

1) Introduction

Litigation between States in the International Court of Justice (ICJ) was considered earlier in the Manual. This chapter will look at litigation in the national courts. National courts may be used in the context of international commercial disputes for a variety of purposes, for example:

- as a forum for resolving disputes in cases where one or more of the parties is an 'overseas' or foreign party;
- as support machinery for the arbitral process;
- as a forum for challenging or enforcing foreign commercial arbitral awards.

2) National Courts as a Dispute Resolution Forum

Despite the increasing use of international commercial arbitration backed up by the New York Convention, litigation in the national courts is probably still the major international dispute resolution process in use.

In the context of international contracts, the major problem in relation to litigation is the prospect for one of the parties of that litigation taking place in the courts of a foreign country, conducted in a foreign language and under a foreign system of law. However, litigation may be the dispute resolution process used for a variety of reasons:

- No contractual provision is made for dispute resolution;
- The bargaining power of one party is such that it is able to insist that litigation takes place in the courts of a country of its choosing;
- It is a deliberate, consensual choice of the parties. For example, parties may choose the English courts as the forum for resolution of any disputes that may arise under the contract, and additionally may choose English law as the law to govern that contract. More than 80 per cent of the cases heard in the Commercial Court in London have no connection with England in the sense that either the subject matter of the contract has no connection with the country or one or more of the parties is not English.⁶⁴

An example of overseas parties litigating in the English courts is given in Box 10.

64 England and Wales have a separate court system from Scotland and Northern Ireland and, broadly speaking, a separate system of law. For the sake of brevity, reference is made in this Manual to the English courts and English law.

Box 10: National Courts as a Dispute Resolution Forum: *BHP v Dalmine*

In the case of *BHP Billiton Petroleum and others v Dalmine SpA*, the Defendant, Dalmine, appealed to the Court of Appeal against a judgment of Mr Justice Cresswell. The Claimant, BHP, was the operator of an oil and gas field in the Irish Sea. Dalmine, an Italian steel maker, manufactured steel pipes used in the construction of a sub-sea gas pipeline. The pipeline suffered sulphide stress corrosion cracking. The cracks started in the weld root between the sections of pipe and then propagated through the weld metal on the adjacent pipe. BHP found that the pipes adjacent to the leak sites were out of specification because the carbon equivalent value exceeded 0.40 per cent, making the steel less resistant to crack propagation.

In proceedings against Dalmine, BHP discovered that the steel maker had fraudulently misrepresented the carbon value of the pipes during the manufacturing and supply process. Dalmine accepted responsibility for that fraud and accepted that BHP had relied on the false documents.

Mr Justice Cresswell found that on the balance of probability the incorporation of non-compliant pipe did cause the pipeline to fail and that the pipeline would not otherwise have failed. The Judge found in favour of BHP and ordered damages to be assessed. The Court of Appeal dismissed the appeal.

A full report of the case can be found at [2003] EWCA Civ 170.

3) National Courts as Support Machinery for the Arbitral Process: The English Arbitration Act

i) Introduction

Most states support the arbitral process while at the same time exercising a degree of control over that process. For example, the English Arbitration Act of 1996 supports arbitration in a number of ways, both by filling gaps where the parties have failed to make some necessary provision for the operation of the arbitral process and by giving powers to the court to assist the arbitral process. (The UNCITRAL Model Law on International Commercial Arbitration, on which the English Act is structured, is considered in Chapter 17.)

The 'gap-filling' aspect of the English Act may be of less importance to an international commercial arbitration held in England in circumstances where the parties have provided in their contract for arbitration under the Rules of one of the major international commercial arbitral institutions, such as the London Court of International Arbitration (LCIA) or the International Chamber of Commerce (ICC). Such Rules contain detailed provisions for the conduct of an arbitration, running from the commencement of the arbitration through to the making of the final award.

However, where the arbitration provisions made in the relevant contract are sketchy ("*arbitration London*"), the English Act gives full supporting machinery for the conduct of

an arbitration whose 'seat' is England. The framework provided by the Act operates from the commencement of the arbitration and the appointment of the tribunal right through to the making of and enforcement of the award.

The Departmental Advisory Committee on Arbitration Law (DAC), under the chairmanship of Lord Justice Mustill (now Lord Mustill), advised the British Government on the proposed Act. In its Report in June 1989, the DAC advised against England, Wales and Northern Ireland adopting the UNCITRAL Model Law and recommended instead that there should be a new and improved Arbitration Act that should comprise a statement in statutory form of the more important principles of the English law of arbitration. However, consideration should be given *"to ensuring that any such new statute should, as far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law"*.

The DAC also recommended that the new Act should apply both to domestic and international arbitrations and should not be limited to the subject matter of the Model Law.

ii) An overview of the Act

Part I of the 1996 English Arbitration Act deals with introductory matters; the arbitration agreement; stay of legal proceedings; commencement of arbitral proceedings; the arbitral tribunal (appointment, resignation, death and the filling of vacancies); jurisdiction of the arbitral tribunal; the arbitral proceedings; powers of the court in relation to arbitral proceedings; the award; costs; powers of the court in relation to the award; and miscellaneous and supplementary provisions.

Part II is largely concerned with domestic arbitration. Part III deals with the recognition and enforcement of foreign arbitral awards, namely Geneva Convention awards and New York Convention awards. Part IV contains general provisions.

The English Act leaves the arbitral process largely in the hands of the parties. For example, the parties may make provisions in their arbitration agreement relating to the appointment of a tribunal. But to the extent that the parties have failed to make those provisions, the Act contains the necessary framework for the appointment and replacement of arbitrators. However, there are certain 'mandatory provisions' that apply regardless of the will of the parties. These include the provisions in Section 9 relating to the stay of litigation where parties have agreed to arbitrate, and the provisions in Section 66 relating to the enforcement of the award.

iii) 'Gap-filling' and supportive provisions in the Act

Stay of litigation

Section 9 of the Act contains a major support mechanism for the arbitral process. It operates to prohibit one of the parties from using litigation in circumstances where an agreement has been made between the parties to utilise arbitration as the dispute resolution process: *"a party to an arbitration agreement against whom legal proceedings are brought... in respect of a matter which under the agreement is to be referred to*

arbitration may... apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter”.

The court shall grant the application unless satisfied that the arbitration agreement is “null and void, inoperative, or incapable of being performed” – the wording of the provision contained in Article II.3 of the New York Convention.

Composition of the tribunal

Sections 15-27 of the Act contain provisions dealing with the appointment of the arbitral tribunal in circumstances where the parties themselves have not agreed such provisions. The Sections deal also with the resignation and death of arbitrators and the filling of vacancies. In addition, Section 24 gives power to the court to remove an arbitrator: Any party to arbitral proceedings may apply to the court to remove an arbitrator on various grounds, including the existence of circumstances that “give rise to justifiable doubts as to his impartiality”.

Jurisdiction of the tribunal

Section 30 contains another important ‘gap-filling’ provision dealing with *competence / competence*:

“Unless otherwise agreed by the parties, the arbitral tribunal may rule on its own substantive jurisdiction, that is, as to –

- (a) whether there is a valid arbitration agreement,*
- (b) whether the tribunal is properly constituted, and*
- (c) what matters have been submitted to arbitration in accordance with the arbitration agreement.”*

Duty of the tribunal

Section 33 lays down the general duty of an arbitral tribunal, which shall

- “(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and*
- (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.”*

The general duty imposed by the Act in Section 33 is linked to one of the few opportunities given to a party to challenge an arbitral award. Section 68 provides that a party to an arbitral award may apply to the court to challenge the award on the grounds of ‘serious irregularity’, one such irregularity being the failure by the tribunal to comply with the general duty set out in Section 33.

Powers of the tribunal

Section 38 stresses the freedom of the parties to agree on the powers exercisable by the tribunal. However, unless the parties have agreed otherwise, the Act gives to the tribunal various powers including:

- the power to order a claimant to provide security costs;
- the power to give directions relating to the preservation of property;
- the power to direct that a party or witness be examined on oath or affirmation;
- the power to give directions to a party for the preservation of evidence.

Section 39 states that the parties are free to agree that the tribunal shall have the power to make provisional awards.

Section 41 sets out the powers of a tribunal in case of a party's default (save where the parties have agreed otherwise):

- the power to make an award dismissing a claim where one party has been guilty of inordinate and inexcusable delay;
- the power to continue with proceedings in the absence of a party who has failed to attend or has failed to submit evidence or make submissions;
- the power to deal with a party who fails to comply with any order or direction of the tribunal.

Section 43 deals with the securing of the attendance of witnesses at an arbitration hearing. It provides that a party to arbitral proceedings may *"use the same court procedures as are available in relation to legal proceedings to secure the attendance before the tribunal of a witness in order to give oral testimony or to produce documents or other material evidence"*.

Powers of the court

Section 44 gives extensive powers to the court to support arbitral proceedings. Unless the parties have agreed otherwise, the court has power to make orders relating to:

- the taking of evidence of witnesses;
- the preservation of evidence;
- the inspection, preservation or detention of property;
- the taking of samples;
- the sale of goods;
- the granting of interim injunctions or the appointment of receivers.

Section 45 contains potentially useful provisions dealing with the determination of a preliminary point of law. Unless the parties have agreed otherwise, the court may *"on the application of a party to arbitral proceedings... determine any question of law arising in the course of the proceedings which the court is satisfied substantially affects the rights of one or more of the parties"*.

Governing law, conflict of laws, *ex aequo et bono* and *amiable compositeur*⁶⁵

Section 46 deals with the vitally important matters of governing law in Section 46 (1) and (2) and conflict of laws in Section 46 (3).

First, the Act states that a tribunal is to decide a dispute "... *in accordance with the law chosen by the parties as applicable to the substance of the dispute, or if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal*". It therefore makes it clear that, in accordance with the generally accepted international view, the parties are free to choose the governing law: for example, Italian law. Alternatively, the parties are entitled to specify that the tribunal may decide a dispute on the basis of "other considerations". This can be read as meaning that it may decide on the basis of general equitable principles, i.e., *ex aequo et bono* or acting as *amiable compositeur*.

This is because the Act is based on the UNCITRAL Model Law, which in Article 28 states that the tribunal "*shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*".

Those who drafted the English Act, however, deliberately avoided using those two terms, instead referring to "other considerations". The DAC Report of February 1996 explained the position: "... [T]he parties may agree that their dispute is not to be decided in accordance with a recognised system of law but under what in this country are often called 'equity clauses' or arbitration 'ex aequo et bono' or 'amiable composition' i.e. general considerations of justice and fairness etc. It will be noted that we avoided using this description in the Bill, just as we have avoided using the Latin and French expressions found in the Model Law."⁶⁶

Section 46 (2) makes it clear that the requirement that an arbitral tribunal is to decide the dispute in accordance with the law chosen by the parties is a reference to the substantive laws of a country (e.g., the laws of Italy) and not to that country's conflict of laws rules.

To the extent that the parties have failed to make a choice "... *the tribunal shall apply the law determined by the conflict of law rules which it considers applicable*" (Section 46 (3)). Most developed systems of law contain rules to be used to discover the law to be applied where the parties to a contract have failed to specify what that law should be. These 'conflict of law' rules, which differ from country to country, may be based on 'connecting factors'. Take the example of a case involving a dispute between French and German companies that comes before an arbitral tribunal sitting in England. The parties failed to specify which country's law should govern their contract, but the contract was signed in Germany, written in German and was to be performed in Germany. The application of the English conflict of law rules might determine that the substantive law to be applied by the tribunal was the law of Germany.

65 *Amiable compositeur* means the arbitrator has the power to abate the strictness of law in favour of general principles of equity.

67 Departmental Advisory Committee on Arbitration Law, *Report on the Arbitration Bill*, February 1996, p 49.

Awards on different issues, etc

Section 47 gives to the tribunal (unless the parties have otherwise agreed) the practical and useful power to make awards on different issues: "... *the tribunal may make more than one award at different times on different aspects of the matters to be determined*".

Settlement and agreed awards

Section 51 deals with settlement. It provides that, if the parties settle the dispute during the arbitral proceedings, the tribunal is to terminate the substantive proceedings and, if requested by the parties and not objected to by the tribunal, it "... *shall record the settlement in the form of an agreed award*". This is an important provision in relation to the New York Convention.

Finality of awards

Section 58 contains one of the vitally significant provisions relating to arbitration, namely the finality of awards. It states that, unless the parties have agreed otherwise, an award is "... *final and binding both on the parties and on any persons claiming through or under them*". The proviso to Section 58 states that the finality of the award does not affect the rights of a person to challenge the award by any "*available arbitral process of appeal or review*", or in accordance with the provisions of the Act. The latter is a reference to the provisions of Sections 67, 68 and 69 (see below).

Challenging awards and appeals on points of law

Section 67 contains provisions enabling a party to challenge an award in relation to the substantive jurisdiction of the tribunal.

Section 68 contains provisions enabling an award to be challenged on the grounds of a "*serious irregularity*" that the court considers has caused or will cause "*substantial injustice*". The types of irregularity are listed in Section 68 (2):

- "(a) failure by the tribunal to comply with section 33 (general duty of tribunal);*
- (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
- (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
- (d) failure by the tribunal to deal with all the issues that were put to it;*
- (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*
- (f) uncertainty or ambiguity as to the effect of the award;*
- (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
- (h) failure to comply with the requirements as to the form of the award; or*
- (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award."*

Section 69 deals with appeals on points of law. Unless the parties have agreed otherwise, a party may appeal to the court on a question of law arising out of an award. The right to appeal on a point of law is limited and such an appeal cannot be brought except:

- “(a) with the agreement of all the other parties to the proceedings, or*
- (b) with the leave of the court.”*

The right to appeal is also subject to the restrictions in Section 70(2) and (3). Leave to appeal will only be given if the court is satisfied,

- “(a) that the determination of the question will substantially affect the rights of one or more of the parties,*
- (b) that the question is one which the tribunal was asked to determine,*
- (c) that, on the basis of the findings of fact in the award –*
 - (i) the decision of the tribunal on the question is obviously wrong, or*
 - (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and*
- (d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.”*

Section 70 (2) provides that an application or appeal may not be brought if the applicant or appellant has not first exhausted

- “(a) any available arbitral process of appeal or review, and*
- (b) any available recourse under section 57 (correction of award or additional award).”*

Section 70 (3) states that any application or appeal *“must be brought within 28 days of the date of the award or, if there has been any arbitral process of appeal or review, of the date when the applicant or appellant was notified of the result of that process”*.

Recognition and enforcement of awards

Section 66 of the Act deals with enforcement of the award. It states that an award may, by leave of the court, be enforced *“... in the same manner as a judgement or award of court to the same effect”*. This Section relates to the enforcement of domestic awards and of international awards made in England. An international arbitral award made in England is not, for purposes of recognition and enforcement, a New York Convention award (Article 1.1 of the New York Convention and Section 100 of the Act). The provisions relating to the recognition and enforcement of awards made *outside* England (i.e., mainly New York Convention awards) are dealt with in Sections 99 to 104.

Section 66 (4) states that:

- “Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under Part II of the Arbitration Act 1950 (enforcement of awards under Geneva Convention) or the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.”*

Section 99 deals with the enforcement of Geneva Convention awards by simply continuing the provisions of the Arbitration Act 1950. Since this Convention is not longer in effect between contracting States that are parties to the New York Convention, there are now obviously very few such awards.

Section 100 deals with New York Convention awards. It defines such an award as one *"made, in pursuance of an arbitration agreement, in the territory of a state (other than the United Kingdom) which is a party to the New York Convention"*.

Section 101 contains the provisions dealing with the recognition and enforcement of New York Convention awards, stating that such an award *"... shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in England and Wales or Northern Ireland"*. The award is enforced by leave of the court *"in the same manner as a judgment or order of the court to the same effect"*.

Section 102 is concerned with the evidence that is to be produced by the party seeking recognition or enforcement of a New York Convention award, which is:

- "(a) the duly authenticated original award or a duly certified copy of it, and*
- (b) the original arbitration agreement or a duly certified copy of it"*.

Section 103 sets out the grounds for the refusal of recognition or enforcement of a New York Convention award. These provisions are based on the Convention itself (which is considered in the next chapter). The Section provides that recognition or enforcement of a Convention award is not to be refused except in the cases listed in Section 103 (2). Recognition or enforcement may be refused if the person against whom the award is invoked proves:

- "(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity;*
- (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made;*
- (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case;*
- (d) that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (but see subsection (4));*
- (e) that the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country in which the arbitration took place;*
- (f) that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made."*

Recognition or enforcement of an award may also be refused if the award *"is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to recognise or enforce the award"* (Section 103 (3)).

Section 103 (4) states that: “An award which contains decisions on matters not submitted to arbitration may be recognised or enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.” The court has the power to adjourn its decision on the recognition or enforcement of an award: “Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f)” (Section 103 (5)).

Section 104 makes provision for the retention of the right to enforce a New York Convention award under common law or under Section 66. An example of the enforcement of a foreign arbitral award by the English courts is given in the next section of this chapter.

For the purposes of this Manual, arguably the most important provisions in the English Arbitration Act are Section 9, dealing with the stay of litigation where parties have agreed to arbitrate disputes; Section 66, dealing with the enforcement of international awards made in England; and Sections 100 to 103, dealing with the recognition and enforcement of New York Convention awards made outside England.

4) National Courts as a Forum for Enforcing and Challenging International Arbitral Awards

National courts may also be used both to challenge foreign arbitral awards and to enforce such awards. This aspect of the national courts’ jurisdiction seems to be increasing and is likely to increase further for two reasons: first, because of the growth of world trade; and second, because of the increasing use of arbitration as a means of resolving international commercial disputes. Examples are given below of cases that have come before courts in England, the United States and China.

i) England: Commercial Court in London

An example of a case concerning the enforcement of a foreign arbitral award in the English national courts is that of *Minmetals Germany GMBH v Ferco Steel Ltd (1999)*.

The case was heard by Mr Justice Colman in the Commercial Court and concerned a New York Convention award. An application was made by the defendant to set aside leave granted under Section 101 of the English Arbitration Act 1996 to enforce two arbitration awards – one in an initial arbitration and one in a resumed arbitration – made by the China International Economic Trade Arbitration Commission (CIETAC), Beijing.

The issue concerned a contractual dispute in which the contract in question contained a Chinese arbitration clause. The awards, subject only to intervention by the Beijing court, were final and enforceable under Chinese law. Applications to the Beijing court to have the awards revoked were rejected.

The applicant made the following contentions: (i) the awards contained decisions on matters beyond the scope of the submission to arbitration within Section 103 (2) (d) of the 1996 Act, in that the arbitrators relied on evidence derived from their own investigations and not previously provided to the applicant; (ii) the applicant had been prevented from

presenting its case; (iii) the decision had been reached by an arbitral procedure that was not in accordance with the agreement between the parties and therefore fell within Section 103 (2) (e) of the 1996 Act; and (iv) the decision was contrary to the requirements of substantial justice as expounded in *Adams v Cape Industries* [1990] 2 WLR 657.

Mr Justice Colman held that:

- 1 The “*scope of the submission to arbitration*” fell to be defined by reference to the issues to be resolved by the arbitrators and not by reference to the procedure to be adopted. The evidence relied on by the tribunal went to a central issue within the overall dispute referred to arbitration. This head of objection to arbitration therefore failed.
- 2 Article V of the New York Convention provided that an award might be avoided if the enforcer had not been given any reasonable opportunity to present its case in relation to the arbitration tribunal’s investigation. In the instant case the defendant had not availed itself of the opportunity to present its case and therefore had not brought itself within that exception to enforcement under the Convention.
- 3 By the arbitration clause, article 53 of the CIETAC Rules was clearly and expressly applicable to the conduct of the arbitrators in making their award. There had been two hearings and a resumed hearing under the auspices of the CIETAC, and following the Beijing court’s order for a resumed hearing the evidence relied on by the arbitrators at the first hearing was open to challenge. However, no such challenge had been made so the defendant had under article 45 of the Rules waived its right to object.
- 4 Where an enforcer alleged that a New York Convention award should not be enforced because this would lead to substantial injustice and be contrary to English public policy, the considerations that would be relevant were: (i) the nature of the procedural injustice; (ii) whether the enforcer had invoked the supervisory jurisdiction of the seat of the arbitration; (iii) whether a remedy was available under that jurisdiction; (iv) whether the courts of that jurisdiction had conclusively determined the enforcer’s complaint in favour of upholding the award; and (v) if the enforcer had failed to invoke that remedial jurisdiction, his reason for such failure, and whether he had acted unreasonably in failing to do so.
- 5 In the instant case the enforcement of the award would not have led to substantial injustice. The unreasonable conduct of the applicant in the manner of its subsequent conduct of the arbitration had, in effect, deprived it of its local remedies and had left it in exactly the same position in substance as if it had wholly ignored the availability of such remedies. Even taking account of a continuing feature of injustice in the failure to disclose the sub-sale award prior to the second award and of the possibility that the arbitrators would have arrived at a more favourable conclusion if disclosure had been made, the countervailing policy considerations in favour of enforcement of the awards were so strong that they displaced the policy consideration of non-enforcement in the face of procedural defects going to a breach of natural justice.

The application was dismissed.⁶⁷

67 A report of the case appeared in *The Times* on 1 March 1999.

ii) United States: US Court of Appeals for the Fifth Circuit

An example of a challenge to a foreign arbitral award in the courts of the United States of America is the case of *Bridas Corporation and Others v Government of Turkmenistan and Others, and State Concern Turkmenneft*.

Plans for an oil/gas pipeline from Turkmenistan through Afghanistan to Pakistan form part of the background to this case. The case initially involved an International Chamber of Commerce (ICC) arbitration award and an application to a US District Court. Bridas applied to a District Court for the Southern District of Texas to confirm an ICC award made in its favour in the sum of US\$495 million. The District Court confirmed the award made against the Government of Turkmenistan and others, and State Concern Turkmenneft. The Turkmenistan parties then appealed to the US Court of Appeals for the Fifth Circuit.

The Court of Appeals judgement

The Court judgment, delivered in September 2003, dealt with complex areas of law. It recounted that Bridas had entered into a Joint Venture Agreement in February 1993 with Turkmenneft, the second Defendant. The Government of Turkmenistan, the first Defendant, was not a signatory. The agreement related to hydrocarbon operations in Keimir, western Turkmenistan. It provided for disputes to be settled by arbitration under the Rules of the ICC, the law governing that agreement being the law of England. Bridas claimed that in 1995 the Government of Turkmenistan had ordered it to suspend work in Keimir and had prohibited it from importing or exporting into or out of Turkmenistan.

In 1996 Bridas had initiated the ICC arbitration proceedings. Although the agreement contemplated that the arbitration would be held in Stockholm, the parties agreed that it would take place in Houston, Texas. The arbitration hearing lasted 19 days. The ICC Tribunal had found for Bridas and awarded damages of US\$495 million. Following motions by both parties to the District Court of the Southern District of Texas, that Court confirmed the ICC award.

The Turkmenistan parties then launched the appeal to the US Court of Appeals, which considered two issues. The first issue related to jurisdiction: whether the Government, which had not signed the agreement, was bound by that agreement. Had the ICC Tribunal properly exercised jurisdiction over the Government? The Court considered a number of arguments – agency, alter ego, estoppel, third-party beneficiary – before vacating and remanding the District Court's decision on this issue.

The second issue involved a challenge to the quantum of damages. The Court of Appeals rejected arguments based on the discount rate applied by the Tribunal and on the contention that the Tribunal had impliedly awarded punitive damages, and held that the District Court had not erred on this issue. It affirmed the District Court's decision in refusing to vacate or modify the Tribunal's award of US\$495 million.⁶⁸

A further consideration of the case

The Court of Appeals considered the case yet again in a decision rendered on 21 April 2006:

"This court, in Bidas S.A.P.I.C. v Government of Turkmenistan ("Bidas I"), 345 F.3d 347 (5th Cir. 2003), considered several theories that could bind a non signatory to an arbitration agreement: agency, alter ego, estoppel, and third-party beneficiary. Rejecting all but one of those theories, Bidas I remanded for further consideration of the alter ego doctrine, as it found the district court's analysis of this 'highly fact-based' issue incomplete and insufficient. The district court was instructed to 'take into account all of the aspects of the relationship between the Government and Turkmenneft.' Because this court resolved other issues concerning the award in Bidas's favor, the sole issue on remand was reconsideration of the alter ego theory. The district court on remand reviewed many of the factors identified by this court as pertinent and held that there was 'an insufficient showing of complete domination or extensive control so as to warrant a finding that Turkmenneft was the alter ego of the Government of Turkmenistan.' Bidas has appealed from the district court's resulting decision to vacate the award against the Government."

On the alter ego issue the Court of Appeals for the Fifth Circuit concluded that:

"Despite some indicia of separateness, the reality was that when the Government's export ban forced Bidas out of the joint venture, the Government then exercised its power as a parent entity to deprive Bidas of a contractual remedy. Intentionally bleeding a subsidiary to thwart creditors is a classic ground for piercing the corporate veil. It is true that the standard for this equitable remedy should be more stringent in breach of contract cases, because the creditor has willingly transacted business with a subsidiary and, as here, forewent the opportunity to obtain a guarantee of Turkmenneft's debts by the Government. The standard is met in this case, however, because Turkmenneft assumed full responsibility for its obligations under the joint venture. The Government, as Turkmenneft's owner, made it impossible for the objectives of the joint venture to be carried out. In this rare case, we are compelled to reverse the district court's finding and conclude that the Government acted as the alter ego of Turkmenneft in regard to this Joint Venture Agreement with Bidas. Accordingly, the judgment of the district court is reversed, and judgment rendered for Bidas authorizing enforcement of the arbitration award."⁶⁹

iii) China: Beijing No. 1 Intermediate People's Court

An example of a case concerning the enforcement in the People's Republic of China of a foreign arbitral award is *Food Industries Planning and Servicing Ltd (Switzerland) ("Food Industries") v China Hua Yang Technology and Trade Corporation ("Hua Yang")*. The case was heard by the Beijing No 1 Intermediate People's Court.

The dispute arose between the parties when Hua Yang failed to make certain payments to Food Industries under a turnkey contract for a fruit juice processing plant. Food Industries commenced an arbitration against Hua Yang before the Arbitration Institute of the

69 *Bidas S.A.P.I.C. v Gov't of Turkmenistan*, No. 04-20842, 2006 WL 1046963 at *1 (5th Cir. Apr. 21, 2006); www.ca5.uscourts.gov/opinions/pub/04/04-20842-CV0.wpd.pdf

Stockholm Chamber of Commerce, which ordered the Respondent, Hua Yang, to pay the Claimant, Food Industries, more than US\$2 million, together with interest. The Respondent failed to comply with the award and the Claimant therefore brought proceedings in China for the recognition and enforcement of the award.

The Beijing Court held that the arbitral award complied with the provisions of the New York Convention and should therefore be recognised and enforced. The Court ruled that Hua Yang should perform its obligations under the arbitral award within 15 days.⁷⁰