party had sought unsuccessfully to have the award set aside before the Chinese courts, and then relied on the same grounds in the enforcement proceedings in Singapore.[44] An Indian court came to the same conclusion in the *International Investor KSCSC v Sanghi Polyesters* case, holding that grounds unsuccessfully raised in annulment proceedings in England were to be considered *res judicata*.[45]

Parties may also be estopped not only from invoking grounds which proved unsuccessful in annulment proceedings, but also from invoking grounds unsuccessfully raised in enforcement proceedings elsewhere. A 2003 Hong Kong judgment is a good illustration of this: in that case, the winning party had already had the award, which was issued in Switzerland, enforced by a US court before it sought enforcement in Hong Kong. With respect to the New York Convention grounds which had been argued unsuccessfully by the losing party in the US court, the Hong Kong court applied the doctrine of issue estoppel. After considering that the conditions for the application of issue estoppel were met in the circumstances,[46] it found that the losing party was estopped from raising them again and granted enforcement of the award.

While courts have found parties to be estopped from invoking previously unsuccessful grounds contained in article V(1) of the New York Convention, it is questionable whether parties would be similarly estopped with respect to grounds contained in article V(2). Indeed, the latter grounds, which include arbitrability under the law of the country in which enforcement is sought, as well as

public policy of that country, are distinct in that they rely on the law at the place of enforcement. A determination of a court in another jurisdiction would therefore have little or no relevance given that the issues to be considered may be completely different.[47] Another reason why parties would be unlikely to be estopped in raising those grounds is that a court in enforcement proceedings may invoke them *ex officio*.

Although the approach of different courts will vary on this issue, it is important for a party to an arbitration to maximize its chances of enforcement in all jurisdictions. Indeed, depending on the nature of the case, it may be difficult to predict where the winning party will enforce an award in its favour. A party must therefore think ahead, from the beginning of the proceedings, and be cognizant of the potential pit-falls described above so as to protect the already limited grounds it has at its disposal to challenge enforcement.

5. Examples of Grounds on which Enforcement was Successfully Resisted

As noted above, the pro-enforcement bias of the New York Convention entails that refusals on the part of courts to enforce awards are rare. However, the Convention is not a basis to simply rubberstamp foreign awards, and courts do occasionally refuse to enforce awards. This section sets out a few examples of such decisions, and in particular explores the public policy ground, which is often invoked by parties resisting enforcement.

A first example is a German case in which, pursuant to article V(1)(a) of the Convention, the court refused enforcement of an award on the grounds that the arbitration agreement was invalid under Chinese law, the law of the seat of arbitration, as had previously been determined by a Chinese court.[48] Applying the due process ground in article V(1)(b), the Hong Kong High Court in the *Paklito Investment Ltd v Klöckner East Asia Ltd* case refused to enforce a Chinese award rendered under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC) on the grounds that a party had not been given an opportunity to comment on the reports of a tribunal-appointed expert.[49] Another example of a refusal based on article V(1)(b) is that of a German court in a case in which the respondent's participation in the proceedings was limited to nominating an arbitrator and submitting documents on the contract in dispute. The respondent was not informed of the arguments presented by the claimant, and the court concluded that merely being given the opportunity to give its view "without knowing the arguments of the opponent, is not sufficient for due process ... ."[50]

It appears that the excess of jurisdiction ground in article V(1)(c) has only very rarely provided a basis for refusal of enforcement.[51] One of those rare cases to invoke it is a Hong Kong decision in which the Court of Appeal refused enforcement ruling that the "arbitrators made their purported awards in excess of jurisdiction and such awards should not be enforced here."[52] On the basis of article V(1)(d), which permits refusal of enforcement where there is an irregularity in the composition of the arbitral tribunal or in the arbitral procedure, an award that had been rendered by a truncated tribunal was refused enforcement in Germany. Contrary to the applicable procedural rules, only two of the three arbitrators had participated in the issuance of the award.[53] Interestingly, the award in that case had been set aside in the country where it had been rendered (Belarus). The German courts did not, however, consider that such annulment was a mandatory ground to refuse its enforcement abroad.[54] Nevertheless, article V(1)(e) provides that enforcement of an award which has been set aside at the place of arbitration can be refused. An example of a case refusing enforcement on that ground is the US Court of Appeals for the District of Columbia decision in *Termorio v Electranta*, a case dealing with an award that had been rendered and subsequently annulled in Colombia.[55] The court ruled that because "the arbitration award was lawfully nullified ... [and] there is nothing in the record here indicating that the proceedings before the [Colombian court] were tainted ..., appellants have no cause of action in the United States to seek enforcement of the award ... ."[56]

The **public policy** ground contained in article V(2) of the New York Convention can in some circumstances provide a basis on which to resist enforcement of an arbitral award. The chances of success in invoking public policy will, however, depend very much on the jurisdiction in which it is raised. Indeed, France, for example, takes a very narrow view of public policy, which is well demonstrated by the *Cour d'appel de Paris*'s decision in the well known *SNF SAS v Cytec Industries BV* case.[57] In its decision granting enforcement of an award rendered in Belgium, the Court of Appeal ruled that enforcement would only be refused on public policy grounds if the violation was "flagrant, actual, and concrete."[58] A Hong Kong court took an equally restrictive stance:

> [to refuse enforcement of a Convention award] the award must be so fundamentally offensive to that jurisdiction's notions of justice that, despite it being a party to the Convention, it cannot reasonably be expected to overlook the objection.[59]

Public policy has nevertheless successfully been relied on to resist enforcement in a number of cases in many jurisdictions. For example, an Indian court refused to enforce an award on the grounds that it rejected an Indian party's plea of *force majeure* despite the fact that the party's performance was rendered illegal by an Indian Government directive.[60] In another example, a German court determined that German public policy was violated by the fact that a party in an arbitration had not been given the opportunity to examine a document submitted to the arbitrator by its opponent, and therefore refused enforcement.[61] In some cases, the way courts use the public policy ground to refuse enforcement of awards can appear questionable.[62] For example, in a recent decision, a court in the Philippines refused to enforce an award rendered in Singapore after it concluded that it violated Philippine public policy because, among other things, it awarded attorney fees and failed to apply Philippine law as was required by the contract. Such decisions are, however, "few and far between."[63]

By and large, though, public policy is quite a small loophole to escape enforcement as it should be construed restrictively by the courts and only prevent enforcement in extraordinary circumstances.[64] **Fraud**, for instance, could constitute such an extraordinary circumstance. A French court concluded that the dispositions of an award affected by one of the parties' fraudulent submission of an erroneous expense report to the tribunal were "contrary to French international public policy".[65] Although it was in an annulment and not an enforcement proceeding, the French courts would arguably have applied the same reasoning in an enforcement case. If, however, a party could have raised a fraud allegation in the arbitration but failed to do so, it may be prevented form resisting enforcement, or even from adducing evidence for the alleged fraud in the enforcement proceedings.[66]

A party that does not wish to pay an award but has a claim, or has acquired a claim in the meantime, against the winning party, may also try to **set off** its claim from the amounts awarded against it in the arbitral award. The admissibility and prerequisites for such a set off will vary depending on the jurisdiction.[67]

6. Conclusion

In conclusion, parties intending on resisting the enforcement of an award will generally face an uphill battle. Whether resisting enforcement will prove to be successful will depend on the grounds that are invoked, as well as on the jurisdiction in which it is sought. Parties must also be cognizant that their conduct throughout the proceedings and after the issuance of the award in the place of arbitration may affect their ability to subsequently resist enforcement of an award. Often, a more practical approach may be to try to reach a post-award settlement, which may be interesting to the winning party as it does not have to engage in costly and lengthy enforcement proceedings with an uncertain outcome.

Notes:

1. Richard J Graving, "Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality", 10 ICSID Review (1995).
2. Hans Smit, "Annulment and Enforcement of International Arbitral Awards: A Practical Perspective" in Lawrence W Newman & Richard B Hill, eds, *The Leading Arbitrators' Guide to International Arbitration*, 2nd ed (New York: Juris, 2008), p 591 at p 591.
3. Among the countries that have not acceded to the Convention are Bhutan, North Korea, Myanmar, and Timor-Leste.
4. *See eg Gulf Petro Trading Co Inc v Nigerian National Petroleum Corp*, F3d, 2008 WL 62546 (US Court of Appeals for the 5th Circuit, 2008), Intl Arb LR (2008), n17, p 17.
5. Albert Jan van den Berg, *The New York Arbitration Convention of 1958* (The Hague: Kluwer, 1981), at 265 [Van den Berg, NY Convention].
6. *Parson & Whittemore Overseas Co v Société général de l'industrie du papier (RAKTA)*, 508 F2d 969 (US Court of Appeals for the 2nd Circuit, 1974); see Domenico Di Pietro & Martin Platte, *Enforcement of International*

Arbitration Awards: the New York Convention of 1958 (London: Cameron May, 2001), p 135.

[7] *Seven Seas Shipping Ltd v Tondo Limitada*, 1999 US Dist LEXIS 9574 (US District Court, Southern District of New York, 1999), YBCA,Vol XXV (2000), p 987.

[8] Van den Berg, *NY Convention, supra* note 4 at pp 265, 269-273.

[9] Article VII(1) of the *Convention* reads as follows : "[t]he 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."

[10] Albert Jan van den Berg, "New York Convention of 1958: Refusals of Enforcement", ICC ICArb Bull Vol18 (2007) No2, p 15 at 49 [Van den Berg, "Refusals of Enforcement"].

[11] Van den Berg, *NY Convention*, *supra* note 5 at p 1 f. *See* also Paolo Michele Patocchi in International Arbitration in Switzerland: An Introduction to and a Commentary on Articles 176-194 *of the Swiss Private International Law Statute* (The Hague: Kluwer Law International, 2000), Art 194, No 3: the courts should "actively adopt a uniform and comparative approach when called upon to interpret and construe the Convention, and in particular they should take judicial notice of the precedents made in other Contracting States."

[12] *Publicis v True North*, 206 F3d 725, 2000 US App LEXIS 3765 (US Court of Appeals for the 7th Circuit, 2000), 18 ASA Bull 2/2000, p 427, YBCA, Vol XXV (2000), p 641 (in this case, a disclosure order is qualified as an award under the *New York Convention*). The solution adopted by the Court in Publicis is one that is identical in many jurisdictions: Phillippe Pinsolle, "Observations – Cour d'appel des Etats-Unis (7e circuit) 14 mars 2000", Rev arb 2000, p 657 at p 659. *See eg* Cour d'appel de Paris, 1 July 1999, *Brasoil*, Rev arb 1999, p 834, note Ch Jarrosson.

[13] An arbitral award has been defined as "a final decision by the arbitrators on all or part of the dispute submitted to them, whether it concerns the merits of the dispute, jurisdiction, or a procedural issue leading them to end the proceedings." (Emmanuel Gaillard & John Savage, *Fouchard Gaillard Goldman On International Commercial Arbitration* (The Hague: Kluwer Law International, 1999), N 1353.) DiPietro & Platte state that "[i]n practice, the term award should be reserved for decisions which finally determine the substantive issues they deal with." (DiPietro & Platte, *supra* note 6, at p 30.) This view is reflected for example in a US case in which the District Court refers to an award as "finally and definitely dispos[ing]" of a claim submitted to arbitration. (*Zephyros Maritime Agencies, Inc v Mexicana de Cobre*, 662 F Supp 892 at p 895 (US District Court, Southern District of New York, 1987.) Because the *Convention* does not define what constitutes an award, the definition must be found in domestic law. While one author writes that it "appears to depend on the arbitration law governing the award" (Van den Berg, *supra* note 10, at p 39), another adds that a foreign decision must also be regarded as an award under the law of the place of enforcement to qualify as such, and that courts should take note how the concept of an "award" has been interpreted by foreign courts applying the *Convention* (Patocchi, *supra* note 11, Art 194, No 2.).

[14] *See eg Austin John Montague v Commonwealth Development Corporation*, 27 June 2000, Appeal No. 8159 of 1999, SC No 29 of 1999, (Supreme Court of Queensland, Court of Appeal Division), YBCA, Vol XXVI (2001), p 744 at para 14, in which the court ruled that an interim award on jurisdiction could be enforced. In another case, an Indian court ruled that an interim award providing for interim measures "can be enforced as an arbitral award": *Marriott International Inc et al v Ansal Hotels Limited et al*, 5 July 2000, FAO (OS) No 335 of 1999 (Delhi High Court), YBCA, Vol XXVI (2001), p 788 at para 28.

[15] Art IV(1) of the *New York Convention*. It should be noted however that not every jurisdiction requires a party seeking enforcement to produce a copy of the arbitration agreement (see eg for Germany Oberlandesgericht [Court of Appeal], Bayern, 23 September 2004, *K Trading Co v Bayerische Motoren Werke AG*, No 4Z Sch 005-04, YBCA, Vol XXX (2005), p 568.)

[16] Patocchi, *supra* note 11, No 50; Van den Berg, *NY Convention*, *supra* note 5 at p 252.

[17] Van den Berg, *NY Convention ibid* at 252.

[18] Art IV(2) of the New York Convention.

[19] Van den Berg, *NY Convention*, *supra* note 5 at p 248. While these are the only requirements imposed by the *New York Convention*, certain jurisdictions impose additional practical requirements on the party seeking enforcement. In China for example, a party seeking enforcement must submit "the name and quantity of the relevant assets [of the losing party], their location and evidence of the

economic situation of the defendant." (Clarisse von Wunschheim & Fan Kun, "Arbitrating in China", 26 ASA Bull 1/2008, p 35, at p 48.) The lack of assets of the losing party in China is "a frequent reason for failure of enforcement procedures". (*Ibid*)

[20] Tribunal Supremo [Spanish Supreme Court], 14 January 2003, *Glencore Grain Ltd v Sociedad Ib rica de Molturacion*, 64 Cuaderno Civitas de Jurisprudencia Civil (January-April 2004), p 71, no 1715, YBCA, Vol XXX (2005), p 605.

[21] Swiss Federal Supreme Court, DFT 4P102/2001-4P.104/2001, 21 ASA Bull 2/2003, p 364.

[22] Oberlandsgericht [Court of Appeal], Celle, 4 September 2004, No 8 Sch 11-02, YBCA, Vol XXX (2005), p 528.

[23] *Ibid*, para 8.

[24] Van den Berg, "Refusals of Enforcement", *supra* note 10 at p 48.

[25] *See*, *eg*, Austria: Hubertus Schumacher, "Zu Inhalt und Bestimmtheit von Schiedsspr chen und Vollstreckungsantr gen", 25 ASA Bull 3/2007, p 493.

[26] For a matter where declaratory relief was enforced *see*, Oberlandesgericht [Court of Appeal], Köln, 22 April 2004, SchiedsVZ/German Arbitration Journal (2004), no4, p VIII.

[27] Art 207 *Federal Arbitration Act*, 9 USC Section 1 et seq. *See Flatow v Iran*, 1999 US Dist LEXIS 18957 (US District Court, District of Columbia, 1999), YBCA, Vol XXV (2000), p 1102.

[28] Art 13 Arbitration Act 1996.

[29] Art 137 Swiss Code of Obligations: the provision however refers to a judgment, not an arbitral award, and no rule applies specifically to arbitral awards. The courts have not yet addressed the question. *See* Christian Aschauer, "La prescription des sentences arbitrales", 23 ASA Bull 4/2005, p 599.

[30] Art 219 Civil Procedure Law of China; Von Wunschheim & Fan Kun, *supra* note 19, p 35 at p 47.

[31] *La société nationale des hydrocarbures v Shaheen National Ressources Inc*, 585 F Supp 57 (US District Court, Souther District of New York, 1983), YBCA, Vol X (1985), p 540 at para 16.

[32] *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*, [1995] HKLR 215 (Supreme Court of Hong Kong, 1994), YBCA, Vol XX (1995), p 671.

[33] *K Trading Co v Bayerische Motoren Werke AG*, *supra* note 15, at para 5.

[34] *Ibid*, para 5.

[35] Oberlandesgericht [Court of Appeal], Koblenz, 28 July 2005, 2 Sch 04/05, YBCA, Vol XXXI (2006), p 673.

[36] *Hainan Machinery Import and Export Corporation v Donald & McArthy Pte Ltd*, [1996] 1 Singapore Law Reports 34 (High Court, 1995), YBCA, Vol XXII (1997), p 771.

[37] *K Trading Co v Bayerische Motoren Werke AG*, *supra* note 15.

[38] Oberlandesgericht [Court of Appeal], Karlsruhe, 14 September 2007, *N v M*, headnote, online: www.kluwerarbitration.com, referring to German Supreme Court, BGH NJW-RR 2001, p 1059.

[39] *Ibid*, headnote.

[40] German Supreme Court, BGH, 17 April 2008, III ZB 97/06, SchiedsVZ/German Arbitration Journal (2008), no 4, p 196.

[41] Oberlandesgericht [Court of Appeal], Hamm, 27 September 2005, 29 Sch 1/05, SchiedsVZ/German Arbitration Journal (2006), no 3, p 106 at paras 5-6.

[42] Article VI of the *New York Convention* reads: "If an application for the 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 it 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." For an example of a court decision refusing enforcement as a result of ongoing annulment proceedings, *see Creighton v Government of Qatar*, 22 March 1995, No 94-1035 RMU (US District Court, District of Columbia), YBCA, Vol XXI (1996), p 751, dealing with an award issued and challenged in France. For an example of a case in which a court granted enforcement despite pending annulment proceedings, *see* Cour d'appel [Court of Appeal, Luxembourg], 28 January 1999, YBCA, Vol XXIVa (1999), p 714.

[43] *Newspeed International Ltd v Citus Trading Pte Ltd*, 4 June 2001, OS No 600044 (Singapore High Court), YBCA Vol XXVIII (2003), p 829 at para 6.

[44] *Ibid* at para 6.

[45] *International Investor KCSC v Sanghi Polyesters Ltd*, 9 September 2002, Civil Revision Petition Nos 331 and 1441 of 2002 (High Court, Andhra Pradesh (India)), YBCA, Vol XXX (2005), p 577.

[46] *Karaha Bodas Company LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 27 March 2003, (High Court of the Hong Kong Special Administrative Region, Court of First

Instance), 21 ASA Bull 3/2003, p 667, at paras 50-51.

47 *See eg Hebei Import and Export Corporation v Polytek Engineering Co Ltd*, [1999] 2 HKC 205 (Court of Final Appeal of the Hong Kong Special Administrative Region), YBCA, Vol XXIVa (1999), p 652 at para. 44, which held that a party was not estopped from resisting enforcement on the ground of public policy even though it did not raise a public policy argument before the court of supervisory jurisdiction, reasoning that "[i]n the court of supervisory jurisdiction, the public policy to be applied would be a different public policy, namely that of the supervisory jurisdiction."

48 Kammergericht [Higher Regional Court], Berlin, 18 May 2006, SchiedsVZ/German Arbitration Journal (2007), No 1, p 100, YBCA, Vol XV (2007), p 347.

49 *Paklito Investment Ltd v Klöckner East Asia Ltd*, 15 January 1993 (High Court of Hong Kong), YBCA, Vol XIX (1994), p 664.

50 Landgericht [Court of First Instance], Bremen, 20 January 1983, YBCA Vol XII (1987), p 486, at p 487.

51 Professor Albert Jan van den Berg writes that only two cases reported in the ICCA Yearbooks have refused enforcement for excess of jurisdiction: Van den Berg, "Refusals of Enforcement", *supra* note 9 at p 24.

52 *Tiong Huat Rubber Factory v Wah-Chang International Company Ltd*, 28 November 1990 (Hong Kong Court of Appeal), YBCA, Vol XVII (1992), p 516, at para 19.

53 German Supreme Court, BGH, 21 May 2008, III ZB 14/07, SchiedsVZ/German Arbitration Journal (2008), No 4, p 195.

54 They examined therefore whether the awards could, in principle, be enforced in Germany. This was not the case as the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties (Article V(1)(d) of the *New York Covention*). The Supreme Court subsequently confirmed this finding. The court's approach to the enforcement of annulled awards has also been taken in other jurisdictions, in particular France, see Cour Cass, 29 June 2007, *PT Putrabali v Rena Holding*, 25 ASA Bull 4/2007, p 826. The French courts enforced an arbitral award rendered in a dispute between an Indonesian party, Putrabali, and French Rena Holding which had been annulled in England.

55 *Termorio v Electranta*, 487 F2d 928 (US Court of Appeals for the District of Columbia Circuit, 2007), note Goldstein, 25 ASA Bull. 3/2007, p 643.

56 *Ibid*, at p 930.

57 Cour d'appel de Paris [Paris Court of Appeal] (1re Ch C), 23 March 2006, Rev Arb 2007, p 100, note S Bollée.

58 *Ibid*.

59 *Hebei Import and Export Corporation v Polytek Engineering Co Ltd*, supra note 46 at para 87; Teresa Cheng, "Experience in Enforcing Arbitral Awards in Asia – A Hong Kong Perspective", (2000) 3 Intl Arb LR 185 at 187.

60 *COSID Inc v Steel Authority of India Ltd*, 12 July 1985 (High Court of New Delhi), YBCA, Vol XI (1986), p 502, at 506-07.

61 Oberlandesgericht [Court of Appeal], Hamburg, 3 April 1975, Recht der internationalen Wirtschaft 1975, p 432, YBCA, Vol II (1977), p 241.

62 Van den Berg, "Refusals of enforcement", *supra* note 10 at p 35.

63 *Ibid*.

64 International Law Association, Final Report on Public Policy as a Bar to Enforcement of International Arbitral Awards, New Delhi Conference 2002, available at http://www.ila-hq.org/en/committees/index.cfm/cid/19.

65 Cour d'appel de Paris [Paris Court of Appeal], 30 September 1993, *European Gas Turbines SA v Westman International Ltd*, YBCA, Vol XX (1995), p 198 at 206.

66 In the *Westacre Investments Inc v Jugoimport – SDPR Holding* case, in which the party resisting enforcement alleged that the opposing party had adduced perjured evidence in the arbitration, the English Court of Appeal ruled that in order to adduce evidence of fraud at the level of enforcement, that evidence must not have been available "at the time of the hearing before the arbitrators." (12 May 1999 (Court of Appeal, Civil Division), YBCA, Vol XXIVa (1999), p 753 at para 45.)

67 *See eg Mangistaumunaigaz Oil Producton Association v United World Trade Inc*, 17 June 1997, Civil Action No 96-WY-1290-WD (US District Court, District of Colorado) at paras. 1-2, YBCA, Vol XXIVa (1999), p 808, in which the US District Court rejected a party's attempt to set off its claims from the amount granted in the award, ruling that "[t]he Convention does not provide any basis for the assertion of counterclaims" in enforcement proceedings. See also Oberlandesgericht [Court of Appeal], Dresden, SchiedsVZ/German Arbitration Journal (2005), No 4, p 210, at p 213; Oberlandesgericht [Court of Appeal], Düsseldorf, SchiedsVZ/German Arbitration Journal (2005), no 4, p 214.

An Invitation to Join the Inter-Pacific Bar Association

The IPBA is an international association of business and commercial lawyers who reside or have an interest in the Asian and Pacific region. The IPBA has its roots in the region, having been established in April 1991 at an organizing conference in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then it has grown to over 1,700 members from 68 jurisdictions, and it is now the pre-eminent organization in the region for business and commercial lawyers.

The growth of the IPBA has been spurred by the tremendous growth of the Asian economies. As companies throughout the region become part of the global economy they require additional assistance from lawyers in their home country and from lawyers throughout the region. One goal of the IPBA is to help lawyers stay abreast of developments that affect their clients. Another is to provide an opportunity for business and commercial lawyers throughout the region to network with other lawyers of similar interests and fields of practice.

Supported by major bar associations, law societies and other organizations throughout Asia and the Pacific, the IPBA is playing a significant role in fostering ties among members of the legal profession with an interest in the region.

IPBA Activities

The breadth of the IPBA's activities is demonstrated by the number of specialist committees overleaf. All of these committees are active and have not only the chairs named, but a significant number of vice-chairs to assist in the planning and implementation of the various committee activities. The highlight of the year for the IPBA is its annual multi-topic 4-day conference, usually held in the first week of May each year. Previous annual conference have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, and Los Angeles attracting as many as 700 lawyers plus accompanying guests.

The IPBA has organized regional conferences and seminars on subjects such as Practical Aspects of Intellectual Property Protection in Asia (in five cities in Europe and North America respectively) and Asian Infrastructure Development and Finance (in Singapore). The IPBA has also cooperated with other legal organizations in presenting conferences—for example on Trading in Securities on the Internet, held jointly with the Capital Market Forum.

The IPBA also publishes a membership directory and a quarterly *IPBA Journal*.

Membership

Membership in the Association is open to all qualified lawyers who are in good standing and who live in, or who are interested in, the Asia-Pacific region.

- Standard Membership — US$195 / ¥23,000
- Three-Year Term Membership — US$535 / ¥63,000
- Lawyers in developing countries with low income levels — US$100 / ¥11,800
- Young Lawyers (under 30 years old) — US$50 / ¥6,000

Annual dues will cover the period of one year starting from January 1 and ending on December 31. Those who join the Association before August 31 will be registered as a member for the current year. Those who join the Association after September 1 will be registered as a member for the rest of the current year and for the following year.

Membership renewals will be accepted until July 31.

Selection of membership category is entirely up to each individual. If the membership category is not specified in the registration form, standard annual dues will be charged by the Secretariat.

Further, in order to encourage young lawyers to join the IPBA, a Young Lawyers Membership category (age under 30 years old) with special membership dues has been established.

IPBA has established a new 3-Year Term Membership category which will come into effect from the 2001 membership year.

There will be no refund of dues for cancellation of all membership categories during the effective term, nor will other persons be allowed to take over the membership for the remaining period.

Corporate Associate

Any corporation may become a Corporate Associate of the Association by submitting an application form accompanied by payment of the annual subscription of (¥50,000/US$500) for the then current year.

The name of the Corporate Associate shall be listed in the membership directory.

A Corporate Associate may designate one employee ("Associate Member"), who may take part in any Annual Conference, committee or other programmes with the same rights and privileges as a Member, except that the Associate Member has no voting rights at Annual or Special Meetings, and may not assume the position of Council Member or Chairperson of a Committee.

A Corporate Associate may have any number of its employees attend any activities of the Association at the member rates.

- Annual Dues for Corporate Associates — US$500 / ¥50,000

Payment of Dues

Payment of dues can be made either in US dollars or Japanese yen. However, the following restrictions shall apply to payments in each currency. Your cooperation is appreciated in meeting the following conditions.

1. A US dollar check should be payable at a US bank located in the US. US dollar check payable in Japan may be returned to sender depending on charges.
2. A Japanese yen check should be payable at a Japanese bank located in Japan.
3. Japanese yen dues shall apply to all credit card payment. Please note that the amount charged will not be an equivalent amount to the US dollar dues.
4. Please do not instruct your bank to deduct telegraphic transfer handling charges from the amount of dues. Please pay related bank charges in addition to the dues.

IPBA Secretariat

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp Website: www.ipba.org

See overleaf for membership registration form

IPBA SECRETARIAT

Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp Website: www.ipba.org

IPBA MEMBERSHIP REGISTRATION FORM

MEMBERSHIP CATEGORY AND ANNUAL DUES:

[ ] Standard Membership..US$195 or ¥23,000

[ ] Three-Year Term Membership..US$535 or ¥63,000

[ ] Lawyers with low income levels in developing countries........................US$100 or ¥11,800

[ ] Young Lawyers (under 30 years old)..US$ 50 or ¥ 6,000

Name: Last Name ______________________ First Name / Middle Name ______________________

Birthday: year ____________ month ______________ day ____________ Sex: M / F

Firm Name: ____

Jurisdiction: ____

Correspondence Address: ____

____

Telephone: ______________________ Facsimile: ______________________

Email: ____

CHOICE OF COMMITTEES:

[ ] Aerospace Law
[ ] Banking, Finance and Securities
[ ] Corporate Counsel
[ ] Cross-Border Investment
[ ] Dispute Resolution and Arbitration
[ ] Employment and Immigration Law
[ ] Energy and Natural Resources
[ ] Environmental Law
[ ] Insolvency
[ ] Insurance
[ ] Intellectual Property
[ ] International Construction Projects
[ ] International Trade
[ ] Legal Practice
[ ] Maritime Law
[ ] Tax Law
[ ] Technology and Communications
[ ] Women Business Lawyers

METHOD OF PAYMENT (please read each note carefully and choose one of the following methods):

[ ] US$ Check/Bank Draft/Money Order
– payable at US banks in the US only (others may be returned to sender)

[ ] Japanese yen ¥ Check/Bank Draft
– payable at Japanese banks in Japan only (others may be returned to sender)

[ ] Credit Card – **Please note that Japanese yen dues shall apply to payment by credit cards**.
[ ] VISA [ ] Master [ ] Amex (Verification Code):
Card Number: ______________________ Expiration Date: ______________________

[ ] Bank Wire Transfer – Please make sure that remitting bank's handling charges are paid by the remitter him/herself.
to The Bank of Yokohama, Shinbashi Branch (Swift Code: HAMAJPJT)
A/C No. 1018885 (ordinary account)
Nihon Seimei Shinbashi Bldg 6F, 1-18-16 Shinbashi, Minato-ku, Tokyo 105-0004, Japan

Signature: ______________________ Date: ______________________

PLEASE RETURN THIS FORM WITH REGISTRATION FEE OR PROOF OF PAYMENT TO:

Inter-Pacific Bar Association
Roppongi Hills North Tower 7F, 6-2-31 Roppongi, Minato-ku, Tokyo 106-0032, Japan
Tel: 81-3-5786-6796 Fax: 81-3-5786-6778 Email: ipba@tga.co.jp

IPBA SCHOLARSHIPS

The Inter-Pacific Bar Association is pleased to announce that the IPBA Scholarship Programme to enable practicing lawyers to attend the IPBA's Nineteenth Annual Meeting and Conference, to be held in Manila from April 27 to May 2, 2009 is now open for nominations.

What is the Inter-Pacific Bar Association?

The Inter-Pacific Bar Association ('IPBA') is an international association of business and commercial lawyers with a focus on the Asia-pacific region. Members are either Asia-Pacific residents or have a strong interest in this part of the world. The IPBA was founded in April 1991 at an organizing conference held in Tokyo attended by more than 500 lawyers from throughout Asia and the Pacific. Since then, it has grown to become the pre-eminent organization in respect of law and business within Asia with a membership of over 1,700 lawyers from 68 jurisdictions around the world. Lawyers in most law firms in the Asia-Pacific region and internationally that have a cross-border practice are members of the IPBA.

What is the Inter-Pacific Bar Association Annual Meeting and Conference?

The highlight of the year for the IPBA is its annual multi-topic four-day conference. The conference has become the 'must attend event' from international business and commercial lawyers. In addition to plenary sessions of interest to all lawyers, programs are presented by the IPBA's eighteen specialist committees. The IPBA Annual Meeting and Conference provides an opportunity for lawyers to meet their international colleagues with Asian practices and to share latest developments in cross-border practice and professional development in Asia. Previous annual conferences have been held in Tokyo (twice), Sydney (twice), Taipei, Singapore, San Francisco, Manila, Kuala Lumpur, Auckland, Bangkok, Vancouver, Hong Kong, New Delhi, Seoul, Bali, Beijing and Los Angeles. Next year the conference will be held in Manila from April 27 to May 2, 2009.

What is the IPBA Scholarships Programme :

The IPBA Scholarship Programme was originally initiated in honour of the memory of M.S. Lin of Taipei, who was one of the founders and a past President of the IPBA. Today it operates to bring to the IPBA Annual Meeting and Conference lawyers who would not otherwise be able to attend and who would both contribute to, and benefit from, attending the IPBA Annual Conference and to endorse the IPBA's interest in the development of law and practice in Asia.

Who is eligible to be an IPBA Scholar?

[1] Lawyers from Developing Countries

To be eligible, the applicants must:

(a) be an indigenous lawyer in Vietnam, Laos, Cambodia, Myanmar, Mongolia or the Pacific Islands;
(b) be fluent in both written and spoken English (given this is the conference language); and
(c) currently be involved in a cross-border practice or wish to become engaged in a cross-border practice.

[2] Young Lawyers

To be eligible, the applicants must:

(a) be under 35 years of age **and** have less than five years of practice:
(b) be fluent in both written and spoken English (given this is the conference language);
(c) have taken an active role in the legal profession in their countries;
(d) currently be involved in a cross-border practice or desire to become engaged in a cross-border practice; and
(e) have published an article in a reputable journal on some topic related to the work of one of our committees or provided some other objective evidence of committed involvement in the profession.

Preference will be given to those applicants who would be otherwise unable to attend the conference, because of personal or family financial circumstances and /or because they are working for a small firm without a budget to allow attendance at the IPBA Annual Conference.

Applicants from multi-national firms will normally be considered only if they have a substantial part of their attendance expenses provided by their firm.

How does one apply to be an IPBA Scholar?

To apply for an IPBA Scholarship, please obtain an application form and return it to Yuko Haba at the IPBA Secretariat in Tokyo no later than **October 31, 2008**. Application forms are available either through the IPBA website (www.ipba.org) or at the IPBA Secretariat.

Please forward applications to the IPBA Secretariat at:

Roppongi Hills North Tower 7F
6-2-31 Roppongi, Minato-ku
Tokyo 106-0032, Japan

Telephone: +81-3-5786-6796
Facsimile: +81-3-5786-6778
E-mail: ipba@tga.co.jp

What happens once a candidate is selected?

The following procedures will apply after selection:

1. The Secretary-General will notify each successful applicant that he or she has been awarded an IPBA Scholarship. The notification will be provided at least two months prior to the opening of the IPBA Annual Conference. Unsuccessful candidates will also be notified.
2. Airfares and accommodation will be arranged by the Manila Conference Host Committee and/or the IPBA Secretariat after consultation with the successful applicants.
3. A liaison person will introduce each Scholar to the IPBA and generally help the Scholar to obtain the most benefit from the IPBA Annual Conference.