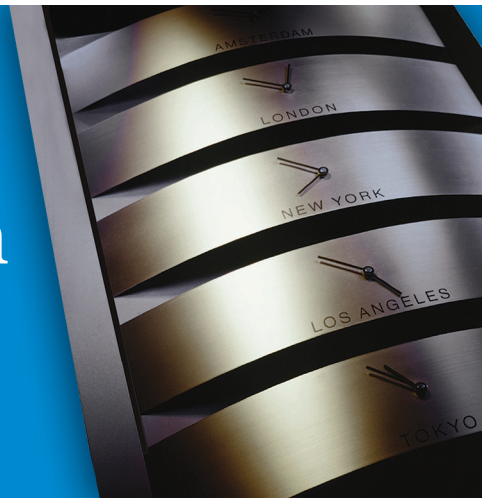


# International Arbitration

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## About Our Practice

Mayer Brown's International Arbitration practice helps businesses and governmental entities resolve cross-border disputes worldwide. We frequently represent corporations, companies, partnerships, financial institutions, insurers and governmental entities before the leading international arbitration bodies. We also advise our clients on how to reduce risk when entering into cross-border transactions and investments. When disputes arise, we put together lean teams of experienced practitioners who know how to overcome such problems as multiple languages, documents scattered across the globe and differing legal traditions to achieve desired results in a cost-efficient manner. The services we provide fall into two broad categories:

**Advocacy.** In resolving both commercial and investor-state disputes, we apply our extensive experience in marshalling complex evidence, analyzing applicable law and procedures, developing and evaluating alternative strategies and engaging in compelling written and oral advocacy.

**Risk Management.** We help our clients manage the risks inherent in international business operations by drafting effective dispute resolution agreements and structuring transactions to take full advantage of the substantive protections available under the expanding network of international trade and investment treaties. We are particularly adept at ensuring that any disputes will be resolved in a neutral forum, rather than in the courts of the opposing party or host country.

## From the Editors



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Welcome to Mayer Brown's International Arbitration Perspectives, a biannual newsletter that reports and comments on developments in international arbitration law and practice that are of significance to your business and investment interests across the globe. In this issue, we have contributions from our International Arbitration lawyers located in the United States, the United Kingdom, Germany, France and the People's Republic of China, discussing arbitration issues and decisions of both regional and international significance.

From our Paris office, Dany Khayat considers the recent decision in *J&P AVAX SA v. Société Tecnimont SpA*, on the continuing obligation of arbitrators to investigate and disclose matters relating to their independence and impartiality. From our Frankfurt office, Mark Hilgard and Jan Kraayvanger discuss a recent German court decision that unifies procedures in Germany for enforcement of arbitration awards that have been reduced to judgment in common law countries.

From our Washington office, Alex Lakatos reviews the *Thomas v. Carnival Corporation* decision in which the US Court of Appeals for

the Eleventh Circuit declined to compel an arbitration concerning seaman's wages on public policy grounds. On a similar theme, but in a different jurisdiction, Sonia Baldia and Violeta Balan, both from our Washington office, analyze court decisions in India that interpret the Indian Arbitration Act. This article also provides practical advice to companies doing business in India on how best to draft dispute resolution provisions within their contracts to protect their rights.

Staying in Asia, Terence Tung from our Beijing office provides an introduction to arbitration law in the People's Republic of China. In particular, he highlights the arbitration rules of the China International Economic and Trade Arbitration Commission (CIETAC), which is the world's leading arbitration institute by number of cases handled.

Finally, Gabriela Grinblat from our Chicago office writes on non-precluded measures clauses in bilateral investment treaties and their effects on foreign investment.

We are also introducing two new features in this issue that are intended to provide practical assistance to clients involved in international arbitration. In the first, Bill Knull from our Houston

office offers his top ten hallmarks of an effective international arbitration agreement. In the second, we are pleased to include the link to a podcast first released by the International Institute for Conflict Prevention and Resolution. In this podcast, Michael McIlwrath interviews Nick Henchie, a partner in our London office, about the UK adjudication procedure for

construction disputes.

We hope that you will find this issue of International Arbitration Perspectives to be a trusted and valuable resource. Should you have any questions about the information presented in any of these articles, or wish to provide any comments or suggestions for the future articles, please contact either of us. ♦

# Paris Court's Strict Approach to the Independence and Impartiality of Arbitrators

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On February 12, 2009, the Paris Court of Appeals rendered an important decision concerning the requirements of independence and impartiality of arbitrators in an arbitration seated in France. The court emphasized the arbitrators' duty to disclose any fact or circumstance that may affect their independence and impartiality continued throughout the arbitration proceedings.

## Background

The case stemmed out of a request for the annulment of a partial International Chamber of Commerce (ICC) arbitral award brought by the Greek company J&P AVAX SA (AVAX) against the Italian company SOCIETE TECNIMONT SPA (TECNIMONT).

TECNIMONT had concluded a subcontracting agreement with AVAX for the construction of a propylene factory located in Greece. A dispute arose between the parties and TECNIMONT instituted ICC arbitral proceedings in Paris pursuant to an arbitral clause in the subcontract agreement. Each party nominated an arbitrator and the chairman of the Arbitral Tribunal was nominated by the party-appointed arbitrators. The secretary-general of the ICC confirmed the nomination of these arbitrators.

A partial award was subsequently rendered by the Arbitral Tribunal on December 10, 2007.

## AVAX's Arguments

AVAX brought annulment proceedings in France against this partial award claiming breach of Article 1502 2° of the French Code of Civil Procedure, which provides that annulment of an arbitral award may be requested if the arbitral tribunal had been improperly composed. In particular, AVAX asserted that the chairman of the Arbitral Tribunal, a well-known arbitrator from a large international law firm, failed to fulfill his obligation to reveal circumstances that could affect his independence due to the nature of the links existing between his law firm and TECNIMONT.

AVAX indicated that in his declaration of independence of October 30, 2002, the chairman of the Arbitral Tribunal was required to reveal any associations existing between his law firm and TECNIMONT, including TECNIMONT's parent company and subsidiaries. AVAX argued that the chairman had failed to disclose that his law firm advised TECNIMONT's parent company, EDISON, throughout 2002 and kept it as a client until 2005. Thus, when the arbitrator was appointed chairman of the Arbitral Tribunal, TECNIMONT's parent company was still a client of his law firm.

Moreover, the Paris office of the chairman's law firm, where he practiced, had represented SOFREGAZ,

a 100 percent subsidiary of TECNIMONT, since February 2004 in a dispute before French courts and had advised SOFREGAZ on a tax matter. Finally, from July 2005 to April 2007, the chairman's law firm advised TECNIMONT, as well as a consortium composed of SOFREGAZ and TECNIMONT, on a project in China, and also in May 2005 advised EDF, another French company, which became the parent company of TECNIMONT. AVAX argued that the chairman had failed to comply with his duty of independence because of the numerous associations over the course of the arbitration between his law firm and TECNIMONT, TECNIMONT's parent companies and TECNIMONT's wholly owned subsidiary.

### TECNIMONT's Arguments

In rebuttal, TECNIMONT argued that annulment proceedings were not admissible by the court because a request for the dismissal of the chairman filed with the ICC on September 14, 2007, had been declared barred. TECNIMONT also argued that the annulment proceedings must be rejected because the chairman did not fail to fulfill his disclosure obligations and had fulfilled his obligation of independence.

### The Court's Reasoning and Decision

The Paris Court of Appeals noted that an arbitrator must reveal to the parties all circumstances that could affect his judgment and could instill a reasonable doubt in a party's mind as to the arbitrator's impartiality and independence. The court also noted that the chairman's declaration of independence merely disclosed that during the previous year, certain offices of his law firm had assisted the parent company of TECNIMONT with respect to a closed matter and that he had never himself worked for this client.

The court took into account the fact that AVAX had questioned the chairman's links to TECNIMONT, and that it had requested additional information from him in the course of the proceedings. On the basis of the answers he provided, AVAX challenged his appointment, a challenge that was subsequently rejected by the ICC. AVAX nevertheless reserved its rights and wrote multiple letters requesting—and obtaining—additional information from the chairman. This information shed further light on the relationship between the chairman's law firm and TECNIMONT.

Given that AVAX did not waive its right to challenge the independence of the chairman on the basis of these new facts, which were unknown before the rendering of the first partial award, the request for annulment of the partial arbitral award was found to be admissible by the Court of Appeals.

The Court of Appeals noted that the chairman's disclosure concerning his law firm's links to TECNIMONT was not exhaustive, as the firm did not stop working with EDISON until 2005. It also noted the firm's work for the SOFREGAZ/TECNIMONT consortium in China during three months in 2005, the representation of SOFREGAZ in ongoing judicial proceedings and the tax advice in 2004.

As stated by the Paris Court of Appeals:

Considering that *the bond of confidence between an arbitrator and the parties must continually be preserved, the parties must be informed throughout the duration of the arbitration of relations that might in their eyes influence the judgment of the arbitrator and which is of a nature that could affect his independence*, that TECNIMONT could have known the affairs in which it, one of its subsidiaries, and its parent company had hired [the Chairman's law firm] and cannot excuse itself because of the global size of [the Chairman's law firm], with 2200 lawyers, and observing that [it] has a department in charge of conflict checks and that the information furnished by [the chairman] to the parties involved in the arbitration were communicated to him by his law firm;" (emphasis added)

On this basis, the Court of Appeals found that the links with TECNIMONT created a conflict of interest between the chairman of the Arbitral Tribunal and one of the parties to the arbitration. In summary, the Court of Appeals ruled that due to the lack of independence of the chairman of the Arbitral Tribunal, the Arbitral Tribunal had been improperly composed, leading to the court's annulment of the partial arbitral award of December 10, 2007.

## Conclusion

The Paris Court of Appeals' decision demonstrates the importance of continuous and strict conflicts checks by arbitrators throughout the arbitration proceedings. Arbitrators involved in arbitration proceedings with a seat in France must ensure that their independence and impartiality is preserved in the eyes of the parties not only at the inception of the arbitration but until the final award is rendered, by updating, whenever necessary, the disclosure they initially made.

The strict approach of the Paris Court of Appeals requires arbitrators to make sure that conflict of interest databases are regularly updated and consulted. Undoubtedly, this adds to the arbitrators' responsibilities and may be challenging to enforce, especially when arbitrators are part of an international law firm. However, far from making arbitration more complex, this important decision has the very positive effect of ensuring that arbitrators sitting in international arbitration tribunals in France are, and also remain, truly independent and impartial throughout the proceedings. ♦



# Foreign Judgments Enforcing Arbitral Awards Are No Longer Enforceable in Themselves in Germany

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In order to enforce an arbitral award in a specific country, the award must be recognized by that country's national courts. Among common law countries in particular, arbitral awards were sometimes said to have been "converted to judgments" under the doctrine of merger. Such judgments could generally be enforced elsewhere in the same jurisdiction. But typically, the doctrine of merger did not prevent enforcement of a foreign award in circumstances where a foreign court judgment would have been unenforceable.

Prior to a recent German Federal Supreme Court decision, a successful claimant seeking arbitral enforcement in Germany could pursue one of two options. The claimant could request the court to enforce the award itself or to apply for enforcement of the foreign judgment. Different procedures and forums were available to the claimant, depending upon which option was selected. In light of the Court's recent decision, however, that choice is no longer available.

Until recently, German case law held that the party seeking to invoke an arbitral award in Germany could choose to enforce either the arbitral award or the US judgment confirming that award (BGH, decision dated March 27, 1984, ref. no. IX ZR 24/83; BGH, decision dated May 10, 1984, ref. no. III ZR 206/82). The Federal Supreme Court had reasoned

that under the doctrine of merger, the arbitral award was converted into a court judgment. In the Court's view, this judgment not only recognized the arbitral award but amounted to an independent ruling on the merits of the underlying case, although proceedings under the New York Convention typically do not include review of the facts and findings of the arbitral tribunal. Such independent ruling was enforceable in Germany under the same conditions as any other US judgment.

In addition, the Court had previously held that the arbitral award remained valid and could be enforced under the New York Convention. The Federal Supreme Court's findings had several advantages for a claimant seeking to enforce his or her claim in Germany.

Under German law, the recognition and enforcement of a foreign arbitral award is subject to different rules than enforcement of a US judgment. While a foreign arbitral award can be recognized and rendered enforceable under the rules of the New York Convention, a similar treaty does not exist between Germany and the United States for court rulings.

A US court decision, like most other foreign court decisions outside of the European Union, is rendered enforceable in Germany pursuant to section 328, 723 of the German Code of Civil Procedure. Preconditions for the



enforcement of an arbitral award under the New York Convention and a US judgment under the German

Code of Civil Procedure differ vastly, however, as shown in the following table:

#### Preconditions for the enforcement of a foreign arbitral award

- The arbitration agreement is valid.
- The party against whom the award is invoked is given proper notice of the appointment of the arbitrator and the arbitration proceedings and is able to present his or her case.
- The award is covered by the scope of the arbitration agreement.
- The composition of the arbitral authority and the arbitral procedure is in accordance with the agreement of the parties and the laws applicable at the place of arbitration.
- The arbitral award has become binding on the parties and has not been set aside or suspended by a competent authority of the country in which that award was made.
- The arbitral award is not contrary to German public policy.
- The subject matter of the dispute is amenable to arbitration.

#### Preconditions for the enforcement of a foreign judgment

- The foreign court has international jurisdiction pursuant to the rules of the German Code of Civil Procedure.
- The statement of claim is duly served on the defendant, and the defendant is able to present his or her case.
- The judgment is not contrary to prior judgments.
- The judgment has become final.
- Reciprocity is assured in the respective state.
- The judgment is not contrary to German public policy.

If the claimant chose to enforce the foreign judgment, the German courts merely assessed whether the preconditions for enforcement of a foreign judgment were fulfilled. In contrast, German courts would not review the foreign judgment and check whether the decision of the foreign court to confirm the arbitral award was correct. In other words, the German court did not attempt to determine if the foreign court had correctly applied the terms of the New York Convention. Nor did it determine if the award would otherwise have been enforceable in Germany. In theory, then, the claimant could circumvent the preconditions of the New York Convention in Germany by seeking enforcement of the foreign judgment.

In addition, the claimant had two chances to enforce its claims: It could first initiate recognition and enforcement proceedings for either the arbitral award

or the judgment. If that action failed relative to one of the elements—the award or the judgment—the claimant could initiate a second proceeding to enforce the other element.

German law no longer permits this practice. In its landmark decision dated July 2, 2009, the German Federal Supreme Court reversed its prior stance, determining that a foreign judgment confirming an arbitral award can no longer be recognized in Germany (BGH, decision dated July 2, 2009, ref. no. IX ZR 152/06).

The Federal Supreme Court reasoned that a foreign judgment recognizing a third country's court decision cannot be applied in Germany. This is because such a finding circumvents the conditions required by German law for recognition of the third country's judgment.

The Court held that the same reasoning must apply to arbitral awards, as otherwise the conditions necessary for recognition and enforcement of the arbitral award in Germany can be circumvented and the scope of the New York Convention can be eroded.

According to the Court, moreover, the party against whom the award or judgment is invoked should not be confronted with more than one recognition procedure in Germany, and from an opposing perspective, the claimant should not be given the opportunity to seek enforcement in two separate and independent proceedings.

Finally, the Court noted that Germany's higher regional courts have exclusive jurisdiction to rule on the recognition and enforcement of a foreign arbitral award. In contrast, recognition and enforcement proceedings for foreign judgments are conducted by local courts. This

division of competences between local courts and higher regional courts will be circumvented if the claimant can freely choose either to enforce the arbitral award or to apply the US judgment confirming the arbitral award.

The Federal Supreme Court's decision has far-reaching consequences. Today, a claimant wishing to enforce a foreign arbitral award in Germany can no longer gain advantage by initiating recognition proceedings in a foreign court in the hope of enforcing the foreign judgment recognizing the arbitral award (as distinct from the arbitral award itself). Such a judgment will be of no help to the claimant, as it will not be enforceable in Germany. To successfully compel an award against assets located in Germany, then, a claimant should initiate recognition and enforcement proceedings based on the arbitral award under the New York Convention. ♦

# Declining to Compel Arbitration on Public Policy Grounds: *Thomas v. Carnival Corp.*

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In *Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) (*per curiam*), the US Court of Appeals for the Eleventh Circuit (which has jurisdiction over federal cases originating in Florida, Georgia and Alabama), relying in part on public policy grounds, reversed and remanded a trial court decision compelling the plaintiff, a head waiter employed by Carnival on one of its cruise ships, to arbitrate certain claims against Carnival. The case is significant because it takes what may be deemed a (perhaps unduly) broad view of when it is appropriate to decline to compel arbitration based on the “public policy” affirmative defense (pursuant to which recognition and enforcement of an arbitral award may be declined on public policy grounds) set forth in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”).

In *Thomas*, the district court first determined that plaintiff’s statutory claim under the Seaman’s Wage Act was subject to the arbitration clause in the relevant employment contract between Thomas and Carnival. Pursuant to that clause, arbitration would occur in the Philippines and be subject to the law of the flag of the vessel—i.e., Panama law—“without regard to principles of conflicts of laws thereunder.” Plaintiff argued that he should not be compelled to arbitrate pursuant to this clause, because if he

were compelled he would be unable to bring his statutory claim under the Seaman’s Wage Act, in contravention of US public policy. The Eleventh Circuit agreed.

Article V of the New York Convention provides an affirmative defense pursuant to which “[r]ecognition and enforcement of an arbitral award may also be refused if...the [r]ecognition and enforcement of the award would be contrary to the public policy of that country [being asked to enforce the award].” To determine whether this public policy defense was applicable, the Eleventh Circuit looked to two Supreme Court cases for guidance.

First, the Eleventh Circuit examined *Mitsubishi Motors Corp. v. Soler Chrysler-Plumouth, Inc.*, 473 U.S. 616 (1985), in which the Supreme Court held that an arbitration clause requiring arbitration of plaintiff’s Sherman Act antitrust claims in Japan did not violate US public policy because the parties had agreed that the Japanese arbitral tribunal would apply US law. The Supreme Court explained in that case that “so long as the prospective litigant effectively may vindicate its statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function.” *Mitsubishi* further held that if “the choice-of-forum and choice-of-law clauses operated in tandem as a

prospective waiver of a party's right to pursue statutory remedies...we would have little hesitation in condemning the agreement as against public policy."

Second, the Eleventh Circuit considered *Vimar Seguros y Reaseguros v. M/V Sky Reefer*, 515 U.S. 528 (1995), in which the Supreme Court held that it was premature to refuse to enforce an arbitration clause on public policy grounds, given that (i) it was unclear what law the arbitral forum would apply, and therefore unclear if the plaintiff would be denied the full relief available under the Carriage of Goods by Sea Act (COGSA), and (ii) if the plaintiff received lesser relief under Japan's parallel statutory scheme, the US courts would have an opportunity to revisit the issue at the award-enforcement stage of the proceedings.

Relying on the foregoing precedents, the Eleventh Circuit concluded that the arbitration clause in *Thomas* was the type of "prospective waiver" of plaintiff's statutory claims that *Mitsubishi* held would be a violation of US public policy. The court explained that, if enforced, the clause would "completely bar Thomas from relying on any U.S. statutorily-created causes of action," which moreover would deny Thomas "one of a private litigant's 'chief tools' of statutory enforcement—the Act's treble-damages wage penalty for provision of late payments."

In *Thomas*, the Eleventh Circuit distinguished *Sky Reefer*. In *Sky Reefer*, the US courts would have had a subsequent opportunity to address the public policy issues when determining whether to enforce plaintiff's arbitration award, but in *Thomas*, the plaintiff would have no Seaman's Wage Act claim at all if forced to arbitrate, and so likely would have no award, and therefore the US courts would not have an opportunity to revisit these public policy issues at the award-enforcement stage. That being the case, the Eleventh Circuit concluded that it was not premature to deny enforcement of the arbitration clause immediately on public policy grounds.

In several respects, the Eleventh Circuit's decision is at odds with the approach taken in other circuits, where courts have been more reluctant to apply the public policy exception as a basis to decline to compel arbitration.

First, with regard to the footnote in *Mitsubishi* on which *Thomas* chiefly relies (providing that prospective waivers of certain US statutory rights will violate public policy), the Ninth Circuit has held: "we do not consider that footnote to be binding." *Simula v. Autoliv, Inc.*, 175 F.3d 716 (9th Cir. 1999) (citing *Richards v. Lloyd's of London*, 135 F.3d 1289, 1295 (9th Cir. 1998)). Accordingly, in *Simula*, the court held that the argument that an arbitral tribunal could not provide identical relief to what a US court would provide on plaintiffs' antitrust claims was unavailing.

Second, although *Thomas* asserts that plaintiffs will not be able to obtain treble damages absent a claim under the Wage Act, the Eleventh Circuit did not explore the applicable Panama law and whether it might have provided plaintiff with comparable relief (e.g., punitive damages), or whether any relevant differences might otherwise have been addressed (e.g., through a stipulation by the defendant). In *International Marine Underwriters CU v. M/V Kasif Kalkavan*, 989 F. Supp. 498 (S.D.N.Y. 1998), for example, the district court compelled arbitration notwithstanding that plaintiff would be required to proceed under Korean law instead of COGSA, in part because "[g]iven their stipulations, the liability of these defendants would not be lessened by requiring plaintiff to bring suit in a Korean forum..."

Similarly, in *Fireman's Fund Ins. Co. v. Cho Yan Shipping Co.*, 131 F.3d 1336, 1340 (9th Cir. 1997), which *Thomas* cites in a footnote, the Ninth Circuit affirmed a decision compelling arbitration on evidence that Korean law would be at least as favorable to plaintiff as COGSA, explaining that "the question is not whether the foreign forum will apply COGSA itself, but 'whether the substantive law to be applied will reduce the carriers' obligations...below what COGSA guarantees.'" Additionally, the Fifth Circuit, in *Ambraco, Inc. v. Clipper Faith MV*, 570 F.3d 233 (5th Cir. 2009), enforced a forum selection clause requiring resolution in the United Kingdom in the absence of "convincing evidence" that a UK court would impermissibly limit defendants' obligations under COGSA.

The *Thomas* decision did not discuss the anti-waiver provisions in the Wage Act. *See* 46 U.S.C. § 10317 (“[a] seaman by any agreement other than one provided for in this chapter may not...be deprived of a remedy to which the...seaman otherwise would be entitled for the recovery of wages. A stipulation in an agreement inconsistent with this chapter...is void.”). As a result, it

is not clear what role, if any, that provision should play in reconciling this decision with the more restrictive reading of the public policy exception to the enforcement of arbitration clauses generally or whether *Thomas* marks a deviation from the jurisprudence of enforcement or is merely a special case under a specific statutory regime. ♦

# Dispute Resolution Precautions in India

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Companies taking advantage of the vibrant growth in India's economy should take extra care to ensure that disputes can be resolved predictably and efficiently. A few precautions beyond those familiar from other jurisdictions can help to keep your disputes from being bogged down in procedural quagmires that can take years to navigate, and which offer uncertain results at the end. This article highlights a few practical considerations to keep in mind when drafting contractual dispute resolution provisions involving India.

## Effective Arbitration Agreements

India is one of more than 140 nations adhering to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the purpose of which is to ensure that awards rendered in one signatory country are enforceable in all of the others. Arbitration affords any transnational transaction or investment the benefits of a neutral forum and enforceability in other Convention signatory states. Although India's Arbitration and Conciliation Act, 1996 (the "Arbitration Act") is based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, arbitration agreements and enforcement of awards can encounter a variety of frustrating obstacles in the Indian courts. Many of those obstacles,

however, can be anticipated and avoided through specifically tailored dispute resolution provisions.

### 1. CONDUCT ALL MAJOR ELEMENTS OUTSIDE INDIA.

Indian courts are notorious for lengthy delays in deciding matters brought before them. As a result, arbitration is the preferred means of dispute resolution in commercial transactions involving India. When entering into a contract with an Indian party, an arbitration provision should explicitly specify (i) a non-Indian, arbitration-friendly venue for the arbitration (e.g., Hong Kong, Singapore, London or New York); (ii) the preferred law that will govern the substantive law of the contract (e.g., New York or English law); (iii) the particular body of international arbitration rules to govern the actual proceedings (e.g., ICC, SIAC, LCIA or ICDR International Dispute Resolution Procedures); and (iv) a non-Indian venue (as discussed in paragraph 3 below) for any litigation not covered by arbitration.

### 2. EXCLUDE APPLICATION OF PART I OF THE INDIAN ARBITRATION ACT.

In a recent ruling, the Supreme Court of India held that Part I of the Arbitration Act permits an Indian court to vacate a foreign arbitral award for violation of India's broadly interpreted "public policy" considerations



that were previously only grounds for challenging domestic (i.e., India-based) arbitration awards. The application of Part I to a foreign arbitration can present other issues that can interfere with the arbitration, such as the power of the Indian courts to appoint arbitrators in cases governed by foreign law. However, the Indian Supreme Court has also held that application of Part I of the Arbitration Act can be waived by agreement of the parties. As a result, agreements involving India or Indian counterparties should contain an arbitration provision expressly excluding the application of Part I of the Arbitration Act to any aspect of the arbitration, including any awards. Companies should, however, be mindful that under certain very limited circumstances, it might be advantageous to only partially exclude Part I in order to retain the ability to invoke the interim measures provided in Section 9 of Part I of the Arbitration Act.

### 3. DISPUTES NOT SUBJECT TO ARBITRATION UNDER INDIAN LAW.

Matters that are not subject to arbitration in India include public rights; proceedings under the Foreign Exchange Management Act, which are quasi-criminal in nature; the validity of intellectual property rights granted by statutory authorities; taxation matters; winding up under the Companies Act, 1956; and disputes involving insolvency proceedings.

#### Structure Investments to Fall Within Indian Bilateral Investment Treaties

The more than 2,500 bilateral investment treaties in force around the world protect investors of the signatory states and their investments from a variety of adverse actions by the investment's host country. These treaties also commonly and importantly provide access to arbitration against the host government, without any direct arbitration agreement other than the treaty, before the World Bank's International Centre for the Settlement of Investment Disputes (ICSID).

The United Nations Conference on Trade and Development lists bilateral investment treaties between India and 30 other nations, including Australia, Belgium, France, Germany, Korea, the Netherlands, Sweden and the United Kingdom; that list, however, does not include many other nations, including the United States.

Companies from countries that do not have treaties in effect with India may nevertheless obtain treaty protection by holding their investments in India in a country that does have a treaty. Some treaties allow for "denial of benefits" where the claimant owner has no actual operational substance in the country of its incorporation; other countries do not, and provide protection based solely on the basis of the claimant's state of incorporation. Care must be taken to identify the most robust treaty and compliance with conditions of eligibility, as well as coordination with tax strategies. However, appropriate planning in structuring the investment can provide important protection against inappropriate government actions.

#### Provide for any Litigation in a "Reciprocating Territory"

Indian law provides for the enforcement of judgments from certain "reciprocating territories" in "execution proceedings," effectively treating judgments from those jurisdictions as decrees of an Indian court for enforcement purposes. Obstacles to enforcement can still arise, including, for example, contentions that the foreign judgment is based on an incorrect view of Indian law or that the underlying claim is founded on a breach of Indian law or public policy. Nevertheless, a judgment from a "reciprocating territory" avoids the treatment of judgments from other jurisdictions as mere evidence, among other evidence, against the Indian party.

India has "notified" the United Kingdom, Singapore, Hong Kong, Malaysia, Canada and New Zealand as "reciprocating territories." The United States is not a "reciprocating territory." While this option is not a substitute for a properly drafted arbitration clause, it may afford valuable options in particular transactions and minimize the risk of being embroiled in lengthy litigation in Indian courts. ♦



# Commercial Arbitration in the People's Republic of China

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## Introduction

The People's Republic of China (PRC) now conducts more arbitrations than any other country and has become of one the most important places for commercial arbitrations in the world. The main PRC institutions responsible for foreign-related arbitrations<sup>1</sup> are China International Economic and Trade Arbitration Commission (CIETAC), China Maritime Arbitration Commission and local arbitration institutions established by various local government authorities. CIETAC is the world's leading arbitration institution in terms of the number of cases handled; in 2008 alone, CIETAC accepted 1,230 cases for arbitration, nearly twice as many as the ICC.

Further, the growth in foreign investment in the PRC and the continued expansion of trade links between the PRC and the rest of the world, even in the current world recession, coupled perhaps with an unwillingness by foreign parties to conduct disputes in PRC courts, means that PRC arbitration institutions will only become busier.

Against the backdrop of the PRC's growing world importance as a place for foreign-related arbitrations, the purpose of this article is to provide an introduction to arbitration within the PRC, with particular reference to arbitrations conducted under the Arbitration Rules of CIETAC (CIETAC Rules).

## Arbitration in the PRC

Arbitration in the PRC is regulated by the Arbitration Law 1995. The Arbitration Law divides arbitrations into domestic arbitrations (i.e., involving PRC-incorporated entities only) and arbitrations with a foreign element. Each has a separate legal framework. One of the main differences between the two is that the PRC courts have more extensive powers to review and to refuse enforcement of a domestic arbitral award than a foreign-related arbitral award.

The powers of a PRC court to review a foreign-related arbitral award (i.e., an arbitral award made by a PRC arbitration institution with a foreign element) are limited and broadly similar to the grounds upon which a court may refuse to enforce an arbitration award under the New York Convention. This article focuses on foreign-related arbitrations. However, foreign investors who have used a "wholly foreign owned enterprise" (WFOE) as their investment vehicle in the PRC should note that a WFOE is considered to be a domestic party for the purpose of the Arbitration Law.

## Arbitration Law

Like the laws of most jurisdictions, the PRC's Arbitration Law prohibits arbitration for matrimonial proceedings, adoption proceedings, inheritance

issues and “administrative disputes,” i.e., disputes between different government departments or involving a government department.

Unlike most other jurisdictions, though, one rather unique feature of the Arbitration Law requires that all arbitrations in the PRC are administered by a PRC arbitration institution. PRC law prohibits “*ad hoc*” arbitrations. This prohibition has led to a concern that an award obtained from an overseas *ad hoc* arbitration might not be enforceable in the PRC. In fact, this is not the case. The PRC has acceded to the New York Convention and *ad hoc* arbitrations obtained in foreign countries are enforceable in the PRC under that Convention. In 2007, the Supreme People’s Court confirmed that awards resulting from *ad hoc* arbitrations conducted in Hong Kong were enforceable in the PRC. No logical distinction should, of course, be drawn between awards made in *ad hoc* arbitrations conducted in Hong Kong and those made in other countries since Hong Kong, for all practical commercial purposes, is viewed as “foreign” as opposed to “domestic.”

A related issue is the extent to which an award from an ICC arbitration that takes place in the PRC is enforceable in the PRC. The doubt over the enforceability of ICC awards results from the fact that the conduct of ICC arbitration in the PRC may fall foul of the Arbitration Law, which requires arbitration in the PRC to be conducted by a PRC arbitration institution. This issue was dealt with recently by the Ningbo Intermediate People’s Court in *Dufercos. A v. Ningbo Arts & Crafts Import & Export Co Ltd*, where it was held that an award from an ICC arbitration conducted in Beijing could be enforced in the PRC. The court’s reasoning was that the arbitration award was “non-domestic,” and was therefore enforceable under the New York Convention, despite the fact that the arbitration took place in the PRC. It should be noted that the PRC, as a civil law jurisdiction, does not adopt a precedent system. Consequently, the *Ningbo* decision is not binding on subsequent court decisions, but to many foreign investors, the *Ningbo* decision will be welcomed.

Over the years, the Arbitration Law has been refined by the Supreme People’s Court through the issuance of various notices and replies. Again, like most jurisdictions, arbitral awards are enforceable as if they were court judgments, subject to certain residual powers

of the People’s Court to refuse enforcement in defined circumstances. It was a concern to most foreign investors that the lack of uniformity by the Intermediate People’s Court across the country, and a possible indiscriminate exercise of these powers to refuse enforcement of a foreign arbitral award (i.e., a convention award under the New York Convention) or a foreign-related arbitral award, could effectively sterilise these arbitral awards.

However, this concern has now been addressed. Upon receipt of an application for enforcement of a foreign, or foreign-related, arbitral award, the Intermediate People’s Court will examine the award and decide whether the award is enforceable in the PRC. Any decision by that Court not to enforce the award immediately triggers an internal review mechanism under which a ruling not to enforce a foreign, or foreign-related, arbitral award must be submitted to the next-highest People’s Court; if that higher court’s decision is that the award should not be enforced, the matter must be submitted for review by the Supreme People’s Court. This review procedure has ensured uniformity in approach.

## CIETAC

CIETAC was first established in 1956. Today, it handles more cases annually than any other arbitration centre. More than 10,000 foreign-related arbitrations have been administered by CIETAC.

The CIETAC Rules adopt a “fully administered” system of arbitrations in which the CIETAC secretariat takes an active role, similar to ICC arbitrations. The CIETAC Rules themselves were amended in 2005 and now the CIETAC Rules are broadly in line with international practice. Generally the CIETAC Rules confer flexibility on the arbitration process by allowing the parties to agree on the following matters:

- The place of arbitration and/or hearing
- The language of the arbitration
- The number of arbitrators
- The nationality of the arbitrators
- The method of selection of arbitrators
- The applicable law of the contract
- The application of ordinary procedure or summary procedure

## Conclusion

The PRC is now an established and important part of the international arbitration community. Following the 2005 amendments to the CIETAC Rules, foreign-related arbitrations are now brought very much in line with international practice and have a high degree of flexibility. CIETAC has now enjoyed the reputation it rightly deserves and will no doubt continue to grow at a pace which is commensurate with that of the economy of the PRC. ♦

## Endnotes

- 1 An arbitrations with a “foreign element” is generally taken to mean an arbitration where one or both parties in the dispute are foreign persons or a company or organisation domiciled in a foreign country, where the subject matter of the dispute is located in a foreign country or where the facts that establish, change or terminate the contract between the parties occur outside of the PRC.

# Non-Precluded Measures Clauses and Their Effect on Foreign Investment

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## A Caution to Investors

Investors should carefully consider the extent to which their foreign investments will be protected through any applicable investment treaties. For example, through Bilateral Investment Treaties (BITs), countries offer investors basic guarantees in the hope of attracting foreign investment. These treaties often allow investors to directly bring claims against a country through arbitration when there is a violation of the treaty.

Many of the BITs under which investors bring their arbitration claims include a Non-Precluded Measures (NPM) clause, meant to limit a country's liability in certain exceptional circumstances. Recently these clauses have been invoked by Argentina as a defense to drastic government action following its response to the economic crisis in 2001. Various International Centre for Settlement of Investment Disputes (ICSID) panels are reviewing and shaping the scope of these NPM clauses, and determining how they will be applied. The interpretation and application of NPM clauses will be critical to both host governments and foreign investors in determining government freedom to respond to exceptional circumstances, and to determining the scope of investment protections available under BITs.

## The Example of Argentina

In 2001, Argentina's economy collapsed as a result of a severe economic crisis. When the collapse occurred, Argentina attempted to stabilize the economy and to restore political confidence through various measures, including passing an Emergency Law on January 6, 2002. The Emergency Law eliminated the peso/dollar parity peg, and ordered public utility rates to be converted into pesos at a rate of 1:1. These actions imposed painful costs on foreign investors who had bought into privatized utility companies. Foreign investors harmed by the Emergency Law sought legal protection under various applicable BITs.

In response, Argentina invoked the NPM clauses contained in its BITs as a defense. NPM clauses allow governments to take actions otherwise prohibited by the relevant treaty when, for example, the actions are necessary for the protection of essential security, or for the maintenance of public order. As long as the host-government's actions are consistent with one of the exceptions specified in the particular NPM clause, acts otherwise prohibited by the treaty will not constitute breaches of that treaty.

The first four awards handed down by ICSID arbitration panels, out of the many cases brought against Argentina as a result of Argentina's reactions to

the economic crisis, have taken different approaches to the NPM clause of the US-Argentina BIT. On the same facts, three tribunals, in the *CMS v. Argentina*, *Enron v. Argentina* and *Sempra v. Argentina* arbitrations, found the NPM clause inapplicable and held Argentina liable for damages to investors in breach of the treaty. A fourth tribunal, in the *LG&E v. Argentina* arbitration, found Argentina's defense under the NPM clause justified and held that Argentina was not liable to investors for harm caused during a certain period of the economic crisis.

The four tribunals did agree on two key points. First, the tribunals interpreted the essential security and public order provisions of the US-Argentina BIT broadly enough to encompass economic emergencies, which could set a precedent in any future cases where arbitrations arise as a result of government responses to an economic crisis. Second, all four tribunals agreed that the NPM clause in the US-Argentina BIT is not self-judging. In other words, the government invoking the NPM clause cannot decide for itself whether that clause would be applicable in any given circumstance. All four tribunals decided that any emergency action taken by a government is subject to review by tribunals.

Although all four tribunals agreed that the NPM clause in the US-Argentina BIT was not self-judging, the *LG&E* tribunal was far more deferential than the *CMS*, *Enron* and *Sempra* tribunals. Those tribunals applied the customary law requirement of necessity, requiring Argentina to show that the actions taken were the only ones available to the government in response to the crisis. In contrast, the *LG&E* tribunal applied a level of scrutiny closer to a good faith review, affording Argentina some deference in reviewing its own determinations of the appropriate responses to the crisis.

An Annulment Committee under the ICSID Convention reviewed the award issued in *CMS v. Argentina*, and criticized the tribunal's handling of the necessity defense for failing to separately analyze the defense under the treaty as well as under customary international law. It nevertheless held that it did not have the authority to correct the tribunal's legal errors since it had not acted in manifest excess of its powers.

## The Resulting Divide in Opinion

The troubling split in decisions by these tribunals has sparked an important debate on how NPM clauses should be interpreted. Some legal scholars have contended that the interpretation of NPM clauses as an equivalent to the necessity defense is problematic. It has been argued that reading the customary defense of necessity into the NPM clause violates the canonical rule of interpretation that each treaty provision must be given effect. Some scholars have claimed that the NPM clauses would serve no purpose if they merely referred to the necessity defense, since that defense would already be available in customary law. Therefore, the clauses would not meaningfully increase government freedom of action in exceptional circumstances. As a consequence, under the three tribunals' interpretations, the risks and costs of government actions in exceptional circumstances would largely fall to the governments.

Those who advocate a deferential review of the invocation of NPM clauses contend that to refuse to do so could prevent a government from taking necessary action in the event of a crisis. Governments often face unexpected threats and crises. If they must bear the full costs of harm to investors caused by a response to a crisis, they may not be able to respond to a crisis in the preferred way. Some governments may not be able to afford their preferred policy in response to a crisis, due to fear of incurring significant liabilities.

ICSID tribunals have increasingly faced questions outside of traditional foreign investment issues, which have required them to review governmental policy, such as the legally permissible responses to a massive economic crisis. Yet, ICSID tribunals often lack the capacity to fully appreciate the context of government policies. Some legal scholars have argued that these tribunals may not be in the best position to undertake substantive reviews of essential governmental policies. Undertaking a good-faith review of these issues would allow ICSID panels to have a supervisory role, without taking away from host governments the freedom to develop policy responses they deem appropriate.

There are others, however, who have advocated for a less deferential review of the invocation of NPM clauses, for the sake of protecting investors and securing continued foreign investment. These

proponents argue that despite the benefits of a deferential review, many investors may perceive such reviews to be detrimental to their interests.

All sides agree that some level of review is necessary in order to balance government freedom of action with investor protection. However, it is important to ensure that when governments attempt to transfer the risks of government action to investors in extreme situations, they can do so only in legitimate and limited circumstances. Furthermore, nations that are deficient in the rule of law, in the operation of their court system and in governance, generate the very risks that concern foreign investors. These risks, in turn, disproportionately expose such countries to investor arbitration claims. In many of these situations, it is plausible that a government might not follow its own laws. Moreover, if host governments are

able to invoke NPM clauses as a defense, subject to a very deferential review, foreign investors may not receive enough protection to outweigh the benefits of foreign investment, and foreign investment may decline significantly in countries greatly dependent on it.

### Looking Forward

As this controversy has yet to be resolved, both host governments and investors should pay close attention as ICSID panels continue to review and analyze the NPM clauses in investment treaties. The interpretation of these clauses can help both host governments and investors to better understand the scope of their protections under relevant treaties, and will allow investors to better assess the costs and benefits of engaging in foreign investment. ♦



# Ten Hallmarks of Effective International Arbitration Agreements

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1. Unambiguous agreement to submit to arbitration (“Any dispute or difference arising out of or relating to this agreement shall be finally resolved by arbitration...”).
2. Unambiguous definition of any exceptions to the agreement to arbitrate (if exceptions absolutely cannot be avoided).
3. If arbitration is to be preceded by negotiation or mediation, the time for commencing the arbitration must be unambiguously defined by reference to objective dates or events (“If no agreement has been reached within \_\_\_ days of the delivery of written notice of the existence of a dispute, either party may serve a request for arbitration...”).
4. Accurate designation of the administering institution (if desired).
5. Designation of the applicable rules.
6. Specification of the site of the arbitration, carefully chosen for the quality of its arbitration jurisprudence and the respect of its courts for the arbitral process.
7. Specification of the number of arbitrators and the means of their selection.
8. Designation of the language of the proceeding.
9. If confidentiality of the proceeding, evidence and award is desired, an explicit provision to that effect that does not rely on assumed, and likely non-existent, provisions in the arbitral rules or applicable law.
10. Definition of any limitations on the power of the arbitrators, such as awarding punitive or consequential damages, injunctive relief, etc., and excluding the arbitrators’ power to alter such limitations. ♦



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