THE ASIAN LEADING ARBITRATORS’ GUIDE TO INTERNATIONAL ARBITRATION

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Chapter 16

RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

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I. INTRODUCTION

The recognition and enforcement of arbitral awards is of fundamental importance in the arbitral process. Proper recognition and enforcement¹ of arbitral awards serves both as a means of ensuring the effectiveness of the arbitral process, and also as a key factor favouring the use of arbitration in preference to other modes of dispute resolution.²

Parties choose arbitration as a dispute resolution process with the expectation that, absent a settlement, an award will be rendered at the end of the arbitral process. The end-product of the arbitral process,

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¹ While there are conceptually differences between recognition of an award and enforcement of an award, such differences are not significant for the purposes of this paper. The various generally-accepted principles underlying the enforcement of awards in international arbitration apply equally to the recognition of awards, given that recognition of an award is a pre-requisite of the enforcement of awards (but not vice versa). Any potential problems faced in the enforcement of arbitral awards will similarly be problems faced in the recognition of awards. Accordingly, references to recognition and enforcement in this paper will, in the interest of economy, be to “enforcement”. For a discussion of the differences between “recognition” and “enforcement” of an arbitral award, see Redfern and Hunter with Blackaby and Partasides, Law and Practice of International Commercial Arbitration, ⁴th Ed. (London: Sweet & Maxwell, 2004) (“Redfern and Hunter”) at 434 – 435.


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the award, is clearly of utmost importance to the parties, and the successful party expects the award to be performed without undue delay. Unless parties can be relatively certain that they will be able to enforce the award at the end of the arbitral proceedings (if not complied with voluntarily), "an award in their favour will be only a pyrrhic victory," and would render the arbitral process largely meaningless. Put another way, there is "no point in having arbitration-friendly laws, well-drafted arbitration rules, and competent arbitrators and counsel, if no effective enforcement mechanism is available, whether or not it is actually used".

The relative extensiveness and ease of enforceability of the arbitral award compared to foreign court judgments is also, in itself, a principal advantage of arbitration over litigation. This advantage of arbitration arises because "the network of international and regional treaties providing for the recognition and enforcement of international awards is more widespread and better developed than corresponding provisions for the recognition and enforcement of foreign judgments". In particular, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"), adopted by more than 130 countries worldwide, has been described as "the single most important pillar on which the edifice of international arbitration rests".

Treaties and conventions form part of the legal framework for recognition and enforcement of arbitral awards which ensures effective and reliable enforcement. A sound legal framework is indispensable in ensuring the recognition and enforcement of awards; "a meaningful arbitral award is conditional upon an effective and reliable

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5 *Op cit* n1, Redfern and Hunter at 437. For a good summary of the multilateral and bilateral conventions in relation to the enforcement of foreign arbitral awards, see *op cit* n3, Lew, Mistelis and Kroll at 693 – 696.
enforcement mechanism.” The “legal framework” of enforcement includes not only the black-letter law encapsulated in these treaties and various national laws, but also, crucially, encompasses the underlying scheme and principles of the arbitration treaties (particularly, the New York Convention), judicial understanding of such principles, and judicial attitude towards the enforcement of arbitral awards (and arbitration in general).

Statistics evidence the effectiveness of the legal frameworks in place for the enforcement of arbitral awards. Albert Jan van den Berg notes that “it is a well-established fact that the vast majority of arbitral awards is internationally enforced.” However, while there is an international policy favouring the enforcement of international arbitral awards, and increasingly rare to find ‘horror stories’ of non-enforcement in published cases,” exceptions unfortunately persist. In Asia, where the advent and practice of international arbitration is more recent, there have been cases of non-enforcement which are contrary to international standards and practices in relation to the enforcement of arbitral awards.

This paper will first set out in the next section the elements of a sound legal framework generally adopted by countries around the world for the enforcement of international arbitral awards. In particular, the broad principles generally accepted in enforcement proceedings will be set out. An analysis of the various ways in which the practices of Asian countries have deviated from the norms of a

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10 A more detailed discussion of the generally accepted enforcement policy of the courts towards international arbitration awards will be discussed in greater detail in Section II of this paper.
sound legal framework for enforcement of international arbitral awards (with reference to non-enforcement cases in Asia) causing problems in enforcement will then follow.

II. ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS – THE ELEMENTS OF A SOUND LEGAL FRAMEWORK

Clearly, an important element of a sound legal framework for the effective enforcement of international arbitral awards is facilitative legislation which provides, for example, minimum conditions for enforcement such as those found in the New York Convention. Article IV of the New York Convention "is set up to facilitate the request for enforcement by requiring a minimum of conditions to be fulfilled by the party seeking enforcement". One of the most important features of the New York Convention is that the party seeking enforcement of an award no longer has to prove compliance with various conditions, but has only to satisfy the requirements in Article IV, which constitute *prima facie* evidence that he is entitled to obtain enforcement of the award. It is then up to the resisting party to prove that enforcement should not be granted.

This position is best contrasted with the previous position under the predecessor to the New York Convention, the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927, which requires the party seeking enforcement to also supply proof that the award had become "final" in the country in which it was made (which, in practice, amounted to the need to acquire leave for enforcement in that country, the so-called "double exequatur"). In addition, "when necessary", the party seeking enforcement had to show proof that the award was an award falling under the Geneva Convention 1927, that the award had been made pursuant to a valid submission agreement (under the applicable law), and that "the award has been made by the arbitral tribunal provided for in the submission to

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arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure”. As a commentator has noted, “the transformation of most of the ‘positive’ conditions [for enforcement] into ‘negative’ conditions [to resist enforcement] was prompted by the desire to ease the conditions to be fulfilled by the party seeking enforcement as much as possible”.

In addition, the New York Convention expressly provides that, even if the grounds for refusal of recognition and enforcement are proved to exist, the enforcing court is not obliged to refuse enforcement. This is reflected by the employment of permissive rather than mandatory language in Art V(1) and V(2) of the New York Convention.

“Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that… [sets out the grounds for refusal]

2. 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… [sets out further grounds for refusal] [emphasis added]”

Accordingly, even if one of the grounds enumerated in Article V is satisfied, the court has the discretion to enforce the award. In the Hong Kong case of China Nanhai Oil Joint Service v Gee Tai Holdings Co Ltd, the Hong Kong Supreme Court stated:

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12 Ibid. at 247.
13 It is noted in op cit n1, Redfern and Hunter at p445, fn69, that this interpretation of the New York Convention is “generally accepted, both in court decisions and by experienced commentators”.
"[T]he grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing Court to achieve a just result in all the circumstances. [emphasis added]"

These aspects of the facilitative nature of the New York Convention are usually faithfully imported into the national legislation of the signatory state.

However, facilitative black-letter law is by itself a necessary but not sufficient condition for effective enforcement. A supportive and well-educated judiciary, which appreciates the nature of arbitration in the commercial world and applies the generally accepted principles of enforcement of international arbitral awards, is a key condition for effective enforcement of awards, and this important factor is satisfied in most countries. The generally accepted principles of enforcement (which are interrelated) are as follows.

First, the key principle in the enforcement of international arbitral awards is the pro-enforcement bias which the courts ought to adopt, so as to facilitate the enforcement of an award. This pro-enforcement bias is also clearly manifested by the provisions of the New York Convention.\(^\text{15}\) Most of the other broadly accepted principles in the enforcement of international arbitral awards may be said to flow from this fundamental principle.

Second, under Article V(1) of the New York Convention and a necessary consequence of the changes from the Geneva Convention 1927 discussed above, the party resisting enforcement of the arbitration award now has the burden of proof to show the existence of the grounds for refusal set out in Article V(1) of the New York Convention.

Third, it is generally accepted that there should not be a review of the merits of the arbitral award by the enforcement court. The New York Convention and the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law") discourage any form of judicial review of an arbitral award on its merits.\(^\text{16}\)


Accordingly, where enforcement is sought under the New York Convention or the Model Law, courts will be especially wary of parties seeking to introduce "back-door" appeals on the merits.

There may be arguments favouring the review of arbitral decisions in order to guard against egregious mistakes of law, as there is ample judicial dicta (but little decided case-law) in support of the proposition that patently unreasonable awards can amount to a violation of public policy. However, there are "serious disadvantages in having a system of arbitration that gives an unrestricted right of appeal from arbitral awards". The decisions of the courts may override the decisions of an arbitral tribunal specifically chosen by the parties, thereby violating the principle of party autonomy. The appeal process may also be used to delay the payment on the award. The New York Convention and the Model Law have come down strongly on the side of finality in the arbitral process over judicial control of arbitral decisions by excluding appeals on the merits of the case.

Fourth, as the grounds of refusal of enforcement of an award are concerned, these grounds should be construed narrowly. Albert van den Berg states:

"As far as the grounds for refusal of enforcement of the award as enumerated in Article V [of the New York Convention] are concerned, it means that they have to be construed narrowly. More specifically, concerning the grounds of refusal in Article V(1) to be proven by the respondent, it means that their existence should be accepted in serious cases only; obstructions by respondents on trivial grounds should not be allowed. Concerning the ground for refusal of Article V(2) to be applied by the court on its own motion, it means that a court should accept a public policy violation in extreme cases only, thereby using the distinction between domestic and international public policy. [emphasis in original]"\(^{19}\)


\(^{18}\) *Op cit* n1, Redfern and Hunter at 422 – 423.

This principle of enforcement (or principle of resisting non-enforcement) is also clearly recognized in leading texts on international arbitration. In Redfern and Hunter, the learned authors note that “the intention of the New York Convention and of the Model Law is that the grounds for refusing recognition and enforcement of arbitral awards should be applied restrictively”.

Whether the above principles are applied in practice depends largely on the judicial climate in relation to arbitration and, accordingly, the enforcement of arbitral awards. Indeed, the main factor interfering with the application of these principles of enforcement in Asia is a non-supportive judicial climate for enforcement. The causes of a non-supportive judicial climate include the lack of understanding by the courts of the arbitral process and the correct application of treaties/statutes on enforcement, and an interventionist attitude towards the arbitral process. Such a judicial climate may have resulted from a lingering suspicion of the arbitral process by the courts, mere lack of familiarity, and/or an attitude of local protectionism.

III. DEVIATIONS FROM THE NORMS IN ASIA

This part of the paper analyses the key ways in which the practice of Asian countries towards the enforcement of arbitral awards deviate from the sound legal framework for enforcement present in most countries (discussed in the previous section of this paper). While attempting to set out the most prevalent pitfalls which await an unsuspecting party seeking to enforce an arbitral award in Asia, this

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20 Op cit n1, Redfern and Hunter at 445. See also op cit n3, Lew, Misteles and Kroll at 706.
21 It may also be observed that the final two potential dangers (Sections 3.7 and 3.8) discussed might actually be the causes of various other potential deviations discussed. Accordingly, the cases earlier cited in Sections A – F may also be examples relevant to the discussion in Sections G and H. This paper does not attempt to draw a strict distinction between these causes and the consequences of these causes, but (as noted above in the main text) instead discusses them together as potential problems which a party may face in enforcement of international arbitral awards in Asia.
analysis lays no claim to comprehensiveness, its purpose being the illustration of the ways in which various Asian countries have deviated from widely-accepted norms in the enforcement of international arbitral awards.

A. Failure of the Legislature to Enact Implementing Legislation

Proper facilitative legislation is, in practice, a necessity (at least in Asia) for the effective enforcement of international arbitral awards. There are various examples in Asia where countries have failed to enact implementing legislation so as to fulfill treaty obligations and facilitate the enforcement of international arbitral awards, which have resulted in various problems in enforcement.\(^\text{22}\)

In Indonesia, there was initially a lack of effective implementing legislation although Indonesia acceded to the New York Convention in 1981. Nine years passed before implementing regulations were promulgated.\(^\text{23}\) Even when the implementing legislation was finally enacted, the implementing legislation was defective and “contrary to the New York Convention”,\(^\text{24}\) as enforcement of a foreign arbitral award was made contingent on a statement from the Indonesian diplomatic mission in the jurisdiction in which the award was rendered to the effect that such country had diplomatic relations with Indonesia, and that Indonesia and such country were contracting states to an international convention regarding implementation of foreign arbitral awards.\(^\text{25}\) The need for such a statement from the Indonesian

\(^{22}\) The problems discussed in this section can be divided into two categories. First, where there is an absence of complementing legislation in relation to the enforcement of awards. Second, where the national implementing legislation, though present, is not on all-fours with the treaty which the country had acceded to (for example, the New York Convention).

\(^{23}\) Supreme Court Regulation No. 1 of 1990.

\(^{24}\) This was noted by \textit{op cit n9}, Lucy Reed in “Experience of Practical Problems of Enforcement” at 564.

\(^{25}\) Indonesia has availed itself to the reciprocity reservation found in Article I(3) of the New York Convention when signing up to the New York Convention,
diplomatic mission violates the minimum conditions for enforcement stipulated in the New York Convention, and would doubtless have also caused delays in the enforcement proceedings.

On 12 August 1999, Indonesia promulgated its new and comprehensive Arbitration Law.\(^{26}\) This new Arbitration Law does not remove the problems noted above, as the requirements for the applications for a foreign-rendered award remain largely similar. Another potential problem which may arise from the new Arbitration Law is that it does not specify a time limit for the courts to issue orders for the enforcement of international arbitral awards. However, it must be noted that the courts have acted very promptly in the enforcement of foreign awards, in some cases issuing exequatur within less than a month of request.\(^ {27}\)

The lack of facilitative legislation also caused delays in the enforcement of arbitral awards in Hong Kong. These delays were due to the lack of implementing legislation for the enforcement of judgments from the People’s Republic of China (“China”) after China resumed sovereignty over Hong Kong in 1997. Prior to 1997, the enforcement of arbitral awards between Hong Kong and China was governed by the New York Convention. However, problems arose following the creation of the Hong Kong Special Administrative Region in July 1997, as the New York Convention is an international treaty struck between sovereign states and only applies to foreign rendered arbitral awards.

As a result of the lacuna governing the enforcement of arbitral awards between China and Hong Kong, delays arose in the enforcement of arbitral awards rendered in Hong Kong in China and vice versa. An example is the case of *Hong Kong Heung Chun Cereal & Oil Food Co Ltd v Anhui Cereal & Oil Food Import & Export Co.* (“Anhui

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\(^{26}\) Law No. 30 of 1999.

In response to an application for an enforcement of an arbitral award made in Hong Kong, the Supreme People's Court (in October 1998) noted that Hong Kong had become a Special Administrative Region since 1 July 1997 and, accordingly, the New York Convention should not apply. As there was no provision on how arbitral awards published in Hong Kong were to be enforced, the Anhui Cereal case would only resume hearing after the promulgation of such provisions. The case eventually resumed in April 2000. This was after the coming into force of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and China ("the Arrangement") and a Supreme People's Court's issuance of a Judicial Interpretation which gave force of law to the Arrangement and provided the legal structure for its implementation, resulting from negotiations lasting for more than two years.²⁹

Furthermore, in China, various other problems exist in relation to the implementing legislation resulting in impediments to enforcement. A potential impediment to the enforcement of awards is found in the Supreme People's Court's Notice on the Implementation of China's Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1987 ("Notice on the New York Convention").³⁰ According to the Notice on the New York Convention, the enforcement of a foreign award "shall" be rejected, provided the existence of the grounds for refusal in the New York Convention can be proved by the respondent. This is in contrast to Art V of the New York Convention, which uses the permissive word "may", and therefore grants the enforcement court "a somewhat discretionary power to disregard the minor defects or minor irregularities with respect to arbitration procedure, thus favouring the enforcement of awards".³¹

²⁸ Supreme People's Court (2003) Civil 4 Miscellaneous No. 9. This case will be discussed in greater detail at Section 3.8.
³⁰ Effective as of 10 April 2007.
Accordingly, the Notice on the New York Convention ignores the discretionary element in the denial of enforcement, and results in a less pro-arbitration position than that envisaged by the New York Convention.

The Chinese legislation also differs from the New York Convention by prescribing for documentary requirements which differ from the minimum documentary requirements provided for under Article IV of the New York Convention. As a result, “confusion often arises in practice as to the precise documentation and information needed for the IPC [Intermediate People’s Court] to accept an application for enforcement.” Under the Regulations of the Supreme People’s Court Regarding Certain Issues in Relation to Enforcement (“the Enforcement Regulations”), the following documents are required.

(i) The party seeking enforcement must submit original or notarized copies of the arbitral award and the arbitration agreement.

(ii) The party seeking enforcement must provide an application in writing, explaining the reasons for and description of the matters of the proposed enforcement and the object to be enforced. Information regarding the property of the party against whom enforcement is sought should also be supplied.

(iii) The applicant’s proof of identity and (where appropriate) proof that the applicant is the successor or assignee of the judgment creditor under the award.

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Awards: 40 Years of Application of the New York Convention (The Hague: Kluwer Law International) 461 at 470. See also the discussion in Section II of this paper.

32 See the discussion in Section II of this paper above.


34 Ibid. at 265 – 266.
(iv) A power of attorney where the application is handled through a legal representative.

(v) The applicant shall also supply "any other documents or identification as shall be required" by the court.

It has also been observed that, at times, a party seeking enforcement "may be required to provide documents not required by law, such as evidentiary documents relied upon by the arbitration tribunal in making its award".\(^{35}\)

One must also be wary of the fact that, under Chinese national legislation, Article 16 of the Arbitration Law of China states that an arbitration agreement shall contain "a designated arbitration commission". Accordingly, while \textit{ad hoc} arbitration is not explicitly forbidden, no clear legal basis for such proceedings appears to exist in China.\(^{36}\) In addition, it is also unclear whether a clause providing for the conduct of foreign arbitral institutions (e.g., the ICC) in China is valid because such foreign arbitral institution may not be an "arbitration commission" within the meaning of the Chinese law. There is accordingly the risk of non-enforcement of arbitral awards in the situations described above.

Problems in enforcement of arbitral awards owing to the lack of effective enforcement legislation have also arisen in Malaysia, as evidenced by the recent Court of Appeal decision, \textit{Sri Lanka Cricket v World Sport Nimbus Pte Ltd ("Nimbus")}.\(^{37}\) In the \textit{Nimbus} case, the Respondent (Nimbus) secured an award against the Appellant (Sri Lanka Cricket) in an arbitration held in Singapore and the Respondent sought to enforce the award in Malaysia. This was resisted by the Appellant. The High Court allowed the Respondent's attempt to enforce the award in Malaysia, but upon appeal to the Court of Appeal, the High Court's decision was set aside.

\(^{35}\) \textit{Ibid.} at 266.

\(^{36}\) However, in the recognition of foreign arbitral awards pursuant to the New York Convention and where the seat of the arbitration is outside of China, China does recognize the legitimacy of these foreign awards rendered abroad via \textit{ad hoc} arbitration.

\(^{37}\) [2006] 3 MIJ 117.
The rationale of the Court of Appeal's decision was based on s. 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 ("1985 Act") which provided as follows:

"The Yang Di Pertuan Agong [the King of Malaysia] may, by order in the Gazette, declare that any State specified in the order is a party to the said Convention, and that order shall, while in force, be conclusive evidence that that State is a party to the said Convention."

Although the word "may" was used in s. 2(2) of the 1985 Act, the Court of Appeal held that, when read in the context of the provision and the whole 1985 Act, s. 2(2) was mandatory in nature. Accordingly, if the Yang Di Pertuan Agong wished to extend the benefit of the summary method of enforcement (compared to the more onerous common law route for enforcement) provided in s. 3(1) of the 1985 Act, then he must by Gazette Notification declare the country in which that award was made to be a party to the New York Convention and, if he did not, that benefit was not available to the party seeking enforcement. As there was no Gazette Notification that Singapore was a party to the New York Convention, the Court of Appeal refused to enforce the award. This was despite the fact that Singapore was clearly a party to the New York Convention, and had also (as noted by the Court of Appeal) included Malaysia in its Gazette as a party to the New York Convention.

The effect of the decision is limited, as the 1985 Act has now been repealed by s. 51(1) of the Malaysian Arbitration Act 2005 ("the 2005 Act"), which came into force on 15 March 2006. The relevant provision in the 2005 Act relating to the enforcement of awards under the New York Convention is s. 38, which reads as follows:

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38 The Attorney General’s Chambers ("AGC") of Malaysia obtained leave to intervene in the appeal to the Federal Supreme Court but the case was settled, leaving the Court of Appeal decision regrettably unchallenged. It is understood that the AGC would have argued for the recognition of the Singapore award.

39 Laws of Malaysia, Act 646.
"Recognition and Enforcement

38. (1) On an application to the High Court, an award made in respect of a domestic arbitration or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by an action.

(2) In an application under subsection (1) the applicant shall produce —

(a) the duly authenticated original award or a duly certified copy of the award; and

(b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, ‘foreign State’ means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.”

S. 38 no longer stipulates the need for a Gazette Notification before a country will be considered a party to the New York Convention, and accordingly there is no such requirement before the enforcement procedure under s. 38 of the 2005 Act can be invoked with regard to an award made in a country which is a party to the New York Convention.

In the Philippines, although the New York Convention was ratified by the Philippine Senate under Senate Resolution No. 71, there was an absence of specific legislation governing the enforcement of awards until recently, via the Republic Act 9285, which bears the full name of the Alternative Dispute Resolution Act of 2004 (“the ADR Act 2004”). It has been noted that “confusion as to

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40 Adopted on 10 May 1965.
the procedure to be followed [in the enforcement of arbitral awards]” had previously resulted due to the absence of specific legislation on the enforcement of arbitral awards.\textsuperscript{41} The ADR Act 2004 now specifically provides that the basic procedure for recognition and enforcement is as laid down by the New York Convention.

Pakistan is another example in Asia of the failure to enact proper implementing legislation which could give rise to problems in the enforcement of awards. Pakistan has adopted the New York Convention, which is implemented into Pakistan law by the Recognition and Enforcement (Arbitration Agreements and Foreign Arbitral Awards) Ordinance 2005.\textsuperscript{42} However, this is a Presidential Ordinance (which was promulgated pursuant to Article 89 of the Pakistan Constitution) and not legislation. According to Article 89 of the Constitution, the President has limited power to legislate by Ordinance if the National Assembly is not in session and if the President is satisfied that conditions exist which render it necessary to take immediate action. However, while such an Ordinance will have the same force and effect as an Act of Parliament, it only lasts for a period of four months, after which it automatically lapses.

To date, the National Assembly has not passed a law in terms of the Ordinance implementing the New York Convention. As a result, the Ordinance must be renewed, or re-enacted, every four months. This has led to what appears, at first sight, to be repeat enactments of the New York Convention, as each new Ordinance implementing the New York Convention in Pakistan is in the same similar terms. Accordingly, there might be a real possibility of confusion by practitioners seeking to enforce arbitral awards in Pakistan, seeking to rely on the New York Convention, as they might proceed under the incorrect Ordinance (although these successive Ordinances are in similar terms). There is a real risk that an unsupportive or less favourable attitude towards arbitration may lead to the dismissal of


\textsuperscript{42} No. VIII of 2005.
an application to enforce where the application is brought under the wrong Ordinance, based on a mere technicality.  

B. Seizing of Jurisdiction by the Courts So As to Deny the Arbitral Process

Another major problem in the successful rendering and subsequent enforcement of international arbitral awards in Asia is the tendency of some courts in Asia to unjustifiably retain jurisdiction over a dispute despite the existence of an agreement to arbitrate between the Parties. Such an approach by the courts is contrary to Article 8(1) of the Model Law, which states:

"Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperable or incapable of being performed. [emphasis added]"

While there is a distinction between the enforceability of an arbitration agreement and the enforcement of an arbitral award, the (unjustifiable) seizing of jurisdiction by the courts is relevant to a discussion of problems in the enforcement of awards for at least two reasons. First, the very seizure of jurisdiction so as to prevent the arbitration from taking place leads to the consequence that there will not even be an award which resolves the dispute, which is a key expectation of parties entering into an arbitration agreement. Second, certain considerations which the courts have taken into account in not enforcing an arbitration agreement (for example,  

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43 An example of such an occurrence is indeed discussed in this paper, see the discussion of the Nimbus case.
arbitrability), could equally be used by the courts in refusing to enforce an award.

An example of how some courts have deviated from the norms by retaining jurisdiction over a dispute is the Indonesian case of *PT Perusahaan Dagang Tempo v PT Roche Indonesia* (“Tempo v Roche”). In *Tempo v Roche*, Roche and its local distributor Tempo entered into a distribution agreement which allowed Tempo to distribute Roche’s pharmaceutical products throughout Indonesia. The distribution agreement provided for distribution of two categories of drugs: (i) prescription drugs; and (ii) over-the-counter drugs. The distribution agreement contained a termination clause which permitted Roche to terminate the agreement by giving six months’ notice. The distribution agreement also contained a dispute resolution clause which provided as follows:

“In the event of any dispute arising among the parties in relation to, or in connection with this Agreement or a breach thereof which cannot be settled amicably shall be finally settled by arbitration to be conducted in the English language and to be held in Jakarta under the Rules of Arbitration of BANI in respect of such dispute by a panel comprised of 3 (three) persons appointed in the manner referred to below.”

Roche then decided to terminate the part of the agreement relating to over-the-counter drugs, and gave 6 months’ notice, without claiming any breach of contract by Tempo. Despite the arbitration clause in the agreement, Tempo brought an action before the District Court of South Jakarta, asserting that Roche could not terminate the agreement without Tempo’s prior consent, and also because it was clear that Tempo had not breached the agreement. Roche claimed that the District Court did not have jurisdiction to hear the dispute, as the forum for dispute resolution should be arbitration in Jakarta before Badan Arbitrase Nasional Indonesia, i.e. the Indonesian National Board of Arbitration (“BANI”), as provided for in the arbitration clause of the distribution agreement.
The District Court of South Jakarta rejected Roche's jurisdictional objection, and issued a ruling asserting jurisdiction to hear the case, notwithstanding the arbitration clause in the agreement. This was on the basis that the partial termination was an "act of tort" which was not arbitrable but fell within the jurisdiction of the courts. The District Court of South Jakarta held that arbitrators may only resolve disputes relating to technical and business matters and, as the dispute in Tempo v Roche concerned an "act of tort", only the courts and not any arbitral tribunal had jurisdiction over the dispute. In effect, the Court reasoned that the dispute between the parties was "legal" by nature, instead of "technical", and suggested that arbitration was limited only to "technical business issues".

This decision has been roundly criticized in various publications, an example of which is the following:

"The South Jakarta District Court's decision, of course, is quite surprising. The Arbitration Law stipulates unambiguously that a state court is not competent to adjudicate a dispute that is within the scope of a written arbitration agreement pertaining a commercial matter over which the parties have settlement authority. As far as we are aware, the South Jakarta District Court is the only court in the world that limits the jurisdiction of arbitration to 'technical business issues'. The Court either should have rejected the complaint and referred the matter to arbitration, or articulated some permissible basis for its retention."\(^{44}\)

The South Jakarta District Court then awarded Tempo "considerable damages"\(^{45}\) on the basis of Roche's partial termination.

The decision of the Indonesian court is inconsistent with the general trend of recognizing the wide scope of disputes which could be submitted for arbitration. A leading textbook notes as follows:\(^{46}\)

\(^{45}\) Op cit n27, Karen Mills, "Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration" at 15.
\(^{46}\) Op cit n3, Law, Mistedis and Kroll at 721.
“The concept of arbitrability has expanded considerably in recent decades as a consequence of a general policy favouring arbitration... There are very few cases in which enforcement of an award has been refused for lack of arbitrability of the underlying dispute.”

Furthermore, as “it is generally accepted that arbitrability forms part of the general concept of public policy,”\textsuperscript{47} this underlying problem of the courts jealously guarding its jurisdiction and lack of knowledge as to the proper approach to the enforcement of arbitral awards would also cause further problems in the sphere of refusal to enforce arbitral awards on the public policy ground, which is discussed in greater detail below.

Two cases involving Bankers Trust Company\textsuperscript{48} have “brought further embarrassment to Indonesia’s reputation in the world of arbitration”\textsuperscript{49} These cases again exemplify the Indonesian courts’ insistence of retaining jurisdiction over a dispute despite the existence of an arbitration clause (as in the Tempo v Roche case). The two cases are virtually identical and will be discussed collectively. Bankers Trust Company and Bankers Trust International (“Bankers Trust”) entered into International Swaps and Derivatives Agreements (“ISDAs”) with an Indonesian company (“the Customer”). Each ISDA included an attached Schedule which set out the standard terms and conditions (including an arbitration clause), which were specifically incorporated into the ISDAs by reference. In each case, the Parties signed only the master agreement.

Largely owing to the Asian economic crisis of 1997 – 1998, the Customer subsequently defaulted on its obligations to make payments under the swap agreements, and Bankers Trust commenced arbitration proceedings before LCIA in London. On the other hand,


\textsuperscript{48} Bankers Trust Company & Bankers Trust International vs PT Jakarta International Hotels and Development; Bankers Trust Company & Bankers Trust International v PT Mayora Isdab.

\textsuperscript{49} Op cit n27, Karen Mills, “Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration” at 28. However, these are the only applications for enforcement of award which have been rejected by the Indonesian courts since the promulgation of the New Law.
the Customer initiated proceedings in the South Jakarta District Court, seeking annulment of the ISDAs on, *inter alia*, the ground that the ISDAs were contrary to public policy claiming that swap trading was, in effect, gambling (which is strictly prohibited in Indonesia).

In the case before the Indonesian court, Bankers Trust argued that the South Jakarta District Court did not have jurisdiction because the Parties had agreed to arbitration. However, the South Jakarta District Court held that since the arbitration clause was contained in an unsigned schedule to a signed ISDA master agreement, it had jurisdiction over the dispute, as there was no valid incorporation and the arbitration clause was therefore not binding upon the Customers. The South Jakarta District Court then went on to nullify the ISDA. Bankers Trust appealed the decision of the South Jakarta District Court.

One of the main criticisms of the decisions by the South Jakarta District Court and the Central District Court of Jakarta is that the master agreement of the ISDA very clearly referred to the attached schedule which contained the arbitration clause. The master agreement contained a clause which stated as follows:

“*The main tekst [sic] to the 1992 Agreements must be signed; however, the Schedule may, but need not to be signed.*”

Accordingly, the finding of the South Jakarta District Court was “*exactly opposite to the finding of the LCLA that the schedule formed an integral part of the ISDA agreements and thus the parties had in fact agreed to arbitration*”. The decision by the South Jakarta District Court raises concerns about the Indonesian courts’ tendency to retain jurisdiction over a dispute despite the existence of an agreement to arbitrate. The Indonesian courts’ tendency to guard its jurisdiction with jealousy is

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50 Reproduced in *op cit* n44, Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” at 125. However, the authors caution that, as the relevant court decisions and related documents are not accessible to the public, the clause cited was sourced from the respective lawyers and publications regarding the case.

clearly in contravention of widely practiced norms in the field of enforcement of international arbitral awards.

C. Disruption of Arbitral Proceedings by the Grant of Anti-Suit Injunctions by the Courts

Certain courts in Asia have also deviated from the international norms of adopting a pro-arbitration and pro-enforcement bias by disrupting arbitral proceedings through the granting of anti-suit injunctions. Similar to the improper and unjustifiable seizure of jurisdiction discusses in the preceding sub-section, the disruption of arbitral proceedings by way of anti-suit injunctions will also prevent any arbitral award from being made, and thereby frustrate the arbitral process. The (in)famous Pertamina disputes and the Pakistani Hubco case are examples of such deviations from the norms.

The Pertamina Disputes

The Pertamina disputes were arbitration cases involving power projects. These cases involved the use of injunctions and annulments by the Indonesian courts, and are highly controversial.

In the early 1990s, the Indonesia Ministry of Mines and Energy (“MME”), together with state-owned electric utility company PLN and state petroleum monopoly Pertamina, entered into contracts for the development of a number of geothermal private power projects. The first project discussed here is the Patuha and Himpurna project. Under the programme, the Indonesian Ministry of Finance (“MOF”) issued an undertaking to cause Pertamina and PLN to perform their obligations under the project documents as due (an MOF Support Letter). There were arbitration clauses contained in the agreements. For the Patuha and Himpurna project, Jakarta was specified as the place of arbitration.

As a result of the Asian financial crisis, the Indonesian government indefinitely postponed or cancelled many of the power projects. Unsuccessful efforts to resolve the suspension of its projects led to Patuha and Himpurna (two special purpose Bermuda subsidiaries of

The tribunal issued an award against PLN in May 1999. Having established the liability of PLN, Patuha and Himpurna then moved to arbitrate against the Republic of Indonesia itself under the MOF Support Letters. At this juncture, Pertamina sued in the Central Jakarta District Court seeking an injunction to halt the arbitration (in relation to the MOF Support Letters) against the Republic in the light of various alleged irregularities committed by the tribunal in the course of the arbitral proceedings. The Indonesian court issued the injunction sought by Pertamina in July 1999, imposing fines of US$1 million per day if the order was violated.

The injunction caused the arbitral tribunal to shift the location of future hearings from Jakarta to The Hague. The Indonesian Government took several actions in response to the relocation of the proceedings, including filing an application to remove the tribunal chairman for bias, and requesting a Dutch court to enjoin the hearings in The Hague. These efforts were ultimately unsuccessful.

There is much controversy over the Patuha and Himpurna disputes. However, the fact remains that the Indonesian courts caused the arbitral tribunal to shift its location by issuing an injunction to halt the arbitration, thereby causing disruption to the arbitral process. This is contrary to the widely-accepted approach that generally, even if a tribunal had erred in the conduct and determination of the case during the course of the arbitration, the courts would not interfere with the arbitral process (e.g., by the issuance of injunctions) but would instead correct the alleged wrongs at the enforcement stage, either by refusing enforcement or setting aside the award. This minimal judicial intervention of the arbitral process is exemplified by the Singapore case of Mitsui Engineering &

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52 See the critical discussion of Mark Kantor, “The Limits of Arbitration” TDM Vol.1 Issue 2 (May 2004) on the way the Pertamina disputes were handled, and a more sympathetic analysis of Pertamina and Indonesia’s actions in the arbitrations, see op cit n27, Karen Mills, “Enforcement of Arbitral Awards in Indonesia & Other Issues of Judicial Involvement in Arbitration” at 22 – 27, 31 – 33.
Shipbuilding Co. Ltd. v Easton Graham Rush and Anor ("Mitsui Engineering"),\(^53\) which will be discussed below.

The second case involved the Karaha Bodas project, another project entered into by MME, PLN, and Pertamina for the development of geothermal private power projects in the early 1990s. The situs of the arbitration for the Karaha Bodas project was Geneva, under the UNCITRAL rules. As noted above, there was a suspension of the projects, including the Karaha Bodas project, and Karaha Bodas filed for arbitration at the end of April 1998.

Eventually, an award was rendered in favour of Karaha Bodas, jointly and severally against Pertamina and PLN.\(^54\)

Pertamina also sought an injunction in this case from the Central Jakarta District Court after the issuance of the award. However, its efforts were ignored by the U.S., Hong Kong, and Singapore courts in subsequent proceedings brought by the project company to attach Pertamina’s offshore assets. Pertamina also unsuccessfully filed for annulment of the award by the Swiss courts.

However, despite these decisions, Pertamina obtained from the Central Jakarta District Court an injunction prohibiting enforcement by Karaha Bodas of the arbitration award anywhere in the world, backed by daily fines of US$500,000 for non-compliance. The court also annulled the arbitration award on the basis that the award was contrary to Indonesian law and contained procedural flaws.\(^55\) The successful enforcement of the award therefore depended on the project company’s ability to claim against Pertamina’s foreign assets, and enforcement of the award was sought in the USA, Canada, Hong Kong, and Singapore. The parties have now settled the dispute, and Pertamina will pay US$319 million to Karaha Bodas.\(^56\) The issuance of an injunction preventing Karaha Bodas from enforcing the arbitral


\(^{54}\) Similar to the Pautha and Himpurna project, the Karaha Bodas case is also extremely controversial. See the discussion by the authors set out in fn52.

\(^{55}\) The annulment of the award by the Indonesian court is discussed further in Section D below.

\(^{56}\) See the article, “Pertamina settles power dispute” in online version of The Financial Times (published 22 March 2007), FT.com.
award anywhere else in the world (and not merely refusing enforcement if and when enforcement is sought in Indonesia) is also contrary to the norms of international arbitration.

Hubco Case

In Pakistan, just as in Indonesia, arbitrations over disputes in power projects have become entangled in local court actions, with the Pakistan courts also issuing injunctions against parties from proceeding with arbitration. The (in)famous case involving Hub Power Company Ltd ("Hubco") and Water and Power Development Authority ("WAPDA") of Pakistan (which was a state-owned utility) demonstrated yet again judicial hostility towards arbitration leading to problems in the enforcement of arbitral awards.

In the Hubco case, the Government of Pakistan invited the private sector to develop thermal power plants to generate and supply electricity to WAPDA. The agreement between Hubco and WAPDA specified English law as the governing law and provided for arbitration in London. The agreement was later amended twice ("the amending agreements"). The dispute over the Hubco project in Pakistan included, among other allegations, those of corruption.

The numerous court and arbitration proceedings covered at least three years. In June 2000, the Pakistani Supreme Court upheld an anti-arbitration injunction blocking Hubco from pursuing ICC arbitration in London over a variety of project disputes, which included disputes over the validity of the amending agreements, which were alleged to have been obtained through corruption/ fraudulently. Hubco's case was that, no matter what the facts, even if there was prima facie evidence of criminal conduct, the requirements of public policy were fully satisfied by the prosecution of the wrongdoers in the pending criminal proceedings. In addition, under both Pakistan and

English law, the arbitrators were the sole judge of their own competence, and fraud and corruption in the procurement of the amending agreements did not prevent arbitration on the issue as to the effect of those matters on the validity of the amending agreements.

The Supreme Court held, by 3:2 majority, that “public policy” supported the injunction, as the allegations of corruption were prima facie evidence that the disputes should be first addressed in the Pakistani courts, and not by international arbitrators, i.e. these issues were not arbitrable. The majority judgment was a mere six pages long, and concentrated on reciting the so-called ‘facts’ alleged by WAPDA which they found to be the basis for invoking public policy to defeat Hubco’s right to arbitration. The majority judgment contained not a single reference to any case, whether cited by Hubco or WAPDA. By contrast, the minority judgment extended to over 60 pages, was fully reasoned, and cited a raft of case law.

The majority decision has been severely criticized. For example, one commentator noted as follows.

“The judiciary (personified in the majority judgment of the Supreme Court) has apparently set its face against international commercial arbitration by invoking public policy and the development of the law has been diverted into barren lands where it can only wither away.”

If the courts adopt a hostile and interventionist attitude towards arbitration, and would invoke the public policy ground as a means to blocking the arbitration proceeding itself, the courts could just as easily invoke this ground to defeat a party’s application for the enforcement of an award. The issue of broad reliance on the public policy ground to refuse enforcement by various courts in Asia will be discussed further in Section E below.

In addition, the majority decision should be contrasted with the narrower approach taken by the English Court of Appeal in the case of Fiona Trust v Privalov (“Fiona Trust”). In Fiona Trust, one party

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38 Ibid. at 10.
attempted to rescind a contract containing the arbitration clause as a whole following allegations of bribery. The Court of Appeal ruled that if the contract was alleged to be invalid for reasons of bribery, the arbitration clause survived unless the bribery relates specifically to the arbitration clause. Accordingly, in that case, the validity of the contract would be determined by the arbitrators and not the court. This ought to have been the approach taken by the Pakistan Supreme Court and, as the alleged fraud and corruption did not appear to be specifically in relation to the arbitration clause, the arbitral tribunal ought to have the jurisdiction to determine the validity of the amending agreements, and it was not contrary to public policy for the arbitral tribunal to do so.

The above cases must also be contrasted with the norms in international arbitration today that courts will be pro-arbitration and less interventionist. A case which demonstrates this clearly is the Mitsui Engineering case, alluded to above. In Mitsui Engineering, Mitsui and Keppel were joint venture partners, but disputes arose between them and referred to arbitration. Mr. Easton was appointed as arbitrator and, after hearing evidence and receiving submissions on certain preliminary issues, the arbitrator issued a first interim award (“FIA”). Mitsui was dissatisfied with the FIA for various reasons, and challenged Mr. Easton’s position as arbitrator. Mitsui then applied for an interlocutory injunction to restrain Mr. Easton from “continuing or assisting in the prosecution or further prosecution or taking any further step” in the arbitration pending the intended application to remove him and set aside the FIA.

Woo Bih Li J. in the Singapore High Court held that the court did not have the jurisdiction to grant the interlocutory injunction and dismissed the application. In reaching the decision, Woo J. stated that Article 5 of the Model Law provided that “no court shall intervene except where so provided in this Law [i.e. the Model Law]” and, as the Model Law did not provide for the interlocutory injunction in respect of an application challenging the arbitrator or to set aside the award, the court did not have the power to grant the interlocutory injunction.60

60 Woo J. also noted that the last clause of Article 13(3) of the Model Law, which allows an arbitrator to continue the arbitral proceedings and even make an
Woo J. also noted in his judgment that the granting of an interlocutory injunction pending the determination of a setting aside application would be "contrary to the overall scheme of minimum court intervention". Similarly, in the recent Singapore Court of Appeal decision in Sub Beng Tee & Co. Pte. Ltd. v Fairmount Development Pte. Ltd., V K Rajah J.A. noted that the "current judicial climate ... dictates that courts should not without good reason interfere with the arbitral process, whether domestic or international [and] it is incontrovertible that international practice has now radically shifted in favour of respecting and preserving the autonomy of the arbitral process in contrast to the earlier practice of enthusiastic curial intervention".

D. Asserting Jurisdiction to Set-Aside Arbitral Awards When Court of Enforcement Is Not the Situs of the Arbitration

In the case of Karaha Bodas, the facts which are discussed in the preceding section, the Central Jakarta District Court has also surely failed to properly apply the arbitration laws by annulling the award, even though Indonesia was not the seat of the arbitration for the Karaha Bodas arbitration. Art V(1)(e) of the New York Convention reads as follows:

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

award pending the outcome of the court’s ruling on the challenge, indicates that it is for the arbitrator and not the court to decide whether arbitral proceedings should be stayed pending a challenge of the arbitrator.

61 [2007] SGCA 28, a case in which the Court of Appeal set aside the lower court’s decision to set aside an arbitral award due to an alleged breach in the rules of natural justice.

62 See also the comment of op cit n52, Mark Kantor, "The Limits of Arbitration" at 6.
(c) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made... [emphasis added]”

It is clear that the situs of the arbitration was not Indonesia. In addition, the generally accepted interpretation of the phrase “under the law of which ... that award was made” is that this refers to the law governing the procedure of the arbitration (law of the seat of the arbitration unless otherwise chosen by the parties, i.e. Swedish law in the Karaha Bodas case) and not the substantive law of the arbitration (Indonesian law). This is clearly reflected in the following commentary.63

‘The ‘competent authority’ as mentioned in Article V(1)(e) for entertaining the action of setting aside the award is virtually always the court of the country in which the award was made. The phrase ‘or under the law which’ the award was made refers to the theoretical case that on the basis of an agreement of the parties the award is governed by an arbitration law which is different from the arbitration law of the country in which the award was made.’

Accordingly, in this case, the Indonesian courts would not have the power under the New York Convention to set aside or annul the arbitration awards. This is a clear indication of the lack of understanding by the Indonesian court of the correct application of the New York Convention and also an interventionist attitude towards the arbitral process.

E. Broad Reliance on the Public Policy Exception by the Courts

The public policy ground as a basis for the refusal of enforcement or setting aside of international arbitral awards64 has

63 Ibid.
64 See, e.g., Article V(2)(b) of the New York Convention and Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law.
caused many problems in practice. The following note of caution on public policy sounded almost two hundred years ago still rings true:

"Public policy is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from sound law. It is never argued at all, but when other points fail." \(^{65}\)

Problems persist as various Asian courts have given the public policy ground a broad definition, deviating from the norm that the public policy ground ought to be given a narrow construction, e.g., as being made out "only where the most basic notions of morality and justice are violated".\(^{66}\)

The Malaysian High Court decision, *Harris Adacom Corporation v Perkom Sdn Bhd* ("Harris Adacom")\(^{67}\) demonstrates the problem that the concept of public policy under Art V(2)(b) of the New York Convention "is not always well understood by national courts".\(^{68}\)

In *Harris Adacom*, the Defendant (Perkom) entered into a distribution agreement with Harris Corporation (an American company), under which the Defendant owed a certain sum. Harris Corporation then sold its interests and assigned all its rights to the Plaintiff (Harris Adacom), and when the Defendant failed to pay the debt, the Plaintiff commenced arbitration proceedings in the United States. An award was made in favour of the Plaintiff. The Plaintiff then applied to register the award under the 1985 Act.

\(^{65}\) Richardson v Mellsch [1824 – 34] All E.R. 258.


\(^{67}\) [1994] 3 MLR 504.

\(^{68}\) Op cit n4, Gabrielle Kaufmann-Kohler, "Enforcement of Awards – A Few Introductory Thoughts" at 287.
One of the grounds raised by the Defendant in opposing the application was that it was contrary to public policy to enforce the award, as the Plaintiff was an Israeli company. Abu Mansor J. allowed the application of the Plaintiff to enforce the arbitral award, as he found that, despite the fact that the Plaintiff had a 68% stake in a subsidiary company engaged in operations in Israel, the products covered by the distribution agreement had been (and would have continued to be) developed, manufactured, and supported from the Plaintiff’s United States operation. Accordingly, he held that it was not against public policy to have the award enforced.

However, the following passage may indicate a lack of clear understanding that a narrow interpretation should be given to the public policy ground for resisting enforcement under the New York Convention.69

“On the allegation that the plaintiff is an Israeli based company and, therefore, it is against public policy to have the award enforced, it is common ground that, in the foreign office declaration produced to this court, if it is so found that the plaintiff is an Israeli company, it is against public policy to enforce it as trade with Israel is prohibited.”

The above excerpt from Mansor J.’s judgment in Harris Addacom suggested the failure to appreciate the narrow scope of the public policy ground for refusing the enforcement of arbitral awards and the “distinction between domestic and international public policy”.70 The distinction between domestic and international public policy, and the narrow scope of the ground of public policy in refusing to enforce an

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69 The Court was unfortunately not assisted by submissions from the AGC of Malaysia which would undoubtedly have not supported the reasoning in this case. However, as the result did not call for an appeal, there was no opportunity for the AGC to express its views.

award is clearly stated in the following commentary by Albert Jan van den Berg.

"The public policy defence rarely leads to a refusal of enforcement. One of the reasons is the distinction between domestic and international public policy. This distinction means that what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. According to the distinction, the number of matters considered as falling under public policy in international cases is smaller than in domestic ones. The distinction is justified by the differing purposes of domestic and international relations. In cases falling under the Convention, the distinction is gaining increasing acceptance by the courts."\(^{71}\)

The approach in the *Harris Adacom* case is a clear contrast to the narrow interpretation of the public policy ground adopted by the United States Court of Appeals for the Second Circuit in the *locus classicus* with regard to the narrow interpretation to be given to the public policy exception, *Parsons & Whittemore Overseas Inc. v RAKTA* ("the *Parsons* case"),\(^{72}\) a case with similar characteristics as *Harris Adacom*. In the *Parsons* case,\(^{73}\) a United States corporation Parsons & Whittemore Overseas entered into a contract with the Egyptian corporation RAKTA for the construction of a mill in Egypt. The project was to be financed by the United States Agency for International Development ("AID"). The Arab-Israeli six-day war broke out when the project was near completion, and Egypt expelled all Americans except those who would apply and qualify for a special visa. AID informed Parsons & Whittemore Overseas that it was withdrawing financial support for the project. Parsons & Whittemore Overseas subsequently abandoned the project on the purported

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\(^{71}\) *Op cit* n8, Albert Jan van den Berg, "Why Are Some Awards Not Enforceable?" at 309.

\(^{72}\) 508 F.2nd 969 (1974).

\(^{73}\) The recital of the facts of the case is largely based on the case discussion in *op cit* n11, *The New York Convention 1958* at 363 – 364.
ground of *force majeure*. RAKTA disagreed and, in the ensuing arbitration, obtained a favourable award.

In the enforcement action, Parsons & Whittemore Overseas contended that the various actions by the United States officials, in particular AID’s withdrawal of financial support, required Parsons & Whittemore Overseas, in the name of being a loyal American citizen, to abandon the project. Enforcement of the arbitral award premised on Parsons & Whittemore Overseas continuing to work on the project contrary to the expressions of national policy would therefore contravene United States public policy.

In response to Parsons & Whittemore Overseas’ contentions, the United States Court of Appeals for the Second Circuit famously remarked as follows.  

“... the Convention’s public policy defense should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum State’s most basic notions of morality and justice.”

The Court then went on to reject Parsons & Whittemore Overseas’ contentions. The following passage from the judgment is especially instructive.

“In equating ‘national’ policy with United States ‘public’ policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention’s utility. This provision was not meant to enshrine the vagaries of international politics under the rubric of ‘public policy’. Rather, a circumscribed public policy doctrine was contemplated by the Convention’s framers and every indication is that the

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74 The *Parsons* case and this passage were referred to in the Singapore Attorney-General’s Chambers Review on Arbitration Laws 2001 (LRRD No.3/2001) at paragraph 2.37.18 and the accompanying footnote 101. It has been repeatedly cited as the definitive statement of the law on this topic: see the cases discussed in the main text.
United States, in acceding to the Convention, meant to subscribe to this supranational emphasis.

To deny enforcement of this award largely because of the United States’ falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention’s mechanism for enforcement. We have little hesitation, therefore, in disallowing Overseas’ proposed public policy defense.”

The approach of the Indonesian courts’ towards the concept of the public policy ground also deviates from the commonly accepted norm as espoused in the Parsons case. In the Indonesian case E.D. & F. Man (Sugar) Ltd. v Yani Haryanto (“EDF Man”),75 the subject matter of the dispute was a contract for provision of sugar between E.D. Man (Sugar) Ltd. (“the Seller”) and Yani Haryanto (“the Buyer”). The contract provided for arbitration in London. At that time, only the Government Logistics Bureau (“BULOG”) was permitted to import, or authorize the import of sugar, and no such authorization had been obtained by the Buyer. The price of sugar declined substantially between the date of the contract and the intended delivery date of the sugar. The Buyer failed to perform in accordance with the contract by failing to provide the necessary Letters of Credit, and cancelled the contract.

The Seller commenced arbitration in London, and obtained an award against the Buyer for breach of contract. The Buyer filed a suit in the High Court of England seeking a declaration that the contract was null and void on the basis that it was contrary to law and public policy, as no permit had been issued by BULOG to import the sugar.

The Parties subsequently reached a settlement agreement whereby the Buyer was to pay to the Seller a reduced compensation in instalments. It was also provided in this settlement agreement that, in the case of any disputes regarding the settlement agreement, arbitration was to be held in London. The Buyer defaulted on payment instalments and the Seller again brought arbitration proceedings in London. The Seller successfully obtained another award against the Buyer.

The Buyer did not satisfy this second arbitral award, and instead brought an action in the District Court of Central Jakarta seeking annulment of the original purchase contract on the basis that it was invalid ab initio, being in violation of law and public policy, and the arbitration clause was accordingly also invalid. The District Court of Central Jakarta declared the original purchase order null and void, on the grounds that, at that time, only BULOG could import (or authorize the import) of sugar, and that the Buyer had not obtained a permit from BULOG to import the sugar. The court held that the original purchase agreement was “contrary to Indonesia’s public policy, as contravening Indonesian State regulations”, and that any arbitration “arising out of a dispute touching on such an ‘illegal contract’ could not be enforced for being contrary to law and public policy”. Both the Jakarta Appellate Court and the Indonesian Supreme Court upheld the District Court’s decision.

By holding that the violation of the domestic law prohibiting the import of sugar meant that the arbitral award in respect of the dispute arising from the sale of sugar was against public policy, the Indonesian courts adopted a broad view of the public policy ground. Furthermore, the Indonesian courts reached such a decision, “despite the fact that it was the Buyer that violated the provisions of law and also that at this stage the parties were in dispute not over the original sale contract but the subsequent settlement agreement”. In view of this factor, there is an even

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76 Op cit n75, Gautama, “Indonesia” at 30.
77 Op cit n75, Leslie Chew, “Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration”.
stronger case for the enforcement of the arbitral award by the Indonesian courts. The settlement agreement was voluntarily entered into and not contrary to public policy. ‘[Adopting] narrower view of the scope of the public policy question would allow the Indonesian courts to give effect to the arbitral award while at the same time satisfying its own national public policy since the recognition of a foreign award giving effect to a settlement would not be a case of sanctioning the illegal import of sugar’.\(^{79}\)

The failure of the Indonesian courts to enforce the arbitral award rendered on the settlement agreement may be an indication that the Indonesian courts will not give sufficient respect to decisions of the arbitral tribunal, and it has been observed that this attitude may possibly be a result of the “lack of understanding of the arbitral concept on the part of the court”.\(^{80}\) Furthermore, the broad reading of the public policy ground is contrary to the pro-enforcement bias contemplated by the New York Convention. All this could conceivably have contributed to the deviation from the generally accepted principles governing the enforcement of international arbitration awards discussed in detail in Section II of this paper.

In the Bankers Trust cases (the facts which are set out at Section B above), although the South Jakarta District Court decided that it had jurisdiction over the disputes and pending the appeal of the decision of the South Jakarta District Court, the LCIA tribunal in the arbitral proceedings issued an award in favour of Bankers Trust. Bankers Trust requested the Central Jakarta District Court to enforce the LCIA awards. The Central District Court of Jakarta rejected the request, ruling that it would be against Indonesia’s “public order” to decide on the granting of an enforcement order for an international arbitral award where the dispute was still pending in civil court proceedings. The Court stated that “the arbitral award would cause public disorder if enforced while there was a decision to the contrary issued by the South

\(^{79}\) Op cit n75, Leslie Chew, “‘Public Policy – The Ride of the Unruly Steed on the Highway of International Arbitration’.”

\(^{80}\) Ibid.
Jakarta District Court”81 The Central District Court of Jakarta reached this finding, despite the fact that “the judgment of the South Jakarta court was not final and binding until all appeal mechanisms have been exhausted, whereas an arbitral award is final and binding and all that is left to the court is to enforce it, but not to review it.”82

The decision of the Central District Court of Jakarta once again illustrated its expansive interpretation of the term “public order/policy”, by holding that, where there is a conflicting arbitration award and judgment of the Indonesian court, the Indonesian court will not enforce the award because this would be contrary to public order. The Court appears to have interpreted the Arbitration Law’s reference to “public order” as including domestic concepts of law and order. As discussed above, this is quite different from the generally accepted practice in the enforcement of international arbitral awards; “most nations restrict international ‘public policy’ to rules which are elementary to retaining social order”.83 Commentators have noted that “the District Court’s more expansive interpretation of ‘public order’ likely will be a source of concern for international commercial parties assessing the reliability of arbitration and award enforcement in Indonesia”.84

In India, the courts have also failed to properly define and apply the public policy ground for refusing the enforcement of international arbitral awards, and have taken a broad view of “public policy”, leading to judicial review of awards approaching a full appeal.

This was evidenced in the case of Oil and Natural Gas Corporation Ltd v SAW Pipes (“SAW Pipes”),85 a decision by the Supreme Court of India. In the case, the Supreme Court of India was concerned with defining the scope of the phrase “public policy of India” as used in the

81 As cited in op cit n44, Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” at 125.
83 Op cit n44, Sebastian Pompe & Marie-Christine van Waes, “Arbitration in Indonesia” at 126.
84 Ibid.
context of s. 34 of the Indian Arbitration and Conciliation Act 1996, which provides as follows:

"34. Application for setting aside arbitral award

... 

(2) An arbitral award may be set aside by the court only if –

... 

(b) the court finds that –

...

(ii) the arbitral tribunal is in conflict with the public policy of India.

Explanation – Without prejudice to the generality of sub-clause (ii), it is hereby declared, for the avoidance of any doubt, that an award is in conflict with the public policy of India if the making of the award was induced or affected by fraud or corruption...”

The dispute in SAW Pipes arose from a contract whereby the Respondent (SAW Pipes) was to supply steel pipes to the Appellant (ONGC). The contract provided for a liquidated damages clause which stated that, in the event of the failure of the Respondent to supply the steel pipes within the contractually stipulated deadline, the Appellant was entitled to recover from the Respondent an agreed sum as liquidated damages, and not by way of a penalty, a sum equivalent to 1% of the contract price per week for such delay, up to a ceiling of 10% of the contract price. A dispute arose between the Parties and the Appellant proceeded to utilize this liquidated damages clause by deducting the sum from the payment due to the Respondent. The deduction was disputed by the Respondent, and the matter referred to arbitration. The Arbitral Tribunal ruled that the Appellant had wrongly utilized the liquidated damages clause, as the Appellant was only entitled to recover liquidated damages if it was shown that it had suffered some loss owing to the Respondent’s breach, but the Appellant had not shown this.
The Appellant proceeded to apply to set aside the award. The Supreme Court of India held that the Arbitral Tribunal was not justified in concluding that the Appellant would still have to establish that it had suffered loss as a result of the delay in the supply of steel pipes before the Appellant could legitimately deduct the amount of the liquidated damages from the purchase price. Accordingly, as the Supreme Court of India was of the view that the phrase “public policy of India” should not be construed narrowly, it held that the award was patently illegal and must be set aside:

“It would be clear that the phrase ‘public policy of India’ is not required to be given a narrower meaning. As stated earlier, the said term is susceptible of narrower or wider meaning depending upon the object and purpose of the legislation… In our view, wider meaning is required to be given so as to prevent frustration of legislation and justice.

... Hence, if the award is erroneous on the basis of record with regard to the proposition of law or its application, the court will have jurisdiction to interfere...”

A previous discussion of this case also noted as follows. 86

“By a cross-fertilisation of ideas obtained from the sphere of administrative law, the Indian Supreme Court has expanded the scope of public policy in India. Such concepts dictate that the error, at least in India, which must be present before public policy can be invoked to set aside an award, must be ‘so blatant, so obvious, so manifest or so palpable that when attention is invited to it, no elaborate argument is needed to support the contention that the conclusion is erroneous.”

The SAW Pipes decision expanded on the test of “public policy” laid down earlier by the Indian Supreme Court in GEC v Renusagar Power

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Co. Ltd. ("Renusagar"),\(^{87}\) by holding that a patently illegal award may be annulled on the public policy ground. In Renusagar, the Indian Supreme Court held that, in order to attract the bar of public policy, the enforcement of the award must invoke something more than a mere violation of Indian law in India. The Indian Supreme Court held that the enforcement of a foreign award would be refused on the ground of public policy if such enforcement would be "contrary to (i) a fundamental policy of Indian law, or (ii) the interests of India, or (iii) justice and morality".\(^{88}\) Concerns had also previously been raised over this test of public policy enunciated by the Indian Supreme Court, as these grounds could be construed fairly broadly:

"The approach of the Indian Supreme Court [in Renusagar], however, gives rise to some question as to how xenophobically an enforcing court may construe the concept of public policy. Although the actual decision in Renusagar was to uphold the award, the court’s remarks imply that certain national and economic interests can constitute public policy."\(^{89}\)

These fears have now been realized, in the light of the Saw Pipes decision. The expanded notion of "public policy" as a result of the Saw Pipes decision could mean further frustration of parties' attempts to enforce an arbitral award in India, and is clearly inconsistent with the pro-arbitration bias and narrow concept of public policy which ought to be applied in the enforcement of international arbitration awards.

As noted above, the broad reading of the public policy ground by these various courts is in stark contrast to the view adopted by most courts around the world that the public policy ground must be narrowly construed. This norm in the interpretation of the public policy ground is clearly adhered to in the following Singapore cases.

\(^{87}\) (1994) AIR 860.
\(^{88}\) Op cit n66, Michael Hwang and Andrew Chan, "Enforcement and Setting Aside of International Arbitral Awards – The Perspective of Common Law Countries" at 157.
\(^{89}\) Ibid., fn 62.
In the case of *Re An Arbitration Between Hainan Machinery Import and Export Corporation and Donald & McArthy Pte Ltd* ("Hainan Machinery")\(^{90}\), the Parties entered into a contract for the sale of steel wire rods from the Defendant to the Plaintiff. It was a term of the contract that, failing settlement by friendly negotiation, disputes may be submitted for arbitration by a named arbitration body in China, in accordance with the rules of procedure promulgated by that body. The Defendant failed to ship the goods by the agreed date in the contract, claiming that this was due to fierce storm and earthquake affecting the port of shipment. The Plaintiff rescinded the contract, and claimed against the Defendant for a "sum of US$217,500 being the non-performance penalty payable by the defendants under the contract". The Defendant, relying on a *force majeure* clause, refused payment. As the Parties could not reach a settlement, the Plaintiff referred the matter to arbitration by the agreed Chinese arbitration body (now known as CIETAC). The Commission wrote to the Defendant on several occasions, informing it of the arbitration proceedings and inviting its participation, but the Defendant refused to participate, insisting that it had not agreed to the institution of the arbitration proceedings. The Commission nevertheless proceeded to hear the case and ultimately issued an award in favour of the Plaintiff.

The Plaintiff then applied for leave to enforce the award in Singapore against the Defendant under the Arbitrations (Foreign Awards) Act ("the Old Act")\(^{91}\). The application was made and heard before the Old Act was repealed by the International Arbitration Act ("IAA 1994")\(^{92}\). The application to enforce the award succeeded, and the order of the Court granting leave to enforce served on the Defendant. The Defendant then applied to have the order set aside, and failed at first instance. The appeal was heard by Judith Prakash J. after the IAA 1994 had come into force, and as required under s. 36 of the IAA 1994, Prakash J. treated the proceedings as if it had been

\(^{90}\) [1996] 1 SLR 34.

\(^{91}\) Formerly, Cap 10A, 1985 Rev. Ed.

\(^{92}\) S. 36 of the IAA 1994 reads as follows: "Any proceedings commenced by virtue of a provision under the repealed Arbitration (Foreign Awards) Act shall continue as if it had commenced by virtue of the corresponding provision of this Act".
commenced under the IAA 1994. The Defendant raised various grounds in support of the appeal, but this paper shall focus only on the public policy ground raised by the Defendant. This was in reliance on s. 31(4)(b) of the IAA 1994 (which is similar to s. 31(4)(b) of the present IAA). The Defendant alleged, ambiguously, that there was “a possibility that the award did not decide on the real matter in dispute between the parties”. By “real matter in dispute”, the Defendant presumably meant the applicability of the force majeure clause. In dismissing the Defendant’s objection, Prakash J. stated as follows.

“The defendants had had ample opportunity to put up before the arbitration tribunal whatever they considered to be the real matter in dispute. In fact the Commission had been aware of the defendants’ position on force majeure. The defendants, however, had not given the Commission any material on which it could find that this position was substantiated and not simply a bare assertion. The defendants had agreed when they signed the contract to arbitration in China. Having done so and having themselves chosen not to participate in the arbitration proceedings, it was not open to them to complain about the possibility of an injustice having been done because their evidence had not been before the Commission.

In my view, 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 not be injurious to the public 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... I could see no exceptional circumstances in this case which would justify the court in refusing to enforce the award of the Commission. [emphasis added]”

Prakash J.’s pro-enforcement approach has been noted as “entirely sensible”\(^3\). This pro-enforcement approach is also reflected in the

recent case of *Aloe Vera of America, Inc. v Asianic Food (S) Pte Ltd and another*\(^4\) where, in discussing refusal to enforce an award from a Convention country on the ground of public policy, Prakash J. noted that such an award “must be enforced unless it offends against our basic notions of justice and morality.”\(^5\) Her Honour also reaffirmed her view in *Hainan Machinery* that 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.

Similarly, courts of various other Asian countries have also (correctly) adopted a narrow approach towards the public policy ground. A famous example is the Hong Kong case of *Hebei Import & Export Corp v Polytek Engineering Co. Ltd.*,\(^6\) where the Hong Kong Court of Final Appeal stated that, “courts should recognize the validity of decisions of foreign arbitral tribunals as a matter of comity, and give effect to them, unless to do so would violate the most basic notions of morality and justice”.

This international norm towards the construction of the public policy ground is also echoed in the Korean case of *Adviso NV (Netherlands Antilles) v Korea Overseas Construction Corp ("Adviso")*.\(^7\) In *Adviso*, the Supreme Court of Korea upheld a Korean Court of Appeal decision to enforce an ICC award rendered in Zurich. The Supreme Court of Korea stated as follows.

“The basic tenet of this provision [Art V(2) of the New York Convention] is to protect the fundamental moral beliefs and social order of the country where recognition and enforcement is sought from being harmed…”

The Supreme Court of Korea accepted that the ground of public policy in Art V(2) of the New York Convention must be interpreted narrowly, and “the mere fact that the particular foreign legal rules applied in an arbitration award violated mandatory provisions of Korean law did not of itself

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\(^4\) [2006] 3 SLR 174.
\(^5\) Citing from the case of *Hebei Import & Export Corp v Polytek Engineering Co Ltd*.
\(^6\) [1999] 2 HKC 205.
\(^7\) XXI YBCA 612 (1996).
constitute a valid reason to refuse enforcement." The Supreme Court of Korea then went on to state that, "only when the concrete outcome of recognizing such an award is contrary to the good morality and social order of Korea, will its recognition and enforcement be refused".

Similarly, in China, it is noted that the Supreme People's Court "appears to have taken a strict interpretation as to what may constitute a violation of public policy." This is demonstrated in the recent Raw Sugar case, which involved an application to enforce a London arbitral award. In the award, damages were awarded for breach of a futures trading contract. While the Supreme People's Court recognized that the futures trading contract was in breach of mandatory Chinese laws which prohibited unauthorized futures trading overseas by PRC companies, it held that a breach of mandatory provisions of PRC law did not completely equate with a breach of public policy so as to justify non-enforcement under Article V of the New York Convention. A commentator also noted that, "the prevailing view is that any attempt to resist enforcement on 'public policy' ground is unlikely to succeed, unless the relevant offence is seen to be so blatant and obvious." The same view was expressed in an article by a Judge of the Supreme People's Court, where the author stated as follows:

"To date, there have been no cases in China where the court refused to enforce a foreign arbitral award on public policy grounds; and one only, in which it refused to enforce a foreign-related (mainland) arbitral award."

In discussing other cases where the Supreme People's Court rejected arguments attacking awards on the public policy ground, the author comments "that they [the later cases rejecting the public policy argument] are perhaps more typical and will show China's present judicial attitude."

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99 Op cit n33, Friven Yeoh, "Enforcement of Dispute Outcomes" at 270.
100 [2003] Min Si Ta Zi No.3.
101 Op cit n33, Friven Yeoh, "Enforcement of Dispute Outcomes" at 271.
103 Ibid. at 23.
In one of the cases discussed in the article, a Japanese company applied to the Haikou Intermediate Court for enforcement of an arbitral award made under the auspices of the Stockholm Chamber of Commerce. The Chinese company opposed the enforcement, claiming that the arbitral award violated a Chinese law stipulating that foreign exchange guarantees by Chinese parties must be examined and approved by the Chinese government. While the lower courts (the Intermediate Court of Haikou and the High Court of Hainan) agreed with the Chinese party’s argument and refused enforcement, the Supreme People’s Court disagreed. Using the same reasoning as that in the Raw Sugar case discussed above, the Supreme People’s Court held that a violation of a compulsory provision in a statute is different from a violation of public policy under the New York Convention.

F. Review of Merits of the Case by the Courts

There have also been examples of Asian courts contravening the internationally accepted norm that the enforcing court not review the merits of the case. As Halsbury’s Laws of Singapore, Vol. 2: Arbitration, Building and Construction, 2003 Reissue notes, in Singapore, “the court hearing an application to set aside an award under the International Arbitration Act has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal”.

In the Chinese case of Hong Kong Huaxing Development Company v Xiamen Dongfeng Rubber Manufacturing Company, the parties (together with two other Chinese companies) entered into a joint venture

104 [2001] Minshu No. 12. The other case discussed is the Raw Sugar case above.
105 See Section 11 above.
106 Lawrence Boo, Halsbury’s Laws of Singapore, Vol. 2: Arbitration, Building and Construction (2003 Reissue) (Singapore: LexisNexis, 2003) at [20.131]. Although this is in the context of the setting aside of arbitral awards, a similar principle would apply to refusal to enforcement as, in Singapore, the grounds for setting aside and refusing enforcement are similar.
contract in Xiamen. Disputes subsequently arose and arbitration was initiated. CIETAC eventually rendered an award in favour of the plaintiff. The award held that the joint venture contract should be terminated, and the joint venture liquidated (Order 1). In order to facilitate the liquidation of the joint venture, the award also held that the defendant should complete formalities for transfer of ownership of certain factory buildings (Order 2). The joint venture contract stated that these factory buildings were to be the defendant's capital contribution.

During the enforcement proceedings before the Xiamen Intermediate People’s Court, the defendant objected to enforcement, alleging that it was not the owner of the factory buildings. The Court found that the defendant had no right of ownership over the buildings, as the factory buildings were built on someone else's land, and were illegal buildings. The Xiamen Intermediate People’s Court then concluded that the arbitral award was incorrect because of a lack of sufficient evidence and Order 2 could not be enforced.

The Court reviewed the merits of the case, which it declared it was empowered to do under Article 217(4) of the Civil Procedure Law, which provided that the Court had the power to decide whether “the main evidence for ascertaining the facts is sufficient”. Article 217(4) of the Civil Procedure Law only applies to purely domestic arbitral awards. However, this case involved a foreign-related arbitration, and accordingly Article 260 of the Civil Procedure Law applied. Article 260 of the Civil Procedure Law statutorily precluded a review of the merits of the case. The application of Article 217(4) of the Civil Procedure Law to reach the conclusion that the award ought not to be enforced has been described as “a big mistake in analyzing the grounds for refusal”.108

108 Op cit n31, Wang Sheng Chang, “Enforcement of Foreign Arbitral Awards in the People’s Republic of China” at 488. However, note Wang’s comments that the Court could have justifiably refused to enforce the award on the ground that the arbitral tribunal dealt with a subject matter beyond the scope of the contract, and the arbitral tribunal had accordingly exceeded its arbitral authority.
This decision is clearly contrary to the generally accepted norms in the enforcement of international arbitral awards discussed in detail above, in particular, the non-review of the substantive merits of the case, as provided for in both the New York Convention and the Model Law.

G. Lack of Familiarity with Arbitration and the Enforcement of International Arbitral Awards by the Courts

Another key factor leading to difficulties in the enforcement of awards in Asia is the courts’ lack of familiarity with arbitration and an understanding of the purposes and spirit behind enforcement treaties such as the New York Convention. As noted above, and briefly alluded to in the discussion of the various cases of non-enforcement, some of the problems of enforcement in the cases discussed above may very well be attributed to the court’s lack of familiarity with arbitration and the generally accepted principles in enforcement proceedings.

Respected commentators have pointed out that this lack of familiarity is a common problem in China. The former Secretary-General of CIETAC has stated as follows:

"Among the awards refused enforcement or set aside by the People’s Courts, some did have mistakes, while some were rejected or set aside only because the People’s Courts did not fully understand arbitration, or the Courts interpreted the laws too strictly, or even because the Courts were influenced by local protectionism."

A lack of judicial competence, in terms of unfamiliarity and a lack of understanding of arbitration in general and of enforcement rules (especially those relating to the New York Convention) as a cause of

109 See fn21 above.
difficulties in the enforcement of awards in China is noted in the following passage.

"In China as a whole, lack of a basic knowledge regarding arbitration among some local judicial personnel — the standard practices of arbitration as well as the New York Convention — is a general phenomenon. Some local judges still have little understanding of how the Convention works and the uniform judicial interpretation of it provisions accepted by courts worldwide. It is still necessary to organize relevant judicial personnel to earnestly and systematically study the New York Convention and international practices regarding enforcement of arbitral awards, and duly and conscientiously to implement it." \[^{111}\]

The following Chinese cases are further manifestations of this problem in China.

The case of Revpower Ltd. v Shanghai Far East Aviation Technology Import and Export Corporation ("the Revpower case") has been described as "one of the most publicized, if not most infamous, examples of the problems facing foreign companies seeking to enforce a foreign rendered arbitral award in China" \[^{113}\]. The unfamiliarity of the Chinese Court with norms in enforcement proceedings led to an overly technical reading of the New York Convention, thereby impeding enforcement of the arbitral award.

The claimant in Revpower (Revpower Ltd.), was a firm registered in Hong Kong owned by a USA company, while the respondent (Shanghai Far East Aviation Technology Import and Export Corporation) was a Chinese company registered in Shanghai, China. The parties entered into a compensation trade agreement, under which the claimant provided the equipment and technology for the manufacture of industrial batteries (which were in accordance with the claimant's specifications) by the respondent. The claimant would


[^112]: This case has not been officially reported.

be compensated for the price of its equipment and technology by manufactured batteries. The compensation trade agreement contained an arbitration clause, as follows:  

"(a) All disputes or claims arising out of this Agreement shall be settled by friendly consultation between the parties if possible.

(b) Except for excusable delays and conditions specified under the Force Majeure clauses in Articles 12 and 13 of the Agreement, if one party breaches the agreement and causes the other party to suffer loss or to be deprived of rights and benefits accorded to it under the terms of the Agreement, the injured party has the right to claim compensation from the infringing party for the losses incurred and should set up a claim within 30 days after the predetermined performance date as specified in the Agreement and provide documentary evidence necessary for the claim. Documentary evidence of Repower shall be issued by the American Arbitration Association. Documentary evidence of Shanghai Far East shall be issued by the China Council for the Promotion of International Trade (CCPIT). If the party against whom the claim is filed does not accept the claim (after all evidence is issued) the parties shall submit the dispute to arbitration as provided below.

(c) Should either party, 60 days after the dispute arises, believe that no solution to a dispute can be reached through friendly consultation, such party has the right to initiate and require arbitration in Stockholm, Sweden, in accordance with the Statute (R&P) of the Arbitration Institute of the Stockholm Chamber of Commerce."

Disputes arose between the parties and the claimant terminated the agreement in December 1989. After unsuccessful negotiations lasting 18 months, the claimant submitted the matter for arbitration before the Arbitration Institute of the Stockholm Chamber of Commerce ("SCC"), without having presented the respondent with the required AAA documentary evidence. SCC accepted the case, and

114 Ibid.
a three-man arbitral tribunal was formed. While the respondent raised a jurisdiction plea, it nominated an arbitrator to the tribunal. The arbitral tribunal then made a partial award in July 1992, rejecting the respondent’s jurisdictional objection.

In March 1993, the respondent filed a complaint in relation to the same dispute in the Shanghai Intermediate People’s Court, a move which caused “furor in both the diplomatic and business fraternities”.\textsuperscript{115} In April 1993, the Shanghai Intermediate People’s Court accepted jurisdiction, on the ground that the arbitration clause contained in the agreement was ambiguous and incapable of performance, as it did not refer to the relevant arbitral body. The claimant then challenged this acceptance of jurisdiction by the Shanghai Intermediate People’s Court. A considerable period of time passed before the Chinese courts made a ruling on the claimant’s challenge.

Meanwhile, after the decision of the Shanghai Intermediate People’s Court in April 1993, the respondent notified SCC that it was withdrawing from the arbitral proceedings. In July 1993, the arbitral tribunal issued a final award in favour of the claimant. The claimant then started enforcement proceedings before the Shanghai Intermediate People’s Court pursuant to the New York Convention. The Shanghai Intermediate People’s Court refused to accept the case, as the jurisdiction issue was pending. As a result, China was openly accused of “failing to honour its commitments under the New York Convention”.\textsuperscript{116}

Finally in 1995, after a lapse of around two years, the Shanghai Intermediate Court ruled to reject the respondent’s application and the Shanghai High Court ruled to uphold the lower court’s decision in July 1995. The claimant then resumed its application to enforce the arbitral award to the Shanghai No. 2 Intermediate People’s Court\textsuperscript{117} in February 1996. In March 1996, the Shanghai No.2 Intermediate

\textsuperscript{115} Ibid. at 169.

\textsuperscript{116} Ibid. at 170.

\textsuperscript{117} In late 1995, the Shanghai Intermediate People’s Court was divided into two courts, the Shanghai No.1 Intermediate People’s Court, and the Shanghai No.2 Intermediate People’s Court. This was in response to the ever-increasing caseload of the courts.
People’s Court finally ruled to recognize and enforce the arbitral award. However, following registration of the award, the claimant was unable to obtain satisfaction, as the respondent had successfully filed for bankruptcy.

There are various criticisms of the way the Chinese courts handled the Renpower case. First, it has been remarked that, “obviously the arbitration clause contained in the contract at issue was a valid arbitration agreement and SFAIC’s [the respondent’s] commencement of judicial proceedings before the court was nothing but a dilatory tactic to interrupt the arbitration proceedings.” As the arbitration agreement was valid, the Shanghai Intermediate People’s Court erred in (initially) accepting the respondent’s application for commencing court proceedings in relation to the dispute which was already pending before SCC. It has been remarked that the Court made a mistake by applying the wrong law in determining the validity of the arbitration agreement.

“[T]he Court made its second mistake by erroneously applying Chinese law to interpret the validity of the arbitration agreement contained in the contract. While the parties agreed that the place of arbitration should be Stockholm, Sweden, and failed to specify the law governing the arbitration agreement, normally the lex arbitri comes into play. According to Swedish law, an arbitration agreement without mentioning an arbitration institution is absolutely valid and capable of operation.”

This was a breach of China’s obligations under the New York Convention. Pursuant to Art II(3) of the New York Convention, the court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement to arbitrate, shall, at the request of one of the parties, refer the matter for arbitration.

Second, the Shanghai Intermediate People’s Court unduly delayed the enforcement proceedings by refusing to accept the enforcement

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case. This must surely be an anomalous situation even if the court were justified in refusing to enforce the award. It is also not clear which ground of Art V of the New York Convention could justify the court's refusal to enforce the arbitral award. Presumably, the court might have refused to enforce the award under Art V(I)(a) of the New York Convention on the (erroneous) basis that the arbitration agreement was not valid.

The second Chinese case is known simply as the 1995 Case,\(^{120}\) which also concerned the validity of an arbitration agreement. The parties (one Chinese and the other Swiss) entered into a contract which contained the following arbitration clause: "any disputes arising from or in connection with the present contract shall be finally settled in accordance with the ICC Rules of Conciliation and Arbitration. The place of arbitration shall be London". The Haikou Intermediate People's Court held that the arbitration clause was invalid, as the ICC Rules were not necessarily solely utilized by the ICC International Court of Arbitration and therefore, the parties failed to nominate an arbitration body to administer the arbitration. The Haikou Intermediate People's Court then held that the arbitration clause was ambiguous, and under Chinese law (as discussed above), such an arbitration clause shall be invalid.

The Haikou Intermediate People's Court was unjustified in concluding that the arbitration clause did not provide (with a certain degree of certainty) that the ICC International Court of Arbitration was the arbitration body chosen by the parties to administer the arbitration. By referring to the ICC Rules, "it is self evident that the ICC International Court of Arbitration will definitely set an arbitration case under the ICC Rules in motion unless the parties have indicated another arbitration body to handle the case".\(^{121}\) This again reflects a possible lack of judicial knowledge and expertise with regard to the pro-arbitration principle in international

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\(^{120}\) Unreported. This case was discussed in op cit n31, Wang Sheng Chang, "Enforcement of Foreign Arbitral Awards in the People's Republic of China" at 484 – 485. The name of this case was not mentioned.

arbitration, and/or a lingering suspicion of the arbitral process on the part of the Chinese courts. As discussed, these factors will contribute to deviation from the generally accepted norms of the enforcement of international arbitral awards, leading to unjustified non-enforcement of international arbitral awards. Indeed, the discussion above demonstrates that these factors have led to such a problem.

H. Attitude of Local Protectionism in the Courts

Local protectionism is a major problem in the enforcement of international arbitral awards in Asia, especially China. It has been described as being “among the most serious stumbling blocks to China’s proper implementation of the New York Convention”.\textsuperscript{122} This problem has also been noted by another leading Chinese commentator.

"Local protectionism is a common problem the courts of most countries must face in the enforcement proceedings of foreign arbitral awards. It also exists. At one time, local protectionism constituted a serious impediment to the enforcement of arbitral awards and caused some enforcement proceedings of foreign awards to be unduly delayed. So-called nationalist or regionalist sentiment still lurks in some regional courts which sympathize with the national or local entities that most often appear before them, denying enforcement."\textsuperscript{123}

In a survey of the enforcement of arbitration awards in China, Professor Randall Peerenboom (who is a Professor of Chinese law at UCLA Law School), provided statistical evidence based on direct interviews with lawyers involved in some 72 enforcement cases between 1995 – 1998 (“the Peerenboom Report”). Overall, 49% of foreign and CIETAC awards are enforced, with the enforcement rate for foreign awards slightly higher at 52%, compared to 47% for


\textsuperscript{123} Op. cit n111, Li Hu at 178.
CIETAC cases. Enforcement applicants were able to recover 100% of the award in 34% of the cases, 75 – 99% in 34% of the cases, 50 – 74% in 14% of the cases, and below 50% in 17% of the cases. However, it must be pointed out that in almost half of the 37 cases where there was no enforcement, the court was unable to enforce the award simply because the respondent had no assets, and “very few jurisdictions can do much in the way of enforcement on a party without assets to seize”\textsuperscript{124} Peerenboom also provided statistical evidence that suggests that the likelihood of enforcement is higher in the larger commercial cities such as Shanghai, Beijing, and Guangzhou, whilst less likely in smaller cities.\textsuperscript{125}

The Peerenboom Report notes that local protectionism is cited as a significant impediment to enforcement, with local courts often being pressured from government officials to deny enforcement or to prolong the proceedings.\textsuperscript{126} It has also been noted that “most commentators consider that the main root of the problem [i.e. refusal of enforcement in China] lies with local protectionism”.\textsuperscript{127}

Signs of local protectionism were evidenced by the Intermediate People’s Court in the case of Hong Kong Cereal, briefly discussed in Section A above. After resumption of the case in April 2000 following the coming into force of the Arrangement Concerning Mutual Enforcement of Arbitral Awards between the Mainland and the Hong Kong Special Administrative Region (“the Arrangement”), and a Supreme People’s Court’s issuance of a Judicial Interpretation which gave the force of law to the Arrangement and provided the legal structure for its implementation, the party seeking enforcement submitted to the Court a Supplemental Application for Enforcement, while the party resisting enforcement responded by claiming that the application should be refused. Hefei Intermediate People’s Court

\textsuperscript{124} Op cit n122 Tao Jingzhou, “Arbitration in China” at 50.
\textsuperscript{125} Op cit n7, Tao Jingzhou, Arbitration Law and Practice in China at 171.
\textsuperscript{126} Op cit n7, Tao Jingzhou, Arbitration Law and Practice in China at 171.
\textsuperscript{127} Freshfields Bruckhaus Deringer, “Resolving Disputes in China through Arbitration”, April 2006 at 40.
decided to refuse enforcement of the award, one of the reasons being that enforcement of the award would cause damage to the legal interests of Anhui, disrupt the social economic order and be contrary to the social public interest of the Mainland. Being contrary to “social public interest” was one of the grounds by which enforcement could be refused under the Arrangement.

Commentary on the Anhui Cereal case had noted that the Hefei Intermediate People’s Court did not “explain the standard and extent of the social public interest concept and did not even analyse how the arbitral award was in breach of social public interest”. Accordingly, the Anhui Cereal case is “open to serious criticism on the ground of local protectionism”. Furthermore, while the term “social public interest” is used in the Arrangement as a possible ground to refuse enforcement instead of the term “public policy” under the New York Convention, it has been noted that the term “social and public interests” is regarded as equivalent to “public policy” in the New York Convention. Given the narrow scope given to the “public policy” ground by the Supreme People’s Court (discussed in Section E above), there is even less justification for the Hefei Intermediate People’s Court to refuse enforcement on the “social public interest” ground.

It must be noted that the Supreme People’s Court rectified the situation by rightly holding that fraud had led to the conclusion of the arbitration agreement, and the agreement was thereby void, and refusal accordingly ordered. However, it must also be recognized that, if the Supreme People’s Court was minded to enforce the award in this case, undue delay to enforcement would have been caused by the attitude of the lower court.

129 Ibid.
130 Op. cit. n102, Gao Xiaoli, “Public Policy and Enforcement” at 22. However, it must be noted that this comment on the ground “social and public interests [of China]” was in the context of a discussion of Article 260 of the Civil Procedure Law regarding the enforcement of foreign-related awards rendered within China, and not the Arrangement itself, although the terms used in Article 260 of the Civil Procedure Law and the Arrangement are very similar.
IV. CONCLUSION

While the discussion above focuses on the problems faced by parties seeking enforcement of international arbitral awards in Asia and the causes of such problems, one must not lose sight of the fact that arbitral awards in Asia are successfully enforced more often than not. Asian countries are also actively seeking to eliminate the problems discussed above, so that the courts will apply internationally accepted principles in enforcement proceedings. As an example, it had been commented that, while Indonesia still experiences problems despite the promulgation of the 1999 Indonesian Arbitration Law, this new Arbitration Law “is an attempt... to improve the situation with respect to arbitration and to encourage disputes to be settled in that way, in order to reduce the ability of the courts to interfere in due legal process [and] for the most part, with notable exceptions... the courts are trying to do this.”

Furthermore, the great majority of awards are accepted and complied with by the parties without the need to start an enforcement procedure. This can partially be attributed to the New York Convention, as noted in the following passage.

“[T]his voluntary compliance with arbitral awards without the need of enforcement is partly due to the preventive effect of the New York Convention itself; Knowing that enforcement can be obtained under the New York Convention, a losing party may often choose voluntary fulfillment of the award instead of the work, time and money that would be required to challenge an enforcement procedure before the courts.”


However, there still exist cases of non-enforcement, arising mainly as a result of the deviations from the generally accepted norms in a sound legal framework governing enforcement proceedings discussed above.\textsuperscript{133} It is hoped that the discussion of the generally accepted principles in enforcement proceedings and the identification of the factors hindering the application of such principles in this paper will contribute to the ongoing dialogue on the improvement of enforcement efficacy in Asia.

\textsuperscript{133} As discussed in Section II of this Paper.