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The Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region

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thought in the context of Chinese-Western commercial relations. Admittedly, some of the jurisdictions discussed may not be acceptable to the Chinese party, depending upon the nature of the transaction and the circumstances. Still, given the impact that such factors as the background of the arbitrators, the language of the proceedings, and the right of appeal have on the outcome of the dispute, a properly drafted dispute-resolution clause not only will provide a fair basis for resolving a dispute but may also provide the incentives and mechanisms to resolve the case before an arbitration actually commences.

A look at the jurisdictions surveyed suggests that there are good reasons why Hong Kong or Sweden ought to be acceptable to a Chinese party as well as its Western counterpart. Furthermore, California's enactment of a conciliation code and the UNCITRAL Model Law provides strong support for why California also ought to be considered under certain circumstances.

Finally, there is no reason why compromises cannot be reached which combine the advantages of the various jurisdictions. For instance, the Stockholm Chamber of Commerce need not administer the arbitration in Stockholm. It can administer an arbitration in Hong Kong and make its rules and list of arbitrators available to that jurisdiction. The bottom line is that there is no single right answer—as long as some thought has been given to the question.

A Survey of Methods for the Enforcement of Foreign Judgments and Foreign Arbitral Awards in the Asia-Pacific Region

JOHN McDERMOTT*

I. INTRODUCTION

The goal of both litigation and arbitration—at least from the plaintiff's or complainant's perspective—is to obtain a sizeable money judgment or award. But even a large award or judgment is of little value unless it can be enforced quickly and easily. The most effective way to guarantee the enforceability of a judgment is to litigate the suit

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in the national courts of the adverse party. Most international businessmen and their attorneys, however, are reluctant to sue in the defendant's national court. The alternatives are arbitration or litigation in the national courts of the plaintiff or, possibly, in a neutral country. Unless the defendant or respondent has sufficient assets in the place where the litigation takes place, the plaintiff will have to seek enforcement of the judgment in another country. Since arbitral awards are not self-enforcing, enforcement will entail judicial proceedings regardless of where the arbitration took place. This survey deals with the judicial enforcement of foreign judgments and foreign arbitral awards in some of the Asia-Pacific region countries.

II. ENFORCEMENT OF FOREIGN JUDGMENTS

The method of enforcing foreign court judgments varies substantially between "common law" and "civil law" jurisdictions, although the recognized grounds for non-enforcement are quite similar. The United States and the other former British Colonies follow English common law concepts, while most other Asian countries employ civil law procedures.¹

A. Common Law Countries

Although foreign judgments have no direct effect in common law countries and, therefore, cannot be immediately enforced by execution, England has enforced foreign judgments since the seventeenth century.² The basis for recognition and enforcement of foreign judgments under the *common law* is the doctrine of obligation, whereby the foreign judgment is treated as an implied promise to pay the amount of the judgment.³

To enforce the foreign judgment, a suit is brought on the foreign judgment in order to obtain a *domestic* judgment in the same amount. If the foreign judgment is "recognized," the defendant will be barred from challenging the merits of the underlying dispute and will not be allowed to present any defenses or raise any errors which could have

1. In the Asia-Pacific region, English law is applied, sometimes with local modifications, in Australia and New Zealand, as well as in Hong Kong, Singapore, Malaysia, India and Pakistan. Sri Lanka uses a blend of English common law and civil law.

2. DICEY & MORRIS, *THE CONFLICT OF LAWS* 418-20 (L. Collins 11th ed. 1987).

3. G. CHESHIRE & P. NORTH, *CHESHIRE'S PRIVATE INTERNATIONAL LAW* 613 (1970).

been presented to the rendering court.⁴ Generally, a foreign judgment will be recognized under English law if:

1. The foreign court had personal jurisdiction according to the principles of English law;
2. The foreign court had subject matter jurisdiction according to its own law;
3. The judgment is final and conclusive;⁵
4. The judgment is for a fixed and definite sum of money;
5. The judgment was not obtained by fraud; and
6. Enforcement of the judgment would not be contrary to English public policy or to "natural justice."⁶

The ease of and procedures for enforcing foreign judgments in England depend to a large extent on where the judgment was rendered. The English Administration of Justice Act of 1920 provided for the enforcement of judgments of all Commonwealth Courts by all other Commonwealth Courts simply by registering the judgment with the clerk of the "enforcing court." This simplified procedure only applied to judgments rendered within England, to certain former dominions and colonies, and to those foreign nations to which the Act had been extended by an Order in Council.⁷ In addition, England, as a member of the European Economic Community ("EEC"), was subject to the Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.⁸

In 1933, the English Foreign Judgments (Reciprocal Enforcement) Act of 1933 provided for the enforcement in England, and presumably throughout the Commonwealth, of judgments from courts in foreign countries which enforce English judgments.⁹ However, even where reciprocity exists, English courts will decline to enforce a foreign judgment where (1) the foreign court lacked personal jurisdiction

4. P. KAYE, CIVIL JURISDICTION AND ENFORCEMENT OF FOREIGN JUDGMENTS 1338 (1987).

5. The fact that the time for filing an appeal has not expired or that an appeal is pending will not prevent the judgment from being final and conclusive. *Id.*

6. *Id.* at 1337-38.

7. See DICEY & MORRIS, *supra* note 2, at 422. The act has been made applicable, *inter alia*, to Newfoundland, New Zealand and the Australian states. *Id.* at 481.

8. 15 J.O. COMM. ERU. (No. 299) Sept. 27, 1968 (1972). See P. KAYE, *supra* note 4, for an extremely comprehensive analysis of application of The Brussels Convention.

9. See D. CASSON & I. DENNIS, ODGERS' PRINCIPLES OF PLEADING AND PRACTICE IN CIVIL ACTIONS IN THE HIGH COURT OF JUSTICE 367 (22nd ed. 1981). It has also been applied to several non-commonwealth countries: Austria, Belgium, the Federal Republic of Germany, France, Israel, Italy, the Netherlands, Norway and Suriname. DICEY & MORRIS, *supra* note 2, at 423.

over the defendant under English jurisdiction law, (2) the defendant was denied due process, (3) the judgment was procured by fraud,¹⁰ or (4) enforcement of the judgment would be contrary to public policy.¹¹

1. Hong Kong¹²

Hong Kong follows the English system described above, in effect combining English common law with more recent statutory law. The governing ordinance is the Foreign Judgments (Reciprocal Enforcement) Ordinance¹³ which is modeled on the Foreign Judgments (Reciprocal Enforcement) Act of 1933, described above. The Hong Kong Ordinance, like the English Act, applies to certain members of the Commonwealth, including, in the Asia-Pacific region: Australia, Brunei, Sri Lanka (Ceylon), India, Malaysia, New Zealand, Pakistan and Singapore.¹⁴ The Ordinance also applies to judgments from Belgium, France, West Germany, Italy, Austria, the Netherlands and Israel.¹⁵

A judgment from a court of general jurisdiction in one of the above countries can be enforced *directly* by registering the judgment with the High Court of Hong Kong within six years of the judgment. The effect of registration is to convert the foreign judgment into a judgment of the registering court, so that it can be enforced by any of the means available in the High Court, such as a writ of execution or a garnishment order.¹⁶ It is reported that in a typical case, it will take about six weeks to register a foreign judgment in the High Court of Hong Kong.¹⁷

The judgments in courts of other countries can not be registered, but they may be sued upon as a debt. To recover on a foreign judgment, the judgment creditor must prove the following:

10. See P. KAYE, *supra* note 4, at 1338-1339. In addition, English courts seem to allow defendants to raise issues concerning fraud in the transaction even if they did not do so in the foreign tribunal. DICEY & MORRIS, *supra* note 2, at 468.

11. The public policy exception prohibits the enforcement of foreign penal or tax judgments. DICEY & MORRIS, *supra* note 2, at 428.

12. This brief discussion is based on an article by Shannon, Kwok and Pearson appearing in P. WEEMS, *ENFORCEMENT OF MONEY JUDGMENTS ABROAD* (Matthew Bender, 1989).

13. *Foreign Judgments (Reciprocal Enforcement) Ordinance*, Laws of Hong Kong, Chapter 319, reproduced in full in P. WEEMS, *supra* note 12, at H.K. 15-26.

14. It also is applicable to judgments from Bermuda. P. WEEMS, *supra* note 12, at H.K. 25-26.

15. *Id.* at H.K. 26.

16. *Id.* at H.K. 4-5.

17. *Id.* at H.K. 5.

1. The foreign judgment is for a definite and actually ascertained sum of money;
2. The foreign judgment is "final and conclusive;" and
3. The rendering court was a court of competent jurisdiction.¹⁸

A recent Hong Kong case suggests that even foreign judgments not entitled to *registration* under the Hong Kong Ordinance will receive favorable treatment in Hong Kong courts.¹⁹ The plaintiff had obtained a judgment in an Oregon (U.S.A.) state court and brought an action (a writ of summons) in Hong Kong to enforce the judgment. The plaintiff obtained an order of summary judgment²⁰ and the defendant/judgment debtor appealed, claiming that it was entitled to a set-off.²¹ The High Court rejected the "set-off defense" as an attempt to impeach the Oregon judgment which it held was not possible under the circumstances of the case. The appeal was dismissed with a judgment entered in favor of the foreign judgment creditor.²²

2. Singapore²³

Judgments obtained in foreign courts have no direct operation in Singapore, but judgments of some courts may be enforced after registration. Only judgments obtained in countries which provide for the reciprocal enforcement of Singapore judgments can be registered and enforced in Singapore. A judgment which is duly registered has the same force and effect as does a judgment originally rendered in Singapore. For the purposes of execution, the registering Court has the same control and jurisdiction over the judgment as it has over its own judgments.²⁴

The practice and procedure governing registration of Commonwealth and foreign judgments are governed by Order 67 of the Rules of the Supreme Court (1970). Order 67, Rule 7(1) of the Rules of the

18. *Id.* at H.K. 10.

19. Caffall Brothers Forest Products Inc. v. Chie Ku-yin t/a Sin Lie International Enterprises (1987) H.K.L.R. 92, reported in P. WEEMS, *supra* note 12, at H.K. 3.

20. In P. WEEMS, *supra* note 12, the authors report that a summary judgment can be obtained within six weeks of the commencement of the enforcement action; if the judgment debtor defaults, the time could be reduced to three weeks. *Id.* at H.K. 6.

21. The judgment debtor also contended that the Oregon state judgment was not "final" but the Court easily rejected that claim since the judgment debtor had itself referred to the Oregon judgment as final and there was no evidence that it was not a final judgment. *Id.* at H.K. 3.

22. *Id.* at H.K. 3.

23. This summary is based in part on an article by H. M. Dyne in P. WEEMS, *supra* note 12.

24. P. WEEMS, *supra* note 12, at SIN 4.

Supreme Court provides that notice of a registration of a foreign judgment must be served on the judgment debtor personally unless the Court otherwise orders. Order 67, Rule 7(2) permits service of such notice out of the jurisdiction without leave of the Court provided that Order 11, Rules 5, 6 and 8, concerning service of notice abroad, have been observed. The notice of registration of a foreign judgment must contain:

- (a) Full particulars of the judgment registered and the order for registration;
- (b) The name and address of the judgment creditor or of his solicitor on whom any summons issued by the judgment debtor may be served;
- (c) Notice of the right of the judgment debtor to apply to have the registration set aside; and
- (d) The period of time within which an application to set aside the registration may be made.²⁵

The Reciprocal Enforcement of Commonwealth Judgments Act ("Commonwealth Act"), originally enacted in 1921, provides for the registration in Singapore of money judgments obtained in a Superior Court of the United Kingdom within twelve months after the date of the judgment or order, or such longer period as may be allowed by the court. The Commonwealth Act has been extended by the Minister of Law on the basis of reciprocity, to judgments obtained in a Superior Court from other parts of the British Commonwealth (outside the United Kingdom), including the following countries: Australia, Brunei, Ceylon, Hong Kong, India (except the States of Jammu and Kashmir), Malaysia, New Zealand, Pakistan, Papua/New Guinea, and Windward Islands.²⁶

The actual use of these reciprocal arrangements by the above-mentioned countries has been rather infrequent, not only in terms of numbers, but also in terms of countries. Between 1966 and 1986 only three countries—England, Hong Kong, and Malaysia—have had a significant number of judgments registered in Singapore and only one—Malaysia—has averaged more than two per year.²⁷

25. *Id.* at SIN 6.

26. *Id.* at SIN 8.

27. The totals for the twenty year period are:

Australia	2
England	34
Hong Kong	36
Malaysia	76
New Zealand	1

Registration of Commonwealth judgments is not quite automatic since the High Court must find that "in all the circumstances of the case . . . it is just and convenient that the judgment shall be enforced in Singapore." Registration shall not be ordered if:

- (1) The original court acted without jurisdiction;
- (2) The judgment debtor, being a person who was neither carrying on business nor ordinarily resident within the jurisdiction of the court of origin, did not voluntarily appear or otherwise submit or agree to submit to the jurisdiction of the court;
- (3) The judgment debtor, being the defendant in the proceedings, was not duly served with the process of the court of origin and did not appear, notwithstanding that he was ordinarily resident or was carrying on business within the jurisdiction of that court or agreed to submit to the jurisdiction of that court;
- (4) The judgment was obtained by fraud;
- (5) The judgment debtor establishes either that an appeal is pending or that he is entitled and intends to appeal against the judgment; or
- (6) The judgment was in respect of a cause of action which for reasons of public policy or for some other similar reason could not have been entertained by the registering Singapore Court.²⁸

The Reciprocal Enforcement of Foreign Judgments Act ("Foreign Judgments Act") provides for the enforcement in Singapore of judgments given within six years of the date of judgment. The discretion to extend the Foreign Judgments Act to non-Commonwealth countries lies with the Minister of Law who must be satisfied that substantial reciprocity of treatment will be assured with regard to the enforcement in the courts of the foreign country of judgments given in the High Court of Singapore. The Foreign Judgments Act has not been extended as yet to any foreign country even though the Act became law in 1959.²⁹

3. The United States

The United States Supreme Court summarized the status of the law in the "civilized world" with respect to the enforcement of foreign judgments nearly 100 years ago when it noted that "there is hardly a civilized nation on either continent which, by its general law, allows conclusive effect to an executory foreign judgment for the recovery of

Id. at SIN 29.

28. *Id.* at SIN 8-9.

29. *Id.* at SIN 9.

money.”³⁰ After reviewing “all of the authorities upon the subject,” including the writings of Chancellor Kent in England and Justice Story in the United States, the Court set forth the criteria to be used in determining when a foreign judgment should be enforced without allowing the defendant to challenge the correctness of the judgment:

. . . that where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact.³¹

The Court, however, went on to add an exception to the general rule—an exception which, like the English Act, requires *reciprocity*: “judgments rendered . . . in any . . . foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiffs’ claim.”³²

The Court did not indicate whether this rule was to be treated as

30. *Hilton v. Guyot*, 159 U.S. 113, 227 (1895). The Court specifically identified the governing law in most of the “civilized nations” of the world: In France and in a few smaller states—Norway, Portugal, Greece, Monaco and Haiti—the merits of the controversy are reviewed, allowing the foreign judgment to have, at the most, no more effect than being *prima facie* evidence of the justice of the claim. In the great majority of the countries on the continent of Europe—in Belgium, Holland, Denmark, Sweden, Germany, in many cantons of Switzerland, in Russia and Poland, in Romania, in Austria and Hungary (perhaps in Italy), and in Spain—as well as in Egypt, in Mexico, and in a great part of South America, the judgment rendered in a foreign country is allowed to have only the same effect as the courts of that country give to the judgments of the country where the judgment in question is sought to be executed. *Id.*

31. *Id.* at 202-03.

32. *Id.* at 227. The court, somewhat defensively, explained that in so holding it did not “proceed upon any theory of retaliation upon one person by reason of injustice done to another, but upon the broad ground that international law is founded upon mutuality and reciprocity, and that by the principles of international law recognized in most civilized nations, and by the comity of our own country, which it is our judicial duty to know and to declare, the judgment is not entitled to be considered conclusive.” *Id.* at 228.

"federal common law" applicable in *all* courts in the United States or merely as a rule of procedure to be applied only in the federal or national courts of the United States. State courts have generally assumed that they are not required to follow *Hilton* and most, following the lead of the New York Court of Appeals,³³ have chosen not to require reciprocity. Further uncertainty resulted from the United States Supreme Court's decision in *Erie R.R. v. Tompkins*,³⁴ which severely reduced the role of federal common law even in federal courts. At the present time, most lower federal courts seem to believe that *Hilton* is not binding on federal courts when the suit is based on state rather than federal law.³⁵

Fortunately, the conflict between federal law and the laws of the fifty states is far less pronounced here than it is in some other areas of United States law. The reason is two-fold; first, the laws of the fifty states are quite uniform; and, second, except for the reciprocity requirement of *Hilton*, all are quite similar to the federal law.

One of the reasons for the state-to-state similarity is the Uniform Foreign Money Judgments Recognition Act (Uniform Act) which has been adopted, with slight variations, in fifteen states.³⁶ States which have not enacted the Uniform Act also take a similar approach to the enforcement of foreign judgments, primarily because of the harmonizing effect of the Restatement of Conflicts.³⁷ Although not binding on the courts, many state judges rely upon the Restatement, especially where there is no statutory guidance. Its approach is similar to the Uniform Act; indeed, a prefatory note to the Uniform Act emphasizes that the Act merely states "rules that have long been applied by the majority of courts in this country." The Uniform Act provides that a "foreign judgment is enforceable in the same manner as the judgment of a sister state"³⁸ unless:

33. See *Johnston v. Compagnie Générale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926) (New York courts are not bound by Supreme Court decision of *Hilton v. Guyot*); *Cowans v. Ticonderoga Pulp & Paper Co.*, 219 App. Div. 120, 219 N.Y.S. 284, *aff'd*, 246 N.Y. 603, 159 N.E. 669 (1927) (New York court does not apply Supreme Court standard).

34. 304 U.S. 64 (1938) (federal court must apply state substantive law when the underlying claim is based on state law).

35. See *Somportex Limited v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435 (3d Cir. 1971) (court in diversity case follows Pennsylvania law rather than Supreme Court).

36. Uniform Foreign Money Judgments Recognition Act. The Act has been adopted in Alaska, California, Colorado, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Missouri, New York, Ohio, Oklahoma, Oregon, Texas and Washington.

37. Restatement (Second) of the Conflict of Laws (1971).

38. States must fully enforce "sister state judgments" under the full faith and credit clause of the United States Constitution art. 4, cl. 1.

- (1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;
- (2) the foreign court did not have personal jurisdiction over the defendant; or
- (3) the foreign court did not have jurisdiction over the subject matter.³⁹

In addition, the Act gives the courts *discretion* to refuse to enforce foreign judgments under the following conditions:

- (1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend [the suit];
- (2) the judgment was obtained by fraud;
- (3) the cause of action on which the judgment is based is repugnant to the public policy of this state;
- (4) the judgment conflicts with another final and conclusive judgment;
- (5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
- (6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.⁴⁰

Thus, the general rule applicable in both federal and state courts in the United States mandates the enforcement of foreign judgments ren-

39. Uniform Foreign Money-Judgments Recognition Act, § 4(a)(1989).

40. *Id.* § 4(b). The Act further provides that a foreign judgment will not be refused recognition for lack of personal jurisdiction if any of the following occurred:

- (1) the defendant was served personally in the foreign state;
- (2) the defendant voluntarily appeared in the proceedings, other than for the purpose of protecting property seized or threatened with seizure in the proceedings or of contesting the jurisdiction of the court over him;
- (3) the defendant prior to the commencement of the proceedings had agreed to submit to the jurisdiction of the foreign court with respect to the subject matter involved;
- (4) the defendant was domiciled in the foreign state when the proceedings were instituted, or, being a body corporate had its principal place of business, was incorporated, or had otherwise acquired corporate status, in the foreign state;
- (5) the defendant had a business office in the foreign state and the proceedings in the foreign court involved a [cause of action] [claim for relief] arising out of business done by the defendant through that office in the foreign state; or
- (6) the defendant operated a motor vehicle or airplane in the foreign state and the proceedings involved a [cause of action] [claim for relief] arising out of such operation.

Id. § 5(a).

dered by courts with both subject matter and personal jurisdiction if the procedures used were consistent with due process and enforcement does not violate the public policy of the forum state.⁴¹ The additional requirement of *reciprocity* is inapplicable in most state courts and in federal courts where the underlying claim is based on state law.⁴²

B. Civil Law Countries

Although the law of the Asia-Pacific countries which are members of the Commonwealth is based on English common law, the law of many other Asia-Pacific countries is based on civil law.⁴³ In civil law countries, enforcement of foreign judgments by direct execution against the judgment debtor's property is not permitted. In order to enforce a foreign judgment—and in many civil law countries even to recognize one—a separate judicial proceeding must be employed.⁴⁴

1. Japan

Final judgments of foreign courts will be given conclusive effect in Japanese courts provided that:

- (1) the jurisdiction of the foreign court was not denied by law or treaty;
- (2) the defendant, if a Japanese national, received service of process other than by publication or entered an appearance;
- (3) the judgment is not contrary to public order or good morals; and
- (4) reciprocity is granted for Japanese judgments.⁴⁵

Japanese courts have limited the public policy exceptions so that, except in family law matters, no foreign judgment has been denied recognition on public policy grounds.⁴⁶ It has been suggested that Japanese courts will even enforce judgments based upon adhesion

41. See *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (no public policy with respect to the enforcement of sister state judgments under the full faith and credit clause).

42. The applicability of the *Erie* doctrine to suits with claims based on *foreign* law has never been definitively resolved.

43. Although German law was the model for Japanese law which in turn was the model for Korea and Taiwan, French law, the *Code Napoléon*, is the foundation for much of the civil law throughout the world. See H. TANAKA, *THE JAPANESE LEGAL SYSTEM* 196-97 (1976). Indonesia actually continues to use Dutch civil law in many commercial transactions.

44. P. KAYE, *supra* note 4, at 1340.

45. Japan Code of Civil Procedure, art. 200.

46. Fujita, *Procedural Fairness to Foreign Litigants as Stressed by Japanese Courts*, 12 INT'L LAW 795, 806, 811 (1976).

contracts.⁴⁷ Enforcement of foreign judgments in Japan is, as it is in France, by *exequatur*.⁴⁸ Execution on the judgment is allowed once its validity is determined as above, and no examination of the merits of the case is permitted.

It would appear that Japanese lawyers have found a way to avoid the prohibition on re-trying the merits underlying a foreign judgment. In *Toho KK v. Hachisuka*⁴⁹ and *KK Kansai Iron Works v. Marubeni American Corp.*,⁵⁰ the Japanese defendants were being sued in American courts. Although there was jurisdiction and proper service, defendants declined to appear but filed declaratory judgment suits in Japanese courts seeking a declaration of "non-liability." The United States plaintiffs did not appear in the Japanese proceedings and the Japanese court rendered default judgments in favor of the Japanese parties. In *Kansai Iron Works*, an American default judgment was rendered in favor of the United States plaintiff. When it attempted to enforce its United States judgment in Japan pursuant to Article 200, the court refused to do so since there was a conflicting Japanese judgment. As a statutory basis for its decision, the Osaka court relied on the "public policy exception" included in Article 200.⁵¹ In both cases the United States plaintiff had very close ties with Japan: in *Toho*, the plaintiff was a Japanese citizen residing in California, while in *Kansai Iron Works*, the plaintiff was a United States subsidiary of a Japanese corporation.⁵²

III. THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

A. *The New York Convention*

Fortunately, the use of arbitration in place of civil litigation will remove much of the uncertainty regarding the enforceability of foreign judgments. Although there are no international conventions for the enforcement of foreign judgments, or at least none that have received general acceptance in the international community, there is a

47. *Id.* at 811.

48. See Japan Code of Civil Procedure, arts. 514-15 (enforcement of foreign judgments by *exequatur*).

49. Tokyo Dist. Ct. (1955), discussed in T. DOI, KOKUSAISHIHO KIHONHANREI ZAIANTORIHAKI (Private International Law: Important Cases - Property & Transactions) (Dobunkan Shuppan KK 1987)(in Japanese) at 128.

50. Osaka Dist. Ct. 1973, discussed in T. DOI, *supra* note 49, at 202.

51. *Marubeni America Corp. v. KK Kansai Iron Works*, Osaka Dist. Ct. 1977, discussed in T. DOI, *supra* note 49, at 202.

52. *Id.*

widely accepted international convention governing the enforcement of foreign arbitral awards: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.⁵³ Responding to the rapid expansion of international trade following World War II, the New York Convention reflects the efforts of international businessmen to provide a workable mechanism for the swift resolution of their commercial disputes. Previous international agreements were not effective in securing enforcement of arbitral awards. Without effective and efficient enforcement, arbitration does not provide a satisfactory alternative to litigation. More than seventy nations are subject to the Convention,⁵⁴ including nearly all of the countries in the Asia-Pacific region.⁵⁵

Article I of the Convention provides that the Convention shall apply to "arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought"⁵⁶ However, Article I also provides that "any State may on the basis of reciprocity declare that it will apply the convention to

53. New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21.3 U.S.T. 2517, T.I.A.S. No. 6997 [hereinafter "New York Convention"]. In the United States, the Convention is sometimes referred to as the "United Nations Convention," perhaps to underscore that it is an international rather than a domestic (New York) agreement. The United States attended and participated in the 1958 conference but did not sign the Convention. Ten years later, in 1968, the Senate gave its consent, but accession was delayed until 1970 in order for Congress to enact the necessary implementing legislation. 9 U.S.C. §§ 201-08 (1976).

54. A total of 69 nations have acceded to the Convention but a number of other countries are covered by the Convention as a result of the "extension" of the Convention to territories of countries which acceded to the Convention. For example, American Samoa, Guam, and the Virgin Islands became subject to the Convention when the United States acceded to the Convention in 1970.

55. The following countries in the Asia-Pacific region have acceded to the Convention: Thailand (1959), India (1960), Japan (1961), Sri Lanka (1962), the Philippines (1967), Korea (1973), Australia (1975), Hong Kong (1977), Indonesia (1981), New Zealand (1983), Malaysia (1985), Singapore (1986) and the People's Republic of China (1987).

The latest nation to accede to the Convention was the People's Republic of China. The Standing Committee of the National People's Congress approved China's accession to the Convention by a decision dated December 2, 1986. On January 22, 1987, the Chinese government notified the United Nations of China's accession to the Convention subject to both the "Reciprocity Reservation" and the "Commerce Reservation." The date the entry into the convention went into force was April 22, 1987.

Nations in the region that have not acceded to the Convention include Burma, Bangladesh, Pakistan and Taiwan. Since it is not a member of the United Nations, Taiwan is not eligible to ratify or accede to the Convention.

56. New York Convention, *supra* note 53, art. I. The Convention also applies to "awards not considered as domestic awards in the State where their recognition and enforcement are sought."

... awards made only in the territory of another Contracting State” and/or to “differences arising out of legal relationships . . . which are considered as commercial under the national law of the State”⁵⁷ These two exceptions are referred to as the “reciprocity reservation” and the “commercial reservation,” respectively. A majority of the Asia-Pacific countries have included one or both reservations when acceding to or ratifying the Convention.⁵⁸

The Convention requires a minimum number of conditions to be fulfilled by the party seeking enforcement. The enforcing party need only supply the duly authenticated original award or a certified copy thereof, and the original arbitration agreement or a certified copy of it. By submitting these documents, the party seeking enforcement has established a *prima facie* right to obtain enforcement of the award. It is then up to the resisting party to prove that enforcement should be denied on the basis of one or more of the grounds for refusal of enforcement enumerated in Article V.⁵⁹

The three main features of Article V are: (1) the specific grounds for refusal of enforcement enumerated in Article V are the only grounds upon which enforcement may be refused; (2) the court before which enforcement of the award is sought may not review the merits of the award, since mistakes in fact or law by the arbitrators are not included among grounds for refusing to enforce an award included in Article V; and (3) the party against whom enforcement is sought has the burden of proving the existence of one or more of the grounds for refusal of enforcement.⁶⁰

The grounds for refusing to enforce an award are:

- (a) invalidity of the arbitration agreement;
- (b) violation of due process;
- (c) the arbitrator exceeded his authority;
- (d) irregularity in the composition of the arbitral tribunal or arbitral procedure;
- (e) award not binding, suspended or set aside.⁶¹

In addition, there are two other grounds for refusal of enforcement

57. *Id.*

58. Countries invoking the “Reciprocity Reservation” include: India, Indonesia, Japan, Korea, Malaysia, New Zealand, People’s Republic of China, and the Philippines. Countries invoking the “Commercial Reservation” include: India, Korea, Malaysia, People’s Republic of China, and the Philippines.

59. New York Convention, *supra* note 53, art. IV.

60. *Id.* art. V.

61. *Id.* art. V(1).

which can be raised by a court on its own motion; (1) non-arbitrability of the subject matter and (2) public policy of the enforcing country.⁶²

The Convention also provides that if a request to set aside the award⁶³ has been made in the country where the award was made, the court before which enforcement is sought may stay enforcement proceedings provided that the party challenging the award posts a bond or other form of security. Enforcement of the award will be refused if the award *has already been* set aside in the country where it was made.⁶⁴ The most important aspect of the Convention is that countries which have acceded to or ratified the Convention will enforce a foreign arbitral award without making a determination as to whether the award is legally correct or whether the findings are adequately supported by the evidence developed during the arbitration hearing.

The Convention has also been adopted by most countries with which Asia-Pacific countries are likely to trade. The United States, all EEC countries except Portugal, and all Eastern Bloc countries except Albania, have acceded to or ratified the Convention. However, nearly all have invoked the reciprocity exception.⁶⁵ Thus, awards rendered in commercial arbitrations conducted in the Asia-Pacific countries which have not acceded to the Convention are not subject to enforcement under the Convention in most developed countries.⁶⁶ Businessmen from those countries would be wise to consider providing for arbitration in one of the other Asia-Pacific countries which have adopted the Convention.⁶⁷

62. *Id.* art. V(2).

63. The setting aside of an arbitral award is often called an "annulment" or, less commonly, a "vacatur."

64. New York Convention, *supra* note 53, art. V(1)(e).

65. The exceptions are Italy, Luxembourg and Spain.

66. Notwithstanding the so-called "reciprocity reservation," some countries, the United States for example, seem to apply the Convention's criteria to awards from non-contracting states. See H. HOLTZMANN, A GUIDE TO THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENT, 30-31 (Nov. 1984).

67. One option would be the Regional Centre for International Commercial Arbitration in Kuala Lumpur. Other Asia-Pacific countries with established arbitration institutions include Japan, Hong Kong, Indonesia, Korea and India. Thailand is presently exploring the possibility of establishing its own arbitration center. The use of one of the many international commercial arbitration centers located in the United States (such as the newly created Los Angeles Center for International Commercial Arbitration), Canada, Japan and western Europe would also insure applicability of the Convention.

B. Enforcement in the United States

1. Violation of Due Process

One of the grounds for refusing to enforce a foreign arbitral award under the Convention exists where a party to an arbitration was denied due process. American courts have rarely upheld challenges based on alleged denials of due process. In *Parsons & Whittemore Overseas Co. Inc. v. Soci  t   General de L'Industrie du Papier*,⁶⁸ the court held that an American corporation's due process rights under the United States Constitution, while entitled to full force under the Convention, were not infringed by the foreign arbitral tribunal's refusal to reschedule a hearing for the convenience of one of the American corporation's witnesses.⁶⁹ Although the court noted that an award would not be enforced if a party was "not given proper notice . . . or was otherwise unable to present his case,"⁷⁰ it concluded that the American corporation had failed to establish either circumstance. The court observed that the inability to present a particular witness was a "risk inherent in an agreement to submit to arbitration,"⁷¹ given the logistical problems of scheduling a hearing date convenient to parties scattered around the globe. The court also noted, apparently not without significance, that the missing witness had made a sworn statement which was available to the arbitrators.

2. Violation of Public Policy

As have the courts of virtually all contracting states, United States courts have narrowly restricted the public policy exception under the Convention. One court has noted that this exception to the general rule of enforceability should be applied only when enforcement would violate the nation's "most basic notions of morality and justice."⁷² Rather than consider vague notions of morality and justice, another federal court emphasized that a party resisting enforcement on public policy grounds would be required to establish that either the obligation itself or the remedy being sought was prohibited by statute or by some other "declaration of public policy."⁷³

Parsons & Whittemore Overseas Co. Inc. v. Soci  t   General de

68. 508 F.2d 969 (2d Cir. 1974).

69. *Id.* at 976.

70. *Id.* at 975.

71. *Id.*

72. *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975).

73. *Antco Shipping Co., Ltd. v. Sidermar S.P.A.*, 417 F. Supp. 207 (S.D.N.Y. 1976).

*L'Industrie du Papier*⁷⁴ illustrates the current restrictive view of the public policy exception employed by the federal courts in New York City. The dispute involved a contract between an American construction company and an Egyptian company for the building of a paper mill in Egypt. The United States State Department funded the project through a program run by an agency for International Development. Before completion of construction, the Egyptian government broke off diplomatic relations with the United States and ordered all Americans out of Egypt. The State Department instructed the American company to cease performance of the contract as United States law prohibited the furnishing of assistance to a country following the cessation of diplomatic relations with that country. The American company complied. The Egyptian company demanded arbitration before the International Chamber of Commerce ("ICC") as provided in the agreement, and the tribunal held the American company in breach of contract.

When the Egyptian company sought to enforce the ICC award in a United States court, the American company contended that enforcement would contravene United States public policy. The Second Circuit held that the American company's argument erroneously equated "national policy" with United States "public policy" and concluded:

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.⁷⁵

The court added:

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, circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention meant to subscribe to this supra-nation emphasis.⁷⁶

Other claims which have been held *not* to fall within the "public

74. 508 F.2d 969 (2d Cir. 1974).

75. *Id.* at 974.

76. *Id.*

policy" exception include assertions that some of the parties gave testimony before the arbitration panel which conflicted in important respects from testimony they had given in prior *judicial* proceedings⁷⁷ and that the amount of interest included in the award was excessive.⁷⁸

3. Recent Decisions of the United States Supreme Court

The United States Supreme Court, at least as presently constituted, *seems* committed to the support of international commercial arbitration. In a trilogy of recent decisions the Court cleared away many of the obstacles to the enforcement of agreements to arbitrate disputes arising from international commercial transactions. First, in *Southland Corp. v. Keating*,⁷⁹ the Court held that federal rather than state law governed the question of what issues are and are not arbitrable; thereby invalidating much state law which was antipathetical to arbitration. *Southland* not only insures consistency and uniformity in all courts in the United States, it also guarantees the use of federal law which is generally very supportive of the use of commercial arbitration, especially in international transactions.

In *Dean Witter Reynolds Inc. v. Byrd*,⁸⁰ the Court resolved a problem involving a dispute which included both arbitrable and non-arbitrable claims or defenses. Parties who no longer were willing to honor their agreement to arbitrate had been able to persuade many lower federal courts that they should be permitted to litigate *all* issues, arbitrable as well as non-arbitrable ones, on the grounds that the issues were too "intertwined" to permit separate resolution.⁸¹ If that tactic failed, the parties would seek to have the court stay arbitration pending judicial resolution of the non-arbitrable claims or defenses.⁸² The Supreme Court put an end to this devious strategy by prohibiting lower courts from staying arbitration of the arbitrable issues. The

77. *Waterside Ocean Nav. Co., Inc. v. International Nav. Ltd.*, 737 F.2d 150 (2d Cir. 1984).

78. *Laminours-Trefilerses-Cableries de Lens, S.A. v. Southwire Company*, 484 F.Supp. 1063, 1068 (N.D. Ga. 1980). Although the trial court noted that to deny enforcement on the basis of "public policy" required a judicial determination that the award violated the *forum country's* most basic notion of morality and justice it concluded that the interest charged was within the acceptable range prohibited by the laws of Georgia. *Id.*

79. 465 U.S. 1 (1984).

80. 470 U.S. 213 (1985).

81. *Sibley v. Tandy Corp.* 543 F.2d 540, 543 (5th Cir. 1976) (when impractical to separate arbitrable from non-arbitrable claims, the court should deny arbitration).

82. *See generally* *Hunt v. Mobil Oil Corp.*, 410 F. Supp. 10 (S.D.N.Y. 1975) *aff'd*, 550 F.2d 68 (2d Cir. 1977) (antitrust laws favor resolution by judicial proceeding rather than arbitration).

Court passed over the argument that the results of the arbitration, which presumably would occur before judicial resolution of the non-arbitrable issues, would have a preclusive effect on trial of the non-arbitrable claims by simply noting that lower courts were not obliged to give preclusive effect to arbitral awards.⁸³

Finally, in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*,⁸⁴ the Court resolved the question of whether claims and defenses based on federal antitrust law, typically the Sherman Act, were arbitrable. Many lower federal courts⁸⁵ previously held these claims were not arbitrable, but the Supreme Court disagreed, stating:

[The] concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context.⁸⁶

Recognizing that an arbitration clause is merely a "specialized form of forum-selection clause,"⁸⁷ the Court relied on its earlier decision in *The Bremen v. Zapata Offshore Co.*⁸⁸ which had rejected "parochial" responses to international commercial disputes:

The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.⁸⁹

Although these three recent cases seem to support the use of arbitration to resolve international commercial disputes, there are aspects of them which are troubling if not ominous. First, the dicta in *Dean Witter Reynolds* provides that arbitration awards are not enti-

83. 832 F.2d 1098 (9th Cir. 1987). Notwithstanding the Supreme Court's view that arbitration awards are not entitled to res judicata, lower federal courts continue to use the doctrine of res judicata to preclude subsequent litigation of claims which were, or which could have been but were not, presented to the arbitral tribunal. *Id.* at 1097.

84. 473 U.S. 614 (1985).

85. The leading case in this area was *American Safety Equipment Corp. v. J.P. Maguire & Co.*, 391 F.2d 821 (2d Cir. 1968).

86. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 629 (1985).

87. *Id.* at 630 (quoting *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 519 (1974)).

88. 407 U.S. 1 (1971).

89. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. at 629 (quoting *The Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 9 (1971)).

tled to preclusive effect as to issues, both legal and factual, actually resolved by the arbitral tribunal.⁹⁰ This seems to mean that the losing party could "relitigate" many of the same issues which had been resolved in the arbitration and it is possible that the court might come to a contrary conclusion from that reached by the arbitrators.⁹¹ This possibility in turn raises enforcement problems; it seems quite unlikely that a United States court would enforce an arbitration award which was inconsistent with the decision of another United States court in the same matter.⁹²

Mitsubishi is even more troubling in that the Court, again in dicta, suggests that the failure of an arbitrable tribunal, particularly a foreign one, to properly apply United States law,⁹³ may prevent the enforcement of the award in the United States on the ground that such an award is contrary to public policy.⁹⁴ This possibility has not escaped the attention of a Swiss lawyer who not only was surprised that United States law would be applied in *Mitsubishi*, since the parties had included a contractual agreement to apply Swiss law,⁹⁵ but was disturbed that the price one might have to pay for the enforcement of an arbitration agreement could be the extraterritorial application of United States law.

Buried at the end of footnote 19 is probably the main message delivered by the Supreme Court in this decision: it is perfectly permissible to arbitrate foreign antitrust claims so long as the arbitrators will, no matter what the law chosen by the parties for governing their dispute says, apply U.S. laws to such claims. Otherwise enforcement of the award might well be denied. . . . [W]e have here a magnificent example of an attempt to export U.S. substantive laws where they had no place up to now: in interna-

90. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222-23 (1985).

91. Notwithstanding the dicta in *Dean Witter Reynolds*, one lower federal court has given preclusive effect to an arbitration award. *Greenblatt v. Drexel Burnham Lambert, Inc.*, 763 F.2d 1352 (11th Cir. 1985).

92. Suppose for example, that the *Greenblatt* court had insisted on retrying the issues of fraud and misappropriation which had been resolved in *Drexel Burnham's* favor in the prior arbitration and found that there was fraud and misappropriation.

93. Although the *Mitsubishi* Court only mentions the situation where the arbitration panel totally ignores United States law, the same result would occur if the arbitration panel totally misconstrued United States law, and arguably, where the panel simply decided an issue governed by United States law incorrectly.

94. 473 U.S. 614, 638 (1985).

95. The contract contained the following choice of law provision: "This agreement is made in, and will be governed by and construed in all respects according to the laws of the Swiss Confederation as if entirely performed therein." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. at 637, n.19 (1985).

tional arbitration proceedings held outside the United States under an arbitration agreement providing for a non-United States law as law governing the dispute. If the price for *Mitsubishi* is this dilution of parties' freedom and extension of United States substantive laws operated in tandem, I doubt that the users of international arbitration can afford to pay it.⁹⁶

Although the Court in *Mitsubishi* recognized that "the efficacy of the arbitral process requires that substantive review at the award-enforcement stage remain minimal,"⁹⁷ it opined that "it would not require intrusive inquiry to ascertain that the tribunal took cognizance of the antitrust claims and actually decided them."⁹⁸ Time will tell whether lower federal courts can make such determinations without substantially undermining the underlying principal of the New York Convention: there shall not be a retrial of the merits of the controversy. It does seem, however, that while making agreements to arbitrate more enforceable, the United States Supreme Court may have made the resulting awards less enforceable.

C. Enforcement in the Asia-Pacific Region⁹⁹

1. Australia

The New York Convention is the only relevant convention to which Australia is a party. Australia acceded to the Convention on March 26, 1975, and it became effective three months later.¹⁰⁰ Although Australia did not invoke the reciprocity reservation it seems to have adopted a statutory equivalent.¹⁰¹ The legislation implementing Australia's accession to the New York Convention¹⁰² provides that if an award is made in a non-contracting state, enforcement of such an award can be granted by an Australian court only if the per-

96. Werner, *A Swiss Comment on Mitsubishi*, 3 J. INT'L ARBITRATION 81, 83 (Mar. 1986).

97. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. at 638. One might have thought that under the New York Convention, "substantive review" was non-existent.

98. *Id.*

99. This summary is based in part on a paper presented by Dr. Albert van den Berg, Secretary General of the Netherlands Arbitration Institute at the Conference on International Commercial Arbitration and Transnational Litigation on September 12, 1986 in San Francisco, California (most of the citations have been omitted).

100. K. SIMMONDS & B. HILL, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMERCIAL ARBITRATION LAW IN ASIA AND THE PACIFIC* 18 (Oceana 1987).

101. The Arbitration (Foreign Awards and Agreements) Act of 1974 [hereinafter *Australian Arbitration Act*].

102. *Id.*

son seeking enforcement is domiciled or ordinarily resident in Australia or in a contracting state at the time of enforcement.¹⁰³

2. Hong Kong

Hong Kong, as a colony of Great Britain, became subject to the New York Convention when England acceded to the Convention. Both international and domestic arbitration in Hong Kong are governed by local statutory law.¹⁰⁴ The Hong Kong law is modelled on the English Acts of 1950, 1975 and 1979 and is thought by some to be the best system for the settlement of international disputes.¹⁰⁵

Foreign arbitral awards can be enforced in Hong Kong either by registration under Parts II and III of the Arbitration Ordinance or by an action at common law.¹⁰⁶ Since Hong Kong is still subject to several different international conventions, different procedures may be required depending on the convention being used.¹⁰⁷ A foreign award for which enforcement is sought under the New York Convention will be enforced unless:

1. the person against whom it is being enforced establishes that it or any other party to the arbitration agreement was under a legal incapacity;
2. the arbitration agreement was invalid;
3. proper notice of the arbitration proceedings and arbitrator(s) was not given, or the party was not given a full opportunity to present its case to the arbitration panel;
4. the award falls outside the "terms of submission," or the composition of the arbitral tribunal was improper; or
5. the award has not become final or has been set aside or suspended by an appropriate court.¹⁰⁸

Enforcement of a foreign award may also be denied if it concerns a matter incapable of settlement by arbitration, or if enforcement would be contrary to the public policy of Hong Kong.¹⁰⁹

Like its English counterpart, Hong Kong law provides for an ap-

103. *Id.*

104. The Arbitration Ordinance, Chapter 341 of the Laws of Hong Kong.

105. K. SIMMONDS & B. HILL, *supra* note 100, at 21.

106. *Id.* at 32.

107. Under the 1923 Protocol on Arbitration or under the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, a foreign award can be enforced by an action on the award pursuant to § 36 of the Arbitration Ordinance or as an award of an arbitrator under § 28 of the Ordinance. *Id.* at 33.

108. *Id.* at 34-35.

109. *Id.* at 34.

peal to the High Court on any question of law arising out of an arbitral award, however the parties may, by an agreement in writing, exclude such rights of appeal in non-domestic cases.¹¹⁰ Unlike English law, this right of the parties to preclude judicial review of legal issues decided by the arbitrators extends—in non-domestic cases—to arbitration agreements involving maritime, insurance, and commodity matters.¹¹¹

3. Japan

Japan ratified the Convention in 1961, but like Indonesia, has not enacted implementing legislation.¹¹² Notwithstanding the absence of such legislation an attempt was made to enforce an award made in London.¹¹³ The defendant asserted that the award could not be enforced because domestic Japanese law did not contain provisions for enforcement of foreign arbitral awards. The Tokyo Court disagreed and held that the absence of express statutory provisions did not prevent enforcement of foreign arbitral awards under Japanese law. The Court reasoned that it is “in conformity with the spirit of our law to attribute to foreign arbitral awards, under certain conditions, the same force as domestic awards.” The Court further observed that with regard to foreign arbitral awards falling under the New York and Geneva Conventions it was “the obligation of this country as signatory of these Conventions to give these awards the same treatment as domestic awards in so far as they comply with the conditions of the Conventions.”¹¹⁴

Japanese courts have generally enforced awards rendered in both Contracting and non-Contracting states. Arbitral awards rendered in the United States were enforced in Japan even prior to the United States ratification of the convention.¹¹⁵ Under the Convention, a court may refuse to enforce a foreign arbitral award if it finds such

110. See § 23B of the Arbitration Ordinance of 1982.

111. K. SIMMONDS & B. HILL, *supra* note 100, at 36.

112. *Id.* at 103. It may be possible to enforce a foreign award even if rendered in a non-Convention country in the same manner as domestic arbitral awards are enforced. *Id.*

113. See Judgment of March 14, 1963, Tokyo Court of Appeals, reported in 1 Y.B. COM. ARB. 194 (1976). The Court of Appeal of Tokyo declined to apply the New York Convention because Japan had reserved the application of the Convention only to awards made in the territory of another contracting state, and the United Kingdom was not a Party to the Convention when the arbitration took place. The Court of Appeal granted enforcement on the basis of the Geneva Convention of 1927.

114. *Id.* at 195.

115. See Judgment of Jan. 25, 1958, Tokyo District Court, Japan, 10 Kaminshu 2232.

award to be repugnant to public policy, but Japanese courts have generally refused to employ public policy to bar enforcement of foreign arbitral awards.¹¹⁶

4. Singapore

In 1985, the Ministry of Law announced that the Government had decided to accede to the New York Convention. It finally did so in 1986 and implemented its accession by enacting the Arbitration (Foreign Awards) Act of 1986. Section 5 authorizes enforcement of awards from convention countries either by separate proceeding or in the same manner as domestic awards.¹¹⁷ In the past, foreign arbitral awards were enforceable on the basis of the Reciprocal Enforcement of the Commonwealth Judgments Act or the Reciprocal Enforcement of Foreign Judgments Act. The Commonwealth Judgments Act applies to arbitral awards and judgments made in Commonwealth Countries. The Foreign Judgments Act applies to judgments given in Commonwealth or other foreign countries which offer reciprocal treatment to judgments rendered in Singapore.¹¹⁸

5. People's Republic of China

China ratified the United Nations Convention for the Recognition of Enforcement of Foreign Arbitral Awards in 1987, but has not yet implemented it with legislation.

As a practical matter, the Chinese seem willing to enforce foreign awards only in the very rare cases where the parties have both agreed to arbitrate outside the country and have actually participated in foreign arbitration.¹¹⁹ There have been numerous statements by various Chinese public officials from a variety of organizations assuring the international trade community that China will abide by any arbitral award. There have also been indications that Chinese courts will enforce foreign arbitral awards, if necessary.

116. See Judgment of Aug. 20, 1959, Tokyo District Court, Japan, 10 Kaminshu 1711 (no public policy against enforcement of foreign award); Judgment of May 28, 1970, Tokyo District Court, Japan, 3 Int'l Case Rep. 583.

117. K. SIMMONDS & B. HILL, *supra* note 100, at 18-20.

118. Such countries include the United Kingdom, Australia, Brunei, Sri Lanka, Hong Kong, India (except the States of Jammu and Kashmir), Malaysia, New Zealand, Papua/New Guinea, and the Windward Islands. P. Kimbrough, *National Report Singapore*, in INT'L HANDBOOK ON COMMERCIAL ARBITRATION 22-25 (Nov. 1984) (Singapore enforces foreign arbitral awards granted by Commonwealth or reciprocating countries).

119. HSIUNG, *LAW & POLICY IN CHINA'S FOREIGN RELATIONS* 312-13 (1972).

IV. CONCLUSION

Where it appears likely that enforcement may be sought in a country other than where the award or judgment is rendered, which will always be the case when parties select a neutral or third country in which to arbitrate, or where an action is commenced in the plaintiff's national courts, arbitration offers significant enforcement advantages over litigation. Not only is the procedure both simpler and quicker, but the grounds for challenging an arbitration award are significantly more limited under the New York Convention than are the grounds for refusing to enforce a foreign judgment under both common and civil law.