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Implementation of the 1958 New York Convention in Several Asian Countries: The Refusal of Foreign Arbitral Awards Enforcement on the Grounds of Public Policy^{*)}

Erman Rajagukguk^{)}**

Konvensi Pengakuan dan Pelaksanaan Putusan Arbitrase Asing tahun 1958 atau yang lebih dikenal dengan Konvensi New York 1958 hingga saat ini telah diratifikasi oleh sekitar 125 negara termasuk Negara-negara Asia, seperti Indonesia, Cina, India, Jepang, Korea, dan Singapura. Melalui Konvensi ini, putusan arbitrase asing dapat dilaksanakan di negara-negara tempat aset yang dieksekusi dengan mekanisme di masing-masing negara. Atas kaitan tersebut, pengadilan domestik negara anggota diberi hak untuk menolak untuk mengakui dan melaksanakan putusan arbitrase asing tersebut dengan alasan ketertiban umum. Alasan inilah yang kemudian menjadi permasalahan dimana negara-negara dengan sistem civil law akan menginterpretasikan ketertiban umum secara berbeda dengan negara dengan sistem common law.

Introduction

Some 125 states have ratified the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹, including some Asian countries such as Indonesia, The People's Republic of China, India, Japan, Korea and Singapore. Under the

^{*)} Presented in the 3rd Asian Law Institute (ASLI) Annual Conference on "The Development of Law in Asia: Convergence versus Divergence?", Shanghai May 25-26, 2006.

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¹ Kenneth R. Davis, "Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", *Texas International Law Journal* 37 (2002): 43, 46.

Article V (2) (b) of the 1958 New York Convention, the courts of member states can refuse the enforcement of foreign arbitral awards if such enforcement is contrary to the public policy of the state concerned. The New York Convention leaves the interpretation of the above mentioned public policy to the Courts of the member states concerned².

The Courts of several Asian member states of the 1958 New York Convention have different interpretations of public policy. Civil Law country courts have a broad interpretation of public policy, whereas Common Law country courts interpret it in a narrower way.

Various Interpretations of Public Policy

Member states of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards are not automatically required to recognize and enforce all arbitral awards made outside the territory of the state concerned.

The following is stated in Article V (2) of the New York Convention:

Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or*
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.*

In other words, the 1958 New York Convention leaves it up to the Courts of member states to interpret public policy. This could be a narrow interpretation, refusing to enforce only if it is contrary to "the most basic notion of morality and justice"³. However, Courts in

² Kenneth R. Davis, *Ibid.*

³ William W. Park, "When The Borrower and the Bankers are at Odds: the Interaction of Judge and Arbitration in Trans-Border Finance", *Tulane Law Review* 65 (1991): 1354.

some countries interpret public policy in a broad manner to include violation of the national laws and regulations of the state concerned.

Public policy can be categorized into domestic public policy, international public policy and transnational public policy⁴. Being contrary to domestic public policy is related to the violation of the public policy of the state concerned, and this can be interpreted as a violation of the national laws and regulations or the national interest of the state concerned⁵. Foreign arbitral awards, for instance, are not recognized if the agreement containing such arbitration clause is contrary to the laws of the country concerned, or is illegal based on the law of the country concerned⁶, or if the enforcement of such arbitral award is harmful for "the national interest, including the local economy"⁷.

At the same time, the Courts of other states apply a narrow interpretation of public policy, namely by placing international public policy above domestic public policy. The courts of these states say that in the context of promoting international trade, the state cannot regulate agreements based on its own national laws, and the disputes arising cannot be handled by its courts alone⁸. Therefore, international arbitral awards must be respected,

⁴ See also John Y. Gotanda, "Awarding Punitive Damages in International Commercial Arbitration in the Wake of *Mastrobuono v. Shearson Lehman Hutton, Inc.*", *Harvard International Law Journal* 38 (1997): 102-107.

⁵ Susan Choi, "Judicial Enforcement of Arbitration Awards Under the ICSID and New York Convention", *New York University Journal of International Law and Politics* 28 (Fall 1995-Winter 1996): 205.

⁶ A.F.M. Maniruzzaman, "The New Law of International Commercial Arbitration in Bangladesh: A Comparative Perspective", *American Review of International Arbitration* 14 (2003): 167.

⁷ Randall Peerenboom, "The Evolving Regulatory Framework for Enforcement of Arbitral Awards in the People's Republic of China", *Asia-Pacific Law & Policy Journal* 1 (2000): 65 .

⁸ *Scherk v. Alberto - Culver Co.*, 4.7 U.S. 506 (1974).

especially if a state expects a similar kind of respect from other countries towards its arbitral awards⁹.

Based on the above view, public policy is violated if the violation touches the “most basic notions of morality and justice”¹⁰.

The third interpretation of transnational public policy is the one deriving from the “international community of states”. Courts must apply the fundamental general principle of law, without examining whether the dispute concerned is related to a specific country. However, there is still some controversy in the interpretation of “transnational principle” due to the ambiguity of this concept. In due course, this concept can be crystallized and defined more clearly, which will make its enforcement more predictable¹¹. The concept of international public policy originates from domestic public policy. Transnational public policy originates from substantive norms derived from international sources and not from domestic ones. Abhorrence of slavery, racial issues, religion issues and sexual discrimination are examples of truly international public policies. Transnational public policy refers to a system of rules and principles, including standards, norms and custom that are accepted and commonly followed by the world community¹².

The Function of the Courts is to Interpret Public Policy

The national character of public policy indicates that the decision is up to the national country concerned. Therefore, each country can rule whether public policy and its related issues are part

⁹ Michael Hwang, “Enforcement of Arbitral Awards In Singapore”, *International Arbitration Law Review* 3 (6) (2000): 211-212

¹⁰ William W. Park, “When the Borrower and The Banker are at odds: The Interaction of Judge and Arbitration in Trans – Border Finance”, *Tulane Law Review* 65 (June 1991): 1354.

¹¹ Kenneth – Michael Curtin, “Redefining Public Policy in International Arbitration of Mandatory National Laws”, *Def. Coins. J.* 65 (1997): 281.

¹² Mark A. Buchanan, “Public Policy and International Commercial Arbitration”, *American Business Law Journal* 26 (1988): 512.

of the country's public policy¹³. Courts around the world have recognized that Article V of the Convention is discretionary.¹⁴

In Indonesia, the Central Jakarta District Court (the court for first instance) has to examine the case and the party which is not satisfied with the District Court decision can appeal to the Supreme Court¹⁵.

Law No. of 1999 of The Republic of Indonesia on Arbitration and Alternative Dispute Resolution stipulates that the recognition and enforcement of international arbitral awards falls within the authority of the Central Jakarta District Court (Article 65). Furthermore, it is set forth in Article 66 that international arbitral awards can only be recognized and enforced in the jurisdiction of The Republic of Indonesia if they meet the following requirements:

- a. The international arbitral award was made by an arbitrator or a panel of arbitrators in a country which has entered into a binding agreement with Indonesia, either bilateral or multilateral, for the recognition and enforcement of international arbitral awards;
- b. International arbitral awards as intended hereinabove (a) shall be limited to awards that, under Indonesian laws and regulations, are considered as being part of the scope of trade;
- c. International arbitral awards as intended in a. hereinabove can only be enforced in Indonesia insofar as they are not contrary to public order;
- d. International arbitral awards can be enforced in Indonesia upon obtaining *eksekutorial* (an order for execution) from the Head of the Central Jakarta District Court; and
- e. International arbitral awards as intended in a. hereinabove related to The State of The Republic of Indonesia as one of the disputing

¹³ Nandine Balkanyi, "The Perils of Parallel Proceedings", *Dispute Resolution Journal* 56 (2001/2002): 27.

¹⁴ Kenneth R. Davis, "Unconventional Wisdom : A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards", *Texas International Law Journal* 37 (2002): 62.

¹⁵ Republic of Indonesia, Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution.

parties can be enforced upon obtaining *eksekutur* (an order for execution) from the Supreme Court of The Republic of Indonesia, which shall be further submitted to the Central Jakarta District Court.

Furthermore, it is stated in Article 68 paragraph (2) that cassation can be filed against the decisions of the Head of the Central Jakarta District Court as intended in Article 66 sub-Article d refusing to recognize and enforce an international award. It is stipulated in Article 68 paragraph (3) that the Supreme Court shall consider and shall decide every request for cassation as intended in paragraph (2) within 90 (ninety) after it receives the request for cassation. Article 68 paragraph (4) stipulates that the decision of the Supreme Court as intended in Article 66 sub-paragraph e is final.

In comparison, external pressures have followed China's emergence as a world economic power. International economic actors have demanded China to modernize its commercial practice to follow the more predictable global standards, including the resolution of commercial disputes¹⁶. China became member of the 1958 New York Convention in 1987.¹⁷ In China a foreign arbitration award must satisfy two conditions before it can be enforced in China. First, the party has failed to execute the award within the time limit specified in the award, and secondly, the party has formerly requested the enforcement to the Chinese Courts¹⁸.

According to Article 260 of the Civil Procedure of 1982, if the People's Court determines that the enforcement of the award would

¹⁶ Carlos de Vera, "Arbitrating Harmony: "Med-Arb" and the Confluence of Culture and Rule of Law in the Resolution of International Commercial Disputes in China", *Columbia Journal of Asia Law* 18 (Fall 2004): 193.

¹⁷ Mark S. Hamilton, "Sailing in a Asia of Obscurity: The Growing Important of China's Maritime Arbitration Commission", *Asia-Pacific Law and Policy Journal* 3 (2002): 10. See also Mo Zhang, "International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System", *Boston College International and Comparative Law Review* 25 (2002): 89.

¹⁸ Jessica L. Su, "Enforcement of Arbitral Awards: A Survey of Selected Asia Jurisdiction", *International Arbitration Law Review* 3 (6) (2000): 180.

be against public policy, the court shall refuse the enforcement. This provision leaves too much discretion in the Chinese Court, and too little security for the party seeking to enforce the award. In addition, there is no procedural rule for parties who may raise an objection¹⁹. Awards are enforced in the Intermediate People's Court, and are considered binding except when the result is held to violate public policy²⁰. The Civil Procedure Law of the PRC was updated in 1991. According to Article 260, the Chinese Court shall order the enforcement of an arbitration award unless the party against whom enforcement is sought can provide evidence proving that one of the following situations exists: (1) the parties have no binding arbitration agreement; (2) the party against whom enforcement is sought did not receive proper notice regarding the appointment of an arbitrator or of the commencement of arbitration proceeding; (3) that party is unable to state its opinions and argument due to reasons beyond its control; (4) the composition of the arbitration tribunal or the arbitral proceedings does not conform with applicable arbitration rules; (5) certain items in the award exceed the scope of the arbitration agreement or are beyond the jurisdiction of the arbitration body; or (6) the Chinese Court believe the arbitration award to be contrary to Chinese social and public interest²¹.

Under Article 260 (2) of the 1991 Civil Procedure Law, if the Chinese Court determines that execution of the arbitral award would be against the social and public interest of China, the court has the discretion to disallow the execution of the award. It can be seen that the grounds set forth in Article 260 of the 1991 Civil

¹⁹ Marcine A. Seid, "The Future of Chinese Arbitration in Dealing with Technology transfer Investments in China", *Santa Clara Computer and High Technology Law Journal* 9 (Nov. 1993) : 573-575.

²⁰ Lucy V. Katz, "Arbitration as a Bridge to Global Markets in Transitional Economics: The Republic of Cuba", *Willamette Journal of International Law and Dispute Resolution* 13 (2005) : 117

²¹ Ge Liu & Alexander Lowrie, "International Commercial Arbitration in China : History, New Development, and Current Practice", *John Marshall Law Review* 28 (Spring 1995): 551.

Procedure law echo Art V of the New York Convention. In Chinese law there is no such phrase as “public policy”. Instead, Chinese law uses “public and social interest”. China interprets the concept of “public and social interest” using its domestic standard, which always means the fundamental public and social interest in China, i.e., the basic legal and moral rule of China. There is no such notion as an “international public interest”²².

The operation of the New York Convention 1958 and the jurisdiction of a Chinese Court is illustrated in *Nautilus Shipping and Trading Company Ltd v. International Economic and Development Company of Jilin*. This case was decided in 1995 by the Maritime Court of Dalian. The parties concluded a charter party in 1992 and became involved in dispute over payment of demurrage. The Applicant submitted the dispute to arbitration in London. A sole arbitrator was appointed. In August 1994, the arbitrator ordered the respondent who had failed to pay a sum of demurrage to the applicant plus interest. The respondent failed to comply with the award. The applicant applied to the Maritime Court of Dalian in February 1995 for the enforcement of the award. The court examined the evidence and decision of the arbitrator, and was satisfied that the application for enforcement was made within the limitation of time stipulated in Chinese law. It concluded that the award was valid under English law and should be recognized and enforced in China under the 1958 New York Convention. The Court found no ground to refuse the enforcement of the award and made a ruling on 25 April 1995 to enforce the award. The respondent challenged the jurisdiction of the Court on the ground that Dalian was neither the place of the respondent’s residence nor the place of property. The Maritime Court of Dalian examined the challenge and ruled on 20 June 1995 that the Court had special jurisdiction over

²² Xiaowen Qiv, “Enforcing Arbitral Award Involving Foreign Parties: A Comparison of the United State and China”, *American Review of International Arbitration* 11 (2000): 611-612.

maritime cases, including the enforcement of maritime arbitral awards²³.

Similarly, the role of the judge in shaping and interpreting public policy in Japan is quite substantial. The submission for enforcement has to apply to the District Court and the party can submit an appeal to the High Court²⁴.

In Singapore, under the International Arbitration Act (IAA) of 1994, section 6, gives the court the power to enforce an arbitration agreement. Section 11 of the IAA states, "any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by court unless the arbitration agreement is contrary to public policy²⁵. A court in Singapore so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that:

- (a) a party to the arbitration agreement in pursuance of which the award was made was, under the law applicable to him, under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law to which the parties have subjected it or, in the absence of any indication in that respect, under the law of the country where the award was made;
- (c) he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- (d) subject to subsection (3), the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration or contains a decision on the matter beyond the scope of the submission to arbitration;

²³ John Shijian Mo, *Arbitration Law in China*, Hong Kong, Sweet & Maxwell Asia,(2001): 428-429.

²⁴ Michael Peter Waxman, "Enforcing American Private Anti Trust Decision in Japan: is Comity Real?", *De Paul Law Review* 44 (1995): 1131.

²⁵ "Arbitration in Singapore: The Establishment of A Legal Framework to Support International Arbitration", *World Arbitration & Mediation Report* 10 (1999).

- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made²⁶.

In any proceedings in which the enforcement of a foreign award is sought by virtue of this Part, the court may enforce the award if it finds that:

- (a) the subject-matter of the difference between the parties to the award is not capable of settlement by arbitration under the law of Singapore; or
- (b) enforcement of the award would be contrary to the public policy of Singapore²⁷.

The Courts Interpret Public Policy Broadly

The courts of Civil Law countries appear to be interpreting public policy broadly. This is quite evident from decisions made by courts in Indonesia, The People's Republic of China, Japan and Korea.

The Indonesian Court considered Article V (2) (b) of the New York Convention which states that the court may deny the enforcement of an arbitral award if enforcement would violate public policy of the place of enforcement. In addition, before the enactment of Law No. 30 of 1999 concerning Arbitration and Alternative Dispute Resolution, the Court referred to Indonesian Supreme Court Regulation No. 1 of 1999, which provides that the enforcement of foreign arbitral awards in Indonesia imitatively applies to awards which do not violate public policy order in terms

²⁶ Leslie KH Chew, *Singapore Arbitration Handbook*, Singapore, LexisNexis (2003): 125.

²⁷ Leslie KH Chew, *Singapore Arbitration Handbook*, Singapore, LexisNexis (2003): 126.

of all underlying principles of the Indonesian legal system and society²⁸.

In Indonesia, *Bakri Brothers v. Trading Corporation of Pakistan Ltd.*, was the first case in which the Court rejected the enforcement of foreign arbitral awards for the reason of violating public policy.

Due process, which pertains to public policy implies as a fundamental principle, that the parties have an equal opportunity to be heard. This principle demands that each party must have been effectively offered such opportunity²⁹.

In *Bakri Brothers v. Trading Corporation of Pakistan Ltd.*, 4231 K/Pdt/1986, the dispute arose when Bakri Brothers Corporation (an Indonesian Company), which had signed an agreement with Trading Corporation of Pakistan Ltd. for the sale and purchase of palm oil, failed to meet its contractual obligation to ship palm oil to Karachi. Trading Corporation of Pakistan Ltd. brought the dispute to Oil and Seed Arbitration in London, as provided for in the contract. The London arbitral award ordered Bakri Brothers to pay compensatory damages. The respondent refused to implement the London arbitral award arguing, among other things, that it had not been properly heard in the process of the said arbitral decision. The Indonesian Supreme Court Affirmed the District Court's and the High Court's decision, refusing the request for the enforcement of the above mentioned London arbitral award, among other things for the reason that the respondent had not been adequately heard in the arbitration proceedings.

In another case, the Indonesian Supreme Court, in the *Yani Hariyanto v. E.D&F. Man Sugar*, 1205 K/Pdt/1990 (1991), refused the enforcement of London arbitral award, because the contract that had arbitration clauses was in violation of Indonesian law, rendering

²⁸ See also Noah Rubins, "The Enforcement and Annulment of International Arbitration Awards in Indonesia", *American University Law Review* 20 (2005): 395-396.

²⁹ Albert Jan van de Berg (General Editor), *Yearbook Commercial Arbitration*, Volume XXVIII – 2003. The Hague: Kluwer Law International, 2003: 667.

the contract invalid under Indonesian law. Yani Hariyanto, an Indonesian entrepreneur, had signed a contract for the sale and purchase of sugar with E.D&F. Man Sugar, a British company. Without clear reason, Yani Hariyanto unilaterally cancelled the contract. E.D&F. Man Sugar brought the dispute to arbitration in London.. The award of the London Arbitration ordered Yani Hariyanto to pay compensatory damages. By virtue of the Decree of the President of The Republic of Indonesia No. 34 Year 1981 at the time, sugar could only be imported by BULOG (National Logistic Agency). Thus, sugar import contracts by private sector parties were not legal³⁰.

A similar decision was made by the Court in PRC. One of the arguments that can be used to reject the enforcement of foreign arbitral awards is as stipulated in Article 260 (2) of the Civil Procedure : "... if it is contrary to the social and public interest of China". Public policy is interpreted more broadly in China. There is no uniform definition of "public policy"³¹.

A foreign arbitration award must meet two conditions prior to being enforceable in China. First, the party has failed to execute the award within the time limit specified in the award, and secondly, the party has formerly requested the enforcement to the Chinese Courts³².

Also arbitration rules with respect to Chinese Civil Procedure Law preclude making an arbitral award without first taking advice from a competent authority where the issue concerns ownership of, or a claim on a patent, or a right to export, use or assign know-how.

³⁰ Yani Hariyanto v. E.D&F. Man Sugar, 1205 K/Pdt./1990 (1991).

³¹ William Heye, "Forum Selection for International Dispute Resolution in China - - Chinese Court vs. CIETAC", *Hasting International and Comparative Law Review* 27 (2004): 544.

³² Jessica L. Su, "Enforcement of Arbitral Awards: A Survey of Selected Asia Jurisdiction", *International Arbitration Law Review* 3 (b) (2000): 180.

Some understand this to impose public policy dimension on technology contract arbitration³³.

The question is, what does “social public interest” mean to imply? One of the answers can be found in the *Dongfeng Garments Factory of Kai Feng City and Taichun International Trade (HK) Co. Ltd., v. Henan Garments Import & Export (Group) Co.* (1992) case. In this case, IPC was of the opinion that the enforcement of the CIETAC award against local Chinese parties in favor of a foreign applicant is contrary to the social public interest of China. The court accepted the view that the respondent had violated the contract. However, it held that enforcing an arbitral award requiring the local party to pay a certain amount of money for damages would bring a negative impact on the local economy³⁴. Some argue that if the People’s Republic China government hopes to increase investor confidence, it is important that these public interests are not broadly defined³⁵. The fact is that foreign investment in China has been gradually increasing, although the Chinese Courts have not changed their interpretation of public policy.

Japan provides that a final and enforcement foreign arbitral award is conclusive and enforceable, except where contrary to public policy³⁶. In Japan, similarly to many other Civil Law

³³ Nathan Greene, “Enforceability of the People’s Republic of China’s Trade Secret Law: Impact on Technology Transfer in the PRC and Preparing for Successful Licensing”, *IDEA: The Journal of Law and Technology* 44 (2004): 453.

³⁴ Cheng Dejun et.al, “International Arbitration in the People’s Republic of China” in Randall Peerenboom, “The Evolving Regulation Framework for Enforcement of Arbitral Awards in the People’s Republic of China”, *Asia-Pacific Law Policy Journal* 1 (2000): 3.

³⁵ Bruce R. Schulberg, “China’s Accession to the New York Convention: An Analysis of the Regime of Recognition and Enforcement of Foreign Arbitral Award”, *Journal of Chinese Law* 3 (Summer 1989): 143.

³⁶ Andrew M. Pardieck, “Virtuous Ways and Beautiful Customs: The Role of Alternative Dispute Resolution in Japan”, *Temple International and Comparative Law Journal* 11 (Spring 1997): 45.

Countries, there is a distinction between public and private law. For example, competition law is generally recognized as public law issue. In *Bryant v. Mansei Kogyo co.*, The Tokyo District Court accepted the possibility of recognition and enforcement of a U.S. punitive damages award, but found the facts insufficient to order the recovery of punitive damages.

However, the Tokyo High Court stated that the District Court was wrong on the ground that Article 200 (3) prevented the recognition of private punitive damages as violation of public policy because the concept of punitive damages implies criminal behavior that is reserved to public law. Japan's concept of public policy is broader than that of the United States³⁷.

In Korea, according to Article 203 of the Code of Civil Procedure, such an award should be compatible with good morals and the social order of Korea³⁸. Similarly, Korea does not award punitive damages. Foreign award of such damages may be against public policy³⁹.

The Courts Construe Public Policy Narrowly

Common Law countries follow the U.S. interpretation of "public policy", which is very liberal in international arbitration. The United States divides "public policy" into domestic and international "public policy". Unless "public policy" international is violated, the court will enforce the award⁴⁰.

³⁷ Michael Peter Waxman, "Enforcing American Private Anti Trust Decision in Japan: is Comity Real?" *De Paul Law Review* 44 (Summer 1995): 1131-1145.

³⁸ Tan Hee Lee, "Dispute Resolution in the Republic of Korea: A General Overview", *World Arbitration & Mediation Report* 7 (Dec/Jan 1995/1996): 20.

³⁹ Kim, Shin & Yu, "Korea Enforcement of Foreign Judgment" in John Y. Gotanda, "Awarding Punitive Damages in International Commercial Arbitration in The Wake of *Mastrobuono v. Shearson Lehman Hutton, Inc.*", *Harvard International Law Journal* 38 (Winter 1997): 101-103.

⁴⁰ Cymie Payme, "International Arbitration", *American Society of International Law Proceeding* 90 (1996): 256.

For example, in the *Parsons & Whitemore Overseas Co. Inc. v. Societe Generale de L'Industrie du Papier (RAKTA)* 508 F2 d 696 (1974) case, the U.S. Court of Appeal stated that the public policy limitation in the New York Convention is to be construed narrowly and applied only where "enforcement would violate the forum state's most basic notions of morality and justice".

In India, enforcement of a foreign arbitration award may be refused if, among other things, enforcement would be against public policy⁴¹. At least there were three court decisions in India to show that the courts interpreted the public policy narrowly.

First, an example of narrow interpretation of the term "commercial" appears in the *Indian Organic Chemical, Ltd. v. Chambex Fibers Inc.* case. The dispute arose between Indian and US parties. The India party filed the case in the Indian Court over dispute involving the transfer of technology. The defendant attempted to stay the court providing and to initiate arbitration in accordance with an arbitration clause in the contract. The High Court of Bombay admitted that the contract and the dispute were commercial in nature. However, the court held that the contract must be commercial "by virtue of provision of law or an operative legal principle in force in India in order for it to be within the scope of the New York Convention"⁴².

Secondly, in *General Electric Co. v. Renausagar Power Co.* (Civil Appeal No. 71 & 71 A of 1990 and No. 379 of 1992) (Sup.Ct.of India, Oct 7, 1992) case. The Indian Supreme Court ruled that the grounds for refusing enforcement of arbitral award should be interpreted more narrowly⁴³. The Supreme Court upheld a

⁴¹ Tracy S. Work, "India Satisfies its Jones for Arbitration: New Arbitration Law in India", *Transnational Lawyer* 10 (Spring 1997): 236.

⁴² Kenneth T. Ungar, "The Enforcement of Arbitral Awards Under UNCITRAL'S Model Law on International Commercial Arbitration", *Columbia Journal of Transnational Law* 25 (1987): 726.

⁴³ 5 *World Arb. & Mediation Rep.* 39 (Febr. 1994) in Hiram E. Chodosk, Stephen A. Mayo, A.M. Ahmadi, Abhaskek M. Singhvi, "India Civil Justice

\$ 12.3 million ICC Arbitration award to General Electric (G.E) determining that award which included compound interest is not contrary to the public policy of India. The interest portion of the award was computed by applying the amount, withheld, compounded annually over 16 years. According to the arbitrators, compounding is essential in computing compensatory damages, because the claimant would have had to pay compound interest if it had replaced the in properly withheld funds by borrowing. The High Court of Bombay had enforced the award October 21, 1988. The Supreme Court affirmed the lower court's decision⁴⁴.

The third example, in January 1998, The Supreme Court of India ruled that legislation pertaining to the enforcement of international arbitration awards remained in effect for the former Republic of Soviet Union. In the mid-1990s, a dispute arose between the Indian Trans Ocean Shipping Agency and the Ukrainian Black Sea Shipping Co. Trans Ocean objected to the enforcement of the award on the ground that a former state of the USSR was not recognized under the Foreign Awards Act and that a new government notification was necessary in order to validate awards originating in countries which were formerly the Soviet Union. The court rejected Trans Ocean argument that the award violated Indian public policy, as long as the award was valid under Ukrainian Law⁴⁵.

Similarly, the Court in Singapore has been reluctant to rely on public policy ground to refuse recognition of foreign arbitral awards. Singapore adopted the International Arbitration Act 1994 to

Reform: Limitation and Preservation of the Adversarial Process", *New York University Journal of International Law and Politics* 30 (Fall-Winter 1997/1998): 44.

⁴⁴ Natasha Affolder, "Awarding Compound Interest in International Arbitration", *American Review of International Arbitration* 12 (2001): 85.

⁴⁵ "Supreme Court of India Rules that Arbitral Award Rendered in Ukraina is Enforceable". *World Arbitration & Mediation Report* 9 (May 1998): 127.

replace the out dated Arbitration Act of 1953 as amended in 1969 and 1980⁴⁶.

The Singapore High Court decision in *Arbitration between Hainan Machinery Import and Export Corporation and Donald & Mc Arthy PTE-Ltd* reflected the attitude of the Singapore Court concerning the enforcement of foreign arbitral awards under the New York Convention. The Court rejected the argument of public policy, that the award should not decide the real matter in dispute between the parties. The Court stated clearly that:

"... public policy did not require that this court refuse to enforce the award obtained by the plaintiffs. There was no allegation of illegality or fraud and enforcement would therefore not be injurious to the public policy good. As the plaintiffs submitted, the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist. As a nation which at self aspires to be an international arbitration center, Singapore must recognize foreign awards if it expects its own awards to be recognized abroad."⁴⁷

Conclusion

Article V (2) (b) of the New York Convention, allows the court to refuse enforcement of a foreign arbitral award if enforcement of the award would be contrary to the public policy of the country.

Some courts in Asia have manifested reluctance to rely on public policy grounds to refuse recognition of foreign arbitral awards. However, other courts have decided that public policy defense were to be read as a device of protection of national interest. Public policy is a nebulous concept which is different from country to country, and is subject to values of the society or the political and economic interest of the respective country.

⁴⁶ "Arbitration in Singapore: The Establishment of a Legal Framework to Support International Arbitration". *World Arbitration & Mediation Report* 10 (Oct 1999): 285.

⁴⁷ Michael Hwary, "Enforcement of Arbitral Awards in Singapore", *International Arbitration Law Review* 3 (b) (2000): 211-212.