

This newsletter provides information on issues of current interest and an update on recent developments in international arbitration law and practice. It is written in general terms. The application of the law always depends on the particular facts of the case. If you would like to follow up any of the issues raised, please contact one of the individuals listed below:

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Visit [www.lovells.com/arbitration](http://www.lovells.com/arbitration) for our on-line International Arbitration Guide.

Please refer to the back of this newsletter for office details.

## In this issue

### ARBITRATION NEWS

Find out what's new in international arbitration, including details of the third edition of the **International Arbitration Planner**.



### MAKING SOMETHING OUT OF NOTHING? FRENCH ENFORCEMENT OF ANNULLED AWARDS: *BECHTEL v DAC*

The French courts are, perhaps, acquiring something of a reputation for recognising and enforcing foreign awards which have been annulled in their country of origin (for example, *Hilmarton*). The Paris Court of Appeal's decision in *Bechtel v DAC* is a recent addition to the body of case law on this issue. **Johanne Houbouyan** analyses the decision.

### AND IN THE CHINA CORNER...

Following on from their article on CIETAC's new arbitration rules (see our November 2005 edition), **Mark Lin** and **Terence Wong** discuss the implications of the recent Notice issued by the Supreme People's Court.

### NEWS FROM LOVELLS' INTERNATIONAL ARBITRATION PRACTICE

Professor Phillip Capper has been appointed head of Lovells' International Arbitration Group. See page 10 for more information.

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## EVENTS

### International Arbitration Planner - new issue, new-look website



The third edition of the International Arbitration Planner, covering events from February 2006, has been published and sent to over 2,000 international arbitration practitioners and contacts worldwide.

The International Arbitration Planner can currently be accessed in PDF format on-line at [www.arbitrationevents.com](http://www.arbitrationevents.com), where new events and suggestions for future editions can be submitted.

However, a new-look, interactive version of the [arbitrationevents.com](http://arbitrationevents.com) website, offering weekly updates and improved search functions to find events by country, date or organiser, will go live in June 2006.

Lovells launched the International Arbitration Planner in 2005, as a service to the international arbitration community. The aim of the International Arbitration Planner is to provide a one-stop source of information on forthcoming major

international arbitration conferences, seminars and symposia around the world. Such events provide the international arbitration community with invaluable opportunities for education, debate and networking.

The website, together with the hard copy Planner, is becoming an invaluable resource for the international arbitration community providing up to date information on what is taking place, when and where.

For further information, contact John Reynolds or Clare Connellan on +44 20 7296 2000 or email [info@arbitrationevents.com](mailto:info@arbitrationevents.com).

## FORTHCOMING CONFERENCES

On 21 June 2006, Lovells' London office will host a presentation from Dr Wang Wenying, deputy director and arbitrator at CIETAC who will discuss the changing context of arbitration under Chinese law under the new CIETAC Rules. This event will be followed by a reception to mark the launch of the new [arbitrationevents.com](http://arbitrationevents.com) website.

On 22 June 2006, Lovells' Paris office will host a conference on "Arbitration and China". Speakers will include Dr Wang Wenying, Marc Henry (Lovells Paris) and Mark Lin (Lovells Hong Kong). This event will be followed by a reception for our Paris clients and colleagues to mark the launch of the new [arbitrationevents.com](http://arbitrationevents.com) website.

On 12 July 2006, Lovells will host an ICC UK symposium of arbitration practitioners. Sessions will include panel discussions on the QMW/PwC survey of global counsels' attitudes to international arbitration, state court

intervention and arbitrating in Arab states, with presentations from the judiciary, practitioners and in-house counsel.

For further information on any of these events, contact Nancy Chapman on +44 20 7296 2000 or email [events@lovells.com](mailto:events@lovells.com).

## INTERNATIONAL TREATIES AND INSTITUTIONS

### CAFTA

The Central America Free Trade Agreement ("CAFTA"), which was signed on 5 August 2004, has entered into force in the United States, El Salvador, Honduras and Nicaragua. The other signatories are Costa Rica, the Dominican Republic and Guatemala. CAFTA is designed to eliminate tariffs and trade barriers and expand regional opportunities for the workers, manufacturers, consumers, farmers, ranchers and service providers of all seven countries.

### ICSID

On 5 April 2006, ICSID published new amendments to the ICSID Rules and Regulations, including changes in relation to provisional measures, amicus submissions, objections to jurisdiction where it is alleged that a claim is "manifestly without merit", and publication of the legal reasoning of awards.

There are currently 104 cases pending at ICSID. Roberto Dañino resigned from his position as Secretary-General of ICSID in early 2006. Scott White has been appointed as Acting Secretary-General.

### Launch of ICDR-Singapore

In February 2006, ICDR (International Centre for Dispute Resolution, the international division of the AAA) and the Singapore International Arbitration Centre announced the launch of a new dispute resolution centre in Singapore. The new facility, which will be known as "ICDR-Singapore", will provide comprehensive rules for the conduct of arbitration and mediation, and case administration services. ICDR-Singapore is scheduled to open within the next few months. ICDR has also recently opened an office in Mexico City.

### Research on investment treaty arbitration

Research undertaken for UNCTAD confirms that international arbitrations under investment protection treaties did not tail off in 2005, even as the number of investor claims against Argentina dwindled. The UNCTAD research, entitled "*Latest Developments in Investor-State Dispute Settlement*", is stated to be the most comprehensive survey to date on the incidence of investment treaty arbitration. Two-thirds of all known investment treaty claims have been launched since the beginning of 2002.

### Saudi Arabia

The Saudi International Arbitration Commission, a body designed to promote arbitration in Saudi Arabia, was launched in December 2005.

### New President of the Court of Arbitration at the Polish Chamber of Commerce in Warsaw

Piotr Nowaczyk has been elected as the new President of the Court of Arbitration at the Polish Chamber of Commerce. The PCC Court of Arbitration is the oldest in Poland (it was established in 1950) and one of the biggest in Europe in terms of caseload. According to its statistics, it received 226 requests for arbitration in the first half of 2005 and 220 awards were issued in the same period. Mr Nowaczyk is an advocate admitted in Poland and in France, and a litigation and arbitration partner at Salans in Warsaw. He is also a member of the ICC International Court of Arbitration.

### New arbitration institutions in Poland

Following the recent adoption of the new arbitration law in Poland, the Polish Confederation of Private Employers, "Lewiatan", has created an Arbitration Court. The Rules, Fees, Ethical Rules for Arbitrators and a list of arbitrators can be found at [www.prywatni.pl](http://www.prywatni.pl).

The Ius et Lex Foundation is proposing to open an International Institute for Arbitration and Mediation in Warsaw. A conference was held in Warsaw on 17 March 2006 to consider the proposal. It is envisaged that the Institute would promote arbitration and mediation in Poland, organise conferences and training sessions, and issue publications concerning arbitration and mediation (domestic and international).

### New Deputy Secretary-General at the Permanent Court of Arbitration

Mr Brooks W. Daly has been appointed to the position of Deputy Secretary-General of the Permanent Court of Arbitration (PCA). Mr Daly previously worked as an attorney in private practice in both Los Angeles and London, before serving as Counsel at the ICC International Court of Arbitration in Paris. The PCA is an intergovernmental organisation established in 1899 for the peaceful settlement of disputes and currently has 105 member states.

### DEVELOPMENTS IN NATIONAL LAW

#### UK: High Court dismisses Ecuador's challenge of UNCITRAL award

Ecuador's challenge in the English High Court of an award rendered in a London-seat UNCITRAL arbitration, which (as reported in our November 2005 newsletter) the English Court of Appeal confirmed was "justiciable" by the English courts, was dismissed by Mr Justice Aikens in a March 2006 judgment (*Republic of Ecuador v Occidental Exploration and Production Company* [2006] EWHC 345 (Comm)).

The UNCITRAL arbitration had been brought pursuant to the US/Ecuador BIT. The first ground on which Ecuador challenged the award before the English High Court (under section 67 of the English Arbitration Act 1996) was that the arbitral tribunal did not have jurisdiction, because Occidental's claims did not fall within the ambit of a clause of the BIT that set out an exhaustive list of matters of taxation to which the provisions

of the BIT would apply. The judge held that the dispute fell within that clause, and that the clause acted as a “gateway” to the other substantive obligations (for example, the fair and equitable treatment obligation) contained in the BIT.

The second ground of challenge (under section 68 of the 1996 Act) was that the arbitral tribunal, in making certain pronouncements and orders regarding Ecuadorian court proceedings pending between the parties, had exceeded its powers by purporting to interfere with the sovereign, internal affairs of Ecuador, such that there had been a serious irregularity. The judge held that, on the contrary, the pronouncements and orders were directed at Occidental, were made to protect Ecuador, and had caused Ecuador no injustice whatsoever.

It is worth bearing in mind that, had the US/Ecuador BIT provided for disputes to be resolved by arbitration under the ICSID Convention (rather than under the UNCITRAL Rules), Ecuador would not have been able to challenge the award before the English courts, because the ICSID Convention provides that ICSID awards are not subject to appeal other than under ICSID’s self-contained review mechanism.

#### **MALAYSIA: Arbitration Act 2005**

The Malaysian Parliament has passed a new Arbitration Act, which came into effect in March 2006.

The Arbitration Act 2005 closely follows the UNCITRAL Model Law and repeals the Arbitration Act 1952. In drafting the 2005 Act, the

Malaysian Government studied the relevant arbitration legislations in jurisdictions such as England, Singapore, New Zealand and Canada. The Malaysian Government also consulted various professional bodies and the business community, including the Bar Council of Malaysia, the Malaysian Institute of Arbitrators and the Kuala Lumpur Regional Centre for Arbitration.

The 2005 Act is in four Parts. Part I contains the preliminary sections. Part II contains the Model Law-based provisions governing commencement of arbitral proceedings through to enforcement of awards. Part III, which applies to domestic arbitrations unless the parties “opt out”, but to international arbitrations only where the parties “opt in”, contains additional provisions in relation to court intervention and support. Part IV contains new provisions in relation to the immunity of arbitrators and arbitral institutions, which are similar to sections 29 and 74 of the English Arbitration Act 1996. Parts I, II and IV apply to both domestic and international arbitrations.

The “opting in/out” scheme in respect of Part III of the 2005 Act is similar to that of the New Zealand Arbitration Act 1996. This scheme also enables the regulation of arbitrations in both the international and domestic regimes by a single piece of legislation, unlike in Singapore where the government has enacted an International Arbitration Act for international arbitrations while leaving domestic arbitrations under the purview of the old arbitration law of that country.

The 2005 Act closely follows the Model Law definition of

“international arbitration” and removes the much criticised “rule-based” dichotomy of arbitral regimes under the 1952 Act. The 1952 Act, drafted primarily to cater for domestic arbitrations, was only amended once, in 1980. That amendment was purportedly aimed at minimising court intervention in international arbitrations. However, following the 1980 amendment, the jurisdiction of the Malaysian Courts was only excluded from arbitrations conducted under ICSID, UNCITRAL or KLRCA Rules, regardless of whether the arbitrations were domestic or international in nature. As such, under the 1952 Act, an international arbitration under the ICC Rules and seated in Malaysia was subject to the jurisdiction of the Malaysian courts.

Against this backdrop, the 2005 Act undoubtedly represents a marked improvement in minimising court intervention in international arbitrations held in Malaysia.

#### **NEW YORK: provisional remedies available from NY courts in relation to international arbitrations regardless of the seat**

In October 2005, New York law was amended to give New York state courts the power to grant provisional remedies (including preliminary injunctions and attachments) in aid of both domestic and international arbitrations, regardless of the seat of the arbitration. Before this recent legislative amendment, New York state law allowed state courts to grant such provisional remedies only where the arbitration was strictly domestic and seated in New York.

**UK: effective service of arbitral process by email to *info@respondent.com* address**

In December 2005, an English High Court judge held that there had been effective service on the respondent in a London Maritime Arbitrators Association arbitration, even though all documents relevant to the arbitration (including the final award) had been sent to an email address (*info@bernuth.com*) which the respondent had not notified to the claimant as an address to be used in the context of the relevant dispute.

High Seas (incorporated in Marshall Islands) hired the “Eastern Navigator” to Bernuth Lines (incorporated in Grand Cayman) for a charter trip from Miami to Nicaragua. High Seas’ invoice was not paid and High Seas’ London lawyers sent a pre-action email to *info@bernuth.com*. This email address had not appeared on any previous communication from Bernuth, but did appear in the Lloyds Maritime Directory 2005 and on a Bernuth website. An arbitrator was appointed by High Seas and the arbitrator proceeded to make a final award against Bernuth, apparently without their having played any part in the proceedings (although, for reasons that are unclear, the arbitrator stated in the award that he was satisfied that the respondent was aware of the proceedings). All relevant pre-award communications were sent only to the *info@bernuth.com* address. The award was sent to that email address and also by post.

Bernuth applied to set aside the award under section 68 of the Arbitration Act 1996, on the basis that the arbitration proceedings had not been

properly brought to the attention of the respondent, such that there had been a serious irregularity causing substantial injustice. The central question was whether the arbitration had been validly commenced. Bernuth’s position was that they had not been served by any effective or agreed method of service. Bernuth’s evidence was that the clerical staff responsible for monitoring the *info@bernuth.com* address had ignored the emails as being “spam” (despite the fact that at least one of the emails had been marked with “High Importance”).

Mr Justice Christopher Clarke was not impressed by this evidence, stating that he would be surprised if much junk email emanated, or purported to emanate, from a London firm of solicitors or an LMAA arbitrator. He also rejected Bernuth’s submission that the English Civil Procedure Rules (which only allow for service by email in specified circumstances) should be used as a benchmark in determining whether service by email was effective in arbitration proceedings.

Although the provision of the Arbitration Act 1996 dealing with service (section 76) does not refer to service by email, it does provide that, where the parties have failed to agree on the manner of service, service may be made “by any effective means”. The judge was satisfied that the emails to the *info@bernuth.com* address had constituted an effective means of service: “Having put *info@bernuth.com* into the current Lloyd’s Maritime Directory as their only email address, they can scarcely be surprised to find that an email inviting them to agree to the appointment of an arbitrator

in a maritime matter was sent to that address”.

**SPAIN: Spanish Supreme Court extends effects of an arbitration agreement to a non-signatory guarantor**

On 26 May 2005, the Spanish Supreme Court recognised that an arbitration agreement might extend to include a bank which guaranteed the obligations of one of the parties arising from the contract containing the arbitration agreement. The judgment shows a determined pro-arbitration approach by the Spanish Supreme Court, although its effects may be too far reaching.

ITSA (Spain) and SATCOM (The Netherlands) entered into a contract for the supply of components for a system of interactive TV. The contract provided for arbitration in Switzerland under the rules of the Chamber of Commerce and Industry of Geneva. Subsequently, the BBVA bank (Spain) provided a guarantee to SATCOM in respect of ITSA’s payment obligation.

ITSA brought an action before the Spanish courts against SATCOM and BBVA, requesting a declaration that SATCOM was in breach of its obligations under the contract, the cancellation of the said contract, the cancellation of the bank guarantee issued by BBVA in favour of SATCOM, and an order for SATCOM to pay ITSA’s damages and costs.

BBVA appeared in the proceedings and admitted the claims; SATCOM objected to the jurisdiction of the Spanish courts on the basis of the arbitration agreement. The court of first instance accepted the

jurisdictional objection and dismissed the action. The Court of Appeals, and then the Supreme Court, confirmed this decision.

Although BBVA was not a party to the contract containing the agreement to arbitrate, the Supreme Court held that BBVA was bound by the arbitration agreement on the basis of the general reference to the contract contained in the guarantee. While the judgment applied the former Spanish Arbitration Act 36/1988 (in force at the time when the action was brought), the findings are equally applicable to the Arbitration Act 60/2003, currently in force.

This particular interpretation of the incorporation of an arbitration agreement by reference arguably exceeds the rationale behind Article 7.2 of the UNCITRAL Model Law. The rationale behind Article 7.2 is to follow the intention of the parties and the Article includes the requirement that “...*the reference is such as to make that clause part of the contract...*”. Although this requirement is missing in the Spanish Act, it is unlikely that this omission will mean that any reference in a document to a separate contract containing an arbitration agreement might be deemed to have incorporated the arbitration agreement into that separate document.

In the meantime, banks and other financial entities, subcontractors and any party to a complex transaction involving a number of contracts between different parties should exercise care in order to avoid becoming bound by an arbitration clause by virtue of references to other contracts, until new decisions confirm, deny or simply clarify this ruling.

**UK: property of foreign central banks immune from execution in the English courts**

The High Court has rejected an attempt by a successful claimant in an investment treaty arbitration to enforce an award against assets held in London by a third party and belonging beneficially to the losing State (*AIG Capital Partners v The Republic of Kazakhstan and the National Bank of Kazakhstan* [2005] EWHC 2239 (Comm)).

The proceedings before the English courts arose out of an arbitration between AIG and the Republic of Kazakhstan under the 1992 US/Kazakhstan BIT. AIG had undertaken a joint venture project in Almaty, Kazakhstan, and the City of Almaty had subsequently transferred all project property to itself, without compensation. AIG commenced ICSID arbitration proceedings against the Republic of Kazakhstan alleging violations of the BIT.

The tribunal rendered an award against the Republic of Kazakhstan for US\$9.9 million. As the award remained unsatisfied, AIG obtained leave to have it “recognised” in the English High Court. AIG then sought to enforce the award as a judgment by obtaining final Third Party Debt and

Charging Orders against cash and securities held in London by a third party, pursuant to a global custody agreement between that party and the National Bank of Kazakhstan. The assets belonged beneficially to the Republic of Kazakhstan.

The Republic of Kazakhstan claimed state immunity under Section 14(4) of the State Immunity Act 1978 on its own account and on that of the National Bank. The State Immunity Act generally provides that a state is immune from the jurisdiction of the UK courts. However, this immunity does not cover property in use or intended for use for commercial purposes. Section 14(4) qualifies this exception, providing that property of a central bank is deemed not to be in use, or intended for use, for commercial purposes. The National Bank intervened in the case, asserting that the assets fell within the meaning of “property of a State’s central bank” in Section 14(4) and that as a result the assets were immune from execution.

The High Court held that the words “property of a State’s central bank” in Section 14(4) of the State Immunity Act should be construed widely to include any assets in which a central bank has rights or an interest. The court further confirmed that all property of foreign central banks is immune from execution in the English courts, whether or not such assets are in use or intended for use for commercial purposes.

# Making something out of nothing? *Bechtel v DAC*<sup>1</sup>: the Paris Court of Appeal confirms *Hilmarton*



Johanne Houbouyan<sup>2</sup>

Arbitral awards may be reviewed by national courts in two situations:

- when the losing party seeks to have the award set aside (also referred to as “annulment” or “vacation”)
- when the winning party seeks to have the award recognised and enforced.

Generally, the losing party will seek to have the award set aside by the courts at the seat of arbitration. By contrast, the winning party may seek recognition and/or enforcement of the award in any jurisdiction<sup>3</sup>.

One question that has sparked a lively debate between academics and practitioners in recent years<sup>4</sup> is whether an award that has been annulled at the seat of arbitration may, despite the annulment, be recognised and enforced elsewhere.

An obvious, and commonly cited, objection to enforcement is that, once an award has been annulled, there is nothing left to enforce: *ex nihilo nil fit* (nothing comes from nothing).

One of the cases most commonly referred to in this context is *Hilmarton*<sup>5</sup>, in which the French Cour de Cassation recognised a Swiss award which had been declared invalid by the Swiss courts, holding that “*the award rendered in Switzerland was an international award which was not integrated to the judicial order of such*

*state so that its existence remained established in spite of the annulment*”.

Under the New York Convention, annulment of an award at the seat of arbitration may constitute a ground for refusal of its recognition and enforcement in another jurisdiction (Article V(1)(e)).

However, the New York Convention also provides that it does not deprive an 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 on*” (Article VII(1)).

Whereas some national courts (for example, German and Spanish courts) have relied on Article V in concluding that annulment at the seat of arbitration constitutes a ground for refusal, others (for example, the French courts) have taken the position that Article VII enables more favourable domestic provisions to apply, the effect of which may be to allow recognition and enforcement despite the foreign annulment.

In the *Norselor*<sup>6</sup> case, for example, the French courts applied the more favourable provisions of Article 1502 of the New Code of Civil Procedure (“NCPC”) and held that the annulment of the award should not prevent its recognition and enforcement in France.

Article VII aside, French courts and academics have taken the position that recognition and enforcement of an annulled award may be justified on the basis that judges at the seat of arbitration should not be entrusted with greater powers of review of international arbitration awards than judges at the recognition and enforcement stage. This is consistent with the view that arbitration should be “delocalised”, and that arbitral tribunals should stand free of any “forum” and of the local standards generated by domestic legal systems, including the legal system of the seat of arbitration<sup>7</sup>.

Contrary to the French approach, some authors consider that the seat of the arbitral tribunal is generally a neutral forum, where an award is likely to be reviewed using more objective standards than those adopted by the courts of the country in which enforcement is sought (which is likely to be the losing party’s country of domicile<sup>8</sup>). Review of an award should, on this argument, be centralised at the seat of arbitration in order to achieve uniformity and coherence within the domestic courts’ recognition process and avoid “*exequatur shopping*”<sup>9</sup>.

Others have tried to find a compromise whereby annulment of an award would prevent its recognition and enforcement only when decided on reasons that are strictly specific to the country where the award was rendered, or where the judge made a

1 Paris, 29 September 2005, 1ère chambre, section C, RG 2004/07635.

2 Johanne Houbouyan is an Associate in Lovells’ International Arbitration Group. She is based in the Paris office.

3 Philippe Fouchard, “La reconnaissance à l’étranger d’une sentence annulée dans son Etat d’origine”, *Rev. arb.* 1997, p. 328.

4 See, for example, the conflicting views of Jan Paulsson and Albert Jan van den Berg published in the ICC Bulletin (May and November 1998 editions).

5 *Hilmarton*, *Rev. arb.* 1993, p. 300; *Rev. arb.* 1994, p. 327.

6 *Rabalk Ticaret c/ Norselor*, *Rev. arb.* 1985, p. 431.

7 Philippe Fouchard, “La portée internationale de l’annulation de la sentence arbitrale dans son pays d’origine”, *Rev. arb.* 1997, p. 328; Sébastien Besson et Luc Pittet *La reconnaissance à l’étranger d’une sentence annulée dans son Etat d’origine*, Bulletin de l’Association Suisse de l’Arbitrage, 1998, p. 498.

8 Jean-François Poudret, *Quelle solution pour en finir avec l’affaire Hilmarton?*, *Rev. arb.* 1998, p. 7.

9 Albert Jan Van den Berg, *Enforcement of annulled awards?*, ICC Bulletin, November 1998, p. 15.

genuine mistake in applying his own law<sup>10</sup>. Contrastingly, where the annulment judgment has been made pursuant to international standards of enforcement, such judgment should bar recognition and enforcement of the award internationally.

These issues were recently revisited by the Paris Court of Appeal in *Direction Générale de l'aviation civile de l'Emirat de Dubai* (“DAC”) *v International Bechtel Co. LLC* (“Bechtel”) (29 September 2005), in which the Court allowed the recognition and enforcement in France of an award which had been annulled in the United Arab Emirates (“UAE”), on the basis that the local annulment of an international arbitral award was not internationally binding<sup>11</sup>. The facts of the case were as follows.

DAC and Bechtel (a company incorporated in the US) were involved in a dispute arising out of a contract for the construction of an amusement park in Dubai. On 20 February 2002, in an *ad hoc* arbitration, the arbitrator found for Bechtel and ordered DAC to pay damages to Bechtel.

Bechtel sought the recognition and enforcement of the award in France and an enforcement order was issued by the President of the Tribunal de Grande Instance on 21 October 2003.

However, on 15 May 2004, the Dubai Cour de Cassation set aside the award on the grounds that the witnesses had not testified under oath as required by UAE law (the procedural law chosen by the parties to govern the arbitral proceedings).

As a result, DAC appealed to the Paris Court of Appeal against the enforcement order, submitting that the Court should not recognise the award of 20 February 2002 on the grounds:

- that the Court was bound to recognise the Dubai court’s annulment of the award;
- that, by virtue of its having been annulled, the award did not meet the requirements set out in Article 13(1)(c) of the 1991 mutual enforcement treaty between France and the UAE (the “Treaty”), which Article provides that a “decision” rendered in the UAE can only be recognised and enforced in France if all remedies have been exhausted against the decision in the UAE and the decision is executory; and
- that the fact that witnesses did not testify under oath as required by the local law chosen by the parties was contrary to international public policy.

The Paris Court of Appeal rejected these arguments and confirmed the enforcement order, deciding that it was not bound to give effect to the Dubai court’s annulment of the award:

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*“decisions made pursuant to an annulment procedure, like decisions made pursuant to a recognition and enforcement procedure, are not internationally binding because they are circumscribed to a determined sovereignty in the territory of which they are enforced, no review being*

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*possible on those decisions issued by a foreign judge in an indirect trial”.*

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The Court held that the requirements set out in Article 13(1)(c) of the Treaty apply only to judicial decisions, and not to arbitral awards. The Court further held that the requirements of Article 17 of the Treaty, which specifically apply to the recognition and enforcement of arbitral awards, were met.

In any event, the requirements in Article 13(1)(c) were, the Court held, contrary to fundamental principles of arbitration in France (as embodied in Article 1498ff of the NCPC), which aim at facilitating recognition of awards, notably by stating that the annulment of an award does not constitute a ground for refusing recognition. Those principles were reflected in the Treaty, which was intended to facilitate the recognition of awards in member states.

This decision reaffirms Hilmarton and goes even further by explicitly stating that annulment judgments at the seat of arbitration and recognition and enforcement judgments should be treated equally, both pertaining to the local enforcement of the award<sup>12</sup>. Accordingly, annulment judgments, like recognition and enforcement judgments, are not capable of being recognised elsewhere precisely because they are limited to the review of the award for the sole purpose of its local recognition and enforcement. Thus, the Paris Court of Appeal considers that review of arbitral awards, whether in annulment or enforcement/recognition proceedings, should follow one single regime.

10 Pierre Lastenouse, *Why setting aside an arbitral award is not enough to remove it from the international scene*, Journal of International Arbitration, 1999, p. 26 ; Jan Paulsson, *Enforcing arbitral awards notwithstanding a local standard of annulment*, ICC Bulletin, May 1998, p. 14.

11 Gazette du Palais Sommaires de jurisprudence des cours et tribunaux, Alexis Moore et Priscille Pedone, December 2005, No 349, p. 453.

12 Christophe Imhoos, *Revue de droit des affaires internationales “les brèves”* (*International Business Law Journal*), les “brèves”, n° 6, 2005.

# China: Notice of the Supreme People's Court

Mark Lin and Terence Wong<sup>13</sup>



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A Notice issued by China's Supreme People's Court on 26 December 2005 (the "12/2005 Notice") deals with a number of issues which should be of interest to businesses involved in arbitration or the enforcement of arbitral awards in China.

The 12/2005 Notice:

- clarifies which courts have jurisdiction to determine the validity of foreign-related arbitration agreements and handle the enforcement of foreign-related arbitral awards or foreign awards;
- clarifies the applicable law for determining the validity of a foreign-related arbitration agreement;
- reminds parties to an arbitration agreement of the importance of specifying the arbitration institution in the arbitration agreement;
- clarifies the status of a dispute resolution clause which confers an option to choose between litigation and arbitration;
- provides that a party who fails to challenge the tribunal's jurisdiction in the arbitration proceedings cannot subsequently raise the same defence in enforcement proceedings;
- provides that to the extent it is severable, the court should only cancel the part of a foreign-related arbitral award that goes beyond the scope of the arbitration agreement; and
- confirms that PRC courts will enforce an arbitral award rendered by an ad hoc arbitral tribunal outside China.

## Jurisdiction

The 12/2005 Notice confirms that a successful party does not have to go to the "home turf" of the losing party to enforce a foreign-related or foreign arbitral award. The Intermediate People's Court of any place where any property of the losing party can be found has jurisdiction to enforce a foreign-related or foreign award.

Likewise, there is no need to go to the court of the opposite party's home turf to confirm the validity of a foreign-related arbitration agreement; this can be done through the court where the party applying for confirmation resides.

This clarification should go a long way to address the problem of local protectionism which remains deeply entrenched in China, particularly amongst the less developed provinces.

## Foreign-Related Arbitration Agreements

The effect of the 12/2005 Notice is that, if parties want a particular law to govern the validity of the arbitration agreement, they should expressly say so in the arbitration agreement. Reliance upon the governing law of the underlying contract is not sufficient. Otherwise the courts will apply the law of the place of arbitration to determine the validity of the arbitration agreement. Where there is no express agreement or unclear agreement on the place of the arbitration, PRC law will apply.

The 12/2005 Notice also reminds parties to an arbitration agreement of the importance of specifying the arbitration institution, failing which

the arbitration agreement will be regarded as invalid.

The 12/2005 Notice reiterates the independence of the arbitration agreement from the underlying contract and reaffirms that a valid written arbitration agreement can be established by reference to other contracts or documents.

It seems that the 12/2005 Notice renders the practice of giving the parties an option to choose between litigation and arbitration invalid (in-so-far as the arbitration agreement is concerned).

## Enforcement/Cancellation of Foreign-Related Awards

The 12/2005 Notice provides that where a party applies to a court to cancel a foreign-related arbitral award and another party applies for enforcement of the same, the court dealing with the enforcement application should stay the enforcement proceedings.

The 12/2005 Notice further provides that if a party does not raise its challenge to the tribunal's jurisdiction during the arbitration, the court will not entertain such a challenge in any subsequent action for cancellation or enforcement. This is likely to lead to an increase in such challenges in arbitrations generally.

The fact that there are separate regimes for the enforcement of an award and the cancellation of an award under PRC law has long been the subject of criticism by legal commentators. In practice, the system could be abused by a losing party, in the sense that the losing party was in

<sup>13</sup> Mark Lin is a Partner and Terence Wong is a Senior Associate in Lovells' International Arbitration Group.

effect given two bites at the cherry (through applying for cancellation and, if that failed, resisting an application for enforcement).

The 12/2005 Notice clarifies that where a party's application for cancellation is rejected by the court, the court will not entertain a request not to enforce in a subsequent application for enforcement. This is definitely a significant improvement.

#### Enforcement of Foreign Awards

In light of the special requirement for institutional arbitration under PRC law, there has been some debate as to whether the PRC courts should enforce ad hoc arbitral awards from outside China.

The 12/2005 Notice now puts this debate to rest. It clarifies that PRC courts will enforce ad hoc arbitral awards rendered outside China.

#### NEWS FROM LOVELLS' INTERNATIONAL ARBITRATION PRACTICE



#### New head of Lovells' International Arbitration Group

Professor Phillip Capper has taken over as head of Lovells' International Arbitration Group. Based in London, Phillip is a recognised authority on international arbitration and is recommended as a leading individual in Chambers Global Directory 2005/6. Phillip is a UK member of the ICC Commission for International Arbitration in Paris and a Director of the International Diploma of the Chartered Institute of Arbitrators. He has extensive experience of acting as an arbitrator. Andrew Foyle, from whom Phillip takes over, is joining barristers' chambers One Essex Court as a full time arbitrator.

#### Lovells Lee & Lee: new brochure

In Singapore, Lovells operates as Lovells Lee & Lee in a joint venture with Lee & Lee, one of Singapore's largest and most established firms. International arbitration is a key element of the Lovells Lee & Lee joint venture, which can act on arbitrations across the South East Asian region, whether or not the seat of arbitration is Singapore. Where the seat of arbitration is China, Hong Kong or Japan, clients' needs are met by Lovells' offices in those jurisdictions.

The Lovells Lee & Lee arbitration practice is led by senior Lee & Lee partner Richard Tan. A brochure on Lovells Lee & Lee's international arbitration practice was launched at a dinner held at the China Club, Singapore on 16 February 2006. Copies of the brochure are available on request from Jerome Finnis ([jerome.finnis@lovells.com](mailto:jerome.finnis@lovells.com)).

#### A practical guide to arbitration

Lovells have produced a short practical guide to issues in international arbitration, published in the April 2006 issue of PLC Magazine ([www.practicallaw.com](http://www.practicallaw.com)). Copies of the article in booklet form are available on request from [jerome.finnis@lovells.com](mailto:jerome.finnis@lovells.com).

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