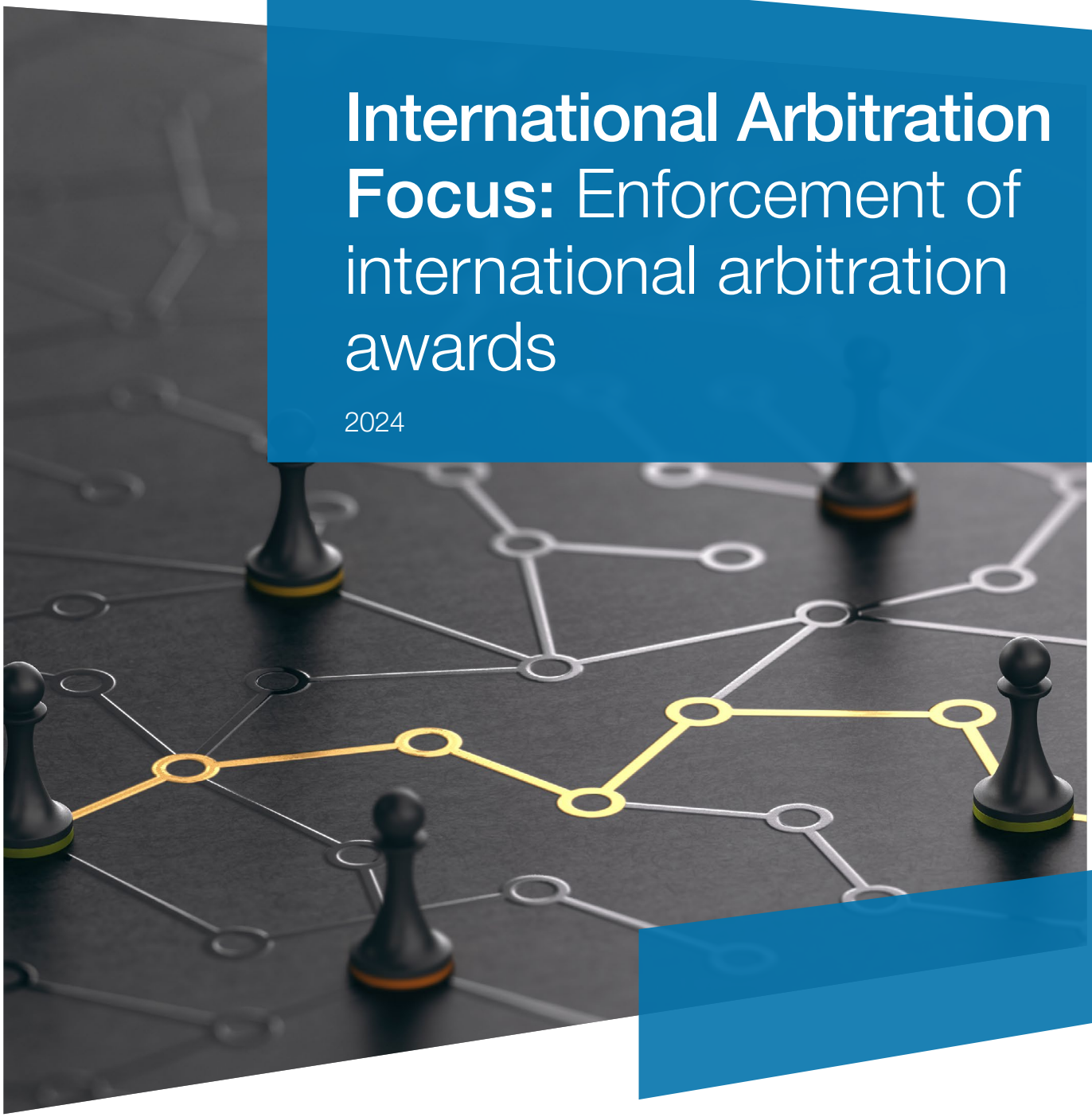
International Arbitration Focus: Enforcement of international arbitration awards

2024



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We are a recognized leader in international arbitration, and are ranked in the elite GAR 30, *Global Arbitration Review*'s ranking of the world's leading international arbitration practices. We have substantial experience representing both claimants and respondents, and a strong track record of obtaining successful results. Our deep knowledge of industry sectors including energy, natural resources, life sciences, transportation, telecoms, insurance, and banking enables us to understand the industry-specific factors and environments affecting our clients' disputes. This combination of deep arbitration experience, our lawyers' advocacy skills, and industry knowledge gives us a competitive advantage when representing our clients.

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Welcome

Welcome to the first Reed Smith international arbitration newsletter of 2024.

This newsletter follows on from our last edition in 2023, which addressed ways in which to avoid a Pyrrhic victory. Enforcement of an arbitral award is a matter of last resort in that quest. It is something that will hopefully not be necessary. But in arbitrations of any size, it can often be a matter of critical importance.

In this edition, our network of international arbitration practitioners share their knowledge on how enforcement of arbitral awards works in their respective jurisdictions. Once again, we showcase the collaborative efforts of our international arbitration practitioners across the globe.

Readers, be advised: Forewarned is forearmed in this area of international arbitration practice.

Peter Rosher
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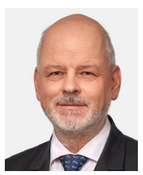
Note from the Editor

As was noted in our last newsletter, the majority of arbitral awards are paid voluntarily without the need for any particular enforcement measures. However, it would be unwise for a claimant in any significant arbitral process to assume such an outcome.

In its broadest sense, matters of enforcement are not limited to the applicable legal regime in the jurisdiction or jurisdictions where enforcement steps may need to be taken. When contemplating a significant arbitral claim, the claimant is well advised to have a broad enforcement strategy and consider a range of enforcement factors, including the corporate form and status of the respondent, its size, its place of incorporation, whether it is publicly listed or a state entity, what information exists in the public domain or otherwise as to its assets and general corporate health, whether political or commercial considerations favor or disfavor the chances of successful enforcement, etc. In complex disputes, levers outside of brute enforcement of the award are not infrequent contributors to a successful outcome for claimants. The claimant will want reassurance in such enforcement matters. And it is well known that third party funders will closely scrutinize these matters when assessing whether to fund an arbitral claim.

All of these considerations might form the subject of a future newsletter. Regrettably, space and time do not allow us to explore them in this edition. Instead, our contributors have concentrated on the mechanics of enforcing awards in their jurisdictions, with occasional excursions down related paths that our readers will hopefully find both informative and interesting. In this edition, we have contributions from New York, Houston, Dubai, Singapore, Paris, London and Hong Kong.

Spring has finally arrived in Europe , a time to reflect and to witness natural growth and the emergence of new shoots on perennial themes. In that spirit, we hope you enjoy this edition of our newsletter wherever you may be.



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Enforcement of international arbitral awards: **England & Wales**

On its own, an arbitral award, even expressed as final and binding on the parties, is incapable of direct enforcement. This article discusses the steps a party can take to enforce an arbitral award in England & Wales.

The United Kingdom is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). This means that the UK courts will recognize and enforce arbitral awards made in other contracting states. With 172 state signatories to the New York Convention, save in a small number of circumstances, the New York Convention is likely to govern enforcement. The New York Convention is a landmark international treaty making the enforcement of awards much easier than court judgments, as there is no such overarching international treaty for judgments of foreign courts.

The Arbitration Act 1996 (the 1996 Act) regulates the conduct of arbitration in the UK. It is the preference of English courts to be pro-arbitration and give effect to arbitral awards. This is enshrined in the 1996 Act, which gives effect to the New York Convention. Parties seeking to enforce an arbitral award in the UK must therefore have regard to the 1996 Act.

There are two elements to the New York Convention. The first is recognition: An arbitration in the territory of a state which is a party to the New York Convention is recognized as binding on the parties to the arbitration. The second is enforcement, which enables a court to give permission for judgment to be entered in the terms of the arbitral award. The award can then be enforced in the same manner as an English court judgment. This article will focus on enforcement.

Presumption of enforceability

An international arbitral award is not enforceable in England & Wales without the leave of the English courts. Section 101 of the 1996 Act deals specifically with enforcement of arbitral awards under the New York Convention. Where leave of the court is given, judgment may be entered in the terms of the award.

Enforcement is mandatory and there is no discretion to refuse to enforce a New York Convention award unless one of the grounds below is satisfied.

Eight defenses to enforcement

There are eight grounds on which the English courts may refuse to enforce the award, which are set out in the New York Convention (and in section 103 of the 1996 Act).

A court may refuse to enforce an arbitral award if the respondent can prove, on the balance of probabilities, at least one of these defenses:

- **A party to the arbitration agreement was (under the applicable law) under some incapacity.** Typically, this will be the incapacity of the respondent who is seeking to resist enforcement. While the New York Convention is silent on the applicable law to determine the "incapacity," it is likely to mean the law where the challenging party is domiciled.
- **The arbitration agreement was not valid under the law to which the parties subjected it or under the law of the country where the award was made.** The "law of the country where the award was made" will typically be the seat of the arbitration.
- **The party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case.** There are two limbs to this ground. The first, dealing with notice, is likely to involve consideration of the procedural rules that governed the arbitration. There is a potential distinction between procedural compliance and actual knowledge, and it is possible that a party might be properly served but never actually become aware of the proceedings (*Kei Kin Hung v. Hua She Asset Management (Shanghai) Co Ltd* [2022] EWHC 662 (Comm)). The second limb involves a factual analysis by the English court of the extent to which the party had an opportunity to present its case. If the party was given an opportunity, but failed to do so (for example, it ignored requests to participate in the arbitration), the English court will enforce the award.

- **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.** The English court will consider the scope of the arbitral tribunal's jurisdiction and whether the tribunal went beyond that jurisdiction. The New York Convention permits the court to (if possible) enforce only the part of the award which was within the tribunal's jurisdiction and refuse to enforce the rest.

- **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.** As to the first limb regarding the constitution of the tribunal, the English court will consider the terms of the arbitration agreement regarding constitution. Even if there was a breach of those agreed terms, the court will need to consider whether the party waived its rights to object – for example, by participating in the arbitration without any reservation of its rights. The English courts have been prepared to consider a failure to disclose by a tribunal member as falling within this sub-section of section 103 of the 1996 Act. For example, in *PAO Tatneft v. Ukraine* [2019] EWHC 3740 (Ch) it was held that there was no failure to disclose, and therefore no failure of arbitral procedure. As to the second limb, requiring compliance with the seat of the arbitration, the party relying on this ground will need to show that the procedure was different to that agreed between the parties, but also that, as a consequence, it had a negative impact on its ability to present its case.

- **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.** If the decision to set aside the award was made by a court in a jurisdiction where recognition of its judgment is required by English law, the English courts are required to adhere to that decision and not enforce the arbitral award.[1] In contrast, if there is no enforcement regime in place between England & Wales and the jurisdiction which is the seat of the arbitration, then the English court retains a discretion to enforce the arbitral award.

  In *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2014] EWHC 2188 (Comm), the English court decided to enforce the arbitral awards, notwithstanding that they had been set aside by a court in Russia. In contrast, the English court declined to enforce the arbitral award in *Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm), holding that the decision to set aside the arbitral award by the Russian court was not so "extreme and perverse" that it could only have been ascribed as bias against the claimant. A party seeking to enforce an arbitral award which has been annulled at the seat of the arbitration has a high hurdle to meet, and will need cogent evidence of actual or inferred bias of the court in the foreign proceedings. The English courts have been willing to carefully examine the evidence available and, if they are satisfied that there is evidence to do so, they will disregard the set aside decision and enforce the annulled award.

  If the question of annulment is outstanding in the seat of the arbitration, the English court may adjourn the decision on enforcement, and may also order the party seeking to rely on this ground to provide security to the party seeking to enforce.

- **The subject matter of the award is not capable of settlement by arbitration.** This is a question of English law and certain matters (including criminal and family matters) cannot be resolved by arbitration.

- **It would be contrary to public policy to recognize or enforce the award.** This is construed narrowly by the English courts, but there are instances where the courts have refused to enforce awards on public policy grounds (for example, relating to rights protected by the Consumer Rights Act 2015 in *Payward Inc. and others v. Maxim Chechetkin* [2023] EWHC 1780 (Comm)).

When seeking to rely on the above grounds, the standard that the respondent must satisfy is "on the balance of probabilities." This standard means that the court must be satisfied, on rational and objective grounds, that the case for a particular argument is stronger than the case against (see *Re H (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563). Although sometimes expressed as being "over 50%," it is not a mathematical or scientific assessment.

Enforcement of a non-New York Convention state arbitral award

Where the arbitral award does not derive from a state which is a signatory to the New York Convention, an application to enforce the award is made under section 66 of the 1996 Act. Section 2(2) of the 1996 Act does not distinguish between domestic and international awards.

As discussed above, there is a preference in England & Wales to give effect to arbitral awards, so an order is likely to be granted if there is no challenge to the award or if any challenges to the award under sections 67-69 of the 1996 Act have been determined.

1 The UK is a signatory to the Hague Convention on the Recognition and Enforcement of Foreign Judgments, but it is not yet in force in the UK. It is currently in force between EU member states and Ukraine.

Procedural steps to enforce an arbitral award

An application to enforce an arbitral award in England & Wales is made by issuing an Arbitration Claim Form in the English court. The Civil Procedure Rules (CPR) govern civil claims in England & Wales and Part 62 of the CPR governs arbitration claims.

The Arbitration Claim Form must be supported by a witness statement which includes the following (as set out in section 102 of the 1996 Act):

- An authenticated original award or a certified copy of the award
- The original arbitration agreement or a certified copy of the agreement
- If the award or the agreement is in a foreign language, a translation sworn by a translator or by a diplomatic or consular agent

Generally, an Arbitration Claim Form will be issued without notice to the respondent. Where a without notice application is made, the claimant must give full and frank disclosure of all material facts. Failure to do so may result in the order being set aside.

Once an order has been granted by the court, it must be served by the claimant on the respondent. If the respondent is not domiciled in England & Wales, permission of the court is required to serve the order out of the jurisdiction. The application for permission to serve the order out of the jurisdiction must be supported by written evidence: (a) stating the grounds on which the application is made; and (b) showing in what place or country the person to be served is found or probably may be found (in accordance with Part 62 of the CPR).

Once served, the respondent has limited time to apply to set aside the court's order. If the respondent is within the jurisdiction, such application must be made within 14 days. Where the court has granted permission to serve out of the jurisdiction, the respondent must make any application within the time limit set by the court.

After the time within which the respondent can apply to set aside the order has lapsed, the order can be enforced as a judgment of the English court.

Enforcement methods in England & Wales

Considering an enforcement strategy is an essential part of pursuing a claim in arbitration. If the respondent has assets in England & Wales (including money, property (including land and securities) and tangible assets), there are several methods that can be deployed to satisfy a judgment debt.

We summarize the main enforcement methods that are likely to be usefully considered following an order by the English court permitting that the final award be enforced as an English court judgment. The question of which are the most appropriate methods of enforcement will depend on the nature of the assets held by the respondent.

It is possible to pursue multiple enforcement methods simultaneously and doing so can exert significant pressure on the respondent and result in payment. If multiple methods are being pursued, it is advisable to ensure the court is aware (as part of the duty of full and frank disclosure required in without notice applications).

- **Third party debt order (or a garnishee order).** The court has the power to grant an order against a natural person or an organization/institution (such as a bank) to freeze any money that would otherwise be paid to the respondent. Typically, this is useful where there are accounts in the name of the respondent held at a known bank. There is a two-stage process to obtaining a final order. The application is made to the court, and if the interim order is granted, it is served on the third party (i.e., the bank). The effect of service of the interim order is to attach to the debt owed by the third party to the respondent – effectively freezing the accounts. In addition, on service of an interim order, the bank must carry out a search to identify accounts in the name of the debtor. For each account, the bank must tell the claimant and the court the account number and whether the account is in credit. If there is a credit in the account, further information must be provided about the balance of the account. At least 28 days after the interim order has been made, there will be a return date hearing at which the court will decide whether to make a final order. If a final order is made, the frozen assets will be paid to the claimant.

  In order for this to be a viable enforcement option, the claimant will need information, including clear evidence of which bank or other financial institution the respondent has an account with, in order to form the basis of any application to the court. If only speculative information is available, it is unlikely that the court will grant an order.

- **Charging order over land and other property.** Where the paying party has an interest in land (such as commercial premises) or other property (such as certain securities including stock of any company registered in England & Wales, as set out in the Charging Orders Act 1979), it is possible to secure the debt by way of charging order over the land. There are three stages to this enforcement method: (a) an interim order; (b) a final order; and (c) an order for sale. The first two stages do not by themselves result in payment to the claimant. If the respondent continues to avoid payment, it would be necessary to seek an order for sale.

Land in England & Wales is (generally speaking) registered at the Land Registry. It is possible to obtain information on the ownership of land by making enquiries with the Land Registry and paying the applicable fee. When seeking to enforce in England & Wales, an easy first step is to ascertain whether the respondent owns any land in the jurisdiction.

When it comes to seeking a charging order over land, it is important to note that there may be higher ranked securities (such as mortgage lenders) which would take priority over any sale proceeds. In addition, any charging orders could be affected if there are steps taken to wind up the debtor.

- **Writ/warrant of control.** The court can grant a writ of control to enable goods to be seized and sold at auction to pay a judgment debt. This is an effective method of enforcement where the debtor is a corporate entity and may have stock, IT equipment, machinery or other assets which could be sold. If the judgment debt is sizeable (such that the sale of assets at auction may not significantly discharge the debt), it may be more appropriate to consider other enforcement options, such as a third party debt order as discussed above.

- **Insolvency.** Where a judgment debt remains unpaid, steps can be taken by a creditor to apply for an order that a corporate entity be wound up. If the debtor is an individual, it is possible for a creditor to apply for bankruptcy. Taking steps to wind up a company (or for the bankruptcy of an individual) will not result in any immediate payment of the judgment debt. The judgment will generally be unsecured, so will rank behind any secured creditors of the debtor.

Interim measures

We discussed a number of important interim measures in our previous edition on "How to avoid a Pyrrhic victory in international arbitration."

These include:

- Freezing injunctions/orders
- Asset preservation orders
- Receivership
- Asset disclosure orders
- Obtaining information from third parties

These measures are equally important when it comes to considering the strategy for enforcing an international arbitral award and can be the leverage needed to persuade the debtor party to pay.

As these are interim measures, they do not result in the actual transfer of money to the claimant. However, they are essential to understanding the assets held in the jurisdiction. These measures can be taken before, during or after taking the steps to apply to the English court to enforce the arbitral award.

Practical tips

1. Knowledge is power and before considering enforcement steps, it is important to consider the overall enforcement strategy:
   a. Where does the respondent have its main operations?
   b. Is it likely to own assets in England & Wales?
   c. What further information is needed about the respondent's assets?
   d. Is the information about the respondent's assets publicly available?
   e. Can any steps be taken to investigate the respondent's assets, without the respondent becoming aware of the investigation?
2. Is there a risk of the respondent seeking to defend against any attempt to enforce the arbitral award, and what steps can be taken to mitigate the risk? For example, ensuring that the award is properly expressed as a "final award" and is for an ascertainable sum of money which is due and payable, and clarifying whether any challenges to the award in the jurisdiction in the seat of the arbitration are concluded.
3. What are the risks of assets being dissipated? Does that possibility warrant taking interim measures to prevent assets being transferred out of the jurisdiction?
4. What are the assets in the jurisdiction, possession of which would be most likely to result in the full payment of the amount of the award?

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Enforcement of international arbitral awards: **France**

After arbitral battle, and absent voluntary payment of the arbitral award, the successful party in the arbitration will look at enforcing the arbitral award against the losing party. Hopefully, these procedural steps will be the last hurdles before actual recovery.

How can the successful party transform an arbitration award into actual recovery in France?

France is generally considered as a jurisdiction that is favorable to international arbitration. This position is clearly reflected in French legislation on the recognition and enforcement of arbitral awards rendered in France or abroad.

France ratified the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards. However, the provisions of the French Code of Civil Procedure (FCCP) are more favorable and prevail over the New York Convention.

The FCCP includes a chapter on "Recognition and enforcement of arbitral awards rendered abroad or in international arbitration" in a section of the FCCP dedicated to international arbitration.[1] This section of the FCCP also includes a chapter on "Appeals" covering both challenges against arbitral awards and decisions on their recognition in France. In this regard, French law makes a distinction between arbitral awards rendered in France and those rendered abroad.[2]

When French law on arbitration was reformed in 2011, the legislature developed new solutions and enshrined in the FCCP solutions previously developed by case law facilitating the recognition and enforcement of arbitral awards in France.[3]

An arbitral award capable of recognition and enforcement: An issue of qualification

The first question one needs to address is whether, under French law, the award qualifies as an arbitral award capable of recognition and enforcement.

Regardless of the form and nature of a particular document, and regardless of the intention of the parties or the arbitral tribunal, French courts will determine this question based on French law.

Pursuant to established case law, French courts consider that arbitral awards are "the acts of arbitrators which determine in final manner, in whole or in part, the dispute submitted to them, whether on the merits, on jurisdiction or on a procedural ground that leads them to terminate the proceedings."[4]

This definition is used for both challenges and recognition proceedings.

Based on this definition, mere procedural orders covering, for example, issues of costs, security or timetable are typically not recognized and enforced by the French courts. However, partial awards and awards on jurisdiction are capable of recognition and enforcement in France.

Some doubts surround consent awards. Consent awards or awards on agreed terms are arbitral awards recording a settlement reached between the parties to the arbitration.[5] In a 2012 decision, the French Cassation Court (the Supreme Court in civil matters) ruled that "a mere finding, in the dispositive part of the decision, of an agreement between the parties, without any reasons in the body of the decision, does not constitute a judicial act."[6]

By this decision, the French Cassation Court cast doubt on whether a consent award may qualify as an arbitral award in France. This decision remains a topic of debate among French legal scholars and international arbitration practitioners.

1 See Chapter III, Article 1514 *et seq.* of the FCCP.
2 See Chapter IV, Article 1518 *et seq.* of the FCCP.
3 Le droit français de l'arbitrage, Clément Fouchard, Jessica Madesclair, Matthieu de Boisséson, LGDJ, ed 2023.
4 French Cassation Court, Civ. 1ère, October 12, 2011, no. 09-72.439.
5 See, for example, Article 33 of the ICC Rules (2021).
6 French Cassation Court, Civ. 1ère, November 14, 2012, no. 11-24.238.

Provisional attachment before recognition

The second question one needs to determine is whether the arbitral award may serve as the basis for provisional attachment before it is recognized by the courts.

French law provides a favorable answer to this question. If the losing party has assets located in France, these assets may be the subject of provisional attachment before the arbitral award becomes enforceable. In this case, the successful party will require the assistance of a French bailiff to proceed with the attachment.

Where the attaching party holds a judicial decision or an arbitral award which is not yet enforceable, prior judicial authorization is not necessary to proceed with the attachment.[7] However, the validity of the attachment is subject to the underlying claim appearing to be well-founded in principle and the existence of circumstances likely to threaten its recovery.[8] The provisional attachment also has to be proportionate.[9] The attaching party will need to show these conditions were met if the attachment is later challenged by the losing party.

Further, and in any event, the attaching party will need to commence recognition proceedings within one month following the provisional attachment.

To conclude on this, where there is a risk of recovery against the losing party, and where there are assets located in France, French law may assist the successful party in promptly and effectively safeguarding its rights over the losing party's assets pending final recovery.

Recognition of arbitral awards in France: The *exequatur* procedure

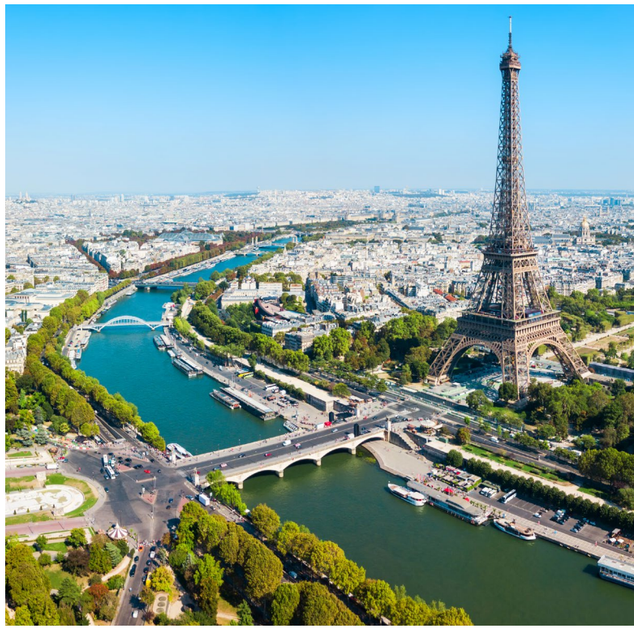
The third question one needs to ask is whether and how the arbitral award may be recognized in France so that it can be enforced.

7 Article L. 511-2 of the French Code of Civil Enforcement Procedure and Cass. 2e civ., October 12, 2006, no. 04-19.062 for arbitral awards.
8 Link the December 2023 IA newsletter edition and Article L. 511-1 of the French Code of Civil Enforcement Procedure.
9 Article L. 111-7 of the French Code of Civil Enforcement Procedure.
10 Article 1515 of the FCCP.
11 See Tribunal des conflits, May 17, 2010 (*Inserm* decision); Tribunal des conflits, April 24, 2017 (*Ryanair* decision).

Under French law, the recognition proceedings for arbitral awards bear the name of *exequatur*. In our experience, the *exequatur* procedure is typically straightforward and quick.

The application and review by the competent courts

The application to obtain *exequatur* is made *ex parte* by any party to the arbitral proceedings. The applicant must provide the original copy of (i) the arbitral award and (ii) the arbitration agreement. As an alternative, the application may be submitted with a copy of these documents attached, provided that the applicant certifies their authenticity. The applicant must also provide a translation of the arbitral award where it is not drafted in French.[10] In our experience, the Paris judicial tribunal generally requires a certified translation. Applicants should be careful in selecting the court before which the application for *exequatur* is to be filed. French civil courts typically have jurisdiction in matters of recognition and enforcement of arbitral awards. However, French administrative courts have jurisdiction in specific cases where the arbitration relates to the performance or termination of an international administrative contract concluded with a French public entity and performed in France.[11]



Also, although the Paris courts may have jurisdiction over arbitral awards issued abroad, this is not always the case in relation to awards rendered in France. The court with relevant jurisdiction will depend on where the award was issued.

Civil courts in *exequatur* proceedings typically exercise a high level control. In examining the request for *exequatur*, the courts will carry out a *prima facie* review of the arbitral award. They will check that the award in fact exists and that its performance does not manifestly constitute a breach of international public order.[12] In practice, civil courts rarely refuse to grant *exequatur*.

However, administrative courts tend to carry out a more substantive review of arbitral awards. For example, in a recent decision issued on October 17, 2023, the Conseil d'Etat (the Supreme Court for administrative matters) refused to grant *exequatur* on the basis that it was illegal for the public entity in this case to resort to arbitration.[13] The court raised *ex officio* the issue of the arbitrability of the dispute.

When it grants *exequatur*, the court will affix it via a stamp directly on the copy of the arbitral award which was provided by the applicant. The *exequatur* order will not include reasons unless the court refuses to grant *exequatur*.

Challenges against the *exequatur* order and interplay with annulment proceedings

The losing party may seek to challenge the *exequatur* order and/or commence annulment proceedings in France if the award was issued in France.

Under French law, whether or not an appeal can be lodged against the *exequatur* order depends notably on where the award was issued. Although an *exequatur* order rendered in relation to an award issued abroad is appealable, this is not always the case vis-à-vis awards issued in France. No appeal can be lodged in France against an order granting *exequatur* where annulment proceedings are available.

Further, any party who wishes to lodge an appeal must do so promptly. Under French law, the time limit for appeals is one month from service of the *exequatur* order.

Finally, interesting and practical questions arise when, on the one hand, the successful party applies to the courts for *exequatur* and, on the other hand, the losing party commences annulment proceedings against an award rendered in France. What is clear is that the filing of annulment proceedings divests the *exequatur* judge of jurisdiction or constitutes an appeal against the *exequatur* order automatically. The objective here is primarily to bring both recognition and annulment issues before the same court.

Under French law, annulment proceedings do not have suspensive effect and therefore do not bar the successful party from seeking recognition of the award in France pending determination of the annulment proceedings.[14] The application for *exequatur* must then be filed with the first president of the Court of Appeal (or the judge in charge of case management) The dismissal of annulment proceedings leads to an automatic grant of *exequatur*.

Enforcement of arbitral awards in France

Finally, when the successful party holds the "exequatured" arbitral award, the key question one needs to consider is, how can this document be used to obtain actual recovery.

Enforcement

Pursuant to articles L. 111-3 and L. 111-4 of the French Code of Civil Enforcement Procedure, "exequatured" international arbitration awards constitute writs of enforcement ("*titres exécutoires*") which can be enforced within 10 years. They will enable the successful party to organize final enforcement against the losing party's assets in France with the assistance of a French bailiff, without the need for judicial authorization.

Before it can be enforced, the "exequatured" arbitral award must first be served on the losing party through a bailiff, along with a formal request to pay. If the losing party fails to pay the amount requested, the bailiff is entitled to seize the losing party's assets in France, including assets held by third parties. Specific formalities and procedures apply depending on the type of assets which are the subject of the enforcement measures.

For example, final enforcement can be obtained against:

- Funds held by French banks and credit institutions
- Movable property such as equipment, commodities, ships, etc.
- Immovable property
- Intangible property such as corporate shares, claims against third parties, etc.

Potential challenges

Locating assets: One of the difficulties for the successful party lies in identifying assets belonging to the losing party which are located in France and available for enforcement. Searches may be carried out on national registers relating to companies, real property, liens, etc.

With regard to bank accounts, French bailiffs have access to a national register[15] where they can search for bank accounts opened in the name of the losing party. French bailiffs are entitled to search this national register where they are in possession of a writ of enforcement (i.e., an "exequatured" arbitral award). When they have identified bank account(s) in the name of the losing party, the bailiffs can organize the seizure of the funds available in these account(s) from the relevant bank(s). The national register is a powerful tool and is often used for enforcement purposes.

Appeal against the exequatur order: Appeals lodged against the *exequatur* order are not a bar to enforcement of the award in France. This is because, under French law, these proceedings do not have suspensive effect.

Annulment proceedings in France: In the same manner as appeal proceedings, under French law, annulment proceedings do not in principle have suspensive effect. They do not usually constitute a bar to enforcement of the arbitral award in France. As set out above, pending determination of the annulment proceedings, the successful party may apply to the courts seized of the annulment proceedings for recognition of the award, with a view to proceeding with enforcement. However, the French court may stay or adapt enforcement where enforcement is likely to seriously prejudice the right of one of the parties.

Annulment of the award abroad: Under French law, annulment of the arbitral award at the place of the seat abroad is not a bar to recognition and enforcement of the award in France.[16] This approach is based on long-established case law.

State immunity: Finally, state immunity can be a bar to enforcement of an arbitral award. Following a reform in 2017, new articles were inserted into the French Code of Civil Enforcement Procedure relating to interim and final enforcement against state assets. Where state immunity is involved, any enforcement measure requires prior judicial authorization. The application is made *ex parte* by the party seeking enforcement. French law also includes specific rules regarding state assets, which can be either available for enforcement or immune from enforcement.

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12 Article 1514 of the FCCP.
13 CE, October 17, 2023 (*Ryanair* decision).
14 Article 1521 of the FCCP.
15 Ficoba: *fichier des comptes bancaires et assimilés*.
16 French Cassation Court, Civ. 1ère, June 29, 2007, no. 05-18.053.

Enforcement of international arbitral awards: **U.S.**

Enforcement actions are designed to secure the award debtor's compliance with its obligations within the limits of certain specific defenses. When the award debtor does not fulfill an international arbitral award, the creditor must take appropriate action to recover the funds or equivalent.

This article outlines the steps for enforcing foreign and non-domestic awards in the United States under the New York Convention and the Federal Arbitration Act (FAA). However, the procedures for recognition and enforcement outlined in this article do not extend to awards made under the Convention on the Settlement of Investment Disputes between State and Nationals of Other States, commonly referred to as the Washington Convention or the ICSID Convention. According to the enabling legislation for ICSID, the FAA does not extend to ICSID awards.[1] As such, individuals seeking to enforce ICSID awards against foreign states must comply with the procedures specified in the Foreign Sovereign Immunities Act (FSIA), which is the exclusive source of jurisdiction for actions aimed at enforcing an ICSID award against a foreign sovereign.[2]

Interplay between the New York Convention, the Federal Arbitration Act and state laws governing arbitration

The United States is a signatory of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. The New York Convention seeks "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which . . . arbitral awards are enforced in the signatory countries."[3] Signatories to the New York Convention agree to recognize and enforce awards issued in other contracting states. The most effective means of increasing the likelihood of award enforcement is by the parties agreeing in their arbitration agreement on a seat that is a signatory of the New York Convention. This will streamline the enforcement process if necessary or if they require supportive court action in a jurisdiction that is also subject to the New York Convention.

The FAA implements the New York Convention in Chapter 2 and grants federal courts the authority to enforce foreign awards under the New York Convention.[4] If there is a conflict between the FAA and the New York Convention, section 208 of the FAA states that the New York Convention will take precedence.[5] In addition, Chapter 1 of the FAA can also apply to Chapter 2 actions and proceedings, provided that it does not conflict with either Chapter 2 or the New York Convention as ratified by the United States.[6]The United States originally enacted the FAA on February 12, 1925. It was reenacted and codified in 1947 as Title 9 of the United States Code to facilitate the resolution of conflicts through private arbitration instead of resorting to litigation. Indeed, the Supreme Court has held that the purpose of the FAA "was to reverse the longstanding judicial hostility to arbitration agreements that had existed at English common law and had been adopted by American courts, and to place arbitration agreements upon the same footing as other contracts,"[7] resulting in a "liberal federal

1 22 U.S.C. section 1650a (2024) ("The Federal Arbitration Act . . . shall not apply to enforcement of awards rendered pursuant to the convention."); *see also, The Panama Convention and its Implementation Under the Federal Arbitration Act*, 11 Am. Rev. Int'l Arb. 1, 72 ("By contrast, to ensure the finality of ICSID awards, federal law provides: 'The Federal Arbitration Act (9 U.S.C. 1 et seq.) shall not apply to enforcement of awards rendered pursuant to the [ICSID] Convention.' 22 U.S.C. section 1650a (1994).").

2 *Mobil Cerro Negro, Ltd. v. Bolivarian Republic of Venez.*, 863 F.3d 96, 99 (2d Cir. 2017) ("We reject the proposition that Section 1650a provides an independent grant of subject matter jurisdiction and hold that the FSIA provides the sole basis for federal court jurisdiction over foreign sovereigns in actions to enforce ICSID awards. Because the FSIA, not Section 1650a, governs these proceedings, the procedural requirements set forth in the FSIA's comprehensive scheme must be satisfied before a federal court may enter judgment against a foreign sovereign.").

3 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

4 Federal Arbitration Act, 9 U.S.C. section 201 *et seq*; 9 U.S.C. section 203 (2024).

5 9 U.S.C. section 208.

6 Id.

7 Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991).

policy favoring arbitration."[8] However, a recent ruling by the Supreme Court has clarified that while parties must be held to their arbitration contracts, courts cannot create new rules favoring arbitration over litigation.[9] Chapter 3 of the FAA implements the Inter-American Convention on International Commercial Arbitration, commonly referred to as the Panama Convention. Indeed, Section 304 of the Panama Convention states that "[a]rbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the [Panama Convention]."[10] Section 305 of the FAA answers the question as to which convention applies when the requirements for the application of both the New York Convention and the Panama Convention apply. Under this premise, the Panama Convention shall apply "[i]f a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the [Panama Convention] . . . [But] [i]n all other cases the [New York Convention] shall apply."[11] It is worth noting that the provisions for enforcement and recognition of the Panama Convention and New York Convention demonstrate no substantive differences between them.[12]

At the state level, different states have established their arbitration laws governing arbitrations within their borders unless sections 2 and 3 of the FAA supersede them. The majority of state arbitration laws are modeled on a modified version of the Uniform Arbitration Act (UAA) introduced in 1955 and updated in 2000 (Revised Uniform Arbitration Act (RUAA)),[13] which has led to significant overlap among them. Other states have adopted the UNCITRAL Model Law on International Commercial Arbitration.[14] In cases involving foreign awards, it is important to note that state law may also come into effect. This is because the FAA allows the parties involved to agree that certain aspects of their

8 *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

9 *Morgan v. Sundance, Inc.*, 596 U.S. 411, 142 S. Ct. 1708, 1713 (2022) ("[A] court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation."). *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302 (2010); *see also Prima Paint Corp. v. Flood & Conklin Mfg. Co*., 388 U.S. 395, 404, n.12 (1967).

10 9 U.S.C. section 304.

11 9 U.S.C. section 305. *See* John Fellas, *The Recognition of International Arbitration Awards That Have Been Vacated At The Seat: The US Approach*, ZDAR Abschiedsheft, at 26, n.4 (2018) ("In the United States, the Panama Conventions takes [sic] precedence over the New York Convention when the majority of the parties to the arbitration agreement are from Panama Convention countries.").

12 *Técnicas Reunidas De Talara S.A.C. v. SSK Ingenieria Y Construccion S.A.C.*, No. 21-22206-CIV-ALTONAGA, 2021 U.S. Dist. LEXIS 197584, at *7 n.7 (S.D. Fla. Oct. 12, 2021); *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 105 (2d Cir. 2016); *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 1994) ("The legislative history of the Inter-American Convention's implementing statute, however, clearly demonstrates that Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention: 'The New York Convention and the Inter-American Convention are intended to achieve the same results . . . in view of . . . the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, [it is expected] that courts in the United States would achieve a general uniformity of results under the two conventions.'" (quoting H.R. Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), *reprinted in* 1990 U.S.C.C.A.N. 675, 678)).

13 Unif. Arb. Act , 7 Pt. IAU.L.A. 1–98 (2009 & Supp. 2015). Twenty-one states have passed the RUAA, while the UAA is still in effect in twelve others. *See* George A. Bermann, *The UNCITRAL Model Law at the US State Level*, 39 Arb. Int'l 172 (2023).

14 California, Connecticut, Florida, Georgia, Illinois, Oregon and Texas.

arbitration will be governed by state arbitration law.[15] The court rulings further influence arbitration law in the United States.

Nuances to consider when applying for the recognition and enforcement of international awards in the United States

Several items must be considered when attempting to enforce an award in the United States. The following list is not meant to be exhaustive but rather a representation of the intricacies that may arise from the courts. Understanding the relevant legal requirements and procedures is essential to navigate these intricacies effectively.

Difference between foreign, non-domestic and purely domestic awards

For purposes of the application of the New York Convention and the FAA, courts in the United States have categorized awards into three groups: (i) foreign, (ii) non-domestic and (iii) purely domestic. Two questions must be answered to determine whether an award is foreign, non-domestic or purely domestic:[16]

i. What is the seat of the arbitration?

ii. Does the New York Convention apply?

Foreign arbitral awards refer to awards made outside the United States in a country that is a party to the Convention.[17] **Non-domestic awards** are made in the United States and contain a foreign component. This means that the award was made following foreign law, the parties involved are foreign, the property is located abroad or there is a reasonable connection with a foreign state or states.[18] The New York Convention and the FAA apply to these awards.

Domestic awards are awards made in the United States but have no foreign component, and, as such, the Convention does not apply to these awards.[19] Domestic awards are subject to the applicability of the FAA set forth in section 1 and related case law.[20] Must the award be reasoned?

According to U.S. federal law, a tribunal is not obligated to provide justifications for its award unless the arbitration rules applicable to the dispute or the parties' arbitration agreement require a reasoned award. Indeed, in the absence of a specific request for a particular form of award, the arbitrator retains the authority to issue an award that solely declares the outcome.[21] The Second Circuit has ruled that a "reasoned award" must encompass more than a brief, unelaborated decision, yet it need not provide exhaustive factual determinations and legal conclusions for each matter brought before the tribunal.[22] It is worth noting that many institutional arbitration rules require the arbitrator to provide a reasoned award unless otherwise agreed by the parties.[23]

Defenses

Personal jurisdiction: "doing business" versus "at home" tests

For a U.S. court to enforce a **foreign award**, it must have jurisdiction over the award debtor or its property.[24] Section 203 (and 302 by incorporation) of the FAA provides original subject matter jurisdiction.[25] In general terms, to have jurisdiction means that the court must adhere to the due process clause of the Fourteenth Amendment, in that the defendant must have "certain minimum contacts with [the forum state] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[26] The Supreme Court has also held that for a foreign corporation to be subject to a court's jurisdiction, it must be "doing business" within the state where the court holds jurisdiction.[27] Moreover, proper service must be effectuated upon an authorized officer or agent.[28]

A decade ago, however, the Supreme Court modified the concept of "doing business," which formerly permitted courts to exert **general jurisdiction** over a foreign corporation in any state where it conducted a continuous and systematic course of doing business.[29] Indeed, in *Daimler AG v. Bauman*, the Supreme Court established that a U.S. court could only exert general jurisdiction over a foreign corporation when the corporation's connections with the state where the lawsuit is filed are so constant and pervasive that it is essentially "at home" in the forum state.[30] A defendant is considered to be at home only in the state where they are incorporated and maintain their primary places of business.[31] Before *Daimler*, courts in New York, for example, exercised general jurisdiction "over a foreign corporation that [was] engaged in such a continuous and systematic course of 'doing business' in New York as to warrant a finding of its 'presence' in the state, even if the cause of action [was] unrelated to the defendant's New York activities."[32]

15 *See* 9 U.S.C. section 2; *see also Volt Info. Scis. v. Bd. of Trs.*, 489 U.S. 468, 478 (1989) ("[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so . . . nor does it prevent parties who do agree to arbitrate from excluding certain claims from the scope of their arbitration agreement. It simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.") (citations omitted).

16 *See, e.g.*, *CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 71 (2d Cir. 2017), *cert. denied*, 583 U.S. 1039 (2017).

17 *See id.* ("[T]he New York Convention applies to arbitral awards 'made' in a foreign country that a party seeks to enforce in the United States (known as foreign arbitral awards) . . . .") (citations omitted).

18 *See, e.g.*, *id.* at 73 ("[A] non-domestic arbitral award is an award that is 'made' in the United States because the parties agreed to arbitrate before an arbitrator in the United States, but which nonetheless falls under the New York Convention and Chapter 2 of the FAA for one of two reasons: (1) it was 'made within the legal framework of another country, e.g., pronounced in accordance with foreign law [,] or (2) it was decided under the laws of the United States but involves either entities that are not U.S. citizens or, even if only U.S. citizens are involved, also involves 'property located abroad, [or] envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.'") (alterations in original) (citations omitted); 9 U.S.C. section 202; *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997) ("The Convention's applicability in this case is clear. The dispute giving rise to this appeal involved two nondomestic parties and one United States corporation, and principally involved conduct and contract performance in the Middle East. Thus, we consider the arbitral award leading to this action a non-domestic award and thus within the scope of the Convention."); *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932 (2d Cir. 1983); *Zeiler v. Deitsch*, 500 F.3d 157, 164 (2d Cir. 2007) ("The facts of the case support the District Court's assumption that, even though the arbitration took place in New York, it should be considered a non-domestic arbitration for the purposes of the FAA, and therefore covered by the Convention. Some of the assets that were the subject of the arbitration are located in Israel, and some of the parties reside there. The law chosen to govern the arbitration is based on a foreign system. The commercial transactions decided in the arbitration have a clear international character.").

19 *See CBF Industria de Gusa*, 850 F.3d at 74 ("Chapter 1 of the FAA, which generally covers domestic arbitral awards that do not fall under the New York Convention, applies to actions and proceedings brought under Chapter 2 only to the extent that [Chapter 1] is not in conflict with [Chapter 2] or the [New York] Convention as ratified by the United States.") (alterations in original) (citations omitted) (internal quotations omitted).

20 *Id.*

21 United Steelworkers of Am. v. Enter. Wheel & Car Corp., 363 U.S. 593, 598 (1960); Tully Constr. Co. v. Canam Steel Corp., No. 13 Civ. 3037, 2015 U.S. Dist. LEXIS 25690, at *34 (S.D.N.Y. Mar. 2, 2015) (citing Cat Charter, LLC v. Schurtenberger, 646 F.3d 836, 844 (11th Cir. 2011)).

22 *Leeward Constr. Co. v. Am. Univ. of Antigua - Coll. of Med.*, 826 F.3d 634, 640 (2d Cir. 2016) ("We agree with our sister Circuits, and hold today that a reasoned award is something more than a line or two of unexplained conclusions, but something less than full findings of fact and conclusions of law on each issue raised before the panel. A reasoned award sets forth the basic reasoning of the arbitral panel on the central issue or issues raised before it. It need not delve into every argument made by the parties.").

23 *See, e.g.*, LCIA Arbitration Rules (2020), Art. 26.2 ("The Arbitral Tribunal shall make any award in writing and, unless all parties agree in writing otherwise, shall state the reasons upon which such award is based."); ICC Rules of Arbitration (2021), Art. 32.2 ("The award shall state the reasons upon which it is based."); ICDR International Dispute Resolution Procedures – International Arbitration Rules (2021), Art. 33.1 ("The tribunal shall state the reasons upon which an award is based, unless the parties have agreed that no reasons need be given.").

24 *See, e.g.*, *Telcordia Tech, Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120–22 (9th Cir. 2002); *Base Metal Trading, Ltd. v. Ojsc Novokuznetsky Aluminum Factory*, 283 F.3d 208, 212–13 (4th Cir. 2002); *Transatlantic Bulk Shipping, Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985).

25 9 U.S.C. section 203 ("An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.").

26 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (citation omitted).

27 *Herndon-Carter Co. v. James N. Norris, Son & Co.*, 224 U.S. 496, 499 (1912).

28 *Id*.

29 *See, e.g.*, *Jazini by Jazini v. Nissan Motor Co.*, 148 F.3d 181, 184 (2d Cir. 1998).

30 571 U.S. 117, 139 (2014).

31 *Id.*

32 *Jazini by Jazini*, 148 F.3d at 184 (alterations in original) (internal quotations and citations omitted).

Forum non conveniens

Although a court may possess the jurisdiction to preside over a case, it can exercise its discretion not to hear it by applying the doctrine of *forum non conveniens*. This legal principle grants courts the ability to refuse jurisdiction in particular situations, effectively enabling them to relocate the case to a more suitable forum. Critics of this doctrine have argued that "we should be especially wary of applying that doctrine expansively or in novel ways that suggest that enforcement plaintiffs should be referred back **to the very courts they sought to avoid in resorting to arbitration**."[33]

Practice tip: In practice, how can we potentially avoid these defenses?

i. Choice of forum provisions. Parties to an arbitration agreement may choose to include a clause explicitly consenting to the jurisdiction of United States courts to recognize and enforce an arbitral award and waiving any defense of *forum non conveniens* concerning enforcement proceedings.

ii. Reducing the award to a judgment in the foreign jurisdiction. Converting the arbitration award to a court judgment in a foreign jurisdiction may open procedural options. It has been noted that certain courts in the United States have held that the creditor of a foreign-money court judgment is not obligated to establish personal jurisdiction over the judgment debtor. In addition, the defense of *forum non conveniens* has been deemed inapplicable by these courts.[34]

The distinction between "recognizing and enforcing" a foreign award and "confirming" a non-domestic award

Federal courts have distinguished the terminology in the United States when parties seek to enforce an award. The Second Circuit,[35] for instance, has clarified that when an award creditor applies for recognition and enforcement of a **foreign award**, the federal court retains jurisdiction as a court of **secondary jurisdiction**,[36] and the award creditor must apply to have the foreign award **recognized and enforced**.[37] On the other hand, when an award creditor aims to enforce a **non-domestic award** issued in the United States, the court before which the application is filed is a court of **primary jurisdiction**, and the application seeks to **confirm** the award.[38]

33 *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru*, 665 F.3d 384, 402 (2d Cir. 2011) (emphasis added).

34 *See, e.g.*, *Abu Dhabi Com. Bank PJSC v. Saad Trading* 986 N.Y.S.2d 454, 457-59 (App. Div. 1st Dept.).

35 The territory of the Second Circuit comprises the states of Connecticut, New York and Vermont.

36 *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007) ("Under the New York Convention, 'the country in which, or under the [arbitration] law of which, [an] award was made' is said to have *primary* jurisdiction over the arbitration award. All other signatory States are *secondary* jurisdictions, in which parties can only contest whether that State should enforce the arbitral award.") (alterations in original) (emphasis in original) (citations omitted) (internal quotations omitted) (quoting *Karaha Bodas Co. v. Negara*, 335 F.3d 357, 364 (5th Cir. 2003)).

37 *CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 74–75 (2d Cir. 2017) ("The Restatement (Third) of the U.S. Law of International Commercial Arbitration indicates that the proper term for the single-step process in which a federal district court engages when it sits in secondary jurisdiction over a foreign arbitral award is 'Enforcement,' in contrast to the process in which a federal district court engages when it sits in primary jurisdiction over a nondomestic arbitral award, which is called 'Confirmation.'") (footnote omitted).

38 *Id. See also id.* at 73 ("As a nondomestic arbitral award is made in the United States, a federal district court sits in *primary* jurisdiction over a nondomestic arbitral award. The process by which a nondomestic arbitral award is reduced to a judgment of the court by a federal court under its *primary* jurisdiction is called 'confirmation.'") (emphasis in original) (citation omitted).

Practice tip: The chart below summarizes the key aspects we have discussed.

Type of arbitral award	Description	Applicable law	Jurisdiction type	Terminology and court's authority
Foreign	Issued outside the United States	New York Convention, because it is an award issued in a New York Convention Country	Secondary jurisdiction	Application to recognize and enforce[39]
Non-domestic	Issued in the United States with a foreign component	New York Convention and Chapter 2 of the FAA	Primary jurisdiction	Application to confirm[40]

Steps to recognize and enforce or confirm an arbitral award in the United States

The New York Convention serves a dual purpose that aims to eliminate the *double exequatur* requirement, which mandates confirmation of the award at the seat as a precondition to enforce arbitral awards.[41] According to article III of the New York Convention, the procedural rules governing the enforcement of awards are subject to the law of the place where enforcement is sought.[42] When seeking recognition and enforcement under article IV of the New York Convention, it is vital to note that the party making the application must provide either the original award or a certified copy, along with the original agreement containing the arbitration clause or a certified copy thereof. If these documents are not in the country's official language where recognition and enforcement are being sought, the party making the application must also provide a certified translation of the documents into the official language.[43] This step is critical to avoid challenges to the enforcement procedures.

Several circuits, including the Second, Fourth, Ninth and Tenth, have determined that non-compliance with the procedural requirements outlined in article IV raises a merits issue rather than a jurisdictional one.[44] This means that the applicant's ability to enforce the award is questioned, rather than the court's power to adjudicate the claim, in the absence of compliance with the procedural requirements of the New York Convention. Therefore, if the party moving to confirm the award fails to meet these requirements, the opposing party should

39 The Second Circuit clarified and explained the terminology litigants should use when enforcing awards in *CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 74–75 (2d Cir. 2017); *see* John Fellas, *Enforcing New York Convention Awards in the United States:* Getting it Right, New York Law Journal (2018).

40 *Ibid*.

41 *See, e.g.*, *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 22 (2d Cir. 1997) ("The [New York] Convention succeeded and replaced the [Geneva Convention]. . . . The primary defect of the Geneva Convention was that it required an award first to be recognized in the rendering state before it could be enforced abroad, the so-called requirement of 'double *exequatur*.'. . . . The Convention eliminated this problem by eradicating the requirement that a court in the rendering state recognize an award before it could be taken and enforced abroad.") (emphasis in original) (citations omitted).

42 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

43 *Id*. at art. IV(2).

44 *Baker Hughes Servs. Int'l, LLC v. Joshi Techs. Int'l, Inc.*, 73 F.4th 1139, 1145 (10th Cir, 2023); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 (2d Cir. 2005); *Reddy v. Buttar*, 38 F.4th 393, 399 (4th Cir. 2022); *Al-Qarqani v. Chevron Corp.*, 8 F.4th 1018, 1024–25 (9th Cir. 2021).

consider contesting the application on both jurisdictional and merit grounds.[45]

Additionally, the FAA's section 207 limits the time frame during which arbitration parties can request the confirmation and enforcement of an arbitral award. According to the legislation, parties have **three years** from the issuance of the arbitral award to initiate recognition and enforcement proceedings.

Once the award is confirmed, the recipient receives a monetary judgment that can be enforced under state law where the federal court is located.[46]

Grounds for resisting the recognition and enforcement of arbitral awards and for vacatur proceedings in the United States

Article V of the New York Convention contains the grounds under which recognition of an award may be refused. Indeed, the New York Convention states that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them…," and that "[r]ecognition and enforcement of the award may be refused. . ." only if the award debtor furnishes proof of any of the grounds to resist recognition.[47]

These grounds are:

a. The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

c. The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

d. 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 the country where the arbitration took place; or

e. 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, that award was made.

An award can also be challenged "if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country."[48]

The FAA incorporates all the non-enforcement grounds specified in the New York Convention.[49] Generally, the U.S. courts construe these FAA grounds strictly and prefer to limit their power to reject recognition of an award instead of expanding it.[50]

The effect of a successful challenge to the recognition of an award is that the award is rendered unenforceable.

Practice tip: Importantly, parties intending to challenge an award must ensure that their challenge does not lack any legal basis, otherwise, they may be subject to sanctions by the court.[51]

Grounds to vacate or set aside an award in the United States

The New York Convention lays down the criteria for a court to refuse recognition and enforcement of a foreign award. Section 10 of the FAA provides the exclusive grounds for vacatur under the FAA, and they significantly overlap with the grounds to deny enforcement stated in article V of the New York Convention.

45 *Baker Hughes Servs. Int'l,* 73 F.4th at 1146.

46 Indeed, "an arbitral award has no legal effect without the stamp of judicial approval." *Schlumberger Tech. Corp. v. United States*, 195 F.3d 216, 220 (5th Cir. 1999). But "[o]nce a nondomestic arbitral award has been confirmed, it becomes a court judgment and is enforceable . . . ." *CBF Industria de Gusa v. AMCI Holdings, Inc.*, 850 F.3d 58, 74 (2d Cir. 2017).

47 New York Convention, *supra* note 42, at arts. III and V.

48 New York Convention, *supra* note 42, at art. V.

49 9 U.S.C. section 207 ("The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention.").

50 *See, e.g.*, *R.M. Perez & Assoc., Inc. v. Welch*, 960 F.2d 534, 539–40 (5th Cir. 1992) ("[J]udicial review of a commercial arbitration award is limited to Sections 10 and 11 of the Federal Arbitration Act, 9 U.S.C. § 1 et seq."); *O.R. Sec., Inc. v. Prof'l Planning Assocs.*, 857 F.2d 742, 746 (11th Cir. 1988); *Moseley, Hallgarten, Estabrook & Weeden, Inc. v. Ellis*, 849 F.2d 264, 267 (7th Cir. 1988) ("Sections 10 and 11 of the Act set forth the exclusive grounds for vacating or modifying a commercial arbitration award.") (citation omitted); *LaFarge Conseils et Etudes, S.A. v. Kaiser Cement & Gypsum Corp.*, 791 F.2d 1334, 1338 (9th Cir. 1986) (The "federal Arbitration Act provides the exclusive grounds for challenging an arbitration award within its purview.") (citation omitted).

51 *See, e.g.*, *Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte Int'l Gmbh*, 921 F.3d 1291 (11th Cir. 2019).

Under Section 10, awards may be vacated where:

i. The award was procured by corruption, fraud or undue means;

ii. There was evident partiality of the arbitrators;

iii. The arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehaviour by which the rights of any party have been prejudiced; or

iv. The arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[52]

Time limits to move to vacate an award

Suppose a party wishes to challenge an arbitral award. In that case, they must file **and serve**[53] a motion to vacate the award within **three months** of its issuance, as mandated by the FAA.[54] Indeed, section 12 of the FAA states, in relevant portion, that:

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.[55]

Practice tip: In the Eleventh Circuit, for example, the three-month period to file a motion to vacate begins from the moment the award is filed or delivered, irrespective of whether the award is undergoing any form of correction.[56]

Manifest disregard of the law – a judicial-born concept or a species of section 10 challenge?

Over the years, many courts have referred to the concept of "manifest disregard of the law" as a ground for not enforcing an arbitration award: "This principle applies when the arbitrator knew and understood the law, but the arbitrator disregarded the applicable law."[57] The manifest disregard standard "is deferential to the arbitrator and,

52 9 U.S.C. section 10.

53 *See Imperial Indus. Supply Co. v. Thomas*, 825 F. App'x 204, 207-08 (5th Cir. 2020) ("Section 12 requires that '[n]otice of a motion to vacate . . . an award must be served upon the adverse party . . . within three months after the award is filed or delivered.'"); *David Mai v. Art Inst. of Dall. Aii, LLC*, Civil Action No. 3:23-CV-1275-D, 2023 U.S. Dist. LEXIS 163102, at *8-9 (N.D. Tex. Sep. 14, 2023) (denying motion to vacate because the plaintiff failed to serve the motion within the three months); *Richards v. IBM*, Civil Action No. 3:22-CV-758-N, 2022 U.S. Dist. LEXIS 224139, at *5 (N.D. Tex. Dec. 12, 2022) (same); *Gonzalez v. Mayhill Behavioral Health, LLC*, Civil Action No. 4:21-MC-00188, 2022 U.S. Dist. LEXIS 73272, at *5-6 (E.D. Tex. Apr. 21, 2022) (same); *Garner v. MBNA Am. Bank, N.A.*, No. 3:05-cv-1029-R, 2006 U.S. Dist. LEXIS 56799, at *7 (N.D. Tex. 2006) ("A party who fails to timely serve of notice of such a motion forfeits his or her right to seek judicial review of the award.").

54 *See, e.g.*, *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 22 ("Indeed, many commentators and foreign courts have concluded that an action to set aside an award can be brought *only* under the domestic law of the arbitral forum, and can never be made under the Convention.") (emphasis in original); *see also Gonsalvez v. Celebrity Cruises, Inc.*, 935 F. Supp. 2d 1325, 1331 (S.D. Fla. 2013) ("To the extent that the Convention does permit vacatur actions, authorities conclude that the FAA's three-month statute of limitations applies via the Convention's residual clause.").

55 9 U.S.C. section 12.

56 *See, e.g.*, *Renovables v. Dom. Rep.*, No. 21-cv-21796-BLOOM/Otazo-Reyes, 2022 U.S. Dist. LEXIS 26008, at *8 (S.D. Fla. Feb. 12, 2022).

57 Chad R. Yates, *Manifest Disregard in International Commercial Arbitration: Whether Manifest Disregard Holds, However Good, Bad, or Ugly*, 13 *U. of Mass. L. Rev*, 336 (2018) (available at https://scholarship.law.umassd.edu/umlr/vol13/iss2/5).

by design, is 'difficult to satisfy.'"[58] "Manifest disregard 'means more than error or misunderstanding with respect to the law.'"[59] Some courts in the United States have recognized the "manifest disregard of the law" as a valid reason to vacate arbitral awards. This legal doctrine stems from the 1953 *Wilko v. Swan*[60] case. While some U.S. courts accept it as an independent ground for review or as a judicial gloss for vacatur, others have rejected it as a valid ground for vacatur of an arbitration award under the FAA, creating a circuit split.[61]

The Second and Ninth Circuits' approach to addressing manifest disregard is something in between. Rather than treating it as a distinct non-statutory basis for vacating an award, they consider it a judicial interpretation of the district court's authority under section 10(a)(4) of the FAA. This allows for the vacating of an award when the arbitrator has "exceeded [their] powers" or failed to produce a "mutual, final, and definite award."[62] Essentially, these circuits view manifest disregard of the law as an extension of the court's existing power to set aside awards under section 10(a)(4).[63] It is critical to note, however, that in *Weiss v. Sallie Mae*,[64] the Second Circuit applied the doctrine of manifest disregard of the law to direct an arbitral award back to the arbitrator for clarification instead of vacating the award. This decision contradicts the well-established doctrines of *functus officio* and finality.[65]

The Fifth Circuit has rejected the manifest disregard doctrine as a stand-alone ground, but it arguably has left the door open to the section 10(a)(4) excess of authority argument.[66]

Practice tip: Manifest disregard is a high standard to meet, even if it is available in a given jurisdiction. Prior to asserting a manifest disregard challenge, the movant should carefully analyze the forum's governing law and the basis for the challenge.

A note on recognizing and enforcing awards that have been set aside at the seat of the arbitration

Under the New York Convention, the third ground to refuse the recognition and enforcement of an award is when an award has been set aside. Indeed, article V(1)(e) explicitly gives primary competence to the authority of the seat of the arbitration **and** to the authority of the law under which the award was rendered to set aside the award.[67]

When an arbitration award has been set aside by the courts in the jurisdiction where the arbitration was conducted (the seat of the arbitration) and subsequently submitted to U.S. courts for recognition and enforcement, the U.S. courts typically do not recognize the set-aside award as a matter of comity.[68] However, in 2016, the Second Circuit recognized an award set aside at the seat. Indeed, in *Pemex*, the District Court for the Southern District of New York held that the Mexican Court's decision to set aside a Mexican-seated award violated

58 *Citigroup Glob. Mkts. Inc. v. Bacon*, 562 F.3d 349, 354 (5th Cir. 2009).
59 *Brabham v. A.G. Edwards & Sons, Inc.*, 376 F.3d 377, 381-82 (5th Cir. 2004).
60 *Wilko v. Swan*, 346 U.S. 427 (1953).
61 *See, e.g.*, *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 480 (4th Cir. 2012); *Coffee Beanery, Ltd. v. WW, LLC,* 300 F. App'x 415, 418 (6th Cir. 2009); *A. Kershaw, P.C. v. Shannon L. Spangler, P.C.*, 703 F. App'x 635, 639–40 (10th Cir. 2017); *Citigroup Glob. Mkts. Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009); *Med. Shoppe Int'l, Inc. v. Turner Invs., Inc.*, 614 F.3d 485, 489 (8th Cir. 2010); *Frazier v. Citifinancial Corp., LLC*, 604 F.3d 1313, 1324 (11th Cir. 2010)
62 9 U.S.C section 10(a)(4).
63 *See, e.g.*, *Comedy Club, Inc. v. Improv W. Assocs.*, 553 F.3d 1277, 1290 (9th Cir. 2009), *cert. denied*, 558 U.S. 824 (2009); *Stolt-Nielsen v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 94 (2d Cir. 2008), *cert. granted*, 557 U.S. 903 (2009) (holding that "'manifest disregard,' reconceptualized as a judicial gloss on the specific grounds for vacatur enumerated in section 10 of the FAA, remains a valid ground for vacating arbitration awards.").
64 *Weiss v. Sallie Mae, Inc.*, 939 F.3d 105 (2d Cir. 2019).
65 J.P. Duffy IV & Philip Danziger, *Is Manifest Disregard Alive and Well in the Second Circuit?: A Remand to Find Out*, Kluwer Arb. Blog (Nov. 12, 2019), http://arbitrationblog.kluwerarbitration.com/2019/11/12/is-manifest-disregard-alive-and-well-in-the-second-circuit-a-remand-to-find-out/.
66 *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009) ("manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected."); *Jones v. Michaels Stores, Inc.*, 991 F.3d 614, 615-16 (5th Cir. 2021) (citing *Stolt-Neilsen* and noting that "Because of uncertainty about whether the manifest-disregard standard could still be used as a means of establishing one of the statutory factors, *McKool Smith* assumed arguendo that it could because the standard was not met in any event.").
67 *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847–49 (6th Cir. 1996) ("[S]uch a motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.") (emphasis in original).
68 *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 937–39 (2007); *Thai-Lao Lignite (Thail.) Co. v. Gov't of the Lao People's Democratic Republic*, 864 F.3d 172, 183–84 (2d Cir. 2017) (citing *TermoRio*) ("[T]he D.C. Circuit ruled that courts considering whether to enforce an award that has been set aside in the primary jurisdiction should give effect to a judicial decision of the primary jurisdiction unless enforcement of that judgment would offend the public policy of the state in which enforcement is sought.").

the U.S.'s "basic notions of justice"[69] and that the drafters of the Panama Convention intended the wording in article V to allocate discretion of enforcing even annulled awards.[70] It is important to note that "when the prevailing party files an action to enforce the award in a secondary jurisdiction and then, the primary jurisdiction sets aside the award, Article V(1)(e) declares that a court of a secondary jurisdiction 'may' refuse to enforce the award . . . in contrast to the general directive that such a court 'shall' enforce the award."[71]

In rendering its opinion, the Second Circuit held that "a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . *unless* . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought. A judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the State where enforcement is sought."[72] However, the public policy exception does not override the rule altogether. Indeed, the court stated that "the standard is high, and infrequently met,"[73] but that in the *Pemex* case, the standard was overcome by "four powerful considerations":[74]

i. The vindications of contractual undertakings and the waiver of sovereign immunity;

ii. The repugnancy of retroactive legislation that disrupts contractual expectations;

iii. The need to ensure legal claims find a forum; and

iv. The prohibition against government expropriation without compensation.

The 2016 *Pemex* decision exemplifies the exceptional circumstances that warrant the consideration of a decision as "repugnant" to the principles of public policy in the United States.[75]

Conclusion

When seeking recognition and enforcement or confirmation of their awards, it is crucial for all parties involved to have a thorough understanding of the complex dynamics and interactions between the convention, the FAA, state law, and court rulings. Additionally, we suggest that these factors be considered during the arbitration agreement drafting process.

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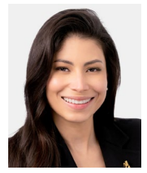

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69 *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 100 (2d Cir. 2016).
70 Id. at 105–06. Similarly, article V of the New York Convention states that the recognition and enforcement of an award may be refused if the party against whom recognition is sought proves there are grounds for refusal.
71 *Thai-Lao Lignite (Thail.) Co.*, 864 F.3d at 176.
72 *Pemex-Exploración*, 832 F.3d at 106 (emphasis in original)(internal quotations and citations omitted) (quoting *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986)).
73 *Id*.
74 *Id*. at 107.
75 *Id*. at 106.

Enforcement of international arbitral awards: **UAE**

Arbitration is the favored method for resolving disputes globally, offering parties flexibility, confidentiality, and specialized expertise in a neutral forum. The legal framework in the United Arab Emirates (UAE) supports arbitration and the enforcement of international arbitral awards. In fact, the legal framework and the courts' approach to enforcement in the UAE have undergone significant changes in recent years, with the aim of enhancing the efficiency and reliability of the enforcement process. However, there are still some challenges and uncertainties that arbitration practitioners and users should be aware of when enforcing international arbitral awards in the UAE.

Court system and arbitration legal framework

The UAE has a federal legal system, composed of the federal courts and the local courts of each of the seven emirates. The UAE courts operate in Arabic and apply civil law procedures, influenced by Islamic law and other legal traditions. This is referred to as "onshore" UAE. Arbitration in onshore UAE is governed by Federal Law No. 6 of 2018 on Arbitration (the Federal Arbitration Law), which draws its foundation from the UNCITRAL Model Law. Like many of the arbitration laws introduced in the Middle East in recent years, the Federal Arbitration Law incorporates certain regional nuances or which parties should be aware of.

In addition to onshore UAE, there is "offshore" UAE, which refers to the UAE's two common law jurisdictions within its territory: the Dubai International Financial Centre (DIFC) and the Abu Dhabi Global Market (ADGM). These two jurisdictions have their own English-language legal and court systems, which are based on common law principles. They also have their own arbitration laws, based on the UNCITRAL Model Law, which govern the enforcement of international arbitral awards in the DIFC and ADGM. DIFC-seated arbitrations are governed by DIFC Law No. 1 of 2008 as amended (DIFC Arbitration Law) and ADGM-seated arbitrations are governed by the ADGM Arbitration Regulations 2015 (ADGM Regulations).

In the last two decades, the UAE has made significant strides in aligning its legal framework for the enforcement of international arbitral awards with international standards. The UAE ratified the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in 2006. The UAE is also a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1965 (the ICSID Convention).

The enforcement of foreign arbitral awards in the UAE is subject to different legal frameworks, depending on whether the award is to be enforced in onshore or offshore UAE, as well as the country of origin of the arbitral award. Enforcement of awards in the DIFC and the ADGM generally follow the common law approach and have largely been consistent in their approach, which provides a familiar environment for businesses operating within these jurisdictions or opting for DIFC and ADGM-seated arbitrations. However, as a result of certain inconsistent approaches taken in cases before the courts in onshore UAE, onshore UAE is sometimes viewed as unpredictable. Critics have flagged certain instances of the misapplication of the New York Convention by UAE courts, resulting in inconsistency and sometimes leading to incorrect interpretations. At times, domestic laws or public policy considerations have been used by the courts to set aside or refuse to enforce arbitral awards. However, despite these concerns , the direction of travel of enforcement in onshore UAE is generally positive. Indeed, a very high percentage of cases are successfully enforced in onshore UAE, with instances of non-enforcement typically stemming from isolated misapplication of the law by the involved parties. This underscores the importance of ensuring the validity of arbitration agreements, as well as the capacity and authority of parties to enter into such agreements, from the outset rather than at the enforcement stage where these issues become more problematic.

What steps should be taken to enforce an international arbitral award in your jurisdiction?

Domestic awards

The recognition and enforcement of domestic awards issued in onshore UAE is regulated by Article 55 of the Federal Arbitration Law, which requires the party seeking enforcement to submit an application to the chief justice of the competent court of appeal or their delegate, accompanied by the original award or a certified copy, a copy of the arbitration agreement, an Arabic translation of the award if it is not in Arabic, and a copy of the minutes of filing the award in court. The competent court must issue an order confirming the award within 60 days, unless there are grounds for setting aside the award under Article 53 of the Federal Arbitration Law. According to Article 54 of the Federal Arbitration Law, parties must lodge an application to set aside an award within 30 days of receiving notification of the award, and they may further challenge the decision before the Dubai Court of Cassation. There is therefore only one lever of possible appeal to such decisions, compared to the typical two levels in onshore litigation.

Foreign awards

The process for enforcing foreign arbitral awards differs notably from that of domestic awards. In onshore UAE, Federal Decree Law No. 42/2022 (the "Civil Procedure Law") governs the recognition and enforcement of foreign awards, not the Federal Arbitration Law. The onshore UAE courts have a quick and simple procedure for enforcing foreign awards. The execution judge must issue a decision on the petition within five days. Under the Civil Procedure Law, the party seeking enforcement of a foreign award must file a petition with the execution judge of the competent court in the relevant emirate where enforcement is sought, accompanied by the original award or a certified copy, a copy of the arbitration agreement, and an Arabic translation of the award if it is not in Arabic. The application to enforce the award is usually made *ex parte*, expediting the process. The execution judge must confirm the award unless they find that one of the grounds for refusal under Article 222 of the Civil Procedure Law, which are similar to the grounds under Article V of the New York Convention, is established. While the grounds are similar to those outlined in the New York Convention, they are narrower than those under the Federal Arbitration Law. However, the award debtor has an automatic right of appeal, which can stay the execution of the award until the appeal is resolved. Typically, while there are usually two levels of appeal in onshore UAE courts, award enforcement involves only one level of appeal (Article 178 of the Civil Procedure Law). Consequently, in theory, enforcing a foreign award may prove to be more straightforward and quicker than enforcing a domestic one.

The recognition and enforcement of foreign awards in the DIFC and the ADGM is regulated by Article 42 of the DIFC Arbitration Law and Article 60 of the ADGM Arbitration Regulations, respectively. The party seeking enforcement must file an ex parte arbitration claim form with the relevant court, together with the original award or a duly certified copy of the award and the arbitration agreement, and a certified translation of the award (if it is not in English). Once the court acknowledges the validity of the award, it issues an order recognizing the award, which allows its enforcement in the same way as a DIFC or ADGM court judgment. Subsequently, the only recourse against such awards is by way of an application to refuse recognition and enforcement under Article 44 of the DIFC Arbitration Law or Article 62 of the ADGM Arbitration Regulations, which mirror the grounds for refusal under Article V of the New York Convention. The order confirming or refusing the award may be appealed to the DIFC Court of Appeal or the ADGM Court of Appeal, respectively.

Key issues

The UAE has made significant progress in modernizing its arbitration regime to facilitate the recognition and enforcement of arbitral awards. However, there are still some lingering issues and challenges that may arise in the context of an onshore UAE enforcement application. Some of these are outlined below:

1) Historically, arbitration has been regarded as an exceptional form of dispute resolution in the UAE, requiring a party to grant a special authority to validly enter into an arbitration agreement. For example, historically awards may not have been enforced in instances where a company director signed an arbitration agreement without such a special authority or when the arbitration agreement was signed by someone other than the company's authorized signatory. Furthermore, the UAE has traditionally made a distinction between specific authority to arbitrate and presumptive authority to arbitrate. The former refers to explicit authorization granted by the company or entity to engage in arbitration, while the latter implies a broader, implied authorization. However, inconsistent rulings on the issue of authority and capacity to agree to arbitration have created uncertainty regarding the viability of arbitration agreements in the UAE, often leading to enforcement challenges. Until UAE courts adopt a cohesive approach, such issues may render an award unenforceable if a challenge is subsequently made on the basis of lack of authority. There has been a shift towards the onshore courts acknowledging apparent authority, marking a departure from the historical perception of arbitration as an exceptional method of dispute resolution requiring special authorization. Some of the positive developments that have come out of the UAE courts in recent years include, for example:

   a) The Dubai Court of Cassation decision in Case No. 141 of 2021, *Gulf Precast Concrete Company LLC v. Alumco LLC*. This case reflects a move towards aligning UAE practices with international arbitration norms. These norms presume that the individual signing an arbitration agreement on behalf of a company had the necessary authority to bind the company to arbitration.

   b) In situations where an individual signs a contract containing an arbitration agreement without being specifically designated as the company's legal representative in the contract's preamble, but their name is associated with the company's name, it establishes a legal presumption that the signatory was acting on behalf of the company. This assertion significantly impacts the company's rights and obligations, irrespective of the individual's actual association with the company. Similarly, when a contract designates someone as the legal representative of a company, but the signature below the contract is illegible, it is presumed that the illegible signature belongs to the designated legal representative who is authorized to act and consent to arbitration, in accordance with the principle of good faith. Consequently, in such scenarios, the designated legal representative cannot contest the attribution of the signature to them.

      In the same vein, if a company's name appears in the preamble of the contract, and another individual representing itself as a signatory of the company signs the contract, it is assumed that the signatory acted on behalf of and in the capacity of the company. (See, for example: DCC Case No. 236/2019; DCC Case No. 293/2019; DCC Case No. 581/2019.)

   c) The UAE courts have acknowledged that the affixation of a company seal on an arbitration agreement, barring evidence of fraudulent interference by the original rightsholder, legally binds the company to arbitration and serves as definitive proof of the proper execution of the arbitration agreement by the company, regardless of other signature requirements. (See, for example: DCC Case No. 685/2019 – Commercial, dated November 10, 2019.)

   d) The courts in the UAE, when affirming the application of apparent authority, have grounded their decisions on the fundamental principle of estoppel, as stipulated in Article 70 of the UAE Civil Transactions Code. This principle prohibits parties from attempting to invalidate agreements they have willingly entered into and prevents defendants from using their own actions or arguments to support their claims against third parties. In so doing, the courts recognize and uphold the integrity of the principle of good faith in all legal proceedings, driven by moral and social considerations aimed at curbing such behavior. (See, for example: DCC Case No. 236/2019 – Real Estate; DCC Case No. 293/2019 – Commercial; DCC Case No. 581/2019 – Commercial.)

2) In the UAE, arbitration awards must align with the "public order and morality of the State." With no exhaustive list defining what constitutes issues of public order and morality of the State, the landscape remains fluid. What was once deemed a matter of public policy may evolve over time. Article 3 of the UAE Civil Transactions Code offers some insight into areas considered part of public policy, encompassing matters such as personal status, governance systems and economic principles, if they do not contravene the definitive provisions and fundamental principles of Islamic Sharia. Case law has further delineated certain matters of public policy, including bankruptcy, interest rates exceeding legal limits and land/title registration. DCC Case No. 585 of 2023 serves as a useful reminder for parties to review outdated shareholding arrangements thoroughly, ensuring they align fully with UAE public policy. The case concerned a subcontract for mechanical and electrical works at Expo 2020 Dubai. Initially, the parties agreed to arbitration in a letter of acceptance, but a later addendum introduced a jurisdiction clause in favor of the Dubai courts. Consequently, the subcontractor pursued payment through the onshore courts, which ruled in its favor. The contractor objected, contending that the arbitration clause should take precedence. While lower courts upheld the onshore court's jurisdiction, citing that the addendum takes precedence over the letter of acceptance, the Dubai Court of Cassation overturned this decision. It held that the arbitration clause in the letter of acceptance extended to subsequent agreements pertaining to the project. This ruling underscores the UAE's supportive stance towards arbitration and its courts' dedication to upholding arbitration agreements.

3) By contrast, and perhaps more simplistically, the DIFC and ADGM courts have adopted a narrower approach to public policy which is more consistent with the approach adopted internationally, and have recognized and enforced awards provided they do not contravene the fundamental values and principles of the UAE.

Outlook and conclusion

There has been significant progress in the enforcement of arbitration awards in the UAE, but uncertainty and unpredictability still remain. Parties should seek legal advice to ensure that their arbitration agreements and awards are valid and enforceable in the UAE. If possible, best practice would be to obtain advice from lawyers familiar with the UAE's legal regimes at the time of entering into an arbitration agreement, to minimize the risks of potential enforcement problems in the future.

In conclusion, the enforcement of arbitral awards in the UAE benefits from a robust legal framework, firmly established and supported by the UAE's commitment to fulfilling its obligations under international treaties. Investors and businesses can thus be assured that their arbitration agreements, save for any glaring problems, ought to be promptly and fairly upheld. This proactive approach not only enhances the UAE's reputation as a global commerce hub but also instils confidence among parties involved in cross-border transactions.

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Enforcement of international arbitral awards: **Singapore**

Singapore is a signatory to the New York Convention and enforces awards from other states on the basis of reciprocity.

The relevant legislation is the International Arbitration Act 1994 (IAA) and the Arbitration Act 2001 (AA). Both the IAA and the AA govern the recognition and enforcement of arbitral awards in Singapore. The IAA applies to arbitral awards made in international arbitrations seated in Singapore (IAA, Section 19) and to arbitral awards made pursuant to an arbitration agreement in the territory of a contracting state of the New York Convention other than Singapore (IAA, Section 29).

Section 5 of the IAA sets out the elements for determining whether an arbitration seated in Singapore is to be treated as an international arbitration. The AA applies to the recognition and enforcement of arbitral awards made in domestic arbitration proceedings to which the AA applies (AA, Section 46(1)) and to arbitral awards that are made in a state that has not contracted to the New York Convention (AA, Section 46(3)).

Sections 19 and 29 of the IAA and Section 46(1) of the AA provide that an award made by the arbitral tribunal pursuant to an arbitration agreement may, with the leave of the court, be enforced in the same manner as a judgment or order to the same effect of the High Court in Singapore. If leave is granted, judgment may be entered in terms of the award.

The procedure to procure the recognition and enforcement of an arbitral award is governed by the Rules of Court 2021, in particular, Orders 34 (AA) and 48 (IAA).

An application for leave to enforce an arbitral award must be made within six years of the date of the award (Limitation Act (Chapter 163), Section 6(1)(c)).

An application for leave to enforce an arbitral award (whether domestic or international) is made to the General Division of the High Court in Singapore. Appeals against a decision of the General Division of the High Court on arbitration matters must be made to the Court of Appeal.

The Singapore High Court is bound to recognize and enforce arbitral awards falling under the IAA unless one of the grounds for refusing recognition and enforcement is established (New York Convention, Article V; IAA, Section 31).

Procedure for enforcing awards

Leave to enforce awards

The Rules of Court 2021 permit the application for leave to enforce an award under Section 19 of the IAA and Section 46(1) of the AA (Leave Application) to be made ex parte (see Rules of Court 2021, Order 34, Rule 14 for enforcement under the AA, and Order 48, Rule 6 for enforcement under the IAA). In other words, there is no need for the applicant to serve the Leave Application on the defendant.

If the court grants leave to enforce the award, the order granting leave (Leave Order) will be drawn up and served on the defendant; the defendant will have 14 days to apply to set aside the Leave Order. If the Leave Order is to be served out of the jurisdiction, the court may extend the time permitted to the defendant to apply to set aside the order (see Rules of Court 2021, Order 34, Rule 14(4) for enforcement under the AA and Order 48, Rule 6(5) for enforcement under the IAA). A foreign state has two months and 14 days to apply to set aside a Leave Order by virtue of Singapore's State Immunity Act (Cap. 313) (*CNX v. CNY* [2022] 5 SLR 368 at [51]).

Documentation required to enforce awards

A Leave Application is made by way of an originating application (or by summons if there is already an action pending) supported by an affidavit.

The affidavit must exhibit the duly authenticated original award and the original arbitration agreement under which the award was made. Where the original arbitration agreement or award cannot be produced, a duly certified copy must be produced instead (Rules of Court 2021, Order 48, Rule 6, Paragraphs (1) to (2)). For applications under the IAA, if the arbitration agreement, award or records are in a language other than English, an English translation is required. The translation must be duly certified in English as a correct translation by a sworn translator, an official or a diplomatic or consular agent of the country in which the award was made (see Rules of Court 2021, Order 48, Rule 6(1)(a)).

An application to enforce an award under the AA must be supported by an affidavit exhibiting the arbitration agreement, a record of the content of the arbitration agreement and the original award or, in either case, a copy thereof (Rules of Court 2021, Order 34, Rule 14(1)). For applications under the AA, a translation must also be filed if the award or agreement is in a language other than English. The translation must be certified by a court interpreter or verified by the affidavit of a person qualified to translate the application (Rules of Court 2021, Order 3, Rule 7).

Fees and other practical matters

For the actual filing of the originating summons, the applicable filing fee is SGD 500 (for matters with a value of up to SGD 1 million) or SGD 1,000 (for matters with a value of more than SGD 1 million) (Rules of Court 2021, Fourth Schedule, Part 1, Paragraph 1).

On filing the supporting affidavit, for every page or part thereof (including any exhibit annexed thereto or produced therewith), the filing fee is SGD 2 per page, subject to a minimum fee of SGD 50 per affidavit (Rules of Court 2021, Fourth Schedule, Part 1, Paragraph 44). Additional court fees are payable when applying for execution against the award debtor's assets.

There are also electronic filing charges in respect of the above-mentioned documents, as well as other documents, such as written submissions or bundles of documents. For submissions and bundles of documents or authorities, the electronic filing charge is SGD 4 per document plus SGD 0.60 per page, and the charge for all other documents is SGD 4 per document plus SGD 0.80 per page (Rules of Court 2021, Fourth Schedule,

Part 1, Paragraph 49(1), Sub-paragraphs (b) and (c)). A document that is composed remotely using the computer system of the electronic filing service provider is deemed to comprise two pages.

The estimated costs recoverable for an uncontested hearing of an ex parte Leave Application for leave to enforce an award are between SGD 1,000 and SGD 5,000 (excluding disbursements). The estimated costs recoverable for a contested hearing of a setting aside of the order granting leave to enforce an award are between SGD 9,000 and SGD 22,000 (excluding disbursements), depending on the duration of the hearing and the complexity and length of the application (Supreme Court Practice Directions 2021, Appendix G).

A party seeking leave to enforce an award on an ex parte basis is subject to a duty of full and frank disclosure.

Types of awards enforceable

An arbitral tribunal may make more than one award, either at different points in time or on different aspects of the matter (IAA, Section 19A(1); AA, Section 33(1)). This may be for the whole award, or for part of the claim or of any counterclaim or cross-claim (IAA, Section 19A(2); AA, Section 33(2)). If multiple awards are made, the tribunal must specify the subject matter of each award on its face (IAA, Section 19A(3); AA, Section 33(3)).

Under Section 19 of the IAA and Section 46 of the AA, only awards can be enforced. An award is further defined under the IAA and AA as "a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award" (IAA, Section 2(1); AA, Section 2(1)).

Both partial and interim awards are considered awards for the purposes of the IAA or the AA and can be recognized and enforced. They are also susceptible to being set aside. A partial award is defined as one that finally disposes of part, but not all, of the parties' claims in arbitration, leaving some claims for further consideration and resolution in future proceedings under the arbitration. By contrast, an interim award is one that does not dispose finally of a particular claim but instead decides a preliminary issue relevant to the disposing of a claim (*PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2015] 4 SLR 364 at [46] to [53]).

Interim measures issued by an arbitral tribunal, such as measures covering security for costs or specific disclosure, are not awards for the purposes of the AA and the IAA, and the Singapore court does not have the jurisdiction to consider any application to resist the enforcement of, or for the setting aside of, such an interim measure (*PT Pukuafu Indah and others v. Newmont Indonesia Ltd and another* [2012] 4 SLR 1157 at [19]). All such orders or directions made or given by the tribunal are, with leave of the court, enforceable in the same manner as if they were orders made by the court. Where leave is given, the judgment may be entered in terms of the order or direction (AA, Section 28(4); IAA, Section 12(6)). In the context of the enforcement of domestic interim measures, *forum non conveniens* considerations do not apply in determining whether the Singapore court is the appropriate court to hear the Leave Application (*CXG and another v. CXI and others* [2023] SGHC 244 at [121]). The term "award" is defined at section 2 of the IAA as "*a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award but excludes any order or direction made under section 12*". It is the substance and not the form that determines the true nature of the ruling of the tribunal. Thus, even where the order is titled as an "*Award*", but does not relate to the substance of the dispute, it would not be an award under s 2(1) of the IAA (*PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2007] 1 SLR(R) 597 at [70]).

Resisting enforcement of an award

Under Section 31 of the IAA, the following are the grounds to resist enforcement of an award:

- There is evidence of the incapacity of a party to the arbitration agreement, under the law applicable to the party, when the agreement was made.
- The arbitration agreement is invalid under the law to which the parties are subject, or in the absence of any indication in that respect, under the law of the country where the award was made.
- A party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present their case during the arbitration proceedings.
- The award deals with a dispute 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. If the award, however, contains decisions on matters not submitted to arbitration, but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted.
- The composition of the tribunal or conduct of the arbitral proceedings was not in accordance with the parties' agreement or the law of the country where the arbitration took place.
- The award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which the award was made, under the law of that country.
- The subject matter of the dispute between the parties to the award cannot be settled by arbitration under the law of Singapore.
- The enforcement of the award would be contrary to the public policy of Singapore.

The court adopts a "mechanistic" approach to determining whether there has been a valid and binding arbitration agreement and award, which means it does not seek to look "behind the face" of the agreement or award (*Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [42] (a case under the IAA); *AUF v. AUG and other matters* [2016] 1 SLR 859 at [163] (a case under the AA)).

In applications to resist enforcement, the Singapore courts have consistently applied a policy of minimal curial intervention even with regard to domestic cases. In *Republic of India v. Vedanta Resources plc* [2021] 2 SLR 354 at [47], the Court of Appeal reaffirmed the principle of minimal curial intervention, which dictates that courts should not without good reason interfere with the arbitral process and should act with a view to respecting and preserving the autonomy of the arbitral process. It is clear, therefore, that the Singapore courts will adopt a generous approach and will not undertake a hypercritical or excessive syntactic analysis of what the arbitrator has written (*Lao Holdings NV and another v. Government of the Lao People's Democratic Republic* [2022] SGCA(I) 9 at [60]).

There is an automatic right of appeal to the Court of Appeal against a decision of the General Division of the High Court refusing leave to enforce an award (SCJA, Section 29C read with Section 1(c) of the Sixth Schedule).

Effect of enforcement

The enforcement of an award is preceded by its recognition and, under Singapore law, no specific distinction is made between the recognition of an award and its enforcement. An award made by the arbitral tribunal pursuant to an arbitration agreement is final and binding on the parties and on any person claiming through or under them. The award may be relied on by any of the parties by way of defense, set-off or otherwise in any proceedings in any court of competent jurisdiction (AA, Section 44(1); IAA, Sections 19B(1), 27(2) and 29(2)).

Once an award has been recognized, a party seeking to enforce the award has to obtain permission from the Singapore court to enforce the award, and the order obtained must be served on the award debtor (Rules of Court, Order 48, Rule 6(3)). The debtor may apply to set aside the order. The debtor must apply within 14 days after service of the order granting permission or, if the order is to be served out of jurisdiction, within the period stipulated by the court granting leave to apply (Rules of Court, Order 48, Rule 6(5)).

The award must not be enforced during that period or, if the debtor applies within that period to set aside the order, until after the debtor's application is finally disposed of (Rules of Court 2021, Order 48, Rule 6(5)). Subsequently, a judgment may be entered in terms of the award, and the award can be enforced in the same manner as any judgment of the Singapore courts (IAA, Sections 19 and 29). An award may also be enforced in court by bringing action on the award (IAA, Section 29(1)).

Effect of annulment proceedings in other countries

If an application to set aside or suspend an arbitration award is pending in the courts of the seat of the arbitration, Section 31(5) of the IAA provides the Singapore courts with the option to adjourn an application to enforce the foreign award in issue.

When the Singapore court elects to do so, it may (1) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, the part of the proceedings that relates to the award, and (2) on the application of the party seeking to enforce the award, order the other party to give suitable security (IAA, Section 31(5)).

If an award has been set aside at the seat of the arbitration, it is likely that the Singapore courts would refuse enforcement of that award. Section 31(2)(f) of the IAA, which is modeled after Article V(1)(e)) of the New York Convention, provides that:

(2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that …

(f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

Further, the Singapore court in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [76] to [77], albeit in *obiter* comments, expressed "serious doubt" about whether it would retain a discretion to enforce an award that has been set aside at the seat of the arbitration.

The Court of Appeal has recently unanimously found that where the seat court of a foreign arbitral award has determined points that are subsequently raised in enforcement proceedings in Singapore, transnational issue estoppel will apply. The effect of this is to prevent the parties to a prior decision of the seat court, in certain circumstances, from re-litigating in Singapore points that were previously raised and determined (*The Republic of India v. Deutsche Telekom AG* [2023] SGCA(I) 10). A majority of the court also gave the "provisional" view that a party may rely on a prior decision of a seat court, and an enforcement court in Singapore should accord primacy to that prior decision of the seat court by treating it as presumptively determinative of the matters dealt with in the judgment pertaining to the validity of the award.

This follows the observations in *BAZ v. BBA* [2020] 5 SLR 266, where the High Court had occasion to determine a setting-aside application in relation to a Singapore-seated award that had already been part-enforced in the Delhi High Court (with part of the award, which had been made against minors, being refused enforcement on the ground of public policy). One of the issues that arose

was whether any issue estoppel would arise from the judgment in the enforcing court to bind the seat court. The High Court suggested that if the seat court is tasked with a *de novo* review on a ground of challenge, the seat court would be accorded "a certain level of primacy," and it would be slow to recognize an issue estoppel arising from the determination of a foreign enforcement court. It also stated that it was "plain" that where the issue before the court was one of public policy or arbitrability, no issue estoppel would arise as these are unique to each state.

However, in *Man Diesel & Turbo SE v. IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537, the Singapore High Court refused to adjourn an enforcement application on the ground that an application to set aside the award was pending in the Danish courts, noting that Section 31(5) of the IAA gave the court a wide discretion. In exercising its discretion to refuse the adjournment, the court took into account the merits of the setting-aside application, the impact on the award creditor of the delay in obtaining the fruits of the award and the chances of dissipation of assets by the judgment creditor during the period of adjournment.

In *ST Group v. Sanum Investments* [2019] SGCA 65, the Court of Appeal refused enforcement of an award in which the tribunal had incorrectly determined an incorrect seat. The court also held that it was not necessary for a party to demonstrate that it had suffered prejudice as a result of the incorrect choice of seat. It would be sufficient for the party to show that, had the arbitration been correctly seated, a different court would have had supervisory jurisdiction.

Further reading and information

For more information on enforcing or setting aside arbitral awards in Singapore, please contact the authors of this article. Members of the international arbitration practice group in Singapore also contributed the Singapore chapter of the latest edition of GAR Know-how - Challenging and Enforcing Arbitration Awards.

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Enforcement of international arbitral awards: **Hong Kong**

From a claimant's perspective, obtaining a victory in an international arbitration is seldom an end. To turn a favorable arbitral award into something of value, it needs to be enforced in jurisdictions where the respondent's valuable assets are located. It is therefore important to understand the mechanism of enforcement of arbitral awards in those jurisdictions.

Applications for enforcement of arbitral awards in the Hong Kong Special Administrative Region (Hong Kong) of the People's Republic of China (PRC or China) are dealt with by the Court of First Instance of the High Court (Court). There are two ways to enforce an arbitral award in Hong Kong, namely the statutory route and common law route. When dealing with an application for enforcement via the statutory route, the Hong Kong courts treat enforcement of arbitral awards as almost a matter of administrative procedure, and are prepared to enforce awards except where complaints of substance can be made good.[1]

This article will first outline the steps required for enforcing an international arbitral award in Hong Kong, followed by some of the challenges which a claimant may face in the process.

Types of arbitral awards

Recognition and enforcement of arbitral awards are governed by Part 10 of the Arbitration Ordinance (Cap. 609 of the Laws of Hong Kong) (AO).

For the purposes of recognition and enforcement, the AO draws distinctions among (a) a Convention award (i.e., an award made in a state or the territory of a state, other than China or any part of China, which is a party to the New York Convention), (b) a Mainland award (i.e., an award made in accordance with the Arbitration Law of the PRC), (c) a Macao award (i.e., an award made in the Macao Special Administrative Region of the PRC), and (d) an award which is not a Convention award, a Mainland award or a Macao award (referred to as an "ordinary award" hereinafter).

While all types of arbitral awards can be enforced in Hong Kong via the statutory route, the common law route only applies to Convention awards, Mainland awards and Macao awards (but not ordinary awards).

Statutory route

Need for leave to enforce

An arbitral award can be recognized and enforced in Hong Kong only with leave (i.e., permission) of the Court.[2] An application for leave to enforce an arbitral award is made to the judge in charge of the Construction and Arbitration List[3] and may be made *ex parte*. However, the Court hearing the application may direct the claimant to issue an *inter partes* summons.[4] For example, where the claimant applies *ex parte* for leave to enforce an award and also for a *Mareva* injunction (also known as an asset freezing order) to restrain the respondent from disposing of its assets, the Court may grant the *Mareva* injunction on an *ex parte* basis but direct that the application for enforcement proceeds on an *inter partes* basis.[5]

Documents required for leave application

An application for leave must be supported by an affidavit exhibiting (a) the duly authenticated original award or a duly certified copy of it, (b) the original arbitration agreement or a duly certified copy of it, and (c) (if the award or agreement is not in either English or Chinese, or in both the said languages) a translation of it in either English or Chinese certified by an official or sworn translator or by a diplomatic or consular agent.[6]

1 *KB v. S* (unreported, HCCT 13/2015, September 15, 2015), at paragraph 1.
2 AO sections 84(1) and 87(1)(b).
3 Practice Direction 6.1.
4 Rules of the High Court (RHC) Order 73, rule 10(1).
5 *G v. X* (unreported, HCCT 58/2021, March 22, 2022).
6 RHC Order 73, rule 10(3)(a)(iii)-(vi).

The affidavit must state the name and the usual or last known place of abode or business of the claimant and the respondent respectively.[7] Further, it shall also state that the award has not been complied with, or the extent to which it has not been complied with, at the date of the application for leave.[8]

Ex parte application: Duty of full and frank disclosure

If the application is made *ex parte*, the claimant as an applicant owes a duty of full and frank disclosure to the Court, including disclosure of all facts and materials relevant to the determination of the application which are within the knowledge or reasonable contemplation of the claimant. If the claimant is guilty of material non-disclosure in its *ex parte* application, any order made on such basis may be set aside on this ground alone, but the Court has a discretion to re-grant the order on an *inter partes* basis (subject to the issue of costs).[9]

Inter partes application: Need for service out of jurisdiction

On the other hand, if the claimant is directed by the Court to take out the application for leave on an *inter partes* basis, it should be made by way of an expedited form of originating summons.[10] In the event that the address for service of the respondent is out of the Hong Kong jurisdiction, leave for service out of the jurisdiction of the originating summons is required from the Court.[11] The application for the grant of such leave must be supported by an affidavit stating the grounds on which the application is made, and in what place the person to be served is found or probably may be found.[12] No leave may be granted unless the Court accepts that the case is a proper one for service out of the jurisdiction.[13]

Enforcement Order and setting aside application

After the Court has acceded to the application for leave to enforce, it will grant leave to the claimant to enforce the award (Enforcement Order). The claimant must draw up the Enforcement Order, and serve the same on the respondent by delivering a copy to the respondent

7 RHC Order 73, rule 10(3)(b).
8 RHC Order 73, rule 10(3)(c).
9 *Grant Thornton International Limited v. JBPB & Co (a partnership)* (unreported, HCCT 13/2012, April 5, 2013).
10 RHC Order 73, rule 10(2).
11 RHC Order 73, rule 7(2).
12 RHC Order 73, rule 7(4).
13 RHC Order 73, rule 7(5).

personally, or by sending a copy to them at their usual or last known place of abode or business, or in such other manner as the Court may direct.[14] It is permissible to serve the Enforcement Order out of the jurisdiction without leave of the Court.[15]

Within 14 days after service of the Enforcement Order (or, if it is to be served out of the jurisdiction, within such other period as the Court may fix), the respondent may apply to set aside the Enforcement Order, and the award shall not be enforced until after the expiration of that period, or (if the respondent applies within that period to set aside the Enforcement Order) until after the setting aside application is finally disposed of.[16] The application for setting aside must be made by summons supported by an affidavit, and such affidavit must be filed at the same time as the summons.[17]

The application for setting aside is usually fixed for 30 minutes. If the evidence filed by the respondent (i.e., the applicant in the setting aside application) discloses no arguable grounds for setting aside the Enforcement Order, the Court will dismiss the application even at the first hearing without the need for the claimant (i.e., the respondent in the setting aside application) to file any opposing evidence.[18]

Common law route

A Convention award, Mainland award or Macao award (but not an ordinary award) is also enforceable in Hong Kong by action in the Court;[19] i.e., the claimant sues on the award and proves their case. The action is based on the implied promise of the respondent to perform a valid award. If the award is not performed, the claimant can proceed with an action for breach of this implied promise and obtain a judgment giving effect to that award.[20]

This route may be useful if the claimant is seeking any remedy which is distinct from the remedies claimed in the arbitration. For example, where the respondents are required under an award to continue to perform their contractual obligation to sell certain shares to the claimant, but the respondents have instead sold the shares to another purchaser, the claimant is entitled to claim against the respondents for damages arising from non-performance of the award.[21]

Possible challenges faced by the claimant

Grounds for refusing enforcement

After service of the Enforcement Order, the respondent may seek to set aside the Enforcement Order on various grounds. In general, enforcement of an arbitral award may be refused if the respondent proves that:[22]

- A party to the arbitration agreement was under some incapacity (under the law applicable to that party);
- The arbitration agreement was not valid under the law to which the parties subjected it, or (if there was no indication of the law to which the arbitration agreement was subjected) under the law of the country where the award was made;
- The person against whom enforcement is sought was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present their case;
- 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;
- The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or (if there was no agreement) with the law of the country where the arbitration took place; or
- 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.

Enforcement of an arbitral award may also be refused if:[23]

- The award is in respect of a matter which is not capable of settlement by arbitration under the law of Hong Kong; or
- It would be contrary to public policy to enforce the award.

14 RHC Order 73, rule 10(4).
15 RHC Order 73, rule 10(5).
16 RHC Order 73, rule 10(6).
17 RHC Order 73, rule 10(6A).
18 *G v. M* (unreported, HCCT 36/2009, September 14, 2009), at paragraph 6
19 AO sections 87(1)(a), 92(1)(a) and 98A(1)(a).
20 *Xiamen Xinjingdi Group Co Ltd v. Eton Properties Ltd* (2020) 23 HKCFAR 348.
21 Ibid.
22 AO sections 86(1), 89(2), 95(2) and 98D(2).
23 AO sections 86(2), 89(3), 95(3) and 98D(3).

Application for security pending determination of setting aside application

When faced with an application for setting aside the Enforcement Order, one option which the claimant should consider is to apply to the Court for an order requiring the respondent to give security as a condition of the further conduct of the application. The Court can also do so on its own motion.[24]

In determining whether or not to order security, the Court will consider two important factors. The first is the strength of the argument that the award is invalid as perceived on a brief consideration by the Court. If the award is manifestly invalid, there should be an adjournment and no order for security. If the award is manifestly valid, there should be either an order for immediate enforcement or an order for substantial security. In cases that fall in between, there will be various degrees of plausibility in the argument for invalidity. The second factor is the ease or difficulty of enforcement and the effect of any delay in enforcement. The Court will consider whether enforcement will be rendered more difficult – for example, by movement of assets or by improvident trading – if enforcement is delayed. If that is likely to occur, the case for security is stronger. On the other hand, if there are and always will be insufficient funds within the jurisdiction, the case for security must necessarily be weakened.[25]

What if the respondent makes applications to set aside the award in the seat and to set aside the Enforcement Order in Hong Kong? The case of *Dana Shipping and Trading SA v. Sino Channel Asia Ltd* [2017] 1 HKC 281 is a good example of the approach that may be taken by the Hong Kong Court, though the facts of the case are rather unusual. In this maritime dispute, the claimant applied for and obtained leave on November 16, 2015 to enforce an English arbitral award in Hong Kong. On November 27, 2015, the respondent applied to set aside the Enforcement Order, arguing that it was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, and that it was unable to present its case in the arbitration. On January 8, 2016, the claimant applied for payment to be made by the respondent of the awarded amount as security. Pending these applications in Hong Kong, in January 2016 the respondent applied to the English court six months out of time to set aside the arbitral award.

At the time the Hong Kong Court heard the claimant's application for security on March 8, 2016, the date of the hearing of the respondent's set aside application before the English court had not yet been fixed and there was no indication of an expected date of the outcome of the said application. On March 14, 2016, the Hong Kong Court handed down its decision and held that the mere existence of a challenge against the award in another jurisdiction did not by itself require

24 AO sections 86(4), 89(5) and 98D(5); RHC Order 73, rule 10A; *Guo Shun Kai v. Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484.
25 These principles, as set out in *Soleh Boneh International Ltd v. Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208, were adopted by the Hong Kong courts in various decisions, for example *Guo Shun Kai v. Wing Shing Chemical Co Ltd* [2013] 3 HKLRD 484.

a refusal of enforcement and adjournment of the enforcement proceedings. Based on the evidence filed in the proceedings, the Hong Kong Court also took the preliminary view that the respondent did not have a strong case to argue that the award was invalid. Worse still, no evidence was adduced on the likelihood of the respondent obtaining leave to apply to set aside the award before the English court out of time, nor was there any explanation as to its delay in making the application to the supervisory court. There was also no evidence on the respondent's financial worth and its ability to comply with the award. The Hong Kong Court concluded that the application in England was nothing more than a delaying tactic, and there was a real risk that the respondent would remove or dissipate its assets to prejudice the enforcement of the award if there was further delay in enforcement. As such, the Hong Kong Court was prepared to adjourn the application to set aside the Enforcement Order for three months, on the condition that the respondent would pay into court 60% of the award amount as security within 21 days.

The respondent failed to make payment of the security into court within 21 days, and as a result its application to set aside the Enforcement Order was dismissed.

On May 13, 2016, the English court set aside the award on the ground that it was made without jurisdiction and was of no effect, and pointed out that there was no time limit stipulated under the English Arbitration Act 1996 for an application to set aside an award by a person alleged to be a party to arbitral proceedings but who has taken no part in the proceedings. In reliance on the English judgment, the respondent applied to the Hong Kong Court to set aside the Enforcement Order again.

In its subsequent decision of July 28, 2016,[26] the Hong Kong Court emphasized that as the court of enforcement, it retained a residual discretion to permit enforcement even if the award had been set aside by the supervisory court, and in doing so its own law (i.e., Hong Kong law) should be applied. The key question was whether a foreign decision setting aside an award should be recognized in accordance with the ordinary principles applying to the recognition of foreign judgments. On the basis that the award was set aside by the English court on grounds equivalent to those set out in Article V(1)(d) of the New York Convention (i.e., the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties), and there was no evidence that the setting aside proceedings before the English court were procedurally unfair or irregular, or that the English court was not impartial, or that it would be contrary to the Hong Kong Court's sense of justice or public policy to recognize the judgment of the English court, the Hong Kong Court concluded that it ought to give effect to the English judgment and set aside the Enforcement Order. The respondent's failure to pay security into court, which led to the dismissal of its application, was of little relevance, given security was ordered only based on a preliminary determination of the merits of the respondent's application and the English court decision constituted a material change of circumstances. Considering all the circumstances, the respondent's breach of the order was not sufficiently egregious to demonstrate bad faith to justify the Hong Kong Court's exercise of its discretion to enforce the award notwithstanding the English judgment.

State immunity

State immunity may come into play where an arbitral award is enforced against a foreign state. In the landmark case of *Democratic Republic of the Congo v. FG Hemisphere Associates LLC (No 2)* (2011) 14 HKCFAR 395, the Hong Kong Court of Final Appeal, by a majority of three to two, decided to seek the views of the Standing Committee of the National People's Congress of the PRC (NPCSC) on whether absolute immunity or restrictive immunity (which does not extend to commercial transactions) should apply in Hong Kong. In that case, the claimant took two ICC arbitral awards, made in Paris and Zurich respectively, against the Democratic Republic of the Congo (DRC) (as respondent) to Hong Kong for enforcement. The DRC applied to set aside the Enforcement Order on the basis that it enjoyed immunity from suit. The NPCSC confirmed that the position on state immunity adopted by the PRC at the time was one of absolute immunity and the Hong Kong courts must apply and give effect to the rules and policies on state immunity determined by the PRC government as being applicable to Hong Kong. Accordingly, the Hong Kong Court of Final Appeal declared that absolute immunity applied and it had no jurisdiction over the DRC.

However, the applicability of absolute immunity to Hong Kong may need to be revisited in the context of enforcement of international arbitral awards against foreign states. On September 1, 2023, the PRC adopted a new Foreign State Immunity Law (FSIL), which came into effect on January 1, 2024. Article 12 of the FSIL provides that where a dispute arising from the commercial activities between a foreign state and an organization or individual of another state (including the PRC) has been submitted to arbitration pursuant to a written agreement, or where a foreign state has agreed (by an international investment treaty or otherwise in writing) to submit to arbitration an investment dispute between it and an organization or individual of another state (including the PRC), the foreign state does not enjoy immunity from the jurisdiction of PRC courts over certain matters that require review by a court, including the confirmation or enforcement of an arbitral award. The implications of the FSIL for Hong Kong remain to be seen, but in light of the change of immunity law in the PRC, Hong Kong will likely follow suit.

Conclusion

While there is a mechanism for a respondent to resist enforcement of an international arbitral award in Hong Kong, the limited recourse is not intended to provide an opportunity to re-argue the case or to invite the courts to review the substance of the award. The Hong Kong courts have time and again emphasized the finality and binding nature of arbitral awards and reiterated their pro-arbitration and pro-enforcement stance. A respondent who fails in their challenge against an Enforcement Order should expect to pay costs on an indemnity basis.[27]

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26 *Dana Shipping and Trading SA v. Sino Channel Asia Ltd* [2016] 4 HKLRD 345.

27 *Grand Pacific Holdings Ltd v. Pacific China Holdings Ltd (in liq) (No 2)* [2012] 4 HKLRD 569.

Enforcement of **ICSID awards**

The ICSID Convention is a self-contained regime of arbitration. This facet is all the more prominent in the provisions dealing with enforcement of ICSID awards. Articles 53 and 54 of the ICSID Convention confirm the finality of an ICSID award, require voluntary compliance by the parties and allow appeal or review only on the basis of narrowly defined grounds prescribed by the ICSID Convention. The role of domestic courts is thus significantly circumscribed by design.

Article 53 of the ICSID Convention prescribes the obligations of the parties to an arbitration. It obliges the parties to an arbitration to "abide by and comply with" awards rendered by ICSID tribunals. It also precludes any recourse not envisaged under the ICSID Convention (annulment under Article 52 being an envisaged recourse), thereby prohibiting parties from approaching domestic courts to appeal or review an ICSID award:

- The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

Article 54(1) of the ICSID Convention states the contracting states' obligations vis-à-vis ICSID awards. It requires the contracting states to recognize ICSID awards as binding as if they were a final judgment of that state's courts:

- 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 judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

Thus, enforcement under the ICSID Convention is meant to be independent of the New York Convention and other international and domestic rules dealing with the enforcement of foreign arbitral awards.

Despite this, the procedural law of many states allows enforcement and/or execution to be challenged on public policy or other grounds. This has led to a few instances of domestic courts entertaining objections to enforcement or execution of ICSID awards and examining the procedure followed during the arbitration or the award itself.

Interactions between ICSID awards and domestic courts have also occurred on issues of sovereign immunity. Article 55 of the ICSID Convention expresses deference to domestic laws on sovereign immunity in force in the state where enforcement is sought:

- Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Issues regarding enforcement

Duty to enforce

Most domestic courts have adopted an approach of deference to ICSID awards. Following the protracted enforcement proceedings in relation to the award in *Ioan Micula, Viorel Micula and others v. Romania (I)* (ICSID Case No. ARB/05/20), the UK Supreme Court held that under the ICSID Convention, the courts of England and Wales have a duty to recognize and enforce ICSID awards. The UK Supreme Court observed that "the Convention scheme is one of mutual trust and confidence which depends on the participation and compliance of every Contracting State." It also held that the English Arbitration Act 1996 implements the ICSID Convention in UK domestic law and entitles a person seeking recognition or enforcement of an ICSID award to have it registered. The English Arbitration Act must be interpreted in the context of the ICSID Convention, and it should be presumed that Parliament intended it to conform to the United Kingdom's treaty obligations.

The U.S. courts have expressed similar deference. The U.S. District Court for the District of Columbia in *TECO Guatemala Holdings, LLC v. Republic of Guatemala*, No. 17-cv-102, 2018 WL 4705794, at *2 (D.D.C. Sept. 30, 2018) held that "the Court's role in enforcing an ICSID arbitral award is therefore exceptionally limited." However, the court is required to ensure that it has subject-matter and personal jurisdiction, the award is authentic and the court's enforcement order tracks the order. (*Tethyan Copper Co. Pty Ltd. v. Islamic Republic of Pakistan*, 590 F. Supp. 3d 262 (D.D.C. 2022).

Despite this deference, the ICSID enforcement regime has not always been smooth sailing. Following Argentina's loss in *CMS Gas Transmission Co v. Argentina*, the then attorney general of Argentina and other senior executive and judicial officers issued public statements that Argentina would not voluntarily comply with ICSID awards and would challenge them before the International Court of Justice or Argentine courts. The award was ultimately enforced by the U.S. courts.

Intra-EU disputes

The enforcement of intra-EU ICSID awards has been and will continue to be a challenge in the wake of the *Achmea* and *Komstroy* decisions of the Court of Justice of the European Union (CJEU). Following *Achmea*, in January 2019, a group of EU member states issued a declaration pursuant to which "defending Member States will request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent."

Award creditors of intra-EU awards have increasingly focussed their enforcement attempts in non-EU jurisdictions. These attempts have met with mixed success and some conflicting decisions. In March 2023, the U.S. courts issued conflicting decisions as regards the treatment of the intra-EU objection at the enforcement stage – rejecting it in the two enforcement proceedings arising out of the *NextEra v. Spain* and *9REN v. Spain* awards, but accepting it in the enforcement proceedings arising out of the *PV Investors v. Spain* award. In the first two cases, the U.S. court declared its jurisdiction over Spain under the U.S. Foreign State Immunities Act (FSIA), which allows the court to find jurisdiction over a state when it has agreed to arbitrate. The U.S. court rejected Spain's defense based on the alleged invalidity of the ECT arbitration clause under EU law and held that its analysis was limited to ascertaining the existence of an arbitration agreement not its validity. However, in *PV Investors v. Spain*, the U.S. court followed Spain's argument that the arbitration agreement in the ECT is invalid under EU law and therefore Spain's state immunity from U.S. courts' jurisdiction was not waived under the FSIA. All three decisions are currently being appealed to the U.S. Supreme Court.

Moving to the UK, the English courts have largely taken a stance in favor of enforcing intra-EU ICSID awards. In 2023, the Commercial Court of England and Wales froze assets belonging to Spain in enforcement proceedings arising out of the *InfraRed v. Spain* award. In the same year, the Commercial Court also rejected Spain's intra-EU objection while deciding on the enforcement of the *Antin v. Spain* enforcement. The Commercial Court found that Spain had given its unconditional consent to arbitrate under the ECT and the ICSID Convention to the exclusion of the jurisdiction of domestic courts and the European Court of Justice. The Commercial Court also confirmed that by so consenting to arbitrate, Spain had effectively waived its sovereign immunity from the jurisdiction of UK courts under the UK State Immunity Act 1978.

Most recently, the English High Court was faced with the intra-EU objection again in *Infrastructure Services Luxembourg SARL & Anor v. Kingdom of Spain (Rev1)* [2023] EWHC 1226 (Comm). Spain argued that the tribunal had acted *ultra vires* by upholding its jurisdiction because an intra-EU arbitration under the ECT is not permissible under EU law. The High Court accepted that EU law and the ECT were in conflict. However, it found that Spain sought an interpretation of the ECT and the ICSID Convention that ignored the clear dispute resolution provisions of both by giving the CJEU primacy over the UK's international treaty obligations. This approach was not accepted by the High Court, which found support in the similar findings of the Australian High Court in *Kingdom of Spain v. Infrastructure Services Luxembourg S.à.r.l* [2021] FCAFC 3, where the court found that Spain was the subject of a binding ICSID arbitral award. The effect of Spain's agreement to Articles 53 to 55 of the ICSID Convention amounted to a waiver of foreign state immunity from the jurisdiction of the courts of Australia to recognize and enforce, but not to execute, the award.

State immunity

Several states have adopted domestic legislation to give effect to immunity from execution. Article 55 of the ICSID Convention provides that ICSID awards are subject to the domestic legislation on sovereign immunities at the place of enforcement. Respondent states often resist execution against their assets by raising arguments on the basis of Article 55 of the ICSID Convention.

In an anonymized judgment in 2023, the Swiss Federal Supreme Court rejected enforcement because the ICSID award lacked "sufficient domestic connection to Switzerland." The investor had applied to the Regional Court of Bern-Mittelland to attach trademarks, patents, real estate, bank accounts, assets in deposit boxes and precious metals supposedly owned by Spain and located in Switzerland. The Swiss rules on immunity require that the debt relationship under an award has a sufficient domestic connection to Switzerland. The court confirmed that these rules apply equally to the enforcement of ICSID awards and that the party seeking to attach a foreign state's assets must satisfy three criteria:

- The state must have acted in its commercial capacity ("*iure gestionis*") and not sovereign capacity ("*iure imperii*").
- The targeted assets were not intended for the state's exercise of sovereign power but used for its commercial activities.
- The underlying relationship must have a "sufficient connection" to Switzerland; i.e., the claim originated or was intended to be performed in Switzerland, or the state performed certain acts in Switzerland.

The court found that no such connection existed, despite one of the claimants in the arbitration being organized under the laws of Switzerland. Notably, the Supreme Court also held that ICSID awards shall be treated akin to final decisions of Swiss domestic courts and that Swiss courts have no power to review an ICSID award, including on the ground of public policy.

The state immunity objection was also raised in the enforcement proceedings following the award in *Yukos and others v. Russian Federation*. Russia objected to enforcement in multiple jurisdictions – the Netherlands, England and Wales and Washington, D.C. In *Hulley v. Russian Federation* [2023] EWHC 2704 (Comm), Russia argued that the English courts should uphold state immunity under the State Immunity Act 1978 (SIA), as under section 1(2) of the SIA, the court has a "positive duty" to enforce state immunity, as provided for under the SIA. The investor argued that Russia had waived its immunity by submitting to the Netherlands' jurisdiction in challenging the arbitral awards in the Dutch courts. The court agreed – if the Dutch courts had applied the SIA, Russia would not have been immune. The English court held that foreign judgments can, and in this case did, cause issue estoppel. As the Dutch courts found that the arbitration agreement was binding, the English courts may consider that issue estoppel applies and that the agreement is therefore binding in England and Wales, too.

Separate enforcement proceedings are also ongoing in Washington, D.C., with an appeal decision due this year. The U.S. District Court for the District of Columbia rejected an application to dismiss an enforcement petition against Russia, dismissing Russia's claims of sovereign immunity. The court held that the FSIA arbitration exception applied. The various enforcement proceedings following the *Yukos* arbitrations, which spanned almost a decade, indicate that enforcement can be a very lengthy and expensive process. With regard to state immunity, the *Yukos* proceedings indicate that state immunity may fail to protect states from enforcement of ICSID awards.

In *Border Timbers Ltd & Anor v. Republic of Zimbabwe* [2024] EWHC 58 (Comm), the English High Court considered whether state immunity is even engaged at the application for registration stage. The court ultimately concluded that it is not. One reason for this was that in registering an award, the court is not taking any action against the state, as the award results from the preceding arbitral process. Sovereign immunity would only become relevant when an order granting recognition is served on the state, as this is when the state has been impleaded and the English courts' jurisdiction is invoked.

Consequently, in terms of enforcement of ICSID awards and state immunity, by consenting to the ICSID Convention, states waive their immunity. This does not extend to execution against the state's assets, which may create protracted execution proceedings where states against which an award has been enforced invoke their immunity with regard to execution.

Conclusion

Enforcement of ICSID awards can come with challenges, though possibly fewer than in non-ICSID awards. The *Achmea* and *Komstroy* saga and the recent departures of EU member states from the ECT will further complexify the enforcement landscape, as might the denunciation of the ICSID Convention by certain states, like Honduras most recently, or the termination of investment treaties by states like India, Indonesia and South Africa. Sunset clauses might allow investors to bring their claims but may raise novel issues of enforcement at a later stage.

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