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Enforcing arbitral awards in Sub-Saharan Africa--Part 1

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Arbitration analysis: In Part 1 of this series, Steven Finizio, Danielle Morris and Katherine Drage of Wilmer Cutler Pickering Hale and Dorr LLP explore the importance of enforcement of arbitral awards to those investing in Africa and the difficulties they face.

IMF--World Economic Outlook: Recovery Strengthens, Remains Uneven (April 2014) AfDB et al--African Economic Outlook 2014

Africa is a highly attractive target for foreign investment. It boasts six of the world's ten fastest-growing economies (IMF--World Economic Outlook: Recovery Strengthens, Remains Uneven (April 2014)) and one-third of its countries have GDP growth rates of over 6% (AfDB et al). Indeed, recent inflows of foreign direct investment have reached US\$80 billion (AfDB et al--African Economic Outlook 2014, p 9).

World Bank Group--Investing Across Borders 2010

Increasing foreign investment often means an increase in disputes. According to the World Bank, the ability to enforce an arbitral award is an important factor for investors considering potential markets in which to invest (World Bank Group, *Investing Across Borders 2010*, p 2). With that in mind, this analysis focuses on the enforcement of international arbitral awards in Sub-Saharan Africa--the 48 states that are fully or partially south of the Sahara. It does not address the seven countries and territories of North Africa, ie Algeria, Egypt, Libya, Mali, Morocco, Tunisia and Western Sahara.

It is impossible to generalise about arbitration trends in Africa even by region. This is true because of the multitude of different legal systems and legal traditions (including those based on French, English and Portuguese law). It is also true because it is often difficult to obtain information about local court decisions, which are particularly relevant to understanding how domestic courts approach the enforcement of arbitral awards.

The New York Convention The Model Law The Uniform Act

With these caveats, this analysis focuses on issues relating to enforcing 'foreign' commercial arbitral awards, ie awards that are made outside of the country in Sub-Saharan Africa in which enforcement is sought. In doing so, it addresses implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) in Sub-Saharan Africa, as well as issues relating to enforcement under national arbitration laws (which will vary depending on whether a country has adopted legislation based on the UNCITRAL Model Law on International and Commercial Arbitration (the Model Law), the Organisation for the Harmonization of Business Law in Africa (OHADA) Uniform Arbitration Act (the Uniform Act), or older arbitration legislation).

In Part 2 of this series, we discuss bilateral and multilateral investment treaties applicable in Sub-Saharan Africa and the enforcement of treaty awards

Legislation on enforcement of foreign arbitral awards and treaties in Sub-Saharan Africa

We attach a list of all the countries in Sub-Saharan Africa and indicate whether a country is a contracting state to the New York Convention and has based its arbitration law on the Model Law or the Uniform Act. The list also identifies the various arbitration (and investment protection)-related treaties each country has ratified.

Implementation of the New York Convention and enforcement of foreign arbitral awards in Sub-Saharan Africa

The New York Convention

The New York Convention is the most important treaty governing the cross-border enforcement of international arbitral awards. It requires the courts of contracting states to give effect to arbitration agreements and to recognise and enforce arbitral awards made in other contracting states, subject only to limited exceptions. The party seeking to resist enforcement of the award bears the burden of proving that one of these exceptions applies.

One significant enforcement issue in Sub-Saharan Africa is that only 29 of 48 Sub-Saharan African states are signatories to the New York Convention. This number is growing, with Burundi and the Democratic Republic of the Congo (DRC) being the most recent states to ratify the New York Convention, and Comoros currently going through the ratification process. As discussed below, this means that in almost half of the countries in Sub-Saharan Africa, a party seeking to enforce a foreign arbitral award must depend on provisions of national law that are unlikely to be as favourable to enforcement as legislation in countries that have ratified and implemented the New York Convention.

NEW YORK CONVENTION COUNTRIES IN SUB-SAHARAN AFRICA



Even where a country has ratified the New York Convention, it must implement the New York Convention through national legislation and its courts must then properly apply that legislation. As described below, a number of countries in Sub-Saharan Africa have adopted arbitration legislation that is based on the Model Law. While the enforcement provisions in the Model Law are intended to be consistent with the New York Convention, some of the countries that have based their arbitration legislation on the Model Law have modified the Model Law's provisions in ways that raise concerns. Some other countries have adopted the Uniform Act, which governs enforcement of arbitral awards made in OHADA Member States as well as those made in non-OHADA Member States which are not party to the New York Convention or other applicable international agreement.

Enforcement in countries that have not ratified the New York Convention

As noted above, in the 19 countries in Sub-Saharan Africa that are not contracting states to the New York Convention, a party seeking to enforce a foreign arbitral award must depend on provisions of national law that may not be as favourable as in those countries that have ratified and implemented the New York Convention. For example, some states have implemented legislation that requires the party seeking to enforce a foreign arbitral award to show that no exception to enforcement exists. This reverses the standard under the New York Convention and makes foreign arbitral awards more difficult to enforce. Other states have put legislation in place that may frustrate enforcement of foreign arbitral awards by permitting the party resisting enforcement to raise vague and frivolous defences.

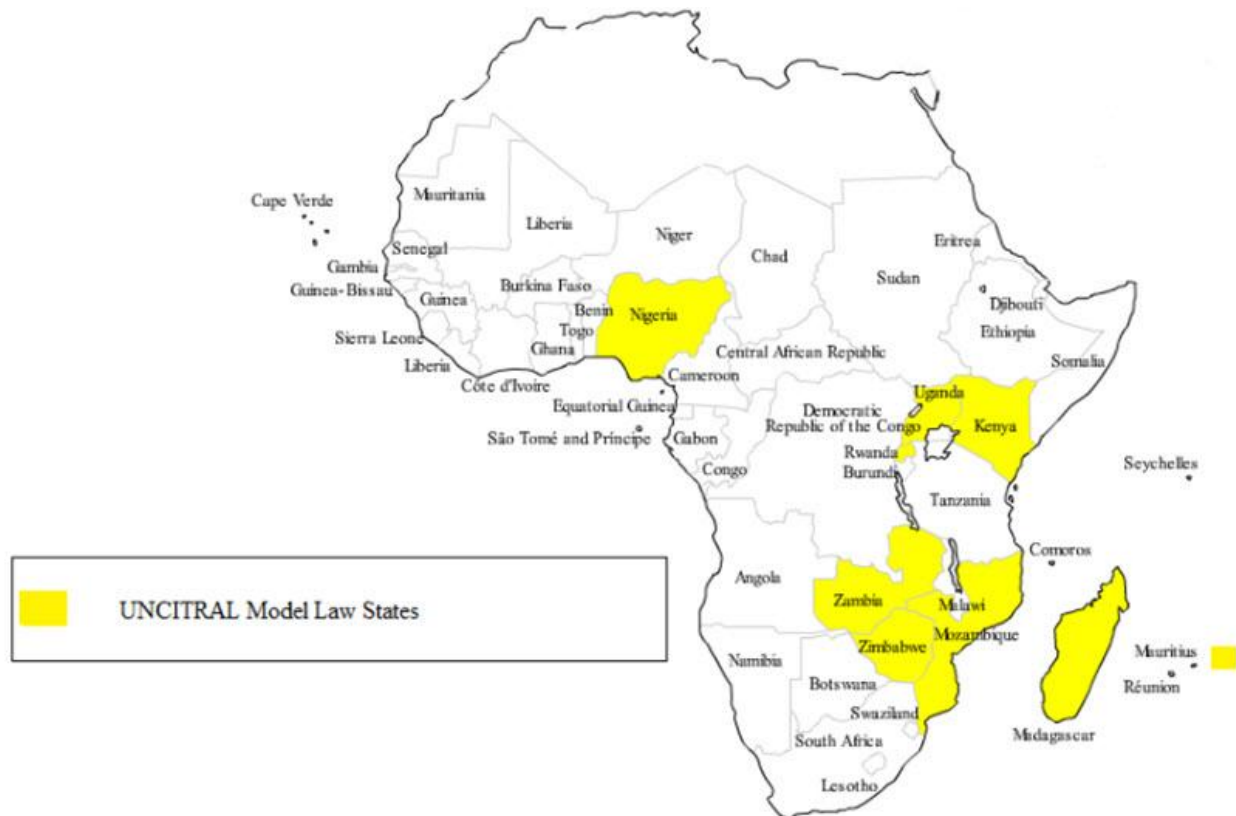
In Malawi, for example, the Arbitration Law Cap 6:03 puts the burden on the party seeking enforcement to prove not only that no ground for refusal exists, but also that the award is final and valid, that the underlying arbitration agreement is valid and that the tribunal was correctly constituted and compliant with the laws of the seat. This provision reverses the burden of proof compared to the New York Convention and makes foreign arbitral awards more difficult to enforce--see: the Malawi Arbitration Law Cap 6:03, s 38 ('Conditions for enforcement of foreign awards') and in particular, s 38(c) ('If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in subsection (1)(a), (b) and (c), or the existence of the conditions specified in subsection (2)(b) and (c) entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.').

In Sudan, although the burden of proof nominally rests with the party resisting enforcement, article 46 of the Sudan Arbitration Act 2005 (Law No 15/2005) includes a number of vague potential defences--see: the Sudan Arbitration Act 2005 (Law No 15/2005), ss 45-46 ('Enforcing the award of a foreign arbitral tribunal'). Some commentators have suggested that the effect of these provisions is to shift the burden of proof to the enforcing party--see: E. Onyema, 'Enforcement of Arbitral Awards in Sub-Saharan Africa', *Arbitration International* 26.1 (2010), pp 115-138, stating that the 'relevance' of the grounds cited within these provisions is 'difficult to justify especially since it is the winning party (and not the contesting party) that has the burden of proof'. These include a requirement that the award 'does not contradict a previous award or order issued by the Sudanese courts'(the Sudan Arbitration Act 2005 (Law No 15/2005), s 46(3)). Not only does this requirement allow Sudanese courts to potentially review the merits of a decision, but it applies even where Sudanese law was not the governing law of the arbitration. Another defence is that the award is 'contrary to the public policy or morals of Sudan' (the Sudan Arbitration Act 2005 (Law No 15/2005), s 46(4)). This broad formulation raises concerns about whether Sudanese courts will interpret this provision consistently and in a narrow way that favours the enforcement of foreign arbitral awards. These same concerns apply to similar provisions in the laws of certain other Sub-Saharan African countries, including legislation in Rwanda and Mozambique, discussed below. A foreign arbitral award also may not be enforced unless the country of origin of the award maintains a reciprocity of execution of judgments with Sudan (the Sudan Arbitration Act 2005 (Law No 15/2005), s 46(5)) (as a condition to enforcement of the award, '[t]he country where the award was rendered accepts the enforcement of Sudanese judgments on its territory or by virtue of conventions for the enforcement of judgments that were ratified by Sudan'). Because Sudan is not a contracting state to the New York Convention (which provides for reciprocal recognition and enforcement of foreign arbitral awards), this means that some other domestic legislation in the country of origin guaranteeing reciprocal recognition of judgments is required.

Enforcement in countries that have implemented the New York Convention through the Model Law

The Model Law

Nine countries in Sub-Saharan Africa (Kenya, Madagascar, Mauritius, Mozambique, Nigeria, Rwanda, Uganda, Zambia and Zimbabwe) have adopted arbitration legislation based on the Model Law (Mozambique did not expressly adopt the Model Law, but its Arbitration Conciliation and Mediation Law No 11/1999 is substantially similar). All nine have ratified the New York Convention.



Several features of the Model Law are particularly important for the enforcement of foreign arbitral awards. One of the ways in which the Model Law implements the New York Convention is by providing only limited bases on which to refuse to recognise or enforce a foreign arbitral award. The party seeking to resist enforcement of a foreign arbitral award also bears the burden of proving one of these exceptions to enforcement applies.

One of the exceptions to the enforcement of a foreign arbitral award in the New York Convention and the Model Law is where that award conflicts with the public policy of the jurisdiction where enforcement is sought:

- o the New York Convention, art V(2)(b) ('Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition or enforcement of the award would be contrary to the public policy of that country.')
- o the Model Law, art 36(1)(b)ii ('Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only if the court finds that the recognition or enforcement of the award would be contrary to the public policy of this State.')

The scope of the public policy exception is more ambiguous than other grounds for refusing recognition and enforcement of foreign arbitral awards and its interpretation has varied greatly across jurisdictions, although courts in jurisdictions with modern arbitration laws have tended to apply the public policy exception restrictively--see: Albert Jan van den Berg, *The New York Convention of 1958* (1981), p 360, explaining that the function of the public policy defence is 'basically to be the guardian of the "fundamental moral convictions or policies of the forum"', and Gary Born, *International Commercial Arbitration* (2014), p 3594, characterising

the public policy defence as 'an exceptional escape device that national courts have used (and should use) only infrequently'. In one well-known decision, a US court characterised the public policy exception as applying to deny the enforcement of foreign arbitral awards 'only where enforcement would violate the forum state's most basic notions of morality and justice'--see: *Parsons & Whittemore Overseas v Societe Generale de l'Industrie du Papier (RAKTA)* 508 F.2d at [974] (not available in Lexis@Library).

It remains to be seen how courts in Sub-Saharan Africa will treat the public policy exception to enforcement. One concern is that several countries in Sub-Saharan Africa have modified the text of the Model Law with regard to this exception. For example, Rwanda has defined the public policy exception in a way that is broader than the Model Law and risks encouraging courts to refuse to enforce foreign arbitral awards on this ground. Under Rwanda's Law No 5/2008 relating to Arbitration and Conciliation in Commercial Matters, the courts may refuse to enforce an award that 'is in conflict with the public security of the Republic of Rwanda'--see: Rwanda's Law No 5/2008 relating to Arbitration and Conciliation in Commercial Matters, arts 47, 51. There is no definition of public security, and it is unclear how far a court may go in deciding whether issues of security should act as a bar to enforcement.

In contrast, Zimbabwe has also modified the text of the Model Law with regard to the public policy exception to its enforcement, but its modification has been interpreted as emphasising the limited nature of the public policy exception. Zimbabwe's Arbitration Act 2002 supplements the wording of the Model Law to provide in art 34(5) that '[f]or the avoidance of doubt ... it is declared that an award is in conflict with the public policy of Zimbabwe if (a) the making of the award was induced or effected by fraud or corruption; or (b) a breach of the rules of natural justice occurred in connection with the making of the award.' In *Zesa v Maposa* (2) ZLR 452 (S) (1999) (not available in Lexis@Library), this additional wording led the Zimbabwe Supreme Court to construe the public policy defence restrictively in accordance with the pro-enforcement character of the New York Convention. Specifically, the Zimbabwe Supreme Court reasoned that an award may be refused on the basis of public policy only where it was based on so fundamental an error, and constituted an inequity so far-reaching and outrageous in its defiance of logic or acceptable moral standards, that a sensible and fair-minded person would consider that the conception of justice in Zimbabwe would be intolerably hurt by the award.

Mozambique's Arbitration Conciliation and Mediation Law No 11/1999 also potentially broadens the definition of public policy from that found in the Model Law and the New York Convention. It does so in the context of the law's choice of law provision, which states that any choice of law provision must not violate 'public morals and the principles of public policy of Mozambican law' (Mozambique's Arbitration Conciliation and Mediation Law No 11/99, art 34(1)). This raises a concern that Mozambican courts may refuse to enforce foreign arbitral awards made under foreign laws, based on arguments that such laws conflict with Mozambican public morals and policy.

Enforcement in countries that have implemented the New York Convention through other domestic legislation

Despite these potential concerns about modifications to the Model Law, enforcement may be even more uncertain in countries that do not have modern arbitration laws like the Model Law, even where the country in question has ratified the New York Convention. There are a number of countries in Sub-Saharan Africa that are contracting states to the New York Convention, but that have arbitration laws that are arguably inconsistent with the New York Convention in ways that can frustrate efforts to enforce an award. This is the case, for example, in some former British colonies and protectorates in Southern Africa (Botswana, Lesotho, and South Africa) that have retained arbitration statutes based on the now repealed English Arbitration Act 1950 (Swaziland, Namibia and Malawi also have arbitration statutes based on the English Arbitration Act 1950. In addition to this outdated legislation, these states also are not signatories to the New York Convention).

Various aspects of South Africa's legal regime for enforcement of foreign arbitral awards raise potential concerns. Although the New York Convention requires each contracting state to 'recognize arbitral awards as binding and enforce them in accordance with the rules of procedure where the award is relied upon' unless the party resisting enforcement can prove an exception, South Africa's Recognition and Enforcement of Foreign Arbitral Awards Act No 40/1977 uses permissive language--it states that an award 'may' be made an order of the court, and 'may' be enforced in the same manner as a court judgment (South Africa's Recognition and Enforcement of Foreign Arbitral Awards Act No 40/1977, s 2(1)).

In addition, South Africa's Recognition and Enforcement of Foreign Arbitral Awards Act No 40/1977, s 4 imposes additional defences to enforcement of a foreign arbitral award beyond those identified in the New York Convention. Indeed, South Africa's Recognition and Enforcement of Foreign Arbitral Awards Act No 40/1977 provides five more potential defences to enforcement of a foreign arbitral award than are available for a domestic award.

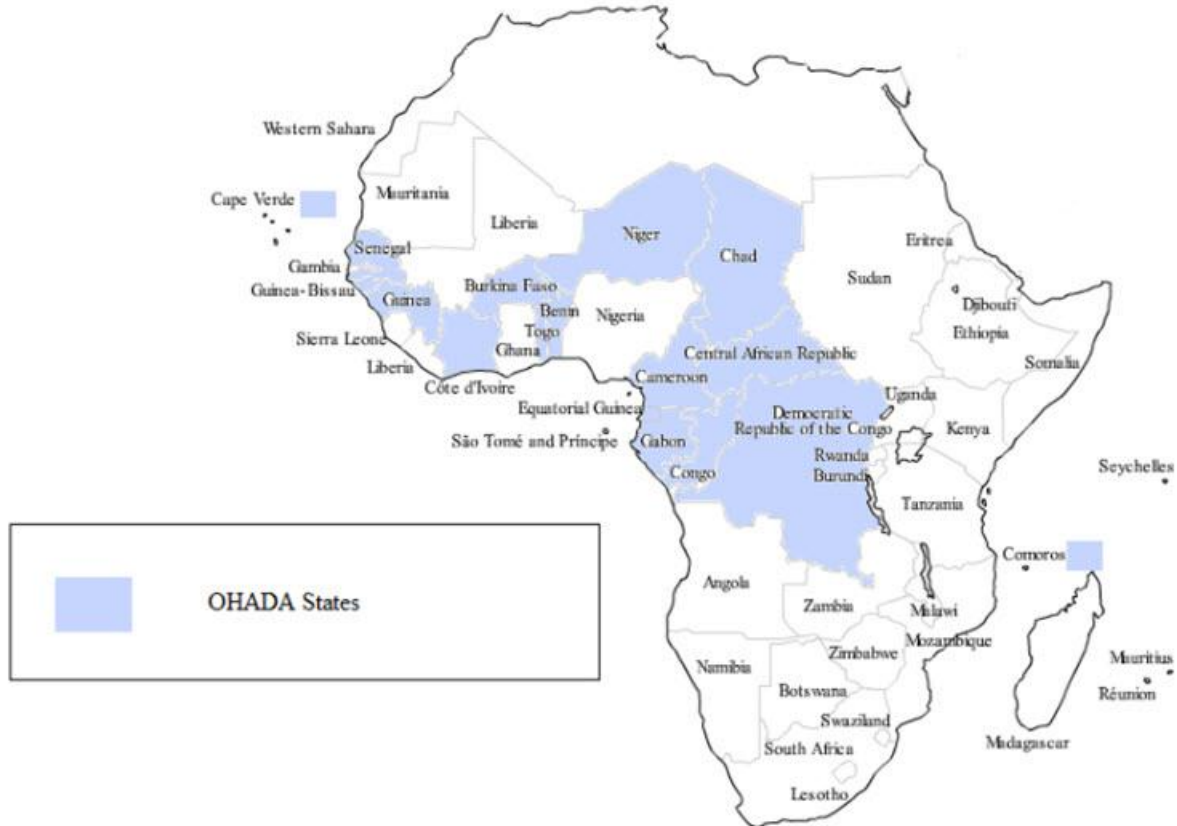
South Africa's Protection of Businesses Act No 99/1978 also creates additional legislative obstacles to enforcement of foreign arbitral awards. Under South Africa's Protection of Businesses Act No 99/1978, s 1, no arbitral awards made outside South Africa may be enforced in South Africa without the consent of the Minister of Economic Affairs if the award arose from a transaction 'connected with the mining, production, importation, exportation, refinement, possession use or sale of or ownership to any matter or material, of whatever nature whether within, outside, into or from [South Africa]'. Some commentators have suggested that there is a risk that the Minister's permission could be needed in almost every enforcement action because the award may be said to relate to ownership of 'matter or material'--see: Richard Frimpong Oppong, *Private International Law in Commonwealth Africa* (2013), p 413.

However, despite the broad wording of South Africa's Protection of Businesses Act No 99/1978, in practice, South African courts appear to have restricted the requirement for ministerial consent to awards arising from transactions relating to raw materials, and in such cases ministerial permission has typically been granted--see: *Seton v Silveroak Industries* 2000 (2) SA 215 at [226] (not available in Lexis@Library) and LEX Africa, *The enforcement of foreign arbitration awards in South Africa*, 21 August 2014, available here, stating that ministerial consent for enforcement of awards is only required for transactions relating to raw materials and is readily given.

Enforcement in Uniform Act jurisdictions

The OHADA consists of 17 Member States in West and Central Africa, the majority of which are francophone and use the CFA franc currency. The OHADA regime is distinct from the New York Convention regime, and 10 of the 16 OHADA Member States in Sub-Saharan Africa are also party to the New York Convention (Benin, Burkina Faso, Cameroon, Central African Republic, Ivory Coast, Gabon, Guinea, Niger and Senegal are OHADA Member States in Sub-Saharan Africa that are also party to the New York Convention. The other OHADA Member States are Chad, Comoros, the Republic of Congo, Equatorial Guinea, Guinea-Bissau and Togo).

SUB-SAHARAN AFRICAN COUNTRIES THAT HAVE ADOPTED THE OHADA UNIFORM ARBITRATION ACT



As part of its efforts to harmonise business law in Africa, OHADA has issued various model laws, including the Uniform Act. Like the Model Law, the Uniform Act seeks to promote arbitration and the predictable enforcement of arbitral awards (the Uniform Act, art 25 accords a final arbitral award the same status as a judgment of a national court in all OHADA Member States). The Uniform Act governs enforcement of domestic and international arbitral awards, although the Uniform Act works differently depending on whether the award was made in an OHADA Member State, or outside an OHADA Member State.

To enforce an arbitral award made in an OHADA Member State, a competent judge in a Member State must first grant an *exequatur* (recognition) of the award. This process has the effect of converting the award into a judgment of the domestic court for enforcement purposes. An order of *exequatur* granted by one Member State then needs to be registered with the courts of other Member States as a formality.

Under the Uniform Act, art 31(4), the only ground for refusing a grant of *exequatur* is when 'the award is manifestly contrary to the international public policy rule of the member States'. The reference to an 'international public policy' of the entire region of Member States, rather than the domestic (or international) public policy of each Member State, limits the scope of the exception and is meant to encourage consistency in application. Having just one ground for refusal is also meant to encourage a favourable and cost-efficient regime for enforcement of awards.

Pursuant to the Uniform Act, art 34, arbitral awards not made in an OHADA Member State are recognised as binding on OHADA Member States for enforcement purposes 'under the conditions provided by international agreements possibly applicable and failing which, under the same conditions as those provided in this Uniform Act'. This means that where OHADA Member States are party to the New York Convention, or other multilateral and bilateral treaties, these international agreements will apply where enforcement of a non-OHADA award is sought in an OHADA Member State. However, if no such international agreement applies, the exequatur procedure under the Uniform Act, art 31 governs the enforcement process.

Understanding legislation at the place of enforcement

Enforcement of foreign commercial arbitral awards in Sub-Saharan Africa is complicated by the fact that so few countries in the region have adopted the New York Convention and enforcement in those countries will depend on application of the arbitration laws in the particular country, many of which are not modern. Moreover, even in the countries that have ratified the New York Convention, it may not be implemented and applied in a pro-enforcement manner, and it is crucial that a party understands the relevant arbitral legislation and practice in the place of enforcement. This is also true with respect to arbitral awards made pursuant to investment treaties because, as will be discussed in Part 2 of this Practice Note, many of these awards will be subject to the same enforcement mechanisms as international commercial awards.