

ENFORCEMENT OF SETTLEMENTS AND AWARDS IN INTERNATIONAL ARBITRATION

BY

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1 In international projects particularly there are additional attractions to arbitration - most significant is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 commonly known as the "New York Convention". The convention has been adopted by 145 states. It should be described as the cornerstone of international arbitration. It simplifies and accelerates the enforcement of arbitral awards in an unprecedented way. It requires courts of a contracting state to give effect to an agreement to arbitrate and to recognise and enforce awards made in other states subject to specific limited exceptions (which I set out below).

2 The Guide to FIDIC contracts endorses the New York Convention where it states:

"For major projects internationally it is desirable that the place of arbitration be situated in a country other than that of the Employer or Contractor. This country should have a modern and liberal arbitration law and shall have ratified a bilateral or multilateral convention (such as the New York Convention) or both, that facilitates the enforcement of an arbitral award in the states of the Parties."

3 In 2008 on the 50th anniversary of the New York Convention, the School of International Arbitration at Queen Mary, University of London obtained empirical and qualitative data into the perceptions and experience of corporations in enforcing arbitral awards and settling their disputes. A brief summary of the results were as follows:

Overview of International Arbitration

Significant support for arbitration

- 88% of the participating corporations had used arbitration.
- certain industries such as insurance, energy, oil and gas and shipping, use International Arbitration as a default resolution mechanism.

Outcome

Overwhelmingly the majority of arbitration cases are successfully resolved:

- 25% of cases are settled before an arbitral award is rendered; 7% are settled at this stage with a subsequent award by consent
- 49% of cases end in voluntary compliance with an award
- 11% of cases result in recognition and enforcement proceedings
- the remaining 8% of cases involved an apparent settlement, or an arbitral award, but this was followed by litigation
- overall 92% of the arbitration disputes are successfully resolved at some stage through the arbitration proceedings.

Enforcement

Most corporations are able to enforce arbitral awards within one year and usually recover more than 75% of the value of the award.

- 57% of the participating corporations that had experienced recognition and enforcement proceedings said that it took less than one year for arbitral awards to be recognised and enforced
- 44% of those corporations had recovered the full value of an award from enforcement and execution proceedings
- 84% of those corporations had received more than 75% of the value of an award following the enforcement and execution proceedings.

4 **Arbitral Awards**

The award contains the Tribunal's decision on the merits finally determining the claim and where appropriate counterclaim. The award is final and binding between the parties - it creates an issue estoppel. The parties cannot contradict the Tribunal's findings of law or fact. As we have discussed if settlement is reached by the parties during the course of an arbitration it is prudent to ensure that this is converted into an Arbitral Award by the Tribunal. An Arbitral Award is rendered by a private Tribunal whose decision making power is based upon a private agreement between two parties. This can be contrasted with the public law authority which pertains to court judgments. Therefore "private" awards need official recognition by domestic courts in order to be enforced. This is the purpose of the recognition and enforcement procedure.

5 **How the Convention works**

In essence where you have a New York Convention Award it is not necessary for the award to be the subject of a court order or any enforcement proceedings in the seat of the arbitration. That was the problem with the Geneva Convention of 1927 where you had to obtain a court order in the seat of the arbitration. Under the New York Convention the award is treated as being made in the seat of the arbitration. For example an award in France which is the seat of the arbitration. France is a party to the New York Convention and therefore the award can be enforced internationally as a New York Convention Award. The "recognition" of the award means the acceptance of the foreign award as having the same effect as a domestic court judgment.

6 **Reservations**

Under the New York Convention states are permitted to make certain reservations. This has led to the two reservations most commonly referred to as the "reciprocity reservation" and the "commercial reservation".

- States may limit the applicability of the New York Convention to awards made in other contracting states (the reciprocity reservation). Therefore it is necessary to check whether both the state where enforcement is desired and the state where the award was made are contracting states.
- States may limit the applicability of the New York Convention to awards relating to commercial matters (the commercial reservation)

I attach to these notes the UNCITRAL status table where I have indicated inter alia which countries have made the reciprocity and commercial reservations.

7 **Resisting enforcement under the New York Convention**

The New York Convention provides for limited grounds on which the enforcement of a Convention Award can be refused as follows:

7.1 **A party to the Arbitration Agreement was (under the law applicable to him) under some incapacity (Article V.1(a))**

The incapacity may relate to the age or competence of a party to enter into the Arbitration Agreement. Alternatively it may relate to whether the party is prohibited from entering into an Arbitration Agreement by the law applicable to it.

The defence of incapacity has never been raised in enforcement proceedings in England in relation to a New York Convention Award.

7.2 That the Arbitration Agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the laws of the country where the award was made (Article V.1(a))

The invalidity refers to a defect in the Arbitration Agreement rather than the incapacity of the parties or the fact that the matter is not capable of being dealt with by arbitration. For example, where the Arbitration Agreement has not been properly incorporated into the Arbitration Agreement by reference.

If the parties have not indicated the governing law of the Arbitration Agreement then the validity of the Arbitration Agreement is determined by the law of the country where the award was made. An English Court will interpret this to mean the law of the seat of the arbitration and will have regard to that country's substantive rules of law rather than its conflicts rules of law - (see *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2008] upheld in the Court of Appeal [2009] and the Supreme Court [2010] (more later).

7.3 That a 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 (Article V.1(b)).

7.4 That the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration (Article V.19(c)).

7.5 That the composition of the 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 (Article V.1(d)).

7.6 That the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made (Article V.1(e)).

This section foresees three sets of circumstances. The first is that the award has not become binding. The second is that the award is set aside. The third is that the award is suspended.

7.7 If the award is in respect of a matter not capable of settlement by arbitration (Article V.2(a)).

The enforcing court applies its own law in deciding whether a matter is capable of settlement by arbitration or not.

Under English law, matters which would not be capable of settlement by arbitration would include:

- decisions affecting the legal status of the parties;
- decisions which affect the legal status or rights of non-parties; and
- decisions which are not quasi-judicial (for example, valuations, mediations and appraisements).

7.8 It would be contrary to public policy to recognise or enforce the award (Article V.2(b)).

N.B. A party does not have to have challenged the award in the place where it was made in order to be able to resist enforcement in another forum (*Dallah v Pakistan*).

8 Dallah v Pakistan 2008-2010 - On resisting enforcement

The Dallah v Pakistan case is of interest. The case arose out of a US\$345 million contract between Dallah and a trust controlled by the Pakistan Government to build housing facilities near Mecca for Hajj pilgrims. Neither side fulfilled their obligations, the housing was never built, and the matter went to an arbitration in Paris in 1998. However, the original contract and its arbitration clause were with the trust, not the Government of Pakistan itself, and the Government argued that it was not bound by the arbitration clause. The Tribunal disagreed and ordered the Government of Pakistan to pay US\$20 million to Dallah. Dallah began enforcement proceedings in London.

The Government of Pakistan resisted enforcement on the grounds it was not a party to the original Arbitration Agreement. The English courts decided that the Government of Pakistan was not a party to the Arbitration Agreement. In order to do so the English Court conducted a full re-hearing in London of the case regarding jurisdiction. Certain passages in the Arbitration Award in Paris suggested that the Tribunal had applied transactional legal principles to determine the scope of the Arbitration Agreement, rather than the law of any particular state. The contract in Dallah did not state which law the parties intended to apply to the arbitration clause therefore the parties accepted that the law of France as the place where the award was made governed the validity of the

Arbitration Agreement. The Supreme Court did not consider that it was possible under French law to employ the transactional legal principles in such a way as to find there was a valid Arbitration Agreement between Dallah and the Court of Pakistan under French law. Enforcement was therefore successfully resisted.

This case has prompted quite a lot of commentary and some arbitration practitioners feel uncomfortable with the wide powers of the English Courts at the enforcement stage. A party resisting enforcement can expect a full re-hearing of the issue of jurisdiction, even though the arbitral Tribunal may have already heard extensive evidence and made a reasoned decision.

The validity of the arbitration clause in Dallah was ultimately ruled on by five (or more) Tribunals; the arbitrators, the English Commercial Court, the English Court of Appeal, the UK Supreme Court and the French Courts. The cost and expense incurred in this jurisdictional battle was no doubt considerable.

Finally a Checklist

In order to maximise the chances of enforcing an award the following points should be considered:

1 Consider the seat of arbitration before commencement.

This is a matter which should also be considered when drafting contracts. Careful consideration must be given to which country is determined in the arbitration clause to be the seat of the arbitration Tribunal, as this will affect the enforceability of the award. The seat of arbitration need not be the same country as the venue (though in practice they are often one and the same) and need not correspond with the law applicable to the substantive dispute. If the award is made in a New York Convention State and the assets are also located in a New York Convention State, then it should be straightforward to enforce.

2 Where do you wish to enforce? Where are the assets?

If you are trying to enforce an award made in a New York Convention State against a respondent's assets located in a New York Convention State, enforcement is theoretically a simply and easy process. If the assets are not located in a New York Convention State it may be more difficult. In either case, seek local advice on how the award will be enforced before commencing proceedings.

3 Do you need to take steps to preserve assets?

A freezing injunction may be required to prevent an award from being rendered ineffective by a defendant dissipating its assets. Though it does not provide any security over the assets a freezing injunction is an interim order that prohibits a party from disposing or dealing with its assets.

Freezing injunctions are particularly useful in cases where a party wishes to make sure that the respondent has sufficient assets to comply with the award, or as a method of security assets for the enforcement of an award. There need not be a full hearing and the application can be made in the absence of the other party.

The availability of such interim measures in any given case and the question of whether they are to be obtained from the arbitral Tribunal and/or from the Courts, will depend on the seat of the arbitration, since generally most legal systems regard interim measures as a matter of procedural rather than substantive law.

4 Have you claimed post award interest?

An applicant may seek to enforce an award of interest, the whole or any part of which relates to a period after the date of the award. The party seeking post-award interest must specifically ask for it and then it is for the Tribunal to decide whether to grant it in the award.

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**Parties to the Convention on the Recognition and Enforcement of Foreign
Arbitral Awards**

A

Afghanistan (a), (b)
Albania
Algeria (a), (b)
Antigua and Barbados (a), (b)
Argentina (a), (b)
Armenia (a), (b)
Australia
Austria
Azerbaijan

B

Bahamas
Bahrain (a), (b)
Bangladesh
Barbados (a), (b)
Belarus (e)
Belgium (a)
Benin
Bolivia
Bosnia and Herzegovina (a), (b), (f)
Botswana (a), (b)
Brazil
Brunei Darussalam (a)
Bulgaria (a), (e)
Burkina Faso

C

Cambodia
Cameroon
Canada (h)
Central African Republic (a), (b)
Chile
China (a), (b), (j)
Colombia
Costa Rica
Cook Islands
Côte d'Ivoire
Croatia (a), (b), (f)
Cuba (a), (b)
Cyprus (a), (b)
Czech Republic (a), (e)

D

Denmark (a), (b), (c)
Djibouti (a), (b)
Dominica
Dominican Republic

E

Ecuador (a), (b)
Egypt
El Salvador
Estonia

F

Fiji
Finland
France (a)

G

Gabon
Georgia
Germany (a)
Ghana
Greece (a), (b)
Guatemala (a), (b)
Guinea

H

Haiti
Holy See (a), (b)
Honduras
Hungary (a), (b)

I

Iceland
India (a), (b)
Indonesia (a), (b)
Iran (Islam Republic of) (a), (b)
Ireland (a)
Israel
Italy

J

Jamaica (a), (b)
Japan (a)
Jordan

K

Kazakstan
Kenya (a)
Kuwait (a)
Kyrgyzstan

L

Lao People's Democratic Republic
Latvia
Lebanon (a)
Lesotho
Liberia
Lithuania (e)
Luxembourg (a)

M

Madagascar (a), (b)
Malaysia (a), (b)
Mali
Malta (a), (f)
Marshall Islands
Mauritania
Mauritius (a)
Mexico
Moldova (a), (f)
Monaco (a), (b)
Mongolia (a), (b)
Montenegro (a), (b), (f)
Morocco (a)
Mozambique (a)

N

Nepal (a), (b)
Netherlands (a), (d)
New Zealand (a)
Nicaragua]
Niger
Nigeria (a), (b)
Norway (a), (i)

O

Oman

P

Pakistan (a)
Panama
Paraguay
Peru
Philippines (a), (b)
Poland (a), (b)
Portugal (a)

Q

Qatar

R

Republic of Korea (a), (b)
Republic of Moldova
Romania (a), (b), (e)
Russian Federation (e)

S

Saint Vincent and the Grenadines (a), (b)
San Marino
Saudi Arabia (a)
Senegal
Serbia (a), (b), (f)
Singapore (a)
Slovakia (a), (e)
Slovenia (f), (k)
South Africa
Spain
Sri Lanka
Sweden
Switzerland
Syrian Arab Republic

T

Thailand
The former Yugoslav Republic of Macedonia
(b), (f), (l)
Trinidad and Tobago (a), (b)
Tunisia (a), (b)
Turkey (a), (b)

U

Uganda (a)
Ukraine (e)
United Arab Emirates
United Kingdom of Great Britain and
Northern Ireland (a), (g)
United Republic of Tanzania (a)
United States of America (a), (b)
Uruguay
Uzbekistan

Z

V

Venezuela (Bolivian Republic of) (a), (b)
Viet Nam (a), (b), (e)

Zambia
Zimbabwe

Parties 145

- (a) Declarations and reservations. This State will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting State.
- (b) Declarations and reservations. This State will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the national law.
- (c) On 10 February 1976, Denmark declared that the Convention shall apply to the Faeroe Islands and Greenland.
- (d) On 24 April 1964, the Netherlands declared that the Convention shall apply to the Netherlands Antilles.
- (e) Declarations and reservations. With regard to awards made in the territory of non-contracting States, this State will apply the Convention only to the extent to which those States grant reciprocal treatment.
- (f) Declarations and reservations. This State will apply the Convention only to those arbitral awards which were adopted after the entry into effect of the Convention.
- (g) The United Kingdom extended the territorial application of the Convention, for the case of awards made only in the territory of another contracting State, to the following territories: Gibraltar (24 September 1975), Isle of Man (22 February 1979), Bermuda (14 November 1979), Cayman Islands (26 November 1980), Guernsey (19 April 1985), Jersey (28 May 2002).
- (h) Declarations and reservations. Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that were considered commercial under the laws of Canada, except in the case of the Province of Quebec, where the law did not provide for such limitation.
- (i) This State will not apply the Convention to differences where the subject matter of the proceedings is immovable property situated in the State, or a right in or to such property.
- (j) Upon resumption of sovereignty over Hong Kong on 1 July 1997, the Government of China extended the territorial application of the Convention to Hong Kong, Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention. On 19 July 2005, China declared that the Convention shall apply to the Macao Special Administrative Region of China, subject to the statement originally made by China upon accession to the Convention.
- (k) On 4 June 2008, Slovenia withdrew the declarations made upon succession mentioned in footnotes (a) and (b).

- (l) On 16 September 2009, The former Yugoslav Republic of Macedonia withdrew the declaration made upon succession mentioned in footnote (a).

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