Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part I

Issues relating to Challenging and Enforcing Arbitration Awards

1

Awards: Early Stage Consideration of Enforcement Issues

Sally-Ann Underhill and M Cristina Cárdenas[1]

We have yet to meet a client who is happy incurring costs to obtain an award they cannot enforce.

Identification of possible issues

By its very nature, an arbitration will invariably arise under an arbitration agreement between the parties.

Save for *ad hoc* arbitrations, the starting point will most likely be that you are in an arbitration with a counterparty with whom you have had a contractual relationship. No matter how much control you had over the relationship during the period of the contract itself, for example a contract for a limited period, when it comes to arbitrating any dispute arising under the contract, you are immediately talking about a longer timescale.

Therefore, even if you enter into your contract on the basis that your counterparty is 'good for the money' for the period of the contract, have you thought about where things will be in, say, one or two years when a possibly protracted and complicated arbitration process has been concluded?

- Will your counterparty even exist when you come to enforce any award?
- What assets does your counterparty have?
- Where are they located?
- Is that location one in which enforcement of an award is easy, or even possible?
- Where will you locate the seat of your arbitration?
- Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) even apply in the most natural seat or forum?
- What disputes can you reasonably anticipate?
- Which law will be most advantageous to you?

1 Sally-Ann Underhill and M Cristina Cárdenas are partners at Reed Smith LLP.

Depending on whether you are likely to enforce under the New York Convention or under a bilateral or multilateral treaty, you also need to consider what the requirements for enforcement will be.

The New York Convention helpfully sets out an exhaustive list of grounds[2] under which the recognition and enforcement of Convention awards can be refused; this has been implemented in England and Wales under Section 103 of the Arbitration Act (International Investment Disputes) 1996. The New York Convention grounds go to the heart of the procedural and structural integrity of the award, including, for example, that the award deals with matters outside the scope of the submission to arbitrate.

None of the grounds require or allow the court to investigate the merits of the dispute that is the subject of the award. In practice, courts are careful not to be drawn into a review of the merits of the award in challenges to enforcement. Some examples are as follows:

- The parties to the agreement were under some incapacity, or the agreement is not valid under the law to which the parties have subjected it.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.
- The composition of the arbitral authority was not in accordance with the agreement of the parties.
- The award has not yet become binding on the parties, or has been set aside or suspended.

Note that the New York Convention also provides that its provisions do not 'deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the treaties of the country where such award is sought to be relied upon'.[3]

This means that domestic rules relating to the recognition and enforcement of foreign awards that are more favourable than those set out in the New York Convention can be applied, and so the enforceability of an award will vary between signatories.

In the United Kingdom, foreign awards from countries that are not party to the New York Convention continue to be enforced under Section 37 of the Arbitration Act 1950. The United Kingdom is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and has enacted:

- the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries; and
- the Arbitration (International Investment Disputes) Act 1966, which provides for the recognition and enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards pursuant to the ICSID Convention.

2 New York Convention [NYC], Article V.

3 id., Article VII(1).

Strategies for future enforcement

Parties usually turn their minds to enforcement only after an award is obtained, but that is often too late. Parties should begin to think strategically about the ultimate enforcement of awards at the contract drafting stage.

First, the choice of seat of the arbitration will be of fundamental importance. Standards differ as to the grounds for challenging arbitral awards, even among New York Convention states. As noted above, under the Convention (Article V(1)(e)), one of the potential grounds for non-enforcement of an award is that the award has been set aside by the courts at the place of the arbitration. If the parties choose a seat that, for example, will be hostile to a non-national or where the courts are likely to second guess the arbitrators, the parties increase the risk that their award may be unenforceable anywhere.

Moreover, Article III of the Convention provides that contracting states 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. This allows the courts of signatory states to follow their own procedural rules in enforcement proceedings, which can result in additional requirements beyond those expressly stipulated in the Convention. Accordingly, parties should try to anticipate the jurisdictions in which enforcement will be sought and plan accordingly.

For example, if enforcement is likely to be sought in the United States, it is generally advisable to include language indicating that 'judgment upon any award rendered by the arbitrators may be entered by any court having jurisdiction thereof'. The US Federal Arbitration Act (FAA) provides that if the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award', then the courts may confirm the award.[4] While some US courts have held that a clause providing for consent to the entry of judgment clause is not required in the context of an international contract governed by the New York Convention, it is advisable nonetheless to include such a clause.

Parties should also avoid including provisions in the arbitration agreement that will impede the enforcement process. For example, US courts have grappled with the matter of whether parties can expand or narrow judicial review of the award during the enforcement stage. Including such provisions in the agreement can unnecessarily delay enforcement proceedings with court challenges.

Other clauses that could unnecessarily delay satisfaction of the award include imposing specific arbitrator qualifications or limited periods in which the arbitration must be completed. If such clauses are not complied with, they can create grounds for challenge by the losing party. If such clauses are necessary, careful consideration should be given to their drafting.

Finally, contracting with sovereign entities can raise additional challenges. The arbitration clause should ideally include a broad waiver of immunity, including both pre- and post-judgment attachment of assets. Moreover, if contracting with an agency or instrumentality of a sovereign state, research should be undertaken to determine whether the national law of the agency or instrumentality imposes specific requirements regarding

4 9 USC Section 9.

approvals that must be obtained prior to entering into the arbitration agreement or whether there are any restrictions on the ability of that entity to arbitrate a future dispute.

Enforcement due diligence

While the expectation may (and even should) be that any arbitration award will be honoured, the reality is that even the best counterparty may be unable or unwilling to effect payment. It is therefore easy to see, from the example of the United Kingdom discussed above, how complex the issue is. The key point is to determine what assets your counterparty has and where they are located. You can then determine what the requirements are for enforcement in that jurisdiction.

But do not lose sight of the need to ensure that, assuming, say, you are enforcing under the New York Convention, there are no grounds on which enforcement can be refused. So, for example:

Notice of appointment

Was proper notice of the appointment of the arbitrator, or of the proceedings, given? To the right person, in the right form and in the correct manner?

You will need to look at the arbitration agreement and consider any applicable institutional rules, as well as the rules of the arbitral seat and all relevant facts.

Opportunity to present case

Did the party against whom an award was given have an opportunity to present its case?

We have run arbitration hearings before panels of three arbitrators to obtain an award so that there can be no suggestion that there was any impropriety, and have then gone on to enforce the award under the New York Convention. The test is not whether the person failed to attend, but whether, for reasons outside their control, they were unable to present their case.

Seat

And remember that the seat is important:

> *[I]f the parties explicitly choose the seat of arbitration, their agreement can have a real basis in the expectations of the parties regarding the potential future enforcement of the arbitral award in a particular state, including the possibility of applying international treaties, whether bilateral or multilateral, or the existence of reciprocal relations between the state where the award was made and the state of enforcement, etc.*[5]

Under English law, an award is to be treated as if it were made at the seat of the arbitration, regardless of where it was signed, from where it was dispatched or to where it was delivered.[6]

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5 Article from Kluwer Arbitration: 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth', *ASA Bulletin*. Available at http://www.kluwerarbitration.com/document/kli-ka-asab310204?q=%22future%20enforcement%22.

6 Section 100(2)(b), Arbitration Act 1996.

Parties should, therefore, give careful consideration to the seat of the arbitration, as this will affect the enforceability of the award.

The seat of arbitration need not be the same country as the hearing venue (though, in practice, they often are) and need not correspond with the law applicable to the substantive dispute. Agreement on the seat of arbitration outside the domicile of the parties can also be influenced by considerations regarding the potential future enforcement of the award.

If the award is made in a New York Convention state and the assets are also located in a New York Convention state, then it should be straightforward to enforce.

Location of assets

Once you know where the assets are located, obtain local advice on how the award will be enforced before commencing proceedings. Also, check what those assets are: we were informed only very recently about a prospective client who sought to enforce an award in a foreign jurisdiction. The property they had been advised of was only rented, and they were reduced to removing and selling office furniture – maybe that is why they are looking for new legal representation.

Alternatives to traditional enforcement

Arbitration awards are not self-executing. If the award debtor does not voluntarily pay, judicial enforcement is required. The New York Convention provides the overall enforcement mechanism for such an award as well as the grounds on which an award can be refused recognition and enforcement.

However, under certain circumstances, an award debtor may be better served by seeking recognition of a foreign judgment (i.e., an award confirmed at the seat and converted into judgment), rather than the award itself.

For example, in the United States, courts require personal jurisdiction over the defendant or the presence of a defendant's assets as a prerequisite to bringing an enforcement action under the New York Convention.[7] And while courts have held that having assets in the jurisdiction is enough for establishing *in rem* or quasi *in rem* jurisdiction, some courts have concluded that a mere 'good faith' belief as to the existence of assets in a particular jurisdiction is not enough.[8]

In contrast, some US courts have concluded that establishing personal jurisdiction over a judgment debtor is not required as a prerequisite to enforcing a foreign judgment.[9] Even if one cannot locate assets of the debtor in the United States at the time the judgment is sought, there are advantages to having a judgment in the United States. Discovery is a

7 *Frontera Res. Azer. Corp. v. State Oil Co. of Azerbaijan*, 582 F.3d 393, 396-98 (2d Cir. 2009).

8 *Glencore Grain Rotterdam B.V. v. Shivnath Raj Harnarain Co.*, 284 F.3d 1114, 1127-28 (9th Cir. 2002).

9 *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D. 2d 42, 49 (4th Dep't 2001). The holding in *Lenchyshyn* was narrowed in *Albaniabeg Ambient Shpk v. Engel S.p.A.*, 160 A.D. 3d 93 (1st Dep't 2018), which held that a proceeding to recognise and enforce a foreign country judgment under Article 53 of the Consolidated Laws of New York, Civil Practice Law and Rules without establishing personal jurisdiction was appropriate only when the judgment debtor 'does not contend that substantive grounds exist to deny recognition to the foreign judgment'. However, *Lenchyshyn* currently remains good law in the Fourth Department of New York. See also *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (ND Iowa 2002).

critical part of an enforcement strategy, as noted above. US states generally provide for broad discovery in aid of judgment enforcement, which can provide leverage for enforcement efforts in other jurisdictions. While perhaps not as broad as in the United States, other countries likewise provide mechanisms for the disclosure of information in connection with judgment enforcement proceedings.

Another consideration in favour of enforcing a judgment as opposed to an award includes a potentially longer statute of limitations.

In the United States, for example, Section 207 of the FAA provides that a party seeking confirmation of an arbitral award under the New York Convention must apply within three years of the date of the award. While the statute of limitations for the enforcement of a foreign judgment varies by state, that period is often longer than three years and can be as long as 20 years in some jurisdictions.[10] Accordingly, consideration should be given as to whether turning an award into a judgment at the seat of the arbitration and then enforcing that judgment in a country is appropriate.

Ways to monetise an award without enforcement

Outside the New York Convention or bilateral and multilateral treaty regimes, the successful party may struggle to enforce its award and so may need to consider how best to monetise the award without 'enforcement', as the term is generally understood. The following is a non-exhaustive summary of options that may be available.

Obtain security for your claim before or after you commence proceedings, but in any event, before you obtain your award. In the shipping context we do this by using the admiralty procedures to arrest an asset of the owner (e.g., a vessel) or time charterer (e.g., bunkers) to obtain security by way of a bank guarantee, P&I club letter or payment into escrow.

Consider also whether you have a right of lien under your contract over any asset of your counterpart.

Certain jurisdictions allow you to attach bank accounts, even before proceedings are commenced: the Dutch Arbitration Act contains a number of provisions pertaining to foreign arbitrations before an application for enforcement is made, for instance in respect of the ability to apply for the attachment of assets to satisfy a foreign arbitral award before the arbitration is initiated. And even jurisdictions such as Switzerland will attach bank accounts once an award is obtained.

Do not think that just because you have an award, it is too late to negotiate. If you are able, for example, to promise mutually beneficial commercial terms to the party against whom you have the award, they may still be willing to pay a good proportion of the award even if the circumstances mean they are unable, or unwilling, to pay it in full.

Although not to be confused with security, as discussed above, a freezing injunction obtained at an early stage may be particularly useful if a party wishes to make sure that the respondent has sufficient assets to comply with the award, or as a method of securing assets (including overseas assets)[11] for the enforcement of an award.[12]

10 Fla. Stat. Section 95.11 (five years in Florida); CPLR Section 211(b) (20 years in New York).

11 *Derby & Co Ltd and others v. Weldon and others (No. 6)* [1990] 1 WLR 1139.

12 *Orwell Steel v. Asphalt and Tarmac (UK)* [1984] 1 WLR 1097.

To obtain a freezing injunction, it is necessary to provide evidence that there is a real risk that the award may not be satisfied. The court applies an objective test and considers the effect of the respondent's actions, not their intent. It has been held that what has to be shown is that 'there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business.'[13]

As well as freezing injunctions, the English court has power to order the appointment of receivers, including over a respondent's foreign assets, to help prevent the dissipation of the assets and thereby assist with enforcement of an award against them.[14]

A judge can also arrange insurance to cover the risk of sovereign default on arbitral awards, thus removing what is often seen as the greatest hurdle associated with funding arbitration in connection with a bilateral investment treaty (i.e., the risk of non-payment by a sovereign state).[15]

You may be able to claim against a litigation funder. For example, US cotton companies were handed an arbitration award in a dispute against an Indian yarn spinner (Tradeline). A confirmation from a US federal judge required Tradeline to cover the costs incurred by the cotton companies in fighting Tradeline's unfair competition claims, but Tradeline still did not pay. The claimants mentioned to the federal judge that a litigation funder (Arrowhead), who had been used by their opponent in association with the case, should also be responsible for the judgment and urged the judge to add Arrowhead as a judgment debtor. In support of their request, they submitted that Arrowhead took a chance and backed the defendant (Tradeline). Since Arrowhead must have realised the weakness of Tradeline's claims, it was argued that it should now suffer some of the consequences for doing so.[16]

In a shipping context, a party who has obtained a monetary award that remains unsatisfied can still bring an action *in rem* on the underlying cause of action, there being no bar to the separate claim against the ship.[17]

Even the threat of enforcement can be enough to obtain payment: in 2016, an ICSID tribunal concluded that Venezuela had breached its investment treaty with Canada by wrongfully ousting Crystallex from an operating contract for a mine containing one of the largest undeveloped gold deposits in the world. Crystallex attempted to enforce the award against Venezuelan assets through litigation in a variety of courts. In those proceedings, a US district court ruled that the Canadian company could seize shares of a subsidiary of Venezuela's state-owned oil company. Following negotiations, Crystallex agreed to pause enforcements efforts in exchange for Venezuela agreeing to pay the entire award plus interest.[18]

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13 Justice Flaux in *Congentra v. Sixteen Thirteen Marine* [2008] EWHC 1615 (Comm).

14 Section 44 Arbitration Act 1996.
See also *Cruz City 1 Mauritius Holdings v. Unitech Ltd and others* [2014] EWHC 3131 (Comm).

15 https://www.thejudgeglobal.com/award-enforcement/.

16 Law 360: 'Litigation Funder On Hook For $8.9M Award, Cotton Cos. Say' (19 December 2018).

17 David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed., Sweet & Maxwell), Chapter 16: The Rena K [1978] 1 Lloyds Rep. 545, 560.

18 Law 360: 'Venezuela Must Justify $1.2B Crystallex Award Row: DC Circ' (10 January 2019); 'Venezuela Breached Deal Over $1.2B Award, Crystallex Says' (11 December 2018).

Thinking outside the box:

> *It may be possible to enforce even where no direct enforcement treaty is available, for instance through the use of a third-party state. If a third-party state is a party to the NYC and also has a bilateral or multilateral treaty for the enforcement of judgments with the state in which enforcement is sought, the party seeking enforcement may be able to apply to the courts of the third-party state for recognition of the judgment under the NYC, and then enforce the resulting court judgment in the state in which enforcement is sought under the bilateral or multilateral treaty.*
>
> *Even where the state of the arbitral seat is not a party to the NYC, it may still be possible, in some instances, for an award to be enforced through a third-party state via the use of two bilateral treaties for the recognition of awards or court judgments.*
>
> *However, such mechanisms are obviously complex and heavily reliant on both the terms of the relevant bilateral treaties and the willingness of the courts to apply them favourably and effectively.*[19]

Shaming may also work (i.e., notifying trade organisations), such as the old practice of posting awards on the Baltic Exchange in London. International arbitration websites are full of news of recent awards being handed down. The issue for English awards is confidentiality; however, the same issue does not arise in, for example, the United States, where there is no *per se* confidentiality of the award absent party agreement.

Risk sharing with third parties

Third-party funding plays an increasingly important part in international arbitration. However, the acceptance of funding varies from country to country. In some jurisdictions, third-party funding is not accepted, while in others, including the United States, it is prevalent. That raises the question: will the courts of a jurisdiction where arbitration funding is disallowed enforce an arbitral award made from another jurisdiction that was funded?

There is not yet a conclusive answer to that. However, as the use of funding continues to grow, undoubtedly this question must be asked whenever a case starts, particularly if enforcement will be sought in a jurisdiction where funding is disallowed.

As has already been mentioned, the grounds for refusing recognition and enforcement of an award are limited. However, to the extent that such a challenge will be brought, the only potentially applicable ground for refusal of enforcement is the public policy ground. As noted, the New York Convention provides that recognition and enforcement of an award may be refused where '[t]he recognition or enforcement of the award would be contrary to the public policy of that country'.[20]

In 2015, the International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards published a report attempting to define public policy and

19 Financier Worldwide, 'Enforcing international commercial arbitral awards', July 2018, available at https://www.financierworldwide.com/enforcing-international-commercial-arbitral-awards/#.XD7-MFywm70.

20 NYC, Article V(2)(b).

catalogue its manifestations.[21] The report found that while public policy is often invoked in challenging an award, its 'manifestations remain uncommon, and recognition and enforcement of a foreign award are rarely refused under Article V(2)(b)' of the New York Convention. Indeed, none of the 'manifestations' of public policy violations summarised by the report included the existence of a funding.

Arbitral tribunals have been known to order disclosure of the existence of funding (see, for example, Article 24(l) of the Singapore International Arbitration Centre's Investment Rules 2017). However, that is not the norm. Moreover, even if the existence of funding is disclosed, the terms of the arrangement generally are not. That said, as the existence of third-party funding becomes more prevalent, a diligent party should at the outset analyse the effect of a funded arbitration if enforcement will be sought in a jurisdiction that disallows funding.

21 International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards, 'Report on the Public Policy Exception in the New York Convention', October 2015.

Appendix 1

About the Authors

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Sally-Ann Underhill deals with disputes arising out of all types of shipping contracts (including charterparty, bill of lading, ship management and shipbuilding disputes) and issues relating to sale contracts and worldwide logistics. She represents clients across the full spectrum of disputes, from highly technical shipbuilding disputes and cargo claims (including claims relating to the carriage of oil and gas products, dry bulk cargoes and containers, and pharmaceutical products) to simple defence issues. Sally-Ann works largely with clients based in Europe (including the United Kingdom, Italy and Greece), the United States, India, China and Saudi Arabia, acting for the full range of shipping players, including owners, charterers, traders, ship managers and insurers. She has considerable experience of drafting standard form amendments to charterparties, contracts of affreightment, pool agreements, ship management agreements and freight forwarding agreements. The economic downturn led to her being involved with a number of high-profile insolvency issues. Her experience also includes the exercise of liens and arrests in many jurisdictions, anti-suit injunctions and enforcement.

Sally-Ann has recently been advising on the impending sulphur limits, cyber issues and the EU General Data Protection Regulation. She regularly lectures on bill of lading and charterparty issues, and is responsible for in-house training in the transportation group.

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M Cristina Cárdenas focuses her practice on international arbitration and complex commercial litigation. She is a native Spanish speaker and has experience in representing clients in a variety of complex international arbitrations and business disputes. Cristina has served as counsel, both in Spanish and in English, before many of the most important arbitral institutions, including the International Chamber of Commerce, the International Centre for Dispute Resolution, the American Arbitration Association and the Inter-American Commercial Arbitration Commission. She also coordinates and oversees the work of local counsel in connection with litigation proceedings in Latin America.

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Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

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