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PRESIDENT'S MESSAGE

Panel of Arbitrators

I have always maintained that our Institute's mission in promoting arbitration in Singapore is not restricted to the education of arbitration and the training and assessment of arbitrators. The Institute has a role to play in facilitating and assisting parties who require services in the appointment of an arbitrator for their dispute. Usually the Institute carries out this role when it receives a specific request from Parties for the appointment of an arbitrator or where pursuant to an arbitration clause in their Agreement, the Institute as the appointing body is requested to make a nomination.



For our Institute to carry out this role effectively, it is paramount that we maintain a Panel of Arbitrators. This will allow the parties to reach in advance our members who are on the Panel and the areas of their expertise.

Towards this end, we recently invited members to apply for appointment on the Panel. The response received was very good. I am pleased to announce that 107 applicants have been approved by the Institute to be placed on our Panel of Arbitrators.

The successful applicants have been notified by the Institute and a list of the Panel Members appears at page 16 of this Newsletter and also in our Institute's Website.

My congratulations to all the successful applicants. The criteria for the selection of applicants are also set out in our Website. I must emphasize that this List is not static or exhaustive and that it will be updated periodically when new applications are approved.

The Institute requires that all of its appointed arbitrators conduct the arbitration proceedings in accordance with the Institute's Arbitration Rules (unless the Agreement provides otherwise) and that he will adhere to and abide with the Institute's Code of Conduct when conducting the arbitration proceedings. Both the Code of Conduct and the Arbitration Rules are set out in the Institute's Website.

I am confident that the establishment of the Panel will enhance the Institute's reputation and prestige in Singapore and in the Region as a Premier Arbitral Institute. More importantly, the Panel will add value to being a member of the Institute and at the same time provide a service to the community at large.

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Pool of Tutors

As mentioned above, the Institute's mission in promoting arbitration is also through education and the training and grading of arbitrators. Our Institute has been active in this role. For instance, last year we organised more than 15 seminars and workshops on arbitration and arbitration related subjects. Further, we also organised and conducted arbitration training courses for members and non members at the Introduction, Entry and Fellowship levels for entry to membership of our Institute as well as for the upgrading to Fellowship. We also contributed to the teaching faculty of the Graduate Certificate in International Arbitration Course conducted by the Law Faculty of the National University of Singapore.

This role of education and training should be shared by all of our members who are in a position to contribute. It should involve as many of our members as possible. Accordingly, we recently invited Fellows of the Institute to join the pool of tutors that the Institute can call upon to assist in its various education and training courses. So far only 18 of our Fellows have responded to this invitation. This is too few a number and I would urge and encourage more to apply. Application forms can also be found in our Website.

Fast Track Fellowship Assessment Workshop (18 & 19 Feb 2006)

The Institute in conjunction with the Chartered Institute of Arbitrators successfully concluded another Fast Track to Fellowship Assessment Workshop on 18 & 19 February 2006 at the Hilton Hotel. A total of 28 participants attended the Workshop. We were greatly encouraged by the high rate of response. We were indeed honoured and privileged to have as one of our assessors for the Workshop, the President of the Chartered Institute of Arbitrators, Mr. Colin Wall,

On behalf of the Institute, I would like to express our sincere appreciation to the Course Director, Mr Neil Kaplan, QC and the following assessors for contributing to the success of the Workshop.

- Mr Colin Wall
- Mr Tony Houghton
- Ms Louise Barrington
- Mr Rowan Planterose
- Ms Karen Mills
- The Rt Hon Lord David Hacking
- Mr Christopher To
- Mr Richard Tan

Website Revamp

With the new initiatives, it will be necessary to revamp the website. The new items to be introduced in the menu of the revamped website will include:

- List of Panel of Arbitrators with search facility and brief background of Panel Members.
- SI Arb's Scale of Fees
- Arbitration Groups
- Training & Development
- Partners

In addition, the Home Page will be improved to include a welcome message and latest announcements.

Challenges

Arbitration as an alternative dispute resolution mechanism will face increasing challenges this year with the popularity of mediation and the introduction of adjudication for the construction industry under the Building and Construction Industry Security of Payment Act as alternatives to arbitration.

It is therefore important for the Institute to respond to these challenges if we are to remain viable and relevant in this ever changing environment. Towards this end, I would urge all members to be more proactive by joining the various sub committees of the Institute and in taking an active role in the Institute's various programmes and activities.

Yours sincerely,

Raymond Chan
President

• UPCOMING EVENTS •

- Talk on Arbitration in Indonesia by Ms Karen Mills on **26 April 2006**
- Signing of MOU with the Singapore Manufacturers' Federation on **23 May 2006**
- Introduction to Arbitration Course organised jointly by SI Arb and the Singapore Manufacturers' Federation on **23 May 2006**
- Annual General Meeting on **26 May 2006**
- Talk by Mr Neil Kaplan, QC and Mr Robert Gaitskell on **23 June 2006**

“CONTRASTING THE INTERNATIONAL RECOGNITION AND ENFORCEMENT OF COURT JUDGMENTS WITH AWARDS”

By Colin Y.C. Ong¹

I GENERAL INTRODUCTION AND ADVANTAGES OF ARBITRATION

Arbitration is an ever-increasing form of dispute resolution process whose popularity is increasing amongst the business community both domestically and internationally in many different countries². The main advantages of arbitration over litigation have been well canvassed over the years and I do not propose to discuss this area in too much depth, save to point out some commonly cited reasons³.

Historically, Arbitration was seen as advantageous by businessmen who had hoped to continue to do business with one another and preferred to have their differences resolved by knowledgeable peers within the same industry. Parties are able to appoint their own arbitrators and can choose them from persons familiar with the trade and who have significant experience and expertise in the disputed subject matter. Parties from different countries are often able to agree on the choice of a neutral forum to settle international disputes and get around the notions of litigation in the other party's back yard and any "perceived chauvinistic bias"⁴ by the courts of the other country.

Businessmen generally also prefer the informal surroundings and the flexibility of the arbitral process including the limited ability of the parties to arrange for the most appropriate procedures given to their disputes⁵. In contrast to the litigation process, which is a public dispute settlement mechanism, arbitral proceedings are held in private and the final arbitral award is confidential and cannot be published without the consent of the parties. This reduces the risk of any damaging publicity arising out of the findings of the proceedings and is an important consideration by well known parties who may not wish to let third parties know of any of the disputes that they are facing.

In general, the judges at most national courts consist of experienced lawyers who may have expertise in both the law and in fact finding. However, in situations where the subject matter of the dispute is of a highly technical or scientific nature, it is the general belief that national courts may not be the most appropriate means of dispute settlement but that it may be more appropriate to have the dispute heard before a arbitrator who possesses the relevant technical and scientific qualifications to understand and decide upon the controversy.

Most importantly, the parties are much more certain to be able to enforce arbitral awards, in comparison with court judgments, in both the country in which the arbitral decision emanated as well as other countries. This last key advantage of arbitration over the litigation process forms the main topic of our session today and I propose to expound on it. As an example, one can take the Statistics of the ICC International Court of Arbitration. If one looks at the statistics provided in the web site under "Facts and Figures on ICC Arbitration in 2004", it can be noted that there were 561 Requests for Arbitration filed with the ICC Court in 2004. Those 561 requests concerned 1,682 parties from 116 different countries and independent territories around the World⁶.

2 The New York Convention 1958

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention") ensures a uniform and more effective means for enforcing international arbitral awards than the enforcement of court judgments in many ways⁷. Courts of a country or state that have ratified the New York Convention are bound to recognise and enforce validly obtained arbitral awards, subject only to very limited exceptions⁸. As a result, it is easier to enforce arbitral awards in

¹This Article is a revised text of a paper that was first presented at the ADR in Asia Conference in Hong Kong organised by the HKIAC on the 15th September 2005. Chartered Arbitrator and Barrister of Essex Court Chambers and 3 Verulam Buildings, London; Adjunct Associate Professor, National University of Singapore; Visiting Fellow, Queen Mary, University of London; Managing Partner, Dr Colin Ong Legal Services, Brunei Darussalam; FCIArb; FAMINZ (Arb); FMIArb; FSIArb.

²See, Knull, & Rubins, *Betting the Farm on International Arbitration: Is it Time to Offer an Appeal Option?*, (2000) 11 Am. Rev. Int'l Arb. 531 at 536 wherein they state "the last two decades have seen extraordinary expansion of the use of arbitration to resolve commercial disputes around the world.....there is little doubt that the globalisation process and the concomitant intensification of cross-border commercial transactions has led to an unprecedented expansion of international commercial arbitration"

³For further reading on why parties agree to arbitrate, see Russell on Arbitration, (22nd Edition, 2002 Sweet & Maxwell); Redfern & Hunter, *Law & Practice of International Commercial Arbitration* (4th Edition 2004, Sweet & Maxwell)

⁴Martin Hunter, *International Commercial Dispute Resolution: The Challenge of the Twenty-first Century*, (2000) 16 Arb. Int'l 378 at 382.

⁵Robert von Mehren, *An International Arbitrator's Point of View*, (1999) 10 Am. Rev. Int'l Arb. 203 at 205.

⁶http://www.iccwbo.org/court/english/right_topics/stat_2004.asp For general reading, see Sanders, *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (1999, Aspen Publishers). The eminent author has observed that there has been a marked increase in the usage of arbitration as preferred dispute resolution mechanism since the Second World War.

⁷United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958, 330 U.N.T.S. 38. For general reading, see Albert Jan Van Den Berg, *The New York Convention of 1958* (1986, Kluwer). As of January 2005, the New York Convention is applicable in more than 130 countries.

⁸See; Catherine Kessedjian, *Court Decisions on Enforcement of Arbitration Agreements and Awards*, (2001) 18 J. Int'l Arb. 1

Continued on page 4

more countries than to enforce court judgments.

The New York Convention is a great leveller of the international playing field as it places standard guidelines and constraints to contracting states of the NY Convention to make it easier for enforcement of the arbitral award. The Convention also prevents the losing party from trying to stall enforcement by continuously appealing to the national appellate courts. This finality effect of arbitral awards will save time and costs to all parties from having to go through seemingly endless litigation as does happen before national courts. It is important for businessmen to be able to continue to get on with their lives and not have to spend much time arguing over decisions. As such, an award is final and binding would save time and provide certainty to parties to know how much to budget for the dispute resolution process.

3 Enforcement of Judgments require Bilateral Treaties

Enforcement of court judgments outside the jurisdiction of that state can be a very onerous and sometimes impossible task. Although a "final and binding" court judgment is always enforceable in the territory of the court, which made the judgment, the judgment is often not recognised in a foreign country. Unless the country or state court where the judgment was made has a bilateral treaty or multilateral treaty with another country in which the judgment is to be enforced, that judgment will have no effect whatsoever in the other country.

While, there are a few multilateral treaties on the Recognition and Enforcement of Foreign Judgments in place in, this is not always the case. The European Union countries have entered into and ratified the Brussels and Lugano Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters⁹, many other industrialised countries, including China, Japan and United States, are not parties to any international conventions on the recognition and enforcement of court judgments of other countries. While the Brussels and Lugano Conventions provide European Union countries with a mechanism for recognising and enforcing each others' court judgments, within the scope and limits of the Conventions, these Conventions are still not as effective as the New York Convention for arbitral awards in both the latter's simplicity and effective coverage of more than 130 countries worldwide.

⁹Brussels Convention, 27th September, 1968, as amended, O.J. (1990) C 189/2, and Lugano Convention, 16th September 16, 1988, O.J. (1988) L319/9.

¹⁰Detailed discussions on the difficulties and problems associated with the recognition and enforcement of court judgments can be found in Andreas Lowenfeld, *International Litigation and Arbitration* (1993 American case book series) at 368-457

¹¹Article III of the New York Convention clearly states "Each Contracting State shall recognise arbitral awards as binding and

So long as a Judgment Defendant is to have his assets situated in a Non-Brussels/Lugano Convention country, there is nothing that the Judgment Creditor can do about it save as to institute a new action in that country based on the court judgment obtained in the other Court.

Whilst the European Union countries may be blessed with the Brussels/Lugano Conventions, other non-EU countries do not generally enter into any recognition and enforcement treaties with other countries and it is always frustrating for successful judgment creditors to find out that they cannot enforce their paper judgments against Defendants who may keep their assets in other countries. Litigants before State courts are generally faced with having to adopt procedures of national courts and sometimes with having to deal with the lack of disclosure processes in Civil law countries or be burdened with over-discovery rules in Common law countries such as the United States. The successful party will then be faced with the procedural difficulties of having to enforce the judgment and the prospects of further appeals before the higher courts¹⁰.

4 Uniform and Universal Acceptability of the New York Convention

All of these procedural problems may however be overcome by the arbitration process, since arbitral awards, are governed by and enjoy the clear and uniform rules of the New York Convention. As such, in comparison to court judgments of national courts, arbitral awards are easily enforceable almost in every country in the world and this enforcement can be done in a straightforward and relatively inexpensive process¹¹.

5 Limited Grounds of Non-Recognition Enforcement of Arbitral Awards

A further advantage of the New York Convention is that it does not permit a court of a contracting state to review an award made in any country on its merits¹². The very limited bases in which an enforcing court can refuse to recognise and enforce an arbitral award is set out in Article V of the New York Convention itself. The limited bases against enforcement of an award mainly focus on the procedural defects in the integrity of the arbitral process itself. These are (1) The lack of a valid arbitration agreement; (2) A denial of a fair opportunity to be heard; (3) Where the arbitrator exceeded his jurisdiction and went on to decide issues that fell beyond the scope of the submissions to arbitration; (4) Where the arbitrator adopted a

enforce them in accordance with the rules of procedure of the territory when the award is relied upon."

¹²One of the key features of the Model Law is that it does not provide for any appeals of an arbitral decision. There is to be no review of the merits of an arbitral award as has been explained by the Singapore High Court of Singapore in *Tan Poh Leng Stanley v. Tang Boon Jek Jeffrey* [2001] 1 SLR 624.

procedure that was contrary to the procedures agreed to by and between the parties; and (5) where there has been an annulment of the award in the country where the award was made.

In addition under Article V(2)(a) and (b) of the New York Convention, recognition and enforcement may also be refused if "the subject matter of the difference is not capable of settlement by arbitration under the law of that country"; or if "the recognition or enforcement of the award would be contrary to the public policy of that country."

In comparison to the limited scope of refusing to recognise and enforce arbitral awards under the text of Article V of the New York Convention, there is much less restriction for national courts to hold their hands and in refusing to recognise and enforce foreign court judgments. In the absence of any specifically negotiated bilateral recognition and enforcement of judgment treaty, it would be almost impossible to see justice being done to court judgments. It is often difficult for countries to sign recognition and enforcement of judgment treaties as countries may have severe differences in laws that cannot be broached. As an interesting case example, one can look at the failed efforts to negotiate and agree such a bilateral treaty between the United Kingdom and the United States in 1976. Although both countries are Common Law countries, the two countries could not agree on the proposed "Convention on the Reciprocal Recognition and Enforcement of Judgments in Civil Matters"¹³. One of the main reasons for the failure of the treaty was the concerns from United Kingdom over the recognition and enforcement of United States judgments on antitrust matters and products liability cases¹⁴.

The negotiation of bilateral recognition and enforcement of judgment treaties will also take much political effort and goodwill from all countries and are perhaps more suited for supranational entities such as the EU, ASEAN and MERCOSUR, which need to have multilateral recognition and enforcement of judgment conventions to deal with legal situations

¹³Initialled on the 26th October 1976. Neither country ratified this proposed Convention, 16 I.L.M. 71 (1977).

¹⁴See Hay & Walker, The Proposed Recognition of Judgments Convention Between the United States and the United Kingdom, (1976) 11 Tex. Int'l L.J. 421 and North, The Draft U.K./U.S. Judgments Convention: A British Viewpoint, (1979) 1 N.W.J. Int'l & Bus. 219.

¹⁵Arbitration is a contractual and consensual dispute settlement mechanism that cannot resolve tort and quasi-contractual matters.

¹⁶Perhaps the ASEAN Protocol on Enhanced Dispute Settlement Mechanism (<http://www.aseansec.org/16754.htm>) which was signed by the ASEAN member countries in November 2004 will eventually be allowed to have gain more jurisdictional powers and eventually be allowed to evolve into some form of ASEAN Central Court, akin to the European Court of Justice. But until such time as a similar "Brussels Convention" type of multilateral recognition and enforcement of Judgments Convention is devised, this is unlikely to take place anytime soon. See generally Colin Ong, *Cross Border Litigation within ASEAN* (1997, Kluwer) at 709-728.

covering both contractual¹⁵ and non-contractual (tortuous and restitutionary) matters. One hopes that the ASEAN will eventually achieve this position but this is likely to take much more commitment, resources and time¹⁶. In the meantime, the 47-year-old New York Convention is still the best dispute settlement platform for all countries on which contracting parties can rely upon to settle their disputes and have any successful award enforced upon.

6 Sovereign Immunity and Enforceability of Arbitral Awards

A further advantage for the successful claimant in an arbitration that is present in an arbitral award but not in a court judgment is in the arena of sovereign immunity. Many national courts would have to respect the notion of sovereign immunity and will not take on jurisdiction against another sovereign state that is being made a Defendant in a suit. The rationale behind the sovereign immunity doctrine is that the judiciary does not wish to hinder or complicate the conduct of foreign relations between its country and that of the country, which is being sued.

However, this doctrine of sovereign immunity does not necessarily apply to the arbitration process and in fact in some countries such as the United Kingdom, the State Immunity Act¹⁷ specifies that there is an implicit waiver of immunity applicable whenever a state has agreed in writing to submit a dispute to arbitration¹⁸. Other nations have adopted similar provisions of law and have also deemed that arbitration clauses constitute waivers of immunity from both the assertion of jurisdiction by arbitral tribunals and also waiver for the purpose of recognition and enforcement of the arbitration award¹⁹.

An arbitral award can therefore be enforced against any party, Sovereign State or private person, in any contracting state and not just the state where the award was rendered or the state where the defendant is residing in. So long as there are assets in a contracting state, Article 1 of the New York Convention obliges that contracting state to enforce the award.

¹⁷See State Immunity Act, 1978 (Chapter 33. Section 9(1) provides "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration." Section 9(2) provides "This section has effect subject to any contrary provision in the arbitration agreement and does not apply to any arbitration agreement between States."

¹⁸See also the House of Lords decision in *J.H. Rayner Ltd. v. Department of Trade* [1989] 3 All E.R. 523. In this case the House of Lords decided that the International Tin Council ("ITC") had sovereign immunity from being sued by creditors before the English courts but that the ITC would not benefit from any immunity in the enforcement of arbitration awards.

¹⁹*Ipitrade Int'l v. Federal Republic of Nigeria*, [D.D.C. 1978] 465 F. Supp. 824 at 826. See also Delaume, *Law and Practice of Transnational Contracts* (1988) at 394-97.

7 Arbitration prevents a Rat Race for Forum selection

A litigant generally does not wish to litigate before the courts of the other party's judicial system, as there is a perceived sense of judicial chauvinism that a foreigner may not receive equal treatment in the courts of the country of his adversary. In the event that parties are forced to litigate, they may be forced to take a chance to participate in forum shopping before courts of jurisdictions in which they perceive they would hold an advantage over the other party. This rat race towards trying to invoke the jurisdiction of courts is expensive and unsettling. The arbitral process removes this fear as parties would have already mutually agreed and pre-selected the arbitration centre or forum before which they wish to resolve any future disputes.

As a result of this prior arbitration agreement, both parties can feel more trust in the system and they can be assured of having a neutral and just platform of having their disputes resolved. This in turn limits the unsuccessful party's chances of trying to derail enforcement of a final award by arguing that he was forced or coerced into a particular forum such as a national court. Although, it may remain open to an unsuccessful court litigant to argue that the court judgment was biased or was against the parties' intention of where to resolve the dispute, this same argument is not possible in an arbitration²⁰.

8 Non-Enforcement of Judgments and Awards under Public Policy Notions

One of the barriers facing court judgments is that they are generally subject to challenges and there can be non-recognition or non-enforcement of judgments through various techniques by judgment debtors. Public policy is often cited and is a grey area as there is no general universal concept of public policy notions in state courts.

Although the same problems are also commonly faced by parties who seek to enforce arbitral awards, there is at least a much more uniform and narrow construction of the public policy notion under Article V(2)(b) of the New York Convention. Article V(2)(b) of the NY Convention refers to the public policy of "that country", which is the enforcing country. The Convention is silent on the definition of "public policy" and

²⁰See Michael Strub, Jr, Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines (1990) 68 Tex. L. Rev. 1031. He has suggested, "Under article V(1)(e), a judge should determine that an award is binding if the parties themselves intended to enter a binding arbitration. If the contract specifies that the parties agree not to contest the award, a court should not have to inquire into the effect of the rendering country's law to determine whether the award is binding. By directing the inquiry to the intent of the parties, the court is enforcing the agreement as the parties expected it to be enforced when they entered into the contract. Parties will turn to arbitration more frequently if they know that awards can be enforced."

is equally silent on what standards are to be followed by the enforcing court but leaves it to the enforcing court to decide for itself if the arbitral award conflicts with its public policy²¹.

It is to be observed from judicial decisions around the world that the application of "public policy" and its standard varies depending on whether an award is challenged to be set aside on the ground that it is in conflict with the "public policy" of the country in which the award is made and where the award is sought to be enforced in another country under the New York Convention. This has in fact led to two differing concepts and standards of public policy, one being "domestic public policy" and the other being "international public policy". Although the concept of public policy appears to be of the same nature in these two classes, the application of the concept differs greatly as awards containing and affecting foreign parties outside the country of enforcement are generally considered to pose much less threat or no real threats to local courts than would awards that concern purely domestic transactions. The New Zealand Court of Appeal in *Amaltal*²² the court discussed the scope of public policy and appeared to have decided that the public policy principle should be subject to a narrow interpretation. It decided that the term "public policy" as used in various treaties New York Convention covered only "fundamental principles of law and justice in substantive as well as procedural respects". The subsequent New Zealand High Court case of *Downer-Hill Joint Venture v Government of Fiji*²³ appeared to follow and support the Amaltal position and emphasised that the required threshold "was high and mere mistake would not suffice." The Court decided that in order to set aside an award it had to be shown that the factual finding complained of was not based on any logically probative evidence and it had also to be shown that "even if such a breach of natural justice had occurred the award was contrary to public policy."

In general, enforcing courts view the concept of "international public policy" to be understood as being of a narrower application than "Domestic public policy". As summed up by an eminent author, "courts in many developed jurisdictions have taken very restrictive views of public policy. Indeed, some authorities have characterized public policy as the last refuge

²¹Similarly, Article 34(2)(b)(ii) of the Model Law includes "public policy" as ground for setting aside an award by the courts at the seat of the arbitration and as a ground for the refusal by an enforcing court to recognise and enforce an international arbitral award. As with the NY Convention, the Model Law does not define "public policy", but leaves this issue to be dealt with by the enforcing court.

²²*Amaltal Corporation Ltd v Maruha (NZ) Corporation Ltd* [2004] 2 NZLR 614.

²³*Downer-Hill Joint Venture v Government of Fiji* [2005] 1 NZLR 554.

²⁴Gary Born, *International Commercial Arbitration*, (Kluwer 2nd ed. 2001) at pages 779 - 880. See also Buchanan, *Public Policy and International Commercial Arbitration* (1988) 26 *American Business Law Journal* 511.

of those without plausible legal arguments²⁴." The English Court in Deutsche Schachtbau v. Ras Al Khaimah National Oil has held that public policy is never argued at all except when other points fail. The court stated that "It has to be shown that there is some element of illegality or that the enforcement of the award would be clearly injurious to the public good or, possibly, that enforcement would be wholly offensive to the ordinarily reasonable and fully informed member of the public on whose behalf the powers of the state are exercised²⁵."

In Parsons & Whittemore Overseas Co v. Societe Generale²⁶, the US Court of Appeals, Second Circuit, held that Article V(2)(b) of the New York Convention must be construed narrowly. It would appear that Australian courts too are careful in applying public policy to refuse to enforce arbitral awards²⁷, while a commentator has stated that German Courts may be more willing to apply the public policy weapon in refusing to enforce a foreign arbitral award²⁸ although he does conclude to say that "There are limits to the use of economic norms in determining public policy... and a violation of public policy is less likely to be found in a case with strong international elements."

9 General Conclusion

Having gone through the various heads of discussions above, one can see that there are

²⁵Deutsche Schachtbau- und Tiefbohrergesellschaft GmbH v. Ras Al Khaimah National Oil Co. [1987] 2 All E.R. 769 at 779.

²⁶Parsons & Whittemore Overseas Co v. Societe Generale de L'Industrie du Papier (508 F.2d 969 (2d Cir 1974)

²⁷See Miller, *Public Policy in International Commercial Arbitration in Australia* (1993) *Arbitration International*, Vol. 9 No. 2 at 167-196.

²⁸See Kuner, *The Public Policy Exception to the Enforcement of Foreign Arbitral Awards in the United States and West Germany Under the New York Convention*, *Journal of International Arbitration*, (1990) Vol. 7 No. 4 at pages 71 - 92.

many clear advantages present in the arbitral system that are not available in court process where enforcement is sought in a foreign country. Apart from clarity of the New York Convention and its constraints over contracting states that are asked to enforce awards, one can also see the other advantages of arbitration over litigation in areas involving sovereign immunity and certainty or where parties can resolve their disputes.

It is positive that the majority of the modern views of the arbitration community take the position that recourse to a court against enforcement of an arbitral award based on the public policy can only be considered where there has been an a manifest disregard of law or egregious error of law committed in the award²⁹.

Perhaps to conclude, one can only hope that national courts do not try to interpret Article V(2)(b) too broadly and allow unfriendly notion of public policy to creep in through the back door to destabilise the New York Convention.

Perhaps, one can only conclude against the dangers of relying too much on public policy by echoing the words of Justice Burrough in the case of Richardson v Mellish³⁰. The learned judge in the said case frowned upon against over reliance on the public policy concept and aptly stated that Public Policy "is a very unruly horse, and when once you get astride it you never know where it will carry you."

²⁹For summary of non-enforcement due to Egregious Error of Law, see, Hwang, "Do Egregious Errors Amount to a Breach of Public Policy?" (2005) Vol. 71 *Arbitration* No. 1 at 1 and see Malhotra, "The Scope of Public Policy under the Indian Arbitration and Conciliation Act 1996", (2005) Vol. 71 *Arbitration* No.1 at 36.

³⁰Richardson v Mellish (1824) 2 Bing 228 at 252.

LEGAL DEVELOPMENT AFFECTING ARBITRATION

by Dr Philip Chan Chuen Fye

Three cases are highlighted in this issue. The first case concerns an application to set aside an arbitral award under the International Arbitration Act. What is particularly interesting is the background of this case. One of the grounds used by the applicant for setting aside the award reveals that the award was being challenged because it contradicted an award issued in an earlier arbitration where the parties are the same as that of the current arbitration in which the arbitral award is being challenged. Also of interest are the comments of the learned judge as regards the options available for a party to an arbitration to deal with an issue that was already the subject matter of an award in a previous arbitration.

The next two cases are not "arbitration" cases per se, as they do not concern the use of arbitration laws. However, the decisions are featured in this issue to highlight the difficulties encountered in the enforcement of foreign arbitral awards. The second case involves the enforcement of an arbitral award against a company that is related to the losing respondent in the arbitration. The winning claimant applied for the lifting of the corporate veil so that the related company and the respondent company would be treated as one for the purpose of enforcing the arbitral award against the related company since the respondent company has been liquidated. In order to assist the claimant to decide whether to pursue such

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19 FEB 06**



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NIGHT
6 JAN 06**



FAST TRACK FELLOWSHIP ASSESSMENT WORKSHOP

18-19 FEB 06



an action, the claimant had sought for pre-action discovery, which was granted. The principles of granting such discovery were considered by the High Court.

The third case involves an Indonesian respondent company, which had a Hong Kong subsidiary company, which in turn had a Singapore subsidiary company. The winning claimant secured a garnishee order against the Hong Kong subsidiary company based on an arbitral award. In the process, it was suspected that money was transferred to the Singapore subsidiary company. The winning company was able to obtain a declaration against both the Hong Kong and the Singapore companies that the amount under suspicion is to be held on trust by the Singapore company for the Hong Kong company and a *mareva* injunction at the first instance against the Singapore subsidiary company. In the case report which was before the Court of Appeal, the declaration was set aside and the injunction was discharged. In the judgment, the Court of Appeal had to consider whether the applicant had a cause of action in making the application for the declaration and injunction.

Setting aside an arbitral award under the International Arbitration Act

PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA [2005] SGHC 197 [High Court – Judith Prakash J]

This case involves an applicant, PT Asuransi Jasa Indonesia (Persero), who is the claimant in an arbitration, the award from which is being sought to be set aside because it, *inter alia*, is inconsistent with an award of an earlier arbitration in which the applicant is the respondent. The respondent, Dexia Bank SA, in this case is also the respondent in the arbitration but was the claimant in the earlier arbitration.

This case concerns an application to set aside an arbitral award under the International Arbitration Act. Four grounds were identified and set out below. [see paragraph 20 of the HC report]

1. pursuant to Art 34(2)(b)(ii) of the UNCITRAL Model Law on International Commercial Arbitration (“the Model Law”) which is part of the International Arbitration Act (Cap 143A) (“IAA”), the award was in conflict with the public policy of Singapore;
2. pursuant to Art 34(2)(a)(iii) of the Model Law which is part of the IAA, the award deals with disputes or issues not contemplated by, or, alternatively, not falling within, the terms of the submission to arbitration and/or contains decisions on matters or issues beyond the scope of the submission to arbitration;
3. pursuant to section 24(b) of the IAA, there was a breach of natural justice when the Award was made by which the rights of the applicant have been prejudiced;
4. pursuant to Arts 34(2)(a)(ii) and 18 of the Model Law, which is part of the IAA, the applicant was not given a full opportunity to present its case and/or was otherwise unable to present its case.

The decisions of the learned judge as regards the four grounds are discussed below.

The public policy ground

It may be convenient to start by stating the laws on which the first ground is based as set out in paragraph 23 of the case report:

- “...in order to set aside the Award on the ground that it was in conflict with the public policy of Singapore, it had, as prescribed by Choo Han Teck J in *John Holland Pty Ltd v Toyo Engineering Corp* [2001] 2 SLR 262 (“*John Holland*”), to first identify the public policy and then show which part of the Award conflicted with it.
- In this respect, the applicant submitted that the public policy that was breached by the Award was that set out in s 19B of the Act. This reads:
 - (1) An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any persons claiming through or under them and may be relied on by any of the parties by way of defence, set-off or otherwise in any proceedings in any court of competent jurisdiction.
 - (2) Except as provided in Articles 33 and 34(4) of the Model Law, upon an award being made, including an award made in accordance with s 19A, the arbitral tribunal shall not vary, amend, correct, review, add or revoke the award.”

It was the applicant’s case that certain findings in the Award which the applicant termed “critical findings” were directly contrary to the findings made by the Previous Tribunal in the Previous Award and, to that extent, the critical findings were in conflict with the public policy of Singapore that findings in arbitral awards are “final and binding”. In other words, the Award had ignored the findings made by the Previous Tribunal and as such ought to be set aside. [see paragraph 21 of the case report]

The learned judge held otherwise. The learned judge held at paragraph 29 of the case report as follows:

- ...that the attack on the Award as being contrary to the Previous Award is an attack that has its foundation in a dissatisfaction with the way in which the legal principles encapsulated in s 19B of the Act seem to have been ignored, rather than an attack founded on the ground of public policy.
- Whilst I do not doubt that a matter of public policy may be expressed in a legal provision, ie, the public policy may be given legislative effect by being enacted as a law, this does not mean that every law has to be regarded as public policy so that if it can be shown that any finding in an arbitration award constitutes a breach of such law, that arbitration award would have to be set aside on the ground of public policy.
- Further, in the context of this case, whilst it is obviously not desirable to have conflicting

arbitral decisions existing on the very same dispute between the same parties, I do not see any public policy implication in such a state of affairs existing between private parties, nor has the applicant identified any such implication.

- The applicant was content to state that because the Award appeared to disregard s 19B of the Act, it was against public policy without substantiating any public policy that the section had been enacted to implement.

Indeed, the learned judge continued by issuing a warning:

- If I were to make such a holding [that is, the award should be set aside on the grounds of public policy], it would prove such a fertile basis for attacking arbitration awards as to completely negate the general rule, at least in so far as international arbitrations covered by the Act are concerned, that awards cannot be set aside by reason of mistakes of law made by the tribunal.

She then gave her perspective of the operation of s 19(B)(1) at paragraph 30 of the case report:

- From my perspective, the purpose of s 19B(1) is to make it clear and beyond dispute that each party to an international arbitration is bound by the award made by the tribunal and cannot challenge it except on the limited grounds set out in the Act and the Model Law.
- This means that even if the tribunal has made a mistake of fact or of law, there is no recourse against that decision and the parties are bound by it.
- The finality given to an award by s 19B(1) also ensures that such award would be enforceable by the successful party as, generally speaking, enforcement of judgments or awards can only be carried out when the same are final and not provisional or subject to appeal.
- The corollary to an award being final and binding on a party is that that party cannot reopen the same issue in further arbitration or court proceedings.
- The provisions of the Act also provide avenues by which parties may ensure that a binding decision rendered by one arbitral tribunal is not subsequently contradicted by another decision made by a second tribunal.

The learned judge also cited the recourse available for *res judicata* in an arbitration

- If the same issue is dealt with for a second time in further arbitration proceedings, then the second set of proceedings may be considered to be in breach of s 19B(1).
- If that is the case, then the remedy for the aggrieved party is either to challenge the jurisdiction of the second tribunal, or to obtain an injunction against the continuation of the second set of proceedings.
- If the second tribunal deals with the challenge to its jurisdiction by ruling that it has jurisdiction,

then that ruling can be challenged in court under the provisions of Art 16(3) of the Model Law.

- On the other hand, if the second tribunal rules that it has no jurisdiction because the issue in question had been finally decided by a prior arbitration between the same parties, then the aggrieved party can try to have that ruling set aside on one of the grounds set out in Art 34 of the Model Law (apart from the public policy ground) or in s 24 of the Act.

Beyond the scope of submission to arbitration

Under this heading, the learned judge in her judgment analysed the complaint of the applicant for purposes of setting aside as that the Tribunal went beyond the scope of the parties' submission to arbitration. Two issues were clearly identified by the learned judge in paragraph 35 as set out below:

- The question before me is whether in determining [its] jurisdiction, the Tribunal had the power to decide issues that had already been decided by the Previous Tribunal.
- The question that next arises is whether in determining that it had no jurisdiction, the Tribunal in fact re-decided any issue that had already been decided by the Previous Tribunal.

In the same paragraph, the learned judge held that the answer to the first issue is that the Tribunal has no power to decide issues that had already been decided by the Previous Tribunal. The learned judge explained as set out below:

- If in the course of determining its jurisdiction, the Tribunal encountered an issue that had already been decided by the Previous Tribunal, it had no authority to determine that issue afresh, but, because the parties themselves were bound by the decision of the Previous Tribunal on that issue, the Tribunal had also to consider itself bound by that decision and proceed on such basis

There were two items of complaint, which required the learned judge's decision. On the first issue, the learned judge held at paragraph 38 of the case report that the Tribunal was not entitled to come to a conclusion that was contrary to the considered opinion of the Previous Tribunal. However this does not mean that the Award should be set aside. She held at paragraph 42 of the case report:

- According to Art 34(2)(a)(iii) of the Model Law, if an award contains decisions on matters beyond the scope of the submission to arbitration, if the decisions on matters submitted on arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside.

Accordingly, she held that only the part that went beyond the scope of the submission to arbitration would be set aside leaving the relevant issue intact, that is, the finding of estoppel.

On the second issue, the learned judge held at paragraph 41 of the case report that there was no contradiction as between the Tribunal's finding and the Previous Tribunal's finding. Although she may be prepared to agree that the Tribunal may be wrong in its finding, such a wrong finding would not be a ground for setting aside the Award. She then warned that this application is not an appeal and, pursuant to the provisions of the Act, errors of law or fact made by the Tribunal do not entitle the court to set aside the Award.

Natural justice and lack of an opportunity to present case

The third and fourth grounds were considered under one heading by the learned judge. It was the applicant's case that "the rule of natural justice, *"audi alteram partem"*, which provides that any party in any action must be given a right to be heard and to present its case fully, had been breached." [see paragraph 44 of the case report] and that, "...the Tribunal never called for oral submissions to be made by the parties' respective counsel. Instead, the Tribunal went ahead unilaterally and issued the Award without consulting the parties, and more crucially, without having given the benefit to the parties of addressing the issues, which were "live" in the Tribunal's mind when deciding the Award. I see no merit in this submission." [see paragraph 51]

The learned judge found that the applicant's reliance on the third ground was not supported by evidence. She noted in paragraph 50 of the case report as follows:

- The evidence in this case was plain that the applicant had been given a full opportunity to present its case on the jurisdictional issue.
- There was no evidence that the Tribunal had any ground for wondering whether the applicant fully appreciated what was being put against it (to use the phraseology of *The Myron* ([46] *supra*))
- ...the applicant had copies of all submissions made by the respondent

However, there was one point of reservation but it was disposed as set out below:

- Whilst the Tribunal in this case did, as I have explained above, make an issue of a point that was never raised by either party, to wit, the applicant's purported non-participation in the Previous Arbitration, that finding was not determinative of its final conclusion, and therefore any breach of natural justice that might have occurred because the Tribunal did not notify the applicant that it considered this to be a point in issue did not prejudice the applicant.
- In *John Holland* ([23] *supra*), the court held that to succeed under s 24(b) of the Act, an applicant had to establish how the breach of natural justice was connected with the making of the award and how such breach had prejudiced the rights of the party concerned.

As regards the fourth ground, the learned judge

concluded that the applicant is not entitled to complain that it was not given a chance to orally address the Tribunal in the circumstances that unfolded from the preliminary meeting held in November 2002 leading to the award as it was not reasonable to assume that the Tribunal still considered that an oral hearing would be of assistance. The learned judge had taken note of the following in paragraph 52 of the case report:

- The preliminary meeting was held in November 2002. The directions given at that meeting contemplated that both parties would file their submissions at least by the end of December 2002 so that they would be ready for the hearing of the oral submissions on the appointed date in February 2003.
- As events turned out, neither party had filed any submissions by that date and the intended hearing could not go on. Thus, the parties' own conduct had rendered the earlier directions completely ineffective.
- When further directions were given in August 2003 and in October 2003 for the filing of submissions by both parties, there was no direction that there would be a hearing thereafter at which oral submissions would be made.
- It is also notable that neither party asked for an oral hearing.
- If the applicant was concerned that the Tribunal might misunderstand its position or that of the respondent, it could have asked for an oral hearing. It did not do so.

Accordingly, the learned judge held that, "...The applicant could not have taken it for granted that there was to be an oral hearing without any request for the same being required since the direction in November 2002 had appointed a specific date for the oral hearing. ..."

Enforcement of an Arbitral Award against a respondent in liquidation

Asta Rickmers Schiffahrtsgesellschaft mbH & Cie KG v Hub Marine Pte Ltd [2005] SGHC 184 [2006] 1 SLR 283 [High Court – Tay Yong Kwang J]

This case involves the plaintiff who was a successful claimant in an earlier arbitration and is exploring the available avenues of enforcing the arbitral award obtained other than by enforcing against the respondent of the arbitration.

The plaintiff/claimant had obtained an award against Hub Lines, the respondent. However, the respondent company was wound up. The plaintiff/claimant suspected that the respondent and the defendant are related companies. In the case before the court, the plaintiff/claimant successfully applied for pre-action discovery of documents to determine whether the defendant was liable in any way for the payment of the arbitral award. The relevant rule for pre-action discovery is O 24 r 6 of the Rules of Court (Cap 322, R5, 2004 Rev Ed).

It was noted by the court at paragraph 13 that:

"The object of the plaintiff in taking out this application was to ascertain if the defendant was liable for the payment of the arbitral award. The plaintiff's allegations were that:

- a. The defendant, by virtue of having operated the vessel, was the real charterer of the vessel and Hub Lines were only named as the charterer as a front for the defendant.
- b. The defendant was a sub-charterer of the vessel under a back-to-back charterparty or similar arrangement with Hub Lines.

It was noted by the court at paragraph 44 that pre-action discovery would be allowed '...if it would necessarily save costs for both the plaintiff and the defendant. If the plaintiff's belief turned out to be undoubted after perusing the relevant documents, a potentially costly action would be averted for both parties. If, however, the documents revealed otherwise, the ends of justice would be served. The defendant's costs of providing the documents were to be paid by the plaintiff on an indemnity basis in any case."

The learned judge referred to two cases, namely, *Kuah Kok Kim v Ernst & Young* [1997] 1 SLR 169 (Court of Appeal) at paragraph 36 and *Bayerische Hypo und Vereinsbank AG v Asia Pacific Breweries (Singapore) Pte Ltd* [2004] 4 SLR 39 (High Court) at paragraph 37 before saying:

- Applying the principles set out in O24 rr 6 and 7, as expounded by the cases cited above, it seems to me that necessity must therefore be considered in the light of the purpose for which pre-action discovery is sought. Here, the plaintiff is trying to ascertain whether it has a cause of action against the defendant by lifting the corporate veil to uncover the real charterers of the vessel. It believes it would be able to do so because Lee Seiu Kin JC has said in *Gerhard Hendrik Gispem v Ling Lee Soon* [2001] SGHC 350 at [125]:

It can be seen from the last two cases that where a company is a cloak or sham to avoid the legal obligations of a party to the Plaintiff, the court will lift the veil of corporation. [see paragraph 38]

- The plaintiff has not launched this application in order to try its luck by trawling in the open sea of chance to see whether it can ensnare some bigger fish to look to for the satisfaction of the arbitral award. It has set out several material facts for its belief that the defendant may have a much closer connection with Hub Lines than it has disclosed thus far. The defendant, on the other hand, seems to want the plaintiff to accept its word that it had no nexus whatsoever with Hub Lines. In my opinion, the plaintiff is entitled, in the light of the evidence it has uncovered thus far, to be skeptical about the disavowal of the defendant and to want to be certain that the defendant truly had no connection with Hub Lines beyond what it had acknowledged. The grounds relied on by the plaintiff are not frivolous

or far-fetched in any way. [see paragraph 39]

- The fact that a liquidator has been appointed in respect of Hub Lines does not preclude the plaintiff from helping itself by looking to other avenues of trying to satisfy the arbitral award in its favour. If the plaintiff is right in its belief that the defendant and Hub Lines were in reality related companies, then it would be unlikely that the officers of Hub Lines would assist the liquidator in answering the plaintiff's queries to him beyond echoing what is being asserted by the defendant in this application.

Enforcement of an Arbitral Award against related companies of the respondent

Karaha Bodas Co LLC v Pertamina Energy Trading Ltd and another [2005] SGCA 47 [2006] 1 SLR 112 [Court of Appeal – Yong Pung How CJ, Chao Hick Tin JA and Judith Prakash J]

In the usual circumstances, a successful claimant in an arbitration would enforce the arbitral award against the respondent. In this case, the claimant had chosen to "enforce" the arbitral award against a company in Hong Kong that is a 99% subsidiary of the respondent. The claimant was able to obtain a garnishee order against the Hong Kong company. However, it was suspected that money was sent to a Singapore company, which is a wholly owned subsidiary of the Hong Kong company to avoid the execution of the garnishee order against the Hong Kong company.

In response, the claimant filed an Originating Summons ("OS") against both the Hong Kong company and the Singapore company and obtained a declaration that the sum of US\$36,236,581.65 [which is the amount under suspicion of being sent from the Hong Kong company to the Singapore company to avoid the execution of the garnishee order] be held by the Singapore company on trust for the Hong Kong company and an order that the Singapore company repay the said sum to the Hong Kong company. Also obtained by the claimant was a Mareva injunction against both companies, which was applied, ex-parte.

However, the two companies were successful in their applications to set aside the OS as well as the injunction. According to the Court of Appeal, it appeared that the learned judge had set aside the OS as the OS revealed a lack of a cause of action. [see paragraph 8 of the CA report] As regards the injunction, the learned judge held that there was no jurisdiction for the court to grant injunctive relief as *Karaha Bodas Co LLC's* ("KBC") real dispute was with *Pertamina Energy Trading Ltd* ("Petral") in Hong Kong and the relief that it was asking for in Singapore was ancillary in nature only. [see paragraph 9 of the CA report] It is against the learned judge's decision which the claimant is appealing against in this report. This case reports two appeals. The claimant in the arbitration mentioned above, KBC, is the appellant in both appeals. The respondent in the arbitration mentioned above is *Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* ("Pertamina"). The abovementioned Hong

Kong company, Petral, is a 99% subsidiary of Pertamina. Petral is the respondent in the first appeal. The abovementioned Singapore company Pertamina Energy Services Pte Ltd ("PES") is wholly-owned subsidiary of Petral. PES is the respondent in the second appeal.

The Court of Appeal dismissed the appeal and gave the following reasons:

- "It is a fundamental rule that in every case where a plaintiff claims a relief against a defendant, his claim must be founded on a reasonable cause of action. Otherwise, the claim is liable to be struck out. The only exception to the rule is when the plaintiff does not ask for substantive relief against the defendant, in the form, for example, of an order for damages, but instead only ask for a declaration of right..." [see paragraph 13 of the CA report];
- "Although we accepted KBC's position that it was not debarred from seeking declaratory relief even if it did not have a cause of action, that was not the end of the matter. A plaintiff who asks for declaratory relief must meet certain requirements. The question that arose was whether KBC satisfied all of these requirements. ..." [see paragraph 14 of the CA report];
- "In considering whether the above requirements had been satisfied in this case, we were chiefly concerned with the further requirement, that of *locus standi*. As far as an action for a declaration is concerned, the requirement that the plaintiff must have the *locus standi* required to bring the action is the equivalent of requiring a plaintiff in an action for substantive relief to have a cause of action. This is because in order to have necessary standing, the plaintiff must be asserting the recognition of a "right" that is personal to him. ..." [see paragraph 15 of the CA report];
- "We agreed that the proceedings did not

disclose that KBC had any right to make a claim to the US\$36m in question. As the respondents submitted, the only two parties who had any claim to the said sum were Petral and PES. They had no dispute between them as to the status of the sum. ...KBC had a money claim only against Pertamina for the US\$261m and against Petral for US\$5.5m. The OS did not relate to either claim. It concerned the US\$36m reflected in the accounts of Petral as being due to Petral from PES. KBC had no money claim vis-à-vis Petral, much less PES, to the US\$36m and therefore, had no right in respect of which a claim for declaration could be made. ..." [see paragraph 20 of the CA report];

- "...it was established by *The Siskina* and followed by many cases including *Steamship Mutual Underwriting Association (Bermuda) Ltd v Thakur Shipping Co Ltd* [1986] 2 Lloyd's Rep 439 ("Thakur Shipping") that in order to apply for Mareva relief, the plaintiff must possess an accrued right of action against the defendant at the time of the application. In this case, at the time the OS was filed, KBC had no accrued right of action against PES in Singapore or even in Hong Kong for that matter. It had no money claim against PES nor did it have the standing to ask for a declaration that PES was holding money in trust for Petral. It had no judgment against Petral that it had registered in Singapore so as to entitle it to garnish moneys that PES might have owed Petral. The US\$5.5m order in Hong Kong, which was the only order for payment of money that KBC had against Petral, had not been registered in Singapore and indeed was not registrable as it was not a final order. It may be that one day, KBC will get a final judgment against Petral and may register the same in Singapore and such judgment may then come to be dealt with substantively by the Singapore court. ..." [see paragraph 44 of the CA report];

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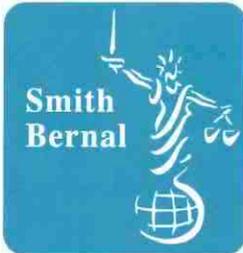
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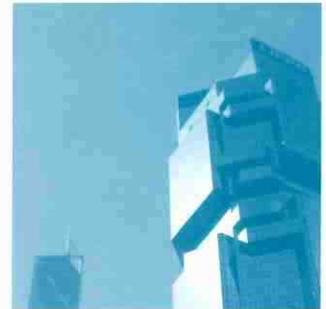
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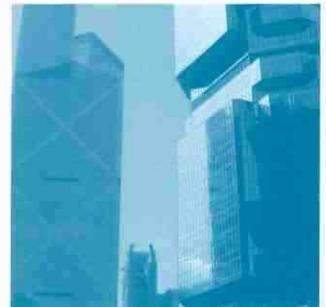
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