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Message from the Chair

Andre R. Jaglom

As I sit in New York in early March writing this message, the news is filled with reports of violence and turmoil in Libya and protests in Bahrain following the fall of governments in both Tunisia and Egypt. One result of the uncertainty associated with this turmoil is the rapid increase in oil prices, which threatens the fragile economic recovery.

The recent earthquake in New Zealand has caused billions of dollars in damages less than six months after NYSBA International held our successful Sydney Seasonal Meeting in the region.

And today's *New York Times* reports on the lessons U.S. cities are learning from the implementation of bus rapid transit in places like Bogota, Mexico City, Jakarta, Sao Paolo and Beijing to reduce commuting time, costs and pollution while providing businesses with access to a broader labor pool.

All of these stories highlight the interconnectedness of our world and demonstrate the importance of the connections formed through NYSBA International to shrink the planet further and enable us, as lawyers, to help our clients navigate international regulatory and cultural shoals so that they can thrive in the global economy.

It will be my honor to assume the position of Chair of the International Section on June 1 and attempt to follow in the footsteps of the leaders who have brought the Section to its current position of success since its founding nearly 25 years ago. I am particularly grateful to our current Chair, Carl-Olof Bouveng, who graciously agreed to take office unexpectedly, months earlier than planned.

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SWITZERLAND

Case Law Developments

Until recently, it was not clear under Swiss case law whether the granting of a stay pending the resolution of annulment proceedings in the foreign country of origin of an arbitral award would prevent the recognition and enforcement of that award in Switzerland. In 1984, the Swiss Federal Tribunal ("SFT") ruled that this was so, and that the arbitral award was consequently not binding.[1] In the following years, however, the SFT has modified this rule on a case-by-case basis.

In a decision published in early 2009, the SFT clearly confirmed that a general *ex lege* stay will not prevent the recognition and enforcement of an award in Switzerland according to the New York Convention.[2] Rather, an express court decision granting such a stay is necessary to prevent enforcement of the award until the end of the annulment proceedings in the concerned foreign country.

In July 2010, the SFT reaffirmed the basic principles relating to enforcement of international arbitral awards under the New York Convention when a violation of the Swiss public order is alleged by the appealing party challenging said enforcement.[3] The claimant alleged in that case, *inter alia*, that an arbitral award rendered in the U.S. should not be confirmed or enforced in Switzerland because both the sole arbitrator and the attorney for the respondent had in the past practiced before the same United States Court of Appeals, and the daughter of the arbitrator had worked as a trainee with the same law firm as one of the respondent's attorneys. The SFT denied the claimant's challenge on the ground that a party must challenge an arbitrator as soon as it learns of a reason to do so. In other words, it is unacceptable for a party to keep this argument in reserve, for use only if and when an unfavorable award is issued against it. Therefore, as claimant's attorney in the arbitration proceedings had been informed during the proceedings about all relevant facts concerning prior contacts between the daughter of the arbitrator and the attorney for defendant and had not considered them as a ground for challenging the arbitrator at that time, claimant could no longer use this ground in good faith against recognition and enforcement of the award. In addition, according to the SFT, the fact that the arbitrator and the attorney for defendant had practiced before the same United States court was obviously not a sufficient ground for challenging the impartiality of the arbitrator.

It was not clear until recently whether interim measures (as opposed to interim *awards* related to jurisdiction or to the appointment of the arbitral tribunal) ordered by arbitral tribunals in Switzerland could be immediately challenged before the SFT. In April 2010, however, the SFT clearly excluded the possibility of bringing such immediate challenges.[4] The SFT reasoned that interim measures, including measures ordering the provisional performance of an agreement the termination of which is disputed, are not tantamount to partial awards, even when the arbitral tribunal would designate its order as such. As a result, such interim measures may not be challenged before the SFT. This important and clarifying decision, which also underscores the SFT's policy of not interfering with pending arbitration proceedings, has been very well received by the Swiss legal community.

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Endnotes

1. Decision of the SFT dated March 14, 1984, published in *Arrêts du Tribunal Fédéral* ("ATF") 110 Ib 191.
2. Decision of the SFT No. 4A_403/2008, dated December 9, 2008, published in ATF 135 III 136.
3. Decision of the SFT No. 4A_233/2010, dated July 28, 2010.
4. Decision of the SFT No. 4A_582/2009, dated April 13, 2010, published in ATF 136 III 200.

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TAIWAN

Taiwan is not a signatory party to the New York Convention. Widely accepted and ratified as the New York Convention may be, Taiwan is not able to be a party to that New York Convention due to its special international status. In order to solve all the possible problems that might arise from its peculiar situation, Taiwanese legislators try to follow the principles of the New York Convention to the extent possible. However, although Taiwan's legal provisions are similar to the New York Convention, the recognition and enforcement of foreign arbitral awards in Taiwan still has some unique features.

Under Taiwanese law, an arbitral award can be regarded as a foreign award if: (1) it is made outside of the territory of the Republic of China; or (2) it is made within the territory of the Republic of China, Taiwan, in accordance with foreign law.

The grounds for refusal of recognition or enforcement of a foreign arbitral award are provided in Articles 49 and 50 of Arbitration Act of the Republic of China (hereinafter referred to as the "Arbitration Act"). The Arbitration Act, formally named "the Commercial Arbitration Act of the Republic of China," was revised and came into force on December 24, 1998. The latest amendment to the Arbitration Act was made on December 30, 2009.

As stipulated respectively in Articles 49 and 50 of the Arbitration Act, there exist two different categories of grounds for refusing to recognize and enforce a foreign arbitral award.

A. Article 49 of the Arbitration Act

Article 49 of Arbitration Act provides that:

1. The court shall issue a dismissal with respect to any application submitted by a party for recognition of a foreign arbitral award, if such award contains one of the following elements:
   i. the recognition or enforcement of the award would be contrary to the public policy of the Republic of China, Taiwan; or
   ii. the subject matter of the dispute is not capable of settlement by arbitration under the laws of the Republic of China, Taiwan.
2. The court may issue a dismissal order with respect to an application for recognition of a foreign arbitral award if the court of the country where the arbitral award is made or whose laws govern the arbitral award does not recognize or enforce arbitral awards of the Republic of China.

Under Article 49 of the Arbitration Act, the courts have the power to dismiss an application for recognition of a foreign arbitral award even in absence of any request from the opposite party.

It is noteworthy that the legislators used the word "may," instead of "shall," in Article 49, Para. 2 of the Arbitration Act. This language vests the court with the discretionary power to grant or refuse recognition to a foreign arbitral award, even when the court of the country where the award was made or whose laws govern the award refuses to recognize or enforce arbitral awards made in the Republic of China, Taiwan. The courts have historically exercised this discretion in favor of recognizing foreign awards. In *All American Cotton Co., Ltd. v. Jian-Rong Textile Co., Ltd.*, 75-Tai-Kang-Tze-No.335, dated August 7, 1986, the Supreme Court ruled as follows:

> Article 32 (2) of the Commercial Arbitration Act (the former article of the current Article 49 (2) of Arbitration Act) provides: the court may refuse the enforcement of an arbitral award if the court of the country where the arbitral award is made refuses to recognize or enforce the arbitral awards made in the Republic of China. However, this principle of reciprocity shall not be interpreted as that this Court can recognize a foreign country's arbitral award only after such country where the arbitration took place has recognized the ROC's arbitral awards first. Otherwise, it would not only undermine the spirit of international courtesy but also constitute an impediment to the enhancement of international cooperation in the administration of justice. This view is clearly demonstrated by the Article cited above, which stipulates that the court of our country "may," rather than "shall," refuse the recognition of an arbitral award.

In a recent amendment, Article 49, Para. 2 of the Arbitration Act was modified to serve as a safeguard clause for the purpose of persuading other members of the international community to recognize and enforce Taiwanese arbitral awards. Article 49 (2) of the Arbitration Act (as amended) provides that: "[t]he court may issue a dismissal with respect to an application for recognition of a foreign arbitral award if the country where the arbitral award is made or whose laws govern the arbitral award does not recognize arbitral awards of the Republic of Taiwan."

This safeguard clause allows for the application of the principle of reciprocity, but also enables the courts of Taiwan to determine the enforcement of foreign arbitral awards after taking into consideration all relevant factors as well as the relevant background. This unique provision empowers the Court to recognize foreign awards without being strictly bound by the principle of reciprocity.

By definition, a strict application of the principle of reciprocity means all awards rendered in countries which refuse to recognize Taiwanese arbitral awards in turn will not be recognized by Taiwanese courts, while foreign awards rendered in countries that recognize Taiwanese arbitral awards will be recognized and enforced by Taiwanese courts. However, it is not entirely predictable whether Taiwanese courts will refuse to recognize an arbitral award rendered in countries that have refused to recognize Taiwanese arbitral awards, or in countries that do not have any precedent of recognizing Taiwanese arbitral awards. In other words, Taiwanese courts have the discretion to decide whether or not to recognize and enforce foreign arbitral awards rendered in countries that do not have any precedent recognizing Taiwanese arbitral awards on a case-by-case basis. To date, Taiwanese precedents indicate that arbitral awards made in 10 countries and 1 special administration region, namely the United States, Great Britain, Switzerland, Finland, France, Russia, South Africa, Vietnam, Japan, Korea and Hong Kong, will be recognized by Taiwan.

B. Article 50 of the Arbitration Act

Article 50 of the Arbitration Act is almost identical to Article V of the New York Convention and Article 36 (1) (a) of the UNCITRAL Model Law, and stipulates as follows:

If a party applies to the court for recognition of a foreign arbitral award which concerns any of the following circumstances, the opposite party may request the court

to dismiss the application within twenty days from the date of receipt of the notice of the application:

a. the arbitration agreement is invalid as a result of the incapacity of a party according to the applicable laws;

b. the arbitration agreement is null and void according to the law chosen to govern the said agreement or, in the absence of choice of law, the law of the country where the arbitral award was made;

c. a party is not given proper notice either of the appointment of an arbitrator or of any other matter required in the arbitral proceedings, or any other situations that give rise to lack of due process;

d. the arbitral award is not relevant to the subject matter of the dispute covered by the arbitral agreement or exceeds the scope of the arbitration agreement, unless the offending portion can be severed from and that will not affect the remainder of the arbitral award;

e. the composition of the arbitral tribunal or the arbitration procedure contravenes the arbitration agreement or, in the absence of an arbitration agreement, the law of the place of the arbitration; or

f. the arbitral award is not yet binding upon the parties or has been suspended or revoked by a competent court.

Article 50 of the Arbitration Act, *reprinted in* 1 CAA ARB. J. 34 (2002).

Thus, under Article 50 of the Arbitration Act, the court is under an obligation to consider whether to dismiss an application if, and only if, the opposite party has so requested based upon various conditions set forth in Article 50.

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UKRAINE

Statutory Developments

When ratifying the New York Convention, Ukraine made a reservation stating that "with regard to awards made in the territory of non-contracting States, it will apply the Convention only to the extent to which those States grant reciprocal treatment." The same approach towards reciprocity was fixed in several Ukrainian national acts, in particular in the Civil Procedural Code of Ukraine ("Code").

Articles 390-398 of the Code govern the procedure for the recognition and enforcement of foreign court judgments. Notwithstanding the fact that these articles concern foreign court judgments, as opposed to foreign arbitral awards, Article 81 of the Law of Ukraine "On Private International Law" No. 2709-IV, dated June 23, 2005, may be interpreted to mean that the words "foreign court judgments" include foreign arbitral awards and hence that these articles of the Code apply to the recognition and enforcement of foreign arbitral awards as well.[1]

Ukrainian law has not changed much in the last year with regard to the enforcement of foreign arbitral awards. However, there has been one significant change. Law No. 1837-VI, dated January 21, 2010, amended the Code such that, when recognition and enforcement of a foreign arbitration award is sought, reciprocity is presumed unless the contrary is proven. Thus, to avoid recognition and enforcement, the respondent must now demonstrate that courts in the state which is the seat of the arbitration do not recognize and enforce arbitral awards issued by the International Commercial Arbitration Court of Ukraine at the Chamber of Commerce of Ukraine and/or judgments of Ukrainian national courts. The impact of this amendment remains to be seen.

Case Law Developments

A. ICC Arbitration Award Against Companies Based in Ukraine and Cyprus Recognized by District Court (*Hefko Minerals and Metals Shipping AG v. Pivdenna Factoring Company Ltd.*, Case No. 2k-1/09)

A Swiss company applied to the Zavodskyy District Court of Zaporizhzhya for recognition and enforcement of an arbitration award issued by the International Court of Arbitration of the International Chamber of Commerce ("ICC"). The ICC awarded two co-claimants $426,625.36 U.S. dollars in damages, arbitration costs of $3,000 and expenses amounting to 47,617.20 in Swiss Francs against two corporate respondents registered in Ukraine and Cyprus, respectively. The respondents were held to be jointly and severally liable for the above amounts. The court found that the arbitration award could be recognized on the territory of Ukraine and directed that the awarded amounts must be recalculated in Ukrainian currency as required by the Code.

B. Defenses of Non-Arbitrability and Public Policy Rejected by Appellate Court (*StalUkrSnab Ltd. v. Promeksim Ltd.*, Case No. 22ц-2125)

A trial court granted the claimant permission to enforce an arbitration award issued by the International Commercial Arbitration Court at the Russian Federation