

# NEWSLETTER

by CIETAC Hong Kong Arbitration Center

## Both CIETAC and CMAC revised arbitration rules to be unveiled at the end of 2014

CIETAC and CMAC have finished revisions of their current arbitration rules and are expected to release them at the end of December 2014.

## HK court's another pro-arbitration decision

Hong Kong's Court of First Instance has awarded indemnity costs against a party that unsuccessfully sought to litigate an issue already dealt with in an ICC arbitration, which again reflects its pro-arbitration stance.

## Su Chi to head China's 1st IP court

Su Chi, formerly the deputy head judge at the Second Intermediate People's Court in Beijing, has been appointed as the head judge of China's first Intellectual Property Court on Tuesday, November 4, 2014. ( See more on Page 2)

## HK Chief Justice encourage arbitrators to build public confidence

Hong Kong Chief Justice Geoffrey Ma has said that arbitrators need to do more to maintain public confidence in the international arbitration system, kicking off Hong Kong's 3rd arbitration week. ( See more on Page 2)



## CMAC events in & after ALMC 2014

The Inauguration Ceremony of the China Maritime Arbitration Commission HK Arbitration Center will be held at HK Conference and Exhibition Centre in the morning of 19 November during Asian Logistics & Maritime Conference 2014. More than 1200 professionals, who are experts of shipping, insurance and legal services industries from the Mainland, Hong Kong and overseas countries will join in the conference. The Vice Chairman of CMAC will attend the Ceremony.

In the afternoon of the same day, CMAC will have a seminar for CMAC and CIETAC arbitrators introducing its upcoming arbitration rules. CMAC will also invite a judge who is in charge of maritime cases from the SPC of China to address in the seminar. (Email to [wuliwen@cietac.org](mailto:wuliwen@cietac.org) for registration.)

## Global report on enforcement of China-seated awards (3)

In this edition, we invite you to take a look at how and why a PRC seated award has not been enforced in the United States. And what to expect when awards are to be enforced in Austria and the U.K.

## Su Chi to head China's 1st IP court

(china.org.cn) Su Chi has been appointed as the head judge of China's first Intellectual Property (IP) Court, which was officially unveiled in Beijing on Tuesday, November 4, 2014.

He was formerly the deputy head judge at the Second Intermediate People's Court in Beijing.

According to a decision made at a session of the National People's Congress Standing Committee, the city of Beijing will initiate the intellectual property court. Two similar courts in Shanghai and Guangzhou will open by the end of this year.

Media outlets say that most preparatory work for the court has been done. After it has been established, other intermediate courts will no longer accept cases in intellectual property. Local courts will still be eligible for small civil cases related to the IP field. The Beijing Higher Court will serve as the Court of Appeals for IP cases.



## Hong Kong Arbitration Week 2014 wrap up in great success



On Oct. 15, CIETAC organised seminar, "Dealing with Last-Mile Challenges: An Examination of Awards Enforcement in China and the Enforcement of Chinese Awards Worldwide" was held successfully in Hong Kong in HKAW 2014. Mr. Li Hu, Deputy Secretary General of CIETAC attended the seminar and delivered the opening remarks. Judge Zhang Yuan, the Deputy Director of Execution Bureau of Appealing and Reviewing, Supreme People's Court, delivered a keynote speech on "Mainland Judicial Supervision on the Enforcement of Domestic Arbitral Awards". Dr. Wang Wenyong, Secretary General of the CIETAC Hong Kong Arbitration Center hosted the seminar. More than 200 arbitrators, scholars, lawyers, businessmen, media friends and delegates of arbitration institutions from more than 20 Countries and regions attended the seminar.

Judge Zhang Yuan gave a full explanation of the mainland judicial supervision on the enforcement of domestic arbitral awards, including how and why mainland courts enforce or not enforce arbitral awards. He also raised several proposals in relation with improving the PRC legal system for refusing enforcement of an arbitral award administered by a mainland arbitration commission.

The seminar included two sub-topics, Foreign Awards Enforcement in the Mainland and Overseas Enforcement of the Mainland Awards. Mr. Danny McFadden, Directing Manager of Centre for Effective Dispute Resolution and Anthony Houghton SC, Senior Counsel, Des Voeux Chambers were the panel moderators respectively. Mr. Li Haifeng (Partner, Global Law Office), Ms. May Tai (Partner, Herbert Smith Freehills), Mr. Thomas So (Partner, Mayer Brown JSM), Mr. Lijun Cao (Partner, Zhong Lun Law Firm), Mr. Edmund Wan (Partner, King and Wood Mallesons), Mr. Simon Greenberg (Partner, Clifford Chance), Matthew Townsend (Norton Rose Fulbright), Mr. Fei Ning (Partner, Hui Zhong Law Firm), and Mr. Nigel N.T. Li (Partner, Lee and Li) participated the panels and had a heated discussion on the two topics. They offered their valuable opinions and suggestions which received high praise by the participants.

## Lessons from enforcing PRC arbitral awards in the USA

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**James Rogers, Andrew Price, Andrea Fair and Matthew Townsend\***

A recent case regarding the enforcement of a foreign award in the US courts (*Exceed International Limited v DSL Corporation and other: Civil Action No. H-13-2572*), in which the authors acted, highlights a simple lesson for any party drafting an arbitration agreement – make sure to clearly document any dispute resolution agreement. Failure to do so may lead to protracted proceedings and an uncertain outcome.

### Background

In 2012 the Applicant, a New Zealand registered company, entered into several contracts (the “Contracts”) for the delivery of steel pipes with the Respondent, a company registered in Texas. The pipes were to be manufactured by a Chinese sister company of the Applicant.

The Contracts were drafted bilingually in English and Chinese – each English paragraph was followed by a corresponding Chinese paragraph. However, the Contracts contained no prevailing language provision. It was, therefore, unclear which language prevailed in the event of a conflict between the two languages.

As originally drafted, paragraph 14 of the Contracts provided that any dispute would be resolved by Beijing-seated CIETAC arbitration proceedings. However, prior to execution, the Respondent struck through the English version of the arbitration agreement. The equivalent Chinese provisions remained.

### The Beijing arbitration proceedings

A dispute arose and on 25 September 2013 the Applicant commenced CIETAC arbitration proceedings. The Respondent received notice of the arbitration but did not respond and did not subsequently participate in those proceedings at all.

On 16 April 2013 the tribunal duly issued an award in favour of the Applicant.

The tribunal had invited submissions on the issue of the striking out of the English version of the arbitration agreement. In its award the tribunal considered the existence and validity of the arbitration clause and held that a valid arbitration clause existed.

The Tribunal found that, in the absence of a prevailing language clause, the English and Chinese text had equal legal force. On this basis, and observing that the Respondent had made no objection to its validity, the tribunal found that the Chinese clause therefore constituted a valid arbitration agreement.

### The Texas Confirmation proceedings

On 3 September 2013, the Applicant applied to confirm the award. The application was made to the Houston Division of the US District Court of the Southern District of Texas, where the Respondent is located.

The Respondent opposed enforcement, raising several defenses including that no valid arbitration agreement existed. It contended that its strike-through of the English version of the arbitration agreement contained in paragraph 14 evidenced a clear intent not to be bound by that paragraph.

As it had argued in the arbitration, the Applicant countered that, because the Chinese version of paragraph 14 remained, the parties were bound by the arbitration agreement. Further the Respondent had failed to object to the jurisdiction of the arbitral Tribunal during the arbitration. It had brought such a challenge for the first time at the confirmation phase.

The Applicant also pointed out that the Tribunal had, in its determination, explicitly ruled that the arbitration

agreement was valid, in accordance with its discretion under article 6 of the CIETAC 2012 rules.

### **Grounds to refuse enforcement**

The US is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "Convention"). The Convention, which is implemented in the US by Chapter 2 of the Federal Arbitration Act, allows a court to refuse to enforce a foreign arbitral award rendered in another signatory country to the Convention.

However, enforcement may only be refused on very narrow and specific grounds. This is not accidental. By limiting the scope of such challenges the Convention encourages the enforcement of foreign arbitral awards and minimizes the undesirable prospect of a confirming court re-opening issues which have already been decided at the arbitration stage.

Accordingly, and in keeping with this approach, the US courts have generally applied a restrictive approach to the grounds for refusal of enforcement. However, in apparent contradiction of this principle, some US courts have been known to adopt wider interpretations of certain Convention grounds.

An example is article V.2(a). This article provides that enforcement may be refused where the enforcing court (in this case the US court) finds that "[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country".

Article V.2(a) is rarely relied on by the national courts. When it is, it will typically be employed where the 'type' or 'category' of dispute is not, as a matter of public policy, arbitrable in the enforcing state. For example it may be used to refuse enforcement of an arbitral award in relation to a family law matter where the state of enforcement does not permit family law matters to be arbitrated.

However, as above, courts have in some circumstances interpreted the article widely to cover the whole issue of a tribunal's jurisdiction. Where, for instance, an enforcing court finds that there is no arbitration agreement as a matter of US law, it may refuse to enforce the award.

The authors note in passing, that this wide interpretation of article V.2(a) as allowing a US court to apply US law to determine the existence and validity of an arbitration agreement does not sit well with other provisions of the Convention. In particular, it seems to contradict article V.1(a) which explicitly requires that, absent party choice to the contrary, the law of the arbitral seat (in this case China) determine such questions.

### **The decision in the US District Court for the Southern District of Texas**

In considering the validity of the arbitration agreement, the District Court judge found that article V.2(a) could indeed be interpreted widely to allow the Court to re-consider under US law the validity of the clause.

Having determined that US law applied, the judge then went on to hold that the arbitration agreement was invalid as a matter of US law, as it did not contain the essential elements of a contract. These included inter alia (a) an offer; (b) acceptance; and (c) a meeting of minds between the parties. In this case, such a meeting of minds did not exist as the Respondent had deleted the English language provision of the arbitration clause.

The judge did not appear to consider it significant that a CIETAC tribunal had already found the arbitration agreement to be valid under PRC law, nor that the Convention under article V.1 explicitly required that Chinese law be determinative in such matters.

Nor did the judge deal fully with the Applicant's waiver argument, that the Respondent had failed to object to the jurisdiction of the arbitral Tribunal during the arbitration.

## Conclusions

The decision raises several lessons for parties looking to enforce Chinese arbitral awards in the USA.

The first lesson is to be prepared for the possibility of re-scrutiny at the enforcement stage. While the US courts will generally apply a 'pro-enforcement' bias towards enforcement, there have been instances (as in the present case) where a confirming US court will attempt to re-examine determined issues such as the jurisdiction of the tribunal.

That said, the greatest lesson to be drawn from this case is somewhat more straight forward. As with many arbitration cases that come before the courts, this case highlights the problems that arise when arbitration agreements are not carefully concluded and properly documented. It is unfortunate that the parties' had not adequately recorded their preference for resolving disputes - significant wasted time and cost would have been saved had they done so.

**\* James Rogers is a partner in the Norton Rose Fulbright Hong Kong office and arbitrator of CIETAC, Andrew Price is a partner and Andrea Fair an associate in the firm's Houston office, and Matthew Townsend is an associate in the firm's Beijing office.**

## How China-seated arbitration awards have been enforced Overseas – the Austrian perspective

By Mag. Daniela Karollus-Bruner \*

### 1.1 Enforcement of foreign arbitral awards in Austria

In Austria, in the great majority of cases, the enforcement of foreign arbitral awards follows quickly and efficiently after an award is issued. Austria is party to several international multilateral and bilateral agreements, in particular to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 ("New York Convention") to which China is a signatory state as well. In the predominant number of cases, foreign arbitral awards are governed by just this Convention and, if they were made in accordance with the Convention, they are recognized and enforced by Austrian courts.

To the extent not determined by international law or legal acts of the European Union, recognition and enforcement of foreign arbitral awards are governed by the provisions of the Austrian Enforcement Act ("EA"). Under these provisions, enforcement proceedings are divided in an approval procedure on the one hand and the actual enforcement procedure on the other hand.

However, regarding foreign arbitral awards, meaning awards rendered by arbitral tribunals which do not have their seat within Austria, the approval of enforcement not only requires the enforcement authorization ("Exekutionsbewilligung"), but also a previously issued leave for enforcement ("Vollstreckbarerklärung") by a domestic court which ensures the subsequent equal treatment of foreign and domestic arbitral awards.

### 1.2 Leave for enforcement and recognition

The application for leave of enforcement may be filed jointly with (but also before) the application for

enforcement authorization (Sec 84a EA), the district court where the defendant has its seat or domicile, or the district court where the particular execution is to be conducted, having jurisdiction (Sec 82 EA). In principle, it is required that the particular foreign award is enforceable according to the provisions of the state of origin and that mutuality of enforcement is guaranteed by a decree or a treaty (Sec 79 EA). However the latter prerequisite does not apply within the scope of application of the New York Convention.

Under the rules of the New York Convention the competent domestic court must be provided with the duly authenticated original award respectively a duly certified copy thereof. As German is the official language in Austria, the award (or its copy) has to be submitted together with a certified translation into German. In this context the Austrian Supreme Court held in 3 Ob 211/05h that the definition of an arbitral award as stated in Article IV(2) New York Convention is not limited to its dictum but includes the arbitral award's reasoning. Therefore, when recognition and enforcement of an arbitral award drafted in a foreign language is sought in Austria, the applicant must provide a certified German translation of the full award. If the required translation is not provided, the courts must give the applicant reasonable time to remedy this defect of form before dismissing the application for the recognition and enforcement.

Differing from both the New York Convention and the UNICITRAL Model Law, Sec 614 of the Austrian Code of Civil Procedure ("CCP") leaves it to the discretion of the court to request the submission of the original arbitration agreement or a duly certified copy thereof. In 3 Ob 35/08f the Austrian Supreme Court held that such a request must be based on reasonable doubts as to the existence of an agreement. In the absence of doubts, there is no need to submit the agreement. Consequently the original arbitration agreement - or a certified copy of the agreement - only has to be submitted if requested by the Austrian court.

The competent court decides on the basis of documents only and therefore without hearing the defendant (Sec 83 EA). The arbitral award may also be declared partially enforceable. The decision will then be submitted to the defendant who may appeal the court's decision within a period of four weeks (Sec 84 EA). Sec 80 seq. EA stipulate certain prerequisites respectively certain grounds for refusing leave for enforcement. The grounds for refusing as laid down in Art 36 of the UNCITRAL Model Law have not been specifically included. Also, the provision is of very limited practical significance as it is overlaid by numerous multilateral and bilateral agreements, namely Art V of the New York Convention.

In 3 Ob 211/05h the Austrian Supreme Court concluded that Article V(2)(b) New York Convention only applies when the recognition and enforcement of the arbitral award contradicts fundamental principles of Austrian legal order; a mere "unfairness" of the outcome of the case or a simple violation of mandatory Austrian law is not sufficient.

Once enforceability is declared, its recognition follows *ipso iure*; that is without any further proceeding. The award thus equates a domestic award and constitutes an executory title. However, in any case, its effects are limited to those of the state of origin. The defendant may therefore, by way of example, request the court to set aside its decision on the leave for enforcement if the arbitral award has been set aside or modified within its state of origin after the domestic court's decision became binding (Sec 84c EA).

To date, the enforcement of foreign awards in Austria, also from China, has not presented any problems.

### **1.3 Enforcement authorization and compulsory enforcement**

With the application for enforcement authorization, State coercive force is requested to implement the enforceable claim. Thus, not only need the parties, the competent domestic court, the enforceable claim and the executory title to be accurately identified, but a description of the desired enforcement measure and of the assets against which enforcement is to be levied, is to be included as well (Sec 54 EA).

In particular, the following enforcement measures may be considered: attachment and transfer of receivables or bank accounts; compulsory creation of a lien, compulsory administration or compulsory sale by auction regarding immoveable assets; seizure, realization and satisfaction regarding moveable goods. A combination thereof is possible, but in specific cases Austrian law provides for preferences such as the precedency of enforcement upon regular income to enforcement upon moveable goods. Regarding executory titles directed at claims for specific performances or omissions, by way of example, the compulsory restitution of moveable goods or the eviction of immoveable assets come into question.

The approval proceedings are generally one-sided, the approval either being granted, usually for an unlimited period, or rejected based on the presented documents. However, there is a right to appeal against the court's decision (Sec 65 seqq. EA). The appeal must be lodged at the enforcement court within 14 days and may constitute a ground for postponement of enforcement. By way of a separate action against the enforcing creditor ("Exekutionsklage"), the defendant may assert that the claim to be enforced either extinguished or deferred (e.g. the claim has been satisfied or payment postponed) after the executory title was granted or else that the enforcing creditor has no right to enforce the executory title (e.g. the enforcing creditor waived the continuation of enforcement proceedings). In such cases, if the court decides in favor of the debtor respectively the third party, enforcement proceedings have to be closed.

Also, third parties may claim to have a right to the assets against which enforcement is to be levied (e.g. being the actual proprietary or having a paramount lien). Creditors are satisfied strictly in accordance with the priority principle, the creditor who first attached an asset taking precedence over the others.

The actual enforcement procedure following the approval proceedings very much depends on the specific type of enforcement measure that has been granted. There is no single enforcement procedure.

\* **Mag. Daniela Karollus-Bruner is a partner at CMS in Vienna**

## **How China-seated arbitration awards have been enforced Overseas – the English perspective**

**by Tom Christopher Pröstler, LL.M. (Sydney) and Sarah McIvor**

### **A. Introduction**

One of the prime advantages of choosing international arbitration over litigation is the existence of a universal and effective enforcement regime in the form of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention", "NYC"). The contracting states of the New York Convention agree that they will recognize and enforce arbitral awards made in other contracting states. 150 countries have ratified the New York Convention, including the United Kingdom (in 1975) and the People's Republic of China (in 1987).

In recent years, international trade with China has developed immensely, not in the least between Chinese and English businesses. As a result, the number of commercial disputes has also increased. In contracts between English and Chinese business partners, international arbitration is the preferred

method of dispute resolution. Not only will disputes be decided efficiently, on neutral grounds and on the basis of mutually agreed rules, but the resulting award can also be readily enforced in virtually every economically important jurisdiction around the world pursuant to the New York Convention.

As many multinational companies and international investors have assets in the United Kingdom, parties seeking the enforcement of international arbitral awards regularly turn to the English courts. As demonstrated by the cases below, this is also true for international arbitral awards issued in China. London, as one of the world's premier financial centers and home to the London Court of International Arbitration (LCIA), is a popular seat for international arbitrations. As a consequence, the English courts have a breadth of knowledge and experience in dealing with matters concerning international arbitration.

## **I. Legal Framework for Enforcement**

The relevant law for the recognition and enforcement of foreign arbitral awards in the England, Wales and Northern Ireland can be found in the Arbitration Act of 1996 ("Arbitration Act"). The requirements of the New York Convention have been implemented into the United Kingdom legal system under section ss. 101 et seq. Arbitration Act. Most notably, s. 101 Arbitration Act enacts Art. III NYC, stating that a New York Convention award shall be recognised as binding and can be enforced in the same manner as a judgment or order of a court to the same effect. Pursuant to s. 103 Arbitration Act, enforcement of a foreign arbitral award may only be refused for an exhaustive list of grounds which correspond to Art. V NYC. These grounds have been implemented verbatim. The grounds of Art. V (1) NYC can be found in s. 103 (2) and the grounds of Art. V (2) NYC are laid out in s. 103 (3) Arbitration Act. These grounds pertaining to refusal to enforce foreign arbitral awards are well-known and established by international arbitration practice.

In addition, s. 104 Arbitration Act provides that a foreign arbitral award can be enforced "at common law or under section 66" without regard to the specific requirements of the New York Convention that have been enacted in the preceding provisions. Although these additional grounds for enforcement seem to benefit the party relying on it, enforcement at common law or under section 66 Arbitration Act will be more difficult than under the rules of the New York Convention set out in ss. 101-103. While the latter specify an exhaustive list of grounds for refusing recognition and enforcement, such grounds are much broader at common law and under section 66 Arbitration Act. As consequence, s. 104 Arbitration Act is not applied in practice.

As a general rule, English courts have been very vocal in recognizing and enforcing foreign arbitral awards based on the pro-enforcement principle of the New York Convention. The grounds for a refusal to enforce a foreign arbitral award set out in s. 103 Arbitration Act are therefore interpreted narrowly by English courts. Most importantly, the fundamental principle that the court is not entitled to review the merits of an award (*révision au fond*), is also applied by English courts. Nevertheless, English courts have not been afraid to scrutinise awards in greater detail than is common in most other jurisdictions, thereby displaying the greater discretion generally afforded to English courts.

## **II. Enforcement Proceedings**

The procedure for the enforcement of foreign arbitral awards in the United Kingdom is governed by the Arbitration Act, as well as Part 62 and Practice Direction 62 of the Civil Procedure Rules of 1998 ("CPR").

In most cases, the High Court will be responsible for enforcement proceedings. The party seeking enforcement is required to submit an arbitration claim form indicating certain basic information about the claim for enforcement. It is usual for the application to be made without notice to the other party; only if the court gives the applicant permission to enforce the award must it be served on the other party. This party may then request the court to set aside the order and refuse enforcement of the award

within 14 days after service of the order or, if the order is to be served outside the United Kingdom, within such other period prescribed by the court.

A party seeking the recognition or enforcement of a foreign arbitral award must produce the documents required under s. 102 Arbitration Act. These are the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement or a duly certified copy thereof. If the award or agreement is in a foreign language, the party must also produce a translation certified by an official or sworn translator or by a diplomatic or consular agent. With regard to the grounds for refusal of enforcement, the burden of proving the existence of such grounds rests on the party resisting enforcement. However, the court will consider issues of public policy on its own motion.

If the court finds that the aforementioned requirements for enforcement are met, it may grant the applicant leave to enforce, meaning that the award can then be enforced like a domestic court judgment through the competent enforcement organs.

## **B. Cases**

### **I. *Tongyuan (USA) International Trading Group v. Uni-Clan Limited***

On 19 January 2001, the High Court handed down its decision granting enforcement of the award.

#### **1. Facts**

Uni-Clan Limited (Uni-Clan) entered into a contract with Tongyuan (USA) International Trading Group (TITG) for the sale and supply of two sachet filling machines. The dispute resolution clause in the contract provided for arbitration administered by the China International Economic and Trade Committee of CCPIT, specifically at either the Shenzhen or Shanghai Offices.

A dispute arose regarding the performance of one of the machines and the matter was referred to arbitration before a tribunal in Beijing. Although duly notified, Uni-Clan did not engage in the arbitration proceedings save for one attempt in which they contacted the arbitrator appointed on their behalf. The tribunal in Beijing rendered an award which held that the machine was defective and required Uni-Clan to return the purchase price, along with interest, to TITG.

TITG applied to the English courts for an enforcement order of the award, to which Uni-Clan objected on the grounds that: the award was a nullity as proceedings had been conducted in Beijing rather than the forums proscribed under the arbitration agreement; the award was insufficiently clear to be awarded as a judgment; and it would be contrary to public policy to enforce the award as it would prevent Uni-Clan from raising a counter claim.

#### **2. Decision**

In regards to the first claim, Justice Briggs held that the arbitration clause did not contain any language which indicated that the place of arbitration was of "critical importance" and thus the clause should be viewed as an intermediate term; the effect of this being that a subjective test must be applied whereby the "nature and gravity of the particular breach" is considered. It was held that in this case there had been no prejudice suffered by Uni-Clan due to the change in location. An important factor which was considered in determining this particular point was that Uni-Clan had failed to engage in the proceedings and as such, no prejudice could result from the tribunal sitting in Beijing.

In regards to the second claim, it was held that the award was clear enough to be enforced. Justice Briggs stated in his obiter dictum that the Court was "concerned in this respect with the form of the award, not with its substance", thus as long as the terms could be translated and inserted into the body of the enforcement order, there can be no reason why the award should be deemed unclear.

In regards to the second claim, it was held that the award was clear enough to be enforced. Justice Briggs stated in his obiter dictum that the Court was "concerned in this respect with the form of the award, not with its substance", thus as long as the terms could be translated and inserted into the body of the enforcement order, there can be no reason why the award should be deemed unclear.

In relation to the third claim, it was held that it would not be against public policy to enforce the award. Justice Briggs stated that in general there was a "a very strong public policy consideration in favour of enforcing awards, whether awards published in this country or published abroad". Further to this, he stated that in regards to claims concerning public policy arguments, there would have to be "a very strong and unusual case to render the enforcement of an award in circumstances of this kind contrary to public policy."

### 3. Remarks

This case demonstrates the willingness of the English courts to uphold the principles of the New York Convention. Perhaps the most important consideration to be taken from the case is the suggestion that English public policy will more likely support the enforcement of an award, than provide a platform for resisting enforcement. Finally, the suggestion that enforcement will only be refused on public policy grounds if a "very strong and unusual case" is given, further shows the English courts' narrow interpretation of the applicable public policy standards.

## II. *Minmetals Germany GmbH v Ferco Steel Ltd*

On 20 January 1999, the High Court delivered its judgment granting enforcement of the award.

### 1. Facts

Ferco Steel Ltd (Ferco) entered into a contract with Minmetals Germany GmbH (Minmetals) for the provision of 10,000 metric tons of steel. This contract entitled Minmetals to refer the goods for inspection to the Chinese Commodity Inspection Bureau, after which if there was any fault with the goods or they did not meet the specified dimensions, it was entitled to lodge a claim against Ferco. Minmetals then entered into a sub-sale contract in which it sold the steel provided by Ferco on to China Resources Metals and Minerals Company (CRMMC). Upon inspection of the metal, the Inspection Bureau held that there was a significant divergence between the dimensions of the metal provided and that which was specified in the contract.

Minmetals thus filed an arbitration claim against Ferco with the CIETAC, claiming loss of profit and the amount of damages payable to CRMMC under the sub-contract (CRMMC Arbitration). At the same time CRMMC initiated arbitration proceedings against Minmetals also under the CIETAC's administration under the sub-contract (Ferco Arbitration). The cases were heard in separate arbitrations but by the same arbitration tribunal.

The award in the CRMMC Arbitration was issued first, awarding CRMMC USD 1.6 million against Minmetals. Thereafter, the tribunal issued the award in the Ferco Arbitration ruling in favour of Minmetals and against Ferco. In Ferco Award, the tribunal made reference to the CRMMC Award. Ferco filed a setting aside application against the Ferco Award before the Chinese People's Courts, arguing that the CRMMC Award had not previously been introduced in the Ferco Arbitration thereby preventing Ferco from presenting its case as it had not been able to comment on the CRMMC Award. The People's Court suspended the Ferco Award and referred the matter back to the tribunal for re-decision. Ferco did not participate in the proceedings consequently reopened by the tribunal as it considered the tribunal not to have jurisdiction to revoke its own award.

In the following, the tribunal issued the second award confirming the Ferco Award. Against this second

award, Ferco again filed a setting aside application before the People's Courts. The People's Court dismissed this application on the grounds that the initial infringement of fair procedure had been rectified as the tribunal had now given Ferco ample opportunity to comment on the CRMMC Award. The Court further held that the fact that Ferco had not used this opportunity was at its own expense.

Following this, Minmetals obtained leave to enforce the Ferco Award in the United Kingdom from the English courts. Ferco contended that the Ferco Award was unenforceable as the tribunal had breached the basic principle of fair procedure protected under s.103 (2) (e) Arbitration Act and its enforcement would therefore also be against public policy.

## 2. Decision

The High Court held that Ferco could not resist enforcement as it had been given the opportunity to present its case following the People's Court's remit of the matter to the tribunal and had on its own account failed to take this opportunity. Justice Coleman stated that under the New York Convention, an award may only be refused enforcement on the grounds of infringement of fair proceedings if a party "has not been given any reasonable opportunity to present its case in relation to the results of [the tribunal's] investigations." He further stated that the inability to present one's case related to "matters outside [the parties'] control" and not to a party's deliberate decision not to present its case when given the opportunity.

The Court agreed with Ferco's submission that on the original Ferco award, the tribunal had failed to apply "international practices and principles of international fairness and reasonableness". However, the Court also held that Ferco had waived its right to rely on this failure by not participating in the proceedings reopened by the tribunal.

As far as Ferco relied on public policy, Justice Coleman held that public policy is generally in favour of enforcing awards, save where there are "exceptional circumstances" in which there has been an "obvious and serious disregard for the basic principles of justice". He further stated that unless one of these exceptional cases was applicable, a review of arbitral awards on grounds of public policy should not be undertaken by English courts.

Ultimately, the Court held that Ferco had not acted reasonably in the proceedings, had thereby waived its right to rely on any procedural defects underlying the award and would therefore also not incur substantial injustice if the award was enforced.

## 3. Remarks

The Minmetals case is often referred to in English court decisions and has become a marker for all cases that have followed, as seen in the previously discussed Tongyuan case. Its main outcomes in this respect are the principle that enforcement of the award is paramount, save only in exceptional circumstances and the principle that even if exceptional circumstances might apply, the aggrieved party waives its right to rely on these circumstances at the enforcement stage if it prevented the rectification of these circumstances during the previous proceedings.

### III. *China Agribusiness Development Corporation v Balli Trading*

On 20 January 1997, the High Court handed down its decision granting enforcement of the award.

#### 1. Facts

China Agribusiness Development Corporation (CADC) entered into a contract with Balli Trading (Balli) for the purchase of hot rolled steel coils. The arbitration clause contained in the contract referred

disputes to the Foreign Economic and Trade Arbitration Commission of the China Council for the Promotion of International Trade (FETAC) to be decided in accordance with FETAC's provisional arbitration rules. When a dispute arose and CADC initiated arbitral proceedings, FETAC had been renamed to its current name CIETAC. Further, FETAC's provisional rules had been replaced by updated CIETAC rules.

The CIETAC accepted the CADC request for arbitration and initiated arbitral proceedings under its contemporary rules. The arbitration resulted in an award mainly in favour of CADC and CADC applied for leave to enforce the award in the United Kingdom. Balli objected to the enforcement of the award on the ground that whilst FETAC and CIETAC were the same entity, the arbitration clause referred specifically to the old FETAC provisional rules and that therefore the award rendered under the updated CIETAC rules was not in accordance with the arbitration agreement.

## 2. Decision

In his reasoning, Justice Longmore held that the arbitration agreement must be read as that the parties agreed on arbitration administered by FETAC or any successor body under the rules applicable at the time of the arbitration. Justice Longmore further held that even if the parties' agreement could not be construed in this way, enforcement would still be granted. In this respect, the Court stated that even if one of the grounds for refusal of a foreign award was applied, English courts still had discretion to nevertheless grant enforcement. In the exercise of this discretion, Justice Longmore held that the courts should assess the degree of prejudice caused by the specific circumstances of each case. As the Court found that the differences between the FETAC provision rules and the updated CIETAC rules were marginal, it considered that Balli had in any case suffered no relevant injustice.

## 3. Remarks

This case is of particular interest as it on the one hand shows that the English courts, when deciding on the enforcement of arbitral awards, will closely review the contents and intended meaning of arbitration agreements should there be a dispute as to whether such an agreement was complied with. On the other hand the decision shows the discretion exercised by the English courts in enforcement proceedings. Hence, it is important to note that a party resisting enforcement should not only focus on proving that a ground for refusal is applicable, but should also show that prejudice has resulted from this ground.

## C: Conclusion

Compared to courts in many other jurisdictions, the English courts still hold considerable discretion when ruling on enforcement of foreign arbitral awards. Nevertheless, this higher degree of decisional flexibility does not infringe on the English courts general pro-enforcement attitude. In fact this discretion can even act to expand the enforceability of awards in the United Kingdom, as it is generally exercised in an enforcement friendly manner.

It is this decidedly pro-enforcement approach of the English courts that makes the United Kingdom a reliable and consistent jurisdiction for the enforcement of foreign arbitral awards, including those rendered in the People's Republic of China. Only in exceptional circumstances will the English courts consider refusing the enforcement of a foreign arbitral award. Business partners, who refer their disputes to international arbitration seated in China, therefore have an efficient and effective method of enforcing potential awards against assets located in the United Kingdom.

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