Issues in the Enforceability of Arbitral Awards in International Project Lending

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International project lending for infrastructure generally involves two sets of contracts, the project agreements, which almost always makes use of international arbitration for the resolution of disputes and the other, the financing documents, which almost always contain submission to jurisdiction clauses for the courts of a money center city, such as New York, London or Paris. This paper will discuss some issues affecting the ability of parties to the project agreements to obtain arbitral awards that can later be enforced against the asserts of the losing party. To put a practical spin on the discussion and to highlight some of these issues, this paper will use a very interesting New York Convention enforceability case involving a failed power project in Indonesia as a reference point. This case has recently wound its way through the U.S. federal court system.

By means of a very basic introduction to international infrastructure project finance, the classic model is based on a series of agreements entered into by an in-country entity (with limited liability) created by the foreign sponsors or developers of a project. The project company obtains a concession or enters into an offtake agreement with a local entity, usually an agency of the host-country government or a parastatal enterprise, to sell power, telecommunications, water or provide port services, or whatever other type of service is required. There is almost always a land use arrangement. The project company also enters into the construction or equipment supply contracts with international contractors to deliver the services and equipment in-country. In a power project, the project company enters into the fuel supply and operations and maintenance agreements. Generally speaking, in international projects, the in-country project agreements are governed by the law of the host country and these agreements almost always contain arbitration clauses for the resolution of disputes.

The basic financing agreement is a credit facility agreement between an international bank, or a consortium of banks, and the project company. If there is a consortium of lenders or if there is credit support or guarantees provided by an export credit agency, then the practice is to have a common agreement where certain obligations of the project company and its representations and covenants are set out for all the lenders and guarantors. The individual facility agreements, the common agreement and any export credit guarantees or agreements are almost always governed by New York or English law (or the law of country of the export credit agency) and provide for the submission to the jurisdiction of courts for the resolution of disputes.

Therefore, when one speaks of the use of arbitration in international project lending, it is almost always in relation to the project agreements. Since project finance is also non-recourse (or limited recourse) financing, lenders scrutinize these agreements very closely to make sure they contain the provisions they expect to mitigate their risks. In short, in project finance, lenders are lending on the strength of the project agreements and the credit of the offtaker. There are some projects that benefit from a full sovereign guarantee of the obligations of the offtaker or the other state enterprises involved in the project, but this is usually not the case. If it is the case, then project lending in essence becomes a type of sovereign lending.

Of course, for international lawyers, the main risk mitigation consideration for lenders considering project documents is that they will in fact be enforceable should a dispute arise. This means that there should be an agreement to arbitrate that withstands challenge and delineates rules and a process that will lead to an arbitral award that can then be enforced against the losing party. While this seems like an obvious point, sometimes it is given short shrift in the negotiation of the documents and project agreements that become subject to disputes sometime contain very inadequate agreements to arbitrate. Why this happens is something of a mystery, although there are several possible explanations. One is that the lawyers who draft and negotiate project documents generally are not litigators or arbitration specialists, so they use standard clauses or form documents with agreements to arbitrate that may not be appropriate for the particular context. Another is a more psychological reason, namely that it is somehow unseemly to discuss too much the potential failure of a project when it is being put together. Even if hundreds of millions or even billions of dollars are being invested or lent, this psychological element comes into play. Also, in many cases, the law governing the project agreements is from a civil law system, certain important aspects of which are unfamiliar to counsel trained in the Anglo-American or common law tradition. There are principles of law in most civil law countries that could potentially undermine the enforceability of key provisions of the agreement, but they might not be explicitly addressed in the documents. In sum, counsel to project lenders and the developers (and ultimately the emerging country counterparties, since everyone should have an equal interest in establishing a reliable contract) should carefully scrutinize the project documents and the agreement to arbitrate for a number of points that could call into question the achievement of the ultimate goal: the enforceable arbitral award.

Some examples of the enforceability points to watch out for are: (i) the arbitrability of the dispute under applicable law, (ii) the participation of multiple parties and how to ensure that all will be bound by the arbitration agreement, (iii) the allocation of force majeure risks, (iv) the exclusivity of the arbitral procedure and the use of provisional remedies, (v) sovereign immunity, since the assets of a state enterprise will always be subject to laws on immunity from execution of its own country and in other countries where it may have assets and (vi) possible bases for annulment of the award.

THE KBC/PERTAMINA NEW YORK CONVENTION PROCEEDINGS

The New York Convention case that highlights these points involves 1994 agreements to develop a 400 MW geothermal power project in West Java, Indonesia.[1] The developer of this project was a Cayman Islands limited liability company known as Karaha Bodas Company, or KBC. It was owned predominantly by two American investors, FPL Energy and a company called Caithness. The project involved agreements with two Indonesian state enterprises: (1) Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, known as Pertamina and (2) PLN. Pertamina is an oil and gas exploration company whose mandate extends to generating electricity. PLN is a state-owned electric utility that supplies electricity.

The Facts

KBC entered into contracts with Pertamina and PLN on November 28, 1994. The contract with Pertamina was known as a Joint Operations Contract (JOC) and its purpose was to allow KBC to arrange financing for the project and then to build, operate and own the generating facilities. The agreement with PLN was an Energy Sales Contract (ESC) to which Pertamina was also a party and which obligated PLN to purchase from Petramina the power generated by KBC's facilities.

Both the JOC and the ESC provided that they would be governed by Indonesian law and for the arbitration of disputes under UNCITRAL Rules in Geneva, Switzerland.

KBC arranged financing for the project and began construction, but the Asian contagion intervened in 1997, the Indonesian currency was devalued and a political crisis ensued in Indonesia. Before KBC could finish construction of the project, the Government of Indonesia issued a Presidential Decree on September 27, 1997 indefinitely postponing the project, along with more than 70 other government-related infrastructure projects.[2] While the project was briefly restored on November 1, 1997, it was again indefinitely postponed by another presidential decree dated January 10, 1998. KBC gave notice that this last Presidential Decree constituted an event of force majeure under both contracts and served a notice of arbitration on April 30, 1998 to both Pertamina and PLN for the initiation of a consolidated arbitration against them.

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[1] *In the Matter of an Arbitration between Karaha Bodas Company, L.L.C, v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 190 F.Supp. 2d 936 (S.D. Tex 2001), 2001 U.S. Dist. LEXIS 23079 (the "NY Convention Case"); Also *Karaha Bodas Company, L.L.C. v Perusahaan pertambangan Minyak Dan Gas Bumi Negara, Ministry of Finance of the Republic of Indonesia*, 313 F.3d 70 (2nd Cir. 2002), 2002 U.S. App. LEXIS 25165 (the "Sovereign Immunity Case").

[2] NY Convention case, at 940, Sovereign Immunity Case at 76.

The arbitration clause had several fairly standard, but nonetheless important provisions, to the effect that the award rendered would be final and binding on the parties and that judgment thereon may be entered in any court having jurisdiction for its enforcement. Somewhat more unusual were provisions where the parties waived any right to appeal from the decision of the arbitral panel, including under certain provisions of Indonesian law, and where they agreed not to commence any suit or legal proceeding concerning a dispute until the dispute has been determined under the arbitration proceeding, and only then for the enforcement of the award.[3]

As for the relationship between the two contracts, the Joint Operations Contract expressly provided that the Energy Sales Contract "shall be an integral part of this contract, and to the extent the provisions of the Energy Sales Contract obligate the Parties hereto, shall be deemed incorporated into this contract for all purposes."[4] Also, the Energy Sales Contract had an integration clause providing that it and the Joint Operations Contract together constituted the entire agreement among the Parties.[5]

Both contracts also had force majeure clauses that included a defined "Government Related Event" as being an event of force majeure with respect to KBC only, meaning that neither Pertamina nor PLN could claim that an act of the Government of Indonesia could be deemed to be force majeure preventing one of them from performing.[6]

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[3] NY Convention Case at 943-44. Relevant portions of the agreement to arbitrate (for both contracts) are as follows:

> The Parties expressly agree to waive the applicablility of (a) Article 650.2 of the Indonesian Code of Civil Procedure so that the appointment of the arbitrators shall not terminate as of the sixth (6th) month after the date(s) of their appointments and (b) the second sentence of Article 620.1 of the Indonesian Code of Civil Procedure so that the arbitration need not be completed with the specific time.
>
> In accordance with Section 631 of the Indonesian Code of Civil Procedure, the Parties Agree that the Tribunal need not be bound by strict rules of law where they consider the application thereof to particular matters to be inconsistent with the spirit of this Contract and the underlying intent of the Parties, and as to such matters their conclusion shall reflect their judgment of the correct interpretation of all relevant terms hereof and the correct and just enforcement of this Contract in accordance with such terms.
>
> The Parties hereby renounce their right to appeal from the decision of the arbitral panel and agree that in accordance with Section 641 of the Indonesian Code of Civil Procedure neither Party shall appeal to any court ... and accordingly the Parties hereby waive the applicability of Articles 15 and 108 of the Law No. 1 of 1950 and any other provision of Indonesian law and regulations that would otherwise give the right to appeal the decisions of the arbitral panel.

[4] NY Convention Case at 946

[5] *Id.*

[6] NY Convention Case, at 954.

Finally, each contract contained a waiver by Pertamina and PLN, respectively, of any right of sovereign immunity over its assets and consented "in respect of the enforcement of any judgment against it."[7]

The Arbitration

KBC appointed an arbitrator in its Notice of Arbitration, but neither Petramina nor PLN responded by appointing its own arbitrator, so KBC invoked the default nomination provisions, which provided for the Secretary General of the International Centre for the Settlement of Investment Disputes (ICSID) to name both Pertamina/PLN's party arbitrator and the chairman. The tribunal consisting of three well-known international arbitrators was in fact constituted in that way in mid-1998 and proceedings were commenced in Geneva.

The PLN party requested at the beginning of the hearings that the tribunal consider as preliminary issues the consolidation of claims and the appointment process. On October 4, 1999, the tribunal issued a preliminary award to the effect that the tribunal was properly constituted, that KBC was entitled to file its claims in a single arbitration and that the government of Indonesia was not a proper party to the arbitration.[8]

The proceedings continued and hearings on the merits were held in June 2000. On December 18, 2000, the tribunal issued a final award in favor of KBC. The tribunal held Pertamina and PLN had breached the Energy Sales Contract and Pertamina had breached the Joint Operations Contract, reasoning that the Indonesian parties had, by virtue of the force majeure clause, contractually assumed the risk of harm imposed by the presidential decrees suspending the project. The tribunal stated that KBC had been "prevented from pursuing the performance of the binding contracts that it relied upon for reasons beyond its control … [and] should not bear the consequences thereof."[9] The tribunal awarded KBC $111.1 million in damages to cover its expenditures on the project, $150 million in future lost profits, some costs and expenses, plus 4% interest from January 1, 2001 until date of full payment.[10]

On February 1, 2001, Pertamina filed an appeal of the award to the Swiss Federal Tribunal, which rejected the appeal on procedural grounds in a decision published on April 24, 2002.

7 Sovereign Immunity Case, at 76.
8 NY Convention Case at 941.
9 Sovereign Immunity Case at 77.
10 NY Convention Case at 942.

New York Convention Enforcement Proceedings

In the meanwhile, KBC had begun to seek in the United States recognition and enforcement of the award under the New York Convention against Pertamina before the United States District Court for the Southern District of Texas, Houston Division. Pertamina contested the enforcement according to several of the grounds set out in Article V of the New York Convention. In a reasoned judgment entered December 4, 2001 and granting KBC's motion for summary judgment, Judge Atlas rejected Pertamina's New York Convention defenses and confirmed the tribunal's award.

KBC then moved to have its judgment made enforceable in all of the U.S. federal judicial districts because it had been able to locate assets of Pertamina in seven New York banks, including fifteen trust accounts at the Bank of America. Judge Atlas granted that motion on February 20, 2002 and allowed KBC to register the judgment in the federal district courts of Delaware, New York and California.[11] Two days later, KBC presented the Houston judgment to the U.S. District Court for the Southern District of New York for registration and was granted a writ of execution on the fifteen trust accounts at the Bank of America and several other banks for satisfaction of its judgment in excess of $261 million, plus interest.

In an oral decision issued on April 5, 2002 (later memoralized on April 26, 2002), the Southern District of New York, per Judge Griesa, analyzed the questions of sovereign immunity posed by attempting to execute on the accounts in which an instrumentality of the Government of Indonesia had an interest, as well as the ownership interests in the fifteen trust accounts at the Bank of America. The trust accounts in question were part of a financing arrangement for the sale by Pertamina of LNG from extraction projects in Indonesia. As summarized by the court and later the Second Circuit Court of Appeals, the extraction contracts, known as Production Sharing Contracts" or PSCs were essentially oil and gas extraction concessions from Petramina under which private contractors were entitled to keep a portion of what they extracted, but turned over the rest to Petramina. Petramina then converted extracted gas to LNG at liquefaction plants and sold to foreign buyers under long-term sales contracts governed by New York law. These contracts required that buyers of LNG remit payment to the trust accounts in New York at the Bank of America. Once in the trust accounts (each account being dedicated to a different project), relevant extraction expenses were paid over to the private contractor. The remainder in the account, essentially the profits from the project, were divided between Petramina and the contractor according to agreed percentages.

Under the trust agreements, Pertamina's share was directly transferred to an account of the Government of Indonesia at Bank Indonesia, except that under a 1982 Indonesian law,

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[11] Sovereign Immunity Case at 77.

Petramina was entitled to keep a 5% "retention" of the amounts transferred to the government. Essentially, the District Court found that KBC would be entitled to execution as to the 5% retention kept by Pertamina, but not for the rest of the funds returned to the Government. The Court held that as a question of conflicts of laws, Indonesian law should apply as to the various ownership interests in the accounts and that this was the appropriate interpretation of the Indonesian statutes, which, incidentally would be the same result if New York law had been applied.

All parties appealed the decision of the Southern District to the Second Circuit Court of Appeals, KBC because it wanted to execute on all the money in the accounts and Pertamina because it thought that even the 5% retention amount belonged to the Indonesian government and was consequently not available to satisfy a judgment against Pertamina. The Indonesian Ministry of Finance also was granted leave to participate as a non-party appellant. In a decision issued on December 10, 2002, the Second Circuit affirmed the decision of the Southern District of New York, meaning that KBC, in attempting to enforce its award, would be entitled to realize upon only the 5% residual interest owing to Pertamina under the relevant Indonesian statute, rather than upon all sums in the account.

Both Petramina and the Indonesian Ministry of Finance sought to appeal the Second Circuit decision to the U.S. Supreme Court, but the Supreme Court denied their writs of certiorari on June 2, 2003, meaning that the law in the initial Southern District of Texas, Southern District of New York and Second Circuit decisions is now what interests us on a number of questions relating to the enforceability of arbitral awards against state enterprises in international project finance.

While these cases touch on many aspects of enforceability of arbitral awards in international project finance, this paper will focus on four major ones – (i) the importance of force majeure clauses in allocating risk; (ii) questions arising from multiple party arbitration or consolidation; (iii) the exclusivity of the procedure or the effect of interim measures and (iv) questions of sovereign immunity in enforcing awards. Before treating these points, though, this paper will set out some basic considerations in the choice of arbitration rules with respect to the way in which arbitral awards, once rendered, are enforced.

BASIC ENFORCEMENT SCHEME FOR ARBITRAL AWARDS

A final award rendered by the ICC Court of International Arbitration (or any other international arbitral tribunal or ad hoc body) is enforced in accordance with the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, known as the "New York Convention". If a host country is not party to the New York Convention, then there may be another regional convention which is relevant (e.g. the Inter-

American Convention on the Recognition and Enforcement of Arbitral Awards).

If the host-country party is a state-owned entity and the investor party meets certain criteria concerning foreign ownership or control, the arbitration rules of the International Centre for the Resolution of Investment Disputes ("ICSID") are also available as an option. If the award is an ICSID award, then it is enforced in accordance with the provision of the ICSID Convention, known as the Washington Convention.

The basic principle of the New York Convention is that an arbitral award rendered in a country that is a party to the New York Convention can be presented for enforcement in any other country that is a party to the convention. The particular procedures for this enforcement are determined by the domestic legislation of the country in which the award is presented. In the United States, the legislation implementing the New York Convention is the American Arbitration Act, 9 U.S.C. 1 *et seq.* Under this law, the party seeking enforcement must make an application to a Federal District Court in the United States and the party against whom enforcement is sought is entitled to object on the basis of the Act, which contains basically the same grounds as Article V of the New York Convention. Appeal from the determination of the District Court is also possible.

Under the Federal Arbitration Act, there are five grounds for refusal of recognition and enforcement under Section 201, Art. V(1):

(a) the parties to the agreement were under some incapacity or the agreement was invalid under the law to which the parties have subjected it;

(b) the party against whom the award was invoked was not given proper notice of the appointment of the arbitrator, the arbitration proceedings, or was otherwise unable to present his case;

(c) the final award deals with a difference not contemplated by the submission to arbitration or is beyond the scope of the submission to arbitration;

(d) the composition of the arbitral authority or the arbitral procedure was improper and not in accordance with the agreement of the parties; or

(e) the award has not yet become binding or has been stayed by a competent authority.

A court may also refuse confirmation of an arbitral award Art. V(2) if it finds (a) the subject matter of the difference between the parties is not capable of settlement by arbitration

under the law of the enforcing state or (b) enforcement of the award would be contrary to the public policy of the enforcing state.

In sum, there are a lot of defenses a losing party can raise to the enforcement of an arbitral award in a New York convention proceeding in domestic courts.

If the transaction and the parties involved meet ICSID's jurisdictional requirements, the ICSID Convention provides a basic advantage in enforcement of awards in that the courts of the country in which an award is presented for enforcement do not have to review the decision in the same way required under the New York Convention. Instead, an award rendered under the ICSID Convention is treated like a domestic judgment of the enforcing state.

Article 54(1) of the ICSID Convention sets forth the basic rule regarding the enforcement of ICSID awards in the territories of all Contracting States.

> Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in the State.

Article 54(3) further provides that execution of the award "shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought."

Thus, if the enforcement of an ICSID award is sought in any Contracting State, by the terms of Article 54 of the ICSID Convention, which has the force of law in all Contracting States, that ICSID award will be considered to be exactly the same as a judgment of a court in that State. U.S. courts and the courts of other countries have held that State parties to the ICSID Convention waive entirely any domestic law requirements otherwise applicable to registration and confirmation of arbitral awards.[12]
Article 52(1) of the ICSID Convention sets forth the grounds on which a party may request annulment of an ICSID award.

> Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

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12. *Soabi (Seutin) v. Senegal* (Cour de Cassation, June 11, 1991), reprinted in 30 I.L.M. 1167 (1191); *S.A.R.L. Benvenutti & Bonfant v. Republique du Congo* (Cour d'Appel, Paris, June 26, 1981), reprinted in 20 I.L.M. 878 (1981); *LETCO v. Republic of Liberia*, 650 F. Supp. 73 (S.D.N.Y. 1986), *aff'd mem.*, No. 86-9047 (2d Cir. May 19, 1987).

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based.

The significance of the foregoing provisions of the ICSID Convention is that, once consent to ICSID arbitration is properly given by a government with respect to the contracting state entity, such consent is approved by the competent authorities in that country and an ICSID tribunal is properly constituted, there is little possibility for either party to the agreement to arbitrate to argue that the subject matter was not capable of settlement by arbitration or that the agreement to arbitrate is invalid.

In the Pertamina case, the parties chose ad hoc arbitration under UNCITRAL rules. While it certainly would have been possible to have ICSID arbitration in the Joint Operations Contract between KBC as a foreign investor and Pertamina as a state-owned entity, it apparently was not possible in the Energy Sales Contract between KBC and Pertamina on the one hand, and PLN on the other. In that contract, there could have been in theory a dispute between two Indonesian state enterprises, thus apparently making it ineligible for ICSID arbitration. Thus, as a result of the choice of UNCITRAL rules, the award from the tribunal would have to be enforced under the New York Convention procedures and be subject to its defenses. When ICSID is available, however, it is desirable to use its arbitration rules because the whole New York Convention recognition and enforcement case in a national court is avoided.

There is one peculiarity of the agreement to arbitrate in the two contracts between KBC and Pertamina and PLN, which caused KBC to argue that Pertamina had waived its New York Convention defenses to enforcement in the Houston District Court case. The agreement to arbitrate had a clause in which the parties "renounced" their right to appeal from the decision of the arbitral tribunal, an in particular waived a right to appeal under particular Indonesian statutes.[13] KBC asked the Houston District Court to find that this language prohibited Pertamina from defending the enforcement proceeding. The court was not persuaded by this argument and allowed Pertamina to raise all its New York Convention defenses. Indeed, Pertamina tried just

[13] New York Convention case at 943. Relevant provisions of the clause cited at note 3, *supra.*

about all of them.

The key point to take away from this failed objection is that one cannot draft out of the New York Convention scheme for recognition and enforcement of arbitral awards.
While the Court recognized the broad language of the clause, which purported to waive the right to commence or maintain "any suit or legal proceeding concerning a dispute hereunder, and did suggest, somewhat in dicta, that if the drafters had intended to deprive an unsuccessful party of all New York Convention defenses in an enforcement proceeding, the drafters could and should explicitly have said so[14], the more practical way to view the drafting of agreements to arbitrate is that no matter what it says, a party against whom enforcement is sought is entitled to the New York Convention defenses.

IMPORTANCE OF FORCE MAJEURE CLAUSES IN ALLOCATING RISK

In my experience, many disputes in international projects arise because of intervening events or changed circumstances which one or the other party claims to be beyond its control and thus an event of force majeure. For this and other reasons, the force majeure clause has a central importance in project document risk allocation, and thus is one of the clauses project lenders should scrutinize most closely in project agreements under consideration. Unfortunately for many laypersons, though, the force majeure clause is long, dense and chock full of legalese. To make matters murkier, there are important differences in the law of force majeure in legal systems based on the Anglo-American common law model and those based on the Napoleonic code civil law model, the legal system prevailing in all of Latin America (except maybe Belize or British Guyana) and French speaking Africa, important parts of the Middle East (such as Turkey) and some countries in Asia (Indonesia is the most important example).

The issue in the KBC/Pertamina cases is a fairly narrow one and actually one I have helped litigate in an ICC arbitration, namely can an agency of a government or a parastatal enterprise claim force majeure as a result of an act of its own government? The answer under domestic legal systems and in international arbitral jurisprudence is "no", but that didn't stop Petramina from claiming that its following the Presidential Decrees of the end of 1997, complying with the law in essence, should relieve it from liability.

Basic Terms of the Force Majeure Clause

By way of background, force majeure clauses basically provide that if a party to a contract is unable to perform an obligation for reasons beyond its control, it is relieved of the

[14] New York Convention at 944.

duty to perform that obligation. In civil law systems, an event can only be considered to be force majeure if it meets the civil code criteria of being unforeseeable, unavoidable and insurmountable. In fact, force majeure as an excuse is available to a party whether or not there is a clause in the contract relating to force majeure because it is provided by law.

On the other hand, if an agreement is governed by English or American law, or some related common law system, there is no mandatory application of force majeure. Under the doctrine of commercial impracticability, the allocation of risk in a contract cannot be altered unless an unforeseen event has a very drastic effect on the affected party's ability to perform, making performance exceptionally burdensome. Courts are very reluctant to find such circumstances because it disturbs the parties' contractual allocation of risk and decisions finding commercial impracticability for price fluctuations less that 100% are rare. However, if the parties define in their agreement what constitutes an event of force majeure and provide that the occurrence of such a defined event will excuse the affected party's performance, the courts will generally enforce it. As a result, lawyers from England and the U.S. have a tendency to draft very elaborate force majeure clauses containing every sort of imaginable catastrophe.

In fact, it is often difficult for common law attorneys to break themselves of the habit of desiring elaborate force majeure clauses and will insist in project agreements governed by the laws of civil law legal systems that there be a long list of events that will be considered force majeure. For purposes of most civil law legal systems, this has an illustrative value only. In other words, one can think up and list every conceivable type of catastrophe in a contract, but an event will only be force majeure if it meets the legal definition, i.e. that it is unforeseeable, beyond the parties' control and insurmountable. Usually there is some case law to help counsel determine if a particular type of event meets the legal definition, but more often than not it is spotty and not necessarily consistent. In fact, some foreign lawyers are so uncomfortable with the laundry-list approach and since they cannot say definitely whether or not some event will fit the definition of force majeure, that the term "force majeure" will be abandoned and the parties will define a term such as "relief event" and provide that the party affected by such an event will be relieved of its performance obligations. This technique takes advantage of another key principle of civil law jurisdictions, namely that the contract is the law between the parties, absent provisions that are contrary to mandatory provisions of law or public order - so if the parties say that something is a "relief event" and local counsel can opine that the contract is enforceable as written, developer's and the bank's common law counsel will feel more comfortable knowing that certain defined events will in fact relieve performance, rather than relying on a legal interpretation as to whether an event meets certain statutory criteria in a foreign legal system.

Force Majeure Clause in Pertamina Contract

These considerations must have been on the minds of the draftspersons of the Pertamina and PLN contracts. Both contracts contain a definition of a "Government Related Event" and both contracts force majeure clauses include a "Government Related Event" as an event of force majeure, but with respect to KBC only.[15] In other words, contractually it was provided that Pertamina could not have asserted an act of the Indonesian government of an act of force majeure preventing its performance. While this is generally speaking the international law on the subject, most contracts do not contain such an explicit contractual statement. This was astute drafting on the part of KBC's project counsel and ultimately aided in favorable rulings from both the arbitral tribunal and the courts hearing challenges to enforcement under the New York Convention.

MULTIPARTY CONTRACTS OR MULTIPLE CONTRACTS – JOINDER AND CONSOLIDATION

One very thorny problem in international project finance is how to provide for a single, efficient dispute resolution process when there may be multiple parties involved or a series of contracts relating to a single investment. To use an example of a power project for which I served as project counsel, the state-owned utility granted the land-use rights to the foreign-owned project company and required in the Power Purchase Agreement that the project company supply the project with fuel (in this case, coal). However, another government agency had jurisdiction over the adjacent port where the coal vessels were to be received and unloaded and there was a separate concession with the port authority for these arrangements. Further, the host-country government gave a letter of support to the project. The developers were very concerned that an action or breach by the port authority would prevent the project company from performing its coal supply obligations and throw the Power Purchase Agreement into breach or cause it lost revenue. We were very careful then to draft joinder and consolidation clauses into the agreement to arbitrate. The joinder clauses required for instance that the national utility and the government be joined in any dispute with the port authority and that any arbitration would have to be consolidated into one proceeding in which the host-country government and agencies would have to choose one arbitrator and the project company would choose one arbitrator. Generally speaking, these types of joinder and consolidation provisions of arbitration clauses are enforceable if the party to be joined consents in the contract to which it is a party. For example, in the project just described, the national utility and the government consented to be joineed in any dispute between the project company and the port authority, with a consent to the port authority's being joined in the agreement between the project company and the utility – and vice-versa. In short, counsel has to be very careful to make sure that everyone who needs to be joined in a dispute consents to it in its relevant contractual documents. If not, and a party's rights are

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[15] NY Convention Case at 954.

affected by relations with more than one entity, then one has to rely on the law of either the contract or the place of arbitration to see if there is a possibility of consolidation by law, but leaving this to chance can have unfortunate consequences for the parties' certainty in obtaining an enforceable award. In the United States at least, the basic principle is that since arbitration is a product of contract, courts cannot consolidate arbitrations absent the parties' consent.[16]

In instances where there are multiple parties to the same agreement, it is impossible of course to maintain the usual international arbitration scheme of each party naming its own arbitrator and the two party arbitrators naming the third. Most arbitration rules allow for the appointment of a sole arbitrator or a three-person tribunal by the institution if the parties consent to this procedure in the arbitration agreement or simply make reference to the rules of the institution. It is practically speaking the only way to have international arbitration for multi-party contracts absent elaborate clauses providing for separate panels for disputes between particular parties to the dispute.

Consolidation of Pertamina Cases

In the KBC case, KBC entered into contracts with two different Indonesian government entities – Pertamina and PLN, thus creating the possibility of separate disputes with each of them. There does not appear to have been an explicit joinder or consolidation provision in the arbitration clauses of the two agreements. In the Joint Operations Contract between KBC and Pertamina, under which KBC was to build and operate the project, each party had to appoint its own aribtrator. In the Energy Sales Contract among three parties, KBC, Pertamina and PLN, under which Pertamina sold the electrical output of the new plant to PLN, KBC and Pertamina together had to appoint one arbitrator and PLN the other, the two so appointed having to appoint the third. This is a confusing and somewhat awkward arrangement, since KBC might have a dispute with Pertamina, but then in a dispute over energy sales to PLN, they would be on the same side and contractually obligated to appoint the same party arbitrator. The contract did provide, though, that if the parties did not appoint their arbitrator as provided within 30 days after the filing of a demand for arbitration, the Secretary General of ICSID could.[17] This is in fact what happened, since Pertamina did not cooperate.

Fortunately for KBC, who wanted to have a single consolidated arbitration, the parties did take care to provide quite explicitly that the arrangements should be understood as a single agreement. For instance, the Joint Operations Contract provided that the Energy Sales Contract would be "an integral part of this contract, and to the extent the provisions of the Energy Sales

[16] See *United Kingdom of Great Britain v. Boeing Co.*, 998 F2d 68 (2d Cir 1993), cited in the New York Convention opinion, p. 945.
[17] New York Convention case at 940.

Contract obligate the parties hereto, shall be deemed incorporated into this contract for all purposes." The Energy Sales Contract also provided that it and the JOC together would constitute one agreement between the parties.[18] On the basis of this explicit language and other elements of the arrangement, the tribunal sitting in Geneva and applying Swiss law, approved a single arbitration based on the "connexity" of KBC's claims and the integration of the two contracts. The tribunal found that the parties "did not contemplate the performance of two independent contracts, but the performance of a single project consisting of two closely related parties."[19] This finding was the basis, in the New York Convention case before the District Court in Houston, to a claim for non-recognition of the award under Article V § 1(d) of the New York Convention on the grounds that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of where the arbitration took place."

The District Court in Houston strongly agreed with the tribunal's decision to conduct a single arbitration, concluding that the integrated nature of the contracts was such that the parties contemplated arbitration in a single proceeding, even though there was no express consolidation clause. In sum, a single arbitration was allowed because these two contracts were in essence seen as one. Most inter-related project agreements do not have this level of "connexity", as the tribunal called it, and counsel will save some grief for all concerned and a claim under Article V§1(d) of the New York Convention when it comes time to enforce the award if there is an explicit consolidation provisions in the agreements to arbitrate of the various contracts.

Primacy of the Law of the Place of Arbitration

Interestingly, on the question of consolidation, there is some support for the proposition that the law of the place of arbitration on consolidation may override the express provisions of the parties' agreement to arbitrate. One treatise cited by the Houston District Court says the following in relation to this point:

> [T]here is strong support for the view that that a judicially consolidated arbitration would be enforceable under the New York Convention where allowed by the governing local law as long as all parties have in effect agreed (i) to arbitration and (ii) to the same arbitral jurisdiction. Where the parties have in effect agreed to a *lex arbitri*, it is reasonable to infer that they have agreed to be governed by any mandatory requirements of that law regarding consolidation which may override the express choice of the parties in matters of composition and procedure of the arbitral tribunal.[20]

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[18] New York Convention case at 946, citing from the preliminary award of the arbitral tribunal.

[19] Cited in the New York Convention case at 946.

[20] Allan REDFERN, Martin HUNTER, LAW AND PRACTICE OF INTERNATIONAL ARBITRATION 187 (2d Ed. 1991),

In other words, no matter what you say in the arbitration agreement, if the law of the place of arbitration says that an arbitration should be consolidated, it can be if one party insists and if it shouldn't be, it can't, if one of the parties objects. Despite this, it is still very advisable to avoid the question of whether the law of the place of arbitration allows it or not and include, if appropriate, express joinder and consolidation provisions. This is particularly true if the place of the arbitration is the U.S. where the basic principle, as pointed out above, is that arbitration is a product of contract and courts cannot consolidate arbitrations absent the parties' consent.

EXCLUSIVITY OF THE ARBITRATION PROCEDURE AND RESORT TO PROVISIONAL MEASURES

It's good practice to take care in drafting an arbitration clause that provides that all possible disputes will be resolved by arbitration, both for certainty and for enforceability of an award.[21] This is of course of particular significance in infrastructure project finance where the projects can be large and the stakes high if there is a dispute. In international projects, careful thought must be given to the extent to which the parties are willing to rely on local courts for interim measures or other steps in aid of arbitration or whether they wish to draft a clause that essentially allows the tribunal, once constituted, to have jurisdiction over all claims, even interim measures.

Treatment of Interim Measures in Arbitration Rules

The ICC Rules, per Article 23, allow the ICC Arbitral Tribunal to order any interim or conservatory measure the Tribunal deems appropriate if one of the parties requests it. On the other hand, the second paragraph of Article 23 also allows the parties to apply to any competent judicial authority for interim or conservatory measures before the file is transmitted to the Arbitral Tribunal and "in appropriate circumstances, even thereafter". While such an application does not invalidate the agreement to arbitrate, there may be circumstances in which the ultimate arbitral award is moot or in contradiction to the interim measures ordered but the *fait accompli* on the ground cannot be refersed. If this is of concern to the parties, the arbitration clause should be explicit in saying that the provisions of Article 23 allowing application for interim measures do not apply. If would then be up to the local court or administrative tribunal hearing the application for provisional measures to defer to the Arbitral Tribunal.

(..continued)
cited in New York Convention case at 946.

[21] Many project agreements do provide for special procedures for technical disputes that are short of formal arbitration. If there are certain types of disputes to be resolved by special procedures, these need to be spelled out explicitly in the agreement to arbitrate.