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## **Enforcement of arbitral awards**

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## Topics

- As an arbitration lawyer, why worry about enforcement?
- What measures can be taken during the arbitration?
- You have won the case – what are your options?
- Legal framework for enforcement
- The 1958 New York Convention
- Enforcement against sovereign States
- Enforcement in an era of sanctions
- Enforcement and modern technology
- Practical considerations for successful enforcement

As an arbitration lawyer, why worry about enforcement?

## As an arbitration lawyer, why worry about enforcement?

- Arbitration is an efficient dispute resolution mechanism, but not an end in itself
- Enforcement is where the money is (and that's what clients are interested in)
- Success of the arbitral process depends on the ability to enforce a final decision – otherwise, the benefits of efficiency and cost-effectiveness may be jeopardised
- Arbitral tribunals are obliged to issue enforceable awards; however, as private dispute resolution bodies, they have no *imperium* or power to enforce – only the judicial authorities do

## As an arbitration lawyer, why worry about enforcement?

- Enforceability of an award adds legitimacy to the arbitration process
- Without a reliable enforcement mechanism, parties may be less inclined to abide by the arbitration award, leading to continued disputes and uncertainty
- Clients wish to avoid post-award litigation

What measures can be taken during the arbitration?

## Possible measures in anticipation of the outcome

- File arbitration claim against solvent party / joinder of third party
- Make sure arbitral tribunal knows what the formal requirements are for any future enforcement jurisdiction(s)
- Collect evidence for enforcement
- Asset tracing – in multiple jurisdictions (ideally in signatory states of the 1958 New York Convention)
- Asset freezing or attachment to avoid dissipation (e.g. blocking of bank accounts)
- For assets located in other jurisdictions: seek advice from local lawyers

You have won the case – what are your options?



## Option 1: voluntary compliance

- Best scenario and still the rule given the favourable enforcement prospects
- Send letter of demand for payment to unsuccessful party
  - Refer to contractual undertaking
    - Example: Art. 35(6) of the 2021 ICC Arbitration Rules

*“Every award shall be binding on the parties. By submitting the dispute to arbitration under the Rules, the parties undertake to carry out any award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made.”*
  - Update interest calculation and specify bank account
  - Set deadline for compliance and announce enforcement measures

## Option 2: “informal enforcement”

- Alternatively, consider informal methods to make unsuccessful party comply with the award
  - Commercial pressure (e.g. through a “black list” operated by some trade bodies)
  - Reputational or diplomatic pressure
- Post-award settlement
  - *“A bird in the hand is worth two in the bush.”*
  - Parties sometimes negotiate a reduction of the awarded sum (e.g. reflecting the costs saved by not challenging the award or not pursuing formal enforcement proceedings)

## Option 3: “formal enforcement”

- If the losing party does not voluntarily comply with an award, the prevailing party will need to take steps to enforce the award.
- **Exequatur**: decision by which a national court declares a foreign arbitral award (or judgment) enforceable domestically
- Two-step process for enforcement
  - (1) Recognition and conversion into a domestic court judgement
  - (2) Enforcement of the resulting judgment through domestic procedures governing the execution of judgments (e.g. seizure and turnover of identified assets suitable for execution)
- Declaratory decisions: recognition only (no enforcement)

## Legal framework for enforcement

- National laws – domestic enforcement procedures
  - Divergent legal systems: different jurisdictions may have varying procedures and requirements for recognition and enforcement of arbitral awards
  - Need for coordination between jurisdictions
- International conventions on recognition and enforcement
  - More harmonized and efficient framework for the recognition and enforcement of arbitral awards across borders
- International arbitration: parties and parties' assets often located in different countries

Why is the ease of recognition and enforcement of arbitral awards often considered one of the key advantages of international arbitration?

UNITED NATIONS CONFERENCE  
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION  
ON THE RECOGNITION AND ENFORCEMENT  
OF FOREIGN ARBITRAL AWARDS



UNITED NATIONS  
1958

## 1958 New York Convention

- Worldwide applicability: 172 State parties
  - 8 February 2022: Suriname became 171<sup>st</sup> State party
  - 17 April 2023: Timor-Leste became 172<sup>nd</sup> State party
  - New York Convention is considered the most successful treaty in private international law
  - Contributed significantly to the effectiveness of arbitration
- By contrast: 2019 Hague Judgments Convention only has few signatories
  - entered into force on 1 September 2023 between the 27 EU Member States (except Denmark) and Ukraine

How has the 1958 New York Convention contributed to the success of international arbitration as a dispute resolution mechanism?



## New York Convention

- Worldwide mutual enforcement regime for arbitration:
  - Contracting states have agreed to enforce arbitration awards from other Convention signatories in their jurisdiction as if they were local judgments (provided conditions laid down in articles IV-VI are met)
- New York Convention has inspired confidence in the rule of law and boosted international trade and foreign direct investment

*Article III*

**Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.**

## New York Convention – scope of application

- Art. I – foreign arbitral awards
  - “Arbitral award”
    - According to *lex arbitri* or, alternatively, according to autonomous interpretation under the Convention
    - Substance over form
    - Excluded: decisions not made by arbitral tribunals (e.g. dispute boards, expert determination decisions, emergency arbitrator decisions, unless specialised legislation)
  - “Foreign”: made in the territory of another state – universal approach
  - “Arising out of differences between persons, whether physical or legal”
  - Reservations of reciprocity / commercial matters (Art. I(3))

## New York Convention – formal requirements

- Art. IV(1): applicant must show that all formal requirements are met and submit:
  - ✓ duly authenticated original award or a certified copy of the award
  - ✓ original or a certified copy of the arbitration agreement (see Art. II)
  - ✓ certified translations if above documents not in an official language
- Applied more or less strictly by different national courts (simple copies vs. certified copies or originals)
- Example Switzerland: if award in English, translation usually not required

## New York Convention – grounds for refusal of recognition

- If formal requirements are met, a foreign award is recognized, unless the party opposing enforcement proves that a ground for refusal enumerated in the Convention exists
- Art. V: limited number of objections which the debtor may raise or which the enforcement court may conclude *ex officio*
- No challenge on the merits
- Burden of proof for the existence of grounds for refusal of recognition lies with the debtor
- Applied more or less restrictively by different national courts

## New York Convention – grounds for refusal of recognition

- Award debtor may invoke the following limited grounds based on which the court may refuse recognition:
  - Art. V(1)(a): Invalidity of the arbitration agreement
  - Art. V(1)(b): Violation of due process
  - Art. V(1)(c): Arbitral award out of scope
  - Art. V(1)(d): Failure to respect the applicable arbitral procedure
  - Art. V(1)(e): Award not yet binding or set aside

## Art. V(1)(a): Invalidity of the arbitration agreement

- Party against which award is invoked proves that the underlying arbitration agreement is not valid
- Examples
  - Incapacity of one of the parties to enter into the arbitration agreement
  - Invalidity of arbitration agreement in terms of form or substance, including lack of consent
- Some courts require that alleged invalidity must be objected to promptly – otherwise right to invoke them is waived

## Art. V(1)(b): Violation of due process

- Party against which award is invoked proves that:
  - it was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings, or
  - for other reason it was unable to present its case during the proceedings
- To prevail and meet the required burden of substantiation and proof, a party would typically have to show that:
  - all major notifications were invalid under the applicable law or procedural rules, and/or
  - none of the notifications reached it at all or timely enough that it could participate in the proceedings

## Art. V(1)(c): Arbitral award out of scope

- Party against which award is invoked proves that arbitral tribunal exceeded its competence or jurisdiction:
  - award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or
  - award contains decisions on matters beyond the scope of the submission to arbitration
- Example: tribunal renders award acting as *amiable compositeur* or *ex aequo et bono* without being authorized by the parties
- But: enforcement court may declare the award at least partially enforceable if different decisions can be distinguished within it



## Art. V(1)(d): Procedural irregularity

- Party against which award is invoked proves that
  - the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement concluded between the parties or, in lack thereof, in accordance with the *lex arbitri*
- Generally applied restrictively: only violations of fundamental rules of procedure are sufficient to refuse enforcement
- Some national courts require a causal connection, *i.e.* proof that the irregularity has affected the arbitral award
- Other jurisdictions require that irregularities must be objected to promptly – otherwise right to invoke them is waived

## Art. V(1)(e): Award not yet binding or set aside

- Party against which award is invoked proves that
  - award has not yet become binding on the parties, or
  - award has been set aside or suspended by competent authority at the seat of the arbitration (invalid award)
- No requirement of “double exequatur” (*i.e.*, no need for party seeking enforcement to obtain declaration of enforceability in the country where the award was made, as still required under the 1927 Geneva Convention)
- Notion of binding force and enforceability of award is primarily governed by the parties’ agreement, failing which by the *lex arbitri*

## New York Convention – grounds examined *ex officio*

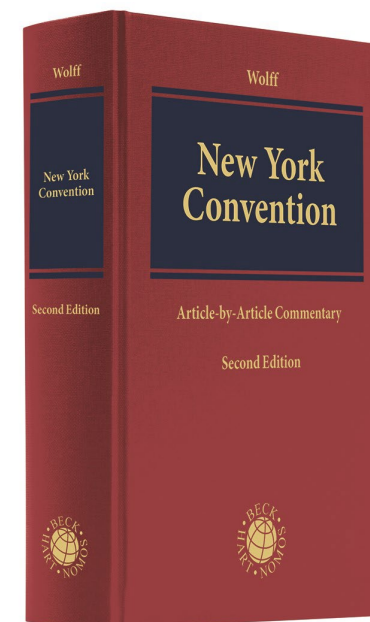
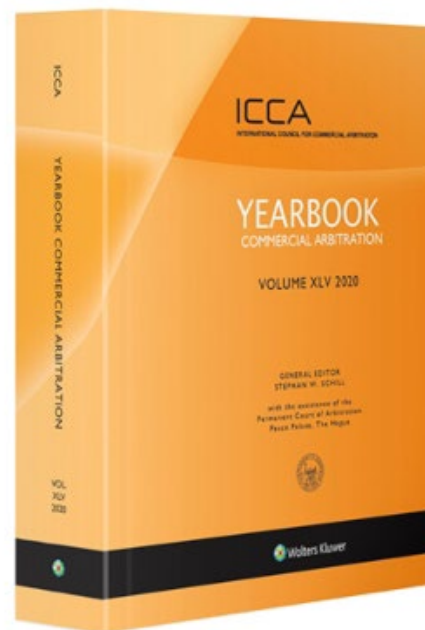
- Art. V(2): courts may refuse recognition and enforcement on their own initiative where:
  - the disputed subject matter is not capable of being resolved by arbitration under the law of that country (non-arbitrability); or
  - the recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought
- Violation of *ordre public*: “safety valve” and only ground allowing for substantive review of the award – but: national courts have different understanding of what is considered irreconcilable with fundamental principles of their legal system

## New York Convention – Challenges

- Reach uniform (pro-enforcement) interpretation
  - Divergent legal systems: courts may exercise discretion and refuse to enforce awards
  - Public policy (Art. V(2)(b)) is the most common ground for refusal of enforcement, but is applied differently in different jurisdictions
- Criticism of the New York Convention
  - Need for reform after 66 years?
    - Art. II(2): “agreement in writing” no longer in line with today’s business reality
    - Art. V(1)(e): recognition can be refused if award has been set aside
    - Art. V(2)(b): inconsistent interpretation of notion of public policy
  - Can shortcomings be remedied?

## New York Convention – sources & case law

- <https://www.newyorkconvention.org/>
- <https://newyorkconvention1958.org/>
- ICCA's Guide to the Interpretation of 1958 New York Convention
- ICCA Yearbook
- Wolff Commentary



## Practical case: enforcement in Algeria (1)

- ICC arbitration between a European consortium and an Algerian state-owned company concerning the construction of a factory for the production of solar panels in Algeria, seat in Geneva
- May 2021: Arbitral Tribunal issues Final Award
- June to December 2021: European consortiums asks Algerian party to comply with its payment obligation under the award / lively correspondence
- January 2022: translation of award and contract into Arabic
- February 2022: filing of application for recognition of award with court of first instance at the seat of the Algerian company

## Practical case: enforcement in Algeria (2)

- March to May 2022: submissions and court hearings before court of first instance
- June 2022: court of first instance issues declaration of enforceability of the final award (exequatur), explicitly stating that the award does not violate Algerian public policy
- July 2022: court officially notifies exequatur decision to Algerian company, triggering a one-month period for lodging an appeal
- August 2022: Algerian company appeals to the Court of Appeal, Chamber for interim measures in administrative proceedings (*Cour d'Alger / chambre des référés*)

## Practical case: enforcement in Algeria (3)

- September – October 2022: further submissions (answer to appeal, reply, rejoinder) and court hearing
- November 2022: Court of Appeal decides to allow the appeal and to annul the declaration of enforceability obtained by the European consortium
- December 2022: Court of Appeal provides its reasoned decision to the parties
- February 2023: European consortium starts proceedings before the Supreme Court of Algeria (“cassation”)
- October 2023: Supreme Court annuls decision of the Court of Appeal



## Enforcement of awards against sovereign states

## Enforcement against sovereign States

- Important differences/challenges:
  - States enjoy immunity under international law, both from jurisdiction and from enforcement
    - But “restrictive theory”: immunity from enforcement only applies to a state’s assets that serve sovereign purposes (*acta iure imperii*), not to a State’s commercial activities and assets which the State owns as a holder of private rights (*acta iure gestionis*), *i.e.* enforcement a possibility where State acted in its private capacity (e.g. freezing order)
  - Bureaucratic and political dynamics
- In Switzerland: transaction out of which the claim against the foreign State arises must have a sufficient connection to Switzerland (e.g. obligations to be performed in Switzerland)

## Enforcement under the ICSID Convention

- The obligation to recognize and enforce an ICSID award is incumbent upon all State parties to the ICSID Convention:
  - Art. 53: ICSID award is binding on all parties to the proceedings and each party must comply with it pursuant to its terms
  - Art. 54: if a party fails to comply with the award, the other party can seek to have the pecuniary obligations recognized and enforced in the courts of any ICSID Member State as though it were a final judgment of that State's courts
  - Art. 55: each State's laws relating to sovereign immunity from execution continue to apply

## Enforcement in times of sanctions

- International sanctions, where applicable, are likely to affect enforcement proceedings that follow the issuance of an arbitral award: delays, additional administrative burden, etc.
- Mitigation of effects of sanctions: licensing regimes, enabling prevailing party to enforce against assets of a sanctioned entity, depending on the jurisdiction(s) where such assets are located
- E.g., licence may be granted to enable the use of a designated person's frozen assets to satisfy an arbitral award, provided that the decision was made before the date on which the person became a designated person

## Enforcement and modern technology

- Automatic “on-chain” enforcement (on the blockchain)
  - Self-executing digital transaction using decentralized cryptographic mechanisms for enforcement (e.g. smart contracts embedded with arbitration agreements)
- Challenges:
  - Identification of assets (escrow-like system whereby mandatory crypto-payment remains in escrow until dispute resolved?)
  - Identification of counterparty (identity tracing tricky but technical solutions available)
- Does New York Convention apply? Only if the on-chain resolution is later converted to off-chain award?

## Practical considerations for successful enforcement

- Enforcement due diligence – navigate the legal landscape to ensure enforceability
  - Where will the seat of the arbitration be? Is it a signatory state to the New York Convention? Does it have a robust enforcement system?
  - Where does the debtor have assets? Are these located in a New York Convention state?
  - Is it necessary to trace assets? Is it possible to obtain a freezing order (or other methods of preservation of assets) in advance?
  - What formalities are required in the award for enforcement?
  - Are third-party funding and a “sale” of the award options?

Thank you!



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Q & A