

International arbitration report

Issue 10 | May 2018

Inside this issue

.....
Marking the 60th anniversary
of the New York Convention
.....

A comparison of the
enforcement regimes
under the New York and
Washington Conventions
.....

Enforcement proceedings
against State entities
.....

Strategic tips on enforcement
for in-house counsel
.....

Summary awards and
expedited procedures
.....

Enforceability of interim
measures and emergency
arbitrator decisions
.....

Awards set aside or annulled
at the seat
.....

Public policy as a bar
to enforcement
.....

Cryptocurrencies
and arbitration
.....

The Dubai Judicial Tribunal
.....

A global round up of new
arbitral rules and impending
updates to existing rules
.....

EU Court rejects ISDS
provisions in intra-EU BITs
.....

Investor State disputes
in the EU
.....



Norton Rose Fulbright

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We have more than 4,000 lawyers and other legal staff based in Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

Recognized for our industry focus, we are strong across all the key industry sectors: financial institutions; energy; infrastructure, mining and commodities; transport; technology and innovation; and life sciences and healthcare. Through our global risk advisory group, we leverage our industry experience with our knowledge of legal, regulatory, compliance and governance issues to provide our clients with practical solutions to the legal and regulatory risks facing their businesses.

Wherever we are, we operate in accordance with our global business principles of quality, unity and integrity. We aim to provide the highest possible standard of legal service in each of our offices and to maintain that level of quality at every point of contact.

Norton Rose Fulbright Verein, a Swiss verein, helps coordinate the activities of Norton Rose Fulbright members but does not itself provide legal services to clients. Norton Rose Fulbright has offices in more than 50 cities worldwide, including London, Houston, New York, Toronto, Mexico City, Hong Kong, Sydney and Johannesburg. For more information, see nortonrosefulbright.com/legal-notices.

The purpose of this communication is to provide information as to developments in the law. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity on the points of law discussed. You must take specific legal advice on any particular matter which concerns you. If you require any advice or further information, please speak to your usual contact at Norton Rose Fulbright.

International arbitration report

Published by Norton Rose Fulbright – Issue 10 – May 2018

Editors-in-chief – Mark Baker, US; Pierre Bienvenu Ad. E., Canada

Editor – James Rogers, London

Assistant editor – Cara Dowling, London

Editorial

Welcome to issue 10 of Norton Rose Fulbright's *International arbitration report*.

With 2018 being the 60th anniversary of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention), the theme for this issue is enforcement. Lawyers from across our global firm review various trends and developments in this area, including current approaches to enforcing awards that have been set aside at the seat and the use of the public policy exception as a bar to enforcement. We provide a practical guide to bringing enforcement proceedings, and offer strategic tips for in-house counsel on how to best position themselves from the outset in order to secure payment of their claim at the end of the day.

As most major arbitral institutions have now introduced procedures for emergency arbitration, expedited procedures and/or summary disposition of claims, we look at the potential enforcement issues that these procedures might raise.

In our Q&A, we offer a perspective on the impact of the New York Convention over the last 60 years.

We compare the enforcement regimes for international commercial arbitration under the New York Convention and investor-State arbitration under the Washington (ICSID) Convention.

We also report on breaking news in investor-state dispute settlement (ISDS), including the decision of the Court of Justice of the European Union that Investor-State dispute settlement provisions in intra-EU bilateral investment treaties are not compatible with EU law and Spain's copy-cat challenge to ISDS provisions in the Energy Charter Treaty. We also analyse ICSID's Caseload statistics on investor-state claims brought against EU Member States or by investors from within the EU.

Our case law update analyses key recent judgments of the Dubai Joint Judicial Committee and the impact those decisions are having on the DIFC Courts' emerging role as a conduit jurisdiction for enforcing arbitral awards in Dubai and elsewhere in the Middle East.

Continuing the theme from our last issue of technology and disruptive innovation, we look at the rise of cryptocurrencies and why arbitration would be a good mechanism for resolving related disputes.

In our global round-up of arbitration developments, we review recent reforms to institutional rules around the globe, including new LMAA Terms, new DIS Rules, proposed amendments to the HKIAC and DIAC Rules, as well as the newly launched AIAC (formerly branded as the KLRCA). We also cover proposed amendments to UAE arbitration law.



Mark Baker and Pierre Bienvenu Ad. E.
Co-heads, International arbitration
Norton Rose Fulbright

Contents

- 02 Marking the 60th anniversary of the New York Convention
A Q&A with Norton Rose Fulbright's global co-heads of international arbitration
- 04 A comparison of the enforcement regimes under the New York and Washington Conventions
A tale of two cities
- 06 Enforcement proceedings against State entities
From one end to another
- 11 Strategic tips on enforcement for in-house counsel
Looking forward to pay day
- 14 Summary awards and expedited procedures
Strike out or home run?
- 17 Enforceability of interim measures and emergency arbitrator decisions
- 20 Awards set aside or annulled at the seat
Zombies, ghosts and buried treasure
- 23 Public policy as a bar to enforcement
Where are we now?
- 25 Cryptocurrencies and arbitration
A match made in heaven?
- 27 The Dubai Judicial Tribunal
A claw-back of jurisdiction?
- 31 A global round-up of new arbitral rules and impending updates to existing rules
- 34 EU Court rejects ISDS provisions in intra-EU BITs
Once BITten, twice shy
- 37 Investor-State disputes in the EU
Some statistical observations

About the cover

Our front cover for this issue features a sculpture of Justitia, Lady Justice, sitting on her throne above the entrance of the Supreme Hanseatic Court of Hamburg, Germany. Lady Justice is an allegorical personification of the moral force in judicial systems.



Marking the 60th anniversary of the New York Convention

A Q&A with Norton Rose Fulbright’s global co-heads of international arbitration

By Mark Baker, Pierre Bienvenu and Cara Dowling

This year marks the 60th anniversary of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention). We interview Mark Baker and Pierre Bienvenu, Norton Rose Fulbright’s global co-heads of international arbitration, about the New York Convention regime and the influence it has had on international arbitration over the last 60 years.

What is the New York Convention and why is it important?

The New York Convention governs two fundamental aspects of international arbitration, namely how States will treat arbitration agreements and arbitral awards that were made in other jurisdictions. It is arguably the most successful UN convention. There are currently some 157 Contracting States to the convention, and as a result, it creates an almost universal, common regime governing these two important issues.

In brief, the New York Convention provides that Contracting States will recognize written arbitration agreements and, at the request of any party, their courts will refer to arbitration any matter brought before them in respect of which there is an arbitration agreement. The only exception is where the arbitration agreement is null, void, inoperative or incapable of being performed. Contracting States also agree

to recognize foreign arbitral awards as binding and to enforce them in accordance with their rules of procedure. Importantly, as discussed further below, there are very limited grounds under the New York Convention on which a party can resist enforcement of an award.

How was the New York Convention created and what were the driving economic and political reasons?

Prior to the New York Convention, the principal regimes applicable to arbitration agreements and awards were the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. Although important precursors, by the early 1950s, these regimes were considered to be cumbersome and to no longer meet the needs of international trade. The International Chamber of Commerce (ICC) therefore initiated a process to replace these regimes with a new

comprehensive convention. This process was subsequently taken over by the United Nations Economic and Social Council. The New York Convention as we know it was ultimately adopted at the 1958 UN conference in New York and it entered into force in 1959.

What have been the key accomplishments of the New York Convention?

The success of international arbitration itself is attributed in great part to the New York Convention, primarily due to the ability to enforce foreign awards almost anywhere in the world. The simple procedure and limited grounds for resisting recognition and enforcement, and a nearly global acceptance of the New York Convention, has provided a successful combination. There is no equivalent regime for recognition and enforcement of foreign court judgments.

How does enforcement of foreign awards work under the New York Convention?

The process prescribed by the New York Convention is very simple – a party seeking enforcement need only supply to the court a copy of the arbitration agreement and the arbitral award. Enforcement may be resisted on only the grounds listed in Article V(1) and (2) of the convention.

Those grounds are

- *Invalidity of incapacity* – the arbitration agreement is not valid or the parties to the agreement were under some incapacity.
- *Lack of notice or due process* – the respondent was not given proper notice of the appointment of the arbitrator or of the proceedings or was otherwise unable to present its case.
- *Lack of jurisdiction* – the award deals with a difference not contemplated by or outside the terms or beyond the scope of the submission to arbitration.
- *Procedural irregularity* – the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, absent such agreement, not in accordance with the law of the country where the arbitration took place.
- *Not binding* – the award is not yet binding on the parties, or has been set aside or suspended at the seat of the arbitration.
- *Arbitrability and public policy grounds* – recognition and enforcement may also be refused if the competent authority where enforcement is sought finds that (i) the subject matter of the dispute is not arbitrable under the law of that country; or (ii) enforcement

would be contrary to the public policy of that country.

How does the New York Convention interact with domestic law?

The New York Convention, in essence, sets out minimum requirements for recognition and enforcement of arbitration agreements and foreign awards. Contracting States implement those into their domestic laws. The formalities of enforcement must therefore be undertaken in accordance with domestic procedural rules.

This means that although in substance the approaches taken by Contracting States should largely align, there can be procedural differences. Differences can also arise because the New York Convention permits domestic arbitration regimes that are more favorable to recognition and enforcement – whether by providing for less rigorous procedural requirements, more restrictive grounds for challenging awards, or other more favorable domestic practices.

Are there alternative regimes?

The Convention on the International Centre for Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention, also known as the Washington Convention) is a comparable arbitration regime – though (as its name suggests) it is particularly focused on investor-State dispute settlement. It has an equivalent reach (some 153 states) and arguably an even stricter regime for enforcing ICSID awards.

There is no equivalent global regime for enforcement of foreign court judgments. However, more recently the Hague Convention on Choice of Court Agreements (Hague Convention) has made some progress towards establishing such a regime. Under the

Hague Convention, State parties must recognize exclusive choice of court agreements in civil matters, and their courts must stay proceedings before them brought in breach of such an agreement. They must also recognize judgments of the chosen court. The EU, US, Singapore, China, Mexico, Ukraine and Montenegro have now signed up to that convention, though not all have ratified it yet. If sufficient other States (in particular, key trading nations) sign up to and ratify the Hague Convention, it could prove an important alternative regime to the New York Convention.

For more information contact:



Mark Baker
Global co-head of international arbitration
Partner, Houston
Tel +1 713 651 7708
mark.baker@nortonrosefulbright.com



Pierre Bienvenu Ad. E.
Global co-head of international arbitration
Partner, Montréal
Tel +1 514 847 4452
pierre.bienvenu@nortonrosefulbright.com



Cara Dowling
Senior knowledge lawyer, London
Tel +44 20 7444 5141
cara.dowling@nortonrosefulbright.com

A comparison of the enforcement regimes under the New York and Washington Conventions

A tale of two cities

By *Matthew Kirtland, Katie Connolly and Jacob Smit*

There are two principle treaties governing the enforcement of international arbitral awards in foreign jurisdictions, namely: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards June 10, 1958 (the New York Convention) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention).

The success of international arbitration, both commercial and investment treaty arbitration, can be attributed in large part to the global enforcement regimes created under these treaties. In this article, we compare a few key differences between the enforcement regimes under these two treaties.

The New York Convention and the Washington Convention

The New York Convention is arguably one of the most successful United Nations treaties in the area of international trade law. It requires contracting States to recognize and enforce foreign arbitral awards (i.e. awards made in jurisdictions other than that in which enforcement is sought) as if they were domestic awards.

The New York Convention, while having a broader scope than the Washington Convention, contains substantially more grounds for resisting enforcement.

The Washington Convention created the International Centre for Settlement of Investment Disputes (ICSID) under the auspices of the World Bank. ICSID is a forum for arbitrating disputes arising under contracts, local investment laws and international treaties between a ratifying state and a national of another ratifying state. The Washington Convention also creates enforcement mechanisms for awards issued under the Washington Convention. ICSID awards are “automatically”

enforceable in any ratifying State as a final judgment of the national courts.

The New York Convention has a broader application in scope and slightly more States have adopted it, as compared to the Washington Convention. At present, 157 States have ratified the New York Convention, including all the large trading nations. In comparison, 154 States have ratified the Washington Convention, with Brazil, South Africa, India and Poland being significant exceptions.

However, as set out in the table below, the New York Convention, while having a broader scope, does contain more grounds for resisting enforcement than exist under the Washington Convention.

While both conventions streamline enforcement, widely disparate implementing national laws can complicate enforcement. For instance,

in China, enforcement of a foreign arbitral award under the New York Convention can be delayed by the Prior Report System, which requires the Higher Court’s approval for annulment of an award, and that process can be extremely time consuming (some reports indicating on average 870 days for

enforcement and 597 for annulment). Parties should carefully consider the procedures and attitudes of the national courts not only when initiating enforcement proceedings but also at the time of drafting the contract. Under the New York Convention, for example, a lack of a valid arbitration agreement is a

ground for resisting enforcement.

The views expressed in this article are the views of the authors and not necessarily the views of Norton Rose Fulbright. The authors would like to thank Nkisu Kaindama, trainee, for his contribution to this article.

A comparison of the two convention enforcement regimes

	New York Convention	Washington Convention
What awards can be enforced?	Pecuniary and non-pecuniary foreign arbitral awards issued by both ad hoc and permanent arbitral bodies are subject to certain treaty-based and national limitations such as limiting enforcement to awards issued in other ratifying states and/or dealing with commercial subject matter.	Pecuniary awards only issued under the Washington Convention
How will the award be enforced?	While enforcement must be subject to the same national rules as for domestic arbitral award enforcement – no more expensive or onerous – contracting States still tend to require that awards be formally “recognized” before enforcement.	Awards are “automatically” enforceable in any ratifying State as a final judgment of the national courts.
What can be done to resist enforcement?	There are seven discretionary and exhaustive grounds for refusing recognition or enforcement of an award <ul style="list-style-type: none"> • Lack of a valid arbitration agreement. • Violation of due process. • Exceeding the tribunal’s authority. • Irregularity in the composition of the tribunal or its procedures. • The award is not yet final or binding. • The award has been set aside or suspended. • Public policy reasons. 	Arbitral appeal mechanisms are limited to annulment, revision or interpretation of an award. At the enforcement stage, grounds for resisting enforcement are exceptionally limited to those available for resisting enforcement of final judgment of a court of that State, and therefore can vary from State to State according to domestic law.

For more information contact:



Matthew Kirtland
Partner, Washington, DC
Tel +1 202 662 4659
matthew.kirtland@nortonrosefulbright.com



Katie Connolly
Associate, Washington, DC
Tel +1 202 662 0461
katie.connolly@nortonrosefulbright.com



Jacob Smit
Associate, Sydney
Tel +61 2 9330 8017
jacob.smit@nortonrosefulbright.com

Enforcement proceedings against State entities

From one end to another

By Neil Q Miller

Remembering one of my favourite scenes in Monty Python’s *The Life of Brian*, if a gathering of arbitration lawyers were huddled in a room contemplating the question “what has arbitration ever done for us?”, then (assuming no meaningful contribution to sanitation, medicine, wine, public order, irrigation, roads, a fresh water system, and public health I am aware of) apart from efficiencies in time and cost (questionable), neutrality of forum, arbitrator expertise and procedural flexibility, the most likely extolled contribution would be “ease of enforcement of awards”.

However, notwithstanding the many deserved tributes to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) elsewhere in this issue, when it comes to enforcing an arbitral award against a non-paying or recalcitrant State or a State owned entity, in most jurisdictions the road ahead can be long and winding, with many unwelcome obstacles.

The guiding principles of the Convention

The introductory words to the Convention set out the central obligation imposed upon Contracting States to recognize foreign arbitral awards as binding and to enforce them, where requested to do so, under the *lex fori*. Each Contracting State is free to determine the domestic procedural mechanisms to be followed (where the Convention does not prescribe any

requirement), albeit these should be in line with the purpose of the Convention which is to encourage recognition and enforcement of awards in the greatest number of cases as possible.

That purpose is enshrined in Articles III and VII(1) of the Convention which on the one hand aim to prohibit domestic law conditions on recognition and enforcement that are more stringent than those in the Convention, yet on the other hand allow domestic law provisions that give more favorable rights to a party seeking to enforce an award.

If only that were so in practice. Despite these good intentions, there are a number of difficulties surrounding enforcement of arbitral awards against sovereign States.

These issues are perhaps best highlighted with the use of a hypothetical case study. The facts of the case study we will use are as follows: The claimant is a foreign private company (Company) which has made an in-country investment in a particular State. The respondent is the government of the country in which the investment was made (State). A dispute has arisen in respect of the investment, which the Company referred to arbitration seated in New York, USA (a Convention State). The tribunal determines that it has jurisdiction and is validly constituted, and ultimately finds in favor of the Company and issues a large monetary award against the State. The State fails to pay the award. The Company brings recognition and enforcement proceedings before the English courts (another Convention State), with the aim of enforcing its award against the State’s assets within that jurisdiction.

Resisting enforcement

In most jurisdictions, awards are not directly enforceable so parties will need to seek the assistance of domestic courts to do so. The process of enforcing foreign awards in England is, on the face of it, relatively simple – the enforcing party applies to the court for recognition and enforcement, usually without notice to the other party, by issuing an arbitration claim form supported by witness evidence exhibiting the award and the arbitration agreement (with certified translations if these are not in English). After the order is granted, the respondent is served with the order and application, and is afforded a certain amount of time within which to apply to set aside the order.

The exhaustive grounds upon which recognition or enforcement of a foreign award may be refused are set out in Article V of the Convention. Those are enshrined in English domestic law by section 103 of the Arbitration Act 1996 (Arbitration Act). In brief, these include

- Incapacity – a party to the arbitration agreement was under some incapacity.
- Invalidity – there was no valid arbitration agreement.
- Lack of due process – a party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
- Lack of jurisdiction – the award deals with disputes outside or beyond the scope of the submission to arbitration.
- Serious procedural irregularity – the composition of the tribunal or the arbitral procedure did not comply with the arbitration agreement or (failing such agreement) the law of the seat.

- Finality – the award is not yet binding or has been set aside or suspended at the seat.
- Arbitrability – the subject matter of the dispute is not capable of settlement by arbitration.
- Public policy – it would be contrary to public policy to recognise or enforce the award.

Despite these grounds being exhaustive and relatively limited, they nonetheless allow a number of avenues to resist or delay enforcement. To complicate matters, many of the terms used (for example, “incapacity” or “proper notice”) are not defined in either the Arbitration Act or the New York Convention – so the question of what falls within these grounds must be hashed out by the domestic courts.

Generally, applications to resist enforcement before the English courts are dealt with on paper, without a full hearing.

Generally, applications to resist enforcement before the English courts are dealt with on paper, without a full hearing. However, not all cases are straightforward and where the court considers the respondent has a real prospect of establishing one of the section 103 grounds for resisting enforcement, or it considers there to be some other compelling reason, the matter will need to be dealt with at trial. Importantly, until such challenges are dealt with, the enforcement order is

stayed. As a result, a party can face (in each jurisdiction where enforcement is sought) a number of challenges to enforcement.

Substantive issues

Jurisdiction – limits to the “competence-competence” doctrine

The “competence-competence” doctrine is a general principle of international arbitration which provides that a tribunal is empowered to determine its own jurisdiction to deal with the dispute.

However, this doctrine does not grant the tribunal *exclusive* power to deal with questions of its own jurisdiction. Importantly, it does not prevent any court where enforcement of the award is sought from re-examining the tribunal’s jurisdiction. It is accepted that arbitrators cannot be the sole judges of their own jurisdiction – hence lack of jurisdiction is one of the grounds for resisting enforcement under the Convention and the Arbitration Act. Consequently jurisdiction issues may be raised both before the courts of the seat (if an action is brought to set aside the award) and the enforcing courts (if an action is brought to enforce the award). Should a court determine that the tribunal lacked jurisdiction, then it may deem the award to be invalid and therefore unenforceable.

One frequently used tactical challenge to resist or delay enforcement of an award is a challenge to the validity or existence of the agreement to arbitrate. Typically whether a valid arbitration agreement exists (and its scope) is a jurisdictional issue dealt with by the tribunal. However, the issue is also capable of being opened up again by the courts, both at the seat and at the enforcement stage.

In *Dallah Real Estate & Tourism Holding Co v Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, the English Supreme Court accepted that the international trend was to limit reconsiderations of the findings of an arbitral tribunal and noted the pro-enforcement policy of the Convention. However, the Supreme Court nonetheless concluded that if an action is brought to set an award aside, a court is not only entitled to review the tribunal's jurisdiction but also has wide powers to re-open issues of fact in order to determine independently, for example, whether a valid arbitration agreement exists. This decision also confirms that a party is not required to challenge or appeal an award in the courts of the seat of arbitration before resisting enforcement elsewhere.

Other possible challenges on jurisdictional grounds include arguing that the award wrongly deals with matters outside the scope of the arbitration agreement and/or outside the scope of the parties' submission to arbitration. Both of these issues go to the heart of the tribunal's jurisdiction. The latter is particularly dangerous – as any dispute resolution lawyer knows, the parties' claims and defences do evolve during the course of proceedings. The particular danger in arbitration arises where they evolve to the extent that they fall outside the scope of the original submission to arbitration.

The key takeaway for parties is that last word on jurisdiction does not necessarily rest with the tribunal.

The key takeaway for parties is that last word on jurisdiction does not necessarily rest with the tribunal. When a party comes before the English courts seeking enforcement of an award, it may be met with a number of jurisdiction challenges, and these may involve the court reopening (albeit limited) issues of both fact and law. Enforcement can be delayed while the courts address such challenges.

State immunity

In most jurisdictions, foreign States are granted certain immunities against proceedings brought against them before the courts of another State. In England, these are set out in the State Immunity Act 1978. However, there are certain exceptions to immunity including where the State has waived immunity. Section 9 of the State Immunity Act provides that where a State has agreed in writing to submit disputes to arbitration, then the State has waived immunity from both arbitration proceedings and arbitration-related proceedings before the English courts. As a result, States can challenge the existence of an arbitration agreement.

Another line of argument brought by States is that the State entity in question did not have the power to enter into an arbitration agreement on behalf of the State and/or the State is not a party to the agreement. This can also involve related incapacity arguments.

Such arguments were raised in *Svenska Petroleum Exploration AB v Lithuania & Anor* [2005] EWHC 2437 (Comm). In that case, the government of Lithuania sought to resist enforcement of an award made against it on grounds that Lithuania was not a party to the arbitration agreement within the commercial joint venture contract in question. It argued that as a State it was not bound by a State-owned company's agreement to arbitrate, which it had not endorsed by its own proper

State procedures. Lithuania had raised the same arguments unsuccessfully before the tribunal, and there had been a two-day hearing on matters of arbitrability and jurisdiction. The same arguments were raised at the enforcement stage before the English courts. Ultimately, the English court agreed with the tribunal's findings.

Consider this scenario in our case study: The State argues that the Company does not fall into the category of "investor" under the Bilateral Investment Treaty (BIT) in which the arbitration agreement is found. It therefore asserts that there is no valid agreement to arbitrate between the parties, and that absent a valid arbitration agreement, the State is entitled to rely on its immunity from both suit and enforcement against assets. Notwithstanding the fact that the Company has successfully proven once in the arbitration that it falls within the definition of investor, the State invites the court to re-examine these issues. The court finds that the question of whether the Company is an investor under the BIT comes down to interpretation, as a result, it may now need to hear submissions on the issues – these can involve complex questions of law (international and treaty interpretation) and expert evidence.

Due process and procedural issues

Enforcement can also be resisted on grounds that the arbitration procedure was improperly conducted or somehow defective. Common examples include: challenges to the arbitrators themselves – whether on grounds of lack of impartiality or bias, or that they did not have the skills prescribed in the arbitration agreement; or challenges to the arbitral process itself – for example, a party was not afforded full opportunity to present its case or the tribunal breached the agreed rules of the arbitration.

Returning to our case study: The State alleges that the tribunal was biased because one of the arbitrators had previously been instructed by the law firm acting for the claimant party. It also argues that, as is clear from the award, the tribunal had failed to properly consider and give weight to the State's evidence on a particular issue. Moreover, the tribunal's case management decisions wrongly restricted the State's ability to properly present its case. Finally, the State argues that the award itself should not be enforced because the investment in question was tainted by bribery and corruption, and therefore the award breaches public policy.

Allegations of due process ... can often be poorly disguised attempts to invite the court ... to review the merits of the tribunal's decision.

In England, such arguments face a high bar and rarely succeed. Allegations of due process and/or procedure can often be poorly disguised attempts to invite the court by the backdoor to review the merits of the tribunal's decision. English courts are also particularly alive to (and strongly resist) any attempts to reopen the merits of a dispute. Nonetheless raising such issues can serve to increase the cost of and delay enforcement.

Finality

It is not uncommon for States to challenge an award at the seat, seeking to have it annulled or set aside. This is particularly common where the seat chosen by the parties (often unwisely)

is within the State's own jurisdiction. Different jurisdictions take different approaches to whether or not an award that has been annulled or set aside at the seat is still enforceable elsewhere (see our article in this issue). In England, the courts will generally not enforce an award that has been set aside at the seat, unless the judgment setting aside the award was obtained by fraud, breached natural justice, or was otherwise contrary to public policy.

Challenges within the court enforcement process

Full and frank disclosure

In England, the initial application for an enforcement order is often made *ex parte* (i.e. without notice to the other side), although enforcement is stayed until the respondent has been served the order and it has had a chance to challenge it. Whenever an order is made without notice, the applicant owes a duty to the court to inform it of all relevant matters. This is known as giving "full and frank disclosure". Relevant matters include anything that that might affect the judge's decision to grant the order.

Practically speaking, this means that the applicant is obliged to draw to the judge's attention the nature of the arguments the defendant is likely to pose, and the critical points for and against granting the application. It is not enough to merely rely on general points or exhibited documents; a party must be proactive in its disclosure of relevant issues. Failure to give full and frank disclosure may not only result in the enforcement order being set aside, but also may leave a party open to costs sanctions.

Procedural and formality challenges

There are also a number of procedural and formality challenges that a party might face when seeking to enforce an award. One example of a common area

of procedural dispute is whether (as a matter of domestic law) a party has been adequately served with all necessary documents. In England, the English Civil Procedure Rules (CPR) prescribe which documents should be served and how. There are also specific rules in respect of service on a State – these are found in both the CPR and the State Immunity Act. Added to that, when serving an order on a foreign State, it will frequently involve serving the State outside of the jurisdiction of the enforcing courts. In England, that means certain formalities must be complied with (as set out in the CPR).

The form and content of the order can also provide grounds for challenges to enforcement. Again, in England, it is the CPR that prescribes the form and content for enforcement orders, including for example that the order must inform the State of its right to apply to set the order aside and that the order is stayed until the time allowed for contesting the award has elapsed or any such application is disposed of.

Therefore, returning to our case study: The Company successfully secures a court order recognising the award and that order is served on the State. However, that is not yet the end of the matter. The State argues that the enforcement order alone was not enough to effect service and that it should have been served with an arbitration claim form and corresponding acknowledgement of service (and all with official translations). It also argues that form and content of the order was not correct. Furthermore, that the process for service was not correctly followed. Such challenges all have the effect of further delaying enforcement.

Arguably, these domestic procedural and formality requirements complicate enforcement beyond that prescribed in

the Convention (again, bearing in mind the Convention's purpose of encouraging recognition and enforcement of awards in the greatest number of cases as possible). However, the reality is that in England, as in most other jurisdictions, domestic procedural laws can complicate the enforcement process as well as allow a State several opportunities to delay enforcement.

Limitation issues

An enforcing party must also bear in mind that there will be limitation periods for enforcing awards. Should the party fail to apply for enforcement within the relevant period, it will face an argument that the enforcement proceedings are time barred. Complicating matters is that a party seeking to enforce against a State will often need to enforce the award in a number of jurisdictions. Limitation periods, however, vary quite significantly across jurisdictions. For example, in England, generally the limitation period is six years. But in China, the limitation period was originally a comparatively short six months period, though that was recently extended to two years.

Calculating the expiry date of relevant limitation periods can also throw up complications. In England, time runs from the date on which the cause of action accrued, namely, when the State failed to pay the award. But where the award does not specify a time limit for honouring the award, the court may need to imply a reasonable time within which the State had to comply and therefore from when time runs for the purposes of limitation. Again, contrasting the situation in China; time will run differently for parties depending on whether or not they have assets located in China when the award was made. These nuances need to be considered quite carefully as soon as an award is obtained (if not in advance), and can prove a real trap for parties unfamiliar with global enforcement.

Conclusion

Successfully obtaining a favorable award is not always the end of the matter. If the losing party fails to honour the award, the successful party will need to seek the assistance of domestic courts, often in a number of jurisdictions, to enforce the award. English courts are known to be very pro-arbitration and it is quite rare for a party to successfully

resist enforcement in this jurisdiction. However, that is not the case across all jurisdictions. Further, even if unsuccessful, challenges to enforcement can prove costly and serve to delay enforcement, particularly facing such challenges in each jurisdiction where enforcement is sought.

As a result, enforcing parties need to be aware of the jurisdiction-specific nuances of enforcing awards in different countries, as well as being alive to common tactics of recalcitrant parties to obstruct or delay enforcement. The moral is "*Effectus autem in re publica facile*"... now go find a large wall and write it out a hundred times!

For more information contact:



Neil Q Miller
Partner, London
Tel +44 20 7444 2625
neil.q.miller@nortonrosefulbright.com

Strategic tips on enforcement for in-house counsel

Looking forward to pay day

By Yaroslav Klimov and Andrey Panov

While there are cases that involve claims for declaratory relief or specific performance, more often than not, disputes are about payment. A claimant only goes into battle, expending time and money developing strong arguments and clever case theories, because it expects to secure payment at the end of the day.

There are several strategic steps that in-house counsel can take throughout the process to maximise the chances that the pay day eventually arrives.

Before the dispute

Enforcement issues should be taken into consideration well before a dispute arises. These should be considered at the time of negotiating and drafting the contract. Many issues can be foreseen and avoided at this stage by proper preparation.

Enforceable obligations

The obvious starting point is to ensure there is an enforceable obligation. This requires clear and careful drafting of relevant contractual provisions to ensure that they are valid and enforceable as a matter of the governing law, and also that they will not offend public policy in the likely place or places of enforcement. For example, a contractual penalty that is punitive by its nature may not be enforceable in many jurisdictions and, as such, may cause problems with enforcement of a future judgment or award.

Due diligence

Moreover, any recourse against the other party will only be effective to the extent the party is likely to be able to meet its obligation to pay. Parties should always undertake proper due diligence on counterparties, in particular identifying what (if any) assets their counterparty has and where those assets are located.

All too frequently, the sole focus of the due diligence is on the transaction structure, rather than security for payment.

All too frequently, the sole focus of the due diligence is on the transaction structure, rather than security for payment. An example is the use of shell companies, newly incorporated

companies or special purpose vehicles for transactions, which by their nature may have little or no assets against which to secure enforcement. When dealing with these types of companies, it is worth considering whether to obtain security for the counterparty's obligations. This could be in any suitable form, from personal or corporate guarantees to a pledge over assets.

Getting the appropriate security in place is usually easier and more straightforward than endeavouring often unsuccessfully, to use litigation to pierce the corporate veil at a later stage in order to reach the entity which does have assets of any value. If security is not available, then this risk should be factored appropriately into the transaction structure.

Dispute resolution clause

Dispute resolution provisions in the contract should be carefully drafted so that they are appropriate, valid and enforceable. While this might sound

obvious, time and again lawyers, arbitrators and courts have to deal with ambiguous or pathological (i.e. defective) arbitration clauses. As well as giving rise to satellite disputes over jurisdiction, pathological clauses can often create additional problems at the enforcement stage. Unfortunately, despite their importance, dispute resolution clauses are frequently negotiated at the eleventh hour and will often be a standard form “one size fits all” clause included from the boilerplate section of a precedent, rather than one that is tailored to suit the parties and circumstances.

There are a number of important considerations when drafting an effective dispute resolution clause. The clause must be valid and enforceable in the relevant jurisdictions, namely

- Where the proceedings will take place.
- Where enforcement against assets will take place.
- It is also advisable that it is valid and enforceable in the home jurisdiction of the counterparties as frequently this is where parallel proceedings are brought in breach of a dispute resolution agreement.

The dispute resolution clause must be drafted to fit the parties. For example, when a State or State owned entity is a contractual counterparty, it is advisable to consider including clear waivers of State immunity from suit, enforcement and execution. Without full waivers, a judgment or award is unlikely to be worth the paper it is written on.

The clause must also be suitable for the types of dispute that are likely to occur. For example, not all jurisdictions have the same approach to what matters are capable of being subject to arbitration.

Choice of forum

The choice of forum for the dispute is often as critical to enforcement as it is to the smooth and effective running of proceedings.

Finally, the choice of forum for the dispute is often as critical to enforcement as it is to the smooth and effective running of proceedings. For obvious reasons, the favoured choice for resolving a dispute is a neutral, unbiased, well-established forum which processes claims without undue cost or delay. But often obtaining a judgment or award is only the start of the process: the successful party will sometimes need to enforce it, possibly in multiple jurisdictions. How foreign judgments or awards are enforced domestically will vary across jurisdictions, so it is important to understand the approach taken in the relevant jurisdictions.

International arbitration, however, owes its success in large part to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the Convention). With 157 contracting state parties, the Convention

has a global reach and prescribes a simple regime for enforcing foreign arbitral awards, which does not allow questions of merit to be revisited and has only a few grounds for resisting enforcement. There is no equivalent for enforcement of foreign court judgments.

When a dispute arises

Once a dispute has arisen or circumstances have been notified that indicate a dispute is about to arise, it is always advisable to conduct a preliminary merits review. This will help to identify strengths and weaknesses in the case and to choose an appropriate case strategy. Having a clear and well-formed strategy from the early stages will help to achieve the end goals in the most efficient manner. It also allows the claimant to plan in advance how to tackle various issues which might arise in the course of proceedings. If the case involves a damages claim, then ideally a quantum expert should also be involved at an early stage. It is certainly better to know before commencing arbitration that the quantum of losses is relatively low, rather than two years into proceedings.

The merits review and case strategy should also consider enforcement issues, such as the potential defenses that the defendant might rely on in its home jurisdiction. The remedies and the relief sought in the proceedings should be chosen with enforcement in mind. There might also be certain procedural steps that are required which can have a later impact on the ability to enforce. For example, in some jurisdictions, it can be a defence to enforcement if notice is not properly served in a particular way. Other jurisdictions may object, for example, to

default judgments. It is a good idea to obtain advice from local counsel at the likely place or places of enforcement to ensure that pitfalls are avoided.

It is also a good idea to once again conduct research on the defendant's assets at the outset of a dispute. In fact, this should be done as part of the early merits assessment stage, because only by understanding the types of the assets and their location can the claimant know the jurisdictions that it will be dealing with when it comes to enforcement. Forensic firms can conduct a high-level exercise at a relatively modest fee. This is usually money well spent as it also helps set realistic goals for recovery.

Again, it is better to find out that the defendant has no assets before commencing proceedings, rather than after expending time and cost obtaining judgment or an award. Moreover, the financial status of the defendant will determine whether urgent measures, such as freezing injunctions, need to be taken in order to preserve the status quo or whether other relief such as security for costs should be sought.

At the enforcement stage

The majority of judgments and awards are complied with voluntarily. However, for some claimants, obtaining judgment or an award, is only the start of the process of getting paid. If a defendant fails to pay, further proceedings are necessary to enforce the judgment or award.

At the enforcement stage, it is necessary to undertake detailed tracing of the defendant's assets, including tangible assets as well as, for example, money payable to the defendant under contracts, court judgments or awards. Claimants should also again consider whether it is appropriate and necessary to seek a freezing order over assets to prevent dissipation. Freezing a defendant's assets is often a very effective tactic to help achieve a post-judgment or award settlement.

It is also important at this stage to again assess that all necessary preliminary steps to enforcement, as required in the relevant jurisdiction or jurisdictions, have been taken. Although the Convention provides a global regime for enforcement of foreign arbitral awards, local procedural rules and court practice do still have a role to play. Enforcement is not always a merely technical exercise. It is advisable to retain lawyers familiar with enforcement in that jurisdiction, who not only have relevant litigation experience before the local courts, but who also have solid understanding of arbitration law and practice in order to be able to assist local judges who may be less familiar with international arbitration.

This article was previously published in PLC Magazine – March 2018.

For more information contact:



Yaroslav Klimov
Partner, Moscow
Tel +7 499 924 5130
yaroslav.klimov@nortonrosefulbright.com



Andrey Panov
Senior associate, Moscow
Tel +7 499 924 5101
andrey.panov@nortonrosefulbright.com

Summary awards and expedited procedures

Strike out or home run?

By James Rogers and Katie Chung

Although institutional rules arguably empower arbitral tribunals to streamline procedure and/or summarily dispose of claims or defences as part of their general case management authority, the trend now is for institutional rules to expressly recognise such powers. But do these procedural innovations aimed at cheaper and quicker arbitrations come at the price of a binding and enforceable award?

Expedited procedure

Since the introduction of an expedited procedure in the 2004 version of the Swiss Rules of International Arbitration, the phrase “Expedited Procedure” has become commonplace in institutional rules. In March 2017, the ICC became the latest arbitral institution to introduce an expedited procedure in its arbitration rules.

Broadly, the objective of an expedited procedure is to prescribe shortened timelines for arbitrations, to facilitate faster and more cost-effective resolution of disputes. Usually the timeline is between three to six months from the constitution of the arbitral tribunal or transmission of the file to the tribunal to the rendering of the final award. It is increasingly common for a fast-track procedure to apply by default (unless the parties have opted-out) if the aggregate value of the claims made in the arbitration fall under a specified monetary value. Parties may also elect to

opt-in in other circumstances, so long as the institution or arbitrator also agrees that it is appropriate for an expedited procedure to apply.

Expedited procedure rules do not limit the scope of the arbitration.

Importantly, however, expedited procedure rules do not limit the scope of the arbitration. That remains for agreement between the parties or, failing that, is left to the discretion of the tribunal. Expedited proceedings are obviously ideal for arbitrations that do not involve significant documents or evidence (whether fact or expert evidence). However, arbitrations conducted under an

expedited procedure do not necessarily always result in “arbitration-light” proceedings. On the contrary, expedited procedures can sometimes involve imposing compressed timelines on a full-blown arbitration which has all the usual stages of proceedings (witness and expert evidence, disclosure, an evidentiary hearing on liability and quantum, and post-hearing oral and written submissions). There are obvious downsides for counsel, parties and arbitrators of such an intensive process. But the benefit of the mechanism is that it necessarily curtails what can be done in the available time, which serves to focus the minds of the parties and the tribunal not only on expedience but also on what is truly at the heart of the dispute. Costs as well as time savings are therefore often made.

Challenges based on expedited procedures – two recent cases and two different outcomes

There can be risks associated with expedited proceedings. Two relatively recent cases conducted under the SIAC Rules are examples where the adoption of expedited proceedings led to challenges to the resulting awards.

In *AQZ v ARA*, the Singapore High Court considered whether the conduct of the arbitration under the SIAC expedited procedure in the 2010 Rules meant that the arbitral procedure was not in accordance with the agreement of the parties. The arbitration agreement in question was silent on which version of the SIAC Rules was to apply. The Singapore High Court therefore applied a presumption that the reference to SIAC Rules in an arbitration agreement refers to the applicable institutional rules as at the date of commencement of the arbitration and not at the date of contract. Based on this presumption, the Singapore Court held that the 2010 Rules (containing an expedited procedure mechanism, unlike the prior rules) were the applicable rules. The expedited arbitral procedure that was followed was therefore anticipated by, and in accordance with, the parties' agreement to arbitrate.

In the more recent decision in *Noble Resources International Pte. Ltd. v Shanghai Good Credit International Trade Co., Ltd.*, the Shanghai No. 1 Intermediate Court reached a very different decision. The relevant arbitration agreement provided for SIAC arbitration seated in Singapore, before a three-member tribunal and for the SIAC Rules at the time being in force to apply. Noble commenced arbitration against Good Credit and requested that the expedited procedure

apply in which case (notwithstanding the provisions of the parties' arbitration agreement) the dispute would be heard by a sole arbitrator. Good Credit opposed that application and insisted that three arbitrators be appointed. The Vice Chairman of SIAC approved the application to apply the expedited procedure and appointed a sole arbitrator. The Shanghai Court subsequently refused to recognize and enforce the resulting award. The court did not find the expedited conduct of the arbitration under the SIAC expedited procedure objectionable. Rather, the court held that the award was not enforceable as the composition of the tribunal was not in accordance with the parties' arbitration agreement (Article V(1)(d) of the New York Convention). Specifically, the court found that the appointment by SIAC of a sole arbitrator was contrary to the parties' express agreement to a three-member tribunal.

Many commentators have described this attempt to uphold party autonomy as misguided given that party autonomy could have been recognized by reading the parties' agreement to a three-member tribunal as subject to the arbitral rules they had chosen (and incorporated by reference into their arbitration agreement) which provided for a single arbitrator in circumstances where an expedited procedure was adopted.

This decision may lead to arbitral institutions amending their expedited procedure rules to provide clarity around this point. A further consequence may be that arbitral institutions will more closely consider whether to exercise their discretion to appoint a sole arbitrator where the parties' arbitration agreement prima facie provides for a three-member tribunal – at least, where one party objects.

Summary disposition

Summary disposition simply means the early determination by the arbitral tribunal of issues of fact and law on an expedited, summary basis, without a full hearing of the evidence.

A few institutional rules contain express summary procedure rules. Rule 41(5) of the ICSID Arbitration Rules allows a party to file an objection that a claim is manifestly without legal merit within 30 days from the constitution of the tribunal or, in any event, no later than the first session (held within 60 days from the constitution of the tribunal). The SIAC Rules 2016 recently introduced provisions (based on Rule 41(5) of the ICSID Arbitration Rules) allowing for the early dismissal of claims or defences that are either (i) manifestly without legal merit, or (ii) manifestly outside the jurisdiction of the tribunal. This was followed by similar provisions in the SIAC Investment Arbitration Rules 2017. The SCC also recently amended its rules with effect from January 1, 2017 to expressly provide for issues of jurisdiction, admissibility or the merits to be dealt with by summary procedure. Most recently, in a public consultation for the revision of its Administered Rules, the HKIAC asked for feedback on whether the HKIAC should consider introducing an early determination provision.

But summary procedures are likely available to parties, even where they are not expressly provided for in the institutional rules. It is now widely accepted that this power is inherent in the general case management authority of tribunals. Most recently, the ICC expressly recognised in its October 30, 2017 Note to the Parties and Arbitral Tribunal on the Conduct of Arbitrations that “[a]pplications for

expeditious determination of manifestly unmeritorious claims or defences may be dealt with within the broad scope of Article 22 [of the ICC Arbitration Rules]”. This endorses the position taken by arbitral tribunals in past ICC Arbitrations that they have the inherent power to utilise summary disposition procedures.

However, in practice, tribunals have been reluctant to utilise summary disposition because of the perceived risk that such awards would be set aside, or enforcement refused, on grounds of procedural irregularity or lack of procedural fairness. It remains to be seen whether this reluctance will continue where arbitral institutions have amended their arbitral rules to include express powers of summary disposition.

Tribunals have been reluctant to utilise summary disposition because of the perceived risk that such awards would be set aside, or enforcement refused, on grounds of procedural irregularity or lack of procedural fairness.

Conclusion

Cost and time of proceedings are perennial issues in international arbitration, as they are in litigation. It is therefore pleasing that the major arbitral institutions continue to update and adapt their arbitral rules to facilitate more efficient proceedings, including by expressly providing for expedited procedures and summary dismissal. However, it remains to be seen whether these mechanism are widely taken up by parties and/or whether in practice they will lead to significant saving in time and cost. As mentioned above, expedited procedures do not necessarily limit the scope of an arbitration. Real savings will therefore only be generated by the parties and the tribunal fully committing to conducting the proceedings in a sensible and efficient manner. With the inclusion of express summary procedure rules in key institutional rules, these rules are likely to be more widely used in the years to come. However, we are unlikely to see an immediate spike in uptake. Parties and tribunals will remain wary particularly where enforcement of the resulting award is in a jurisdiction where the courts are unfamiliar with the concept.

For more information contact:



James Rogers
Partner, London
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com



Katie Chung
Of counsel, Singapore
Tel +65 6309 5434
katie.chung@nortonrosefulbright.com--

Enforceability of interim measures and emergency arbitrator decisions

By Martin Valasek and Jenna Anne de Jong

In recent years, many of the leading arbitral institutions have amended their rules in order to make arbitration more responsive to users' needs. A key development has been the introduction of emergency arbitrator procedures, which enable parties to obtain urgent relief before the substantive tribunal is formed. For good reason, these new mechanisms are receiving significant attention from parties and arbitrators. However, have enforcement mechanisms kept pace with these developments?

Emergency arbitrator procedures

An important consideration for many parties is the ability to obtain immediate interim relief once a dispute arises to either to preserve the status quo or prevent the other side from continuing the breach in question pending final resolution of the dispute. In the arbitration context, there are a number of avenues for obtaining interim relief.

Courts in most jurisdictions retain residual authority to grant interim measures in support of arbitration. Obviously, some of the benefits of arbitration – such as confidentiality and efficiency – may be lost if a party is forced to pursue interim relief in open court. Some parties therefore prefer to seek interim measures within the arbitral process.

A tribunal once appointed also will generally have wide powers, akin to those of a court, to grant interim relief.

The difficulty that can arise is that in some instances the appointment of the substantive tribunal can take months, particularly if one party is obstructive or raises challenges to the nominated arbitrators.

In response, many leading arbitral institutions have introduced emergency arbitrator procedures which seek to close that gap by allowing parties, in situations of emergency, to obtain urgent arbitral relief *before* the substantive tribunal is formed. Under emergency arbitrator procedures, a sole arbitrator is appointed by the arbitral institution on an expedited basis to determine applications for interim relief that cannot wait for the formation of the substantive tribunal. Arbitral institutions that have adopted emergency arbitrator mechanisms include the ICC, ICDR, SIAC, SCC, and LCIA.

Generally, the relevant arbitral rules provide that decisions of emergency arbitrators are interim-binding, in that they can later be varied or suspended by the substantive tribunal once formed. In some instances, such interim measures may expire by default after a certain period of time.

Depending on the applicable arbitral rules and/or law, an emergency arbitrator (and/or arbitral tribunal) may grant interim relief in a number of ways; in the form of a preliminary order, a procedural order, a direction, or an interim or partial award. The ICC, for example, requires that an emergency arbitrator decisions take the form of an order, thus avoiding the ICC's "scrutiny" process for awards, which would delay the issuance of the emergency decision. By contrast, the SCC and ICDR rules permit a decision in the form of either an order or an award.

Despite the interest and seeming demand for such relief, there are some questions over the enforceability of arbitrator interim measures.

Despite the interest and seeming demand for such relief, there are some questions over the enforceability of arbitrator interim measures. Key questions arise from the very nature of the relief; that it is interim binding and, in the case of emergency arbitrator decisions, is made by someone other than the substantive tribunal. The form of the relief can also play a part – particularly where arbitrator interim relief is in the form of an order rather than an award.

Applicable enforcement mechanisms

In international commercial arbitration, the key enforcement mechanisms are the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention) and the applicable domestic arbitration laws, many of which are based on the UNCITRAL Model Law on International Commercial Arbitration (the Model Law).

The New York Convention is silent on the question of arbitrator interim awards and orders. On the face of it, the convention applies only to “awards”, thereby

seemingly excluding arbitrator orders, interim or otherwise. Moreover, there is no definition of “award”, but finality is considered an essential characteristic of an award in many jurisdictions – not least because the convention provides that a party may resist enforcement of an award on grounds that it is not yet “binding”. As such, this raises questions over the enforceability of orders and awards that are only interim-binding.

Unlike the New York Convention, the original Model Law does expressly address interim relief, in that it empowers a tribunal to order interim measures. However it does not address the enforcement of such measures, instead leaving it open to national courts whether or not to provide assistance in that regard. The Model Law was updated in 2006 to address, among other things, the enforceability of arbitrator interim measures. The amended Model Law empowers tribunals to grant interim relief in both the form of an award as well as in “another form”, and provides that such measures will be binding and enforceable as any other award. Save that, if made in the form of a preliminary order, although binding on the parties such an order will *not* be subject to enforcement by a court (and does not constitute an award).

The amended Model Law offers some helpful clarity. But it does not perfectly resolve all issues. Firstly, it fails to define “arbitral tribunal”, which leaves open the question of whether an emergency arbitrator falls outside the definition. More importantly, the 2006 amendments

have not been widely adopted. Over one hundred jurisdictions implemented domestic arbitration laws based on a version of the Model Law, but less than half of those have adopted the 2006 revisions. Among those that have are Australia, Belgium, the Canadian province of Ontario, the state of Florida, New Zealand, and several Latin American countries. Add to that, a number of domestic arbitration laws, including those in some of the leading seats of arbitration (England, France, the United States), are not based on the Model Law at all. In actuality, few domestic arbitration laws address the enforceability of emergency arbitrator relief.

In the absence of express provisions (such as those adopted in Hong Kong and Singapore), it is up to the domestic courts to determine whether an emergency arbitrator decision, be it in the form of an award or an order, is enforceable.

The courts’ approach to arbitrator interim measures

The approach taken by domestic courts to this question has varied across jurisdictions. In some, courts have found that where arbitrator interim measures finally dispose of certain issues, they are enforceable as awards. In the United States, for example, arbitrator interim measures have been held to be enforceable as an award provided the ruling containing the interim measure finally and definitively disposes of a self-contained issue (see e.g. *Island Creek Coal Sales Company v City of Gainesville Florida* (1985), 729 F2d 1046, U.S.C.A., 6th Circuit).

Some courts that follow this approach will look at the substance of the measure, and not its form, enforcing both arbitrator order and awards.

The question of whether interim relief granted by an emergency arbitrator is enforceable in the same fashion as interim relief ordered by the substantive tribunal, also remains a live issue. Again taking the United States as an example of the high water mark; generally US courts have applied the same approach to emergency arbitrator decisions as to interim measures issued by the substantive arbitral tribunal (see e.g. *Yahoo! v Microsoft Corporation*, 983 F. Supp. 2d 310 (S.D.N.Y. 2013)).

There are encouraging signs that other jurisdictions are following suit and taking a pro-enforcement approach to arbitrator interim relief. A decision of an emergency arbitrator appointed under the SCC rules was enforced by the courts of Ukraine in the context of an investor-state dispute under the Energy Charter Treaty (*JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum Company JV v Ukraine*).

There are encouraging signs that other jurisdictions are following suit and taking a pro-enforcement approach to arbitrator interim relief.

But not all jurisdictions are heading in the same direction. The Swiss Federal Tribunal, for example, has characterized it as “dangerous” to treat interim measures as an award (see Judgment of April 13, 2010, DFT 136 III 200).

And, of course, not all interim measures will “finally” resolve some part of a dispute. That leaves enforcement of such measures uncertain even in otherwise pro-enforcement jurisdictions.

The bigger issue for users, however, is that in many jurisdictions there have been no or too few court decisions to reliably predict how emergency arbitrator decisions will be treated.

Conclusion

Given the current patchwork approach globally, enforcement of interim measures issued by arbitral tribunals remains uncertain and uneven. Until more proceedings to enforce emergency arbitrator decisions come before courts, or until legislators decide to deal with the issue in domestic legislation, questions over the enforceability of arbitrator interim relief remain.

The uncertainties associated with enforcement is an important issue for users to take into consideration when deciding whether to seek relief from an emergency arbitrator or from a court. It is critical that, prior to deciding, parties obtain local law advice from the jurisdiction/s where enforcement will be sought.

For more information contact:



Martin Valasek
Partner, Montréal
Tel +1 514 847 4818
martin.valasek@nortonrosefulbright.com



Jenna Anne de Jong
Associate, Ottawa
Tel +1 613 780 1535
jennaanne.dejong@nortonrosefulbright.com

Awards set aside or annulled at the seat

Zombies, ghosts and buried treasure

By Sherina Petit and Benjamin Grant

A disgruntled party on the losing end of an award will sometimes seek to have the award annulled or set aside at the seat of arbitration. But even if such a challenge at the seat is successful, that is not necessarily the end of the matter. Awards that are seemingly “dead and buried” can sometimes be resurrected or haunt the losing party in other jurisdictions where enforcement of the award is sought. This article compares the different approaches taken in various jurisdictions to awards that have been set aside or annulled at the seat.

Awards that are seemingly “dead and buried” can sometimes be resurrected or haunt the losing party in other jurisdictions where enforcement of the award is sought.

The provisions of the New York Convention

The New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) does not oblige Contracting States to refuse enforcement of awards that have been set aside at the seat. Article V(1)(e) only goes so far as to provide that an award “may” be

denied recognition and enforcement if it has been annulled by the courts of the arbitral seat – it does not prohibit enforcement. Additionally, Article VII provides that the Convention shall not deprive any party of any right to benefit from an arbitral award as permitted by the law of the enforcing State. These provisions therefore leave room for national courts to exercise a discretion to recognize annulled awards.

Unfortunately however, there is no further guidance in this regard contained in the New York Convention. In the absence of an international standard, domestic courts in different jurisdictions have taken diverging approaches to this question. Most recently, the issue has returned to the international spotlight as a result of a Dutch court’s annulment of an arbitral award worth over US\$50 billion in a dispute between shareholders of the Yukos Oil Company and Russia, with inevitable

consequences for Yukos shareholders’ ongoing enforcement proceedings against Russian assets in numerous jurisdictions worldwide.

Treatment of awards set aside at the seat

England

English courts will ordinarily respect a foreign decision annulling an arbitral award, unless that decision is found to be contrary to basic principles of honesty, natural justice or domestic public policy. In a case involving a different Yukos entity (*Yukos Capital SARL v OJSC Rosneft Oil Company*) several arbitral awards were recognized and enforced by the English courts notwithstanding that they had been set aside in Russia. The English court rejected an argument that the awards no longer existed legally because they had been annulled. The court found that the annulment was a result of a “partial and dependent judicial system”

and should therefore be disregarded in the enforcement proceedings. There were however rather extreme factual circumstances.

A different outcome was reached in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*, where the English court refused to recognize and enforce an arbitral award that had been set aside in Russia. The test the English court applied was whether the Russian courts' decisions were so extreme and incorrect that the courts could not have been regarded as acting in good faith. Absent cogent evidence of actual (rather than apparent) bias, the English court refused enforcement of the annulled award.

Netherlands

The Dutch courts take a similar approach as the English courts. In the Amsterdam Court of Appeal judgment in *Yukos Capital SARL v Rosneft* (involving the same award as in the English case between the same parties described above), the Dutch court gave effect to the awards notwithstanding that they had been set aside by Russian courts. This decision was also based on a determination that the annulment resulted from a partial and dependent judicial process in Russia.

However, again consistent with the approach of the English courts, in the Supreme Court judgment in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* (again, involving the same annulled award as in the English case above) enforcement was refused. Although the Dutch Supreme Court confirmed that it has a discretion to enforce an annulled award under Article V(1) of the New York Convention, it held that this power can be exercised in exceptional cases only – i.e. situations where the annulment at the seat was

based on grounds that do not reflect Articles V(1)(a)-(d) of the New York Convention or other internationally acceptable standards. Such exceptional circumstances were not found in the case before the court and so the court refused to enforce the annulled award.

France

French law provides for limited grounds for refusing enforcement of awards. Accordingly, French courts have long held that an award which has been annulled at the seat can still be enforced in France. In the seminal decision of *Hilmarton v Omnium*, the Cour de Cassation permitted enforcement of an arbitral award which had been set aside in Switzerland. The core of the French court's reasoning relied on Article VII of the New York Convention, which enables Contracting States to apply a more liberal domestic regime for enforcement of arbitral awards. Since annulment of an award is not one of the grounds for refusing enforcement under French law, the court held that the permissive language of Article V(1)(e) in conjunction with Article VII constituted a sufficient basis to enforce awards annulled at the seat. Subsequent cases represent a continuation of this approach.

United States

In a leading US decision in *Chromalloy Aeroservices v Arab Republic of Egypt*, the court set out the grounds for enforcing an arbitral award annulled at the seat. The award had been set aside in Egypt following a detailed substantive judicial review, in circumstances where the parties had waived any such review. The US court reasoned that the US public policy in favour of final and binding arbitration of commercial disputes compelled it to enforce the award despite its annulment at the seat.

In other judgments, although approving the reasoning in *Chromalloy*, US courts have not found adequate reasons on the facts for disregarding foreign annulments (for example, *Martin I. Spier v Calzaturificio Recnica*). In a controversial decision in *TermoRio SA v Electranta*, a US court held that an award that has been set aside “does not exist to be enforced” in other Contracting States to the New York Convention.

In TermoRio SA v Electranta, a US court held that an award that has been set aside “does not exist to be enforced” in other Contracting States to the New York Convention.

More recently however, a US court enforced an annulled award in *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v Pemex-Exploración y Producción*. The arbitral award in question had been set aside in Mexico on the ground that Pemex, as an entity deemed part of the Mexican government, could not be forced to arbitrate. It was held that the US court's deference to the Mexican court's annulment would run against US public policy in favour of enforcement.

Conclusion

Having been drafted in a permissive manner, the New York Convention leaves domestic courts with a discretion to enforce annulled awards. As this area of law is not settled, different jurisdictions have adopted diverging standards with regards to the circumstances in which the enforcement of annulled awards may be permitted. Taken very generally, these

circumstances can include

- The annulment procedure being tainted by serious procedural irregularity or otherwise contrary to basic principles of honesty or natural justice.
- The annulment being based on local public policy standards or other local standards of review.
- The annulment being a result of extensive substantive review of merits (when it was contractually excluded by the parties).

Parties should, however, be aware that in most jurisdictions, there is an increasingly high burden to satisfy when seeking to enforce an annulled award. Particularly, where a claim is made that the annulment was contrary to basic principles of justice.

Where obtaining judicial recognition of an annulled award will likely be most problematic is if the grounds for annulment at the seat properly applied the grounds given in Article V(1)(a)-(d) of the New York Convention.

However, the key takeaway is that just because an award seems dead and buried, that does not mean that it is necessarily the end of the matter. Where an award has been set aside, it is essential that parties seek advice from arbitration counsel knowledgeable in the jurisdiction of the enforcement to identify if recovery may still be possible.

The authors would like to thank Ewelina Kajkowska, trainee, for her contribution to this article.

For more information contact:



Sherina Petit
Partner, London
Tel +44 20 7444 5573
sherina.petit@nortonrosefulbright.com



Ben Grant
Associate, London
Tel +44 20 7444 3623
ben.grant@nortonrosefulbright.com

Public policy as a bar to enforcement

Where are we now?

By Paul Stothard and Alexa Biscaro

The public policy exception to recognition and enforcement of international arbitral awards creates uncertainty with respect to enforcement of these awards, particularly because Contracting States have diverse approaches to issues of public policy. In this article, we look at recent global developments in the use of the public policy exception.

What is public policy?

Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and article 36(1)(b)(ii) of UNCITRAL's Model Law both provide that a State may refuse to enforce an award if doing so would be contrary to the public policy of the State in which enforcement is sought. Unfortunately, neither provides a definition of "public policy". In October 2015, the International Bar Association released a Report on the Public Policy Exception in the New York Convention that reaffirmed that public policy remains a nebulous and evolving concept that defies precise definition.

Positive developments

Most major arbitral jurisdictions define public policy (or "ordre public") narrowly and apply it exceptionally when an award contravenes fundamental (and largely international) legal norms. Indeed, in most, the public policy violation must reach a

certain threshold to warrant refusing enforcement, such as "blatant", "flagrant" or "intolerable". The exception can legitimately apply, for instance, to awards concerning contracts that would be illegal under national laws (such as those concerning crime).

There is a reassuring trend toward the widespread adoption of a narrow interpretation of the public policy exception.

There is a reassuring trend toward the widespread adoption of a narrow interpretation of the public policy exception. For example, the Indian Supreme Court was once notorious for a string of decisions endorsing an ever-expanding definition of public

policy to include mere error of law (an approach rejected by the US and all leading European jurisdictions). The Indian Arbitration Act 2015 now explicitly precludes refusal of enforcement of foreign awards based on "patent illegality" or error of law. The High Court of Delhi affirmed that the amendments "brought about a material change" and that the public policy defence must be construed "extremely narrowly" (*Cruz City 1 Mauritius Holdings v Unitech Limited*).

In a 2016 case, a Chinese court refused to enforce an ICC award on the basis that it contravened Chinese law requiring that all arbitrations must be institutional (and the Court found that the ICC arbitration was not explicitly institutional). This decision conflates Chinese domestic law with public policy and is therefore open to criticism. Given that, improvements have been noted in China, where, since 2000, any Chinese court decision refusing to enforce a foreign award is

subject to the mandatory review of the Supreme People’s Court on a more pro-enforcement basis, it is possible that the decision may yet be reversed.

In *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*, [2017] EWHC 251 (Comm), the United Kingdom reiterated its “pro-enforcement bias”, holding that enforcement of awards concerning otherwise legal contracts and awards will not be “tainted” by fraud or bribery. Thus, English courts will not refuse to enforce a contract procured by bribery.

Other outliers

Some jurisdictions do still maintain a parochial approach to the public policy exception. For instance, Egyptian courts recently deemed that the following fall under the public policy exception: late payment interest exceeding the maximum ceiling set out in the Egyptian Civil Code, mandatory approval of the competent minister to arbitrate a dispute arising out of an administrative contract, and the absence of reasoning for damages awarded by the tribunal.

Russian courts have also often refused enforcement of awards where the amount of damages was deemed punitive or disproportionate to the breach. Other jurisdictions such as Italy, Poland, Finland, Greece and, very recently, Portugal, have refused to enforce awards on the same basis.

Cautious optimism?

Recent trends in the interpretation of the public policy exception by legislators and national courts invite cautious optimism that major jurisdictions are converging in the practice of adopting a narrow interpretation of the public policy exception.

For more information contact:



Paul Stothard
Partner, Dubai
Tel +971 4 369 6300
paul.stothard@nortonrosefulbright.com



Alexa Biscaro
Associate, Ottawa
Tel +1 613.780.8603
alexa.biscaro@nortonrosefulbright.com

Cryptocurrencies and arbitration

A match made in heaven?

By James Rogers and Ayaz Ibrahimov

The world of finance faces huge disruption if the current interest in cryptocurrencies leads to mainstream adoption. The market capitalization of cryptocurrencies has soared since 2008 to well over US\$500 billion. This interest in the decentralization of currencies and the use of blockchain technology has created new opportunities but also raises important, commercial, administrative and regulatory questions. It also raises questions about how future cryptocurrency disputes are to be resolved in a world where privacy is paramount.

In this article we explore the nature of cryptocurrencies before turning to the potential disputes likely to arise within the cryptocurrency universe and explore how arbitration may be well suited to the resolution of these disputes.

What is a cryptocurrency?

A cryptocurrency is a digital currency which relies on encryption for security and to verify transactions, and operates independently of any bank (i.e. has a decentralized control).

At its simplest, cryptocurrencies are just records of transactions (blockchains) kept on a decentralized ledger/database which all members have access to, and which is updated whenever a new transaction is verified by a consensus mechanism. When we speak of a consensus mechanism we simply mean that decisions affecting the ledger (e.g.

in relation to the next block in the chain) are made by a consensus of the users of that blockchain. Some blockchains allow not only simple transfers but also more complex arrangements that automate transfers of cryptocurrency on the occurrence of specified triggers – these are referred to as “smart contracts”.

In proper use, such blockchains are theoretically immutable, meaning that it is impossible to alter existing data without detection. A single shared ledger of transactions is important for verifying the ownership of an asset or the completion of a transaction.

Cryptocurrencies also involve a degree of pseudonymity. Users use a digital, blockchain wallet to manage and hold cryptocurrencies, with each wallet tied to one or more specific keys or addresses, as opposed to names and proper identities.

There is no unified inter-governmental approach to the regulation of cryptocurrencies.

Potential cryptocurrency disputes

The cryptocurrency market is very dynamic. However, there is no unified inter-governmental approach to the regulation of cryptocurrencies, and with national law makers and regulators racing to keep abreast of break-neck developments within the market, the risks for unwary investors remain significant.

Potential areas of dispute risk for those involved in cryptocurrency transactions include commercial disputes over transfers of cryptocurrency or the

operation of smart contracts. However, given the pseudonymity of the market, there is also a heightened risk of fraud and the potential for violating sanction regimes, money laundering laws and terrorist financing regulations. There are also concerns for the security of the market infrastructure associated with cryptocurrencies which may yet prove susceptible to hacking.

Our recently released white paper on blockchain dispute resolution entitled *Unlocking the Blockchain* analyses in more detail the risks associated with blockchain technologies such as cryptocurrencies.

Dispute resolution – arbitration to fill the void?

With the aforementioned risks in mind it is important for investors to have access to quick, effective and affordable dispute resolution to assist them with the broad range of potential issues they may encounter in conducting transactions in cryptocurrencies. One form of dispute resolution that is inherently well-suited to the resolution of cryptocurrency disputes, at least at the commercial level, is international arbitration.

Party autonomy, confidentiality and the ability for parties to choose arbitrators with specific expertise lie at the heart of arbitration. It therefore supports the anonymity that underpins the cryptocurrency market. It also allows parties to appoint arbitrators with the expertise necessary for the resolution of disputes which may well be both technically challenging and concern novel legal issues.

Arbitration is also more removed from the sometimes anti-cryptocurrency rhetoric and policy objectives of regulators and, potentially, national courts. This will be appreciated by many investors in the cryptocurrency market

who, at the risk of overgeneralizing, are more anti-establishment than those invested in traditional financial models. As a neutral forum of dispute resolution, crypto-currency investors are therefore likely to have more confidence in the arbitration process than traditional, centralized court systems.

The benefits of global enforcement of arbitral awards (under the New York Convention on the Enforcement of Foreign Arbitral Awards) are also worth bearing in mind, given the fundamentally borderless nature of blockchain technology. That said it remains to be seen how arbitral awards may be enforced against a blockchain given its decentralized nature and that transactions are verified by a consensus mechanism – the traditional means of enforcing awards by attachment of monetary assets do not necessarily apply.

The inherent flexibility of arbitration also suggests that it will be favored by cryptocurrency investors. Arbitration also affords parties greater control over how proceedings are managed. This includes control, by agreement, over if or to what extent document disclosure is necessary, the scope of evidence and whether oral evidence and hearings need to take place. The recent move of arbitral institutions to establish expedited and emergency procedures, which will improve procedural economy and led to greater cost savings, may also lead to growth in this area. Parties also have control over the format of proceedings, and therefore the increasing use of technology in arbitration will have an impact. In particular, the rise of online dispute resolution (ODR) will change how arbitration is conducted. Parties are free to agree, for example, to electronic hearings conducted over video-link using real-time transcription and online bundles (please see our article on *Online Dispute Resolution and electronic*

hearings). Progress in virtual reality technologies is also likely to impact how arbitration proceedings are conducted in the future. It is entirely foreseeable that future disputes could be resolved by dedicated “cyberspace tribunals” akin to the “cyberspace courts” recently unveiled in Hangzhou.

The best international arbitral institutions have done much over the last decade to improve arbitration and to offer greater procedural flexibility. This includes by updating their standard rules and model clauses and through the emergency of specialist arbitral rules and the constitution and promotion of specialist arbitrator panels. Cryptocurrency is an area ripe for similar development – the unique nature of cryptocurrency, and cryptocurrency transactions, suggests that specialist arbitral rules and panels may soon develop. In short, watch this space.

For more information contact:



James Rogers
Partner, London
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com



Ayaz Ibrahimov
Associate, London
Tel +44 207 444 3721
ayaz.ibrahimov@nortonrosefulbright.com

The Dubai Judicial Tribunal

A claw-back of jurisdiction?

By Deirdre Walker and Aarti Thadani

In recent years, the Dubai International Financial Centre Courts (DIFC Courts) have taken a literal and expansive approach when rendering decisions regarding the jurisdiction of the DIFC Courts. One consequence is that the DIFC Courts have developed a conduit jurisdiction – namely, recognizing and enforcing arbitral awards (both foreign and domestic) and foreign judgments in circumstances where some argue it should not have.

This conduit route for enforcement has been questioned and challenged by recent decisions of the newly established Joint Judicial Committee (JJC), which determines conflicts of jurisdiction between the onshore Dubai Courts and the DIFC Courts. The establishment of the JJC has altered the legal landscape of Dubai significantly and is a development of which practitioners and corporates must be cognisant. This article discusses these important recent developments.

The DIFC Courts as a conduit jurisdiction

The jurisdiction of the DIFC Courts was established by Dubai Law No. 12 of 2004 (as amended) (Judicial Authority Law). The DIFC Courts' jurisdiction was initially limited to matters relating to corporate entities established in the DIFC, cases involving a DIFC body (such as the Dubai Financial Services Authority) or transactions conducted in whole or in part within the DIFC. However, a 2011 amendment to the Judicial Authority Law extended the DIFC Courts'

jurisdiction to include circumstances where parties have opted in to the jurisdiction, regardless of whether the parties or subject matter of the contract have any connection to the DIFC.

Enforcement of foreign arbitral awards through the onshore Dubai Courts has not been without its challenges.

A number of parties have chosen the DIFC Courts (in preference to the Dubai Courts) when seeking to enforce arbitral awards and foreign judgments. This is for a number of reasons. Although the UAE is a signatory to the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), enforcement

of foreign arbitral awards through the onshore Dubai Courts has not been without its challenges. Parties have on occasion faced judicial interventionism, including a review of the merits of the award or judgment sought to be enforced. Moreover, in proceedings before the onshore Dubai Courts, parties have an automatic right of appeal with limited adverse costs consequences for the losing party which can result in appeals being launched with little chance of success. This means that such proceedings can be expensive and time-consuming. In addition, proceedings are conducted in Arabic which may not be the preferred language of the parties or the language of the relevant contract.

The DIFC Courts, some contend, have a pro-arbitration and pro-enforcement approach, supported by provisions of the DIFC Arbitration Law (as amended) based largely on the provisions of the UNCITRAL Model law. There are limited grounds for resisting enforcement or appealing decisions and DIFC Court

proceedings are conducted in English. The combination of these factors has led to the development of the DIFC Courts’ “conduit” jurisdiction.

Parties seek to passport arbitral awards (both foreign and domestic) by obtaining recognition and enforcement by the DIFC Courts, which then enables them to enforce against assets in onshore Dubai and beyond under the UAE’s international and regional treaties (such as the Riyadh Convention).

Central to the DIFC Courts’ conduit jurisdiction is Article 7 of the Judicial Authority Law which provides that the DIFC Courts and the onshore Dubai Courts are required to enforce arbitration awards which have been ratified by the other court. In principle therefore, a party may enforce a foreign arbitral award in the DIFC Courts and then seek execution in the onshore Dubai Courts. Crucially, in so doing, parties may avoid any review by the onshore Dubai Courts of the merits of the award or judgment sought to be enforced.

In principle therefore, a party may enforce a foreign arbitral award in the DIFC Courts and then seek execution in the onshore Dubai Courts.

Jurisdictional conflicts between the DIFC Courts and Dubai Courts

On June 9, 2016, H.H. The Ruler of Dubai issued Decree 19 of 2016 (Decree 19) establishing the Joint Judicial Committee (JJC) whose primary task is to resolve conflicts of jurisdiction between

the DIFC and Dubai Courts. Some commentators view the formation of the JJC as a response to what they consider to be the expansive (and creeping) jurisdiction of the DIFC Courts.

Decree 19 comprises eight articles (which, arguably, do not provide detailed and prescriptive guidance). It establishes the JJC and provides that it shall be comprised of four onshore Dubai judicial members (the President of the Dubai Court of Cassation sitting as the Chairman with a casting vote) and three DIFC judicial members. Amongst the powers conferred on the JJC is to determine, where there is a conflict of jurisdiction between the onshore Dubai Courts and the DIFC Courts, which court has jurisdiction. Where conflicting judgments are entered by the onshore Dubai Courts and the DIFC Courts in actions involving the same parties and the same subject of dispute, it may also determine which judgment should be enforced. It also has the ability to order a stay pending the JJC’s decision (although some argue such a stay is automatic). This latter power has raised concerns that parties may use a referral to the JJC as a dilatory tactic, frustrating proceedings through unmeritorious applications.

The DIFC Courts’ jurisdiction to enforce Dubai-seated awards

The introduction of Decree 19 caused concern that the DIFC Courts’ status as a conduit jurisdiction was being attacked – particularly in respect of domestic Dubai seated arbitrations. From the JJC decisions on this question to date (discussed below), it would appear that parties may no longer be able to enforce Dubai seated arbitral awards before the DIFC Courts until any ongoing annulment proceedings before the onshore Dubai Courts have concluded. Unfortunately, as discussed

below, these key JJC decisions do not contain sufficiently detailed reasoning to allow a full extrapolation of the JJC’s general approach. It is hoped that future decisions will allow further insights.

In the JJC’s first case, *Daman Real Capital Partners Company LLC v Oger Dubai LLC*, Oger applied to the DIFC Courts for recognition and enforcement of an award made in an arbitration seated in onshore Dubai. Daman in turn applied to the onshore Dubai Courts to annul the award and sought a stay of the DIFC Court proceedings pending the outcome of the Dubai Court proceedings. The DIFC Courts granted a stay on the condition that Daman paid security into the DIFC Courts. When Daman failed to comply, the DIFC Courts proceeded to recognise and enforce the award. In the meantime, the onshore Dubai Court of First Instance and, subsequently, the Dubai Court of Appeal both determined that they lacked jurisdiction to annul the award because it had already been enforced by the DIFC Courts. While on appeal, Daman referred the matter to the JJC. The JJC confirmed the existence of a “conflict of jurisdiction” between the Dubai and DIFC Courts in that enforcement proceedings had been brought before the DIFC Courts and parallel annulment proceedings had been filed before the onshore Dubai Courts. The JJC concluded that the onshore Dubai Courts were the competent courts to make a determination on the validity of the arbitral award and DIFC Courts should cease from “entertaining the case”.

The three DIFC Court judges sitting in the JJC (Chief Justices of the DIFC Courts Michael Hwang and Omar Al Muhairi and Deputy Chief Justice of the DIFC Court Sir David Steele) dissented from the part of the JJC ruling which stated that the DIFC Courts should refrain from

entertaining the case. Their dissenting opinion stated that, while the DIFC Courts have always respected that the court with competence to annul an award rendered in onshore Dubai is the Dubai Court, the DIFC Courts have exclusive jurisdiction to hear applications to enforce those arbitral awards within the DIFC. Accordingly, both courts have separate but concurrent jurisdiction to determine certain issues relating to the award, be it annulment in Dubai or enforcement in the DIFC.

A similar decision was handed down in the JJC's second case, *Dubai Water Front LLC v Chenshan Liu*, which concerned a Dubai International Arbitration Centre (DIAC) award against an onshore company with no presence or assets in the DIFC, that the DIFC Courts had ordered be recognised and enforced. Echoing its decision in the *Daman* case, the JJC ordered that the case be remitted to the Dubai Courts and that the DIFC Courts cease entertaining the case.

The DIFC Courts' jurisdiction to enforce foreign awards and judgments

The effect of these JJC judgments on the DIFC Courts' ability to enforce foreign arbitral awards and judgments is less clear. There is some suggestion that the JJC would adopt a different approach when considering the enforcement of foreign arbitral awards rendered outside of Dubai.

The reasoning in *Daman* suggests that the JJC would adopt a different approach when considering the enforcement of arbitral awards rendered outside of Dubai. The JJC stated that: "There is no similarity between this case and the case when it sought to enforce or annul a foreign arbitral award in several jurisdictions pursuant to the New York Convention 1958".

In the JJC's third case, *Marine Logistics Solutions LLC and another v Wadi Woraya LLC and others*, *Woraya* had obtained an award against *Marine Logistics* in a London seated arbitration and sought to enforce the award in the DIFC Courts despite *Marine Logistics* being located in onshore Dubai and having no connection to the DIFC. *Marine Logistics* applied to the JJC to determine whether the DIFC Courts or the Dubai Courts had jurisdiction to hear the enforcement action. The JJC rejected the application because no parallel application for annulment had been made to the Dubai Courts.

A similar decision was reached by the JJC in *Gulf Navigation Holding PJSC v DNB Bank ASA* which concerned a foreign judgment rather than a foreign award. In that case, the JJC clarified that to trigger the JJC's jurisdiction, there had to be some conflict of jurisdiction – whether positive (i.e. both courts seizing jurisdiction or issuing conflicting judgments) or negative (both courts abandoning jurisdiction). (See also *Emirates Trading Agency LLC v Bocimar International N.V.*, which involved recognition of English court judgments and London-seated arbitral awards.)

Unfortunately, none of these cases involved instances of an actual conflict of jurisdiction and so offer limited insight into the JJC's approach where parallel proceedings (enforcement and annulment).

In *Gulf Navigation Holding P.S.C v Jinhai Heavy Industry Co. Limited*, the JJC considered alleged conflict of jurisdiction between the DIFC Courts and the Dubai Centre for Amicable Settlement of Disputes (Centre). The Centre was launched in 2009 by the Department of Economic Development in co-operation with the Dubai Courts to provide a mediation alternative to litigation. Certain disputes must be

referred to the Centre for mediation before commencing litigation, but parties can also otherwise elect to use the Centre. *Jinhai* had obtained an award against *Gulf Navigation* in a London-seated arbitration and applied to the DIFC Courts to recognise and enforce that award under the DIFC Arbitration Law (article 42(1) provides that DIFC Courts are bound by international enforcement instruments that bind the UAE, which includes the New York Convention). But approximately eight months prior, *Gulf Navigation* had filed an application to the Centre. The JJC found that the Dubai Courts were competent to hear the case because the Centre is "attached" to the Dubai Courts. The majority concluded that the DIFC Courts should cease to entertain the case and that "[...] this case is not similar to cases in which the Courts apply the provisions of the New York Convention 1958 because the two courts are in one Emirate, viz, Dubai Emirate)."

Again, all three DIFC Court judges on the JJC dissented. In their dissenting opinion they disagreed with the majority's finding of a principle of general jurisdiction according precedence to the Dubai Courts in the event of a jurisdictional conflict between the Dubai and DIFC Courts. They held that nothing in the prevailing legislation indicates that the onshore Dubai courts are to be perceived as hierarchically superior in jurisdiction to the DIFC Courts. Both courts qualify, constitutionally speaking, as part of the Dubai Court system with defined jurisdictional limits. Further, the majority's conclusions on the New York Convention were incorrect statements of international law – the convention can be enforced in different parts of countries (such as different states in the USA). Moreover, if the DIFC Courts were prevented from enforcing foreign awards, it would place the UAE in breach of its obligations under Article

III of the New York Convention, which requires all Contracting States to the Convention to must enforce foreign awards. The dissenting opinion also expressed concern that Gulf Navigation’s application to the Centre violated the important fundamental principles of the New York Convention.

Conclusions

The implementation of Decree 19 and establishment of the JJC has served to restrict the DIFC Court’s developing conduit jurisdiction. At present there appears to still be room for the DIFC Courts to act as a conduit jurisdiction in relation to the recognition of foreign awards and judgments, as long as there are no ongoing parallel proceedings before the Dubai Courts. In practice, this will often be the case given that the appropriate forum for an appeal or annulment application would be the courts of the seat of the arbitration or court that handed down the judgment (and not the Dubai Courts).

The JJC’s decisions to date are, however, regrettably short and could benefit from more clearly defined principles, in particular any finding that the Dubai Courts have “general jurisdiction”. Additionally, the application of such a principle has not been consistent.

It is perhaps encouraging to note that JJC decisions are not binding on future JJC decisions, and so there is a chance that going forward, the JJC’s assumption of a general jurisdiction of the Dubai Courts may be substituted.

Finally, the lack of a filtering system for applications and the longer-than-anticipated turnaround time for JJC decisions may have an impact on the international community’s view of the DIFC as a route to enforcing arbitration awards in the UAE. Given the pre-existing concerns with enforcement before the Dubai Courts, this may have an impact on the attractiveness of the UAE itself as a dispute resolution centre.

The views expressed in this article are the views of the authors and not necessarily the views of Norton Rose Fulbright.

For more information contact:



Deirdre Walker
Partner, Dubai
Tel + 971 4 369 6300
deirdre.walker@nortonrosefulbright.com



Aarti Thadani
Associate, Dubai
Tel +971 4 369 6323
aarti.thatani@nortonrosefulbright.com

A global round-up of new arbitral rules and impending updates to existing rules

By Marie Kelly, James Rogers, Alfred Wu, Patrick Bourke, Paul Stothard, Cara Dowling, Kevin Hong, Simon Goodall

In recent months, a number of arbitral institutions have launched, or have announced the imminent launch, of updates to their rules of arbitration. In this article, we look at these changes and highlight key points of interest.

New London Maritime Arbitration Association (LMAA) Terms

The London Maritime Arbitration Association (LMAA) Terms 2017 are now in effect for appointments on or after May 1, 2017. These seek to improve the time and cost efficiency of the LMAA while maintaining the LMAA's 'light touch' approach. The LMAA has also released revised versions of the LMAA Small Claims Procedures and the LMAA Intermediate Claims Procedure.

Of most interest are new terms addressing: appointment of arbitrators where either a party fails to appoint its party-appointed arbitrator in time or the parties are unable to agree on the sole arbitrator; obligations to make the arbitration process as cost effective as possible; powers to order security for costs; and increasing the maximum level for small claims to US\$100,000.

Dealing first with the new terms addressing appointment of arbitrators; where one party has failed to appoint its arbitrator in time, the non-defaulting party (having duly appointed its arbitrator) may give seven days' prior written notice to the other party to

appoint an arbitrator, failing which the non-defaulting party's arbitrator will be appointed the sole arbitrator and their award shall be binding on both parties.

There is also a new term which provides that where the parties have agreed to appoint a sole arbitrator but fail to reach agreement within 14 days of calling for arbitration, the arbitrator can be appointed by the President of the LMAA.

As for costs; the new terms emphasise the importance of cost efficiency and impose an express obligation on the parties and the Tribunal to actively consider ways to make the arbitral process as cost-effective and efficient as possible. They also strengthen tribunals' powers in respect of costs, including the power to require security for the tribunal's own costs.

The new terms have been welcomed by the maritime arbitration community.

New DIS Arbitration Rules

The German Institution of Arbitration (*Deutsche Institution für Schiedsgerichtsbarkeit*, DIS) has implemented major changes to the DIS

Arbitration Rules. These are the result of extensive consultation over the last two years.

The German Institution of Arbitration has implemented major changes to the DIS Arbitration Rules.

The updated rules continue to have a focus on supporting early settlement, but also represent an attempt to modernise DIS arbitrations implementing widely used best practices under comparable regimes. The rules are designed to assist international and domestic parties, whilst retaining certain key elements linked to civil law proceedings. Key motivations behind the revisions were to enhance the efficiencies afforded by arbitration under the DIS Rules, and to provide a modern, non-bureaucratic flexible system in line with comparable arbitral regimes.

Highlights of the amendments include

- A renewed focus on efficient conduct of the arbitration, particularly evident with the implementation of shorter deadlines, including reducing the time for appointment of arbitrators; new early filing rules; and a shorter indicative time limit for the return of the award which requires the tribunal to finalize its award “in principle within three months after the last hearing or the last authorized Submission.”
- More detailed rules relating to more complex proceedings. The amended rules include provisions for multi-contract and multi-party proceedings within a single arbitration providing relevant agreements are in place, allow for the joinder of additional parties through the submission of an additional Request for Arbitration prior to the appointment of the tribunal and allow for the consolidation of proceedings.
- The creation of the “Arbitration Council”. The newly constituted institution will be competent to rule on a variety of issues including the appointment of a sole arbitrator in instances of non-party agreement as to the composition of an arbitral tribunal, the authority to handle challenges to an arbitrator (previously this function rested with the tribunal itself under the 1998 rules), and the fixing and reduction of arbitrator fees.

It should be noted that whilst the new rules implement welcome efficiencies, there are some notable differences to comparable regimes. These include no provisions for the appointment of an emergency arbitrator, no mechanism for the expedited formation of a tribunal, and no opt in system for expedited procedures where lower sums in dispute are concerned.

A non-final version of the English rules can be accessed [here](#).

Proposed amendments to the Hong Kong International Arbitration Center (HKIAC) Rules

The Hong Kong International Arbitration Centre (HKIAC) is proposing amendments to the 2013 version of its Administered Arbitration Rules (2013 Rules).

The HKIAC does not contemplate a wholesale revision, rather, the proposed amendments are aimed at addressing practical problems arising from the surge of international arbitrations and enhancing efficiency in arbitral proceedings.

Highlights of the proposed amendments include

- The use of secured online repositories for the submission and storage of any written communications in an arbitration.
- Introduction of multilingual procedures for bilingual or multilingual arbitration so that where all members of the arbitral tribunal are proficient in all languages of the arbitration, the arbitration may be conducted in one language only.
- New provisions requiring disclosure when there is a third party funding arrangement in place and allowing disclosure of information to a third party funder which is otherwise confidential (these mirror the changes brought about by the Arbitration and Mediation Legislation (Third Party Funding) (Amendment) Ordinance 2017).
- New provisions allowing the tribunal to hear multiple proceedings concurrently, or one immediately after another, or stay any of those proceedings until after the

determination of any other, in situations where a common question of law or fact arises and the arbitrations have not been consolidated.

The proposed amendments are now at the public consultation stage.

Asian International Arbitration Centre launches

The Kuala Lumpur Regional Centre for International Arbitration (KLRCA) has rebranded and relaunched as the Asian International Arbitration Centre (AIAC). The AIAC has adopted new arbitral rules, based largely on the UNCITRAL Arbitration Rules 2013, and published a new model arbitration clause. Key features of the new AIAC rules include provisions dealing with expedited appointment of emergency arbitrators, new powers to consolidated proceedings, and amendments to the provisions dealing with joinder and technical review of awards.

The AIAC administers international commercial arbitration under its AIAC Rules as well as offering fast track arbitration and Shariah (Islamic law) arbitration. In addition AIAC offers mediation, adjudication, and resolution of domain name complaints. Its facilities are also available for investment arbitration – it has arrangements with both the ICSID and the PCA, and AIAC is itself an administering authority under the 2009 ASEAN Comprehensive Investment Agreement.

Proposed amendments to Dubai International Arbitration Center (DIAC) Rules

The Dubai International Arbitration Centre (DIAC) has recently announced its intention to launch a new set of Arbitration Rules in 2018 (the New Rules) to replace the existing 2007 Rules. Although the New Rules are yet to

be published, DIAC has released details of its proposed changes. These include

- The default seat of arbitration will be the Dubai International Financial Centre (DIFC) rather than onshore Dubai. This will give the DIFC Courts supervisory jurisdiction over parties who do not specify the arbitral seat in their contracts, which may make it more difficult for unsuccessful parties to challenge awards. It may also make enforcement easier, given that the DIFC Courts can convert an award rendered in a DIFC-seated arbitration into a DIFC Court judgment and refer that judgment to the Dubai Courts for automatic ratification and execution. That said, it remains to be seen the extent to which the ready and smooth enforcement of a DIFC-seated award and subsequent court judgment before the onshore courts will be curtailed by the Judicial Committee which was established pursuant to Decree 19 of 2016. (See our [related article in this issue](#).)
- Awards will be deemed to have been rendered at the seat of arbitration even if the tribunal is not physically present there at the time the award is signed. This addresses Article 212(4) of the UAE Civil Procedures Law, which provides that an award must be “issued” in the UAE in order to be regarded as a domestic award.
- The tribunal will have the power to award legal costs, including fees for legal representation. The 2007 Rules made no reference to the recovery of such costs and the Dubai Court of Cassation subsequently held (in case number 282/2012) that the tribunal did not have authority to award legal costs without the parties’ express agreement.
- Parties will be able to apply for arbitration proceedings to be conducted on an expedited basis. This may apply if the amount in dispute is less than AED 2 million or in cases of exceptional urgency. Expedited cases will generally be decided by a sole arbitrator on the basis of documentary evidence only and within three months from the date that the tribunal receives the file.
- The DIAC Executive Committee will have the power to appoint an emergency arbitrator upon the application of one of the parties prior to the constitution of the tribunal. The emergency arbitrator, who will be appointed within three days of receipt of the application and accompanying fee, will have the power to order or award any interim relief deemed necessary, such as attachment orders against a debtor’s assets.
- Tribunals will be entitled to impose sanctions on parties and their counsel for misconduct, including attempts to frustrate the arbitral process. It is unclear, however, how tribunals would have jurisdiction/authority over counsel in respect of such sanctions.
- DIAC will be able to publish awards, either with the consent of the parties or in redacted form to preserve the confidentiality of the parties.

The New Rules, which are intended to address some of the common issues encountered in UAE-seated arbitrations, are currently expected to be enacted during the first quarter of 2018. It remains to be seen how some of these changes will apply in practice, but their issuance is viewed as a positive step.

UAE set to implement new arbitration law

In a welcome move for businesses and arbitration practitioners in the Middle East, the United Arab Emirates’ advisory parliament, the Federal National Council, has recently approved a new arbitration law for the UAE.

It is anticipated that the new arbitration law will be passed later this year, once it has been approved by the President of the UAE and presented to the Federal Supreme Council for ratification.

The new arbitration law will replace Articles 203 to 218 of the Civil Procedures Law. Although the contents of the new arbitration law are yet to be published, it is expected that it will be largely based on the UNCITRAL Model Law, a model for international commercial arbitration that has been adopted successfully in many jurisdictions worldwide. The new arbitration law will apply to all arbitration proceedings in the UAE except those seated in the Dubai International Financial Centre (DIFC) or the Abu Dhabi Global Market (ADGM), autonomous free zones within the UAE that have their own courts and arbitration laws.

If, as hoped, the new arbitration law specifies clear and limited grounds for setting aside and challenging awards and provides procedures for expediting the recognition and enforcement of awards in the local courts, it will help cement the UAE’s position as a seat of choice within the region.

The authors would like to thank Matthew Gregson and Santiago Lev, trainees in the London office, for their contributions to this article.

EU Court rejects ISDS provisions in intra-EU BITs

Once BITten, twice shy

By James Rogers and Cara Dowling

In this article, we review breaking news in investor-State arbitration: the decision of the Court of Justice of the European Union that investor-State dispute settlement provisions in intra-EU bilateral investment treaties are incompatible with EU law. We consider the ramifications of that decision, including Spain’s copy-cat challenge to the ISDS provisions in the Energy Charter Treaty.

A somewhat unexpected outcome

Continuing the shake up within the EU of investor-State dispute settlement (ISDS), the Court of Justice of the EU (CJEU) in *Opinion C284-16 (Slovak Republic v Achmea BV)* has held that ISDS provisions in bilateral investment treaties (BITs) between EU Member States (intra-EU BITs) are incompatible with EU law. This decision will have come as a blow to many in the investment arbitration sphere, given that as recently as September 2017, Advocate-General Wathalet came to the **opposite conclusion** in support of ISDS. Opinions of the CJEU’s Advocate-Generals are not binding on the Court, but are often followed, which is why the CJEU’s contrary conclusion was somewhat unexpected.

The CJEU’s primary objection was to arbitral tribunals ruling on matters of the interpretation or application of EU law or treaties.

The CJEU concluded that the Treaty on the Functioning of the European Union (TFEU) “must be interpreted as precluding” provisions in international agreements between EU Member States that allow investors to bring proceedings against an EU Member State before arbitral tribunals. The CJEU’s primary objection was to arbitral tribunals ruling on matters of the interpretation or application of EU law or treaties – the CJEU is granted primacy in that

regard by the TFEU and it acts as ultimate guardian of the uniformity of EU law across the EU. Advocate-General Wathalet had avoided this issue by opining that tribunals could (indeed, must) refer any question of the interpretation or application of EU law to the CJEU, like any domestic EU court. The CJEU disagreed, finding that tribunals established on the basis of intra-EU BITs are different from domestic courts and are not able to refer questions to the CJEU for a preliminary ruling. As awards are generally not subject to review by EU domestic courts, a referral on a point of EU law could not be obtained that way either. The CJEU reasoned that such tribunals therefore undermine the principle of autonomy of EU law and threaten the uniform application of EU law across the EU, concluding that ISDS provisions in intra-EU BITs are incompatible with EU law.

The full impact of the CJEU's decision is not yet clear

The CJEU's conclusion will have a wide ranging impact. There are over 190 intra-EU BITs – EU investors will no longer be able to exercise rights granted to them under those treaties to bring proceedings against infringing EU Member States. Less clear is the impact on ongoing, or indeed concluded, arbitrations under intra-EU BITs. Ongoing arbitrations will certainly face jurisdictional challenges from the respondent EU Member States, but awards already rendered might also face challenges, particularly if still at the enforcement stage. Adding to the confusion, such challenges – within the arbitration process or before the courts – may result in different outcomes depending on the location of the seat of the arbitration and the tribunal/courts' view of whether they are bound to follow decisions of the CJEU.

... Will they renegotiate those provisions or terminate their intra-EU BITs entirely? The latter certainly seems a possibility.

It is also not clear what State parties to intra-EU BITs must now do in response to the CJEU decision – will they renegotiate those provisions or terminate their intra-EU BITs entirely? The latter certainly seems a possibility. The European Commission (EC) has long been hostile to intra-EU BITs and views them as incompatible with EU law. The EC has on a number of occasions gone as far as to intervene in investor-State arbitrations to object (albeit, unsuccessfully) to the applicability of

intra-EU BITs. It has also demanded that EU Member States terminate their intra-EU BITs (with mixed responses) and brought infringement proceedings against a number of EU Member States on grounds that their intra-EU BITs are in violation of EU law. It is likely that the *Achmea* decision will invigorate the EC's campaign and undermine continuing EU Member State resistance.

EU investors investing within the EU will lose important protections

The EC's campaign has faced criticism because, particularly in respect to investor-State dispute resolution, there is no adequate alternative in place. The EU's controversial proposal for an investment court system (ICS) is a long way off from being agreed let alone implemented. Indeed a challenge to the ICS, also on grounds of incompatibility with EU law, is before the CJEU. That leaves EU investors with no option but to seek recourse for illegal EU Member State conduct before the State's own courts. For obvious reasons, for most, that is a less than desirable option.

This is not a theoretical issue. Despite a common misconception that investor-State disputes happen only in emerging markets and rarely involve Western European States, disputes involving EU investors and/or EU Member States are not uncommon and have been on the rise. ICSID's Caseload Report with a special focus on investor-State arbitration in the EU (as of April 30, 2017) recorded that 17 percent of cases registered with ICSID (i.e. some 105 cases) involved an EU Member State respondent party – an increase from 12 percent as reported in ICSID's 2014 EU Caseload Report. Spain had the highest number of cases (28 percent), followed by Romania and Hungary (both 12 percent). The ICSID EU Caseload Statistics do not specify how many were brought under intra-EU

BITs, but according to UNCTAD's ISDS Navigator, intra-EU disputes accounted for one-fifth of all investment arbitrations initiated in 2017. UNCTAD also reported that by the end of 2017, the total number of known intra-EU investment arbitrations was 168 – again, representing almost 20 percent of all known investment arbitrations. That is a significant proportion.

According to ICSID's 2017 EU Caseload Report, the most common grounds for establishing jurisdiction were BITs (56 percent) and the Energy Charter Treaty (ECT) (43 percent). This is a notable rise in ECT disputes involving the EU over the last three years – ICSID's 2014 EU Caseload Report reported that 25 percent of cases were brought under the ECT. The increase is largely due to claims brought following EU Member States' withdrawal of renewable energy subsidies in the wake of the financial crisis. A more detailed analysis of the ICSID's EU Caseload Report can be found in our article in this issue [Investor-state disputes in the EU – some statistical observations](#).

The Energy Charter Treaty is also in the hot seat

The CJEU's decision did not expressly comment on the ECT, but there is a risk that by analogy ISDS provisions in the ECT also will be deemed incompatible with EU law.

Indeed, hot on the heels of the *Achmea* decision, Spain has applied to reopen two ICSID arbitrations (in which proceedings had concluded but the awards had not yet been handed down) in order to bring challenges on precisely that basis. Irrespective of the tribunal's decision in Spain's arbitrations, it is likely that more challenges on similar grounds will follow, again before tribunals and the courts of the seat and/

or enforcement. It is worth noting that, reportedly, the EC intervened or sought leave to intervene in a number of ECT cases involving EU investors and EU Member States – its view is the ISDS provisions in the ECT should be read as applying only to extra-EU claims; in circumstances where EU investors are bringing proceedings against other EU Member States, the ECT’s ISDS provisions would be incompatible with EU law. No doubt the question ultimately will be referred to the CJEU.

A silver lining

As a final aside, it is not bad news for everyone. The CJEU’s decision does not impact investment treaties between non-EU States and EU Member States, nor does the uncertainty in respect of the ECT extend to extra-EU proceedings. As a result, there is likely to be a benefit for non-EU jurisdictions. ISDS provisions in BITs were introduced as a mechanism for investors to mitigate political risk of investing in foreign States. EU investors investing within the EU are now facing a lack of such investment protections and/or effective dispute resolution mechanisms. This might increase the attractiveness of foreign direct investment by EU investors into non-EU States and/or the attractiveness of non-EU States for structuring investments into Europe. Likewise, should courts of non-EU States decide that they are not bound to follow the CJEU’s decision in *Achmea*, it might increase the attractiveness to investors of those States as seats of arbitration.

For more information contact:



James Rogers
Partner, London
Tel +44 20 7444 3350
james.rogers@nortonrosefulbright.com



Cara Dowling
Senior knowledge lawyer, London
Tel +44 20 7444 5141
cara.dowling@nortonrosefulbright.com

Investor-State disputes in the EU

Some statistical observations

By Holly Stebbing and Cara Dowling

There is a common perception that investor-State disputes tend to happen only in emerging markets. To dispel this misconception, we analyse the most recent statistics available from the International Centre for Settlement of Investment Disputes (ICSID) Secretariat concerning investor-State disputes brought against European Union (EU) Member States and/or brought by investors from the EU.

ICSID Caseload Report with a special focus on investor-State arbitration in the EU as of April 30, 2017 offers an interesting overview of disputes involving EU Member States and investors, including the number of cases registered against each Member State, the number of cases brought by EU investors, the type of cases registered, the basis of consent to ICSID jurisdiction, and the economic sectors involved in each instance.

In this article, we review the key statistics from the report, compare prior ICSID Caseload Reports to ascertain trends, and discuss economic factors that have led to increases in ICSID cases involving EU Member State parties or EU investors.

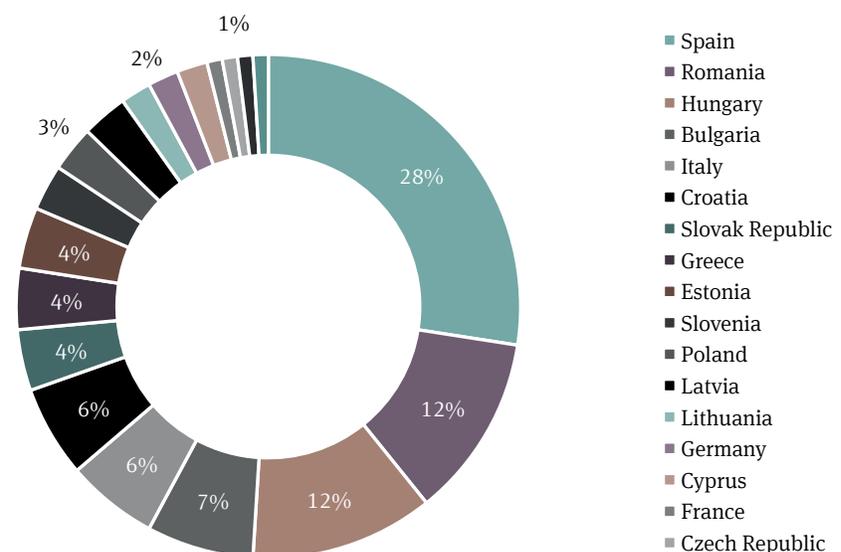
EU Member States feature prominently in investor-State disputes

Despite the perception that investor-State disputes tend to happen elsewhere, in fact in 2017 a significant number of investor-State cases included EU Member States: 105 of the 608 cases registered

with ICSID (17 percent) involved an EU Member State as respondent to the claim. Spain had the highest number of recorded ICSID cases against it (28 percent), followed by Romania (12 percent) and Hungary (12 percent).

By comparison, ICSID's 2014 EU Caseload Report recorded only 12 percent of cases as being against EU Member states. The most dramatic spike is seen in the number of cases against

ICSID cases involving a State party from the EU



*Denmark, Finland, Ireland, Luxembourg, Malta, Netherlands, Portugal, Sweden and the United Kingdom have not been involved as a Respondent State Party.

Spain, which increased from just over 11 percent to 28 percent of total cases registered. This increase is primarily due to the Spanish government withdrawing the incentives offered to new investors in wind energy, solar energy and waste incineration after the global recession hit its public finances. EU Member States such as Spain, the Czech Republic and Italy had strongly promoted policies subsidising investments in renewable energy pursuant to the Energy Charter Treaty (ECT) objectives, but had to scale back those commitments because they could not meet the demand for subsidies after the economic crisis. In response, several groups of investors commenced arbitration against those States under the ECT challenging the withdrawal of their renewable energy subsidies.

Most EU-related disputes involved the energy and extractive industries

By far the sector most represented in claims against EU Member States was the Electric Power and Other Energy sector with 44 percent of the cases registered involving that sector. The percentage of Electric Power and Other Energy sector disputes against EU Member States has risen dramatically since 2014 from 24 percent, again due to the ECT claims brought against EU Member States in response to the withdrawal of renewable energy subsidies. Similarly, 20 percent of cases brought by EU investors related to this sector.

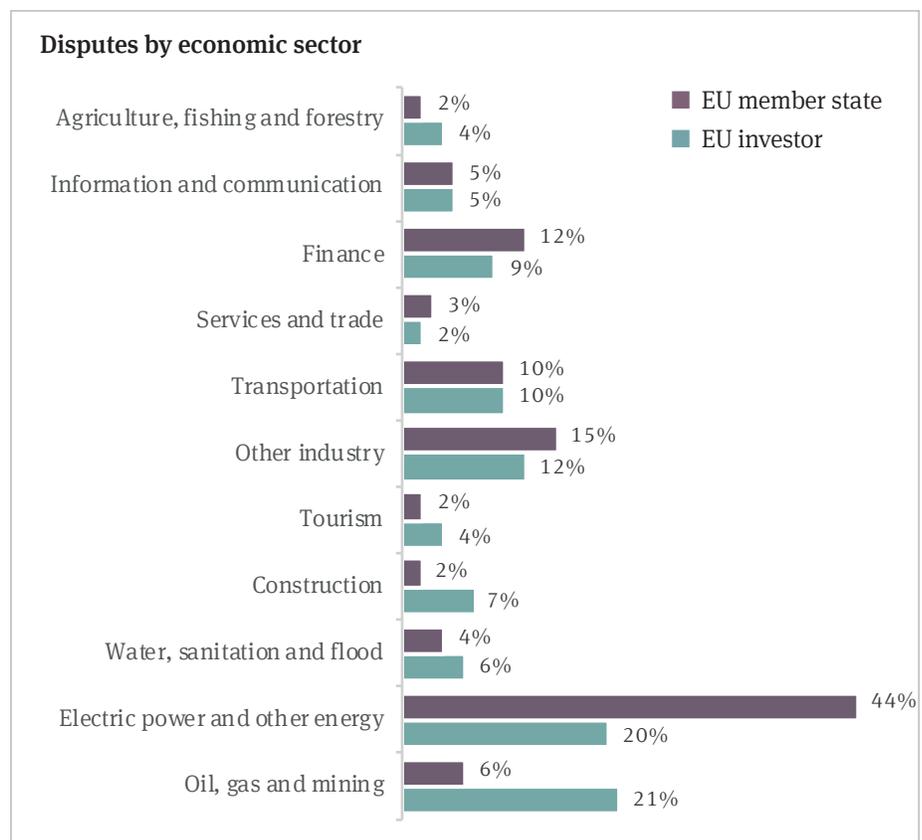
Oil, Gas and Mining also featured heavily for EU investors (21 percent), although unsurprisingly not in respect of cases brought against EU Member States: only six percent of claims against EU Member States related to this sector.

The majority of claims were brought under bilateral investment treaties or the Energy Charter Treaty

The vast majority of all registered cases (97 percent) were brought under the ICSID Convention. In cases brought against EU Member States, the most common grounds for establishing ICSID jurisdiction were either bilateral investment treaties (BITs) (56 percent) or the ECT (43 percent). Compared to the figures in the ICSID’s 2014 EU Caseload Report, ECT disputes have risen

considerably from 25 percent. Again, this spike is principally attributable to claims brought in response to the withdrawal of renewable energy subsidies.

For cases brought by EU investors, the basis of consent was predominantly BITs (61 percent), with the ECT representing a smaller proportion (15 percent), followed by investment contracts (14 percent) and host-State investment laws (10 percent).



Disputes were more frequently resolved by a final award rather than a settlement

Settlement continues to play an important role in resolving investor-State disputes. 22 percent of cases against EU Member States were settled by the parties or discontinued before a final determination. This has decreased somewhat, with ICSID's 2014 EU Caseload Report recording that 36 percent of cases settled or were discontinued.

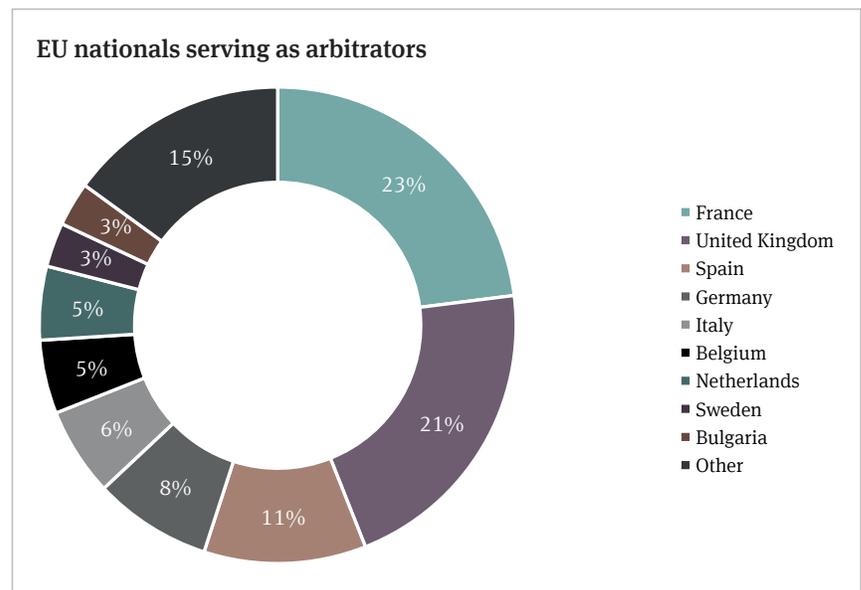
Of the remaining 78 percent of claims against EU Member States that were resolved by a final award, 47 percent of cases were dismissed in full, whereas 31 percent of cases were upheld in part or full. Jurisdiction was declined in 22 percent of cases.

In comparison, 35 percent of cases brought by EU investors were settled by the parties or discontinued before a final determination. Of the remaining 65 percent of cases that fell to be decided by a tribunal, 25 percent were dismissed in full, whereas 49 percent of investors' claims were upheld in part or full. Jurisdiction was declined in a similar number of cases (26 percent).

Arbitrators from the UK and France were chosen to preside over a significant proportion of cases

In approximately 72 percent of arbitral appointments made in ICSID cases, the parties selected the arbitrators, with ICSID appointing only 28 percent. In both scenarios, arbitrators from EU Member States were regularly appointed in a large proportion of investor-state disputes.

43 percent of all arbitral appointments in ICSID cases involved nationals from an EU Member State, a level that has been consistent for the last three years. Nationals from France and the UK continued to be the most commonly appointed, followed by Spain, Germany, Italy, Belgium and the Netherlands.



Considering ICSID’s statistics in the context of proposed reforms of ISDS

Bilateral or multi-lateral investment treaties (and sometimes free trade agreements) often offer important protections to foreign investors designed to help mitigate political risk, including detrimental regulatory change. The number of claims brought against EU Member States, evidences the fact that political risk is not an issue solely found in emerging markets. If an investment is structured appropriately, investors into the EU (whether from outside the EU or other EU Member States) can benefit from these important protections, as can EU Member States given that the existence of such protections, in turn, helps promote foreign investment.

Arguably the most important protection is the right of foreign investors to bring proceedings against a host-State in neutral forum.

Arguably the most important protection is the right of foreign investors to bring proceedings against a host-State in a neutral forum (generally, international arbitration seated in a neutral State). Without that, the only recourse available to foreign investors would be to seek to bring a claim before the domestic courts of the host-State, or hope to persuade their home State to seek a diplomatic State to State resolution. Neither of those options historically proved particularly effective or satisfactory for foreign investors, hence the development of ISDS. Yet despite this, a number of

States across the globe are now seeking to modify or remove these protections. These reforms are largely a reaction to the backlash against ISDS by critics of the system.

A number of States have terminated their investment treaties or sought to amend them to remove ISDS provisions. The EU plans significant reforms to ISDS (as discussed in a prior article in *issue 8* of the *International arbitration report*) and a number of other States are following suit. The level of investor-State disputes involving EU Member States and/or EU investors puts into context how significant these reforms will be to both EU investors and investors into the EU.

ISDS is admittedly not a perfect mechanism (though it is hard to find any perfect dispute resolution mechanism) but most critically for investors, as things currently stand, there is no effective, viable alternative and reforms proposed to date seem likely to bring their own issues. Only time will tell if in the mid to long term this will impact foreign investment into those States – whether by reducing investment or making it less profitable as investors are forced to mitigate the risk of their investment in other ways.

The key takeaway for foreign investors, however, is that these are important developments which will have a direct impact on them. It is important that investors follow these trends, and ensure that they have a voice in the ongoing debate about changes to the current system for resolving disputes between foreign investors and the host-States that they are investing in.

With special thanks to Aimee Denholm, Knowledge assistant, for her contribution to this article.

For more information contact:



Holly Stebbing
Partner, London
Tel +44 20 7444 5143
holly.stebbing@nortonrosefulbright.com



Cara Dowling
Senior knowledge lawyer, London
Tel +44 20 7444 5141
cara.dowling@nortonrosefulbright.com

Contacts

International arbitration, Co-heads



Mark Baker
Houston



Pierre Bienvenu, Ad. E.
Montréal

Canada

Calgary

Mary Comeau
Clarke Hunter, QC

Montréal

Martin Valasek

United States

Houston

Kevin O’Gorman

Washington DC

Matthew Kirtland

Latin America

Caracas

Ramón Alvins

Europe

Amsterdam

Yke Lennartz

London

Patrick Bourke

Marie Kelly

Sherina Petit

James Rogers

Irina Tymczyszyn

Paris

Christian Dargham

Moscow

Yaroslav Klimov

Middle East

UAE

Paul Stothard

Deirdre Walker

Africa

South Africa

Andrew Robinson

Asia

China/Hong Kong

Alfred Wu

Singapore

KC Lye

Australia

Brisbane

Ernie van Buuren

Perth

Dylan McKimmie

Global resources

Norton Rose Fulbright is a global law firm. We provide the world's preeminent corporations and financial institutions with a full business law service. We employ 4000 lawyers and other legal staff based in more than 50 cities across Europe, the United States, Canada, Latin America, Asia, Australia, the Middle East and Africa.

People worldwide

>7000

Legal staff worldwide

>4000

Offices

58

Key industry strengths

Financial institutions

Energy

Infrastructure, mining
and commodities

Transport

Technology and innovation

Life sciences and healthcare



Our office locations

Europe		Latin America		Africa	
Amsterdam	Milan	Bogotá		Bujumbura ³	
Athens	Monaco	Caracas		Cape Town	
Brussels	Moscow	Mexico City		Casablanca	
Frankfurt	Munich	Rio de Janeiro		Dar es Salaam	
Hamburg	Paris	São Paulo		Durban	
Istanbul	Piraeus			Harare ³	
London	Warsaw			Johannesburg	
Luxembourg				Kampala ³	
				Nairobi ³	
United States		Asia Pacific		Middle East	
Austin	New York	Bangkok		Bahrain	
Dallas	St Louis	Beijing		Dubai	
Denver	San Antonio	Brisbane		Riyadh ²	
Houston	San Francisco	Canberra			
Los Angeles	Washington DC	Hong Kong			
Minneapolis		Jakarta ¹			
		Melbourne			
		Port Moresby (Papua New Guinea)			
		Perth			
		Shanghai			
		Singapore			
		Sydney			
		Tokyo			
Canada					
Calgary	Québec				
Montréal	Toronto				
Ottawa	Vancouver				

1 TNB & Partners in association with Norton Rose Fulbright Australia
 2 Mohammed Al-Ghamdi Law Firm in association with Norton Rose Fulbright US LLP
 3 Alliances

Norton Rose Fulbright

International arbitration

At Norton Rose Fulbright, we combine decades of international arbitration experience with a commercial approach to offer our clients the very best chance of determining their disputes promptly, efficiently and cost effectively. Our international arbitration group operates as a global team, regardless of the geographic location of the individual.

We deliver experience across all aspects of international arbitration, from commercial arbitrations to investment treaty arbitrations; skilled advocates experienced in arguing cases before arbitral tribunals, who will oversee the dispute from start to final award; and a commercial approach from a dedicated team experienced in mediation and negotiation and skilled in promoting appropriate settlement opportunities.

Dispute resolution

We have one of the largest dispute resolution and litigation practices in the world, with experience of managing multi-jurisdictional disputes across all industry sectors. We advise many of the world's largest companies and financial institutions on complex, high value disputes. Our lawyers both prevent and resolve disputes by giving practical, creative advice which focuses on our clients' strategic and commercial objectives.

Our global practice covers alternative dispute resolution, international arbitration, class actions, fraud and asset recovery, insolvency, litigation, public international law, regulatory investigations, risk management and white collar crime.

