CELEBRATING 50 YEARS OF THE NEW YORK CONVENTION

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I INTRODUCTION

It is often said that the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('Convention')[1] is 'the single most important pillar on which the edifice of international arbitration rests'[2] and is a convention which 'perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law'[3]. The most significant function that the Convention serves in international trade and commerce is that it provides for the almost universal enforceability of awards. There are currently 142 parties to the Convention,[4] including most of the major trading nations.

By and large the enforcement of arbitral awards is significantly less problematic than the enforcement of judgments rendered by national courts. In Australia, the *Foreign Judgments Act 1991* (Cth) governs the enforcement of foreign court decisions. However, the statutory scheme only applies to judgments from certain courts and countries, and does not cover important jurisdictions such as the United States. The common law rules apply to the enforcement of judgments which fall outside of the statutory scheme. At common law, a foreign judgment would only be enforced if it was for a fixed sum, and was final and conclusive. Given the difficulties in enforcing foreign judgments, the Convention effectively makes arbitration a preferable method of resolving international commercial disputes.

This article examines the two main obligations which the Convention imposes on Contracting States – to give effect to agreements to arbitrate, and to recognise and enforce foreign arbitral awards. It then discusses cases illustrating a tendency to favour the enforcement of awards.

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1 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (New York), opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959).

2 J Gillis Wetter, 'The Present Status of the International Court of Arbitration of the ICC: An Appraisal' (1990) 1 *American Review of International Arbitration* 91, 93.

3 Michael Mustill, 'Arbitration: History and Background' (1989) 6 *Journal of International Arbitration* 43

4 *Status, 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (2007) UNCITRAL <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html> at 20 April 2008.

II ENFORCEMENT OF ARBITRATION AGREEMENTS

The first obligation imposed by the Convention is that it requires the courts of Contracting States to give effect to valid agreements to arbitrate. Article II(1) provides that States shall recognise an agreement in writing under which parties agree to submit to arbitration a dispute capable of settlement by arbitration. An 'agreement in writing' must include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.[5] A court, when seized of a matter in respect of which the parties have made an arbitration agreement, must refer the parties to arbitration, unless the arbitration agreement is 'null and void, inoperative or incapable of being performed'.[6]

Article II was examined in the recent Australian case of *Comandate Marine Corp v Pan Australia Shipping Pty Ltd*.[7] The case concerned a charter party for the vessel Comandate, which provided that '[a]ll disputes arising out of this contract shall be arbitrated at London … Any dispute arising hereunder shall be governed by English Law.'[8]

Alleging various breaches of the charter party, Pan commenced in rem proceedings against Comandate and obtained the arrest of Comandate. Pan later sought an anti-anti-suit injunction restraining Comandate Marine from obtaining an injunction from a foreign court, which would prevent Pan from filing a claim against Comandate Marine under the *Trade Practices Act 1974* (Cth).

Pan obtained an ex parte order granting the anti-anti-suit injunction and Comandate Marine subsequently applied for a stay of Pan's proceedings under the *International Arbitration Act 1974* (Cth) on the basis that there had been an agreement to arbitrate in London. One issue which arose was whether there had been an agreement in writing for the purposes of Article II of the Convention. In an exchange of documents, the parties had agreed that the charter party (including the arbitration clause) would not be binding until a bank guarantee was provided. Justice Allsop, who delivered the leading judgment, held that as long as the arbitration agreement was assented to in mutually exchanged documents, then the validity of that arbitration agreement is not denied by the fact that in the substantive agreement, the parties agreed that their binding contractual relations (including the arbitration clause) would not arise until one party performed an act, such as providing a bank guarantee. The Full Court of the Federal Court enforced the arbitration agreement and granted an unconditional stay of Pan's proceedings.

5 Article II(2).
6 Article II(3).
7 (2006) 157 FCR 45 ('*Comandate*').
8 Ibid 54.

III ENFORCEMENT OF AWARDS

The second obligation imposed by the Convention on Contracting States is to recognise and enforce arbitral awards made in the territory of another State.[9] Under Article III, Contracting States have an obligation to recognise arbitral awards as binding and enforce them in accordance with their rules of procedure. A party applying for the recognition and enforcement of an award must supply the court with the arbitral award and the arbitration agreement.[10] There are limited grounds for challenging the enforcement of an award. Article V(1) provides that enforcement may be refused where:

(a) the arbitration agreement was invalid;

(b) there has been a violation of due process;

(c) the arbitrator has exceeded his or her authority;

(d) there has been an irregularity in the composition of the arbitral tribunal or arbitral procedure; or

(e) the award has not become binding, or has been set aside or suspended in the country in which the award was made.

Furthermore, a court may refuse enforcement of an award where the subject matter of the dispute is not capable of settlement by arbitration or violates the public policy of the country where enforcement is sought.[11]

IV PRO-ENFORCEMENT BIAS

In applying the grounds for refusing enforcement of awards under Article V, courts have generally demonstrated a tendency to favour the enforcement of Convention awards. This pro-enforcement bias is reflected in the willingness of courts to exercise their discretion to enforce awards and to interpret the public policy exception under Article V(2) narrowly.

A Discretionary power to enforce awards

Even where one of the grounds for refusing enforcement under Article V has been made out, courts have interpreted these grounds as permissive, and not mandatory. In *Europcar Italia SpA v Alba Tours International Inc*,[12] the Ontario Court of Justice found that the use of the word 'may' in Article 36(1) of the United Nations Commission on International Trade Law (UNCITRAL) Model Law (Article V of the Convention), makes it clear that even if a ground for opposing enforcement exists, the court nevertheless has a discretionary power to grant enforcement.

9 Article I.
10 Article IV.
11 Article V(2).
12 [1997] OJ No 133, 23 OTC 376 (Gen Div).

One of the factors considered by the court in exercising its discretionary power to enforce an award, is whether the party resisting enforcement should be estopped from relying on a defence which has been established. This was considered in the Hong Kong High Court case of *China Nanhai Oil Joint Service Corporation Shenzhen Branch v Gee Tai Holdings Co Ltd*.[13] The defendant opposed the enforcement of an award rendered by the Shenzhen Sub-Commission of the China International Economic and Trade Arbitration Commission (CIETAC). One of the defendant's arguments was that there had been an irregularity in the composition of the arbitral tribunal, since the arbitration agreement had provided for disputes to be submitted to CIETAC in Beijing. The defendant had raised its objection with one of the three arbitrators, who decided that CIETAC Shenzhen did have jurisdiction.

The defendant failed to take further steps, such as making a complaint to CIETAC Beijing. Instead, the defendant fully participated in the arbitration. Justice Kaplan held that technically the arbitrators did not have jurisdiction as the Shenzhen Sub-Commission maintained its own list of arbitrators. However, even if one of the grounds for challenging the award had been established, the court had residual discretion to enforce the award nonetheless. In this case, the doctrine of estoppel applied. There was a duty of good faith which required the defendant to bring to the notice of the full tribunal or CIETAC Beijing its objections to the composition of the tribunal. The defendant's failure to do so and 'keeping this point up its sleeve to be pulled out only if the arbitration was lost' were inconsistent with the obligation of good faith. Hence, although technically the ground of opposition under Article V(1)(d) had been made out, the court found that this was an appropriate case to exercise the discretion to nevertheless enforce the award.

Another consideration which the court takes into account in determining whether it should exercise its discretion to enforce an award, is whether the outcome of the dispute would have been different, had there been no contravention of one of the Article V grounds. This issue arose in *Paklito Investment Limited v Klockner East Asia Limited*.[14] The parties had entered into a contract under which Klockner was to sell steel coils which were loaded in Istanbul and delivered to Paklito in China. A dispute arose when the goods were found to be defective and the matter was referred to CIETAC for arbitration. The arbitral tribunal appointed experts to inspect the goods and determine whether the defects were of manufacture or storage. The experts' report was copied to both parties and Klockner informed the tribunal that it wished to make comments in response to the experts' opinion. Before it could do so, the tribunal rendered an award in favour of Paklito. Justice Kaplan held that the defendant had been prevented from presenting its case and had not been given a fair and equal opportunity to be heard, in contravention of section 44(2)(c) of the *Arbitration Ordinance*[15] (Article V(1)(b) of the Convention). The court then had to consider

13 [1995] 2 HKLR 215.
14 [1993] 2 HKLR 39.
15 Chapter 341 of the Laws of Hong Kong.

whether it was appropriate to exercise its discretion to permit enforcement of the award. Justice Kaplan observed that the court might exercise its discretion, for example, where the new material which the defendant wished to put forward would not have affected the outcome of the dispute. This was not such a case as there had been a serious due process violation, and enforcement was hence refused.

B Narrow interpretation of public policy

Pro-enforcement bias is further reflected in the numerous cases where courts have rejected arguments that enforcement should be denied on the basis that the award violates public policy. In a frequently quoted definition of public policy, Joseph Smith J in the United States Court of Appeals case of *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA*,[16] held that the public policy defence should be construed narrowly and that enforcement of a foreign award may be denied only when enforcement would violate 'the forum state's most basic notions of morality and justice'.[17]

The case concerned a contract between an Egyptian company and a United States contractor for the construction and operation of a paperboard mill in Egypt. The United States contractor argued that a change in United States foreign policy towards Egypt as a result of the Six Day War between the Arab states and Israel, required it to abandon the project. In rejecting the public policy argument, the court held that

> [t]o read the public policy defence as a parochial device protective of national political interests would seriously undermine the Convention's utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of "public policy".[18]

A narrow interpretation of the public policy exception can also be found in the Hong Kong case of *Hebei Import and Export Corp v Polytek Engineering Co Ltd*.[19] In that case, Litton PJ observed that 'courts should recognise the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice. It would take a very strong case before such a conclusion can be properly reached …'.[20] Polytek opposed the enforcement of an award on the basis that, during the course of the arbitration, the Chief Arbitrator and tribunal-appointed experts had inspected equipment at Hebei's factory, in the absence of Polytek, and this was contrary to public policy. The Court of Final Appeal found that even though the inspection in the absence of Polytek was a procedure which in Hong Kong might be considered unacceptable, the public policy argument was without substance, as Polytek had been provided with a copy of the experts' report and did not indicate that it wished to contest any part of the report or question the experts.

16 508 F 2d 969 (2nd Cir 1974).
17 Ibid 974.
18 Ibid.
19 [1999] 1 HKLRD 665.
20 Ibid 670.

The Singaporean courts have also interpreted the public policy ground narrowly. In *Re An Arbitration between Hainan Machinery Import & Export Corporation and Donald & McArthy*,[21] the Court rejected the public policy argument as there was no allegation of illegality or fraud, and enforcement would not be injurious to the public good. Justice Prakash stated that

> the principle of comity of nations requires that the awards of foreign arbitral tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which itself aspires to be an international arbitration centre, Singapore must recognise foreign awards if it expects its own awards to be recognised abroad.

Courts have also observed that the public policy defence should not be a means by which the merits of an award can be revised. In the Canadian case of *Schreter v Gasmac Inc*,[22] Gasmac argued that enforcement of the award would be contrary to the public policy of Ontario, as the award included a significant sum for the acceleration of royalty payments for breach of contract. The Court concluded that if it were to re-open the merits of an award on legal issues decided in accordance with the law of a foreign jurisdiction and where there had been no misconduct, under the guise of ensuring conformity with public policy, the procedure for enforcement of awards would be brought into disrepute.

The above cases on public policy should be compared with *TermoRio SA ESP v Electrificadora Del Atlantico SA ESP*,[23] a 2007 decision of the United States Court of Appeals for the District of Columbia. In that case, TermoRio sought confirmation and enforcement of an ICC Tribunal's arbitration award in the United States District Court ('District Court'). The District Court action followed a decision of the Council of State, the highest Administrative Court in Colombia, which terminated the award on the basis that Colombian law did not expressly permit the use of ICC procedural rules in arbitration. The District Court granted Electranta a motion to dismiss the application on the basis that TermoRio's application did not state a claim for which relief could be granted, or alternatively on the basis that the District Court was an inappropriate forum in which to hear the matter.

On appeal, the United States Court of Appeals for the District of Columbia affirmed the judgment of the District Court, holding that because the arbitration award was lawfully nullified by the country in which the award was made, TermoRio had no cause of action to seek enforcement under the Convention or the *Federal Arbitration Act* ('FAA').[24]

In analysing the validity of a foreign judgment in vacating an arbitration award, the Court noted that the basic understanding of the Convention contained in Article III is that each Contracting State shall enforce arbitral awards in accordance with the rules of procedure in the territory in which the award was entered into. Article V(1)(e) of the Convention provides that enforcement of an award 'may be refused' if it has been set aside by a competent authority in the

21 [1996] 1 SLR 34.
22 (1992) 7 OR (3d) 608.
23 487 F 3d 928 (DC Cir 2007) ('*TermoRio*').
24 9 USC § 201.

country in which the award was made. The Court noted that, pursuant to this provision, a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a 'competent authority' in the primary Contracting State. The Court generally subscribed to the reasoning in *Baker Marine (Nig) Ltd v Chevron (Nig) Ltd,*[25] in agreeing that 'mechanical application of domestic arbitral law to foreign awards under the convention would seriously undermine finality and regularly produce conflicting judgments'.[26] Hence, in finding that TermoRio had no cause of action to seek enforcement, the Court stated that 'an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made'.[27]

The Court further considered whether public policy considerations were applicable such that the Court should enforce the award, despite annulment in a foreign country. In a discussion of the applicable standard of public policy under Article V(1)(e), the Court accepted that a foreign judgment is unenforceable as against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States'.[28] However, the claim still failed as no evidence had suggested such a notion.

Whilst *TermoRio* is a salutary lesson in choosing the right seat for your arbitration and a warning not to use a set of arbitral institutional rules randomly because they were used in your last agreement, it also highlights the circumstances in which the public policy can be successful in preventing an award from being enforced.

V CONCLUSION

While the growth in international investment and trade provides corporations with a plethora of opportunities, there are also significant risks. In dealing with cross-border disputes, international arbitration is undoubtedly the preferred method. A recent survey of the views of in-house counsel at leading corporations worldwide found that 73 per cent of corporate counsel favoured international arbitration as a means for resolving cross-border disputes.[29] The flexibility of procedure and the enforceability of awards pursuant to the Convention were the most widely recognised advantages of international arbitration.[30] In fact, enforceability of awards was ranked as the single most important advantage by the highest number of respondents.[31]

25 191 F 3d 194 (1999).
26 Ibid 197.
27 *Parsons & Whittemore Overseas Co Inc v Société Générale de l'Industrie du Papier RAKTA,* 508 F 2d 969, 974 (2nd Cir 1974).
28 See *Tahan v Hodgson,* 662 F.2d 862, 864 (DC Cir 1981).
29 PricewaterhouseCoopers & Queen Mary, University of London, 'International Arbitration: Corporate Attitudes and Practices 2006' (Press Release, 25 July 2006) 2.
30 Ibid.
31 Ibid 6.

The concept of a final and binding award capable of enforcement is of paramount importance in international commercial arbitration.[32] It is fair to say that there is an overall bias towards the enforcement of awards, which ensures a level of certainty and predictability in international arbitration that is crucial to international trade.

Although approaches to the enforcement of awards and interpretation of the exceptions to enforcement varies from State to State, the majority of cases acknowledge that an award will only be set aside in the rarest of circumstances and usually on overriding international public policy concerns. According to another report, as of 1996, in more than 95 per cent of cases where enforcement was sought the awards were enforced by the courts.[33] In another survey, the figure for voluntary enforcement by State Courts was 98 per cent.[34]

The harmonisation which the Convention provides in relation to the rules on the recognition and enforcement of arbitration awards, truly makes it one of the pillars and foundation stones of international arbitration.

32 Julian Lew, Loukas Mistelis & Stefan Kroll, *Comparative International Commercial Arbitration* (2003) 731.

33 Albert van den Berg, 'The New York Convention: Its Intended Effects, Its Interpretation, Salient Problem Areas' in Blessing (ed), *The New York Convention of 1958* (1996) 25.

34 Michael Kerr, 'Concord and Conflict in International Arbitration' (1997) 13 *Arbitration International* 121, 129.