Welcome to the third in our series of briefings for in-house counsel on key aspects of international arbitration.

In this briefing we will examine one of the key advantages that arbitration offers, namely the enforcement of awards in foreign jurisdictions. In arbitration, in contrast to alternative dispute resolution but like court proceedings, the parties receive a binding decision. The majority of arbitral awards are thought to be performed voluntarily.1 However, if the losing party does not comply then the winning party will have to commence court proceedings in order to recover the awarded sum.

Enforcement usually takes place against the losing party’s assets and so, ideally before starting an arbitration, it is necessary to establish where that party’s assets are located and what the prospects for enforcement are in that jurisdiction or jurisdictions. Once an award has been obtained, the winning party can apply to the national court in that country for an order against the assets. Like foreign court judgments, the enforcement of foreign arbitral awards is dictated by national laws. However, in contrast to foreign court judgments, the enforcement of arbitral awards has a great degree of uniformity across the world due to the 1958 New York Convention on Arbitral Awards (the “Convention”).

This briefing will outline the enforcement regime under the Convention and also highlight some difficulties in enforcing foreign arbitral awards around the world.

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Scope of the New York Convention

The Convention obliges courts of contracting states, of which there are currently 156, to give effect to arbitration agreements and to recognise and enforce foreign arbitral awards. As opposed to foreign court judgments, the enforcement of which is governed by a multitude of bilateral treaties, the high uptake of the Convention has led to substantial uniformity in the enforcement of foreign arbitration awards. Nevertheless, important differences remain.

Article I(3) of the Convention allows contracting states to make two reservations which limit its scope:

- The “reciprocity reservation” allows the contracting state to limit the applicability of the Convention to awards made in other contracting states; and
- The “commercial reservation” allows the contracting state to limit the applicability of the Convention to disputes arising out of legal relationships that are considered “commercial” under the national law of the contracting state.

The fact that each state can determine for itself the definition of a “commercial” relationship has created some problems, even within a state, as was shown by two Indian cases where the courts were asked to stay legal proceedings that had been commenced in contravention of arbitration agreements. The first case concerned a chain of contracts for the supply of machinery and technical information in relation to a fibre plant.\(^2\) The High Court of Bombay (as it then was) held that, whilst the agreement from which the dispute arose was commercial in nature, the relationship between the parties was not as there was no legal provision in India according to which the transaction could be defined as commercial and so the stay was rejected. The High Court in Gujarat later disapproved of the Bombay decision and held that the term commerce ‘is a word of the largest import and takes in its sweep all the business and trade transactions in any of their forms’.\(^3\) The Indian Supreme Court has since approved the Gujarati decision.\(^4\)

In cases where the arbitration concerns something other than traditional commercial relationships, the parties should be aware of the potential uncertainty arising from this reservation, particularly in less developed legal jurisdictions.

Formalities

Article IV of the Convention sets out the fairly straightforward requirements for obtaining recognition and enforcement of awards, including the need to produce an authenticated original or duly certified copy of both the arbitral award and the underlying arbitration agreement, plus a translation if necessary.

In some jurisdictions, courts have been willing to enforce awards even where these requirements have not been met, for example in *HP v Berg*, where the US District Court of Massachusetts was presented with uncertified copies of the arbitral award and arbitration agreement; and in *Shaanxi Provincial Medical Health Products*, where the Spanish Supreme Court enforced a CIETAC award where the underlying

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\(^2\) Indian Organic Chemical Ltd v Subsidiary 1 (US), Subsidiary 2 (US), and Chemtex Fibres Inc (Parent Co.) (US) (1979) IV Ybk Comm Arb 271.


\(^4\) RM Investments & Trading Co. P. Ltd v Boeing Company 1994 (4) SCC 541


\(^6\) Shaanxi Provincial Medical Health Products I/E Corporation v Olpaso, S4, Tribunal Supremo, Case No. 112/2002, 7 October 2003
In contrast, the Qatar Court of First Instance has recently rejected an application for the recognition and enforcement of an ICC Award rendered in Paris as the award had not been authenticated and certified by the competent authority. The court rejected the application without regard to the procedure for issuing an award set out in the ICC Rules (which do not provide for certification) and the argument about authentication and certification was raised by the court itself, rather than by the parties.

In light of these divergent approaches, it is always wise to ensure that the requirements of Article IV of the Convention are fully complied with before seeking enforcement of an arbitral award.

**Grounds for Refusal of Enforcement**

However, where challenges are made to enforcement of an arbitral award, the challenge will normally be made pursuant to Article V of the Convention, which sets out that recognition and enforcement may be refused where:

a) A party is under some incapacity or the agreement to arbitrate is not valid either under the law to which the parties have subjected it or where the award was made;

b) The losing party was not given proper notice of arbitral proceedings or was otherwise unable to present his case;

c) The award deals with a dispute beyond the scope of the submission to arbitration;

d) The arbitral procedure was not in accordance with the agreement of the parties or the law of the seat state;

e) The award has not yet become binding, has been set aside, or suspended;

f) The subject matter of the dispute is not capable of settlement by arbitration in the enforcing state; and

g) The enforcement of the award would be contrary to the public policy of that country.

These limited grounds are the only grounds on which enforcement can be refused and the enforcing court is not obliged to refuse enforcement if one of the grounds is proved to exist. Notably, the Convention does not allow for the review of the merits of an arbitral award. Accordingly, realistic prospects of resisting enforcement under the Convention are normally few and far between.

It is the ground set out at (g) above that has caused the most significant difficulties and, again, the fact that the contracting state may define for itself the meaning of “public policy” has led to widely divergent results.

Most national courts have adopted a “pro-enforcement” stance and choose to construe the grounds for refusal narrowly on the basis that the parties have opted to determine their disputes in arbitration. By way of example, before refusing to enforce an award, the French Cour de Cassation looks for circumstances of “flagrant, effective and concrete” violations of the requirements of international public policy,
which represents a liberal approach even compared with other arbitration-friendly jurisdictions.\(^8\)

The English courts have held that a distinction must be made between domestic and international public policy and thus acts outside the field of universally condemned activities (such as terrorism, drug trafficking, prostitution, paedophilia) or anything short of corruption or fraud in international commerce will not invite the attention of English public policy.\(^9\)

In contrast, some jurisdictions have been more willing to employ the public policy defence to enforcement. The Turkish Court of Appeal has ruled that tax laws and other receivables to the state pertain to public policy;\(^10\) Vietnamese legislation gives the courts the right to refuse enforcement if the award violates “fundamental principles”;\(^11\) and Chinese courts have recognised an obligation to consider in every case whether there has been a breach of ‘national sovereignty or national security or breaches of the principles of social ethics and fundamental moral value’, even if neither party has raised it.\(^12\)

In the ‘Heavy Metal’ case\(^13\), the Chinese Supreme People’s Court (the “SPC”) considered a CIETAC tribunal award for compensatory damages in favour of a US heavy metal band, whose performance had been banned by the Chinese Ministry of Culture on the grounds that the artists performed ‘outrageous acts’ such as drinking, smoking, splashing water, lying on the stage floor while performing, and jumping down from the stage. When the band sought enforcement, the SPC refused on the grounds that the tribunal’s findings were in manifest disregard of the underlying facts that the performance of heavy metal music was against ‘national sentiments’ and accordingly contrary to social and public interests. A new requirement that lower courts obtain leave of the SPC to refuse recognition or enforcement of awards has reduced the incidences of use of overly broad interpretations of public policy grounds in China, although, in the Heavy Metal case, the approach of the SPC can hardly have been said to be pro-enforcement.

Many jurisdictions in the Middle East have linked public policy with the provisions of Sharia law. The 1983 Riyadh Convention on Judicial Cooperation between States of the Arab League stipulates that arbitral awards are not to be recognised and enforced among signatory states where any part of the award contradicts ‘the provisions of the Islamic Shari’a, the public order or the rules of conduct of the requested party’.\(^14\) In practice, the strict application of this rule has been largely limited to the enforcement of domestic awards, however it remains a risk for international parties.

It should be noted, however, that the Dubai International Financial Centre (DIFC) is modelled on international best practice and does not follow Sharia law. Recent

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\(^8\) SNF v Cytec Industries BV, judgment no. 680 of 4 June 2008 of the French Cour de Cassation


\(^12\) Explanations on and Answers to Practical Questions in Trial of Foreign-Related Commercial and Maritime Cases (No. 1), Issued by the Supreme People’s Court on 8 April 2004, art. 43

\(^13\) Reply of the Supreme People’s Court in the matter regarding the request by Beijing First Intermediary People’s Court to Refuse Enforcement of Arbitral Award [1997] Jing Ta 35

\(^14\) Article 37(e)
judgments have indicated that the DIFC courts are willing to be used as a conduit jurisdiction, allowing creditors to have an award recognised in the DIFC even though the debtor has no assets there, thus making the award easier to enforce in other parts of the UAE.15

Conclusion
The almost universal applicability of the New York Convention, with its limited grounds for refusal, means that enforcement really is one of the main advantages of arbitration compared to court litigation. However, parties should be aware that some difficulties remain. The place of enforcement is determined by where the assets of the losing party lie and so, ideally before embarking on arbitration, those assets should be identified. Once located, the rules concerning the recognition and enforcement of arbitral awards in that jurisdiction should be researched, in particular whether there is a reciprocity reservation or any troublesome interpretations of the grounds for refusal to enforce.

Without the ability to enforce, a successful arbitration award may well be a Pyrrhic victory.

FOR MORE INFORMATION

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15 See Case CA 005/2014