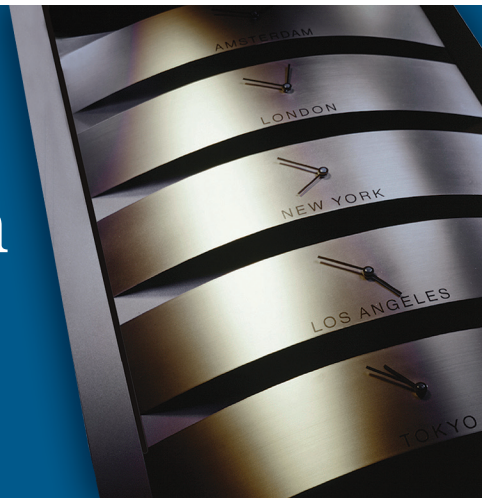


# International Arbitration

## PERSPECTIVES ON ENFORCEMENT



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## About Our Practice

Mayer Brown's International Arbitration practice helps businesses and governmental entities resolve cross-border disputes worldwide. We frequently represent corporations, companies, partnerships, financial institutions, insurers and governmental entities before the leading international arbitration bodies. We also advise our clients on how to reduce risk when entering into cross-border transactions and investments. When disputes arise, we put together lean teams of experienced practitioners who know how to overcome such problems as multiple languages, documents scattered across the globe and differing legal traditions to achieve desired results in a cost-efficient manner. The services we provide fall into two broad categories:

**Advocacy.** In resolving both commercial and investor-state disputes, we apply our extensive experience in marshalling complex evidence, analyzing applicable law and procedures, developing and evaluating alternative strategies and engaging in compelling written and oral advocacy.

**Risk Management.** We help our clients manage the risks inherent in international business operations by drafting effective dispute resolution agreements and structuring transactions to take full advantage of the substantive protections available under the expanding network of international trade and investment treaties. We are particularly adept at ensuring that any disputes will be resolved in a neutral forum, rather than in the courts of the opposing party or host country.

## From the Editors



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In this edition of *International Arbitration Perspectives* we focus on the enforcement of arbitration agreements and arbitral awards. These issues are of increasing significance to our clients, with the value of an arbitration process often judged by its outcome.

In this issue, we present contributions on enforcement from Mayer Brown lawyers located in the United States, EU and Asia.

Concern around the increased risk of sovereign defaults raises questions about the enforcement of arbitration agreements and arbitral awards against states and state entities. This edition contains articles examining the issues encountered when seeking to enforce awards rendered in ICSID arbitrations against a European state or state entity and an analysis of the recent decisions of the English and French courts in *Dallah v. Pakistan* on enforcement of an arbitral award under the New York Convention, as well as hallmarks of effective arbitration agreements with sovereigns and state entities.

This edition also considers the unique risks of enforcing arbitral awards in Sub-Saharan Africa, which will be supplemented by our guide to this topic

to be published in early 2012, as well as the arrangements for the enforcement of arbitral awards between Mainland China, Taiwan and the Special Administrative Regions of Hong Kong and Macau, which takes place outside of the New York Convention.

Finally, we examine the impact of the exclusion of arbitration from the scope of EU Regulation 44/2001, governing the recognition and enforcement of judicial decisions by EU Member States, and the important clarification provided by the English Supreme Court in *Jivraj v. Hashwani* concerning parties' autonomy in the selection of arbitrators in their arbitration agreements.

Our analysis of sovereign immunity issues will be supplemented by a White Paper to be published in early 2012, reviewing sovereign immunity issues in the United States, Germany, Hong Kong and China, Brazil and the UK.

We hope that this issue is helpful in enhancing your awareness of the challenges arising in enforcement of arbitral awards, particularly in the cross-border setting. If you have any questions about matters raised in this edition, please do not hesitate to contact any of the authors or editors. ♦

# London Says “No” and Paris Says “Oui” on Enforcement: Contrasting the English and French Court Decisions in *Dallah v. Pakistan*

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Without effective enforcement, international arbitration can be pointless. The New York Convention<sup>1</sup> (the Convention), widely recognised as the foundation instrument of international arbitration, is the means by which international arbitration awards are given teeth in almost 150 countries around the globe. However, recent decisions on the same issue in the English and French courts have shown that enforcement under the Convention is not as straightforward in practice as it is in principle.

## The Arbitral Award in *Dallah*

Pursuant to a memorandum of understanding signed in 1995, Dallah Real Estate and Tourism Holding Company (Dallah), a Saudi Arabian company, agreed with the Ministry of Religious Affairs for the government of Pakistan to provide housing for Muslim pilgrims who wished to undertake the Hajj. It appears, however, that the agreement containing the relevant arbitration clause was entered into between Dallah and an entity known as the Awami Hajj Trust. In December 1996, following a change of government in Pakistan, the Awami Hajj Trust ceased to exist as a legal entity. Dallah subsequently commenced an International Chamber of Commerce (ICC) arbitration in Paris against the government of Pakistan, seeking compensation.

Dallah appointed Lord Mustill as its arbitrator and the ICC, under its rules,

appointed Justice Dr. Nassem Hasan Shah to act as the Pakistani government's arbitrator, with the highly respected Lebanese arbitrator Dr. Ghaleb Mahmassani appointed to chair the tribunal. In its first partial award, the tribunal held that the Pakistani government was a true party to the agreement and, as such, should be bound by the arbitration clause. The arbitral tribunal rendered the final award in 2006, in which it ordered the Pakistani government to pay approximately US\$20.5 million to Dallah.

## Enforcing the Award in England

Sections 100 to 103 of the Arbitration Act 1996 (the Act) implement the Convention. Section 101(1) emphasises that enforcement of a Convention award is mandatory, subject to limited exceptions (set out in Section 103(2)), which provide a high threshold for denying enforcement, including the incapacity of a party to an arbitration agreement, invalidity of the arbitration agreement and the award being contrary to public policy. The onus of proving such exceptions rests upon the party opposing enforcement and it is not for the claimant to demonstrate that an award does not contravene the Convention.

The Act demonstrates a clear policy in favour of the enforcement of Convention awards, also reflected in the approach of the English courts in

decisions including *Norsk Hydro ASA v. State Property Fund of Ukraine*,<sup>2</sup> where the court said that “there is an important policy interest, reflected in the country’s treaty obligations, in ensuring the effective and speedy enforcement of... international arbitration awards.”

That policy is not, however, without its limits, as demonstrated by the decision of the Supreme Court of the United Kingdom (Supreme Court) in the *Dallah* case.<sup>3</sup> Enforcement of the arbitral award was refused at first instance in this case on the grounds that the government of Pakistan was not a party to the arbitration agreement. This decision was upheld by the Court of Appeal of England and Wales (Court of Appeal), which was followed by an appeal to the Supreme Court. The Supreme Court considered whether enforcement should be refused on the grounds of Section 103(2)(b) of the Act, which provides that “recognition or enforcement of the award may be refused if the person against whom it is invoked proves ... (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made.”

Contrary to the findings of the arbitral tribunal, the English courts found that there was no “common intention” that the government of Pakistan would be party to the agreement and that therefore, as a matter of French law (the law of the seat of the arbitration), the government was not a party to the arbitration agreement and the agreement was not valid for the purposes of Section 103(2)(b) of the Act.

The headline message from this case is that the English courts will deny enforcement under the Convention in circumstances where they do not believe that a valid arbitration agreement exists. Lord Collins emphasised that a party can challenge jurisdiction in the courts of the arbitral seat and can also resist enforcement in the court before which the award is brought for recognition and enforcement on the same basis. These options are not mutually exclusive although “in some cases a determination by the court of the seat may give rise to an issue of estoppel or other preclusive effect in the court in which enforcement is sought.”

## But a Little While Later, in the French Courts ...

A few months later, the Paris Court of Appeal was faced with a request, in parallel proceedings, by the government of Pakistan to set aside the same arbitral award in an application for annulment of the arbitral award under Article 1502(1) of the French Code of Civil Procedure (the Code). This provision allows the setting aside of an award rendered with a seat in France if the award was rendered with no valid arbitration agreement.

Although the hearing before the French court took place after the decision of the Supreme Court described above, the English decision was only mentioned in passing because, under French law and the Convention, the French court, as the court of the seat of the arbitration, was not required to stay its own proceedings in favour of the English action (or even to take this into account).

The French court decision<sup>4</sup> rejected the government’s arguments and held that the arbitral tribunal validly extended the scope of the contract arbitration agreement to Pakistan.<sup>5</sup> This decision is entirely at odds with the English decision but, in both cases, each court applied the law of the seat of the arbitration, French law, to the issue. What, then, was different in the French decision?

Putting aside differences in style, the French decision does not apply legal principles that are any different from those relied on by the English courts. Under French law, the court that reviews the award at the annulment stage (where a party alleges lack of jurisdiction) conducts its own analysis of all relevant factual and legal aspects of the matter before the arbitrators. In other words, French courts, although perceived to be extremely liberal in their approach to international arbitration awards, do review the legal and factual grounds of an award when assessing whether the tribunal had jurisdiction or not. This is in marked contrast to the French court’s liberal attitude when it comes to respecting the principle of “competence-competence” at the outset of the arbitration.

In *Dallah*, the French court analysed all aspects of the case and the various documents relied upon by the arbitrators to reach the conclusion that they had

jurisdiction over the government of Pakistan. In doing so, it applied French case law that was also identified and applied in the English decision. The departure came in the way that the French court assessed the evidence and the weight to be given to certain documents. In finding that the government of Pakistan “behaved as if the contract was its contract” and “as the real Pakistani party in the economic operation,” the French court took a different view on the importance given to pre-contractual negotiations between the parties and the interpretation of key correspondence. In doing so, it came to the same answer as the arbitrators.

From a French perspective, the English decision appears to be more focused on assessing the reasoning of the arbitrators’ award—which it strongly criticised. In contrast, the French court did not address the award at all but instead decided afresh the issue of the extension of the arbitration clause to the Pakistani government.

So where does this leave us? The conflicting decisions may not send those wishing to enforce awards hurrying to Paris and those wishing to evade them rushing to London, but there are two important lessons here. The first lesson is that the choice of enforcing court may be crucial; the second, preemptive lesson, highlights the importance of ensuring that parties to a negotiated agreement actually sign it. It may be obvious advice but it could avoid some difficult future arguments on jurisdiction, not to mention time and costs. ♦

## Endnotes

- 1 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- 2 [2002] EWHC 2120 (Comm)
- 3 [2010] UKSC 46
- 4 Cour d’appel de Paris, 17 février 2011, *Gouvernement du Pakistan—Ministère des Affaires religieuses c. Société Dallah Real Estate and Tourism Holding Company*, n° R/G 09/28533.
- 5 An appeal was recently lodged by the Government of Pakistan before France’s Supreme Court which should issue a decision sometime in 2012



# *Jivraj v. Hashwani*—Arbitrators as Employees? The Supreme Court Puts London Arbitration Back on Track

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The final court of appeal in the United Kingdom, the Supreme Court, recently put to rest a concern about the enforceability of many arbitration agreements under English law when it reversed a decision of the Court of Appeal of England and Wales (Court of Appeal). The decision had invoked the EU Employment Equality (Religion or Belief) Regulations 2003 (the Regulations) to invalidate a contractual requirement that members of an arbitral tribunal be members of a specific religious community.

The intermediate ruling had put in question the validity of provisions in the rules of such institutions as the London Court of International Arbitration (LCIA) and the International Chamber of Commerce (ICC) requiring that, where parties of different nationalities are in dispute, a chairman or sole arbitrator should be of a nationality different from all the parties. By clarifying that arbitrators are not “employees” within the meaning of the EU statute and regulations, the Supreme Court eliminated that concern and elaborated on the role of arbitrators.

## The Arbitration

Mr. Hashwani and Mr. Jivraj are members of the Ismaili community, part of the Shia branch of Islam. In 1981, they established a joint venture to invest in real estate. Their agreement provided that if any dispute arose, it

would be referred to three arbitrators (acting by a majority): one to be appointed by each party and the third arbitrator to be the president of the HH Aga Khan National Council for the United Kingdom. One term in the arbitration agreement provided that “all arbitrators shall be respected members of the Ismaili community and holders of high office within the community.”

In 1998, Mr. Hashwani and Mr. Jivraj decided to terminate their venture and they appointed three members of the Ismaili community to act as a conciliation panel to assist them. Certain matters remained unresolved.

In July 2008, Mr. Hashwani put forward a claim for more than US\$1.4 million plus compound interest, and gave notice to Mr. Jivraj of his appointment of Sir Anthony Colman, a retired High Court Judge who was not of the Ismaili faith, as one of the arbitrators. Mr. Jivraj started proceedings seeking a declaration that the appointment of Sir Anthony Colman was invalid. Mr. Hashwani applied to the court for an order that Sir Anthony Colman should be appointed by the court as sole arbitrator.

## The Issues

Mr. Hashwani contended that the term in the arbitration agreement, that the arbitrators must be members of the Ismaili community, had become void in

2003 by virtue of the Regulations (and, by extension, would be unlawful pursuant to the relevant provisions of the 2010 Equality Act which had replaced the Regulations).

The key issues for determination were therefore:

- Whether a term in an arbitration agreement which provided that all arbitrators must be members of the Ismaili community related to “employment” as defined in, and was discriminatory under, the Regulations;
- If so, whether, in the circumstances of the case, the term fell within the “genuine occupational requirement” exception in the Regulations; and
- Whether, if such a term in an arbitration agreement was void, this made the whole arbitration agreement void.

### Court Decisions Prior to the Supreme Court’s Ruling

Justice David Steel, at first instance, found that the nature of the relationship between arbitrators and the parties appointing them was not one of employment within the meaning of the Regulations. Therefore, the legislation did not apply and the requirement that the arbitrators should be members of the Ismaili community was valid. Even if arbitrators were “employees” for the purposes of the legislation, Justice Steel was prepared to find that the requirement that the arbitrators be members of the Ismaili community was a genuine occupational requirement.

The Court of Appeal, in a decision which caused concern and debate within the international arbitration community, reversed the first instance decision. Finding that the definition of employment in the Regulations included “a contract personally to do any work,” the Court of Appeal concluded that it extended to the terms on which arbitrators acted in arbitration matters and that therefore the appointing party was an “employer” within the meaning of the Regulations.

It therefore held that the restriction of eligibility for appointment as an arbitrator to members of the Ismaili community constituted unlawful discrimination on religious grounds. The Court of Appeal further held that being a member of the Ismaili community

was not a “genuine occupational requirement” for the job.

Finally, the Court of Appeal concluded that the incorporation of the requirement that the arbitrators be Ismaili was so fundamental to the arbitration agreement that if that part of the agreement was unlawful, the whole agreement to arbitrate fell away. It was not possible simply to remove the required characteristics in relation to the arbitrators without fundamentally changing the nature of the parties’ agreement to arbitrate.

### The Supreme Court Judgment

The Supreme Court unanimously restored the first instance decision, finding that arbitrators are exempt from the requirements of anti-discrimination legislation as the relationship between them and the appointing parties is not one of employment.

The Supreme Court focused on the case law from the European Court of Justice which had considered the definition of “worker” for the purposes of the EC Treaty, and the European Union legislation derived from the Treaty. The definition was best set out in the case of *Allenby v. Accrington and Rossendale College* (Case C-256/01) where the Court of Justice had drawn together principles previously laid down in other cases concerning workers and summarized the position as follows:

[T]here must be considered as a worker a person who, for a certain period of time, performs services for and under the direction of another person in return for which he receives remuneration ... [I]t is clear from that definition that the authors of the Treaty did not intend that the term “worker” within the meaning of Article 141(1)EC should include independent providers of services who are not in a relationship of subordination with the person who receives the services.

The importance of the “relationship of subordination” became clear in the context of the wording of the Regulations, since the Regulations provided that “employment” meant employment *under* a contract of service or of apprenticeship or a contract personally to do any work.



In the view of Lord Clarke, who gave the leading judgment, the Court of Appeal had failed to appreciate the significance of the phrase “employment under ... a contract personally to do any work” which, in his view, required a careful analysis of the nature of the contract. Lord Clarke explained that:

[A]lthough the dominant purpose of the contract may be personal work, it may not be personal work under the direction of the other party to the contract ... [I]t is in my opinion plain that the arbitrator’s role is not one of employment under a contract personally to do work. [The arbitrator] is rather in the category of an independent provider of services who is not in a relationship of subordination with the parties who receive his services ...

The Arbitrator is in critical respects independent of the parties. His functions and duties require him to rise above the parties and interest of the parties and not to act in, or so as to further, the particular interests of either party.

Both the ICC and the LCIA had been given permission to intervene in the Supreme Court hearing because their respective rules of arbitration provide that, in cases where parties of different nationalities are in dispute, the Chairman or sole arbitrator should be of a different nationality than the parties. This provision would fall foul of the 2010 Equality Act were it to be held that arbitrators were employees within the meaning of that legislation. Given the Court of Appeal’s conclusion that such provisions could not be severed from the overall agreement to arbitrate without fundamentally changing the nature of the parties’ agreement, the case raised the possibility that agreements to arbitrate pursuant to those rules would, if governed by English law, be invalidated.

On the question of the “genuine occupational requirement” exemption in the Regulations, Lord Clarke referred to the principle of party autonomy in the English Arbitration Act 1996, pursuant to which the parties are free to agree on how their disputes are to be resolved, subject only to such safeguards as are necessary in the public interest. A majority of the Supreme Court held that even if arbitrators were

employees, the “genuine occupational requirement” exception would apply on the facts of this case, such that it would be, not only a genuine, but also a legitimate and justified requirement, to stipulate that an arbitrator be Ismaili.

Counsel for Mr. Hashwani had argued that the application of the relevant “genuine occupational requirement” exception should be interpreted very narrowly and as a matter of necessity. The Supreme Court was not persuaded that the test was one of necessity. The question was whether, in all the circumstances, the provision that all the arbitrators should be respected members of the Ismaili community was legitimate and justified, and the majority found that it was.

In the light of the Supreme Court’s conclusions on the first two issues, it was unnecessary to consider the severability point.

## Conclusions

This judgment, which strongly affirms the principle of party autonomy in arbitration, and the legitimacy of contracting parties’ desire to select tribunals having particular characteristics (such as neutral nationality), is a commercially sensible response to the issues raised.

The Supreme Court’s careful analysis of the nature of the relationship between arbitrators and parties is a helpful one, which recognises the essential difference between the subordinate nature of an employment relationship and the quasi-judicial activities of an arbitrator who is truly self-employed, although entitled to remuneration for the services provided.

From the perspective of users of London arbitration as a preferred method for the resolution of their disputes, the strong line taken by the Supreme Court is of considerable comfort, as it indicates that an issue of this type should not be raised in future, even where the basis of selection between potential arbitral candidates is not based on religious belief but on other parameters. The decision supports and gives certainty to parties that their autonomy in the selection of arbitrators will be upheld in English law. ♦

# Non-Convention Enforcement of Arbitral Awards in Mainland China, Hong Kong, Macau and Taiwan

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## Introduction

The People's Republic of China (PRC) today has three separate legal systems. In addition to the PRC's Central People's Government (CPG), which governs Mainland China, there are two Special Administrative Regions (SARs): Hong Kong (HKSAR) and Macau. SARs have their own constitutions,<sup>1</sup> providing for independent executive, legislative and judicial powers, but they are subject to the sovereign control of the CPG as regards external affairs, including entry into bilateral treaties and multilateral conventions.

The PRC ratified the New York Convention<sup>2</sup> (Convention) in 1987. It was extended to Hong Kong in 1997, after the transfer of Hong Kong's sovereignty by the United Kingdom, and to the Macau SAR on 19 July 2005. As a result, arbitral awards made in the PRC, the HKSAR or the Macau SAR can be enforced in any of the 142 member states of the Convention, and awards from the Convention countries may be enforced in each of these jurisdictions.

However, the Convention is not applicable between these three jurisdictions, as they each form part of a single member state: the PRC. Consequently, enforcement among these jurisdictions must take place under the non-Convention arrangements outlined below.

Taiwan stands out as a highly developed, modern economy that has significant trade ties to other countries but that is not a member state of the Convention. This is because the government of Taiwan was replaced by the PRC at the United Nations in 1971. Although there are no formal constitutional ties between the PRC and Taiwan, they have each entered into arrangements to facilitate trade and commerce, including arrangements for mutual recognition and enforcement of arbitral awards.

## Arrangement between Mainland China and the HKSAR

A Memorandum of Understanding on the Arrangement concerning Mutual Enforcement of Arbitral Awards between Mainland China and HKSAR was signed on 21 June 1999 (the Mainland-HK Arrangement). This provides for reciprocal recognition and enforcement of arbitral awards between Mainland China and the HKSAR and sets out detailed procedures for applications to their respective courts for enforcement.

The Mainland-HK Arrangement applies to:

- Arbitral awards made under the HKSAR's Arbitration Ordinance (which covers all arbitrations where the HKSAR is the "seat" or *lex fori*). Mainland China's Supreme People's

Court (SPC) has clarified that the Mainland-HK Arrangement applies to *ad hoc* arbitral awards made in the HKSAR and also to arbitral awards made in the HKSAR under the rules of the International Chamber of Commerce (ICC) or other foreign arbitration institution;<sup>3</sup> and

- Arbitral awards made pursuant to the Arbitration Law of the PRC by specified arbitral authorities in the Mainland (see below).

An application for enforcement must be justified by the domicile or the presence in the place of enforcement of interests or assets belonging to the party against whom the application is made. This determines the location of the Intermediate People's Court (IPC) where the application may be filed. An application may only be filed with one IPC. In the HKSAR, applications are made to the High Court.

A party may not seek enforcement of the award against assets in Mainland China and in the HKSAR concurrently, unless and until the result of enforcement proceedings in one place proves insufficient to fully satisfy the award.

An application for enforcement must contain the detailed information set out in Article 4 of the Mainland-HK Arrangement, which includes a copy of the arbitral award and the arbitration agreement.<sup>4</sup>

Applications must be made within the limitation period for such proceedings in the place of enforcement. As the limitation period in Mainland China can be as short as six months from the date of the award,<sup>5</sup> it is important to seek the advice of local counsel as quickly as possible. Article 7 of the Mainland-HK Arrangement provides for refusal of enforcement on seven grounds, which correspond to the seven grounds for refusal set out in Articles V(1)(a) to (e) and V(2)(a) to (b) of the Convention.<sup>6</sup>

In relation to the seventh ground for refusal, while Article V(2)(b) of the Convention recognizes refusal when enforcement is "contrary to the public policy," the Mainland-HK Arrangement provides for refusal if the Mainland China court holds that enforcement would be contrary to "the public interests of Mainland China."

In the HKSAR, the Mainland-HK Arrangement is now implemented under the new Arbitration

Ordinance (Cap. 609)<sup>7</sup> (the HK Ordinance). Sections 92 to 95 of the HK Ordinance provide for enforcement of Mainland China awards in accordance with the procedures set out above. Additionally, Section 97 of the HK Ordinance requires the HKSAR's Secretary for Justice to publish, by notice in the Government Gazette, the list of recognized Mainland China arbitral authorities supplied from time to time by those authorities.

## Arrangement between Mainland China and the Macau SAR

The Arrangement on Mutual Recognition and Enforcement of Arbitral Awards Made in the Mainland and Macau SAR (the Mainland-Macau Arrangement) came into force on 1 January 2008. It provides for the reciprocal enforcement of arbitral awards in both jurisdictions. Enforcement of arbitral awards under the Mainland-Macau Arrangement is generally similar to enforcement under the Mainland-HK Arrangement as set out above, subject to the following substantive differences:

- In the Macau SAR, the intermediate courts have jurisdiction over applications for recognition of arbitration awards and the lower courts have the right to enforce arbitration awards.
- Under Article 3 of the Mainland-Macau Arrangement, where there are assets or domiciles in both places, applications for enforcement may be made in the Macau SAR and in Mainland China at the same time. If approved, the courts in each place may seal, detain or freeze the relevant property. The court at the place of arbitration executes payment first. The other court may then proceed to execute after receiving a certificate stating the amount of the award that remains unsatisfied.
- Under Article 3 of the Mainland-Macau Arrangement, the first six grounds for refusal of enforcement correspond with the first six grounds set out in Article V of the Convention. In respect of the seventh ground, the Mainland-Macau Arrangement provides for refusal if enforcement would be contrary to "the basic principles of law or the public interests of Mainland China" or if enforcement would be contrary to the "the basic principles of law or the public order of the Macau SAR."

- Article 9 of the Mainland-Macau Arrangement provides for suspension pending determination of an application for revocation in another jurisdiction, subject to provision of a sufficient guarantee, in terms similar to Article VI of the Convention. Provision is also made for interim protective measures to be taken against the property of the party against whom enforcement is sought, in accordance with the legal provisions of the place of enforcement.

### Enforcement of Arbitral Awards between Mainland China and Taiwan

Although there is no formal bilateral arrangement between Mainland China and Taiwan for mutual arbitration enforcement, each has unilaterally enacted complementary legislation, which provides for reciprocal enforcement.

In 1992, Taiwan enacted the Act Governing Relations between Peoples of the Taiwan Area and the Mainland Area (the Taiwan-Mainland Act). Article 74 of that Act, as subsequently amended, provides for recognition and execution of “any irrevocable civil ruling or judgment, or arbitral award rendered in the Mainland Area” to the extent that it is not “contrary to the public order or good morals of the Taiwan area,” upon application to the Courts of Taiwan. The operative parts of Article 74 of the Taiwan-Mainland Act were made subject to a specific proviso that they would not come into force until such time as Mainland China makes provision for reciprocal recognition and execution of any irrevocable civil ruling, judgment or arbitral award rendered in the Taiwan Area.

In 1998, the SPC promulgated the Regulations Concerning Recognition by People’s Courts of Civil Judgments of Taiwan Courts (the Mainland-Taiwan Regulations), which provide for recognition and enforcement of civil judgments and arbitral awards rendered by Taiwan courts.

The Mainland-Taiwan Regulations were clarified and extended by the Supplementary Regulations Concerning Recognition by People’s Courts of Civil Judgments of Taiwan Courts (the Supplementary Regulations), which came into force on 15 May 2009.

The PRC’s promulgation of the Mainland-Taiwan Regulations and the Supplementary Regulations satisfied the proviso of Article 74 of the Taiwan-Mainland Act, stating that final Mainland China civil judgments and arbitral awards are now recognisable in Taiwan, subject to the “public order or good morals” exception.

A Taiwan arbitral award that is recognised by a PRC court must be given the same effect as a judgment of a Mainland China court. An application for recognition of a Taiwan arbitral award must be submitted to the IPC where the applicant is domiciled or where the assets against which enforcement is sought are located.<sup>8</sup> The Supplementary Regulations extend the limitation period for such application from one to two years, starting from the effective date of the award. Specific provision has also been made for interim preservation measures to be taken against the assets which are the subject of enforcement proceedings during the recognition proceedings.

Neither Mainland China nor Taiwan has provided for the refusal of enforcement of awards between their jurisdictions on grounds reflecting those set out in Article V of the Convention.

Article 74 of the Taiwan-Mainland Act only provides for the “public order or good morals” exception. The grounds for refusal of recognition applicable to foreign awards from non-Chinese jurisdictions, which reflect Article V of the Convention, are not applicable to Mainland China awards.<sup>9</sup>

The Supplementary Regulations provide for refusal of recognition of a Taiwan arbitral award if:

- The effectiveness of the award has not been determined (e.g., if the award is subject to an application for revocation).
- The respondent was absent and was not legally summoned, lacked capacity or was not given access to appropriate legal assistance.
- The case falls within the exclusive jurisdiction of a Mainland China People’s Court.
- The case has already been adjudicated by a Mainland China People’s Court.
- The case violates fundamental principles or social and public interests of Mainland China.



## Taiwan: Enforcement of Arbitral Awards Made in the HKSAR or Macau SAR

There is no formal bilateral arrangement between Taiwan and either the HKSAR or the Macau SAR for mutual enforcement. Each jurisdiction has, however, unilaterally made legislative provision for reciprocal enforcement.

In Taiwan, Article 42 of the Act Governing Relations with Hong Kong and Macau, which came into force on 1 July 1997 for the HKSAR and on 10 December 1999 for the Macau SAR, provides that enforcement of an arbitral award from the HKSAR or Macau SAR is governed by Articles 47 to 51 of Taiwan's Arbitration Law (1998). These are the same provisions applicable to enforcement of awards from all other non-Chinese foreign jurisdictions, which are largely based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (Model Law). They provide for refusal to recognize foreign arbitral awards on grounds corresponding to the first six grounds of refusal in Article V of the Convention, as well as the additional ground that refusal may be enforced where the award is "contrary to the public order or good morals of the Taiwan area."

## HKSAR: Enforcement of Arbitral Awards Made in the Macau SAR or Taiwan

As at the time of this writing, the HKSAR government has entered into formal discussions with the government of the Macau SAR concerning a proposed arrangement on mutual enforcement of arbitral awards between the HKSAR and the Macau SAR. The HKSAR government also proposes to work with relevant Taiwanese authorities to foster the establishment of a mechanism for reciprocal recognition and enforcement of arbitral awards within the region.<sup>10</sup>

Pending formalisation of the proposed bilateral arrangements, non-Convention enforcement of awards made in the Macau SAR or Taiwan is provided for under the HK Ordinance.

Sections 84 to 86 of the HK Ordinance provide for enforcement of awards that are not enforceable under the Convention and which are not Mainland China awards, with the leave of the High Court of the HKSAR. The seven grounds for refusal are almost

identical to those set out in Article V of the Convention, with an additional ground of "for any other reason the court considers it just to do so."

Section 86(4) provides for adjournment pending determination of an application for revocation in another jurisdiction, subject to possible provision of security, in terms similar to Article VI of the Convention.

A party also is entitled to bring an action at common law to enforce an arbitral award made in the Macau SAR or Taiwan by way of a writ, followed by an application for summary judgment in the terms of the arbitral award. This alternative route is unlikely to provide any greater assistance than the procedure under the HK Ordinance,<sup>11</sup> as the HKSAR High Court has stated that its role in allowing enforcement of an award through the statutory procedure or at common law should not be fundamentally different, and the Court's role in both cases should be minimal and "as mechanistic as possible."<sup>12</sup>

## Macau SAR: Enforcement of Arbitral Awards Made in the Macau SAR or Taiwan

Awards made in the HKSAR or Taiwan are enforceable in the Macau SAR under provisions applicable to all non-Convention awards, contained in the Macau SAR's Decree Law 55/98M (the Decree Law).

The Decree Law governs "international commercial arbitration," which is defined in Article 1(4) in terms similar to Articles 1(1) and 1(3) of the Model Law, except that "State" is replaced with "State or territory" (i.e., to include any arbitration where the parties have places of business in different states or territories).

Non-Convention awards, including those made in the HKSAR or Taiwan, may be recognised under Articles 35 and 36 of the Decree Law, subject to grounds for refusal of recognition which are similar to those set out in Article V of the Convention, with the exception that a term which translates as "public order" is used in lieu of "public policy" in the seventh ground.

Article 36(2) provides for adjournment pending determination of an application for revocation in another jurisdiction, subject to possible provision of appropriate security, in terms similar to Article VI of the Convention.

An application for enforcement must include a copy of the award and the arbitration agreement, together with a certified translation in Chinese or Portuguese, if the documents are written in another language.

Alternatively, if an award made in the HKSAR or Taiwan is not within the scope of the Decree Law, it may be enforceable under Articles 1199 to 1200 of the Macau SAR's Code of Civil Procedure, which provides for enforcement of any arbitral award made outside the Macau SAR subject to the leave of the Macau SAR Courts. Such recognition is subject to the applicant proving the following:

- The authenticity and interpretation of the award.
- The finality of the award according to the law of the place where it was rendered.
- The award does not involve subject matter within the exclusive jurisdiction of courts of the Macau SAR or the jurisdiction of the arbitral tribunal has not been acquired by fraud.
- The subject matter has not been adjudicated by the Macau SAR courts, unless submitted earlier to the foreign tribunal.
- Proper notice of the proceedings was given to the party against whom enforcement of the award is sought, and due process has been observed.
- Recognition of the award would not be contrary to the public policy of the Macau SAR.

## Conclusion

The close connections and significant commercial relationships between Mainland China, the HKSAR, the Macau SAR and Taiwan require each to ensure that effective reciprocal arrangements are in place to facilitate the enforcement of arbitral awards among these four jurisdictions, despite the fact that they do not have Convention enforcement available. The various mutual arrangements and unilateral legislation which have been brought into effect between these jurisdictions in recent years largely achieve these objectives, in most cases by implementation of enforcement arrangements that mirror those prescribed under the Convention, subject only to a residual discretion in most cases to refuse enforcement on “public policy” related grounds that are wider than those prescribed under the Convention. This approach appears to demonstrate a desire to promote

more legal uniformity across the Greater China region, while at the same time retaining a residual element of caution reflecting the historical divisions between each of these jurisdictions. ♦

## Endnotes

- 1 The *Basic Law of the HKSAR Administrative Region of the People's Republic of China* (1997) and the *Basic Law of the Macau Administrative Region* (1999).
- 2 The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 1958.
- 3 Supreme People's Court of the PRC — *Notice of Relevant Issues on the Enforcement of Hong Kong Arbitral Awards in the Mainland*, Fa [2009] 415 (On 30 December 2009).
- 4 In Mainland China, the award and arbitration agreement, if in another language, must be filed together with a certified translation in Chinese. In the HKSAR, a certified translation is required only for awards that are in a language other than Chinese or English. *cf.* Article IV of the Convention.
- 5 Article 219 of the PRC's *Civil Procedure Law* (1991) provides a limitation period of six months, which is applicable to legal entities in certain circumstances. For individuals, the corresponding limitation period is one year.
- 6 These are :
  - (1) Invalidity of the arbitration agreement or incapacity of a party to the arbitration agreement under the governing law of the arbitration agreement or the law of the country where the award was made.
  - (2) Lack of or improper notification of appointment of arbitrator or of arbitration proceedings, or inability of one party to present his case.
  - (3) Parts of the award are outside or beyond the scope of the arbitration.
  - (4) Invalidity of the arbitral authority or of the arbitral procedure followed under the law of the country where the award was made.
  - (5) The award is non-binding, suspended or has been set aside by a competent authority.
  - (6) The subject matter of the difference was wrongly referred to arbitration.
  - (7) Recognition or enforcement of the award would be contrary to the public policy of the country where enforcement is sought.
- 7 The new *Arbitration Ordinance* (Cap. 609) replaced the previous *Arbitration Ordinance* (Cap. 341) effective 1 June 2011.
- 8 In accordance with Article 217 of the PRC's *Civil Procedure Law* (1991).
- 9 Articles 47, 49 and 50 of Taiwan's *Arbitration Law* (1998).
- 10 As reported to the LegCo Panel on Administration of Justice and Legal Services in Legislative Council (LC) Paper No. CB(2)2412/10-11(01) [<http://legco.hk/yr10-11/english/panels/ajls/papers/aj0228cb2-2412-1-e.pdf>].
- 11 The common law enforcement route may indeed be more cumbersome and less likely to succeed, as the burden of proof



and available defences are more exhaustive—see *Halsbury's Laws of Hong Kong*, Volume 1(2) (2008 Reissue), [Arbitration] at 25.187.

- 12 *Xiamen Xingjingdi Group Ltd v. Eton Properties Ltd* [2008] 4 HKLRD 972 at 47 and 63, affirmed on appeal: [2009] 4 HKLRD 353; *Re Petrochina International (Hong Kong) Corp Ltd.* [2011] 4 HKLRD 604.

# Ten Hallmarks of Effective Arbitration Agreements with Sovereigns and State Entities

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Arbitrating with sovereigns involves all of the issues inherent in proceedings between private entities plus a variety of specialized concerns. This article lists 10 of the most critical terms to ensure a level playing field in resolving a dispute with a sovereign party.

1. Unambiguous agreement to submit to arbitration. (Example: “Any dispute arising out of or relating to this agreement shall be finally resolved by arbitration ...”.)
2. Explicit agreement to submit to arbitration *signed by* any governmental entity that may be necessary to the dispute or to enforcement of the award, including the ultimate sovereign if necessary under the circumstances. Enforcement against non-signatories *cannot* be presumed.
3. Strict compliance with the laws of the sovereign as to procedures to ensure that the substantive agreement, the agreement to arbitrate and the waiver of sovereign immunity by each signatory are all authorized under the sovereign’s constitution, laws and regulations. This should include, if necessary, approval by the legislature, cabinet of ministers or other ultimate authority.
4. Specification of the site of the arbitration. This should be carefully chosen for its political neutrality, the quality and reliability of its arbitration jurisprudence and the respect that its courts have for the arbitral process. If at all possible, the arbitration site should not be in the country of the counterparty.
5. Broadest possible waiver of sovereign immunity. The waiver should encompass both the arbitration and collection/enforcement against assets of the sovereign or a sovereign entity sufficient to satisfy any award under the laws of the jurisdictions in which assets are located.
6. Incorporation of the contracting party or an intermediate or ultimate parent in a jurisdiction that is party to a robust investment protection treaty with the sovereign of the counterparty.
7. Precise and unambiguous definition of any exceptions to the agreement to arbitrate (if they absolutely cannot be avoided).
8. Unambiguous definition of the time for commencement of any negotiation or mediation that is to precede arbitration. This definition should clearly reference objective dates or events. (Example: “If no agreement has been reached within \_\_\_ days of the delivery of written notice of the existence of a dispute, either party may serve a request for arbitration ...”.)

9. Designation of the usual elements of effective arbitration agreements:
  - » Administering institution (if desired) and applicable rules;
  - » Number of arbitrators and the means of their selection; and
  - » Language of the proceedings.
10. Explicit provision of any confidentiality desired with regard to the proceedings, evidence and award. This should not rely on an assumption that there are confidentiality provisions in the arbitral rules or applicable law, because these may not exist. ♦

# Enforcement of Awards in ICSID Arbitration

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Although planning for the potential difficulties in enforcing an arbitration award is sometimes neglected before an arbitration is initiated, reviewing such issues must be part of any overall assessment of the dispute.

A common belief is that awards rendered in proceedings held pursuant to the rules of the International Centre for Settlement of Investment Disputes (ICSID), as established by the 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention), are largely unaffected by such difficulties. The reality, however, is somewhat more complex. While enforcement issues do arise less frequently in ICSID arbitration, in certain situations states attempt to evade their obligations to enforce adverse awards, with mixed degrees of success.

On the positive side, the ICSID Convention contains commanding language obliging state parties to enforce the awards rendered under its auspices. Article 54 is particularly clear in this respect:

Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

The undertaking of contracting states to “enforce the pecuniary obligations” imposed by an ICSID award carries considerable weight. States considering whether or not to comply with ICSID awards are well aware that the ICSID Convention is a multilateral agreement signed by most countries in the world. More importantly, the ICSID Convention was negotiated and adopted under the aegis of the World Bank. The ICSID itself is an agency of the World Bank, and the Chairman of ICSID’s Administrative Council is the World Bank’s President. The intimate relationships between the ICSID and the World Bank weigh heavily in favor of the voluntary enforcement of ICSID awards by member states, particularly for those in need of support from one of the agencies of the World Bank Group.

The publication of the vast majority of arbitral awards in recent years, whether officially or unofficially, adds further pressure on a state to comply with the awards, as does the increasing frequency of participation by *amicus curiae* and public hearings. As a result, the amount awarded against a state frequently becomes public knowledge. Similarly, public disclosure of states’ actions toward investors in breach of international law is detailed in awards that are easily available to all interested parties. These include multilateral or regional organizations, financial institutions and private lenders,

non-governmental organizations (NGOs), media and similar entities. Disclosure to such parties builds pressure on exposed states and encourages them to enforce ICSID awards, particularly those states in need of international financial support.

Finally, the so-called “automatic” recognition of an ICSID award in all contracting states, “as if it were a final judgment of a court in that State” pursuant to Article 54, removes most grounds that a recalcitrant state might otherwise have to block enforcement of the award. Indeed, there is no legal seat of the arbitration in ICSID arbitration, contrary to commercial arbitration. Thus, the ICSID Convention eliminates any possibility for any challenge to the validity of an ICSID award anywhere in the world. All that remains is the annulment proceedings on limited grounds pursuant to Article 52 of the ICSID Convention, before an *ad hoc* Committee created within the self-contained system of the Convention. Lengthy—and sometimes dilatory—proceedings in local courts to resist recognition of the award are therefore impossible in ICSID arbitration. The fact that states may not resort to such proceedings, which sometimes are used abusively with guerilla-like tactics before their own courts or foreign courts, considerably diminishes the threats to the enforcement of the award.

The above legal considerations are confirmed by a statistical survey of the enforcement of awards. It is generally accepted that states have voluntarily complied with the vast majority of ICSID awards. With the exception of certain well-known instances discussed below, it seems that investors are rarely faced with difficulties in enforcing ICSID awards, including with so-called impecunious states.

Recent trends however, show that ICSID awards are not totally immune from enforcement difficulties.

As an initial matter, parties to ICSID arbitration now resort frequently to the annulment procedure of Article 52 of the ICSID Convention. In the past three years, 17 annulment requests have been filed with several other such procedures pending. In addition, *ad hoc* committees constituted pursuant to Article 52 have recently been decried for a spate of annulments of awards. Most commentators have regretted this series of annulments, criticizing *ad hoc* committees for going too far in the direction of a full-fledged re-trial of the case, as if it was

an appeal procedure, while the ICSID Convention only provides for limited annulment grounds.

This does not mean that resorting to annulment proceedings necessarily implies difficulties in enforcing the award, if it survives the challenge. However, the overall duration of proceedings is extended, and the finality of ICSID awards is also affected. Also, most *ad hoc* committees take the view that, upon the request of a party, annulment proceedings result in the stay of enforcement of the challenged award. In most cases, *ad hoc* committees have rejected requests by investors to lodge bank guarantees by the state requesting the annulment and obtaining the stay of enforcement. As a result, enforcement becomes next to impossible for the duration of the annulment proceedings, although this was not necessarily intended in the ICSID Convention.

In addition, it is important to note that adherence to the ICSID Convention does not waive the states’ sovereign immunity on matters of enforcement. Article 55 of the ICSID Convention is very clear in this respect: “Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.”

Finally, Argentina has made headlines in the past few years for refusing to comply with ICSID awards rendered against it, despite the clear provisions of the ICSID Convention. This country, faced with dozens of ICSID matters, is currently putting to the test the strongly worded provisions of the ICSID Convention by requiring investors to seek recognition and enforcement of the ICSID award before its national courts pursuant to Argentine law. While this “resistance” by Argentina is understandable given the large and accumulating total of the awards outstanding against it, the result has been to bar Argentina from sources of international finance, a result that will become increasingly onerous as time goes on. As a result, it appears unlikely that states less able to survive without access to international financial sources, will be inclined similarly to flout the provision for automatic enforcement in the ICSID Convention.

Despite these difficulties, ICSID arbitration remains a very important risk management tool for any party contemplating investment in foreign jurisdictions. ♦

# Enforcement of Arbitral Awards in Sub-Saharan Africa—A Risky Business?

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## Introduction

Sub-Saharan Africa<sup>1</sup> is currently among the fastest growing regions in the world. The Economist Intelligence Unit forecasts that the sub-Saharan African regional economy will grow by almost 5 percent per annum between 2012 and 2015.<sup>2</sup>

The number and value of projects in sub-Saharan Africa, across a range of sectors (including modernisation and infrastructure, mining, energy and telecommunications), are forecast to grow significantly in the coming years. This will doubtless attract the attention of investors, contractors and consultants from around the world, but what are the risks and pitfalls? Do greater growth and investment mean a greater number of disputes? How effective can arbitration be in helping parties resolve such investment and contractual disputes when they do arise? All of this serves to highlight the importance of the ability of contracting parties to enforce arbitral awards in the region.

Sub-Saharan Africa is a large and diverse region, encompassing legal systems influenced by, and based on, a wide variety of legal traditions (including common law, civil law, customary law and shari'a). The degree to which principles such as the separation of powers and the rule of law are upheld, and the prevalence of factors (such as corruption) which can significantly

impede enforcement of arbitral awards, differ markedly from one state to another. In this article, we discuss some of the considerations, issues and risks associated with the enforcement of arbitral awards in sub-Saharan Africa. Where appropriate, reference is made to particular states, issues and case studies by way of illustration.

## The New York Convention

Some 26 sub-Saharan African states (more than half of the total) are party to the New York Convention<sup>3</sup> (the NY Convention), which offers an effective tool for the enforcement of arbitral awards. The NY Convention provides for the recognition and enforcement of international arbitral awards in a broad range of circumstances, subject only to a limited number of expressly stipulated exceptions (set out in Article V of the NY Convention).

Ghana, for example, is a signatory to the NY Convention. Arbitration in Ghana is governed by the Alternative Dispute Resolution Act 2010 (the Act), which explicitly provides for the enforcement of international arbitral awards under the NY Convention. Section 59 of the Act provides that the High Court of Ghana will enforce a foreign arbitral award made under the NY Convention that is not subject to a pending appeal.

The circumstances in which enforcement will be refused are limited and



broadly reflect the grounds set out in Article V of the NY Convention (Section 59(3) of the Act). One point of interest (and potential uncertainty) is that Section 59 of the Act does not include an express exemption from enforcement on the grounds of public policy (either domestic or international). It is, however, thought unlikely that the Ghanaian courts would be prepared to enforce an arbitral award which directly contravened Ghanaian public policy, so that it remains to be seen how the Ghanaian courts might proceed if this issue arose.

### UNCITRAL Model Law

Several states in sub-Saharan Africa, including Kenya, Nigeria and Uganda, have adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law (the Model Law). Chapter VIII of the Model Law addresses the recognition and enforcement of awards.

Unlike the NY Convention, which only concerns the enforcement of arbitral awards made outside the state where enforcement is sought, the Model Law also deals with domestic arbitral awards. The approach is to treat all awards uniformly, irrespective of where they are made. Pursuant to Article 35(1) of the Model Law, any award is to be recognised as binding and enforceable, subject to the provisions in Articles 35(2) and 35(6). Reciprocity of the enforcement of awards is not a condition of enforcement under the Model Law, nor is the presentation of the arbitration agreement.

The grounds on which recognition can be refused (set out in Article 35(6) of the Model Law) reflect those listed in the NY Convention.

### OHADA Uniform Arbitration Act

Sixteen<sup>4</sup> sub-Saharan African states are currently members of the Organisation for the Harmonisation of Business Law in Africa (OHADA), an organisation that aims to modernise, standardise and harmonise commercial law in Africa. The majority of those countries are francophone (although not exclusively so), with legal systems based on the civil law tradition.

Each OHADA member state has adopted a Uniform Arbitration Act (Uniform Act), which puts in place a framework for arbitration in terms similar to the Model

Law. This supersedes the national laws on arbitration to the extent that any conflict arises. Importantly, the Uniform Act provides that arbitral awards with a connection to one OHADA member state are given final and binding status in all OHADA states. It sets out a straightforward mechanism for enforcement of both domestic and international awards.

To enforce an award under the Uniform Act, a party must obtain an exequatur,<sup>5</sup> i.e., a legal document recognising the right to enforce the award, from a judge in an OHADA member state. Notification of an application for an exequatur must be given to the party against whom enforcement is sought. However, the grounds on which an application for an exequatur can be refused are very limited. For instance, the public policy exemption is limited to international public policy (i.e., it must be shown that the award was “manifestly contrary to international public policy of the member states”). This is narrower than the domestic public policy exemption provided for by the NY Convention (Article V(2)(b)). A party seeking to oppose an award enforced under the Uniform Act would need to make a separate application to nullify Article 31(4). Once obtained, an exequatur can be enforced in another OHADA member state.

### Issues, Pitfalls and Risks

Some of the common issues, pitfalls and risks with regard to enforcement of arbitral awards are summarised below. Among other things, the degree of risk will depend upon the type of award being enforced, the state where enforcement is sought and the international conventions and/or legal structures in place in that state.

#### TIME TO ENFORCE AN ARBITRAL AWARD

The length of time necessary to enforce an arbitral award varies significantly between states and, of course, from case to case. Even in those sub-Saharan African states with more advanced regimes for the enforcement of arbitral awards, enforcement periods range from six months to over a year, and courts in the region frequently struggle with large case backlogs. In the worst cases, enforcement proceedings can drag on for many years before final resolution.

Research by the World Bank indicates, however, that overall, average enforcement periods in sub-Saharan Africa do not compare particularly unfavorably with the rest of the world. A recent World Bank report<sup>6</sup> found that on average, it takes approximately six months to enforce an arbitral award in the sub-Saharan African states surveyed, compared with a 118-day average in “high income” OECD countries.

#### COST OF ENFORCING AN ARBITRAL AWARD

Bringing a claim via arbitration will naturally entail significant cost and resources. This is partially a function of the time taken to obtain and enforce an arbitral award, but the costs of travel to and from the state where enforcement is sought (by the legal team and, if necessary, witnesses) can serve to increase costs. Visa requirements and restrictions can also be onerous, adding a further layer of cost and administrative burden.

Another factor that can increase cost is a lack of developed jurisprudence with regard to arbitration and enforcement in many states of sub-Saharan Africa. This can give rise to a need for appeals and references to higher courts regarding matters which might have been disposed of in a more straightforward manner in jurisdictions where the courts have greater experience with such matters.

#### POLITICAL FACTORS

The degree to which constitutional principles (such as the rule of law and the separation of powers between the executive and the judiciary) are upheld is patchy across the sub-Saharan African region. This can place further obstacles in the way of a party seeking to enforce an arbitral award, especially where a state-owned or quasi-state entity is involved. In particular, this raises the risk that political pressure will be placed on the courts when considering matters of enforcement, and that the courts will be reluctant to make or enforce decisions and orders that are perceived to run against state interests.

An interesting development, with significant implications for the enforcement of international arbitral awards, has been the increasing number of instances

where non-governmental organisations have sought to intervene in legal proceedings in African states on an *amicus curiae* basis. The Uniform Act does in fact make express provision (at Article 25(4)) for a third party to oppose the recognition and enforcement of an arbitral award by means of an *amicus curiae* intervention.

Such interventions involve a third party or parties seeking to assist the court by advancing arguments to support one party to the proceedings. With regard to enforcement of arbitral awards, such applications are often made on behalf of sub-Saharan African state entities or institutions in disputes with large multinational investors, funders or contractors, where there may be a perceived lack of equality of resources. Such non-governmental organisations can sometimes have substantial financial, legal and public relations resources at their disposal, and their intervention can therefore be telling.

Such interventions may, of course, increase the delay, cost and complexity associated with efforts to enforce an arbitral award. However, and as the *amici curiae* may argue, such interventions may also benefit arbitration and enforcement in the state concerned (and perhaps in the region more generally) by assisting in promoting better tribunal decision-making and enhancing the legitimacy of the arbitral and enforcement process.

#### STATES THAT ARE NOT PARTY TO INTERNATIONAL CONVENTIONS

Some 15 sub-Saharan African states (e.g., Angola, Cape Verde and Sudan) are not parties to any of the major conventions with regard to enforcement or recognition of arbitral awards (e.g., the NY Convention or OHADA) and have not adopted a model arbitration law (e.g., the Model Law or the Uniform Act).

As might be expected, the provisions for enforcement of arbitral awards vary widely among such states and are generally more haphazard. Broadly speaking, foreign arbitral awards will be recognised in more limited circumstances and enforcement is often conditional on reciprocity between the state where the award was made and the state where enforcement is sought.

## Civil Unrest

Political and civil unrest and instability, which are unfortunate facts of life in certain states within sub-Saharan Africa, can naturally present fundamental obstacles to the conduct of arbitral proceedings and/or the enforcement of awards. It is likely that recent political upheavals in North Africa will only serve to increase the concern with which many view the continent as a whole.

Particularly over the last decade, the majority of sub-Saharan African states (examples include Tanzania, Ghana and Botswana) have, however, shown a considerable degree of political stability. Concerns over civil unrest should not, therefore, necessarily deter arbitration and/or enforcement in sub-Saharan Africa. On the contrary, this issue is better considered on a case-by-case basis, giving careful consideration to the state in question (or even, in some instances, the region within that state).

## Case In Point

The recent decisions in *IPCO (Nigeria) Limited (IPCO) v. Nigerian National Petroleum Corporation (NNPC)* [2005] All ER (D) 385 (Apr) and [2008] All ER (D) 249 (Apr) illustrate some of the issues discussed above.

In 2004 a Nigerian domestic arbitral tribunal made an award of US\$152 million in favor of IPCO. NNPC applied to the High Court of Nigeria to set aside the award, while IPCO applied to the High Court to enforce the award. A delay of several years then ensued as a consequence of NNPC's applications seeking the transfer of the case to a different judge and appeals to the Nigerian Court of Appeal on other matters.

As it was clear that many years were likely to elapse before these issues were resolved, IPCO applied to the English High Court to enforce the award. Section 101 of the Arbitration Act 1996 permits the English courts to enforce an award made in the territory of another state that is party to the NY Convention. The English High Court held that the NNPC had no realistic prospect of success in relation to most of its challenges to the award and granted partial enforcement of the award against NNPC.

## Summary

While development and harmonisation are gradually expanding in sub-Saharan Africa, international contracting parties doing business in the region need to be aware of the risks inherent in resolving disputes and enforcing arbitral awards. Although the preference of such parties will often be for an arbitral seat in one of the more established jurisdictions, such as London or Paris, this may not always be open to negotiation. African governments are becoming increasingly assertive in insisting on a local seat of arbitration and the application of local laws in relation to projects where they are the client. In any case, regardless of the seat of arbitration, where the significant assets of a party against which a claim is pursued are held in sub-Saharan Africa, the need for enforcement in the region may prove unavoidable.

Arbitrating and/or enforcing arbitral awards in sub-Saharan Africa does carry certain risks, but it is possible to limit or manage many of these. This is particularly so if contracting parties ensure that they are informed from the outset as to what the contract provides in the event of a dispute and know where assets are located should enforcement of an award be necessary. An accurate assessment of the difficulties that might be faced if a dispute arises should therefore form an integral part of any commercial risk assessment. So long as international contracting parties appreciate the challenges and the risks they face with regard to the enforcement of arbitral awards, such issues need not deter them from capitalising on the benefits of contracting and investing in sub-Saharan Africa. ♦

## Endnotes

- 1 For the purposes of this article, "sub-Saharan Africa" excludes the North African countries of Algeria, Egypt, Libya, Morocco, Tunisia and Western Sahara.
- 2 The World Bank is also forecasting similar annual growth percentages: 5.5 percent for 2012.
- 3 The NY Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958.
- 4 The Democratic Republic of Congo is in the process of seeking accession.
- 5 An exequatur is a legal document issued by a sovereign authority allowing a right to be enforced in the authority's domain of competence.
- 6 See *World Bank, Investing Across Borders 2010: Indicators of Foreign Direct Investment Regulation in 87 Economies* (2010), p. 63.

# Enforcement Issues Arising under European Law

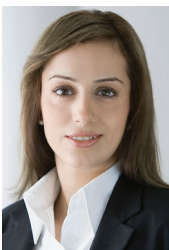
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Under European law, the recognition and enforcement of judicial decisions by EU Member States is governed by Council Regulation (EC) No. 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Reg (EC) 44/2001 or the Regulation).

However, according to Article 1 II (d) of Reg (EC) 44/2001, the Regulation shall not apply to arbitration. It therefore neither applies to arbitral tribunals nor to state courts in cases in which the courts have to render decisions relating to arbitral proceedings or arbitral awards.<sup>1</sup> According to the European Court of Justice (ECJ), this is the case even if the existence or validity of an arbitration agreement has to be examined in the lawsuit as a preliminary question. That is because the applicability of Reg (EC) 44/2001 is determined by the actual matter in dispute (e.g., nomination of an arbitrator) irrespective of which preliminary questions might become decisive. Thus, according to the ECJ, the exclusion of Article 1 II (d) of Reg (EC) 44/2001 has to be interpreted widely and is not limited to arbitration proceedings as such, but also covers court proceedings which are initiated in support of arbitral proceedings.

This also means that Reg (EC) 44/2001 is not relevant for the proceedings of recognition and declaration of enforce-

ability of foreign arbitral awards within the European Union. Rather, the procedure to enforce a foreign arbitral award is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (New York Convention), which has been ratified by all Member States.

## No Recognition and Enforcement of Court Decisions Incorporating Arbitral Awards under Reg (EC) 44/2001

The aforementioned exclusion also applies to court decisions that incorporate arbitral awards pursuant to the doctrine of merger in Anglo-American jurisdictions. A court decision ordering an obligation of the defendant by way of incorporation of the arbitral award cannot be recognized and declared enforceable in another Member State under Reg (EC) 44/2001.<sup>2</sup> The court's decision declaring the arbitral award enforceable has effect only within the territory of the deciding court's state. Hence, the claimant should seek a declaration of enforceability of the award in the Member State chosen for intent to execute the award.<sup>3</sup>

## Recognition and Enforcement of Court Decisions Disregarding an Arbitration Clause

Another enforcement issue arising under European law is the question whether a judgment of a foreign court



is enforceable under Reg (EC) 44/2001 if the court unlawfully disregarded the existence of an arbitration agreement and, therefore, had no jurisdiction to decide on the merits of the case.<sup>4</sup> Whether such a decision can be enforced according to the rules of Reg (EC) 44/2001 has been much debated since the revision of the Regulation in 1978. The predominant view (which is contrary to the view formerly taken by the United Kingdom), is that such a decision must be recognized and declared enforceable in accordance with Reg (EC) 44/2001. This outcome is justified by the fact that even if a valid arbitration agreement exists, the court's decision in dispute has been rendered in a civil and commercial matter. In fact it has no connection to arbitration.

Protection against the disregarding of an arbitration agreement must be sought before the first court and not before the second court that is concerned with the recognition of the judgment. In addition, Articles 34 and 35 of Reg (EC) 44/2001 stipulate the exclusive reasons for denial of recognition. These provisions do not provide for a general examination of the question whether or not the first court had jurisdiction to decide the case. Thus, a Member State court cannot deny recognition of a foreign court's decision on the grounds that the first court has disregarded a valid arbitration agreement.

### Defense Against the Breach of Arbitration Agreements

In connection with the enforcement of arbitration agreements, the question arises about how a party can defend a violation of an arbitration agreement in order to prevent the aforementioned danger of a court decision disregarding an arbitration clause. The ECJ recently ruled that anti-suit injunctions brought in order to enforce an arbitration agreement are incompatible with community law.

In its *Turner* judgment,<sup>5</sup> the ECJ had already ruled that anti-suit injunctions violated the principles of European law.

In its landmark decision in the *West Tankers* case, C-185/07,<sup>6</sup> the ECJ had to decide if an anti-suit injunction also infringes the principles of Reg (EC) 44/2001 when the injunction relates to arbitration-related court proceedings.

The ECJ concluded that the Member States must not grant anti-suit injunctions where litigation proceedings have been brought before the court of another Member State in violation of an arbitration agreement. The ECJ determined that if, because of the subject matter of the dispute, those proceedings come within the scope of Reg (EC) 44/2001 a preliminary issue concerning the applicability of an arbitration agreement also comes within its scope of application.

Anti-suit injunctions are incompatible with the principles of the Regulation because they interfere in the powers of the courts to decide on their jurisdiction. The ECJ argued that it would be contrary to the general principle of the Regulation that every court seized itself determines whether it has jurisdiction to resolve the dispute before it.

As a consequence of the *West Tankers* ruling, European law does not permit the courts—including the court in the seat of the arbitration—to grant anti-suit injunctions to protect arbitration agreements from litigation in the court of another EU Member State. Therefore, if a party brings a lawsuit before a Member State court in violation of an arbitration agreement, the only defense might be an objection to the suit based on the existence of an agreement to submit any dispute to an arbitral tribunal.

In light of *West Tankers*, an anti-suit injunction will only be possible if the court asked to grant the injunction is not located in a Reg (EC) 44/2001 Member State. The *West Tankers* ruling thus permits a party to obstruct an arbitration by contesting the clause in a jurisdiction it perceives as favorable, whether because of local law or, for example, the slow speed of its judicial processes. Nevertheless, it remains the law in the EU unless and until Reg (EC) 44/2001 is amended.

### Initiative to Amend EU Law

When *West Tankers* was issued, discussions about a reform of Reg (EC) 44/2001 had already begun. In the so called *Heidelberg Report*,<sup>7</sup> which was prepared for the European Commission, the authors suggested several amendments to the Regulation. The report also dealt with the scope of applicability of the Regulation and in particular with respect to the arbitration exclusion. The authors of the report suggested that this

exclusion be lifted. They recommended that the courts at the place of arbitration have exclusive jurisdiction for court proceedings relating to arbitral matters. In addition, they recommended that the commencement of a court proceeding at the place of arbitration dealing with the existence, the validity and/or the scope of an arbitration agreement should result in a mandatory stay of any proceedings dealing with this issue pending in a court in another Member State.

Subsequent to the *Heidelberg Report*, the European Commission issued a report and the “Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters” on 21 April 2009.<sup>8</sup> In its Green Paper the Commission considered a partial deletion of the exclusion of arbitration from the scope of the Regulation.

In its *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* of 14 December 2010,<sup>9</sup> the Commission finally proposed a partial deletion of the exclusion of arbitration from the scope of the Regulation. The proposal includes a specific rule on the relationship between arbitration and court proceedings. It would oblige a court seized of a dispute to stay proceedings if (i) its jurisdiction is contested on the basis of an arbitration agreement and an arbitral tribunal has been seized of the case, or (ii) court proceedings relating to the arbitration agreement have been commenced in the member state of the seat of the arbitration. The Commission argues that this modification will enhance the effectiveness of arbitration agreements in Europe, prevent parallel court and arbitration proceedings, and eliminate the incentive for abusive litigation tactics.

As a next step, the European Parliament and the Council of the European Union will have to agree to the proposed amendments. If the amendments of the Commission become effective, the aforementioned total exclusion of arbitration from the Regulation will lapse and the Regulation will be applicable to prevent a party trying to undermine an arbitration agreement. ♦

## Endnotes

- 1 See the leading decision of the European Court of Justice, judgment of 25 July 1991, Case No. C-190/89, *Rich*, Collection of Judgments 1991, I-3855.
- 2 Report on the Convention on the Association of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice dated 9 October 1978, by Professor Schlosser, so-called “*Schlosser Report*,” page 92.
- 3 See *Kraayvanger/Hilgard*, “Must a foreign arbitral award be challenged in its state of origin to preserve objections in domestic recognition and enforcement proceedings?” *IBA—Arbitration Newsletter*, March 2009, 54 *et seq.*
- 4 See *Kraayvanger/Hilgard*, “US Arbitration Award unenforceable against German Franchisee,” *IBA Arbitration Newsletter* Sept. 2008, 26 *et seq.*
- 5 ECJ, judgment of 27 April 2004, Case No. C-159/02, *Turner*, IPRax 2004, 425.
- 6 ECJ, judgment of 10 February 2009, Case No. C-185/07, *Allianz SpA* (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali SpA v. West Tankers Inc., *West Tankers*. See also *Hilgard et al*, “Anti-Suit Injunctions in Defence of Arbitration,” *Bloomberg European Law Journal* 2008, 41 *et seq.*
- 7 See *Hess/Pfeiffer/Schlosser*, The Brussels regulation 44/2001—Application and Enforcement, 2008, also available at [www.europa.eu](http://www.europa.eu).
- 8 <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0175:FIN:EN:PDF>.
- 9 [http://ec.europa.eu/justice/policies/civil/docs/com\\_2010\\_748\\_en.pdf](http://ec.europa.eu/justice/policies/civil/docs/com_2010_748_en.pdf).



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