Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

The Guide to Challenging and Enforcing Arbitration Awards

General Editor

J William Rowley QC

Editors

Emmanuel Gaillard and Gordon E Kaiser

Reproduced with permission from Law Business Research Ltd
This article was first published in May 2019
For further information please contact Natalie.Clarke@lbresearch.com

Publisher
David Samuels

Business Development Manager
Gemma Chalk

Editorial Coordinator
Hannah Higgins

Head of Production
Adam Myers

Copy-editor
Caroline Fewkes

Proofreader
Martin Roach

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.globalarbitrationreview.com

ISBN 978-1-83862-205-3

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

20 ESSEX STREET CHAMBERS

ADVOKATFIRMAN VINGE KB

AEQUITAS LAW FIRM

ARBLIT RADICATI DI BROZOLO SABATINI BENEDETTELLI TORSELLO

BARBORA ŠNÁBLOVÁ ATTORNEYS

CECIL ABRAHAM & PARTNERS

CLEARY GOTTLIEB STEEN & HAMILTON LLP

CURTIS, MALLET-PREVOST, COLT & MOSLE LLP

DE BRAUW BLACKSTONE WESTBROEK NV

DEBEVOISE & PLIMPTON

DLA PIPER

EGOROV PUGINSKY AFANASIEV & PARTNERS

ENERGY ARBITRATION CHAMBERS

FIELDFISHER LLP

FRESHFIELDS BRUCKHAUS DERINGER LLP

FRORIEP LEGAL SA

GÓMEZ PINZÓN ABOGADOS

JENNER & BLOCK LONDON LLP

JONES DAY

K&L GATES LLP

KHAITAN & CO

KING & SPALDING INTERNATIONAL LLP

KONRAD PARTNERS

LOYENS & LOEFF

MHR | MARTÍNEZ DE HOZ & RUEDA

MILBANK LLP

NORTON ROSE FULBRIGHT LLP

RASHED R AL MARRI LAW OFFICE

REED SMITH LLP

SHEARMAN & STERLING LLP

SPA AJIBADE & CO

URÍA MENÉNDEZ

VIEIRA DE ALMEIDA

VON WOBESER Y SIERRA, SC

YOUSSEF & PARTNERS

YULCHON LLC

ZAMFIRESCU RACOȚI & PARTNERS

Publisher's Note

Global Arbitration Review is delighted to publish this new volume, *The Guide to Challenging and Enforcing Arbitration Awards*.

For those unfamiliar with Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, and a series of more in-depth books and reviews, and also organise conferences and build work-flow tools. Visit us at www.globalarbitrationreview.com.

As the unofficial journal of international arbitration, sometimes we spot gaps in the literature earlier than other publishers. Recently, as J William Rowley QC observes in his excellent preface, it became obvious that the time spent on post-award matters has increased vastly compared with, say, 10 years ago, and it was high time someone published a reference work focused on this phase.

The Guide to Challenging and Enforcing Arbitration Awards is that book. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover energy, construction, M&A and mining disputes in the same unique, practical way. We also have books on advocacy in international arbitration and the assessment of damages.

My thanks to the editors for their vision and energy in pursuing this project and to my colleagues in production for achieving such a polished work.

Contents

Editor's Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – i.e., efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in approximately 160 countries. When enforcement against a sovereign state is at issue, the ICSID Convention of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 161.

Awards used to be honoured

A decade ago, international corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement, most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily - of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

During 2018, *Global Arbitration Review*'s daily news reports contained literally hundreds of headlines that suggest that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement.

A sprinkling of last year's headlines on the subject are illustrative:

- 'Well known' arbitrator sees award set aside in London
- Gazprom challenges gas pricing award in Sweden
- ICC award set aside in Paris in Russia–Ukrainian dispute
- Yukos bankruptcy denied recognition in the Netherlands
- Award against Zimbabwe upheld after eight years
- Malaysia to challenge multibillion-dollar 1MBD settlement
- Uzbekistan escapes Swiss enforcement bid
- India wins leave to challenge award on home turf

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially

since 2008. However, given the importance of the subject (without effective enforcement, there really is no effective resolution) and my anecdote-based perception of increasing concerns, last summer I raised the possibility of doing a book on the subject with David Samuels (*Global Arbitration Review*'s publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Emmanuel Gaillard and Gordon Kaiser agreed to become partners in the project.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said in a report 35 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

This guide is structured to include, in Part I, coverage of general matters that will always need to be considered by parties, wherever situated, when faced with the need to enforce or to challenge an award. In this first edition, the 13 chapters in Part I deal with subjects that include (1) initial strategic considerations in relation to prospective proceedings, (2) how best to achieve an enforceable award, (3) challenges generally, (4) a variety of specific types of challenges, (5) enforcement generally, (6) the enforcement of interim measures, (7) how to prevent asset stripping, (8) grounds to refuse enforcement, and (9) the special case of ICSID awards.

Part II of the book is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This first edition includes reports on 29 national jurisdictions. The author, or authors, of each chapter have been asked to address the same 35 questions. All relate to essential, practical information on the local approach and requirements relating to challenging or seeking to enforce awards in each jurisdiction. Obviously, the answers to a common set of questions will provide readers

with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

Through this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with *The Guide to Challenging and Enforcing Arbitration Awards* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors, colleagues who were some of the internationally recognised leaders in the field. Emmanuel, Gordon and I feel blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role played by funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach with chapters on China, Saudi Arabia, Turkey and Venezuela.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this first edition of this publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley QC

April 2019

London

Part I

Issues relating to Challenging and Enforcing Arbitration Awards

1

Awards: Early Stage Consideration of Enforcement Issues

Sally-Ann Underhill and M Cristina Cárdenas[1]

We have yet to meet a client who is happy incurring costs to obtain an award they cannot enforce.

Identification of possible issues

By its very nature, an arbitration will invariably arise under an arbitration agreement between the parties.

Save for *ad hoc* arbitrations, the starting point will most likely be that you are in an arbitration with a counterparty with whom you have had a contractual relationship. No matter how much control you had over the relationship during the period of the contract itself, for example a contract for a limited period, when it comes to arbitrating any dispute arising under the contract, you are immediately talking about a longer timescale.

Therefore, even if you enter into your contract on the basis that your counterparty is 'good for the money' for the period of the contract, have you thought about where things will be in, say, one or two years when a possibly protracted and complicated arbitration process has been concluded?

- Will your counterparty even exist when you come to enforce any award?
- What assets does your counterparty have?
- Where are they located?
- Is that location one in which enforcement of an award is easy, or even possible?
- Where will you locate the seat of your arbitration?
- Does the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) even apply in the most natural seat or forum?
- What disputes can you reasonably anticipate?
- Which law will be most advantageous to you?

1 Sally-Ann Underhill and M Cristina Cárdenas are partners at Reed Smith LLP.

Depending on whether you are likely to enforce under the New York Convention or under a bilateral or multilateral treaty, you also need to consider what the requirements for enforcement will be.

The New York Convention helpfully sets out an exhaustive list of grounds[2] under which the recognition and enforcement of Convention awards can be refused; this has been implemented in England and Wales under Section 103 of the Arbitration Act (International Investment Disputes) 1996. The New York Convention grounds go to the heart of the procedural and structural integrity of the award, including, for example, that the award deals with matters outside the scope of the submission to arbitrate.

None of the grounds require or allow the court to investigate the merits of the dispute that is the subject of the award. In practice, courts are careful not to be drawn into a review of the merits of the award in challenges to enforcement. Some examples are as follows:

- The parties to the agreement were under some incapacity, or the agreement is not valid under the law to which the parties have subjected it.
- The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.
- The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration.
- The composition of the arbitral authority was not in accordance with the agreement of the parties.
- The award has not yet become binding on the parties, or has been set aside or suspended.

Note that the New York Convention also provides that its provisions do not 'deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law of the treaties of the country where such award is sought to be relied upon'.[3]

This means that domestic rules relating to the recognition and enforcement of foreign awards that are more favourable than those set out in the New York Convention can be applied, and so the enforceability of an award will vary between signatories.

In the United Kingdom, foreign awards from countries that are not party to the New York Convention continue to be enforced under Section 37 of the Arbitration Act 1950. The United Kingdom is also a party to the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 and has enacted:

- the Foreign Judgments (Reciprocal Enforcement) Act 1933, which provides for the enforcement of judgments and arbitral awards from specified former Commonwealth countries; and
- the Arbitration (International Investment Disputes) Act 1966, which provides for the recognition and enforcement of International Centre for Settlement of Investment Disputes (ICSID) awards pursuant to the ICSID Convention.

2 New York Convention [NYC], Article V.

3 id., Article VII(1).

Strategies for future enforcement

Parties usually turn their minds to enforcement only after an award is obtained, but that is often too late. Parties should begin to think strategically about the ultimate enforcement of awards at the contract drafting stage.

First, the choice of seat of the arbitration will be of fundamental importance. Standards differ as to the grounds for challenging arbitral awards, even among New York Convention states. As noted above, under the Convention (Article V(1)(e)), one of the potential grounds for non-enforcement of an award is that the award has been set aside by the courts at the place of the arbitration. If the parties choose a seat that, for example, will be hostile to a non-national or where the courts are likely to second guess the arbitrators, the parties increase the risk that their award may be unenforceable anywhere.

Moreover, Article III of the Convention provides that contracting states 'shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. This allows the courts of signatory states to follow their own procedural rules in enforcement proceedings, which can result in additional requirements beyond those expressly stipulated in the Convention. Accordingly, parties should try to anticipate the jurisdictions in which enforcement will be sought and plan accordingly.

For example, if enforcement is likely to be sought in the United States, it is generally advisable to include language indicating that 'judgment upon any award rendered by the arbitrators may be entered by any court having jurisdiction thereof'. The US Federal Arbitration Act (FAA) provides that if the parties 'in their agreement have agreed that a judgment of the court shall be entered upon the award', then the courts may confirm the award.[4] While some US courts have held that a clause providing for consent to the entry of judgment clause is not required in the context of an international contract governed by the New York Convention, it is advisable nonetheless to include such a clause.

Parties should also avoid including provisions in the arbitration agreement that will impede the enforcement process. For example, US courts have grappled with the matter of whether parties can expand or narrow judicial review of the award during the enforcement stage. Including such provisions in the agreement can unnecessarily delay enforcement proceedings with court challenges.

Other clauses that could unnecessarily delay satisfaction of the award include imposing specific arbitrator qualifications or limited periods in which the arbitration must be completed. If such clauses are not complied with, they can create grounds for challenge by the losing party. If such clauses are necessary, careful consideration should be given to their drafting.

Finally, contracting with sovereign entities can raise additional challenges. The arbitration clause should ideally include a broad waiver of immunity, including both pre- and post-judgment attachment of assets. Moreover, if contracting with an agency or instrumentality of a sovereign state, research should be undertaken to determine whether the national law of the agency or instrumentality imposes specific requirements regarding

4 9 USC Section 9.

approvals that must be obtained prior to entering into the arbitration agreement or whether there are any restrictions on the ability of that entity to arbitrate a future dispute.

Enforcement due diligence

While the expectation may (and even should) be that any arbitration award will be honoured, the reality is that even the best counterparty may be unable or unwilling to effect payment. It is therefore easy to see, from the example of the United Kingdom discussed above, how complex the issue is. The key point is to determine what assets your counterparty has and where they are located. You can then determine what the requirements are for enforcement in that jurisdiction.

But do not lose sight of the need to ensure that, assuming, say, you are enforcing under the New York Convention, there are no grounds on which enforcement can be refused. So, for example:

Notice of appointment

Was proper notice of the appointment of the arbitrator, or of the proceedings, given? To the right person, in the right form and in the correct manner?

You will need to look at the arbitration agreement and consider any applicable institutional rules, as well as the rules of the arbitral seat and all relevant facts.

Opportunity to present case

Did the party against whom an award was given have an opportunity to present its case?

We have run arbitration hearings before panels of three arbitrators to obtain an award so that there can be no suggestion that there was any impropriety, and have then gone on to enforce the award under the New York Convention. The test is not whether the person failed to attend, but whether, for reasons outside their control, they were unable to present their case.

Seat

And remember that the seat is important:

> *[I]f the parties explicitly choose the seat of arbitration, their agreement can have a real basis in the expectations of the parties regarding the potential future enforcement of the arbitral award in a particular state, including the possibility of applying international treaties, whether bilateral or multilateral, or the existence of reciprocal relations between the state where the award was made and the state of enforcement, etc.*[5]

Under English law, an award is to be treated as if it were made at the seat of the arbitration, regardless of where it was signed, from where it was dispatched or to where it was delivered.[6]

---

5 Article from Kluwer Arbitration: 'Importance of the Seat of Arbitration in International Arbitration: Delocalization and Denationalization of Arbitration as an Outdated Myth', *ASA Bulletin*. Available at http://www.kluwerarbitration.com/document/kli-ka-asab310204?q=%22future%20enforcement%22.

6 Section 100(2)(b), Arbitration Act 1996.

Parties should, therefore, give careful consideration to the seat of the arbitration, as this will affect the enforceability of the award.

The seat of arbitration need not be the same country as the hearing venue (though, in practice, they often are) and need not correspond with the law applicable to the substantive dispute. Agreement on the seat of arbitration outside the domicile of the parties can also be influenced by considerations regarding the potential future enforcement of the award.

If the award is made in a New York Convention state and the assets are also located in a New York Convention state, then it should be straightforward to enforce.

Location of assets

Once you know where the assets are located, obtain local advice on how the award will be enforced before commencing proceedings. Also, check what those assets are: we were informed only very recently about a prospective client who sought to enforce an award in a foreign jurisdiction. The property they had been advised of was only rented, and they were reduced to removing and selling office furniture – maybe that is why they are looking for new legal representation.

Alternatives to traditional enforcement

Arbitration awards are not self-executing. If the award debtor does not voluntarily pay, judicial enforcement is required. The New York Convention provides the overall enforcement mechanism for such an award as well as the grounds on which an award can be refused recognition and enforcement.

However, under certain circumstances, an award debtor may be better served by seeking recognition of a foreign judgment (i.e., an award confirmed at the seat and converted into judgment), rather than the award itself.

For example, in the United States, courts require personal jurisdiction over the defendant or the presence of a defendant's assets as a prerequisite to bringing an enforcement action under the New York Convention.[7] And while courts have held that having assets in the jurisdiction is enough for establishing *in rem* or quasi *in rem* jurisdiction, some courts have concluded that a mere 'good faith' belief as to the existence of assets in a particular jurisdiction is not enough.[8]

In contrast, some US courts have concluded that establishing personal jurisdiction over a judgment debtor is not required as a prerequisite to enforcing a foreign judgment.[9] Even if one cannot locate assets of the debtor in the United States at the time the judgment is sought, there are advantages to having a judgment in the United States. Discovery is a

7 *Frontera Res. Azer. Corp. v. State Oil Co. of Azerbaijan*, 582 F.3d 393, 396-98 (2d Cir. 2009).

8 *Glencore Grain Rotterdam B.V. v. Shivnath Raj Harnarain Co.*, 284 F.3d 1114, 1127-28 (9th Cir. 2002).

9 *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D. 2d 42, 49 (4th Dep't 2001). The holding in *Lenchyshyn* was narrowed in *Albaniabeg Ambient Shpk v. Engel S.p.A.*, 160 A.D. 3d 93 (1st Dep't 2018), which held that a proceeding to recognise and enforce a foreign country judgment under Article 53 of the Consolidated Laws of New York, Civil Practice Law and Rules without establishing personal jurisdiction was appropriate only when the judgment debtor 'does not contend that substantive grounds exist to deny recognition to the foreign judgment'. However, *Lenchyshyn* currently remains good law in the Fourth Department of New York. See also *Pure Fishing, Inc. v. Silver Star Co.*, 202 F. Supp. 2d 905, 910 (ND Iowa 2002).

critical part of an enforcement strategy, as noted above. US states generally provide for broad discovery in aid of judgment enforcement, which can provide leverage for enforcement efforts in other jurisdictions. While perhaps not as broad as in the United States, other countries likewise provide mechanisms for the disclosure of information in connection with judgment enforcement proceedings.

Another consideration in favour of enforcing a judgment as opposed to an award includes a potentially longer statute of limitations.

In the United States, for example, Section 207 of the FAA provides that a party seeking confirmation of an arbitral award under the New York Convention must apply within three years of the date of the award. While the statute of limitations for the enforcement of a foreign judgment varies by state, that period is often longer than three years and can be as long as 20 years in some jurisdictions.[10] Accordingly, consideration should be given as to whether turning an award into a judgment at the seat of the arbitration and then enforcing that judgment in a country is appropriate.

Ways to monetise an award without enforcement

Outside the New York Convention or bilateral and multilateral treaty regimes, the successful party may struggle to enforce its award and so may need to consider how best to monetise the award without 'enforcement', as the term is generally understood. The following is a non-exhaustive summary of options that may be available.

Obtain security for your claim before or after you commence proceedings, but in any event, before you obtain your award. In the shipping context we do this by using the admiralty procedures to arrest an asset of the owner (e.g., a vessel) or time charterer (e.g., bunkers) to obtain security by way of a bank guarantee, P&I club letter or payment into escrow.

Consider also whether you have a right of lien under your contract over any asset of your counterpart.

Certain jurisdictions allow you to attach bank accounts, even before proceedings are commenced: the Dutch Arbitration Act contains a number of provisions pertaining to foreign arbitrations before an application for enforcement is made, for instance in respect of the ability to apply for the attachment of assets to satisfy a foreign arbitral award before the arbitration is initiated. And even jurisdictions such as Switzerland will attach bank accounts once an award is obtained.

Do not think that just because you have an award, it is too late to negotiate. If you are able, for example, to promise mutually beneficial commercial terms to the party against whom you have the award, they may still be willing to pay a good proportion of the award even if the circumstances mean they are unable, or unwilling, to pay it in full.

Although not to be confused with security, as discussed above, a freezing injunction obtained at an early stage may be particularly useful if a party wishes to make sure that the respondent has sufficient assets to comply with the award, or as a method of securing assets (including overseas assets)[11] for the enforcement of an award.[12]

10 Fla. Stat. Section 95.11 (five years in Florida); CPLR Section 211(b) (20 years in New York).

11 *Derby & Co Ltd and others v. Weldon and others (No. 6)* [1990] 1 WLR 1139.

12 *Orwell Steel v. Asphalt and Tarmac (UK)* [1984] 1 WLR 1097.

To obtain a freezing injunction, it is necessary to provide evidence that there is a real risk that the award may not be satisfied. The court applies an objective test and considers the effect of the respondent's actions, not their intent. It has been held that what has to be shown is that 'there is a real risk that a judgment or award will go unsatisfied, in the sense of a real risk that, unless restrained by injunction, the defendant will dissipate or dispose of his assets other than in the ordinary course of business.'[13]

As well as freezing injunctions, the English court has power to order the appointment of receivers, including over a respondent's foreign assets, to help prevent the dissipation of the assets and thereby assist with enforcement of an award against them.[14]

A judge can also arrange insurance to cover the risk of sovereign default on arbitral awards, thus removing what is often seen as the greatest hurdle associated with funding arbitration in connection with a bilateral investment treaty (i.e., the risk of non-payment by a sovereign state).[15]

You may be able to claim against a litigation funder. For example, US cotton companies were handed an arbitration award in a dispute against an Indian yarn spinner (Tradeline). A confirmation from a US federal judge required Tradeline to cover the costs incurred by the cotton companies in fighting Tradeline's unfair competition claims, but Tradeline still did not pay. The claimants mentioned to the federal judge that a litigation funder (Arrowhead), who had been used by their opponent in association with the case, should also be responsible for the judgment and urged the judge to add Arrowhead as a judgment debtor. In support of their request, they submitted that Arrowhead took a chance and backed the defendant (Tradeline). Since Arrowhead must have realised the weakness of Tradeline's claims, it was argued that it should now suffer some of the consequences for doing so.[16]

In a shipping context, a party who has obtained a monetary award that remains unsatisfied can still bring an action *in rem* on the underlying cause of action, there being no bar to the separate claim against the ship.[17]

Even the threat of enforcement can be enough to obtain payment: in 2016, an ICSID tribunal concluded that Venezuela had breached its investment treaty with Canada by wrongfully ousting Crystallex from an operating contract for a mine containing one of the largest undeveloped gold deposits in the world. Crystallex attempted to enforce the award against Venezuelan assets through litigation in a variety of courts. In those proceedings, a US district court ruled that the Canadian company could seize shares of a subsidiary of Venezuela's state-owned oil company. Following negotiations, Crystallex agreed to pause enforcements efforts in exchange for Venezuela agreeing to pay the entire award plus interest.[18]

---

13 Justice Flaux in *Congentra v. Sixteen Thirteen Marine* [2008] EWHC 1615 (Comm).

14 Section 44 Arbitration Act 1996.
See also *Cruz City 1 Mauritius Holdings v. Unitech Ltd and others* [2014] EWHC 3131 (Comm).

15 https://www.thejudgeglobal.com/award-enforcement/.

16 Law 360: 'Litigation Funder On Hook For $8.9M Award, Cotton Cos. Say' (19 December 2018).

17 David Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed., Sweet & Maxwell), Chapter 16: The Rena K [1978] 1 Lloyds Rep. 545, 560.

18 Law 360: 'Venezuela Must Justify $1.2B Crystallex Award Row: DC Circ' (10 January 2019); 'Venezuela Breached Deal Over $1.2B Award, Crystallex Says' (11 December 2018).

Thinking outside the box:

> *It may be possible to enforce even where no direct enforcement treaty is available, for instance through the use of a third-party state. If a third-party state is a party to the NYC and also has a bilateral or multilateral treaty for the enforcement of judgments with the state in which enforcement is sought, the party seeking enforcement may be able to apply to the courts of the third-party state for recognition of the judgment under the NYC, and then enforce the resulting court judgment in the state in which enforcement is sought under the bilateral or multilateral treaty.*
>
> *Even where the state of the arbitral seat is not a party to the NYC, it may still be possible, in some instances, for an award to be enforced through a third-party state via the use of two bilateral treaties for the recognition of awards or court judgments.*
>
> *However, such mechanisms are obviously complex and heavily reliant on both the terms of the relevant bilateral treaties and the willingness of the courts to apply them favourably and effectively.*[19]

Shaming may also work (i.e., notifying trade organisations), such as the old practice of posting awards on the Baltic Exchange in London. International arbitration websites are full of news of recent awards being handed down. The issue for English awards is confidentiality; however, the same issue does not arise in, for example, the United States, where there is no *per se* confidentiality of the award absent party agreement.

Risk sharing with third parties

Third-party funding plays an increasingly important part in international arbitration. However, the acceptance of funding varies from country to country. In some jurisdictions, third-party funding is not accepted, while in others, including the United States, it is prevalent. That raises the question: will the courts of a jurisdiction where arbitration funding is disallowed enforce an arbitral award made from another jurisdiction that was funded?

There is not yet a conclusive answer to that. However, as the use of funding continues to grow, undoubtedly this question must be asked whenever a case starts, particularly if enforcement will be sought in a jurisdiction where funding is disallowed.

As has already been mentioned, the grounds for refusing recognition and enforcement of an award are limited. However, to the extent that such a challenge will be brought, the only potentially applicable ground for refusal of enforcement is the public policy ground. As noted, the New York Convention provides that recognition and enforcement of an award may be refused where '[t]he recognition or enforcement of the award would be contrary to the public policy of that country'.[20]

In 2015, the International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards published a report attempting to define public policy and

19 Financier Worldwide, 'Enforcing international commercial arbitral awards', July 2018, available at https://www.financierworldwide.com/enforcing-international-commercial-arbitral-awards/#.XD7-MFywm70.

20 NYC, Article V(2)(b).

catalogue its manifestations.[21] The report found that while public policy is often invoked in challenging an award, its 'manifestations remain uncommon, and recognition and enforcement of a foreign award are rarely refused under Article V(2)(b)' of the New York Convention. Indeed, none of the 'manifestations' of public policy violations summarised by the report included the existence of a funding.

Arbitral tribunals have been known to order disclosure of the existence of funding (see, for example, Article 24(l) of the Singapore International Arbitration Centre's Investment Rules 2017). However, that is not the norm. Moreover, even if the existence of funding is disclosed, the terms of the arrangement generally are not. That said, as the existence of third-party funding becomes more prevalent, a diligent party should at the outset analyse the effect of a funded arbitration if enforcement will be sought in a jurisdiction that disallows funding.

21 International Bar Association's Subcommittee on Recognition and Enforcement of Arbitral Awards, 'Report on the Public Policy Exception in the New York Convention', October 2015.

2

Awards: Form, Content, Effect

James Hope[1]

Introduction

Arbitral awards have a special status under international law by reason of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).[2]

Pursuant to the New York Convention, arbitral awards made in the territory of one contracting state shall be recognised as binding and enforced in another contracting state, subject only to the limited grounds for refusal of recognition and enforcement set out in Article V of the Convention.

Given such special status, the form and content of an arbitral award is clearly important. This chapter considers the following issues:

- The form of an arbitral award – types of arbitral awards, and formal requirements under the New York Convention and selected national laws.
- The content of an arbitral award – best practice regarding the contents of arbitral awards, as compared with mandatory requirements under selected national laws and arbitration rules.
- The effect of an arbitral award – finality, the possibility of challenges to arbitral awards, the limited possibility of appeals to arbitral awards, and enforcement.

The form of an arbitral award

Arbitral award or arbitration award?

To start with, which term is more appropriate – arbitral award or arbitration award?

1 James Hope is a partner at Advokatfirman Vinge KB.

2 The New York Convention has been described as the most successful treaty in private international law, having been ratified by 159 countries, as at the time of writing (see www.newyorkconvention.org).

The New York Convention uses 'arbitral award', as do the United Nations Commission on International Trade Law (UNCITRAL) Model Law and the UNCITRAL Arbitration Rules. However, many sets of arbitration rules, including those under the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA), the International Centre for Dispute Resolution (ICDR), the Stockholm Chamber of Commerce (SCC) and the Singapore International Arbitration Centre, simply use the term 'award'. The English Arbitration Act also mainly uses the term 'award', although the long title of the Act refers to 'arbitration awards' and the term 'arbitral award' appears in Sections 2(b) and 81(c).

Thus, the correct term is 'arbitral award', but the terms 'arbitration award' and 'award' may also be used.

Types of arbitral awards

As is stated in Article 1(1), the New York Convention applies to 'the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal'. Article 1(1) adds that the Convention also applies to 'arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought'. Further, Article 1(2) provides that the term 'arbitral awards' 'shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted'.

Thus, distinctions can be made between several different types of awards, including:

- A 'domestic award' is an arbitral award made within the territory of a state.
- A 'foreign award' is an arbitral award made – or deemed to be made – in the territory of another state. For example, if the legal place (or seat) of arbitration is London, the arbitral tribunal may nevertheless decide to sign the award in another country for reasons of convenience. Nevertheless, the award will be treated as having been made at the seat pursuant to Section 53 of the English Arbitration Act 1996.[3]
- An 'interim award' (or 'provisional award') is an award that is subject to a final determination at a later stage (see, e.g., Section 39 of the English Arbitration Act). Since Article V(1)(e) of the New York Convention requires an arbitral award to have become binding, an interim award is generally considered to be unenforceable. However, some US courts have held that an interim order by an arbitral tribunal, or even by an emergency arbitrator, could be enforced as an award if it finally and definitely disposed of a self-contained issue.[4]
- A 'partial award' determines only part of the claims in dispute between the parties.
- An 'agreed award' is an arbitral award entered into by agreement of the parties and the arbitral tribunal, recording the result of a settlement.

3 Where the award is actually signed is, under most modern arbitration laws, irrelevant. Section 53 of the English Arbitration Act 1996 negates the effect of the English case *Hiscox v. Outhwaite* [1992] 1 AC 562, in which the UK House of Lords came to the unfortunate conclusion that an award in an English arbitration was a French award merely because the arbitrator happened to sign the award in France.

4 See *Island Creek Coal Sales Company v. City of Gainesville Florida* (1985), 729 F2d 1046, USCA, 6th Circuit; *Yahoo! v. Microsoft Corporation*, 983 FSupp 2d 310 (SDNY 2013).

It is important to differentiate an arbitral award from other decisions or orders within an arbitration since it is only awards that can be enforced internationally under the New York Convention, and domestically under national arbitration laws. Although arbitral awards are generally clearly indicated as being awards, it should be noted that the nomenclature used by the arbitral tribunal is not determinative.

Formal requirements for an arbitral award

International conventions generally do not set out any formal requirements in relation to awards. However, the New York Convention imposes an implied written requirement by providing in Article IV that 'the party applying for recognition and enforcement shall . . . supply: (a) [t]he duly authenticated original award or a duly certified copy thereof'.

Requirements in relation to formalities are primarily set out in national arbitration laws or in applicable arbitration rules. Thus, for example:

- Many national arbitral laws, including the UNCITRAL Model Law (Article 31), provide that the award shall be made in writing, shall be signed by the arbitrator or arbitrators, and shall state the date of the award and the place of arbitration.[5]
- It is also often provided that the arbitral tribunal must state the reasons upon which the award is based.[6] This matter is considered in more detail below.

Some national arbitration laws, such as the English Arbitration Act 1996 (Section 52(1)), expressly provide that the parties are free to agree on the form of the award.

Signature

Although not strictly necessary under the New York Convention, in practice it is a fundamental requirement that the award should be signed.

In the case of a three-person tribunal with arbitrators in different countries, it is necessary to allow sufficient time for the final agreed award to be couriered between the respective arbitrators to obtain their respective signatures. The arbitrators should also ensure that there is a sufficient number of originals – generally, one original per party, one for each of the arbitrators, and one for the arbitral institution, where applicable.

Although it is usual for all the arbitrators to sign the award – and that is so even where there is a dissenting opinion – it can happen that a dissenting arbitrator refuses to sign the award. The solution in such a situation is usually for the majority to sign the award, or at least the chair or presiding arbitrator, provided an explanation is given for the missing signature.[7]

The place of the award should be stated as being the legal place or seat of arbitration, even if the award is actually signed in a different place. This is important, since the legal seat determines the nationality of the award for the purposes of the New York Convention.

---

5 See, for example, the 2013 UNCITRAL Rules (Article 34), the 2014 LCIA Rules (Article 26), the 2017 SCC Rules (Article 42) and the 2014 ICDR Rules (Article 30).

6 See, for example, the 2017 ICC Rules (Article 32(2)), the 2013 UNCITRAL Rules (Article 34(3)), the 2014 LCIA Rules (Article 26.2), the 2017 SCC Rules (Article 42(1)), the 2014 ICDR Rules (Article 30(1)).

7 See, for example, the 2013 UNCITRAL Rules (Article 34(4)), the 2014 LCIA Rules (Article 26.6), the 2017 SCC Rules (Article 42(3)), the 2014 ICDR Rules (Article 30(2)).

Reasons

As noted above, many arbitration laws and rules require the arbitrators to state the reasons upon which the award is based.[8]

However, note, for example, that the Swedish Arbitration Act of 1999 does not require any reasons to be given, although the SCC Rules do impose such a requirement.

The requirement to give reasons is generally stated to be non-mandatory, but where there is such a requirement and the parties agree to dispense with it, it is important for there to be clear evidence of such an agreement and for this to be clearly recorded in the award itself.

See further below, regarding what may be regarded as sufficient reasoning.

Other formal requirements under some national laws

In addition to the above-mentioned requirements, some national laws impose others that are required to be followed for arbitral awards made in that particular seat of arbitration.

For example:

- In Sweden, the Swedish Arbitration Act of 1999 provides that the award must contain clear instructions as to what must be done by a party who wishes to challenge the award, (1) where the award concludes the proceedings without a determination on the merits, and (2) as regards challenges to the amount of compensation awarded to the arbitrators (see Sections 36 and 41 of the Act).
- In Scotland, Rule 51 of Schedule 1 to the Arbitration (Scotland) Act 2010 provides as a default rule that the award should state whether any previous provisional or part award has been made (and the extent to which any previous provisional award is superseded or confirmed).

It is always important for arbitrators to check for any specific rules that may apply in the applicable seat of arbitration or under the applicable arbitration rules.

Time limits

National arbitration laws usually do not set out a time limit for rendering the award in international arbitrations.

However, some arbitration rules provide for time limits. For example, the 2017 ICC Rules provide that the arbitral tribunal shall render its final award within six months of the date of the terms of reference (Article 31(1)). However, the ICC Court may extend the time limit on its own initiative or following a reasoned request for an extension from the arbitral tribunal. The 2017 SCC Rules have a similar provision, setting out a time limit of six months from the date when the case was referred to the arbitral tribunal (Article 43).

The 2014 ICDR Rules state that the arbitral tribunal shall make every effort to deliberate and prepare the award as quickly as possible after the hearing and, unless otherwise agreed by the parties, specified by law, or determined by the ICDR administrator, no later than 60 days after the closing of the hearing (Article 30(1)).

8 See, for example, Article 31(2) of the UNCITRAL Model Law.

A time limit from the outset of the proceeding has the advantage of putting time pressure not only on the arbitral tribunal but also on the parties, for the award to be rendered within a reasonable time. This can be coupled with a general obligation on all participants to act efficiently, with potential costs consequences on a party that fails to do so.[9] Nevertheless, it is common for the six-month time limit under both the ICC and SCC Rules to be extended, at least in larger cases.

The purpose of a time limit between the closing of the case and the issue of the award is to impose efficiency and discipline on the arbitrators. It also helps to ensure that the parties will not have to wait too long after the hearing to receive the award, and that the arbitrators will consider the evidence and arguments while the case is still fresh in their minds. Some institutions penalise arbitrators for delays in issuing the award.

On the other hand, institutions are generally careful to ensure that time limits are extended where necessary, either upon request by the arbitral tribunal or on the institution's own initiative, since there is a clear risk that an award that is issued after such a deadline would be liable to be set aside.

In the rare circumstances that the arbitration agreement provides a deadline without the possibility of an extension, the arbitral tribunal needs to ensure that it complies with such a deadline. However, national arbitration laws may provide a statutory possibility for a time limit to be extended. For example, Section 50(1) of the English Arbitration Act provides that '[w]here the time for making an award is limited by or in pursuance of the arbitration agreement, then, unless otherwise agreed by the parties, the court may in accordance with the following provisions by order extend that time'.

Delivery of the award to the parties

National arbitration laws usually require that the arbitral award should be communicated to the parties without delay.

For example, Section 31 of the Swedish Arbitration Act provides that '[t]he award shall be delivered to the parties immediately'. Section 55(2) of the English Arbitration Act provides that, in the absence of any other agreement between the parties, 'the award shall be notified to the parties by service on them of copies of the award, which shall be done without delay after the award is made'. Similar provisions can be found in most institutional rules.

In most cases, it is the chair of the arbitral tribunal that delivers the award to the parties. However, under some institutional arbitration – notably under the ICC, LCIA and ICDR Rules[10] – it is the institution that delivers the award.

Traditionally, arbitral awards have been delivered to the parties by courier, but this can give rise to the unfortunate situation that one party might receive the award several days in advance of another party, if the parties are situated on different continents. To avoid such a situation, it is common for arbitral tribunals to deliver the award to the parties initially by email, with the originals to follow by courier.

9 See Articles 2, 49(6) and 50 of the 2017 SCC Rules.

10 See Articles 35(1), 26.7 and 30(4) of those Rules, respectively.

It is good practice for arbitral tribunals to ask parties to acknowledge receipt of the award. This is important not only to ensure that the award has been duly delivered, but also for the purpose of calculating time limits for any corrections, or for possible applications to set aside the award.

Under English law, the arbitral tribunal has the power to withhold delivery of the award pending full payment of its fees and expenses – although a party can ask the English court to intervene in this situation.[11] Conversely, Section 40 of the Swedish Arbitration Act expressly states that the arbitrators may not withhold the award pending payment of compensation. In institutional arbitration, the arbitral institution invariably ensures that the requisite fees and costs have been paid in good time prior to the delivery of the arbitral award.

Correction of the award

Arbitration laws and rules generally provide that either a party may apply to the arbitral tribunal for correction of any clerical, computational or typographical error within a set time limit, typically within 30 days from the date of the award. It is also generally possible for a party to ask for an interpretation of a specific part of the award within the same time limit. Moreover, if the arbitral tribunal has failed to rule upon any claim presented to it, a party may ask for an additional award in respect of that claim. Such powers can also generally be exercised by the arbitral tribunal on its own initiative.[12]

It should be noted, however, that the powers of the arbitral tribunal to correct or supplement the arbitral award cannot be used to alter the substance of the award to any extent.

The content of an arbitral award

In considering the content of an arbitral award, it is important to distinguish between international best practice on the one hand, and, on the other hand, the minimum content that may be deemed necessary for the award to be considered to be valid and enforceable pursuant to the applicable arbitration law at the seat of arbitration.

Since there are good policy reasons for arbitral awards to be enforceable, the minimum requirements are generally set at a very low level. Nevertheless, international arbitration would not be acceptable as a system of international dispute resolution if arbitrators and arbitral institutions were content to abide by such minimum requirements.

International best practice

International arbitration is inherently flexible, and it is right and proper that there should also be flexibility in relation to the style of drafting of arbitral awards.

11 English Arbitration Act, Section 56.

12 See, for example, UNCITRAL Model Law (Article 33).

Guidelines on the proper drafting of arbitral awards

Nevertheless, it has become increasingly common for arbitral institutions and other organisations to publish guidelines for arbitrators on the proper drafting of arbitral awards. These guidelines include:

- ICC Award Checklist;
- IBA Toolkit for Award Writing;
- Chartered Institute of Arbitrators Practice Guideline on Drafting Arbitral Awards – Part I (General), Part II (Interest); and
- many private initiatives from law firms and other bodies in different jurisdictions.

It can be suggested that an arbitral award should, at the very least, include the following sections:

- details of the parties and their counsel;
- the procedural history;
- details of the applicable contract, including the arbitration agreement;
- details of the background facts and circumstances;
- the claims and arguments advanced by each party;
- a list of issues, where appropriate;
- the arbitral tribunal's detailed reasoning regarding jurisdiction, where applicable;
- the arbitral tribunal's detailed reasoning regarding the substantive merits of the case, dealing with each disputed issue in turn; and
- the operative part of the award.

Minimum requirements

Formal requirements

As noted above, there are various formal requirements under most national laws and arbitration rules that generally need to be complied with.

If an award does not follow the applicable formal requirements, it may be subject to annulment at the seat of the arbitration since such requirements are usually mandatory. Arguably, it could also be an argument for non-recognition in other jurisdictions, although Article V of the New York Convention does not set out such a basis for non-recognition. In practice, however, such formal requirements rarely create any problems – and when errors do occur, it is generally possible for the errors to be corrected as noted above.

Reasons

If there is a requirement under the arbitration law or the applicable arbitration rules, or both, to give reasons, the question arises as to whether a failure to give reasons for all or part of the decision constitutes a valid ground for seeking to set aside the award.

Courts generally set a rather low standard for the requirement to give reasons, partly because of the general policy requirement to ensure that arbitral awards are generally enforceable, and partly because it is recognised that arbitrators are not required to be legally trained and it would therefore be wrong to impose the same standards as may be required of a judge.

In the English case *Bremer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2)*,[13] Lord Justice Donaldson stated:

> *All that is necessary is that the arbitrators should set out what, in their view of the evidence, did or did not happen and should explain succinctly why, in the light of what happened, they have reached their decision and what that decision is. Where [an] . . . award differs from a judgment is that the arbitrators will not be expected to analyse the law and the authorities. It will be quite sufficient that they should explain how they reached their conclusion.*

Similarly, in *Navigation Sonamar Inc v. Algoma Steamships Limited*,[14] an attempt to set aside an arbitral award for lack of reasons was refused, taking account not only what was expressly stated but also what was implicit in the award. The court held that the arbitrators could not be criticised for expressing themselves as commercial men and not as lawyers.

In the *Soyak II* case,[15] the Swedish Supreme Court decided that only a total lack of reasons would be sufficient to constitute grounds to set aside an award. This was a case under the SCC Rules in which one of the parties sought to set aside the award on the basis of a lack of reasons. The Supreme Court stated, *inter alia*, as follows:

> *There can be different reasons for a provision in the arbitration agreement that the award should contain reasons. In the absence of more precise provisions concerning what should be included in the reasons, the parties can also have more or less extensive expectations regarding how the arbitral tribunal should explain its decision-making. However, the question of what the parties with or without justification expected and what can be said to be good practice among arbitrators must be distinguished from whether the arbitral tribunal's reasoning is so lacking that it constitutes a ground for setting aside the award.*
>
> *The provision of sufficient reasoning in an arbitral award constitutes a guarantee of legal certainty, since it forces the arbitral tribunal to analyse the legal issues and the evidence. However, the value of having full reasoning for the outcome must be balanced, as regards set-aside grounds, against the interest of having finality. Determination of a challenge to an arbitral award does not provide room to judge the substance of the arbitral tribunal's decisions. For that reason, and since a qualitative judgment of the reasoning would give rise to significant difficulties in drawing the line between procedure and substance, it follows that only a total lack of reasons, or reasons that in the circumstances must be considered to be so insufficient that they can be equated with a lack of reasons, can be sufficient to constitute a procedural irregularity. On the other hand, where there is such a serious procedural irregularity, it can be presumed that the lack of reasons has affected the outcome of the award.*[16]

13 [1981] 2 Lloyd's Rep 130 and 132.

14 (1994) XIX YCA 256, Superior Court of Quebec (*Rapports Judiciaires de Québec* 1987, 1346).

15 NJA 2009 page 128.

16 Unofficial translation from the original Swedish.

Scrutiny

The ICC

It is one of the main distinguishing features of ICC arbitration that the ICC Court scrutinises the award as to form before it is issued. Article 34 of the 2017 ICC Rules provides that '[b]efore signing any award, the arbitral tribunal shall submit it in draft form to the Court'.

Article 34 goes on to state that '[t]he Court may lay down modifications as to the form of the award and, without affecting the arbitral tribunal's liberty of decision, may also draw its attention to points of substance'.

Thus, the purpose of the scrutiny process is to ensure that the award follows the formal requirements set out in the ICC Rules. In practice, the Court makes proposals for modifications to the award in almost every case. In 2012, the Court approved 483 of 491 awards after making some amendments. Only eight awards were approved without any comment from the Court. In 59 cases, the Court requested that the award shall be resubmitted to the Court for potential approval.[17]

Other institutional rules

Other institutional rules have taken inspiration from the ICC scrutiny. The China International Economic and Trade Arbitration Commission (CIETAC) has a light form of scrutiny; Article 51 of the 2015 CIETAC Rules provides that CIETAC 'may bring to the attention of the arbitral tribunal issues addressed in the award on the condition that the arbitral tribunal's independence in rendering the award is not affected'. Thus, CIETAC may raise issues for the arbitral tribunal to consider, but the arbitral award is not formally subject to approval.

The Danish Institute of Arbitration also has a light form of scrutiny. Article 28 of the 2013 Rules provides that the Secretariat 'may propose modifications as to the form of the award and without affecting the Arbitral Tribunal's jurisdiction, draw its attention to other issues, including issues of importance to the validity of the award and its recognition and enforcement', but it is stressed that the responsibility for the contents of the award lies exclusively with the arbitral tribunal.

The German Arbitration Institute's 2018 Arbitration Rules also include provision for scrutiny of the award (Article 39.3).

The effect of an arbitral award

Finality

One of the main features of arbitration as opposed to domestic litigation is that arbitration is generally a single-instance procedure, without recourse to any substantive appeal on the merits.

England provides a notable exception, since Section 69 of the English Arbitration Act allows for an appeal on a point of law subject to leave of the court. However, it should be noted that this provision is generally only applicable in *ad hoc* arbitration; institutional

17 Webster and Bühler, Handbook of ICC Arbitration, 2014, at 33–1.

arbitration, such as under the ICC or LCIA Rules, generally excludes any appeal on the merits.[18]

All awards that finally decide either some or all of the issues referred to the arbitral tribunal by the parties are 'final' in relation to those issues. However, the term 'final award' is reserved for those awards that conclude the arbitration proceeding by finally deciding upon all the outstanding issues. A final award in that sense renders the arbitral tribunal *functus officio*. In other words, the 'final award' completes the mandate of the arbitral tribunal.

It is common that the parties set out in the arbitration agreement that the award shall be 'final and binding'. Further, Article III of the New York Convention provides that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'. National laws and arbitration rules also generally provide that the award will be final and binding on the parties.

What 'finality' really means will depend on the grounds for setting aside awards at the seat of arbitration, and on the enforcement regime at any place where the arbitral award is sought to be enforced. If the state where the award is made and the state where enforcement is sought have ratified the New York Convention, finality usually entails that enforceability of the award may only be refused if there is a serious procedural irregularity or if the award is contrary to public policy. The arbitration laws of New York Convention states generally replicate the rules for recognition and enforcement of foreign arbitral awards as set out in the Convention.[19]

18 See, e.g., Article 26.8 of the 2014 LCIA Rules, which provides that 'the parties also waive irrevocably their right to any form of appeal, review or recourse to any state court or other legal authority, insofar as such waiver shall not be prohibited under any applicable law'. See also Article 35(6) of the 2017 ICC Rules, which states that the parties 'shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made'.

19 For more information regarding enforcement of awards, see Chapter 9.

3

Awards: Challenges

Michael Ostrove, James Carter and Ben Sanderson[1]

Introduction

Having secured an arbitral award in its favour, the prevailing party might reasonably expect the other party to comply with the award voluntarily. Indeed, statistics, commentaries and experience bear witness to a relatively high degree of voluntary compliance with arbitral awards. One of the attractions of international arbitration, after all, is the finality of awards rendered in this consensual process. Other than in certain exceptional circumstances, there is no prospect of appeal. Parties have only very limited means of recourse to challenge awards. Nevertheless, an unsuccessful party may choose not to comply with an award and instead to challenge the outcome. In those circumstances, the losing party may:

- seek to have the award set aside before the courts of the seat of arbitration;[2] or
- refuse to execute the award and attempt to resist recognition and enforcement thereof before the national courts of the jurisdiction or jurisdictions to which the successful party takes the award for the purpose of enforcement.[3]

This chapter is concerned with the first of these approaches, namely setting aside an award at the seat of arbitration. While reference will be made to the alternative means of challenge as appropriate, they are dealt with more fully elsewhere and are not the focus of this chapter.

---

1 Michael Ostrove and James Carter are partners and Ben Sanderson is of counsel at DLA Piper.

2 Depending on the legal system at issue, seeking to have an award set aside is sometimes referred to as seeking to have an award annulled or seeking *vacatur*. In this chapter, we have elected to use the term set-aside, although the alternative terms are equally appropriate.

3 In addition to the two options cited, the rules of a number of arbitral institutions empower tribunals to correct, interpret or supplement their awards upon the application of the parties.

Set-aside – general principles

The setting aside of an award is envisaged in Article V of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). However, the New York Convention is primarily concerned with the second option listed above – namely the grounds on which signatory states may refuse to recognise or enforce an award rendered in another signatory state. One of the grounds provided is that a signatory state may refuse to recognise or enforce an award that has 'been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'.[4] However, the New York Convention does not prescribe the circumstances in which an award may be so 'set aside or suspended'.

The grounds on which an arbitral award may be set aside can be found in national legislation particular to each jurisdiction. The silence of the New York Convention might have led to major differences between the international arbitration legislation of different jurisdictions. In reality, however, national arbitration laws tend to provide for similar grounds. Some 159 states are party to the New York Convention, and the grounds on which it permits signatory states to refuse recognition or enforcement (or both) of an award have also come to form the basis of the grounds for set-aside in the vast majority of national arbitration laws.[5]

Quite apart from a simple state-by-state decision to ensure consistency between grounds for set-aside and for refusing enforcement, a key reason for this uniformity is the UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which was promulgated in 1985 and amended in 2006. The Model Law was designed to assist states in modernising and reforming their laws on arbitration procedure and has been adopted by many jurisdictions as the basis for their domestic arbitration laws. In setting out the grounds on which an award may be set aside, the Model Law lifts the wording almost verbatim from Article V of the New York Convention.[6] The enthusiasm of those responsible for drafting the Model Law to ensure that it aligned with the terms of the New York Convention has been well documented elsewhere, and the benefits of an internationally harmonious framework governing the grounds on which awards could be challenged are self-evident.[7] The Model Law has been hugely influential. To date, it (or legislation based on it) has been adopted in 111 jurisdictions, including major hubs of international arbitration such as Hong Kong and Singapore.[8]

4 New York Convention, Art. V(1)(e).

5 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

6 UNCITRAL Model Law [Model Law], Art. 34.

7 See, e.g., G Born, *International Commercial Arbitration* (2nd Ed., 2014), pp. 3186, 3187 and H Holtzmann and J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1989), p. 911.

8 See www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

Commonly available grounds for set-aside

The Model Law provides that an award may be set aside on the following six grounds:

- a party to the arbitration agreement pursuant to which an award was rendered did not have the capacity to enter into the agreement, or the agreement is not valid under the applicable law;[9]
- a party was not given proper notice of an arbitrator being appointed or of the proceedings, or was otherwise denied the opportunity to present its case;[10]
- the award deals with a dispute not contemplated by or not falling within the submission to arbitration;[11]
- the composition of the arbitral tribunal or the arbitral procedure was other than as prescribed by any lawful agreement between the parties;[12]
- the subject of the dispute is not arbitrable;[13] or
- the award is contrary to the state's public policy.[14]

Given the effectiveness of the Model Law in unifying the legal framework for international arbitration, it is perhaps surprising to note that a number of non-Model Law jurisdictions are widely recognised as being some of the most arbitration friendly. For example, France, England and Wales, and the United States all elected not to adopt the Model Law. However, despite their status as non-Model Law jurisdictions, and despite the drafting differences found in their national arbitration laws, these jurisdictions nonetheless all make provision for essentially the same grounds for set-aside as are found in the Model Law. By way of example, the French Code of Civil Procedure permits awards to be set aside in cases where:

- the arbitral tribunal has wrongfully accepted or declined jurisdiction in relation to the dispute;
- the composition of the arbitral tribunal was irregular;
- the arbitral tribunal has not respected the limits of its mission;
- there has been a lack of due process, or a party has been denied the right to a fair hearing; or
- the award is contrary to international public policy.[15]

The grounds provided for by French legislation pursuant to which an award may be set aside are substantially the same as those in the Model Law, other than the fact that the first ground cited above essentially combines the two grounds found in Article 34(2)(a)(i) and 34(2)(b)(i) of the Model Law. Additionally, the French legislation refers to 'international public policy'.[16]

---

9 Model Law, Art. 34(2)(a)(i).

10 id., Art. 34(2)(a)(ii).

11 id., Art. 34(2)(a)(iii).

12 id., Art. 34(2)(a)(iv).

13 id., Art. 34(2)(b)(i).

14 id., Art. 34(2)(b)(ii).

15 French Code of Civil Procedure, Art. 1520.

16 This is in contrast to the reference in the Model Law to the public policy of the seat of the arbitration. In practice, the reference to 'international' public policy makes the term more restrictive than the Model Law

Set out below are examples of challenges that may be brought under the commonly available grounds for set-aside, whether in Model Law or leading non-Model Law jurisdictions. The examples are not intended to serve as an exhaustive list of the situations in which an application for set-aside might be brought, but rather to demonstrate the kinds of challenge that may be considered. It is important to bear in mind, however, that, notwithstanding the steps taken towards establishing uniform international rules to ensure the validity and finality of arbitral awards, there remain a myriad of subtleties that distinguish the applicable legislation applicable across the globe. As such, local law advice should always be sought when making or responding to an application for set-aside.

Incapacity of a party or invalidity of the arbitration agreement

Incapacity of a party or invalidity of the arbitration agreement is a ground commonly invoked when a party seeks to argue, *inter alia*, that an arbitration agreement was never concluded between the parties. While an arbitration agreement will survive a contract that otherwise ceases to bind the parties (further to which, see below), an arbitration agreement that never comes into effect will not be able to bind the parties. This was the argument before the English High Court in *A v. B*.[17] The claimant (A) made an application to set aside an award rendered by a tribunal of the International Cotton Association pursuant to Section 67 of the Arbitration Act 1996. The claimant's case was that the tribunal that had rendered the award lacked the requisite jurisdiction because the claimant had never entered into an agreement with the defendant (B) providing for the resolution of disputes by arbitration.

The validity or otherwise of an arbitration agreement will not necessarily depend on whether the broader agreement remains in force. This concept is referred to as the 'separability' of the arbitration clause. As the authors of *Redfern and Hunter on International Arbitration* observe, it would be 'entirely self-defeating' were an arbitration clause to lose its force concurrently with the wider agreement as the point when a contract breaks down is when arbitration is most needed.[18]

Party not given notice or denied the opportunity to present its case

The provision in Article 34(2)(a)(ii) of the Model Law that an award may be set aside if a party 'was otherwise unable to present his case' is reflected in the French Code of Civil Procedure's ground that 'the tribunal did not respect due process'.[19] In October 2018, the Hong Kong Court of First Instance similarly held that the opportunity for a party both to present its case and to deal with an opponent's case is a 'fundamental rule of natural justice'.[20]

Award dealing with matters outside the submission to arbitration

This ground would include claims that a tribunal's decision has gone beyond what the parties agreed should fall within the scope of the arbitration. The Model Law makes express provision for the preservation of those parts of an award that are 'within' the scope

because domestic French public policy grounds are insufficient for setting aside. Only very limited issues of French international public policy suffice.

17 *A Ltd v. B Ltd* [2015] EWHC 137 Comm.

18 N Blackaby et. al., *Redfern and Hunter on International Arbitration* (6th Ed., 2015), p. 104, para. 2.101.

19 French Code of Civil Procedure, Art. 1520, para. 4.

20 *P v. M* [2018] HKCFI 2280.

of a tribunal's jurisdiction when other parts are set aside.[21] This demonstrates the drafters' intentions to disturb the finality of awards as little as possible. Wording to similar effect is also found in the English Arbitration Act 1996, Section 67 of which provides that the court may, on finding that the tribunal lacked substantive jurisdiction, 'set aside the award *in whole or in part*'.[22]

Composition of the arbitral tribunal

The Model Law provides for an award to be set aside if 'the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties'.[23] The foundation of this ground is respect for the parties' agreement. However, Article 34(2)(a)(iv) includes a *caveat*. If the parties' agreement is in conflict with a provision of the Model Law from which the parties cannot derogate, deviating from that agreement will not be a ground to set aside the award. For example, Article 18 of the Model Law imposes an absolute requirement that the parties shall be treated equally and given a full opportunity to present their case. Were the parties to an arbitration governed by the Model Law to agree to a procedure that did not comply with this requirement, deviation from that agreement would not constitute a ground on which the award could be set aside.

In England and Wales, a challenge on the basis that the tribunal was improperly constituted falls within Article 67 of the Arbitration Act 1996 (as a challenge to the tribunal's substantive jurisdiction). The Court of Appeal has said that where there is a procedure for the appointment of arbitrators, a 'substantial failure to comply with that procedure should have an effect on the jurisdiction of the tribunal itself'.[24] Cases in which the non-compliance was inconsequential or was waived may serve as an exception to this general rule.[25]

Inarbitrability of the underlying dispute

The Model Law states that an award may be set aside if the courts of the arbitral seat determine that 'the subject matter of the dispute is not capable of settlement by arbitration under the law [of that state]'.[26] Traditionally, discussions of inarbitrability arose in the context of disputes over which the jurisdiction of the courts was argued to be inalienable either by operation of law or in the public interest. The English Court of Appeal held in *Fulham Football Club* that 'even the most widely drafted arbitration agreement will have to yield to restrictions derived from other areas of the law'.[27] However, this was in the context of whether to grant a stay of court proceedings in favour of arbitration. Applying the principles in *Fulham Football Club*, the English Court of Appeal has held that 'the fact that an arbitrator cannot give all the remedies which a Court could give does not afford any

21 Model Law, Art. 34(2)(a)(iii).

22 Emphasis added.

23 id., Art. 34(2)(a)(iv).

24 *Sumukan Ltd v. Commonwealth Secretariat* [2007] EWCA Civ 1148 at [23].

25 D Sutton et al., *Russell on Arbitration* (24th ed., 2015), pp. 500, 501, para. 8-073.

26 Model Law, Art. 34(2)(b)(i).

27 *Fulham Football Club (1987) Ltd v. Richards & another* [2011] EWCA Civ 855 at [41].

reason for treating an arbitration agreement as of no effect'.[28] The reasoning of the English courts is in line with an international trend towards increasing the scope of those disputes that can be resolved by arbitration.[29]

The interplay between questions of arbitrability and public policy is unavoidable. Indeed, it is in large part by virtue of their effect on matters of public policy that certain categories of dispute have historically been held not to be arbitrable. This is increasingly becoming less of an issue, with disputes raising matters such as competition law[30] and those in which bribery and corruption are alleged[31] being expressly held to be arbitrable and awards treating these subjects being enforced without reopening the factual argument in multiple jurisdictions.[32]

Award contrary to public policy

An award that is contrary to the public policy of the state in which an application for set-aside is being heard (as is the case in Model Law jurisdictions and England and Wales) or to international public policy of that state (as is the case under the French Code of Civil Procedure) may be set aside. Awards that contravene public policy may differ from jurisdiction to jurisdiction, but questions of public policy commonly arise where challenges involve allegations that the award has been obtained by fraud.[33]

The international arbitration community has long been concerned that the vagueness of the term 'public policy' gives states the ability to set aside awards on regionally particular, and perhaps unexpected, grounds when it suits them to do so. Under the arbitration legislation of Saudi Arabia, for example, the public policy ground is worded more broadly than in the Model Law on which the legislation is based. It provides for setting aside on the ground that the award 'violates the provisions of Sharia and public policy'.[34]

In Poland, public policy is a ground for setting aside an award that 'is contrary to the fundamental principles of the legal order of the Republic of Poland'.[35] This has been held by the Polish Supreme Court to include a situation amounting in essence to the erroneous interpretation by an arbitral tribunal of a contract, albeit where the consequence of said misinterpretation was a violation of a party's property rights.[36] Despite expressly

28 *Kanat Assaubayev and Others v. Michael Wilson & Partners Limited* [2014] EWCA Civ 1491 at [68].

29 See, e.g., the decision of the US Supreme Court in *Mitsubishi Motors Corporation v. Soler Chrysler Plymouth Inc.* 473 US 614 (1985).

30 ibid.

31 See, e.g., the decision of the English Court of Appeal in *Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd* [2000] QB 288, in which the court enforced an award in which the tribunal had addressed allegations of bribery of public officials and found that the contract underlying the arbitration was not illegal.

32 As a matter of terminology, it is important to note that the term 'arbitrable' is used differently in the United States. There, arbitrable refers more generally to matters within the jurisdiction of arbitral tribunals, rather than matters capable of being submitted to arbitration.

33 The courts of England and Wales have set a high bar to challenges on the public policy ground. See, e.g., *Double K Oil Products 1996 Ltd v. Neste Oil OYJ* [2009] EWHC 3380 (Comm), in which it was held that, *inter alia*, there must have been some form of reprehensible conduct which contributed substantially to the award.

34 Law of Arbitration, Royal Decree No. M/34, Art. 50(2).

35 French Code of Civil Procedure, Art. 1206(2)(2).

36 J Koepp and A Ason, 'An anti-enforcement bias? The application of the substantive public policy exception in Polish annulment proceedings', *Journal of International Arbitration* [2018] Vol. 35, Issue 2, p. 157 at 169.

acknowledging the need to interpret the public policy ground narrowly, the Polish courts have shown their willingness to engage in an 'extensive review' of arbitral awards when they deem it necessary to do so.[37]

Less commonly available grounds for set-aside

Challenge on a point of law

As a general rule, the ability to appeal on a point of law is anathema to international arbitration and undermines the principle of finality of the award. However, the English Arbitration Act 1996 goes beyond the provisions of the Model Law and offers parties, by way of an application pursuant to Section 69 of the Arbitration Act 1996, the right to challenge an award on a point of law. Unlike Sections 67 and 68 of the Arbitration Act 1996 (which address the more commonly available grounds for set-aside), the parties to an arbitration agreement are free to contract out of the provisions of Section 69.[38] Recourse to a challenge on a point of law is further limited by the fact that, absent the agreement of the parties, the party challenging the award will require the court's permission to bring an application under Section 69. This will be given only in circumstances where the court is satisfied that (1) the determination of the question will substantially affect the rights of one or more of the parties; (2) the question is one that the tribunal was asked to determine; (3) on the basis of the findings of fact in the award, (a) the decision of the tribunal is obviously wrong, or (b) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt; and (4) despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.[39] The most recent statistics issued by the English Commercial Court underscore the very high threshold imposed by the English courts: in 2016, 46 applications for leave to appeal were made but none was granted. In 2015, 60 applications were made, of which 20 were granted. However, ultimately only four of those appeals were successful.[40]

Challenge on a point of law has also been the subject of intense debate in the United States in the guise of the 'manifest disregard' doctrine. Following the decision in *Hall Street Associates LLC v. Mattel Inc*, US courts have been split as to whether it remains possible to set aside an award where a tribunal manifestly disregards the law.[41] The grounds on which an award rendered in the United States may be set aside are set out in Section 10(a) of the Federal Arbitration Act, which contains no explicit reference to manifest disregard of the law. The origins of the doctrine can be traced back to the decision in *Wilko v. Swan*, in which the Supreme Court appeared to imply that while interpretations of law by an arbitral tribunal will not be subject to review by the courts, their manifest disregard of the law might be.[42]

37 ibid., pp. 169, 170.

38 English Arbitration Act 1996, Section 4(2) and Schedule 1.

39 id., Section 69(3).

40 Commercial Court Users' Group Meeting Report – March 2018 available at https://www.judiciary.uk/wp-content/uploads/2018/04/commercial-court-users-group-report.pdf.

41 *Hall Street Associates LLC v. Mattel Inc.*, 552 US 576 (2008).

42 *Wilko v. Swan*, 346 US 427 (1953).

The perceived risk that an arbitral award rendered by a United States-seated tribunal could be vulnerable to review by the courts has been a concern to members of the international arbitration community for some time.

Formality

One area in which the expertise of local counsel may often prove invaluable is in the appreciation of local requirements pertaining to procedural formality in the context of international arbitration. In certain jurisdictions, including the United Arab Emirates, the public policy ground has been interpreted broadly so as to encapsulate a failure to comply with local procedural requirements. By way of example, the Dubai Court of Cassation has refused to enforce an award rendered overseas on the basis that the tribunal failed to require that witnesses giving evidence swear an oath in the manner required in proceedings before the courts of the United Arab Emirates.[43] Conversely, in the context of a set-aside decision, the Abu Dhabi Court of Cassation dismissed an application made on the same basis, reasoning that although unsworn witness testimony is void, where it was not relied upon by the tribunal, the award would be allowed to stand.[44] Further decisions of the courts of the United Arab Emirates have indicated that, in certain circumstances, an arbitrator's failure to sign each page of the award could render the award unenforceable.[45]

Courts' attitude to challenge

Regardless of the ground on which set-aside is sought, in the face of challenges to an award, many countries demonstrate what is widely referred to as 'a pro-arbitration bias'. One recent analysis concluded that the courts of England and Wales, France, Singapore and the United States are relatively unlikely to set aside arbitral awards and that awards subject to those jurisdictions' oversight are most likely to be final and binding as a consequence.[46]

The persistence of this position in England and Wales (specifically in relation to challenges under Sections 68 and 69 of the Arbitration Act 1996) was reiterated in 2018 by the release of statistics by the English Commercial Court.[47] These revealed that of the 47 set-aside applications brought under Section 68 between 1 January 2017 and 13 March 2018, none was successful.

---

43 H Arab and D Al Houti, 'The Pendulum of Public Policy and the Enforcement of Arbitral Awards in the UAE [2014], *International Journal of Arab Arbitration*, Volume 6, Issue 4, pp. 7, 8. The authors were referring here to *International Bechtel Co Ltd v. Department of Civil Aviation of the Government of Dubai*, Dubai Court of Cassation, Case No. 503/2003, Judgment (15 May 2004).

44 id., p. 8. Here, the authors were referring to Case No. 924 of 2009.

45 id., p. 9.

46 The reluctance of courts to set aside awards in a sample of internationally reputable arbitration jurisdictions was illustrated in an article produced by DLA Piper in 2016. J Carter and C Macpherson, Arbitral Awards - Challenging to Challenge, [2016] Int. A.L.R., Issue 4, p. 89.

47 See footnote 40.

Losing the right to apply for set-aside

Time limits

States have tended to impose strict time limits during which parties may apply for an arbitral award to be set aside. In the Model Law, for example, the time in which a party may apply to set aside an award is limited to three months from its receipt.[48] Legislators in France have adopted a comparatively less generous approach with the Code of Civil Procedure, permitting parties to issue a challenge only within one month of notification of the award.[49] Parties considering an application for set-aside should therefore act promptly following publication of an award (or, at least in France, formal notification) to avoid missing out on an opportunity to challenge it.

Waiver

Parties should be alive to the risk that they may waive their right to apply to the courts for set-aside in circumstances where they do not first raise their concerns with the arbitral tribunal.[50] To some, the risk of inadvertently waiving the right to apply to set aside an award will undoubtedly be of concern. To others, the finality and certainty represented by arbitration might be bolstered further were it possible for parties to contract out of the right to seek set-aside. In certain jurisdictions it has relatively recently become possible for parties to do just that and exclude the jurisdiction of the courts to set aside an arbitral award. The French Code of Civil Procedure, for instance, was amended in 2011 to permit parties in international cases to 'expressly waive their right to bring an action to set aside'.[51] The Organization for the Harmonization of Business Law in Africa's (OHADA) Uniform Act on Arbitration Law was similarly amended, effective in 2018, to permit such a waiver.[52] Conversely, in England and Wales, parties cannot contract out of Sections 67 and 68 of the Arbitration Act 1996.[53] Even under the more permissive French regime, parties should be aware that agreeing to waive their rights to apply for set-aside will not prevent them resisting recognition or enforcement of the award on the same grounds as are available for set-aside.[54]

Certain national legislation may restrict parties' rights to seek to have an award set aside subject to their satisfaction of certain thresholds. By way of example, the courts of England and Wales require a party to exhaust any available arbitral process of appeal or review and any available recourse under Section 57 of the Arbitration Act 1996 for the correction of an award or rendering of an additional award before any application for set-aside may be

48 Model Law, Art. 34(3).

49 French Code of Civil Procedure, Art. 1519.

50 See, e.g., English Arbitration Act 1996, Section 73(1).

51 French Code of Civil Procedure, Art. 1522 ('Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation. Dans ce cas, elles peuvent toujours faire appel de l'ordonnance d'exequatur pour l'un des motifs prévus à l'article 1520.').

52 Acte Uniforme Relatif au Droit de l'Arbitrage, Art. 25, para. 3.

53 English Arbitration Act 1996, Section 4(1) and Schedule 1. These are the sections of the national arbitration legislation of England and Wales that set out the grounds for setting aside an award on the basis that (1) the tribunal lacked substantive jurisdiction, or (2) was affected by serious irregularity.

54 French Code of Civil Procedure, Art. 1522, states in the paragraph immediately following the authorisation to waive a set-aside action: 'In that case, the parties can still appeal an enforcement order on one of the grounds set forth in Article 1520.'

brought.[55] The rules of any relevant arbitral institution would need to be considered in this regard as many of these include provisions for correction of awards,[56] additional awards[57] or, in rare circumstances, appeal of the award.[58]

To some extent, these intra-arbitral methods of redress can be considered methods for the challenge of an award (or part of an award) in their own right. As failure to pursue these potential alternatives may result in a party waiving its right to apply for an award to be set aside, in the interest of completeness, we now address the more commonly available methods.

Correction

Article 33(1)(a) and (2) of the Model Law prescribe a narrow set of circumstances in which it is open to a tribunal, either at the request of a party or of its own volition, to correct errors in the award, including 'errors in computation, any clerical or typographical errors or any errors of similar nature'. It is common for national arbitration legislation to broadly follow the provisions of the Model Law in allowing for arbitral tribunals to make corrections to their awards in narrow circumstances.[59] Section 57(3)(a) of the English Arbitration Act 1996 permits arbitral tribunals to 'correct an award so as to remove any clerical mistake or error arising from an accidental slip or omission'.

The UNCITRAL Rules and the arbitration rules of numerous leading international institutions contain provisions addressing the ability of arbitral tribunals to correct their awards. The rules of UNCITRAL, ICC, LCIA, HKIAC and SIAC, for example, broadly follow the template of the Model Law in relation to the correction of awards in as much as they permit arbitral tribunals to correct clerical, computational, typographical or similar errors.[60]

Interpretation

If the parties have agreed to permit interpretation by the arbitral tribunal, Article 33(1)(b) of the Model Law permits interpretation 'of a specific point or part of the award'. The arbitral tribunal is permitted to make such an interpretation at the request of either party. Section 57(3)(a) of the English Arbitration Act 1996 empowers arbitral tribunals to 'clarify or remove any ambiguity in the award'. While this Section does not specifically reference interpretation, the High Court of England and Wales has found that arbitrators are obliged to 'consider all possible accidental slips, omissions or ambiguities in the award' once asked to correct an award.[61]

---

55 Section 70(2) of the English Arbitration Act 1996 requires a party to exhaust any available arbitral appeal or review processes and any available process by which an award may be corrected or supplemented before it is entitled to bring any set-aside application before the English court. The importance of this was restated by the High Court in *X v. Y* [2018] EWHC 741 (Comm).

56 See, e.g., LCIA Arbitration Rules (2014), Art. 27 and HKIAC Administered Arbitration Rules (2018), Art. 38.

57 See, e.g., SIAC Rules (2016), Rule 33 and UNCITRAL Arbitration Rules (2013), Art. 39.

58 See, e.g., Arbitration Rules of the Court of Arbitration for Sport, Rule 47.

59 G Born, *International Commercial Arbitration* (2nd ed., 2014), pp. 3130, 3131.

60 UNCITRAL Arbitration Rules (2013), Art. 38(1), ICC Rules of Arbitration, Art. 36(1), LCIA Arbitration Rules, Art. 27(1), HKIAC Administered Arbitration Rules (2018), Art. 38.1 and SIAC Rules, Rule 33.1.

61 *R.C. Pillar & Sons v. Edwards* [2001] All ER (D) 232 [58].

As with correction, the UNCITRAL Rules and the rules of most leading institutions follow, to a large degree, the provisions of the Model Law in relation to interpretation of awards. The rules of UNCITRAL, ICC, HKIAC and SIAC expressly envisage interpretation of awards by arbitral tribunals.[62] The rules of the LCIA, meanwhile, like the Arbitration Act 1996, permit arbitral tribunals 'to correct in the award . . . any ambiguity'.[63]

Additional award

Article 33(3) of the Model Law provides that, subject to the parties having agreed otherwise, the arbitral tribunal may, at the request of one or other of the parties, 'make an additional award as to claims presented in the arbitral proceedings but omitted from the award'. Section 57(3)(b) of the English Arbitration Act 1996 follows the Model Law by permitting arbitral tribunals (subject to the terms of the agreement between the parties) to 'make an additional award in respect of any claim . . . which was presented to the tribunal but was not dealt with in the award'.

The UNCITRAL Rules and the arbitration rules of many leading international institutions largely follow the Model Law as regards tribunals' power to make additional awards. The UNCITRAL Rules and the rules of the LCIA, HKIAC and SIAC permit tribunals to make additional awards at the request of a party in respect of claims presented to, but not decided by, the arbitral tribunal.[64]

Concluding remarks

The grounds for challenging awards are relatively narrow and prescriptive, and there is remarkable harmonisation of the law around the world in this respect. Courts in the leading centres of international arbitration are particularly conservative in their interpretation of these grounds, reflecting a broad consensus as to the merits of arbitral awards being final.

While parties who have lost an arbitration and consider that the tribunal misjudged the facts, or the law may be frustrated that an award cannot be challenged as easily as a court judgment could be appealed, systemically this frustration is outweighed by the benefit and attractiveness of an international arbitration award being final, at least in most cases. So long as that finality is protected by national courts, it will continue to be an important reason for parties to continue to choose arbitration as their preferred dispute resolution mechanism.

62 UNCITRAL Arbitration Rules (2013), Art. 37(1), ICC Rules of Arbitration, Art. 36(2), HKIAC Administered Arbitration Rules (2018), Art. 39.1 and SIAC Rules, Rule 33.4.

63 LCIA Arbitration Rules, Art. 27(1).

64 UNCITRAL Arbitration Rules (2013), Art. 39(1), LCIA Arbitration Rules, Art. 27(3), HKIAC Administered Arbitration Rules (2018), Art. 40.1 and SIAC Rules, Rule 33.3.

4

Arbitrability and Public Policy Challenges

Elie Kleiman and Claire Pauly[1]

Definitions

Arbitrability

Arbitrability refers to the question of whether a particular dispute may or may not be settled through arbitration. As explained by Professor Loukas A Mistelis, the issue of arbitrability 'involves the simple question of what types of issues can and cannot be submitted to arbitration and whether specific classes of disputes are exempt from arbitration proceedings'.[2] Although it is established that parties are free to submit their dispute to arbitration, national laws have often restricted this freedom of access to arbitration, with regard to either certain matters or to specific persons.

Inarbitrability is one of the typical defences raised against the enforcement of an arbitral award. When faced with an inarbitrable dispute, an arbitral tribunal may be required to decline jurisdiction. If it fails to do so, the enforcement of its final award may be successfully challenged if the national law of the state where enforcement is sought considers the dispute to be inarbitrable.

For this reason, arbitrability has become a recurrent issue faced by arbitrators, judges and contract drafters. This has led to the development of the so-called 'non-arbitrability doctrine'.[3] Commentators have drawn a well-established distinction between 'objective arbitrability' (or arbitrability *ratione materiae*), which depends on the subject matter of the dispute, and 'subjective arbitrability' (or arbitrability *ratione personae*), which relates to the

1 Elie Kleiman is a partner and Claire Pauly is a senior associate at Jones Day in Paris. The authors wish to thank Mr Hady Gouda for his invaluable help in preparing this chapter.

2 Loukas A Mistelis and Stavros L Brekoulakis (editors), 'Arbitrability: International and Comparative Perspectives', *International Arbitration Law Library*, Volume 19 [Mistelis and Brekoulakis], pp. 3 and 4, paras. 1 to 6.

3 Gary B Born, *International Commercial Arbitration*: 'Commentary and Materials' (2nd Edition) [Born], p. 243.

aptitude of a party to submit disputes to arbitration.[4] Simply put, objective arbitrability relates to the question of 'which' matters can or cannot be submitted to arbitration. Criminal matters and matters relating to personal status (divorce, nationality, etc.) are typical examples of objectively inarbitrable disputes. However, subjective arbitrability answers the question of 'who' can or cannot resort to arbitration. This type of arbitrability typically arises when a state or a state entity is involved in the dispute. As described below, the difference between the two notions is recognised by the New York Convention and by most domestic arbitration laws.

With the aim of providing a clearer explanation of arbitrability, it has been common to link it to the notion of public policy. It is submitted that inarbitrable disputes usually involve matters of public policy. This common view also stems from the fact that the New York Convention, as we will see later, refers to arbitrability and public policy as defences to enforcement under the same Article – V(2)(a) and V(2)(b) respectively. However, despite the relevance of public policy to the discussion of arbitrability, the former is a broader notion and the mere involvement of public policy matters would not necessarily lead to the inarbitrability of the dispute.

Another distinction between both notions is that inarbitrability is usually invoked at the very beginning of the arbitration process, as an argument for the tribunal to decline jurisdiction, while public policy typically kicks in after the end of the arbitration, namely during the enforcement or annulment proceedings before domestic courts.[5]

Public policy

The notion of public policy is so vague that it may not appear to be easy to tell what constitutes a matter of public policy from what does not. Initially a French distinction, the sphere of internal public policy (*ordre public interne*) has been opposed to that of international public policy (*ordre public international*). While the former refers to domestic rules that cannot be contracted out of when the legal relationship is governed by the forum state's law (e.g., French courts applying French law), the latter refers to the system of values that – given its widely agreed international nature – is so fundamental that it must be complied with whatever law governs the dispute. In other words, international public policy is a narrower category that covers only those universal rules that are considered by most nations as fundamental and mandatory. A domestic court would feel bound to apply those rules irrespective of the law applicable to the dispute.[6]

But what does international public policy exactly include? In fact, it has often been referred to the notion of mandatory rules of law (*lois de police*) as a subcategory of international public policy. These rules are designed to protect a public interest or

4 See for example, Christophe Seraglini and Jérome Ortscheidt, 'Droit de l'arbitrage interne et international' (edition 2013) [Seraglini and Ortscheidt], pp. 529 and 530, para. 62. See also Piero Bernardini, 'Chapter 17: The Problem of Arbitrability in General', in Emmanuel Gaillard and Domenico Di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice* (edition 2008, by Cameron May), p. 503.

5 Karl-Heinz Bockstiegel, 'Public Policy and Arbitrability', in Pieter Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series, Volume 3 [Bockstiegel], p. 178.

6 George A Bermann, 'Introduction: The Origin and Operation of Mandatory Rules', in George A Bermann and Loukas A Mistelis, *Mandatory Rules in International Arbitration* (edition 2011) [Bermann and Mistelis], p. 4.

policy. They must be applied regardless of the law applicable to the relationship. To define mandatory rules, one may refer to Article 9 of the Rome I Regulation, which states that:

> *[o]verriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.*[7]

Along the same lines, Professor Phocion Francescakis has explained that *lois de police* are 'laws the observation of which is necessary for the safeguard of political, social and economic organisation'.[8]

However, these definitions have been criticised for being imprecise and too broad. It was argued that almost every law or regulation could be viewed as preserving a social or economic interest, and thus falling within the scope of said definition.[9] As Professor Pierre Mayer has pointed out, it is practically impossible to confine the notion of *lois de police* to one clear-cut definition, even if very broad or general.[10]

Hence, one can safely say that international public policy and the notion of *lois de police* are, and will probably remain, abstract concepts that would differ and evolve depending on the subjective view of each nation of what is part of the sphere of general interest or good morals that must be preserved and protected, notwithstanding the will of the parties or any otherwise applicable law.

Grounds upon which to challenge or oppose the enforceability of an award based on arbitrability or public policy

The arbitrability exception: Article V(2)(a) of the New York Convention

As mentioned above, the issue of arbitrability has mainly started to attract the interest of the arbitration community since it was listed by the New York Convention as one of the grounds for refusal of recognition and enforcement of arbitration awards. Article V(2)(a) of the Convention provides that a state may refuse to recognise or enforce an award if the subject matter of the dispute that led to the award is 'not capable of settlement by arbitration' under the state's domestic law. Although neither the New York Convention nor its *travaux préparatoires* define this notion, the UNCITRAL Guide on the New York Convention (the UNCITRAL Guide) clearly provides that it refers to arbitrability. [11] More specifically, the Convention refers to objective arbitrability – '[t]he subject matter of the difference is not capable of settlement by arbitration'. Commentators have suggested that for the purposes

7 Article 9, Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

8 *Répertoire de droit international*, Dalloz, 1ère éd., Conflits de lois, No. 137.

9 Pierre Mayer and Vincent Heuzé, *Droit international privé* (10th edition), pp. 91 and 92, paras. 121 to 123.

10 id., p. 92, para. 123.

11 UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), (2016 Edition), pp. 228 and 229, paras. 7 and 8.

of the application of the New York Convention, and given its pro-enforcement nature, arbitrability in this context should be construed narrowly.[12]

It should be noted that according to Article V(2)(a), arbitrability is to be assessed under 'the law of that country' where recognition and enforcement is sought and not under any other law, including the law of the seat. Accordingly, the issue of arbitrability pertains to the national legal order of the country of enforcement in such a manner that the subject matter of an award may be found arbitrable in one country and inarbitrable in another. That said, it is fair to add that there is almost a consensus among national courts that disputes of a purely commercial nature should be considered to be arbitrable. This consensus is less evident when it comes to disputes of a non-commercial nature (labour disputes, antitrust disputes, etc.).[13]

The public policy exception: Article V(2)(b) of the New York Convention

Article V(2)(b) allows the refusal of recognition and enforcement by the state where the enforcement is sought, when recognition or enforcement would be 'contrary to the public policy of that country'.

The treatment of public policy under the New York Convention is very similar to that of arbitrability. It is agreed that, in this context, the notion of public policy should be given a restrictive interpretation. As noted by Loukas Mistelis, '[p]ublic policy, whatever it means, pursuant Article V(2)(b), must be construed narrowly'. [14] In line with this approach, the UNCITRAL Guide refers to the violation of the 'core values of a legal system' as a public policy basis for refusal of enforcement.[15]

Illustrations

In the United States, one must refer to the often-cited *Parsons* decision of the US Court of Appeals, which held that the public policy defence is relevant 'only where the enforcement would violate the forum state's most basic notions of morality and justice'.[16]

A similar approach can be found in France. Pursuant to Article 1520 of the French Code of Civil Procedure: 'The setting aside is only available if . . . the recognition or enforcement of the award would be contrary to *the international public order*'.[17]

In applying this provision, the Paris Court of Appeal noted that Article V(2)(b) of the Convention refers to the international public policy of the host state, as opposed to its internal public policy. It further considered that the French conception of international public policy consists of 'the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character'.[18] In this respect, the

12 id., p. 230, para. 12.

13 id., pp. 232 to 236.

14 Mistelis and Brekoulakis, p. 2, paras. 1 to 3.

15 The UNCITRAL Guide, p. 240, para. 4.

16 *Parsons & Whittemore Overseas v. Société Générale de l'Industrie du Papier (RAKTA)*, Court of Appeals, Second Circuit, United States of America, 508 F.2d 969, 974 (1974).

17 Emphasis added.

18 *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. N'DOYE Issakha*, Paris Court of Appeal, 16 October 1997, No. 96/84842.

Court refused to set aside an arbitral award resolving an employment dispute despite the fact that, under French law, employment disputes fall within the exclusive jurisdiction of the French labour tribunal. The Court found that the settlement of such disputes by arbitration would not be contrary to the fundamental principles of French international public policy.[19]

Swiss courts also adopt a restrictive definition of public policy. The Swiss Federal Tribunal considered that '[a]s an exceptional clause, the public policy reservation is to be interpreted restrictively'.[20] Accordingly, public policy would be violated only 'when the recognition or the enforcement of a foreign award offends the Swiss concepts of justice in an intolerable manner'.[21]

Challenges of awards based on arbitrability

The law governing arbitrability

There is no consensus among arbitrators, judges and commentators with regard to which law should be applicable to the issue of arbitrability. Different laws may be involved, such as the law applicable to the arbitration agreement, to the main contract or to the procedure of the arbitration (in the case of objective arbitrability); the law of the parties or even international legal principles (in the case of subjective arbitrability). [22] The choice between these options would often differ depending on whether the question is raised (1) before an arbitral tribunal, (2) before a domestic court while the dispute is still pending in arbitration proceedings or (3) before a domestic court during a setting aside or enforcement procedure. For the purposes of this chapter, we are focusing on the latter.

As mentioned above, by referring to 'the law of that country [i.e., the country where recognition and enforcement is sought]', Article V(2)(a) of the Convention provides that arbitrability is to be assessed in accordance with the *lex fori*.

For example, in the context of enforcement or annulment proceedings, French courts apply French law (as the *lex fori*) to determine whether a dispute is arbitrable.[23] In particular, French courts apply a 'material rule', which consists of applying directly a substantive rule to the issue in question rather than determining which domestic law should govern it (as do conflict of laws rules). The relevant material rule, which is based on consistent case law, provides that as a matter of principle, international commercial disputes are arbitrable, subject to matters of international public policy.[24]

Similarly, in Switzerland, Article 177(1) of the Federal Statute on Private International Law provides that every dispute of a financial nature may be subject to arbitration.

Examples of awards annulled on the ground of inarbitrability

This section focuses on objective arbitrability challenges, as challenges based on subjective arbitrability have not given rise to any notable decisions in domestic courts.

19 http://newyorkconvention1958.org/index.php?lvl=notice_display&id=149&opac_view=6.

20 Swiss Federal Tribunal, 28 July 2010, Decision No. 4A_233/2010, para. 3.2.1.

21 ibid.

22 Bockstiegel, pp. 184 and 185.

23 Seraglini and Ortscheidt, p. 533, para. 631.

24 Seraglini and Ortscheidt, p. 548, para. 645.

As the confidence in international arbitration has been growing, countries have tended to limit the scope of inarbitrable disputes and to interpret narrowly the New York Convention's phrase 'not capable of settlement by arbitration'. [25] This trend of trust in arbitration was initiated in the United States and then expanded all over the world.[26] It continued to spread to include sometimes controversial matters, such as antitrust, intellectual property and insolvency issues.

While there is almost a consensus that disputes of a purely commercial nature are capable of settlement by arbitration, views are more divergent when it comes to disputes involving matters that are not purely commercial, such as labour, intellectual property, insolvency and antitrust disputes.[27]

The first significant case in this regard was the refusal by the Belgian Supreme Court to enforce an award on the ground of inarbitrability by virtue of a mandatory Belgian statute relating to exclusive distributorship agreements.[28]

As regards French case law, in an early landmark decision, the *Tissot* case, the French Supreme Court reversed a decision that ordered the enforcement of an award, on the ground that the Court of Appeal failed to examine whether a sale contract was contrary to public policy rules, in which case the dispute should have been considered inarbitrable.[29]

However, French courts have generally adopted a very liberal approach by extending the scope of the arbitrable sphere to include a wide range of disputes, even those involving questions of public policy, such as issues of fraud[30] and antitrust.[31] The remaining sphere of inarbitrable disputes relates to subject matters that were considered as inherently incapable of settlement by arbitration, the perfect example being disputes of a criminal nature.[32]

Challenges of awards based on public policy

Tribunals' duty to apply mandatory rules

When thinking about arbitral tribunals' duty to apply mandatory rules, the first question that naturally arises is: mandatory rules of which legal order? Is it the law of the country of the seat of arbitration? The law governing the contract between the parties? Or even for enforceability considerations, the law of the country where the parties may eventually wish to enforce their award (which obviously may not be predicted with any certainty by the tribunal in advance)?

25 The UNCITRAL Guide, p. 232.

26 Seraglini and Ortscheidt, p. 546.

27 id., pp. 232 to 236.

28 Belgian Supreme Court, *Audi-NSU v. Adelin Petit & Cie*, 28 June 1979. See also, Bernard Hanotiau, 'The Law Applicable to Arbitrability', *Singapore Academy of Law Journal* (2014) 26, fn. 30.

29 Cass. com., *Tissot v. Neff*, 29 November 1950. See also, Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) [Gaillard and Savage], p. 334.

30 Gaillard and Savage, pp. 336 and 337.

31 Paris Court of Appeal, 19 May 1993, *Labinal v. Mors*, 1993 Rev. Arb. 645.

32 Seraglini and Ortscheidt, p. 551, para. 649.

It is commonly accepted that arbitrators have an obligation – at least in practice – to apply the mandatory rules of the country of the seat. Otherwise, their award would be at significant risk of being set aside.[33]

A similar level of deference should be accorded to the mandatory rules of the law governing the contract. An award in clear violation of any such law may face enforcement challenges. As a learned author concluded '[f]ailure to apply a mandatory rule of [the law governing the contract] by an international commercial arbitrator is not often fatal to the award or to the arbitrator's future employment, albeit it can endanger the enforcement of the award in certain jurisdictions as well as render the arbitral process less credible to many users of international arbitration'.[34]

Turning to the question of the mandatory rules of the country where the enforcement is expected to be sought, this is a much more complex – and controversial – task for the arbitrators. Although it is submitted that arbitrators should be keen to render an enforceable award, it is a discomforting situation for an arbitrator to be asked to speculate and predict in which states the parties may wish to enforce the award. This task becomes even harder when the answer would involve more than one state with conflicting mandatory laws.

That said, it is submitted that the main – if not the only - reason why an arbitrator would apply mandatory rules of law is having the aim of rendering an enforceable award.[35] There is no doubt that this question naturally occupies a place in any commercial arbitrator's mind. No arbitrator would like to see his or her award to be inefficient; the same applies to the parties, or at least to the prevailing party.

In this sense, the law of the country of enforcement is of great importance in practice, as we will see in the next subsection.

Examples of awards annulled on the ground of a breach of public policy

As discussed earlier, French courts adopted a restrictive interpretation of public policy by limiting its rejection to only those awards for which enforcement would be in clear violation of its international public policy.

This arbitration-friendly approach has been evolving. At an early stage, one should refer to the *Dutco* decision in which the French Supreme Court overturned a Court of Appeal's decision that had rejected an annulment application, as the Supreme Court found that the principle of equality of the parties was violated.[36] A similar decision was reached in another case when the Paris Court of Appeal found that the award was obtained by fraud.[37]

Later decisions have reflected the evolution of a liberal approach in France. French courts have held in several decisions that an award shall be annulled (or its enforcement rejected) only when the violation of public policy is 'flagrant, effective and concrete'.[38] The

33 Laurence Shore, 'Chapter 4: Applying Mandatory Rules of Law in International commercial Arbitration', in Bermann and Mistelis, p. 131.

34 id., p. 132.

35 Christophe Seraglini, *Lois de police et justice arbitrale international*, éditions Dalloz 2001.

36 Cass. civ. 1ère, *B.K.M.I. v. Dutco*, 7 January 1992, 1992 Bull. Civ. I, No. 2.

37 Paris Court of Appeal, 10 September 1993, 1994 Rev. Arb., p. 359, note D Bureau, cited in Seraglini and Ortscheidt, p. 890, fn. 385.

38 Paris Court of Appeal, *SA Thalès Air Défense v. GIE Euromissile*, 18 November 2004. See also, Paris Court of Appeal, *Cytec*, 23 March 2006, Rev. arb. 2007.100, note S Bollée.

rationale behind this position stemmed from the courts' conviction that their role in the review of foreign awards should be limited and should not extend to the merits of the case. In other words, the courts' review should not amount to a re-adjudication of the dispute, even when requested to review the award's compliance with international public policy. In this sense, courts tended to review the awards in law, without re-examining the facts already decided by arbitral tribunals.

This restricted control became the legal test applied by French courts for many years. However, in more recent years, and following the criticism of what has been viewed as too liberal an approach, French courts have seemed to take a step back and have started to move towards a tighter control of awards. The Paris Court of Appeal has considered on more than one occasion that it is vested with the power of examining all the elements of the awards, including the facts of the dispute. For instance, the Court has recently admitted the setting aside of an ICC award on the ground that the investment was procured by fraud and that, by entertaining that fraud, the award had breached a foreign country's sovereignty over its natural resources, which is part of French international public policy. To reach this decision, the Court reinvestigated the facts of the case, including forgery and fraud allegations. The Court held that, in reviewing whether the award complied with French international public policy, it has the power to examine 'in law and in fact all the elements relating to the defects in question'.[39]

Along the lines of the French perspective, most state courts have given a narrow interpretation to the public policy exception. Hence, the challenge of the enforcement of awards on that ground has been rarely successful.[40] As noted by the UNCITRAL Guide, those rare instances have included cases where the award was considered as contrary to the national interest of the enforcement state,[41] to its core constitutional values[42] or to a previous judgment of its courts.[43]

Awards annulled for failure to apply overriding mandatory provision (*lois de police*)

Overriding mandatory rules constitute a typical public policy defence against the recognition and enforcement of awards. However, just like any other public policy defence, mandatory rules of the forum state are viewed by most jurisdictions as an exceptional basis for annulment or refusal of enforcement. Hence, this defence has been successful only in rare cases. Typically, those cases related to issues of fraud, corruption, antitrust or insolvency.[44]

In the United States, only awards that violate mandatory rules in highly regulated fields have been subject to annulment.[45] For instance, an award was vacated on the ground that

39 Paris Court of Appeal, 16 January 2018, No. 15/21703.

40 The UNCITRAL Guide, p. 248 et seq.

41 id., citing *United World v. Krasny Yakor*, Federal Arbitrazh Court of the Volgo-Vyatsky Region, Russian Federation, Case No. A43-10716/02-27-10, 17 February 2003.

42 id., citing *BCB Holdings Limited and The Belize Bank Limited v. The Attorney General of Belize*, Caribbean Court of Justice, Appellate Jurisdiction, 26 July 2013 [2013] CCJ 5 (AJ).

43 id., citing Hemofarm DD, MAG *International Trade Holding DD, Suram Media Ltd v. Jinan Yongning Pharmaceutical Co. Ltd*, Supreme People's Court, China, 2 June 2008 [2008] Min Si Ta Zi No. 11.

44 Born, 'Chapter 25: Annulment of International Arbitral Awards', pp. 3321 and 3322.

45 ibid.

it was contrary to 'the well-defined public policy against intentional dishonesty by police officers in connection with their employment'.[46]

German courts have ruled that insolvency matters are part of German mandatory rules, and thus have annulled arbitral awards in violation of those rules.[47] The same was decided in relation to serious violations of German foreign exchange regulations,[48] competition law[49] and human rights.[50]

In Asia, Chinese courts have rejected the recognition of an award that was considered contrary to the mandatory prohibition of future contracts[51] and Indian courts refused to enforce an award conflicting with a previous export ban.[52]

Annulment of awards on the ground of corruption

The prohibition of corruption is an integral part of international public policy in almost all countries. In this sense, an award giving effect to corruption may be set aside under Article V2(b) of the New York Convention.

In France, corruption is considered to be one of the serious violations that cannot be tolerated by the French legal order, even in an international context. For this reason, the Paris Court of Appeal has been very strict when dealing with allegations that awards had given effect to investments or contracts that were procured by corruption. The Court has consistently held that it has the power to conduct a full review of all the factual and legal elements of the award while investigating corruption allegations.[53] This extensive approach has been upheld by the French Court of Cassation.[54]

Unlike the French approach, English courts generally tended to abide by arbitrators' findings on bribery or corruption allegations, even though a different result could have been reached by applying English law. In this respect, if an allegation of bribery had been dismissed by the arbitral tribunal, an English court would not re-examine the arbitrators' decision during enforcement proceedings.[55] In rejecting an application against the

46 id., citing *Town of Stratford v. AFSCME*, Council 15, Local 407, 60 A.3d 288, 293 (Conn. App. 2013).

47 UNCITRAL Guide, p. 246, citing Oberlandesgericht [OLG] Karlsruhe, Germany, 9 Sch 02/09, 4 January 2012.

48 id., citing Bundesgerichtshof [BGH], Germany, II ZR 124/86, 15 June 1987.

49 id., citing judgment of 8 August 2007, 4 Sch 03/06 (Oberlandesgericht Jena).

50 id., citing judgment of 20 April 2005, 11 Sch 01/05 (Oberlandesgericht Dresden).

51 id., citing Lanfang Fei, 'Public Policy as a Bar to Enforcement of International Arbitral Awards: A Review of the Chinese Approach', 26(2) *Arbitration International* 301, 305 and 306 (2010).

52 id., citing *COSID Inc. v. Steel Authority of India Ltd*, High Court of Delhi, India, 12 July 1985, XI Y.B. Com. Arb. 502 (1986).

53 Paris Court of Appeal Paris, 21 February 2017, No. 15/01650; Paris Court of Appeal (setting aside an arbitration award on the ground of corruption and money laundering); Paris Court of Appeal, *European Gas Turbines SA v. Westman Int'l Ltd*, *Yearbook Commercial Arbitration*, Volume XX (1995), p. 198 (refusing the recognition of an award on the ground that the contract was obtained through bribery). See other decisions where the Court of Appeal applied the same extensive review, yet, without establishing bribery: Paris Court of Appeal, *Gulf Leaders for Management and Services Holding Company v. SA Crédit foncier de France*, 4 March 2014, Rev. arb. 2014.955, note L.-Ch. Delanoy; Paris Court of Appeal, *République du Congo v. S.A. Commissions Import Export (Commisimpex)*, 14 October 2014.

54 Cass. civ. 1ère, 13 September 2017, No. 16-25.657.

55 Born, 'Chapter 26: Recognition and Enforcement of International Arbitral Awards', pp. 3673 and 3674.

enforcement of an arbitral award, the English High Court clearly held that '[a]n arbitration award made under a foreign proper and curial law [Swiss law], which had specifically found that there was no corruption practice, should be enforced in England even if English Law would have arrived at a different result on the ground that the underlying contract breached public policy because its performance involved a breach of statutory regulation in the place of performance [Algerian law]'.[56]

Similarly, the Swiss Federal Tribunal considered that the payment of bribes is contrary to Swiss public policy, while ultimately concurring with the arbitrators' finding that the bribery allegation was not proven conclusively. The Tribunal held that, in any case, the investigation of such allegations are 'beyond the review of the Federal Tribunal'.[57]

Although, in almost all jurisdictions, bribery and corruption are contrary to international public policy, and thus are valid grounds for annulment, such an argument has been rarely successful in practice, mainly as a result of difficulties relating to evidence.

The *Achmea* and *Micula* cases: bases for new challenges on the ground of inarbitrability or breach of public policy?

With the recent decision issued by the European Court of Justice in the *Achmea* case,[58] and subsequent examples of domestic courts staying or refusing the enforcement of awards issued in disputes relating to intra-EU bilateral investment treaties (BITs),[59] arbitration practitioners will witness an increase in challenges based on the inarbitrability of intra-EU arbitration disputes. While this argument should only be raised in the context of disputes based on intra-EU BITs – which were the only disputes that the European Court of Justice had in mind in the *Achmea* decision – it is to be expected that litigants try to bring the same argument in the context of commercial disputes on the ground that only domestic EU courts should be empowered to apply EU law.

56 English High Court, *Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd* [1999] 2 Lloyd's Rep. 222, 224 (QB).

57 Swiss Federal Tribunal, 17 January 2013, Decision No. 4A_538/2012, para. 6.2.

58 The European Court of Justice, *Slowakische Republik v. Achmea BV*, Judgment of the Court (Grand Chamber) of 6 March 2018, No. C-284/16.

59 Nacka District Court, *Micula v. Romania*, 23 January 2019 (a Swedish court refusing to enforce an ICSID award against Romania); English Court of Appeal, *Micula v. Romania*, 27 July 2018 (upholding the stay of enforcement of an ICSID award against Romania); German Federal Court of Justice, *Achmea v. Slovakia*, 31 October 2018 (Germany's top court setting aside an UNCITRAL award against Slovakia); Svea Court of Appeal, *PL Holdings v. Poland*, 13 June 2018 (a Swedish court staying the enforcement of an intra-EU investment treaty award against Poland).

5

Jurisdictional Challenges

Michael Nolan and Kamel Aitelaj[1]

The focus of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and other similar instruments, is chiefly procedural infirmity in the making of arbitral awards.[2] Among these infirmities, one commonly raised ground to challenge the validity of an arbitral award is the lack of jurisdiction of the tribunal, whether due to invalidity of the arbitration agreement or action by the tribunal in excess of the parties' consent to arbitration.

As a preliminary matter, it is beyond debate in most – if not all – jurisdictions that a tribunal is generally competent to rule on its own jurisdiction, under the principle of Kompetenz-Kompetenz.[3] Virtually all arbitral institution rules also recognise this principle.[4] This cardinal rule of modern arbitration law is fundamental to the stability of the arbitral process. By the same token, however, it offers a window of opportunity for award debtors to challenge an award, based on the argument that the tribunal was not vested with the powers to adjudicate the way it did, or at all.

---

1 Michael Nolan is a partner and Kamel Aitelaj is a senior associate at Milbank LLP.

2 The grounds for refusing to enforce or vacate an international arbitral award are essentially uniformly modelled after the New York Convention, whether in other international instruments or national legislations. Although the authors recognise some distinctions may be drawn, reference to jurisdictional challenges will centre on the articulation of related ground made in the New York Convention for the purposes of this chapter, supplemented only where deemed useful in light of recent developments in arbitration practice.

3 See generally, G Born, *International Commercial Arbitration* (Second Edition) (Kluwer International), p. 1048.

4 See, e.g., 2010 UNCITRAL Rules, Article 23(1) ('The arbitral tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement.'); 2012 ICC Rules ('In all matters decided by the Court under Article 6(4), any decision as to the jurisdiction of the arbitral tribunal, except as to parties or claims with respect to which the Court decides that the arbitration cannot proceed, shall then be taken by the arbitral tribunal itself.').

Although post-award objections to the tribunal's jurisdiction are common, so too are objections to the jurisdiction of the enforcing court. This chapter briefly examines these categories of objections in turn.

Challenges to the tribunal's jurisdiction

As regards jurisdictional grounds to challenge an award, Article V of the New York Convention provides that enforcement of a foreign arbitral award 'may be refused', *inter alia*, where (1) the arbitration agreement 'is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made' or (2) 'the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration'.

Challenges based on invalid or non-binding arbitration agreement

Given the contractual nature of arbitration (whether based on a private agreement in the case of commercial arbitration or an international treaty in the case of investment-based arbitration), it is axiomatic that there can be no valid award if the agreement on which the award was rendered did not exist. On that basis, for example, the mammoth US$50 billion award in the *Yukos* arbitration was recently set aside by The Hague District Court, on the basis that it was premised on the determination by the tribunal that Russia had agreed to arbitrating disputes with investors under the Energy Charter Treaty when, in fact, it had never ratified the treaty.[5]

The question as to whether the arbitration agreement is valid can be resolved with reference to the law governing the arbitration agreement, if any,[6] or the law of the seat of arbitration. To illustrate the importance of this choice-of-law question regarding the validity of the arbitration agreement, one can look at the US Supreme Court case *First Options*,[7] in which a tribunal upheld its jurisdiction over a dispute in which the arbitration agreement upon which it based its jurisdiction was not contained in the agreement that the parties actually signed. As such, there was held to be no valid arbitration agreement, and thus no valid award. This solution seems obvious. What is less obvious is that, in reaching this determination, the Supreme Court reasoned that, absent a party's express consent to grant the arbitrators power to determine 'arbitrability',[8] it was for the courts themselves to make that determination, without any deference to the arbitrators' decision on the same. Although, in this particular instance, the correct result was achieved, the method employed to get there, which was in denial of the implicit power of the arbitrators to determine their competence, is viewed by some commentators as unfortunate. For the practitioner, it is a potentially critical consideration when selecting the applicable law for

5 *The Russian Federation v. Veteran Petroleum Limited, Yukos Universal Limited and Hulley Enterprises Limited.*

6 The authors note that there may be variations as to the applicable substantive law governing the underlying contract and the arbitration agreement *per se*, under the well-accepted principle of separability of the arbitration agreement.

7 *First Options of Chicago, Inc. v. Kaplan*, 514 US 938 (US S.Ct. 1995).

8 'Arbitrability' under *First Options* is not to be understood in the ordinary sense of whether a subject matter can be arbitrated as a matter of law but rather whether the arbitrators have the power to arbitrate at all.

an arbitration agreement or when commencing proceedings. The position of the US Supreme Court regarding the 'gateway issue' of arbitrability expressed in *First Options* was recently confirmed as good law;[9] as such, parties to arbitrations seated in the United States ought to pay attention to the risk that a court's scrutiny may jeopardise the finality of the award. One possibility is for the parties simply to agree in the famous Procedural Order No. 1 for the tribunal to determine arbitrability, to the extent that the agreement does not already exist in the arbitration clause or the applicable institutional rules.

The question of determination of the validity of an arbitration agreement under the applicable law recently arose with particular force in the context of investment treaty claims within European nations. In the landmark decision *Achmea*,[10] the Court of Justice of the European Union ruled that the arbitration clause contained in the Netherlands-Slovakia bilateral investment treaty (BIT), on the basis of which an arbitral award had been rendered against Slovakia, was incompatible with EU law. The stated basis was the primacy of EU law over the law of individual Member States of the European Union. Because the arbitral award in *Achmea* was not subject to review by a court of an EU Member State, as was held to be required by the Treaty on the Functioning of the European Union, it was rendered on the basis of a mechanism incapable of ensuring the proper application and full effectiveness of EU law. The award was later struck by the German Federal Court of Justice.[11]

Investment claims based on intra-EU treaties (of which there are 196 currently in force) are thus arguably without a valid agreement to arbitrate. Practitioners wishing to resort to arbitration to adjudicate claims regarding foreign investment protection may need to turn to other avenues (e.g., the Energy Charter Treaty where applicable).

Another issue that recently came to the fore with respect to validity of the arbitration agreement is the question of collective claims. In *Abaclat*,[12] for example, a distinguished tribunal determined that it had jurisdiction to hear the claims of more than 60,000 Italian investors against Argentina under the ICSID Convention and the Argentina–Italy BIT. Despite the silence of these two instruments regarding the permissibility of mass claims, the tribunal's view was that, to the extent there may be an issue regarding the number of claimants, that issue was not one of jurisdiction but one of admissibility of the claims.[13] Applying the *Abaclat* tribunal's approach, an obvious issue, given the ordinary deference given on the matter to the tribunal, is whether the reviewing court could even reach the issue as to the propriety of the decision to uphold jurisdiction where the point of contention was 'kicked out' to the merits of the case (typically unreviewable) – from jurisdiction to admissibility.[14] Here again, the law applicable to the review of the award may provide some useful guidance. In the United States, for example, the position regarding collective arbitration has evolved from a complete rejection based on the idea that collective

9 *Henry Schein Inc. v. Archer & White Sales Inc.*, 586 US _ (2019).

10 *Slovak Republic v. Achmea B.V.* (Case C-284/16).

11 The arbitration proceedings were seated in Frankfurt, hence the set aside proceedings held in Germany.

12 *Abaclat v. Argentine Rep.*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility (4 Aug 2011).

13 id., para. 249.

14 See generally, on the distinction between jurisdiction and admissibility, M Nolan and E Popova-Talty, 'Admissibility', *The Investment Treaty Arbitration Review* (Law Business Research), pp. 43 to 52.

arbitration subverts the privity of the arbitration agreement, to a general acceptance, at least so long as the tribunal 'construes the contract' in allowing it.[15]

Challenges based on excess of authority

A corollary to the principle that arbitral jurisdiction derives from the parties' consent is that the scope of the tribunal's authority also is limited by the parties' consent. Typically, a party challenging an award based on a violation of the scope of the tribunal's authority will do so because of an excess of power – or *ultra petita*. On more rare occasions, a party will take the view that the tribunal failed to discharge its mandate by refusing jurisdiction over certain, or all, of that party's claims – or *infra petita*.

Ruling ultra petita

It is often the case that, in the context of enforcement or set-aside proceedings, an award debtor will raise the argument that the issues or claims decided in an award exceeded or differed from those presented for adjudication by the parties to the tribunal, or where the tribunal determined *sua sponte* issues or claims not raised by the parties. In practice, however, these arguments tend to be difficult to sustain, provided the arbitration agreement is sufficiently broad to encompass these issues or claims, such as in a clause providing for arbitration of 'any dispute or controversy'. To the extent that the issues or claims are properly briefed or orally argued during the proceedings, these issues and claims should be seen, in most instances, as properly within the purview of the tribunal.

There are, of course, instances where a tribunal will have squarely exceeded its mandate. For example, the Hong Kong Court of First Instance has found that a sole arbitrator had exceeded its powers by issuing an award on the basis that neither party had advanced during the arbitration.[16]

Such arguments may gain more traction with respect to matters that are more arcane and for which arbitrators may be less attuned to risks, such as damages quantification. In that respect, in *Rusoro v. Venezuela*, the Paris Court of Appeal[17] upheld Venezuela's argument that the tribunal exceeded its jurisdiction under the Canada-Venezuela BIT when it awarded compensation for expropriation of gold mining interests in an amount that did not reflect the value of the interests at the time of the expropriation. The award had calculated the compensation without taking account of an intervening decline in value resulting from restrictions on gold exports. These restrictions, the tribunal had concluded, were outside the scope of its jurisdiction *ratione temporis*. The Court determined that there had been an excess of authority by the tribunal.[18]

15 *Oxford Health Plans LLC v. Sutter*, 133 S.Ct. 2064, 2069-70 (US S.Ct. 2013).

16 See J Ballantyne, 'Hong Kong Award Remitted for Serious Irregularity' (Global Arbitration Review), 20 November 2018.

17 The Paris Court of Appeal is vested with primary responsibility for reviewing international awards.

18 See *République Bolivarienne du Venezuela v. Rusoro Mining Limited*, RG 16/20822 - No. Portalis 35L7-V-B7A-BZ2EA.

Ruling infra petita

Although it is rather uncontroversial that an award exhibiting an excess of authority from the tribunal may be annulled, or refused enforcement, it is less so when a tribunal declines to rule based on its determination that it lacks jurisdiction. In particular, it remains debatable whether Article V(1)(c) of the New York Convention allows challenges on *infra petita* grounds at all.[19] In the few instances where a party was even able to argue that an award should be annulled on *infra petita* grounds, it has been based on the provisions of the applicable law. For example, in *GPF v. Poland*,[20] Mr Justice Bryan of the Commercial Court of London set aside an award rendered under the auspices of the Stockholm Chamber of Commerce, in which the tribunal had declined to hear claims for indirect or creeping expropriation and breach of the fair and equitable treatment standard under the BIT between the Belgium-Luxembourg Economic Union and Poland. In an unprecedented decision, Bryan J substituted his own determination that the BIT did confer jurisdiction to an arbitral tribunal to hear such claims and thus set aside the tribunal's findings to the contrary. It should be noted that the basis for this decision is Section 67(1)(a) of the 1996 English Arbitration Act, which states that '[a] party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court . . . challenging any award of the arbitral tribunal as to its substantive jurisdiction'. This broad language, on its face, gives more leeway for a court to reach the sort of decision Bryan J did. It remains to be seen whether similar decisions will be handed down in other jurisdictions. One that comes to mind in that respect is the United States, where the Federal Arbitration Act allows courts to vacate an arbitral award 'where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made'.[21] Yet, this particular deviation from the common New York Convention Article V grounds has been, in practice, of little moment. Indeed, courts 'consistently accorded the narrowest of readings to this provision of law' and will uphold a challenged award as long as the arbitrators offer 'a barely colorable justification for the outcome reached'.[22]

Challenges to enforcing court jurisdiction

Under most legal regimes, a foreign or international award is presumptively enforceable wherever the award creditor wishes to seek enforcement.[23] Two issues arise with respect to the jurisdiction of the enforcing court, namely (1) when the award was annulled at the seat of the arbitration, and (2) when a sovereign defends against enforcement on the basis of its immunity from suit.

19 The relevant language refers only to 'a difference not contemplated by or not falling within the terms of the submission to arbitration'.

20 *GPF GP Sarl v. The Republic of Poland* [2018] EWHC 409 (Comm).

21 9 USC Section 10(a)(4).

22 *ReliaStar Life Insurance Co. of New York v. EMC National Life Co.*, 564 F.3d 81, 85-86 (2d Cir. 2009).

23 A *caveat* is, in the event enforcement is sought based on an international instrument such as the New York Convention or Panama Convention, as is typically the case, enforcement will have to be in a signatory state and subject to any reservations (such as reciprocity) that the signatory state may have made.

Enforcement of an award that was annulled at the seat

Article V(e) of the New York Convention allows an award debtor to challenge enforcement where 'the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made'. The problem thus becomes whether a court to which the award creditor applies for recognition and enforcement is vested with the jurisdiction to do so in the event another court at the seat has set it aside. On that specific question, there are two schools of thought.

Under the classic approach, the annulment decision by a court at the seat of arbitration is given deference and the award is deemed unenforceable in any jurisdiction. In other words, the decision of the court of primary jurisdiction deprives any other court on a universal plane of jurisdiction to hear enforcement applications of the same award. This position, or variations thereof, is the most widely adopted. For example, in 2017, in *Pemex v. Commisa*, the Luxembourg Court of Appeal refused to enforce a US$300 million ICC award against the Mexican state oil and gas company Pemex on the basis that the award had been set aside at the seat. It did so even though the US Court of Appeals for the Second Circuit had previously ruled that the award was enforceable notwithstanding its annulment in Mexico.

Conversely, in *Baker Marine v. Chevron*,[24] the US Court of Appeals for the Second Circuit held that when a foreign award is brought for enforcement in the United States, the US court must grant enforcement unless it finds a ground for refusal to enforce the award. The Court found that Article V(1)(e) disallows enforcement if the award has been set aside by a competent authority in the place where it was made. Although the Second Circuit did not deny enjoying discretion in enforcing an award notwithstanding its annulment at the seat, based on the permissive language of the New York Convention, it declined in this instance to exercise any such discretion.

In the tentacular *Thai-Lao Lignite* case, the claimants launched a multidirectional enforcement campaign for its US$56 million award against Laos in New York, London, Paris and Singapore. While Laos' request for set-aside at the seat in Malaysia was pending (it had failed to file its request within the time allotted), the claimants obtained confirmation in Paris, and enforcement orders in New York and London. After the award was finally vacated at the seat in 2014, the US Court of Appeals for the Second Circuit reversed itself in a move that was unprecedented (as the circumstances were, also, unprecedented with an annulment that post-dated the enforcement order). Singapore had stayed the proceedings pending the decision of the Malaysian court and ultimately dismissed the application for enforcement. The Commercial Court in London, after having issued enforcement orders, also overturned those orders in light of the Malaysian court's decision. The last piece of the *Thai-Lao Lignite* puzzle is the French proceedings, where the award's confirmation also was overturned. The reason the Paris Court of Appeal overturned the confirmation was not out of deference to the Malaysian court set-aside proceedings; rather, the Paris Court of Appeal determined that the tribunal had exceeded its authority. In other words, the French court made its own determination as to whether the award stood up to scrutiny, irrespective of any decision at the seat.

24 *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd*, 91 F.3d 194.

The Paris Court of Appeal's decision in *Thai-Lao Lignite* epitomises the second school of thought, dubbed by some commentators as the internationalist approach, under which no heightened status is given to the seat as being the primary jurisdiction of the award; instead, every court where enforcement is sought assesses the validity of an arbitral award independently. That is because international awards are deemed to belong to a supranational plane, given their subjection to international instruments such as the New York Convention. Given that the Convention in particular takes a permissive stance regarding enforcement or denial thereof, as Article V states that a court 'may' refuse enforcement, internationalists view as fair game their independent analysis of an award's validity.

France leads the internationalist school of thought.[25] In the words of the Court of Cassation, under French law:

> *a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Article V(1)(e) of the 1958 New York Convention, are not among the grounds specified.*[26]

A number of decisions have confirmed this view. For example, in the *Chromalloy* case, the Paris Court of Appeal recognised an award made in Egypt, despite it having been annulled in Egypt. This is because 'the award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy'.[27]

As the foregoing suggests, it is thus of paramount importance to devise a thoughtful strategy when determining the jurisdictions in which to seek enforcement of an award, and, more fundamentally, when selecting an arbitral seat to the extent the choice can still be made.

Enforcement of an award involving a sovereign

With the increase in the number of arbitrations involving state and state entities in the past 15 years or so, enforcement of awards against sovereigns has become commonplace. A number of arbitrations are practically removed from any meaningful court scrutiny, given the near self-contained system established under the 1965 Convention on the settlement of investment disputes between States and nationals of other States (i.e., the ICSID Convention) whereby an ICSID award is enforceable 'as if it were a final judgment of the

25 A few jurisdictions were reported as following the internationalist approach, among which Belgium, Austria and the Netherlands. See, G Born, op. cit., at p. 3628.

26 Judgment of 10 March 1993, *Polish Ocean Lines v. Jolasry*, XIX YB Comm. Arb. 662, 663 (French Court of Cassation civ. 1e) (1994). Note that the reasoning of the Court is based on Article VII of the 1958 New York Convention, which the court explained 'does not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon'.

27 Judgment of 14 January 1997, 1997 Rev. arb. 395 (Paris Court of Appeal), Note, Fouchard. See also Judgment of 29 September 2005, XXXI YB Comm. Arb. 629 (Paris Court of Appeal) (2006) (recognising award annulled in arbitral seat).

courts of a constituent state'.[28] But a growing number of such arbitrations are subject to *ad hoc* proceedings under the UNCITRAL rules or other institutional proceedings, such as by the ICC or the Stockholm Chamber of Commerce. To be enforced, these awards are subject to the same constraints as any other international award, with the added complication that a sovereign party may have the ability to further claim immunity from jurisdiction as a defence to enforcement. Indeed, contrary to a private party, it seems difficult to enforce a ruling against a state (or a state entity) in its own courts, let alone attach any state assets. As such, an award creditor is often left with no practical recourse but to try to pursue state assets held somewhere else; hence the need to seek enforcement of the award in a third-party state.

In the *Tatneft* case, for example, Ukraine raised sovereign immunity as a defence to enforcement in the United Kingdom, claiming that it had not consented to arbitrate breaches of the fair and equitable provision in the Russia–Ukraine BIT. Although the Commercial Court in London disagreed, as the arbitration provision in the treaty allowed arbitration of 'any disputes', this sort of argument should be expected when facing certain sovereign parties as award debtor.

Under the US Foreign Sovereign Immunities Act (FSIA), a general principle is that 'a foreign state shall be immune from the jurisdiction of the courts of the United States and of the State'.[29] Some exceptions to this principle exist, however, such as the provision under Section 1605(a)(1) of the FSIA that a 'foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the foreign state has waived its immunity either explicitly or by implication'. Section 1605(a)(6) of the FSIA further provides that a foreign state is not immune from jurisdiction if:

> *the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship . . . or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards.*

US courts have consistently recognised the express exception of Section 1605(a)(6) as foreclosing a state's ability to raise its immunity of jurisdiction.[30] Even prior to the adoption

28 See Article 54(1), ICSID Convention.

29 US Foreign Sovereign Immunities Act [FSIA], Section 1604.

30 In *Cargill International S.A. v. M/T Pavel Dybenko* (991 F.2d 1012, 1018 (2d Cir. 1993)), the Second Circuit Court of Appeals held: 'If the alleged arbitration agreement exists, it satisfies the requirements for subject-matter jurisdiction under the [New York] Convention and FSIA.' In *Creighton Ltd v. Government of the State of Qatar* (181 F.3d 118 (DC Cir. 1999)), the plaintiff obtained an ICC arbitral award against Qatar, which it sought to enforce in DC's district court. The court found that it had jurisdiction under the arbitration exception in Section 1605(a)(6) of the FSIA (even though Qatar was not a signatory to the New York Convention on recognition and enforcement of foreign arbitral awards). In *Blue Ridge Investments, LLC v. Republic of Argentina* (Docket No. 12–4139–cv., 19 Aug 2013 - US 2nd Circuit), the US Court of Appeals for the Second Circuit confirmed the District Court's conclusion that 'Argentina waived its sovereign immunity

in 1988 of the exception to immunity from jurisdiction contained in Section 1605(a)(6) of the FSIA, some US courts were inclined to construe a sovereign's consent to arbitration as an implicit waiver of immunity from jurisdiction under Section 1601(a)(1).[31] Other jurisdictions, such as Switzerland[32] and Sweden,[33] have taken a similar approach in denying a state immunity from jurisdiction if the state has agreed to arbitrate.

Where the issue of sovereign immunity from jurisdiction becomes more pregnant is in the presence of sovereigns hailing from former (or current) communist obedience (for example, the *Tatneft* case above). One point of reference in that respect is the People's Republic of China, which historically – and still to this day – officially claims absolute sovereignty, both of jurisdiction and execution. Where the distinction *acta jure gestionis / acta jure imperii* is widely accepted to determine which of a state's action shall be immune from suit (or which asset shall be immune from execution), some states, such as China, strictly adhere to the principle of absolute immunity. In the *FG Hemisphere* case, China indeed explained that 'the consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of "restrictive immunity"'[34] (that is, immunity attaching only to regalian prerogatives and not commercial actions).

Conclusion

As the foregoing developments suggest, the basis for jurisdictional challenges often intersects with other issues of public policy and due process (both of which are addressed in other chapters). Like most things in arbitration procedure, preparing for jurisdictional challenges, whether on the offence or the defence, requires thoughtful strategy. In that respect, we have sought to draw your attention on salient issues regarding the location of the seat of arbitration, the type of party in opposition and the location of that party's assets.

---

pursuant to the arbitral award exception'. Other court decisions reached the same conclusion with respect to ICSID arbitral award (see *Continental Casualty Co. v. Argentine Republic*, 893 F. Supp. 2d 747, 751 (ED Va. 2012); *Funnekotter v. Republic of Zimbabwe*, No. 09 Civ. 8168(CM), 2011 WL 666227 at *2 (SDNY 10 Feb 2011); *Siag v. Arab Republic of Egypt*, No. M-82, 2009 WL 1834562 (SDNY 19 Jun 2009)).

31 In *Ipitrade International, S.A. v. Federal Republic of Nigeria* (465 F. Supp. 824 (DCDC 1978), the court held that Nigeria's agreement to arbitrate all disputes arising under the contract at issue (governed by Swiss law), under the ICC International Court of Arbitration's Rules, constituted a waiver of sovereign immunity pursuant to Section 1601(a)(1). In *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya* (482 F. Supp. 1175 (DCDC 1980)), the court held that because Libya had expressly agreed to arbitration of disputes arising out of petroleum concessions granted to the plaintiff (an oil company), it was deemed to have waived its defence of sovereign immunity for the purposes of the FSIA.

32 See *Westland Helicopters Ltd v. Arab Organization for Industrialization (AOI)*, ICC Award No. 3879, 23 ILM 1071, 1089 (1984) (stating that the act of entering into an arbitration agreement amounts to a waiver of jurisdictional immunity before the arbitral tribunal).

33 *Libyan American Oil Co. (LIAMCO) v. Socialist People's Republic of Libya*, Svea Court of Appeal (18 Jun 1980), 62 ILR 225 (stating 'Libya, which otherwise in its capacity as a sovereign State has extensive rights to immunity from jurisdiction of the courts of Sweden, is deemed to have waived the right to invoke immunity by accepting the arbitration clause in Article 28 of the concession agreement').

34 *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Ors*, Judgment [FACV Nos. 5, 6 & 7 of 2010], para. 211.

6

Due Process and Procedural Irregularities: Challenges

Simon Sloane, Daniel Hayward and Rebecca McKee[1]

Introduction

One of the perceived advantages of international arbitration is the freedom a tribunal and parties have to determine the appropriate procedure of the arbitration in order to resolve the dispute in a timely and cost-effective manner, relatively unburdened by national rules of procedure. All a tribunal needs to do is ensure due process is followed.

Due process has been described by eminent practitioners as being both a precondition of arbitration[2] and the procedural cornerstone of the rule of law. 'It serves as the shield protecting fundamental procedural rights and was transposed into arbitration because arbitral tribunals issue binding decisions that determine parties' substantive rights.'[3] Such is the importance of due process in arbitration that its absence forms the basis for challenging an award under national arbitration statutes and for resisting enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention).

Unfortunately, it is becoming increasingly common for one or both opposing counsel to send a detailed plea to the tribunal prior to the award (and in some cases at or immediately following a hearing) reserving its client's rights in respect of an alleged procedural slight, in the hope of creating a platform to challenge the award or resist enforcement should their client be unsuccessful in the arbitration. Such an attempt to manipulate the way in which a tribunal runs the proceedings can give rise to a tribunal displaying 'due process paranoia',[4] resulting in extensive delays in the conduct of the arbitration and increased costs. This is

1 Simon Sloane and Daniel Hayward are partners and Rebecca McKee is a senior associate at Fieldfisher LLP.

2 J Lew et al., *Comparative International Arbitration* (1st edition, 2003), p. 674.

3 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

4 ibid.

stopping some tribunals from attaining the objective of dispute resolution in a quick and cost-effective manner.

The legal basis for due process

The parties' right to due process is set out in Article 18 of the UNCITRAL Model Law[5] (the Model Law), which deals with the equal treatment of parties. It states that 'the parties shall be treated with equality and each party shall be given a full opportunity of presenting its case'. The purpose of Article 18 is to provide the framework for the fair and effective conduct of the arbitral proceedings and to ensure the mandatory nature of these requirements is consistently upheld by national courts, from which the parties cannot derogate.[6]

All well-recognised legal systems have a requirement that parties be treated equally and fairly; each party should be given a reasonable opportunity to present its case and deal with that of its opponent.[7] For example, if the parties agree to oral hearings for the presentation of evidence then the tribunal should hold such a hearing and the tribunal must ensure sufficient notice of the hearing is given to all the parties – *audi alteram partem*. But this right does not extend to the parties' prescribing procedural aspects of the hearing, such as the timing or length.

The Canadian courts have clarified that the purpose of Article 18 is to protect the party from egregious and injudicious conduct by an arbitral tribunal and is not intended to protect a party from its own failures and strategic choices.[8] This element has also been clarified by the Singapore courts, which have held that while the tribunal should not surprise the parties with their own ideas,[9] where a party should be on notice of legal issues a tribunal's determination on that issue does not constitute a breach of due process because of the party's failure to recognise it.

Included within this due process requirement is a party's right to have access to all statements, documents or other information supplied to the arbitral tribunal by one party. This right is expressly included in Article 24(3) of the Model Law.

The right to due process is also set out in Article V(1)b of the New York Convention, which states that recognition of the award may be refused where the party against whom the award is invoked proves that it 'was not given proper notice of the arbitration proceedings or was otherwise unable to present its case'.

Recently, there has been an attempt to narrow the due process language, not to diminish parties' rights, but to prevent abuse of more open language that might invite unreasonable procedural demands.[10] For example, while Article 15(1) of the 1976 UNCITRAL Rules stated that any parties should be afforded 'a full opportunity' to present their case 'at any stage

5 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006).

6 2012 UNCITRAL Digest of Case Law on the Model Law on International Arbitration.

7 See, e.g., Arbitration Act 1996 of England and Wales, Section 33(1)(a); International Arbitration Act of Singapore (Cap 143A, 2012 Rev Ed), Section 22.

8 *Re Corporacion Transnacional de Inversiones S.A.de C.V. et al. v. STET International S.p.A. et al.*, Ontario Superior Court of Justice, Canada, 22 September 1999.

9 *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28, para. 44.

10 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

of the proceedings', Article 17(1) of the UNCITRAL Rules as adopted in 2013 provide for 'a reasonable opportunity' to present one's case at 'an appropriate stage of the proceedings' (emphasis added).[11] The purpose of this transformation is to avoid mischief.[12]

Content and requirements of arbitral due process

There are no definite international rules as to how and when due process should be observed in the arbitral process. Perhaps the most comprehensive summary on the rules of natural justice in the arbitration context, under a common law system, was enunciated by the New Zealand High Court[13] when it stated:

> *a Arbitrators must observe the requirements of natural justice and treat each party equally.*
>
> *b The detailed demands of natural justice in a given case turn on a proper construction of the particular agreement to arbitrate, the nature of the dispute, and any inferences properly to be drawn from the appointment of arbitrators known to have special expertise.*
>
> *c As a minimum, each party must be given a full opportunity to present its case.*
>
> *d In the absence of express or implied provisions to the contrary, it will be necessary that each party be given an opportunity to understand, test and rebut its opponent's case; that there be a hearing of which there is reasonable notice; that the parties and their advisers have an opportunity to be present throughout the hearing; and that each party be given a reasonable opportunity to present evidence and argument in support of its case, test its opponent's case . . . and rebut adverse evidence and argument.*
>
> *e In the absence of express or implied agreement to the contrary, the arbitrator will normally be precluded from taking into account evidence extraneous to the hearing without giving the parties further notice and opportunity to respond.*
>
> *f The last principle extends to [her or] his own opinions and ideas if these were not reasonably foreseeable as potential corollaries if those opinions and ideas that were expressly traversed during the hearing.*
>
> *g On the other hand, an arbitrator is not bound to slavishly adopt the position advocated by one party or the other.*

Unsurprisingly, not all national laws recognise the parties' rights to an oral hearing and, in some civil law jurisdictions, the right to a hearing is limited to the right to make written submissions.[14]

If due process has been breached, a party may (1) seek redress before the court in the same jurisdiction as the seat of the arbitration to have the award remitted back to the tribunal for reconsideration, set aside, annulled, or (2) challenge the award at the enforcement stage in an appropriate jurisdiction. However, such challenges should and usually are treated with

11 1976 UNCITRAL Arbitration Rules; 1976 UNCITRAL Arbitration Rules (as adopted in 2013).

12 L Reed, 'Ab(use) of due process: sword vs shield', Freshfields Arbitration Lecture 31st, 26 October 2016.

13 *Trustees of Rotoaira Forest Trust v. Attorney General* [1992] 2 NZLR 452 at 463.

14 See, e.g., Swiss law does not recognise a party having an automatic right to make oral submissions – Decision BGE 117 II 348.

great caution in the courts of almost all 'pro-arbitration' jurisdictions. As a result, a party will usually only succeed where 'the most basic notion of morality and injustice' is violated.[15]

Setting aside an award for breach of due process

Article 34(2)(a) of the Model Law sets out four sets of circumstances[16] under which an application to set aside an award may be allowed, and all relate to a breach of due process where a party has proven it has not been treated equally and fairly.

Most jurisdictions contain similar provisions enabling a party to set aside an award or have it remitted back to the arbitration.

Australian federal laws recognise the right to set aside an award for procedural unfairness. In *Sino Dragon Trading v. Noble Resources*,[17] a party challenged the arbitrators alleging 'justifiable doubts as to their impartiality or independence' and applied to the Australian Federal Court for it to decide on the challenge under Article 13(3) of the UNCITRAL Model Law. The court refused to set aside an award against Sino Dragon on grounds of procedural unfairness because they were based on technical difficulties ensuing from its own decision to examine witnesses by videoconference via WeChat.

Singapore statute allows an award to be set aside on the ground that a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced.[18] However, 'arid, hollow, technical or procedural objections that do not prejudice any party should never be countenanced'. It is only where the breach of natural justice has surpassed the boundaries of legitimate expectation and propriety, culminating in actual prejudice to the party, that the remedy of setting aside an award can or should be made available.[19]

In a recent award review, a committee of the International Centre for Settlement of Investment Disputes (ICSID) declined to annul an award on the grounds of an undeclared alleged conflict of interest in circumstances where the other tribunal members had determined the challenged arbitrator should not be disqualified. The committee decided it was not for it to undo the tribunal members' decision unless it was so plainly unreasonable that no reasonable decision maker could have reached it.[20]

There have been some recent, helpful decisions in the English courts on the issue of due process and the standard required to set aside or remit an award under national laws.

In England and Wales, the mechanism to set aside or remit an award lies within the Arbitration Act 1996 (the 1996 Act). Section 68 provides a party with a right to challenge an award in circumstances where there has been a 'serious irregularity' that has caused or will cause an injustice to the applicant.

---

15 *Parsons & Whittemore Overseas Co. Inc. v. Société Générale de l'Industrie du Papier (RAKTA) and Bank of America (RAKTA)*, 508 F.2d 969 (1974).

16 1985 UNCITRAL Model Law on International Commercial Arbitration (as amended in 2006), Article 34(2)(a)(i) to (iv).

17 *Sino Dragon Trading Ltd v. Noble Resources International Pte Ltd (No.2)* [2015] FCA 1046.

18 International Arbitration Act of Singapore (Cap 143A, 2012 Rev Ed), Article 24(b).

19 *Soh Beng Tee & Co Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28, para. 99.

20 A Ross, 'Award against Argentina upheld despite committee's qualms', *Global Arbitration Review*, 18 December 2018; see also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. The Argentine Republic*, ICSID Case No. ARB/03/17.

Section 68(2) defines the term 'serious irregularity' by setting out an exhaustive list of situations that might cause such an injustice. On the other hand, the term 'substantial injustice' is not defined within the 1996 Act; it is a question of fact. These irregularities relate to failures in due process – failures made by the tribunal during the arbitral proceedings or in the course of rendering the award. They are set out as follows:

> *68 Challenging the award: serious irregularity*
> *(a) failure by the tribunal to comply with section 33 (general duty of tribunal);*
> *(b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);*
> *(c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;*
> *(d) failure by the tribunal to deal with all the issues that were put to it;*
> *(e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;*
> *(f) uncertainty or ambiguity as to the effect of the award;*
> *(g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;*
> *(h) failure to comply with the requirements as to the form of the award; or*
> *(i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.*

If the English court finds that there has been a serious irregularity, as set out above, which has caused a party a substantial injustice, it can select the most appropriate remedy: (1) remit the award back to the tribunal for reconsideration, (2) set aside the award or (3) declare the award ineffective. Each remedy is available in whole or in part.

The opportunity for parties to bring due process failures to the attention of the English court is an important feature of the arbitral process, but the success rates are low, the threshold is high and the costs are potentially substantial. The 1996 Act was drafted to include a high threshold for the purpose of reducing the court's intervention in the arbitral process.[21]

A common, serious irregularity cited in Section 68 applications is the tribunal's failure to deal with all the issues put to it. In *Asset Management Corporation of Nigeria (AMCON) v. Qatar National Bank*,[22] there were multiple grounds on which the claimant challenged the award. First, AMCON claimed that the tribunal failed to apply relevant principles of Nigerian law, and second, it failed to deal with three of the claimant's submissions. The court found that the claimant's first complaint was not one that fell within the boundaries of Section 68, rather the complaint was that the tribunal applied one principle of Nigerian law instead of another. It found that the remainder of the claimant's submissions that the tribunal failed to deal with an issue were unfounded. Conversely, the issues raised by the claimant were in fact dealt with by the tribunal. The court concluded that the application

21 *Terna Bahrain Holding co WLL v. Bin Kamel Al Shamzi & Others* [2013] 2 CLC 1, para. 85.

22 *Asset Management Corporation of Nigeria ('AMCON') v. Qatar National Bank* [2018] EWHC 2218 (Comm).

had no prospect of success, and it was yet another example of 'a dissatisfied party to an arbitration seeking to challenge an Award in circumstances where statute does not allow it'.

In *Midnight Marine Ltd v. Thomas Miller Specialty Underwriting Agency Ltd*,[23] the challenge was brought pursuant to Section 68(2)(b): the tribunal exceeded its powers. During the course of the arbitration, the respondent applied for a declaration that the claim was time-barred. The respondent argued that the claim should be dismissed pursuant to Section 41(3) of the 1996 Act, whereby the tribunal may dismiss a claim if it is satisfied that there has been 'inordinate and inexcusable delay on the part of the claimant in pursing his claim' and the delay:

> *(a) gives rise, or is likely to give rise, to a substantial risk that it is not possible to have a fair resolution of the issues in that claim, or*
> *(b) has caused, or is likely to cause, serious prejudice to the respondent . . . .*

The tribunal found in favour of the respondent; the claim was time-barred pursuant to Section 41(3). The claimant challenged the award claiming that the tribunal had exceeded its 'jurisdiction' in its dismissal. The court considered the claimant's challenge to be 'hopeless' as it was obvious from the circumstances that if any party were to suffer a substantial injustice it would be the respondent if it was required to defend a claim when it was likely that a fair resolution was not possible because of the claimant's conduct. As a result, the court found that it was unnecessary to consider the claimant's challenge that the tribunal had exceeded its powers.

However, the London Commercial Court did allow a challenge to an award under Section 68(2)(b) in *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited*, in which an arbitrator failed to notify the parties of written communications between himself and the Football Association and failed to give the parties the opportunity to make representations on the communications. The Court determined that the arbitrator had failed to comply with his duties under Section 33 of the 1996 Act to 'act fairly and impartially . . . giving each party a reasonable opportunity of putting his case and dealing with that of his opponent'. Such a failure amounted to a serious irregularity that was capable of causing a substantial injustice. Had the parties been afforded the opportunity to make additional representations, it was possible that the arbitrator might have reached a different conclusion. The court remitted the award back to the arbitrator citing that the irregularity was a discrete part of the claim, and it would not be inappropriate to do so.[24]

On the rare occasion that an applicant succeeds in its Section 68 challenge, it faces further costs to effect the court's remedy. In *The Secretary of State for the Home Department v. Raytheon Systems Limited*, the English court set aside an arbitral award for a serious irregularity. It held that the tribunal had failed to consider issues of liability and quantum and it would be inappropriate for the tribunal to attempt to redetermine the issues.[25] In

23 *Midnight Marine Ltd v. Thomas Miller Specialty Underwriting Agency Ltd* [2018] EWHC 3431 (Comm).

24 *Fleetwood Wanderers Limited (t/a Fleetwood Town Football Club) v. AFC Fylde Limited* [2018] EWHC 3318 (Comm).

25 *The Secretary of State for the Home Department v. Raytheon Systems Limited* [2015] EWHC 311 (TCC) and [2014] EWHC 4375 (TCC).

those circumstances, while much of the factual and expert evidence might be salvaged, the arbitral process must be recommenced and a new tribunal appointed. The parties will have borne the costs of the original arbitration, while the tribunal will have been remunerated for delivering an ineffective decision. In *P v. D, X & Y*,[26] the court held that the tribunal's failure to deal with the issue of joint and several liabilities resulted in a substantial injustice against the claimant. The issue was remitted back to the tribunal for consideration. Once again, in such circumstances, the parties would normally be expected to pay the tribunal to revisit an issue that they failed to deal with properly first time around. This thankfully rare situation raises its own questions as to whether it is right for a tribunal to be compensated despite their errors or negligence.[27]

From the cases in England referenced above, the majority of which have been determined in the past 12 to 18 months, it is evident that parties do regularly allege 'serious irregularity' in respect of awards rendered by English seated tribunals. Although it is outside the scope of this chapter, the discussion as to whether courts and lawmakers should do more to tackle this practice in England and Wales is live and likely to continue.[28]

Challenging enforcement for breach of due process

Article 36 of the Model Law allows for a challenge to enforcement of an award on the basis of a breach of due process where the party against whom enforcement is sought can prove one of the four grounds as set out in Article 34(2) of the Model Law. It follows that the same principles for setting aside an award for breach of due process under Article 34(2) also apply when a party seeks to challenge the enforcement of an award under Article 36.

However, typically it is the New York Convention that a party will turn to if it seeks to prevent enforcement of an award. Article V(1)b of the Convention states that recognition of the award may be refused if the party against whom the award is invoked proves that it 'was not given proper notice of the arbitration proceedings or was otherwise unable to present its case'.

For example, in the United States, in *Iran Aircraft Industries v. Avco Corporation*,[29] the Iran-United States Claims Tribunal at The Hague issued an award against Avco for lack of proof of damages, having told the company in a pre-hearing conference that it need not produce the thousands of invoices underlying its claim. Subsequently, the US Second Circuit Court of Appeals refused enforcement of the award on the basis that Avco had been denied the opportunity to present its claim. The Second Circuit Court of Appeals concluded that, although 'unwittingly', the tribunal had nevertheless misled the appellee and denied the opportunity to present its claims in a 'meaningful manner' as requested under the New York Convention.

However, in *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*,[30] the English court approved enforcement of an award despite a similar due process objection. In this case, the state said it had been unable to present its case in an ICSID Additional Facility proceeding

26 *P v. D, X & Y* [2017] EWHC 3273 (Comm).

27 R-J Temmink, 'Who should pay for serious irregularities in international arbitration?', *Lexology*, 15 May 2018.

28 See, e.g., K Noussia, 'Arbitration Act – Time for Reform?', *Journal of Business Law*, Issue 2, 2019.

29 *Iran Aircraft Industries v. Avco Corporation*, 980 F.2d 141 [1992].

30 *Gold Reserve Inc. v. Bolivarian Republic of Venezuela* [2016] EWHC 153 (Comm).

because the division of hearing time was unequal, even though it had itself requested a condensed hearing and chosen not to cross-examine the claimant's witnesses.

In the case of *Malicorp Ltd v. Egypt*, the English court refused to enforce an award on two grounds: (1) the award had been set aside by the Cairo Court of Appeal and (2) the award had granted remedies on a basis that were neither pleaded nor argued. The claimant contended that the Cairo Court of Appeal decision to set aside the award was wrong and its judges were guilty of pro-government bias. The English court refused the claimant's argument as it had no 'positive and cogent evidence' to support its claim. In respect of the second ground, the tribunal had granted damages to the claimant under Article 142 of the Egyptian Civil Code in circumstances where it sought compensation for a breach of contract only. The court concluded that 'the award of damages . . . must have been a complete surprise to Egypt'. The tribunal failed to ensure that Egypt was warned of these matters, which constituted a 'serious breach of natural justice'.[31]

Due process paranoia – an unfortunate trend

When addressing procedural issues, tribunals often pander to a party's procedural request out of fear that its award might be challenged due to a breach of the party's due process rights. Often, such pandering will result in prolonged proceedings that are not in a party's interests, raise costs and negatively affect the attractiveness of international arbitration as a dispute resolution mechanism.

In most cases the boundary between due process breaches and simple procedural complaints are clear. Except in extreme circumstances, most procedural disagreements, such as extensions of time and determinations on the scope of disclosure, are not serious threats to fundamental fairness and equality. However, procedural lapses by a tribunal, such as a refusal to hold a hearing when requested to do so, the failure to give notice of a hearing, not dealing with proven witness tampering and intimidation, or the tribunal making biased statements, can all be instances of serious breaches of due process.

Tribunals should take comfort from the fact that very few awards are successfully set aside or challenged for procedural complaints. A robust rejection of 'due process paranoia' by arbitral tribunals would greatly enhance international arbitration's reputation at a time when delay and high costs are having the opposite effect.

31 *Malicorp Ltd v. Egypt* [2015] EWHC 361 (Comm).

7

Awards: Challenges based on misuse of tribunal secretaries

Chloe Carswell and Lucy Winnington-Ingram[1]

In a method of dispute resolution that is always based on a consent agreement between the parties,[2] and where the persons empowered to determine the dispute are typically party-appointed, the role of the tribunal secretary in the arbitral process can be problematic. Procedural ambiguity and a perceived lack of transparency have given rise to challenges both to arbitrators and to arbitration awards. For many, these threaten to undermine the legitimacy of international arbitration and engender concerns around the enforceability of awards.

The 'fourth arbitrator'

In 2002, the *Journal of International Arbitration* published Constantine Partasides' seminal article 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration'.[3] Describing the unease developing around the use, or misuse, of tribunal secretaries almost two decades ago, Mr Partasides noted that:

> *[a] concern is growing in the world of arbitration at what is perceived to be the excessive role of some of these assistants, known commonly as secretaries to tribunals. The term the 'fourth arbitrator' alludes to this concern, rather than to a state of affairs that is presently believed to exist. For, whether justified or not, such a concern can only damage the legitimacy of the arbitral process and deserves to be addressed.*[4]

1 Chloe Carswell is a partner and Lucy Winnington-Ingram is an associate at Reed Smith LLP.

2 C Schreuer, 'Consent to Arbitration', in P Muchlinski, et al (editors), *The Oxford Handbook of International Investment Law* (2008), p. 1.

3 C Partasides, 'The Fourth Arbitrator? The Role of Secretaries to Tribunals in International Arbitration', 2002(18) *Journal of International Arbitration*, p. 147.

4 id., pp. 147 and 148.

Since the publication of this article, the role and functions of tribunal secretaries in international arbitration have come under increasing scrutiny, with a number of well-known challenges to awards and arbitrators, and increasing academic commentary on the subject. In response to the international arbitration community's mounting concerns, arbitral institutions have also taken steps to codify the precise framework for the use of tribunal secretaries.

Challenges to arbitration awards

Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA

One of the first known challenges to an award based (in part) on the actions of a tribunal secretary is recorded in the 1990 Paris Court of Appeal Decision in *Compagnie Honeywell Bull SA v. Computacion Bull de Venezuela CA*,[5] well before the concept of the 'fourth arbitrator' was first described by Mr Partasides.

In an appeal to set aside an International Chamber of Commerce (ICC) award, the appellant, Honeywell, alleged that the tribunal secretary had 'interfered' during the two-day hearing on the dispute.[6] In dismissing this element of the complaint, the Paris Court of Appeal noted that the tribunal was permitted to appoint a tribunal secretary and Honeywell had 'not explained how he would have interfered in the proceedings in circumstances which would be more prejudicial to Bull than to its opponent'.[7]

Sonatrach v. Statoil

In the ICC arbitration between Statoil and the Algerian state oil company (Sonatrach), the scope of the tribunal secretary's role was expressly agreed by the parties. The question of whether the tribunal secretary had exceeded that scope was one of the grounds of Sonatrach's subsequent challenge of the award under Section 68 of the Arbitration Act 1996 (AA 1996).[8]

Sonatrach sought to set aside the award, *inter alia*, on the ground that the tribunal improperly delegated its authority to the tribunal secretary, and impermissibly allowed her to participate in its deliberations. In its application, Sonatrach alleged that the tribunal secretary had exceeded her agreed remit by producing three notes for the tribunal on substantive matters.[9] It was asserted that this fell outside the agreed scope of the tribunal secretary's role, which had been set out in a letter to the parties (and thereafter confirmed by the parties) as follows:

> *The status of the Administrative Secretary will only consist in assisting the Tribunal and its Chairman in the administrative tasks for the proceedings, the organization of the hearings and the preparation of documents that may be useful for the decision. In no way the Administrative Secretary will have the right to participate in the decision.*[10]

5 *Compagnie Honeywell Bull S.A. v. Computacion Bull de Venezuela C.A.*, Paris Court of Appeal [PCA], 21 June 1990, 1991(1) Rev. Arb. 96 (unofficial translation).

6 id., p. 100.

7 ibid.

8 *Sonatrach v. Statoil* [2014] EWHC 875 (Comm).

9 id., 48.

10 id., 47.

The tribunal refused to produce the three notes to Sonatrach on the basis that to do so would violate the secrecy of the tribunal's deliberations.[11] This reasoning gave rise to the allegation by Sonatrach that the tribunal secretary must accordingly have participated in the tribunal's deliberations, thus exceeding her agreed remit.[12]

Mr Justice Flaux held that there was no inconsistency between the chairman's reference to the secrecy of deliberations and the tribunal secretary not exceeding the agreed remit: the tribunal had not said that the tribunal secretary participated in the tribunal's deliberations, only that the notes formed part of those deliberations.[13] Flaux J accordingly dismissed this ground of challenge, noting that it was 'a very serious allegation which is completely without merit and which should never have been made'.[14]

The Yukos set-aside proceedings

A more fully articulated, and better known, challenge to an arbitral award based on the involvement of a tribunal secretary is Russia's application to the District Court of The Hague[15] to set aside the tribunal's awards in the *Yukos* proceedings.[16]

Russia sought to set aside the awards, *inter alia*, on the ground that the arbitrators did not personally fulfil their mandate but instead delegated their adjudicative function[17] to an 'assistant to the Tribunal',[18] Mr Valasek, and that the tribunal was irregularly composed.[19]

Acknowledging that the position of a tribunal secretary should be distinguished from that of an assistant, and noting that, unlike a tribunal secretary, the powers of a tribunal assistant are not anchored in Dutch legislation, Russia's formulation of the role of an arbitral assistant was one that was of lesser substance than that of a tribunal secretary.[20] At the same time, Russia argued that the job description of a tribunal secretary, as defined by international practice, was in any event only one of support of the tribunal in the carrying out of administrative tasks relating to the organisation of the arbitration.[21]

Russia emphasised the strictly personal mandate of an arbitrator and asserted that Mr Valasek's hours, being between 40 per cent and 70 per cent greater than those of any member of the tribunal,[22] evidenced an improper and unauthorised delegation of this mandate to Mr Valasek, whose hours could only be explained on the basis that he had participated in substantive work and deliberations.[23] This was particularly the case in

11 id., 48.
12 id., 49.
13 ibid.
14 id., 46.
15 *Yukos Universal Limited (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227, Writ of Summons, 28 January 2015 [Yukos Set-Aside Petition].
16 *Hulley Enterprises Limited (Cyprus) v. Russia*, UNCITRAL, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. Russia*, UNCITRAL, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. Russia*, UNCITRAL, PCA Case No. AA 228.
17 Yukos Set-Aside Petition, Section V.
18 id., para. 469.
19 id., Section VI.
20 id., para. 485.
21 id., para. 473.
22 id., para. 469.
23 id., para. 499.

circumstances where the Permanent Court of Arbitration had been entrusted with the administration of the proceedings[24] and Mr Valasek had been brought in at the request of the chairman, ostensibly to provide him with personal assistance 'in the conduct of the case'.[25] In this regard, Russia also complained that the tribunal did not obtain the permission of the parties to the appointment of Mr Valasek,[26] with the same being presented to the parties as a *fait accompli*.[27]

Using the same reasoning as *Sonatrach*, Russia argued that the improper role of Mr Valasek was confirmed by the tribunal's refusal to disclose further details regarding his hours on the basis that to do so could prejudice the 'confidentiality of the Tribunal's deliberations'.[28] As further 'proof of the tribunal's impermissible delegation' of its mandate,[29] Russia submitted a report from a linguistics expert who, having conducted an analysis of the writing styles of the arbitrators and Mr Valasek, concluded that it was 'extremely likely' that Mr Valasek wrote 79 per cent of the preliminary objections section of the awards, 65 per cent of the liability section and 71 per cent of the damages section.[30]

The District Court of The Hague ultimately set aside the awards on alternative grounds and did not address Russia's complaints regarding Mr Valasek's involvement in the proceedings.[31]

P v. Q

Reliance by a party on the time records of a tribunal secretary to support an allegation of an improper delegation of duty is not limited to the challenge of arbitration awards. The role of tribunal secretaries has most recently been put under the spotlight by the claimant's application in *P v. Q* to remove the co-arbitrators appointed to a London Court of International Arbitration (LCIA) tribunal.[32] The application was grounded on allegations of improper delegation of the adjudicative function to the tribunal secretary in relation to three procedural decisions made between 2015 and 2016.

The trigger for the application was an email from the chairman intended for the tribunal secretary, but mistakenly sent to a paralegal at the claimant's lawyers. By reference to correspondence received from the claimant on the preceding day, the chairman asked 'Your reaction to this latest from [Claimant]?'[33]

24 ibid.

25 id., para. 488.

26 id., para. 490.

27 id., para. 487.

28 id., para. 500.

29 A Ross, 'Valasek wrote Yukos awards, says linguistics expert', October 2015, https://globalarbitrationreview.com/article/1034846/valasek-wrote-yukos-awards-says-linguistics-expert (last accessed 15 January 2019).

30 ibid.

31 District Court of The Hague, 20 April 2016, ECLI:NL:RBDHA:2016:4230.

32 *P v. Q and Ors* [2017] EWHC 194 (Comm).

33 id., 10.

Following a failed application to the LCIA Court[34] to have all three members of the tribunal removed on five grounds, three of which[35] related expressly to the improper delegation of tasks to the tribunal secretary and the alleged failure of the tribunal to discharge their decision-making duties,[36] the claimant brought an application under Section 24 of AA 1996 to remove the co-arbitrators.[37] A witness statement submitted in support of this application noted that the improper delegation of its decision-making duties by the tribunal had 'cause[d] prejudice which cannot be un-done'.[38]

In addition to the chairman's email, the claimant relied on the time records of the tribunal secretary, the chairman and the co-arbitrators, stating that the significant amount of time recorded by the tribunal secretary in relation to the three procedural decisions indicated an improper delegation of functions to him, and that the comparatively shorter amount of time spent by the co-arbitrators indicated that they had failed to fulfil their obligations.[39]

In dismissing the application, Mr Justice Popplewell articulated an important distinction between acts amounting to a failure to properly conduct proceedings under the LCIA Rules[40] and Notes for Arbitrators,[41] which are relatively permissive regarding the role of the tribunal secretary[42] and best practice in international arbitration, which should allay any hints of a 'fourth arbitrator'.[43]

As regards the proper conduct of proceedings under the LCIA Rules, Popplewell J noted that the 'yardstick' for the purposes of Section 24 of AA 1996 is that the 'use of a tribunal secretary must not involve any member of the tribunal abrogating or impairing his non-delegable and personal decision-making function'.[44] The touchstone of this function is the exercise of independent judgement.[45] The receipt and even the consideration of the opinions of others, including those of a tribunal secretary, does not automatically preclude

34 The London Court of International Arbitration[LCIA] dismissed all three grounds of complaint relating to the tribunal secretary, but the chairman's appointment was revoked on the unrelated ground that certain circumstances existed giving rise to justifiable doubts as to his impartiality (*P v. Q and Ors* [2017] EWHC 194 (Comm), 19 and 20).

35 id., 14: '(1) Ground 1: the Tribunal improperly delegated its role to the Secretary by systematically entrusting the Secretary with a number of tasks beyond what was permissible under the LCIA Rules and the LCIA Policy on the use of arbitral secretaries; (2) Ground 2: the Chairman breached his mandate as an arbitrator and his duty not to delegate by seeking the views of a person who was neither a party to the arbitration nor a member of the tribunal on substantial procedural issues (i.e., the Secretary); (3) Ground 3: the other members of the Tribunal equally breached their mandate as arbitrators and their duty not to delegate by not sufficiently participating in the arbitration proceedings and the decision-making process.'

36 id., 17.

37 *P v. Q and Ors* [2017] EWHC 194 (Comm).

38 id., 23.

39 ibid.

40 id., 50: 'The LCIA Rules provide at Article 14.2 that unless otherwise agreed by the parties under Article 14.1, the Tribunal shall have the widest discretion to discharge its duties permitted by the applicable law.'

41 The LCIA arbitration was conducted pursuant to the LCIA's Notes for Arbitrators dated 29 June 2015, as subsequently amended in October 2017.

42 *P v. Q and Ors* [2017] EWHC 194 (Comm), 50 to 55.

43 id., 68.

44 id., 65.

45 ibid.

an arbitrator from reaching an independent decision based on their own reasoning and due diligence.[46]

As to the nature of the tasks undertaken by the tribunal secretary, Popplewell J emphasised the wide discretion afforded to the tribunal to discharge its duties under the LCIA Rules, noting that in agreeing to the appointment of the secretary, the parties did not seek to limit his permitted involvement in the process or otherwise place any constraints upon the tasks and functions that he might perform.[47]

In relation to the latter, and by reference to the 'considerable and understandable anxiety in the international arbitration community that the use of tribunal secretaries risks them becoming, in effect, "fourth arbitrators"', Popplewell J stated that to ensure that the adjudicatory function of arbitration is undertaken by tribunal members alone, best practice dictates that the tribunal 'avoid involving a tribunal secretary in anything which could be characterised as expressing a view on the substance of that which the tribunal is called upon to decide'. Anything else could give rise to a 'real danger of inappropriate influence over the decision-making process by the tribunal',[48] tantamount to an abrogation of the personal decision-making function, which is non-delegable.

Application to excuse Mr Gaetano Arangio-Ruiz

Another early allegation of misuse of a tribunal secretary also comes from an arbitrator challenge. In August 1991, Iran submitted an application to excuse the incumbent chairman of Chamber Three of the Iran–United States Claims Tribunal, Mr Gaetano Arangio-Ruiz, from his office for an alleged failure to perform his arbitral functions.[49] The application under Article 13(2) of the Iran–United States Claims Tribunal Rules of Procedure was prompted by a dissent from Chamber Three's Iranian arbitrator,[50] which revealed that Mr Arangio-Ruiz had been present at the tribunal for 'no more than 40 working days' in the preceding 12 months.[51]

In drawing attention to Mr Arangio-Ruiz's lack of physical presence at the tribunal, Iran noted:

> *It is also more than obvious that a judicial function cannot be properly conducted by a legal assistant's telecommunicating a condensed or selective version of the parties' pleadings and evidence to the arbitrator living abroad. Under such circumstances, the arbitrator would, in reality, be the legal assistant, and a situation of this kind would defeat the parties' choice of an arbitrator on the basis of his personal qualifications. What may appear to a legal assistant as relevant or material in his study of the case, might not necessarily strike the arbitrator in the same matter, and vice versa.*[52]

46 id., 67.
47 id., 50.
48 id., 68.
49 J Adlam and E Lauterpacht (editors), Iran-US Claims Tribunal Reports (Vol. 27, 1991), pp. 293 to 297.
50 id., pp. 297 to 305.
51 id., p. 304.
52 id., p. 294.

In this vein, Iran also argued that Mr Arangio-Ruiz's questions had been formulated by his legal assistant, and that he had failed to properly engage with the cases before him.[53]

In a subsequent letter dated September 1991,[54] Iran put its case more squarely: in the absence of agreement, an arbitrator's powers of adjudication cannot be delegated to anybody else. To do so would violate a key tenet of international arbitration; that is, a party has the right to choose the individual or individuals to whom it ascribes powers of adjudication. Further, in the context of disputes brought before the Iran–United States Claims Tribunal, in which the arbitrators' power of adjudication has been delegated to them by the state parties to the Algiers Declarations, this would offend the settled principle *delegata potestas non potest delegari* (no delegated powers can be further delegated).[55]

Determining the application, the appointing authority of the Iran–United States Claims Tribunal noted that the test under Article 13(2) of the Iran–United States Claims Tribunal Rules of Procedure would be met where an arbitrator 'consciously neglects his arbitral duties in such a way that his overall conduct falls clearly below the standard of what may be reasonable [*sic*] expected from an arbitrator'.[56]

Against that standard, and in response to allegations relating to the misuse of the tribunal secretary, the appointing authority determined that:

- Mr Arangio-Ruiz had formed his decisions on the basis of the complete original documents that had been sent to him and had not relied solely on abstracts of pleadings and submissions selected and prepared by his assistant;[57] and
- there was insufficient evidence to support the allegation that Mr Arangio-Ruiz had failed to study properly the cases he had to adjudicate or that his work was done by his assistants.[58]

The key issues

An analysis of these cases reveals a number of central themes.

The first is bound up with a central feature of arbitration, that is, a party's right to select its arbitrator – identified by 39 per cent of respondents to the 2018 Queen Mary Arbitration Survey as among the three most valuable characteristics of international arbitration.[59] Arbitrator selection is typically an involved process with decisions based on numerous factors, including an arbitrator's experience, expertise, previous decisions, language capabilities and reputation. The acceptance of an appointment by an arbitrator creates an 'arbitrator's contract',[60] which 'gives rise to reciprocal rights and obligations on

53 id., p. 295: 'It has become apparent that he does not even bother to formulate the questions himself. The questions are passed to him by his legal assistant in the back seat.'

54 id., pp. 312 to 317.

55 id., p. 325.

56 id., p. 332.

57 id., pp. 322 and 333.

58 id., p. 334.

59 Queen Mary University of London – School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration', 2018, www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF (last accessed 21 January 2019), p. 7.

60 G Born, *International Commercial Arbitration* (2nd ed., 2014), p. 1981.

the part of both the arbitrator(s) and the parties'[61] and 'obligates the arbitrator to resolve the parties' dispute'.[62] It follows that an arbitrator's mandate is strictly personal (*intuiti personae*). No one else can properly determine the dispute.

The second, and a corollary of the personal mandate, concerns the proper role of a tribunal secretary in the arbitral process. It is common ground that the adjudicative function, the essence of the arbitrator's mandate, is non-delegable. The question is what tasks and responsibilities can be safely delegated to a tribunal secretary for reasons of procedural efficiency before their role risks trespassing on that of the arbitrators.

On this latter point, there appears to be some divergence of opinion, and it is in an effort to combat this that arbitral institutions have taken steps to codify the precise framework for the use of tribunal secretaries.

International arbitration rules and guidelines

The development of non-binding notes and guidelines

The '2016 UNCITRAL Notes on Organizing Arbitral Proceedings', intended for general and universal use across arbitral institutions,[63] briefly detail the use of tribunal secretaries in international arbitration.[64] Acknowledging that the '[f]unctions and tasks performed by secretaries are broad in range',[65] the Notes only confirm that, save in certain specialised forms of arbitration, 'it is recognized that secretaries are not involved and do not participate in the decision-making of the arbitral tribunal'.[66]

The 'Young ICCA Guide on Arbitral Secretaries',[67] the product of two surveys conducted in 2012 and 2013[68] and arguably the most authoritative and detailed study on the use of tribunal secretaries in international arbitration, sets out non-binding guidelines for the appointment and use of arbitral secretaries. While this study concluded that 'with appropriate direction and supervision' by the arbitral tribunal, an arbitral secretary's role 'may legitimately go beyond the purely administrative',[69] support from the survey's participants for arbitral secretaries performing specific tasks decreased as the proposed duties moved away from the purely administrative and towards tasks involving analysis and decision-making.[70] For example, actual participation in the tribunal's deliberations was opposed by 83.5 per cent of respondents,[71] and only 31.9 per cent of respondents considered that a tribunal secretary should draft the legal reasoning portions of the award.[72]

61 ibid.

62 ibid.

63 '2016 UNCITRAL Notes on Organizing Arbitral Proceedings', p. 1.

64 id., paras. 35 to 38.

65 id., paras. 36.

66 ibid.

67 International Council for Commercial Arbitration [ICCA], 'The ICCA Reports No. 1: Young ICCA Guide on Arbitral Secretaries', 2014, https://www.arbitration-icca.org/media/3/14235574857310/aa_arbitral_sec_guide_composite_10_feb_2015.pdf (last accessed 21 January 2019).

68 id., p. vii.

69 ibid.

70 id., p. 3.

71 id., Art. 3(2)(i) Commentary.

72 id., Art. 3(2)(j) Commentary.

Setting out a non-exhaustive list of 10 tasks that 'may' be undertaken by the tribunal secretary, to include: '[u]ndertaking administrative matters',[73] '[c]ommunicating with the arbitral institution and parties',[74] '[d]rafting procedural orders and similar documents',[75] 'research',[76] '[r]eviewing the parties' submissions and evidence, and drafting factual chronologies and memoranda summarizing the parties' submissions and evidence',[77] '[a]ttending the arbitral tribunal's deliberations'[78] and '[d]rafting appropriate parts of the award',[79] the study ultimately concluded that:

> *it should be left to the discretion of the tribunal to determine what duties and responsibilities can appropriately be entrusted to the arbitral secretary, taking into account the circumstances of the case and the arbitral secretary's level of experience and expertise.*[80]

For some, the proper supervision and direction of tasks by a conscientious tribunal[81] may be sufficient to militate against any impairment of the tribunal's non-delegable decision-making function. However, the recent challenges to arbitration awards show that the wide margin of discretion afforded to tribunals pursuant to these general guidelines may not go far enough to protect against procedural ambiguity or a perceived lack of transparency.

Arbitral institution rules

The majority of the major international arbitration institutions' rules[82] provide that a tribunal secretary can only be appointed following consultation with,[83] or by agreement of,[84] the parties. Pursuant to the same rules, tribunal secretaries are typically subject to the same or similar requirements of impartiality and independence as the members of the tribunal.[85] Further, of these institutions, all but the Singapore International Arbitration

73 id., Art. 3(2)(a).

74 id., Art. 3(2)(b).

75 id., Art. 3(2)(g).

76 id., Art. 3(2)(e) and (f).

77 id., Art. 3(2)(h).

78 id., Art. 3(2)(i).

79 id., Art. 3(2)(j).

80 id., Art. 3(1) Commentary.

81 Born, p. 2000; S Maynard, 'Laying the fourth arbitrator to rest: re-evaluating the regulation of arbitral secretaries', 34(2) *Journal of International Arbitration* 173, p. 182.

82 For example, the rules of the Hong Kong International Arbitration Centre [HKIAC], the Singapore International Arbitration Centre [SIAC], the Stockholm Chamber of Commerce [SCC], the LCIA, the International Chamber of Commerce [ICC], the Swiss Chambers' Arbitration Institution [SCAI] and the International Centre for the Settlement of Investment Disputes [ICSID].

83 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 2.1; 2014 SCAI Guidelines for Arbitrators, Guideline A1.

84 2017 LCIA Notes for Arbitrators, paras. 74 and 75; 2015 SIAC Practice Note for Administered Cases – On the Appointment of Administrative Secretaries, para. 3; 2017 SCC Arbitration Rules, Article 24(1); 2019 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration, para. 182.

85 SCC Arbitration Rules, Art. 24(3); HKIAC Guidelines on the Use of a Secretary, Guideline 2.2; ICC Note on the Conduct of the Arbitration, para. 181; LCIA Notes for Arbitrators, paras. 78, 81; SCAI Guidelines for Arbitrators, Guideline A1.

Centre (which remains silent on the tasks that may be undertaken by a tribunal secretary)[86] have taken steps to define and regulate the scope of the tribunal secretary's role.

In October 2017, the LCIA adopted changes to its Notes for Arbitrators[87] to 'clarify the tribunal secretary role, and strengthen the existing elements of the LCIA's approach to tribunal secretaries'.[88] The list of tasks that the tribunal 'may wish to propose' includes administrative tasks, attendance at hearings, meetings and deliberations, and substantive tasks such as summarising submissions, reviewing authorities and preparing first drafts of procedural orders and awards.[89] Notably, it mandates that any tasks proposed by a tribunal to be performed by the tribunal secretary must be expressly agreed to by the parties. Commenting on these changes, the LCIA noted:

> *The fundamental theme underlying all of these changes is communication and consent, ensuring that parties are given the opportunity to have their say. By requiring consent in relation to individual aspects of the tribunal secretary role, arbitrators are better able to see which elements (if any) the parties have concerns about, and respond accordingly. Once parties are made fully aware of the pertinent aspects of the tribunal secretary's role, the risk of challenges or other issues arising is greatly reduced.*[90]

This concern with consent to each aspect of the tribunal secretary's role is similarly reflected in the January 2017 Stockholm Chamber of Commerce (SCC) Rules, which provide that the tribunal shall consult the parties regarding the tasks of the secretary.[91]

Unlike the LCIA Notes and SCC Rules, most institutional rules do not require the consent of the parties to the individual aspects of the tribunal secretary's role in each case. The ICC Rules, which are silent as to tribunal secretaries, are supplemented by the January 2019 Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the 2017 ICC Rules of Arbitration. The ICC Note sets out a non-exhaustive list of 'organisational and administrative' tasks that may be undertaken by a tribunal secretary, which include: 'transmitting documents and communications', 'organising hearings and meetings', 'conducting legal or similar research', 'proof-reading and checking' procedural orders and awards, and 'attending hearings, meetings and deliberations; taking notes or minutes or keeping time'.[92] At the same time, the ICC Note seeks to constrain the role of the secretary stating:

> *Under no circumstances may the arbitral tribunal delegate its decision-making functions to an Administrative Secretary. Nor shall the arbitral tribunal rely on an Administrative Secretary to perform on its behalf any of the essential duties of an arbitrator.*[93]

86 SIAC Practice Note On the Appointment of Administrative Secretaries.

87 LCIA, 'LCIA implements changes to tribunal secretary processes', 27 October 2017, www.lcia.org/News/lcia-implements-changes-to-tribunal-secretary-processes.aspx (last accessed 28 January 2019).

88 ibid.

89 LCIA Notes for Arbitrators, para. 71.

90 'LCIA implements changes to tribunal secretary processes' – see footnote 87.

91 SCC Arbitration Rules, Art. 24(2).

92 id., para. 185.

93 id., para. 184.

The list of 'organisational and administrative tasks' under the ICC Note is broadly replicated in the 2014 the Hong Kong International Arbitration Centre (HKIAC) Guidelines on the Use of a Secretary to the Arbitral Tribunal under the same heading.[94] Notably, however, the HKIAC Guidelines enumerate further tasks that may be performed '[u]nless the parties agree or the arbitral tribunal directs otherwise'.[95] These tasks appear to be accepted as being in addition to and, accordingly, more substantial than 'organisational and administrative' tasks. Contrary to their classification under the ICC Note,[96] under the HKIAC Guidelines, both research[97] and attendance at the tribunal's deliberations[98] fall under this latter category, as does the preparation of 'summaries from case law and publications as well as producing memoranda summarising the parties' respective submissions and evidence'.[99]

Both the HKIAC Guidelines and the ICC Note include a reiteration of the tribunal's personal and non-delegable duty to review the complete case file and materials,[100] since this is critical to the exercise of independent judgement by the arbitrator in reaching their ultimate decision.

The arbitral institution rules and guidelines detailed above each include an express prohibition against the delegation of the tribunal's decision-making function.[101] This prohibition appears to transcend any agreement by the parties to the contrary. By contrast, certain other institutions appear reluctant to override the parties' wishes. For example, the Swiss Chambers' Arbitration Institution Guidelines for Arbitrators governing the use of administrative secretaries, which are silent on this point,[102] have been interpreted by the Swiss Supreme Court as permitting the exercise of the judicial function by the administrative secretary, provided there is a corresponding agreement by all parties.[103] Such permitted delegation was also reported in *AES v. Hungary*,[104] in which an International Centre for the Settlement of Investment Disputes (ICSID) tribunal, with the agreement of the parties, delegated the decision-making function on a discrete issue to the tribunal secretary.[105]

---

94 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.3.

95 id., Guideline 3.4.

96 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 185.

97 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.4(a) and (b).

98 id., Guideline 3.4(e).

99 id., Guideline 3.4(c).

100 ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 184; 2014 HKIAC Guidelines on the Use of a Secretary to the Arbitral Tribunal, Guideline 3.6.

101 LCIA Notes for Arbitrators, para. 68; SCC Arbitration Rules, Art. 24(2); ICC Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration, para. 184; HKIAC Guidelines on the Use of a Secretary, Guideline 3.2.

102 SCAI Guidelines for Arbitrators.

103 4A_709/2014 of 21 May 2015: 'Without a corresponding agreement by the parties, the arbitral secretary must however refrain from exercising any judicial function, which remains to be the privilege of the arbitrators.' See: Tribunal fédéral, Ière Cour de droit civil, 4A_709/2014, Arrêt du 21 mai 2015, *A. SA contre B. Sàrl*, Mmes les Juges Kiss, présidente, Hohl et Niquille. Greffier: M Carruzzo, 33(4) ASA Bull. 879.

104 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010, para. 3.29.

105 ibid. Specifically, it was agreed that any disagreement between the parties on the redactions proposed by the respondent would be submitted to the secretary for a decision.

It is undisputed that consent and party autonomy are central tenets of international arbitration that facilitate the flexibility of the arbitral process. However, the codified prohibition against any delegation by the tribunal of its core function may act as an important safeguard. The danger inherent in the absence of the same lies in the relationship between the parties and the tribunal. The nature of this relationship could foreseeably give rise to a situation in which a party feels unable to refuse a request by the tribunal to delegate some aspect of its role, including in respect of adjudication.

The exceptional position under ICSID

The position under ICSID is unique. Among the 'Special Features of ICSID' enumerated on the ICSID website, it is stated that '[a] dedicated ICSID case team is assigned to each case and provides full legal and administrative support throughout the process'.[106] This includes the appointment of a tribunal secretary from among ICSID's staff (i.e., the ICSID Secretariat) by the secretary general.[107] The secretary is further said to act as the representative of the secretary general while serving in that capacity.[108] The secretary's tasks include serving as the channel of communication between the parties and the centre, keeping summary minutes of hearings and the performance of 'other functions with respect to the proceeding at the request of the President of the Commission, Tribunal or Committee, or at the direction of the Secretary-General'.[109]

While the authors are not aware of any challenges to ICSID awards or arbitrators on the ground of misuse of tribunal secretaries, the additional opinion of Professor Dalhuisen appended to the decision on annulment in *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v. Argentine Republic*[110] offers an unprecedented and scathing indictment of the role of the ICSID Secretariat in that particular case:

> *Before ending the discussion, I should like to deal with the role of the ICSID Secretariat in this matter which has led to multiple complications and has delayed the final decision by many months.*[111]

Professor Dalhuisen's criticism of the secretariat's actions in the instant annulment proceedings focused on:

- the secretariat's desire to prepare the recitals in the award, which 'delayed the final result considerably';[112] and
- the view taken by the secretariat that it could intervene to streamline the text of the award agreed by the *ad hoc* committee and in particular the approach by senior

106 ICSID, 'Special Features of ICSID', https://icsid.worldbank.org/en/Pages/about/Special-20Features-20of-20ICSID.aspx (last accessed 21 January 2019).

107 2006 ICSID Administrative and Financial Regulations, Reg. 25.

108 id., Reg. 25(a).

109 id., Reg. 25(d).

110 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Argentina's Annulment Request – Additional Opinion of Professor J H Dalhuisen, 10 August 2010.

111 id., para. 1.

112 id., paras. 4 and 5.

secretariat members to individual members of the *ad hoc* committee with a view to amending the text, which gave rise to 'fundamental issues of propriety, independence, open and direct communication between Committee Members, and confidentiality'.[113]

Levelling more general and wide-ranging criticisms at the secretariat, Professor Dalhuisen cautioned against the secretariat's apparent desire 'to obtain for itself a greater role in the conduct of ICSID cases'.[114] In particular, he noted that:

- the drafting of any part of the tribunal's or *ad hoc* committee's decisions or reasoning by the secretariat is 'wholly inappropriate' and cannot be legitimised by subsequent approval by the tribunal;[115]
- the use of the secretariat as an intermediary for communications between the chairman and the other members of the tribunal or committee risks breaching Arbitration Rule 15, which mandates that the deliberations of the *ad hoc* committee or tribunal are both secret and private;[116]
- the secretariat is not entitled to intervene in the proceedings in any way save if asked to do so by the committee or tribunal (which should never affect the substance of the case);[117] and
- the secretariat should not assume the mantle of promoting a *jurisprudence constante* across ICSID awards.[118]

Related to the central issue of the right and obligation to exercise the decision-making function, Professor Dalhuisen stated that: 'Submissions by the Secretariat, whatever the intention, are here legally irrelevant and no more than unsolicited opinion. Not being subject to examination by the parties, they cannot carry any weight.'[119]

While the grounds for annulment under the ICSID Convention are limited, it is easy to see how allegations of this nature against an ICSID tribunal secretary by a party to the arbitration could give rise to an application for annulment, for example, on the ground that the delegation to, or the assumption by, the ICSID Secretariat (including the tribunal secretary) of the tribunal's mandate amounted to a serious departure from a fundamental rule of procedure.[120]

Mitigating the risks

The recent challenges to both awards and arbitrators based on the alleged misuse of tribunal secretaries suggests that the 'fourth arbitrator' is no longer a spectre. For many, and as forewarned by Mr Partasides, it now describes the 'state of affairs that is presently believed to exist'.[121] Further, and despite efforts to codify the extent of the tribunal secretary's role

113 id., para. 9.
114 id., para. 2.
115 id., para. 7.
116 id., paras. 10 to 12.
117 id., para. 15.
118 id., paras. 16 and 17.
119 id., para. 19.
120 2006 ICSID Convention, Art. 52(1)(d).
121 Partasides, p. 148 (see footnote 3).

by some institutions, many argue that there remains a manifest lack of consistency across the various institutional rules and guidelines.

At the other end of the spectrum, some commentators have opined on what they conceive to be illegitimate challenges based on the alleged misuse of tribunal secretaries. In this regard, during the 2017 Spring Arbitration Symposium, Professor Janet Walker is reported to have said that attacks on the use of tribunal secretaries do not come on their own, but tend to occur in one of two situations: when 'the party cannot allow the award to stand under any circumstances and finds the use that was made of a tribunal assistant as a convenient means of attacking the award' and when 'the tribunal's conduct of the matter caused general dissatisfaction to one or both parties'.[122]

It is evident that concerns from those on both sides of the debate give rise to questions of transparency and legitimacy. On the one hand, the delegation of the personal adjudicative function to a tribunal secretary, lacking any mandate to determine the dispute, threatens to undermine the integrity of the arbitral process. On the other, a successful party to the arbitration may face an opportunistic challenge to the award, which exploits any procedural ambiguity around the use of a tribunal secretary. In either case, there is a real danger of jeopardising what is still regarded as the most valuable characteristic of international arbitration: the enforceability of awards.[123]

The surest protection is early and proactive engagement with the tribunal on the scope of the tribunal secretary's role.

For arbitrations not conducted under the auspices of institutions such as the LCIA or SCC, where the scope of the tribunal secretary's role is subject to party consent, the parties remain at liberty to seek to agree the exact role and functions of the tribunal secretary with each other and the tribunal. The benefits of this are at least threefold:

- The parties will have defined the role of the tribunal secretary in accordance with their own subjective criteria. It is the parties who will determine which tasks can be safely undertaken by the secretary without diluting the arbitrators' mandate and who will accordingly have given the secretary a mandate of his or her own.
- By defining the four corners of the tribunal secretary's role, a party will be better equipped to point to circumstances demonstrating that the tribunal secretary has overstepped his or her mandate.
- In the same vein, it will be more difficult for a party to mount an opportunistic (and potentially unmeritorious) challenge on the basis of the involvement of the tribunal secretary where the tribunal secretary's role was agreed by the parties and transparent throughout the proceedings.

122 D Ganev, 'Problematics of tribunal secretaries', 16 August 2017, https://www.cdr-news.com/categories/arbitration-and-adr/7522-problematics-of-tribunal-secretaries (last accessed 21 January 2019).

123 2018 International Arbitration Survey: 'The Evolution of International Arbitration', p. 7.

8

Substantive Grounds for Challenge

Joseph D Pizzurro, Robert B García and Juan O Perla[1]

Introduction

For several decades, arbitration has been promoted as the preferred method for resolving commercial disputes, especially in international commerce. One of the advantages often touted in favour of arbitration is the final and binding nature of arbitral awards. The conventional wisdom has been that arbitral decisions should be insulated from any substantive judicial review, but in recent years, this pro-arbitration paradigm is being increasingly tested and courts seem to be taking notice.

This chapter looks at various avenues for challenging awards on substantive grounds. First, we consider a possible shift in judicial attitudes towards arbitration and, in line with that evolution, we define 'substantive grounds' broadly to include mistakes of law or fact going to the overall merits or substance of an arbitral decision, as distinct from strictly procedural or jurisdictional errors.[2] Second, we identify existing mechanisms for appealing directly from an arbitral award within the arbitration process itself or in the courts. Third, we survey recent court decisions to assess the viability of raising mistakes of law or fact as a basis for challenging awards in collateral judicial proceedings. Further, we explore how courts are relying on public policy or public order as a vehicle for correcting other serious defects in the merits or substance of an award. Finally, we describe the *sui generis* investor-state arbitration regime created under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 (the ICSID Convention) and the possibility of challenging ICSID awards on substantive grounds.

---

1 Joseph D Pizzurro is a managing partner, Robert B García is a partner and Juan O Perla is an associate at Curtis, Mallet-Prevost, Colt & Mosle LLP. The authors would like to thank William Hampson, associate in Curtis' London office, for his contribution.

2 See Chapters 5, 6 and 7.

An evolving paradigm for challenging arbitral awards on substantive grounds

The emergence of the current 'arbitration friendly' system was aided by the implementation of two of the most significant legal instruments governing arbitral awards: the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention) and the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration of 1985.[3] As a result, arbitration institutions saw a boom in international commercial arbitrations.[4] That trend carried over into investor-state arbitration with the ratification of the ICSID Convention and the subsequent proliferation of bilateral and multilateral investment treaties.[5]

As explained in more detail below, this international legal framework limits the extent to which courts are able to review arbitral awards. With rare exceptions, awards are not subject to appeal or direct review. Thus, any relief from a defective award is likely to occur in collateral judicial proceedings either to set aside the award at the seat of the arbitration or to enforce the award in secondary jurisdictions. In either situation, there are no express provisions for directly challenging an award on 'substantive grounds', that is to say on the basis of a general mistake of law or fact. Instead, grounds for challenging awards are geared towards correcting mistakes in the arbitral process itself, such as serious departures from basic procedural rights or deviations from the arbitral mandate (sometimes described as jurisdictional or admissibility errors).[6]

As this international legal regime made its way into domestic laws, many national courts began to shed any prior scepticism towards arbitration and adopted an explicitly pro-arbitration bias.[7] Accordingly, courts have significantly limited their review of arbitral awards to facilitate faster and easier enforcement across jurisdictions. Put differently, courts have acted as strict enforcers of the parties' agreement to arbitrate and have deferred substantially to the legal and factual determinations of arbitral tribunals. Thus, under the existing legal framework, a party has little, if any, chance of successfully challenging the merits or substance of an arbitral award.

However, recent judicial decisions suggest that courts may be showing a greater willingness to flex their judicial muscle to correct excesses or abuses of arbitral power. Most notably, the Court of Justice of the European Union (CJEU), the highest judicial authority

3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed on 10 June 1958, http://www.newyorkconvention.org/new+york+convention+texts; United Nations Commission on International Trade Law, UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html. See Nigel Blackaby and Constantine Partasides with Alan Redfern and Martin Hunter, *Redfern and Hunter on International Arbitration*, Sections 1.01 to 1.03 (6th ed. 2015).

4 From 2012 to 2016, the overall caseload at major arbitral institutions continued to grow significantly. See Markus Altenkirch and Jan Frohloff, 'International Arbitration Statistics 2016 – Busy Times for Arbitral Institutions', Global Arbitration News (26 June 2017), https://globalarbitrationnews.com/international-arbitration-statistics-2016-busy-times-for-arbitral-institutions/.

5 The number of International Centre for Settlement of Investment Disputes [ICSID] cases has grown exponentially in the last two decades. See World Bank, 'The ICSID Caseload – Statistics 7' (Issue 2019-1), https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%202019-1(English).pdf.

6 See *Redfern and Hunter on International Arbitration* (footnote 3), at Sections 10.36, 10.41, 10.75.

7 See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 US 614, 631 (1985).

on EU law, recently sent shock waves through the arbitration community when it ruled in *Slovak Republic v. Achmea* that EU Member States are precluded from agreeing to arbitrate disputes with investors of other EU Member States outside the EU judicial system,[8] effectively ending investor-state arbitration in its current form within the European Union.[9]

In that case, a Dutch investor, Achmea, brought claims against Slovakia pursuant to the arbitration provisions in a bilateral investment treaty (BIT) between the Slovak Republic and the Netherlands, both of which are EU Member States. Slovakia opposed the arbitral tribunal's jurisdiction, arguing that, upon the state's accession to the European Union, the arbitration provision in the BIT was unenforceable under EU law.[10] The tribunal concluded that it had jurisdiction and rendered an award in favour of Achmea. Because the arbitration was seated in Germany, Slovakia applied to set aside the award in a German court. Germany's highest civil court, the Federal Court of Justice (BGH), referred the issue to the CJEU for a preliminary ruling. The CJEU agreed that Slovakia's accession to the European Union precluded the state from agreeing to arbitrate disputes with investors of other EU Member States under the BIT. Accordingly, the BGH annulled the award on the grounds that no valid arbitration agreement existed between the parties under EU and German law.[11]

Although the BGH's reason for annulling the award – the non-existence of a valid arbitration agreement – fits within the jurisdictional grounds for setting aside awards under the existing legal framework, that strict characterisation ignores a more fundamental aspect of the court's decision. The court overruled the tribunal's determination of its own jurisdiction on the basis of a substantive legal error, in that case a mistake in the interpretation and application of EU law. Thus, in a broader sense, the decision in *Achmea* is an example of an award that was set aside on substantive grounds because the German court reversed a mistake of law in the arbitral decision itself, as opposed to correcting only a mistake in the arbitral process.

Direct review on questions of law or fact

Although the default practice is to agree to final and binding arbitration without any appellate review, in some cases parties may still be able to obtain direct review of an adverse award by agreeing either to arbitral rules that provide for direct appeals within the arbitration process itself or to arbitrate under the laws of a jurisdiction that allows for direct review by a court.

For instance, parties may provide for direct appeal of awards rendered under the auspices of the American Arbitration Association or its international arm, the International Centre for Dispute Resolution, pursuant to the Optional Appellate Arbitration Rules, which

8 Judgment of 6 March 2018, *Slovak Republic v. Achmea B.V.*, Case C-284/16, ECLI:EU:C:2018:158, paras. 45, 46, 48, 49, 62 [hereinafter *Achmea*].

9 Following the Court of Justice of the European Union's *Achmea* decision, EU Member States committed to terminating intra-EU bilateral investment treaties. See European Commission – Daily News, 'Single Market: Commission welcomes Member States' commitments to terminate all bilateral investment treaties within the EU' (17 January 2019), http://europa.eu/rapid/midday-express-17-01-2019.htm?locale=en.

10 *Achmea*, at para. 11.

11 *Slovak Republic v. Achmea B.V.*, Bundesgerichtshof [BGH] [Federal Court of Justice] 31 October 2018, I ZB 2/15, paras. 14, 15.

'apply a standard of review greater than that allowed by existing federal and state statutes' in the United States.[12] Under these rules, a new *ad hoc* panel of arbitrators is appointed to hear challenges on the grounds that the underlying award is based upon '(1) an error of law that is material and prejudicial; or (2) determinations of fact that are clearly erroneous'.[13]

Similar optional appellate provisions are included in the arbitral rules of the International Institute for Conflict Prevention and Resolution (CPR) and the Judicial Arbitration and Mediation Services (JAMS). The CPR rules allow the new *ad hoc* appellate panel to set aside or modify the award if it '(i) contains material and prejudicial errors of law of such a nature that it does not rest upon any appropriate legal basis, or (ii) is based upon factual findings clearly unsupported by the record'.[14] Under the JAMS rules, the *ad hoc* appellate panel 'will apply the same standard of review that the first-level appellate court in the jurisdiction would apply to an appeal from the trial court decision' and 'may re-open the record' to review any evidence that was 'improperly excluded' by the original arbitrators or new evidence that has become 'necessary in light of the [appellate panel's] interpretation of the relevant substantive law'.[15] Other major institutions, such as the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), do not provide comparable appellate procedures.

Outside the arbitration process, few jurisdictions still permit direct appeals from arbitral awards in court. One prominent example is England. The English Arbitration Act explicitly provides for direct appeals in certain enumerated circumstances, but only on questions of English law and only by agreement of all the parties to the arbitral proceedings or by leave of the court.[16] In practice, few applications make it 'over the leave requirement which has been designed to catch all but the most meritorious appeals'.[17] Moreover, parties may contract out of these provisions by explicitly waiving the right to appeal in the contract or by selecting arbitral rules that expressly waive any right to appeal or other forms of recourse, such as Article 35(6) of the ICC Rules and Article 26(8) of the LCIA Rules.[18]

12 American Arbitration Association [AAA], 'Optional Appellate Arbitration Rules 3' (1 November 2013), https://www.adr.org/sites/default/files/AAA%20ICDR%20Optional%20Appellate%20Arbitration%20Rules.pdf.

13 id., at A-10. In the United States, parties cannot contractually expand the statutory grounds upon which a *court* may review and set aside an award. *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 US 576 (2008). But there is no indication that such a prohibition extends to broader appellate review by *arbitrators*. In fact, a federal court in New York has confirmed an arbitral award modified under the AAA appellate procedures as if it were any other award rendered under the Federal Arbitration Act. *Hamilton v. Navient Sols. LLC*, No. 18-cv-5432 (PAC), 2019 US Dist. LEXIS 24412 (SDNY 14 February 2019).

14 The International Institute for Conflict Prevention and Resolution, 'Appellate Arbitration Procedure', Section 8.2(a) (2015), https://www.cpradr.org/resource-center/rules/arbitration/appellate-arbitration-procedure.

15 Judicial Arbitration and Mediation Services, 'Optional Arbitration Appeal Procedure', Section (d) (June 2013), https://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Optional_Appeal_Procedures-2003.pdf.

16 English Arbitration Act 1996, Section 69.

17 David St John Sutton, Judith Gill and Matthew Gearing, *Russell on Arbitration*, 531 (24th ed. 2015).

18 See, e.g., *Lesotho Highlands v. Impregilo* [2006] 1 AC 221, para. 3.

But a provision in an arbitration agreement that the award shall be 'final, conclusive and binding' has been deemed to be insufficiently clear to waive this right.[19]

Similarly, in what some experts have described as a 'ground-breaking precedential decision' with potential ramifications for many African jurisdictions, the Ethiopian Supreme Court recently ruled that it could review an arbitral award for fundamental errors of Ethiopian law.[20] In that case, the governing law was Ethiopian law and the applicable arbitral rules (the European Development Fund Arbitration Rules) assimilated the award to a final court judgment of an Ethiopian court. Because the Ethiopian Constitution grants the Supreme Court jurisdiction to review the final judgments of all Ethiopian courts for fundamental errors of Ethiopian law, the court concluded that it could review the award for any such defects.[21] Applying this standard, the court found that the arbitral tribunal had erred in the interpretation and application of Ethiopian law in several respects, including by ignoring evidence of fraud in the contract, thereby rendering the award a nullity.[22] Commentators have observed that this decision departs from precedent in which the Ethiopian Supreme Court ruled that arbitral awards are not subject to substantive review.[23]

Challenging awards in collateral proceedings under national arbitral laws and the New York Convention

In the absence of a direct appeal, a party may still be able to attack an award in collateral judicial proceedings in two ways. One option is to oppose enforcement of the award wherever the prevailing party tries to enforce it. The New York Convention, with almost 160 contracting states, provides the nearly universal defences against recognition and enforcement of awards.[24] A successful defence would not extinguish the award, but would avoid enforcement in that jurisdiction and could preclude enforcement in other jurisdictions as well.[25]

---

19 See, e.g., *Shell Egypt West Manzala GmbH v. Dana Gas Egypt Ltd* [2009] EWHC 2097 (Comm), para. 36.

20 I-Arb Africa, 'The Ethiopian Supreme Court Annuls a €20 Million Euro International Arbitral Award in Favor of an Italian Contractor under the European Development Fund Rules (EDF)', https://www.iarbafrica.com/en/news-list/17-news/660-the-ethiopian-supreme-court-annuls-a-%E2%82%AC-20-million-euro-international-arbitral-award-in-favor-of-an-italian-contractor-under-the-european-development-fund-rules-edf.

21 id.

22 Sadaff Habib, 'Spotlight on Ethiopia as it Annuls a Euro 20 million Arbitral Award', Kluwer Arbitration Blog (14 August 2008), at http://arbitrationblog.kluwerarbitration.com/2018/08/14/spotlight-on-ethiopia-as-it-annuls-a-euro-20-million-arbitral-award/.

23 Mintewab Afework, 'The Fate of Finality Clause in Ethiopia', Kluwer Arbitration Blog (22 July 2018), http://arbitrationblog.kluwerarbitration.com/2018/07/22/fate-finality-clause-ethiopia-2/. Note that Ethiopia is not a party to the New York Convention, and its arbitration law is not based on the UNCITRAL Model Law. See UNCITRAL, 'Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)', www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html; UNCITRAL, 'Status – UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006', http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

24 'Status – Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (footnote 23).

25 See Gary Born, *International Commercial Arbitration*, Vol. III 3391 (2nd ed. 2014).

Another option is to apply to have the award set aside or annulled by a court with supervisory or primary jurisdiction over the arbitration (also known as the seat of the arbitration). Under the New York Convention, there may be two primary jurisdictions (i.e., 'the country in which, *or* under the law of which, that award was made' (emphasis added)).[26] The most common grounds for setting aside an award are set forth in Article 34 of the UNCITRAL Model Law, which forms the basis of arbitration laws in more than 110 jurisdictions.[27]

If the award is properly set aside, courts in other countries or secondary jurisdictions may recognise the annulment decision and refuse to enforce the award under the New York Convention.[28] However, nothing in the New York Convention or the UNCITRAL Model Law mandates recognition of an annulment decision.[29] And some courts have enforced awards notwithstanding the fact that they had been annulled in a primary jurisdiction, for instance when the annulment decision is 'repugnant to fundamental notions of what is decent and just'.[30]

As is evident from a side-by-side comparison (see table below), the grounds for challenging an award in set-aside and enforcement proceedings are practically identical. Nevertheless, the odds of success may vary depending on the procedural posture because courts in different jurisdictions may apply different standards of review and may respond differently to the same award.[31]

Under both legal regimes, the grounds for attacking an award are limited primarily to serious deviations from constitutive or procedural aspects of the arbitration, for example a failure to act within the scope of the arbitration agreement or a failure to abide by basic standards of due process. In addition, an award may be disregarded if it decides an issue that is not arbitrable (i.e., not capable of settlement by arbitration under the state's domestic law), or if it is otherwise contrary to public policy insofar as it violates the forum's fundamental notions of justice and morality or contravenes important national interests.[32] Notably, there are no express provisions for directly attacking the merits or substance of an arbitral decision, whether on the basis of a mistake of fact or law.

---

26 New York Convention, Article V(1)(e) (emphasis added).

27 'Status – UNCITRAL Model Law' (footnote 23).

28 See, e.g., *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 936 (DC Cir. 2007) ('[A]n arbitration award does not exist to be enforced in other Contracting States [under the New York Convention] if it has been lawfully "set aside" by a competent authority in the State in which the award was made.'); *Luxembourg No. 7, PEMEX – Exploracion y Produccion v. Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V.*, Court of Appeal of Luxembourg, Case No. 59/17, 27 April 2017, in *Yearbook Commercial Arbitration*, Volume XLII (van den Berg ed. 2017) [hereinafter *Luxembourg PEMEX* decision] (refusing to enforce an award under the New York Convention because it had been annulled at the seat of the arbitration and therefore 'produce[d] no effects . . . in its country of origin'); see also Born, *International Commercial Arbitration* (footnote 25), at 3390.

29 Both the Model Law and the New York Convention provide that a court 'may' refuse to recognise and enforce an award that has been set aside by a competent authority. UNCITRAL Model Law, Article 36(1)(a)(v); New York Convention, Article V(1)(e).

30 See, e.g., *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, 832 F.3d 92, 99 (2d Cir. 2016) [hereinafter *United States PEMEX* decision].

31 Compare *Luxembourg PEMEX* decision (footnote 28) with *United States PEMEX* decision (footnote 30).

32 See *Redfern and Hunter on International Arbitration* (footnote 3), at Sections 10.82, 10.83.

Article 34 of the UNCITRAL Model Law	*Article V of the New York Convention*
A party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or	The parties to the [arbitration] agreement . . . under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or	The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or	The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or	The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
	The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made; or
The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or	The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
The award is in conflict with the public policy of this State.	The recognition or enforcement of the award would be contrary to the public policy of that country.

Arbitration laws that are not based on the UNCITRAL Model Law can be similarly or even more restrictive in leading arbitral jurisdictions. In the United States, the Federal Arbitration Act (FAA) provides the exclusive grounds for a federal court to set aside or 'vacate' an award:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality or corruption in the arbitrators, or either of them;
- where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[33]

33 9 USC Section 10.

As with the UNCITRAL Model Law, the FAA does not expressly include grounds for vacating an award on the basis of general mistakes of law or fact.[34] The same is true under Swiss and French arbitration laws.[35] And French law goes even further for international awards. Unlike domestic awards, which are subject to review on the basis of French standards of morality and justice (*ordre public interne*), international awards – regardless of where they were rendered – are subject to a presumably lower standard of review under internationally recognised norms (*ordre public international*).[36]

In short, the only realistic way to attack an arbitral award on 'substantive grounds' in collateral proceedings is to present a challenge within the context of the express provisions found in the New York Convention or the relevant state's domestic arbitration law. Recent court decisions setting aside awards or refusing enforcement under the excess of powers or public policy rubrics illustrate this point.[37]

Challenging substantive errors of law as excesses or abuses of arbitral power

Even though it is not expressly included in the FAA, United States courts have recognised the doctrine of 'manifest disregard of the law' as a proper basis for vacating awards, including international awards rendered in the United States.[38] And the United States Supreme Court has explained that 'manifest disregard of the law', as opposed to general errors of law, may be a proper basis for review under one of the FAA's express provisions, such as when the arbitrators are 'guilty of misconduct' or 'exceeded their powers'.[39] As a general rule, this doctrine applies when two criteria are met: '(1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case'.[40]

Although this defence rarely succeeds, in January 2019, the US Court of Appeals for the Ninth Circuit affirmed a lower court's decision to vacate an international award rendered in the United States under the FAA because the arbitrators' decision was 'completely irrational' and in 'manifest disregard of the law'.[41] In that case, a US government contractor, ECC, awarded subcontracts to a local company, Aspic, for two construction projects in Afghanistan pursuant to ECC's prime contract with the US Army Corps of Engineers.

34 See *Hall St.*, 552 US at 584; *United Paperworkers Int'l Union v. Misco, Inc.*, 484 US 29, 38 (1987).

35 See Swiss Federal Private International Law Act 1987, Article 190; French Code of Civil Procedure 2011, Article 1492.

36 Compare French Code of Civil Procedure 2011, Article 1492 5º with Article 1520 5º. See *Redfern and Hunter on International Arbitration* (footnote 3), at Section 10.84; Frank-Bernd Weigand, *Practitioner's Handbook on International Commercial Arbitration*, Section 1.159 (2nd ed. 2010).

37 See generally Born, *International Commercial Arbitration* (footnote 25), at 3354.

38 *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys 'R' Us, Inc.*, 126 F.3d 15, 21 (2d Cir. 1997).

39 *Hall St.*, 552 US at 584, 585. Some federal courts of appeals have rejected this interpretation, raising the prospect that the Supreme Court will revisit this issue in the near future. See, e.g., *Affymax, Inc. v. Ortho-McNeil-Janssen Pharm., Inc.*, 660 F.3d 281, 285 (7th Cir. 2011); *Citigroup Glob. Mkts Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009).

40 *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004) (*citation omitted*); *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 95, 97 (2d Cir. 2008).

41 *Aspic Eng'g & Constr. Co. v. ECC Centcom Constructors LLC*, No. 17-16510, 2019 US App. LEXIS 2774, at *8 (9th Cir. 28 January 2019) (quoting *Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 997 (9th Cir. 2003)).

Under the terms of the subcontracts, Aspic were obliged to comply with US regulations applicable to ECC as a government contractor, the Federal Acquisition Regulations (FAR), including provisions relating to termination of contracts and settlement procedures.

Eventually, the Army Corps of Engineers terminated the prime contract and ECC accordingly cancelled the subcontracts. Aspic claimed that it was owed certain expenses and termination costs, but ECC refused to pay, in part because Aspic had failed to properly present its settlement costs as required by the relevant FAR provisions. Aspic filed for arbitration pursuant to the subcontracts, and the sole arbitrator issued an award in favour of Aspic for more than US$1 million on the basis that it would be 'unreasonable' and 'unjust' to hold a local Afghan company to the same strict standards as a US contractor.[42] A federal district court in California vacated the award and the court of appeals affirmed. The latter reasoned that the arbitrator erred as a matter of law and thereby exceeded its authority in concluding that Aspic need not comply with the FAR provisions.[43]

Similarly, in France, in January 2019, the Paris Court of Appeal partially set aside an award on the grounds that the arbitral tribunal exceeded its mandate by erroneously awarding damages for claims that the tribunal itself had concluded to be outside its temporal jurisdiction.[44] A Canadian gold mining company, Rusoro, had acquired interests in certain mining projects in Venezuela between 2006 and 2008. In 2009, Venezuela enacted various measures restricting exports of gold and regulating foreign exchange. In 2011, Venezuela nationalised the gold mining sector. Rusoro submitted a request for arbitration, claiming that Venezuela had breached its obligations under the Canada–Venezuela BIT by enacting restrictive measures in 2009 and expropriating Rusoro's gold mining interests in 2011.

The arbitral tribunal found that the claims based on the 2009 measures were time-barred under the BIT. Nevertheless, it awarded Rusoro US$967 million plus interest in compensation for the alleged expropriation based on the value of the company's shares in 2008, without taking into account the decrease in value caused by the restrictive measures imposed in 2009. The French court reviewed the relevant 'elements of law and of fact' and concluded that it was an error to award damages for losses that were caused by measures that fell outside the tribunal's mandate.[45]

Challenging the substance of an award based on violations of public policy

Another avenue for challenging an award on substantive grounds is the public policy defence. Under the UNCITRAL Model Law and the New York Convention, courts are free to disregard an award if they believe it violates their own state's public policy. Again, as a general matter, an award is contrary to public policy if it is repugnant to fundamental notions of justice or morality or if it contravenes important national interests.[46] Because of

42 id., at *13, *14.

43 id., at *14.

44 *République Bolivarienne du Venezuela v. Société Rusoro Mining Limited*, Paris Court of Appeal, 29 January 2019, No. RG 16/20822, No. Portalis 35L7-V-B7A-BZ2EA [hereinafter *Société Rusoro*], https://www.italaw.com/sites/default/files/case-documents/italaw10298.PDF; see also Tom Jones and Sebastian Perry, 'Billion-dollar award set aside in Paris', *Global Arbitration Review* (30 January 2019), https://globalarbitrationreview.com/article/1179819/billion-dollar-award-set-aside-in-paris.

45 *Société Rusoro* at 4, 9.

46 See *Redfern and Hunter on International Arbitration* (footnote 3), at Sections 10.82, 10.83.

its inherent vagueness, the public policy defence seems to provide the greatest latitude for courts to correct substantive defects in an arbitral award. Accordingly, it is perhaps the most commonly invoked basis for challenging an arbitral decision, yet rarely with any success.

However, recent cases suggest that awards may be increasingly vulnerable to this sort of challenge, consistent with the current trend towards greater scrutiny of arbitral awards. For example, in June 2018, a federal district court in Washington, DC, refused to confirm an arbitral award against India on public policy grounds.[47] India had entered into a contract with an Indian company, HEPI, for the exploration and potential commercialisation of oil and natural gas in India. A dispute arose regarding HEPI's rights to continue its exploration activities following India's determination that the company had relinquished its rights to a certain block. The tribunal ultimately ruled in favour of HEPI but, instead of awarding monetary damages, ordered India to let the company back into the block so that it could continue its exploration activities for another three years. The tribunal also awarded interest on the value of HEPI's investment, including 18 per cent interest that would continue to accrue until HEPI was allowed back into the block.

The US district court refused to enforce the award. The court found that it could not order India to perform an act within its own territory because doing so would violate US public policy respecting the sovereignty and independence of nations.[48] The court found that the interest portion of the award also violated public policy because the penal nature of the interest had the 'practical effect' of coercing India into complying with the specific performance ordered by the award[49] and, furthermore, it contravened US law on foreign sovereign immunity, which expressly prohibits holding foreign states liable for punitive damages.[50]

In France, too, the public policy defence has gained some appeal 'as an extension to the courts' increasing control over arbitral awards'.[51] This is even more notable because in France, as explained above,[52] international awards are only subject to review for violations of internationally recognised norms rather than purely domestic norms, and courts must find that the alleged violation satisfies the heightened standard of being 'flagrant, effective and concrete'.[53] In a notable case in 2018, the Paris Court of Appeal ruled that it had the power to review an international award 'in law and in fact' to determine whether it violated international public policy.[54] The court then vacated the award because it had the effect of conferring international legal protection to an investment secured by defrauding government

47 *Hardy Exploration & Production (India) v. Gov't of India*, 314 F. Supp. 3d 95 (DDC 2018).

48 id., at 110, 114.

49 id., at 115, 116.

50 id., at 113. The United States Foreign Sovereign Immunities Act expressly states that foreign states 'shall not be liable for punitive damages.' 28 USC Section 1606.

51 See, e.g., Stéphane Bonifassi and Elena Fedorova, 'In France, Increasing Court Control Over Arbitral Awards', Law360.com (8 February 2019), https://www.law360.com/internationalarbitration/articles/1127331/in-france-increasing-court-control-over-arbitral-awards?nl_pk=b85b02ef-3fb5-4def-8e3c-944cad40b3c4&utm_source=newsletter&utm_medium=email&utm_campaign=internationalarbitration.

52 See subsection 'Challenging awards in collateral proceedings under national arbitration laws and the New York Convention'.

53 *Société MK Group v. S.A.R.L. Onix*, Paris Court of Appeal, 16 January 2018, No. RG 15/21703, p. 8 [hereinafter *Société MK Group*], http://web.lexisnexis.fr/LexisActu/CAParis16janv20181521703.pdf.

54 id., at 4.

authorities in derogation of the 'international consensus' respecting every state's right to control foreign investments within its territory and subject them to government approval.[55]

Challenging awards on substantive grounds under the ICSID Convention

An entirely different regime applies to awards rendered under the ICSID Convention, which creates a 'self-contained' arbitration system for investor-state disputes separate and apart from the regime created under the New York Convention and the UNCITRAL Model Law.[56] The ICSID Convention provides the exclusive mechanism for annulling an award within the ICSID system itself. An *ad hoc* committee composed of three ICSID-appointed arbitrators considers the annulment application.

Article 52 of the ICSID Convention sets forth the exclusive grounds for annulling an ICSID award:

- the tribunal was not properly constituted;
- the tribunal has manifestly exceeded its powers;
- there was corruption on the part of a member of the tribunal;
- there has been a serious departure from a fundamental rule of procedure; or
- the award has failed to state the reasons on which it is based.

As with the UNCITRAL Model Law, these provisions relate primarily to the integrity of the arbitration process and do not expressly include errors in the substance of the arbitral decision. Nevertheless, *ad hoc* committees have annulled awards for serious mistakes of law under an excess of powers rubric, for instance when the arbitral tribunal failed to apply the proper law or its misinterpretation or misapplication of the law is 'so gross or egregious as substantially to amount to failure to apply the proper law'.[57]

A recent example is Venezuela's success in having an ICSID award partially annulled for failure to apply the proper law in calculating damages.[58] The arbitrators awarded certain subsidiaries of ExxonMobil approximately US$1.6 billion in compensation for various claims, including for an expropriation under the Netherlands–Venezuela BIT. The *ad hoc* committee reviewed the award and found that the tribunal had disregarded the terms agreed by the parties for computing damages and instead had applied general principles of international law.[59] The *ad hoc* committee disagreed with the tribunal's decision on the applicable law and 'the way in which the Tribunal put that decision into effect'.[60] It concluded that the tribunal had exceeded its powers and, accordingly, annulled the relevant portion of the award, which amounted to a reduction of more than US$1.4 billion.[61]

---

55 id., at 5, 8.

56 See Christoph Schreuer, *The ICSID Convention: A Commentary*, 1103, 1154 (2d ed. 2009).

57 *Hussein Nuaman Soufraki v. United Arab Emirates*, ICSID Case No. ARB/02/7, Decision on Annulment, 5 June 2007, para. 86; see, e.g., *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, 29 June 2010, paras. 164-165; *Occidental Petroleum Corporation v. Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment, 2 November 2015, para. 48, 56.

58 *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment, 9 March 2017.

59 id., at paras. 143, 150, 165, 186, 187.

60 id., at para. 175.

61 id., at paras. 188(a), 189.

Unless an award is annulled in accordance with the ICSID Convention, each contracting state is required to enforce it as if it were a final judgment of its domestic courts.[62] The New York Convention's grounds for resisting enforcement do not apply. Thus, challenging ICSID awards in court is even more difficult because, in theory, they are not subject to judicial review on any grounds. Yet, the recent saga involving intra-EU investor-state arbitration has shown that ICSID awards are susceptible to judicial oversight as well. In February 2019, a Swedish court refused to enforce an ICSID award because, in effect, it directed Romania, an EU Member State, to grant impermissible subsidies or 'state aid' to investors of another EU Member State in violation of EU law. The court recognised that the ICSID Convention called for recognition and enforcement of the award as if it were a final judgment of a Swedish court, but reasoned that a Swedish court judgment that violated EU law would also be unenforceable.[63]

In the United States, the notion that ICSID awards are automatically enforceable against foreign states has been rejected. Under the federal statute implementing the ICSID Convention, ICSID awards must be enforced in federal court as if they were final judgments of a court of a constituent state.[64] For many years, federal district courts in New York believed this provision permitted the use of state court procedures to convert ICSID awards into federal judgments in summary proceedings without notice to the award debtor. In 2017, however, the US Court of Appeals for the Second Circuit put an end to that decades-old practice and ruled that proceedings to enforce ICSID awards against a foreign state are subject to the procedural and substantive requirements of the US law on foreign sovereign immunity, including its service of process, venue and jurisdictional immunity provisions.[65]

Conclusion

Mounting a successful challenge against an arbitration award on 'substantive grounds' is not easy, but it is not impossible. Courts across jurisdictions, including in so-called 'arbitration friendly' jurisdictions, have shown that they will not blindly enforce awards containing egregious mistakes of law or other serious defects. And recent court decisions seem to suggest that, in light of a growing suspicion of arbitration within many communities, courts may be rediscovering their scepticism about unfettered arbitral power and reasserting their own power to scrutinise awards more closely.

62 ICSID Convention, Article 54.

63 See Tom Jones, 'Miculas suffer setback in Sweden', *Global Arbitration Review* (4 February 2019), https://globalarbitrationreview.com/article/1179932/miculas-suffer-setback-in-sweden.

64 22 USC Section 1650a.

65 *Mobil Cerro Negro, Ltd v. Bolivarian Republic of Venezuela*, 863 F.3d 96 (2d Cir. 2017).

9

Enforcement under the New York Convention

Emmanuel Gaillard and Benjamin Siino[1]

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention, or the Convention) was prepared under the auspices of the United Nations and adopted on 10 June 1958 at United Nations Headquarters in New York. The Convention is now hailed as 'one of the most important and successful United Nations treaties in the area of international trade law, and the cornerstone of the international arbitration system'.[2]

The primary goal of the drafters of the Convention was to overhaul the existing regime under the Convention on the Execution of Foreign Arbitral Awards signed in Geneva in 1927 to remove unnecessary obstacles to recognition and enforcement, and to maximise the circulation of foreign arbitral awards.[3] To achieve this goal, the drafters (1) created a presumption as to the binding nature of awards, (2) repealed the double *exequatur* requirement, (3) reversed the burden of proving the conditions for recognition and enforcement, and (4) permitted the courts of contracting states to exercise their discretion to refuse recognition or enforcement of foreign arbitral awards based on the grounds listed in Article V.

Key to the success of the Convention is the foresight of its drafters in laying down strict conditions for recognising and enforcing foreign arbitral awards, while leaving contracting states free to apply more liberal rules for recognition and enforcement, as enshrined at Article VII(1). In this respect, the Convention is a forward-looking instrument, which has been able to evolve and keep pace with the tremendous growth of international arbitration since it was adopted.

---

1 Emmanuel Gaillard is a partner and Benjamin Siino is a counsel at Shearman & Sterling.

2 Message from the Secretary of UNCITRAL, published on the newyorkconvention1958.org website.

3 See Philippe Fouchard, 'Suggestions to Improve the International Efficacy of Arbitral Awards', in A J van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9 (1999), p. 602.

One of the principal findings of the 2017 UNCITRAL Secretariat Guide on the Convention[4] is that contracting states (159 and counting) have interpreted and applied the Convention in an overwhelmingly consistent manner, with national courts remaining remarkably true to its pro-enforcement spirit.

Scope of application

Article I, like the rest of the Convention, was drafted with the aim of 'going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards'.[5] By making the reciprocity requirement optional and doing away with the nationality or residence requirement, Article I ensures that the Convention has a broad scope of application.[6] However, nationality or residence may still play a part in the context of 'non-domestic awards'. An enforcing court may deem an award rendered in its territory 'non-domestic' if one or both parties to arbitration are foreign or reside abroad, in which case nationality is used to enlarge the scope of the Convention, rather than to restrict it.[7]

The first sentence of Article I(1) provides that the Convention applies to awards 'made in the territory of a State other than the State where the recognition and enforcement of such awards are sought'.[8] Commentators are in broad agreement that 'recognition' refers to the process of considering an arbitral award as binding but not necessarily enforceable, while 'enforcement' refers to the process of giving effect to an award.[9] Some jurisdictions have held that recognition can be sought separately from enforcement.[10]

Pursuant to the second sentence of Article I(1), the Convention also applies to awards 'not considered as domestic' in the state where recognition and enforcement is sought. As the Convention does not define the term 'domestic', contracting states have discretion

4 See the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (E Gaillard and G Bermann eds, Brill Nijhoff, 2017) [UNCITRAL Secretariat Guide on the Convention].

5 *Travaux préparatoires*, 'Report of the Committee on the Enforcement of International Arbitral Awards', E/2704, E/AC.42/4/Rev.1., p. 5.

6 See Javier Rubinstein, Georgina Fabian, 'The Territorial Scope of the New York Convention and Its Implementation in Common and Civil Law Countries' in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, 91, 95 (E Gaillard, D Di Pietro eds, 2008) [Rubinstein and Fabian].

7 See A J van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, 15 (1981) [A J van den Berg]; Georgios Petrochilos, *Procedural Law in International Arbitration*, 360, para. 8.54 (2004).

8 The Convention does not apply to court actions seeking to set aside awards or to stay ongoing arbitration proceedings: see, e.g., *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys 'R' Us, Inc.*, US Court of Appeals, Second Circuit, 10 September 1997, 126 F.3d 15 [*Toys 'R' Us*]; *Firooz Ghassabian v. Fatollah Hematian et al.*, US District Court (SDNY), 27 August 2008, 08 Civ. 4400 SAS.

9 See Rubinstein and Fabian (footnote 6), 91, 93; Bernd Ehle, 'Commentary on Article I', in *New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary*, 26, 77 (R Wolff ed., 2012).

10 See *Toys 'R' Us* (footnote 8); Évora Court of Appeal (Portugal), 31 January 2008, 1141/06-2. This approach finds support in commentaries: see A J van den Berg (footnote 7), 243 to 245; *Fouchard Gaillard Goldman on International Commercial Arbitration*, 966, para. 1667 (E Gaillard, J Savage eds, 1999) [*Fouchard Gaillard Goldman*]; Rubinstein and Fabian (footnote 6), 91, 93.

to decide, in accordance with their own law, what constitutes a non-domestic award.[11] This 'non-domestic' criterion is in addition to the 'territorial criterion' set out in the first sentence of Article I(1).[12]

Article I(2) provides that the term 'arbitral awards' shall include not only awards rendered by arbitrators appointed for each case but also those 'made by permanent arbitral bodies to which the parties have submitted'. Courts have found that the term 'permanent arbitral bodies' includes, for example, the Iran-United States Claims Tribunal, the ICC International Court of Arbitration and the Singapore International Arbitral Centre.[13]

Finally, Article I(3) allows each contracting state, when signing, ratifying or acceding to the Convention, to restrict the scope of application of the Convention by making the reservations allowed by it. The first reservation, known as the reciprocity reservation, allows a state to apply the Convention only to awards made in the territory of another contracting state.[14] The second – the commercial reservation – allows a state to apply the Convention only to 'differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration'. If an award does not arise out of a legal relationship considered as commercial, the award would not benefit from the regime established by the Convention. Enforcement of the award would instead be governed by domestic law.[15]

Regarding the term 'arbitral award', which is not defined in the Convention, courts have generally accepted that the determination of whether a decision is an award depends on its nature and content, not on the label given to it by arbitrators.[16] For example, a US court has held that a decision need not be entitled 'award' for it to be enforceable

11 See, e.g., *Sigval Bergesen, as Owners of the M/T Sydfonn and others v. Joseph Müller Corporation*, US Court of Appeals, Second Circuit, 17 June 1983, 710 F.2d 928; *RZS Holdings AVV v. PDVSA Petroleos S.A. et al.*, US District Court, Eastern District of Virginia, Alexandria Division, 5 February 2009, 598 F. Supp. 2d 762.

12 Courts in the United States have applied, in addition to the 'territorial criterion', the 'non-domestic criterion' to determine whether an award falls within the scope of the New York Convention (see, e.g., *Jacada Ltd v. International Marketing Strategies, Inc.*, US Court of Appeals, Sixth Circuit, 18 March 2005, 03-2521; *Toys 'R' Us*). Similarly, relying on the 'non-domestic' criterion, a Chinese court held that an award rendered in Beijing pursuant to the ICC Arbitration Rules was not considered as domestic in China (see *Duferco S.A. v. Ningbo Arts & Crafts Import & Export Co., Ltd*, Ningbo Intermediate People's Court (China), 22 April 2009 [2008] Yong Zhong Jian Zi No. 4).

13 See, e.g., *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc., Gould Marketing, Inc., Hoffman Export Corporation, and Gould International, Inc.*, US Court of Appeals, Ninth Circuit, 23 October 1989, 887 F.2d 1357; *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, Supreme Court of New South Wales (Australia), 1 November 2010, [2010] NSWSC; *Transpac Capital Pte Ltd v. Buntoro*, Supreme Court of New South Wales (Australia), 7 July 2008, 11373 of 2008.

14 See, e.g., *Norsolor S.A. v. Pabalk Ticaret Limited Sirketi*, Paris Court of Appeal (France), 19 November 1982; Federal Court of Germany, 14 April 1988, III ZR 12/87; *GSS Group Ltd v. National Port Authority*, US District Court, District of Columbia, 25 May 2012, 680 F.3d 805.

15 See Philippe Fouchard, 'La levée par la France de sa réserve de commercialité pour l'application de la Convention de New York', 1990 Rev. Arb. 571, 574, 579.

16 See, e.g., *Merck & Co. Inc., Merck Frosst Canada Inc., Frosst Laboratories Inc. v. Tecnoquimicas S.A.*, Supreme Court of Justice (Colombia), 26 January 1999, E-7474; *Publicis Communication v. Publicis S.A., True North Communications Inc.*, US Court of Appeals, Seventh Circuit, 14 March 2000, 206 F.3d 725; Federal Court of Germany, 18 January 2007, III ZB 35/06.

under the Convention.[17] Similarly, it would not be enough for arbitrators simply to label a decision 'award' to make it an award within the meaning of the Convention.[18]

Moreover, courts have found that only those decisions made by arbitrators that determine all or some aspects of the dispute in a final and binding manner can be considered 'arbitral awards' within the meaning of the Convention.[19] Accordingly, courts have found that, for a decision to be considered an 'arbitral award' under the New York Convention, it needs to (1) be made by arbitrators,[20] (2) resolve a dispute or part thereof in a final manner,[21] and (3) be binding. As an illustration, a German court has held that an award was binding because it was not subject to appeal either before another arbitral tribunal or a national court.[22] Applying a similar approach, the French Court of Cassation refused to enforce an award on the ground that it was not binding because one of the parties was seeking review of the award before another arbitral tribunal.[23]

An issue that has arisen before courts is whether awards on jurisdiction are enforceable under the Convention. Reported case law on this issue is scarce and concerns the recognition and enforcement of awards that deal with both jurisdiction and the allocation of costs incurred during the jurisdictional phase of the proceedings.[24] Commentators have taken the view that awards on jurisdiction can be considered as genuine awards capable of recognition and enforcement under the Convention.[25]

The obligation to recognise awards and the rules of procedure provided in each contracting state where recognition and enforcement are sought

The first sentence of Article III of the Convention provides that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them'.

The general principle set forth by Article III has been referred to by a number of courts as embodying the Convention's 'pro-enforcement bias'. For example, a US court stated that '[t]he Convention and its implementing legislation have a pro-enforcement bias', of which

17 See *Blackwater Security Consulting LLC et al. v. Richard P. Nordan*, US District Court, Eastern District of North Carolina, Northern Division, 21 January 2011, 2:06-CV-49-F.

18 See in the context of setting aside proceedings, *Braspetro Oil Services Company (Brasoil) v. The Management and Implementation Authority of the Great Man-Made River Project*, Paris Court of Appeal (France), 1 July 1999, XXIV Yearbook Com. Arb. 296 (1999).

19 For a discussion of the effect of Article I(2) and the notion of 'arbitral award' within the meaning of the Convention, see UNCITRAL Secretariat Guide on the Convention (footnote 4), Article I, paras. 65 to 68.

20 See *Marks 3-Zet-Ernst Marks GmbH & Co. KG v. Presstek, Inc.*, US District Court, District of New Hampshire, 9 August 2005, Civ.05-CV-121-JD, XXXI Yrbk Com. Arb. 1256 (2006); *Frydman v. Cosmair Inc.*, US District Court (SDNY), 25 July 1996, 94 Civ. 3772 LAP.

21 See *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty Ltd*, Supreme Court of Queensland (Australia), 29 October 1993, XX Yrbk Com. Arb. 628 (1995); *Hall Steel Company v. Metalloyd Ltd.*, US District Court, Eastern District of Michigan, Southern Division, 7 June 2007, 492 F. Supp. 2d 715, XXXIII Yrbk Com. Arb. 978 (2008) [*Hall Steel v. Metalloyd*].

22 See Federal Court of Germany, 18 January 1990, III ZR 269/88.

23 See *La Société Diag v. The Czech Republic*, Court of Cassation (France), 5 March 2014, 12-29.112.

24 See, e.g., *Hall Steel v. Metalloyd* (footnote 21)

25 See Domenico Di Pietro, 'What Constitutes an Arbitral Award Under the New York Convention' in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, 139, 153 (E Gaillard, D Di Pietro eds, 2008); Gary B Born, *International Commercial Arbitration*, 2935-36 (2014) [Gary B Born].

'Article III of the Convention is illustrative'.[26] The Court of Appeal of England and Wales also held that, pursuant to this principle, foreign arbitral awards are entitled to a *prima facie* right to recognition and enforcement.[27] A number of other courts have expressed the same view.[28]

Courts of contracting states have frequently pointed to the mandatory nature of the obligation under Article III, which results from the word 'shall'.[29] Leading commentators similarly describe Article III as the source of the contracting states' obligation to recognise and enforce foreign arbitral awards.[30] A number of these commentators also characterise this obligation as a 'presumptive' one, or have referred to it as embodying the 'pro-enforcement bias' of the Convention.[31]

The first sentence of Article III also provides that the recognition and enforcement of foreign arbitral awards shall be granted 'in accordance with the rules of procedure of the territory where the award is relied upon'. The Convention does not refer to any specific set

26 *Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain Company*, US Court of Appeals, Ninth Circuit, 26 March 2002, 01-15539.

27 See, e.g., *Yukos Oil Co. v. Dardana Ltd*, Court of Appeal (England and Wales), 18 April 2002, [2002] EWCA Civ 543 [*Yukos v. Dardana*].

28 See, e.g., *Gouvernement de la région de Kaliningrad v. République de Lituanie*, Paris Court of Appeal (France), 18 November 2010, 09/19535; *Sojuznefteexport (SNE) v. Joc Oil Ltd*, Court of Appeal (Bermuda), 7 July 1989, XV Yrbk Com. Arb. 384 (1990); *AO Techsnabexport v. Globe Nuclear Services and Supply Limited*, US District Court of Maryland, 28 August 2009, AW-08-1521, XXXIV Yrbk Com. Arb. 1174 (2009); *WTB – Walter Thosti Boswau Bauaktiengesellschaft v. Costruire Coop. srl*, Court of Cassation (Italy), 7 June 1995, 6426 [*WTB v. Costruire Coop*].

29 See, e.g., *Altain Khuder LLC v. IMC Mining Inc., et al.*, Supreme Court of Victoria, Commercial and Equity Division, Commercial Court (Australia), 28 January 2011 and *IMC Aviation Solutions Pty Ltd v. Altain Khuder LLC*, Supreme Court of Victoria, Court of Appeal (Australia), 22 August 2011, XXXVI Yrbk Com. Arb. 242 (2011); *Merck & Co. Inc., Merck Frosst Canada Inc., Frosst Laboratories Inc. v. Tecnoquimicas SA*, Supreme Court of Justice (Colombia), 24 March 1999, XXVI Yrbk Com. Arb. 755 (2001); *Brace Transport Corp. of Monrovia, Bermuda v. Orient Middle East Lines Ltd.*, Supreme Court (India), 12 October 1993, 5438-39 of 1993; *Guarantor v. Borrower*, Supreme Court, Judicial Collegium (Russian Federation), 22 May 1997, XXV Yrbk Com. Arb. 641 (2000); *Jorf Lasfar Energy Company S.C.A. v. AMCI Export Corporation*, US District Court, Western District of Pennsylvania, 5 May 2006, 05-0423.

30 See, e.g., *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges*, 69 (P Sanders ed., 2011); Ramona Martinez, 'Recognition and enforcement of international arbitral awards under the United Nations Convention of 1958: the "refusal" provisions', 24 *Int'l Law*, 487, 495-96 (1990); Emilia Onyema, 'Formalities of the Enforcement Procedure (Articles III and IV)' in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, 597 (E Gaillard, D Di Pietro eds, 2008) [Emilia Onyema]; Loukas A Mistelis, Domenico D Pietro, 'New York Convention, Article III (Obligation to Recognise and Enforce Arbitral Awards)' in *Concise International Arbitration*, 10 (L A Mistelis ed., 2010).

31 See, e.g., Maxi Scherer, 'Article III (Recognition and Enforcement of Arbitral Awards; General Rule)' in *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary*, 193, 196 (R Wolff ed., 2012) [Maxi Scherer, 'Article III']; Emilia Onyema (footnote 30), 597; Andreas Börner, 'Article III' in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 115 (H Kronke, P Nacimiento et al. eds, 2010) [Andreas Börner, 'Article III']; Gary B Born (footnote 25), 3394.

of rules, leaving it to each contracting state to define the rules of procedure applicable to the recognition and enforcement of arbitral awards in its territory.[32]

In accordance with the wording of Article III, courts have applied the procedural rules of their national laws to the recognition and enforcement of arbitral awards, and not the laws of the country in which the arbitration took place or any other law.[33]

In the absence of any guidance in the text of the Convention, contracting states are free to determine the rules of procedure applicable to the recognition and enforcement of arbitral awards. In a number of cases, courts have applied national rules that determine the competent authority to hear applications for recognition and enforcement of foreign arbitral awards.[34]

In other reported cases on Article III, courts have held that the limitation period applicable to an application for recognition and enforcement of a foreign arbitral award is a procedural rule governed by national law. For instance, the Supreme Court of Canada, after interpreting the text of the Convention and its *travaux préparatoires*, held that the Convention 'was intended to allow Contracting States to impose time limits on the recognition and enforcement of foreign arbitral awards if they so wished'.[35] Commentators confirm that the determination of the court with jurisdiction to hear requests for recognition and enforcement of foreign arbitral awards, or of the limitation periods applicable to recognition and enforcement, constitute procedural issues that should be governed by the contracting states' national laws.[36]

Reported case law provides other examples in which courts have applied national rules of procedure to the recognition and enforcement of foreign arbitral awards. These

32 See *Saroc, S.p.A. v. Sahece, S.A.*, Supreme Court (Spain), 4 March 2003, XXXII Yrbk Com. Arb. 571 (2007); *Zeevi Holdings Ltd v. The Republic of Bulgaria*, US District Court (SDNY), 29 March 2011, 09 Civ. 8856 (RJS), XXXVI Yrbk Com. Arb. 464 (2011) [*Zeevi v. Republic of Bulgaria*].

33 See, e.g., *Kuwait No. 1, contract party v. contract party*, Supreme Appeal Court, Cassation Circuit (Kuwait), 21 November 1988, XXII Yrbk Com. Arb. 748 (1997); *TermoRio S.A. E.S.P., LeaseCo Group and others v. Electranta S.P.*, et al., US Court of Appeals, District of Columbia Circuit, 25 May 2007, 06-7058, XXXIII Yrbk Com. Arb. 955 (2008); *China National Building Material Investment Co., Ltd v. BNK International LLC*, US District Court, Western District of Texas, 4 December 2009, A-09-CA-488-SS, XXXV Yrbk Com. Arb. 507 (2010).

34 See *Romanian Company v. Panamanian Company*, Supreme Court (Romania), 3 June 1984, XIV Yrbk Com. Arb. 691 (1989); *African Petroleum Consultants (APC) v. Société Nationale de Raffinage*, High Court of Fako Division (OHADA, Cameroon), 15 May 2002, HCF/91/M/2001-2002; Porto Court of Appeal (Portugal), 21 June 2005, 0427126; *Brace Transport Corporation of Monrovia, Bermuda v. Orient Middle East Lines Ltd and ors*, High Court of Gujarat (India), 19 April 1985, AIR 1986 Guj 62 [*Brace Transport v. Orient Middle East Lines*]; *Centrotex, S.A. v. Agencia Gestora de Negocios, S.A. (Agensa)*, Supreme Court (Spain), 13 November 2001, XXXI Yrbk Com. Arb. 834 (2006).

35 *Yugraneft Corporation v. Rexx Management Corporation*, Supreme Court (Canada), 20 May 2010, 2010 SCC 19. See also *OAO Ryazan Metal Ceramics Instrumentation Plant*, Constitutional Court (Russian Federation), 2 November 2011, 1479-O-O/2011; *Brace Transport v. Orient Middle East Lines* (footnote 34); *The Government of Kuwait v. Sir Frederick Snow & Partners and Others*, Court of Appeal (England and Wales), 17 March 1983, IX Yrbk Com. Arb. 451 (1984).

36 See Maxi Scherer, 'Article III' (footnote 31), 193, 199 to 202; Andreas Börner, 'Article III' (footnote 31), 115, 122 to 127; A J van den Berg (footnote 7), 240. See also UNCITRAL, 'Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (New York, 1958), A/CN.9/656/ Add.1, at 2/3.

include rules concerning the ranking of creditors' claims,[37] the setting off of claims,[38] the enforcement of a forum selection clause,[39] the doctrine of *forum non conveniens*[40] and issues of diplomatic protection.[41]

Finally, according to the second sentence of Article III, substantially more onerous conditions, or higher fees or charges, than those imposed on the recognition or enforcement of domestic arbitral awards should not be imposed. Contracting states' discretion to determine the rules of procedure applicable to the recognition and enforcement of foreign arbitral awards in their territories is thus limited. However, nothing prevents contracting states from imposing less onerous conditions.[42] This view is confirmed by commentators, who consider that Article III does not require that the rules of procedure applicable to the recognition and enforcement of foreign arbitral awards be identical to those applicable to domestic awards.[43]

The conditions laid down by the Convention regarding the recognition and enforcement of arbitral awards

Documents required to recognise and enforce an arbitral award (Article IV)

One of the principal barriers to recognition and enforcement of foreign arbitral awards prior to the adoption of the Convention was the requirement of double *exequatur*, which meant that an applicant seeking to recognise or enforce an award had first to obtain a declaration of the award's enforceability from the courts of the country where the award was rendered.[44]

---

37 See, e.g., *Artemis Shipping & Navigation Co. SA v. Tormar Shipping AS*, US District Court, Eastern District of Louisiana, 9 December 2003, 03-217.

38 See *Rumanian Firm C. v. German (F.R.) party*, District Court of Hamburg, Hamburg Court of Appeal (Germany), 27 March 1974 and 27 March 1975, II Yrbk Com. Arb. 240 (1977). These decisions have been criticised in the doctrine. See, e.g., Andreas Börner, 'Article III' (footnote 31), 115, 130, 131; Maxi Scherer, 'Article III' (footnote 31), 193, 203, 204.

39 *Zeevi v. The Republic of Bulgaria* (footnote 32).

40 *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine and State of Ukraine*, US Court of Appeals, Second Circuit, 15 November 2002, 01-7947, 01-9153. The interpretation has been criticised by most commentators: see, e.g., American Law Institute, 'Restatement of the Law – The United States Law of International Commercial Arbitration', Tentative Draft No. 4 (April 17, 2015); George A Bermann, 'Domesticating' the New York Convention: the Impact of the Federal Arbitration Act, 2(2) J. Int. Disp. Settlement 317, 326 (2011); Maxi Scherer, 'Article III' (footnote 31), 193, 203; William W Park, 'Respecting the New York Convention', 18(2) ICC Bull. 65, 68-72 (2007); Dimitri Santoro, 'Forum Non Conveniens: A Valid Defense under the New York Convention?', 21 ASA Bull. 713, 723 (2003).

41 See, e.g., Federal Court of Germany, 4 October 2005, VII ZB 09/05; Federal Court of Germany, 4 October 2005, VII ZB 8/05.

42 See *Ditte Frey Milota and Seitelberger v. Ditte F. Cuccaro e figli*, Naples Court of Appeal (Italy), 13 December 1974, I Yrbk Com. Arb. 193 (1976).

43 See, e.g., *Fouchard Gaillard Goldman*, (footnote 10) 982, para. 1671; Andreas Börner, 'Article III' (footnote 31), 115, 119.

44 See Jan Kleinheisterkamp, 'Recognition and Enforcement of Foreign Arbitral Awards', in *Max Planck Encyclopedia of Public International Law*, paras. 9 to 12 (www.mpepil.com, last updated 2008); Dirk Otto, 'Article IV' in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 143 (2010) (H Kronke, P Nacimiento et al. eds), p. 145.

As explained by the representative of the Dutch delegation, Peter Sanders: 'The main elements of the Dutch proposal were first of all the elimination of the double *exequatur*. And it seemed logical not to require two *exequatur* but only in the country where enforcement is sought. Why should you ask it also in the country where the award has been made?'[45] The abolishment of double *exequatur* has been acclaimed as a 'revolution', and 'one of the principal achievements of the New York Convention'.[46]

As a result, pursuant to Article IV, an applicant is now required to supply only a limited number of documents to obtain recognition and enforcement of an award: the duly authenticated original award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof). Article IV(2) further provides that, if these two documents are not in an official language of the country in which recognition or enforcement is sought, the applicant must produce a translation.

National courts have held that, once the applicant has supplied these documents, it has obtained a *prima facie* right to recognition and enforcement of the award. For example, the Court of Appeal of England and Wales has held that, once a party seeking recognition or enforcement has, under Section 102(1) of the 1996 Arbitration Act (which gives effect to Article IV of the Convention), produced the duly authenticated award or a duly certified copy and the original arbitration agreement or a duly certified copy, it attains a *prima facie* right to recognition and enforcement.[47] The Italian Court of Cassation has similarly held that the burden on the party requesting enforcement is limited to the production of the documents required under Article IV, whereupon there is a presumption of enforceability of the award.[48]

Grounds on which the recognition and enforcement of arbitral awards may be refused (Article V)

Article V of the Convention sets forth the limited and exhaustive grounds on which recognition and enforcement of an arbitral award may be refused by a competent authority in the contracting state where recognition and enforcement is sought.[49] These include the

45 Pieter Sanders, 'Reflections on the New York Convention, The International Bar Association' (2007), available at http://legal.un.org/avl/ha/crefaa/video01.html. See also the *travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Fourth Meeting, E/CONF.26/SR.4, pp. 7, 8: 'Mr SANDERS (Netherlands) . . . The Netherlands delegation did not see why an award should have to be operative in a country where it did not have to be enforced. Thus, the Rome draft, and more recently the draft of the Council of Europe, had provided for only one exequatur. International arbitration could be simplified and developed still further by limiting as much as possible the grounds on which a country could refuse to recognize or enforce an award and by concentrating judicial control in the country of enforcement. Indeed, the Committee's draft, like the Geneva Convention, had the disadvantage of giving the losing party an opportunity to prevent enforcement by filing a motion to annul the award in the country where it had been rendered.'

46 A J van den Berg (footnote 7), p. 247. See also E Gaillard, 'The Relationship of the New York Convention with Other Treaties and with Domestic Law' in *Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice*, 69 (E Gaillard and D Di Pietro eds, 2008), p. 87.

47 See *Yukos v. Dardana* (footnote 27).

48 See *WTB v. Costruire Coop* (footnote 28).

49 See Gary B Born (footnote 25), 3427; Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration', 17 *Arb. Int'l* 19, 22 (2001); A J van den Berg (footnote 7), 265; Julian Lew, Loukas

incapacity of a party or invalidity of the arbitration agreement (V(1)(a)), the violation of due process (V(1)(b)), the arbitral tribunal exceeding its authority (V(1)(c)), the improper constitution of the arbitral tribunal or procedural irregularities (V(1)(d)), and when an award has not yet become binding or has been set aside or suspended (V(1)(e)). Courts have generally construed the grounds for refusal under Article V narrowly and parties resisting enforcement have been largely unsuccessful in proving grounds for refusal.

Court have consistently found that the Convention does not allow the refusal of recognition and enforcement of an award on grounds other than those listed in Article V.[50] Notably, these grounds do not include an erroneous decision of law or fact by an arbitral tribunal, and courts may not review the merits of the arbitral tribunal's decision.[51] This principle has been confirmed unanimously by courts and commentators.[52]

Pursuant to the introductory sentence of Article V(1), '[r]ecognition and enforcement of the award may be refused' if one or more of the grounds for non-recognition or enforcement listed in that paragraph is present (subparagraphs (a) to (e)). Thus, the Convention grants courts of contracting states the discretion to refuse recognition and enforcement of an award on the grounds listed in Article V, without requiring them to do so.

In keeping with this discretionary language, a number of national courts have taken the position that they are not required to refuse recognition or enforcement of an award even in instances in which one of the grounds for non-recognition or enforcement has been established.[53] The Supreme Court of Hong Kong has reasoned that '[i]t is clear . . . that the

---

Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration*, paras. 26 to 70 (2003) [Lew, Mistelis and Kröll]; Nigel Blackaby et al., *Redfern and Hunter on International Arbitration*, para. 11.57 (2015) [*Redfern and Hunter*]; Marike R P Paulsson, *The 1958 New York Convention in Action*, 166 (2016).

50 See, e.g., *N.Z. v. I,* Basel-Stadt Court of Appeal (Switzerland), 27 February 1989, XVII Yrbk Com. Arb. 581 (1992). See also *Rosseel NV v. Oriental Commercial Shipping,* High Court of Justice (England and Wales), 16 November 1990, XVI Yrbk Com. Arb. 615 (1991); *Inter-Arab Investment Guarantee Corp. v. Banque Arabe et Internationale d'Investissements*, Brussels Court of Appeal (Belgium), 25 January 1996, XXII Yrbk Com. Arb. 643 (1997); *Karaha Bodas Company LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, Court of Final Appeal (Hong Kong), 5 December 2008, FACV 6/2008; *Zeevi Holdings Ltd (in receivership) v. The Republic of Bulgaria*, Jerusalem District Court (Israel), 13 January 2009, XXXIV Yrbk Com. Arb. 632 (2009).

51 See, e.g., *Trading company v. Buyer*, Cologne Court of Appeal (Germany), 23 April 2004, XXX Yrbk Com. Arb. 557 (2005); *Kotraco, Inc. v. V/O Rosvneshtorg*, Moscow District Court (Russian Federation), 31 October 1995, XXIII Yrbk Com. Arb. 735 (1998); *AB Götaverken v. General National Maritime Transport Company*, Supreme Court (Sweden), 13 August 1979, VI Yrbk Com. Arb. 237 (1981); *Generica Ltd v. Pharmaceutical Basics, Inc. et al.*, US District Court, Northern District of Illinois, 18 September 1996, 95 C 5935, XXII Yrbk Com. Arb. 1029 (1997); *Xiamen Xinjindi Group Ltd v. Eton Properties Ltd*, High Court (Hong Kong), 14 June 2012, HCLL 13/2011.

52 See, e.g., *Fouchard Gaillard Goldman* (footnote 10), 983, para. 1693; Gary B Born (footnote 25), 3707; A J van den Berg (footnote 7), 269 to 273; Lew, Mistelis and Kröll (footnote 49), paras. 26 to 66 (2003); *Redfern and Hunter* (footnote 49), para. 11.56; Pieter Sanders, 'A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards', 13 *Int'l Law*, 269 (1979) [Pieter Sanders]; Michael Hwang and Amy Lai, 'Do Egregious Errors Amount to a Breach of Public Policy?', 71 *Arbitration* 1 (2005).

53 See, e.g., *China Agribusiness Development Corporation v. Balli Trading*, High Court of Justice (England and Wales), 20 January 1997, XXIV Yrbk Com. Arb. 732 (1999); *Nigerian National Petroleum Corporation v. IPCO (Nigeria) Ltd*, Court of Appeal (England and Wales), 21 October 2008, [2008] EWCA Civ 1157; *Chromalloy Aeroservices v. Arab Republic of Egypt*, US District Court, District of Columbia, 31 July 1996, 94-2339 [*Chromalloy*]; *China Nanhai Oil Joint Service Corporation Shenzhen Branch v. Gee Tai Holdings Co. Ltd*, High Court (Hong Kong), 13 July 1994, 1992 No. MP 2411 [*China Nanhai Oil v. Gee Tai Holdings*]. See also

only grounds upon which enforcement can be refused are those specified in [Article V] and that the burden of proving a ground is upon the Defendant. Further, it is clear that even though a ground has been proved, the court retains a residual discretion'. On the facts before it, the Court found that this was 'an obvious case where the court can exercise its discretion to enforce the award notwithstanding a ground of opposition in the New York Convention being made out', and that this conclusion was 'consistent with the pro-enforcement bias of the Convention and the pro-enforcement attitude of most enforcing courts around the world'.[54]

Finally, Article V(1) provides that recognition and enforcement may only be refused 'at the request of the party against whom [the award] is invoked', and if that party 'furnishes proof' of the grounds listed in that paragraph. In accordance with this wording, courts in the contracting states have consistently recognised that the party opposing recognition and enforcement has the burden of raising and proving the grounds for non-enforcement under Article V(1).[55]

Article V(2) lists the grounds on which a court may refuse enforcement on its own motion. Recognition and enforcement may also be refused if the competent authority in the country where recognition and enforcement is sought finds that 'the subject matter of the difference is not capable of settlement by arbitration under the law of that country' (Article V(2)(a)) and 'the recognition or enforcement of the award would be contrary to the public policy of that country' (Article V(2)(b)). 'Arbitrability' and 'public policy' are not concepts unique to the New York Convention. These concepts form 'part of a wider range of tools, such as the mandatory rules of the forum that override private autonomy, that allow a court to protect the integrity of the legal order to which it belongs'.[56]

Although Article V(2) does not specifically allocate the burden of proof to either party, courts of contracting states have considered that the party opposing recognition and enforcement has the ultimate burden of proving the grounds.[57]

A J van den Berg (footnote 7), 265; Gary B Born (footnote 25), 3428 to 3433; Teresa Cheng, 'Celebrating the Fiftieth Anniversary of the New York Convention' in *50 Years of the New York Convention: ICCA International Arbitration Conference*, 679, 680 (A J van den Berg, ed., 2009) [Teresa Cheng].

54 *China Nanhai Oil v. Gee Tai Holdings* (footnote 53). See also *Chromalloy* (footnote 53). Commentators confirm this view: see e.g., A J van den Berg (footnote 7), 265; Gary B Born (footnote 25), 3428 to 3433; Teresa Cheng (footnote 53), 679, 680; UNCITRAL Secretariat Guide on the Convention (footnote 4), Article V, paras. 5 and 6..

55 See, e.g., *Dutch Shipowner v. German Cattle and Meat Dealer*, Federal Court of Germany, 1 February 2001, XXIX Yrbk Com. Arb. 700 (2004); *Trans World Film SpA v. Film Polski Import and Export of Films*, Court of Cassation (Italy), 22 February 1992, XVIII Yrbk Com. Arb. 433 (1993); *Europcar Italia SpA v. Maiellano Tours Inc.*, US Court of Appeals, Second Circuit, 2 September 1998, 97-7224, XXIV Yrbk Com. Arb. 860 (1999) [*Europcar Italia*]; *Encyclopedia Universalis S.A. v. Encyclopedia Britannica Inc.*, US Court of Appeals, Second Circuit, 31 March 2005, 04-0288-cv, XXX Yrbk Com. Arb. 1136 (2005).

56 UNCITRAL Secretariat Guide on the Convention (footnote 4), Article V(2)(b), para. 2. See also id., Article V(2)(a), para. 8.

57 See, e.g., *Licensee v. Licensor*, Düsseldorf Court of Appeal (Germany), 21 July 2004, XXXII Yrbk Com. Arb. 315 (2007); *Gater Assets Ltd v. Nak Naftogaz Ukrainiy*, Court of Appeal (England and Wales), 17 October 2007, [2007] EWCA Civ 988.

The Convention does not identify the specific subject matter that is capable of settlement by arbitration (Article V(2)(a)), nor does it define public policy (Article V(2)(b)), leaving national courts to exercise their discretion to interpret these provisions.

In general, courts have set very few limits on the types of disputes that are capable of settlement by arbitration pursuant to Article V(2)(a) and most courts have narrowly interpreted public policy. Although courts define public policy differently, the case law shows that they refuse to recognise an award on the basis of public policy only when there has been a deviation from the core values of their legal system.[58] In the words of the Swiss Federal Tribunal, an award contravenes public policy 'if it disregards essential and widely recognised values which, according to the conceptions prevailing in Switzerland, should form the basis of any legal order'.[59] The French courts have taken a similar approach, by defining international public policy as 'the body of rules and values whose violation the French legal order cannot tolerate even in situations of international character'.[60]

As a result, applications to refuse recognition and enforcement on these grounds have rarely been successful.[61]

Grounds to adjourn recognition and enforcement proceedings (Article VI)

Article VI of the Convention addresses the situation in which a party seeks to set aside or suspend an award in the country where it was issued, while the other party seeks to enforce it elsewhere. In this context of parallel proceedings, Article VI achieves a compromise between the two equally legitimate concerns of (1) promoting the enforceability of foreign arbitral awards, and (2) preserving judicial oversight over awards, by granting courts of contracting states the freedom to decide whether to adjourn enforcement proceedings.[62]

Under Article VI, a court of a contracting state 'may, if it considers it proper, adjourn' proceedings and 'may also . . . order the other party to give suitable security'. In light of the 'permissive language' of Article VI,[63] the courts' discretionary power applies not only to

58 See, e.g., *Parsons & Whittemore Overseas v. Société Générale de L'Industrie du Papier (RAKTA)*, US Court of Appeals, Second Circuit, 508 F.2d 969, 974 (1974); *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd*, Court of Final Appeal (Hong Kong), 9 February 1999, [1999] 2 HKC 205; *Traxys Europe S.A. v. Balaji Coke Industry Pvt Ltd*, Federal Court (Australia), 23 March 2012, [2012] FCA 276.

59 *X S.p.A. v. Y S.r.l.*, Federal Tribunal (Switzerland), 8 March 2006, Judgments of the Federal Court (2006) 132 III 389. See also Paolo Michele Patocchi, 'The 1958 New York Convention: The Swiss Practice', 1996 *ASA Bull.* 145, 188 to 196.

60 *Agence pour la sécurité de la navigation aérienne en Afrique et à Madagascar v. M. Issakha N'Doye*, Paris Court of Appeal (France), 16 October 1997.

61 See, e.g., Pieter Sanders (footnote 52), 269, 270; Susan Choi, 'Judicial Enforcement of Arbitration Awards Under the ICSID and New York Conventions', 28 *N.Y.U. J. Int'l & Pol.* 175, 206 and 207 (1995-1996).

62 See *Fouchard Gaillard Goldman* (footnote 10), 981; Nicola C Port, Jessica R Simonoff et al., 'Article VI' in *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention*, 415, 416 (H Kronke, P Nacimiento et al. eds, 2010) [Port and Simonoff, 'Article VI']. See also *Continental Transfer Technique Ltd v. Federal Government of Nigeria*, High Court of Justice (England and Wales), 30 March 2010, [2010] EWHC 780 (Comm); *IPCO v. Nigeria (NNPC)*, High Court of Justice (England and Wales), 27 April 2005, [2005] EWHC 726 (Comm) [*IPCO*].

63 *Europcar Italia* (footnote 55).

the decision to adjourn enforcement proceedings, but also to whether a defendant should provide security, and the amount of that security.[64]

The Convention does not provide any standard by which a court should decide whether to stay enforcement proceedings, thereby leaving courts in contracting states to use their discretion.[65] In practice, courts have developed their own criteria and consider a wide variety of factors when deciding whether to grant a request for adjournment. Those factors include, *inter alia*, (1) the Convention's goal of facilitating the enforcement of arbitral awards and expediting dispute resolution, (2) the likelihood of the party prevailing in the setting aside proceeding, (3) the expected duration of the proceedings pending in the country where the award was issued, (4) the potential hardship to parties, (5) judicial efficiency, and (6) international comity.[66] Courts that are not prepared to recognise a global effect to the decision to set aside will not stay the enforcement on the basis of a pending setting aside proceeding.[67]

The 'more favourable right' provision

The presumption as to the binding nature of awards established under Article III, with the streamlined procedure for recognition and enforcement under Articles IV and V, embody the Convention's 'pro-enforcement bias'. This bias is also reflected in Article VII(1), otherwise known as the 'more favourable right' provision.

In accordance with Article VII(1), a party seeking recognition and enforcement shall not be deprived of the right to rely, in addition to the Convention, on a more favourable domestic law or treaty. It is clear, therefore, that a contracting state is free to impose a legal regime more liberal than that established under the Convention, and will not be in breach of the Convention by enforcing awards pursuant to such a regime. The corollary of this principle is that a contracting state is not permitted to impose conditions for recognition and enforcement more onerous than those laid down by the Convention. In this respect, Article VII makes it clear that the Convention establishes a 'ceiling', or a maximum level of control.

---

64 See *Spier v. Calzaturificio Tecnica S.p.A*, US District Court (SDNY), 29 June 1987, 663 F. Supp. 871; *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, US District Court, Eastern District of Louisiana, 26 January 2000, 99-2205, XXV Yrbk Com. Arb. 1115 (2000); *Yuko. v. Dardana* (footnote 27); *IPCO* (footnote 62); *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court (Cayman Island), 17 June 1988, XIV Yrbk Com. Arb. 621 (1989) [*Gabon v. Swiss Oil*]. Leading commentators agree that, on the basis of the permissive language used in Article VI, the decision to stay enforcement proceedings or order security is discretionary: see, e.g., Gary B Born (footnote 25), 2873 and 2874; W Michael Tupman, 'Staying Enforcement of Arbitral Awards under the New York Convention', 3 *Arb.Int'l*, 209, 211 (1987) [Michael Tupman]; Christoph Liebscher, 'Article VI' in *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary*. 438, 438 (R. Wolff ed., 2012); A J van den Berg (footnote 7), 353, 358.

65 See Michael Tupman (footnote 64); Port and Simonoff, 'Article VI' (footnote 62), 415, 419.

66 See, e.g., *Gabon v. Swiss Oil* (footnote 64); *Europcar Italia* (footnote 55); *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia (Canada), 30 June 2004, 2004 BCSC 876; *IPCO* (footnote 62).

67 See e.g., in France, *Bargues Agro Industries S.A. v. Young Pecan Company*, Paris Court of Appeal (France), 10 June 2004, 2004 Rev. Arb. 733 [*Bargues v. Young Pecan Company*]. The Court held that the potential setting aside of the award in the country where it is rendered does not affect the existence of the award in a way that would prevent its recognition and enforcement in other national legal orders and, as a result, that Article VI 'is of no use in the context of the recognition and enforcement of an award'.

Certain arbitral awards or agreements may fall within the field of application of the Convention as well as the field of application of a multilateral or bilateral treaty. Article VII(1) provides the basic rule that the Convention shall not affect the validity of multilateral or bilateral treaties concerning the recognition and enforcement of arbitral awards entered into by the contracting states to the Convention, and that an interested party may rely on those treaties if they are more favourable to enforcement than the Convention. This is in keeping with the broader objective of the Convention to provide for the recognition and enforcement of arbitral awards and agreements whenever possible, either on the basis of its own provisions or those of another instrument. The conditions for recognition and enforcement under bilateral agreements may be more or less favourable than the Convention, depending on the circumstances surrounding the award.

As an illustration, German courts have applied more favourable provisions of bilateral treaties in accordance with Article VII(1). In a case before the German Federal Court of Justice, an interested party was permitted to rely on the 1958 German–Belgian Treaty concerning the Reciprocal Recognition and Enforcement of Judicial Decisions, Arbitral Awards and Official Documents in Civil and Commercial Matters, which provides that an award rendered in Belgium must be recognised and enforced in Germany when it has been declared enforceable in Belgium and does not violate German public policy.[68]

Article VII(1) also facilitates the recognition and enforcement of foreign arbitral awards pursuant to more favourable provisions found in the domestic laws of the contracting states.[69]

Moreover, Article VII's 'more favourable regime' principle applies to substantive grounds for control listed in Article V, such as Paragraph (1)(e), which provides that recognition and enforcement may be refused if the award 'has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.'

The Convention does not prohibit a court in a contracting state from recognising or enforcing an award that has been set aside or suspended in the country in which it was made. In this respect, French courts have consistently held that a party opposing enforcement is precluded from relying on grounds for non-enforcement under Article V(1)(e), in light of the more limited grounds under French law.[70]

68 See Federal Court of Germany, III ZR 78/76, 9 March 1978.

69 German courts, for example, have relied on Article VII(1) in holding that a party seeking enforcement of a foreign arbitral award in Germany need not supply a copy of the arbitration agreement or a translation of an arbitral award concluded in a language other than German (as would otherwise be required under Article IV of the Convention): see e.g., Munich Court of Appeal, 34 Sch 14/09, 1 September 2009; Federal Court of Germany, III ZB 68/02, 25 September 2003.

70 See *Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor*, Court of Cassation (France), 83-11.355, 9 October 1984, 1985 Rev. Arb. 431, with English translation in 24 *I.L.M.* 360 (1985); *Société OTV v. Société Hilmarton*, Court of Cassation (France), 10 June 1997. XX Yrbk Com. Arb. 663 (1995); *Bargues v. Young Pecan Company* (footnote 67); *PT Putrabali Adyamulia v. S.A. Rena Holding*, Paris Court of Appeal (France), 31 March 2005, 2006 Rev. Arb. 665; *Direction Générale de l'Aviation Civile de l'Emirat de Dubaï v. International Bechtel Co.*, Paris Court of Appeal (France), 29 September 2005, 2006 Rev. Arb. 695.

In the 2007 *Putrabali* decision, the Court of Cassation ruled that:

> *an international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought. Under article VII [the interested party] . . . could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country'*.[71]

Conversely, the Convention does not require courts to recognise an award that has been set aside or suspended and they will not violate the Convention by refusing to do so.[72]

As contracting states continue to modernise their arbitration laws in an effort to make their jurisdictions more 'arbitration friendly,' an increasing reliance by national courts on Article VII's 'more favourable regime' principle is to be expected.

71 *PT Putrabali Adyamulia v. S.A. Rena Holding*, Court of Cassation (France), 05-18053, 29 June 2007, 2007 Rev. Arb. 507. See also *The Russian Federation v. Hulley Enterprises Limited*, Paris Court of Appeal (France), 27 June 2017, No. 15/11666.

72 UNCITRAL Secretariat Guide on the Convention (footnote 4), Article VII, para. 46.

10

Enforcement of Interim Measures

James E Castello and Rami Chahine[1]

This chapter addresses the enforcement of interim measures of relief issued by international arbitral tribunals. The topic is treated in three parts: the evolution of the legal framework for such enforcement, examples of measures that have been enforced, and suggestions for drafting interim measures to maximise their potential enforceability.

Evolution of legal framework for enforcing arbitral interim measures

Few UNCITRAL delegates will forget the moment some years ago – during a debate on a Model Law provision to require courts to enforce arbitrators' interim measures – when one of the world's most senior arbitrators took the floor to question the objective. 'I have been an arbitrator for more than 40 years,' he told delegates, 'and I have never ordered interim relief that the parties did not obey.' Given the speaker's stature, no one doubted that parties before him might fear to disregard his orders. And, of course, it remains the case that most parties hesitate to disobey such orders for fear of antagonising a tribunal that has yet to rule on their claims. But spontaneous compliance with arbitral interim measures has never been a universal norm and, if anything, it is less so today than ever. Accordingly, the world has struggled to find a mechanism for effective enforcement of interim measures. That is why another renowned arbitrator, Mr V V Veeder, could complain even two decades ago – at the UN's 40th anniversary celebration of the Convention on Recognition and Enforcement of Foreign Arbitral Awards, signed in New York in 1958 (the New York Convention) – that, 'for too long, there have been difficulties enforcing an arbitrator's order for interim measures', noting that 'the better view of [the New York Convention's]

1 James E Castello is a partner and Rami Chahine is a senior associate at King & Spalding International LLP in Paris. The authors gratefully acknowledge the excellent research assistance of Alison Chamberlain, an international arbitration associate in the firm's London office.

application excludes any provisional order for interim measures from enforcement abroad as a Convention award'.[2]

Mr Veeder opined that an arbitral interim measure 'could be at least as [important as], if not more important than, an arbitral award' because, without such measures, 'it is sometimes possible for a recalcitrant party to thwart the arbitration procedure – completely and finally' (for example, by dissipating assets out of which an award would be paid).[3] He thus concluded that the lack of enforceability of interim measures 'strikes at the heart of an effective system of justice in transnational trade' and required 'a supplementary convention to the New York Convention on the enforcement by State courts of an arbitral tribunal's interim measures'.[4]

As Mr Veeder's remarks confirmed, even by 1998, interim relief was becoming increasingly available from arbitral tribunals and increasingly important. As far back as 1976, the United Nations Commission on International Trade Law (UNCITRAL) had inserted language in its first Arbitration Rules broadly authorising tribunals to issue interim measures; this was already a big step, since '[h]istorically, national law not infrequently denied arbitrators the power to order interim measures'.[5] Yet, even Professor Pieter Sanders, who helped draft those 1976 Rules, regarded the provision as having modest scope. As he wrote at the time, '[t]he question of interim measures only occasionally presents itself in an arbitration' and, even with the new UNCITRAL Rules, arbitral interim measures would not 'exist where the applicable national (procedural) law provides for the exclusive jurisdiction of the Courts'.[6] True to Professor Sanders' assessment, parties' recourse to these measures grew only gradually in subsequent years.[7] In time, however, their use did increase, as UNCITRAL duly recorded in 2000.[8]

---

2 V V Veeder, 'Provisional and Conservatory Measures in Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects' 21, UN Publication Sales No. E.99.V.2 (1999).

3 ibid.

4 ibid. Others who spoke at the same 1998 UN conference also underscored the importance of interim measures; see, e.g., ibid. at 46, 49 (remarks by Australia's former Solicitor General, Gavan Griffith, 'Possible issues for an annex to the UNCITRAL Model Law': 'As a matter of commercial reality, an incapacity to make effective interim measures may entirely destroy the integrity of the arbitral process . . . . There is scope to enhance powers for interim awards made in support of the arbitration. Whether made by arbitrators or by courts, such awards should become enforceable beyond the place of arbitration'); see also id. at 23 (remarks by Sergei Lebedev, President of the Russian Maritime Arbitration Commission, 'Court Assistance with Interim Measures').

5 Gary B Born, *International Commercial Arbitration*, pp. 1949, 1950, fn. 37 (2009) (further noting that such major European jurisdictions as Switzerland, Italy, Spain, Germany, Austria and Greece once barred arbitrators from issuing interim measures, which were thus only available from national courts).

6 P Sanders, *Commentary on UNCITRAL Arbitration Rules*, II Yearbook, Com. Arb. 172, pp. 195, 196 (Kluwer 1977)

7 See, e.g., E Schwartz, 'The Practices and Experience of the ICC Court,' in ICC (ed.), *Conservatory and Provisional Measures in International Arbitration*, pp. 45, 47 (1993) (between 1978 and 1993 only 25 ICC cases addressed the subject of provisional measures).

8 See Secretary General, 'Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Conciliation, Interim Measures of Protection, Written Form for Arbitration Agreement' (hereafter, Possible Uniform Rules), Paragraph 104, UN Doc. A/CN.9/WG.II/WP.108 (2000) ('Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases').

The drafters of UNCITRAL's 1976 Arbitration Rules fashioned this provision so that arbitrators' interim measures might conceivably benefit from enforcement under the New York Convention. They did this by authorising tribunals not only to 'take any interim measures it deems necessary', but to do so possibly 'in the form of an interim *award*' (emphasis added) and by further providing that a tribunal generally 'shall be entitled to make interim, interlocutory, or partial awards' in addition to 'final awards'.[9] By emphasising that interim measures might take form as awards, the drafters seemed to aim at their possible enforcement under the New York Convention.

However, hopes for the general enforceability of interim measure awards under the Convention have not been widely realised. The Convention itself does not describe enforceable 'awards' in any way that expressly includes coverage of 'interim awards'. Indeed, given the undoubted rarity of arbitral interim measures in 1958, when the Convention was adopted, its drafters may not have thought at all about tribunals granting provisional relief. Conversely, however, neither is there any textual (or other) reason to suppose that the drafters deliberately excluded arbitral interim measures from the New York Convention's ambit – a point acknowledged by most of the scholars who interpret the Convention's scope in either way regarding such enforceability.[10] After all, Article III of the Convention, requiring that '[e]ach Contracting State shall recognize arbitral awards as binding and enforce them',[11] never defines 'award', much less expressly restricts enforceability to awards that are 'final' (though it is often said to do so).

Nevertheless, among those jurisdictions whose courts have addressed this interpretive question, a majority appears to have found that tribunal-ordered interim measures (even when styled as interim 'awards') were not enforceable under the New York Convention.[12] A leading case in this respect is the decision by the Supreme Court of Queensland, Australia, in the *Resort Condominiums International* case in 1993.[13] A US claimant had brought a US arbitration in the state of Indiana against an Australian respondent; the dispute arose under an agreement for reciprocal rights to use timeshare properties controlled by each party. The arbitrator issued an interim arbitration order and award, enjoining the respondent during the arbitration to continue to carry out the parties' agreement and to refrain from entering

9 UNCITRAL Arbitration Rules (1976), Articles 26.1, 26.2 and 32.1, respectively.

10 Compare V V Veeder (see footnote 2), at 21 ('The *better view* of [the Convention's] application excludes any provisional order for interim measures from enforcement abroad as a Convention award . . . The decision to that effect of the Australian Court in *Resort Condominiums International* (1993) is persuasive; and commentators who criticize the judgment have never done so with equal persuasiveness' (footnote omitted; emphasis added)) with A J van den Berg (footnotes 21 and 22 and accompanying text).

11 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III (New York, 1958).

12 See G Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards: The Interpretation and Application of the New York Convention by National Courts', in Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards* 1, 15 (Springer 2017) ('it appears that a clear majority of jurisdictions that have addressed the question – doing so less often by express statutory language than by judicial interpretation or academic consensus – decline to treat provisional measures as awards, thereby excluding them from coverage of the Convention's guarantee of recognition and enforcement', citing the volume's national reports from Argentina, Austria, Canada, Croatia, the Czech Republic, Greece, Italy, Japan, the Netherlands, Norway, Russia, Singapore, Switzerland, Taiwan and Turkey).

13 *Resort Condominiums International Inc. v. Ray Bolwell and Resort Condominiums, Pty Ltd*, Case No. 389 (Queensland Sup. Ct, 29 Oct 1993), excerpts reprinted in XX Yearbook, Com. Arb. 629 (Kluwer 1995).

into any similar agreement with another entity. The claimant sought to enforce this interim award against the respondent in its home jurisdiction; the Queensland court refused. The court rejected the view that there could be only 'one final award' enforceable under the New York Convention (as the respondent argued), given that bifurcation of proceedings yielding partial final awards was increasingly common.[14] However, the court found that an award under the New York Convention must be 'binding' on the parties[15] in the sense that it 'determines at least all or some of the matters referred to the arbitrator for decision', which it contrasted with an interim measure that, by its nature, 'may be rescinded, suspended, varied or reopened by the tribunal which pronounced it'.[16]

Some US courts have expressly rejected this conclusion, enforcing arbitral interim measures because they finally dispose of a particular request relating to the dispute, even if the measure does not itself resolve part of the dispute.[17] Thus, for example, in *Polydefkis Corp v. Transcontinental Fertiliser Co*,[18] involving disputed implementation of a charter party contract between a Greek shipowner and a US trader, a federal court in Pennsylvania confirmed an 'award' by arbitrators sitting in London, directing the respondent provisionally to pay a portion of the compensation sought by the claimant into an escrow account – to be controlled jointly by counsel for both parties.[19]

Apart from national court decisions, what has been the view of commentators and practitioners as regards enforceability under the New York Convention of arbitral interim measures? As noted, Mr Veeder, at the 1998 UN conference, regarded the 'better view' as that the New York Convention did not enforce arbitral interim measures, and UNCITRAL itself appeared to agree, when it subsequently identified issues raised at that 1998 conference that might merit further consideration as to possible solutions: 'The

14 id., at 641 (recognising that 'there are cases where it is highly desirable that . . . issues of liability, being one of the substantive issues referred for decision, are determined in the first instance, leaving the question of quantum of damages to be determined later').

15 Courts derive this 'binding' requirement from Article V(1)(e) of the New York Convention, which establishes among the grounds for a court's possibly refusing to recognise or enforce a foreign arbitral award the fact that '[t]he award has not yet become binding on the parties'.

16 id., at 642.

17 See, e.g., Y Lahlou, A Poplinger & G Walters, 'Other Issues in Enforcement Proceedings', in Frischknecht et al. (eds), *Enforcement of Foreign Arbitral Awards and Judgments in New York*, 235, 245 to 249 (Kluwer 2018); id., at 247 ('preliminary awards that require parties to take certain provisional actions during the pendency of the arbitration, such as providing pre-hearing security on the potential award, paying the advance on costs, or making a preliminary payment, have been found to satisfy the requirement for a "specific act" and enforced as "final" in New York' (footnotes omitted)).

18 1996 WL 683629 (ED Pa.).

19 ibid.; see also *Sperry International Trade Inc. v. Government of Israel et al.*, 532 F.Supp 901, 909 (SDNY), aff'd, 689 F.2d 301 (2d Cir. 1982) (enforcing the tribunal's interim measure that (1) barred Israel from calling on a disputed Letter of Credit and (2) ordered that the Letter's proceeds be paid into an escrow account under joint control of the parties; further explaining that, while 'the Arbitrators have not definitively resolved the question of which party, if any, is in breach of the contract', the interim measure did qualify as 'final' since the arbitrators 'did decide what the equities required concerning a further $15,000,000 investment by Sperry in the project, namely, the proceeds of the Letter of Credit', which 'was a clearly severable issue'); see also Bermann (footnote 12), at 16 ('Only in a minority of jurisdictions is it established that such measures are or may be subject to recognition and enforcement as Convention awards', citing the volume's national reports also for Macao, Peru, Romania, Singapore, the United Kingdom and Venezuela as well as one French court decision).

prevailing view, confirmed also by case law in some States, is that the Convention does not apply to interim awards'.[20] However, Albert Jan van den Berg, perhaps the leading scholar of the New York Convention, believed otherwise, specifically criticising UNCITRAL's report because it 'does not give a source for this statement' and noting that 'there does not appear to be a "prevailing view" on this question' since – at least as at 2000, when Mr van den Berg voiced his critique – '[t]he reference to case law "in some States" is, to my knowledge, limited to one Australian court decision, which is moreover not entirely persuasive'.[21] Mr van den Berg found greater wisdom in the 'pragmatic view' exemplified by US case law, which he said recognised that 'no major obstacles to the enforcement of a "temporary" award seem to exist'.

> *An award will be enforced in accordance with its terms. If one of the terms is that the order contained in the award is for a limited period of time, the enforcement will correspondingly cover that period of time. If the interim award is subsequently rescinded, suspended or varied by an arbitral tribunal, that will as a rule be laid down in a subsequent interim award, which can also be enforced.*[22]

The approach sketched out by Mr van den Berg is the one that UNCITRAL ultimately pursued, as its Working Group II took up the challenge in 2001 of enhancing the enforceability of interim measures. However, the Working Group did this in a statutory context, rather than tinker with the wording of the New York Convention, and it ultimately produced a revised Model Law on International Commercial Arbitration (2006) (the Model Law).[23]

A background report prepared for this drafting project by UNCITRAL's Secretariat summarised the status of national legislation as of 2000. It found that, quite apart from the

---

20 Possible Uniform Rules (footnote 8), at para. 83.

21 A J van den Berg, 'The 1958 New York Arbitration Convention Revisited', in Karrer, P (ed.), *Arbitral Tribunals or State Courts: Who Must Defer to Whom?*, 125 (ASA Special Series No. 15, 2001). Following Mr van den Berg's assessment, other commentators and courts in jurisdictions other than Australia did reject the view that arbitral interim measures were enforceable awards; see, e.g., G Born (footnote 6), at 2511 n. 270 (citing 'Judgment of 8 May 2001, Case No. 83 (Tunisian Court of Appeal) (award ordering interim measures was not award within meaning of Article 34 and was not subject to annulment)', and at 2514 n. 279 (citing 'Judgment of 13 April 2010, DFT 136 III 200 (Swiss Federal Tribunal) (provisional measures order not award under Article 190 of Swiss Law on Private International Law and not subject to annulment)) and citing 'J Lew, L Mistelis & S Kröll, *Comparative International Commercial Arbitration*, paras. 23 to 94 (2003)), and at 2512 n. 272 (citing 'J-F Poudret & S Besson, *Comparative Law of International Arbitration*, para. 633 (2d ed. 2007) (arbitral decisions ordering provisional measures are not final because they do not finally determine all or part of the dispute)').

22 A J van den Berg (footnote 21), at 143. Other commentators share Mr van den Berg's view; see, e.g., G Born (footnote 5), at 2514 ('the better view is that provisional measures should be and are enforceable as arbitral awards under generally applicable provisions for the recognition and enforcement of awards in the [New York] Convention and most national arbitration regimes').

23 See Report of the Secretary General, '*Possible Uniform Rules on Certain Issues Concerning Settlement of Commercial Disputes: Written Form for Arbitration Agreement, Interim Measures of Protection, Conciliation*' (hereafter, Possible Uniform Rules II), para. 55 (22 September 2000) (although UNCITRAL delegates recognised that a treaty might be the best vehicle for an interim measures enforcement regime, yet discussion focused on a statutory solution), UN Doc. A/CN.9/WG.II/WP.110.

possibility of interpreting 'award' within the New York Convention so that interim awards that embodied provisional measures might also be enforceable thereunder, a number of states had enacted legislative regimes for dealing separately with enforcement of arbitral interim measures, while the legislation in many countries remained entirely silent on the matter.[24] This summary was supplemented during the following five years by various practitioners or scholars who examined enforcement regimes in specific jurisdictions in greater detail; together, these various surveys confirm that, in states that have sought to authorise enforcement of arbitral interim measures, there are many approaches.[25]

For example, some states that enacted legislation based on the 1985 Model Law added a provision to its Article 17 (authorising tribunals to issue interim measures) expressly permitting court enforcement of such measures.[26] Many state enactments authorise parties to request such enforcement,[27] some require a request from the tribunal[28] and some contemplate requests from either a party or arbitrators.[29] There are also procedural variations on each approach (such as requiring that leave be sought from a court before an enforcement action will be judicially entertained).[30] Some states, instead, formally modified their implementation of the New York Convention so that it would apply 'as if a reference to an award in those provisions were a reference to such an order' for interim measures.[31] And a few jurisdictions even authorised enforcement of arbitral interim measures by treaty.[32] However, it bears repeating that very many jurisdictions had not addressed this matter legislatively at all. Most importantly, despite the diversity of approaches in the states that had done so, one feature common among many of these laws was that they confined

24 Possible Uniform Rules (footnote 8), at 21.

25 See D Donovan, 'The Scope and Enforceability of Provisional Measures in International Commercial Arbitration: A Survey of Jurisdictions, the Work of UNCITRAL and Proposals for Moving Forward', in van den Berg (ed.), *International Commercial Arbitration: Important Contemporary Questions*, 82, 132 to 143 (ICCA Congress Series No. 11, 2003); C Huntley, 'The Scope of Article 17: Interim Measures under the UNCITRAL Model Law', 9 Vindobona J of Com. L & Arb. 69, 88 to 95 (2005); A Yeşilrmak, *Provisional Measures in International Commercial Arbitration*, 246 to 269 (Kluwer 2005).

26 See, e.g., C Huntley (footnote 25), at 93, 94 (citing enactments of the Model Law (1985) in Ireland, New Zealand, Scotland and Ontario, Canada, specifying that tribunal orders issued pursuant to Model Law Article 17 constitute awards under, e.g., Model Law Article 35). Legislators in these jurisdictions may well have been aware that the drafters of UNCITRAL Article 17 in the original Model Law (1985) had considered adding language authorising a tribunal to seek executory assistance from a court to enforce its arbitral interim measure; delegates at that time ultimately rejected that proposal 'because it touched on matters dealt with in laws of national procedure and court competence and would probably be unacceptable to many States'. H Holtzmann & J Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary*, 531 (Kluwer 1989).

27 See, e.g., Donovan (footnote 25), at 138 (describing law in Germany).

28 See, e.g., Swiss Law on Private International Law, Art. 183(2); see also Yeşilrmak (footnote 25), at 253 (describing law of Tunisia).

29 Possible Uniform Rules (footnote 8), at para. 88.

30 See, e.g., Donovan (footnote 25), at 140, and Yeşilrmak (footnote 25), at 250 (each describing law in Hong Kong).

31 Possible Uniform Rules, at paras. 86, 93; see also Singapore International Arbitration Act, Section 12(I) (2012) (defining a Convention award to 'include an order or a direction made or given by an arbitral tribunal in the course of arbitration'); C Huntley (footnote 25), at 93 (describing enactment of Model Law (1985) by Canadian province of British Columbia).

32 See Yeşilrmak (footnote 25), at 259.

enforcement to interim measures issued by a tribunal seated in the court's own state,[33] making development of a uniform transnational regime all the more desirable.[34]

UNCITRAL resolved to fill that void when it embarked on revising its Model Law in 2001. The revised Model Law that UNCITRAL ultimately promulgated in 2006 includes a sprawling new Article 17 on interim measures, of which subsections 17H and 17I establish an explicit right and mechanism to enforce arbitral interim measures in the national courts of any relevant jurisdiction. Article 17H requires that an arbitral interim measure, no matter how styled (as an award, an order, a decision) 'shall be recognized as binding and . . . enforced upon application to the competent court, irrespective of the country in which it was issued', subject to certain limited grounds for non-enforcement set forth in Article 17I. These include the grounds already established for non-enforcement of awards on the merits under Model Law Article 36 (which derives, in turn, from Article V of the New York Convention), plus a few grounds only relevant to interim measures, such as that a party has not fulfilled a tribunal requirement to post security for the interim measure.[35]

The drafters also included in the Model Law (2006) several provisions in response to the temporary nature of interim measures – starting with a clause confirming that a tribunal that has issued an interim measure may at any time 'modify, suspend or terminate' it.[36] This power to revise interim measures is necessary since the facts known to a tribunal (or its appraisal of facts already known) may change as the arbitration progresses. To make this revision authority fully effective, the drafters authorised tribunals to require any party that has obtained an interim measure 'promptly to disclose any material change in the circumstances on the basis of which the measure was requested or grounded'.[37] Similarly, a party that has obtained court enforcement of such a measure 'shall promptly inform the court of any termination, suspension, or modification of that interim measure'.[38]

A further provision seeks to broaden the possible scope of enforcement by authorising any court that confronts an interim measure 'incompatible with the powers conferred upon [it]' to 'reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that . . . measure'.[39] Finally, the drafters included a closing provision reaffirming that any court entertaining a motion for enforcement of an interim measure 'shall not, in making that determination, undertake a review of the substance of the interim measure'.[40]

To gauge the impact of the Model Law's innovation in interim measures enforcement, one must place Article 17, H and I in the larger context of the entire new Article 17,

33 id., at 258, 259 (noting that, as of 2005, only the '[l]aws of a minority of states, for example, Australia, Hong Kong, and Switzerland permit the enforcement of arbitral provisional measures issued abroad').

34 Possible Uniform Rules (footnote 8), paras. 84 to 93. This was particularly likely in jurisdictions authorising interim measure enforcement through Article 17 of the Model Law since the 1985 version of the Model Law provided that most provisions – including Article 17 – applied only 'if the place of arbitration is in the territory of this State'; see Model Law (1985), Article 1(2).

35 Model Law (2006), Article 17I(1)(a)(ii).

36 id., Article 17D.

37 id., Article 17F(1).

38 id., Article 17H(2).

39 id., Article 17I(1)(b)(i).

40 id., Article 17I(2).

whose 11 subsections reflect a dramatic shift in understanding as to the importance of interim measures in international arbitration. Quite unexpectedly, what UNCITRAL launched as a relatively narrow project to provide for transnational enforcement of interim measures grew into a much broader legislative undertaking, ultimately encompassing eight new subsections of Article 17 that define the permissible categories of arbitral interim measures, establish the conditions on which tribunals may grant them, and stipulate a number of other procedural matters regarding their issuance, including the possibility of a subsequent award of damages to an affected party if the tribunal later determines that the interim measures should not have been granted.[41]

Since these other provisions are addressed to tribunals rather than courts, they may appear to have little to do with enforcement. But, in fact, a primary reason why the Model Law now specifies which interim measures tribunals may issue, and when and how they may do so, is 'to reassure courts that were asked to enforce arbitral interim measures that these measures were issued pursuant to a tribunal's clear authority, and . . . to encourage national legislatures to enact a Model Law that required courts to enforce such measures'.[42] Additionally, as noted by the Secretariat (and agreed by delegates):

> *Reports from practitioners and arbitral institutions indicate that parties are seeking interim measures in an increasing number of cases . . . To the extent arbitral tribunals are uncertain about issuing interim measures of protection and as a result refrain from issuing the necessary measures, this may lead to undesirable consequences, for example, unnecessary loss or damage may happen or a party may avoid enforcement of the award by deliberately making assets inaccessible to the claimant. Such a situation may also prompt parties to seek interim measures from courts instead of the arbitral tribunals in situations where the arbitral tribunal would be well placed to issue an interim measure.*[43]

Thus, a final reason why UNCITRAL developed a detailed regulation regarding arbitral interim measures was to give tribunals greater confidence in exercising their interim authority. Indeed, UNCITRAL delegates subsequently imported nearly all the provisions on tribunal interim measures from Article 17 of the Model Law into Article 26 of the updated Arbitration Rules (2010).

According to UNCITRAL, 80 jurisdictions have now adopted national legislation based on the Model Law; more than 30 have acted in the past dozen years and thus have included the 2006 revisions (sometimes with modifications).[44] For parties and their counsel now seeking to enforce an arbitral interim measure in any given jurisdiction that has not adopted the 2006 Model Law, it will be necessary to examine national legislation to see if there are other enactments (along the lines of the various approaches previously described)

41 id., Article 17, A to G.

42 J Castello, 'Generalizing About the Virtues of Specificity: The Surprising Evolution of the Longest Article in the UNCITRAL Model Law', 6(1) World Arb. & Med. Rev. 7, 17-8 (2012) (article describing the evolution of expanded interim measures provisions in the revised Model Law and in the 2010 UNCITRAL Arbitration Rules).

43 Possible Uniform Rules (footnote 8), para. 104.

44 See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status (last accessed 25 February 2019).

that may authorise such enforcement and, if not, to consult national jurisprudence to determine whether legislation that does not expressly so provide has nonetheless been judicially so construed (such as by broadly interpreting the term 'award').

In this regard, the impact of the revised Model Law is likely to extend beyond the 30 or more states that have formally adopted the updated statute. That is because the dramatic shift in perspective reflected in the new Model Law – the recognition that arbitral interim measures are important and that their enforceability may be crucial to the effectiveness of international arbitration itself – provoked much discussion in the world of transnational dispute resolution, both during UNCITRAL's five years of drafting and thereafter. And UNCITRAL's work coincided with complementary changes both in national laws (for example, practically no jurisdiction now confines the issuance of interim measures to courts instead of arbitrators)[45] and perhaps even in prevailing views as to the scope of the New York Convention. As expressed by Gary Born:

> *the constitutional character of the Convention contemplated that Contracting States' legislation would need to change, to give full effect to the Convention, and that States' views of non-arbitrability and public policy would evolve over time; there is no reason that the term 'award' should not include reasoned, signed decisions by arbitrators on requests for provisional measures when Contracting States have (almost universally) recognized the authority of arbitrators to grant such relief.*[46]

Already, a few courts have shown themselves to be more receptive to enforcing arbitral interim measures, as we discuss below.

Recent case law on enforcement of arbitral interim measures orders

Although there are still significant differences across jurisdictions, recent court decisions may signal a trend toward broader recognition and enforcement of arbitral interim measures, even in the absence of an express statutory provision to that effect.

The United States continues to be at the forefront of the enforcement movement. For example, in *CE International Resources Holdings LLC v. SA Minerals Ltd et al*. (2012) (*CE International Resources*), a federal district court in New York City confirmed its long-standing jurisprudence that 'an award of temporary equitable relief . . . was separable from the merits of the arbitration' and was therefore capable of immediate recognition and enforcement.[47] While the district court did not expressly refer to the New York Convention (or its statutory implementation, under the Federal Arbitration Act)[48] as the basis for its power to enforce the interim award, the case involved foreign parties and likely constituted a 'non-domestic award' falling within US courts' expansive application of the

45 G Born (footnote 5), at 1949, 1950 n. 37 (the restriction was abandoned in Austria in 2006 and in Switzerland and Germany in 1987 and 1988, respectively; within Europe, it appears now to persist only in Italy).

46 id., at 2515.

47 *CE International Resources Holdings LLC v. SA Minerals Ltd et al.*, 2012 US Dist. LEXIS 176158, 6, 7 (SDNY).

48 9 USC Section 1 et seq. (especially Chapter 2 thereof).

New York Convention.[49] Several similar decisions have been issued in other US cases in recent years.[50]

Interestingly, the discussion in this case did not revolve exclusively around the finality of the arbitral order but also addressed the type of temporary relief granted by the arbitrator – an issue that is not so often addressed but may have important practical implications (see 'Practical considerations for enforcement of arbitral interim measures', below). In this case, the sole arbitrator, seated in New York, had issued an interim decision providing for an award ordering the posting of prejudgment security or, in default of that, enjoining the respondent from transferring any assets, wherever located. The respondent argued that the type of interim relief granted by the arbitrator was not available under the law of the seat of arbitration and that the arbitrator thus exceeded his powers, manifestly disregarding the law and breaching public policy.[51] While the district court acknowledged that the relief awarded would not have been available from a New York court, it did not find that the sole arbitrator exceeded his powers by granting the relief. The court relied on the parties' agreement to resolve their dispute under the International Centre for Dispute Resolution arbitration rules of the American Arbitration Association, which allowed the arbitrator to take 'whatever interim measures [he] deems necessary, including injunctive relief and measures for the protection or conservation of property'.[52] The district court further concluded that '[n]othing about enforcing an order rendered in accordance with the procedures to which the parties agreed offends either New York law or New York public policy'.[53]

Other common law jurisdictions have recognised the enforceability of arbitral interim measures in recent years. For example, in 2015, the Singapore Court of Appeal confirmed that awards ordering interim relief are 'final' as to the issue they adjudicate (i.e., the question whether the requested relief is warranted) and can therefore be enforced under the Singapore Arbitration Act.[54] In this case, the 'interim relief' at stake was somewhat unusual: an arbitral order compelling one party to comply with a prior decision by a dispute adjudication board (DAB), constituted under the 1999 FIDIC Red Book, which ordered the party to pay an amount of money to the other party.[55]

Courts in certain civil law jurisdictions also appear to have followed this trend. For example, in 2016, the Supreme Court of Ukraine appeared willing to consider the enforcement of provisional relief granted by a Stockholm Chamber of Commerce arbitral

49 See A J van den Berg, 'The Application of the New York Convention by the Courts', in van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 26, 27 (ICCA Congress Series No. 9, 1999).

50 See e.g., *Century Indem. Co. v. Certain Underwriters at Lloyd's London*, 2012 WL 104773 (SDNY); *Sharp Corporation et al. v. Hisense USA Corporation et al.*, 292 F. Supp. 3d 157 (DDC 2017); *Ecopetrol S.A. et al. v. Offshore Exploration and Production LLC*, 46 F. Supp. 3d 327 (SDNY 2014).

51 *CE International Resources Holdings LLC v. SA Minerals Ltd et al.*, 2012 US Dist. LEXIS 176158, 1 to 9 (SDNY).

52 id., at 14.

53 id., at 9.

54 *PT Perusahaan Gas Negara (Persero TBK) v. CRW Joint Operation* [2015] SGCA 30.

55 id.; see also E Tan and R Coldwell, 'Another (Unsuccessful) Challenge to the Finality of Interim Arbitral Awards in Singapore and Enforcing DAB Decisions on International Projects under FIDIC', Kluwer Arbitration Blog, 15 June 2015.

tribunal in the context of an investor-state arbitration.[56] In this case, the relief had been rendered in the form of an award enjoining the state from collecting royalties on gas production from the investor at a higher rate than was previously in place. The investor sought to enforce the emergency award in Ukraine and succeeded at first instance before the Perchersk District Court, reportedly because the relief was rendered in the form of an 'award' and thus was enforceable pursuant to the New York Convention. Although this decision was later overturned by the Kiev Court of Appeal, in February 2016, the Supreme Court of Ukraine quashed the Court of Appeal's decision, remanding it for reconsideration while holding that a Ukrainian court could only refuse to recognise or enforce an arbitral award on the grounds enumerated in Article V of the Convention and that the Kiev Court of Appeal had not, *inter alia*, taken these grounds into account in overturning the first instance decision.[57]

Likewise, in May 2018, the Cairo Court of Appeal became the first Egyptian court to recognise and enforce an arbitral order for interim measures issued by a foreign tribunal, which was seated in Paris.[58] The tribunal had issued an interim order enjoining one of the parties to cease and desist from Egyptian court proceedings that sought the liquidation of a performance bond. The Court of Appeal held that arbitral interim measures finally resolve the parties' dispute with respect to the provisional measures sought in the arbitration and were therefore capable of enforcement.[59] Notably, the Cairo Court of Appeal stated that enforcement of interim measure orders issued by arbitral tribunals was consistent with the objectives of the New York Convention, namely to favour the enforcement of arbitration agreements and arbitral awards, to ensure predictability in international commercial dealings and consistency among jurisdictions.[60]

Of particular interest was the Cairo Court of Appeal's express reference to the 2006 revision of the Model Law, clearly providing for enforcement of arbitral interim measures and which the Court said 'derives from the New York Convention and implements its guarantees and standards'.[61] As the Court recalled, Egypt's arbitration law is inspired by the Model Law[62] but was enacted well before the 2006 revision. The Court further noted the potential inconsistency in allowing arbitral tribunals to issue interim measures but then refusing to recognise or enforce them.[63]

Despite what may be a nascent trend among some national courts towards enforcement of arbitral interim measures, even in the absence of a statutory provision to that effect,

56 *JKX Oil & Gas plc, Poltava Gas B.V. and Poltava Petroleum JV v. Ukraine*, Decision of the Supreme Court of Ukraine, 24 February 2016, available at https://www.italaw.com/sites/default/files/case-documents/italaw7391.pdf.

57 ibid.

58 Cairo Court of Appeal, 7th Commercial Circuit, Case No. 44/134 JY, Decision dated 9 May 2018; see also Global Arbitration Review, 'Cairo court fills interim measures "void" in Egyptian law', 23 May 2018 (available at https://globalarbitrationreview.com/article/1169888/cairo-court-fills-interim-measures-void-in-egyptian-law).

59 Cairo Court of Appeal, 7th Commercial Circuit, Case No. 44/134 JY, Decision dated 9 May 2018, paras. 20, 21.

60 id., para. 21.

61 ibid.

62 id., para. 14.

63 id., para. 17.

other jurisdictions remain reluctant to embrace this path. For instance, although the Korean Arbitration Act was revised in 2016 and largely incorporated provisions on interim measures from the 2006 Model Law, it nevertheless limits enforcement of interim measures to those issued by tribunals seated in Korea.[64] In 2010, the Chilean Supreme Court rejected the *exequatur* of arbitral interim measures granted abroad regarding assets located in Chile.[65] Similarly, in Russia, the Presidium of the Highest Arbitrazh Court reaffirmed in 2010 its position that only awards finally deciding (part of) the merits of a dispute can be enforced in the Russian Federation.[66]

Practical considerations for enforcement of arbitral interim measures

Even if a relevant court stands ready to enforce an interim measure issued by an arbitral tribunal, the party seeking such a measure may still need to attend to the form of the relief sought, to maximise the likelihood of effective enforcement. While interim measures can take numerous forms, they often consist of non-monetary relief, generally an injunction to one party to do (or refrain from doing) something. However, the efficacy of such injunctive relief mainly depends on the tools available in each jurisdiction to force compliance with the judicial injunction or to sanction a party's failure to comply.

In a number of common law jurisdictions, courts may have the power to hold the recalcitrant party in contempt for failing to comply with the judge's decision enforcing the interim measure.[67] For example, in the *CE International Resources* case, the party enjoined by the arbitral tribunal to post security or to refrain from transferring assets abroad (in the order as enforced by the court) failed to comply. As a result, the district court subsequently held the respondent in civil contempt, imposing daily-accruing civil fines and issuing a civil commitment order.[68]

By contrast, in most civil law jurisdictions, there is no equivalent to the common law concept of contempt of court.[69] That said, courts in those jurisdictions are not powerless in the face of a party that refuses to comply with an injunction or any other form of non-monetary relief. For instance, in France, a judge can order an *astreinte* (i.e., the payment

64 See Doo-Sik Kim, Jae Min Jeon, Seung Min Lee and Arie Eernisse, 'Korea' in *GAR Know-How, Commercial Arbitration*, accessible at https://globalarbitrationreview.com/jurisdiction/1004953/korea (accessed on 25 March 2019) ('The amendments make clear that an interim order made by an arbitral tribunal can be recognised and enforced by applying to the court for a decision. However, interim measures will only be enforced by a Korean court if the arbitration is seated in Korea and the order that is made by the arbitral tribunal is compatible with Korean law.').

65 See Supreme Court No. 5468-2009, *Western Technology Services International Inc. (Westech) v. a Chilean company, Cauchos Industriales SA (Cainsa)*, 11 May 2010 (case described in UNCITRAL's *Case Law On Uncitral Texts* (CLOUT), dated 23 August 2011 (A/CN.9/SER.C/ABSTRACTS/111), at 5.

66 *Living Consulting Group AB (Sweden) v. OOO Sokotel (Russian Federation)*, Presidium of the Highest Arbitrazh Court, Russian Federation, 5 October 2010, A56-63115/2009, in Albert Jan van den Berg (ed.), XXXVI Yearbook Com. Arb. 317, 318 (Kluwer 2011).

67 C V Giabardo, 'Disobeying Courts' Orders – A Comparative Analysis of the Civil Contempt of Court Doctrine and of the Image of the Common Law Judge', 10 J. Civ. L. Stud. (2018), at 38, available at https://digitalcommons.law.lsu.edu/jcls/vol10/iss1/5.

68 *CE International Resources Holdings LLC v. SA Minerals Ltd Partnership*, 2013 WL 324061, at 3, 4 (SDNY)

69 C V Giabardo (footnote 67), at 41.

of a fine for each day the debtor delays compliance with the judgment).[70] Luxembourg, Belgium, the Netherlands and Italy have similar mechanisms.[71] In Germany, courts enjoy a comparable power, although the fine is paid to the state and not to the petitioner.[72]

In certain civil law jurisdictions, such as France, the power to order a pecuniary sanction such as an *astreinte* is primarily granted to judges to ensure the enforcement of their own decisions.[73] Accordingly, it is questionable whether an enforcing court would have the ability to order an *astreinte* to ensure its own enforcement of an interim measure actually ordered by an arbitral tribunal. The situation may be different in those countries, such as Switzerland, where the courts do not appear to directly enforce the arbitral interim measure but rather issue their own provisional order, mirroring the interim measure initially ordered by the tribunal.[74] That said, even in France, it would still be possible for the beneficiary of the enforced interim measures order to request the imposition of an *astreinte* later from a judge who specialises in matters of enforcement, if circumstances so justify.[75]

But if the imposition of an *astreinte* turns out to be impossible (whether immediately by the enforcement court or at a later stage), the beneficiary of the order may end up with relatively limited options to force compliance with the injunction. Indeed, it will most likely be left with the sole remedy of seeking an award of further damages from the tribunal against the enjoined party for failing to comply with the interim measure (which arguably constitutes a tort or a breach of the arbitration agreement). Moreover, there may be a further question whether this claim for extra damages should be made before the arbitral tribunal that issued the interim measure or before the courts of the country in which this order was enforced (and not complied with).

Accordingly, parties seeking injunctive interim relief from an arbitral tribunal would be well advised to anticipate, to the extent possible, in which jurisdictions these injunctions are likely to be enforced if the enjoined party does not voluntarily comply. Depending on the coercive tools available in these jurisdictions, the requesting party may want to consider asking the arbitral tribunal itself to accompany its injunction with a self-contained pecuniary sanction in the case of non-compliance, akin to an *astreinte*, to the extent that this possibility is available to the tribunal.[76] Such a self-contained pecuniary sanction – which might be enforced by a court directly against the enjoined party's assets – may avoid the need to resort to subsequent court litigation regarding the enjoined party's failure to

70 id., at 39.

71 ibid.

72 ibid.

73 See Article L-131-1 of the French Code of Civil Enforcement Procedures.

74 See P Bärtsch and D Schramm, *Arbitration Law of Switzerland: Practice & Procedure 66* (Juris 2014) ('If the Swiss court enforces the interim measure, it renders a self-standing ruling that is subject to enforcement under Swiss procedural law as if it were a decision rendered from the outset by a Swiss court. Thus, all coercive measures for the enforcement of domestic decisions are available.')

75 See Article L-131-1 of the French Code of Civil Enforcement Procedures.

76 On the ability of arbitrators to issue *astreintes*, see e.g., Alexis Mourre, 'Judicial Penalties and Specific Performance in International Arbitration', in De Ly and Lévy (eds), *Interest, Auxiliary and Alternative Remedies in International Arbitration*, *5 Dossiers of the ICC Institute of World Business Law* (Kluwer Law International, 2008), pp. 52 to 78.

comply with the injunctive interim relief. This could prove very useful, as interim measures are often issued in a context of urgency.

Parties seeking interim relief should also consider whether the measure requested from the arbitral tribunal (including any associated pecuniary sanction for non-compliance) constitutes a known form of relief in the potential place, or places, of enforcement. As illustrated by the *CE International Resources* case, the non-availability of a certain type of relief in the place of enforcement might raise concerns regarding the compatibility of the interim measure order issued by the arbitral tribunal with the public policy of the place of enforcement, thus creating a risk that enforcement is refused. For instance, it was suggested by one commentator on the Egyptian case discussed in the second section of this chapter that an anti-suit injunction of the type issued by the arbitral tribunal in Paris was contrary to the enjoined Egyptian party's constitutional rights (to seek relief against a third party) and thus to Egyptian public policy.[77] In the same vein, some jurisdictions consider that disproportionate damages are contrary to their international public policy[78] and may thus frown upon interim measures that are accompanied by particularly heavy sanctions in the case of non-compliance.

77 See Ibrahim Shehata, 'Are Arbitral Anti-Suit Injunctions Enforceable before Egyptian Courts?', Kluwer Arbitration Blog, 23 January 2019.

78 For example, the EU's Rome II regulation notes in its preamble that 'the application of a provision of the law designated by this Regulation which would have the effect of causing non-compensatory exemplary or punitive damages of an excessive nature to be awarded may, depending on the circumstances of the case and the legal order of the Member State of the court seised, be regarded as being contrary to the public policy (*ordre public*) of the forum'. (See Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), 32); see also A Mourre (footnote 76), at 69 ('in some jurisdictions, judicial penalties may be prohibited insofar as they would lead to an undue enrichment of the creditor').

11

Prevention of Asset Stripping: Worldwide Freezing Orders

Charlie Lightfoot, James Woolrich and Michaela Croft[1]

Introduction

Claimants in international arbitration will sometimes face recalcitrant respondents with operations, affiliates and assets in numerous jurisdictions. The risk that such a respondent will take steps to 'strip' itself of assets so as to make any (prospective) award unenforceable is often all too real. This chapter considers the availability of freezing orders, in particular worldwide freezing orders, in support of the arbitral process as a tool to restrain respondents from engaging in this sort of conduct. It is primarily focused on the well-established jurisdiction of the English courts to grant such relief, which has been cited as one reason (among many) why parties might wish to choose London as the legal seat for their arbitrations.[2] The chapter also considers when the English courts may be prepared to grant freezing relief in support of foreign-seated arbitrations, or against non-parties to an arbitration, and will compare the position in the United States and some civil law jurisdictions.

What is a freezing order?

The English court formerly described the freezing injunction as a 'draconian remedy' and as one of the law's two 'nuclear weapons'.[3] Nowadays, it is a weapon deployed with some regularity. In the international arbitration context, a freezing order is likely to be a form of personal (*in personam*) relief: in other words, it operates to prevent a respondent from

1 Charlie Lightfoot is the managing partner, James Woolrich is a partner and Michaela Croft is an associate at Jenner & Block, based in London. The authors would like to thank Elizabeth Edmondson, a partner in Jenner & Block's New York office, for her contribution in respect of the US position, and Thomas Mason, for his research assistance.

2 This chapter refers to the position of the English court in respect of England and Wales. For brevity, England only is referred to but should be read as 'England and Wales'.

3 *Bank Mellat v. Nikpour* [1985] FSR 87 (CA), 92 (Donaldson LJ).

dealing with its assets in certain specified ways, up to a value threshold, and prevents third parties on notice from aiding or abetting any breach of the order.[4] It is usually coupled with an asset disclosure order (requiring the respondent to disclose the location, value and details of its assets by letter and then affidavit) and is given a coercive edge by contempt of court sanctions in the event of its breach. Freezing orders can be applied for in respect of assets located within the territorial jurisdiction of the English court (a domestic freezing order) or those anywhere in the world (a worldwide freezing order (WWFO)). Whether domestic or worldwide, and whether granted prior to, during or following the conclusion of arbitral proceedings, freezing orders can support the enforcement of arbitration awards.[5]

Threshold requirements for freezing order relief

The substantive test applied by the English courts for the grant of a freezing order in aid of arbitration is broadly the same as that for the grant of a freezing order in aid of litigation. It is therefore convenient to consider the threshold requirements a party must establish to obtain such relief before considering the particular requirements in the context of arbitration.

As a preliminary step, an applicant will need to show 'grounds for belief' that the defendant holds assets on which the order could bite.[6] If the applicant is unable to identify assets, then the court will not grant a WWFO as it would have no practical utility. Having done so, it is for the applicant further to establish (1) a good arguable case as to the merits of the underlying claim, and (2) that there is a real risk of dissipation of assets by the defendant or that the award (or judgment) will go unsatisfied.[7]

Taking each of these requirements in turn, first, the meaning of a 'good arguable case' is well established by case law.[8] It does not require an applicant to satisfy a court that a claim will succeed on the balance of probabilities, but a claim that is no more than merely arguable will not suffice.[9] In the arbitration context, where it is for the tribunal, not the court, to assess the merits of the claim, the court will only need to be satisfied (pre-award) that there is a *prima facie* case to get over this 'initial hurdle'.[10] Post-award, a 'good arguable case' will have been established by virtue of the award.[11]

---

4 See standard form freezing order at Appendix 11 of the English court's Commercial Court Guide (10th ed., 2017) pp. 121 to 127. Proprietary freezing orders may also be granted (these being based on a claimant's property right – they are more common in the civil fraud context).

5 *Masri v. Consolidated Contractors International Company* [2008] EWCA Civ 303, [2009] QB 450; *Nomihold Securities Inc v. Mobile Telesystems Finance SA* [2011] EWCA Civ 1040, [2012] 1 All ER (Comm) 223.

6 *Ras Al Khaimah Investment Authority v. Bestfort Development LLP* [2017] EWCA Civ 1014, [2018] 1 WLR 1099, para. 39 (Longmore LJ).

7 *Derby & Co Ltd v. Weldon* (No. 1) [1990] Ch. 48 (CA), 56 to 57 (Parker LJ).

8 *Ninemia Maritime Corporation v. Trave Schiffahrtsgesellschaft m.b.H. und Co. K.G. (The Niedersachsen)* [1984] 1 All ER 398 (CA), 402J to 404D (Mustill J).

9 id., 404A (Mustill J).

10 A court should refrain from passing any view on the merits of a case that will fall to the arbitrators in due course; see *Belair LLC v. Basel LLC* [2009] EWHC 725 (Comm), at para. 33 (Blair J).

11 The matter will be beyond argument if the claimant has been granted permission to enforce the award in the same way as a judgment and any challenge by the respondent (for example, under Section 67 of the Arbitration Act 1996 (the 1996 Act)) has been dismissed. See *Celtic Resources Holdings v. Ardvina Holding BV* [2006] EWHC 2553 (Comm), at para. 20 (Clarke J).

What is meant by a 'real risk of dissipation' has been established by case law.[12] Although the courts have stressed the need for 'solid evidence', what this entails will be fact-specific and courts are willing to take into account numerous factors (for example, ease with which assets could be moved around).[13] It will not be enough just to suggest that a respondent is not to be trusted or that a respondent is dishonest. To discharge the burden the claimant will need to show justification for its suspicion.[14] Post-award, while something more than a defendant's failure to pay will need to be shown to establish risk of dissipation, the inference that a recalcitrant award debtor poses a risk of dissipation is more easily drawn and a freezing order will be more readily granted.[15]

If an applicant is able to meet these criteria, then, since it is an equitable remedy, it will be for the court to decide in its discretion whether it is 'just and convenient to grant the order'.[16] Usual equitable maxims apply; for example, an applicant's lack of clean hands may bar relief.

Jurisdiction of the English court

In the arbitration context, the basis for the English court's jurisdiction will depend on the stage reached in the proceedings. If pre-award, an applicant will usually rely on Section 44 of the Arbitration Act 1996 (the 1996 Act); if post-award, Section 37 of the Senior Courts Act 1981 (the SCA).[17]

Pre-award: Section 44 of the 1996 Act

Section 44 of the 1996 Act permits the English court to exercise powers in respect of specific matters in arbitrations seated in England (and by virtue of Section 2(3) of the 1996 Act, also in arbitrations seated outside England or where no seat has yet been designated or determined), provided that the parties have not agreed to dispense with these

12 See *Great Station Properties v. UMS Holding Limited* [2017] EWHC 3330 (Comm), para. 3 (Teare J) confirming that the appropriate test was *Holyoake v. Candy* [2017] EWCA Civ 92, [2018] Ch. 297, para. 34 (Gloster LJ).

13 *Holyoake v. Candy* [2017] EWCA Civ 92, [2018] Ch. 297, para. 20 (Gloster LJ).

14 *Congentra AG v. Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479, at paras. 50 to 52 (Flaux J), quoting Gibson LJ in *Thane Investments Ltd v. Tomlinson* [2003] EWCA Civ 1272, para. 28.

15 *Masri v. Consolidated Contractors International Company* [2008] EWCA Civ 303, [2009] QB 450, at para. 134 (Collins LJ).

16 *The Niedersachsen* [1983] 1 WLR 1412 (CA), 1426 C (Kerr LJ).

17 For some time, there has been a debate about the interplay between wide-ranging powers in Section 37 of the Senior Courts Act 1981 and the narrower-drawn Section 44 of the 1996 Act in the context of the court's jurisdiction to grant freezing order relief prior to an award being granted: see *Cetelem SA v. Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555, at para. 74 (Clarke LJ). The court has largely cleared up this distinction in the context of anti-suit injunctions, but there is still no clarity as to the demarcation between Section 37 and Section 44 in the context of freezing order relief. In this section of the chapter, we focus on Section 44. See *UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889, at para. 48 (Lord Mance).

powers.[18] Those matters include the preservation of assets and evidence for the arbitration and the grant of interim injunctions (which includes WWFOs).[19]

To preserve the balance of power between a tribunal and a supervisory court, Section 44 has a number of provisions that limit a court's ability to intervene. In particular, a court is permitted to 'make such orders as it thinks necessary for the purpose of preserving evidence or assets' but can only do so (1) in circumstances where relief is sought urgently, (2) with the permission of the tribunal or the other party, or (3) if the tribunal 'has no power or is unable for the time being to act effectively'.[20] If a court so orders, any order it makes will cease to have effect on the order of the tribunal.[21]

To establish urgency, an applicant will need to demonstrate that it could not obtain the same relief from the tribunal within a reasonable time frame. This will be fact-specific. Certain interim measures under Section 44 have become harder to justify in circumstances where the arbitration rules, such as those of the London Court of International Arbitration (LCIA), now allow for the appointment of an emergency arbitrator or for an expedited tribunal.[22] However, it is generally accepted that freezing order relief sought on a without notice (*ex parte*) basis will be sufficiently urgent as to warrant the court's intervention under Section 44(3) of the 1996 Act, particularly when relief is being sought at an early stage and the tribunal has not been constituted.[23]

Post-award: Section 37 of the SCA

Once a tribunal has handed down a final award, it is *functus officio* and freezing relief sought in aid of enforcement is not directly 'for the purposes of and in relation to arbitral proceedings'.[24] Section 44 of the 1996 Act is therefore unlikely to apply. In the post-award situation, a party will need to rely on the English court's general power to grant injunctions under Section 37 of the SCA. Section 37(1) provides that '[t]he High Court may by order (whether interlocutory or final) grant an injunction . . . in all cases in which it appears to the court to be just and convenient to do so'. This broad provision allows the English court to grant a freezing order in support of enforcement of a final award.[25]

18 The 1996 Act, Section 44(1): '[U]nless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitration proceedings the same power of making orders about the matters listed below [in the subsections] as it has for the purposes of and in relation to legal proceedings.'

19 *Cetelem SA v. Roust Holdings Ltd* [2005] EWCA Civ 618, [2005] 1 WLR 3555; *Mobil Cerro Negro v. Petroleos de Venezuela* [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034, at para. 135 (Walker J).

20 The 1996 Act, Sections 44(3), (4) and (5).

21 id., Section 44(6).

22 See *Seele Middle East FZE v. Drake & Scull International SA Co* [2014] EWHC 435 (TCC), at para. 33 (Ramsey J); *Gerald Metals SA v. Timis* [2016] EWHC 2327 (Ch), at paras. 6 to 8 (Leggatt J).

23 See *Belair LLC v. Basel LLC* [2009] EWHC 725 (Comm), at paras. 28 to 30 (Blair J).

24 S Gee, *Commercial Injunctions* (6th ed, Sweet & Maxwell, London, 2016) Section 6-036; see also D. Sutton, J Gill and M Gearing, *Russell on Arbitration* (24th ed, Sweet & Maxwell, London, 2015) Section 7-191.

25 See *Celtic Resources Holdings v. Arduina Holding BV* [2006] EWHC 2553 (Comm); *Gidrxslme Shipping Co Ltd v. Tantomar-Transportes Maritimos Lda* [1994] 4 All ER 507, 519 (Colman J).

English-seated arbitrations

When dealing with arbitrations that have their legal seat in England, provided the threshold requirements described earlier can be met, and while a court's power to grant injunctive relief is a matter of discretion, it has been found that the court should 'take the lead' in granting freezing orders in support of arbitration (unless there is a reason not to.)[26] This is true both pre-award and post-award.

This remains the case even if the party against whom an order is sought has little or no connection with England. For example, having insufficient or no assets in the jurisdiction will not dissuade the court from taking action, even if enforcement will take place elsewhere.

For example, in *U&M Mining Zambia Ltd v. Konkola Copper Mines Plc*,[27] the claimant, a Zambian mining equipment contractor, applied to the court to continue a WWFO (made in support of an award handed down by a London-seated tribunal) against the defendant, the operator of a Zambian copper mine. The defendant argued that grant of a WWFO was not just and convenient because the claimant could seek a domestic freezing order from the Zambian courts, the jurisdiction in which the assets were located.

Mr Justice Teare held that, provided the threshold requirements were met, the claimant's ability to obtain freezing relief in Zambia was irrelevant to the question of the English court's jurisdiction. Teare J pointed to Sections 2 and 44 of the 1996 Act and drew the inference that, if England was the seat of the arbitration, it would be appropriate for the supervisory court to issue orders in support of the arbitration even when there were no assets within the jurisdiction. Teare J recognised that enforcement would take place in Zambia, where the relevant assets were located, but found that the possibility of both the English and local courts granting freezing relief would not, itself, be a barrier to the English court's ability to grant a WWFO since the court's *in personam* jurisdiction over the defendant was derived from the London arbitration clause.[28] The local court in the place where the assets are located may itself provide ancillary relief in support of an English order.[29]

Foreign-seated arbitrations

The power of the English court to grant freezing relief is not limited to arbitrations seated in England. Section 2(3) of 1996 Act provides that the powers conferred under Section 44 apply both in circumstances where the seat of the arbitration is outside England and in circumstances where no seat has yet been designated.[30] However, it will be harder in such cases to persuade a court to grant a freezing order since it will generally be presumed that the courts at the seat of the arbitration will be the natural forum in which to seek injunctive relief.[31] Therefore, the English court has to be satisfied that the exercise of its

26 *Cetelem SA v. Roust Holdings Limited* [2005] EWHC 300 (QB) para. 18 (Langley J); see also *Econet Wireless Limited v. Vee Network* [2006] EWHC 1568 (Comm), [2006] 2 All ER (Comm) 989; *Belair LLC v. Basel LLC* [2009] EWHC 725 (Comm).

27 [2014] EWHC 3250 (Comm).

28 ibid., para. 65 (Teare J).

29 This will be a matter for the local law.

30 Section 44 of the 1996 Act does not apply to ICSID arbitrations; see *ETI Euro Telecom International NV v. Republic of Bolivia* [2008] EWCA Civ 880, [2009] 1 WLR 665, para. 14 (Lawrence LJ).

31 R Merkin, *Arbitration Act 1996* (5th ed., Informa Law, Oxford and New York, 2014), p. 173.

power is appropriate in all the circumstances and may refuse to act if it considers that the fact that the seat is, or is likely to be, outside England makes it inappropriate to do so.[32]

'Appropriate' in all the circumstances

As to when it will be 'appropriate' for a court to grant such relief, the point was made by Mr Justice Morison in *Econet Wireless Ltd v. Vee Networks Ltd & Ors* that the powers of the court to support a foreign-seated arbitration under Section 44 were a 'long arm reach'.[33] For the court to be minded to grant such an application, the requesting party would need to answer satisfactorily the question: 'Why are you asking for an order from this court?'[34] This will be a fact-sensitive enquiry.

In *Econet*, the claimant had sought and was granted, on a without notice basis, injunctions against 21 defendants: a Nigerian Company and 20 of its shareholders. At the return date hearing, Morison J discharged the WWFO, finding that the claimant had not sufficiently established why relief was being sought from the English court in connection with a dispute arising out of a shareholders agreement governed by Nigerian federal law, and which provided for disputes to be settled by way of arbitration seated in Nigeria. In arriving at his decision, Morrison J provided helpful guidance on the types of cases in which such an order in support of a foreign-seated arbitration might be made. In particular, he stated that such an order might be appropriate where (1) the arbitration was conducted under English procedural law, (2) where the order is intended to secure assets that are located within the jurisdiction, or (3) where the order is sought against a respondent who has a connection with the jurisdiction.[35]

Even if the parties can establish a good reason for making an application to the English court on the above basis, the courts have been hesitant to overstretch their territorial reach in respect of parties who chose a seat outside the jurisdiction.[36] Consequently, a court will only be persuaded that freezing order relief against a party to a foreign-seated arbitration is 'appropriate' in exceptional circumstances.

'Exceptional circumstances'

The court provided guidance on when 'exceptional circumstances' might arise in *Mobil Cerro Negro v. Petroleos de Venezuela*.[37] The salient question in *Mobil* was whether the court had jurisdiction to grant a WWFO in support of an arbitration that had not yet commenced but which was to be seated in New York under International Chamber of Commerce Rules of Arbitration. Mr Justice Walker said that the court could grant

32 The 1996 Act, Section 2(3).

33 *Econet Wireless Limited v. Vee Network* [2006] EWHC 1568 (Comm), [2006] 2 All ER (Comm) 989, para. 19 (Morison J).

34 ibid.

35 ibid.

36 See comments of Lord Donaldson in *Rosseel N.V. v. Oriental Commercial Shipping (U.K.) Ltd* [1990] 1 WLR 1387 (CA), 1389 C: 'It seems to me that, apart from the very exceptional case, the proper attitude of the English courts . . . is to confine themselves to their own territorial area, save in cases in which they are the court or tribunal which determined the rights of the parties. So long as they are merely being used as enforcement agencies they should stick to their own last.'

37 *Mobil Cerro Negro v. Petroleos de Venezuela* [2008] EWHC 532 (Comm), [2008] 2 All ER (Comm) 1034.

a WWFO in support of a foreign-seated arbitration, but in the absence of assets in the jurisdiction, an applicant would need to show either that the respondent had a sufficiently strong link with the jurisdiction, or that there was some other factor of sufficient strength to warrant the intervention of the English court.[38] In *Mobil*, Walker J found that the fact that the respondent (the Venezuelan government) had no office or business operations within England, and had no bank accounts, real property or other assets located in the jurisdiction, meant that there were insufficient links to England to ground relief.[39]

Similarly, in *Eastern European Engineering Ltd v. Vijay Construction (Proprietary) Limited*, evidence before the court that the respondent held shares in an English company was insufficient to establish a 'strong link' to the jurisdiction.[40] The vast majority of the respondent's assets were located in the foreign jurisdiction in which the parties and the arbitration were seated, making it the more appropriate forum.[41] In such cases, an applicant will need to show evidence of some other factor, such as international fraud, which may, owing to policy considerations, necessitate the court's intervention.[42] Such cases are relatively rare, limiting the scope of the English court's role in foreign-seated arbitrations.[43]

International jurisdiction

The English court will only grant relief against a foreign person or entity not present within its territorial jurisdiction if there is a basis on which the court can take (international) jurisdiction over it. The position under the English court's Civil Procedure Rules (CPR) and accompanying Practice Directions can be summarised as follows:

- Practice Direction 62 (Arbitration), Paragraph 3.1 provides that a court may exercise its powers under CPR Rule 6.15 (which provides for alternative service) to permit service of an arbitration claim form within the jurisdiction at the address of a party's solicitor or representative acting for that party in the arbitration. In other words, service out of the jurisdiction may not be necessary.
- Pre-award: Under CPR Rule 62.5(1)(b), a court may give permission for an arbitration claim form to be served out of the jurisdiction if it is 'for an order under Section 44 of the 1996 Act'. This provision therefore covers service of an arbitration claim form seeking a pre-award freezing order against a party to the arbitration agreement.[44]
- Post-award: If CPR Rule 62.18 has been relied upon to serve an arbitration claim form seeking leave to enforce an award (or the enforcement order itself) out of the jurisdiction, the court also has jurisdiction to grant freezing relief against the award debtor. No separate jurisdictional gateway is necessary.[45] Alternatively, under CPR Rule 62.5(1)(c), a court may give permission to serve an arbitration claim form out of the jurisdiction if the applicant 'seeks some other remedy . . . affecting an arbitration

38 id., paras. 119 and 155 (Walker J).

39 id., para. 142 (Walker J).

40 [2018] EWHC 1539 (Comm).

41 id., para. 43 (Butcher J).

42 id., paras. 41 and 43(5) (Butcher J).

43 *Arcelormittal USA LLC v. Essar Steel Ltd & Ors* [2019] EWHC 724 (Comm).

44 See *Val do Rio Doce Navegacao SA v. Shanghai Bao Steel Ocean Shipping Co* Ltd [2000] 2 Lloyd's Rep. 1, paras. 39 to 42 (Thomas J), a case under the predecessor provision PD49G.

45 See footnote 43.

(whether started or not), an arbitration agreement or an arbitration award' and the 'seat of the arbitration is or will be within the jurisdiction . . . '.[46] This provision encompasses a claim under Section 37 of the SCA[47] and is therefore available in respect of an application for a post-award freezing order. However, it does not apply to respondents who are not parties to an arbitration agreement or arbitral proceedings (as to which, see further below).[48]

- CPR Rule 6.36 and Practice Direction 6B: CPR 6.36 provides that a claimant can serve a claim form out of the jurisdiction with the permission of the court if any of the grounds set out in Practice Direction 6B 3.1 apply. In practice, an application made against a party to the arbitration would be made through CPR Part 62 but in the case of a non-party to the arbitration, CPR Part 6 will be relevant.[49]

In respect of parties who are domiciled in an EU Member State, the Brussels I regime may (also) apply, which, depending on the applicable Article, may introduce the requirement of a 'real connecting link' between the subject matter of the relief sought and the jurisdiction of the court – but this will depend on whether the application is made pre-award or post-award and whether the 'arbitration exception' in the Brussels I regime is found to apply.[50]

Freezing orders against non-parties

Freezing orders against non-parties to the substantive dispute (a 'non cause of action defendant', or NCAD for short) – commonly referred to as *Chabra* orders after the case of that name[51] – will be available if a claimant can show that the assets held by an NCAD either in truth belong to the defendant or if there is some other means by which a claimant could enforce against those assets.[52] *Chabra* orders are an increasingly common feature of

46 It should be noted that CPR Rule 62.5(1)(c) has no relevance to foreign-seated arbitrations, being largely restricted to arbitrations seated in England and to those where no seat has been determined. See R Merkin, *Arbitration Act 1996* (5th ed, Informa Law, Oxford and New York, 2014), p. 198.

47 See *UST-Kamenogorsk Hydropower Plant JSC v. AES UST-Kamenogorsk Hydropower Plant LLP* [2013] UKSC 35, [2013] 1 WLR 1889, at para. 50 (Lord Mance), in the context of a claim to restrain foreign proceedings in breach of the negative aspect of an arbitration agreement.

48 *Cruz City 1 Mauritius Holdings v. Unitech Limited and others* [2014] EWHC 3704, [2015] 1 All ER (Comm) 305, paras. 44 and 52 (Males J).

49 The question of which gateway(s) in paragraph 3.1 might apply will depend on the facts and as a result is outside the scope of this chapter.

50 See Article 1(2)(d), Article 35, Regulation (EU) No. 1215/2012 (the Brussels I Regulation (Recast)); Van Uden *Maritime BV v. Kommanditgesellschaft in Firma Deco Line*, C-391/95, 17 November 1998, [1999] QB 1225, 1258.

51 *TSB Private Bank International v. Chabra* [1992] 1 WLR 231 (Ch).

52 *PJSC Vseukrainskyi Aktsionernyi Bank v. Maksimov* [2013] EWHC 422 (Comm), para. 7 (Popplewell J): 'The *Chabra* jurisdiction may be exercised where there is good reason to suppose that assets held in the name of a Defendant against whom the Claimant asserts no cause of action (the NACD) would be amendable to some process, ultimately enforceable by the courts, by which the assets would be available to satisfy a judgment against a Defendant whom the claimant asserts to be liable upon his substantive claim (the CAD).'

commercial disputes.[53] However, for reasons discussed below, there is a degree of uncertainty regarding the application of the *Chabra* jurisdiction in the international arbitration context.

The starting point is that if the NCAD is English or either located or incorporated in England, *Chabra* relief is available. In *Maksimov*, the court granted a *Chabra*-style freezing order against English non-party companies in support of enforcement of an arbitral award granted in English-seated LCIA arbitration proceedings.[54] The court found that the assets (shares in a Ukrainian company) held by the non-parties were in truth the assets of the respondent to the arbitration.

If the NCAD is foreign and not present within the jurisdiction, matters are less straightforward. In *Cruz City*, an application by an award creditor to the English (supervisory) court for a WWFO against NCADs who were all incorporated outside England and who had no known assets, directors, officers or business within the jurisdiction, was dismissed on jurisdictional grounds. One of the reasons the court gave was that Section 44 does not apply post-award or to non-parties. This (*obiter*) reasoning was referred to and approved in *DTEK Trading SA v. Morozov*,[55] in which the court held that it did not have the power to make an order under Section 44 against a non-party to an arbitration agreement and that, accordingly, the claimant could not obtain permission to serve proceedings outside the jurisdiction under CPR Rule 62.5(1)(b).

This approach has been criticised by some commentators as leaving a *lacuna* in the law of injunctions in support of arbitrations.[56] Nevertheless, the current state of the law is that an applicant will face significant challenges in obtaining *Chabra* relief pre-award or post-award if the NCAD is outside the territorial jurisdiction of the English court.

Practical considerations

Generally, an applicant will seek freezing order relief on a without notice (*ex parte*) basis. In such circumstances, an applicant is under an obligation to provide all the material facts and law to the court regardless of whether they are helpful to him or her.[57] A party failing to provide full and frank disclosure, or who fails to continue to comply with that duty up to the return date hearing, faces having the freezing order set aside or cost consequences imposed by the court.[58] In addition, the applicant will usually be required to provide an undertaking to pay damages in the event that the court finds at the return date hearing that the order should not have been granted in the first place.[59]

53 Court of Appeal treatment: approved in *Mercantile Group (Europe) AG v. Aiyela* [1994] QB 366; applied in *Lakatamia Shipping Co Ltd v. Su* [2014] EWCA Civ 636, [2015] 1 WLR 291; *JSC Mezhdunarodniy Promyshlenniy Bank v. Pugachev* [2015] EWCA Civ 906, [2015] WTLR 1759; *JSC BTA Bank v. Ablyazov* (No. 11) [2014] EWCA Civ 602, [2015] 1 WLR 1287.

54 [2013] EWHC 422 (Comm).

55 [2017] EWHC 94 (Comm), [2017] 1 Lloyd's Rep 126.

56 S Gee, *Commercial Injunctions* (6th ed, Sweet & Maxwell, London, 2016), Section 6-037.

57 See principles of full and frank disclosure in: *Brink's-Mat Ltd v. Elcombe and others* [1988] 3 All ER 188, 192G to 193D (Gibson LJ).

58 See *Congentra AG v. Sixteen Thirteen Marine SA* [2008] EWHC 1615 (Comm), [2009] 1 All ER (Comm) 479, at paras. 61 to 64 (Flaux J).

59 See *Belair LLC v. Basel LLC* [2009] EWHC 725 (Comm).

The position in other jurisdictions

Having focused on the English court's jurisdiction to grant domestic and extraterritorial freezing relief, we now briefly turn to analogous court powers in other common law and civil jurisdictions.

Common law jurisdictions

There is significant overlap between the approach of the English court in relation to the grant of freezing relief and that of certain common law offshore jurisdictions, such as the Isle of Man, Cyprus, the British Virgin Islands and the Cayman Islands, where judges show a readiness to follow, and in some cases extend, the English jurisprudence described above. That is not true of all common law jurisdictions, though.

In the United States, the availability of freezing orders is quite limited in both federal and state courts. Pursuant to a 1999 decision by the United States Supreme Court, in actions for money damages, federal courts lack the inherent power to enjoin a defendant from dissipating its assets in anticipation of a judgment for money damages.[60] Instead of a single *in personam* remedy and absent any statute specifically authorising a freezing order, litigants in federal court must pursue *in rem* attachment of particular assets. Adding to the complexity, there is no uniform federal procedure for prejudgment attachment. Instead, the Federal Rules of Civil Procedure incorporate the prejudgment remedies of the state where the court is located.[61]

Although the 1999 Supreme Court decision limited only the power of federal courts, several state courts concluded that they also lacked inherent authority to freeze assets in cases involving money damages.[62] In those states, a plaintiff's only option is to pursue statutory prejudgment attachment remedies, which can be procedurally quite complex and limited in scope.[63]

To streamline the process of securing assets in aid of a judgment or award, in 2012 the Uniform Law Commission (an organisation that provides states with model legislation to bring clarity and uniformity to state law) promulgated the Uniform Asset-Preservation Orders Act, which would provide a uniform process for *in personam* freezing orders. As at March 2019, no states had adopted the draft legislation. Accordingly, prejudgment freezing orders in the United States remain largely out of reach.

Civil law jurisdictions

Many civil law jurisdictions recognise that it is not incompatible with a tribunal's powers for the domestic courts to provide interim and conservatory measures.[64] However, these are rarely extraterritorial in nature and often granted against specified assets.

---

60 See *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 US 308, 319 (1999).

61 Fed. R. Civ. P. 64.

62 See *Credit Agricole Indosuez v. Rossiyskiy Kredit Bank*, 729 NE 2d 683 (NY 2000); *Interisle Consulting Grp v. Galaxy Internet Servs* 2014 WL 3816557 (Mass. Sup. Ct 2014).

63 See Delaware limits prejudgment remedies against assets held at financial institutions (10 Del. Ct s. 3502 (2018)).

64 Chapter 23 'Interim and conservatory Measures', in Julian D M Lew, Loukas A Mistelis, et al., *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at 23-100 p. 616.

By way of example, if one looks to other key arbitration centres, such as France and Switzerland, there appears to be no means of obtaining *in personam* relief. In France, a party can apply to the French court for interim measures in the form of attachment orders (*saisie conservatoire*) to preserve assets pending judgment or a final award, but these are generally only ordered when the defendant's assets are located in France (or one of its overseas collectives).[65] Similarly, in Switzerland, interim relief is limited to applying for civil attachment orders only in respect of Swiss-seated arbitrations or if the assets are located in the jurisdiction.[66] The Swiss courts do not generally offer interim measures with extraterritorial effect.

Conclusion

The English court's willingness to grant freezing orders, including WWFOs, in support of the arbitral process is an important example of its supportive approach to arbitration and the enforcement of arbitral awards. The power to grant WWFOs both in respect of English and foreign-seated arbitrations is one that is not generally available to claimants in other jurisdictions, where such relief as is available will often confer rights against individual assets rather than the broader *in personam* relief available in England against parties (and sometimes non-parties) to the arbitral process. The English court recognises that if a party is ultimately unable to enforce an award because the respondent has taken steps to 'asset strip' then this would render arbitration pointless. While the ongoing *lacuna* in the law regarding the availability of WWFOs against (foreign) non-parties means the law is ripe for further development, the WWFO is nevertheless a powerful tool available to a party in support of arbitral proceedings in England.

65 Interim measures available pursuant to Article L. 511+11 of the Code of Civil Enforcement Proceedings (https://e-justice.europa.eu/content_procedures_for_enforcing_a_judgment-52-fr-en.do?member=1, accessed 6 March 2019).

66 Federal Act on Debt Collection and Insolvency of 11 April 1889, Articles 271 to 281.

12

Grounds to Refuse Enforcement

Sherina Petit and Ewelina Kajkowska[1]

New York Convention and UNCITRAL Model Law

The central objective of the New York Convention is to facilitate enforcement of foreign arbitral awards by subjecting the enforcement to a limited number of conditions. Under Article V of the Convention, the grounds for refusal to enforce an arbitral award are restricted to a narrow list of defects affecting the arbitral procedure or the award. As analysed in detail in the following two sections, these defects must be of a serious nature and include irregularities such as invalidity of the arbitration agreement, lack of due process or violation of public policy of the enforcement state.

The grounds for refusal to enforce an arbitral award under the UNCITRAL Model Law parallel those enacted in the New York Convention. Article 36 of the UNCITRAL Model Law is virtually identical to Article V of the Convention and subjects the enforcement to the exceptions grounded in the Convention. Three fundamental features of the framework concerned must be identified: (1) exhaustive list of exceptions to enforcement excluding review of the merits of the award; (2) discretion to enforce an award notwithstanding the grounds to refuse enforcement; and (3) preclusion of parties' objections.

With regard to the feature in point (1), above, Article V of the New York Convention (replicated in Article 36 of the UNCITRAL Model Law) provides for an exhaustive list of the objections to enforcement. Under this framework, the recognition and enforcement of the award may be refused 'only if' one of the exceptions applies. Accordingly, a party resisting enforcement cannot successfully bring a defence that is not grounded in the provisions of the New York Convention. In particular, no review of the merits of the award is allowed, and national law cannot be the basis of any such defence against enforcement. The list of possible grounds on which the party may resist enforcement is narrow and allows only for most serious irregularities to form the basis of the party's

1 Sherina Petit is a partner and Ewelina Kajkowska is an associate at Norton Rose Fulbright LLP.

defence. The exclusive character of the exceptions to enforcement means that Article V of the New York Convention must be interpreted narrowly.[2]

Turning to the second feature, both Article V of the New York Convention and Article 36 of the UNCITRAL Model Law are drafted in a permissive, rather than mandatory fashion. The provisions in question state that enforcement 'may be' (rather than 'shall be') refused on one of the specified grounds. Consistent with the pro-enforcement policy of the New York Convention, nothing in that act requires a contracting state to deny enforcement of the award. Instead, the court may overrule the defence to enforcement and give effect to the award, even if one of the objections in Article V of the New York Convention has been established. This notion of the enforcing court's autonomy has far-reaching consequences. It allows the enforcing court to independently assess potential defects of the arbitral award and procedure and, in appropriate circumstances, enforce even those awards that were annulled at the seat.

The third feature of the enforcement framework in question is preclusion of objections to enforcement of the award. In accordance with this principle, a party is barred from invoking Article V defences in the enforcement court, if it failed to bring the relevant objection during the arbitration or before the courts of the arbitral seat. Although the rules governing preclusion are not expressly included in the text of the New York Convention, they are widely recognised in national arbitration laws and considered compatible with the spirit of the Convention.

The rules governing preclusion affect almost every ground specified in Article V of the Convention, most notably, jurisdiction objections are typically required to be raised at the outset of arbitral proceedings. Generally, preclusion may extend to both the objections that should have been raised in arbitration, and the objections that must be first exercised in the foreign state's court proceedings (e.g., for setting aside the award). However, the position on this issue is not consistent in jurisdictions. Under the English authority in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*,[3] a party is not precluded from relying on a given defence in the enforcement proceedings even if it failed to bring the same defence in an action to set aside the award at the seat. A different conclusion has been reached in other jurisdictions, where the courts held that a party who failed to bring certain defects by way of an action to set aside an award may not rely on the same defects in the enforcement procedure.[4]

New York Convention Article V(1)

Article V(1) of the New York Convention prescribes grounds that need to be proven by a party to successfully resist enforcement of the award. It provides that enforcement of the award may be refused if:

- a party to the arbitration agreement was under some incapacity;
- the arbitration agreement was invalid;
- the procedure before the arbitral tribunal was affected by procedural unfairness;

2 A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), pp. 267, 268.

3 [2010] UKSC 46.

4 See P Nacimiento, in H Kronke (et. al), *Recognition and Enforcement of Foreign Arbitral Awards* (Wolters Kluwer 2010) p. 214 in relation to German judiciary.

- the award deals with issues falling outside the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, absent such an agreement, the law of the arbitral seat;
- the award has not yet become binding on the parties; or
- the award has been set aside in the country where it was made.

Each of these grounds is discussed in this chapter.

Incapacity of the party

Under Article V(1)(a) of the New York Convention, an award may be refused enforcement on the basis that the award debtor lacked the capacity to conclude a binding arbitration agreement. Two issues require special attention. First, Article V(1)(a) provides that the parties' capacity must be determined by reference to the law 'applicable to them'. However, the provision does not specify the choice of law rules relevant to this determination, leaving it to the court of the enforcement state to deal with any conflicts of law rules.

Second, Article V(1)(a) of the New York Convention is restricted to lack of capacity to enter into the agreement at the time it was made. It does not deal with any lack of capacity to enter into the underlying contract, or lack of proper representation during the arbitral proceedings. This conclusion is particularly important with regard to those jurisdictions whose arbitration laws require special authority to enter into arbitration agreements.[5]

Lack of valid arbitration agreement

Article V(1)(a) of the New York Convention provides that enforcement of an award may be refused if the arbitration agreement was not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. This provision is the expression of a consensual nature of arbitration and one of the commonly invoked grounds for refusal of enforcement for want of jurisdiction.

As has already been mentioned, it is commonplace in modern arbitration legislation and institutional arbitration rules that an objection to a tribunal's jurisdiction must be raised promptly, failing which it will be considered waived. As a consequence, the enforcement court hearing the defence under Article V(1)(a) of the Convention is likely to be presented with the consideration of the same issue by the arbitral tribunal and, in appropriate circumstances, possibly also by the court of the arbitral seat. Importantly, however, under the New York Convention, the enforcement court is empowered to undertake an independent analysis of the validity of the arbitration clause.

Notably, Article V(1)(a) contains a conflicts of law rule, which states that the law governing the validity of an arbitration clause should be the law chosen by the parties. Absent a parties' choice, the applicable law is that of the arbitral seat.

The parties' choice of law applicable to their arbitration agreement may be express or implied and the Convention does not provide for any restrictions in this regard. Absent an express choice as to the law governing the arbitration agreement, the applicable law is

5 See, e.g., Article 4(1) of the UAE Arbitration Law.

typically considered to be the same as the law governing the remainder of the contract. However, failure to specify the law applicable to the arbitration clause may result in a different law being applicable, based on the presumption that an arbitration agreement is separable from the main contract.[6]

Procedural unfairness

Article V(1)(b) provides a basis for refusal of enforcement of an award if the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his or her case. The defence concerned applies in circumstances where the arbitral procedure was tainted by procedural unfairness. Irregularity contemplated in the above provision must be sufficiently serious to be taken into account. In particular, the defence will not typically be successful if it is beyond doubt that the award could not have been different, notwithstanding the irregularity.

The variety of issues emerging in the jurisprudence of the national courts applying this ground goes beyond the scope of this chapter. However, it is important to note that the enforcement courts in the developed arbitral jurisdictions tend to defer to arbitrators' procedural decisions and the application of Article V does not typically interfere with procedural informality and flexibility of arbitration. By way of example, omission of evidence by a tribunal or an order to discontinue document production do not on their own satisfy the ground in Article V(1)(b) of the New York Convention.

Active participation in arbitration, notwithstanding procedural defects, may result in waiver of the objection contemplated in Article V(1)(b). On the facts of the English decision in *Minmetals Germany GmbH v. Ferco Steel Ltd*,[7] the party resisting enforcement of an award failed to avail itself of an opportunity to challenge the findings of fact resulting from the investigations undertaken by the arbitrators. The court held that the party waived its right to object by failing to contest the improperly acquired evidence in the course of arbitral proceedings by calling upon the courts of the country concerned to exercise their supervisory jurisdiction. It was concluded that, in such circumstances, no substantial injustice would result from enforcement of the award.

Unlike Article V(1)(a), Article V(1)(b) of the New York Convention does not contain any indication as to the law governing the determination of procedural unfairness. According to the accepted view, the standard of due process for the purposes of Article V(1)(b) is that of the enforcing state. However, the relevant measure must take into account the specificity and international character of arbitration. In particular, having contracted for arbitration, the parties should not expect the same procedural safeguards as those available in the domestic judicial forum.

6 This conclusion has been reached (albeit in the context of an anti-suit injunction) in the English Court of Appeal decision in *Sulamerica CIA Nacional de Seguros SA and others v. Enesa Engenharia SA and others* [2012] EWCA Civ. 638.

7 [1999] 1 All ER (Comm.) 315.

Excess of authority

Article V(1)(c) of the New York Convention is concerned with awards that decide issues falling outside the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration. Article V(1)(c) deals with jurisdictional defects in circumstances where the arbitrators have exceeded their mandate (as opposed to complete lack of jurisdiction, is governed by Article V(1)(a)). In particular, this provision covers awards *ultra petitum* (i.e., where the arbitrators granted relief not requested by the party). However, if the tribunal fails to address all the issues presented to it (award *infra petitum*), the resulting incomplete award is not covered by the language of Article V(1)(c). In these circumstances, the party may resist enforcement of an award on other grounds (e.g., Article V(1)(d)).

Despite the specific wording of the provision, it is widely accepted that Article V(1)(c) also deals with the excess of the arbitrators' authority, and not merely with the scope of the request submitted to arbitration.[8] The provision would therefore be engaged if the award in question decides issues that do not fall within the ambit of the relevant arbitration clause.

Unlike in the case of Article V(1)(a) providing that validity of arbitration agreements should be primarily determined under the law chosen by the parties, there is no guidance in the New York Convention regarding the law applicable to the assessment of the scope of the arbitrators' jurisdiction. The absence of any conflicts of law provision is particularly problematic in circumstances where the scope of the arbitrators' mandate raises issues of interpretation of the arbitration agreement.

As with other jurisdictional objections, a party can waive the defence in Article V(1)(c) by failing to raise a timely objection.

Composition of a tribunal or arbitral procedure not in accordance with the parties' agreement

Article V(1)(d) of the New York Convention is concerned with cases in which the composition of the arbitral tribunal or the arbitral procedure were not in accordance with the agreement of the parties, or, in the absence of such an agreement, with the law of the arbitral seat. The provision confirms the consensual nature of the arbitral procedure, with the law of the seat playing a subsidiary role. The parties have autonomy in determining the procedure to govern their arbitration and may select the national rules of any country, agree to their own rules or refer to the rules of an arbitration institution.

In circumstances where the parties have agreed that their proceedings will be governed by institutional rules, the procedural discretion of the arbitrators warranted by those rules often renders the defence based on the first prong of Article V(1)(d) inoperative. As has already been mentioned, the courts are not prepared to police arbitrators' procedural decisions and a review on this basis is frequently limited.[9] Conversely, the second prong of Article V(1)(d) of the Convention is a more frequently invoked ground and provides a

8 A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), pp. 314, 315 with reference to the English and French texts of the Convention.

9 The alleged failure to follow the China International Economic and Trade Arbitration Commission Rules as parties' agreed procedures has been rejected on English authority in *Minmetals Germany GmbH v. Ferco Steel Ltd* [1999] 1 All ER (Comm.) 315.

substantial defence in cases where the composition of the tribunal was not in compliance with the parties agreement.

Similarly to the defence under Article V(1)(b) concerning procedural unfairness, in most instances the defence in Article V(1)(d) will be considered waived, if not raised promptly.

The award is not yet binding

Under Article V(1)(e) of the New York Convention, an award may be denied enforcement if it has not yet become binding on the parties.

The New York Convention eliminated the 'double *exequatur*' requirement prevalent under the enforcement regime of the Geneva Convention. Essentially, double *exequatur* meant that a party seeking enforcement of an award had to prove that it had become 'final' in the country it was made, and the country in which enforcement was sought. This could only be proven by obtaining an *exequatur* (i.e., leave for enforcement) in both countries. Courts and practitioners found this to be an unnecessary, time-consuming hurdle.

The New York Convention accomplished the removal of the double *exequatur* in two ways. First, it replaced the word 'final' with the word 'binding', to indicate that it was not necessary to prove an award was 'final' in the country it was issued. Second, it shifted the burden of proof from the party seeking enforcement to the party against whom enforcement is sought – to prove that the award has not become binding.[10] Nonetheless, the meaning of the word 'binding' remains controversial and it unclear whether it should be considered binding according to the law of the country of origin or where enforcement is sought.

Annulment of the award at the seat

Under Article V(1)(e) of the New York Convention, the court may refuse to enforce an award annulled by the court of the arbitral seat. However, as has already been mentioned, the discretionary nature of Article V leaves room for national courts to give effect even to those awards that have been set aside at the seat.

There is no guidance in the Convention as to the requirements that a court should take into account when deciding whether to enforce an annulled award. In the absence of an international standard, the courts in different jurisdictions have taken diverging approaches to this matter. In most jurisdictions, there is an increasingly high burden to satisfy when seeking to enforce an annulled award. In summary, the circumstances in which the enforcement is permissible include:

- the annulment procedure being tainted by serious procedural irregularity or otherwise contrary to basic principles of honesty or natural justice;
- an annulment based on local public policy standards or other local standards of review; and
- the annulment being a result of an extensive substantive review.

An example of the above approach is an English decision in *Yukos Capital SARL v. OJSC Rosneft Oil Company*,[11] in which several arbitral awards were given effect despite them

10 A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), p. 267.

11 [2014] EWHC 2188 (Comm.).

being set aside in Russia. However, a different result was reached in *Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat*,[12] in which the court refused to give effect to an arbitral award set aside in Russia. Absent cogent evidence of actual (rather than apparent) bias, the court relied on the Russian annulment and denied enforcement. Notably, the same conclusions were reached by the Dutch courts in analogous cases concerning the same awards as considered by the English courts in the above-mentioned cases.

The US courts apply a similar approach. In *Chromalloy Aeroservices v. Arab Republic of Egypt*,[13] the award concerned was set aside in Egypt following a detailed substantive review. The 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. More recently, the court gave effect to an annulled award in *Corporación Mexicana de Matenimiento Integral, S De RL De CV v. Pemex-Exploración y Producción*.[14] The arbitral award in question was 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.[15]

Different considerations apply in circumstances where annulment of an award is not one of the grounds for refusing enforcement under the national legislation of the enforcing court. In such instances, Article VII of the New York Convention enables contracting states to apply a more liberal domestic regime for enforcement of arbitral awards. This is the case in France, where the approach to enforcement of annulled awards is characteristically less restrictive.[16]

New York Convention Article V(2)

Article V(2) of the New York Convention provides that the court may refuse enforcement if it finds that the dispute was not arbitrable under the law of the state where the enforcement is sought or if the enforcement is contrary to the public policy of that state. The grounds in Article V(2) may be taken into account by a court on its own motion.

Non-arbitrability of the dispute

Article V(2)(a) provides that enforcement of an award can be refused if the subject matter is not capable of being arbitrated under the laws of the enforcing state.

There is no international definition or uniform standard of non-arbitrable matters. A matter is considered to be non-arbitrable if mandatory national laws provide that certain issues are to be decided only by domestic courts. Although variations exist from country to country, some common examples of non-arbitrable matters include certain categories of

12 [2017] EWHC 1911 (Comm.).

13 939 F. Supp. 907, 912-13 (DDC 1996).

14 No. 13-4022 (2d Cir. Aug. 2, 2016).

15 The court's discretion was based on Article 5(1) of the Inter-American Convention on International Commercial drafted in a similarly non-mandatory manner as Article V(1)(e) of the New York Convention.

16 See the seminal decision in *Hilmarton v. Omnium* (Court of Cassation, first civil chamber, Case No. 92-15.137 (23 March 1994)), in which the French Court of Cassation permitted enforcement of an arbitral award that has been set aside in Switzerland. See further S Petit, B Grant 'Awards set aside or annulled at the seat', *International Arbitration Report* (Issue 10, May 2018), pp. 20 to 22.

criminal disputes, family law matters, bankruptcy, antitrust claims, employment grievances, sanctions and intellectual property disputes.

The reference in the New York Convention to the national law of the enforcing state may suggest that the non-arbitrability ground has given leeway to contracting states to designate particular subject matters, or claims and defences, as non-arbitrable. However, there are only a limited number of cases in which enforcement has been denied on the ground of non-arbitrability.[17]

Furthermore, national courts, particularly in the context of international arbitrations (as opposed to domestic arbitrations where non-arbitrability is given a broader meaning), generally take the view that a clear statement of legislative intent is needed before determining that a subject matter is non-arbitrable under Article V(2)(a) of the Convention.[18] Accordingly, this has led commentators to state that 'arbitrability is the rule, inarbitrability is the exception'.[19]

Violation of public policy

Article V(2)(b) of the New York Convention provides that an award may be denied enforcement if it is contrary to the public policy of the state in which enforcement is sought. The notion of public policy is not defined in the Convention and its meaning varies between the contracting states. Of all the grounds prescribed in Article V, the public policy exception is probably the most unsettled, owing to its indeterminate and evolving nature. Accordingly, various studies have been undertaken to draw up a catalogue of irregularities giving rise to public policy exceptions in different jurisdictions, while underlining the open nature of this notion.

The International Bar Association's 'Report on the Public Policy Exception in the New York Convention' confirms no uniformity in the extent of review of an award by the enforcing courts.[20] Notwithstanding the localised nature of the public policy exception, many jurisdictions define it narrowly, in line with the Convention pro-enforcement approach. The violation concerned must therefore be considered sufficiently serious to warrant the refusal of enforcement. A noteworthy example of this trend can be observed in *Sinocore International Co Ltd v. RBRG Trading (UK) Ltd*.[21] In this case, the English Commercial Court held that the public interest in the finality of arbitration awards outweighed an objection to enforcement on the grounds that the transaction was 'tainted' by fraud.

17 One of the reasons for this is that disputes relating to arbitrability often tend to arise and be resolved at the stage of enforcing the arbitration agreement.

18 For instance, the Canadian Supreme Court in *Editions Chouette Inc. v. Desputeaux* [2003] SCC 17 stated that, '[i]f Parliament had intended to exclude arbitration in copyright matters, it would have clearly done so'.

19 B Hanotiau, O Caprasse, Public Policy in International Commercial Arbitration, in E Galliard, D di Pietro (eds), Enforcement of Arbitration Agreements and International Arbitral Awards: The New York Convention in Practice 819 (Cameron May 2008) p. 819.

20 See International Bar Association, 'Report on the Public Policy Exception in the New York Convention', October 2015, p. 18, https://www.ibanet.org/LPD/Dispute_Resolution_Section/Arbitration/Recogntn_Enfrcemnt_Arbitl_Awrd/publicpolicy15.aspx (accessed 18 February 2019).

21 [2017] EWHC 251 (Comm), per Phillips J. See also *Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd* [2000] QB 288.

However, certain countries continue to maintain parochial approaches to the public policy exception. In those jurisdictions, public policy can be used opportunistically by award debtors as a gateway to review the merits of the award. However, a reassuring trend can be observed towards a more curtailed application of the public policy exception in those jurisdictions that have traditionally displayed idiosyncratic approaches to the interpretation of the New York Convention.[22] A notable example is the Indian judiciary which once endorsed an expansive definition of public policy to include even a mere error of law, but has now aligned its application of this ground with the generally accepted view that the public policy exception must be interpreted narrowly.[23]

Given the role of public policy as an exceptional device, issues of waiver and preclusion of the relevant objection are treated differently from other grounds. Public policy is a matter that a court can take into account on its own motion. Further, it is based principally on the national law of the enforcement court, which may render recourse to the courts of the arbitral seat inadequate. Consequently, failure to seek annulment of the award on public policy grounds should not preclude a party from resisting enforcement on the same basis. Similarly, failure to raise the public policy argument in arbitral proceedings should not constitute a bar to consider the same by the enforcing court. However, different considerations may apply if the arbitrators considered an argument based on public policy and rejected it. In such circumstances, certain courts have considered themselves bound by the arbitrators' findings and refused to entertain the public policy argument *de novo*.[24]

Non-New York Convention enforcement

The New York Convention governs enforcement and recognition of arbitral awards within contracting states, of which there are currently 159. Given an almost universal remit of the Convention, instances in which arbitral awards are subjected to a non-New York Convention enforcement regime are inevitably rare. However, in circumstances where a more favourable, alternative enforcement regime is available to a party seeking to enforce an arbitral award, Article VII of the Convention provides that the treaty more advantageous to enforcement should prevail. The same applies to a more favourable domestic law.

When no international regime is available,[25] a party seeking enforcement of an arbitral award will have to rely on the domestic legislation of the enforcing state. Some jurisdictions incorporate the New York Convention grounds into their domestic framework by repeating the relevant provisions in national legislation, without distinguishing between Convention awards and non-Convention awards. This approach has been adopted in the UNCITRAL Model Law. In such instances, the framework originating from the New York Convention will apply with minor or no modalities incorporated in the national legislation.[26]

---

22 P Stothard, A Biscarro, 'Public policy as bar to enforcement', *International Arbitration Report* (Issue 10, May 2018), pp. 23, 24.

23 *Cruz City 1 Mauritius Holdings v. Unitech Limited*, 11 April 2017, EX.P.132/2014 & EA(OS) Nos. 316/2015, 1058/2015, 151/2016, 670/2016.

24 *Westacre Investments Inc v. Jugoimport SDPR Holding Co Ltd* [2000] QB 288.

25 e.g., as a result of the reciprocity reservation under Article I(3) of the New York Convention and in the absence of a regional convention or bilateral treaty dealing with enforcement of foreign awards.

26 Notable examples include Switzerland or France, albeit the latter does not track verbatim the language of the UNCITRAL Model Law.

However, a number of states prescribe different enforcement rules for Convention awards and non-Convention awards. A notable example of the latter approach is the English Arbitration Act 1996.[27] Consequently, in circumstances where a foreign arbitration award is not a New York Convention award, a variety of provisions under which it can be enforced in England may apply.[28]

Other examples of subjecting enforcement to the requirements extrinsic to those prescribed in the New York Convention are less straightforward and include deviating from the Convention standard. This may occur primarily by way of (1) application of internationally recognised non-New York Convention grounds for refusal of enforcement; (2) disregard of the New York Convention by the courts of the contracting states, contrary to their international law obligations; and (3) enacting in national legislation grounds for refusal of enforcement inconsistent with the New York Convention.

The most notable example of the practice described in point (1), above, is defence of state immunity. In most jurisdictions, foreign states are granted certain immunities (typically from suit and execution) that protect them against proceedings brought against them before the courts of another state. Although the defence of state immunity is not mentioned in the New York Convention or the UNCITRAL Model Law, it is frequently invoked in practice by unsuccessful state parties resisting enforcement of awards rendered against them. Pursuant to the widely accepted doctrine, the existence of state immunity depends on whether the acts of the state giving rise to a dispute are regarded as *iure imperii* (understood as the exercise of the state's sovereign functions) or *iure gestionis* (i.e., acts undertaken in the state's commercial capacity).

In England, the position is set out in the State Immunities Act 1978. Section 9 of that Act deals specifically with arbitration and clarifies that where a state has agreed in writing to submit disputes to arbitration, it has waived immunity from both the arbitration proceedings and the arbitration-related proceedings before English courts. A similar rule is adopted internationally. However, notwithstanding the principle that the state is deemed to have waived its immunity from suit by entering into an arbitration agreement, this may not implicate a waiver of the state's immunity from execution. Under English law, waiver of immunity extends to court proceedings relating to the recognition and enforcement of foreign arbitral awards[29] but it does not ordinarily extend to execution measures following recognition and enforcement, for which a separate, explicit waiver of immunity is required (Section 13 of the State Immunities Act 1978).

The second example of a departure from the New York Convention enforcement standard entails disregard of the provisions of the Convention by the courts of the contracting states. Although discrepancies in interpretation are inevitable in any area regulated by way of a transnational legal instrument and over which no supreme body exercises adjudicative power, certain instances of blatant violation of the Convention's

27 Sections 99ff.

28 For an overview, see R Merkin, *Arbitration Law* (Informa 2004) paras. 19.20, 19.21.

29 *Svenska Petroleum Exploration AB v. Government of Republic of Lithuania and AB Geonafta* [2006] EWCA Civ. 1529 at para. 117.

standards have been reported in various jurisdictions.[30] However, these anomalous results are contrary to the practice of the vast majority of the contracting states that adhere to the Convention and uphold its pro-enforcement policy.

Finally, certain states prescribe in their legislation exceptions to enforcement of arbitral awards that depart from the language of, and go beyond the list of exclusions permitted by, the New York Convention. By way of example, Article 459 of the Vietnamese Code of Civil Procedure prohibits enforcement of a foreign arbitral award that is contrary to basic principles of Vietnamese law. In a similar fashion, the new UAE Arbitration Law[31] allows refusal of enforcement of an arbitral award on grounds that are not envisaged in the New York Convention. These include, for example, circumstances where 'the arbitral award excludes the application of the parties' choice of law for the dispute' or 'was not issued within the specified time frame'.[32]

It remains to be seen whether the courts will apply these additional restrictions to enforcement of Convention awards. As emphasised by A J van de Berg, the New York Convention should supersede domestic law concerning the enforcement of foreign awards and should be applied directly (or, as the case may be, by way of reference to the implementing act), leaving no room for the application of *lex fori* of the enforcing court.[33]

30 See examples of Turkish, Indonesian, Chinese and Russian cases in Born, *International Commercial Arbitration* (2nd edn, Kluwer Law International 2014) p. 3716 to 3718.

31 Federal Law No. (6) of 2018 on Arbitration.

32 Articles 53(1)(e), (g) and 55(1)(2) of the UAE Arbitration Law. Pursuant to Article 2, the UAE Arbitration Law applies to (1) arbitration conducted in UAE, (2) international commercial arbitration conducted abroad, if the parties have chosen this law to govern such arbitration, and (3) arbitration arising from a dispute in respect of a legal relationship, whether contractual or not, governed by UAE law. Instances (2) and (3) leave room for application of the New UAE Arbitration Law to foreign arbitration awards.

33 A J van den Berg, *The New York Arbitration Convention of 1958* (Kluwer Law International, 1981), pp. 268 to 270.

13

ICSID Awards

Claudia Annacker, Laurie Achtouk-Spivak, Zeïneb Bouraoui[1]

Introduction

The Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention) establishes a self-contained and autonomous arbitration system. This system includes an internal procedure for the review of ICSID awards and limits the role of domestic courts to the recognition and enforcement of these awards. In recognising and enforcing ICSID awards, the domestic courts of each contracting state to the ICSID Convention are required to enforce the pecuniary obligations imposed by an ICSID award as if it were a final court judgment of the contracting state.

ICSID arbitration is more attractive than ever (49 ICSID arbitrations were initiated in 2018) and the ICSID Convention continues to attract new contracting parties, such as Mexico in 2018 and Iraq in 2015.[2] Yet, the ICSID annulment and enforcement regime faces a number of challenges, some new and others that have been grappled with since inception, spanning the degree of scrutiny of ICSID awards in the annulment process and the recognition and enforcement of investment treaty awards within the European Union.

Annulment of ICSID awards

Overview of grounds for annulment and statistics

Pursuant to Article 53(1) of the ICSID Convention, ICSID awards are not 'subject to any appeal or to any other remedy except those provided for in this Convention'. The ICSID

1 Claudia Annacker is a partner, Laurie Achtouk-Spivak is a counsel and Zeïneb Bouraoui is an associate at Cleary Gottlieb Steen & Hamilton LLP. The views expressed in this chapter are those of the authors and do not necessarily reflect the views of the authors' firm or any of its clients.

2 ICSID, List of Contracting States and Other Signatories of the Convention (as at 27 August 2018), available at https://icsid.worldbank.org/en/Documents/icsiddocs/List%20of%20Contracting%20States%20and%20Other%20Signatories%20of%20the%20Convention%20-%20Latest.pdf.

annulment regime was designed to balance the competing needs for the finality of awards and the necessity 'to prevent flagrant cases of excess of jurisdiction and injustice'.[3] The balance struck is reflected in Article 52(1) of the Convention, which limits the possibility to seek annulment of an ICSID award to five grounds:

> *(a) that the Tribunal was not properly constituted;*
> *(b) that the Tribunal has manifestly exceeded its powers;*
> *(c) that there was corruption on the part of a member of the Tribunal;*
> *(d) that there has been a serious departure from a fundamental rule of procedure; or*
> *(e) that the award has failed to state the reasons on which it is based.*

Annulment under the Convention is thus not an appeal but an 'extraordinary and narrowly circumscribed remedy'.[4]

Ad hoc committee practice confirms the exceptional nature of the annulment mechanism. As at December 2018, the number of ICSID awards that had been rendered is 285. As at the same date, 66 annulment decisions had been issued. Only five ICSID awards were annulled in full, 12 were annulled in part[5] and the vast majority were upheld.

Following mounting criticism that *ad hoc* committees have interpreted their functions too broadly,[6] their practice has evolved towards a more restrictive approach to annulment. Whereas the annulment rate was at 13 per cent for the years 1971 to 2000, it dropped to 8 per cent for the years 2001 to 2010 and was as low as 3 per cent for the years 2011 to 2018.[7] However, parties continue to seek annulment, with 52 per cent of all annulment applications having been registered since January 2011.[8]

---

3 A Broches, Awards Rendered Pursuant to the ICSID Convention: Binding Force, Finality, Recognition, Enforcement, Execution, ICSID Review – Foreign Investment Law Journal (1987), Vol. 2, Issue 2, p. 290.

4 A Broches, 'Observations on the Finality of ICSID Awards', *ICSID Review – Foreign Investment Law Journal* (1991), Vol. 6, Issue 2, p. 327; see e.g., *Wena Hotels Ltd v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Decision on Annulment (5 Feb 2002) [*Wena Hotels*], para. 18; *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on Annulment (3 Jul 2002) [*Vivendi I*], paras. 62, 64; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment (21 Mar 2007), para. 31; *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Decision on Annulment (25 Mar 2010) [*Rumeli*], para. 70.

5 The outcome of one annulment proceeding (*Tenaris S.A. and Talta – Trading e Marketing Sociedade Unipessoal Lda v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Decision on Annulment (8 Aug 2018)) remains unknown.

6 e.g., C H Schreuer, 'From ICSID Annulment to Appeal Half Way Down the Slippery Slope', *The Law and Practice of International Courts and Tribunals* (2011), Vol. 10, pp. 222 to 224.

7 ICSID Annual Report 2018, available at https://icsid.worldbank.org/en/Documents/resources/2018ICSIDAnnualReport.ENG.pdf.

8 ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (5 May 2016), para. 33.

Procedure

The application

A party seeking the annulment of an ICSID award must submit an application in writing, addressed to the Secretary General of ICSID. Except when annulment is requested based on corruption on the part of a member of the tribunal, the application must be made within 120 days of the date on which the award was rendered.[9]

The request for annulment must specify the grounds under Article 52(1) of the Convention on which it is based. Only ICSID awards are subject to annulment. Decisions on jurisdiction or liability – in cases of bifurcation – may only be challenged upon issuance of the final award.[10] The Secretary General's power to refuse registration is limited to applications filed after expiry of the time limit.[11]

The ad hoc committee

Ad hoc committees are composed of three persons who are appointed by the chairman of the administrative council from the Panel of Arbitrators.[12] Committee members cannot have the same nationalities as the parties or the original tribunal members, and cannot be designated to the Panel of Arbitrators by the state party to the dispute or the investor's home state.[13]

The Convention's provisions on the procedural powers of an ICSID tribunal and the ICSID Arbitration Rules are generally applicable *mutatis mutandis* in annulment proceedings.[14]

An *ad hoc* committee has the authority to annul an award, in whole or in part, on any of the grounds set forth in Article 52(1) of the Convention.[15] An *ad hoc* committee is not empowered to decide the underlying dispute. Instead, if an award is annulled, the dispute may be submitted to a new ICSID tribunal upon request of either party.[16]

The first *ad hoc* committee constituted under the Convention, the *Klöckner I* committee, considered that, 'save under exceptional circumstances', a finding of one of the grounds for annulment in Article 52(1) of the Convention requires it to annul the award.[17] Later committees have generally held that they enjoy a measure of discretion in 'refus[ing] to exercise [their] authority to annul an award where annulment is clearly not required to remedy procedural injustice and annulment would unjustifiably erode the binding force and finality of ICSID awards'.[18] However, a number of committees have

9 ICSID Convention, Art. 52(2).

10 R Doak Bishop, Silvia M Marchili, *Annulment Under the ICSID Convention* (2012), para. 4.01.

11 ICSID Arbitration Rules, Rule 50(3)(b).

12 ICSID Convention, Art. 52(3).

13 ibid.

14 ICSID Convention, Art. 52(4); ICSID Arbitration Rules, Rule 53.

15 ICSID Convention, Art. 52(3).

16 ICSID Convention, Art. 52(6).

17 *Klöckner Industrie-Anlagen GmbH and others v. United Republic of Cameroon and Société Camerounaise des Engrais*, ICSID Case No. ARB/81/2, Decision on Annulment (3 May 1985) [*Klöckner I*], para. 179.

18 *Maritime International Nominees Establishment (MINE) v. Republic of Guinea*, ICSID Case No. ARB/84/4, Decision on the Application by Guinea for Partial Annulment of the Arbitral Award dated 6 January 1988 (22 Dec 1989) [*MINE*], para. 4.10; see also *Amco Asia Corporation and others v. Republic of Indonesia*

taken the view that if an error significantly affected the legal rights of the parties, such as a serious departure from a fundamental rule of procedure, they no longer have discretion not to annul.[19]

Grounds for annulment

Improper constitution of a tribunal

Overview

Pursuant to Article 52(1)(a) of the Convention, annulment of an ICSID award may be sought on the ground that 'the Tribunal was not properly constituted'.

Article 52(1)(a) has been rarely invoked: only 10 *ad hoc* committee decisions have addressed this annulment ground and none has annulled an ICSID award on the basis of this ground.[20] Nine *ad hoc* committees rejected the applicant's allegation that the arbitral tribunal had not been properly constituted, and one *ad hoc* committee annulled the award on the ground that the tribunal manifestly exceeded its powers, without addressing the challenge to the constitution of the arbitral tribunal.[21]

The notion of 'proper constitution' of an arbitral tribunal has been interpreted as referring to the principles set forth in Chapter IV, Section 2 of the Convention that govern the constitution of the arbitral tribunal.[22] Applicants on annulment have either challenged a decision on a previous request for disqualification made during the course of the arbitration or raised a ground for disqualification for the first time in the application for annulment.

Ad hoc committee practice

Ad hoc committees have rejected requests for annulment based on a circumstance that a party knew or should have known during the pendency of the arbitration, but failed to make an application for disqualification in a timely manner.[23] *Ad hoc* committees have also refused to second-guess decisions on requests for disqualification of an arbitrator made during the

---

(Amco II), ICSID Case No. ARB/81/1, Decision on the Applications by Indonesia and Amco Respectively for Annulment and Partial Annulment (17 Dec 1992) [*Amco II*], para. 1.20; *Vivendi I*, para. 66; *EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic*, ICSID Case No. ARB/03/23, Decision on Annulment (5 Feb 2016), para. 73; see also ICSID Updated Background Paper on Annulment for the Administrative Council of ICSID (5 May 2016), paras. 62, 74; R Doak Bishop, Silvia M Marchili, *Annulment Under the ICSID Convention* (2012), paras. 4.14 to 4.24.

19 *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Annulment (29 Jun 2005) [*CDC*], note 71; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Decision on Annulment (30 Dec 2015) [*Tulip*], para. 79.

20 ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (5 May 2016), para. 79.

21 *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Application for Annulment of the Award (29 Jun 2010) [*Sempra*].

22 L Achtouk-Spivak, 'Les Voies de Recours dans l'Arbitrage en Matière d'Investissements', in C Leben (ed.), *Droit International des Investissements et de l'Arbitrage Transnational* (2015) p. 902.

23 *Compagnie d'Exploitation du Chemin de Fer Transgabonais v. Gabonese Republic*, ICSID Case No. ARB/04/5, Decision on Annulment (11 May 2010), para. 130; see also C H Schreuer et al., *The ICSID Convention: A Commentary* (2009), p. 937, paras. 127 and 128.

pendency of the arbitration. For example, the *Azurix v. Argentina* committee rejected such a request, noting that it 'cannot decide for itself whether or not a decision under Article 58 was correct, as this would be tantamount to an appeal against such a decision'.[24]

Manifest excess of powers

Overview

Pursuant to Article 52(1)(b) of the Convention, a party may seek the annulment of an award on the ground that 'the Tribunal has manifestly exceeded its powers'.

The drafting history of the Convention suggests that this ground for annulment was intended to apply 'where a decision of the tribunal went beyond the terms of the compromise or compromissory clause'.[25] *Ad hoc* committees have extended the scope of application of this ground to (1) lack of jurisdiction, (2) failure to exercise jurisdiction and (3) failure to apply the law applicable to the dispute.

An excess of powers must be manifest to give rise to annulment. The term 'manifest' was added to Article 52(1)(b) of the Convention upon a proposal by Germany to curtail the risk of frustration of awards.[26] Most applications for annulment invoke manifest excess of powers, and most successful annulments are based on this ground. *Ad hoc* committees have annulled four awards in their entirety[27] and six awards in part[28] for manifest excess of powers.

Evolution of ad hoc committee practice

Ad hoc committees have grappled with the degree of scrutiny to be exercised in assessing whether an ICSID tribunal manifestly exceeded its powers. Specifically, some *ad hoc* committees have taken the view that to be 'manifest', the excess of powers must be flagrant or obvious.[29] By contrast, other committees have considered that the excess of

---

24 *Azurix Corp. v. The Argentine Republic*, ICSID Case No. ARB/01/12, Decision on Annulment (1 Sep 2009) [*Azurix*], para. 282.

25 ICSID, 'History of the ICSID Convention': Vol. II-1 (2006), p. 517; See L Achtouk-Spivak, 'Les Voies de Recours dans l'Arbitrage en Matière d'Investissements', in C Leben (ed.), *Droit International des Investissements et de l'Arbitrage Transnational* (2015), pp. 904 and 905.

26 ICSID, 'History of the ICSID Convention': Vol. II-1 (2009), p. 423.

27 *Mr Patrick Mitchell v. Democratic Republic of the Congo*, ICSID Case No. ARB/99/7, Decision on the Application for Annulment of the Award (1 Nov 2006) [*Mitchell*]; *Klöckner I*; *Sempra*; *Malaysian Historical Salvors, SDN, BHD v. The Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 Apr 2009) [*MHS*].

28 *Amco Asia Corporation and others v. Republic of Indonesia*, ICSID Case No. ARB/81/1, Decision on Annulment (16 May 1986) [*Amco I*]; *Vivendi I*; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Application for Annulment of the Argentine Republic (30 Jul 2010) [*Enron*]; *Helnan International Hotels A/S v. Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision of the *ad hoc* committee (14 Jun 2010) [*Helnan*]; *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Decision on Annulment (2 Nov 2015) [*Occidental*]; *Venezuela Holdings, B.V., et al v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Annulment (9 Mar 2017) [*Venezuela Holdings*].

29 See e.g., *Azurix*, para. 68; *Rumeli*, para. 96; *Caratube International Oil Company LLP v. The Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision on the Annulment Application of Caratube International Oil Company LLP (21 Feb 2014), para. 84; *Central European Aluminium Company (CEAC) v. Montenegro*, ICSID Case No. ARB/14/8, Decision on Annulment (1 May 2018) [*CEAC*], para. 87; *Standard Chartered*

powers relates to the seriousness of the excess, rather than its clarity.[30] A third category of annulment decisions attempts to reconcile these competing approaches. After noting that 'a strict opposition between two different meanings of "manifest" – either "obvious" or "serious" – is an unnecessary debate', the *Soufraki v. United Arab Emirates* committee, for example, required that 'the excess of power should at once be textually obvious and substantively serious'.[31]

Ad hoc committees have found a manifest excess of powers where the tribunal:

- awarded compensation for a portion of an investment that was beneficially owned by an investor not protected under the applicable bilateral investment treaty (BIT);[32]
- held that the operation of a law firm qualified as an investment under Article 25 of the Convention and the applicable BIT;[33]
- failed to exercise jurisdiction over BIT claims on the ground that it would have to address contractual issues that, according to a concession contract between the claimant and the respondent state, fell within the exclusive jurisdiction of the respondent state's courts;[34]
- declined jurisdiction on the ground that a maritime salvage contract does not qualify as an investment under Article 25 of the Convention;[35]
- failed to apply the customary international law rule reflected in Article 25 of the International Law Commission's Articles on State Responsibility (Necessity) as the proper law applicable to the analysis of the respondent state's necessity defence;[36] or
- reasoned that a finding of a breach of the applicable BIT was conditional upon the claimant's exhaustion of local remedies.[37]

Corruption on the part of a member of the tribunal

Article 52(1)(c) of the Convention allows a party to seek annulment of an ICSID award on the ground that 'there was corruption on the part of a member of the Tribunal'. Attempts during the negotiations of the Convention to replace 'corruption' with 'bias', 'misconduct' or 'lack of integrity' did not succeed.[38] An application on annulment must establish bias of

---

Bank (Hong Kong) Limited v. Tanzania Electric Supply Company Limited, ICSID Case No. ARB/10/20, Decision on Annulment (22 Aug 2018) [*Standard Chartered Bank*], para. 181; *Mitchell*, para. 20.

30 *Vivendi I*, para. 86; *Duke Energy International Peru Investments No. 1 Ltd v. Republic of Peru*, ICSID Case No. ARB/03/28, Decision on annulment (1 Mar 2011), para. 229.

31 *Hussein Nuaman Soufraki v. The United Arab Emirates*, ICSID Case No. ARB/02/7, Decision of the *ad hoc* committee on the Application for Annulment of Mr Soufraki (5 Jun 2007), para. 40; see also *Malicorp Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Decision on the Application for Annulment of Malicorp Limited (3 Jul 2013) [*Malicorp*], para. 56; *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Decision of the *ad hoc* committee on the Application for Annulment (29 Jun 2012), paras. 31, 32.

32 *Occidental*, para. 266.

33 *Mitchell*, para. 40.

34 *Vivendi I*, para. 115.

35 *MHS*, para. 80.

36 *Enron*, paras. 393 to 395; *Sempra*, para. 120.

37 *Helnan*, para. 9.

38 ICSID, 'History of the ICSID Convention': Vol. II-2 (2006), pp. 851 and 852.

a member of the tribunal owing to the acceptance of improper payment.[39] To date, this ground has not been invoked in an ICSID annulment proceeding.

Serious departure from a fundamental rule of procedure

Overview

Pursuant to Article 52(1)(d), the annulment of an ICSID award may be sought on the ground that 'there has been a serious departure from a fundamental rule of procedure'.[40] The Convention does not define the term 'fundamental rule of procedure'. The Convention's drafting history shows that this ground was meant to cover principles of natural justice, namely principles essential to the integrity of the arbitral process, such as the parties' right to be heard and the equal treatment of the parties.[41]

Article 52(1)(d) is frequently invoked by applicants. *Ad hoc* committees have annulled one award in full,[42] two awards in part[43] and one supplemental decision and rectification[44] on the basis of this ground.

Ad hoc committee practice

Not every violation of a rule of procedure justifies annulment of an award.[45] *Ad hoc* committees apply a dual test to determine whether ICSID awards should be annulled under Article 52(1)(d) of the Convention: the rule of procedure must be fundamental and the violation must have been serious.[46]

In line with the Convention's *travaux préparatoires*, *ad hoc* committees have consistently held that fundamental rules of procedure are those that concern natural justice,[47] such

39 C H Schreuer et al., *The ICSID Convention: A Commentary* (2009), pp. 978 and 979 (para. 273).

40 ICSID Convention, Art. 52(1)(d).

41 ICSID, 'History of the ICSID Convention': Vol. III (2003), p. 273; see also, L Achtouk-Spivak, 'Les Voies de Recours dans l'Arbitrage en Matière d'Investissements', in C Leben (ed.) *Droit International des Investissements et de l'Arbitrage Transnational* (2015), p. 913.

42 *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Application for Annulment of the Republic of Chile (18 Dec 2012) [*Victor Pey Casado I*].

43 *Fraport AG Frankfurt Airport Services Worldwide v. The Republic of the Philippines*, ICSID Case No. ARB/03/25, Decision on Application for Annulment of Fraport AG Frankfurt Airport Services Worldwide (23 Dec 2010) [*Fraport*]; *TECO Guatemala Holdings LLC v. Republic of Guatemala*, ICSID Case No. ARB/10/23, Decision on Annulment (5 Apr 2016) [*TECO*].

44 *Amco II*.

45 ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (5 May 2016), para. 99; see also *Tulip*, para. 71.

46 See, e.g., *Standard Chartered Bank*, para. 387; *Tidewater Investment Srl. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/10/5, Decision on Annulment (27 Dec 2016) [*Tidewater*], para. 160; *TECO*, para. 81; *Libananco Holdings Co. Limited v. Republic of Turkey*, ICSID Case No. ARB/06/8, Decision on Annulment (22 May 2013), paras. 84 to 89; *CDC*, para. 48.

47 e.g., *Alapli Elekrik B.V. v. Republic of Turkey*, ICSID Case No. ARB/08/13, Decision on Annulment (10 Jul 2014), para. 131; *Joseph C Lemire v. Ukraine*, ICSID Case No. ARB/06/18, Decision on Ukraine's Application for Annulment of the Award (8 Jul 2013) [*Lemire*], para. 263; *Daimler Financial Services A.G. v. Republic of Argentina*, ICSID Case No. ARB/05/1, Decision on Annulment (7 Jan 2015) [*Daimler*], para. 265; *Togo Electricité et GDF-Suez Energie Services v. La République Togolaise*, ICSID Case No. ARB/06/07, Decision on Annulment (6 Sep 2011), para. 59.

as the principle of equal treatment of the parties,[48] the parties' right to be heard,[49] the independence and impartiality of the arbitral tribunal,[50] deliberations among the members of the tribunal,[51] or the proper handling of evidence and allocation of the burden of proof.[52]

For an award to be annulled under Article 52(1)(d) of the Convention, the violation of a fundamental rule of procedure must be serious. A determination of the seriousness of a procedural violation is necessarily case-specific, requiring the committee to assess the conduct of the particular arbitral proceeding.[53] *Ad hoc* committees are divided on the question of whether the violation of a fundamental rule of procedure must have had a material effect on the outcome of the case. Some *ad hoc* committees, such as the *Wena Hotels v. Egypt* committee, took the view that the violation of a fundamental rule of procedure is serious only if the tribunal would have reached a substantially different result had the rule been respected.[54]

By contrast, other committees, such as the *Occidental v. Ecuador* committee, have held that an applicant is 'not required to prove that the violation of the rule of procedure was decisive for the outcome, or that the applicant would have won the case if the rule had been applied'.[55] Rather, it is sufficient that the violation had the potential to have a material effect on the outcome of the case.[56]

Whether an applicant on annulment has to show that the departure of a fundamental rule of procedure had a material effect, or had the potential to have a material effect, on the outcome of the award will depend on the circumstances of the case. For example, the *Kiliç v. Turkmenistan* committee confirmed that if the tribunal violated a party's right to be heard, it is sufficient for an *ad hoc* committee to rely on the potential material effect of the award since 'it will never be known whether the tribunal would have decided differently had it heard the party in question'.[57]

---

48 e.g., *Malicorp*, para. 36; *Iberdrola Energía S.A. v. Republic of Guatemala*, ICSID Case No. ARB/09/5, Decision on Annulment (13 Jan 2015) [*Iberdrola*], para. 105; *Tulip*, paras. 72, 84, 145.

49 e.g., *Wena Hotels*, para. 57; *Empresas Lucchetti, S.A. and Lucchetti Peru, S.A. v. The Republic of Peru*, ICSID Case No. ARB/03/4, Decision on Annulment (5 Sep 2007), para. 71; *Fraport*, para. 197; *Occidental*, para. 60.

50 e.g., *Wena Hotels*, para. 57; *CDC*, paras. 51 to 55; *Total S.A. v. The Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Annulment (1 Feb 2016) [*Total*], paras. 309, 314.

51 e.g., *Daimler*, paras. 297 to 303; *Iberdrola*, para. 105; *Total*, paras. 309, 314.

52 e.g., *Wena Hotels*, paras. 59 to 61; *Iberdrola*, para. 105; *Total*, paras. 309, 314.

53 ICSID, 'Updated Background Paper on Annulment for the Administrative Council of ICSID' (5 May 2016), para. 100.

54 *Wena Hotels*, para. 58; *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Decision on the Application for Annulment (8 Jan 2007), para. 81; *CDC*, para. 49; *Fraport*, para. 246; *Impregilo S.p.A. v. Argentine Republic*, ICSID Case No. ARB/07/17, Decision of the *ad hoc* committee on the Application for Annulment (24 Jan 2014), para. 164; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Decision of the *ad hoc* committee on the Application for Annulment of the Argentine Republic (22 Sep 2014) [*El Paso*], para. 221; *Iberdrola*, para. 104; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Annulment (15 Jan 2016), para. 208; *Ioan Micula, Viorel Micula, S.C. European Food S.A, S.C. Starmill S.R.L. and S.C. Multipack S.R.L. v. Romania*, ICSID Case No. ARB/05/20, Decision on Annulment (26 Feb 2016) [*Micula*], para. 134.

55 *Occidental*, para. 62; see also *CEAC*, para. 213; *TECO*, para. 85.

56 *CEAC*, para. 93; *TECO*, paras. 85, 193.

57 *Kiliç İnsaat İthalat İhracat Şanayi Ve Ticaret Anonim Şirketi v. Turkmenistan*, ICSID Case No. ARB/10/1, Decision on Annulment (14 Jul 2015) [*Kiliç*], para. 70.

Failure to state reasons on which the award is based

Overview

Article 52(1)(e) of the Convention allows a party to an ICSID arbitration to seek the annulment of an award on the basis that 'the award has failed to state the reasons on which it is based'. The Convention's drafting history shows that a tribunal's failure to address every issue submitted to it by the parties does not necessarily warrant annulment.[58] Neither the Convention nor its drafting history provides further guidance as to when a failure to state reasons has occurred. *Ad hoc* committees have held that an ICSID tribunal fails to state reasons within the meaning of Article 52(1)(e) when: '(i) the failure to state reasons leaves the decision on a particular point essentially lacking in any expressed rationale, and that point was itself necessary to the tribunal's decision, or (ii) the tribunal stated contradictory reasons that completely cancel each other out, leaving the award with a total absence of reasons'.[59]

This ground for annulment was invoked in more than 95 per cent of the cases that led to a decision on annulment. The 63 applications for annulment that invoked a failure to state reasons resulted in two awards being annulled in full[60] and eight in part.[61]

Ad hoc committee practice

Ad hoc committees require that an award must, at a minimum, allow the parties to be in a position to understand the tribunal's analysis of the facts and interpretation of the law in arriving at its ultimate conclusion. For example, the *MINE v. Guinea* committee stated that 'the requirement to state reasons is satisfied as long as the award enables one to follow how the tribunal proceeded from Point A to Point B and eventually to its conclusion, even if it made an error of fact or of law'.[62]

In assessing whether an award has failed to state the reasons on which it is based, early *ad hoc* committees reviewed the relevance of the reasons stated by the tribunal.[63] These annulment decisions have been criticised for applying 'excessively liberal standards of review', which 'may lead to the weakening of one of the principal salutary attributes of arbitration; namely, finality'.[64] Subsequent *ad hoc* committees have clarified that 'the adequacy of the reasoning is not an appropriate standard of review under Paragraph (1)(e), because it almost invariably draws an *ad hoc* committee into an examination of the substance of the

58 ICSID, 'History of the ICSID Convention': Vol. II-2 (2006), p. 849.

59 *Standard Chartered Bank*, para. 618.

60 *Klöckner I*; *Mitchell*.

61 *Venezuela Holdings*; *Tidewater*; *Amco I*; *MINE*; *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the *ad hoc* committee on the Application for Annulment of the Argentine Republic (25 Sep 2007) [*CMS*]; *Enron*; *Victor Pey Casado I*; *TECO*.

62 *MINE*, para. 5.09; see also *Wena Hotels*, para. 81; *Occidental*, para. 66; *Micula*, para. 136; *Kiliç*, para. 64.

63 See *Klöckner I*, para. 120 (annulling the award pursuant to Article 52(1)(e) on the ground that the tribunal failed to state sufficient reasons with respect to its interpretation of the claimant's contractual obligations); *Amco I*, para. 43 (partially annulling the award pursuant to Article 52(1)(e) on the ground that the tribunal erred in its determination of the amount of the claimant's investment).

64 S B Padilla IV, 'Some Available Options to Save the Viability of ICSID Arbitration in the Light of the Annulment Awards in Klöckner v. Cameroon and Amco Asia v. Republic of Indonesia', *Philippines Law Journal* (1988), pp. 321, 323, 362; see also M B Feldman, 'The Annulment Proceedings and the Finality of ICSID Arbitral Awards', *ICSID Review – Foreign Investment Law Journal* (1987), p. 86.

tribunal's decision, in disregard of the exclusion of the remedy of appeal by Article 53 of the Convention'.[65] They do not review the reasons stated in an award other than to assess whether they are frivolous or contradictory.[66]

Ad hoc committees have found a failure to state reasons where the arbitral tribunal has stated genuinely contradictory reasons in determining the method of calculation of damages[67] and where the arbitral tribunal has failed to state reasons for its 'broad interpretation' of the umbrella clause of the applicable BIT.[68] *Ad hoc* committees have also considered that, while a tribunal is not required to address each and every piece of evidence in the record, a tribunal's total failure to discuss evidence upon which the parties placed significant emphasis warrants annulment of an award.[69]

Setting aside of non-ICSID awards: a brief comparison

Non-ICSID awards are subject to being set aside by the courts of the seat of the arbitration. The arbitration law of the state of the seat determines the scope of review of non-ICSID awards and the degree of scrutiny exercised. In contrast to the self-contained ICSID regime, the standard of judicial review of non-ICSID awards may thus vary considerably.[70]

The UNCITRAL Model Law on International Commercial Arbitration (the Model Law), which has been implemented by 80 states,[71] sets forth six grounds for annulment, namely: (1) invalidity of the arbitration agreement; (2) the applicant was unable to present its case; (3) departure beyond the scope of the arbitration agreement; (4) irregularities

65 *MINE*, para. 5.08.

66 See, e.g., *Amco I*, para. 97; *Señor Tza Yap Shum v. The Republic of Peru*, ICSID Case No. ARB/07/6, Decision on Annulment (12 Feb 2015), para. 101; *El Paso*, para. 221; *Antoine Abou Lahoud and Leila Bounafeh-Abou Lahoud v. Democratic Republic of the Congo*, ICSID Case No. ARB/10/4, Decision on Annulment (29 Mar 2016), paras. 133 to 135; *Malicorp*, para. 45.

67 *Victor Pey Casado I*, paras. 285 to 287; *MINE*, para. 6.07; *Venezuela Holdings*, paras. 184 to 188, 195 and 196.

68 *CMS*, paras. 97 to 100.

69 *TECO*, paras. 131 and 132.

70 See W L Craig, 'Uses and Abuses of Appeals from Awards', *Arbitration International* (1988), Vol. 4, Issue 3, pp. 174 to 227; G R Delaume, 'The Finality of Arbitration Involving States: Recent Developments', *Arbitration International* (1989), Vol. 5, Issue 1, pp. 21 to 34. For an overview of the standard of judicial review of non-ICSID arbitral awards in France, see L Gouiffès & L Chatelain, 'L'Annulation en France des Sentences Arbitrales Rendues sur le Fondement de Traités d'Investissement', *Revue de l'Arbitrage* (2017), Issue 3, pp. 839 to 865; in the United States, see V Orlowski, Chapter 22: 'FAA Section 10 Applications to Vacate an Award (Including "Manifest Disregard")', in L Shore, T-H Cheng, et al. (eds.), *International Arbitration in the United States* (2017), pp. 503 to 540; in the United Kingdom, see V V Veeder & R H Diwan, 'National Report for England' (2018), in J Paulsson & L Bosman (eds.), ICCA International Handbook on Commercial Arbitration (1984), Supplement No. 98 (March 2018), pp. 1 to 73; in Canada, see M Lalonde & L Alexeev, 'National Report for Canada' (2018), in J Paulsson & L Bosman (eds.), ICCA International Handbook on Commercial Arbitration (1984), Supplement No. 98 (March 2018), pp. 1 to 56; in Switzerland, see S Besson, 'Le Recours Contre la Sentence en Droit Suisse', *Revue de l'Arbitrage* (2018), Issue 1, pp. 99 to 120; in Egypt, see D Hussein, I Selim et al., 'Chronique de Jurisprudence Etrangère, Egypte', *Revue de l'Arbitrage* (2013) Issue 1, pp. 191 to 232.

71 UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006 [the Model Law], Status, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html.

in the composition of the tribunal or the arbitral procedure; (5) non-arbitrability of the dispute; or (6) violation of public policy.[72]

A number of recent annulments of investment treaty awards by domestic courts show that domestic courts, unlike *ad hoc* committees, review *de novo* jurisdictional issues[73] and may set aside awards on public policy grounds, in particular where fraud or corruption is at stake.[74] In addition, unlike an ICSID award, which can no longer be enforced following its annulment, a non-ICSID award annulled by the courts of the seat of the arbitration may nonetheless be enforceable in some other jurisdictions.[75]

Enforcement of ICSID awards

Compliance with ICSID awards

In the vast majority of cases, contracting states to the Convention have complied with ICSID awards. It has therefore rarely become necessary to compel compliance.[76] However, an increasing number of ICSID awards have required enforcement efforts. For example, Argentina took the position that its obligation to satisfy an ICSID award was contingent upon the award creditor's initiation of enforcement proceedings in Argentinian domestic courts. *Ad hoc* committees have rejected Argentina's position.[77] After the United States suspended

---

72 The Model Law (see footnote 71), Art. 34, available at http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

73 e.g., Paris, Pôle 1 – Ch. 1 (18 Nov 2010), Gouvernement de la région de Kaliningrad c/ Lituanie, *Revue de l'Arbitrage* (2011), note S Lemaire; N Maziau, J Cazala, A Marie, L Trigeaud, Jurisprudence française relative au droit international – 2010, *Annuaire Français de Droit International* (2011), Vol. 57, pp. 744, 745; République de Moldavie c/ société Komstroy, *Revue de l'Arbitrage* (2016); Paris, Pôle 1 – Ch. 1 (29 Nov 2016), Ukraine c/ société Pao Tatneft, *Revue de l'Arbitrage* (2017); Paris, Pôle – Ch. 1, *Pren Nreka v. Czech Republic*, Decision of the Paris Court of Appeals (25 Sep 2008); *Government of the Lao People's Democratic Republic v. Sanum Investments Ltd*, Judgment of the Supreme Court of Singapore, Originating Summons No. 492 (14 Aug 2017); *Kingdom of Lesotho v. Swissbourgh Diamond Mines (Pty) Ltd and others*, Judgment of the Supreme Court of Singapore, Originating Summons No. 492 of 2016 (14 Aug 2017); *Czech Republic v. European Media Ventures SA*, Judgment of the High Court of Justice, 2007 EWHC 2851 (5 Dec 2007); Serafín García Armas et Karina García Gruber, *Revue de l'Arbitrage* (2017), p. 768; *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, Judgment of the High Court of Justice, 2016 EWHC 153 (2 Feb 2016); *Stans Energy v. Kyrgyzstan*, Judgment of the Moscow Arbitrazh Court, Case No. A40-64831/14 (25 May 2015); *OKKV v. Kyrgyzstan*, Judgment of the Moscow Arbitrazh Court, Case No. A40-25942/14-25-164 (19 Nov 2014); *Griffin v. Poland*, Judgment of the High Court of England and Wales, 2018 EWHC 409 (2 Mar 2018).

74 *République du Kyrgyzstan v. Belokon*, Judgment of the Paris Court of Appeal, Case No. RG 15/01650 (21 Feb 2017).

75 See H Gharavi, C Liebscher, *The International Effectiveness of the Annulment of an Arbitral Award*, Kluwer Law International (2002) p. 181, note 696; See also L Achtouk-Spivak and A Ben Mansour, 'Reconnaissance et Exécution des Sentences Arbitrales en Matière d'Investissements', in C Leben (ed.), *Droit International des Investissements et de l'Arbitrage Transnational* (2015), pp. 1016 to 1018.

76 J L Volz, R S Haydock, 'Foreign Arbitral Awards: Enforcing the Award Against the Recalcitrant Loser', *William Mitchell Law Review* (1996), Vol. 21, Issue 3, p. 870; S T Tonova and B S Vasani, 'Enforcement of Investment Treaty Awards Against Assets of States, State Entities and State-Owned Companies', in J Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards* (2015), p. 83.

77 *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (7 Oct 2008), para. 67; see also *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (5 Mar 2009), para. 37;

Argentina's trade status under the United States' Generalized System of Preferences legislation, blocked the extension of loans by the World Bank and the Inter-American Development Bank, and threatened to block an agreement with the members of the Paris Club to restructure Argentina's debt,[78] Argentina entered into settlement agreements with several award creditors.[79]

There are additional recent examples of non-compliance with ICSID awards.[80] For example, Zimbabwe,[81] the Democratic Republic of the Congo[82] and Kazakhstan[83] have failed to voluntarily comply with ICSID awards rendered against them. Enforcement proceedings were initiated against these countries, and while Kazakhstan and Zimbabwe appear to be making gradual payments in satisfaction of the award,[84] the Democratic Republic of the Congo has not yet satisfied the award.

Continental Casualty Company v. The Argentine Republic, ICSID Case No. ARB/03/9, Decision on Argentina's Application for a Stay of Enforcement of the Award (23 Oct 2009), para. 12; *Victor Pey Casado and President Allende Foundation v. Republic of Chile*, ICSID Case No. ARB/98/2, Decision on the Request for the Stay of the Enforcement of the Award (1 Mar 2018), para. 40.

78 See M Hirsch, 'Explaining Compliance and Non-Compliance with ICSID Awards: The Argentine Case Study and a Multiple Theoretical Approach', *Journal of International Economic Law* (2016), pp. 699 and 700.

79 L E Peterson, 'After Settling Some Awards, Argentina Takes More Fractious Path in Bond-Holders Case, with New Bid to Disqualify Arbitrators', *Investment Arbitration Reporter* [*IA Reporter*] (30 Dec 2013), available at https://www.iareporter.com/articles/after-settling-some-awards-argentina-takes-more-fractious-path-in-bond-holders-case-with-new-bid-to-disqualify-arbitrators/; 'Argentina Announces Another Settlement of Unpaid BIT Awards, Once Again at a Discount', *IA Reporter* (15 May 2016), available at https://www.iareporter.com/articles/argentina-announces-another-settlement-of-unpaid-bit-awards-once-again-at-a-discount/; Damien Charlotin, 'Argentina Settles More Arbitral Awards With Foreign Investors', *IA Reporter* (12 Jan 2018), available at https://www.iareporter.com/articles/argentina-settles-more-arbitral-awards-with-foreign-investors/.

80 See L E Peterson, 'How Many States Are Not Paying Awards Under Investment Treaties', *IA Reporter* (7 May 2010); L Achtouk-Spivak and A Ben Mansour, 'Reconnaissance et Exécution des Sentences Arbitrales en Matière d'Investissements', in C Leben (ed.), *Droit International des Investissements et de l'Arbitrage Transnational* (2015), pp. 1000 and 1001.

81 L E Peterson, 'Zimbabwe Not Paying ICSID Award', *IA Reporter*, available at https://www.iareporter.com/articles/zimbabwe-not-paying-icsid-award/ (7 May 2010) (Zimbabwe failed to comply with a 2009 ICSID award ordering it to pay €8.2 million).

82 L Roddy, 'Australian Court Enforces ICSID Award Against Congo', *Global Arbitration Review* (9 Oct 2017), available at https://globalarbitrationreview.com/article/1147842/australian-court-enforces-icsid-award-against-congo (the Federal Court of Australia enforced an ICSID award rendered in 2014 that ordered the Democratic Republic of Congo to pay compensation in the amount of US$1.7 million plus interest to Mr Antoine Abou Lahoud and his wife).

83 L E Peterson, 'Deadline Lapses Without Payment by Kazakhstan on BIT Award', *IA Reporter* (7 May 2010), available at https://www.iareporter.com/articles/deadline-lapses-without-payment-by-kazakhstan-on-bit-award/ (Kazakhstan failed to comply with a 2008 ICSID award ordering it to pay US$125 million).

84 L Yong, 'Zimbabwe is Paying, Reveals Dutch Farmer', *Global Arbitration Review* (10 Oct 2017), available at https://globalarbitrationreview.com/article/1148709/zimbabwe-is-paying-reveals-dutch-farmer; A Ross, 'Kazakhstan Must Pay Up, Says ICSID Annulment Committee', *Global Arbitration Review* (5 Oct 2018), available at https://globalarbitrationreview.com/article/1175322/kazakhstan-must-pay-up-says-icsid-annulment-committee.

Recognition and enforcement of ICSID awards

The Convention's simplified enforcement regime

The ICSID Convention establishes a simplified and accelerated regime for all awards rendered pursuant to the Convention, excluding awards rendered in ICSID Additional Facility arbitrations.

Article 53(1) of the Convention requires the parties to comply with and abide by the terms of an ICSID award. In addition, pursuant to Article 54(1), each contracting party must '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'. Commentators have interpreted Article 54(1) as leaving domestic courts with 'no discretion to review the award once its authenticity has been established', not even to ascertain compliance with domestic or international public policy.[85]

The Convention thus insulates the enforcement of pecuniary obligations imposed by an ICSID award from the enforcement regime of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[86] and the ICSID contracting states' domestic enforcement legislation. The *Vivendi v. Argentina* committee emphasised that 'one of the fundamental issues which the drafters of the ICSID Convention were keen to achieve was a total divorce from the recognition and enforcement system which prevailed under domestic laws or under the 1958 New York Convention'.[87]

However, the recognition and enforcement of ICSID awards is not entirely insulated from the ICSID contracting parties' domestic laws, including remedies available before domestic courts against final judgments.[88] Pursuant to Article 54(3) of the Convention, the execution of ICSID awards is governed by 'the laws concerning the execution of judgments in force in the State in whose territories such execution is sought'.

For example, in the United Kingdom, the enforcement of ICSID awards is governed by the Arbitration Act of 1966.[89] Pursuant to Section 2 of the Arbitration Act, a registered ICSID award 'shall, as respects the pecuniary obligations which it imposes, be of the same force and effect for the purposes of execution as if it had been a judgment of the High Court'.[90] In the context of the *Micula v. Romania* case (discussed in further detail below), the England and Wales High Court (EWHC) explained that a 'judgment of the High Court is subject to the EU Rules as to State aid', adding that 'national courts must, in particular, refrain from taking decisions which conflict with a decision of the Commission'.[91]

85 C H Schreuer et al., *The ICSID Convention: A Commentary* (2009), pp. 1140, 1141, para. 85.

86 id., p. 1118, para. 4.

87 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement (4 Nov 2008), para. 35.

88 A Broches, 'Observations on the Finality of ICSID Awards', *ICSID Review – Foreign Investment Law Journal* (1991), Vol. 6, Issue 2, p. 322; L Achtouk-Spivak and A Ben Mansour, 'Reconnaissance et Exécution des Sentences Arbitrales en Matière d'Investissements', in C Leben (ed.), *Droit International des Investissements et de l'Arbitrage Transnational* (2015), p. 1011.

89 Arbitration (International Investment Disputes) Act of 1966.

90 id., Section 2.

91 *Viorel Micula et al. v. Romania*, Decision of the UK's High Court of Justice on Romania's Request to Set Aside the Registration of the ICSID Award, Case No. CL-2014-000251 (20 Jan 2017), para. 131.

The EWHC, in staying the enforcement proceeding pending the resolution of the EU proceedings, emphasised that Article 54 of the Convention requires the United Kingdom to equate ICSID awards with final judgments of its own courts and that 'a purely domestic judgment would be subject to the same limitation'.[92]

The United States has implemented the Convention through the ICSID Enabling Statute, which provides that '[t]he pecuniary obligations imposed by an [ICSID] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States'.[93]

Although federal district courts have exclusive jurisdiction over the enforcement of ICSID awards (under 22 USC Section 1650(a)), the statute does not provide for a specific procedure to enforce ICSID awards. US courts have struggled with the interaction between the ICSID Enabling Statute and the Foreign Sovereign Immunity Act, which provides for uniform procedures on service over a foreign state and sets forth the legal standards governing claims of immunity.[94] In particular, US courts have taken diverging approaches to whether or not summary *ex parte* procedures apply in relation to the enforcement of ICSID awards.[95]

In addition, the full faith and credit status accorded to ICSID awards under 22 USC Section 1650(a) triggered a debate on whether ICSID awards are subject to review in the same manner as final US domestic state court judgments.[96] So far, US courts have consistently taken the view that they are not authorised to engage in substantive review of ICSID awards and that the limited exceptions to the full faith and credit status are not applicable to ICSID awards.[97]

Forced execution of ICSID awards

Article 55 of the Convention provides that '[n]othing 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'. Article 55 concerns the respondent state's immunity from execution, as opposed to immunity from jurisdiction or the recognition proceedings,[98] and significantly limits an award creditor's ability to seize assets to execute an ICSID award.

92 id., para. 160.

93 22 USC Section 1650(a)(2012).

94 M Slater, I Rozenberg and R Freeman, 'Jurisdictional and Forum Requirements for ICSID Award Recognition against Foreign Sovereigns: Recent Developments', *Mealey's International Arbitration Report*, Vol. 32, Issue 11 (Nov 2017), pp. 3 and 4.

95 ibid.; see also A Cohen Smutny, A D Smith & M Pitt, 'Enforcement of ICSID Convention Arbitral Awards in US Courts', *Pepperdine Law Review*, Vol. 43 (2016), p. 659.

96 ibid., p. 669; see also Rule 60(b) of the Federal Rules of Civil Procedure.

97 *Mobil Cerro Negro Ltd v. Bolivarian Republic of Venezuela*, No. 14 CIV. 8163 PAE, 2015 WL 631409 (SDNY) (13 Feb 2015); *Micula v. Government of Romania*, No. 15 Misc. 107, 2015 WL 4643180 (SDNY) (5 Aug 2015); *Enron Corp. & Ponderosa Assets L.P. v. Argentine Republic*, No. M-82 (SDNY) (20 Nov 2007); *Sempra Energy International v. Argentine Republic*, No. M-82 (SDNY) (14 Nov 2007).

98 G Coop, Á Nistal, R G Volterra, 'Sovereign Immunities and investor-state awards: specificities of enforcing awards based on investment treaties', in J Fouret (ed.), *Enforcement of Investment Treaty Arbitration Awards* (2015), p. 71; see also *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (1 Jun 2005), para. 31.

In practice, when it comes to forcing execution, ICSID award creditors face hurdles similar to those faced by other state creditors, namely the difficulty in identifying commercial assets that are not immune from measures of constraint.[99]

Diplomatic protection

While Article 27(1) of the Convention prohibits a contracting state to the Convention from giving diplomatic protection in respect of a dispute that one of its nationals and another ICSID contracting state consented to submit to ICSID arbitration, the right to diplomatic protection revives in the event of non-compliance with an ICSID award. Diplomatic protection thus constitutes an alternative, non-judicial means to enforce an ICSID award. Although resort to diplomatic protection may supplement judicial enforcement, investors are generally reluctant to seek the assistance of their home states in enforcing an ICSID award.[100]

Recognition and enforcement of non-ICSID awards: a brief comparison

The New York Convention[101] governs the recognition and enforcement of non-ICSID foreign arbitral awards, and the enforcement of non-pecuniary obligations imposed by an ICSID award, in the 159 states that are party to the New York Convention.[102]

Article V(1) of the New York Convention sets forth the sole grounds upon which a 'competent authority where the recognition and enforcement is sought' may refuse to recognise and enforce an arbitral award. The main difference between the New York Convention and the ICSID Convention enforcement regimes is that the former allows domestic courts to refuse recognition and enforcement on the basis of certain grounds that were intentionally excluded from the ICSID enforcement regime. Compared to the ICSID Convention, the New York Convention 'leaves a substantial role for national law and national courts to play in the international arbitral process'.[103]

Pursuant to Article V(1) of the New York Convention, a court may refuse recognition and enforcement of an investment treaty award on grounds that allow the courts of the seat of the arbitration to annul an award pursuant to Article 34 of the Model Law.[104] In addition,

---

99 J A Kuipers, 'Too Big to Nail: How Investor-State Arbitration Lacks for an Appropriate Execution Mechanism for the Largest Awards', *Boston College International and Comparative Law Review* (2016), Vol. 39, p. 419.

100 See J E Viñuales, D Bentolila, 'The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States', in L Boisson de Chazournes et al. (eds.), *Diplomatic and Judicial Means of Dispute Settlement* (2013), p. 268; C Schreuer, 'Investment Protection and International Relations', in A Reinisch et al. (eds.), *The Law of International Relations, Liber Amicorum Hanspeter Neuhold* (2007), pp. 345 to 358.

101 Other international treaties, such as the 1975 Inter-American Convention on International Commercial Arbitration adopted in Panama, 14 I.L.M. 33 (1975), may also be relevant for enforcement purposes.

102 See UNCITRAL, Status of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

103 G B Born, *International Commercial Arbitration*, Vol. I (3rd ed. 2009), p.101; see also A Sardu, 'On the Execution of Investment Arbitral Awards in Recent Case Law', *The Law and Practice of International Courts and Tribunals* (2018), Vol. 17, Issue 3, p. 504.

104 See the Model Law, Art. 34: (1) invalidity of the arbitration agreement, (2) the party was unable to present its case, (3) departure beyond the scope of the arbitration agreement, (4) irregularities in the composition of the tribunal or the arbitral procedure, (5) non-arbitrability of the dispute, and (6) violation of public policy.

a court may refuse to recognise and enforce an award that has not yet become binding on the parties, or has been set aside or suspended by the courts of the seat of the arbitration.

For instance, domestic courts have refused to enforce investment treaty awards pursuant to Article V of the New York Convention if the arbitral tribunal awarded damages to an investor who was involved in money laundering, on the ground that the recognition and enforcement of the award would be a 'manifest and effective' violation of international public policy,[105] or if the award had been annulled at the seat of arbitration.[106]

Current challenges

Conditional stay of enforcement of the award

An increasing number of applicants for annulment request a stay of enforcement of the award. Pursuant to Article 52(5), '[t]he Committee may, if it considers that the circumstances so require, stay enforcement of the award pending its decision'. The Convention does not expressly empower *ad hoc* committees to condition a stay of enforcement on the posting of a security. An increasing number of *ad hoc* committees has nonetheless done so,[107] and the 2018 Proposals for Amendment of the ICSID Rules explicitly authorise an *ad hoc* committee to condition a stay of enforcement on any undertaking it deems appropriate.[108]

Concerns have been expressed that if *ad hoc* committees were to stay the enforcement of ICSID awards without conditioning the stay on the posting of security, this would encourage an increase in the number of annulment applications, contrary to the exceptional nature of annulment under the Convention and the importance of the finality of the award.[109] However, while there are various reasons justifying a conditional stay of enforcement, including to deter dilatory applications for annulment[110] and to protect the award creditor against potential non-compliance,[111] a general policy in favour of conditional stay may impair a party's ability to contest the validity of an ICSID award.

---

105 *République du Kyrgyzstan v. Belokon*, Judgment of the Paris Court of Appeal, Case No. RG 15/01650 (21 Feb 2017).

106 *Russia v. Yukos and others*, Judgment of the Court of First Instance of Brussels, Case Nos. 15/8991/A, 15/9211/A and 16/1134/A (8 Jun 2017).

107 See ICSID, Updated Background Paper on Annulment for the Administrative Council of ICSID (5 May 2016), para. 58; *Adem Dogan v. Turkmenistan*, ICSID Case No. ARB/09/9, Decision on Stay of Enforcement (24 Nov 2014); *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54) (5 Mar 2009); *CDC Group plc v. Republic of Seychelles*, ICSID Case No. ARB/02/14, Decision on Decision on Whether or Not to Continue Stay (14 Jul 2004); *Lemire*, para. 51; *Kiliç*, para. 13; *Iberdrola*, para. 14.

108 ICSID, 'Proposals for Amendment of the ICSID Rules – Consolidated Draft Rules' (Volume 2) (2 Aug 2018), Article 67.

109 A K Bjorklund, L Vanhonnaeker, 'Stay of enforcement pending annulment and set-aside proceedings in investment arbitration', in J Fouret (ed.) *Enforcement of Investment Treaty Arbitration Awards* (2015), p. 58.

110 See, e.g., *Repsol YPF Ecuador S.A. v. Empresa Estatal Petróleos del Ecuador (Petroecuador)*, ICSID Case No. ARB/01/10, Procedural Order No. 1 Concerning the Stay of Enforcement of the Award (22 Dec 2005), para. 9.

111 See, e.g., *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (1 Sep 2006), para. 38; *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3, Decision

Enforcement of investment treaty awards within the European Union

New challenges to the enforcement of ICSID awards rendered under BITs within the European Union (intra-EU BITs) will arise following the 6 March 2018 judgment of the Court of Justice of the European Union (CJEU) in *Slovak Republic v. Achmea BV*. The CJEU held that Articles 267 and 344 of the Treaty on the Functioning of the European Union preclude investor-state arbitration clauses in intra-EU BITs, such as the one in Article 8 of the Netherlands–Slovakia BIT.

The *Achmea* judgment may have far-reaching consequences for the enforcement of intra-EU ICSID awards, in particular before courts in EU Member State. The *Micula v. Romania* case exemplifies the hurdles that an investor may face in attempting to enforce an ICSID award that is considered to be incompatible with EU law. In 2013, the tribunal found that Romania's revocation of an investment incentive scheme had breached the Sweden–Romania BIT and awarded compensation. The claimants moved to enforce the award in Belgium, France, Luxembourg, Romania, Sweden and the United Kingdom. In 2015, the European Commission issued a decision finding that the award constituted state aid, prohibiting Romania from paying the claimants the compensation awarded to them, and ordering Romania to recover any amounts already paid to claimants.[112] The claimants' attempts to enforce the ICSID award have so far been unsuccessful.

For example, the Brussels Court of First Instance held that 'the decision of the European Commission . . . justifies non-compliance with the Award and thus makes the Award lose its (present) executory force. As a consequence, it makes its enforcement illegal'.[113] The EWHC stayed the enforcement of the award on the ground that 'the principle of sincere cooperation in Art. 4(3) TEU [Treaty on the Functioning of the European Union] . . . precludes national courts from taking decisions which conflict with a decision of the Commission'.[114] The Court of Appeal of England and Wales confirmed the stay of enforcement until the General Court of the European Union issues its final judgment on the challenge of the European Commission's Decision.[115]

---

on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (7 Oct 2008), para. 49; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on the Respondent's Request for a Continued Stay of Execution (1 Jun 2005), para. 29.

112 See European Commission Decision 2015/1470 (n.4) Article 2(1). The Commission also held that the claimants would be liable to repay any amounts received, see European Commission Decision 2015/1470 (n.4) Article 2(2).

113 Court of First Instance of Brussels, the Chamber of Seizures, Civil Matters (25 Jan 2016); see also T Jones, 'Micula suffers setback in Sweden', *Global Arbitration Review* (4 Feb 2019) (the Nacka District Court in Stockholm held that the principle of sincere cooperation provided for by EU Law obliges the Court to implement the Commission's Final Decision and consequently prohibits it from enforcing the award).

114 *Micula & Others v. Romania*, Judgment, High Court of Justice, Case CL-2014-000251 (20 Jan 2017), para. 203.

115 *Micula v. Romania v. EC*, Cases A3/2017/1853, 1855, 1856 and 1903, England and Wales Court of Appeal, Judgment (27 Jul 2018); *Micula and Others v. Commission*, Case T-704/15, Court of Justice of the European Union (pending).

Part II

Challenging and Enforcing Arbitration Awards: Jurisdictional Know-How

14

Argentina

José Martínez de Hoz and Francisco A Amallo[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Argentina is a party to several international treaties facilitating the recognition and enforcement of arbitral awards, including:

- the 1889/1940 Montevideo Treaties on International Procedural Law;
- the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards;
- the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States;
- the 1975 Panama Convention on International Commercial Arbitration;
- the 1979 Montevideo Convention on the Extraterritorial Validity of Judgments and Arbitral Awards;
- the 1992 Las Leñas Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labour and Administrative Law Matters;
- the 1994 Buenos Aires Protocol on International Jurisdiction in Contractual Matters; and
- the 1998 Mercosur Agreement on International Commercial Arbitration.

Pursuant to Section 75(22) of the Federal Constitution, international treaties prevail over domestic laws. Therefore, when applicable, the above treaties will prevail over domestic arbitration laws. The answers provided in this chapter are focused on domestic arbitration law exclusively.

1 José Martínez de Hoz and Francisco A Amallo are founding partners at Martínez de Hoz & Rueda.

Domestic and international commercial arbitration are regulated separately. Therefore, the answers to most of the questions in this chapter may vary, depending on whether the arbitration is international or domestic.

International commercial arbitration

International commercial arbitration is governed by Law 27,449 (the ICA Law), which is based on the UNCITRAL Model Law and entered into force in August 2018. The ICA Law is a federal law that governs international commercial arbitration throughout the country, including both its substantive and procedural aspects.

According to Article 3 of the ICA Law, an arbitration is 'international' if (1) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, or (2) one of the following places is situated outside the state in which the parties have their places of business:

- the place of arbitration if determined in, or pursuant to, the arbitration agreement;
- the place where a substantial part of the obligations of the commercial relationship is to be performed; or
- the place with which the subject matter of the dispute is most closely connected.

Article 6 of the ICA Law provides a wide definition of the term 'commercial', as any legal relationship, contractual or non-contractual, of private law or governed predominantly by it under Argentine law.

Pursuant to Articles 86 to 89 of the ICA Law, awards issued in an international arbitration shall:

- be in writing;
- be signed by the arbitrators, although in arbitral proceedings with more than one arbitrator, the signatures of the majority of members of the arbitral tribunal shall suffice, provided that the award states the reason for any omitted signature;
- be reasoned;
- be dated; and
- indicate the seat of the arbitration.

A copy of the award, signed by the members of the tribunal, must be served to each party.

Domestic arbitration

Domestic arbitration is governed by separate bodies. The procedural codes of each jurisdiction (i.e., the Autonomous City of Buenos Aires and of each province) regulate the procedural aspects of arbitration. Despite the existence of different procedural codes, reference will be made hereinafter mainly to the Federal Code of Civil and Commercial Procedure (the FCP) because it is applicable in the Autonomous City of Buenos Aires, where most arbitrations take place, and because provincial codes are in most cases based on the FCP. Contractual aspects of arbitration (i.e., arbitration agreements) are regulated by the Civil and Commercial Code (the CCC), which is applied by both federal and provincial judges throughout the country.

The arbitration provisions of the FCP do not specifically regulate the form of the award issued in domestic arbitration. Article 757 of the FCP only states that if an arbitrator resists

meeting with its co-arbitrators for deliberations or the preparation of the award, the same will be valid if it is signed by the majority of the members of the arbitral tribunal. In the absence of other specific rules, a court might apply by analogy the formal requirements established for court judgments. Pursuant to Article 163 of the FCP, a court judgment shall contain in essence:

- the place and date in which it was rendered;
- the name and surname of each of the parties;
- a summary of the subject matter of the trial;
- an analysis of the subject matter;
- the motivation and the application of the law;
- an express, positive and precise decision;
- a time limit for compliance;
- a decision on the costs and fees; and
- the signature.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

According to Articles 93 to 97 of the ICA Law, applicable to international arbitrations, any party may request, within 30 days of receipt of the award, (1) to correct in the award any errors in computation, any clerical or typographical errors or any errors of a similar nature, (2) to give an interpretation of a specific point or part of the award, and (3) to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within 30 days, or shall make the additional award within 60 days of receipt of the request.

Article 758 of the FCP, applicable to domestic arbitrations, states that the same remedies against court judgments are available against arbitral awards issued in domestic arbitration. This includes the petition for clarification regulated in Article 166(2), whereby a party may request (1) the correction of any material error, (2) clarification of any vague or ambiguous expressions, provided that it does not entail a material modification of the decisions, and (3) an additional decision as to claims presented in the proceedings but omitted from the judgment. Articles 759 and 760 of the FCP set forth that these remedies are unwaivable and must be filed before the arbitral tribunal within five days of the date on which the award was served.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Article 98 of the ICA Law sets forth that the only recourse to a court against an arbitral award issued in international arbitration is the application for setting aside. The grounds for setting aside are listed in Article 99 and are virtually identical to those contained in the UNCITRAL Model Law. Under Article 100, an application for setting aside may not be made after 30 days have elapsed since the date on which the award was served on the party requesting the annulment. Article 13 of the ICA Law provides that the commercial court of appeals of the seat of the arbitration is the competent court for hearing an application for setting aside.

The remedies against the arbitral award issued in a domestic arbitration vary depending on whether the arbitration is in law or equity.

Arbitration in law

Article 758 of the FCP sets forth that the same remedies against court judgments are available against arbitral awards, provided that the parties did not waive them. In practice, this means that a party can file an appeal on the merits (unless it waived its right to do so) or an application for setting aside. Articles 760 and 761 of the FCP contain the grounds for setting aside: (1) an essential procedural violation; (2) not rendering the award within the time limit; (3) rendering the award on matters not submitted to arbitration; and (4) inconsistent decisions in the dispositive part of the award.

Article 759 of the FCP establishes that the remedies must be filed before the arbitral tribunal within five days of the date on which the award was served. Once a party appeals or files an application for setting aside with the arbitral tribunal, the latter must grant or refuse to grant leave. If it grants leave, it must transfer the appeal or the application for setting aside to the competent court. If it refuses to grant leave, the interested party can file a complaint against the refusal with the competent court and the latter has the discretion to overturn the arbitral tribunal's decision refusing leave.

Pursuant to Article 763 of the FCP, the competent court is the second instance court that would have heard any appeal or application against a judgment of the first instance court that would have decided the dispute had no arbitral agreement been executed. The parties can agree to submit those remedies to another arbitral tribunal.

Article 760 of the FCP states that the application for setting aside is unwaivable, so, in practice, an appeal on the merits is the only remedy that could be waived by the parties. However, this has been attenuated by the Federal Supreme Court in the *Cartellone* case (Fallos 327:1881), in which it was concluded that any arbitral award is subject to judicial review when it might be considered 'unconstitutional, illegal or unreasonable'.

Arbitration experts strongly criticised this decision and its scope remains unclear because the Federal Supreme Court has subsequently issued other rulings in which it acknowledged that, if the parties decided to waive their right to appeal the award, the only way of judicial review would be the application for setting aside contained in Article 760 of the FCP. However, it cannot be concluded that the doctrine has been definitively reversed

because, although the Federal Supreme Court has not again reviewed and reversed an arbitral award based on that doctrine, in some cases it has analysed whether its requirements were fulfilled.

Unfortunately, the CCC has added more uncertainty to this matter. The last paragraph of Article 1656 of the CCC states that final arbitral awards may be reviewed by the competent courts when grounds for total or partial annulment are invoked under the provisions of 'this Code'. It also provides that the parties cannot waive their right to challenge the final award that is 'contrary to law'.

This presents at least three problems. First, the paragraph refers to grounds for annulment that are invoked under the provisions of 'this Code' even though the CCC does not contemplate any grounds for setting aside arbitral awards. The intent was possibly to refer to the procedural codes that could apply to the case, which do establish specific grounds for setting aside awards.

Second, it refers to the inability of waiving the right to 'challenge' the final award, without specifying whether it refers to the inability to waive the right to appeal on the merits or the right to set aside the award. The FCP authorises the parties to waive their right to appeal but not the right to set aside the award. Some international treaties ratified by Argentina establish that the only recourse against the award is the application for setting aside. Therefore, consistently with the FCP and international treaties, Article 1656 of the CCC should be interpreted to refer exclusively to the inability of waiving the right to set aside the award.

Third, Article 1656 of the CCC refers to the challenge of final awards that are 'contrary to law', which is a very broad concept. If, as explained above, the CCC is interpreted in the sense that it refers to the inability of waiving the right to set aside the award, instead of referring to the right to appeal the award, then it could be interpreted that the CCC refers to the procedural law that is applicable to the case, which would normally be that of the seat of the arbitration. In other words, the parties could not waive their right to set aside an award that is invalid because it does not meet the validity requirements established by the applicable procedural law, but they could waive their right to appeal the award.

The opposite interpretation (i.e., that a final award may be appealed for being allegedly contrary to a legal provision) would not only be inconsistent with international treaties and the sources of inspiration of the arbitration dispositions of the CCC, but moreover with the main purpose of arbitration to displace disputes from the competence of the judicial courts, except for the review of final awards based on specific causes of annulment.

All the court rulings that have been published since the enactment of the CCC in connection with the last paragraph of Article 1656 were favourable for arbitration. The courts have concluded that among the different interpretations of Article 1656, the most suitable for arbitration was the one whereby only applications for setting aside are unwaivable (i.e., that the waiver of the right to appeal is valid).

Some scholars have also stated that the last paragraph of Article 1656 is not only poorly drafted but also unconstitutional because it refers to a procedural matter and the Federal Congress is not empowered to regulate matters for which the provinces are competent. However, there is no case law in this regard yet.

Arbitration in equity

Article 771 of the FCP establishes that the awards rendered by *amiables compositeurs* cannot be appealed but can be set aside if the arbitral tribunal does not render the award within the time limit or renders the award on matters not submitted to arbitration. This remedy must be filed with the first instance court that would have decided the dispute had no arbitral agreement been executed, within five days of the date on which the award was served.

Although the CCC falls short from clarifying the point, the discussion arising in relation to Article 1656 described above should not apply to arbitration in equity since said provision refers to legal challenges and *amiables compositeurs* are not required to apply the law.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Argentina is a party to several treaties facilitating the recognition and enforcement of arbitral awards (see question 1).

In domestic law, the recognition and enforcement of foreign awards is governed by Articles 102 to 106 of the ICA Law.

Domestic awards have the same status as domestic court judgments, so no recognition procedure is applicable. They are immediately enforceable through the same procedure established for domestic court judgments in Article 499 et seq. of the FCP.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Argentina is a party to the New York Convention. It was approved by Law 23,619 on 28 September 1988, ratified on 14 March 1989 and entered into force on 12 June 1989.

Argentina declared that: (1) on the basis of reciprocity, it will apply the Convention only to the recognition and enforcement of foreign arbitral awards made in the territory of another contracting state; (2) it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under its national law; and (3) the Convention will be interpreted in accordance with the principles and disposition of the Federal Constitution.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Neither the ICA Law nor the FCP indicates which is the competent court to hear an application for recognition and enforcement of foreign or domestic arbitral awards. These applications are usually filed with the competent first instance court. This solution is in line with Article 518 of the FCP, which sets forth that the application for recognition and enforcement of foreign court judgments must be filed with the competent first instance court.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

There is no provision regulating Argentina's jurisdiction over an application for recognition and enforcement of foreign arbitral awards. However, there is case law establishing that Argentina has jurisdiction if the party against whom a court judgment is invoked is domiciled or has assets in Argentina (*Aguinda Salazar v. Chevron Corporation*).

The enforcement of awards issued in domestic arbitration does not normally present jurisdictional problems because domestic arbitrations do not have relevant connecting factors with other jurisdictions.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are adversarial under both the ICA Law and the FCP.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

According to Article 103 of the ICA Law, the party relying on a foreign award or applying for its enforcement shall supply the original award or a certified copy thereof.

The FCP is silent in this regard. The party relying on an award issued in a domestic arbitration or applying for its enforcement shall supply the original award or a certified copy thereof. The courts may also require a record of the arbitral proceedings or the document containing the arbitration agreement.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Article 103 of the ICA Law sets forth that if the foreign award is not made in Spanish, the court may request the party to supply a translation thereof in Spanish.

Article 123 of the FCP also provides that all documentation in a language other than Spanish must be filed with a certified translation by a sworn translator.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

According to Law 23,989, a party seeking the recognition and enforcement of an award must pay a court tax of 3 per cent of the monetary value of the award. If it does not have a monetary value or if the monetary value is undetermined, the party must pay 1,500 pesos and, in the latter case, must pay the balance once the proceeding is over and the value is determined.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Neither the ICA Law nor the FCP explicitly provides the possibility of recognising or enforcing partial or interim awards. If a partial or interim award is final in respect of the matters it determines, it should be recognised and enforced by Argentine courts. However, there is no case law in this regard.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds for refusing the recognition and enforcement of foreign awards are listed in Article 104 of the ICA Law and are virtually identical to those contained in Article V of the New York Convention.

There are only two differences, namely: (1) in addition to 'incapacity', the ICA Law includes 'capacity restriction' as grounds for refusal; and (2) instead of referring to 'public policy', the ICA Law refers to 'Argentine international public policy'.

The grounds for refusing the enforcement of an award issued in a domestic arbitration are contained in Article 506 of the FCP, namely: (1) falsehood of the award; (2) extinction of the obligation due to the lapse of a limitation period; (3) payment of the award; and (4) debt reduction, extension of the payment period or cancellation of the debt. The FCP

establishes in Article 507 that any opposition to the enforcement must be based on facts that occurred after the award and must be proved with trial records or documents issued by the creditor. No other means of evidence are accepted.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

A decision recognising a foreign award may be appealed. If the decision is not appealed within statutory time limits, or the appellate court upholds the decision, it will become enforceable.

Awards issued in domestic arbitration are considered to have the same status as court judgments, so no recognition procedure is needed. They are immediately enforceable.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision refusing recognition of a foreign award may be appealed.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Article 105 of the ICA Law provides that the court where recognition or enforcement is sought may stay its decision if an application for setting aside or suspension of an award has been made. However, there is no case law in this regard.

The FCP is silent on this matter. However, under Article 499 of the FCP, an award issued in a domestic arbitration will only be enforceable if it has *res judicata* authority. Therefore, a court should not enforce an award subject to set aside or suspension applications.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Article 105 of the ICA Law provides that the court where recognition or enforcement is sought may, on application by the party claiming recognition or enforcement of the award,

order the other party to provide appropriate security. However, there is no case law in this regard.

The FCP is silent on this matter. For the same reasons as discussed in question 16, a court should not proceed with the enforcement of the award nor order the posting of security.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Article 104(a)(v) of the ICA Law sets forth that a court may refuse to recognise or enforce a foreign award if the party against whom it is invoked proves that the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. There is no case law in this regard.

For the same reasons as discussed in question 16, a court should not enforce an award issued in a domestic arbitration and set aside at the seat.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The FCP allows different service methods (e.g., official notice, public summons, notarial certificate, registered mail) depending on the type of document. However, under Article 136 of the FCP, the service of the claim can only be made by official notice or notarial certificate.

Argentina has ratified several treaties that could apply to the service of documents in international cases, including:

- the 1992 Las Leñas Protocol on Jurisdictional Cooperation and Assistance in Civil, Commercial, Labour and Administrative Law Matters;
- the 1975 Inter-American Convention on Letters Rogatory;
- the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters;
- the 1954 Hague Convention on Civil Procedure; and
- the 1889 Montevideo Treaty on International Procedural Law.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Article 132 of the FCP sets forth that any communication addressed to a foreign judicial authority will be made through letters rogatory. Article 2612 of the CCC provides that Argentine courts may also establish direct communications with foreign courts.

The treaties listed in question 19 could also be applied to the service of documents out of Argentina.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There is no database or publicly available registry allowing the identification of all debtors' assets, but there are specific public registries (e.g., real estate, automobile, industrial and intellectual property) that, at the request of a party or a judge, could provide information about a debtor's assets registered therein.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Article 323 of the FCP provides that a party may request certain preliminary measures to prepare its claim or defence, including, among others, the sworn statement of the defendant regarding personal information without which the claim cannot be filed, and the submission of corporate documents by one of the shareholders.

Article 326 of the FCP regulates pretrial proceedings. The purpose of a pretrial proceeding is to obtain evidence before the initiation of the trial and is only admissible when there are justified reasons to believe that the production of evidence can become impossible or very difficult at the evidentiary phase of the trial. In a pretrial proceeding, a party may request (1) the witness statement of a person who is very old, seriously ill or about to leave the country, (2) a judicial inspection or expert opinions, (3) information from third parties and (4) the exhibition, securing or seizure of documents concerning the subject matter of the claim.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

There are different interim measures against assets available in Argentina, including attachment, seizure and *inhibición general de bienes* (i.e., a restraining order preventing the debtor from encumbering or selling the property). The FCP does not contain an exhaustive list of interim measures. The parties are entitled to request measures not regulated therein, provided their request is duly justified.

However, interim measures are usually requested before or during the procedure. At the enforcement stage, the attachment is of the essence and is the necessary previous step for the auction of goods.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

As a general rule, interim measures are issued *ex parte*, and their issuance is subject to the fulfilment of the following requirements: (1) *periculum in mora* (i.e., the well-founded risk that, pending issue of a ruling on the merits, the right that the interim measure seeks to safeguard may be irreparably harmed); (2) *fumus boni juris* (i.e., a *prima facie* case for the claim); and (3) sufficient guarantee. The debtor must be served within three days of the enforcement of the measure unless the debtor became aware of it as a result of the enforcement. The debtor can appeal the measure, but the appeal does not suspend its effects.

However, as explained in question 23, the attachment is of the essence in enforcement proceedings and is the necessary previous step for the auction of goods. At the enforcement stage, the procedure varies.

If the award orders the payment of a certain amount or of an amount that can be easily determined, and the debtor does not voluntarily comply with the award within the applicable time limits, the judge will attach the assets of the debtor. If the creditor wishes to avoid the attachment, it can request the court to order the debtor to pay the award, but if the debtor fails to pay within five days of notice, the creditor must request the attachment. After the attachment of the assets, the debtor will have five days to prove any of the grounds for refusing enforcement mentioned in question 13, and the creditor will have five days to answer. If the court dismisses the debtor's defence, it will order the sale of the assets attached.

If the award orders the payment of an uncertain amount or of an amount that cannot be easily determined, any of the parties can submit a settlement and the other party will have five days to answer. If there is disagreement, the court will determine the amount to be paid. Once the amount has been determined, the same procedure as discussed in the previous paragraph will be followed.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There is no specific procedure for interim measures against immovable property. The court will notify the relevant public registry with which the asset is registered so that it takes note of the interim measure.

Interim measures against moveable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There is no specific procedure for interim measures against movable property. The court will notify the relevant public registry with which the asset is registered so that it takes note of the interim measure.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no specific procedure for interim measures against intangible property. The court will notify the relevant public registry in which the asset is registered so that it takes note of the interim measure.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Please refer to question 24.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

There is no specific procedure for the attachment of immovable property. The court will notify the relevant public registry with which the asset is registered so that it takes note of the attachment.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

There is no specific procedure for the attachment of movable property. The court will notify the relevant public registry with which the asset is registered so that it takes note of the attachment.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

There is no specific procedure for the attachment of intangible property. The court will notify the relevant public registry with which the asset is registered so that it takes note of the attachment.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules governing the recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

There are no specific rules applicable to the service of documents to foreign states.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Unlike jurisdiction immunity, which is regulated in Law 24,448, there is no domestic regulation of enforcement immunity. However, it is widely accepted that assets belonging to foreign states are immune from enforcement unless they have validly waived that immunity, or the relevant assets are exclusively allocated for commercial purposes that do not entail the exercise of sovereign powers by the state. To proceed, the enforcement upon such assets must not be prohibited by international treaties to which Argentina is a party (e.g., the 1961 Vienna Convention on Diplomatic Relations) or other applicable laws.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

A foreign state may waive immunity from enforcement in Argentina, provided its waiver is expressly made regarding immunity from enforcement. The Federal Supreme Court has stated that a waiver of a state's jurisdiction immunity does not necessarily include a waiver of its enforcement immunity and that a specific waiver is needed after that (Fallos 330:5139).

15

Austria

Christian W Konrad and Philipp A Peters[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

An arbitral award must be in writing. Unless the parties have agreed otherwise, it must be written in the language of the arbitral proceedings.

In general, the award must be signed by all arbitrators. However, this mandatory requirement is satisfied when a minority of arbitrators refuse to sign it or are unable to do so. If this is the case, an arbitrator must record the reason for the omission of any signature on the award itself.

An arbitral award must also state the date and place where it is rendered (i.e., the place of arbitration as agreed by the parties), although a failure to do so does not constitute a ground to set aside the award.

Unless the parties have agreed otherwise, the arbitral award must be reasoned. Failure to provide reasoning constitutes a breach of Austrian procedural public policy and may be invoked as a ground to set aside the arbitral award. The Austrian Supreme Court recently held that the intensity of the reasoning depends on whether the issue in question was discussed at some point during the proceedings or not. In any case, the reasoning should put the parties in the position to understand how the arbitral tribunal comes to its finding.

1 Christian W Konrad is the founding and managing partner and Philipp A Peters is a partner at Konrad Partners.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Once the award has been rendered, the arbitral tribunal becomes *functus officio*. Therefore, in general, it may not alter or rescind its award. However, Austrian arbitration law expressly allows an arbitral tribunal to provide an explanation of an award or to correct calculation, spelling or printing errors in the award.

An arbitral tribunal may also render an additional award to decide on requests raised during the arbitration on which it has not decided in the original award. A party may request such an explanation, correction or an additional award, and the arbitral tribunal may provide a correction of the award on its own motion within four weeks of the date of the award.

Notably, in order for a party to request an explanation of an award, there must be a party agreement to that effect which, naturally, includes the arbitration rules agreed by the parties.

A request for explanation, correction or for an additional award must be transmitted to the other party, who must be given an adequate opportunity to be heard. A tribunal would have four weeks to decide on a request to explain or correct an award and eight weeks for a request to render an additional award.

An explanation and a correction constitute parts of the original award and do not have any effect on the running of the time limit for challenging the award and may not be set aside in independent proceedings. However, an additional award represents a new, separate award. Therefore, it may be set aside in separate proceedings and the time limit for challenging it starts running upon receipt of the award by the party seeking to have it set aside.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award rendered in Austria may become subject to setting aside proceedings under the Austrian Code of Civil Procedure (ACCP). Except for awards rendered in labour and consumer disputes, the challenge will be heard directly by the Austrian Supreme Court. If successful, a motion will result in the setting aside of an award. Unless the parties have agreed on an appeal mechanism, this is the only recourse available under Austrian law. Furthermore, as discussed in question 13, arbitral awards may be scrutinised by Austrian courts within enforcement proceedings.

Importantly, the Austrian Supreme Court is not vested with the authority to conduct a substantive review (i.e., it is not allowed to revise the factual and legal basis of the award). An award may be set aside only on the basis of very few grounds, which have been exhaustively enumerated in Section 611(2), Nos. 1 to 8 of the ACCP:

- a valid arbitration agreement does not exist, or one of the parties was incapable of concluding a valid arbitration agreement under the law that governs its personal status, or the arbitral tribunal has denied its jurisdiction;
- a party was not properly notified of the arbitral proceedings or of the appointment of an arbitrator or for another reason was unable to presents its case;
- the award includes a decision on a dispute or an issue that is not covered by the arbitration agreement or by the parties' requests;
- the composition or constitution of the arbitral tribunal was in breach of a party agreement on the matter or in breach of the applicable ACCP provisions;
- the award represents a violation of public policy (i.e., the manner in which the arbitral proceedings were conducted is irreconcilable with the fundamental values of Austrian law (procedural public policy));
- circumstances exist that, if the dispute was subject to Austrian court proceedings, would have led to a revision of the court judgment under Section 530(1), Nos. 1 to 5 of the ACCP. These circumstances are sometimes referred to as 'the criminal law grounds' for setting aside an arbitral award;
- the subject matter of the dispute is non-arbitrable under Austrian law; or
- the arbitral award itself is irreconcilable with the fundamental values of the Austrian legal system (substantive public policy).

The parties may not validly agree to provide for further grounds for setting aside the arbitral award. Notably, the non-arbitrability of the subject matter of the dispute and the violation of substantive public policy must be examined by the Austrian Supreme Court *ex officio*. They may not be waived by the parties. All other grounds must be invoked by the party seeking to have the award set aside. According to scholars, the parties may only validly waive their right to invoke these grounds after the rendering of the arbitral award, in particular after the party entitled to challenge the award has gained knowledge of the circumstances giving rise to the respective ground.

A challenge must be raised within three months of receipt of the award. However, this does not apply with respect to the criminal law grounds mentioned above. The time limit for invoking these grounds is determined *mutatis mutandis* by the provisions governing the reopening of court proceedings.

If a challenge against an award is successful, enforcement proceedings must be abandoned. The effects of the arbitral award would cease *ex tunc* (i.e., as if it had never been rendered); however, the arbitration agreement would remain intact. The Austrian Supreme Court may only declare the arbitration agreement ineffective upon request of the party challenging the arbitral award and only if that motion would represent the third successful challenge against arbitral awards in the same subject matter.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Domestic awards are those rendered by an arbitral tribunal having its seat in Austria. Section 1, No. 16 of the Austrian Enforcement Act (AEA) provides that domestic awards (and domestic arbitral settlements) by themselves represent executory titles and hence do not require prior recognition. The enforcement of domestic arbitral awards is thus governed by the general provisions of the AEA and by specific provisions of the ACCP.

Arbitral awards rendered by a tribunal whose seat is abroad (i.e., foreign arbitral awards) must first undergo a recognition procedure to acquire the status of executory titles in Austria. The recognition of such awards is governed by Section 403 et seq. of the AEA.

These domestic statutory provisions are complementary and subordinate to international law. Thus, the multitude of bilateral and multilateral treaties ratified by Austria and governing the recognition and enforcement of foreign arbitral awards take precedence over conflicting provisions of domestic law.

Most importantly, Austria has acceded to the New York Convention, which governs the recognition and enforcement of foreign arbitral awards. In 1964, the European Convention on International Commercial Arbitration (the European Convention) entered into force for Austria; Article IX thereof governs the recognition and enforcement of arbitral awards.

Austria has also ratified the ICSID Convention of 1965; Article 53 et seq. thereof govern the recognition and enforcement of awards rendered under this Convention.

Besides the above-mentioned multilateral treaties, Austria has concluded and ratified or succeeded to bilateral agreements with Belgium, Croatia, Kosovo, Liechtenstein, North Macedonia, Montenegro, Serbia, Slovenia and Switzerland, which provide for the reciprocal recognition and enforcement of arbitral awards.

Importantly, many treaties may apply to one and the same arbitral award. If this is the case, a court may only refuse enforcement if all conditions in all the applicable treaties are fulfilled.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Austria acceded to the New York Convention of 1958 on 2 May 1961 and the treaty entered into force on 31 July the same year. Upon accession to the treaty, Austria made a reciprocity reservation as entitled to under Article I(3). However, on 25 February 1988, Austria notified the Secretary General of the United Nations of its decision to withdraw this reservation. Therefore, the Convention fully applies to the recognition and enforcement of arbitral awards in Austria.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The district courts are competent to issue a leave for enforcement concerning a given foreign arbitral award, thus recognising it.

With respect to local jurisdiction, in general, Section 409 of the AEA effectively entitles an award creditor to choose between the district court where the award debtor has its seat or domicile and the district court where the movable or immovable asset of interest is registered.

Once the leave for enforcement is given, the foreign arbitral award is treated as Austrian executory title, and thus it undergoes the same enforcement procedure that also applies to domestic arbitral awards. The creditor of a foreign award may combine the applications for leave for enforcement and enforcement authorisation to obtain both decisions at once.

Upon appeal, the district court's decision may be reviewed by the respective regional court. That regional court's decision may, in turn, be examined by the Austrian Supreme Court. Notably, however, the Austrian Supreme Court's review is limited to points of law and only to issues of material importance to the uniformity, the certainty or the development of Austrian legal policy.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Apart from those already discussed, there are no further requirements for the jurisdiction of the court. With respect to enforcement proceedings, if an applicant chooses to establish the territorial jurisdiction of the district court based on the location of the asset against which enforcement is being sought rather than on the debtor's seat or domicile, the applicant must show that the asset is indeed located within the territorial jurisdiction of the court where the enforcement application is pending. An applicant would typically combine the recognition proceedings with a request for enforcement authorisation. However, a request for enforcement authorisation requires the indication of specific assets.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are *ex parte*. The court shall decide whether to grant or deny a leave for enforcement based only on documents (i.e., without conducting a hearing or otherwise involving the award debtor). This procedure was designed to grant the award creditor the advantage of unannounced enforcement access.

However, this does not mean that the award debtor is denied the right to be heard. Rather, they may appeal against the court order granting a leave for enforcement and, in doing so, they may also introduce new facts. The appeal will be heard by the competent regional court in *inter partes* proceedings.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Pursuant to Article IV(1)(a) of the New York Convention, an applicant seeking recognition of an arbitral award shall furnish the original award or a certified copy thereof and the original arbitration agreement or a certified copy thereof.

Notably, Section 614(2) of the ACCP governs the same subject matter but it places the decision whether to request that the applicant furnish the relevant arbitral agreement (or a certified copy thereof) within the discretion of the competent court. In line with Article VII(2) of the New York Convention, the more liberal approach as enshrined in this domestic provision supersedes the stricter approach taken by the international treaty.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If an arbitral award is not in German, an applicant must submit a certified translation of the whole award by a sworn or officially appointed translator. However, awards written in Slovenian may be submitted without a German translation to the district courts in Bleiburg, Ferlach and Eisenkappel, and their common court of appeal (i.e., the regional court in Klagenfurt in the state of Carinthia). Similarly, no translation is required with respect to awards in Croatian if the recognition proceedings are pending before the district courts in Eisenstadt, Güssing, Mattersburg, Neusiedl am See, Oberpullendorf or Oberwart as well before their common appeals court (i.e., the regional court in Eisenstadt in the state of Burgenland).

It is within the discretion of the competent court to request that an applicant submit a fully translated copy of the arbitration agreement. However, the applicant is not required to submit a translation of the entire underlying contract in which the relevant arbitration clause is contained.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

Since the district court would only examine whether the formal requirements of the New York Convention are satisfied without hearing the award debtor, the Austrian Supreme

Court has adopted a formalistic approach to the proceedings. The court will meticulously examine whether the name of a debtor as indicated in a request for enforcement authorisation conforms with the name indicated in the arbitral award.

The court fees for the recognition and enforcement of arbitral awards are calculated in accordance with a schedule. The amount depends on the value of the award, with the fees for enforcement against immovable assets being slightly higher than the fees required for other assets. The amount also increases with the number of debtors against whom the award is to be enforced. Ultimately, should the request for enforcement authorisation be successful, the award debtor will be obliged to reimburse the creditor for the procedural costs.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

An arbitral award that provides for a final resolution of at least part of a dispute on the merits meets the criteria of the New York Convention and thus may be recognised and enforced in Austria provided that the substantive issues it concerns are separable from the rest of the dispute.

Interim awards, on the other hand, do not represent a final resolution of a dispute regardless of whether they claim to resolve the dispute in its entirety or only parts of it. Hence, such awards are not enforceable.

However, interim and conservatory measures are enforceable in Austria. This is true regardless of whether they may be characterised as awards in the sense of the New York Convention or not.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The New York Convention and, in particular, the grounds for refusing the enforcement and recognition of a foreign arbitral award provided under Article V of the Convention are directly applicable in Austria. Austrian statutory law, therefore, does not provide for a domestic catalogue of grounds for refusing recognition.

Notably, the interpretation of Article V of the Convention is influenced by the jurisprudence of the Austrian Supreme Court developed under Section 611 of the ACCP, which stipulates the grounds for setting aside an arbitral award as they correspond with the grounds listed in Article V.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once leave for enforcement is obtained, the foreign arbitral award shall be treated equally with domestic arbitral awards. This, in itself, is not sufficient to render the award enforceable. Rather, as mentioned in question 6, the award creditor has to request the court to issue an enforcement authorisation. As also discussed in question 6, the AEA allows applicants to combine this request with a request for a leave for enforcement to obtain the decisions on both subject matters at once.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Since recognition proceedings are *ex parte*, an award debtor would only learn about the outcome once the district court's decision is served. The debtor may appeal against this decision before the competent regional court within four weeks. This period doubles if the award debtor's seat or domicile is abroad, provided that this appeal is the debtor's very first opportunity to participate in the recognition proceedings. The appeal must be based on the grounds for rejecting the recognition and enforcement of an arbitral award as listed in Article V of the New York Convention. This provision also allows the debtor to invoke grounds for refusal that have not been discussed before the district court.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Under Article VI of the New York Convention, the enforcement court may adjourn the enforcement proceedings if a challenge against a foreign arbitral award becomes pending before a court in the country where the award was rendered. If the court decides to do so, it may also order the debtor to provide appropriate security. The Austrian Supreme Court interprets this provision as placing both decisions, whether to adjourn the proceedings and whether to order the debtor to give security, within the discretionary powers of the competent court.

Whether the adjournment will be granted depends on the chances of success of the challenge against the arbitral award in its state of origin. While the Austrian Supreme Court has ruled that it is within the competent court's discretion to treat an application to set aside an award 'generously', it has also stressed that the onus is on the debtor to show why the award is likely to be set aside and that merely proving that a challenge has been raised against it is not sufficient to adjourn the recognition proceedings in Austria.

In addition to Article VI of the New York Convention, the AEA allows the debtor to request the adjournment of the enforcement authorisation proceedings if the foreign executory title has not yet become final and binding in accordance with the rules in its jurisdiction of origin. The Austrian Supreme Court regards this provision as a necessary supplement to Article VI of the New York Convention, which it interprets as applying only to proceedings to obtain a leave for enforcement and not allowing for adjournment of the enforcement authorisation proceedings.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

It is within the court's discretionary powers to order an award debtor to provide security, should a creditor request this. As a general rule, the court will require the debtor to provide the security.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Under Article V(1)(e) of the New York Convention, the recognition and enforcement of an arbitral award 'may be refused' if it has been set aside in the jurisdiction of its origin.

Article IX of the European Convention has an important role as it limits the scope of application of Article V(1)(e) of the New York Convention by providing that this ground for refusing recognition of a foreign award may not be invoked if the award has been set aside because of that foreign jurisdiction's public policy (Austrian Supreme Court, 23 February 1998, 3 Ob 115/95).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The service of documents within the territory of Austria is governed by the ACCP, by the Austrian Service Act and by the Court Organisation Law.

Both natural persons and legal entities may appoint a person they trust to serve as their authorised representative for the purpose of document service, provided that this person has its point of delivery within the territory of Austria. If a party to court proceedings does

not have a point of delivery in Austria, the court may order it to appoint an authorised representative for document service. It is also within the court's discretion to order a group of two or more parties to appoint a common authorised representative.

Documents may be served to their addressees 'in person'. In accordance with Section 16 of the Austrian Service Act, should the addressee be away at the time of the service, the document may be served to any person of age who lives in the addressee's household or who is the addressee's employee or employer. Should these methods fail, the documents may be deposited with the local postal office and the addressee must be notified.

Occasionally, the Austrian law prescribes that a registered personal service is required, thereby allowing for service on that very person.

Notably, a special system for electronic service of documents has been put in place in Austria, and attorneys, insurance companies, credit institutions, social insurance providers and certain specific institutions are obliged to use it.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Should the document be served to a point of delivery situated in another Member State of the European Union, then Regulation (EC) No. 1393/2007 is applicable and must be observed. Beyond the European context, the Hague Service Convention of 1965 allows for service of documents without recourse to consular and diplomatic channels. However, the latter are required for service of documents to foreign parties enjoying immunity under public international law.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Austria's Land Register is publicly available. An extract from the register showing information concerning the ownership of a particular immovable property may be obtained from the competent court. With the help of licensed software typically used by attorneys and notaries public, a search by property may be done online. However, the database is only searchable by property number. It is therefore difficult to obtain comprehensive information about the registered immovable property owned by a particular debtor unless the creditor is aware of the location of the property in advance. However, once the creditor has obtained an executory title they will, upon request, receive comprehensive information about the real estate owned by the debtor.

Austria's commercial register lists all limited liability companies and stock companies, and those partnerships and individual business peoplewhose annual revenues exceed a certain amount. The register lists each business entity's shareholders and its management. The database is searchable by name of company.

The website of the Austrian Patent Office maintains a register allowing for a quick and easy online search by name of national and European patents, trademarks and designs, and protections.

Creditors may turn to private service providers, such as Kreditschutzverband 1870, Creditreform and Compass Gruppe, that offer information about a person's or a company's creditworthiness as well as indicating bank accounts, shares in other companies and annual accounts.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

As mentioned in question 21, the Land Register is searchable by name for creditors who have already obtained an executory title against their debtors.

Under specific circumstances stipulated in the AEA, a debtor may be ordered to prepare a full list of their assets. Notably, the Austrian Penal Code foresees a sanction of up to six months of forced confinement if a debtor provides false or incomplete information that jeopardises the satisfaction of the claim.

Notably, recent amendments to the AEA allow attorneys and notaries public access to enforcement data (i.e., information about the enforcement court, the case number and the amount of the debt subject to the enforcement proceedings). The database also shows previous attempts to seize a debtor's movable assets and whether the debtor has been ordered to prepare an inventory of its property within the past year. However, it does not provide information about proceedings in which a creditor has not taken an action to actively pursue enforcement within the past two years or proceedings that have taken less than a month to conclude since their respective leave of enforcement. Most importantly, to gain access to this information, attorneys and notaries public do not need to exhibit an executory title, but merely attest to the existence of a receivable their clients may have against the debtor, and to reasonable doubt as to the debtor's solvency. This allows potential claimants to benefit from the new database and evaluate enforcement chances before commencing proceedings.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

The ACCP authorises arbitral tribunals to order pre-award interim or protective measures upon party request, should they find that the enforcement of a claim would otherwise be frustrated or significantly impeded. Regardless of the arbitration clause, parties may also request such measures from a state court.

Importantly, if the arbitral tribunal has been requested to issue interim measures, the opponent of the party at risk must be heard.

Regardless of the arbitration clause, state courts are authorised to grant interim measures, too. This is important as it gives parties a chance to obtain interim measures before their arbitral tribunal is constituted.

Whether or not interim measures may be applied to assets owned by a foreign state depends on whether these assets are used to enable the state to exercise its state powers or not. For more on this matter, see question 34.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Interim measures issued by an arbitral tribunal do not need to be recognised before their enforcement. A request for enforcement of an interim measure may be filed with the district court where the opponent of the party at risk has its habitual residence, domicile or seat. Otherwise, the request must be brought before the district court where the enforcement measure is to be carried out.

While arbitral tribunals are free to order interim measures of types that are unknown under Austrian law, Section 593(3) of the ACCP authorises enforcement courts to transform them into interim measures of a type that is in conformity with Austrian law and that comes closest to the interim measure originally ordered by the arbitral tribunal. Importantly, in such cases, the party at risk must specify the Austrian interim measure it considers appropriate, or its request for enforcement must be refused by the court under Section 593(4), No. 4 of the ACCP.

Before granting enforcement, the arbitral tribunal must hear the opponent of the party at risk, thereby giving it a chance to raise objections based on Section 593(4) of the ACCP. This provision lists four grounds for refusing enforcement of interim measures. In addition to Section 593(4), No. 4, as discussed above, an interim measure must be refused (1) if it suffers from a defect that would amount to a ground to set aside an arbitral award, (2) if it is a foreign interim measure and suffers from a defect that would constitute a ground for refusing to recognise an arbitral award, or (3) if the interim measure is incompatible with prior court measures. The court must examine these grounds *ex officio*.

The ACCP provides for a list of grounds for suspending the enforcement of interim measures. Importantly, an interim measure must be suspended if an opponent of the party at risk has provided security in connection with the measure.

The decision of the district court may be appealed by both parties.

As has already been discussed, the party at risk may choose to bring its request for interim measures before a state court. The court at the seat of the opponent of the interim measure is competent to grant the measures if the request has been raised before or during the arbitration or before enforcement proceedings. Otherwise, if the request has been filed with the court during a current enforcement proceeding, it will be heard by the court in charge of the enforcement proceedings.

Notably, the proceedings before the court are *ex parte*; therefore, the opponent of the party at risk will only be heard upon appeal. Parties at risk may request the court to issue interim measures against third parties. This is an important advantage in comparison

with interim measures issued by an arbitral tribunal that may only bind the parties to the arbitration. Note also that the party at risk does not have to prove but merely to attest the fulfilment of the conditions for granting interim measures (i.e., the existence of a claim and that its enforcement would be frustrated or significantly impeded if the court refuses to order the requested interim measure). If the claim is for a money payment, the party at risk will have to show that it is in jeopardy owing to circumstances arising from the behaviour of its opponent. Otherwise, it must attest that it is rooted in objective circumstances.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Neither the ACCP, nor the AEA provisions governing the enforcement of interim measures in general, distinguish between the types of assets that the interim measures are aiming at. However, it does make a difference whether the claim at risk is a claim for money payment or not.

If the claim is for money payment, the available enforcement measures are the following: (1) deposit and administration of tangible movable assets and money; (2) prohibition of any disposal of or pledge in relation to a specific tangible movable asset; (3) prohibition aimed at an opponent of the party at risk to collect specific receivables and a prohibition aimed at that party's debtors (third-party debtors) to perform their corresponding obligations; (4) administration of immovable property; and (6) prohibition of any disposal of or pledge in relation to a specific immovable property.

If the claim is not for money payment, in addition to the measures listed above, the party at risk may request the following interim measures: (1) deposition of assets with the court; (2) right to retention; (3) order aimed at the opponent of the party at risk to take specific conservation measures; and even, under specific conditions, (4) arrest.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

Since there are no specific provisions governing the enforcement of such measures in particular, they must be enforced in accordance with the procedures described in questions 24 and 25.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

Since there are no specific provisions governing the enforcement of such measures in particular, they must be enforced in accordance with the procedures described in questions 24 and 25.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Court enforcement proceedings are typically based on documents and no oral hearing is required. If a hearing is nevertheless scheduled, it would be open only to the parties to the proceedings. A streamlined procedure applies to claims not exceeding €50,000 and satisfying the other conditions of Section 54b(1) of the AEA.

Court orders are subject to an appeal, except if is expressly excluded by the law. In general, appeals must be brought within 14 days; however, with respect to court orders authorising the enforcement of foreign executory titles, such as arbitral awards, the time limit is four weeks. Note also that a recourse against the authorisation of enforcement of a foreign executory title allows for an applicant to refer to new facts.

The court does not examine the merits of a claim in the course of enforcement authorisation proceedings. Therefore, it might authorise the enforcement even if the underlying claim has lapsed or has been satisfied as the result of a circumstance that occurred after rendering of the executory title (i.e., the arbitral award). A debtor may therefore raise claims against a creditor with the aim of closing or limiting the enforcement proceedings. A dispute regarding such claims will be heard by the court in accordance with the provisions of the ACCP. Similarly, an enforcement would be inadmissible if the claim was not yet mature or not yet enforceable, if the creditor has waived its right to enforce the claim, or under other similar circumstances expressly provided by the law. Finally, third parties whose rights have been violated in the course of the enforcement proceedings are also entitled to raise a claim against a creditor.

Actions of the bailiff (i.e., an ancillary organ of the enforcement court in charge of tracing, collecting or making use of the debtor's assets, may either be subject to enforcement complaints regarding alleged non-compliance with the law, or with court orders on the part of the bailiff, or they may be subject to supervision complaints with respect to an alleged refusal or delay of enforcement actions.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

We distinguish between three types of enforcement measures that an award creditor may combine or apply for separately, namely (1) compulsory mortgage, (2) compulsory administration with the aim of generating revenue to satisfy a claim, and (3) compulsory sale of an immovable asset.

Naturally, the compulsory sale of an immovable property is the most intrusive measure a creditor may choose to request. Once all parties are notified, an independent expert will be appointed to evaluate the property. Its estimated value will then form the basis of the auction procedure. The property may not be sold at a price that is lower than 50 per cent of the estimated value.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

The provisions regulating an enforcement measure against movable property distinguish between attachment against tangible and movable objects, attachment against receivables, attachment against claims to be handed out in respect of tangible property and other property rights (such as trademarks, patents, copyrights, licences and shares). Enforcement against intangible assets is discussed in question 31.

Once the enforcement court permits the creditors to attach tangible movable assets, the bailiff takes charge of the remaining part of the proceedings. The bailiff's objective is to generate sufficient revenue to satisfy the creditor's claims within four months. The AEA provides for a very general normative framework for the enforcement measures, thus allowing bailiffs a large degree of independence.

The bailiff is obliged to produce a seizure report listing the attached assets. In this way, while remaining with the debtor, the respective assets are transferred into the public domain, and only government institutions may dispose of them. Notably, the AEA provides a list of certain types of tangible movable assets, such as food products, pets, certain goods required for the exercise of religious rites, and duties and money amounts before their next payment. These types of assets may not be seized by the bailiff. Seized assets must be deposited with the court, with specific institutions or with third-party depositories appointed by the creditor.

The bailiff is the one to decide whether the sale should be direct or through an auction. Auctions may be conducted on the internet, at the court's premises, at the premises of a commercial auction house or at the site where the assets are generally held.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

A creditor may request the enforcement court to attach receivables owed to the debtor by third-party debtors. The court would then issue an order prohibiting the third-party debtors from performing their obligations as regards the award debtor and prohibiting the award debtor from accepting their performance. Importantly, specific receivables, such as nursing allowance, rent aid, family allowance and scholarships, may not be attached. Other receivables may become subject to attachment proceedings but only to a limited extent or under further specific circumstances. The main purpose of these restrictions is to ensure that the debtor's income does not fall below the subsistence minimum.

Further property rights, such as intellectual property rights, shares, licences and fishing rights may be attached provided that they are transferable from one person to another and provided that they may be subject to commercial exploitation. The creditor is required to indicate such rights in the request for attachment but does not need to specify a particular kind of commercial exploitation. Rather, upon issuing a prohibition to dispose of the property rights in question and upon hearing all creditors, the court will decide how best to satisfy their claims.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Austrian domestic law does not provide for a particular set of provisions governing enforcement proceedings against states. However, domestic statutory rules, such as Article IX of the Introductory Law to the Law on Jurisdiction, and international treaties and customary international law do address individual aspects of enforcement against states in the context of sovereign immunity. These provisions are discussed in the questions that follow.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

In line with the theory of limited sovereignty, Austria distinguishes between acts of state that are governed by private law (*acta iure gestionis*) and acts through which states exercise state power (*acta iure imperii*). In the latter case, statutory law stipulates that the relevant documents must be served to the foreign state through the Federal Ministry for Europe, Integration and Foreign Affairs. Domestic statutory law, of course, only applies provided that the subject matter is not regulated in an international treaty between the two states.

In general, the relevant state's embassy in Austria is not the right point of delivery. However, it may accept the service of a particular document and forward it to the state addressee. With unopposed acceptance by the state, the document is then regarded as being validly delivered.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

In line with the theory of limited immunity, foreign states are only exempt from the jurisdiction of Austria's courts to the extent that they act in their capacity as states (i.e., where they exercise state power). Thus, foreign states do not enjoy immunity with respect to transactions based on private law and disputes arising from such transactions may be heard by Austrian courts.

Assets owned by foreign states and situated in Austria are exempt from enforcement proceedings depending on the purpose of their use. If the assets are meant to be used solely for private transactions, they may be seized and become subject to enforcement proceedings in Austria. However, if their purpose is to enable the foreign state to exercise its state powers (e.g., to enable the embassy to perform its tasks), no enforcement measures may be ordered against them. This concerns the premises of foreign embassies as well as the apartments where that state's diplomats reside.

State immunity also extends to assets of mixed use. If an Austrian bank account owned by the embassy of a foreign state is not used solely for private transactions but also for payment enabling the embassy to exercise its state powers, such a bank account would fall under that state's immunity and therefore would be immune from enforcement measures in Austria. The purpose of this broad approach to state immunity is to avoid jeopardising the continued capacity of foreign states to maintain their embassies in Austria. The onus is on the creditor of the executory title to show that the purpose of the respective asset allows for an exemption from state immunity.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Waiver of state immunity is governed by Article IX of the Introductory Law to the Law on Jurisdiction. In accordance with this provision, states may waive their right to sovereign immunity at any stage of the proceedings by means of an agreement or through a unilateral declaration. To be effective, such a declaration must be made expressly. However, a state may implicitly confirm that such a waiver has been made. Also, there are no specific form requirements applicable to waivers of sovereign immunity. Such a declaration may therefore be made also verbally.

Importantly, a waiver made in relation to litigation or arbitration proceedings does not extend to the enforcement stage of the dispute. This means that an additional waiver is necessary, referring to enforcement in particular, and must be made under the rules as described above.

16

Belgium

Hakim Boularbah, Olivier van der Haegen and Jasmine Rayée[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The Belgian law on arbitration is contained in Part Six, Articles 1676 to 1722 of the Belgian Judicial Code (BJC). It is inspired to a large extent by the UNCITRAL Model Law. Arbitration proceedings initiated before 1 September 2013, and court proceedings relating to those arbitrations, remain governed by the former rules of the BJC. In 2016 (by an Act of 25 December 2016), some minor changes and corrections of the Act of 24 June 2013 were implemented, which entered into force on 9 January 2017.

The form of arbitral awards is governed by Article 1713 of the BJC, which deals with the validity requirements and different aspects relating to the content of arbitral awards. Belgian law builds on Article 31 of the UNCITRAL Model Law, adding to it as well as deviating from it in a number of ways, including by requiring that an arbitral award issued in Belgium should be reasoned and by removing the opportunity for parties to agree that no reasons need to be given (a lack of reasoning constitutes, among others, a ground for annulment of the arbitral award – see question 3).

To be valid under Belgian law the arbitral award must:

- as to form: be in writing and signed by the arbitral tribunal (the signature of the majority of the members of an arbitral tribunal is sufficient, if the reason for any omitted signature is mentioned) (Article 1713, Section 3, BJC);

1 Hakim Boularbah is a partner, Olivier van der Haegen is a counsel and Jasmine Rayée is a junior associate at Loyens & Loeff.

- as to substance: state the reasons upon which it is based (Article 1713, Section 4, BJC) and contain at least the following information: (1) the names and domiciles of the arbitrators, (2) the names and domiciles of the parties, (3) the object of the dispute (and a citation of the arbitration agreement, although not explicitly required by law), (4) the date on which the award was rendered, and (5) the place of arbitration.

Following the amendment of the Belgian law on arbitration in 2016, it is no longer required by law that an original copy of the award be filed with the competent court for the enforcement.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Parties may apply for an interpretation, a correction or an additional award within a month of communication of the arbitral award to the parties.

If there are any clerical or typographical errors, errors in calculation or other errors of a similar nature, the parties (or the arbitral tribunal on its own motion) may request the correction of the arbitral award pursuant to Article 1715, Section 1(a) of the BJC.

A party may also, subject to agreement by the other parties to that effect, request the arbitral tribunal to provide an interpretation of (an aspect of) the award (Article 1715, Section 1(b), BJC). Unless agreed otherwise, the parties may also request the arbitral tribunal to issue an additional award on claims that had been presented to it but on which it has not pronounced itself (Article 1715, Section 3, BJC).

In principle, the same arbitral tribunal is competent to issue correcting, interpreting or additional awards as described above. When it is impossible for the same arbitrators to do so, the court of first instance is competent (Article 1715, Section 6, BJC).

Belgian law also provides parties with the opportunity to ask that potential annulment grounds be remedied by the arbitral tribunal. Pursuant to Article 1717, Section 6 of the BJC, parties may request the court be seised in set-aside proceedings to stay the proceedings for a period determined by the court, so that the arbitral tribunal can take any measure necessary (including reopening the arbitration proceedings) to remedy the potential grounds for setting aside.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Pursuant to Article 1716 of the BJC, appeals against arbitral awards are only possible when the parties provided beforehand, in a mutually agreed arbitration clause, for the possibility of an appeal. In such – very exceptional – cases, an appeal should be brought before a new arbitral tribunal.

Pursuant to Article 1717 of the BJC, Belgian awards, which are not open to appeal, may be set aside by Belgian courts on the basis of an exhaustive list of grounds provided in the law.

Set-aside proceedings must be initiated by writ of summons served on the other parties to the arbitration proceedings, before one of the six competent courts in Belgium (the courts of first instance of Brussels (French-speaking and Dutch-speaking), Antwerp, Ghent, Liège and Mons) (Article 1717, Section 2, BJC). The law provides a time limit for initiating the setting aside proceedings (i.e., within three months of the date on which either the award was communicated to the party seeking setting aside, or the arbitral tribunal's decision on an application for correction or request for an additional award or omitted claim – if such an application or request was made – was communicated to that party) (Article 1717, Section 4, BJC).

When none of the parties are Belgian nationals, they may waive, by explicit declaration in the arbitration agreement or by later agreement, the possibility for annulment of the arbitral award (Article 1718, BJC). The annulment (or setting aside) decision is final and cannot be appealed before the courts of appeal (Article 1717, Section 2, BJC). However, a recourse before the Belgian Supreme Court remains open.

The law provides for a limited number of grounds that can warrant the setting aside of the arbitral award. Those exhaustive grounds are inspired by Article 34(2) of the UNCITRAL Model Law and are similar to the grounds for refusal of enforcement (see question 13).

A party may seek the setting aside of a Belgian award if it provides proof of one the grounds listed under Article 1717, Section 3 of the BJC:

- one of the parties to the arbitration agreement was under some incapacity; or the arbitration agreement is invalid under the law applicable to it, or if there is none, under Belgian law (Section 3(a)(i));
- the party seeking annulment invokes a violation of the right to be heard (i.e., that party was not notified properly of the appointment of an arbitrator or of the arbitral proceedings or it was otherwise impossible for that party to present its case) (Section 3(a)(ii)). This ground will only be accepted if the irregularity had an effect on the arbitral award;
- the arbitral award pertains to a dispute that does not fall within the terms, or under the scope, of the arbitration agreement (Section 3(a)(iii)). Here, only the part of the award that does not fall under the scope of the arbitration agreement may be set aside;
- there was an irregularity in the composition of the arbitral tribunal or the arbitral proceedings, either according to the parties' agreement, or to Part Six of the BJC (the Belgian law on arbitration) (Section 3(a)(v)). Irregularities in the arbitral proceedings may only lead to a setting aside if it is established that they had an effect on the award;
- the arbitral award is not reasoned (Section 3(a)(iv));
- the arbitral tribunal exceeded its powers (Section 3(a)(vi));
- the subject matter of the dispute cannot be settled by arbitration (non-arbitrability) (Section 3(b)(i));
- the award is contrary to public policy (Section 3(b)(ii)); or
- the award was obtained by fraud (Section 3(b)(iii)).

The latter three grounds (non-arbitrability, public policy and fraud) must also be raised by the court of first instance seised by the party seeking setting aside of the award on their own motion, thus even if the parties do not invoke such grounds.

Note that a party may be estopped from advancing certain grounds for setting aside if it was aware of them during the arbitration proceedings but failed to invoke them before the arbitral tribunal (Article 1717, Section 5, BJC, referring to the first four grounds listed above).

If an arbitral award is set aside, it is deemed to no longer exist under Belgian law. If the award was set aside on any ground other than the invalidity of the arbitration agreement, the parties may initiate new arbitration proceedings. In contrast, an appeal against the arbitral award (if the parties provided for that opportunity) would result in a new arbitral award, which in itself would be open to setting aside proceedings.

In principle, only a person or entity that was a party to the original arbitration proceedings may request the annulment of the arbitral award. It is only in the event of fraud that a third party may be admitted to request the setting aside of an arbitral award.

However, the Belgian Constitutional Court decided (judgment dated 16 February 2017) that third parties aggrieved by an arbitral award should be able to exercise recourse against that award by way of third party opposition proceedings instituted before domestic courts. Therefore, a third party is now entitled to challenge an arbitral award in the same way as a third party can challenge a judicial decision (a challenge that is known as a tierce-opposition (*derdenverzet*), as provided in Article 1122, BJC). This opens the possibility for a review of awards on the merits. So far, the legal regime governing this third party opposition to an arbitral award has not been presented in more detail. The precise consequences of the Constitutional Court's decision remains to be delineated. In our view, there is a need to adjust the BJC to provide for the applicable regime to those specific challenges from third parties.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Belgian law on arbitration is contained in Part Six of the BJC (as remodelled by the Arbitration Act of 24 June 2013 and by the Act of 25 December 2016) and is to a large extent inspired by the UNCITRAL Model Law. Chapter VIII of the BJC (Articles 1719 to 1721, BJC) governs the recognition and enforcement of arbitral awards.

Belgium is party to several treaties facilitating recognition and enforcement of arbitral awards, namely the New York Convention of 10 June 1958 (which it signed with the reservation of reciprocity (see question 5); the New York Convention supersedes the Geneva Convention of 26 September 1927 on the enforcement of foreign awards, which Belgium had also ratified), the European Convention on International Commercial Arbitration of 21 April 1961, and the ICSID Convention of 18 March 1965 (the Belgian Act of 17 July 1970 implements the ICSID Convention under Belgian law). The recognition and enforcement of ICSID arbitral awards is governed by a distinct regime (see question 32).

Belgium has also signed five bilateral treaties on recognition and enforcement of arbitral awards with Austria, France, Germany, the Netherlands and Switzerland.

Article 1721(3) of the BJC provides that a treaty concluded between Belgium and the country where the arbitral award was rendered takes precedence over domestic rules. This provision must be read with the 'more favourable law' provision of the New York Convention, which provides that the Convention does not take precedence over legislation that is more favourable to recognition and enforcement.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes. Belgium signed the Convention on 10 June 1958 and ratified it on 18 August 1975. The New York Convention entered into force on 16 November 1975.

Belgium has made a reciprocity reservation under Article I(3) of the Convention. Therefore, it is only applicable to the recognition and enforcement of arbitral awards made in the territory of a contracting state. In Belgium, the Convention is applicable in both commercial and civil matters.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The court of first instance has jurisdiction to hear applications for recognition and enforcement of arbitral awards.

In the case of a foreign award, the territorially competent court of first instance is the court of the place where the party against whom enforcement is sought has its domicile, residence, registered seat or branch in Belgium or, in the absence of any of these, the place where the applicant wishes to enforce the arbitral award (Article 1720, Section 2, BJC).

In the case of a Belgian award, the competent court is the court of first instance with jurisdiction at the place of the seat of the arbitration (Article 1680, Section 6, BJC).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As for any other proceedings, the applicant has to demonstrate that it has *locus standi* (meaning a genuine interest to act). Apart from that, there are no specific requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards, whether foreign or domestic.

It is not required under Belgian law that the applicant identifies assets within the jurisdiction of the court to obtain the recognition and enforcement of an arbitral award.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are *ex parte* in Belgium, meaning that recognition is sought by way of a unilateral request. The party against whom enforcement is sought has no right to be heard at that stage of the procedure (but it can lodge third-party opposition proceedings against the *exequatur* order).

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Pursuant to the New York Convention, an applicant must provide the court with the original or a duly authenticated copy of both an arbitral award and an arbitration agreement.

Pursuant to the BJC, an applicant must provide the court with the original or a duly authenticated copy of an arbitral award in its entirety. Following the entry into force of the latest amendments to the Belgian law on arbitration in January 2017, it is no longer required to provide the court with the original or a copy of an arbitration agreement. This amendment was introduced to make Article 1720 of the BJC compatible with Article 35 of the UNCITRAL Model Law and Article 1681 of the BJC, which no longer requires an arbitration agreement to be in writing.

The application itself must be filed in triplicate and signed by an attorney entitled to plead before Belgian courts.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Pursuant to the New York Convention, if the required documentation is not drafted in the language of the proceedings (in Belgium, either French or Dutch), it is necessary to submit a sworn translation of an arbitral award or an arbitration agreement.

There is no such requirement provided in the BJC. In practice, it is recommended to submit a translation (at least an informal translation) to allow the *exequatur* judge to have a clear understanding of the case.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An applicant must elect domicile in the district of the court of first instance with jurisdiction over the application for recognition and enforcement of the arbitral award. In practice, foreign applicants usually elect domicile at their attorney's office. If an arbitral award is recognised by the *exequatur* judge, a registration fee of 3 per cent of the amount of the award (excluding interests) will be levied by the Belgian Tax Authority. In principle, the registration fee is only payable by the award debtor.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Belgian courts generally recognise and enforce partial and interim awards (whatever their form) as long as they contain an order that is no longer subject to appeal before the arbitrators.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Article 1721 of the BJC provides several grounds for refusing recognition and enforcement that are inspired by Article 36 of the UNCITRAL Model Law and are to a large extent similar to those provided under Article V of the New York Convention.

The grounds for refusal of *exequatur* set forth in Article 1721 of the BJC are similar to the grounds for annulment of Belgian arbitral awards (see question 3). Hence, recognition and enforcement of an arbitral award may be refused if the party against whom enforcement is sought provides evidence that:

- one of the parties to the arbitration agreement was under some incapacity, or the arbitration agreement is invalid under the law applicable to it, or if there is none, under Belgian law;
- the right to be heard of the party against whom enforcement is sought was breached (i.e., that party was not notified properly of the appointment of an arbitrator or of the arbitral proceedings or it was otherwise impossible for that party to present its case) if the irregularity had an effect on the arbitral award;
- the arbitral award pertains to a dispute that does not fall within the terms, or under the scope, of the arbitration agreement. If only part of the award falls under the scope or terms of the arbitration agreement, only that part may be recognised and enforced;
- the arbitral award is not reasoned. Recognition or enforcement may only be refused if such reasoning is required under the rules applicable to the arbitration proceedings;

- there was an irregularity in the composition of the arbitral tribunal or the arbitral proceedings, either according to the parties' agreement or to the law of the country where the arbitration took place. Irregularities in the arbitral proceedings may only lead to a refusal of recognition if it is established that they had an effect on the award;
- the arbitral award has not yet become binding on the parties (e.g., because it is still open for appeal) or has been set aside or suspended by a court of the country where the award was made (or which laws were applicable to the proceedings) (for more details, see question 16); or
- the arbitral tribunal exceeded its powers.

Recognition and enforcement of an arbitral award may also be refused *ex officio* if:

- the subject matter of the dispute cannot be settled by way of arbitration (non-arbitrability);
- the award is contrary to public policy; or
- the award was obtained by fraud.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The order of the *exequatur* judge recognising the arbitral award in Belgium is immediately enforceable and is not subject to appeal by the party seeking recognition and enforcement.

Under Belgian law, the party against whom enforcement is sought can challenge the decision granting the *exequatur* to the award within one month of the date of the service of the order by way of third party opposition proceedings before the same court of first instance, this time in adversarial proceedings. The challenge does not in itself stay the enforcement of the arbitral award.

As of 9 January 2017, the party who lodges a recourse against a decision enforcing an arbitral award issued in Belgium and who wants to have an arbitral award set aside, is forced to make a setting aside application concomitantly with the challenge to the enforcement order and in the same procedure (provided that the deadline to file a setting aside application has not expired) (Article 1717, Section 7, BJC).

Aside from that, it has long been decided by the Belgian Court of Cassation that third parties (parties who did not participate and who were not called to participate in the arbitration) may not challenge the order recognising and enforcing the arbitral award. As noted above (see question 3), the Belgian Constitutional Court decided in a judgment dated 16 February 2016 that a third party should have the right to directly challenge an arbitral award before the Belgian courts (to avoid being in opposition to the *res judicata* effect of that award). Nevertheless, it remains the case that a third party may not challenge the enforcement of an arbitral award.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

If recognition is refused, an applicant may only lodge an appeal against that decision before the Belgian Court of Cassation on points of law (the Arbitration Act of 2013 removed the possibility to challenge the decision before a court of appeal).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

With respect to foreign arbitral awards, Article VI of the New York Convention provides that, if annulment proceedings are initiated in the state where an award was rendered, the *exequatur* judge may, if appropriate, adjourn the decision on the enforcement of the award. Belgian courts essentially rely on the seriousness of the grounds invoked at the seat of the arbitration for setting aside the arbitral award. If there is no reasonable risk of the award being set aside, Belgian courts will not adjourn the proceedings. The Belgian *exequatur* judge also considers the potential ease or difficulty of enforcing the award.

There is no similar provision under Belgian law pertaining specifically to the adjournment of recognition proceedings in the event of a setting aside proceedings pending in the state where the arbitration had its seat. Nevertheless, once the *exequatur* is granted, the person against whom enforcement is sought and who challenges the recognition order may request before the court of attachments (a specific chamber within a court of first instance) a temporary stay of the enforcement of the *exequatur* order on the basis of Article 1127 of the BJC. According to the relevant case law and legal literature, an applicant must demonstrate either that there is a strong *prima facie* chance that the *exequatur* order will be reversed or that a risk of irreparable harm exists.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

In accordance with Article VI of the New York Convention, an *exequatur* judge may, at the request of an applicant, order the person against whom enforcement is sought to post a suitable security. Article VI grants *exequatur* judges a great margin of discretion in deciding whether to order the posting of a security and the amount that should be posted as security.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Pursuant to Article V(1)(e) of the New York Convention and the new Article 1721(1)(a)(vi) of the BJC, the setting aside of an arbitral award at the seat of the arbitration is a ground for refusal of its recognition and enforcement. However, it can be argued that the enforcement court keeps a discretion under Article V of the New York Convention in this respect (hence the same argument can be made with respect to Article 1721(1)(a)(vi), BJC).

Under the former regime of the BJC, the setting aside of the arbitral award was not contained in the list of grounds for refusal of recognition and enforcement (former Article 1723). Therefore, several prominent authors have argued that Belgian law was more favourable and had to prevail on the basis of Article VII(1) of the New York Convention.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of judicial and extrajudicial documents are carried out in Belgium by bailiffs. They are the only officers entitled to perform that mission pursuant to the BJC.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Different regimes are potentially applicable for the service of extrajudicial and judicial documents abroad, depending on the state addressed.

In principle, service on a defendant who is not domiciled or has no (chosen) place of residence in Belgium is governed by the BJC (more specifically Article 40), which provides that service occurs by registered mail through normal postal channels, and that the service is deemed complete at the time of delivery of the documents to the postal services. However, international agreements take precedence over the general rule of domestic law. Hence the procedures set forth at the European and international level (as set out below) will supersede Article 40 of the BJC.

Service from and to Member States of the European Union is regulated by Regulation (EC) No. 1393/2007 of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters. A proposal for the revision of the Regulation is due to be voted on in the course of 2019. This would amend the Regulation on a number of points, to take into account, among other elements, new technologies and to promote the use of more direct and cheaper methods of judicial assistance. The currently applicable Regulation 1393/2007 provides a procedure for the service of documents via

designated transmitting agencies and receiving agencies between EU countries, including Denmark. A transmitting agency transmits documents to a receiving agency, which 'serve[s] the document or ha[s] it served, either in accordance with the law of the Member State addressed or by a particular method requested by the transmitting agency, unless that method is incompatible with the law of that Member State' (Article 7(1), Regulation 1393/2007).

Service in states outside the European Union is regulated by the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention), for those states that have ratified it. The Hague Service Convention provides that the authority or judicial officer competent under the law of the state in which the documents originate (in Belgium, the bailiff is a competent judicial officer) shall forward a request to the central authority of the state addressed (as designated by that state – in Belgium, the Federal Public Service for the Judiciary). In this respect, the Belgian Supreme Court has admitted the 'double date theory', determining that the service of judicial acts is deemed to be accomplished towards the served party as from the date this party actually receives the served act. Towards the serving party, the service under Article 3 of the Convention is considered effective when the judicial act is handed over to the postal service of the state of origin with notice of registered sending, and therefore prior to the actual receipt of the act by the served party. The Convention allows for service by way of alternative channels (such as registered mail), on the condition that the contracting states did not issue an objection in that regard.

Judicial and extrajudicial documents can also be served through diplomatic channels, especially when they are to be served on sovereign states (see question 33).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Article 22 of the Belgian Constitution protects the right of the debtor to privacy, including the privacy of its estate. Therefore, only restricted means exist to identify assets of an award debtor located in Belgium. Public registers are available for immovable properties (land and mortgage registers) but not for other types of assets (movable and intangible properties).

Usually award creditors use publicly available information, run private investigation or perform third-party attachments (garnishments) with banks and financial institutions to identify assets in Belgium.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Belgian law allows for the collection of evidence by means of investigatory measures requested from the courts (for instance, an order can be requested to force a debtor to disclose specific documents). Article 877 of the BJC specifically deals with the forced disclosure of documents. Courts may order a party or a third party to file a document

containing evidence of a relevant fact if there are serious, precise and corroborative presumptions that a party or a third party holds the said documents.

Investigatory measures can be requested by means of an *ex parte* application if the applicant demonstrates an absolute necessity to waive adversarial proceedings (extreme urgency, need to benefit from a surprise element or impossibility of identifying the adverse party).

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Articles 1413 et seq. of the BJC authorise award creditors to apply conservatory attachments against assets of their debtor. Conservatory attachments operate like freezing orders.

Conservatory attachments are valid for a (renewable) three-year period as from the date of their service on the debtor by the bailiff.

Other types of interim measures that are possible include requesting an order for security, a specific guarantee or the appointment of a court receiver who can keep and preserve movable assets during the course of the proceedings.

Following the amendment of the BJC by law dated 23 August 2015, any measures of enforcement, including conservatory garnishment, against assets owned by a sovereign state, will only be successful if an exception enshrined in Article 1412 quinquies, Section 2 BJC applies (i.e., when the assets are not covered by sovereign immunity (as discussed more extensively in question 34)).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

The following conditions are required to apply for a conservatory attachment against assets in Belgium: a valid title (i.e., a claim that is certain and due, and definite or subject to a provisional estimate) and urgency, to be determined on the basis of objective criteria.

In principle, an authorisation of the court of attachments is required before proceeding with the conservatory attachment. Authorisation is granted on an *ex parte* basis.

However, Article 1414 of the BJC provides that a judgment, even if not enforceable, can serve as an authorisation to lay interim measures on assets of the debtor. For the purposes of said Article 1414, non-recognised foreign arbitral awards are equally considered judgments provided that a treaty exists between Belgium and the state where the award was made.

Moreover, garnishments of bank accounts (or of other type of claims held by a debtor in Belgium) can be made without prior authorisation (see question 27).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Apart from the rules outlined in question 24, specific documentation has to be filed with the court of attachments with an *ex parte* application, namely an extract from the land register pertaining to the immovable property in question and a mortgage certificate.

If the court of attachments grants the authorisation, its order has to be served on the debtor. To be valid, the conservatory attachment on immovable properties must be entered on the mortgage register.

A debtor has one month to lodge an appeal against an order of the court of attachments from the date of its service by the bailiff.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There are no specific rules dealing with conservatory attachments against movable property (other than those outlined in question 24).

Once an authorisation in granted by the court of attachments, the order has to be served on the debtor. An appeal may be lodged within a month of the date of service.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

As stated in question 24, a prior authorisation of the court of attachments is required, in principle. However, in respect of intangible assets, pursuant to Article 1445 of the BJC, garnishments may be made on the basis of a 'private title', without prior authorisation of the court of attachments.

An order of the court of attachments or a writ of attachment (if no authorisation has been requested) must be served by a bailiff on the garnishees listed in that document (generally, banks, financial institutions and companies). The garnishees have 15 days from the date of the service to issue a declaration of every debt they owe the principal debtor as well as their origin, amount, and terms and conditions. If they fail to do so, garnishees may be summoned before the court of attachments to be declared themselves debtor of all or part of the principal claim (and costs). Moreover, as soon as the order or the writ has been served on the garnishees, they may no longer relinquish any sums or securities that form the object of the attachment, again under penalty of being declared debtor of the principal claim (and costs) themselves.

The garnishments must be notified to the debtor within eight days of the service on the garnishees by the bailiff. A challenge can be lodged within a month of the date of the notification.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

To lay an executorial attachment on assets (i.e., an attachment that will enable the creditor to be paid out of the assets' value), the creditor must hold an enforceable title (i.e., the *exequatur* order enforcing the arbitral award). Once this title is granted, the creditor can either convert a conservatory attachment measure into an executorial attachment, or lay an autonomous executorial attachment.

According to Articles 1491 and 1497 of the BJC, if a conservatory attachment was made pending the grant of an enforceable title, no new attachment is required to convert the interim measure into an executorial attachment. The service of the *exequatur* order on the debtor will automatically convert the conservatory attachment into an executorial one. However, if an appeal has been lodged against the interim measure, Article 1491(3) of the BJC provides that the conversion is delayed until a judgment is handed down by the court of attachments.

To avoid the risk of a delay in the conversion of an interim measure into an executorial attachment, the creditor may choose to lay an autonomous executorial attachment based on the title obtained in the meantime. The autonomous attachment can be made from the day after the service of the title on the debtor.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The executorial attachment of immovable property is preceded by service of a prior notice to pay under the penalty of attachment. To save time, service of the prior notice can be made with service of the enforceable title on the debtor. The prior notice is entered on the mortgage register, after which the immovable property cannot be disposed of.

Service of the writ of executorial attachment can only be performed 15 days after service of the prior notice on the debtor. The attachment will have to be registered in the mortgage register within 15 days.

After an attachment has been entered on the mortgage register, the creditor has one month to file an *ex parte* application with the court of attachments to request the appointment of a notary to proceed with the auction of the attached property. A challenge may be brought by the debtor no later than one month after service of that order.

According to the BJC, the public auction shall take place within six months of the order appointing the notary (in principle, an appeal by the debtor against the appointment order does not stay the auction process). Meanwhile, the notary gathers information (title deeds, land plans, etc.) and visits the attached immovable property to draw up the terms of sale. These terms have to be served on the interested parties at least one month prior to the first auction session, and can be challenged within eight days of service (on form and substance). Once any dispute on the terms of sale is settled by the court of attachments, the public auction can take place. In principle, the property is allocated to the highest bidder.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

An executorial attachment of movable property is preceded by service of a prior notice to pay under the penalty of attachment. To save time, service of the prior notice can be made at the same time as service of the enforceable title on the debtor. There must be at least one day between service of the prior notice and the laying of the attachment.

The bailiff will draw up a report describing precisely and in detail the attached movable properties. This report is either given to, or served on, the debtor. The auction shall then take place one month after this service. In principle, movable properties are allocated to the highest bidder.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Similarly to conservatory garnishments, an attachment writ served on the garnishees must be notified to the debtor within eight days. The debtor has 15 days to challenge the garnishment. Article 1543 of the BJC provides that if a debtor has not filed an appeal against an attachment within the deadline, the garnishees shall transfer the attached monies (their debts towards the principal debtor) up to the amount of the principal claim of the creditor. The monies will be transferred in the hands of the bailiff at the earliest two days after expiry of the 15-day deadline. If the debtor challenges the attachment, any transfer of funds to the bailiff will be stayed until a decision is handed down by the court of attachments.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

The Act of 17 July 1970 implementing the ICSID Convention in Belgium sets out a specific regime applicable to the recognition and enforcement of ICSID arbitral awards (see question 4). Article 3 of the Act of 1970 provides that the Ministry for Foreign Affairs is entitled to validate the authenticity of the awards for recognition and enforcement purposes. This is simply done by presenting a certified copy of the foreign arbitral award (signed and certified by the Secretary General of the ICSID Secretariat) to the competent government ministry. The verified and certified documents are then transmitted by the Ministry of Justice to the Chief Clerk of the Court of Appeal of Brussels to grant the *exequatur* to the arbitral awards.

There are no other domestic rules that specifically govern recognition and enforcement or arbitral awards against foreign states. If the award is not an ICSID award, the general rules will apply.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Unless provided otherwise by a treaty, judicial and extrajudicial documents intended for service on sovereign states are usually served through diplomatic channels.

No specific provision of the BJC governs diplomatic service, which is based on an international custom, recognised and admitted in Belgium. In practice, when judicial and extrajudicial documents are intended for service on sovereign states, they are transmitted by bailiffs to the foreign government through the Belgian Ministry for Foreign Affairs. The Ministry plays a role of intermediary by sending the documents to the Belgian Embassy located in the foreign states. The Embassy then forwards the documents to the competent local authorities. In general, a copy of the judicial and extrajudicial documents is also sent by the Ministry for Foreign Affairs to the diplomatic mission of the foreign state in Belgium, for information purposes.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Pursuant to Article 1412 quinquies, Section 2 of the BJC, there are three specific exceptions to immunity from enforcement of assets belonging to a foreign state:

- the foreign state has 'explicitly' consented to enforcement against the assets. The Belgian Constitutional Court determined in 2017 that the requirement that consent also be 'specific' (as the law still reads) only applies with regard to diplomatic assets;
- the foreign state has specifically allocated these assets to the enforcement of the claim that forms the basis of the application for enforcement; or
- the assets are specifically used or allocated to an economic or commercial activity and are located in Belgium.

The party seeking to enforce against the assets of a foreign state must obtain prior authorisation from an attachment judge, who will determine whether one of the above-mentioned exclusions applies. This is so even if, under the general rules, prior authorisation would not be required.

Otherwise, state immunities are governed by customary international law as interpreted and applied by Belgian courts. Belgium has signed the UN Convention on jurisdictional immunities of states and their property, but that treaty has not yet entered into force.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive its state immunity from enforcement, but such a waiver needs to be explicit.

Assets used or intended to be used for diplomatic purposes, including bank accounts, are covered by a special immunity from enforcement by virtue of customary international law and the 1961 Vienna Convention on Diplomatic Relations. Waiver of diplomatic immunity from enforcement needs to be explicit and specific.

There is little authority on the persons or organs of the state entitled to waive immunity from enforcement. According to legal literature, the issue is governed by the law of the foreign state concerned.

17

Canada

Gordon E Kaiser[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Article 31 of the International Commercial Arbitration Act (ICAA) in both Ontario and British Columbia provides that an award must be in writing and signed by the arbitrators. In proceedings in Ontario with more than one arbitrator, the signatures of the majority of the tribunal is sufficient but the reason for any omitted signature must be provided. The award must state the date and place of the arbitration and set out the reasons; however, parties can agree that no reasons should be given. The award must be delivered to each party.

Arbitrations often settle prior to the conclusion of the hearing. If that happens, both the UNCITRAL Model Law and the rules of Ontario and British Columbia provide that the parties can ask the arbitration panel to write an award reflecting the settlement. That makes the settlement binding on all parties to the arbitration and subject to enforcement in other jurisdictions.

Neither the Model Law nor the provincial rules have any provisions regarding the timing of an award. However, Rule 46 of the ICSID Rules provides that an award shall be drawn up and signed within 120 days of closure of the proceeding, although the tribunal may extend this by a further 60 days if it would otherwise be unable to draw up the award.

Arbitration proceedings terminate with the delivery of the final award; however, they can terminate earlier. Both the Model Law and the Ontario and British Columbia rules provide that the proceedings may terminate earlier if the parties agree to terminate, or the tribunal determines that continuing the proceedings is either unnecessary or impossible.

1 Gordon E Kaiser is an arbitrator and settlement counsel at Energy Arbitration Chambers.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The Model Law provides that mistakes, including clerical, typographical or computational errors, may be corrected. This must be done within 30 days of receipt of the award unless the parties agree to a longer term.

Section 44 of the Ontario Arbitration Act 1991 and Article 33 of the Model Law, which is attached to the Ontario International Commercial Arbitration Act, grants arbitrators the right to correct typographical errors, errors in calculations and similar errors in awards. Section 44(2) grants the right to correct an injustice caused by an oversight by the tribunal. Finally, Section 44(3) grants the authority for a tribunal to make an additional award to deal with a claim that was presented in the arbitration but omitted from the earlier award.

Article 33 of the Model Law contains a much narrower power to amend an award. The tribunal has no broader power without agreement by the parties. Article 33 states that, provided the parties agree, the tribunal may offer an interpretation on a specific point or part of the award. It also states that if one party applies, the tribunal may make an additional award regarding claims presented in the arbitration but omitted from the award.

The leading cases are the British Columbia Court of Appeal decision in *Westnav Container* (2010, 315 DLR (4th) 649) and the Ontario decision in *Canadian Broadcasting Corp* (1997, 34 OR (3rd) 493). These cases struggle to define the difference between an error and a rewrite of a decision.

Under the ICSID Rules, if a party later discovers some fact that was not known to that party or the tribunal at the time the award was rendered, despite due diligence, and that fact would have decisively affected the award, the party can apply to have an award changed through a process known as revision or reconsideration. A party also has a right to apply for annulment of an award on procedural grounds.

Two decisions deal with the question of whether tribunals under the ICSID Rules can reconsider final decisions: *Perenco v. Ecuador*, ICSID Case No. ARB/08/6; *Standard Chartered Bank v. Tanzania*, ICSID Case No. ARB/10/20. In *Perenco*, a notice of motion was filed for reconsideration of the decision. The tribunal permitted the motion to proceed but emphasised that only in exceptional circumstances would it reconsider a previous decision. The argument was that the tribunal had repeatedly refused to determine certain issues. In the end, the tribunal found that it was not prepared to reconsider. In *Standard Chartered Bank*, the claimant requested reconsideration based on the receipt of new information. The tribunal found that it did not have jurisdiction to reconsider the prior decision.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Provincial legislation provides that an arbitration order can be appealed only on a question of law with leave of the court. For example, Section 31 of the British Columbia Arbitration Act provides that a party to an arbitration can appeal to the court on any question of law arising from an award if all parties to the arbitration consent or the court grants leave. Section 31 provides that the court may grant leave if it determines that the importance of the result justifies its intervention, the determination of the point of law may prevent a miscarriage of justice and the point of law is important to both the applicant and the general public.

The Ontario Arbitration Act of 1991 contains a similar provision in Section 45, that a court will grant leave to appeal only if the court is satisfied that the issue is important to the parties and significantly affects the rights of the parties. The two leading cases are the Supreme Court of Canada decisions in *Sattva Capital* (2014 SCC 53) and *Teal Cedar* (2017 SCC 32). The British Columbia Court of Appeal decision in *Richmont* (2018 BCCA 452) also confirms that courts grant leave only in the clearest of circumstances.

Set-asides

The Model Law, which underlies all provincial legislation dealing with arbitrations, limits challenges to very narrow grounds. Article 34 thereof governs applications to set aside all international commercial arbitrations seated in Canada and any attempts to refuse enforcement of awards from tribunals seated outside Canada. Article 34(2) provides that an award may be set aside only if:

- an applicant furnishes proof of:
  - the incapacity of the party or the invalidity of the arbitration agreement;
  - lack of notice or denial of opportunity to present its case;
  - excess of jurisdiction; or
  - the arbitral procedure not being in accordance with the agreement; or
- the court finds that:
  - the subject matter is not arbitrable; or
  - the award is against public policy.

Note that there is no scope for any review on grounds of error of law or fact (*Canada v. SD Myers* [2004] 3 FCR 368 (*SD Myers*)) and failure to object in the arbitration may be a waiver of rights. Article 16(2) provides that a plea that the tribunal lacks jurisdiction must be raised no later than the statement of defence or as soon as a matter alleged to exceed jurisdiction is raised. This may preclude later challenges to the award (*SD Myers*).

Note also that there is a presumption that a tribunal has acted within its jurisdiction (*Corporacion Transnacional* (2000) 49 OR (3rd) 414 (CA)). As previously stated, the Canadian courts continually reinforce the notion that arbitral tribunals are entitled to significant judicial deference (*Nippon Steel Corp* [1991] WWR 219 CA)).

Canadian courts rarely allow set-asides on the grounds of public policy. In *Corporacion Transnacional*, the court stated that public policy does not refer to Canada's political or international position but to fundamental principles of justice. There have been attempts to argue that 'manifest disregard of law' should be a ground but so far that argument has been unsuccessful.

Appeals, set-asides and reconsiderations all take place after an award has been granted. Some attention should be paid to the early dismissal provisions. For example, Rule 41 of the ICSID Rules provides for a preliminary objection of any claim that is not within the jurisdiction of ICSID or the tribunal. Any objection must be filed within the time limit fixed for filing the counter-memorial. If a tribunal decides that a dispute is not within the jurisdiction of ICSID or within its own competence, or that the claims are manifestly without legal merit, it must render an award to that effect.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Canada is a federal jurisdiction with 10 provinces and three territories. Each has separate statutes for dealing with both domestic and international arbitration. The New York Convention and the UNCITRAL Model Law are incorporated into international arbitration legislation. In fact, Canada and its provinces were among the first jurisdictions in the world to enact legislation expressly implementing the Model Law. Further, the domestic provincial legislation is generally based on the Model Law.

Federal legislation also governs domestic arbitration, which is also based on the Model Law. The federal Commercial Arbitration Act only applies when the Crown in the right of Canada, a government department or a federal Crown corporation is a party or the dispute relates to a matter exclusively under federal jurisdiction, such as maritime or intellectual property law.

In Quebec, Canada's only civil law jurisdiction, both domestic and international arbitration is governed by the Civil Code of Quebec (Books 5 and 10) and the Quebec Code of Civil Procedure (Book 7).

To enforce foreign or domestic awards, an application is usually made on notice to the court that has jurisdiction over the arbitration. Applications on matters governed by provincial law are made to the Superior Court of first instance. Subject matter governed by federal law falls within the jurisdiction of the Federal Court Trial Division.

There are no material differences between the language of Article V(2)(b) of the New York Convention and Article 36(1)(b) of the Model Law, on the one hand, and the language adopted by the Canadian provinces, on the other.

Canadian courts take a deferential approach to the enforcement of international arbitral awards and a narrow approach regarding public policy defences under the New York Convention and the Model Law.

ICSID

Canada ratified the Convention on the Settlement of Disputes Between States and Nationals of Other States, 1966 (the ICSID Convention) on 1 November 2013.

Enforcement procedures differ for awards issued under the Convention establishing the International Centre for the Settlement of Investment Disputes. Non-ICSID awards generally fall under the New York Convention. The ICSID Convention covers 154 contracting states.

The ICSID Convention provides in Article 53(1) that an ICSID award shall be binding on the parties and shall not be subject to any appeal or any other remedy except for the limited revision and annulment remedies provided for in Articles 51 and 52. When an annulment application is made, the enforcement may be stayed at the discretion of the three-person *ad hoc* committee that ICSID appoints to consider annulment applications.

ICSID awards are directly and immediately enforceable. Article 54(1) of the Convention requires all contracting states to treat ICSID awards as binding and to enforce awards as if they were a final judgment of a court in a contracting state. Pursuant to Article 54(2), a party seeking to enforce an ICSID award merely needs to provide a copy of the award, certified by the ICSID Secretary General, to the court that the contracting state has designated with ICSID.

Non-ICSID awards must be enforced under the New York Convention or a similar treaty. In such cases the court may refuse to recognise a non-ICSID award under the narrow grounds provided in the New York Convention or other applicable enforcement treaties. The party opposing enforcement of a non-ICSID award may seek to have the award annulled in the courts at the arbitration seat. If a set-aside proceeding is launched, enforcement must be stayed.

Article 54 provides that all contracting states to the ICSID Convention are obliged to recognise ICSID awards as binding. There is no basis in the Convention for a contracting state party to refuse recognition of an ICSID award. Article 54 also provides that all contracting states are obliged to enforce pecuniary obligations imposed by an arbitral award as if they were a final judgment of a court in that state. There is therefore no basis for a contracting state to decline to enforce the obligations imposed by a ICSID award.

However, Article 55 clarifies that the obligations in Article 54 do not alter the laws in effect regarding foreign sovereign immunity. Whatever national laws apply to the execution of final judgments against foreign states and their assets generally apply also to the execution of ICSID awards.

North American Free Trade Agreement

The other international treaty that is important in Canadian arbitration circles is the North American Free Trade Agreement (NAFTA). It gives investors from the United States and Mexico protection for their investments in Canada, and Canadian investors protection for their investments in the United States and Mexico.

As in the case of many international investment treaties, Chapter 11 of NAFTA provides potential recovery for claimants if the host state has violated investment protection obligations such as fair and equitable treatment, full protection and security, national treatment and most-favoured-nation treatment. During the 25 years when NAFTA was in force, Canada lost eight and won nine of its arbitration decisions. However, NAFTA

is being replaced by a new treaty called the United States Mexico Canada Agreement, following an agreement reached by the three countries on 30 September 2018.

In the future, Canadian investors will have no protection for their investments in the United States, and Americans will have no protection for their investments in Canada. The domestic courts will still be open to those investors, as will other international arbitration agreements, such as ICSID and the New York Convention.

There will be a sunset provision, however. Canadian or US investors must initiate any valid claims regarding investments established or acquired while NAFTA was in force within three years of NAFTA's termination, after which they will no longer be able to invoke NAFTA investor-state remedies. Canadian and US investors will be limited to litigating future investment disputes in the domestic courts or before other international arbitration tribunals. All the Canadian provinces have international arbitration legislation that incorporates rights under both the Model Law and New York Convention but the substantive rights are not as specific as outlined in NAFTA. In effect, the provincial legislation is largely procedural.

Canadian investors in Mexico and Mexican investors in Canada will continue to have investor-state arbitration protection because both countries are signatories to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, which came into force on 30 December 2018.

The Comprehensive Economic and Trade Agreement (CETA) between Canada and the European Union was approved by the European Parliament in February 2017, and Canada is preparing to provisionally apply parts of the agreement. Chapter 8, which deals with investment disputes, will not be applied during provisional implementation and will only take effect after CETA is ratified by all Member States. Investment disputes under CETA are to proceed before a three-member tribunal comprising one EU national, one Canadian national and one third country, with the tribunal panel being randomly selected from a pool of 15 members appointed by the CETA Joint Committee. In addition to the creation of a tribunal to hear cases submitted pursuant to Article 8.23, an appellate tribunal has also been created to 'uphold, modify or reverse a Tribunal's award' on any errors in the application or interpretation of applicable law; any manifest errors in the appreciation of the facts, including the appreciation of relevant domestic law; and on any of the grounds set out in Article 52(1) of the ICSID Convention.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention entered into force in Canada on 10 August 1986. There was one reservation, being that Canada declared that it would apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered commercial under the laws of Canada. The exception is the province of Quebec, where the law does not provide for such a limitation.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Both the Federal Court of Canada and the superior courts in the provinces have jurisdiction to hear enforcement applications.

The Federal Court has a limited statutory jurisdiction to review a narrow scope of legal issues whereas the superior courts of the provinces have plenary jurisdiction. The Federal Court has jurisdiction over commercial arbitration awards that fall within the purview of applicable federal legislation when one of the parties is a Crown or federal government agency or the subject matter is within exclusive federal jurisdiction, such as maritime law or patent law. The New York Convention was incorporated into the federal United Nations Foreign Arbitral Awards Convention Act, which functions to govern foreign awards that are within the jurisdiction of the federal government.

The UNCITRAL Model Law has been implemented into the various versions of the federal Commercial Arbitration Act, which is applicable to international arbitrations within the purview of federal jurisdiction.

In each province, legislation for enforcement of international arbitral awards is separate from that for domestic awards. All provinces have an International Commercial Arbitration Act and an Arbitration Act to govern international and domestic arbitration awards, respectively. The legislation follows the Model Law, including the language in Article 35 indicating that awards must be recognised, with the court having little or no discretion to refuse enforcement unless one of the grounds for refusing recognition or enforcement under Article 36 can be shown.

Enforcement occurs by application to a court of the competent jurisdiction, which must be supplied with original documents that reflect the award, or certified copies. An application for enforcement is commenced by issuing a notice of application to the appropriate court. Applications are generally made by notice but may be brought *ex parte* in limited circumstances.

The Federal Court Rules are more detailed and require an affidavit stating that the award has not been satisfied, that there is no impediment to recognition or enforcement, and the award is final.

Enforcement in Superior Court proceedings can include a number of steps, such as examination and garnishment, and writ of seizure or sale. In all provinces, the Rules of Civil Procedure under provincial legislation apply. The Federal Court has its own Rules of Procedure, which apply to federal applications.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The Supreme Court decision in *Chevron v. Yaiguaje* (2015 SCC 42) settles the long-standing question of whether a foreign judgment may be enforced in Canada without the claimant demonstrating that the claim or judgment debtor has any connection with Canada. The Court has ruled that no such connection is necessary. In short, it is not necessary to identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings.

This situation is not the same as when a claim is initiated in Ontario; there a substantial connection may be required. The issue here is whether Canada has an obligation under the relevant treaties to enforce the claim.

In *Chevron Canada*, the Supreme Court held that the Ontario court had jurisdiction because the company was served at its place of business in Ontario. The Supreme Court held that its conclusion on the jurisdictional issue was based on three reasons:

> *First, this Court has rightly never imposed a requirement to prove a real and substantial connection between the defendant or the dispute and the province in actions to recognize and enforce foreign judgments. Second, the distinct principles that underlie actions for recognition and enforcement as opposed to actions at first instance support this position. Third, the experiences of other jurisdictions, convincing academic commentary, and the fact that comparable statutory provisions exist in provincial legislation reinforce this approach. Finally, practical considerations militate against adopting Chevron's submission.*

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Under domestic arbitration legislation in Ontario, Alberta, Saskatchewan, Manitoba and New Brunswick, a person entitled to the enforcement of an award made anywhere in Canada can apply to the Superior Court in that province. In some provinces, the legislation expressly provides that the application for enforcement must be made on notice. However, in most cases there is a provision to bring the application *ex parte* if there is neither the means nor the time to provide meaningful notice or if a delay would frustrate the process.

To enforce a foreign award, an application for enforcement is commenced by issuing a notice of application under the applicable legislation to the appropriate court.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

All applications relating to international awards require the original award and arbitration agreement, or certified copies, in a manner that conforms with Article 35(2) of the Model Law. The same generally applies with respect to domestic awards.

Once approved, the order of the arbitrator can be enforced in the same manner as a judgment of the court with leave of the court.

Filing fees vary across the provinces and range from C$35 to C$250.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If an award is not in one of the official languages of Canada (French or English), the original or certified copy of the award must be accompanied by an official certified translation. This applies to both international and domestic awards.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An important practical consideration concerns limitations periods, for which there are no provisions in the New York Convention or the Model Law. However, in Canada, the provincial rules for limitation periods are applicable to enforcement of international arbitrations, and enforcement applications are subject to provincial discoverability rules. In some provinces, this means that an application must be made within two years of the date of the award. In others, the two-year period runs from the date of expiry of the appeal period. Courts are generally unwilling to extend limitation periods. Further, recent amendments to Ontario legislation have extended the limitation period in the province to 10 years.

The foregoing is just one of the time limits counsel must be aware of. The first limitation period starts the arbitration. Under Section 52 of the Ontario Arbitration Act and Section 4 of the Ontario Limitations Act, the general limitation is two years from the day of discovery of the claim: this will govern the first limitation period. The International Commercial Arbitration Act (ICAA) in Ontario does not establish a limitation period but it is generally believed that the Rules of Civil Procedure will apply.

The third deadline concerns any objection to jurisdiction. Under Section 17 of the domestic Arbitration Act, an objection must be made no later than the beginning of the hearing or, if there is no hearing, no later than the first occasion on which the parties submit a statement to the tribunal.

Under Article 16 of the Model Law, which is attached to the Ontario ICAA, a claim that an arbitrator does not have jurisdiction must be raised no later than the submission of the statement of defence.

The fourth time limit relates to disputes regarding an arbitrator's impartiality or independence. This is a common claim that has become a disguised ground of appeal. Article 13 of the Model Law requires challenges to be brought within 15 days of the notice of appointment or the date on which the circumstances giving rise to the challenge become known.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

As a general rule, courts are more reluctant to grant interim relief in international arbitrations than domestic arbitrations. The arbitrator's jurisdiction does not extend to parties not bound by the arbitration agreement and any award made against non-parties will not be enforceable. Interim relief may be sought from the arbitral tribunal or the courts, which are prepared generally to assist an arbitration tribunal if it is necessary to carry out their responsibilities.

With the exception of Quebec, Canadian arbitrators regularly grant interim relief. Article 940.4 of the Quebec Civil Code has been interpreted to mean that only judges hold the power to grant injunctions.

Parties may alter a tribunal's power to award preliminary or interim relief by agreement. Otherwise, arbitral tribunals hold broad discretion to order interim relief against parties to a dispute. Tribunals will typically exercise their discretion when the following elements are present:

- the request for preliminary or interim relief cannot await a decision on the merits;
- the relief is necessary to prevent imminent harm that is not reasonably compensable by money;
- the balance of convenience favours the applicant; or
- the applicant has established a reasonable possibility of success on the merits.

Canadian courts will enforce interim orders of tribunals, and parties can apply directly to the courts for interim relief when necessary. Courts will even grant relief before the arbitration begins (*Dynatec*, 2016 ONSC 2810). Courts have refused to grant *Mareva* injunctions or *Anton Piller* orders because they bind third parties (*Sauvageau Holdings*, 2011 ONSC 1819). Canadian courts will also grant interim relief in support of foreign arbitration (*TLC Multimedia*, 1998 BCJ No. 11656 BCSC).

The Model Law expressly provides for security for costs if a party is seeking an interim measure (*CGI Information Systems*, 2008 311 DLR 4th 728, Ont CA).

British Columbia and Ontario have taken important steps in the case of interim relief. The former, in Section 17 of its International Commercial Arbitration Act, provides that an arbitral tribunal may order interim relief unless otherwise prohibited by the parties. The same is true in Ontario, where the authority to grant interim relief changed recently as a result of the International Commercial Arbitration Act 2017. Jurisdiction to award interim relief is granted by Article 17 of the Model Law, which permits an arbitral tribunal at the

request of a party and, absent an agreement to the contrary, to grant interim measures to maintain or restore the status quo pending determination of the dispute. Other grounds include the need to preserve evidence that may be relevant. In interim relief applications, a party must prove that irreparable harm is likely to result without the interim relief.

However, there is a requirement that there is a reasonable possibility that the moving party will succeed on the merits of the claim. Note that the party seeking interim relief may be liable for any costs or damages caused if the arbitrator ultimately finds that relief should not have been granted.

The tribunal may grant interim relief without notice to the other party, unless otherwise agreed by the parties, provided that the tribunal finds first that notice would risk frustrating the purpose of the interim relief.

International arbitrations often take place through institutions such as the London Court of International Arbitration and the ICC International Court of Arbitration, many of which now have provisions for interim relief and, in some cases, emergency arbitrators. Those provisions vary from institution to institution and are often broader than the statutory provisions granted by Article 17 of the Model Law.

Parties can seek to enforce only part of an award. This usually happens when the party against whom the award was made has partially performed its obligations under the award.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

In domestic arbitrations, under provincial legislation, the courts generally follow the enumerated grounds listed in Article 36 of the Model Law (as discussed in question 6). Note that the onus for establishing grounds rests with the party attempting to resist enforcement.

The most common objection is that the subject matter is not considered arbitrable in the jurisdiction in which enforcement is being sought; in the case of Canadian provinces, examples would be criminal or family law matters and certain consumer contracts (*Seidel v. Telus*, 2011 SCC 15). However, counsel must be careful not to waive the right to object. Article 16 of the Model Law provides that a claim that a tribunal lacks jurisdiction must be raised no later than the statement of defence or as soon as the matter alleged to exceed jurisdiction is raised.

Another ground is where there exists a pending challenge to an award in the originating jurisdiction. Canadian courts will generally adjourn the enforcement proceedings to allow the challenge to proceed to its conclusion. Further, the court may order that security be provided.

Canadian courts have recognised annulled foreign awards (see *Powerex Corp*, 2004 BCSC 876) but this is rare. The Ontario courts have also considered the impact of outstanding appeals in enforcement applications (*Dalimpex*, 2003 64 OR 737) and regulatory proceedings relating to the same dispute (*NYSE v. Orbixa*, 2014 ONCA 219). As a general rule, the courts have either adjourned the enforcement application or simply disregarded the parallel proceedings.

Another common objection is a claim that the public policy of the enforcing jurisdiction is being violated. A number of objections have been lodged based on bribery or fraud claims arising out of existing litigation that US and Canadian parties face under anti-bribery legislation. Canadian courts are reluctant to allow public policy challenges. The Ontario Superior Court has stated that to succeed on public policy grounds, an award must be egregious and fundamentally offend the most basic principles of fairness and justice. The leading case in that regard is (*Scheter v. Gasmasc*, (1992) OJ No. 257).

Canadian courts have rejected foreign awards on public policy grounds because an arbitrator failed to give reasons rather than because of error of law, unless it was patently unreasonable. However, the courts will refuse to enforce awards when a tribunal has decided a claim does not fall within the scope of the arbitration agreement or grants a remedy that the agreement disallows (see *Telesat Canada*, 2012 ONSC 2785; *Alectra Utilities*, 2018 ONSC 4926).

One of the unique Canadian contributions to this body of law is the finding that double recovery may be contrary to public policy principles. The leading cases are *Lambert* (2001 OJ No. 2776) and *Boardwalk Regency* (1992 51 OAC 64).

The other common ground for refusing to enforce an arbitration award is that the applicant has missed the limitation period. The leading case here is *Yugraneft* (2010 SCC 19), in which a Russian corporation sought to enforce an award in Alberta more than three years after the award was rendered. The Supreme Court of Canada refused to enforce the award because the Alberta Limitation Act provided for a two-year limitation period.

Another common challenge arises when there are justifiable doubts about an arbitrator's impartiality or independence; however, again there are some time limits. Under Article 13 of the Model Law, challenges must be brought within 15 days of the notice of appointment or the date the circumstances giving rise to the challenge became known to the party. Rule 9 of the ICSID Rules provides that a challenge must be brought promptly and in any event before the proceedings are declared closed.

Note, however, that the Ontario Court of Appeal recently found that the two-year limitation period commenced on the date the mediation requirement in the parties' contract had been fulfilled despite the fact that the arbitration was initiated four years after the claim was discovered. For most claims under Ontario law, including arbitration claims, the act prohibits proceedings being brought more than two years after the claim was discovered (*PQ Licensing*, 2018 ONCA 331).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

A decision by a court to recognise an arbitration award makes an award enforceable as an order of the court. That gives the holder of the arbitration award a broad range of remedies that the court may provide to assist in the recovery of what has become a judgment of the court. However, it is open to the parties objecting to the court's decision to appeal that decision on the usual legal grounds. Further, any appeal requires leave of the court and Canadian courts are reluctant to grant leave.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision by a court refusing to recognise an award is subject to an appeal to the appellate court in that jurisdiction. The usual grounds of appeal generally relate to an error of law. Note that the courts grant deference to the arbitrator's decision. The number of successful appeals is relatively rare. This is particularly the case with respect to decisions refusing to recognise an arbitral award.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The courts will generally adjourn recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration. Courts will look at the strength of the objection at the seat and, in some circumstances, will require security for costs. The decision to order security for costs is always a matter of judgment depending on the strength of the objections and the prospects for success (*Empresa Minera Los Quenuales SA v. Vena Resources*, 2015 ONSC 4408).

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Where warranted and where requested, the courts will order security for costs when annulment proceedings have been initiated at the seat of the arbitration while a party is attempting to have the award recognised in another jurisdiction. Security for costs are more likely to be awarded if there is a long-standing record of delay with respect to the arbitration proceedings.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

A foreign award set aside at the seat of the arbitration may be recognised and enforced if the set-aside decision was impeachable for fraud, contrary to natural justice, or contrary to public policy. However, Canadian courts interpret public policy claims very narrowly. The decision must offend the most basic and explicit principles of justice and fairness. It is likely that it would not be sufficient to find that the set-aside decision conflicted with Canadian law (*Boardwalk Regency*, 1992 OJ No. 26 Ont CA).

An error of law will not be sufficient but if a decision was patently unreasonable, clearly irrational or affected by fraud, there may be sufficient grounds to disregard a set-aside (*Navigation Sonamar*, 1995 1 MALQR 1 Que SC).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

As indicated in question 6, a party may enforce an arbitral award in Canada by applying, typically on notice, to the appropriate Canadian court. Accordingly, application materials must be served on the defendant. The rules concerning service are set out in the civil procedure legislation in force in each province. The provincial civil procedure rules are similar, though not identical, and attention must be given to the specific legislation.

Broadly speaking, an application to enforce an award is an 'originating' document, which must be served 'personally' under the rules. In the case of *ARA v. Staicu et al* (2018 MBQB 92), for example, the Manitoba Court of Queen's Bench considered that an application to enforce an international arbitration award was an originating process. For individuals, this means that documents must be left with the individual. For corporations and partnerships, this means that documents must be left with an officer or director, or a partner. Subsequent documents arising during the enforcement proceedings (i.e., after the application has been served) may be served more simply. Indeed, most rules of procedure now permit service by email for documents that are not originating documents (see, e.g., the Alberta Rules of Court, Rule 11.21).

The rules of civil procedure also contemplate that Canada's courts may make orders permitting 'substitutional service', 'dispensing with service' and 'validating service'. In respect of the former, a court will permit an applicant to serve application materials in a manner not contemplated by the rules if service under the rules is 'impractical'. Similarly, if service is impossible, a court may direct that service be dispensed with entirely. Finally, a court may validate (or ratify) service, despite non-compliance with the rules, if it can be shown that the defendant actually received the documents. These orders provide a party seeking to enforce an award additional tools to satisfy service requirements; they also narrow the gap between Canada and other jurisdictions where awards may be enforced *ex parte*.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

When a defendant does not reside in the province in which enforcement proceedings are commenced, an order from the court for service *ex juris* may be required. However, in some circumstances, the provincial rules of civil procedure may permit service *ex juris* without an order (see Ontario's Rules of Civil Procedure, Rules 17.02, 17.03).

Traditionally, when leave is required, the enforcing party applies to the court *ex parte*, with evidence demonstrating that there is a 'real and substantial connection' between the enforcement proceedings and the forum. However, the comments of the Supreme Court of Canada in *Chevron* (see question 7) suggest that this analysis may no longer be necessary. In *Chevron*, the Supreme Court affirmed the importance of international comity and remarked that: 'In an action to recognize and enforce a foreign judgment where the foreign court validly assumed jurisdiction, there is no need to prove that a real and substantial connection exists between the enforcing forum and either the judgment debtor or the dispute.' Based on these comments, courts may not grant orders for service *ex juris* as a matter of course.

The manner of service *ex juris* is also specified by the relevant rules of civil procedure. In Alberta, for example, documents served *ex juris* must be served in a way that would be permitted in Alberta, or be in accordance with Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, or be in accordance with the law of the place of service.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Judgment creditors in Canada have access to several databases and registries to search for and identify assets of a judgment debtor. Since arbitral awards may be enforced in the same manner as court judgments, these tools apply to parties seeking to enforce awards in Canada.

To begin, a judgment creditor may search for real estate property owned by the debtor through provincial land titles offices, which are public registries of land ownership in each province. In Alberta, for example, a party who obtains a judgment may request that the court issue a 'writ of enforcement', which the party may then present to the Alberta Land Titles Office and requisition a title search. Similar processes exist in the rest of Canada.

Additionally, a judgment creditor may search provincial personal property registries to identify a debtor's movable property. Unlike land searches, a writ is typically not required before requisitioning a personal property search. However, personal property search results do not disclose all of a debtor's assets, only those in respect of which third parties have registered security interests or liens.

A judgment creditor may also conduct corporate registry searches. Specifically, corporations must file basic information with provincial registries prior to conducting

business in each province. This information is public, and may be searched. In some provinces, corporations must disclose whether they hold shares in other corporations. Similarly, searches may be carried out with the Office of the Superintendent of Bankruptcy, which will disclose whether any bankruptcy proceedings have been commenced in respect of the judgment debtor. Bankruptcy searches are especially important when enforcement proceedings are contemplated, as Canada's bankruptcy legislation stays any and all enforcement actions, unless the court orders otherwise.

Finally, several industry specific databases are available to judgment creditors, including those maintained by Canada's securities commissions and by provincial energy or utilities regulators. The owners of trademarks may also be searched through the Canadian Intellectual Property Office, which is maintained by the federal government.

In short, many options are available to a party seeking to identify an award debtor's assets in Canada, although the precise procedures (including any associated costs) depend on the province.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

The primary method of obtaining information concerning a judgment debtor's assets in Canada is through 'examinations in aid of execution', pursuant to which a judgment creditor may question the debtor (under oath) regarding their assets and financial information. Again, since awards may be enforced in the same way as judgments, the process is available to parties seeking to enforce arbitral awards. The process for examinations in aid of execution are set out in the provincial rules of civil procedure and, depending on the province, leave of the court may be required before a notice of examination may be served. When the debtor is a corporation, a representative of the corporation may be examined to ascertain information regarding the assets of the company.

If a debtor fails to attend an examination, conceals information or refuses to answer any proper question, the court may sanction the debtor through various orders, including (in the most serious cases) an order for contempt of court. In addition to in-person examinations, provincial rules of procedure also contemplate examinations in writing, questionnaires to be completed by the debtor at the request of the enforcing party, and sworn statutory declarations by debtor.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

As discussed in question 12, interim relief against assets is available. However, such measures are more often granted by the court assisting the arbitration process, rather than by the arbitration tribunal itself, since tribunals may not make orders that bind third parties. In the

important case of *Sauvageau Holdings*, the Ontario Supreme Court made it clear that arbitration agreements as 'private contractual provisions do not and cannot confer on the arbitrator the court's jurisdiction over third parties who are strangers to the arbitration agreement'.

In respect of interim measures against assets owned by a sovereign state, decisions run both ways. These cases are largely decided individually and often turn on whether a waiver has been granted. Canadian courts have both granted and denied interim applications relating to assets owned by sovereign states.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Reforms in recent years have resulted in greater jurisdiction being granted to both arbitrators and courts to grant interim relief against assets, in both domestic and international arbitrations. In practice, however, applications for interim measures against assets are most often made to the courts.

First, unlike orders of a tribunal, interim measures by a court may bind third parties. Second, for a tribunal to make an interim measure it must already be constituted, which may cause delay and prejudice to the party seeking the interim measure. Third, orders granted by a tribunal must be enforced by a court, which adds expense and procedural steps. Finally, and perhaps most importantly, tribunals are restricted in terms of the kinds of interim measures that may be ordered. Generally speaking, domestic and international arbitration legislation in Canada enables tribunals to make orders concerning the 'detention, preservation or inspection of property that are the subject of the arbitration' (Ontario Arbitration Act 1991, Section 18). In contrast, the court may grant interim injunctions, appoint receivers and grant any other equitable relief it sees fit (Ontario Arbitration Act 1991, Section 8).

In terms of procedure, parties seeking interim measures against assets may apply to the court with notice or on an *ex parte* basis, depending on the urgency and risks associated with providing notice. However, in *Secure 2013 Group Inc v. Tiger Calcium Services Inc* (2017 ABCA 316), the Alberta Court of Appeal affirmed that *ex parte* interim relief is 'extraordinary', that applicants must seek *ex parte* interim relief expeditiously and without delay, and that applicants seeking *ex parte* relief must act with the 'utmost good faith' and make full, fair and candid disclosure to the court. Although *Secure 2013 Group* did not concern relief in support of an arbitration, the Alberta Court of Appeal's remarks have general application. Particular care must therefore be taken by any party preparing evidence and submissions for an application for interim relief against assets without notice.

The essential legal test applied by Canadian courts when considering interim relief is threefold: (1) whether the balance of convenience favours the granting of the measure; (2) whether the relief is necessary to prevent imminent and irreparable harm to the applicant; and (3) whether the applicant has a reasonable prospect of success on the merits in the arbitration. Evidence must be adduced to meet this test. Most notably, Canadian courts will not grant preservation of property or other interim orders if damages would compensate the applicant.

A final consideration is that Canadian courts will require a party applying for interim measures to provide an 'undertaking as to damages'. This is an undertaking by the party, made to the court, pursuant to which the party promises to compensate the opposing party for any harm caused by the interim relief, if the tribunal ultimately dismisses the underlying arbitration. Canadian courts may also request that undertakings are fortified with letters of credit or other security, and this may be particularly so in the context of an international arbitration when the applicant is not domiciled in Canada.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedural and legal requirements for interim measures against assets (especially those granted by Canadian courts) are general similar for immovable property, movable property and intangible property. The relevant considerations are discussed in question 24.

However, one specific interim measure that may be available in respect of immovable property is a certificate of pending litigation (or a certificate of *lis pendens*). A party who commences litigation in Canada, and claims an interest in land, may apply to the court for a certificate to be registered against the title of the land. The certificate of litigation pending does not restrain the debtor from selling the land, but acts as notice to third parties that the land is subject to the litigation. In practice, a certificate of litigation pending operates as an interim injunction against the land. The specific procedures for obtaining a certificate of litigation pending are set out in the provincial rules of court. Most importantly, a certificate will only be granted if the land is the subject of the dispute. Certificates of litigation pending are frequently granted in Canadian civil litigation and may apply to arbitrations in the appropriate circumstances.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedural and legal requirements for interim measures are generally the same for all types of property. See question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedural and legal requirements for interim measures are generally the same for all types of property. See question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Canadian courts may grant attachment orders in support of arbitral proceedings. Specifically, Canada's domestic and international arbitration legislation broadly empowers courts to make any interim injunction 'as in court actions' (see Ontario Arbitration Act 1991, Section 8), which includes attachment orders.

Under Canadian law, an attachment order is an injunction by the court freezing the property of the defendant and prohibiting the defendant (or others) from dealing with it. In certain provinces, an attachment order may be made pursuant to legislation (e.g., Alberta's Civil Enforcement Act), and in all provinces, the courts have an inherent jurisdiction to grant attachment orders in the form of *Mareva* injunctions.

In contrast, and unlike other interim preservation measures, it is doubtful that a Canadian court would enforce an attachment order issued by a tribunal (see *Sauvageau Holdings*). As noted, a hallmark of an attachment order or *Mareva* injunction, or both, is that it binds non-parties (such as financial institutions) and therefore it has been held that a tribunal lacks jurisdiction to make such orders.

In terms of procedure, similar considerations apply to a party seeking a prejudgment attachment order from the court, as apply to other court applications for interim relief. For instance, applications may be brought on notice or *ex parte*. If made *ex parte*, courts impose onerous duties on applicants to apply expeditiously, to act in good faith, and to make full and fair disclosure (see question 24). Provincial legislation concerning attachment orders may also set out specific procedures that must be followed.

The legal test applied by courts when considering attachment orders is generally the same three-part test as for interim relief (see question 24). However, courts will also require evidence of a real risk that the defendant will remove assets from the jurisdiction to avoid future enforcement.

Finally, several provinces have published model attachment orders or *Mareva* injunctions, or both, which should be consulted when applying for such relief. Undertakings as to damages must also be given for attachment orders.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The procedural and legal requirements for attachment against property are generally the same for all types of property. See question 28.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

The procedural and legal requirements for attachment against property are generally the same for all types of property. See question 28.

However, unique considerations concern one type of attachment order, which concerns movable property. An order for prejudgment garnishment has the effect of compelling third parties who owe debts to the defendant to pay such monies into court for preservation. Although prejudgment garnishment may not be available in all Canadian provinces, the courts of British Columbia and Manitoba have acknowledged its availability in support of arbitration (see *Trade Fortune*, 1994 CarswellBC 139; *Winnipeg Condominium Corporation*, 2017 MBQB 112). As with other attachment orders, Canadian courts hold that prejudgment garnishment orders may not be made by a tribunal and are exclusively within the jurisdiction of the courts (*Winnipeg Condominium Corporation*, 2017 MBQB 112).

The specific availability, procedure and legal requirements for a prejudgment garnishment order vary from province to province.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The procedural and legal requirements for attachment against property are generally the same for all types of property. See question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

The rules governing recognition and enforcement of awards against foreign states are set out in the Canada State Immunity Act RSC 1985 (CSA). A state may waive its immunity. In any event, there is no immunity with respect to commercial activities. The CSA does not provide for any exception from immunity for arbitration agreement.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Leave would likely be needed to serve a foreign state with enforcement application materials *ex juris*. See question 20.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Canada, like the United Kingdom and the United States, takes a restrictive approach to sovereign immunity. Under the Canada State Immunity Act RSC 1985 (CSIA) practice, a state can wave immunity. However, jurisdictional immunity requires proof that the foreign state explicitly submits to the jurisdiction of the court by written agreement, as provided for in Section 4 of the CSIA. A waiver of execution immunity requires that the state has either explicitly or by implication waived its immunity from attachment and execution.

Section 5 of the CSIA provides that a foreign state is also not immune from jurisdiction in any proceeding relating to commercial activity. In addition, Canada does not have an exception for immunity for arbitration agreements. *TMR Energy* (2003 Fc 1517) suggests that an agreement to arbitrate may be considered an express waiver of jurisdiction immunity.

See also question 35.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

In *Callavino* (2007 ABQB 212), the State of Yemen was deemed to have waived execution immunity by agreeing to international arbitration. A similar result followed in *Canadian Planning and Design* (2015 ONCA 661), in which the Ontario Court of Appeal considered whether bank accounts owned by Libya were related only to the embassy and were therefore subject to diplomatic unity.

Canadian cases in this area turn on their specific facts. The courts have both refused to find sovereign immunity and, in other cases, accepted that claim.

18

Colombia

David Araque Quijano and Johan Rodríguez Fonseca[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The National and International Arbitration Statute in Colombia – Law 1563 of 2012 (the Arbitration Statute) – contains, in Article 114, a mandatory list of requirements for the awards rendered by international arbitration tribunals seated in Colombia:

- The award must be written and signed by the arbitrators. When most, rather than all, of the arbitrators sign the award, it is still valid.
- The tribunal must motivate the award. This rule applies unless (1) both parties do not have their domicile in Colombia or (2) the parties agree on a transaction.
- The award must indicate its date and the seat of the arbitration.
- The tribunal must serve signed copies of the award to the parties.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Pursuant to Article 106 of the Arbitration Statute, any party can request that the tribunal correct any errors in the calculation, transcription or drafting of the award, or append any clarifications. The request must be filed within one month of service of the award. The

1 David Araque Quijano is a partner and Johan Rodríguez Fonseca is an associate at Gómez Pinzón Abogados.

applicant party must notify its counterparty about this request. If the tribunal accepts the request, it must modify or clarify the award within the following month: this decision constitutes part of the award.

The tribunal can also decide itself to modify or clarify an award regarding any mistake in the calculation, transcription, drafting or grammar.

Unless otherwise agreed by the parties, any party can request that the tribunal render an additional award regarding any claims presented during the proceedings that were omitted from the principal award. If the tribunal accepts the request, the additional award must be rendered within the following 60 days, attending to the requirements discussed in question 1.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award cannot be appealed but can be set aside. Article 108 of the Arbitration Statute establishes the reasons to set aside an award, either at any party's request or *ex officio*.

Those reasons concern (1) the validity of the arbitral agreement between the parties; (2) the legal exercise of due process and other substantive and procedural rights; (3) the substantive scope of the arbitration clause; and (4) the legal and agreed rules relating to the constitution of the tribunal.

Article 108 provides for the annulment of an award at any party's request, when it is proved that:

- at the execution of the arbitration agreement, the applicant party was not able to agree on it. Also, if the agreement is deemed invalid under the applicable law, unless the parties agreed to it, Colombian law must be applied;
- the applicant party was not legally served about an arbitrator's appointment or the initiation of the proceedings; or if, for any reason, the applicant party could not exercise its rights;
- the award exceeded the scope of the arbitration clause. If the award contains matters included in the scope, these cannot be annulled; or
- the arbitral tribunal was constituted against the arbitration agreement or breaches a legal stipulation of the Arbitration Statute.

Likewise, an annulment should be ordered *ex officio* if:

- under Colombian law, the dispute is not subject to arbitration; or
- the award is contrary to the public international policy of Colombia.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Article 605 of the General Procedural Code (GPC) states that the recognition of foreign judgments is subject to *exequatur*, in accordance with the rules in the Colombian system. Therefore, the recognition and enforcement of arbitral awards is governed by the Arbitration Statute (Article 114) and the international treaties ratified by Colombia.

In particular, the Arbitration Statute sets forth the general regime for national (First Section) and international arbitration (Third Section) as a dual arbitration system and establishes the rules for recognising and enforcing awards (Articles 111 to 116). Article 111 sets different rules, depending on the seat of each arbitration proceeding. Note that interim measures taken by arbitral tribunals do not need any recognition proceeding, pursuant to Article 88 of the Arbitration Statute.

Any decision rendered by an arbitral tribunal seated in Colombia shall be considered a national award. Therefore, decisions do not require any recognition procedure and may be enforced immediately before the competent judge (Arbitration Statute, Article 111.3). However, if the parties decide to exclude the possibility of an annulment procedure pursuant to Article 107 of the Statute, the award must be recognised before being enforced.

However, decisions rendered by tribunals seated abroad are subject to recognition and enforcement procedures set forth in Articles 111 to 116 of the Arbitration Statute and the applicable international treaties (Article 111.4).

Colombia is a party to five international treaties relating to recognition and enforcement of international awards:

- The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention);
- The 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention);
- The 1889 Montevideo Treaty on International Procedural Law;
- The 1979 Inter-American Convention on Extraterritorial Validity of Foreign Judgments and Arbitral Awards (the Montevideo Convention); and
- The 1965 Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (the ICSID Convention).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention entered into force in Colombia on 24 December 1979, without the inclusion of any reservations. However, the effects of the international treaties to which

Colombia is a party are dependent on the incorporation of the Convention in the national legal system – the Colombian Congress issued Law 37 of 1979 for that purpose. This law was declared unconstitutional by the Supreme Court of Justice on 1988, as a consequence of which the Congress issued Law 39 of 1990 in an attempt to include and maintain the Convention in the national legal system. This law is currently in force.

The case law of the Supreme Court of Justice has been consistent in recognising the effects of the Convention since 1979, even though Law 37 of 1979 was declared unconstitutional.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The Supreme Court of Justice and the Council of State are the competent courts for the recognition and enforcement of decisions rendered by arbitral tribunals seated abroad.

Article 30.5 of the GPC states that the Civil Cassation Chamber of the Supreme Court of Justice is the competent court for the recognition and enforcement of arbitral awards, following the applicable legislation for that purpose. Likewise, Article 68 of the Arbitration Statute provides that the Supreme Court of Justice is competent for that purpose.

Article 68 also states that if a state entity is a party to an arbitration decision, the Third Section of the Council of State is the competent court for recognition and enforcement proceedings. In this context, to identify the competent court for the recognition and enforcement of an arbitral award, it is mandatory to determine whether a state entity is a party to the arbitration or not.

We refer to both courts hereinafter as the competent court.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As explained in question 6, the only requirement for a court to have jurisdiction over an application is to determine the nature of the parties involved in the award. The presence of assets within the jurisdiction is not a requirement for recognition proceedings.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Pursuant to Article 115 of the Arbitration Statute, once a party has filed an application for recognition and enforcement of an award, the competent court must decide on its admission. After that, the other party has 10 business days to submit its response to the request. Hence, the nature of the proceeding is adversarial.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Article 111.2 of the Arbitration Statute establishes that a request must be filed before the competent court following the rules explained in question 8, and submitted with the original award or a certified copy thereof.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the award was not rendered in Spanish, the competent court may request that the applicant submits a translated copy with the application. See also question 11.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

Pursuant to Articles 73 and 75 of the GPC, both parties must be represented by one or more admitted lawyers, unless any contrary legal rule applies. Any party can change its representative during the proceedings, subject to any special prohibition. Pursuant to Article 77, the representative has, *inter alia*, the power to request interim measures and initiate appeal proceedings.

The GPC also contains special rules related to documents not drafted in Spanish. Article 251 states that any documentary evidence drafted in a foreign language must be translated either by the Ministry for Foreign Affairs, an official translator or a translator designated by the judge. Designation by a judge is mandatory if there is any perceived controversy regarding the content of the translation.

In the same vein, Article 251 provides that public documents issued by authorities of foreign countries must observe the requirements of the apostille in accordance with the international treaties ratified by Colombia. In this regard, Colombia has ratified the Hague Convention Abolishing the Requirement for Legalisation for Foreign Public Documents, which entered into force for Colombia on 30 January 2001. If any public documents were issued by a state that is not a party to this Convention, those documents must first be declared legal by the Colombian consul or diplomatic agent in the foreign country.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Yes. Although there is no definition of the term 'award' in the Arbitration Statute, the case law of the Supreme Court of Justice has stated that any decision rendered by an

arbitral tribunal should be recognised if it resolves any issue relating to a dispute in a definitive manner.

However, under this criterion, procedural orders and other kinds of decisions relating to the procedure of an arbitration are not 'awards' and cannot be the subject of recognition proceedings (see Supreme Court of Justice, Civil Cassation Chamber, Decision dated 24 July 2016).

As explained in question 4, the interim measures do not need to be recognised under the Colombian legal system. Thus, if a tribunal renders a partial award in that regard, it has immediate effect.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Article 112 of the Arbitration Statute contains an exhaustive list of reasons to refuse the recognition of an award. This list is largely the same as provided by Article V of the New York Convention, but has a specific restriction regarding the public policy of a country. The Supreme Court of Justice has also stated that it may review the Panama Convention when analysing matters not covered by the Arbitration Statute (see Supreme Court of Justice, Civil Cassation Chamber, Decision dated 7 September 2016).

In that regard, Article 112.b.2 of the Arbitration Statute states that recognition may be refused if the enforcement or an award would be contrary to the international public policy of Colombia. In the same vein, Article V(2)(b) of the New York Convention establishes that the recognition or enforcement of an award may be denied when it is contrary to the public policy of a country.

Hence, the criterion adopted by the Arbitration Statute is more restrictive than that provided by the New York Convention, insofar as the Statute only takes into account the international public policy and does not consider domestic public policy.

In its case law, the Supreme Court of Justice had developed an 'international public policy' before the Arbitration Statute was issued by the Congress. It has been defined as the 'most basic and fundamental principles of Colombian juridical institutions', which include good faith, due process and the impartiality of the arbitral tribunal. (See Supreme Court of Justice, Civil Cassation Chamber, Decision dated 27 July 2011; Supreme Court of Justice, Civil Cassation Chamber, Decision dated 19 December 2011; Supreme Court of Justice, Civil Cassation Chamber, Decision dated 5 November 1996.)

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

As stipulated by Article 116 of the Arbitration Statute, when an award is recognised, it is subject to enforcement before the national courts.

For that purpose, Article 68 of the Arbitration Statute provides that both civil and administrative judges are competent to enforce an award. Thus, an interested party should invoke Article 422 of the GPC to start proceedings before those judges.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Pursuant to Article 113 of the Arbitration Statute, a decision rendered by a competent court regarding the recognition of a foreign arbitral award is not subject to any judicial review.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Although Article 115 of the Arbitration Statute provides that the competent court should render its decision regarding a request for recognition within 20 business days of its receipt, some recognition proceedings have taken more than two years.

Likewise, Article 112 states that the competent court is able to adjourn recognition proceedings when an annulment proceeding has been initiated at the seat of the arbitration. Nonetheless, if the seat was Colombia and any party has started annulment proceedings, it does not suspend the recognition proceedings.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Article 112 of the Arbitration Statute entitles the competent court to order the posting of security, following a request from the enforcing party.

There have been no judgments on the form or amount of security to be posted by the party resisting enforcement where recognition or enforcement proceedings have been adjourned subject to pending annulment proceedings under the Arbitration Statute.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

It is not possible to recognise and enforce an award when it has been fully set aside at the seat of the arbitration, in accordance with Article 112.a.v of the Arbitration Statute.

If the award has been partially set aside, the competent court shall determine whether the remaining part of the award resolves any issue or not, following the case law referred to in question 12.

As has been stated in question 15, a decision on the recognition of a foreign arbitral award cannot be made subject to challenge.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The Arbitration Statute does not provide anything about the judicial service. The relevant legislation is stated in Articles 290 to 301 of the GPC.

Pursuant to Article 290 of the GPC, personal service is mandatory for (1) a decision regarding the admission of a statement of claim, (2) the summons of public entities or public officers, and (3) specific cases as provided by the law. To carry out personal service, the claimant party must serve the defendant at his or her domicile.

If personal service is not possible, the claimant party must send a communication through a certified mail company to the defendant's domicile. It is mandatory to attach the relevant documents to the award.

Should none of the aforementioned methods be successful, Articles 293 and 108 of the GPC provide that the name of the defendant may be included in a national journal to summon him or her to appear before the competent court. If all attempts at service have failed, the state must assign an *ad litem* lawyer, who will represent the defendant's interests in the proceedings.

Finally, according to Article 301 of the GPC, a defendant can be served by conclusive behaviour (i.e., if the defendant states verbally or in writing that he or she is aware of the documents, and there is a record of that statement being made).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The procedure is the same as discussed in question 19. Nonetheless, the terms may be flexible should the defendant party be abroad.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Colombia has several public registers that may be checked by any interested party order to identify its debtor's assets, including the Real Estate Property Register held by the Office of Public Instruments, the Unique National Transit Register held by the Ministry of Transit, and the Register of Boats held by General Maritime Division.

Likewise, each city's Chamber of Commerce has records of Colombian companies that include a reference to its heritage. In the same vein, the Chambers of Commerce Confederation holds a register of movable securities relating to Colombian companies.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Article 43.4 of the GPC entitles Colombian judges to order any public authority or private person to disclose any information that is relevant to a proceeding. In particular, regarding collection proceedings, the judge is entitled to use this power to identify and locate a debtor's assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Article 80 of the Arbitration Statute provides that an international arbitral tribunal seated in Colombia should grant interim measures at the request of any party, unless otherwise agreed. The arbitral tribunal may also order interim measures on its own initiative in certain exceptional situations.

The objective of the measures can be to maintain or restore the status quo pending the decision in a case; to refrain from taking an action that could prejudice the arbitral proceedings; to take action to prevent any action that could prejudice the arbitral proceedings; to provide a means to preserve assets out of which a prospective award may be satisfied; or to preserve evidence that could be relevant and material to the resolution of the dispute.

However, the claimant party of the interim measures must fulfil the requirements as provided for in Article 81 of the Arbitration Statute regarding reasonableness and appropriateness, *inter alia*.

Irrespective of the application of interim measures against assets owned by a sovereign state, Colombian courts usually refer to the customary rules on sovereign immunity.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Pursuant to Article 88 of the Arbitration Statute, interim measures ordered by an international arbitration tribunal need not be enforced by any recognition procedure by a Colombian judge, unless any other requirements have been determined by the arbitral tribunal.

To carry out the interim measures, the judge must follow the applicable procedure for that purpose as applies in Colombia. As such, only the counterparty can claim that the interim measure has not been carried out in accordance with Article 89 of the Arbitration Statute. If a party obtained the application of an interim measure in Colombia, it must inform the judge of any modification stated by the arbitral tribunal.

A judge may request guarantees from the parties to protect the rights of third parties regarding whom the arbitral tribunal made no provision.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The interim measures must be recorded in the Real Estate Property Register held by the Office of Public Instruments. If the interim measure is the seizure of the assets, the judge must name a sequester, who will be entitled to manage the asset until the conclusion of the proceeding. Note, however, that all the immovable property that may be defined as 'family patrimony' cannot be affected by interim measures.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure depends on the mandatory inscription of the movable property in any public registration.

When the affected movable property is subject to that inscription, for instance cars, vessels and aeroplanes, it is necessary to include the decision regarding the measures with the public registration of the assets.

However, the interim measures will be perfected with the seizure of the asset, unless it is required to be recorded on a public register. If this is the case, the competent court must determine the date, time and any other relevant conditions to carry out the measures.

In cases that involve bank accounts, the bank should be informed about the measure. It must then order the constitution of a deposit, which could amount to 150 per cent of the claimed credit.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

Colombian law does not provide for any special procedure in this regard. Nevertheless, the measures under Article 590.1.c. of the GPC should be analysed. Those provisions state that a judge may order any reasonable measure to protect the object of the dispute, prevent its breach or avoid any consequences deriving from it, prevent damages and ensure the effectiveness of the claim.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

See questions 25 and 26.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

As discussed in question 24, Article 88 of the Arbitration Statute states that interim measures taken by arbitral tribunals do not need any recognition proceeding.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

As discussed in question 26, the interim measures should be perfected by means of a record being made in the relevant public register, or with the seizure of the assets if they are not subject to public registration.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

There is no stated procedure in this regard for arbitration cases in Colombia.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Colombian legislation has no particular rule in this regard. However, should the need arise, it would be necessary to refer to the international treaties to which Colombia is a party.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

When required, the Colombian courts will service a foreign state through the Ministry for Foreign Affairs, insofar as it is a diplomatic situation. In such a case, the general rules stated in the GPC will apply.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

There is no domestic law on foreign sovereign immunity. However, all the immunities granted to foreign states in Colombia are listed in the 1961 Vienna Convention on Diplomatic Relations and in the 1963 Vienna Convention on Consular Relations. In the same vein, Colombian courts should follow the customary international law.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

There is no specific regulation under Colombian law. If the case requires, the court should refer to the customary law and the international treaties to which Colombia is a party.

19

Czech Republic

Barbora Šnáblová and Lucie Mikolandová[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The form of domestic arbitral awards in the Czech Republic is governed by Sections 25 and 28 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards, which require that the award be in writing and signed by a majority of arbitrators, and that the verdict be explicit. The award must contain reasoning, unless the parties to the proceedings have agreed otherwise, and must be served on all parties. An arbitral award should also include the place of issuance to determine whether it is a domestic or foreign award.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Typing or calculating errors or other obvious mistakes in the arbitration award shall be corrected by arbitrators or an arbitration court at any time at the request of either party. Such a correction must be approved, signed and served as an arbitration award pursuant to Section 26 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards.

1 Barbora Šnáblová is the founding partner and Lucie Mikolandová is an associate at Barbora Šnáblová Attorneys.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

First, the Czech Republic is one of the few countries that provide for the possibility of revision of an arbitration award by newly appointed arbitrators. Section 27 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards stipulates that the award may be reviewed by other arbitrators at the request of any or all parties if so agreed by the parties to the arbitration agreement. Unless the arbitration agreement stipulates otherwise, the request for revision shall be delivered to the other party or parties within 30 days of the day of the delivery of the arbitration award to the requesting party. The revision of the arbitration award forms part of the arbitration proceedings and is governed by provisions of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards, and is subject to the same rules as the first instance arbitration proceedings, including the scope of review of both legal and factual issues, but the parties cannot introduce new submissions and new evidence on the record. In the revision proceedings, the arbitrators either confirm the original award or render a new decision in which they overrule the original award.

Second, Section 31 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards regulates the setting aside of arbitral awards and termination of an adjudicated enforcement of arbitral awards by courts.

Pursuant to Section 31, any party may file an application the court to set aside the arbitral award if:

- no arbitration agreement can be concluded in the concerned case;
- the arbitration agreement is null and void for other reasons, was cancelled or does not apply to the concerned case;
- any of the arbitrators who took part in the case were not called on to decide on the case on the basis of the arbitration agreement, or otherwise, or were incapable of becoming an arbitrator;
- the arbitration award was not approved by the majority of arbitrators;
- the party was not provided with the possibility to properly plead its case before the arbitrators;
- the arbitration award condemns the party to a performance that was not requested by the entitled party or that is impossible or unlawful under Czech law; or
- new facts or evidence are established that were not available in the original proceedings and that justify reopening the case.

The required period to file the application for setting aside the arbitration award under Section 32 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards is three months from the service of the arbitration award. The filing of an application does not suspend enforceability of the arbitral award. However, the court may, at the request of the award debtor, suspend enforceability of the arbitration award if an immediate enforcement of the award would result in considerable harm to this party, or if it is possible to establish that the application for setting the award aside is *prima facie* justified.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Recognition and enforcement of arbitral awards in the Czech Republic is governed by two sets of rules: international treaties and domestic law. As a general rule, international treaties take precedence over domestic rules if there are conflicting provisions (Article 10 of the Constitution).

In domestic law, recognition and enforcement of foreign arbitral awards is predominantly governed by Part 7 of the Act on Private International Law. In addition, other laws also regulate various aspects of enforcement of foreign and domestic arbitral awards, in particular Part 6 of the Civil Procedure Code, which sets the rules of court enforcement procedure; the Act on Arbitral Proceedings and Enforcement of Arbitral Awards, which regulates, *inter alia*, the setting aside of domestic arbitral awards and termination of adjudicated enforcement of arbitral awards; and the Act on Court Bailiffs and Execution, which provides for the powers and activities of court bailiffs regarding enforcement and related issues.

The Czech Republic is a party to several multilateral treaties facilitating recognition and enforcement of arbitral awards, in particular: the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1961 European Convention on International Commercial Arbitration (the Geneva Convention) and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

The Czech Republic has also entered into several bilateral treaties on legal aid, governing, *inter alia*, recognition and enforcement of arbitral awards, including with Afghanistan (1983), Albania (1960), Algeria (1984), Bosnia and Herzegovina (1964), Bulgaria (1978), Croatia (1964), Cyprus (1983), Greece (1983), Hungary (1990), Mongolia (1978), Montenegro (1964), Serbia (1964), Slovakia (1993), Slovenia (1964), Spain (1989), Switzerland (1929), Syria (1986), Tunisia (1981), Vietnam (1984) and Yemen (1990).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The Czech Republic is a successor state of the Republic of Czechoslovakia, which signed the Convention on 3 October 1958 and ratified it on 27 April 1959. The Convention entered into force on 10 October 1959. For the successor state, the Czech Republic, the Convention has been in force since 1 January 1993, and the instrument of succession was deposited with the Secretary General of the United Nations on 30 September 1993.

Upon the signing of the Convention, Czechoslovakia made the reservations under Article I(3) of the Convention. Accordingly, from the Czech perspective, the Convention applies to the recognition and enforcement of arbitral awards issued in the territory of another contracting state and to arbitral awards of non-parties on the basis of reciprocity.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Jurisdiction over applications for recognition and enforcement of arbitral awards (both foreign and domestic) lies with the court of first instance, usually a district court in the place where the enforcement debtor permanently resides, or stays in the absence of residence, where the place of business of an entrepreneur is located, or where the seat of a legal person is. If the court of first instance cannot be determined through these rules, the court of the place where the property of the debtor is located has jurisdiction. The governing provisions are Sections 9, 11, 84, 85 and 252 of the Civil Procedure Code.

Only domestic court awards can be enforced, as an alternative, through licensed court bailiffs under the Act on Court Bailiffs and Execution. The bailiffs could also, exceptionally, enforce a foreign arbitral award if confirmation of the enforceability of a foreign arbitral award was issued under a directly applicable law of the European Union or international treaty, or where the decision on recognition was issued prior to the enforcement (i.e., in another jurisdiction).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Foreign arbitral awards (i.e., in arbitrations seated outside the territory of the Czech Republic) are not subject to a separate formal decision on recognition. Pursuant to Section 122 of the Act on Private International Law, foreign arbitral awards are recognised within the enforcement proceedings where recognition of the award represents a preliminary question to be positively answered, and adequately reasoned, by the court when deciding on enforcement of the award.

Accordingly, the award creditor in the Czech Republic shall apply directly for enforcement of an award, as would be done with an domestic arbitral award. An application solely for recognition of an award shall be rejected by Czech courts.

The applicant is obligated to state in the application the preferred method of enforcement, essentially thus identifying the assets of the debtor that will be attached. Further requirements for an application vary depending on the proposed method of enforcement. To this end, pursuant to Section 261 of the Civil Procedure Code, the award

creditor is obliged in a petition for enforcement of a pecuniary obligation to stipulate the proposed method of the enforcement and to specify: (1) the wages payer of the award debtor (if attachment of wages is requested); (2) the name of the bank and the number of the debtor's bank account (if attachment of a receivable from an account maintained by a bank is requested); and (3) the award debtor's debtor or obligated person and the title of the award debtor's receivable against such persons (if assignment of a receivable other than from the debtor's bank account is requested).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Although the award debtor is formally a party to the enforcement proceedings (and recognition of the award forms an integral part thereof), the court generally decides on the application and adjudicates enforcement of the award *ex parte* on the basis of the application filed by the award creditor, without a formal hearing or involvement of the award debtor (Section 253 of the Civil Procedure Code).

However, the decision on enforcements is served on the award debtor, who can appeal the decision within 15 days of its receipt and can, in the appellate proceedings, submit new facts and evidence regarding adjudication of the enforcement, including recognition of the award.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

An application for enforcement of an award must satisfy the general requirements for court submissions as set out in Section 42 of the Civil Procedure Code (i.e., the application must identify the competent court and the award creditor, must set out the basis on which the application is based, and must state the relief being sought.

If the award is issued in an arbitration seated in a contracting state of the New York Convention, Article IV of the Convention applies, which requires the applicant to submit to the court the duly authenticated original award, or a certified copy thereof, and the original arbitration agreement, or a duly certified copy thereof.

With regard to domestic awards, or foreign awards issued in arbitrations seated in non-contracting states to the New York Convention, Section 261(2) of the Civil Procedure Code applies, and a party applying for enforcement of an arbitral award must submit to the court the original or a certified copy of the award, with confirmation of its enforceability, executed either on the first page of the award or in a separate document or in any other manner in accordance with the law of the seat of the arbitration or law governing the award.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the required documents referred to in question 9 are drafted in a language other than Czech, the party seeking enforcement of the award must submit full translations of these documents, which shall be certified by an official or a sworn translator, or by a diplomatic or consular agent (Article IV(2) of the New York Convention).

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A party applying for enforcement of an arbitral award through a court must pay court fees for the application as determined by the Act on Court Fees. The fees vary depending on the object of the enforcement and, if there are any pecuniary obligations, are typically set as a percentage of the enforced amount.

Other costs relating to the enforcement of an arbitral award include the costs of legal representation; however, these will usually be borne by the award debtor in the case of a successful enforcement. Nonetheless, legal representation of the applicant is not obligatory.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Pursuant to Section 251 of the Civil Procedure Code, only enforceable decisions that impose obligations will be enforced (and recognised in the case of foreign arbitral awards) by Czech courts.

Accordingly, partial arbitral awards will be generally enforced under Czech law, provided that they stipulate an obligation that is binding on a party and a deadline for the performance of this obligation.

By contrast, interim arbitral awards that typically do not impose any obligations on the parties will not be enforced under Czech law. For determination, Czech courts will not be bound by the respective title of the award, but rather by relief rendered.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Applicable grounds for the refusal of recognition of foreign arbitral awards in the Czech Republic are set out both in the New York Convention and domestic law, and overlap to a great extent.

With respect to foreign awards issued in a state that is a party to the Convention, the Czech courts directly apply Article V of the Convention, which sets out the possible grounds for refusal of recognition of arbitral awards.

According to the case law of the Supreme Court of the Czech Republic, when deciding on an application for enforcement, the courts shall review *ex officio* the grounds for refusal as listed in Article V(2) of the Convention (i.e., that the subject matter is capable of settlement by arbitration and that the award is not contrary to public policy). Grounds for refusal as listed in Article V, Paragraph 1 of the Convention (relating to incapacity of the parties or invalidity of the arbitration agreement, lack of due process, including the absence of proper notice of appointment of the arbitrators or of the proceedings, jurisdictional issues, irregularities in composition of the tribunal, non-binding, set aside or suspended award) shall be, pursuant to the text of the Convention, reviewed by the courts only at the request of the award debtor and will be therefore reviewed by the courts only upon appeal by the award debtor against the court decision on enforcement of the award (and inherently recognising the award at the same time) or upon application by the debtor for termination of enforcement proceedings (which is further discussed in question 14).

The recognition of foreign awards issued in non-contracting states is governed by Sections 120 and 121 of the Act on Private International Law. Recognition or enforcement will be refused if:

- the foreign state does not reciprocally recognise and enforce Czech arbitral awards;
- the award has not become final and enforceable in the country, or under the law of the country, in which it was issued;
- the award has been set aside in the country, or under the law of the country, in which it was issued;
- grounds for setting aside a Czech arbitration award exist; or
- the award contravenes public policy.

Grounds for setting aside domestic awards are listed in Section 31 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards and include:

- lack of arbitrability;
- invalid arbitration agreement;
- incapacity of arbitrators;
- award not approved by the majority of arbitrators;
- lack of due process;
- unsolicited, impossible or unlawful relief; and
- existence of grounds for renewal of proceedings in civil proceedings.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Under Czech law, there are three possible avenues to challenge the recognition of an award via a decision on enforcement of the award (including recognition of the award which is,

as explained in question 7, inextricably intertwined with the decision of the competent court on enforcement).

First, the award debtor can appeal the court decision ordering enforcement of the award, pursuant to Section 254 of the Civil Procedure Code, within 15 days of service of the court decision. In the appeal, the award debtor can claim grounds for refusal of recognition of the award (as to the particular grounds, see question 13). The regional court has jurisdiction over the appeal, and enforceability of the award is suspended until there is a decision on the appeal.

Second, the award debtor can apply for termination of the enforcement proceedings after the court has ordered enforcement proceedings, if it is ascertained that the award has not become enforceable, the award has been suspended or set aside, or for other reasons relating to enforcement of the award as provided for in Section 268 of the Civil Procedure Code. Similarly, the award debtor can apply for termination of the enforcement proceedings for additional grounds as set out in Section 35 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards, namely that the award was not approved by a majority of the arbitrators, the award provides for relief that was not requested by the claimant or that is not possible or lawful under Czech law, for another reason concerning a lack of mandatory representation of a party to the proceedings. The court shall suspend the enforcement, and the award debtor is obliged to apply to set aside the award with the competent court (a foreign court with respect to foreign awards) within 30 days, otherwise the enforcement proceedings will resume.

Third, the available challenge concerns domestic awards only in the form of an application for setting aside a domestic award, which can be filed within three months of service of the award with the regional court in the district in which the arbitration was seated. However, commencement of proceedings on setting aside the award does not suspend enforcement of the award (see also question 13).

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision by a district court in which it refuses to recognise an award (and hence rejecting an application for enforcement of the award) can be appealed by the award creditor to the regional court within 15 days of service of the award.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Article VI of the New York Convention is directly applicable and provides the competent court with the discretion to adjourn recognition and enforcement proceedings if an

application for setting aside or suspension of the award is pending. However, there is no prominent case law applying this Article by Czech courts.

As regards awards issued in non-contracting countries, enforcement proceedings will not be adjourned pending annulment proceedings at the seat of the arbitration. Pursuant to Section 121 of the Act on Private International Law, enforcement will be suspended only when the award has been set aside.

Similarly, a request to set aside a domestic award does not automatically eventuate in adjournment of enforcement of the award. However, pursuant to Section 32 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards, the court may adjourn enforceability of the award at the request of the award debtor, if immediate enforcement would cause significant harm or the application for setting aside the award is *prima facie* well founded. An application for setting aside a domestic award must be lodged with the competent court within three months of service of the award.

Another way to achieve adjournment of enforcement of an award is provided for in Section 266 of the Civil Procedure Code, under which the competent court may adjourn the performance of enforcement, if it can be reasonably expected that the enforcement will be terminated upon application by the award debtor (see question 13).

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Article VI of the New York Convention provides a court adjourning a decision on the enforcement of an arbitral award with the discretion, upon application by the award creditor, to order the award debtor to provide suitable security. However, this provision is not mirrored in Czech law and the process would be rather unusual from a Czech law perspective; accordingly, there is no prominent case law on adjournment or ordering security pursuant to the Convention by the Czech courts.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Awards set aside at the place of arbitration are not recognised in the Czech Republic pursuant to Article V(1)(e) of the New York Convention, provided that the award debtor invokes this ground for the refusal of recognition either in an appeal to the first instance court decision on the enforcement of the award or in an application to terminate the enforcement (see also question 13).

The Czech Republic is also a party to the Geneva Convention. Article IX thereof provides more favourable rules for recognition of awards that have been set aside at the seat of arbitration and limits the grounds of refusal to (1) incapacity of the parties or invalidity of the agreement, (2) violation of due process, (3) unsolicited relief and (4) violation of the rules on the composition of an arbitral tribunal. Pursuant to Article VII of the New York Convention, these rules of the Geneva Convention will take precedence when applicable.

With respect to foreign awards outside the scope of the aforementioned conventions, Section 121(b) of the Act on Private International Law provides that the recognition and enforcement of a foreign arbitral award shall be refused if the award has been set aside in the state of its issuance or under the law of the state of issuance.

If the award is set aside after the court has already decided on enforcement of the award (thus recognising the award inherently), the award debtor can request termination of enforcement of the award on the grounds set out in Section 268(1)(b) of the Civil Procedure Code.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Domestic service of extrajudicial and judicial documents is governed by the Civil Procedure Code (Sections 45 to 50e). The procedure is primarily effected by courts at the hearing, or within another judicial act, via a public data service to the addressee's electronic data box, if available, or via the public mailing system. Important judicial documents must be sent by registered mail and their receipt acknowledged (personal service). The Civil Procedure Code provides for detailed rules on when the service procedure is considered effective when public mail is used, if the addressee fails to acknowledge receipt of the documents. In the case of personal service, the addressee has 10 days to collect the documents – upon expiry of this period, the service is considered effective even if the addressee fails to acknowledge receipt (service by substitution).

Service from EU Member States to defendants residing in the Czech Republic is governed by the EU Service Regulation (Regulation (EC) No. 1393/2007). The designated central body under the Regulation is the Ministry of Justice and the competent receiving authorities are district courts in the territory of which the addressees have their residence or seat.

Service procedure for documents from non-EU Member States is governed by the multilateral 1965 Hague Service Convention.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The service procedure within EU Member States is governed by the EU Service Regulation; for details see question 19.

The service procedure outside the European Union is governed by the multilateral 1965 Hague Service Convention, which allows for the service of judicial and extrajudicial documents. The service is effected by the Ministry of Justice, which attends to more complex issues regarding the service procedure, and by courts, public prosecutors and court bailiffs as sending authorities.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several public registers and databases that allow for identification of an award debtor's assets in the Czech Republic, including (1) trade register for shares in companies; (2) land register for land or other immovable property; (3) vehicle register; and (4) Industrial Property Office register for information about industrial and intellectual property rights. In most cases, the information in the registers is accessible online and free of charge.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

An award creditor who is due to receive a monetary award from an award debtor can apply to the court to summon the award debtor to make a declaration of property (Section 260a et seq. of the Civil Procedure Code).

An application for a declaration of property must precede the application for enforcement, and must include the original or a certified copy of the award. The court will grant the application if the award creditor provides evidence that it was impossible to satisfy his claim from the award debtor via the standard enforcement procedure.

If summoned, the award debtor is obliged to appear before the court and disclose information regarding real estate property, movables, bank accounts, wages payer and receivables (Section 260e of the Civil Procedure Code).

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures against assets are generally available in the Czech Republic. Jurisdiction to issue interim measures in the arbitration context lies with the courts, which will, upon application, render interim measures provided that a party to arbitral proceedings demonstrates that future enforcement of the arbitral award is threatened.

On the basis of Section 76 of the Civil Procedure Code, the Czech courts have developed in case law a number of interim measures, such as the mandatory deposit of

movable property, a ban on the transfer of property, and an obligation to refrain from certain actions.

Czech law provides for no specific rules on interim measures against a sovereign state. Accordingly, general rules on immunities apply and a court can render an interim measure against state assets used for commercial purposes, but not against assets that serve for government functions (see question 34).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Prior to commencement or during the course of an arbitration, a court may apply interim measures if it is demonstrated by a party to the arbitration that future enforcement of the award is threatened. To this end, the applicant must essentially demonstrate that a party transfers or depreciates assets.

An applicant for interim measures must set out what kind of interim measure is sought and make a security deposit with the court's account in the amount of 10,000 Czech crowns, or 50,000 Czech crowns if it is a commercial dispute.

The competent court is the court in the seat of the arbitration or, with respect to arbitrations seated outside the Czech Republic, the court that would have jurisdiction to decide the dispute in the absence of an arbitration agreement (the relevant provisions are Sections 74 et seq. and Section 102 of the Civil Procedure Code, and Sections 22 and 41 of the Act on Arbitral Proceedings and Enforcement of Arbitral Awards).

The court decides without hearing from the defendant and orders the interim measure immediately upon receipt of the application or, exceptionally, within seven days (Section 75c of the Civil Procedure Code).

The decision rendering the interim measure is immediately enforceable upon service to the defendant and, although it can be appealed within 15 days of receipt, the appeal does not suspend enforceability of the measure.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There are no specific rules regarding interim measures against immovable property. Therefore, the general rules as described in questions 23 and 24 apply.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There are no specific rules regarding interim measures against movable property. Therefore, the general rules as described in questions 23 and 24 apply.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There are no specific rules regarding interim measures against intangible property. Therefore, the general rules as described in questions 23 and 24 apply.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Attachment of assets is effected through court enforcement proceedings initiated following an application by the award creditor for enforcement of the award. Domestic awards are also enforced by court bailiffs (see question 6).

The enforcement proceedings are in two stages: (1) decision of the court ordering enforcement; and (2) performance of enforcement by the court. It is in the second phase that a debtor's assets are attached.

The creditor must specify in the application what assets he or she prefers to attach and the court will generally uphold the application, provided that the proposed measure of attachment is not manifestly disproportionate to the creditor's claim. The court usually orders enforcement without hearing from the award debtor (Section 253 of the Civil Procedure Code; see also question 8), determines the particular means of attachment of assets and decides on the costs of the proceedings, which are generally covered by the debtor (Section 270 of the Civil Procedure Code). At the same time, the court bans the debtor from disposing of assets that are the subject of the enforcement (the ban is also registered with the land register, where appropriate).

The decision ordering enforcement is served on the debtor and can be appealed within 15 days of receipt; if appealed, the enforcement is suspended until the decision is confirmed by the appellate court.

Subsequently, the court proceeds *ex officio* with the enforcement and attaches particular assets to compensate the creditor. Attached assets are appraised by the court or a court-appointed appraiser and frequently sold in a public auction.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The procedure described in question 28 applies; the court where the real estate property is located has jurisdiction to decide on enforcement proceedings and to attach assets.

Measures for attachment of immovable property include: (1) compulsory administration of the real estate property; (2) establishment of a lien over the property; (3) mandatory sale of the real estate property (Sections 320b, 338b and 335 of the Civil Procedure Code); and (4) forced vacation and division of real estate property where non-pecuniary claims are enforced (Sections 340 and 348 of the Civil Procedure Code).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

The procedure described in question 28 applies. In general, measures for attachment of moveable property include: (1) attachment of wages or other income; (2) attachment of receivables towards banks; (3) attachment of other pecuniary claims or other proprietary rights; (4) sale of movable property; and (5) attachment of enterprise.

Several other measures are available if a non-pecuniary claim is enforced, such as division of the property or ordering the performance or carrying out of work by the debtor.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

There is no specific procedure for enforcement measures against intangible property. Therefore, the procedure described in question 28 and the measures for attachment against movable property described in question 30 apply.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific domestic rules for recognition and enforcement of arbitral awards against foreign states. Accordingly, the general rules on recognition and enforcement, and the rules on state immunities (discussed in question 34), are applicable.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Under the Act on Private International law (Section 7(5)), the procedure for service to a foreign state is conducted by the Ministry of Foreign Affairs via diplomatic channels.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Pursuant to Section 7(1) of the Act on Private International Law, foreign states are generally exempt from enforcement in the Czech Republic, provided that the proceedings concern property used for a government function. Therefore, the courts can enforce arbitral awards only with respect to state property used for commercial purposes.

This notion of restrictive immunity has been repeatedly applied by the Czech Supreme Court in the context of disputes against foreign states (jurisdictional immunity), although not specifically in proceedings relating to state immunity within enforcement proceedings.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

There are no specific provisions in Czech law for the waiver of a foreign state's immunity from enforcement. General rules of international law on immunities, which enable a state to waive immunity with respect to enforcement, should thus apply. However, there is no published case law to support this course of action by Czech courts.

20

Egypt

Karim A Youssef[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Article 43 of Law No. 27/1994 (the Egyptian Arbitration Act (EAA)) sets forth a limited list as to the requirements applicable to the form of arbitral award of which a violation results in annulment of the award.

According to Article 43, an award must be in writing. This provision echoes the requirement, during the enforcement phase, that an arbitral award be deposited with the Court Registry to obtain *exequatur* and a written document is the only means presenting the method of execution of the award. This requirement cannot be overridden by an agreement between the parties.

The date of issuance of the award and the place of arbitration (i.e., the city or, more generally, the country of its issuance) must be indicated in the award. According to the Cairo Court of Appeal, failure to indicate the place of issuance results in annulment of an award (Cairo Court of Appeal, 8th Commercial Circuit No. 19/124JY, dated 24 April 2013).

Moreover, under Article 43, an arbitral award must include the names of the parties and their respective addresses, and the names, addresses, nationalities and identification of the arbitrators (as to whether the arbitrator in question is a co-arbitrator or the chairman of the arbitral panel).

A copy of the arbitration agreement, and a summary of the parties' claims, statements and exhibits, must also appear in the award.

1 Karim A Youssef is a managing partner at Youssef & Partners.

An arbitral award must include the reasons why it has been issued and what led the arbitral tribunal to issue its decision in the manner it did. An exception is made for when the parties have agreed otherwise or when the *lex arbitri* does not require the arbitrators to include any reasons. The award must also include an operative part with the arbitrator's decision.

Finally, the signatures of all members of the tribunal are required. The Court of Cassation has established that a signature placed on the last page of an award only, may suffice unless the debtor of the award can establish that the purpose of this requirement (i.e., verifying that the arbitrators have deliberated before issuing the award) has not been fulfilled (Egyptian Court of Cassation, Decision No.1394/86JY, dated 13 June 2017). The arbitral award can be validly issued with the signatures of the majority of the panel members. If this is the case, the reason why certain arbitrators did not sign the award must be given. If the dissenting opinion is not stated, however, the award may only be nullified if the debtor proves that the reason for the lack of signatures is the absence of deliberation (Egyptian Court of Cassation, Decision No. 4457/77JY, dated 9 November 2010).

It should be noted that as per Article 25 of the EAA, it is permissible for the parties to subject the arbitral proceedings to any set of institutional rules. If the agreed set of rules provides different requirements as to the form of an award, the later shall prevail, as long as it does not violate Egyptian public policy. For example, if the parties agree to apply a set of rules that does not require the award to include any reference to the reasons behind an arbitrator not signing the award, the award shall not be set aside (Egyptian Court of Cassation, Decision No. 414/71JY, dated 8 January 2009).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Article 49 of the EAA governs an arbitral tribunal's authority regarding clarification or interpretation if there is any ambiguity in the arbitral award. Hence, the parties are entitled to request the arbitral tribunal, within 30 days of the day the party was notified of the arbitral award, to clarify any ambiguity that may taint the operative part of the arbitral award. However, the party requesting the clarification must notify the other party of that request before submitting it to the arbitral tribunal. The clarification award must be in writing and must be issued within 30 days, which, if necessary, can be extended to 30 more days, as of the day the request was submitted to the arbitral tribunal. The clarification award shall be supplementary to the original award and subject to the same rules.

Article 50 of the EAA governs the rectification of arbitral awards. If the award is tainted by a mere material error, be it typographical or a miscalculation, the arbitral tribunal is charged with rectifying such an error. It is entitled to issue a written rectification decision, *ex officio*, within 30 days of the date of issuing the award, or upon the request of any of the parties. The decision must be signed by the panel chairman as well as the co-arbitrators and notified to the parties within 30 days of its issuance.

However, the rectification decision must not amount to a review of the findings of the arbitral tribunal or else it may be annulled pursuant to Articles 53 and 54 of the EAA.

Additionally, Article 51 of the EAA entitles both parties, within 30 days of receiving an arbitral award, to request the arbitral tribunal to issue a complementary award deciding upon any issues that have been omitted by the arbitral award. The party requesting said complementary award must serve a notice thereof to the other party.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Article 52/1 of the EEA expressly excludes arbitral awards from being challenged through the means of recourse set forth for national court rulings. Hence an award cannot be the subject of appeal, cassation or a petition for reconsideration. However, by virtue of Article 52 of the EAA, it is possible to apply for setting aside any final arbitral award (Article 22/3 EAA) that has been issued as of 22 May 1994 (the date the EEA entered into force) and provided that the place of arbitration is Egypt, pursuant to exhaustive grounds listed in Article 53 of the EAA:

- the first ground set forth in Article 53(a) relates to the absence or the invalidity of the arbitration agreement;
- pursuant to Article 53(b), an award may be set aside if one of the parties lacked the legal capacity to contract arbitration at the time of the conclusion of the agreement;
- Article 53(c) provides for the annulment of the award if there has occurred a violation of a party's right to a due process;
- additionally, if the arbitrators apply to the subject matter of the dispute a law other than the one agreed by the parties (Article 53(d));
- if the arbitrators exceed the limits fixed in the agreement, the award may be set aside pursuant to Article 53(f). Exceptionally, if the parts of the award tainted by nullity owing to an excess of authority can be severed from the other parts of the award, only this part shall be affected by the nullity;
- pursuant to Article 53(e), an award may be set aside if the constitution of the arbitral tribunal or the appointment of arbitrators contravened the law or the parties' agreement;
- Article 53(g) provides for the situation where the form according to which the arbitral award must have been issued was not respected (e.g., if the award does not contain the names of the arbitrators who have issued it or lacks the issuance date, or the reasons upon which it has been based). The same applies to a situation in which a flagrant contradiction in the reasoning of the tribunal can be detected. Additionally, the arbitral award may be set aside if any of the arbitral proceedings were tainted by nullity as to invalidate the award (e.g., if the award has been issued without due deliberation or when the notification of arbitration has been delivered to the opponent in a different manner from that which has been agreed between the parties);
- according to Article 53(2), the national courts can set aside *ex officio* an arbitral award that violates Egyptian public policy but only in the context of ongoing setting aside

proceedings. A violation may occur, for example, if the subject matter of the arbitration agreement is inarbitrable, which applies for the determination of criminal responsibility.

As to the difference between an appeal and an application to set aside, an appeal on a court judgment pursuant to Article 232 of the Code of Civil and Commercial Procedure (CCCP) involves a *de novo* review of the dispute, that is to say points of both fact and law contained in the ruling in question shall be subject to review during the appeal proceedings. Unlike an appeal, the setting aside procedure does not allow a review of the findings of the arbitrators but is a limited review of the existence of one of the aforementioned grounds of annulment. Hence, an error *in judicando* that results in the potential unfairness of the arbitral award without affecting its validity cannot give rise to a setting aside judgment. An error of law or an error relating to its application or interpretation cannot be sanctioned through the setting aside proceedings.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The EAA is the applicable law for the enforcement of arbitral awards, specifically Articles 55 to 58. However, the CCCP governs certain matters in respect of which the EAA is silent, such as the identification of the court that has jurisdiction to rule on a challenge to an order to grant *exequatur* of awards.

The EAA applies to the enforcement of arbitral awards rendered in proceedings in which the place of arbitration is Egypt. It also would apply to awards rendered in proceedings seated abroad, to the extent that the parties have agreed to apply Egyptian law to those proceedings (see Article 1 of the EAA). The EAA applies in general terms to 'international commercial arbitration' as defined in Articles 2 and 3 thereof.

With respect to foreign arbitral awards, the CCCP initially was the governing law. It contained provisions dealing explicitly with the enforcement of foreign arbitral awards (Articles 296 to 299). However, since the mid 2000s, case law has started applying the EAA to the enforcement of foreign awards, based on Article III of the New York Convention, because the EAA was considered to be less stringent than the CCCP in terms of conditions for enforcement and court fees (see, for example, Court of Cassation Decision Nos. 966/73J, dated 1 January 2005, and 15912/76J, dated 6 April 2015). In other cases, Egyptian courts have continued to allow award creditors to elect to enforce under the provisions of the CCCP (see, for example, Court of Cassation Decisions Nos. 913/73J, dated 23 February 2010 and 5000/78J, dated 28 April 2015). A key difference between the two sets of rules is that recognition and enforcement under the EAA is obtained through *ex parte* proceedings by a judge's order, which is enforceable immediately, whereas the enforcement procedure under the CCCP requires the order to enforce to be obtained through adversarial proceedings by filing a lawsuit before the court of first instance, making the order enforceable only upon exhausting the appeal stage.

Egypt is party to a number of treaties that facilitate recognition and enforcement of arbitral awards. International treaties include the 1958 New York Convention (ratified in 1959) and the ICSID Convention (which entered into force in Egypt in 1972).

Regional treaties include The Riyadh Arabic Convention for judicial cooperation (2014), the Convention concerning the Settlement of Arab Investments Disputes (1976), and the Convention for promotion and protection of investments among the state members of the Islamic Conference Organization (1988).

Treaties that are relevant to the enforcement of awards include bilateral treaties for judicial cooperation, including those with Germany (1970), Tunisia (1976), Kuwait (1977), Italy (1981), France (1983), Jordan (1987), Bahrain (1989), Libya (1993), China (1995), Morocco (1997), Hungary (1999), Syria (2000), UAE (2001) and Oman (2002).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Egypt ratified the New York Convention on 9 March 1959, by virtue of Presidential Decree No. 171/1959, without reservation, and the Convention entered into force as of 7 June 1959 (New York Convention Guide 1958, Egypt, http://newyorkconvention1958.org/index.php?lvl=notice_display&id=1724).

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

According to Articles 9 and 56 of EAA, jurisdiction over the enforcement of awards to which the EAA applies lies with the president of the court that was originally competent to adjudicate the dispute had there not been an arbitration agreement. Jurisdiction over the enforcement of international commercial awards lies with the President of the Cairo Court of Appeal, or any other court of appeal agreed by the parties, but excluding administrative courts of appeal even if the matter pertains to an administrative contract (see Constitutional Court Decision No. 47/31J, dated 15 January 2012). Jurisdiction over the enforcement of foreign awards lies with the President of the Cairo Court of Appeal. The judge concerned does not have the jurisdiction to review the judgment as a matter of law or fact or to assess its content or the process of decision-making involved in rendering it. The judge either affirms or rejects the order. He is not an appellate or review authority.

However, as per the Minister of Justice Decree No. 8310 for 2008 (as amended), the depositing of the arbitration before the Arbitration Bureau of the Ministry of Justice is a precondition to apply for enforcement as per Articles 46 and 56 of the EAA. As per Decree No. 8310, the Arbitration Bureau exercises a minimal review and a supervisory jurisdiction over the enforcement of an award. It allows the depositing of the award only after verifying

that it includes no violation of public policy or pertains to matters that cannot be settled by agreement.

Finally, the Supreme Constitutional Court of Egypt has jurisdiction to rule on whether an award may be enforced in a situation where it is alleged that contradiction exists in respect of recognition and enforcement between the award and a final decision of a court or other judicial body (Article 25/3 of Constitutional Court Law No. 48/1979).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The only legal text fixing jurisdiction regarding applications for recognition and enforcement of arbitral awards is in Articles 9 and 56 of the EAA (see discussion in question 6). These Articles are indifferent as to whether the other party has assets within the borders of its jurisdiction or not.

However, as per the Cairo Court of Appeal, to request the enforcement of an arbitral award, the enforcement proceedings must have a link with the Egyptian territory, regardless of the Egyptian courts' jurisdiction over the dispute itself. This link is deemed to exist if any of the grounds of jurisdiction listed under Articles 28 to 34 of the CCCP can be established (Appeal No. 10/122JY, 91th Commercial Circuit, dated 30 May 2005).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Enforcement proceedings, as per Article 56 of the EAA, are *ex parte*. In practice, there have been cases in which the judge sitting for the *ex parte* proceeding caused an applicant to serve the award debtor, for example where it is believed that a contradictory court judgment exists and was rendered before the arbitral award (see Article 58(2)(a) of the EAA).

However, the appeal proceedings against an enforcement order issued in the *ex parte* proceedings are adversarial, in accordance with Article 58(3) of the EAA, and Articles 197 to 199 of the CCCP.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Under Article 194 of the CCCP, the documentation required to obtain an enforcement order consists of two originals of the application. The judge or court renders the enforcement order on one of the two originals (Article 195, CCCP). As per Article 56 of the EAA (according to Ministerial Decree No. 8310/2008 as amended), the application should also include the following supporting documents:

- the original award or a signed copy thereof;

- an official certified Arabic translation of the award, if rendered in a language other than Arabic;
- a copy of the arbitration agreement;
- an official certified Arabic translation of the arbitration agreement, if originally drafted in a language other than Arabic;
- the original of the notification made to the defendant of enforcement with the arbitration award, which is a practical requirement so that the judge can verify whether the time limit for bringing an annulment proceeding has expired as per Article 58(1) of the EAA;
- an official copy of the certificate of the deposit of the award at the competent court, pursuant to Article 47 of the EAA;
- the original of the notification made to the defendant of enforcement with the certificate of deposit of the award; and
- the original of an official special power of attorney in the name of the applicant or portioner, if the application is submitted by a person other than the creditor of the award.

The application for recognition of the award can only be accepted after expiry of the time limit for filing an action to set aside the award, if any, which is 90 days from the date of notification of the judgment to the award debtor.

If an application lacks any required documents, the application will be denied. However, in practice, in some instances, an applicant will be notified and given an opportunity to complete them.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

All the required documentation, if foreign, should be authenticated by the Egyptian Consulate in the country where the document has been originally issued.

All the documentation should be in Arabic, otherwise an official, certified Arabic translation should be submitted.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A judge's decision to grant an *exequatur* must be submitted to the competent court officer within 30 days of the date of its issuance to seal the award with the *exequatur*. Otherwise the decision shall become ineffective.

If the request for *exequatur* is dismissed, the award creditor can file a plaint against the decision pursuant to Article 58(3) of the EAA within 30 days in accordance with the procedure set forth by Article 197 of the CCCP. In any case, a decision, whether granting

or denying the *exequatur*, has no *res judicata* effect and the applicant may reapply to obtain one. The court fees are assessed in accordance with Law No. 90/1944.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Recent case law in Egypt has confirmed the possibility of recognising and enforcing an interim award issued by a tribunal seated in a foreign country (Cairo Court of Appeal, Ruling No. 39/134JY, dated 8 November 2017).

As to the enforcement of partial awards, Article 42 of the EAA entitles the arbitrators to issue partial awards disposing finally of certain claims before issuing the award, and putting an end to the dispute. Partial awards can be subject to enforcement measures provided that they decide upon an issue that can be separately subject to enforcement proceedings and that the procedure for enforcing an arbitral award is followed.

According to Article 58(1) of the EAA, an application for enforcement is inadmissible unless the time limit of 90 days defined for bringing annulment proceedings (Article 54(1) of the EAA) has expired. The only exception is interim and conservatory awards, which as per Article 24 of the EAA, can be enforced with the permission of the tribunal, or by obtaining an enforcement order as per Article 56 of the EAA, as the case may be.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

According to Article 58(1) and (2) of the EAA, the grounds on which enforcement may be rejected or be found inadmissible are:

- the time limit for bringing an annulment challenge, which is 90 days starting from the notification of the award to the debtor, has not expired;
- violation of the public policy of Egypt, in that the award was not properly notified to the award debtor; or
- the award contradicts a previous judgment rendered by the Egyptian courts and dealing with the same subject of the dispute.

With respect to foreign awards, the New York Convention supersedes national legislation and, accordingly, Egyptian courts have consistently rejected objections to enforcement on grounds available under the EAA or the CCCP but that are not part of the New York Convention.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once the award is sealed by *exequatur*, it becomes immediately enforceable, and allows the award creditor to apply attachments to the assets of the debtor. Article 58(3) of the EAA originally did not allow any challenge to the order granting enforcement, while allowing the award creditor to challenge an order denying enforcement. This part of the Article was held to be unconstitutional for discriminating between the two situations with respect to the right of challenge (Supreme Constitutional Court, No. 92/21JY, hearing held on 6 January 2001). As such, an award debtor is now entitled to challenge an order granting enforcement.

One issue remains: the time limit for challenging an order granting enforcement. Case law and a number of scholars consider the time limit to make that challenge is 10 days starting from the date of presenting the order for enforcement or from the date of notifying the order to the debtor as per Article 197 of the CCCP. However, given that Article 58(3) of the EAA allows the award creditor 30 days to challenge the order denying enforcement, such ongoing difference between the respective rights of challenge was the subject of a number of unconstitutionality pleas for discriminating between the two parties as to the time limit for challenge, but the issue has not yet been finally settled by the Constitutional Court.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

As per Article 58(3) of the EAA, the award creditor may challenge a decision refusing enforcement within 30 days of the date the decision was issued, before the president of the court that rendered the decision.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

According to Article 57 of the EAA, an annulment action does not suspend enforcement. In practice, on occasion, an enforcement judge may refrain from deciding on an application for enforcement until the annulment action has been decided.

An award debtor may seek the suspension of enforcement either through annulment proceedings or, after an order of enforcement is granted, through an interim application to the enforcement judge in his authority as a summary judge by virtue of Article 275 of the CCCP, provided that an issue can be identified regarding said enforcement. Nevertheless,

the court may order said suspension if the applicant requests it in his or her application and that request is based upon serious grounds (Article 57, EEA).

If the request is made before the enforcement judge, the matter is discretionary, but in most cases the request is denied.

Additionally, an award debtor may seek from the judge of enforcement, for reasons that arose after the award was rendered, a suspension of enforcement, after the order of enforcement is granted, on an interim or a substantive basis.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

According to Article 57 of the EAA, if the court decides to adjourn recognition or enforcement proceedings pending the annulment proceedings, it may order the defendant to present security, but it also may not. So, it has a discretionary power regarding that matter, however, as explained in question 16, in most cases the request for suspension is rejected.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Egyptian law does not explicitly allow the enforcement of an award that has been set aside at the seat of arbitration. There is also no precedent for an Egyptian court enforcing an award that was nullified at the seat of arbitration. However, the grounds for non-enforcement of an award do not include that the award was previously nullified at the seat of arbitration. In other words, the legislative possibility that an award nullified at the seat may be enforced by Egyptian courts exists.

When the award is set aside at the seat after an order of enforcement is granted, the debtor may seek a cancellation of the order through the challenge procedure. If the period during which a challenge can be made has expired, the award debtor may seek the cancellation of all enforcement proceedings made thereafter through a substantive application to the enforcement judge.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

If no international treaty or a specific provision of law is applicable, service shall be made via a court officer pursuant to the procedures set out in the CCCP in Articles 6 to 19, and, in respect of enforcement, Articles 281 to 285.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

If no international treaty or a specific provision of law is applicable, service, as per Article 13(9) of the CCCP, shall be through delivering the documents to the Public Prosecutor, who then sends them to the Minister of Foreign Affairs to be delivered through diplomatic channels.

However, if service is to a foreign company that has a branch or agent in Egypt, service shall be to that branch or agent, as per Article 13(5) of the CCCP.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

A number of public registers can be helpful in identifying a debtor's assets within Egypt. They include the real estate register office (for identification of land and real estate ownership) and the commercial register (for identification of commercial companies).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

There are a number of procedures that would result in the disclosure of information about an award debtor; for example, the application for conservatory or preventive attachment on the debtor's properties in the possession of a third party as per Articles 325 to 352 of the CCCP. This would oblige that party, as per Article 339, to disclose all such properties, including debts within 15 days of notifying the attachment to the third party, unless the debtor deposits at the court an amount either equal to the amount of the award or as may be decided by the enforcement judge.

Also, pursuant to Article 789 of the Civil Code, if the debtor has a guarantor, who is not jointly liable with the debtor, the guarantor shall guide the creditor to assets of the

debtor sufficient to settle the amount of the award, if he or she wishes to plea that the creditor shall seek enforcement and discharge the award on the debtor first.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures against assets are available; for example, an award creditor may apply for conservatory attachment on the debtor's assets by virtue of the arbitration award without the need to obtain an enforcement order and, according to some, even if the order is denied.

According to the Egyptian Court of Cassation, the customary public international law constitutes an integrated part of Egyptian internal legislation (Court of Cassation Decision No. 1412/50JY, dated 29 April 1986). These rules prevent award creditors from applying for interim measures on assets owned by a foreign state because of the state's immunity from enforcement, unless the state has expressly consented to take such measures, or the property was in use by the state for purposes other than government non-commercial purposes (International Court of Justice decision, *Germany v. Italy*, dated 3 February 2012, at Paragraph 116). Note that a waiver of immunity from jurisdiction does not imply waiver of immunity in respect of the enforcement of the judgment, even if lawfully rendered (as by the International Court of Justice in *Germany v. Italy*, at Paragraph 113).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Generally, interim measures are obtained through adversarial proceedings (i.e., by bringing a lawsuit before the judge for interim measures). The applicant shall demonstrate that his or her rights would be jeopardised by the passage of time, and that his or her right is probable *prima facie*.

In addition, an award creditor may apply a conservatory attachment by virtue of the award, even if not yet enforceable, given that the conservatory attachment applies only to movable property. The attachment is applied through the court bailiffs and is notified to the debtor within eight days (Article 320, CCCP), failing which it becomes invalid. If the property is in the possession of a third party, the attachment is applied by a notification to that party, including of the information required under Article 328 of the CCCP, and shall be notified to the debtor within eight days, otherwise the attachment becomes invalid. These attachments have the effect of freezing the attached property, preventing the debtor or the third party from any acts of disposition or transfer, and hence providing security for the award.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Unlike monetary, movable and intangible assets, interim measures in respect of immovable properties can be obtained only through adversarial proceedings as explained in question 24, and cannot be subject to conservatory attachment.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See questions 23 and 24 (as per Article 316, CCCP).

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

In principle, interim measures against intangible property are mainly subject to the same rules of interim measures on movable property, including conservatory attachment, as explained in questions 23 and 24. Furthermore, the CCCP governs the provisions regarding shares and securities by which they are attached by the same measures as for movable property (Article 398) and regular revenues, in-name shares, profit shares that are attached by the same method of attachment of property in the possession of a third party (Article 399).

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Pursuant to Article 281 of the CCCP, the debtor must be served a notice in person or at his or her original residency, including the exact amount of the debt, and be summoned to pay. At least a day after the notice is served, and upon submitting the enforcement title (which must have obtained *exequatur* or be exempted from that requirement by the force of the law or by a judicial decision) to the court bailiffs, assistants of the enforcement judge are obliged to proceed with the enforcement proceedings. If they do not do so, the creditor may submit the enforcement title to the enforcement judge (Article 279 of the CCCP). In that event, the debtor is not required to appear before the judge of enforcement.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Attachment against immovable property starts with a notification to the debtor and any third party who has a pledge on the property, that, if the debtor did not pay, the notice shall be entered on the Real Estate Register and the property shall be sold involuntarily. The notice shall include sufficient description of the property in accordance with the Real Estate Registration Law, and shall define the enforcement title, its date and the amount to be paid (see Article 401 of the CCCP). Upon registration of that notice, the property is considered attached (Article 404 of the CCCP). If, before registration, a third party who acquired an *in rem* guarantee on the property by a registered contract shall be notified to pay the debt or evacuate the property, otherwise enforcement shall take place. This latter notice shall also be registered (Article 411 of the CCCP).

Upon deciding on any objections to the forced sale, and after verifying that the enforcement title is final, the enforcement judge, upon the creditor's request, will render an order defining the sale session and starting the sale procedures (Articles 414 to 426 of the CCCP).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Attachment of movable property is made by the court officer via a report at the location of the property (Article 353 of the CCCP). The property is considered attached once stated in the minutes of the procedure (Article 361 of the CCCP), and the court officer shall undertake certain publishing procedures. If the attachment takes place in the presence of the debtor or at his or her domicile, a copy of the minutes shall be delivered to him or her, otherwise it shall be notified to him or her the next day at the latest (Article 362 of the CCCP). The sale shall not take place sooner than eight days after this notification and one day after completion of the publication procedure (Article 376 of the CCCP).

If the attachment is made on a property in the possession of a third party, that third party shall pay the creditor within 15 days of disclosure by the third party of the property in his or her possession (Article 344 of the CCCP), provided that prior notice of at least eight days was given to the debtor (Article 285 if the CCCP). If payment did not take place and the amount set by the enforcement judge was not deposited, the property shall be sold as per the procedures described in question 29 (Articles 346 to 348 of the CCCP). (Additional procedures may apply to the sale of shares, which may require the involvement of a broker; see Article 400 of the CCCP.)

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

In the case of securities and shares for the bearer or which are assignable, they are attached in the same way as described in questions 27 and 30.

Regular revenues, in-name shares, profit shares are attached in the same way as with respect to property in the possession of a third party.

The sale of these assets is made through a broker to be designated by the enforcement judge (Articles 398 to 400, CCCP).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules that govern recognition and enforcement of arbitral awards against foreign states in Egypt.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

The applicable procedure for service of extrajudicial and judicial documents to a foreign state is governed by the Hague Service Convention of 15 November 1965. Alternatively, service can be made through diplomatic channels, by submitting the notice to the Public Attorney's office in Egypt.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

There is no clear body of rules governing foreign state immunity from enforcement in Egypt. However, the Egyptian Court of Cassation has ruled that customary public international law constitutes an integrated part of Egyptian internal legislation (Court of Cassation, Decision No. 1412/50JY, dated 29 April 1986). Hence, enforcement proceedings shall not take place on assets owned by a foreign state, because of the state's immunity from enforcement, unless the state has expressly consented to take such measures, or the property was in use by the state for purposes other than government non-commercial purposes (see International Court of Justice decision, *Germany v. Italy*, dated 3 February 2012, at Paragraph 116).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Yes, it is possible for a foreign state to waive immunity from enforcement in Egypt. There are no specific requirements regarding the effectiveness of the waiver.

21

England and Wales

Oliver Marsden and Ella Davies[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The parties are free to agree on the form of an award. Absent such agreement, Sections 52(3) to 52(5) of the Arbitration Act 1996 (the Act; all statutory references that follow are to the Act unless otherwise indicated) state that an award must be in writing signed by all arbitrators or all those assenting to the award. The award should contain reasons, unless the parties have agreed to dispense with reasons or it is an agreed award. The award should also state the date when the award was made and the seat of the arbitration. Unless an alternative process is agreed by the parties, the award should be notified to the parties by service on them of copies of the award without delay after the award is made (Section 55).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The parties are free to agree on the powers of the tribunal to correct an award or make an additional award (Section 57(1)). Unless agreed otherwise, the tribunal has the power (on its own initiative or on an application by one of the parties to the arbitration) to correct an award so as to remove any clerical mistake or error arising from an accidental slip

1 Oliver Marsden is a partner and Ella Davies is an associate at Freshfields Bruckhaus Deringer LLP.

or omission, or to clarify or remove any ambiguity in the award (Section 57(3)(a)). The tribunal is also empowered to make an additional award in respect of any claim (including a claim for interest or costs) that was presented by the parties but not addressed in the award (Section 57(3)(b)). In all cases, the tribunal must first afford the other parties a reasonable opportunity to make further representations.

An application to the tribunal for correction or clarification of the award or for an additional award must be made within 28 days of the date of the original award (Section 57(4)). Any correction of an award must be made within 28 days of the date the application was received by the tribunal or within 28 days of the award if the correction is made by the tribunal on its own initiative (Section 57(5)). Additional awards must be issued within 56 days of the award (Section 57(6)). These time limits can be extended by agreement of the parties. A party must exhaust any recourse available from the tribunal to correct the award or issue an additional award under Section 57 of the Act before seeking to appeal or challenge the award before the courts (see question 3).

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An award may be challenged before the English courts on the grounds of lack of substantive jurisdiction (Section 67) or serious irregularity (Section 68). These provisions are mandatory and cannot be excluded by agreement of the parties.

An award may also be appealed to the courts on a question of English law under Section 69 of the Act, unless the parties have excluded this right of appeal (e.g., through selection of institutional rules such as the LCIA Rules containing a waiver of appeal rights).

Lack of substantive jurisdiction

A challenge to an award under Section 67 of the Act can be pursued after the tribunal has issued its jurisdictional award or otherwise following issuance of the tribunal's final award. 'Substantive jurisdiction' is defined in the Act by reference to whether (1) there is a valid arbitration agreement, (2) the tribunal is properly constituted, and (3) the matters submitted to arbitration are in accordance with the arbitration agreement (Sections 82 and 30(1)). An in-time application under Section 67 involves a full rehearing (see *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 at Paragraph 26). The court has the power to confirm, vary or set aside the award in whole or in part (Section 67(3)).

A party may lose its right to challenge an award before the English courts for lack of substantive jurisdiction if the jurisdictional objection has not been raised before the tribunal in accordance with the time frames provided in Section 31 of the Act, unless the challenging party can show that at the time it took part in the arbitral proceedings, it did not know, and could not with reasonable diligence, have discovered the grounds for the jurisdictional objection (Section 73).

Serious irregularity

An award can also be challenged before the courts for serious irregularity affecting the tribunal, the proceedings or the award under Section 68 of the Act. As defined in Section 68, 'serious irregularity' means one or more of the following types of irregularity (this is an exhaustive list) that has caused 'substantial injustice' to the applicant:

- failure by the tribunal to comply with the general duties set out in Section 33 of the Act, which are:
  - to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting its case and dealing with that of its opponent; and
  - to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined;
- the tribunal exceeding its powers (other than by exceeding its substantive jurisdiction);
- failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties or to deal with all the issues that were put to it;
- the relevant arbitral institution exceeding its powers;
- uncertainty or ambiguity as to the effect of the award;
- the award being obtained by fraud or the way in which it was procured being contrary to public policy;
- failure to comply with requirements as to the form of the award; and
- any irregularity in the conduct of the proceedings, or in the award, that is admitted by the tribunal or relevant arbitral institution.

If a serious irregularity is made out, then the court has the power to remit all or part of the award to the tribunal for reconsideration, or to set aside the award or to declare the award to be of no effect, in whole or in part (Section 68(3)). If the award is remitted to the tribunal, the tribunal must issue a fresh award in respect of the relevant matters within three months of the court's order or within any alternative time frame ordered by the court (Section 71(3)). As with Section 67, the right to challenge an award based on serious irregularity may be lost if the objection has not been raised in a timely manner with the tribunal (Section 73(1)).

Appeal on a question of law

Section 69 of the Act provides parties with a right of appeal to the English courts on a question of law arising out of the award, unless (as noted above) the parties have agreed to exclude this right. Absent the agreement of all parties, an appeal on a question of law can only be made with the permission of the court. Leave to appeal will only be granted if (1) the determination of the question of law will substantially affect the rights of one or more of the parties and is one that the tribunal was asked to determine; (2) on the basis of the findings of fact in the award, the decision of the tribunal on the relevant question of law (a) is obviously wrong or (b) concerns a question of general public importance and is at least open to serious doubt; and (3) it is just and proper in all the circumstances for the court to determine the question, notwithstanding the parties' agreement to arbitrate the dispute (Section 69(3)). On an appeal under Section 69, the court has the power to

confirm, vary, set aside or remit the award to the tribunal for reconsideration, in whole or in part (Section 69(7)).

Procedure

As noted in question 2, a party should exhaust any available recourse or appeal rights before the tribunal before pursuing a challenge or appeal before the courts (Section 70(2) of the Act).

Any challenge or appeal must be filed within 28 days of the date of the award or within 28 days of the parties being notified of the outcome of any arbitral appeal, review or correction to the award or an additional award (Section 70(3)). These time limits may be extended by the court.

To commence a challenge or appeal against an award, an applicant must file an arbitration claim form complying with the requirements of Rule 62.4 of the Civil Procedure Rules (CPRs). If the appeal is on a question of law, the arbitration claim form must also identify the relevant question of law and grounds for seeking leave to appeal, and append the award and a skeleton argument that complies with the requirements of Practice Direction (PD) 62.12.2. Written evidence may only be filed in support of an appeal in the limited circumstances set out in PD 62.12.4. An application under Sections 67, 68 or 69 of the Act should be made on notice to the other parties and the tribunal. The court's usual case management powers will apply, including the power to make an order for summary dismissal.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The United Kingdom has ratified the New York Convention, its predecessor the Geneva Convention, and the Washington (ICSID) Convention.

The Act governs the recognition and enforcement of arbitral awards in England, Wales and Northern Ireland.

Section 66(1) of the Act provides that an award made by a tribunal pursuant to an arbitration agreement may, by leave of the court, be enforced in the same manner as a judgment or order of the court to the same effect. If leave is so given, judgment may be entered in the terms of the award (Section 66(2)). Section 66 of the Act is mandatory and applies to arbitrations seated both inside and outside England and Wales or Northern Ireland (Schedule 1 and Section 2(2)(b) of the Act).

Part III of the Act contains provisions for the recognition and enforcement of foreign awards. Section 101(1) provides that a New York Convention award made outside the United Kingdom shall be recognised as binding on the persons between whom it was made, and may be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings. Pursuant to Section 101(2) of the Act, a New York Convention award may, by leave of the court, be enforced in the same manner as a judgment or order of the

court to the same effect. If leave is so given, judgment may be entered in the terms of the award (Section 101(3)).

Pursuant to Section 99 of the Act, Part II of the Arbitration Act 1950, which deals with enforcement, applies to Geneva Convention awards that are not New York Convention awards. Foreign awards that are neither New York Convention nor Geneva Convention awards may be capable of enforcement under legislation applicable to the registration of foreign judgments if the award has become enforceable in the same manner as a judgment in the place where it was made.

Matters of English court procedure are governed by the CPRs, particularly Part 62 (Arbitration Claims). The registration and enforcement of ICSID awards is governed by a separate regime set out in the Arbitration (International Investment Disputes) Act 1966 Act and CPR 62.21, which implements the Washington Convention.

It is also possible to enforce an arbitral award in England at common law by bringing an 'action on the award' (i.e., a claim for non-performance of the award).

Since the Act provides no separate procedure for seeking 'recognition' of an award (other than by way of defence or set-off), the responses to questions 6 to 18 describe the procedure for seeking leave to enforce an award under Sections 66 and 101 of the Act.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention entered into force in the United Kingdom on 23 December 1975. A reciprocity reservation is in effect.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

An application for leave to enforce an award may be made to the High Court of England and Wales (EWHC) or any county court. In practice, the application should usually be made to the High Court (Commercial Court Registry).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The English courts are bound to recognise and enforce foreign awards under the New York Convention unless one of the grounds for refusing recognition and enforcement in Section 103 of the Act is made out. The court's permission is required to serve the claim

form on a defendant out of the jurisdiction (see question 20) but the presence of assets within the jurisdiction is not a precondition for granting leave to enforce (*Rosseel NV v. Oriental Commercial & Shipping Co (UK) Ltd* [1991] 2 Lloyds Rep 625).

Where an arbitration is seated in England and Wales or Northern Ireland, the English courts have supervisory jurisdiction over the arbitration and may grant interim measures in support of enforcement of the award, even when there are no assets in the jurisdiction and enforcement will take place abroad (see question 23).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

An application for leave to enforce an award under either Section 66(1) or Section 101(2) of the Act may be made *ex parte* in an arbitration claim form (CPR 62.18(1)). The court may direct the arbitration claim form to be served, in which case the claim form should be validly served on the defendant, or defendants, and the enforcement proceedings will then continue as adversarial proceedings (see CPR 62.18(2) and 62.18(3)). If the court grants leave to enforce the award *ex parte*, the defendant will be served with the order and will have a period of 14 days (or such longer time as specified by the court) to apply to have the order set aside (CPR 62.18(9)).

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

An application for leave to enforce an award should be made in an arbitration claim form (N8) (CPR 62.18(1)). The arbitration claim form should be supported by an affidavit or witness statement containing the information specified in CPR 62.18(6) and exhibiting originals or copies of the arbitration agreement and the award (CPR 62.18(6)(a)). Originals or duly certified copies of these documents must be submitted if the award is a New York Convention award (Section 102(1)).

The claimant must also submit two copies of a draft court order granting permission to enforce the award to be served on the defendant. The order must contain a statement of the defendant's right to apply to set aside the order within 14 days (or such longer period as the court directs) and a statement that the award will not be enforced until that period has expired or any application made by the defendant within the time limit has been finally disposed of (CPR 62.18(10)).

If the claimant seeks to enforce an award providing for post-award interest, the claimant must also file a statement of interest containing the information specified in CPR 62.19.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

A translation of the arbitration agreement and award certified by an official or sworn translator, or by a diplomatic or consular agent, must be submitted in the case of a New York Convention award (Section 102(2)).

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A party seeking leave to enforce an award will need to pay the applicable court fee (currently £66 in the EWHC or £44 in the county court). Additional court fees will be payable when applying for execution against an award debtor's assets.

A party seeking leave to enforce an award on an *ex parte* basis is subject to a duty of full and frank disclosure. This means that the court should be informed of all material facts, including any pending set aside proceedings and any potential defences of state immunity.

Failure to give full and frank disclosure may lead to an *ex parte* order being set aside or to costs sanctions (see e.g., *Gold Reserve v. Venezuela* [2016] EWHC 153, in which the court upheld an *ex parte* order granting permission to enforce an ICSID award despite the claimant's failure to give full and frank disclosure of Venezuela's state immunity defence but imposed costs sanctions).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Whether a partial or interim order, decision or award of an arbitral tribunal is enforceable will depend on whether it is an 'award' for the purposes of Section 66 or Section 100(1) of the Act.

A partial award made in England and Wales or Northern Ireland under Section 47 of the Act that finally disposes of some of the issues in dispute will be capable of enforcement as an award under Section 66 since, under Section 58(1) of the Act, such a decision will be final and binding (unless otherwise agreed). In contrast, provisional orders that are subject to further review by the tribunal, or procedural decisions, orders or directions, will not be enforceable as an award. However, they may be enforced by the court under Section 42 of the Act if made as a peremptory order by the tribunal under Section 41 of the Act. The court may order the defaulting party to comply with the tribunal's peremptory order, thus converting the tribunal's order into a court order, with all the associated sanctions for non-compliance. When considering the effect of a decision by a tribunal (i.e., whether the decision finally disposes of some of the issues in dispute and is therefore an award, rather than a provisional order for the purposes of enforcement), the courts look at the

substance of the tribunal's decision and not the label (*Rotenberg v. Sucafina SA* [2012] 2 All ER (Comm) 952).

In *Svenska Petroleum Exploration AB v. Lithuania (No. 1)* [2005] EWHC 9 (Comm), the court recognised a foreign jurisdictional award under Section 103(2) of the Act in response to an application by the defendant to strike out the claimant's application to recognise a final award under Sections 101 to 103 of the Act. However, *obiter* statements by the Supreme Court in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 (at Paragraph 22) suggest that the English courts may refuse to recognise and enforce a foreign award that is not final as to its subject matter.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

If recognition or enforcement of a foreign award is sought under Section 101 of the Act, the grounds for refusal are the same as in Article V of the New York Convention (which Section 103 of the Act implements).

The English courts adopt a pro-enforcement approach and are reluctant to refuse enforcement on the grounds of public policy (see, e.g., *Westacre Investments Inc v. Jugoimport-SPDR Holding Co Ltd* [1999] 3 WLR 811, in which enforcement was ordered despite public policy considerations relating to alleged illegality). If a tribunal has found that there is no illegality under the governing law of the contract, but there is illegality under English law, public policy will only be engaged if the illegality reflects considerations of international public policy rather than domestic public policy (*RBRG Trading (UK) Ltd v. Sinocore International Co Ltd* [2018] EWCA Civ 838).

In circumstances where a foreign court has already refused enforcement of the same award, recognition and enforcement may be refused if the foreign court judgment creates an issue estoppel (see *Diag Human SE v. Czech Republic* [2014] EWHC 1639 (Comm), *Yukos Capital Sarl v. OJSC Rosneft Oil Co* [2012] EWCA Civ 855).

If an application for leave to enforce an award is made under Section 66 of the Act, the courts must refuse leave to enforce an award if, or to the extent that, the person against whom it is sought to be enforced shows that the tribunal lacked substantive jurisdiction to make the award (see Section 66(3)). However, this is subject to the loss of the right to object stipulated in Section 73. In considering applications for leave to enforce under Section 66, the courts have also recognised discretionary grounds for refusing enforcement, which mirror those under the New York Convention.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

If an order for leave to enforce is granted on an *ex parte* basis, the court's order must be served on the defendant, who will then have a period of 14 days (or such longer time as the court

may specify) to apply to set aside the order on the basis that one of the grounds for refusing enforcement under Article V of the New York Convention applies (see question 13). The order may also be set aside if there has been a failure to make full and frank disclosure. The award must not be enforced until after that period expires or any challenge brought by the defendant within that period is finally determined (CPR 62.18(8), 62.18(9)). Thereafter, judgment may be entered in the terms of the award and the award may be enforced in the same manner as any judgment of the English courts.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision of the EWHC refusing leave to enforce an award (or setting aside an order for permission to enforce an award) may be appealed with the permission of the Court on a point of law.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The English courts have discretion under Section 103(5) of the Act to adjourn enforcement proceedings pending the conclusion of set aside proceedings at the seat. If permission to enforce the award has already been granted, the court has the power to order a stay of execution.

The approach by the English courts is usually to adjourn enforcement of an award (either with or without payment of security) pending the outcome of the annulment proceedings at the seat. Relevant factors when deciding whether to adjourn will usually include (1) whether the application before the courts at the seat of the arbitration is *bona fide* and not simply a delaying tactic; (2) whether the application before the courts at the seat of the arbitration has at least a realistic prospect of success; and (3) the extent of the delay occasioned by the adjournment and any resulting prejudice (see *IPCO (Nigeria) Limited v. Nigeria National Petroleum Corporation* [2005] 2 Lloyd's Reports 326 at Paragraph 15).

In *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation* [2015] EWCA Civ 1144 and [2015] EWCA Civ 1145, the Court of Appeal ruled for the first time that an arbitral award subject to pending annulment proceedings at the seat of the arbitration that had a reasonable prospect of success could, in principle, be enforced because of exceptional and 'catastrophic' delays in the Nigerian court system if the English courts determined that enforcement of the award would not be contrary to English public policy.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

If, under Section 103(5) of the Act, a court adjourns a decision on enforcement of an arbitral award pending annulment proceedings at the seat of the arbitration, it may (but is not required to) order the award debtor to give suitable security on an application by the enforcing party.

When considering whether or not to grant security, the court will look at the strength of the argument for setting aside the award at the seat of the arbitration and the ease or difficulty of enforcing the award if an order for security is refused (*Soleh Boneh International Limited v. Government of the Republic of Uganda* [1993] 2 Lloyd's Rep 208).

If an adjournment application is brought by an award creditor and resisted by the award debtor, this will be 'a very important factor militating against an order for security' (*Stati and ors v. Republic of Kazakhstan* [2015] EWHC 2542 (Comm), Popplewell J at Paragraphs 6 to 8; *Eastern European Engineering Ltd v. Vijay Construction (Proprietary) Ltd* [2017] EWHC 797 (Comm), Baker J at Paragraph 24).

The award debtor may be required to give security for part of the award (as in *Soleh Boneh*) or for the full amount of the award (as in *Travis Coal Restructured Holdings LLC v. Essar Global Fund Ltd* [2014] EWHC 2510 (Comm), in which the court considered there was no realistic prospect of the foreign annulment proceedings succeeding).

The Supreme Court has confirmed that there is no general power under Section 103 of the Act to order an award debtor to post security if enforcement is resisted but there is no adjournment pending a decision by the courts of the seat (see *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corporation* [2017] UKSC 16, in which the court allowed an appeal against the judgment referenced in question 16 on the issue of security).

A similar approach is adopted if permission to enforce an award has already been granted and a party seeks a stay of execution of either an award being enforced in England and Wales or Northern Ireland (see *Socadec SA v. Pan Afric Impex Co Ltd* [2003] EWHC 2086), or the overseas enforcement of an award made in England and Wales or Northern Ireland (see *Apis AS v. Fantazia Kereskedelmi KFT* [2001] 1 All ER (Comm) 348).

In proceedings for registration of an ICSID award, it is open to the court to grant a stay of execution, including an order for security pursuant to its general powers under CPR 40.8A and CPR 83.7(4) (see, e.g., *Micula v. Romania* [2018] EWCA Civ 1801, in which the court ordered Romania to post US$150 million security; an appeal to the Supreme Court is pending at the time of writing.)

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

A foreign award set aside at the seat of the arbitration may be recognised and enforced if the judgment setting aside the award is (under English private international law rules relating to the recognition and enforcement of foreign judgments) impeachable for fraud, contrary to natural justice, or otherwise contrary to public policy (see *Yukos Capital v. OJSC Rosneft Oil Company* [2014] EWHC 2188 and *Malicorp v. Government of Egypt* [2015] EWHC 361 (Comm)). Although this possibility has been recognised under English law, the English courts have not yet enforced an award set aside by the courts at the seat of the arbitration.

More recently, in *Nikolay Viktorovich Maximov v. OJSC 'Novolipetsky Metallurgichesky Kombinat'* [2017] EWHC 1911 (Comm), the EWHC stated that a claimant seeking to enjoin the court to exercise its discretion to enforce a set aside award 'bears a heavy burden', and must 'establish not only that [the] foreign court's decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias' (Sir Michael Burton at Paragraph 53).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The applicable rules for service within the jurisdiction are set out in CPR 6 and CPR 62.

The court may direct that the arbitration claim form should be served on specified parties to the arbitration. Unless ordered otherwise by the court, an arbitration claim form should be served on the defendant within one month of the date of issue (CPR 62.4(2)). Permitted modes of service include first-class post, DX, fax, email and other electronic means of communication (PD 62.1.3). If the arbitration claim form is served by the claimant, he or she must file a certificate of service within seven days of service (PD 62.3.2). An order giving permission to enforce an award must be served on the defendant by delivering a copy to the defendant personally or by sending a copy to the defendant at his or her usual or last known place of residence or business (CPR 62.18(7)).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The applicable rules for obtaining permission for service out of the jurisdiction are set out in CPR 6 and CPR 62 (PD 6B). An arbitration claim form seeking leave to enforce an award may be served out of the jurisdiction with the permission of the court, irrespective of where the award is made, or treated as made (CPR 62.18(4)). Service of the court's order

giving permission to enforce an award out of the jurisdiction does not require the court's permission (CPR 62.18(8)).

The court may permit service to be effected on a party's solicitors of record in the arbitration within the jurisdiction in certain circumstances, to avoid the need for service out of the jurisdiction (CPR 6.15(1); PD 62.4(3.1); *Kyrgyz Republic v. Finrep GmbH* [2006] 2 CLC 402, Tomlinson J at Paragraph 29; *Joint Stock Asset Management Company 'Ingosstrakh Investments' v. BNP Paribas SA* [2012] EWCA Civ 644, Stanley Burnton LJ at Paragraph 74).

If the party to be served is a state or state entity, additional service requirements set out at Section 12 of the State Immunity Act 1978 (SIA 1978) and CPR 6.44 may also apply – see question 33.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several publicly available registers and databases that can be consulted, including:

- the Insolvency Register – to confirm whether an individual award debtor is bankrupt or subject to any related orders;
- the Land Registry – to confirm ownership details for properties and details of any registered charges;
- the Attachment of Earnings index – to confirm whether an individual award debtor has any other attachment of earnings orders against them;
- Companies House – a search will provide information about a UK company or a UK limited liability partnership, including copies of accounts and details of whether a company is in administration or liquidation;
- the Register of Judgments, Orders and Fines – contains details of county court and EWHC judgments from 6 April 2006 for the payment of money (except for certain exempt judgments);
- the Insolvency and Companies List (ChD) of the Business and Property Courts of England and Wales – the court can confirm whether administrators have been appointed by a company or related applications made to the court;
- the Maritime and Coastguard Agency and the Ships and Lloyd's Register – contain information regarding ships; and
- the Aircraft Registration Section of the Civil Aviation Authority and the UK Register of Aircraft Mortgages – contain information regarding aircraft and aircraft mortgages.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Once permission to enforce an award has been granted, the claimant may make an *ex parte* application under CPR 71 for an order requiring the award debtor (or, if the award debtor is a company, an officer of the company) to attend court to provide information that may

facilitate enforcement of the award (e.g., relating to the award debtor's assets). Failure by an award debtor to comply with this procedure risks sanction from the court.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

The court has the power to grant interim relief in support of enforcement proceedings. There is some uncertainty in case law about whether the court's powers to do so derive from Section 44 of the Act (which is the source of the court's powers to award interim relief in support of arbitration proceedings, whether seated inside or outside England and Wales or Northern Ireland), or from Section 37 of the Senior Courts Act 1981 (which sets out the court's inherent powers to award interim relief in all court proceedings). See, for example, *U&M Mining Zambia Ltd v. Konkola Copper Mines* [2014] EWHC 3250 (Comm)).

The most commonly sought interim measure is a freezing order to restrain an award debtor from dissipating assets. Freezing orders are available, in principal, in respect of any type of asset (including, e.g., land, securities and bank accounts) provided the applicant can show a real risk that assets will be dissipated or that the award will go unsatisfied, and that it is just and convenient for the court to make the order.

If an award relates to an arbitration seated in England and Wales or Northern Ireland, the court may grant a worldwide freezing order even if there are no assets within the jurisdiction and enforcement will take place abroad (see *U&M Mining Zambia Ltd v. Konkola Copper Mines*). If the award relates to an arbitration seated outside England and Wales and Northern Ireland, the court may refuse to exercise its powers to grant such relief if it considers that it is inappropriate to do so.

Exceptionally, it may also be possible to obtain an interim measure against a non-party to the arbitration that holds assets on behalf of the award debtor. Based on the current authorities, the non-party must be within the jurisdiction of the English courts (*Cruz City 1 Mauritius Holdings v. Unitech* [2014] EWHC 3704 (Comm); *DTEK Trading SA v. Sergey Morozov and anor* [2017] EWHC 94 (Comm)).

Under Section 13(2)(a) of the SIA 1978, the property of a 'state' (as defined in the SIA 1978) will be immune from injunctive relief absent any express waiver of immunity (*ETI Euro Telecom International NV v. Republic of Bolivia* [2008] EWCA Civ 880).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

An application for interim relief under Section 44 of the Act should be made in accordance with the procedure for arbitration claims set out in CPR 62. The general court rules

relating to interim relief, including the requirements that apply for freezing orders, are contained in CPR 25.

As set out in CPR 25, an application for a freezing order may be made *ex parte* and will require supporting evidence in the form of an affidavit. This will need to provide details of the respondent's assets and the risk of their dissipation, the amounts to be frozen and an explanation of the respondent's likely defences. An applicant will usually be required to provide a cross-undertaking for any damage suffered by the respondent as a result of complying with the order.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

See questions 23 and 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See questions 23 and 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See questions 23 and 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Once the court has granted permission to enforce the award in the same manner as a judgment and the time limit for challenging the court's order has elapsed, an award creditor may seek to avail himself or herself of any of the usual measures available for enforcing a money judgment in England. These measures are listed in PD 70 and include writs or warrants for the control of goods (CPRs 83, 84), third-party debt orders (CPR 72), charging orders (CPR 73), attachment of earnings orders (CPR 89) and the appointment of a receiver (CPR 69). Other potential measures include initiating winding-up or insolvency proceedings. The procedure varies depending on the measure pursued.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

An award creditor may apply for a charging order to obtain a charge over the award debtor's beneficial interest in land (as well as securities or certain other assets). The procedure is set out in CPR 73 and involves an application (usually *ex parte*) to court for an interim charging order. The order will be served on the defendant and the court will fix a hearing to consider whether a final charging order should be issued. Once in possession of a final charging order, the award creditor may realise the assets by applying for an order for sale of the property.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

An award creditor may seek a writ or warrant for control of an award debtor's goods located within England and Wales or Northern Ireland using the procedures set out in CPRs 83 to 85, Schedule 2 of the Tribunal, Courts and Enforcement Act 2007 and the Taking Control of Goods Regulations 2013. The procedure enables an enforcement officer to seize and sell goods (except to the extent they are exempt) to raise funds to satisfy the award debt.

A writ or warrant of control can be issued, without notice, by the court following production of documents and on payment of a fee (although notice must be provided to the award debtor prior to enforcement). In certain circumstances, the prior permission of the court will be required (see CPR 83.2(3)) and an application to obtain that permission should be made in accordance with the procedure set out in CPR 23.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

In addition to a charging order as described under question 29, an award creditor may apply for a third-party debt order compelling a third party within the jurisdiction that owes money to the award debtor to pay those funds directly to the award creditor (CPR 72.1(1)). Third-party debt orders may be used to obtain funds held in bank accounts within the jurisdiction in the name of the award debtor. The procedure is set out in CPR 72 and involves a two-phase process of obtaining an interim and final third-party debt order from the court.

If the award debtor is an individual, it may also be possible to obtain an order from the County Court Money Claims Centre attaching his or her earnings in accordance with the procedure set out in CPR 89.

Exceptionally, if no other legal methods of execution are available, it may be possible to apply to the court for the appointment of a receiver over an award debtor's assets to assist in the preservation or gathering of property in accordance with the procedure in CPR 69.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

The SIA 1978 governs the immunity of states and quasi-state bodies (as defined in the SIA 1978) under English law. If a state has agreed in writing to submit a dispute to arbitration, it is not immune from proceedings in the English courts that relate to the arbitration (Section 9(1) of the SIA). This immunity extends to court proceedings relating to the recognition and enforcement of foreign awards (*Svenska Petroleum Exploration AB v. Government of Republic of Lithuania and AB Geonafta* [2006] EWCA Civ 1529 at Paragraph 117). However, it does not extend to execution measures following recognition and enforcement, for which a separate, explicit waiver of immunity is required – see questions 34 and 35.

A state is not precluded from raising fresh jurisdictional arguments before the English courts that were not raised before the arbitral tribunal for the purposes of asserting immunity from jurisdiction in the context of enforcement proceedings (see *PAO Tatneft v. Ukraine* [2018] EWHC 1797 (Comm), which concerned a bilateral investment treaty award).

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Section 12(1) of the SIA 1978 requires a writ or other document served for instituting proceedings against a state to be transmitted through the Foreign and Commonwealth Office to the Ministry of Foreign Affairs of the state. Service is deemed to have been effected when the writ or document is received at the Ministry. Section 12(2) provides that any time for entering an appearance shall begin to run two months after the date on which the writ or document is received. However, these provisions do not apply if the state has agreed to the service of a writ or other document in another manner (Section 12(6)). Additional rules on the procedure for serving states are set out in CPR 6.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Section 13(2) of the SIA 1978 provides that relief may not be given against a state by way of an injunction or order for specific performance or for the recovery of land or other property, and that the property of a state shall not be subject to any process for the enforcement of a judgment or arbitral award or, in an action *in rem* for its arrest, detention or sale. There are two exceptions to this rule: (1) the state may expressly agree in writing to waive its immunity from execution or injunctive relief (Section 13(3)); or (2) enforcement proceedings (but not injunctive relief) are permitted in respect of property belonging to the state if the relevant property is 'in use or intended for use for commercial purposes'

(Section 13(4)). The state must have a proprietary interest in the assets in question; property belonging to a state-owned entity (even if subject to state control) will not constitute 'property of a state' for the purposes of the SIA 1978 (see *Botas Petroleum Pipeline Corporation v. Tepe Insaat Sanayii AS* [2018] UKPC 31).

The leading case on the scope of the commercial purposes exception is *SerVaas Incorporated v. Rafidain Bank* [2012] UKSC 40, in which the Supreme Court considered whether debts owed to Iraq by an insolvent state-controlled bank fell within the commercial purposes exception because they had arisen from commercial transactions. The Supreme Court held that the commercial purposes exception does not take into account the origin or source of the property and, in the absence of any proof that the debts were to be applied for a commercial purpose, the claim failed.

The test thus focuses on the use to which the state's property is put. For instance, in *LR Avionics Technologies Ltd v. Nigeria* [2016] EWHC 1761 (Comm), the EWHC discharged a charging order over a state-owned premises leased to a company for the purposes of providing visa and passport services on the grounds that the services provided (although outsourced) were consular in nature and therefore the property was immune from execution.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Pursuant to Section 13(3) of the SIA 1978, a state may expressly agree in writing to waive immunity from execution. A written agreement by a state to submit a dispute to arbitration will constitute a waiver of immunity from proceedings in the English courts relating to the recognition and enforcement of an award but will not amount to a waiver of immunity from execution. To formulate the broadest possible waiver of immunity from execution, the waiver clause should cover immunity from execution both pre-award and post-award or judgment, extend to the relevant state, not just a particular state entity, and specify the categories of assets in respect of which immunity is being waived.

22

France

Noah Rubins and Maxence Rivoire[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Article 1481 of the Code of Civil Procedure provides that an award (whether domestic or international) must contain:

- the name, surname or corporate name of each of the parties, as well as their domicile or registered office;
- if applicable, the name of the lawyers or of any other person who represented or assisted the parties;
- the arbitrators' names;
- a date; and
- the place where the award was rendered.

Under Article 1482 of the Code of Civil Procedure, the award must also contain reasons and give a succinct summary of the parties' submissions. It is implicit from these formal requirements that the award must be in writing.

In international arbitration, the parties may depart from the rules described above, though there would be very few reasons to do so in practice. By contrast, in domestic arbitration, the formal requirements are mandatory.

In principle, all the arbitrators must sign the award (Articles 1480 and 1513 of the Code of Civil Procedure). Should a minority of arbitrators refuse to sign the award, this must be mentioned, but the validity of the award is not affected. However, if the majority refuses

1 Noah Rubins is a partner and Maxence Rivoire is an associate at Freshfields Bruckhaus Deringer.

to sign it, the award can be set aside in domestic arbitration. An international award would still be valid, as long as the president of the tribunal signs it and mentions the others' refusal. Though French law allows the president to render an international award alone, arbitrators should be mindful that many arbitration rules (e.g., the UNCITRAL rules) require a majority decision. In such a case, there is a risk that an award with a single arbitrator signature will not be enforced in France, or will be set aside, as the tribunal would arguably breach the mandate conferred upon it (see by analogy, Paris Court of Appeal, 1 July 1999, *Revue de l'arbitrage* 1999, No. 4, page 834).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Article 1485 of the Code of Civil Procedure provides that the parties may ask the arbitral tribunal to interpret or supplement the award, or to correct material errors and omissions where the tribunal has failed to decide an element of the claim. If it is impossible to reconvene the arbitral tribunal and the parties cannot agree to reconstitute it, the power to modify the award belongs to the court that would have had jurisdiction in the absence of an arbitration agreement.

Such requests must be made within three months of notification of the award (Article 1486 of the Code of Civil Procedure).

These rules apply in both domestic and international arbitration.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and following what procedures? What are the differences between appeals and applications for set-aside?

In international arbitration, an award is not subject to appeal, even if the parties have otherwise agreed.

Appeals are possible in domestic arbitration, provided that the parties give their consent.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Two separate sets of rules apply in France to the recognition and enforcement of arbitral awards.

Article 1514 et seq. of the Code of Civil Procedure apply to international awards, which include awards rendered in France in international matters and awards rendered

abroad, whereas the recognition and enforcement of domestic awards is governed by Article 1487 et seq. of the Code of Civil Procedure. The rules applicable to international awards are generally more arbitration-friendly. For the purposes of answering the following questions, we focus primarily on international arbitration.

France is party to several treaties facilitating the recognition and enforcement of arbitral awards, including the New York Convention of 10 June 1958, the ICSID Convention of 18 March 1965, and the European Convention on International Commercial Arbitration of 21 April 1961.

The provisions of the Code of Civil Procedure prevail over the New York Convention by virtue of the 'more favourable law' provision contained in Article VII(1) of the Convention. This is because the French regime on recognition and enforcement is more liberal than that of the New York Convention. For example, under French law, an arbitral award that has been set aside at the seat of arbitration may be recognised or enforced. As a result, the New York Convention is less relevant in France than elsewhere.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

France is a party to the New York Convention, which it signed on 25 November 1958 and ratified on 26 June 1959. The Convention entered into force in France on 24 September 1959.

France had initially made the commercial and reciprocity reservations, as permitted by Article I(3) of the Convention. The commercial reservation was withdrawn on 17 November 1989. The reciprocity reservation remains in force today.

However, as explained in question 4, French courts rarely apply the New York Convention, since French law is more arbitration-friendly. The French provisions on recognition and enforcement apply, whether or not the award was rendered in a New York Convention Contracting State.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

International awards rendered in France may only be enforced by the president of the civil court of first instance that has territorial jurisdiction where the award was rendered (Article 1516 of the Code of Civil Procedure). If annulment proceedings are pending, the award may be enforced by the president of the court of appeal that has territorial jurisdiction, or by a judge in charge of the case management, once the case has been referred to him or her (Article 1521 of the Code of Civil Procedure).

Where the award was rendered abroad, the president of the court of first instance in Paris has exclusive jurisdiction to enforce it (Article 1516 of the Code of Civil Procedure).

However, in two circumstances, award enforcement will not be handled by the president of a civil court of first instance.

First, in international arbitration, the decision of a court of appeal dismissing an application to set aside an award has the effect of automatically enforcing it, whether the seat of arbitration is in France or a foreign country (Article 1521 of the Code of Civil Procedure).

Second, according to recent case law, where enforcement requires a review of whether the award complies with 'mandatory rules of French public law relating to the occupation of public land or rules governing public expenditure', the administrative courts of first instance have exclusive jurisdiction over enforcement, not the civil courts (Trib confl, 24 April 2017, No. C4075; Trib confl, 11 April 2016, No. C4043; CE, Ass, 9 November 2016, No. 388806; and CA Paris, 4 July 2017, No. 15/16653). This exception is directly linked to the duality of the French judicial system. Unlike in common law jurisdictions, cases with public law elements are handled by administrative courts, whereas private law cases are heard by civil and criminal courts.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

French courts have jurisdiction over an application for the enforcement of an international arbitral award, whether domestic or foreign, so long as the applicant can establish a legitimate interest in the success of its application within the meaning of Article 31 of the Code of Civil Procedure. According to the Court of Cassation, the applicant has a legitimate interest if the award is in its favour (Cass civ 1, 25 May 2016, No. 15-13.151).

The applicant is not required to identify assets within the jurisdiction of the court.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Pursuant to Article 1516 of the Code of Civil Procedure, enforcement proceedings are *ex parte*. In the authors' experience, the Paris Court of First Instance generally issues an enforcement order within one month of filing the application with the registry.

However, enforcement proceedings become adversarial as soon as the award debtor lodges an appeal against the order, or applies to set aside the award (if the seat of arbitration was in France, see question 14).

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Pursuant to Articles 1515 and 1516(3) of the Code of Civil Procedure, the party applying for enforcement must provide the original version or duly authenticated copies of both the arbitral award and the arbitration agreement. In practice, in Paris, the court requires the original award, an authenticated copy of the arbitration agreement and an extra copy of each of these documents.

The application itself usually consists of a plain handwritten note on the first page of the award, setting out the application for enforcement.

Translation of required documents

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Under Article 1515(2) of the Code of Civil Procedure, a full translation is required if the required documentation is not drafted in French. The applicant may be invited to provide a certified translation by a sworn translator, although this is not a requirement in principle. In the authors' experience, a certified translation is usually required in Paris.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

To apply for enforcement of an arbitral award, applicants must be represented by an *avocat*, as per Article 813 of the Code of Civil Procedure.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

In principle, French courts recognise and enforce all decisions that can be characterised as 'awards' within the meaning of French law.

Case law defines an award as a 'final decision resolving in full or in part the dispute submitted to the arbitrators, whether on the merits, the jurisdiction of the tribunal, or another procedural objection putting the proceedings to an end' (Cass civ 1, 12 October 2011, No. 09-72439).

Accordingly, a partial award may be enforced in France. The enforcement of interim decisions is more controversial, though the Paris Court of Appeal found that a decision whereby a tribunal ordered interim measures for the duration of the arbitral proceedings did constitute an award (7 October 2004, No. 2004/13909).

It must be noted that French courts do not consider themselves bound by the language used by arbitral tribunals to characterise their decisions; therefore, even an award labelled as a procedural order may be enforced in France if it can be regarded as a final decision on a disputed issue.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Pursuant to Article 1514 of the Code of Civil Procedure, an award may be recognised or enforced in France if:

- its existence is demonstrated by the applicant, based on the required documentation (see questions 9 and 10); and
- recognition or enforcement of the award would not be manifestly contrary to international public policy.

In the context of enforcement proceedings, the court of first instance carries out a *prima facie* review of compliance with international public policy. If an appeal is lodged against the enforcement order or if annulment proceedings are brought against the award itself, the court of appeal may scrutinise the award more intensely (see question 14).

Notably, according to the Court of Cassation, an arbitral award that has been set aside at the seat of arbitration may be recognised or enforced in France (see question 18). This is the most significant distinction when compared to the grounds provided under Article V of the Convention.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Pursuant to Article 1526 of the Code of Civil Procedure, arbitral awards are immediately enforceable once *exequatur* has been granted, even if challenges against the enforcement order or the award are pending (see question 13).

Once *exequatur* has been granted, the award debtor may appeal against the enforcement order if the award was rendered abroad (Article 1525 of the Code of Civil Procedure). If the award was rendered in France, then the debtor may apply to set aside the award (Article 1518 of the Code of Civil Procedure). The parties can expressly agree to waive their right to bring annulment proceedings; in such a case, however, the award debtor would retain its right to lodge an appeal against the enforcement order (Article 1522 of the Code of Civil Procedure).

Under Article 1520 of the Code of Civil Procedure, the enforcement order will only be repealed, or the award set aside, on one of the following grounds:

- the arbitral tribunal wrongly upheld or declined jurisdiction;
- the tribunal was irregularly constituted;

- the arbitral tribunal ruled without complying with the mandate conferred upon it;
- the due process requirement was violated; or
- recognition or enforcement of the award would violate international public policy.

With respect to awards enforced by the administrative courts of first instance (see question 6), the Council of State (the Supreme Court for public law matters) has jurisdiction to hear applications for annulment. Although its grounds for refusing to enforce awards appear to be similar to those set out in Article 1520 of the Code of Civil Procedure, the Council of State scrutinises awards more intensely than do the civil courts, in particular on public policy grounds. Indeed, the Council of State reviews the award's compliance with public policy broadly, whereas the civil courts' scope of review is limited to international public policy (see, for example, CE, Ass, 9 November 2016, No. 388806).

In addition to applying for annulment, parties can bring a 'revision action' before the arbitral tribunal to review allegedly fraudulent awards (Articles 1502 and 1506(5) of the Code of Civil Procedure). In the event that the tribunal cannot be reconvened, the court of appeal that would have had jurisdiction to hear other challenges against the award will handle the application, provided that the award was rendered in France (Article 1502 of the Civil Code of Procedure). If the award was rendered abroad, then a new tribunal will have to be constituted.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Pursuant to Articles 1523 and 1525 of the Code of Civil Procedure, decisions refusing to recognise or to enforce an award may be appealed against within a month of service.

If the arbitral award was rendered in France, a party may also apply for annulment, even during the appellate proceedings against the decision refusing to recognise the award, unless that party has waived its right to set aside, or the time limit has expired (Article 1523(3) of the Code of Civil Procedure).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Pursuant to Article 1526(1) of the Code of Civil Procedure, challenges against an award do not have suspensive effect; therefore, courts will not typically adjourn enforcement proceedings pending the outcome of annulment proceedings at the seat.

Yet, the court can suspend or adapt enforcement proceedings if a party can show that it is likely that its rights would be severely prejudiced by the enforcement of the award (Article 1526(2) of the Code of Civil Procedure). Obtaining the suspension or adaptation of enforcement proceedings is generally difficult. Case law shows that such measures are

granted only in exceptional circumstances (Paris Court of Appeal, 18 October 2011, *Revue de l'arbitrage* 2012, No. 2, page 393). Nevertheless, in one decision, the Paris Court of Appeal agreed to suspend immediate enforcement on the basis that restitution of the amounts paid by the debtor would be 'uncertain' should the enforcement order be later repealed, insofar as the creditor wanted to transfer the assets from France to the Czech Republic (Paris Court of Appeal, 23 April 2013, No. 13/02612).

It must be noted that Article 1526 applies whether the seat of arbitration is France or a foreign country. However, in the latter case, courts are very unlikely to adjourn enforcement proceedings, since an arbitral award may be enforced in France even if it has been set aside in a foreign country.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Article 1526(2) of the Code of Civil Procedure allows the court to adapt the enforcement of the award. Thus, if the award debtor's rights are likely to be 'severely prejudiced' by the enforcement of the award (see question 16), the court may order the debtor to post security, possibly for the full amount awarded by the arbitral tribunal. Whether such an order is necessary depends on the circumstances of the case.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

The only grounds on which an award may be refused recognition and enforcement in France are the five stated in Article 1520 of the Code of Civil Procedure. Annulment of the award at the seat is not listed among them.

Therefore, French courts must recognise or enforce an award even though it has been set aside abroad (Cass civ 1, 9 October 1984, No. 83-11.355, *Norsolor*; civ 1, 23 March 1994, No. 92-15.137, *Hilmarton*; Cass civ 1, 29 June 2007, *Putrabali*, Bull civ 1, No. 05-18.053).

Likewise, annulment of the award after the decision enforcing the award has been issued is not a ground for challenging this decision.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of extrajudicial and judicial documents by a bailiff is always permitted (Article 651 of the Code of Civil Procedure). Such documents may be served by other means only where the law expressly allows it. For example, among *avocats*, documents may be served directly by registered mail (Article 671 of the Code of Civil Procedure).

Special rules apply where the documents to be served upon a defendant residing in France originate from a foreign state (see Article 688-1 et seq. of the Code of Civil Procedure).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

To serve extrajudicial and judicial documents on a person who habitually resides outside France, bailiffs must send them to the public prosecutor's office of the court in which the claim is brought, the decision was rendered or in which the party serving the documents is domiciled (Article 684 of the Code of Civil Procedure). The public prosecutor's office must then collaborate with the Ministry of Justice for the service of the documents outside France.

These rules do not apply in cases governed by international treaties or European regulations allowing the bailiff to serve the documents on the person in question or on the authority having jurisdiction to notify in the state where the documents are meant to be served.

Service of documents on a foreign state is addressed below (see question 33).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Several public registers may be useful to an award creditor seeking to identify its debtor's assets prior to enforcement. For information on ownership of real estate property in France, one must send a form to the local land registry service. General information about corporations may be found in the Register of Commerce (more information here: https://www.infogreffe.com/). Finally, bailiffs have access to a national register known as the FICOBA, which contains information about bank accounts held by individuals and corporations.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

There are no proceedings allowing for the disclosure of information about an award debtor in France. However, as many decisions are publicly available, it may be possible to find useful information about a debtor by scrutinising these decisions, including in the context of bankruptcy proceedings.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

It follows from Article L. 511-2 of the Code of Civil Enforcement Proceedings that interim measures against assets are available to award creditors, without the need to apply to a court (see question 24).

In principle, assets owned by a sovereign state are immune from enforcement, subject to certain exceptions (see question 34).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

As a general rule, Article L. 511-1 of the Code of Civil Enforcement Proceedings provides that a party must obtain prior court authorisation before applying for interim measures.

The party must show that:

- the existence of the debt appears to be well founded; and
- certain circumstances are likely to threaten the recovery of damages (e.g., a risk of insolvency, financial difficulties).

Authorisation is granted *ex parte* by a specialised court, responsible for enforcement in civil proceedings. The court must state the amount of the debt to be guaranteed and the assets to which the interim measure shall apply (Article R. 511-4 of the Code of Civil Enforcement Proceedings). The authorisation will expire if the measure in question is not performed within three months (Article R. 511-6 of the Code of Civil Enforcement Proceedings).

Award creditors do not need prior court authorisation. Indeed, under Article L. 511-2 of the Code of Civil Enforcement Proceedings, prior court authorisation is not necessary when the creditor already holds an enforceable title or when its claim is based on a judicial decision that is not yet enforceable. Arbitral awards constitute judicial decisions within the meaning of this Article (Cass civ 2, 12 October 2006, No. 04-19.062).

In any case, where the measure is performed without an enforceable title, the creditor is required to initiate proceedings or to carry out the necessary formalities to obtain a properly enforceable title within a month of performance of the measure, failing which the measure will be voided (Article R. 511-7 of the Code of Civil Enforcement Proceedings). Hence, an award creditor would have to apply for enforcement soon after obtaining interim relief.

Finally, the debtor can apply to lift an interim measure at any time, provided that the two conditions set forth in Article L. 511-1 are not met (Article L. 512-1 of the Code of Civil Enforcement Proceedings). If the measures are indeed lifted and have caused the debtor damage, the creditor may be required to compensate the debtor for his or her loss (Article L. 512-2 of the Code of Civil Enforcement Proceedings).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Under Article L. 531-1 of the Code of Civil Enforcement Proceedings, creditors may be granted security over immovable property. Among the forms of security, liens are automatically attached to court decisions and arbitral awards that have been granted *exequatur* in France (Article 2412 of the Civil Code). Under French law, liens allow a creditor to seize immovable property if the debtor defaults.

Creditors, or their *avocat*, must register the lien with the local land registry service by providing the documents specified in Article R. 532-1 of the Code of Civil Enforcement Proceedings and Article 2428 of the Civil Code. The documents must then be served on the debtor by a bailiff within eight days of registration (Article R. 532-5 of the Code of Civil Enforcement Proceedings).

After registration, the debtor may still dispose of its immovable property, but the property remains encumbered by the lien after being sold, which makes it more difficult to find a purchaser.

It must be noted that registration of the lien is only provisional. Conversion into a final or permanent registration is possible if the creditor can provide an enforceable title to the real estate office, at least one month after the provisional registration (Article R. 532-6 of the Code of Civil Enforcement Proceedings).

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

Under Article L. 521-1 et seq. and R. 521-1 of the Code of Civil Enforcement Proceedings, a creditor may instruct a bailiff to seize its debtor's movable assets temporarily, even if they are held by a third party. In practice, the assets are to be frozen, that is to say the debtor is no longer able to dispose of them.

If the debtor is present when the seizure is performed, the bailiff must give, among other things, oral notification to the debtor that the assets may no longer be disposed of, as well as a copy of the related document (Article R. 522-2 of the Code of Civil Enforcement Proceedings). If the debtor is absent, the bailiff must serve the documents

related to the interim measure on the debtor, who then has eight days to inform the bailiff of the existence of any prior attachment (Article R. 522-3 of the Code of Civil Enforcement Proceedings).

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

For this section, we have focused on corporate shares, goodwill, transferable securities, claims against third parties and intellectual property rights.

Under Article L. 531-1 of the Code of Civil Enforcement Proceedings, creditors may be granted a pledge over corporate shares, transferable securities and goodwill. However, pledges are only valid after certain formalities have been completed. The creditor must:

- with respect to a pledge over goodwill, register it with the clerk of the commercial court having territorial jurisdiction (Article R. 532-2 of the Code of Civil Enforcement Proceedings);
- with respect to a pledge over corporate shares, notify the company whose shares are concerned (Article R. 532-3 of the Code of Civil Enforcement Proceedings); and
- with respect to a pledge over transferable securities, notify a person identified by the Code of Civil Enforcement Proceedings (see Articles R. 532-4, R. 232-1, R. 232-2, R. 232-3, R. 232-4).

Creditors can also instruct a bailiff to temporarily seize the debtor's corporate shares, transferable securities or even its claims against third parties (Articles R. 523-1 and R. 24-1 of the Code of Civil Enforcement Proceedings). The procedure is the same as for movable property (see question 27). In any of these cases, a bailiff must serve various documents on the debtor within eight days of the seizure (Articles R. 523-3 and R. 524-2 of the Code of Civil Enforcement Proceedings).

The Code of Civil Enforcement Proceedings does not contain any specific provisions about trademarks. But it is accepted that seizure of a trademark follows the same procedural rules as corporate shares or transferable securities, the only difference being that the seizure must be registered with the National Institute of Intellectual Property to be opposable to third parties (Articles L. 714-7 and R. 714-4 of the Intellectual Property Code).

By contrast, the procedure to seize a patent is governed by specific rules. Seizure must be notified to the patent owner, the National Institute of Intellectual Property and to anyone holding rights under the patent (Article L. 613-21 of the Intellectual Property Code). Furthermore, the creditor must bring a claim before the competent court within a certain deadline, to confirm that the seizure was valid and for the patent to be sold.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Pursuant to Article L. 111-7 of the Code of Civil Enforcement Proceedings, a creditor may decide which enforcement measure it wishes to carry out, as long as the measure is proportionate and necessary. Therefore, attachment of the assets of a debtor is possible and does not require prior court authorisation, as long as the creditor has a valid enforceable title or where its claim is based on a judicial decision that is not yet enforceable, such as an arbitral award (see question 24).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

First, the creditor must put the debtor on formal notice to pay, by mandating a bailiff to serve an order to pay, which is equivalent to a writ of attachment (Articles L. 321-1 and R. 21-1 to R. 321-3 of the Code of Civil Enforcement Proceedings). The attachment then needs to be registered in a special registry of the land registry (Article L. 321-5 of the Code of Civil Enforcement Proceedings). Finally, the creditor must comply with various deadlines, before the property is sold by public auction or, upon judicial authorisation, private sale.

The proceeds of the sale are distributed among the creditors participating in the procedure. The remaining balance is returned to the debtor.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

First, the creditor must put the debtor on formal notice to pay, by instructing a bailiff to serve an order to pay (Articles R. 221-1 to R. 221-4 of the Code of Civil Enforcement Proceedings). If the debtor fails to pay within eight days, the creditor can then instruct a bailiff to seize the debtor's movable property, whether held by the debtor or a third party (Article R. 221-10 of the Code of Civil Enforcement Proceedings). If the debtor is not present during the attachment, the bailiff must serve the documents relating to the measure within eight days (Article R. 221-26 of the Code of Civil Enforcement Proceedings). The debtor then has one month to sell its assets voluntarily to settle its debt (Article R. 221-30 of the Code of Civil Enforcement Proceedings), failing which the property is sold by public auction.

The proceeds of the sale are distributed among the creditors participating in the procedure. The remaining balance is returned to the debtor.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Attachment against intangible property, including patents, is governed by similar procedural rules as are applicable to movable property (see Article R. 231-1 et seq. of the Code of Civil Enforcement Proceedings).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Articles L. 111-1-1, L. 111-1-2 and L. 111-1-3 of the Code of Civil Enforcement Proceedings, which came into force on 9 December 2016 (Sapin II Act), deal with the issue of state immunity from enforcement. Paragraph 3 of Article L. 111-1-2 specifically relates to enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

To serve extrajudicial and judicial documents on a foreign state (or indeed any other beneficiary of jurisdictional immunity), bailiffs must send them to the public prosecutor's office of the court in which the claim is brought, the decision was rendered or in which the party serving the documents is domiciled (Article 684 of the Code of Civil Procedure). The public prosecutor's office must cooperate with the Ministry of Justice, which will serve the documents through diplomatic channels.

The above rules do not apply in cases governed by specific international treaties or European regulations. However, according to the Paris Court of Appeal, diplomatic channels are the only option if the recipient of the document is protected by jurisdictional immunity (Paris Court of Appeal, 6 December 2011, No. 10/11533). Consequently, it appears that service of a document on a foreign state cannot be made through the mechanism provided under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Article L. 111-1-2 of the Code of Civil Enforcement Proceedings provides that assets belonging to a sovereign state are, in principle, immune from enforcement in France, unless:

- the state has expressly consented to the enforcement measure in question;

- the state has allocated or earmarked the asset in question for the satisfaction of the claim that is the object of the proceedings; or
- a judgment or an arbitral award has been rendered against the state and (1) the asset in question is specifically used or was intended to be used by the state other than for a non-commercial public service and (2) has a connection with the entity against which the proceedings were directed.

The Code further sets out that, in applying Article L. 111-1-2(3), the following assets are notably considered to be specifically used or intended to be used by a state for the purposes of a non-commercial public service:

- assets, including bank accounts, that are used, or intended to be used, within the performance of the state or its consular offices' diplomatic mission, their special missions, their missions in international organisations, or within the functions of the state's delegations in the bodies of international organisations or in international conferences;
- assets that have a military character or are used, or intended to be used, within the scope of military functions;
- assets that are part of the cultural heritage of the state or its archives and are not put up, or intended to be put up, for sale;
- assets that are part of an exhibition of objects having scientific, cultural or historical value and are not put up, or intended to be put up, for sale; and
- tax debts or social security debts of the state.

Finally, it should be noted that the award creditor must apply for judicial authorisation prior to applying conservatory or enforcement measures against the assets of a foreign state (Article L. 111-1-1 of the Code of Civil Enforcement Proceedings). The application is brought *ex parte*, without prior notice to the state, and is heard by the division of the Paris Court of First Instance specialising in enforcement matters (Articles L. 111-1-1 and R. 111-1 of Code of Civil Enforcement Proceedings).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of the waiver?

Pursuant to Article L. 111-1-2(1) of the Code of Civil Enforcement Proceedings (see question 34), a state may waive its immunity from enforcement. The waiver must be express, but need not be specific.

A specific (and express) waiver is required with respect to assets used or intended to be used within the performance of the state or its consular offices' diplomatic missions, their special missions or their missions to international organisations (Article L. 111-1-3 of the Code of Civil Enforcement Proceedings; see also, on the regime applicable prior to the entry into force of this provision, Cass civ 1, 10 January 2018, No. 16-22.494, *Commisimpex 2*; Cass civ 1, 24 January 2018, No. 16-16.511).

23

Germany

Boris Kasolowsky and Carsten Wendler[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

German law provides for form requirements for arbitral awards. Under Section 1054(1) of the German Code of Civil Procedure (ZPO), an award has to be in writing and signed by the arbitrators. If there is more than one arbitrator, the award need only be signed by the majority of the arbitrators, subject to the requirement that an explanation for the missing signatures is provided. Furthermore, the award shall specify the date and the seat of the arbitration (Section 1054(3), ZPO) and contain a statement of reasons, unless the parties have agreed otherwise (Section 1054(2), ZPO). Finally, a signed version of the arbitral award shall be transmitted to each party (Section 1054(4), ZPO). There are no additional requirements for transmission of the award. A formal transmission (e.g., service) is not required.

1 Boris Kasolowsky is a partner and Carsten Wendler is a principal associate at Freshfields Bruckhaus Deringer LLP.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Section 1058 of the ZPO governs the modification, clarification and correction of an award. In the absence of an agreement to the contrary, each party may request the correction, interpretation or supplementation of an award within one month of receiving it. The tribunal has one month to correct or interpret the award and two months to supplement it. The correction, interpretation and supplementation of an award is subject to the form requirements under Section 1054 of the ZPO.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

German arbitration law does not provide for an appeal mechanism. Although an arbitral award is final, the parties are free to agree on an appellate mechanism, which the German courts would then respect.

However, an award rendered in a German-seated arbitration can be challenged and potentially set aside (Section 1059, ZPO) (see also Federal Supreme Court (BGH), SchiedsVZ 2017, 103, 106). A party has three months from receipt of an award to challenge it. The grounds for a challenge are adopted from the UNCITRAL Model Law and are as follows:

- a party asserts that:
  - a party to the arbitration agreement did not have the capacity to agree on arbitration, or the arbitration agreement is invalid;
  - it has not been properly notified of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to present its case;
  - the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration; or
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with a provision of German arbitration law or with an admissible agreement of the parties and this presumably affected the award; or
- the court finds that:
  - the subject matter of the dispute is not arbitrable under German law; or
  - recognition or enforcement of the award leads to a result that violates public policy.

In this context, it is important to emphasise that the setting aside proceeding is not considered an appeal against an award, as the court will not re-evaluate the merits of the case.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Arbitration proceedings in Germany are governed by the 10th book (Section 1025 et seq.) of the ZPO. Recognition and enforcement of arbitral awards are dealt with in Chapters 8 and 9 of the 10th book.

German arbitration law provides for different regimes regarding the recognition and enforcement of domestic (Section 1060, ZPO) and foreign awards (Section 1061, ZPO).

Germany is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) as of 30 June 1961, the 1961 European Convention on International Commercial Arbitration (the Geneva Convention) as of 27 October 1964, and the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) as of 18 April 1969.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Germany signed the New York Convention in 1958 – subject to the reservation made under Article I(3) regarding reciprocity – and ratified it on 30 June 1961. The Convention entered into force in Germany on 28 September 1961.

In 1998, Germany withdrew its reciprocity reservation. Thus, German courts will also enforce awards made in a state that is not a party to the New York Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The higher regional courts have jurisdiction over applications for the recognition and enforcement of arbitral awards.

For domestic awards, the jurisdiction lies with the higher regional court designated in the arbitration agreement or, failing any such designation, with the higher regional court in whose district the place of arbitration is situated (Section 1062(1), ZPO).

For foreign awards where there is no specific agreement between the parties, jurisdiction lies with the higher regional court in whose district the opposing party has its place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measures are located. In the absence of any of the foregoing, the Higher Regional Court of Berlin will have jurisdiction (Section 1062(2), ZPO).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Other than the requirements stated in question 6, there are no additional requirements for a higher regional court to have jurisdiction over an application for the recognition and enforcement of arbitral awards.

If the jurisdiction is based on assets being located in the district of the higher regional court, the applicant bears the burden of proving that the assets are in fact situated within that district. Mere speculations (e.g., based on the fact that the respondent had prior business dealings with a bank located in that jurisdiction) may not suffice (Court of Appeal (OLG) Frankfurt, decision dated 23 May 2011 – 26 Sch 6/11, recently confirmed in its decision dated 5 December 2016 – 26 Sch 2/16). Moreover, it is not sufficient for jurisdictional purposes that the assets may have been located temporarily in that district (e.g., moving objects such as aeroplanes (Munich Court of Appeal, IPRspr 2011, 811, 812)).

For the purpose of jurisdiction, however, it is irrelevant whether the assets are sufficient to satisfy the award in full (OLG Cologne, BeckRS 2011, 19891; OLG Munich, BeckRS 2016, 09823) or whether the enforcement for the assets will eventually be possible (Supreme Court (KG), Berlin, SchiedsVZ 2007, 108, 111). In fact, the applicant does not have to show in detail whether the assets are suitable for potentially successful enforcement proceedings (OLG Munich, BeckRS 2016, 09823).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition and enforcement proceedings are adversarial (Section 1063(1)(2), ZPO). The recognition and the declaration of enforceability cannot be granted *ex parte*.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The party seeking recognition and enforcement of an award must submit the original award or a certified copy of the award with its application (Section 1064(1), ZPO). A certified copy of a foreign award also needs to certify the authenticity of the arbitrator's signature (OLG Munich, BeckRS 2016, 09823).

In contrast to Article IV of the New York Convention, German law does not require a party seeking enforcement to submit the original or a certified copy of the arbitration agreement. This more favourable national regulation not only applies to domestic awards but also to foreign awards in light of the principle of most favourable treatment contained in Article VII of the New York Convention (BGH, SchiedsVZ 2003, 281, 282).

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

An application for recognition and enforcement must be in German and must be accompanied by the original of the arbitration award or a certified copy thereof. The application does not necessarily need to be accompanied by the arbitration agreement or a translation of the arbitration award. However, the court may request the arbitration agreement or a certified translation of the award by a sworn translator (Section 142, ZPO).

Pursuant to the requirements of the New York Convention, an application for the recognition and enforcement of a foreign arbitral award must be accompanied by a certified translation of the award made by an official or sworn translator or by a diplomatic or consular agent. However, in light of the principle of most favourable treatment, the German courts generally apply the more generous practice pursuant to which awards and clauses need not necessarily be translated (BGH, SchiedsVZ 2003, 281, 282).

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

The party seeking recognition and enforcement of an award may submit its application to the court without being represented by a member of the German Bar. Only in cases where an oral hearing will be conducted does each party have to be represented by an attorney admitted to the German Bar (see Section 78(3), ZPO).

Moreover, the applicant is required to make an advance payment on the court costs based on the amount in dispute (Section 10 et seq. Courts Costs Act (GKG)).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

When deciding on the recognition and enforcement of an arbitral award, German courts will take into consideration the substance of the award rather than the language and labelling used by the tribunal. An award may only be recognised and enforced to the extent that it contains a final and binding decision. If a binding decision resolves the complete matter in dispute, it is referred to as a final award; if it merely deals with an independent or separable part of the main dispute, it is referred to as a partial award. Both a final and a partial award can be recognised and enforced (OLG Munich, BeckRS 2016, 06078).

Awards that decide on specific issues of a claim with a binding character on the tribunal only are often referred to as interim awards. They will generally not be recognised and enforced.

Interim measures ordered in the form of an award are also often referred to as interim awards. These types of interim awards have a binding character and may thus be recognised and declared enforceable by German courts (Section 1041(2), ZPO).

Finally, the decisions on jurisdiction do not fall within any of the foregoing descriptions. While they may be challenged before German courts within one month of being rendered (Section 1040(3), ZPO), they are not directly enforceable. However, any decision on costs issued in a decision on jurisdiction may be enforceable.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Germany is a UNCITRAL Model Law state. The grounds for refusing recognition of domestic awards accordingly comprise: the invalidity of the arbitration agreement; violations of the right to be heard and to fairly present one's case; the tribunal exceeding its jurisdiction; incorrect constitution of the tribunal; incorrectly conducted arbitral proceedings; a violation of public policy; and non-arbitrability of the dispute (Section 1060, ZPO). Incidentally, these are also the grounds for challenging domestic arbitral awards (Section 1059, ZPO).

If an application for a declaration of enforceability must be rejected and the arbitral award will be set aside because one of the grounds for setting aside specified in Section 1059(2) of the ZPO exists, Section 1059(4) of the ZPO shall apply *mutatis mutandis* and the case will be remitted to the arbitral tribunal (BGH, SchiedsVZ 2018, 318, 319).

For foreign awards, the grounds for refusing recognition contained in Article V of the New York Convention apply directly (Section 1061(1), ZPO) (see also, for example, BGH, SchiedsVZ 2017, 200). The party opposing recognition of the award bears the burden of proof for the existence of a ground for refusing recognition (see, for example, OLG Brandenburg, SchiedsVZ 2016, 43). Any aspect that could have, but out of negligence has not, been raised during recognition proceedings is precluded from being invoked during later enforcement proceedings (Frankfurt County Court (LG), SchiedsVZ 2017, 206).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

German arbitration law distinguishes between recognition and enforcement. The main effect of the recognition of an award is the binding decision on the question of *res judicata*. The recognition of the award is a prerequisite for enforcement, but it does not render the award immediately enforceable. Unlike foreign awards, domestic awards do not require a recognition decision, but automatically have the effect of a German court decision (Section 1055, ZPO). The enforceability of the award requires a declaration of enforceability by the higher regional court. The declaration of enforceability of the court is the required title for the execution proceedings, which can be executed as any other title under German civil procedure (Section 794(1) (No. 4a), ZPO). In practice, the recognition and enforcement of foreign awards will usually be applied for and decided simultaneously.

Under Section 1065(1) of the ZPO, the parties are entitled to appeal a decision on recognition and enforcement to the Federal Court of Justice (Section 133 of the German Courts Constitution Act).

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The higher regional court's decision refusing to recognise and enforce an award can be appealed to the Federal Court of Justice (Section 1065(1), ZPO).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

In the case of pending annulment proceedings at the seat of arbitration, a German court may adjourn the recognition and enforcement proceedings (Article VI, New York Convention).

German courts have held that a party seeking adjournment in recognition and enforcement proceedings has to demonstrate the prospects of success of the annulment action (KG Berlin, SchiedsVZ 2013, 112, 118; BGH SchiedsVZ 2018, 53, 59). Moreover, in such instances, German courts will generally require the setting aside proceedings to have been formally commenced and to still be pending.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Commentators are divided as to whether Article VI of the New York Convention provides a basis for the German courts to order security. The prevailing opinion is that the courts have discretion to order security whenever they deem it necessary to preserve the applicant's chances for successful execution of the award. However, there is no published case law available on this matter.

When ordering security in any civil proceeding, which should include proceedings for the recognition and enforcement of foreign arbitral awards, the courts generally require it to be approximately 110 per cent of the total amount claimed. The security can be – and often is – posted in the form of a bank guarantee (Section 108, ZPO).

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

German courts will generally deny the enforcement of a foreign arbitral award set aside at the seat of arbitration (BGH, NJW 2001, 1730, 1731; OLG Munich, SchiedsVZ 2012, 339, 341). However, it cannot be ruled out that a German court assuming exceptional circumstances may use its discretion to proceed with the recognition and enforcement notwithstanding the annulment of the award by the courts of the seat of arbitration.

A decision on the recognition and enforcement of an arbitral award that subsequently has been set aside at the seat of arbitration may be annulled by the competent higher regional court (Sections 1061(3), 1062(1)(No. 4) and 1062(2) ZPO).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

German civil procedure distinguishes between service of process *ex officio* (Sections 166 to 190, ZPO) and service between the parties (Sections 191 to 195, ZPO). In the former case, service may be conducted by clerks of the court, the postal service, an employee of the judiciary or a bailiff. If service between the parties is admissible or required, the parties may instruct a bailiff or rely on service between the parties' attorneys.

Documents can only be served to a natural person, not a legal person. For legal persons, such as companies, it is sufficient to serve either the company's legal representative or the entity's director (Section 170, ZPO). If legal proceedings are pending, service is to be made to the attorney on record (Section 172, ZPO).

Service may be established by a certificate recording the service, service against a receipt, in person at the offices of the court, or a registered letter with acknowledgment of receipt. Service between attorneys is established by means of service against a receipt.

If none of the above-mentioned means of service is available, the document may be served by publication on the bulletin board and is deemed served one month after publication (Section 188, ZPO).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The procedure for service of documents out of the German jurisdiction is governed by international instruments (e.g., the Hague Service Convention of 15 November 1965 or Regulation (EC) No. 1393/2007), statutory provisions in the ZPO (Section 183 et seq.) and the Ordinance on Legal Assistance in Civil Matters (ZRHO).

If an international instrument provides for service by post, service shall be made by a registered letter with acknowledgment of receipt. In all other cases, service shall be made upon request by the presiding German judge directly through the public authorities of the relevant other state (Section 183(2), ZPO). The specific procedure for the transmission of documents through the transmitting agencies in Germany to the receiving agencies abroad is regulated by the ZRHO.

However, if there is no applicable international instrument, or the competent bodies of the foreign state refuse to provide legal assistance, then service may be made by the responsible diplomatic or consular mission of Germany in the relevant country or by any other competent German public authority (Section 183(3), ZPO).

If the documents cannot be served abroad, the option of service by publication exists (Section 185 (No. 3), ZPO).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several databases and registers available for identifying an award debtor's assets. Such information may be found for companies in the commercial register; immovable property in the land register; ships in the ship register; aircraft in the aircraft register; and intellectual property (i.e., patents, trademarks, designs and utility models) in the register for intellectual property.

Moreover, schedules of assets prepared by bailiffs in enforcement proceedings are electronically stored for two years at www.vollstreckungsportal.de, to which bailiffs and other public enforcement institutions have access whenever they hold an enforcement title against a debtor. Private parties must request access through the competent bailiff (Sections 802f(6), 802d(1), ZPO). The schedule of assets will be available in the event that a debtor has previously been ordered by a court to give full disclosure of its assets (see question 22).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Bailiffs properly charged with an enforcement may require an award debtor to make full disclosure of its assets and its financial situation (Sections 802a(2) (No. 2), 802c, 802e, 802f, 807(1), ZPO), including information with respect to immovable, movable and intangible property (Section 802c(2), ZPO).

Additionally, bailiffs may obtain information from the relevant public entity, such as the public pension funds, Federal Central Tax Office or Federal Motor Transport Authority, which has information regarding the ownership of cars registered in Germany (Section 802(1), ZPO).

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Under German civil procedure, pre-award interim measures are generally available pursuant to Section 916 et seq. of the ZPO, which provide for an attachment and a preliminary injunction. While an attachment serves to secure a potential monetary award (Section 916, ZPO), a preliminary injunction is available to provisionally protect other rights or regulate legal relationships (Sections 935 and 940, ZPO). Pre-award interim measures granted by an arbitral tribunal may be declared enforceable by German courts (Section 1041, ZPO).

For arbitral award creditors, German arbitration law provides for a special regime to obtain interim measures. Pursuant to Section 1063(3) of the ZPO, an award creditor may request the preliminary enforceability of an arbitral award, which then forms the legal basis for interim enforcement measures. However, these may only comprise protective measures (e.g., the freezing of bank accounts, the attachment of tangible assets or company shares). In principle, the proceedings pursuant to Section 1063(3) prevail over the proceedings pursuant to Sections 916 et seq. (LG Braunschweig, SchiedsVZ 2015, 292, 294). German courts dealing with the enforceability of an arbitral award may also issue an order that enforces the interim measures of protection of the arbitral tribunal (Section 1063(3), ZPO).

Interim measures may also be granted against assets owned by a sovereign state. However, German courts will apply the sovereign immunity doctrine used in regular execution proceedings (Federal Constitutional Court (BVerfG), NJW 1983, 2766, 2768). Assets that serve a diplomatic purpose, for example, cannot be subject to interim measures (e.g., bank deposits for expenses of a diplomatic mission) (BVerfG, NJW 1978, 485, 486, 487). Interim measures against assets that are not serving a public function (e.g., bank deposits from a state-owned entity that shall be transferred to the foreign state's central bank to cover its budget) are admissible (BVerfG, NJW 1983, 2766, 2768).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Interim measures pursuant to Section 1063(3) of the ZPO are only available for (domestic and foreign) awards that are the subject matter of proceedings for a declaration of enforceability before the competent higher regional court. A court authorisation is required, which can only be granted upon a specific request of the party seeking the declaration of enforceability.

The competence to grant interim measures lies with the presiding judge of the senate of the higher regional court dealing with the application for a declaration of enforceability. Section 1063(3) of the ZPO does not contain any explicit requirements for granting

interim measures. The presiding judge therefore has wide discretion. In making his or her decision, the presiding judge will consider the prospects of success of the proceedings for the declaration of enforceability; the impact on the award debtor; and most notably the risks of the respondent taking steps to frustrate the enforcement of the award. Courts have granted such interim measures when the award debtor had intangible and movable assets in Germany, which could easily have been transferred outside Germany (OLG Frankfurt, SchiedsVZ 2010, 227, 228).

To ensure the effectiveness of the protective interim measures, proceedings pursuant to Section 1063(3) of the ZPO may be conducted *ex parte*. The interests of the award debtor are protected mainly by being permitted to provide security to prevent the enforcement (Section 1063(3)(3), ZPO). Security may be provided in form of a bank guarantee.

The decision of the presiding judge is final and may not be challenged (BGH, decision dated 7 July 2016 – I ZB 90/15). However, the decision may be amended and revoked at any time, especially if the original circumstances have changed.

An order for interim measures granted by the presiding judge constitutes the legal title that is the basis for the interim measures described below (see questions 25 to 27).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

German civil procedure law distinguishes between various types of enforcement proceedings depending on the substantive claim of the enforceable title. In the interests of simplicity, the sections on enforcement proceedings referred to below assume that the enforceable title secures a monetary claim.

The order of interim measures pursuant to Section 1063(3) of the ZPO may, in principle, form the basis of protective interim measures against immovable property.

In this situation, the award creditor may request the land register to register an equitable mortgage on the award debtor's immovable property (Section 867, ZPO). The awarded amount must exceed €750 without interest (Section 866(3), ZPO). The respondent has to be either listed as the owner of the property (Section 39, Land Registry Rules (GBO)) or be a legal successor (Section 40, GBO). The latter must be proven by the applicant.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The order of interim measures pursuant to Section 1063(3) of the ZPO may form the basis of protective interim measures against movable property.

Movable assets that are at risk of being transferred outside Germany may be attached by way of a temporary seizure pursuant to Section 808 of the ZPO. A temporary seizure will be performed by a bailiff (Section 803, ZPO) of the local court in whose district the movable assets are located.

The debtor will generally be allowed to remain in possession of his or her assets, but cannot dispose of them (i.e., the assets are frozen). The bailiff must inform the debtor of the performed seizure (Section 808(3), ZPO).

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The order of interim measures pursuant to Section 1063(3) of the ZPO may form the basis of protective interim measures against intangible property.

Intangible property is secured by attachment pursuant to Sections 829 et seq. of the ZPO. However, in this context, the intangible assets may not be transferred to the award creditor. The application must be made to the court that is local to where the award debtor has its seat or where the intangible assets are located (Sections 828(2), 12, 13, 17, 23, ZPO). The most common protective measures are the attachment (i.e., freezing) of bank accounts (Sections 829 and 833a, ZPO) and claims to money (Section 829, ZPO). Shares in a limited liability company (Section 857, ZPO) and shares in other types of companies (Section 859, ZPO)) can also be subject to attachment pursuant to Sections 829 et seq. of the ZPO. Note that registered shares (Section 821, ZPO) are regarded as tangible movable property and are thus subject to the regime described in question 26.

Patents, trademarks, designs and utility models may also be attached. Attachment can be registered at the register for intellectual property.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

There are three (main) steps for attaching assets on the basis of the enforcement of an award in Germany.

First, the award creditor has to obtain a declaration of enforceability of the award from the competent higher regional court (Sections 1060 and 1061, ZPO). These proceedings cannot be conducted *ex parte* (Section 1063(2), ZPO). Once the award has been declared enforceable, the clerk of the court will issue the certificate of execution (Sections 794(1) (No. 4a), 795, 724(1), ZPO), which is the legal basis for the attachment proceedings.

Second, the documentation has to be served on the respondent (Section 750(1), ZPO). The third step is the initiation of the execution procedure for attaching the specific type of asset (i.e., immovable, movable or intangible property (see questions 29 to 31)).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Immovable property is attached by ordering the registration of a compulsory mortgage at the land registry (Section 867, ZPO). The awarded amount must exceed €750 without interest (Section 866(3), ZPO). The respondent must either be listed as the owner of the property (Section 39, GBO) or be a legal successor (Section 40, GBO). The latter must be proven by the applicant.

Execution is then effected by either a compulsory administration or a compulsory sale in a public auction of the immovable property (Section 866(1), ZPO). Both enforcement measures have to be requested at the enforcement court (i.e., the court that is local to the district where the immovable property is located (Section 1(1) of the Foreclosure Law (ZVG)). Compulsory administration is applied for in cases where the immovable property generates profits that can be used to satisfy the award (Sections 146 to 161, ZVG). The compulsory sale generally takes a considerable period of time and the award debtor has various options to stop the procedure and thus to keep his property (Sections 30, 30(a) to (d), 31, 85(a), ZVG).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Movable property can be attached by way of seizure (Section 803, ZPO). An application must be made to the court that is local to the place where attachment is sought. In principle, the applicant may instruct the bailiff to attach specific objects to the extent that the performance of the instruction does not (1) infringe legitimate interests of the respondent, (2) cause unnecessary costs, or (3) cause undue pressure on the respondent. Certain objects are excluded from attachment (e.g., property used in connection with the respondent's employment) (Sections 811, 812, ZPO). Execution is then effected by compulsory sale in a public auction (Section 814 et seq., ZPO).

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Attachment and execution against intangible property is effected by ordering its attachment and its transfer. Intangible property may comprise claims against third parties, such as claims to money, claims to the delivery of goods, or other rights (e.g., shares in a company). Such an order has the legal effect of assigning the claim of the award debtor against a third party to the award creditor (Sections 829, 835, 857, 886, ZPO). Patents, trademarks, designs and utility models may also be attached and transferred to the award creditor (Section 857, ZPO).

Generally, an application has to be directed to the court that is local to where the award debtor has its seat in Germany or where the intangible assets are located (Section 828(2),

12, 13, 17, 23, ZPO). The third party does not need to be heard prior to the attachment (Section 834, ZPO). The claim to be attached can be due in the future, but execution can only be ordered when the claim is due (Section 751(1), ZPO). Certain claims are excluded from attachment (e.g., the earned income of the award debtor may only be attached to a certain extent) (Sections 850 et seq., ZPO).

Moreover, an applicant may also preliminarily attach claims that an award debtor has against third parties (Section 845, ZPO).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no domestic, codified rules that specifically govern recognition and enforcement of arbitral awards against foreign states. Thus, German courts will apply the general rules on recognition and enforcement and the general sovereign immunity principles described in questions 33 to 35.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Service on a foreign state in its capacity as a defendant in a proceeding depends on whether the proceeding relates to *acta jure gestionis* or *acta jure imperii*. In the case of *acta jure gestionis*, the general procedure applies (see question 20). However, it should be noted that even if international agreements allow for service by other means, German authorities are likely to serve the foreign state through diplomatic means.

For *acta jure imperii* cases, international agreements may not apply (see, for example, Court of Justice of the European Union (BeckEuRS 2015 432880)) and service on a foreign state will be made through diplomatic or consular channels (Section 183(3), ZPO). In practice, the German foreign mission will be commissioned with servicing the state authority responsible for receiving extrajudicial and judicial documents. Service to the diplomatic mission of the foreign state in Germany is generally not permissible as the diplomatic mission will usually not have the authority to receive such documents.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

To apply rules on state immunity in enforcement proceedings, it is necessary to differentiate between the declaration of enforcement and the execution proceedings. With regard to the former, German courts will have to determine whether the arbitration dealt with *acta jure imperii* or *acta jure gestionis*. By contrast, in execution proceedings, courts will have to distinguish between assets used for a sovereign purpose and assets used for a commercial

purpose. This distinction is made on the basis of the doctrine of limited sovereign immunity. Accordingly, an award can be enforced against assets of a foreign sovereign that are situated in Germany and have commercial use. State assets that fulfil a sovereign purpose, however, are protected against an enforcement measure (BVerfG, NJW 2012, 293, 295), unless the foreign state gives its consent to enforcement against that particular asset (BVerfG NJW 2012, 293, 295).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Under German law, the agreement to arbitrate is generally understood as a waiver of immunity for the purposes of the arbitration proceedings and, most likely, for the declaration of enforceability (BGH, SchiedsVZ 2013, 110, 112; BGH SchiedsVZ 2018, 53, 54). However, the waiver of immunity resulting from an arbitration agreement will not extend to the execution proceedings (BGH, SchiedsVZ 2013, 110, 112; BGH SchiedsVZ 2018, 53, 54). For execution proceedings, an explicit or implicit waiver is required. The latter requires the clear intent of the state to make available for enforcement those of its assets that are protected by immunity.

24

Hong Kong

Tony Dymond and Z J Jennifer Lim[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Section 67 of the Hong Kong Arbitration Ordinance (Cap. 609) (HKAO), which gives effect to Article 31 of the UNCITRAL Model Law, sets out the formal and substantive requirements for an award. It provides that an award must:

- be in writing;
- be signed by the arbitrator or arbitrators. A signature by a tribunal majority is sufficient in proceedings with more than one arbitrator, provided that the reason for any omitted signature is stated (e.g., death, incapacity, permanent absence overseas with no means of contact, refusal to sign in the case of dissent);
- state the reasons on which it is based, unless the parties have agreed otherwise; and
- be dated and state the place of arbitration.

A signed copy of the award must be delivered to each party.

There is no default time limit for making an award (Section 72(1), HKAO). The Court of First Instance of the High Court of Hong Kong (the Court) has the power to extend any time limit to render an award, even if it has expired (Section 72(2), HKAO).

1 Tony Dymond is a partner and Z J Jennifer Lim is a senior associate at Debevoise & Plimpton.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Section 69(1) of the HKAO, which gives effect to Article 33 of the UNCITRAL Model Law, provides that within 30 days of receipt of the award (unless the parties have agreed on another time limit), a party, with notice to the other party, may request that the tribunal:

- correct any computational, clerical or typographical errors or similar errors in the award; and
- if so agreed by the parties, give an interpretation of a specific point or part of the award.

Within 30 days of receipt of the request, the tribunal must determine whether the request is justified and, if so, make the correction or give the interpretation. The interpretation will form part of the award. The tribunal can also correct any computational, clerical or typographical or similar error on its own initiative within 30 days of the date of the award (Section 69(1), HKAO).

Unless the parties have agreed otherwise, a party may also, with notice to the other party and within 30 days of receipt of the award, request an additional award as to claims presented in the arbitral proceedings but omitted from the award. The tribunal has 60 days to make the additional award if it considers the request to be justified (Section 69(1)(3), HKAO). The tribunal may extend the time limit to make a correction, interpretation or additional award (Section 69(1)(4), HKAO).

A correction or interpretation of the award, or an additional award, must be made in accordance with the requirements of the HKAO (Section 69(1)(5)) as to form, content and delivery of awards generally, set out in question 1. Section 69(2) of the HKAO further provides that the tribunal has the power to make other changes to an award that are necessary or consequential to the correction or interpretation of the award.

The tribunal may also review an award of costs within 30 days of the award if, when making the award, the tribunal was not aware of certain information relating to costs that it should have taken into account. The tribunal can then confirm, vary or correct the award of costs (Sections 69(3) and 69(4), HKAO).

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An award may ordinarily not be appealed. However, the parties may opt into Section 5 of Schedule 2 of the HKAO pursuant to Section 99(e) of the HKAO if they wish to have the right to appeal an award on a question of law or to challenge an award on the grounds of serious irregularity. In those circumstances, the Court will have discretion in determining appeals and will have the power to either confirm, vary, remit or set aside the award.

In set-aside proceedings, the Court will not consider the substantive merits of the dispute or the correctness of the award, whether concerning errors of fact or law. The grounds for setting aside an arbitral award in Hong Kong are set out in Section 81 of the HKAO, which incorporates Article 34 of the UNCITRAL Model Law. The grounds for challenge include incapacity of a party, invalidity of the arbitration agreement, inability to present a party's case, arbitrability, and conflict with Hong Kong public policy. Hong Kong public policy has been construed to mean 'contrary to the fundamental conceptions of morality and justice of Hong Kong', to be construed and applied narrowly (e.g., if an award was procured by fraud, corruption or other unconscionable behaviour (*Hebei Import v. Polytek Engineering* [1999] 2 HKC 205 at 233)).

An award can also be set aside if there has been a successful challenge to an arbitrator who has participated in proceedings resulting in an award (Section 26(5), HKAO).

An application to set aside the award under Section 81 of the HKAO must be made within three months of the date of receipt of the award or, if a request for a correction or interpretation of an award or an additional award has been made, from the date on which the request has been disposed of by the tribunal (Section 81(1)(3), HKAO). However, the Court has discretion to decide on a longer time limit (*Sun Tian Gang v. Hong Kong & China Gas (Jilin) Ltd* [2017] 1 HKC 69 at [90]).

The application is made by originating summons under Order 73, Rule 1 of the Rules of the High Court (Cap. 4A) (RHC). The application and any order thereon may be served out of the jurisdiction by leave of the Court (Order 73, Rule 7(1), RHC).

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The HKAO is the applicable legislation in Hong Kong. It divides awards into four main categories for the purposes of enforcement:

- Convention awards (defined in Section 2 of the HKAO as awards made in states or territories that are party to the New York Convention (the Convention), other than the People's Republic of China (PRC)), the enforcement of which is governed by Division 2 of Part 10 of the HKAO;
- Mainland awards (defined in Section 2 of the HKAO as awards made in any part of China other than Hong Kong, Macao and Taiwan), the enforcement of which is governed by Division 3 of Part 10 of the HKAO;
- Macao awards (defined in Section 2 of the HKAO as awards made in the Macao Special Administrative Region), the enforcement of which is governed by Division 4 of Part 10 of the HKAO;
- awards made in Hong Kong and other arbitral awards that are not Convention awards, Mainland awards or Macao awards, the enforcement of which is governed by Division 1 of Part 10 of the HKAO.

Hong Kong, as a Special Administrative Region of the PRC, is not itself a party to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (International Centre for Settlement of Investment Disputes, Washington 1965) (the ICSID Convention). However, when the PRC took over sovereignty of Hong Kong from the United Kingdom in 1997, the PRC notified the United Nations and the World Bank that the ICSID Convention would apply to Hong Kong.

The Arrangement Concerning Mutual Enforcement of Arbitral Awards Between the Mainland and the Hong Kong Special Administration Region allows for the enforcement of arbitral awards as between the PRC and Hong Kong, and similarly, the Arrangement Concerning Reciprocal Recognition and Enforcement of Arbitral Awards Between the Hong Kong Special Administrative Region and the Macao Special Administrative Region allows mutual recognition of arbitral awards between Hong Kong and Macao.

With regard to the New York Convention, see question 5.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

As is the position with respect to the ICSID Convention, Hong Kong itself is not a separate contracting state party to the Convention. Nevertheless, the PRC, which contracted to the Convention on 22 January 1987, extended application of the Convention to Hong Kong in 1997 when it resumed sovereignty.

The PRC has made both reciprocity and commercial relationship reservations under Article I(3) of the Convention, which also bind Hong Kong. These mean that Hong Kong will apply the Convention (1) to recognise awards made in the territory of another contracting state (the reciprocity reservation), and (2) 'only to differences out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration' (the commercial reservation).

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The competent court in Hong Kong for the recognition and enforcement of arbitral awards is the Court of First Instance of the High Court of Hong Kong. See Sections 61 and 84 of the HKAO (granting leave to enforce an arbitral order, direction or award); Sections 87(1)(a), 92(1)(a) and 98A(1)(a) of the HKAO (enforcing a Convention, Mainland or Macao award).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Section 84 of the HKAO specifies that an award in arbitral proceedings by an arbitral tribunal, whether made within or outside Hong Kong, is enforceable in the same manner as a judgment of the Court that has the same effect, but only with leave of the Court, and otherwise subject to the provisions of the HKAO. Typically, if a party tries to enforce an arbitral award in Hong Kong, it is because there is some jurisdictional nexus with Hong Kong (e.g., assets located in Hong Kong), though this is not a statutory requirement.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

As discussed in greater detail in question 11, an application seeking leave to enforce an arbitral award under Section 84 of the HKAO is governed by Order 73, Rule 10 of the RHC, as amended by Section 13 of Schedule 4 of the HKAO. The application is made *ex parte*, supported by an affidavit. The Court may direct a summons to be issued where it considers it appropriate to give the other party an opportunity to be heard in an *inter partes* hearing. The recognition and enforcement proceedings themselves are adversarial in nature.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Under Section 85 of the HKAO, a party seeking recognition of an arbitral award must produce the duly authenticated original award or a duly certified copy of it, the original arbitration agreement or a duly certified copy of it and, if the award or agreement is not in either or both of the official languages, a translation of it in either official language certified by an official or sworn translator or by a diplomatic or consular agent. The official languages of Hong Kong are English and Chinese.

Sections 88, 94 and 98C of the HKAO require similar documents for the recognition of a Convention award, Mainland award and Macao award, respectively.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Yes. According to Sections 85, 88, 94 and 98C of the HKAO, if the final arbitral award is not in either or both of the official languages (i.e., English or Chinese), it is necessary for

the award to be translated into either official language, and certified by an official or sworn translator or by a diplomatic or consular agent.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

Under Hong Kong law, the first step towards the recognition and enforcement of an arbitral award is the Court's grant of leave to enforce the award.

The procedure for seeking leave to enforce an award under Section 84 is governed by Order 73, Rule 10 of the RHC, as amended by Section 13 of Schedule 4 of the HKAO. The application is usually made on an *ex parte* basis and the applicant must make full and frank disclosure of all relevant information in support of the application, including the existence of any proceedings to set aside the award. The failure to do so could be fatal to the application. The Court may direct a summons to be issued if it considers it appropriate to give the other party an opportunity to be heard in an *inter partes* hearing.

Once leave to enforce is granted, the Court's order must be drawn up by or on behalf of the applicant and personally served on the respondent, delivered to his or her last known or usual place of business or abode, or in such other manner as the Court may direct.

The award may be enforced 14 days after the date of service of the Court's order on the respondent or, under Order 73, Rule 10(6) of the RHC, the respondent may apply by way of summons and affidavit to set aside the order granting enforcement of the award within 14 days of being served. Note also that if an 'application for setting aside or suspending' an award has been made, then 'the court before which enforcement of the award is sought . . . may, if it thinks fit, adjourn the proceedings for the enforcement of the award' (Sections 86(4)(a), 89(5)(a) and 98D(5)(a), HKAO).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Section 71 of the HKAO states that 'an arbitral tribunal may make more than one award at different times on different aspects of the matters to be determined', meaning that partial or interim awards can be recognised and enforced.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The major grounds for refusing recognition and enforcement of an arbitral award in Hong Kong are set out under Sections 86(1), 89(2), 95(2) and 98D(2) of the HKAO, which substantially replicate the grounds set out in Article V(1) of the Convention.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The grant of leave to enforce by the Court is the first step towards recognition and enforcement of an award. The award is enforceable only after expiry of 14 days (or such other period that the Court may fix) from the date of the service of the Court's order granting leave on the award debtor (Order 73, Rule 10(6), RHC). An award debtor on which such an order is served may, within 14 days of the date of service, seek to resist enforcement as a way of challenging the decision recognising an arbitral award.

Once an award becomes enforceable, it is enforced as though it were a local court judgment. As is the case with a local court judgment, the Court may stay enforcement of the award under Order 47, Rule 1(1) of the RHC, which states that 'there are special circumstances which render it inexpedient to enforce the judgment'.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

If the Court has refused leave to enforce an award under Section 84(1) of the HKAO, an appeal against that decision may be made with leave of the Court pursuant to Section 84(3) of the HKAO.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

It lies within the Court's discretion to determine whether it will adjourn an application to enforce an arbitral award if an action to remit or set aside the award is pending. The Court will consider factors such as the merits and prospects of success of the set-aside application (Sections 86(4)(a), 89(5)(a) and 98D(5)(a), HKAO).

Note that Section 84 of the HKAO is subject to Section 26(2), which means that if an application for the enforcement of an arbitral award is made during the period when a challenge to the appointment of an arbitrator is pending before the Court, and the arbitral tribunal that made the award includes the challenged arbitrator, the Court may refuse enforcement of the award. This usually applies if the award on which enforcement is sought is a partial or interim award, rather than the final award.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Sections 86(4)(b), 89(5)(b) and 98D(5)(b) of the HKAO provide that the court before which enforcement of the award is sought can order security to be posted when an application for setting aside or suspension of the award has been made by a party.

The chief factors likely to be considered by the court when deciding whether or not to order security, include the strength of the grounds of challenge to the award, and the possible difficulty in enforcing the award if security is not ordered. (See *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corp* [1993] 2 Lloyd's Rep 208 CA (Eng).)

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Under Section 89(2)(f)(ii) of the HKAO, the court before which enforcement of the award is sought has discretionary powers to refuse enforcement if an award has been 'set aside or suspended by a competent authority of the country in which, or under the law of which, it was made'. If the award has been set aside at the seat of the arbitration, the enforcing court in Hong Kong could nevertheless decide to enforce the award or it could proceed to allow enforcement of the award before the set-aside application has been completed.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The procedure for service with respect to applications to the Court for leave to enforce arbitral awards is governed by Order 65 of the RHC (service of documents in connection with proceedings within Hong Kong).

Order 65 prescribes that service can be effected by personal service, by post or by putting the documents through the letter box of the defendant at his or her usual or last known address, or, in the case of a corporation, at its registered address.

If it appears that it is impracticable to serve the documents in any of the methods described above, the claimant can apply to the Court for an order of substituted service. Substituted service of a document is effected by taking steps as the Court may direct

to bring the document to the notice of the defendant. This type of service is generally made by affidavit *ex parte*. The affidavit should clearly state the type of substituted service proposed, and it must show that the writ is likely to reach the defendant or come to his or her knowledge if the method of substituted service is allowed.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

There are different procedures that apply to service out of the jurisdiction, depending on the type of extrajudicial and judicial document being served. For documents that relate to arbitration, the following rules apply:

- Order 73, Rule 7 of the RHC applies to summonses or orders made under the HKAO or any orders made thereon other than those by which an application for leave to enforce an arbitral award is made; Order 73, Rule 10(5) of the RHC applies to an order made further to an *ex parte* application seeking leave to enforce an arbitral award.
- Pursuant to Order 73, Rule 7, summonses or orders made under the HKAO can be served out of the jurisdiction with leave of the Court provided that (1) the summons or order relates to an arbitration governed by Hong Kong law, save where the application is for leave to enforce an arbitral award, (2) the arbitration has been, is being or is to be held within Hong Kong, or (3) the originating summons is one by which an application is made under Section 45(2) (interim measures) or Section 60(1) (inspection, photographing, preservation, custody, detention, sale, sampling or experimenting of any relevant property) of the HKAO.
- Pursuant to Order 73, Rule 10(5), an order made *ex parte* granting leave to enforce an arbitral award can be served without leave. However, if service needs to be outside the jurisdiction, pursuant to Order 11, Rule 1(1)(m), an originating summons by which an application is made to enforce an arbitral award or any orders made thereon can be served out of the jurisdiction with leave of the Court. This type of service is permissible with leave whether or not the arbitration is governed by Hong Kong law.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Certain databases are publicly available in Hong Kong and can be used for the identification of assets. For example, land records with information about property assets are kept by the Land Registry, which is open to public searches.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Section 84 of the HKAO provides that, with leave of the Court, an arbitral award may be enforced in the same manner as a judgment of the Court, subject to the provisions of the HKAO, meaning that orders facilitating the enforcement of judgments, such as the ability to examine judgment debtors under Orders 48 and 49B of the RHC, are also available in relation to the enforcement of arbitral awards.

Pursuant to Order 48 of the RHC, on an *ex parte* application of the award creditor, the Court may order the award debtor to attend before the Registrar, or such officer as the Court may appoint, and be orally examined on the following matters: (1) whether there are any debts owing to the award debtor by other persons, and (2) whether the award debtor has any other property or financial resources that could be used for satisfying the award. If the award debtor is a limited company, the order can be made against a senior officer of the company.

Pursuant to Order 49B of the RHC, where the award is for the payment of a specified sum of money, on an *ex parte* application of the award creditor, the Court may order an examination of the award debtor regarding his or her assets, liabilities, income and expenditure and of the disposal of any assets or income. If it appears to the Court that there is reasonable cause to believe that an order to appear before the Court for examination may be ineffective to secure the award debtor's attendance, the Court may order that the award debtor be arrested and brought before the Court on the day following the day of arrest.

Further, pursuant to Order 38, Rules 13 and 14 of the RHC, the judgment debtor may apply for an order (1) to require a non-party witness to attend any proceedings in the cause or matter and produce any document considered by the Court to be necessary, or (2) to compel the attendance of a non-party witness to give evidence or to produce documents or other material evidence.

Order 38 does not apply to discovery applications against non-party banks, to which Section 21 of the Evidence Ordinance applies. Section 21 provides that: 'On the application of any party to any proceedings, the court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's record for any of the purposes of such proceedings.' The court in *Pacific King Shipping Holdings Pte Ltd v. Huang Ziqiang* [2015] HKEC 76 noted that, although the court could grant such an order in the appropriate circumstances, it 'would not lightly use its powers to order disclosure of full information touching the confidential relationship of banker and customer'.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures against assets are available in Hong Kong. Award creditors may apply for such measures before the arbitral tribunal or the Court.

Pursuant to Section 35 of the HKAO, unless otherwise agreed by the parties, the arbitral tribunal may grant interim measures upon the request of any party. Those measures may be granted to a party (1) to maintain or restore the status quo pending determination of the dispute, (2) to take any action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process, (3) to preserve assets out of which a subsequent award may be satisfied, and (4) to preserve evidence that may be relevant or material to the resolution of the dispute.

Pursuant to Section 45 of the HKAO, the Court also may grant interim measures in support of arbitration upon the application of any party. The power conferred by this Section may be exercised by the Court irrespective of whether or not similar powers may be exercised by an arbitral tribunal under Section 35 in relation to the same dispute, though the Court may decline to do so if 'the interim measure sought is currently the subject of arbitral proceedings' or if it 'considers it more appropriate for the interim measure sought to be dealt with by the arbitral tribunal' (Section 45(4), HKAO).

Award creditors cannot apply such interim measures against assets owned by a sovereign state. Foreign states enjoy absolute immunity from enforcement and jurisdiction in Hong Kong, unless the foreign state has agreed to waive its sovereign immunity (see *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011) 14 HKCFAR 95). With respect to the PRC, because Hong Kong is a Special Administrative Region of the PRC, the PRC will have crown immunity as opposed to sovereign immunity, although the practical effect is similar. Whether or not a PRC entity (such as a PRC state-owned enterprise) would be able to shield its assets through crown immunity, would depend on a test of control (i.e., whether or not the entity in question is able to exercise powers independent of the PRC government), in which case it is less likely to benefit from crown immunity (see *The Hua Tian Long (No.3)* [2010] 3 HKC 557).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Pursuant to Section 35 of the HKAO, an award creditor can apply directly to an arbitral tribunal seated in Hong Kong for interim measures against assets. There is no requirement to obtain prior court authorisation to make such an application. Further, Section 37 of the HKAO (unless the parties have agreed otherwise) allows a party to 'without notice to any other party, make a request for an interim measure' (i.e., a party can apply for an interim measure on an *ex parte* basis).

As discussed in question 23, the Court can grant interim measures under Section 45 of the HKAO and this power can be exercised irrespective of whether similar powers may also be exercised by an arbitral tribunal under Section 35 of the HKAO in relation to the same dispute. According to Order 29, Rule 1(2) of the RHC, whereby the Court grants interim measures, where 'the applicant is the plaintiff and the case is one of urgency, such application may be made *ex parte* on affidavit'.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

With respect to an application for interim measures, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The procedure set out in question 24 will apply to interim measures for all types of assets or property.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The procedure to attach assets in Hong Kong is to apply to the court. The two main orders by which assets may be attached are garnishee orders and charging orders.

Garnishee order

Pursuant to Order 49, Rule 1 of the RHC, in certain circumstances, award creditors, for the purpose of enforcing the award, may apply to the Court for a garnishee order. Order 49, Rule 2 of the RHC states that an application for a garnishee order must be made *ex parte*, supported by an affidavit or affirmation (1) stating the name and the last known address of the judgment debtor, (2) identifying the judgment to be enforced and stating the amount remaining unpaid under it at the time of the application for the garnishee order, (3) stating that to the best of the information available to, or belief of, the applicant, the garnishee is within the jurisdiction and is indebted to the judgment debtor, and stating the sources of the applicant's information or the grounds for his or her belief, and (4) stating, if the garnishee is a bank having more than one place of business, the name and address of the branch at which the judgment debtor's account is believed to be held or, if it be the case, that this information is not known to the applicant.

The garnishee order initially will be an order *nisi*. The Court may grant the award creditor an order absolute upon further consideration of the matter. The garnishee should pay the amount specified in the order to the award creditor, and any payment made by

the garnishee in compliance with the order shall be a valid discharge of his or her liability towards the award debtor to the extent of the amount paid (Order 49, Rule 3, RHC).

Charging order

For the purpose of enforcing an award, the Court may make an order imposing on any property of the award debtor, a charge to secure the payment of any debt due, or to become due under that award (Order 50, Rule 1, RHC). A charging order can be imposed on the following types of property: land or real estate, securities and funds in court (Section 20A(2), High Court Ordinance).

An application for a charging order may be made *ex parte*, supported by an affidavit or affirmation (1) identifying the award to be enforced and stating the amount remaining unpaid under it as at the date of the application, (2) stating the name of the award debtor and of any creditor whom the applicant can identify, (3) giving full particulars of the subject matter of the intended charge, and (4) verifying that the interest to be charged is owned beneficially by the award debtor. Unless the court otherwise directs, the supporting affidavit or affirmation may contain statements of information or belief and the sources and grounds for that information or belief (Order 50, Rule 1(3), RHC).

An order made by an *ex parte* application will be an order *nisi*. Upon further consideration of the matter, the Court may make the charging order absolute. However, the charging order is not a direct mode of enforcement, but is rather an indirect mode in the sense that it provides the award creditor with security, in whole or in part, over the property of the award debtor. To obtain the actual proceeds of the charge, the award creditor must then proceed to apply further for an order to sell the specified assets and satisfy his or her award (Order 50, Rule 3, RHC).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

With respect to an application for attachment, Hong Kong law does not distinguish between immovable, movable, intangible or other forms of property. The procedure set out in question 28 applies to applications for attachment for all types of property.

Attachment against movable property

30 What is the procedure for enforcement measures against moveable property within your jurisdiction?

See question 28.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

In 2011, the Hong Kong Court of Final Appeal held in *Democratic Republic of the Congo v. FG Hemisphere Associates* (2011) 14 HKCFAR 95 that an arbitral award against a foreign state cannot be enforced in Hong Kong unless the foreign state has waived its sovereign immunity. The Court stated that a waiver must be made 'in the face of the Court'. Further, the Court observed that when a state enters into 'an arbitration agreement with a private individual or company, it involve[s] merely the assumption of contractual obligations vis-à-vis the other party to the agreement. That act did not constitute a submission to any other State's jurisdiction'.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

The procedure for service of extrajudicial and judicial documents to a foreign state is governed by Order 11, Rule 7 of the RHC.

Subject to the sovereign state having waived its immunity, as discussed in question 32, after obtaining leave to serve under Order 11, Rule 1, a person who wishes to have the writ served on the state must lodge in the Registry (1) a request for service to be arranged by the chief executive, (2) a copy of the writ and (3) except where the official language of the state is, or the official languages of that party include, English, a translation of the writ in the official language or one of the official languages of that state.

Documents duly lodged will then be sent by the Registrar to the Chief Secretary for the writ to be served on the state.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Assets belonging to a foreign state are immune from enforcement in Hong Kong, unless the foreign state has waived immunity.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive immunity from enforcement in Hong Kong. For the requirements of such a waiver, see question 32.

25

India

Sanjeev Kapoor and Saman Ahsan[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Section 31 of the Arbitration and Conciliation Act 1996 (the Arbitration Act) provides, *inter alia*, that an arbitral award shall be made in writing and be signed by the members of the arbitral tribunal. In this respect, Section 31(2) also clarifies that in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated. After the award is made, a signed copy is required to be delivered to each party.

Section 31 also provides that the arbitral award shall state the reasons upon which it is based unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms under Section 30 (Settlement).

Additionally, the award is required to state the date and place of arbitration as determined in accordance with Section 20 (Place of Arbitration) and the award shall be deemed to have been made at that place.

1 Sanjeev Kapoor is a partner and Saman Ahsan is a principal associate at Khaitan & Co.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Section 33 of the Arbitration Act provides that a party, with notice to the other party, may within 30 days of receipt of the arbitral award (unless another time limit has been agreed by the parties) request the arbitral tribunal to correct any computation errors, any clerical or typographical errors, or any other errors of a similar nature occurring in the award. Additionally, if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request made by a party to be justified, then it is required to make the correction or give the interpretation within 30 days of receipt of the request and any such interpretation shall form part of the arbitral award. The arbitral tribunal may also correct any errors of the types referred to above on its own initiative within 30 days of the date of the award.

Section 33 also provides that a party may request the arbitral tribunal, with notice to the other party and within 30 days of receipt of the award, to make an additional award as to claims presented in the arbitral proceedings but omitted from the arbitral award, unless it is otherwise agreed by the parties. The arbitral tribunal is then required to make the additional arbitral award within 60 days of receipt of the request, if it considers the request to be justified.

If necessary, the arbitral tribunal may also extend the time limit within which it shall make a correction, give an interpretation or make an additional award. The provisions of Section 31 (Form and contents of arbitral award) shall apply to a correction or interpretation of the arbitral award or to an additional award made under Section 33.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

See questions 13 and 15.

As for the difference between appeals and applications for set-aside, the first recourse available to a party against a domestic arbitral award would be to file an application for setting aside the award under Section 34 of the Arbitration Act. Thereafter, an appeal may lie under Section 37 of the Act from an order setting aside or refusing to set aside an arbitral award under Section 34. Significantly, no second appeal lies from an order passed in appeal under Section 37; however, nothing prevents a party from approaching the Supreme Court by way of a Special Leave Petition under Article 136 of the Constitution of India.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Arbitration Act is the applicable legislation for the recognition and enforcement of an arbitral award in India.

India is a party to the Convention on the Execution of Foreign Arbitral Awards 1927 (i.e., the Geneva Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (i.e., the New York Convention). India is also a signatory to bilateral investment treaties, which, typically, contain a dispute resolution clause. However, India is not a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (i.e., the ICSID Convention).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

India is one of the original signatories and ratified the Convention on 13 July 1960. However, there are a number of reservations to its applicability, as per Section 44 of the Arbitration Act.

India will enforce an award as per the Convention only if it was made in the territory of another contracting state. Section 44 of the Arbitration Act states the names of 48 countries to which the Convention will apply, which are states that have made reciprocal provisions for the recognition and enforcement of awards made in India. This data is available to the public.

Further, India will apply the Convention only to differences arising out of legal relationships, whether contractual or not, that are considered 'commercial' under Indian law.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

In the case of a foreign seated award, the concerned High Court having original jurisdiction to decide the questions forming the subject matter of the arbitral award will have jurisdiction over an application for enforcement in terms of Section 47 read with Section 49 of the Arbitration Act.

In the case of a domestic award, the principal civil court of original jurisdiction in a district and the High Court in cases where the High Court exercises ordinary original civil

jurisdiction, would have jurisdiction to hear an application for enforcement of the award under Section 36 read with Section 2(1)(e)(i) of the Arbitration Act.

In accordance with Section 10 of the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act 2015, in the case of an international commercial arbitration, all applications or appeals arising out of the arbitration are to be heard and disposed of by the Commercial Division of the High Court (where a Commercial Division has been constituted in the competent High Court).

In the case of an arbitration other than an international commercial arbitration, if the principal court of original jurisdiction is a district court, all applications or appeals arising out of the arbitration are to be heard and disposed of by the commercial court, where constituted. Further, if the High Court has original pecuniary jurisdiction to entertain disputes regarding a particular pecuniary threshold, all applications or appeals arising out of the arbitration are to be heard and disposed of by the Commercial Division (where a Commercial Division has been constituted in the competent High Court).

Note that the Commercial Division of the High Court and the Commercial Court in the District Court consist of judges who have experience in dealing with commercial disputes.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

An award holder must file its application for the enforcement of a foreign or domestic arbitral award before the competent court in whose jurisdiction the assets of the award debtor are located (*Executive Engineer v. Atlanta Limited*, 2014, 11 SCC 619; *Tata International Ltd v. Trisuns Chemical Industry Ltd*, 2001, SCC Online Bom 905; *Wireless Developers Inc v. India Games Limited*, 2012, SCC Online Bom 115). If the assets of the judgment debtor are located in the territorial jurisdiction of more than one court, the award holder can file execution petitions simultaneously in all such courts (*Bulk Trading SA v. Dalmia Cement (Bharat) Limited*, 2005, SCC Online Del 1389; *Cholamandalam Investment and Finance Co Ltd v. CEC Ltd and Anr*, 1995, SCC Online Del 240).

As a matter of practice, the applicant generally files a list of assets held by the judgment debtor with the enforcement petition (or states the reasons why it believes the assets of the judgment debtor are located within the territorial jurisdiction of the court where the execution proceedings are filed). If the award holder is unable to identify the assets of the judgment debtor, the award holder may make an application to the court requesting disclosure of the assets held by the award debtor under provisions analogous to Order XXI, Rule 41 of the Code of Civil Procedure 1908 (CPC).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

India follows the adversarial system. The courts will proceed *ex parte* only if the defendant fails to attend despite being served with proper notice of court proceedings.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

In the case of a foreign award, Section 47(1) of the Arbitration Act provides that a party applying for the enforcement of an award shall, at the time of the application, produce before the court the original award or a copy thereof, duly authenticated in the manner required by the law of the country in which it was made; the original agreement for arbitration or a duly certified copy thereof; and such evidence as may be necessary to prove that the award is a foreign award. For example, in *Hugo Neu Corporation v. Lloyds Steel Industries*, 2009, SCC Online Bom 785, an affidavit was filed by the attorney appearing on behalf of the petitioner after the original award and other documents were destroyed.

In so far as a domestic award is concerned, the original copy of the award must be filed in court. Indian courts have held that in the case of a domestic award, if the original award is not filed in court, a certified copy may be filed with an endorsement regarding whether the original award is duly stamped (and stating the value of the stamp duty paid) and specifying whether the original award is duly registered (*Union of India v. M/S Gala Constructions*, 2015, SCC Online MP 5908).

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Under Section 47(2) of the Arbitration Act, if any award or agreement sought to be produced under Section 47, subsection (1) is in a foreign language, then the party seeking to enforce the award will have to produce a translation of the award in English, certified as correct, by a diplomatic or consular agent of the country to which that party belongs.

Alternatively, the award may be certified as correct in another manner as may be sufficient according to the law in force in India. In this regard, a translated copy of the award must be certified as correct by a notary appointed under the Notaries Act 1952. Further, a translation certified by a notary could be a translation of the award made by either the notary himself or herself, or any other person, but verified by the notary as correct (*KTC Korea Company Limited v. Hobb International Pvt Ltd*, 2004, SCC Online Cal 179).

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A foreign award requires neither any registration nor any stamping, but can be enforced as a decree of the court (*M/s Shriram EPC Limited v. Rioglass Solar SA* (AIR 2018 SC 4539); *Naval Gent Maritime Limited v. Shivnath Rai Harnarain (I) Limited*, 2009, SCC Online Del 2961; *Vitol SA v. Bhatia International Limited*, 2014, SCC Online Bom 1058).

Under Section 35 of the Indian Stamp Act 1899, a domestic award that is unstamped, or is insufficiently stamped, is inadmissible for any purpose. As per Section 17 of the Registration Act 1908, an award, if it affects immovable property in the manner stated therein, would require compulsory registration, and will be invalid if it is not registered (*Rajinder Parshad Sharma v. Ashok Sharma and Ors*, 2008, SCC Online Del 1317).

The court fees required to be paid in any judicial proceeding are prescribed by the Courts Fees Act 1870. However, various states have amended court fee rates by state amendments to the Court Fees Act 1870 or in their own Court Fees Act. Thus, the court fees payable will vary, depending on the court in which the execution proceedings are filed.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

The definition under Section 2(1)(c) of the Arbitration Act of 'arbitral award' includes an interim award; thus, any interim or partial award can be enforced under Section 36 (domestic award) and Section 47 (foreign award) of the Arbitration Act. However, it is relevant to note that for the purposes of recognition and enforcement under Indian law, the finality of the award is the determining factor. To be enforceable, the interim or partial award must finally determine the issues or claims covered by it. If the nature of the award is such that it is intended to have effect only if the final award is not delivered, then such an award will not be enforceable (*National Thermal Power Corporation Ltd (NTPC) v. Siemens Aktiengesellschaft* 12, 2005, DLT 36).

Further, under Section 17 of the Act, which is applicable to domestic seated arbitrations, interim measures of protection may be passed by an arbitral tribunal during the arbitral proceedings or at any time after the making of the arbitral award but before it is enforced. By virtue of recent amendments to Section 17 of the Arbitration and Conciliation (Amendment) Act 2015 (the Amendment Act), the arbitral tribunal has the same power for making orders under Section 17 of the Act as the court has for the purpose of, and in relation to, any proceedings before it under Section 9, and any such order passed by the arbitral tribunal is enforceable under the CPC, in the same manner as an order of the court.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds on which an award may be refused recognition under the Arbitration Act are similar to those provided under Article V of the Convention. Thus, the grounds for refusing recognition and enforcement of a foreign award under Section 48(1) of the Arbitration Act are as follows:

- the parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made;

- the party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings, or was otherwise unable to present his or her case;
- the award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration;
- the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, absent any agreement, was not in accordance with the law of the country where the arbitration took place; or
- the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further, under Section 48(2) of the Arbitration Act, enforcement of a foreign award may also be refused if the court finds that:

- the subject matter of the difference is not capable of settlement by arbitration under the law of India; or
- the enforcement of the award would be contrary to the public policy of India.

In this regard, recent amendments to the Arbitration Act have clarified that an award is in conflict with the public policy of India only in the following circumstances:

- the making of the award was induced or affected by fraud or corruption, or was in violation of Section 75 (Confidentiality) or Section 81 (Admissibility of evidence);
- it is in contravention with the fundamental policy of Indian law; or
- it is in conflict with the most basic notions of morality or justice.

Under Section 34(2) of the Arbitration Act, the grounds for challenging a domestic award are similar to those for challenging a foreign award. However, an additional ground for challenging a domestic award is if the award is vitiated by patent illegality appearing on the face of the award (Section 34(2A) of the Arbitration Act).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once the executing court is satisfied that an award is recognisable or enforceable, or both, the award is deemed to be a decree of that court as per the provisions of Section 36 (domestic award) and Section 49 of the Arbitration Act (foreign award). It may then be enforced under the relevant provisions of the CPC relating to the execution of a decree.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Under Section 50 of the Arbitration Act, an appeal lies against a decision refusing to recognise or enforce a foreign award to the High Court concerned. It may be noted that, insofar as a domestic award is concerned, the courts can pass an order setting aside a domestic award under Section 34 of the Arbitration Act. If a challenge is made to the award under Section 34 of the Arbitration Act and that challenge is allowed or dismissed, an appeal lies against such a decision under Section 37 of the Arbitration Act.

No second appeal lies from an order passed under Sections 50 and 37 of the Arbitration Act. The aforementioned provisions do not take away the right of the parties to prefer a Special Leave Petition to the Supreme Court under Article 136 of the Constitution of India and the same would be maintainable.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The Arbitration Act was amended by way of the Amendment Act, which came into force on 23 October 2015. In so far as domestic awards are concerned, prior to the Amendment Act coming into force, there was a deemed stay on the execution of an award once an application under Section 34 of the Arbitration Act was moved by the award debtor, challenging the award, within the prescribed period of limitation. However, since the Amendment Act has come into force, there is no deemed stay on the execution of the award and the award debtor must file a separate application under Section 34 of the Arbitration Act for a stay of operation of the award and the court can grant the same, subject to any conditions it may deem fit. The Supreme Court has clarified that all cases in which an application under Section 34 is filed after the Amendment Act came into force, and an application for stay is made under Section 36 of said Act, shall be governed by the amended Sections 34 and 36 (*Board of Control for Cricket in India v. Kochi Cricket Pvt. Ltd*, 2018, 6 SCC 287).

Note that under Section 34(5), while filing an application for setting aside an award, a party is required to issue prior notice to the other party. However, in the case of *State of Bihar v. Bihar Rajya Bhumi Vikas Bank Samiti* (AIR 2018 SC 3862), the Supreme Court has clarified that the prior notice requirement is only a direction and therefore not mandatory.

As a matter of law, if the award is for payment of money, while considering the application for grant of stay of the operation of the award, the courts may grant a stay of enforcement proceedings only after considering whether similar conditions for grant of stay of a money decree under the provisions of the CPC have been satisfied. Ordinarily, execution of a money decree is not stayed since the satisfaction of a money decree does not amount to irreparable injury and in the event of the appeal being allowed, the remedy of restitution is always available to the successful party (*Sihor Nagar Palika Bureau v. Bhabhlubhai Virabhai*

and Co, 2005, 4 SCC 1). Nevertheless, the courts may stay the operation of an award in appropriate cases and may consider the following factors while staying enforcement:

- that substantial loss may result to the party applying for stay of execution unless the order is made;
- that the application seeking a stay of operation of the award has been made without unreasonable delay; and
- that security has been given by the applicant for due performance of the award.

In so far as a foreign award is concerned, as per Section 48(3) of the Arbitration Act, the court may adjourn a decision on enforcement of an award if an application for setting aside or suspending the award has been made to a competent authority of the country under the law of which the award has been made.

Indian courts have held that Section 48(1)(e) of the Arbitration Act (which stipulates that enforcement of an award may be refused if an award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award is made) read with Section 48(3) of the Arbitration Act makes it clear that the 'competent authority' in Section 48(3) is the authority of the country of origin, where the award has been made, and not the executing court in India.

Courts in India have held that it may be reasonable to adjourn enforcement proceedings if a challenge has been made by an award debtor in the country where the award has been made (*Naval Gent Maritime Limited v. Shivnath Rai Harnarain (I)* Limited (2009) SCC Online Del 2961). However, courts may direct a deposit of security while the execution proceedings are kept in abeyance.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Under Section 34 (domestic award) and Section 48 (foreign award) of the Arbitration Act, a court may order an award debtor to provide suitable security pending the outcome of annulment proceedings.

While considering whether to direct an award debtor to post security, the courts are required to satisfy themselves that such a measure is essential and adequate to safeguard the interests of the award holder (*Steel Authority of India Limited v. AMCI Pty Limited*, 2011, SCC Online Del 3689). Factors such as the financial condition of the award debtor and the likelihood of the award debtor disposing of his or her assets prior to payment of the award, may be relevant considerations in this regard (*CV Rao v. Strategic Port Investment*, 2014, SCC Online Del 444; *Aditya Birla Finance Limited v. Carnet Elias Fernandes*, 2014, SCC Online Bom 4774).

The courts may either direct the award debtor to deposit a sum equivalent to the sum awarded to the award holder in court, or may direct the award debtor to furnish a bank guarantee of equivalent amount and keep the same alive until the execution proceedings are pending before the court. Alternatively, the court may direct the award debtor to earmark assets that may be used for satisfaction of the award and prohibit the award debtor from creating any third-party rights over the same.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Under Section 48 of the Arbitration Act, the court cannot enforce an award that is not binding on the parties. Indian courts have held that an award becomes binding between the parties if it has not been challenged by the award debtor in the country where the award was given and hence became executable. Thus, if the award has been fully or partly set aside at the seat of arbitration, the award would not be binding on the parties to the extent of the same having been set aside and consequently would be unenforceable. Further, in light of Section 48(3) of the Arbitration Act, Indian courts are likely to await the outcome of proceedings in which an award has been challenged before the courts of the seat of arbitration and proceed with enforcement only thereafter.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The procedure applicable for service of extrajudicial and judicial documents to a defendant in Indian jurisdiction is governed, *inter alia*, by the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the Hague Convention), which has been signed by India. However, India has expressed reservations regarding Article 10 of the Hague Convention and has objected to the following modes of service: (1) sending judicial documents by postal channels directly to persons abroad; (2) effecting service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination by judicial officers, officials or other competent persons of the state of origin; and (3) effecting service of judicial documents directly through the judicial officers, officials or other competent persons of the state of destination by any person interested in a judicial proceeding.

Therefore, the only process permitted by India for a valid service of judicial or extrajudicial documents under the Hague Convention is through the means of transmission set out in Article V of the Hague Convention (i.e., through the designated central authority). The designated central authority for service in India is the Ministry of Law and Justice.

Additionally, the CPC, under Section 29(c), lays down the procedure in connection with the service of foreign summons and other processes issued by any other civil or revenue court outside India. These summons and other processes may be sent to courts in the territory of India to which the CPC extends and can be served as if they were summons issued by those courts. India has also entered into mutual legal assistance treaties in civil and commercial matters with certain countries for reciprocal arrangements for service of summons under Section 29(c) of the CPC; execution of civil decrees under Section 44A of the CPC; issuing letters of request under Section 77 of the CPC; taking of evidence under Section 78 of the CPC; and enforcement of arbitral awards under Section 44(b) of the Arbitration Act.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The service of extrajudicial and judicial documents outside the Indian territory may be done in accordance with the provisions of the Hague Convention, provided that the receiving country is a signatory of the Hague Convention. Alternatively, the provisions under the law of the country where the receiving party resides may apply.

Additionally, Order V of the CPC is applicable for the service of summons. Further, Rule 25 of Order V of the CPC provides that if a defendant resides outside India and does not even have an agent in India empowered to accept service, summons shall be addressed to the place where the defendant resides. The summons shall be sent to the defendant by registered post or by such courier service as may be approved by the High Court or by fax or by email as approved by the rules of the concerned High Court. In addition to the provisions of the CPC, the service of judicial documents is also regulated by rules of various High Courts in India.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Although there is no publicly available database dedicated particularly to the identification of assets of a company, one may access the financial statements (including balance sheets) of companies from the public documents portal on the website of Ministry of Corporate Affairs (www.mca.gov.in).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Since an arbitral award is enforced as a decree of the court, provisions of the CPC would be applicable at the enforcement stage of the award. Order XXI, Rule 41(2) of the CPC

contemplates that when a decree for payment of money has remained unsatisfied for 30 days, the court may order the officers of the judgment debtor company to disclose its assets by furnishing an affidavit stating the particulars of the assets of the said debtor. The decree holder will have to make an application in the execution proceedings before the court in this regard. Courts have held that such an application can be filed even before presentation of the execution petition. In such cases, the decree holder can apply under Rule 41 of Order XXI of the CPC to retrieve details of the judgment debtor's assets that are known only by the judgment debtor.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, interim measures are available against assets. If the agreement contains an arbitration clause, then interim measures of protection may be sought by a party under Sections 9 and 17 in respect of any of the following matters:

- the preservation, interim custody or sale of any goods that are the subject matter of the arbitration agreement;
- securing the amount in dispute in the arbitration;
- the detention, preservation or inspection of any property or thing that is the subject matter of the dispute in arbitration;
- an interim injunction or the appointment of a receiver;
- another interim measure of protection as may appear to the court to be just and convenient.

These orders can then be enforced as per the provisions of the CPC.

In respect of sovereign states, India does not have a separate legislation on sovereign immunity, unlike the United States and the United Kingdom. Although India is a signatory to the Convention on the Jurisdictional Immunities of the States and their Property (i.e., the UN Convention), it is yet to come into force in India.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

In the execution of an award, an application may be made to the court under provisions analogous to Order XXI, Rule 12 (movable property) or Rule 13 (immovable property) of the CPC for interim measures against assets belonging to the judgment debtor. In this regard, once a party moves such an application, the court may issue ad interim orders or interim orders in respect of the assets located within its jurisdiction. It will also issue notice

to the decree debtor of the execution proceedings being filed. If the decree debtor does not attend, the execution proceedings may be proceeded *ex parte*.

Additionally, as discussed in question 23, interim measures of protection are available against the assets of an award debtor under Sections 9 and 17 of the Arbitration Act, before or during arbitral proceedings, or at any time after the making of the arbitral award, but before it is enforced.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

As per Order XXI, Rule 13 of the CPC, when an application is made for the attachment of any immovable property belonging to a judgment debtor, it must contain a description of the property sufficient to identify the same and, if such property can be identified by boundaries or numbers in a record of settlement or survey, a specification of those boundaries or numbers. The application should also include a specification of the judgment debtor's share or interest in the property to the best of the belief of the applicant, and so far as he or she has been able to ascertain the same.

Further, as discussed in question 23, under Sections 9 and 17 of the Arbitration Act, a party may apply to a competent court for an interim measure of protection in respect of immovable property by way of the preservation, interim custody or sale of immovable property; the detention, preservation or inspection of any immovable property; an interim injunction or the appointment of a receiver in respect of any immovable property; and any other interim measure of protection as may appear to the court to be just and convenient.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

As per the provisions of Order XXI, Rule 12 of the CPC, an application may be made to the executing court for attachment of any movable property belonging to a judgment debtor (but not in possession of the judgment debtor), with an inventory of the property giving a reasonably accurate description of the same.

Further, as discussed in question 23, under Sections 9 and 17 of the Arbitration Act, a party may apply to a court for an interim measure of protection in respect of movable property by way of the preservation, interim custody or sale of any movable property; the detention, preservation or inspection of any movable property; an interim injunction or the appointment of a receiver in respect of any movable property; and any other interim measure of protection as may appear to the court to be just and convenient.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

For the purposes of obtaining interim measures against intangible property, the provisions under Order XXI, Rules 46, 47, 48 and 48A of the CPC may be applied, which provide the procedure for attachment of intangible movable property. These provisions include attachment of debt, share, share in movables, salary or allowances of government servants or of railway employees or of employees of the local authority and salary or allowances of private employees. These attachments can be made by the executing court by issuing prohibitory orders against persons holding such assets.

Further, as discussed in question 23, a party may apply to a court for an interim measure of protection in respect of intangible property under Sections 9 and 17 of the Arbitration Act.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

On an application made by the decree holder in the execution proceedings, the court may require the judgment debtor to make a disclosure of its assets and investments, after which it may issue prohibitory orders. The decree holder is required to obtain prior authorisation of the court before attaching the assets of the judgment debtor. Proceedings for attachment of assets are not *ex parte* unless the judgment debtor fails to attend court after proper service.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

To effect an attachment of immovable property, it is necessary, among other measures, to obtain an order prohibiting the judgment debtor from transferring, alienating or charging the property in any way.

Attachment against movable property

30 What is the procedure for enforcement measures against moveable property within your jurisdiction?

If the property to be attached is movable property in the possession of the judgment debtor, the attachment is made by actual seizure and the attaching officer keeps the property in his or her own custody, or in the custody of one of his or her subordinates.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

For the purposes of obtaining interim measures against intangible property, the provisions under Order XXI, Rules 46, 47, 48 and 48A of the CPC may be applied, which provide for the procedure of attachment of intangible movable property. These provisions include attachment of debt, share, share in movables, salary or allowances of government servants or of railway employees, or of employees of the local authority, and salary or allowances of private employees. These attachments can be made by the executing court by issuing prohibitory orders against persons holding such assets.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules governing recognition and enforcement of arbitral awards against sovereign states. Although Section 86 of the CPC (which governs the issue of foreign state immunity) contemplates prior consent of central government before instituting a suit in any court of law against a foreign state, such enforcement proceedings are not barred. In relation to execution of an arbitral award, the courts have given the word 'suit' a narrow interpretation and have held that passing a 'judgment and decree on arbitration award' does not commence with a plaint or a petition in the nature of a plaint (*Nawab Usmanali Khan v. Sagarmal (*AIR 1965 SC 1798)). Therefore, the execution proceedings in respect of an arbitral award cannot be regarded as a suit for the purposes of Section 86 of the CPC. In *Ethiopian Airlines v. Ganesh Narain Saboo*, 2011, 8 SCC 539, the Supreme Court of India held that sovereign immunity to a foreign state cannot apply to commercial transactions and that the contracting party should be held liable for its contractual and commercial activities and obligations.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

There is no specific procedure for service of extrajudicial and judicial documents to a foreign state. However, as stated in question 20, the service of extrajudicial and judicial documents outside the Indian territory may be done in accordance with the provisions of the Hague Convention provided that the receiving country is a signatory of the Hague Convention. Alternatively, the provisions under the law of the country where the receiving party resides may apply.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Assets belonging to a foreign state are not absolutely immune from enforcement in India. Under Section 86 of the CPC, a foreign state can be sued in suit proceedings, subject to the condition that the consent of the central government has been obtained, duly certified in writing by the Secretary to that government. Section 86, subsection (3) of the CPC specifically requires the consent of the central government for the execution of a decree against the property of any foreign state. An entity will qualify as a foreign state depending upon the nature of its constitution and the extent of control the government exercises on that entity.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

As discussed in question 34, the assets of a foreign state are not absolutely immune from enforcement in India. Any immunity may be waived by a foreign state either expressly or impliedly. Courts in India have upheld that waiver is effective if the foreign state itself invokes the jurisdiction as a plaintiff or if it appears as a defendant without objection and fights the case on its merits. As an example, in *Ethiopian Airlines v. Ganesh Narin Saboo (*AIR 2011 SC 3495), the Indian Supreme Court held that, in effect, by entering into the Warsaw Convention, Ethiopia had expressly waived its airline's right to immunity in cases relating to aircraft carriers.

26

Italy

Massimo Benedettelli and Marco Torsello[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Under Article 823 of the Italian Code of Civil Procedure (CCP), an award must be in writing. Moreover, the deliberation of the award must take place in the presence of all arbitrators, although it need not be unanimous and can be rendered by a majority vote. The award must contain the names of the arbitrators and those of the parties, the seat of arbitration and must quote the arbitration agreement. The award must also include (at least) brief reasoning and the operative part of the award. Finally, the arbitrators must sign the award; the signatures of the majority suffices, provided that the award states (1) that all arbitrators have participated in the deliberation and (2) the reasons why it was not possible for certain arbitrators, or why they refused, to sign the award.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Pursuant to Article 826 of the CCP, at the request of one of the parties, an arbitral tribunal may correct an award, provided that the request is filed within one year of notification of

1 Massimo Benedettelli and Marco Torsello are partners at ArbLit Radicati di Brozolo Sabatini Benedettelli Torsello.

the award to the parties. This remedy applies only to clerical and computational errors and to omissions (e.g., if the award does not state the arbitrators' or parties' names, or the seat of arbitration). If the arbitrators neglect to correct the award or if the one-year time limit has elapsed, the interested party may file a motion before the court of the seat of arbitration. If the award has been challenged, parties may entrust the competent court of appeals with correcting the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

At the request of the losing party, an award may be set aside by the court of appeals of the seat of arbitration and the right to request the setting aside cannot be waived or relinquished *ex ante* by the parties. Italian law is consistent with most advanced arbitration legislation in providing limited grounds for a challenge. As a rule, awards may not be challenged on the merits and may be challenged for errors in law only if this possibility was expressly agreed by the parties or it is admitted by law (this happens, for example, if the subject matter of the arbitration is the validity of resolutions of a shareholders' meeting of companies incorporated under Italian law or a labour dispute, or if an arbitral tribunal has decided on a non-arbitrable preliminary issue). Furthermore, a challenge is always possible in the event that an award conflicts with public policy.

Article 829 of the CCP lists 12 grounds for challenging an award, which consist of procedural violations, namely: invalidities affecting the arbitration agreement; invalidities affecting the appointment of arbitrators; incapacity of the arbitrators; a decision *ultra petita*; failure of an award to fulfil the mandatory formal requirements; failure to decide within the time limit for rendering the award; failure to comply with mandatory procedural formalities; conflict with a previous award or court decision that has acquired *res judicata* authority; failure to comply with the principle of fair trial and *audi alteram partem*; failure to decide on the merits when a decision on the merits was due; contradictions affecting the dispositive part of the award or its reasons; and failure to decide on any of the parties' claims or defences in conformity with the arbitration agreement. As noted in question 13, these grounds largely mirror those under which an award may be denied recognition or enforcement.

Although annulment is the most relevant remedy, and most often applied for the setting aside of an arbitral award, it is not the only recourse available under Italian law. Article 831 of the CCP extends to arbitral awards the availability of remedies granted in exceptional circumstances against final judgments, even if they are no longer subject to appeal. Hence, revocation of an award (and consequent renewal of proceedings) may be obtained in the event of an award resulting from an act of fraud by the winning party, of an award based on false proofs, or the losing party's acquisition of new conclusive evidence after the award is rendered, provided that the party had not been able to obtain the evidence previously, or in the event of an act of fraud by the arbitrator declared by a final court judgment. Moreover, the award may be subject to a recourse for annulment by third parties who did not participate in the arbitral proceedings, in the event that the

award is detrimental to their rights. Finally, creditors or assignees of one party to the arbitral proceedings can file a recourse for annulment if the award is the result of fraud or collusion to their detriment.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Article 824-bis of the CCP provides that, as of the date of the last signature, a domestic award has the same effects as a court judgment. Under Article 825 of the CCP, the winning party who intends to enforce the award must file a request with the court at the seat of arbitration for the granting of the *exequatur*. In the context of the *exequatur* proceedings, the court merely reviews the formal validity of the award.

The request for *exequatur* of a foreign arbitral award must be filed with the court of appeals of the place of domicile of the party against whom the enforcement of the award is sought. If the party against whom the enforcement is sought is not domiciled in Italy, the request must be filed with the court of appeals of Rome. The president of the court of appeals reviews merely the formal validity of the award and declares the award enforceable in Italy, unless the dispute would not have been arbitrable according to Italian law, or the award contains dispositions that are contrary to public policy.

Italy is a contracting state to several treaties that have the aim of facilitating the recognition and enforcement of awards, including the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the 1961 European Convention on International Commercial Arbitration (the Geneva Convention), the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and several bilateral conventions.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Italy ratified the 1958 New York Convention on 19 January 1968. No reservations were made and the Convention entered into force in Italy on 1 May 1969. Since the ratification took place by way of an instrument (i.e., an execution order) whereby an international treaty is directly incorporated in the Italian legal system, the rules set out by the Convention apply directly in lieu of the provisions laid down by Articles 839 and 840 of the CCP, which remain applicable only for matters not regulated by the Convention, or when providing for a regulation that is 'more favourable' to the recognition and enforcement of a foreign award within the meaning of Article VII of the Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

In this regard, a distinction must be made between domestic and foreign awards (i.e., awards rendered in arbitrations seated in a foreign jurisdiction).

As mentioned in question 4, Article 824-bis of the CCP provides that, as of the date of the last signature, the award has the same effect as a court judgment. Nonetheless, under Article 825 of the CCP, the winning party who intends to enforce the award must file a request with the court at the seat of arbitration for affixing the *exequatur*. In the context of the *exequatur* proceedings, the court merely reviews the formal validity of the award.

The request for *exequatur* of a foreign arbitral award must be filed with the court of appeals at the place of domicile of the party against whom the enforcement of the award is sought. If that party is not domiciled in Italy, the request must be filed with the court of appeals of Rome. The president of the court of appeals simply reviews the formal validity of the award and declares it enforceable in Italy, unless the dispute is not arbitrable according to Italian law or the award contains dispositions that are contrary to public policy.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Jurisdiction for recognition and enforcement is not based on the location of the award debtor's assets. As with all proceedings filed in Italy, motions to recognise or enforce an award require standing and the interest of the party filing the request.

In the case of domestic awards, the jurisdiction of the court for the *exequatur* proceedings is established on the basis of the place at the seat of arbitration, whereas for foreign awards, the court of appeals' jurisdiction for recognition and enforcement is based on the award debtor's place of domicile.

However, once an award has obtained the *exequatur*, the enforcement proceedings on the debtor's assets are governed by a different set of rules, which deal with enforcement proceedings in general. In this context, the jurisdiction of the court to oversee enforcement and to decide on oppositions thereto, if any, is based, with limited exceptions, on the place where the assets are located.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

As regards the nature of recognition proceedings, irrespective of the territorial origin of the award (domestic or foreign), an initial *ex parte* phase is provided for, which may be followed

by a subsequent adversarial phase. However, the court in charge and the proceedings differ depending on whether the award is domestic or foreign.

Domestic awards are granted the *exequatur* by the competent court of first instance following a mere review of formal compliance with the mandatory requirement provided by law. The court gives notice to the parties of the grant (or denial) of *exequatur*. Within 30 days of the date of the notice, either party may file with the court of appeals a request to overturn the court of first instance's order granting or denying the *exequatur*. The court of appeals decides in closed chambers after hearing the parties. Recent case law has clarified that, as recourse to the court of appeals is not to be confused with proceedings for the setting aside of an award, the court's decision cannot be appealed to the Supreme Court.

Different formalities are provided for recognition proceedings relating to foreign awards. The request for *exequatur* is filed with the court of appeals (rather than with the court of first instance) and the review by the president of the court of appeals implies a scrutiny not only of the formal validity of the foreign award, but also of the arbitrability of the matter decided by the arbitral award under Italian law and of the compliance of the award with Italian public policy.

Also with regard to foreign arbitral awards, the *ex parte* phase may be followed by an adversarial phase before a panel, in accordance with the procedure provided for by Article 645 of the CCP (concerning the procedural rules applicable to oppositions to payment or delivery orders rendered *ex parte*). The adversarial phase is triggered by one of the parties filing its opposition to the *exequatur*, provided that it is filed within 30 days, which run either from notification of the notice of refusal of recognition of the award, or from service of the decree granting the *exequatur*.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The enforcement of a domestic award requires a request to be filed with the competent court of first instance at the seat of arbitration, accompanied by the original, or a certified copy, of the award and the original, or a certified copy, of the arbitration agreement. The request for recognition and enforcement must be signed by a lawyer duly admitted to the bar and endowed with special power of attorney.

The same formalities apply, *mutatis mutandis*, to the recognition and enforcement of foreign arbitral awards before the competent court of appeals.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Pursuant to Article 839(2) of the CCP, if rendered in a language other than Italian, the award and the arbitration agreement must be submitted with a certified translation into Italian.

As for other documents that may be requested and submitted during the opposition phase, these must also be submitted with an Italian translation in accordance with Article 122 of the CCP. However, if the other party does not raise any objection to the submission of documents without an Italian translation, judges may exempt the party from submitting a translation. Likewise, as a rule, translations must be duly certified, but if no objection is raised, a courtesy translation may suffice.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

The petitioner must pay fees consisting of the standard court fees and administrative stamps. Moreover, both the award and the arbitration agreement (whether submitted in original or certified copies) must bear a fixed-price tax stamp; the same requirement applies to certified translations. A registration tax is also payable for an enforcement, which is currently levied at an amount equal to 3 per cent of any sum of money that a party is required to pay in the award or to 1 per cent of any right having a patrimonial value on the existence of which the award has been adjudicated. The arbitrators have no direct or vicarious obligation for the payment of taxes. If the award is annulled after the registration tax has been paid, the party who made the relevant payment is entitled to be reimbursed by the tax authorities, provided that the relevant application is filed within three years of the date on which the payment was made or the award was annulled, whichever is the later.

The petitioner must file the required documents with the registry of the competent court.

Finally, lawyers' fees incurred in these proceedings are subject to the loser-pays rule and can thus be reimbursed according to Ministerial Decree No. 55/2014.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Awards may be recognised and enforced regardless of whether they are partial or final.

As regards enforcement, one should distinguish between declaratory and constitutive awards, on the one hand, and condemnatory awards, on the other hand. Although all types of (domestic) awards produce the same effects as a court judgment, irrespective of the granting of the *exequatur* by the court of first instance, only awards whose operative part is condemnatory may be enforced, entered in public registries or provide a legal basis for the filing of a court-ordered mortgage on the award debtor's immovable property, pursuant to Article 825 of the CCP.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds under which an award may be refused recognition correspond to those set forth by the New York Convention of 1958.

First, the court of appeals shall refuse recognition either when it finds *ex officio* that the dispute was not arbitrable under Italian law or when the award contains provisions contrary to public policy. In this context, public policy must be construed as a reference to international (rather than purely domestic) public policy (i.e., it refers to the core of fundamental values that are enshrined in the Italian constitution and bar the recognition of conflicting foreign judgments).

The court of appeals shall also deny recognition if, in the adversarial opposition filed by the party against whom the award is invoked, that party proves the existence of one of the following circumstances:

- the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the state where the award was made;
- the party against whom the award is invoked was not informed of the appointment of the arbitrators or of the arbitration proceedings, or was otherwise unable to present its case in the proceedings;
- the award decided upon a dispute not contemplated in the submission to arbitration or in the arbitration clause, or exceeded the limits of the submission, provided that, if the decisions in the award that concern questions submitted to arbitration can be separated from those concerning questions not so submitted, the former can be recognised and enforced;
- the composition of the arbitration tribunal or the arbitration proceedings were not in accordance with the agreement of the parties or, failing such an agreement, with the law of the place where the arbitration took place; or
- the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the state in which, or under the law of which, it was made, provided that (1) the fact that the award may still be subject to a challenge before foreign courts, or the lack of *exequatur* by the court of the state of the seat, do not prevent the recognition and enforcement of the award in Italy, and (2) in relation to the states that are also parties to the Geneva Convention, pursuant to Article IX(2) thereof – this provision shall apply only when the award has been set aside under any of the grounds listed in Article IX(1).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Under Italian law, it is a matter of debate whether a decision that merely declares the recognition of a foreign award is capable of immediate enforcement. The prevailing view is that recognition and enforcement must be kept distinct and that, to proceed with an enforcement, an award must be accompanied by the enforceability decree rendered by the court.

The decision on enforceability of a foreign award can be challenged before the Supreme Court, although the latter may only exercise a limited review of the lower court's decision.

Likewise, recourse against a decision by the court of first instance granting the *exequatur* to a domestic award is not subject to *de novo* review by the court of appeals, which can only be called upon to exercise a limited review of the lower court's decision.

Awards that have been granted recognition constitute an enforceable order (*titolo esecutivo*). However, enforcement itself may be initiated only after the recognised award and a writ of enforcement have been served on the award debtor. The award and the writ of enforcement must be served directly on the award debtor and not on the debtor's counsel.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The remedies available to challenge refusals to recognise or enforce an award are the same as those available against decisions that recognise an award and grant the *exequatur*.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Under Article 840(4) of the CCP, the court of appeals 'may' (but is not bound to) stay the proceedings pending the outcome of a challenge brought before the competent court of the state of the arbitral seat. The trend is for the court seised with the request for recognition to assess whether the challenge against the award is well founded or merely instrumental.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

When staying the proceedings on the recognition and enforcement of an arbitral award, if so requested by the applicant, the court of appeals may order the defendant to post security. In exercising the discretion assigned to them, courts have often emphasised the reference contained in Article 840(2) to the rules applicable in the event of opposition to an *ex parte* payment order and have applied the criteria developed in that context, which require an assessment based on all circumstances of the case.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

As a general rule, awards set aside by the courts at the seat cannot be enforced in Italy pursuant to Article 840(3), No. 5 of the CCP. However, this provision may be deemed trumped by Article V of the New York Convention, which is the direct source of the obligation of recognition of foreign awards, to the extent that it provides that recognition 'may' rather than 'shall' be denied when one of the relevant grounds materialises.

Despite the lack of any precedent in point, it has been argued that enforcement could be granted to an award set aside at the seat of the arbitration in the event that the foreign judgment setting aside the award were itself unenforceable in Italy under any of the grounds laid down by Italian private international law (Article 64 of Law 31 May 1995, No. 218).

Italian case law has not settled what happens to decisions recognising a foreign award in the event that the award is then set aside at the seat. The prevailing view among commentators is that the judgment granting the *exequatur* is not affected *per se* and it preserves its *res judicata* authority. However, annulment of the award could be raised as a defence at the enforcement stage under Article 615 of the CCP.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of judicial and extrajudicial documents is governed, in general terms, by Articles 137 to 151 of the CCP, although other statutory provisions may be relevant in practice. The default procedure (set forth in Article 137 of the CCP) requires the

participation of a judicial officer, who delivers the judicial or extrajudicial documents to the addressee upon request of a party, a prosecutor or a court clerk.

As a rule, the addressee must be served in person. If the addressee cannot be found at his or her home, domicile or place of business, the documents can be served to a family or household member, to an employee or to the building's doorman. As an alternative, documents can be served by mail, which is the required procedure when service is to be made outside the officer's territorial district.

If the addressee cannot be found either in the municipality where he or she currently resides, or has his or her centre of interests, as a last resort, service can be made at the town hall of the municipality of the last known residence of the addressee.

Service of documents on legal entities and companies follows a similar set of rules, outlined in Article 145 of the CCP.

In exceptional circumstances, if the ordinary means of service cannot be adopted, at the request of the interested party the judge can authorise service by special means chosen by the judge (e.g., email, announcements published in specialist press, and the like).

A relevant innovation was introduced by Law No. 53/1994 (as modified by Law No. 183/2011, Law No. 221/2012 and Law No. 132/2015), which has provided for the possibility of service being carried out by lawyers, by mail, telefax or (as from 2011) via certified email.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The two main sources of the law governing service out of Italy consist of the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Hague Service Convention) and Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters.

The Hague Service Convention entered into force in Italy as of 24 January 1982 without any reservation. Therefore, as far as Italy is concerned, service can be carried out in accordance with either of the alternative procedures provided for by the Convention, including service via the central authorities designated by each state, via postal service, diplomatic agents and judicial officers.

Regulation (EC) No. 1393/2007 allows for service via diplomatic channels, specifically authorised agencies, the postal service and via direct service on the defendant.

Finally, in the absence of any (multilateral or bilateral) international convention, under Article 142 of the CCP, service out of the Italian jurisdiction can be carried out by transmission of one copy of the relevant documents by registered mail and transmission of another copy through the Ministry of Foreign Affairs, upon request by the attorney general.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

As a general rule, identification of a debtor's assets is carried out by a judicial officer, who can directly search the debtor's premises for attachable assets. In practice, the relevant information is passed to the judicial officer by the creditor and, in particular, it is for the creditor to identify and request seizure of receivables or debtor's assets that are in the possession of third parties. In conducting a search for assets, judicial officers (and creditors) may have access to the following public databases, among others: the Real Estate Registry (known as *Catasto*), the Public Automobile Registry and the Company Registry.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Since 2014, pursuant to Article 492-bis of the CCP, judicial officers in charge of enforcement proceedings, subject to authorisation by the president of the court of first instance, may access all databases run by state administrations, and tax and social security registers. As an incentive, the judicial officer will be rewarded with a bonus based on the value of the identified (and then foreclosed) assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Although interim measures are generally available under Italian law, Article 818 of the CCP prevents arbitrators from issuing them. Therefore, award creditors seeking an interim measure can only file a request with the competent court (the only exception to this rule being that, in corporate arbitration, arbitral tribunals can suspend the effects of a resolution via a shareholders' meeting).

Interim measures prior to or pending enforcement of an arbitral award are issued by the court competent for the enforcement (the court of appeals in the case of foreign awards), following a fast-track adversarial phase or, under special circumstances, *ex parte*. In the latter case, the addressee of the interim measure is heard by the judge after the issuance of the measure, with a view to confirming, amending or revoking the interim measure.

Under Article 669-bis et seq. of the CCP, the issuance of interim measures is subject to two requirements: the applicant must prove the existence of a serious risk of irreparable harm pending the decision on the merits and of the existence of a *prima facie* case for the main claim.

When issuing an interim measure, courts may require that the applicant posts security.

Finally, under Article 669-terdecies of the CCP, interim measures (or decisions refusing to grant them) may be appealed through a fast-track procedure before a panel of judges of the same court as the judge that decided on the original application.

The measures that may be granted are either protective or anticipatory. The main types of interim measures are judiciary seizures, evidence seizures, seizures for security and urgency measures.

Judiciary seizures may be granted to ease direct enforcement whenever ownership or possession of an asset is disputed. Evidence seizures are a subtype of judiciary seizures and have the aim of preserving books, registers and other documents or goods that may be a source of evidence.

Seizures for security under Article 671 of the CCP may be authorised in the event of collateral being insufficient; the seizure is performed in the form of (and can be converted into) attachment.

The infrequent measure known as 'liberating seizure' can be granted when, pending a dispute over certain facets of an obligation, the debtor offers some assets as collateral to be released from his or her obligation.

Finally, Article 700 of the CCP provides for an atypical and residual anticipatory measure with the aim of protecting a petitioner's rights from possible irreparable harm.

All the aforementioned measures may apply to immovable, movable and intangible property.

Interim measures against assets owned by foreign states follow the general principles, but the practical enforcement of an interim measure may be limited on grounds of immunity, according to the rules discussed in questions 32 and 34.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

A creditor seeking to obtain an interim measure must file a request with the competent court. The issuance of interim measures is subject to two requirements: the applicant must prove the existence of a serious risk of irreparable harm pending the decision on the merits and of a *prima facie* case for the main claim.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure for obtaining interim measures against immovable property in Italy is the same as the general procedure for obtaining any interim measures. Special rules apply only as regards the enforcement of interim measures against immovable property, as the creditor is required to request the filing of the interim measure in the public Real Estate Registry.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for obtaining and enforcing interim measures against movable property is the same as the general procedure for obtaining and enforcing interim measures.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for obtaining interim measures against intangible property is the same as the general procedure for obtaining any interim measures. Special rules may apply as regards the enforcement of interim measures against intangible property, as the rules on enforcement follow the rules on attachment and are described in further detail in question 31.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Attachment is the first act of enforcement proceedings and requires the prior filing with the judicial officer of both an enforceable order and the writ of enforcement.

The enforcement proceedings may be started only after 10 days have elapsed since service of the order and writ of enforcement on the debtor, unless the creditor obtains an exemption from the 10-day period from the court. Furthermore, the enforcement proceedings must be started within 90 days of service of the order and writ of enforcement, otherwise the order and the writ must be served anew.

Italian law outlines a standard procedure for attachment, accompanied by special provisions for different types of assets. As a rule, attachment consists of a warning by the judicial officer not to dispose of the collateral specified by the officer, with a request to provide information about any other attachable asset. The debtor may avoid attachment by either asking for conversion of the attached asset or paying the amounts due directly to the judicial officer.

Attachment loses its effects if the applicant does not request sale of the assets or direct assignment within 45 days.

Enforcement proceedings in general are *ex parte*, but the debtor or a third party may file an opposition, thus triggering an adversarial phase that may consist of opposition to enforcement, opposition to specific acts of the proceedings, or third-party opposition.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Attachment against immovable assets deviates from the general rules by requiring filing of the attachment order with the Real Estate Registry and by providing different deadlines for the sale of the immovable assets.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Attachment against movable property is directed at a debtor's assets, including any debtor's assets in the possession of a third party.

The judicial officer follows the general enforcement procedure with only minor deviations. Indeed, the officer proceeds by searching the debtor's home, then his or her place of business or office for attachable assets.

Special procedures are set for the attachment of vehicles pursuant to Article 521-bis of the CCP, which requires the order of attachment to be filed with the relevant public registry.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

As regards attachment against intangible property, the situation varies depending on the specific type of intangible property at stake. In the event of intangible property resulting from a public registry (as in the case of most intellectual property rights), the attachment requires the filing of the order and the writ of attachment with the relevant registry. In the event of intangible property consisting of participation in the capital of a company incorporated into physical, paper-based shares, the attachment requires a physical annotation of the attachment on the shares on the part of the judicial officer, or the serving of the order with a writ of attachment on the debtor and on the company. In the event of dematerialised corporate shares, the attachment is done by serving the order and writ of attachment on the debtor and on the intermediary in charge of the management of the dematerialised shares (it is still a matter of debate whether or not service is also required on the company whose dematerialised shares are being attached). If, instead, participation in the capital of a corporation is not confirmed by the issuance of any shares (as in the case of private limited liability companies), attachment of the corporate participation quota is done by serving the order with a writ of attachment on the debtor and on the company, followed by the filing of the attachment in the public companies' registry.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no special rules in Italian law governing enforcement against foreign states. However, Italy is a signatory of the ICSID Convention, so Italian courts are bound to recognise and enforce awards rendered under the umbrella of that Convention.

Beyond the framework of investment arbitration, when faced with the foreign state immunity exception in the context of enforcement proceedings, Italian courts are bound by customary international law, the applicability of which is confirmed by Article 10 of the Italian Constitution.

Usually, as for jurisdictional immunity, the courts adopt a restrictive approach and differentiate between subject matters falling within a state's public function and those arising from private undertakings, such as entrepreneurial or commercial ventures.

While Italian law does not contain any express provision, it is possible for a foreign state to waive its jurisdictional immunity by consenting to arbitration, although this does not imply an extension of a waiver of immunity to the enforcement.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Foreign states may be served only via diplomatic channels, through the prosecutor's office. The Ministry of Foreign Affairs, when so requested, delivers the relevant documents to the foreign state's embassy or to its head of state.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

The subjective distinction between a state's public function and its private undertakings also applies objectively to the characterisation of its assets. Therefore, enforcements of awards are likely to be available only against non-sovereign assets, although this can happen without prior authorisation by the Italian government. Nonetheless, a review of case law suggests that Italian courts tend to adopt a restrictive approach and, if there is any doubt, tend to uphold the immunity defence. For instance, Italian courts have repeatedly denied enforcement on accounts held by foreign central banks, on assets belonging to customs agencies and on assets with attached scientific or cultural value. Conversely, enforcement has been granted on aeroplanes belonging to foreign national carriers and on state-owned freighters and ships.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

The likelihood of a waiver is scant. Therefore, enforcement on assets held in Italy by a foreign state generally requires current consent by the said state. The sole foreseeable exception occurs when a state waives immunity from enforcement by earmarking beforehand certain assets to satisfy claims against it.

27

Japan

Nicholas Lingard and Toshiki Yashima[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Japanese law is similar to what is found in the UNCITRAL Model Law. According to Article 39 of the Arbitration Act, an award must be in writing, and must be prepared and signed by the arbitrators making the award, with the exception that signatures of a majority of the arbitral tribunal can suffice if the award states the reasons for any omitted signatures. The default rule is that the award must set out its reasoning, but the parties may agree otherwise. The award must be dated and indicate the place of arbitration. Signed copies of the award shall be sent to all parties by the arbitral tribunal.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

With respect to correction or modification of awards, Japanese law largely corresponds to the UNCITRAL Model Law. Under Article 41 of the Arbitration Act, a party may request corrections of clerical or similar errors within 30 days of the party's receipt of the award unless the parties agree otherwise. An arbitral tribunal may make such corrections on its own initiative.

1 Nicholas Lingard is a partner and Toshiki Yashima is an associate at Freshfields Bruckhaus Deringer.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Under Article 44 of the Arbitration Act, a Japanese court may set aside an arbitral award on any of the following grounds: (1) limited capacity of a party; (2) incompatibility with the law applicable to the parties' agreement to arbitrate; (3) a petitioner did not receive the notice required under Japanese law or the parties' agreement otherwise in the procedure of appointing arbitrators or in the arbitration proceedings; (4) a petitioner was unable to defend himself or herself in the arbitration proceedings; (5) the award has exceeded the scope of the arbitration agreement or of the claims made by the parties; (6) the composition of the arbitral tribunal was in violation of Japanese law or the parties' agreement; (7) the dispute was not arbitrable under Japanese law; or (8) the award is against the public policy of Japan. With respect to grounds (1) to (6), the party seeking set-aside bears the burden of proving the grounds exist. With respect to grounds (7) and (8), the court may order the award set aside even if the party seeking set-aside has not met its burden. If the basis for set-aside would be that the award exceeded the scope of the parties' arbitration agreement or the claims presented, partial set-aside is permitted if the matters exceeding scope can be separated from the matters that are within scope.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Japan is a party to the New York and ICSID Conventions, and has bilateral treaties with various states, including the United States, the United Kingdom and China. Under Japanese law, the Arbitration Act provides for automatic recognition of arbitral awards in Japan and stipulates detailed procedures for their enforcement. The Civil Execution Act stipulates the procedures for the attachment of assets following a decision to enforce an arbitral award (see question 28).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention came into force in Japan on 18 September 1961. Japan has made only the reciprocity declaration under the first part of Article I(3) of the Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Both domestic and foreign arbitral awards are recognised automatically in Japan without the need to commence court proceedings. Japanese district courts have jurisdiction over applications for enforcement of both domestic and foreign arbitral awards. If, during enforcement proceedings, a court finds that one or more grounds exist for refusing to enforce an award (see question 13), the court may dismiss the enforcement application (see question 15).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Article 5, Paragraph 1 and Article 46, Paragraph 4 of the Arbitration Act provide that the district courts have jurisdiction over enforcement applications if the parties agree; if the court has jurisdiction over the place of arbitration (limited to cases where an area within the jurisdictional district of the relevant district court is determined to be the place of arbitration); if the court has jurisdiction where the defendant is based; or if the court has jurisdiction in the location of the subject matter of the claim, or if the obligor has property that can be seized.

The applicant therefore does not necessarily need to identify assets within the jurisdiction of the court to bring an application for enforcement.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

As stated in question 6, both domestic and foreign arbitral awards are recognised automatically in Japan without the need to commence court proceedings. Therefore, there is no separate recognition proceeding under Japanese law, and a party seeking enforcement may do so directly.

Enforcement proceedings are adversarial (Article 46, Paragraph 10 and Article 44, Paragraph 5 of the Arbitration Act).

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

As stated in question 6, both domestic and foreign arbitral awards are recognised automatically in Japan without the need to commence court proceedings; there is therefore no separate recognition proceeding under Japanese law.

To commence enforcement proceedings, as set out in Article 46, Paragraph 2 of the Arbitration Act, an applicant must submit the following documents: a certified copy of the arbitral award; and a Japanese translation of the award (unless the award was issued in Japanese).

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

It is necessary to obtain translations of the required documentation. However, it is not required that translations should be certified.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A fee of ¥4,000 is required to file a petition for enforcement (Article 3, Paragraph 1 and Attachment 1 of the Act on Costs of Civil Procedure).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Partial awards are recognised and are capable of being enforced.

Tribunals seated in Japan can order any party to take any interim or provisional measures the tribunal considers necessary (Article 24, Paragraph 1 of the Arbitration Act). However, such orders cannot be enforced in the courts against the parties.

There is no clear rule or precedent on the treatment of interim awards issued by arbitral tribunals outside Japan.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Article 45, Paragraph 2 of the Arbitration Act lists the following grounds for which the court may refuse enforcement of arbitral awards. They reflect the grounds in Article V of the Convention:

- the award is not valid owing to the limited capacity of a party;
- the award is not valid on grounds other than the limited capacity of a party pursuant to the laws and regulations designated by the agreement of the parties as those that should be applied to the arbitration agreement (or, if no such designation has been made, the laws and regulations of the country to which the place of arbitration belongs);
- the party did not receive the notice required under the laws and regulations of the country to which the place of arbitration belongs (or if the parties have reached an agreement on the matters concerning the provisions unrelated to public policy in those laws and regulations, that other agreement) in the procedure of appointing arbitrators or in the arbitration procedure;
- the party was unable to present a defence in the arbitration;
- the arbitral award contains a decision on matters beyond the scope of the arbitration agreement, or of the application presented in the arbitration procedure;
- the composition of the arbitral tribunal or the arbitration procedure is in violation of the laws and regulations of the country to which the place of arbitration belongs (or if the parties have reached an agreement on the matters concerning the provisions unrelated to public policy in those laws and regulations, that other agreement);
- the arbitral award is not final and binding, or has been set aside, or its effect has been suspended by a judicial body of the country to which the place of arbitration belongs (or if the laws and regulations applied to the arbitration procedure are laws and regulations of a country other than the country to which the place of arbitration belongs, that other country) pursuant to the laws and regulations of that country;
- the applications presented in the arbitration procedure are related to a dispute that cannot be the subject matter of an arbitration agreement pursuant to the provisions of Japanese laws and regulations; or
- the content of the arbitral award is against public policy in Japan.

If a party asserts that one or more grounds exist for refusing recognition of the award, this will be considered by the court during the enforcement proceedings (Article 46, Paragraph 8 of the Arbitration Act). A party seeking the dismissal of an enforcement application bears the burden of proving the existence of the requisite ground or grounds. In addition, the court may of its own volition make a finding that the award should not be recognised. In this situation, however, the court may only consider the final two grounds listed above.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

As stated in question 6, arbitral awards are recognised automatically in Japan, and so there is no separate procedure as such for challenging the recognition of an award.

An application for enforcement should be made to the relevant district court (Article 46, Paragraph 1 of the Arbitration Act). Enforcement proceedings are adversarial (Article 46, Paragraph 10 and Article 44, Paragraph 5 of the Arbitration Act).

Either party may challenge an enforcement decision within two weeks of the date of notification of the decision (Article 7 of the Arbitration Act). The challenge will be determined by the High Court, which will not give any deference to the district court's findings.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

If, during enforcement proceedings, the court finds that one or more grounds exist for refusing to enforce an award (see question 13), the court may dismiss the enforcement application (see question 18). If the court dismisses the application, the party seeking enforcement can challenge the dismissal within two weeks of notification of the decision (see question 14).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

If an application for setting aside an arbitral award, or for the suspension of the effect of an award, has been made to the judicial body at the seat of the arbitration, the court may suspend the enforcement proceedings in Japan (Article 46, Paragraph 3 of the Arbitration Act). There are no publicly available precedents regarding the suspension of enforcement proceedings.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The court may order a defendant to provide security upon the request of the enforcement applicant (Article 46, Paragraph 3 of the Arbitration Act). The Act does not stipulate any particular forms of, or criteria for the amount of, security; neither does it set out any particular standard the court must apply, so the court will exercise its own discretion.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

The Arbitration Act stipulates that the court may dismiss enforcement proceedings if it considers that grounds exist for refusing enforcement, including when an award has been set aside at the seat of the arbitration. We are not aware of any publicly reported cases in Japan that have considered this issue.

If an award is set aside after the court issues an enforcement order, a defendant may challenge the enforcement decision within two weeks of the date of notification of the order (Article 7 of the Arbitration Act and see question 14). If, however, the award is set aside after the two-week period, there is no particular provision under Japanese law that provides for challenging the enforcement order. However, it may be possible to challenge the decision by filing a petition under the Civil Execution Act, such as an action to oppose the execution of the order (Article 35, Paragraph 1 of the Civil Execution Act).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Judicial documents

There are two ways to provide documents to a defendant under the Civil Procedure Law and the Rules of Civil Procedure: service and sending.

Service of documents can be categorised as (1) service by personal delivery (Article 101 of the Civil Procedure Law); (2) in the event that (1) is unsuccessful, service by registered mail (unlike (1), service by registered mail is deemed to be effected at the time of sending, regardless of whether the defendant actually receives the documents (Article 107 of the Civil Procedure Law)); or (3) if neither (1) or (2) are successful, service by publication (in

which a clerk of the court posts a notice in the posting area of the court, stating that the documents are in the possession of the court clerk and can be delivered at any time to the recipient).

Service of documents is required to be conducted by the court in the case of important documents for which receipt by the defendant is considered absolutely essential (e.g., petitions, petitions to appeal and the filing of final appeals).

Some documents (including written answers, briefs and documents stating an offer of evidence) are required to be sent directly to the defendant instead of involving the court. The Rules of Civil Procedure stipulate that a party may send documents directly to the counterparty in some cases. For example, if a party submits documentary evidence to a counterparty and requests examination of that evidence, the party may directly send to the counterparty a copy of the documents, with a description of what the documents evince.

Extrajudicial documents

There is no particular provision under Japanese law governing the service of extrajudicial documents.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Judicial documents

For service by the court, several methods of service are available; which of those methods is used will depend on the terms of the relevant treaty between Japan and the country in which the defendant is domiciled.

There are three main methods of service: (1)a request is made to the related foreign authorities to serve the documents; (2) the documents are served via the Japanese consulate in that country; or (3) a request is made to the courts of the foreign country to effect service of the documents.

If there is no treaty, a party must make a request to the country in which the defendant is domiciled to serve the documents.

Extrajudicial documents

There is no particular treaty or provision governing the service of extrajudicial documents.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are no databases or publicly available registers as such that allow applicants to identify a defendant's assets in Japan. Although real estate property and motor vehicle registers exist, applicants are unable to search them using the defendant's name alone; more specific

information would be required, such as addresses for the properties or registration numbers of motor vehicles.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Yes, such proceedings exist by virtue of Article 196 et seq. of the Civil Execution Act. Upon obtaining an enforcement order from the court, an applicant is able to apply for a property disclosure order, which requires the defendant to submit a list of assets held in Japan. Following submission of the list, the defendant is required to attend court to provide an explanation as to the status of those assets, and answer any questions from the court or the applicant. However, these proceedings are rarely beneficial for applicants because of the frequent failure of defendants to turn up at court.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

There are three types of interim measures available under the Civil Provisional Remedies Act:

- if the right to be preserved is a monetary claim, the court may, upon the request of a party, issue an order for the provisional seizure of specific property (Article 20, Paragraph 1 of the Civil Provisional Remedies Act);
- if the right to be preserved is not a monetary claim, the court may, upon the request of a party, issue an order for provisional disposition against the property in dispute (Article 23, Paragraph 1 of the Civil Provisional Remedies Act); and
- if there is a legal right to be preserved, the court may, upon the request of a party, issue an order of provisional disposition that determines the provisional status of the relationship of the rights in dispute (Article 23, Paragraph 2 of the Civil Provisional Remedies Act).

In relation to interim measures against assets owned by a sovereign state, in general, states are immune from enforcement. Therefore, it is impossible to apply for an interim measures order against assets owned by a sovereign state unless the state has otherwise expressly consented to it not being immune from jurisdiction (Article 17, Paragraph 1, Item 2 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc., and Article 19, Item (a)(i) of the Convention on Jurisdictional Immunities of States and Their Property (the UN Convention)). However, it is possible to apply for an interim measures order against assets owned by state-run entities, unless the entity has been granted the right to exercise sovereign power (e.g., a central bank) (Article 2, Paragraph 1, Item 3 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

An applicant seeking interim measures must file an application that stipulates the applicant's requests, the rights the applicant wishes to preserve, and the need to preserve those rights. The court will then conduct an examination of the rights the applicant wishes to preserve, and the need to preserve those rights. Although the court generally meets only with the applicant (i.e., *ex parte*), the court may meet with the defendant if the case is complicated or there would be a substantial impact on the defendant.

The interim measures appropriate in a particular situation will depend on the rights the applicant wishes to preserve, and the purpose for seeking the interim measures. For example, if an applicant seeks to preserve a monetary claim, the interim measure available is an order prohibiting the disposal or otherwise encumbering the defendant's property.

There is no requirement to obtain court authorisation before applying such measures.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

If the right to be preserved is a claim for money, the applicant must petition the relevant court to issue an order for the provisional seizure of specific immovable property. This proceeding is conducted *ex parte*. Although the court generally meets only with the applicant, the court may, at its discretion, call the defendant for examination (Article 7 of the Civil Provisional Remedies Act and Article 87, Paragraph 2 of the Code of Civil Procedure). The court will issue an order for provisional seizure of specific property if 'compulsory execution for the monetary claim is likely to be impossible or extremely difficult' (Article 20, Paragraph 1 of the Civil Provisional Remedies Act).

If the right to be preserved is a claim for the delivery of immovable property, the applicant must petition the relevant court to issue an order for the provisional disposition of the immovable property in dispute. This proceeding is conducted *ex parte* and proceeds on a paper only; however, the court may, at its discretion, call the defendant for examination (Article 7 of the Civil Provisional Remedies Act and Article 87, Paragraph 2 of the Code of Civil Procedure). The court will issue the order if 'there is a likelihood that the party's exercise of its right will be impossible or extremely difficult due to any changes to the existing state of such subject property' (Article 23, Paragraph 1 of the Civil Provisional Remedies Act).

Upon issuing an order for the provisional seizure of, or provisional disposition against, immovable property, in general, the court will order the applicant to offer security for the order (Article 14 of the Civil Provisional Remedies Act). There are no statutory rules governing the amount of the security, but the amount can be estimated to some extent based on precedents.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for interim measures against movable property is largely the same as that stated in question 24, except that an order for provisional seizure or provisional disposition with regard to movable property need not list all items of movable property individually (Article 21 of the Civil Provisional Remedies Act).

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for interim measures against intangible property is the same as that stated in question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

After an execution order for an arbitral award has become final and binding, the applicant must complete three steps before making an application for compulsory execution.

First, the applicant must apply to the relevant court clerk for a certificate of execution to be attached to the authenticated copy of the arbitral award (Article 22, Item 6-2, Article 25 and Article 26, Paragraphs 1 and 2 of the Civil Execution Act). A certificate of execution is produced through the proceedings for the enforcement order. The applicant must submit the relevant application form and an authenticated copy of the arbitral award produced with the enforcement order. The court clerk will then conduct a formal examination of the application (such as checking whether the arbitral award has become final and binding). If the certificate of execution can be issued, the court clerk will affix the certificate of execution to the authenticated copy of the arbitral award, since the certificate of execution is in the form of a seal.

Second, the applicant must obtain from the relevant court clerk a certificate of service, which evidences that the authenticated copy of the arbitral award produced with the enforcement order has been served upon the defendant (Article 29 of the Civil Execution Act).

Third, the applicant must obtain from the relevant court clerk the certificate that evidences that the enforcement order has become final and binding (Article 48, Paragraph 1 and Article 50, Paragraph 3 of the Rules of Civil Procedure).

Following completion of these three steps, the applicant must petition either the relevant district court – for enforcement of a monetary award against immovable property or enforcement against intangible property (see questions 29 and 31) – or the relevant execution officer – for enforcement of a monetary award against movable property, enforcement of an award ordering the delivery of immovable property, enforcement

of an award ordering a handover of movable property (see questions 29 and 30) or the commencement of compulsory attachment. When petitioning an execution officer, an applicant must supply (1) a petitioning form, (2) the authenticated copy of the arbitral award produced with the enforcement order (which has been affixed with the certificate of service), (3) the certificate of service, (4) the certificate evidencing that the order has become final and binding, and (5) other requirements, as the case may be, such as the certificate of incorporation of the counterparty (if the counterparty is a legal entity).

The procedures described in this question are conducted *ex parte*. For further information, see questions 29 and 30.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Enforcement of a monetary award

Compulsory auction and compulsory administration are both available as attachment measures for monetary claims against immovable property, and the applicant may use either or both of them (Article 43, Paragraph 1 of the Civil Execution Act).

A party must petition the relevant court for an order to commence either compulsory auction or compulsory administration. If the court determines that the requirements for issuing such an order are satisfied, the court will issue an order to commence compulsory auction or compulsory administration (as the case may be) against the target assets, stating that the target assets will be attached (Article 45, Paragraph 1 and Article 93, Paragraph 1 of the Civil Execution Act).

In the case of a compulsory auction, following the court's order for its commencement, the court will order an execution officer to investigate the current condition of the immovable property (Article 57 of the Civil Execution Act), after which the execution officer will prepare a report of the investigation (Article 29 of the Rules of Civil Execution). The court will also appoint an appraiser and order him or her to appraise the immovable property (Article 58 of the Civil Execution Act) and prepare an appraisal report (Article 30 of the Rules of the Civil Execution). The court will determine the value of the immovable property based on the appraisal report (Article 60, Paragraph 1 of the Civil Execution Act) and, using both the investigation report and the appraisal report, will prepare a description of the property, which contains information about the immovable property (such as where it is located and any rights regarding the property) (Article 62 of the Civil Execution Act).

In parallel, the court clerk will give public notice of the fact that an order for the commencement of a compulsory auction has been issued, and the time limit for a demand for distribution of the proceeds of the sale. The court clerk will also issue a notice to certain creditors that they are to notify the court of the presence or absence of claims, and the basis and amounts of those claims, by the end of the time limit for a demand for distribution of the proceeds of sale (Article 49, Paragraph 2 of the Civil Execution Act).

The court clerk will then determine and carry out the method of selling the immovable property, including by silent or public auction (Article 64 of the Civil Execution Act). The

proceeds from any sales will be distributed to the relevant creditors (Article 87 of the Civil Execution Act).

In the case of compulsory administration, upon the court's order for its commencement, the court will appoint an administrator, who will be in charge of managing the relevant assets (Article 94, Paragraph 1 of the Civil Execution Act). The administrator will make a profit from the assets by leasing them or otherwise (Article 93, Paragraph 2 and Article 95, Paragraph 1 of the Civil Execution Act). The proceeds from any sales will be distributed to the relevant creditors (Article 107, Paragraphs 1 and 2 of the Civil Execution Act).

Enforcement of an award ordering the delivery of immovable property

Enforcement measures for the delivery or surrender of immovable property will be carried out as follows: (1) an execution officer removes the defendant from the immovable property; and (2) the execution officer requires the applicant to gain possession of the immovable property (Article 168 of the Civil Execution Act). The enforcement measures commence upon the filing of the petition (Article 2 of the Civil Execution Act).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Enforcement of a monetary award

A party must petition the relevant execution officer to commence the attachment procedure. If the procedure can be commenced, the execution officer will attach the property by seizing the target assets (Article 122, Paragraph 1 of the Civil Execution Act).

What happens next depends on whether the target assets are in the possession of the defendant or a third party. If the assets are in the possession of the defendant, the execution officer will be authorised to attach them by forcibly taking possession (Article 123, Paragraph 1 of the Civil Execution Act). However, if the target assets are in the possession of a third party, the execution officer is not permitted to take them unless the third party is willing to cooperate (Article 124, and Article 123, Paragraph 1 of the Civil Execution Act). If the third party is not willing to cooperate, the applicant will need to petition the relevant court for an order for attachment against the defendant's right to take possession from the third party (Articles 143 and 163 of the Civil Execution Act).

Attached movable property will be sold by the execution officer in the way he or she deems appropriate (Article 134 of the Civil Execution Act). The proceeds from the sale of such assets will be distributed to the relevant interested parties (Article 140 of the Civil Execution Act).

Enforcement of an award ordering handover of movable property

In relation to non-monetary claims, the execution officer will confiscate the target assets from the defendant and deliver them to the applicant (Article 169 of the Civil Execution Act). Again, the applicant is required to file a petition to the court to access the remedy of attachment (Article 2 of the Civil Execution Act).

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Claim for money

An applicant may petition the court for attachment against the defendant's right to receive payments (referred to as a 'monetary claim') (Article 143 of the Civil Execution Act).

If the applicant is successful in obtaining attachment, the defendant's entitlement to the payments will commence one week from the day on which the order for attachment is served upon the defendant (Article 155, Paragraph 1 of the Civil Execution Act). If the defendant refuses to pay monies to the applicant, the applicant can file a suit for enforcement of the payment (Article 157 of the Civil Execution Act). The applicant can appropriate from the collected amount the unpaid amount of the applicant's claim and execution costs (Article 155, Paragraph 2 of the Civil Execution Act).

The applicant may also petition the court for an assignment order (Article 159, Paragraph 1 of the Civil Execution Act). If an assignment order is issued, the applicant's claim for money and execution costs will be deemed to have been performed in the amount of the face value of the defendant's attached claim for money, and the attached claim will be transferred from the defendant to the applicant at the time of service of the assignment order upon the defendant of the defendant's attached monetary claim (Article 160 of the Civil Execution Act).

When the seized claim for money is subject to a condition or has a due date, or when it is difficult to collect the claim since it relates to counter-performance, or on any other grounds, the court may, upon petition, choose other remedies including to issue an order (1) to transfer the claim to the applicant at the price specified by the court in lieu of payment; (2) that requires an execution officer to sell the claim by the method specified by the court in lieu of collection; (3) to appoint an administrator and order the administrator to conduct administration of the claim; or (4) to adopt any other reasonable method (Article 161, Paragraph 1 of the Civil Execution Act).

Other intangible property rights

If the target assets consist of any other property right (e.g., copyright, patents, electronic shares), except as otherwise provided, the rules for enforcement against monetary claims will apply *mutatis mutandis* (Article 167, Paragraph 1 of the Civil Execution Act).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Although there are no rules that specifically govern recognition of arbitral awards against foreign states, the Act on the Civil Jurisdiction of Japan with respect to a foreign state provides, *inter alia*, foreign states with immunity from the enforcement of arbitral awards

(Article 17, Paragraph 1 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.). See also questions 34 and 35 for more information.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Judicial documents

As stated in question 19, in relation to service by the court, there are several methods available. The method used will depend on the terms of the relevant treaty between Japan and the country in which the defendant is domiciled.

There are three main methods of service: (1) requesting the related foreign authorities to serve the documents; (2) serving the documents via the Japanese consulate; or (3) requesting the courts of the foreign country to effect service of the documents.

If there is no applicable treaty, the foreign state's agreement to serve documents is required.

Extrajudicial documents

There is no specific treaty or municipal law governing the service of extrajudicial documents.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Assets belonging to a foreign state are immune from enforcement of arbitral awards unless the foreign state agrees otherwise in a treaty or other international agreement, an arbitration agreement, or a written contract (Article 17, Paragraph 1 of the Act on the Civil Jurisdiction of Japan with respect to a Foreign State, etc.).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Yes – see question 34.

28

Kazakhstan

Lyailya Tleulina and Ardak Idayatova[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Requirements for the form of arbitral awards are set forth in Articles 45 and 47 of the Kazakhstan Law No. 488-V on Arbitration dated 8 April 2016 (the Law on Arbitration).

An arbitral award shall be issued in written form and signed by all arbitrators (sole arbitrator). If a signature of one of the arbitrators is absent, the reason for this shall be indicated in the arbitral award. An arbitrator adhering to a dissenting opinion is not required to sign, but the dissenting opinion shall be attached in writing to the arbitral award. The award enters into force from the date of its signing by the arbitrators (sole arbitrator).

An arbitral award shall contain the following information:

- date of rendering the award;
- seat of arbitration;
- composition of arbitral tribunal;
- substantiation of the arbitral tribunal's jurisdiction to resolve the matter;
- names of the parties to a dispute, titles of the parties' representatives and a description of their authorities;
- description of the claimant's claims and the defendant's objections;
- merit of a dispute;
- facts and circumstances as established by an arbitral tribunal; evidence in support of the established facts and circumstances; the laws based on which the arbitral tribunal renders its award;

1 Lyailya Tleulina and Ardak Idayatova are associates at Aequitas Law Firm.

- arbitral tribunal's conclusions on satisfying or rejecting each of the stated claims;
- amount of arbitration costs and allocation of costs between the parties; and
- time and procedure for execution of an arbitral award, if required.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Under Article 50 of the Law on Arbitration, either party has the right to apply to an arbitral tribunal with a request to correct typographical and other errors in an arbitral award within 60 calendar days of the date of receiving the award, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

If the arbitral tribunal finds the request substantiated, it shall modify the arbitral award within 30 calendar days, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

The arbitral tribunal has the right to modify an arbitral award on its own initiative within 60 calendar days of the date of rendering the award, unless another term is agreed by the parties or provided for by the rules of a respective arbitration institute.

Also, within 60 calendar days of the date of receiving an award, the parties may file a request for rendering an additional arbitral award with regard to claims that are not reflected in the award. If the arbitral tribunal finds the request to be substantiated, it shall modify the arbitral award within 60 calendar days.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Kazakhstan legislation does not provide for appealing against an arbitral award.

An arbitral award may be set aside by a Kazakhstan court. An applicant for set-aside must submit the evidence to the court that:

- the arbitral award contains a decision on the matter not contemplated by or not falling within the terms of the arbitration agreement, or it contains a decision on the matters beyond the scope of the arbitration agreement, or a dispute is not within the jurisdiction of the arbitral tribunal. If an arbitral award on the matters falling within the terms of an arbitration agreement may be separated from an arbitral award on matters beyond that agreement, a court cannot refuse rendering an enforcement order (writ of execution) for enforcement of that very part of the arbitral award falling within the terms of the arbitration agreement;
- the court has considered one of the parties to the arbitration agreement as legally incapable, or an arbitration agreement is invalid under the law that the parties selected as the governing law of the arbitration agreement, and, in the absence of such choice, under the law of the Republic of Kazakhstan;

- a party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings, or was otherwise unable to provide its explanations under the circumstances admitted by the court as reasonable;
- the composition of the arbitral tribunal or the arbitral procedure is not in accordance with the agreement of the parties or, in the absence of such an agreement, is not in accordance with the Law on Arbitration; or
- a court decision, or an arbitral award that has entered into legal force, had been rendered in a dispute between the same parties, on the same subject matter and for the same reasons, or a court or an arbitral tribunal terminated the proceedings in connection with the abandonment or relinquishment of the claim by the plaintiff.

An arbitral award may also be set aside if the court finds that enforcement of the award contravenes the public policy of Kazakhstan, or the dispute, in respect of which the arbitral award was made, is not arbitrable in accordance with Kazakhstan legislation.

An application to set aside an arbitral award could be submitted to a Kazakhstan court within one month of the date of its receipt. The court duty shall be paid when submitting the application. With respect to proprietary claims, the amount of the state duty is 1.5 per cent for legal entities and 0.75 per cent for individuals. In relation to non-pecuniary claims, the amount of the state duty is about 631 tenge.

An application for setting aside an arbitral award shall be considered by the court within 10 business days (this term to be extended in some exceptional cases). Upon consideration of the application, the court renders a ruling on setting aside the arbitral award or rejecting the application submitted. The court ruling could be appealed to a higher instance court within 10 days and enters into force on the date of expiry of the period for appeal or on the date of rendering a decision by a higher instance court.

The rulings rendered by the first instance court and the appellate court could be further appealed to the Supreme Court of Kazakhstan, provided that the amount of claim under the arbitral award exceeds the threshold of approximately 5.05 million tenge for individuals or approximately 75.75 million tenge for legal entities.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Foreign arbitral awards are recognised and enforced in accordance with the international treaties to which Kazakhstan is a party, the Civil Procedure Code No. 377-V dated 31 October 2015 (CPC) and the Law on Enforcement Proceedings and Status of Court Enforcement Officers.

Kazakhstan is a party to the New York Convention, European Convention on International Commercial Arbitration (Geneva, 1961) and the Convention on the Settlement of Disputes (the ICSID Convention).

Domestic arbitral awards are recognised and enforced in accordance with the CPC, the Law on Arbitration and the Law on Enforcement Proceedings and Status of Court Enforcement Officers.

The Arbitration Law may also apply to the procedure for recognition and enforcement of foreign arbitral awards, if the seat of the arbitration is the Republic of Kazakhstan and the parties agreed that an arbitration agreement will be governed by the laws of the Republic of Kazakhstan.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Kazakhstan is a party to the 1958 New York Convention, which entered into force on 18 February 1996 (according to the Convention status published online by UNCITRAL at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html). Under Article I(3), Kazakhstan applies the Convention only to recognise and enforce awards made in the territories of other contracting states.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Pursuant to the CPC, disputes the parties to which are legal entities or individuals engaging in entrepreneurial activities without forming a legal entity (individual entrepreneurs) fall within the jurisdiction of specialised inter-district economic courts. Disputes in which at least one party is an individual not engaging in entrepreneurial activities are to be reviewed by district courts of general jurisdiction.

The territorial jurisdiction of arbitral award enforcement application is dependent on the place of residence (individual debtor) or the location of the main organisation (legal entity debtor). If the debtor's place of residence or location is unknown, the application is to be filed with a court according to the location of the property. The CPC also sets forth that applications may be filed at the place of the dispute review by arbitration (which may be the case if the place of dispute review was Kazakhstan).

The jurisdiction rules apply to both local and foreign arbitral awards.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Pursuant to the CPC, an applicant may apply to court at the location of the debtor's assets if the debtor's location is unknown. In this case, the applicant should provide documents to support the fact that the debtor's assets are located in the territory of the Republic of Kazakhstan (e.g., extracts from the register of shareholders or a certificate of registered rights to immovable property).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are adversarial. The parties are informed of the place and time of the court hearing. However, their failure to attend court does not prevent the review, unless the debtor motions for postponement and provides valid reasons for why it was not possible to attend.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The party applying for recognition and enforcement of an arbitral award must submit to the competent court the authenticated original award, or a duly certified copy thereof, and the original arbitration agreement (agreement including an arbitral clause), or a duly certified copy thereof. It is necessary to submit one copy of each of these documents.

The New York Convention does not define 'duly certified copy', but we believe it to be a copy certified by the arbitration having rendered the award, or a notarised copy.

Pursuant to Article 475 of the CPC, documents issued, compiled or certified by the competent authorities of foreign states, which are executed outside Kazakhstan according to the laws of foreign states, are accepted by courts if they are consular legalised, unless otherwise provided for by an international treaty. Kazakhstan is a party to the Hague Convention Abolishing the Requirement of Legalization for Foreign Public Documents of 5 October 1961, under which documents compiled and certified by the competent authorities of a contracting states do not require consular legalisation, an apostil being sufficient. Hence, if a copy of a foreign arbitral award is notarised, for submission to a Kazakh court, it would suffice to apostil the notarised copy of the award.

As regards domestic arbitral awards, according to the CPC, it is necessary to submit to court a notarised copy of an award by an *ad hoc* arbitral tribunal. If an award was issued by a constantly functioning arbitral tribunal, the award copy may be certified by the head of that arbitral tribunal.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the required documents are drawn up in a foreign language, the party must provide a duly certified translation of the documents into the Kazakh or Russian (which is used, if necessary, alongside Kazakh). The language of judicial proceedings is established by the court ruling, depending on the language of the application filed in court. Thus, if the application for arbitral award enforcement is made in Russian, the applicant must provide a Russian translation of the foreign language documents attached to the application.

There are no sworn translators in Kazakhstan. A translation may be prepared by any translator possessing a relevant qualification. The submitted translation normally contains the translator's signature, the authenticity of which is notarised, although there is no such requirement in the Kazakhstan legislation. As a rule, documents submitted to court must be translated in full.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An application for recognition and enforcement of an arbitral award must include a document confirming payment of the state duty; in 2019, the duty is 12,625 tenge.

The application for arbitral award enforcement may be filed within three years of the date of expiry of the term for its voluntary performance. This gives rise to a question of how to determine the voluntary performance term, if it is not specified in the arbitral award. If the award or the rules of arbitration lack provisions setting the term for voluntary or immediate performance of the award, it would be expedient if the party, once it receives the full text of the award rendered in its favour, submits to the other party a written proposal to perform the award voluntarily, specifying a reasonable term for the same.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Article V of the New York Convention implies in its essence that only arbitral awards rendered on the dispute merits and upon completion of arbitration proceedings are subject to enforcement. According to Article 501 of the CPC, Kazakhstan also recognises and enforces arbitral awards (resolutions, rulings) approving an amicable agreement.

The Kazakhstan legislation does not regulate the procedure for recognition of partial or interim awards. At the same time, the identified single cases in judicial practice do not allow for completely excluding the practical likelihood of the recognition and enforcement of partial or interim awards.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The CPC provides for a greater number of grounds for refusing recognition of the award than stipulated by the New York Convention. In addition to the grounds provided for by Article V of the Convention, a court may refuse recognition and enforcement of an arbitral award if a party, against which the arbitral award was rendered, submits evidences that:

- there is an effective court decision or arbitral award rendered under a dispute between the same parties, with respect to the same subject and on the same grounds, or a court or arbitration ruling on termination of proceedings in the case in connection with the claimant's abandonment of the claim; or
- rendering of an arbitral award became possible following the commitment of a criminal offence established by a court sentence, which took legal effect.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The court ruling on recognition and enforcement of an arbitral award is subject to immediate enforcement. The court issues an enforcement order, which is the basis for instituting the enforcement proceedings. Further, the arbitral award is enforced by the enforcement agencies.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision refusing to recognise an arbitral award may be appealed in the appellate instance court. If the appellate court dismisses the appeal, the judicial act issued by the appellate court may be appealed under the cassation procedure.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The procedure for recognition and enforcement of arbitral awards is not the action proceedings; therefore, the Kazakhstan legislation provides for an extremely short timeline for this procedure, equal to 15 business days from the date the court accepts an application.

The judicial acts issued under this procedure are not always published and we cannot investigate the trends suggested by recent decisions. Based on the firm's experience, the court did not suspend the recognition or enforcement proceedings, although a party filed an application for suspension, referring to the annulment proceedings at the seat of the arbitration. Subsequently, the arbitral award under this case was annulled, after which the Kazakh court annulled its ruling on enforcement of the arbitral award upon the concerned party's application.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The Kazakhstan legislation does not provide for any security measures when considering applications for recognition or enforcement of arbitral awards.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

If a party submits evidence that an arbitral award was fully set aside, the court will refuse to recognise and enforce it. Should the award be partially set aside, the court will recognise and enforce the part that remains in force.

The CPC provides for the grounds for reconsideration of judicial acts under newly discovered circumstances. These include a decision being set aside, which serves as a basis for issuing a judicial act. If an award is set aside after the decision recognising the award has been issued, the party concerned may file an application to court for reconsideration under newly discovered circumstances of the ruling on recognition and enforcement of the award. An application must be filed within three months of the date the award was set aside.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Extrajudicial and judicial documents are generally served in Kazakhstan via a courier service with confirmation of delivery.

According to the CPC, a defendant is notified about a court hearing by way of a notification letter sent by recorded delivery, or a telegram or telephone message or other

means of communication whereby the time of delivery can be fixed. Kazakhstan courts have started to notify parties about the date of a court hearing by sending emails or messages to mobile phones.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Kazakhstan legislation does not provide for a particular procedure for service of extrajudicial and judicial documents to a defendant outside Kazakhstan.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

The only publicly available database is the electronic register of Kazakhstan's legal entities. This database allows public access to information about participation of a company or an individual in legal entities registered in Kazakhstan (except for joint-stock companies with a large number of shareholders).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

It is not possible to obtain information about a debtor's assets at the recognition and enforcement stage of an arbitral award. Disclosure of such information through judicial proceedings is possible during the arbitration proceedings by applying to the court for the adoption of interim or provisional measures (in most cases, provisional measures are adopted in the form of seizure or attachment of the debtor's property). Information about a debtor's assets may also be disclosed during the enforcement proceedings by court enforcement officers (once the award is recognised by court).

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures against the assets of a debtor are available either during the arbitration proceedings by applying to the court, or at the enforcement stage of an arbitral award, by court enforcement officers, after the award has been recognised by the court and the relevant court ruling on enforcement has been rendered.

Under Article 492 of the CPC, award creditors may apply interim measures against assets owned by a sovereign state if:

- the state has expressly consented to the taking of such measures as indicated;
  - by international agreement;
  - by an arbitration agreement or in a written contract; or
  - by a declaration before the court or a written communication after a dispute between the parties has arisen; or
- the state has allocated or earmarked property for the satisfaction of the claim that is the object of that proceeding; or
- the state either uses the property in Kazakhstan, or the property is designated, for purposes other than for the performance of sovereign power.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

According to the CPC, the Kazakhstan court may apply provisional measures upon the claimant's application, if failure to take such measures may hinder the enforcement of a judgment or even make it impossible.

The CPC provides for the following provisional measures:

- freezing money or other property of the defendant;
- prohibiting certain actions by the defendant;
- prohibiting other persons from carrying out obligations to the defendant as stipulated by legislation or contract (e.g., transferring disputed property to the defendant or registering rights thereto);
- suspending the sale of property, if a claim for the release of that property is filed; and
- suspending debt recovery on the basis of a writ of execution that is disputed by the applicant.

This list is not exhaustive. The court may also apply other measures, depending on the merits of the dispute, including applying several measures at one time.

The court considers an application for security of a claim without notifying the defendant. The parties may appeal to a superior court against a court ruling on application of provisional measures or on refusal to apply such measures. The term for bringing an appeal is 10 business days from the date the court issues a ruling in its final form or from the date when a party becomes aware of the ruling. Filing an appeal to a superior court does not suspend the court ruling on the application of provisional measures.

Arrests (freezing) of money or other property owned by the defendant are most often applied in Kazakhstan when considering commercial disputes.

A court ruling on the adoption of interim or provisional measures is subject to enforcement by court enforcement officers, whose function is to identify a defendant's property and to send the court ruling on attachment to the relevant authorities for execution.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure for interim measures against immovable property is same as discussed in question 24. A court ruling on the attachment of a defendant's immovable property is to be sent by the court enforcement officer to the Ministry of Justice; the latter records the relevant encumbrances on the immovable property register.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for interim measures against movable property is same as discussed in question 24. A court ruling on the attachment of a defendant's movable property is to be sent by the court enforcement officer to the relevant registration authorities for recording the relevant encumbrances on the appropriate register (concerning shares, participatory interest, motor vehicles, etc.).

Further, arrested movable property may be withdrawn by the court enforcement officer or a defendant may have restricted use of the arrested property.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for interim measures against intangible property is same as discussed in question 24. If intangible property is subject to registration (e.g., IT rights), the relevant encumbrances are recorded on the appropriate register, based on the relevant court ruling.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Kazakhstan law does not distinguish between interim measures and attachment proceedings. The law provides for provisional measures – see question 24. The procedure for adopting provisional measures is the same for all types of measures.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

See question 25.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See question 26.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See question 27.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no rules in Kazakhstan that specifically govern recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Since Kazakhstan has ratified the UN Convention, the procedure provided for by Article 22 of the Convention applies to service of judicial documents to a foreign state.

Article 499 of the CPC provides that service of notices and other judicial documents to a foreign state is performed through diplomatic channels. The documents are deemed to be served on the date of their receipt by the relevant foreign affairs authority of the state.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

It is not sufficiently clear whether a foreign state enjoys immunity from enforcement of arbitral awards.

Article 482 of the CPC provides that by concluding the arbitration agreement, the foreign state voluntarily waives judicial immunity regarding issues associated with implementation of the functions relating to arbitration by Kazakhstan courts. Enforcement of an arbitral award requires adoption of a relevant court ruling on recognition and enforcement by a Kazakhstan court. This could lead to a conclusion that when recognising and enforcing an arbitral award against a foreign state, the Kazakhstan court implements its functions relating to arbitration, whereby the foreign state is not immune from enforcement.

Kazakhstan legal practitioners support this position, under which conclusion of an arbitration agreement means that the foreign state waives immunity from enforcement of the arbitral award (see Suleimenov MK and Osipov E, *Immunity of International Organizations*, https://online.zakon.kz/Document/?doc_id=31115410#pos=50;19 (in Russian)).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

As discussed in question 31, it is not sufficiently clear whether a foreign state enjoys immunity from enforcement of arbitral awards. To secure creditors' interests, we would recommend that an arbitration agreement should explicitly provide that a foreign state waives its immunity from enforcement of a future arbitral award.

29

Korea

Sae Youn Kim and Andrew White[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Article 32 of the Korean Arbitration Act (KAA) governs the form of arbitral awards in Korea. An arbitral award shall be in writing and signed by all arbitrators. In addition, an arbitral award shall state the reasons on which it is based as well as the date and place of the arbitration. An authentic copy of the award made and signed in accordance with the foregoing shall be delivered to each party involved.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The correction or interpretation of an award is governed by Article 34 of the KAA.

Correction upon parties' request

Within 30 days of receipt of the authentic copy of an arbitral award, each party may request that the arbitral tribunal (1) correct any errors in computation, any clerical or typographical errors or any errors of a similar nature, (2) give an interpretation of a specific point of or part of the award, if so agreed by the parties, or (3) make an additional award as

1 Sae Youn Kim is a partner and Andrew White is a senior foreign counsel at Yulchon.

to claims presented in arbitral proceedings but omitted from the award. The arbitral tribunal should decide within 30 days (as regards points (1) and (2), above) or 60 days (as regards point (3), above) of receipt of the request.

Correction at the discretion of the arbitral tribunal

The arbitral tribunal may, *ex officio*, correct any errors in computation, any clerical or typographical errors or any errors of a similar nature within 30 days of the date of the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An award, domestic or foreign, cannot be appealed to the courts. The only way for a party to challenge an award is to file a lawsuit with the court for setting aside the award within three months of the date on which the party received an authentic copy of the award (Article 36(1) and (3), KAA).

A domestic award can be set aside by the court when the party seeking set-aside of the award (the challenging party) proves that (1) the underlying arbitration agreement is invalid or any party to the arbitration agreement was under some incapacity under the law applicable to it; (2) the challenging party was not given proper notice of the appointment of arbitrators, or other arbitral proceeding; (3) the subject matter of the award dealt with matters outside the scope of the arbitration agreement; or (4) the composition of the arbitral tribunal or arbitral proceedings were not in accordance with the agreement between the parties or the KAA. The court may also set aside an award when it finds on its own initiative that the subject matter of the dispute is not arbitrable under the laws of Korea, or the award is in conflict with the good morals and other forms of social order of Korea (Article 36(2), KAA).

A foreign award can be set aside according to the laws of the place of the arbitration and by the court thereof.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The recognition and enforcement of arbitration proceedings in Korea is governed by the KAA, and by treaties ratified by Korea such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Since amendments to the KAA entered into effect, on 30 November 2016 (Act No. 6083 of 1999 as amended by Act No. 14176 of 2016), the KAA closely follows the language of the 2006 UNCITRAL Model Law. Among other things, the 2016 amendments

to the KAA further simplify the recognition and enforcement process. That is, the process of recognition and enforcement will be carried out in the form of a court order (rather than a formal judgment), encouraging more expeditious enforcement proceedings.

Although there have not been many cases on recognition or enforcement of arbitral awards since the amendments have taken effect, in light of the few cases so far, it appears that the courts are attempting to expedite the process and swiftly render their orders. Notably, a district court has recently decided to recognise and enforce a foreign arbitral award as swiftly as within three months of the application, despite an annulment proceeding that was pending at the seat of the arbitration outside Korea (Changwon District Court Decision No. 2017 Kagi824 rendered on 24 August 2017).

Korea is a party to the 1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) and to multiple regional or bilateral investment promotion and protection agreements that guarantee enforcement of arbitral awards relating to the disputes between a host country and an investor. Therefore, foreign arbitral awards, including ICSID awards that are subject to these Conventions, are recognised and enforced in Korea in accordance with these Conventions.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes, Korea acceded to the New York Convention on 8 February 1973 and the Convention entered into force in Korea on 9 May 1973. Korea has made reservations for both reciprocity and commercial relationships. As a result of these two reservations, an award is treated as a New York Convention award under the KAA only if it was rendered in a country that is also a party to the New York Convention and it involves a commercial dispute as determined by Korean law. This apparent limitation is not so relevant in practice, however, as the vast majority of foreign arbitral awards presented for enforcement in Korea are rendered in countries that are parties to the New York Convention and concern commercial matters. Furthermore, awards rendered outside Korea that are not subject to the New York Convention may still be enforced in Korea under Article 39(2) of the KAA.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The Korean judiciary is based on a three-tier court system. There are no separate courts that handle the recognition and enforcement of arbitral awards. Thus, the first instance courts that have jurisdiction in accordance with Article 7(4) of the KAA (see question 7) will have jurisdiction over the recognition and enforcement of both domestic and foreign arbitral awards.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Under Article 7(4) of the KAA, an application for the recognition and enforcement of an arbitral award (both domestic and foreign) shall be filed with any of the following courts, as appropriate: a court designated by arbitration agreement; or a court that has jurisdiction over (1) the place of arbitration, (2) the place where a respondent's property is located, (3) a respondent's domicile or place of business, (4) a respondent's place of abode if neither the domicile nor place of business can be found, or (5) a respondent's last known domicile or place of business if his or her place of abode cannot be found.

The applicant need not identify assets within the jurisdiction of the court unless he or she files the application based upon subparagraph 3 of Article 7(4) of the KAA (jurisdiction over the place where respondent's property is located).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings in Korea are adversarial although, under the 2016 KAA, a formal hearing, at which each party should present its arguments, is no longer required. However, the court may summon the parties to a brief hearing at its discretion, when the court would ask questions necessary for rendering its order, depending on the level of complexity of the case. Although there have not been many cases since the 2016 KAA has taken effect, it appears that the number of hearings is usually limited to one.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Under Article 37(3) of the KAA, an application to obtain a recognition order must be filed before the relevant competent court, accompanied by the original award, or a copy thereof, and, if the award is made in a foreign language, a translation of the award in Korean. The arbitral award does not have to be duly certified or authenticated, and the Korean translation of the award does not have to be duly certified.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the award is made in a foreign language, a translation of the award in Korean must be filed with the application.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

As well as the written application and the required documents, the applicant must submit a receipt for payment of the service of the process fee and the stamp fee, and, if the party has appointed legal counsel to act on its behalf, a document evidencing power of attorney.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Korean courts recognise and enforce partial or interim awards.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Korean courts have advanced a strong pro-arbitration policy. They will refuse recognition or enforcement of arbitral awards only if one of the grounds for refusal of enforcement of the KAA (for domestic awards) or Article V of the New York Convention (for foreign awards) exists. The grounds for the refusal of enforcement provided by the KAA are almost identical to those provided by Article V of the Convention, except that there is no provision corresponding to Article V.1(e). It should also be noted that Korean courts have narrowly interpreted the grounds for refusal of enforcement and have only refused recognition of arbitral awards on very rare occasions. Most notably, the Supreme Court has held in a 2018 enforcement proceeding that an arbitral award ordering the losing party to pay a daily monetary penalty for non-performance of an injunctive order, which is not allowed in judgments on merits under the Civil Execution Act, was not against Korean law or public policy (Supreme Court Decision No. 2016Da18753 rendered on 29 November 2018). This decision clearly shows that the Korean courts are strongly inclined to recognise and enforce arbitral awards, except in exceptional cases.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Under Article 35 of the KAA, an order recognising an arbitration award confirms that the arbitration award has the same effect as a final and conclusive court judgment. Thus, if the court recognises an arbitral award, it will have *res judicata* effect. The award will not become automatically enforceable as a result, however, and a separate enforcement order is necessary (Article 37(2), KAA). The party seeking enforcement can seek both recognition and enforcement in one action. When the court issues an order for recognition or enforcement, or both, of an arbitration award, it must include the grounds for its decision, although it may choose to only include the basic grounds, if it did not hold oral hearings (Article 37(5), KAA).

Challenges against an order recognising an arbitral award can be made through an immediate appeal (Article 37(6), KAA). When an order is rendered by the first instance court, the losing party may appeal the order by submitting a petition of appeal within one week of being notified of the order (Article 444(1) of the Korean Civil Procedure Code (KCPC)). The appellate decision is also subject to further appeal to the Supreme Court, which must be filed within one week of the notification of the lower appellate decision. However, a further appeal to the Supreme Court may be filed only when a violation of the Constitution, laws or regulations has affected the lower appellate decision (Article 442, KCPC).

While an immediate appeal does not have the effect of suspending execution of the enforcement order, the appellate court may still suspend execution, either with or without requiring the losing party to post security, or allow execution by requiring the prevailing (i.e., enforcing) party to post security (Article 37(7), KAA).

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Challenges against a decision refusing to recognise an arbitral award can be made in the same way as challenges against a decision recognising an arbitral award, that is, by way of immediate appeal (Article 37(6), KAA) and further appeal (Article 442, KCPC).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

There is no explicit rule in Korea that regulates a situation in which an annulment proceeding is still pending at the seat of the arbitration and a proceeding seeking recognition

or enforcement is simultaneously sought in Korea. The Korean court has the discretion to adjourn the recognition or enforcement proceeding when an annulment proceeding is pending at the seat of the arbitration. The court also has discretion to suspend the recognition or enforcement proceeding by not setting the next hearing date until the annulment proceeding has been finalised. In deciding whether to adjourn or suspend a proceeding to recognise or enforce an award, the court will consider factors such as the likelihood of annulment and the likelihood of a party suffering irreparable damages if the award is annulled at the seat of the arbitration after the court has recognised or enforced the award.

However, it is notable that a Korean court recognised and enforced a foreign arbitral award while an annulment proceeding as pending at the seat of the arbitration, in Finland. Despite the fact that the annulment proceeding was pending in Helsinki District Court, Changwon District Court swiftly decided to recognise and enforce the arbitral award (Decision No. 2017Kagi824 rendered on 24 August 2017).

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

In the case of foreign awards governed by the New York Convention, it is possible to order security in accordance with Article VI of the Convention. However, it rarely happens in practice.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Domestic awards

If an award had been set aside, one cannot obtain recognition and enforcement of the award. The grounds for setting aside an award under the KAA are the same as those for refusing recognition or enforcement and, therefore, enforcement of such an award will be refused.

Foreign awards governed by the New York Convention

According to Article V.1(e) of the New York Convention, the fact that the award has been set aside at the seat of the arbitration may qualify as a ground to reject the recognition or enforcement of the award. There is no record of a Korean court granting enforcement of such an award.

Foreign awards not governed by the New York Convention

Foreign awards not governed by the New York Convention should fulfil the requirements of recognition according to Article 217 of the KCPC. An award that has been set aside at the seat of the arbitration could be rejected for any of the following grounds: (1) the award is not a final and conclusive judgment; (2) recognition or enforcement of the award violates the public policy of Korea; and (3) there is no mutual guarantee.

Appealing the recognition or enforcement order when the award has been set aside after the decision of recognition or enforcement of the award

If the order recognising or enforcing the award has not been finalised, one can appeal to a higher court by way of immediate appeal or further appeal. If the recognition or enforcement order has been finalised, one can only apply for a quasi-retrial (Article 461, KCPC).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

There is no particular procedure regarding service of extrajudicial documents.

As for the service of judicial documents, Korean courts handle service of process and arrange delivery of judicial documents.

Service is made directly upon the recipient by registered mail delivery to his or her residence or place of business. One may also obtain service of process by delivering the document to a representative or an employee of the recipient at his or her residence or office, delivering the document directly to the recipient at the court hearing, posting in the Official Gazette, or serving the party electronically by allowing the document to be accessed through the court website (Articles 187 to 196, KCPC).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Korea is a signatory to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the 1965 Hague Convention), and to bilateral treaties regarding judicial assistance in civil and commercial matters with Thailand, Uzbekistan, Mongolia, China and Australia. In addition, the Act on International Judicial Mutual Assistance in Civil Matters (the Judicial Assistance Act) specifically provides for service if the relevant country is neither a member of the 1965 Hague Convention nor a party to any bilateral treaties with Korea. The Judicial Assistance Act can also be applied on a supplementary basis to service in Member States of the 1965 Hague Convention. Under certain circumstances, the KCPC is also applied, but usually on a supplementary basis.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Real estate, automobiles, vessels, airplanes and intellectual property rights are registered with a publicly available registry. Thus, ownership or security rights for such assets may be verified by checking the public record. However, as such registrations are not classified by the owner but are separately prepared for each property, one cannot identify the award debtor's assets by checking the debtor's name on the public records. Therefore, a creditor must first identify an award debtor's assets by other means.

A creditor can hire an asset investigation company to identify a debtor's assets registered on the publicly available registry, including real estate, automobiles, vessels, airplanes and intellectual property rights and the existence of any bank accounts. However, an asset investigation company cannot identify the actual value of such properties or the balance on a debtor's bank account.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

According to Article 61 of the Korean Civil Execution Act (KCEA), when an enforcement order is finalised, the winning party may file a request for specification of the debtor's property with the first instance court that has jurisdiction over the award debtor's domicile, residence, office or property.

A proceeding on the request for specification of a debtor's property will be a written proceeding, without a hearing date or questioning of the debtor.

When such a request is granted by the court and the court orders the debtor to specify the property, the court will also fix the date for specifying the property and ask the debtor to appear on that date. According to Article 64(2) of the KCEA, the debtor must appear before the court on the date set and submit a list of the properties subject to a compulsory execution, as well as the following matters: non-gratuitous transfer of immovable properties performed by the debtor within one year before the service of an order to specify the property; onerous transfer of properties other than the immovable properties performed by the debtor to the family or relatives within one year before the service of an order to specify the property; and gratuitous disposition in respect of property performed by the debtor within two years before the service of an order to specify the property.

The award debtor should also take an oath on the date of specifying property that the content of the property list is correct.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Three types of interim measures against assets are readily available through the courts: preliminary attachment, preliminary injunction on property under dispute and preliminary injunction to set preliminary status.

In addition, recent amendments to the KAA adopted all the interim measures available under the UNCITRAL Model Law on International Commercial Arbitration 1985, except for preliminary orders. Under Article 18-7 of the KAA, any party seeking recognition of an interim measure ordered by an arbitral tribunal may file an application with a court asking it to approve the interim measure. A party seeking to enforce an interim measure also may file an application asking a court to confirm the interim measure's enforceability. Further, Article 18-8 of the KAA prescribes an exhaustive list of limited circumstances in which recognition or enforcement of an interim award may be refused.

Assets owned by the Korean government may be classified as either administrative or general property, depending on the purpose of use. Administrative property is for official or public use, while general property is any state property other than administrative property.

Interim measures against administrative property are not available, while interim measures against general property are permitted. For interim measures against general property, however, 'an urgent need for preservation' must be proven. If a creditor is seeking satisfaction of his or her monetary claim in a preliminary attachment against general property, as the debtor is the Korean government, the requirement of 'an urgent need for preservation' is not easily satisfied.

Administrative property of foreign states is subject to diplomatic privilege. Thus, it would be difficult to obtain any interim measures affecting such property. Theoretically, general property of a foreign state is subject to interim measures, but as with general property of the Korean government, it is difficult to satisfy the requirement of 'an urgent need for preservation, if the creditor is making a monetary claim.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Prior court authorisation is not required to apply interim measures. As stated in question 23, there are three types of interim measures available in Korea.

Preliminary attachment

Preliminary attachment is used to preserve a monetary claim. Assets subject to a preliminary attachment include real estate, accounts receivable and chattels. The requirements for a

preliminary attachment are the probability of success in the case on merits and an urgent need for preservation of the assets to be attached.

To obtain a preliminary attachment, an applicant must file an application with the district court having jurisdiction over the location of the assets to be attached, or the court having jurisdiction over the merits. The attachment application will be reviewed and determined on an *ex parte* basis. Usually, the court will require the submission of security (in cash or surety bonds) before issuing an attachment order.

Preliminary injunction on property under dispute

This type of preliminary injunction is used to preserve a direct claim on properties under dispute (real estate, account receivables, chattels, and so on). The requirements are the probability of success in the case on the merits of the underlying dispute and an urgent need for preservation of the assets under dispute.

As with preliminary attachments, an applicant seeking a preliminary injunction must file an application with the court with jurisdiction over the merits of the underlying claim or the district court with jurisdiction over the location of the property under dispute. The application for injunction will be reviewed and determined on an *ex parte* basis, and usually the court will require the submission of security (in cash or surety bonds) before issuing an injunction order.

Preliminary injunction to set preliminary status

This type of preliminary injunction is used to preserve various claims when specific performance or injunctive relief is sought. The requirements are the probability of success on the merits of the underlying claim and an urgent need for preservation, including irreparable harm. The threshold for the second requirement is very high.

To obtain a preliminary injunction to set preliminary status, an applicant must file an application with the court with jurisdiction over the merits of the underlying claim or the district court with jurisdiction over the location of the objects in dispute. The application for this preliminary injunction will be determined after the court has heard from both parties. The court will usually require the submission of security (in cash or surety bonds) before issuing an injunction order. When ordering certain specific performance or injunctive relief, the court may also order indirect compulsory performance (i.e., an order to pay a daily monetary penalty for non-performance of an injunctive order, to compel compliance with the order).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

See question 24. Interim measures are categorised by purpose, not by the type of assets against which the interim measures are applied.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings ex parte?

When an enforcement order has become final and conclusive, or when there is a declaration of provisional execution, the prevailing party can get a writ of execution on an authentic copy of the order.

With the writ of execution, a party can commence a procedure for compulsory enforcement by commencing attachment proceedings on relevant assets. These proceedings are *ex parte*, but debtors are allowed to raise objections after attachment.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

There are two types of enforcement measures against immovable property in Korea:

- compulsory auction is a way of obtaining satisfaction by selling the property; and
- compulsory administration is a way of obtaining satisfaction by taking advantage of the property (by using the property).

In practice, a creditor rarely exercises compulsory administration. A creditor may opt to have execution effected by either of these measures, or by concurrently exercising both. A court will attach the property when it orders the compulsory auction or the compulsory administration.

Attachment against movable property

30 What is the procedure for enforcement measures against moveable property within your jurisdiction?

An execution officer should, after attaching the movable property, make a sale of the attached objects by bidding or by means of a quoted auction, and deliver the proceeds to

the creditor (Article 199, KCEA). However, seized money should be delivered directly to the creditor (Article 201, KCEA).

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

A winning party can attach an obligor's accounts receivable by submitting an enforcement application to the court. The attachment order is then sent to a third party debtor of the obligor. As well as the attachment order, the winning party can seek either (1) an order for collection on behalf of the obligor (in which case the winning party will collect the obligor's claim and report it to the court for distribution among creditors), or (2) an order for transfer of the claim (in which case the claim will be transferred to the winning party as a payment under the enforcement).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There is no general provision under Korean law governing the recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Korean law does not address the applicable procedure for service to a foreign state (see question 17).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

A foreign state (or assets belonging to it) is considered, in general, to be immune from the jurisdiction of Korean courts unless (1) the state explicitly consented to jurisdiction of the Korean courts or waived its immunity from jurisdiction in an international treaty, an arbitration agreement, any other written agreement, or by an oral statement made before the Korean courts, or (2) the proceedings relate to private acts (e.g., commercial transaction) and not sovereign acts (Supreme Court Decision No. 97Da39216 rendered on 17 December 1998).

In 2011, the Supreme Court (Decision No. 2009Da16766 rendered on 13 December) further opined that Korean courts:

> *can exercise jurisdiction with a foreign country as defendant, except when there are special circumstances, such as the judicial act in question falling under the scope of or bearing close relation to the sovereignty of the foreign country, thus posing the risk of unfairly interfering with the sovereignty of the foreign country.*

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive its immunity from enforcement in Korea, though there are no special requirements. A foreign state may waive its immunity from jurisdiction by explicitly expressing its waiver in a written arbitration agreement, in an international treaty, in any other written agreement, or in an oral statement.

30

Malaysia

Cecil W M Abraham, Aniz Ahmad Amirudin and Syukran Syafiq[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

For an award to be enforceable, an award must comply with the provisions of Section 33 of the Arbitration Act 2005 (the Act). Pursuant to Section 33 of the Act, an award must be in written form and signed by the arbitrator. In respect of an award by a larger tribunal, the award need only be signed by the majority, although for clarity and prudence, all members are advised to sign the award. In the same vein, reasons must be provided for any absent signatures. An award must also furnish the reasons upon which it is based. Exceptions lie where there is an agreement to the contrary between parties or the award is a consent award. Further, the award must be dated and the seat of arbitration stated.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Upon receipt of an award, parties to arbitration proceedings will be afforded a 30-day window to bring forth any requests for correction, interpretation or for additional awards

1 Cecil W M Abraham is a senior partner, Aniz Ahmad Amirudin is a partner and Syukran Syafiq is an associate at Cecil Abraham & Partners.

to be made, as the case may require. The relevant provisions are contained in Section 35 of the Act.

Correction

A party may bring to the arbitral tribunal's attention any accidental slips in the award (i.e., computation, clerical or typographical errors) and request that the tribunal rectify the matter. In appropriate cases, the arbitral tribunal will grant a 'corrective award' to effect the necessary changes.

Interpretation

A party may request the arbitral tribunal to give an interpretation of a specific point or part of an award to resolve any areas of ambiguity. As a prerequisite, the other party must agree to the same. The arbitral tribunal will then make an 'interpretative award' to address and resolve the ambiguity.

Additional awards

A party may request the arbitral tribunal to make an additional award for claims omitted from the award. If the arbitral tribunal considers such a request to be justified, it will make the additional award within 60 days of receipt of the request.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

The Malaysian courts have consistently demonstrated judicial adherence to the non-interventionist approach with respect to arbitral awards. This is to promote the finality of awards in accordance to legislative intent. Parties who have elected to resolve their disputes via arbitration are prohibited from resiling from their undertaking and seeking alternative remedies in a court of law. As such, stringent standards have been set up in the face of any applications concerning the setting aside of an arbitral award.

In the past, parties could apply to either set aside an arbitral award pursuant to Section 37 of the Act or refer to the High Court any question of law arising out of an award pursuant to Section 42 of the Act. The latter, dubbed 'an appeal in all but name', gave rise to considerable difficulties in the administration of justice where the distinction between questions of law and fact became muddied. The provision under Section 42 of the Act was eventually repealed by the Arbitration (Amendment) (No. 2) Act 2018 (which came into force on 8 May 2018) in an attempt to counter the Federal Court's wide-ranging interpretation in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang and other appeals* [2018] 1 MLJ 1. In brief, the decision expanded the scope of judicial challenges against arbitral awards on questions of law to include those that have been previously referred to an arbitrator. This area was previously non-challengeable.

The repeal of Section 42 of the Act leaves the provision under Section 37 as the only one available for an aggrieved party to mount a challenge on the arbitral awards. Eight grounds are available under Section 37(1)(a) and 37(1)(b) that warrant the setting aside of an arbitral award. The party making the application to set aside an arbitration award must provide proof that:

- a party to the arbitration agreement was under some form of incapacity;
- the arbitration agreement is invalid under the law to which the parties have subjected it;
- the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings;
- the arbitration award is not linked to the terms of arbitration;
- the arbitration award is beyond the scope of the agreement;
- there are irregularity on the composition of the arbitral tribunal or arbitral procedure;
- the dispute is not capable of settlements by Arbitration; and
- the award is in conflict with the public policy of Malaysia.

These provisions mirror Article 34 of the UNCITRAL Model Law.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Arbitration proceedings are governed by the Arbitration Act 1952 and the Arbitration Act 2005, which came into force on 15 March 2006. The 1952 Act applies to arbitrations commenced prior to 15 March 2006 and the 2005 Act applies to arbitrations commenced after 15 March 2006. The applicable procedural law for recognition and enforcement of an arbitral award can be found under Section 38 of the Act, while Section 39 deals with the grounds for refusing recognition and enforcement of an award.

In respect of international conventions, Malaysia is a signatory to the New York Convention and the Convention on the Settlement of Investment Disputes (the ICSID Convention); the latter was enacted in 1966.

Malaysia is also a signatory of the Comprehensive Investment Treaty between members of the Association of Southeast Asia Nations.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes, subject to the reciprocity reservation (i.e., it will only enforce arbitration awards of other signatory states). The Convention came into force in Malaysia on 3 February 1986.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Pursuant to Sections 38 and 39 of the Act, an application for recognition and enforcement is made to the High Court. Pursuant to Section 2 of the Act, the term 'High Court' refers to the High Court of Malaya or High Court of Sabah and Sarawak, as the case may require.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Section 38 of the Act provides a summary procedure for recognition and enforcement of awards that is applicable both to awards where the seat of arbitration is in Malaysia and to foreign awards sought to be enforced in Malaysia.

On written application to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign state shall, subject to Sections 38 and 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action (Sections 38(1) and (2)). A 'foreign state' in this context means a state that is a party to the New York Convention (Section 38(4)).

The mandatory nature of Section 38 of the Act serves to limit the court's discretion in refusing to recognise and enforce an award when the formal requirements of the Act have been satisfied. Reference is made to Section 39 of the Act, which lists the exhaustive grounds upon which recognition or enforcement may be refused (see question 13).

There is no express requirement in the Act for the applicant to identify the assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings.

See also questions 9, 10 and 11.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Applications for recognition in Malaysia are made *ex parte*, but can be directed to be heard on an *inter partes* basis by the court. Generally, applications for recognition of awards are determined on an *ex parte* basis.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Pursuant to Section 38 of the Act, a party seeking to recognise an arbitral award will need to make an application to the High Court by way of an originating summons. The application must be accompanied by the duly authenticated original copy of the award or a duly certified copy of the same, and the original arbitration agreement or a duly certified copy of the same.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the award or the agreement is in a language other than the national language (Malay) or English, the applicant must provide a duly certified translation of the full award in English.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

The enforcement of awards falls within the jurisdictional ambit of the commercial division of the High Court. Proceedings brought must be completed within nine months of the date of filing the application to enforce the award. In the event that a challenge is made against the award that is sought to be enforced, the time limit can vary from three to nine months. An appeal arising therefrom to the Court of Appeal may take between six and 12 months to be determined. Thereafter, any application for leave to appeal to the Federal Court may take a further three to six months to be determined. If leave to appeal to the Federal Court is granted, that appeal may take a further six to nine months to be determined.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Yes, the courts recognise and enforce partial and interim awards in Malaysia. Section 2 of the Act defines an award as 'any final, interim or partial award and any award on costs or interest' but excludes any interlocutory orders.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds for refusing recognition of an award under Section 39 are identical to the grounds for setting aside an award under Section 37 of the Act (see question 3).

In addition, an award may be refused recognition when the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made (Section 39(a)(a)(vii) of the Act).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Section 38(1) of the Act states that on application to the High Court, an award shall be recognised as binding and be enforced by entry of judgment in terms of the award or by action. The award then becomes immediately enforceable.

The challenges would include those stated in question 10.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Section 39 of the Act, which corresponds with Article 36 of the UNCITRAL Model Law deals with grounds for refusing recognition or enforcement. The listed grounds for refusal of recognition are exhaustive; therefore, if no ground is present, the award must be recognised. This position has recently been affirmed by the apex court of Malaysia in *CTI Group Inc v. International Bulk Carriers SPA* [2017] 5 MLJ 314.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

One of the grounds for refusing recognition or enforcement under Section 39(1)(vii) of the Act is if the award has not yet become binding on the parties, or has been set aside or suspended by a court of the country in which, or under the law of which, the award was made. In this respect, courts have the discretion to order a stay or suspension of the recognition or enforcement of arbitration decisions.

In matters relating to arbitration, Malaysian courts, like their foreign counterparts, have always accorded foremost consideration to the achievement of the objects of the arbitral regime – finality and resolution. This is to give effect to legislative intent and to protect successful claimants who have submitted themselves to arbitration from having their rights rendered illusory.

With this in mind, the High Court in *Lebas Technologies Sdn Bhd v. Malaysian Bio-Excell Sdn Bhd* [2018] 12 MLJ 321 opined that the courts' inherent powers to order a stay as amplified in cases such as *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 should not be imposed on matters that are legitimately caught by the provisions of the Act. It was further stated that nothing in the Act allows for the admission of a stay of enforcement based on special circumstances that would typically warrant a stay of execution in respect of a court judgment.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The High Court can order a party to provide appropriate security pending enforcement of an award under Section 39(2) of the Act, which deals with parallel proceedings.

The discretion granted to the High Court under this subsection may only be exercised to protect the party seeking enforcement during the period of an adjournment. Therefore, this is the fundamental consideration against the grant of security. Other relevant factors may include the following: a lack of enthusiasm on behalf of the party applying to set aside or suspend the award or to prosecute that award; the validity of the award; or the difficulty threshold for enforcement of the award because of the delay.

In determining whether to grant security, the High Court is also likely to take into consideration the financial situation of the respondent and whether the respondent has any assets within the jurisdiction. The High Court may direct a conditional stay be granted subject to a bank guarantee being provided or a sum of money being paid into a joint account between the parties or their respective solicitors.

The forms of security over assets generally include financial instruments, real estate, movable property, cash deposits, and claims and receivables.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

One of the grounds for refusing recognition or enforcement pursuant to Section 39(1)(vii) of the Act is if the award has been set aside or suspended by a court of the country in which, or under the law of which, the award was made.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Order 62 of the Rules of Court 2012 (the ROC 2012) governs the service of judicial documents to a defendant in Malaysia. Personal service of a document is required only where specifically provided for in the ROC 2012 or by order of the High Court.

Personal service of a document is effected by leaving a copy of the document with the person to be served (Order 62, Rule 3 ROC 2012) and not his or her agent, except when authorised under Order 10, Rule 2(1) of the ROC 2012. Service on a corporate office is effected by leaving a copy of the document at the registered office of the corporation, by sending a copy of the document by registered post addressed to the corporation at its principal office, handing a copy of the document to the secretary or any director of the corporation, or in the case of a foreign company registered in Malaysia, by handing a copy of the document or by sending the same by registered post to a person authorised to accept service of process on behalf of the foreign company (Order 62, Rule 4 ROC 2012). The court may make an order for substituted service if personal service is required.

Ordinary service is effected by leaving the document at the proper address of the person to be served, by prepaid registered post, by facsimile through a party's solicitor, in such other manner as may be agreed between the party serving and the party to be served or in such other manner as the court may direct. The proper address for service of any person is the address for service of that person. If, at that time, the person does not have a proper address for service, service may be effected at the business address of his or her solicitor; in the case of an individual, his or her last known address; in the case of individuals who are suing or being sued in the name of a firm, the principal or last known place of business of the firm; or in the case of a body corporate, the registered or principal office of the body (Order 62, Rule 6 ROC 2012).

Service on a minister in proceedings that are not by or against the government is governed by the Government Proceedings Act 1956 (Order 62, Rule 7 ROC 2012). Section 26 of the Government Proceedings Act provides that all documents required to be served on the government for the purpose of, or in connection with, any civil proceedings by or against the government may be served, in the case of proceedings by or against the federal government, on the Attorney General, and in the case of proceedings by or against the state government, on the State Secretary.

Notices sent from any court may be sent by post or electronically (Order 62, Rule 11 ROC 2012).

If no appearance has been entered or if the address for service is non-existent, all relevant documents that need to be served may be served by filing them with the proper officer of the court (Order 62, Rule 13 ROC 2012).

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Malaysia is not a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Therefore, any service to a defendant out of Malaysia may be accomplished through a law firm within the particular foreign jurisdiction.

However, Malaysia is a party to a number of bilateral investment treaties and is therefore afforded a method for the service of documents outside diplomatic channels or for private process servers. In general, these communications are sent and received by the Ministry of Foreign Affairs unless the relevant treaty specifies an alternative designated authority, be it the Ministry of International Trade and Industry or the Attorney General of Malaysia.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

No.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Yes – see, for example, question 28.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes – see, for example, questions 24 to 27. Interim measures are also available against assets owned by a sovereign state.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Yes, court authorisation is required and the application is made to the High Court by way of a notice of application supported by an affidavit. The notice of application can be heard *ex parte* in urgent situations or if there is a real risk that the assets might be dissipated.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

One generally relies on Section 11 or Section 19 of the Act, or both, in seeking to secure interim relief in aid of arbitration. If one seeks the court's assistance in securing interim measures, Section 11 read together with the ROC 2012 yield the relevant provisions.

If one places sole reliance on the tribunal to order interim measures, the relevant provision is Section 19 of the Act, which corresponds to Article 17 of the UNCITRAL Model Law. See question 24 for the procedure for filing an application before the High Court.

The main difference between the aforementioned two Sections of the Act is that the power of the High Court under Section 11 can be invoked at any time after the arbitration agreement comes into existence to the commencement of the arbitral process, until the time of the making of the award and its enforcement. However, Section 19 of the Act can only be invoked after the constitution of the arbitral tribunal and up to the termination of the arbitration proceedings.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See question 25.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See question 25.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

It is a requirement to obtain court authorisation to attach assets in Malaysia, and these proceedings are made on an *ex parte* basis. Order 49 of the ROC 2012 prescribes a two-stage process:

- If the garnishee is within the jurisdiction (Order 49, Rule 1(1) ROC 2012), an applicant may commence proceedings by obtaining an order for the garnishee to show cause why he or she should not pay the judgment creditor (Order 49, Rule 1(2) ROC 2012).
- The order to show cause in Form 97, specifying the time and place for further consideration of the matter, will attach the debt to answer the judgment and the costs of the garnishee proceedings (Order 49, Rule 1(2) ROC 2012).

The *ex parte* application for the show cause order must be supported by a Form 98 affidavit stating the judgment or order and the unpaid sum for enforcement; that the garnishee is believed to be within the jurisdiction and the judgment debtor is indebted by the garnishee; and the sources of the aforementioned information and belief (Order 49, Rule 2 ROC 2012).

Service must be made, personally, at least seven days before the time appointed for further consideration to the garnishee and the judgment debtor, unless the court orders otherwise (Order 49, Rule 3(1) ROC 2012). The order will bind the garnishee from the service time of any debt specified in the order (Order 49, Rule 3(2) ROC 2012).

If a garnishee does not attend or dispute the debt owed, an order absolute (Form 99) shall be made (Order 49, Rule 4(1) ROC 2012).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

If the property is to be seized, a seizure shall be made by order of court prohibiting the transfer, charge, lien or lease of title of immovable property (Order 47, Rule 6 ROC 2012).

An application for seizure can be made *ex parte* by way of notice of application supported by an affidavit (Order 47, Rule 6(b), (c) ROC 2012). The judgment debtor must then be served with a copy of the order issued to the judgment creditor for presentation to the Land Office Registrar, and issued to the Registrar (Order 47, Rule 6(d) ROC 2012). The order will then need to be registered in order to seize the property.

Alternatively, one may seek injunctive relief pursuant to Order 29 of the ROC 2012, read with Section 11 of the Act, in the form of a prohibitory order or *Mareva* injunction to prevent a party from dealing with the immovable property. This is generally applied for in seeking interim relief in aid of arbitration as opposed to post-award final relief.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See questions 23 and 25.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See answers to questions 24 and 25.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Sections 38 and 39 of the Act deal with recognition and enforcement of both domestic foreign arbitral awards and the grounds for refusal, respectively. The provisions apply to foreign states as well.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

See question 20.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

No, assets belonging to a foreign state may not be immune from enforcement in Malaysia.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive immunity from enforcement in Malaysia; however, there should be an agreement between the parties to waive immunity.

31

Mexico

Adrián Magallanes Pérez and David Ament[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Pursuant to the Mexican Commerce Code (the Commerce Code), all arbitral awards must be in writing and signed by the arbitrators, indicating the seat of the arbitration and the date on which it was signed. If there is more than one arbitrator, only the signatures of the majority are necessary. However, the award must include the reasons why any arbitrators failed to sign. The award must also contain the reasons for the decision, unless the parties have agreed otherwise or settled their dispute.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Parties may request the correction of miscalculations, typographical errors or other types of formal mistakes up to 30 days after the parties have been notified that the award has been issued. If the arbitral tribunal identifies any mistakes itself, it can make the necessary corrections on its own initiative.

The parties may request an interpretation of a specific point or section of the award. If the arbitral tribunal considers this request is justified, it will issue its interpretation of

1 Adrián Magallanes Pérez is a partner and David Ament is an associate at Von Wobeser y Sierra, SC.

the award within 30 days of the request. This interpretation is considered to be part of the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Under Mexican law, an appeal seeks to overturn or modify the decision contained in the award. The setting aside procedure seeks to render the award null and to prevent it from being enforced.

As a general rule, an arbitral award may not be appealed. Under the Commerce Code, awards are considered binding and final, unless otherwise agreed by the parties. It is rare that parties agree to an appeal mechanism under Mexican law and practice.

Arbitral awards can be set aside by a local or federal court in any of the following situations:

- one of the parties to the arbitration agreement was not legally capable;
- the arbitral agreement was not valid under the law to which the parties have subjected it or, in the absence of an agreement, to Mexican law;
- the party was not given proper notice of the appointment of an arbitrator or the arbitral proceedings, or was unable to enforce its rights for any reason;
- the award deals with issues not included or falling outside the scope of the arbitration agreement;
- the constitution of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- the subject matter of the procedure was not arbitrable; or
- the award breaches public policy.

The judgment issued by the court in a setting aside procedure cannot be appealed, but can be challenged through an *amparo* claim by federal courts.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The recognition and enforcement of arbitral awards in Mexico is governed by the provisions contained in the Fourth Title (entitled Commercial Arbitration) of the Fifth Book (entitled Commercial Trials) of the Commerce Code, which was amended in 1993 to incorporate the United Nations Commission on International Trade Law (UNCITRAL) Model Law of 1985 (the Model Law) as Mexico's arbitration law, with only a few minor modifications. In 2011, the Commerce Code was amended again to incorporate some of the 2006 amendments to the provisions of the Model Law.

Regarding multilateral treaties facilitating recognition and enforcement of arbitral awards, Mexico is a party to the New York Convention of 1958, ratified in 1971, the Inter-American Convention on International Commercial Arbitration (Panama Convention), ratified on October 1977, the Inter-American Convention of Extraterritorial Validity of Foreign Judgments and Arbitral Awards (Montevideo Convention), ratified in 1987, and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention), which entered into force in 2018.

Regarding bilateral treaties on arbitration, Mexico is a party to the Convention on the Recognition and Enforcement of Foreign Judgments and Arbitral Awards in Civil and Commercial Matters with the Kingdom of Spain since 1992.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes. The Convention was ratified in 1971 and published in the Federal Official Gazette on 22 June 1971. Mexico made no declarations or reservations.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Mexico is a federal state. There is a federal judiciary branch and a local judiciary branch in each of the 32 states. First instance civil courts, both federal and local, have jurisdiction to hear arbitration-related matters. The claimant can choose whether to file the application before a federal or a local court.

The court that has jurisdiction over an application for the recognition and enforcement of an arbitral award is the first instance court of the place of the seat of the arbitration. If the seat of arbitration is not in Mexico, then the first instance court of the place of residence of the party against which the arbitral award is to be enforced or, in the absence of any such domicile, the court of the place where the assets are located (Article 1422, Commerce Code, incorporating Article 6, Model Law).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

For a court to have jurisdiction over an application for the recognition and enforcement of an arbitral award, the seat of the arbitration must be within the territorial jurisdiction

of the court or the place of residence of the party against which the arbitral award is to be enforced, or its assets must be within that jurisdiction.

The applicant is not necessarily required to identify assets within the jurisdiction of the court for the purpose of recognition proceedings. However, it must present to the court the original arbitration agreement and the award.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings in Mexico are adversarial in all cases. To obtain the recognition of an arbitral award, it is necessary to process a special proceeding for commercial settlements and arbitration in which both parties have the opportunity to provide evidence and present arguments.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

To recognise and enforce an arbitral award in Mexico, the interested party must file a request for recognition and enforcement containing (1) the original arbitration agreement or a certified copy of it, (2) the original award duly authenticated or a certified copy of it, and (3) if either the award or the agreement to arbitrate is not in Spanish, a certified translation of that document.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the award or the agreement to arbitrate is not in Spanish, the party requesting recognition of the award must file a translation certified by a translation expert approved by the Mexican government (Article 1461, Commerce Code). These experts must be certified by the federal or local judiciary, and must hold an official government seal.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

There are no additional requirements for the recognition and enforcement of arbitral awards. However, note that the interested party is not required to pay costs or fees to the court. Also, the burden of proof to demonstrate the existence of grounds to refuse the recognition and enforcement is not on the requesting party, but on the party opposing the

enforcement, with the exception of cases that require an *ex officio* analysis by the court (see question 13).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Mexican courts do recognise and enforce partial and interim awards. The Commerce Code makes no distinction between interim or partial and final awards for recognition purposes. Also, Mexican courts may enforce provisional measures without regard to whether interim relief was obtained through an order or a preliminary award.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

A court may deny recognition and enforcement of an award under Mexican law for the following limited reasons established in Article 1462 of the Commerce Code, which mirror those provided for in Article V in the New York Convention and Article 36 of the Model Law, namely:

- the arbitration agreement was invalid or the parties lacked the legal capacity to make the agreement;
- the appointing authority did not give a party proper notice of the appointment of the arbitrator or of the arbitration proceedings, or a party was otherwise unable to present its case;
- the award deals with a matter not provided for by or falling within the terms of the arbitration agreement;
- the constitution of the arbitral tribunal or arbitral procedure breaches the parties' agreement or (absent any such agreement) the law of the seat of arbitration;
- the award is not binding at the seat of arbitration or was set aside by a court at the seat of arbitration;
- the subject matter of the parties' dispute is not arbitrable under Mexican law; and
- recognition or enforcement of the award goes against public policy.

The first five grounds may only be raised and proven by the party opposing enforcement of the award. Mexican courts may raise the last two grounds *ex officio*.

The court has discretion on whether to enforce an award despite the confirmation of one of the grounds mentioned. However, we are unaware of a case in which a Mexican court decided to exercise this discretion.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The effect of a decision recognising an award in Mexico is that the award is immediately enforceable.

No ordinary remedies against a decision recognising an arbitral award are available. However, the party against whom the award is to be enforced may file an *amparo* claim against the court's judgment arguing violations to human rights as recognised in the Mexican Constitution and international treaties. A collegiate circuit court has jurisdiction to rule on the *amparo* claim. However, it cannot rule on the merits of the award.

The court before which the *amparo* procedure is brought must examine whether the challenged judicial ruling has been correctly issued, and indicate, if such is the case, that the judge incorrectly evaluated the limited grounds to refuse recognition of the award.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision denying the recognition of an arbitral award cannot be challenged through ordinary remedies. The only available procedural remedy is an *amparo* trial before a collegiate circuit court, alleging violations to human rights (most of the times parties allege violations to the principle of legality) committed by the court that decided not to recognise the award. Under no circumstances is the *amparo* court or the first instance court allowed to review the merits of the award.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

If the outcome of annulment proceedings at the seat of the arbitration is pending, the court that receives an application for recognition or enforcement of the award may adjourn the proceeding, if it deems it appropriate under the circumstances (Article 1463, Commerce Code).

There has not been a clear trend arising from recent decisions; in fact, there have been cases in which courts have refused to adjourn and others in which they have suspended a proceeding. A factor usually considered by courts to adjourn recognition or enforcement is whether the court that will rule on the annulment proceeding assumed jurisdiction properly.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

If a Mexican court decides to adjourn recognition or enforcement proceedings pending annulment proceedings, the claimant may request the court to order the defendant to be ordered to post security.

The court has discretion to decide whether said security shall be posted by the party resisting the enforcement, as well as the amount of the security. The security usually consists of deposit-in-court certificates or surety bonds. If the award relates to a monetary claim, courts will usually order an annual renewal security to be posted in an amount equal to the applicable interest rate on the principal amount.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Mexican courts have discretionary powers to decide whether to enforce an award that has been set aside in a different jurisdiction (Article 1462, Section I, Subsection (e), Commerce Code). In any event, the party against whom the award is to be enforced must prove that it has been set aside or declared void by the courts at the seat of arbitration in order for the Mexican court to decide whether it will refuse to recognise or enforce the award.

The procedural remedy against a decision to enforce an award before a decision to set aside the award has been issued would be an *amparo* claim, arguing violations to human rights (such as a violation of the principle of legality). However, to our knowledge, there is no case on this matter.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

All service of documents regarding judicial proceedings is performed by the personnel of the competent court. Notification of judicial documents to the parties involved is subject to strict procedural rules, and the court officer that summons the defendant has authority under statutory law to fully certify whether the summons was performed. Service of process is always performed by a summons with notice.

All parties in the proceedings for the enforcement and recognition of arbitral awards are required to choose in their first writ filed before the court an address where the tribunal's communications can be received (Article 1473, Commerce Code). In all other cases, or when a personal notification cannot be performed or is not necessary, communications are notified to the parties by the other methods provided in Commerce Code (by publication of the communication in a judicial newsletter, publication in edicts, certified mail or certified telegraph).

As regards the service of extrajudicial documents, there is no specific formality that must be satisfied. However, the enforcement procedure regulated under the Commerce Code does not provide for an instance in which parties shall notify each other or communicate through extrajudicial methods.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Articles 1071 and 1072 of the Commerce Code provide the rules applicable to the service of documents in places other than the seat of the proceedings, but within the country. This procedure mainly consists of the sending of a letter rogatory requesting the assistance of the competent judge or other relevant judicial authority in the place where the communication is to be delivered.

Articles 1073 and 1074 of the Commerce Code govern the procedure for the service of documents outside the country. This procedure provides for communication to be in the form of letter rogatory sent via the Mexican Foreign Service. It also establishes the minimum formal requirements that the letter rogatory must have in order to be valid.

Only personal notices to the parties are subject to this procedure. Regarding non-personal notices, the other methods of service of documents provided in the Commerce Code will apply (publication of the communication in a judicial newsletter, publication in edicts, certified mail or certified telegraph). These latter methods are usually used for communicating decisions that do not affect the substantive rights of the parties.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Each state in Mexico has its own real estate public registry and a corresponding public registry of commerce. The former consists of a database, which is available to the public, showing who holds the ownership of immovable property. This consists of a database, also available to the public, of all the relevant information pertaining a company, such as its assets, minutes, shareholders and managers.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Information about private companies or entities, such as bank accounts and company shares, can be requested to those who hold them by means of a court order.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

The procedure regarding the application, granting and enforcement of interim measures can be found in Articles 1425 and 1478 to 1480 of the Commerce Code. Interim measures can be granted before or during the arbitration proceedings, as well as during the proceedings for enforcement of an arbitral award. Interim measures can be granted either by a court (Article 1425) or by an arbitral tribunal (Article 1479).

According to Articles 1470, Section III, 1425 and 1478 of the Commerce Code, there is no limitation in Mexican law as to which interim measures can be granted for the enforcement of an arbitral award (Article 1478).

As regards the application of interim measures in Mexico against assets owned by a foreign sovereign state, the Mexican Supreme Court of Justice has held that they have immunity, unless the assets are property used for a private purpose and not related to the exercise of sovereign powers.

The Mexican government and government entities enjoy full immunity over their assets, and they cannot be attached under Article 4 of the Federal Code of Civil Procedure and Articles 4 and 13 of the National Assets Act. However, in a recent case before the Mexican Supreme Court, the subject matter of the dispute was the constitutionality of these legal provisions. The case involved the Federal Commission of Electricity and the predicted judgment, which was published, was in favour of declaring these provisions as unconstitutional. Unfortunately, the case was settled by the Federal Commission of Electricity before the draft of the judgment came to a vote by the justices. Hence, this judgment was never entered.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

When an interim measure that has already been ordered by a Mexican court is not willingly complied with by a party, another order from the competent court is still necessary to enforce it. This procedure is not *ex parte* and could probably imply criminal liability for contempt.

The procedure for requesting interim relief from a Mexican court in support of an arbitration procedure – or for requesting the recognition of an interim measure granted by an arbitral tribunal – begins by filing a written motion before the competent court. Afterwards, the other party against whom the interim measure is to be enforced (or recognised) is summoned to the proceedings to present its defence. Finally, after giving the parties the opportunity to produce evidence, the court renders its decision on whether the interim measure will be granted (or recognised) or not.

There has been extensive discussion among practitioners on whether it is appropriate to summon the other party to the proceedings before deciding whether the interim measure will be granted, under the argument that this could make the whole purpose of said measure pointless since the procedure usually takes a long time, and thus risking losing precisely what the interim measure seeks to protect.

There have been cases in which the courts have granted interim relief at the very beginning of the proceeding before summoning the defendant. In those cases, the interim relief is kept in force throughout the procedure pertaining to the injunction application, and in the final judgment, the court decides whether it will maintain the interim measures for the duration of the arbitration.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There is no specific procedure for recognising or enforcing interim measures against immovable property. The interim measure only needs to be requested by the interested party to the competent court for it to be granted (or recognised when dealing with an interim measure granted by an arbitral tribunal) in the final judgment issued by the court in the special procedure for commercial transactions and arbitration. Once the judge issues his or her ruling, a notice of the judgment will be registered in the deed of the property located in the public registry.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There is no specific procedure for recognising or requesting interim measures against movable property.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no specific procedure for recognising or requesting interim measures against intangible property.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The procedure to attach assets is not *ex parte* and a court order is always required. Once the competent court has granted the interim measure (or recognised it), it will then order the attachment of the relevant property. The specific attachment procedure depends mainly on whether the property being dealt with is immovable, movable or intangible.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Once an interim measure has been granted by the competent court (or recognised if granted by an arbitral tribunal), said court will also order the corresponding public real estate registry to register the attachment of the immovable property.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Only an order from the court requesting the attachment is necessary for enforcement of the interim measure and its subsequent attachment. However, it is also possible, seeking legal certainty, to request the competent court to order the Secured Transactions Registries to register the attachment of the movable property.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

It is necessary to obtain a court order for the enforcement of the measure and the subsequent attachment of intangible property. The specific steps to be taken after the court orders the attachment of intangible property depends on the type of asset that is going to be attached.

As regards intellectual property, trademarks and patents, it is possible to obtain an order requesting the National Copyright Institute to register the attachment over the incomes produced by intellectual property (Articles 32 and 41, Copyright Federal Law) or to order the Mexican Institute of Industrial Property to register an attachment over trademarks and patents (Article 143 of the Industrial Property Law).

As regards shares in corporations, the procedure differs depending on whether the corporation is listed on the stock market. If it is a private corporation with shares not listed on the stock market, the court will order the management body of the corporation to register the attachment in the book of registered shareholders (Articles 73 and 128, General

Law of Business Corporations). In the case of shares of corporations listed on the stock market, the competent court can order the brokerage firm with whom the shareholder has a securities trading agreement to register the attachment (Article 292, Securities Market Law).

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Even though there is no specific statutory regulation in Mexican law regarding immunity, the Mexican Supreme Court of Justice has established in prior rulings that foreign states have sovereign immunity and therefore Mexican courts cannot exercise jurisdiction over them. However, this immunity only applies with respect to sovereign or public acts or assets, and not with respect to their private acts or assets (such as commercial transactions), since in this case the foreign state and its agents could be held liable to the same extent as a private individual would.

In 2005, a legislative initiative was presented in the Senate entitled the Law on State Jurisdiction Immunity but was not approved. In fact, it was discarded a year later.

In 2015, Mexico ratified the United Nations Convention on Jurisdictional Immunities of States and their Properties, which recognises that the signatory states enjoy immunity with regard to itself and its property from the jurisdiction of the courts of another state, except regarding commercial transactions, contracts of employment, personal injuries and damage to property, ownership, possession and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a state, and arbitration agreements.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

The procedure for the service of extrajudicial and judicial documents to a foreign state is established in Articles 549 to 556 of the Mexican Federal Civil Code of Procedure and Articles 1073 and 1074 of the Commerce Code.

These provisions state that to serve documents outside the country, the competent Mexican court must send a letter rogatory through the Mexican Foreign Service. Those provisions also establish several minimum formal requirements that the letter rogatory must satisfy in order to be valid.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Foreign state entities enjoy sovereign immunity over assets situated on Mexican territory, except if those assets consist of property used for a private purpose and not in the exercise

of sovereign powers. The term 'protected assets' relates to, *inter alia*, the premises of the diplomatic mission, their furnishings and other property thereon, and the means of transportation of the mission, which are immune from search, requisition, attachment or execution (Article 22, 1961 Vienna Convention on Diplomatic Relations).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

To our knowledge, no such case has been brought before Mexican courts; however, there is no reason that leads us to believe that a waiver would not be valid as long as it is made expressly in precise and clear terms (Article 7, Federal Civil Code).

32

Netherlands

Marnix Leijten, Erin Cronjé and Abdel Zirar[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Requirements for the form of arbitral awards are set out in the Dutch Arbitration Act (as amended, effective from 1 January 2015), which forms part of Book 4 of the Dutch Code of Civil Procedure (DCCP).

An award must be in writing and, in principle, be signed by all arbitrators. A qualified electronic signature is also permitted in terms of the DCCP. If an arbitrator refuses to sign the award, the remaining arbitrators must make mention of this in the award. A similar statement must be made if a minority of arbitrators is incapable of signing and it is unlikely that this impediment will be resolved within a reasonable time (for example, in the case of serious illness). An arbitral award that is not signed or that is incorrectly signed is liable to be set aside.

The award must contain the names and addresses of the arbitrators and the parties, and the date and place where the award was rendered. Further, the award must contain the tribunal's decision, namely an operative part of the award in which each of the claims is granted or denied in whole or in part.

Finally, the award must include reasons for the tribunal's decision; for every portion of the operative part in which a claim is granted or denied, the body of the award should provide some reasoning for that particular decision. This does not apply in certain arbitrations pertaining to the quality or condition of goods, awards recording a settlement

1 Marnix Leijten is a partner and Erin Cronjé and Abdel Zirar are senior associates at De Brauw Blackstone Westbroek NV.

reached by the parties and in all other cases where the parties have agreed in writing that no reasoning for the decision shall be given. Failure to give reasons can result in an award being set aside.

In respect of delivery of the award, the tribunal must ensure that the original of every final, partial final and interim award (or a copy, certified by an arbitrator or a third party as nominated by the parties, such as an arbitral institution) is sent to the parties as soon as possible after it is made. The tribunal may do so by requesting or permitting an arbitral institution to dispatch the award on its behalf, as is typically the practice in an institutional arbitration. The parties may also agree that the tribunal is required to have the original award deposited with the district court registry within whose judicial district the seat of arbitration is situated. In practice, awards are often sent by email to the parties if email was used to communicate between the tribunal and the parties. In such cases, the DCCP permits electronic copies to be treated as original or certified copies of the award.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The Dutch Arbitration Act allows for correction of manifest computing or writing errors in the award after it has been delivered. Other manifest errors may also be corrected at the request of one of the parties, as long as the errors can be rectified easily. Similarly, if the names and addresses of the parties and the arbitrators, or the date and place of the arbitral award, are stated incorrectly, or are partly or entirely missing, a party may request the tribunal to correct the error or omission.

The Dutch Arbitration Act does not exclude specific types of awards, and hence final awards, partial awards, additional awards and interim awards may be subject to a request for correction. A tribunal may also interpret an earlier (partial) award, provided the tribunal's mandate is still in effect; however, corrections in this context must be distinguished from a situation in which an arbitral tribunal has failed to decide on one or more matters that have been submitted to it. In the latter case, either party may request the arbitral tribunal to render an additional award.

An application by a party to a tribunal to correct an award must be made in writing within the time limit agreed by the parties, or if there is no such agreement, no later than three months after the day when the award is dispatched to the parties. The tribunal may, on its own motion, make a correction within the same time constraints. Before a tribunal decides on a request to correct an award or before it corrects an award on its own motion, it must give the parties the opportunity to express their views on the proposed correction.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral appeal will only be possible if the parties have explicitly agreed to permit appeal, in which case an appeal is usually made to a second tribunal, depending on the parties' agreement. Dutch courts do not have jurisdiction over appeals of arbitral awards, unless the parties specifically agree to this in an arbitration agreement.

The Dutch Arbitration Act provides for two exhaustively listed forms of recourse against arbitral awards to a court: setting aside and revocation.

Setting aside

The seat of the arbitration must be in the Netherlands for the state courts to have jurisdiction in respect of a setting aside application. An application for setting aside can only be made against a final or partial final arbitral award; an application to set aside an interim award may only be made in conjunction with an application for setting aside a final or partial final arbitral award. The period within which an application must be filed is usually three months from the day the award was delivered or, in the case of an arbitral appeal provision, three months from expiry of the time limit for lodging an appeal.

The setting aside of arbitral awards is limited to two instances. An application for setting aside must be made by a writ of summons addressed to the competent court of appeal of the district of the seat of arbitration. All grounds on which the party relies for the setting aside must be mentioned in the writ of summons, failing which the party will be barred from invoking them at a later stage.

An award may only be set aside on one or more of the following grounds:

- absence of a valid arbitration agreement;
- the arbitral tribunal was composed in violation of the applicable rules;
- the arbitral tribunal has manifestly not complied with its mandate;
- the award was not signed or did not contain reasons in accordance with the DCCP; or
- the award, or the manner in which it was made, violates public policy.

After the court of appeal has given a decision, the parties can appeal in cassation to the Supreme Court, unless the parties have agreed to exclude the possibility of cassation.

Revocation

An award may be revoked only if it is wholly or partially based on fraud committed in the arbitration, on forged records that turn out to have been forged after the award was made, or if relevant documents have been withheld by the other party. A claim for revocation must be brought before the court of appeal within three months of one of the grounds for revocation becoming known to the party requesting the revocation.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

For the purposes of enforcement, Dutch arbitration law distinguishes between domestic arbitral awards and foreign arbitral awards. Domestic awards are enforced by means of a petition to the preliminary relief judge of the district court in whose judicial district the place of arbitration is located. The application can be filed and decided *ex parte*. A decision granting leave for enforcement (*exequatur*) is typically issued within one or two business days. The preliminary relief judge must grant leave if none of the grounds for refusal is present. A decision granting leave for enforcement is not subject to appeal, but a decision denying leave can be appealed. The period within which a domestic arbitral award can be enforced in the Netherlands is limited to 20 years under Dutch law.

Foreign awards require recognition in addition to leave for enforcement. For this purpose, the Dutch Arbitration Act distinguishes between awards recognised and enforced pursuant to an enforcement treaty, and awards recognised and enforced without the application of a treaty.

Recognition and enforcement based on a treaty

In respect of enforcement with an applicable treaty, the proceedings commence with the filing of a petition for leave to recognise and enforce a foreign award at the court of appeal. The application must be filed at the court of appeal in the district where enforcement is sought (i.e., in the district where an asset of the award debtor is situated or where the award debtor is domiciled). The court of appeal must order a hearing before it decides on the request. The parties against whom enforcement is sought must be summoned for the hearing by the party requesting enforcement by formal service of the court's decision ordering a hearing. The court of appeal records its decision in a separate *exequatur* judgment that must contain reasoning. Unless the relevant enforcement treaty provides otherwise, both the applicant and the respondent can appeal to the Supreme Court within three months of the day of the decision. Such an appeal does not suspend the enforceability of the court of appeal's *exequatur*, unless that court decided otherwise.

The Netherlands is a party to both the New York Convention and the ICSID Convention. In the case of New York Convention awards, the procedure is largely the same as the procedure described above. A petition for leave to recognise and enforce an ICSID award must be made to the preliminary relief judge of the District Court of The Hague, which is the designated competent court for this procedure in the Netherlands, in accordance with the ICSID Convention.

Recognition and enforcement without a treaty

If no applicable treaty exists for the recognition and enforcement of a foreign award, or if a treaty is applicable but permits a party to seek recognition and enforcement pursuant

to the law of the state where the enforcement is sought, a party can apply for recognition and enforcement of the award based exclusively on Dutch law, in accordance with the Dutch Arbitration Act and DCCP. The proceedings are largely identical to those for an application based on a treaty.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The Netherlands has signed and ratified the New York Convention, effective on 24 April 1964. The only reservation made is the reciprocity reservation, in terms of which only awards from other contracting states will be enforced as per the Convention's terms.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

A domestic arbitral award is fit to be recognised and enforced by the district court within whose judicial district the seat of the arbitration is located. The competent court in respect of foreign awards is the court of appeal in the district where enforcement is sought.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The competent court in the district within which the seat of arbitration is located will have jurisdiction in respect of enforcement of domestic awards.

Dutch courts have a general jurisdiction to enforce foreign arbitral awards. An application for leave to enforce a foreign award in the Netherlands is, by its nature, considered to be sufficiently closely connected to the Dutch legal order, and the presence of assets in the state is not specifically required. This certainty of jurisdiction, coupled with liberal rules on levying *ex parte* prejudgment attachments and the fact that many companies and institutions are structured through Dutch entities, makes the Netherlands an attractive jurisdiction for the enforcement of arbitral awards.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

A Dutch domestic arbitral award is enforced by proceedings before a single judge in the competent district court, which are typically handled on an *ex parte* basis. Enforcement

proceedings of foreign arbitral awards are conducted in the first instance by the competent court of appeal. There is usually one round of written submissions and both parties are given an opportunity to address the court at the hearing. Please refer also to question 4.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The DCCP requires at least an authenticated copy of the award to be produced to the relevant court for enforcement of domestic awards. For foreign arbitral awards, the DCCP and the New York Convention require the original arbitration agreement and the original arbitral award, or duly certified copies of these documents, to be produced to the relevant court. In respect of ICSID awards, an authentic copy of the award signed by the Secretary General of ICSID must be furnished.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

In practice, Dutch courts will accept awards rendered in English and possibly in French or German. Although the New York Convention requires translation of an award into the official language of the country in which enforcement of an award is sought, Dutch courts usually adopt a pragmatic approach in these cases. There are court decisions finding that the translation requirement is not to be enforced if the arbitral award is in a language understood by both the party defending against the request for leave and the court. There is also no requirement that an ICSID award be translated into Dutch.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

There are no additional costs beyond normal legal costs associated with any other court application, such as counsel's fees, disbursements and court fees.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

An award deciding on interim measures, whether qualifying as an interim award or as a partial final award, is in principle enforceable in the same manner as an arbitral award on the merits.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

In the absence of an applicable treaty concerning recognition and enforcement, the grounds for refusal as contained in the Dutch Arbitration Act apply. The grounds closely resemble those in the New York Convention:

- there is no valid arbitration agreement under the law applicable to the arbitration agreement;
- the tribunal was constituted in violation of the applicable rules;
- the tribunal violated its mandate;
- the award is open to appeal to another arbitral tribunal or court in the country where the award was made;
- the arbitral award has been set aside by a competent authority of the country where the award was made; or
- recognition or enforcement would be contrary to public policy.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Both domestic arbitral awards and foreign awards only become enforceable after leave for enforcement (*exequatur*) has been granted by the relevant court (see question 4). Once *exequatur* has been granted, the arbitral award can be enforced in the Netherlands in the same manner as an enforceable state court judgment.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

In respect of domestic arbitral awards and where there is no applicable treaty on recognition and enforcement, the DCCP provides for an appeal process only if recognition is refused. If this is the case, the party may apply to the competent court of appeal, and if appeal is again unsuccessful, a cassation appeal can be filed with the Supreme Court.

In respect of recognition sought on the basis of the New York Convention, the Dutch Supreme Court has ruled that there is no right of appeal against a decision granting leave to enforce an award in terms of the Convention. In the case of a foreign award where the New York Convention is not applicable, and unless the relevant enforcement treaty provides otherwise, both the applicant and the respondent can appeal to the Supreme Court following a decision either refusing recognition or granting leave for enforcement.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The enforcement of an arbitral award is not automatically suspended by an application for the setting aside of the arbitral award. In terms of the Dutch Arbitration Act, upon request by a party, and if there are good grounds for doing so, the court may suspend enforcement of the award until a final decision on the application for setting aside has been made.

Similarly in respect of foreign awards for which there is no applicable enforcement treaty, the court of appeal may suspend its decision on the recognition and enforcement if proceedings to set aside the award have been initiated in the state where the award was rendered. Dutch courts also abide by the provisions of applicable treaties in this regard, for example Article VI of the New York Convention, which provides for a court to suspend recognition or enforcement proceedings if a setting aside application has been made before the court at the seat of arbitration.

When reviewing a request for suspension of enforcement, the court generally considers two cumulative requirements that must be met for the request to succeed. First, it must be probable that the award will be set aside. Second, the interest of the award debtor to delay enforcement must outweigh the interest of the award creditor in proceeding with the enforcement.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

In the event that recognition and enforcement proceedings are suspended pending the outcome of an application for setting aside, the Dutch Arbitration Act permits the court to order the party seeking suspension to provide security. Conversely, if the request for suspension is denied, the court may order the party seeking enforcement to provide security.

In nuanced cases, the Dutch courts have been willing to consider suspending their decisions on recognition and enforcement subject to the provision of suitable security; however, in practice, security is rarely sought in these situations and so there are no established factors for consideration.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

An award that was set aside at the seat of arbitration may still be recognised and enforced in the Netherlands. Although the Dutch Arbitration Act provides that an award that has been set aside at the seat is a ground for refusing recognition and enforcement, the Supreme Court has indicated that this does not automatically preclude Dutch courts from recognising an award. An award may be recognised in the Netherlands in exceptional circumstances if, for example, the award has been set aside on grounds that are not grounds for refusal of recognition as set out in the Dutch Arbitration Act and that are not internationally accepted.

The approach of the courts is similar in New York Convention cases. The Dutch courts are required to grant leave for the recognition and enforcement of a foreign arbitral award under the Convention, unless a ground for refusal as provided in Article V(1) applies. However, even if such a ground for refusal applies, the court nevertheless has a certain discretion to grant leave for recognition and enforcement, which may be applied in special circumstances. A special circumstance exists if the award was set aside in foreign proceedings on grounds that do not match with those in Article V, (1)(a) to (1)(d) of the New York Convention, and grounds that are not generally accepted according to international standards. A special circumstance also exists if the decision rendered in the foreign setting aside proceedings cannot be recognised in the Netherlands, on the grounds that one or more of the requirements under Dutch private international law for the recognition and enforcement of a foreign decision have not been fulfilled.

The party seeking recognition and enforcement has the burden of asserting and proving facts and circumstances that justify granting leave for recognition and enforcement despite a ground for refusal being applicable.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of any applications, writs of summons and judgments or *exequaturs* are ordinarily effected through the Dutch bailiff, instructed by the applicant or award creditor as the case may be. Service is usually effected at the respondent's domicile, which may also be the offices of the respondent's counsel if nominated. However, in light of some recognition and enforcement proceedings being *ex parte* proceedings, service in this manner will not always be required.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, and Regulation (EC) No. 393/2007 regulate service of judicial documents in the EU Member States. If service is to be effected in a state that is not a member of the European Union or not a signatory to the 1965 Convention, service is regulated by the DCCP. In such a case, the court bailiff must send the document by registered post to the foreign address, and present the document to the office of the public prosecutor in the relevant district of the competent court. The public prosecutor must provide the document to the Dutch Ministry of Foreign Affairs, which must then give notice to the foreign respondent.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

A number of databases and registers allow for the identification of assets in the Netherlands, including: the land registry (*Kadaster*), which facilitates a database of real estate and includes information about ownership, mortgages, value of properties and legal attachments; the vessel register and database, which is supported on the *Kadaster* website; the aircraft register; the patent register; the Benelux Office of Intellectual Property, including information on trademarks; and the trade register (KvK), which includes content on corporate entities registered in the Netherlands, such as directorship, financial reports and shareholding.

In addition, under new European legislation, the Netherlands is in the process of implementing a UBO register, identifying the ultimate beneficial owner of legal entities.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Dutch law does not provide for either specific legal proceedings in respect of asset disclosure, or a specific obligation for an award debtor to disclose its assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

An award creditor may obtain a prejudgment attachment against assets of an award debtor pending, or prior to commencing, *exequatur* proceedings. The purpose of such an

attachment is to secure assets sought to be recovered upon enforcement, which are at risk of being disposed of or alienated by an award debtor before enforcement. In fact the attachment regime in the Netherlands is very liberal and award creditor friendly.

A prejudgment attachment may be obtained against assets of a sovereign state that are not protected by sovereign immunity from enforcement measures. As discussed in questions 32 and 34, the Netherlands recognises parts of the 2004 UN Convention on Jurisdictional Immunities of States and their Property as a reflection of customary international law that governs the question of which assets may be subjected to post-judgment attachment as well as prejudgment attachment.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

In order to levy prejudgment attachment against assets of an award debtor, an award creditor must obtain leave for attachment from the preliminary relief judge of the district court in the district where the assets are located or where the award debtor is domiciled. The petition for leave to attach assets may be done *ex parte* and the leave is customarily granted within a matter of days. After obtaining the leave to attach assets, the attachment is effected through instruction to a bailiff, who will levy the attachment through service of an attachment order.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Please refer to questions 23, 24 and 29, with the exception that sale of the property may not be permitted in the prejudgment process prior to a final decision on enforcement proceedings.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

Please refer to questions 23, 24 and 30, with the exception that sale of the property may not be permitted in the prejudgment process prior to a final decision on enforcement proceedings.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for movable property also applies to intangible property – see question 26.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Before enforcing an arbitral award through attachment of assets, an award creditor must obtain an *exequatur* from the competent Dutch court, as discussed in question 4. After obtaining an *exequatur*, attachments may be levied against the award debtor's assets through a direct instruction to a court bailiff in accordance with the DCCP.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The procedures for enforcement against immovable property are set out in the DCCP. Prior to attachment of immovable property belonging to an award debtor, an award creditor must instruct a bailiff to serve a payment order on the award debtor, including a summons for the debtor to complete payment under the award within two days. After this term, attachment may be levied by the bailiff through an attachment order that is entered on the public registry for immovable property. In the event that the immovable property is under mortgage, the award debtor must inform the mortgage holder of the attachment. The immovable property is sold at auction by a notary public who is designated by the award creditor (either in the attachment order served on the award debtor, or in a later order served on the award debtor). An auction of immovable property must be announced on the internet at least 30 days before the date of the auction. The designated notary public will take payment for the immovable property, pay the sums due to the award creditor, and return any residual funds to the award debtor.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

For movable property that is required by law to be registered in public registries (see question 21), the procedure is the same as with immovable property, although the time limit for complying with the bailiff's payment order is 24 hours instead of two days, and the time limit for notice of the sale of the immovable property varies (between two weeks and six weeks), depending on the type of property.

For other movable property (i.e., that is not required by law to be registered in a public registry), attachment is effected through direct instruction of a bailiff who will, after serving a payment order with a summons to pay the awarded sum within two days, seize the property and sell it or, if the property is liquid, pay out to the award creditor.

Selling off registered shares in a (public or private) company requires obtaining prior leave from the district court in the district where the company is located. The district court will summon the bailiff, the award creditor, the award debtor, the company and any

interested party (such as other parties with an attachment on the shares) before issuing a decision on the request for leave.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The procedure for movable property also applies to intangible property – see question 30.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

When enforcing an investment arbitration award against a state in the Netherlands, Dutch law on immunity from execution applies. Although the Netherlands is not a signatory, the Supreme Court has endorsed certain parts of the 2004 UN Convention on Jurisdictional Immunities of States and Their Property as reflecting customary international law, in particular Articles 19 and 21 thereof, which set out exceptions to the general rule of sovereign immunity in respect of post-judgment attachments. However, the Supreme Court has indicated that Article 18 of the Convention, which contains strict prejudgment attachment provisions, is not reflective of customary international law. Accordingly, prejudgment attachments would also be permissible in accordance with the exceptions to immunity set out in Articles 19 and 21, as discussed in question 34.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

For signatory states, the 1972 European Convention on State Immunity will apply to service on foreign states. Judicial process must be provided to the Ministry of Foreign Affairs of the respondent state, which then distributes it to the competent authority for the foreign state.

If the foreign state is not a signatory to the 1972 Convention, service is effected in accordance with the DCCP, in the same manner as that for non-Member States set out in question 20. For the purposes of service on a foreign state, the domicile is usually considered to be the office of the Minister of Foreign Affairs in that state's capital city.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Following international customary law and Dutch law on sovereign immunity as referred to in question 32, the general principle is that the property of foreign states is not susceptible

to attachment and execution. Under the terms of Article 19 of the 2004 Convention, exceptions to this immunity exist if:

- the foreign state has expressly consented to enforcement measures;
- the foreign state has designated or reserved property to satisfy the claim; or
- it has been established that the property is used or intended to be used by the state for purposes other than government, non-commercial purposes.

The burden of proof with respect to suitability for attachment of the property in the third category rests on the award creditor seeking attachment.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It is possible for a foreign state to waive immunity from enforcement. The Dutch Supreme Court has confirmed that a waiver of immunity must be explicit and specific; it cannot be implied from the provisions of the relevant arbitration agreement. See also question 34.

33

Nigeria

Babatunde Ajibade and Kolawole Mayomi[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The primary legislation applicable to arbitration is the Arbitration and Conciliation Act, Chapter A18, Laws of the Federation of Nigeria 2004 (ACA). Section 26 of the ACA states that an arbitral award shall be in writing and signed by the arbitrator or arbitrators, and that if the arbitral tribunal comprises of more than one arbitrator, the signatures of a majority of the members of the arbitral tribunal shall suffice provided the reason for the absence of any signature is stated.

Furthermore, the award shall state the reasons upon which its conclusions are based unless the parties have agreed that no reasons are to be given or the award is on agreed terms under Section 25 of the ACA (consent award). The award shall also state the date on which it was made and the place of arbitration. A copy of it shall be delivered to each party.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Section 28 of the ACA provides that a party may, within 30 days of receipt of an arbitral award, with notice to the other party, request the arbitral tribunal to correct in the award

1 Babatunde Ajibade is the managing partner and Kolawole Mayomi is a partner at SPA Ajibade & Co.

any errors in computation, any clerical or typographical errors or any errors of a similar nature, and give an interpretation of a specific point or part of the award. The tribunal shall revert within 30 days. The tribunal may also on its own volition, within 30 days of the date of the award, correct any error.

The parties can also request the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the award. An additional award shall be made within 60 days of the request.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitration award is final and there is no provision for an appeal arising therefrom under Nigerian law. However, Sections 29 and 30 of the ACA provide three grounds for setting aside the award.

Section 29(2) provides that the court may set aside an arbitral award if a party makes an application (on notice to the other party) and furnishes proof that the award contains decisions on matters that are beyond the scope of submission to arbitration. However, if the decisions on matters submitted to arbitration can be separated from those not submitted, only that part of the award that contains decisions on matters not submitted may be set aside.

Section 30(1) provides two further grounds for setting aside an arbitral award. The first ground is if an arbitrator has misconducted himself or herself. The instances of misconduct were set out by the Supreme Court of Nigeria in *Taylor Woodrow (Nig.) Limited v. S.E. GmbH* [1993] 4 NWLR (Pt 286) 127. Second, the court may set aside an award if it was improperly procured or tainted by fraud.

Whereas an appeal attacks the merits of an arbitral award (which is not permitted under Nigerian law), a setting aside application is essentially a complaint that due process was not observed by an arbitral tribunal in making an arbitral award.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Section 51 of the ACA provides that an arbitral award shall, irrespective of the country in which it is made, be recognised as binding and shall, upon the award creditor's application, be enforced by the court.

Nigeria is a signatory to the New York Convention and has domesticated the Convention by incorporating it as the Second Schedule to the ACA. Thus, a foreign arbitral award may be enforced under the ACA or directly pursuant to the New York Convention (*Tulip Nigeria Ltd v. Noleggioe Transport Maritime* [2011] 4 NWLR (Pt 1237) 254).

Nigeria ratified the International Centre for Settlement of Investment Disputes (ICSID) Convention in 1965, and domesticated it through the International Centre for Settlement of Investment Disputes (Enforcement of Awards) Act 1967.

A foreign arbitral award may also be enforced pursuant to the Reciprocal Enforcement of Judgments Act 1922, which was promulgated to ensure ease of registration and enforcement of court judgments obtained in the United Kingdom and certain Commonwealth countries. This Act permits the enforcement of arbitral awards, as long as they have become enforceable as judgments of a court in the country in which the award was handed down.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Nigeria is a party to the New York Convention. She acceded to the Convention on 17 March 1970 and it formally came into force in the territory of Nigeria on 15 June 1970.

Nigeria made a reservation under Article 1(3) to the effect that she would apply the New York Convention only on the basis of reciprocity to the recognition and enforcement of awards made only in the territory of another contracting state to the Convention and to differences arising out of legal relationships, whether contractual or not, that are considered to be commercial under the laws of the Federal Republic of Nigeria.

Note, however, that insofar as recognition and enforcement of arbitral awards in Nigeria is concerned, the reservation made relating to reciprocity appears to have been waived by the provisions of Section 51 of the ACA (discussed in question 4).

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Both the Federal High Court and the various state high courts have jurisdiction to entertain an application to enforce an arbitral award, be it domestic or foreign (*Magbagbeola v. Sanni* [2002] 4 NWLR (Pt 756) 193). That said, the Court of Appeal has recently ruled in *Kabo Air Limited v. The O'Corporation Limited* [2014] LPELR 23616 CA, albeit in the context of the enforcement of a judgment of the High Court of Gambia, that it is the particular court that would have had original subject-matter jurisdiction over the underlying dispute that would have capacity to entertain an application to enforce a foreign judgment arising therefrom. Accordingly, it may be prudent to file an application for enforcement of an arbitral award in the particular court (Federal High Court or state high court) that would have had jurisdiction to entertain the subject matter of the dispute that was resolved in the arbitration.

However, in respect of an ICSID award, the Supreme Court of Nigeria is the only court with jurisdiction to entertain enforcement proceedings.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

For the court to have jurisdiction over an application for recognition and enforcement of an award, it must have jurisdiction over the award debtor, either by virtue of the award debtor being present in Nigeria and being served with process or, by virtue of the award debtor being amenable to service of process outside the jurisdiction under the applicable rules of court for this purpose. To exercise jurisdiction, the court must be satisfied that the recognition and enforcement processes have been properly served on the award debtor.

There is no requirement that an applicant must identify assets within the jurisdiction of the Nigerian court that will be the subject of enforcement for the purpose of recognition proceedings. This matter would only come up after an enforcement order has been granted and the applicant wishes to levy execution. At this stage, specific information on a defendant's assets will be required to enable the issue of execution processes.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings in respect of an arbitral award are usually adversarial as most of the applicable rules of court provide that recognition proceedings shall be 'on notice'. Although Order 52, Rule 16(1) of the Federal High Court (Civil Procedure) Rules 2009 provide that the proceedings may be commenced *ex parte*, the court will invariably order the respondent to be put on notice since any resultant order would affect the respondent's assets.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The following documentation is required to be attached to an enforcement application under the ACA:

- the duly authenticated original award or a duly certified copy thereof;
- the original arbitration agreement or a duly certified copy thereof; and
- if an award or arbitration agreement has not been not made in English, a duly certified translation thereof into English.

In addition to the above statutory requirements, the courts have also required:

- the name and last known place of business of the person against whom the award is intended to be enforced; and
- a statement that the award has not been complied with, or complied with only in part.

See *Imani & Sons Ltd v Bil Construction Co. Ltd* [1999] 12 NWLR [Pt 630] 253.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Yes, it is necessary to submit a translation as required under Section 51(2)(c) of the ACA. The translation shall be certified by a court-approved translator or by a diplomatic agent. A full translation is necessary.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A party seeking leave to enforce an award will have to pay the applicable filing fee. The fees will be assessed by the appropriate court registry on a scale that is reviewed from time to time. At present, the Federal High Court charges, on average, about 50,000 naira as the filing fee for an application for the recognition and enforcement of a foreign arbitral award. The various state high courts also charge a similar sum as the filing fee.

If the court recognises an award and grants leave to enforce, the mode of enforcement will determine the fees that are payable. For instance, if the award creditor chooses the route of filing garnishee proceedings to attach the monies in the bank accounts of the award debtor, the filing fee payable for a garnishee proceeding is about 3,000 naira. However, if there are no available funds, the award creditor would have to apply for a writ of *fieri facias* to execute the award against the movable assets of the award debtor. This route is quite expensive as the court sheriff may have to enlist the assistance of recovery specialists and other external agents to secure these assets. The costs of this exercise will lie between 150,000 and 200,000 naira.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Yes, the courts will recognise and enforce a partial or interim award insofar as it is a final determination of the substantive issues and questions in a reference, as distinct from mere procedural orders and directions. Indeed, a partial award was enforced in *Celtel Nigeria BV v. Econet Wireless Ltd & Ors* [2014] 2 CLRN 63.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Section 52 (2) of the ACA lists the grounds for refusal of enforcement. These grounds are essentially drawn from Article V of the New York Convention and can be broadly split into two.

First, if the party against whom an award is sought to be enforced furnishes proof of the presence of vitiating elements, such as: that the arbitration agreement was invalid by reason of the incapacity of one of the parties thereto, or that it was not valid under the governing law of the jurisdiction of either the contract or the seat of arbitration; or that the award deals with a dispute that does not fall within the terms of the submission to arbitration; or that the composition of the arbitral tribunal, or the arbitral procedure, was not in accordance with the agreement of the parties; or that the award has been set aside by a court at the seat of arbitration.

Second, if the court finds that the subject matter of the dispute is not arbitrable under Nigerian law, or that enforcement of the award would be against public policy.

Apart from the statutory grounds, the courts have ruled that an arbitral award (domestic or foreign) will not be recognised or enforced if it is statute barred. The enforcement application must be filed within the six years after the cause of action arose (*City Engineering Nigeria Limited v. Federal Housing Authority* [1997] 9 NWLR (Pt 520) 244).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once the proceedings for recognition and enforcement of an award are properly initiated, and the award is recognised, it is immediately enforceable as if it were a judgment of the court in Nigeria (*Shell Trustees (Nig.) Ltd v. Imani & Sons (Nig.) Ltd* [2000] 6 NWLR (Pt 662) 639.

The award debtor is entitled to challenge the recognition decision on its merits before the appellate courts.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

Any final decision of a state high court or the Federal High Court refusing recognition can be challenged by an appeal to the Court of Appeal, and subsequently to the Supreme Court if necessary.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Considering that one of the grounds for refusal of enforcement of an award is that the award has been set aside or suspended by a court of the country in which, or under the law of which, the award was made, it is highly likely that the courts will adjourn recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration.

There are no reported cases we are aware of in which this issue has arisen in Nigeria.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Section 52(3) of the ACA provides that if an application for setting aside an award has been made at the seat, the court before which the recognition or enforcement is sought may, if it considers it proper, postpone its decision and may on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

We are not aware of any case law in Nigeria in which this specific issue has been determined. However, drawing on the analogous situation in maritime practice in which a defendant may be ordered to provide security for the release of an arrested vessel, it has been held that the factors that would be considered by a court in ordering security for costs include: (1) whether the plaintiff's claim is *bona fide* and not a sham; (2) if there is an admission by the defendant on the pleadings or elsewhere that shows that the defence (or the annulment application as the case may be) is weak; (3) if it appears by credible evidence that there is reason to believe that the defendant will be unable to pay the costs of the action if the defence (or annulment application) is unsuccessful; (4) if the residence of the defendant is incorrectly stated in its papers, unless the misstatement is innocent and made without any intention to deceive; (5) if a defendant is only temporarily resident in the jurisdiction and has no known assets therein that can be attached; and (6) if the application for security for costs is being used oppressively so as to stifle an otherwise genuine claim (*Oduba v. Houtmangracht* [1997] 6 NWLR (Pt 508) 185).

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Although there is no reported case law we are aware of on this matter, given the provisions of Section 52(2)(a)(viii) of the ACA (which provides that recognition and enforcement may be refused if the award has been set aside or suspended by a court of the country in which, or under the law of which, the award was made), it is safe to say that the Nigerian courts will not ordinarily entertain an application to recognise and enforce an award that has been set aside at the seat.

In a situation where the fact that the award has been set aside at the seat of the arbitration was not brought to the court's attention during the recognition proceedings, the award debtor can, before the award is enforced, apply to the enforcing court to set aside the decision on grounds premised upon the annulment of the award. However, once the award has been enforced and satisfied, it will not be possible to reverse the enforcement on this basis.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

The various state high courts and the Federal High Court have different rules for service. Thus, the procedure for service of extrajudicial and judicial documents to a defendant in Nigeria will depend on the applicable state high court rules or the Federal High Court Rules. In most instances, the rules require judicial processes to be personally served on the award debtor (if a natural person), or to be served at the award debtor's registered office or advertised place of business (if a juridical entity) within the jurisdiction. Note, however, that if the documents to be served are issued by a court or tribunal outside Nigeria, it is the procedure prescribed by the Federal High Court Rules that will apply.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The various rules of court require an applicant to file a without-notice application to obtain leave of court to serve extrajudicial and judicial documents on a defendant who is out of jurisdiction. The grounds upon which such leave will be granted are stated in the various rules of court and generally require that the applicant establish a *nexus* between the defendant or the cause of action and the forum. Once leave is granted, the court will require satisfactory proof of service on the defendant (i.e., an acknowledgement slip duly signed or stamped, or other reliable document that evidences service).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are no publicly available registers allowing the identification of an award debtor's assets in Nigeria should the situation arise that there is no information in existence as to the identity of such assets. There are publicly available registers by which the status of known assets may be confirmed or verified. For example, information about land ownership can be found at the land registry in each state.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

No such proceedings are available.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures are available in Nigeria. An applicant can invoke the powers of the courts to grant injunctive orders in all cases in which it appears to the court to be just or convenient so to do. These powers can be exercised to grant injunctive orders to preserve assets both before and during enforcement proceedings. Any such interim measure may be made either unconditionally or upon such terms and conditions as the court may consider appropriate.

In practice, an applicant may be required to demonstrate that there is a real risk of dissipation of these assets before the enforcement proceedings are initiated and completed.

The above relief would not be exercised against assets owned by a sovereign state. Nigerian law upholds the doctrine of sovereign immunity, which protects the assets of a foreign sovereign from execution.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

An application for interim measures will be commenced *ex parte* on grounds that the assets may be irretrievably dissipated if the award debtor is given notice of the application. Any interim order made by the court will be served on the award debtor alongside a substantive

application for interlocutory relief. The interim order will abate after a fixed period (seven or 14 days in most instances). The court may grant an extension for a further period. Within this period, it is expected that the substantive application will be argued and, if successful, an interlocutory injunctive order restraining dealing with the asset will be issued by the court to preserve the asset until the final determination of the enforcement proceedings.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure for obtaining interim measures against immovable property is same as the procedure outlined in question 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for obtaining interim measures against movable property is same as the procedure outlined in question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

On the assumption that intangible property as referred to here relates to property such as shares in a company, the procedure for obtaining interim measures against such property will be fact specific and depend on the type of intangible property involved. This procedure will be a modified version of the procedure outlined in question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Any party who has been granted leave by the court to enforce an award will be able to enforce it as though it were a court judgment. If there is no stay of execution or of proceedings because of a pending appeal or challenge to an award, the award creditor will apply to attach assets belonging to the award debtor. An application will need to be made by the judgment creditor to the court for the issuance of a writ of attachment, which will need to be signed by the judge.

Note that there are some statutory limitations in place against attachment or execution against certain state property. For example, Section 84 of the Sheriffs and Civil Processes Act (SCPA), Chapter S6, Laws of the Federation of Nigeria 2004 provides that the consent of the Attorney General of either the federation or a state must be obtained before attaching

public funds. This can be a difficult process as the consent of the Attorney General to attach state funds is notoriously difficult to obtain. That said, a writ of *mandamus* to compel the Attorney General's consent may be obtained from the courts if consent is unreasonably refused (*Onjewu v. Kogi State Ministry of Commerce and Industry & Ors* [2003] 10 NWLR (Pt 827) 40).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

An award creditor can apply to court for a writ of execution against the immovable property of the award debtor if no movable property of the judgment debtor can, with reasonable diligence, be found, or if the movable property is insufficient to satisfy the award and the costs of execution (Section 44 of the SCPA).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

The SCPA details various methods of execution of a judgment debt. First, a writ of *fieri facias* can issue against movable property. The writ empowers the sheriff to seize and sell an adequate quantity of goods belonging to an award debtor until the judgment debt is satisfied.

Second, garnishee proceedings may be commenced to order a third party who is indebted to, or in custody of funds belonging to an award debtor, to pay directly to the judgment creditor the debt due or so much of the debt as may be sufficient to satisfy the award and the costs of the enforcement proceedings.

Third, a judgment summons can be issued to cause an award debtor to attend court and be examined on oath concerning his or her ability to pay the debt. If the court is satisfied that the debtor can pay but chooses not to, he or she may be committed to prison. However, if it is proven that the debtor has genuine difficulty in paying, the court can make ancillary orders, such as for payment of the debt in instalments.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

On the assumption that intangible property as referred to here relates to property such as shares in a company, that property can be attached by a court order in satisfaction of the award debt. The court order to divest ownership of such shares from the award debtor for the purpose of satisfying the debt would be served on the company secretary and the company's registrars to ensure compliance. Indeed, Section 151(2) of the Companies and Allied Matters Act, Chapter C20, Laws of the Federation of Nigeria 2004, provides that company shares can be transferred by an instrument of share transfer, or by operation of law.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Diplomatic channels are used for the service of legal documents on a foreign state. Such documents are transmitted through the Nigerian Ministry of Justice and the Nigerian Ministry of Foreign Affairs to the government of the foreign state (Order 7, Rule 18 of the Federal High Court Rules 2009).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

The Diplomatic Immunities and Privileges Act, Chapter D9, Laws of the Federation of Nigeria 2004 (DIPA) protects the official residence and offices of the envoy of a foreign state from attachment or seizure by judicial process in Nigeria.

Aside from the limited diplomatic immunity contained in the DIPA, the common law doctrine of sovereign immunity will avail, in the absence of an express waiver, to protect the assets of foreign sovereigns from execution in Nigeria.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Section 2 of the DIPA allows a foreign state entitled to immunity to waive such immunity in the same way that a person who is generally entitled to the benefit of a statutory provision can decide to waive it and allow the transaction to proceed as though the provision did not exist.

Having said that, while it is settled that jurisdictional sovereign immunity can be waived, as was done in the cases of *African Reinsurance Corporation v. Fantaye* [1986] 3 NWLR (Pt 32) 811, *African Reinsurance Corporation v. AIM Consult Ltd* [2004] 11 NWLR (Pt 884) 223 and *Oluwalogbon v. Government of UK* [2005] 14 NWLR (Pt 946) 760, it is doubtful that these authorities support, or are applicable to the issue of, waiver of sovereign immunity against the attachment of sovereign assets, if the initial jurisdictional hurdle is cleared.

34

Portugal

Frederico Gonçalves Pereira, Miguel Pinto Cardoso, Rui Andrade, Filipe Rocha Vieira, Joana Neves, Catarina Cunha and Matilde Líbano Monteiro[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

According to the Portuguese Voluntary Arbitration Law (VAL), which was enacted in December 2011 and entered into force in March 2012, the award shall:

- be made in writing and signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, signatures of the majority of the tribunal's members or that of the chairman, if the award is to be made by the latter, shall suffice, provided that the reason for the omission of the remaining signatures is stated in the award;
- state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is rendered on the basis of a settlement of the parties (award by consent);
- state the date on which it was rendered, as well as the place of arbitration;
- determine the proportions in which the parties shall bear the costs directly resulting from the arbitration, unless otherwise agreed by the parties; and
- after its completion, be immediately notified through delivery to each of the parties of a copy signed by the arbitrator or arbitrators.

1 Frederico Gonçalves Pereira, Miguel Pinto Cardoso and Rui Andrade are partners, Filipe Rocha Vieira and Joana Neves are managing associates and Catarina Cunha and Matilde Líbano Monteiro are senior associates at Vieira de Almeida (VdA).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Yes, the VAL establishes that any party may, within 30 days of receipt of the award and with notice to the other party, request the arbitral tribunal to correct any error in computation, any clerical or typographical error or any error of an identical nature in the award or to clarify any obscurity or ambiguity of the award or of the reasons on which it is based. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the clarification within 30 days of receipt of the request. This clarification shall form part of the award. The arbitral tribunal may also, on its own initiative and within 30 days of the date of notice of the award, correct any of the above-mentioned errors in the award.

Within 30 days of receipt of the award, any party may also, with notice to the other party, request the arbitral tribunal to make an additional award as regards parts of the claim or claims submitted in the arbitral proceedings but omitted from the award, unless the parties agreed otherwise. If the arbitral tribunal considers the request to be justified, it shall grant the additional award within 60 days.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

According to the VAL, an award is only subject to appeal if the parties have expressly agreed on such a possibility in the arbitration agreement and provided that the dispute has not been decided *ex aequo et bono* or through amiable composition.

However, if the arbitration agreement was concluded while the VAL of 1986 was in force, the parties maintain the rights to the appeals they would have had, had the arbitral proceedings been conducted under this law. The consequence is that, unless the parties have waived the right to appeal, the same appeals that are admissible regarding a judgment of the court of first instance may be lodged with the court of appeal against the arbitral award.

In international arbitration, the award made by the arbitral tribunal is not subject to appeal, unless the parties have expressly agreed on the possibility of an appeal to another arbitral tribunal and regulated its terms.

The VAL establishes that the right to apply for the setting aside of an arbitral award cannot be waived. The VAL allows a waiver only if a party knew that a provision of the VAL that parties can derogate from, or any condition set out in the arbitration agreement, was not respected and the party proceeds without making a timely objection.

An arbitral award may be set aside if:

- a party, within 60 days of the date on which it received notification of the award, applies to set aside the award, furnishing proof that:
  - one of the parties to the arbitration agreement was under some incapacity; or that said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the VAL;
  - there has been a violation within the proceedings of fundamental principles and the violation had a decisive influence on the outcome of the dispute;
  - the award dealt with a dispute not contemplated by the arbitration agreement, or contains decisions beyond the scope of the agreement;
  - the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless the agreement was in conflict with a provision of the VAL from which the parties cannot derogate, or, failing such agreement, was not in accordance with this law, and, in any case, this inconformity had a decisive influence on the decision of the dispute;
  - the arbitral tribunal has decided in an amount in excess of what was claimed or on a different claim from that which was presented, or has dealt with issues that it should not have dealt with, or has failed to decide issues that it should have decided;
  - the award was made in violation of the requirements of written form, signature of the arbitrator or arbitrators, and assertion of reasons upon which it is based; or
  - the award was notified to the parties after the maximum time limit of 12 months since the date of acceptance of the last arbitrator, without the parties agreeing, or the arbitral tribunal deciding, to extend the time limit; or
- the court finds that:
  - the subject matter of the dispute cannot be decided by arbitration under Portuguese law; or
  - the content of the award is in conflict with the principles of international public policy of the Portuguese state.

Both the application for appeal and the application for setting aside an arbitral award are presented directly in the court of appeal.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The recognition and enforcement of arbitral awards is regulated both by the VAL and the Portuguese Civil Procedure Code (PCPC).

Portugal is party to several bilateral and multilateral treaties regarding the recognition and enforcement of arbitral awards. The most important bilateral treaties include those between Portugal and Portuguese-speaking countries, such as Angola, Cape Verde, Guinea-Bissau, Mozambique and São Tomé and Príncipe. Portugal has also signed a Judiciary Cooperation

Agreement with the Special Administrative Region of Macao (People's Republic of China). As for multilateral treaties, Portugal is a party to the Geneva Convention on the Execution of Foreign Arbitral Awards, the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States, and the Inter-American Convention on International Commercial Arbitration.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Portugal is a party to the New York Convention, which entered into force in January 1995. Portugal made the reciprocity reservation, meaning that the Convention is only applicable to arbitral awards rendered in a state that is also a party to the Convention. This reservation is of limited practical effect considering the more-favourable-right provision of the Convention and given that (1) Portugal is a party to treaties that allow for the recognition of foreign arbitral awards, and (2) the requirements for the recognition of foreign arbitral awards contained in the VAL are very similar to those of the Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The court that has jurisdiction over an application for recognition of foreign arbitral awards in Portugal is the court of appeals in the same location as the domicile of the person against whom the decision is to be invoked. As for the enforcement of foreign arbitral awards, the court with jurisdiction is the first instance court of the domicile of the person against whom the decision is enforced. The enforcement of domestic arbitral awards must take place in the first instance court in whose jurisdiction the place of arbitration is located.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

Without prejudice to the grounds for refusal of the recognition, which are similar to those of the New York Convention (see question 12 for details), there are no particular requirements for the competent courts (as per question 6) to have jurisdiction over an application for the enforcement of an arbitral award (domestic or foreign) other than the general requirements to initiate civil proceedings, notably those of legal personality and legal capacity and having a legitimate interest in the application.

Identifying assets in the application is not a requirement for recognition.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

The recognition proceedings are adversarial.

The party against whom the recognition is sought has 15 days to challenge the recognition (see question 12 for details). The applicant may then respond thereto within 10 days.

After the written pleadings of the parties have been made and all the procedural steps deemed necessary by the court have been taken, the parties and the public prosecutor will be granted 15 days to submit closing arguments.

The decision rendered by the Court of Appeals is subject to appeal to the Supreme Court.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

The applicant must provide an authenticated copy of the award or a duly certified copy, as well as the original of the arbitration agreement or a duly certified copy and proof that the award was duly notified to the parties. If both the agreement and the award are not written in Portuguese, a certified translation must be furnished. Copies must be filed in the number of parties against which the recognition is sought.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

All documents submitted in court proceedings that are not written in Portuguese must be translated. If there are founded doubts about the translation, the applicant may be ordered by the court to provide a duly certified translation by a notary or a diplomatic or consular officer from the country of the document's original language.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

To apply for recognition and enforcement of an arbitral award, the applicant must be represented by a lawyer and pay court fees, which may be claimed (as can lawyer fees to a certain extent) from the party against whom the recognition and enforcement is sought if the court renders a favourable decision. Parties in court proceedings are bound by the duties of cooperation, procedural good faith and reciprocal correction.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Portuguese courts will recognise and enforce an arbitral award, whether it deals with the whole, or with an independent part, of the matter in dispute, to the extent that it contains a final and binding decision on any of the claims. While procedural orders are not enforceable as awards, awards on costs and settlements formalised in an 'award by consent' that finally resolve one or more of the claims may be recognised and enforced as an award.

Unless the tribunal has decided otherwise, awards deciding on interim measures are enforceable before state courts. The court may, if it considers it justified, order the party seeking recognition or enforcement of the interim award to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security, or where such a decision is necessary to protect the rights of third parties.

A party may oppose the recognition or enforcement of an interim award on grounds similar to those established in the UNCITRAL Model Law. The state court's decision on recognition or enforcement of the interim award cannot be subject to appeal.

When deciding whether the award is final, partial or interim, Portuguese courts will look at the substance of the decision and will not be bound to the tribunal's qualification of the decision.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Recognition of foreign arbitral awards may be refused on the grounds set forth in the Convention or, when the Convention is not applicable, under certain grounds established in the VAL, which are very similar to those of the Convention.

If a party against whom an award is invoked requests recognition or enforcement of that award by the competent court, that party shall furnish proof of the following: (1) the incapacity of the parties or invalidity of the arbitration agreement under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was rendered; (2) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was otherwise unable to present its case; (3) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (4) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made.

Recognition will also be refused if a court finds that (1) the subject matter of the dispute cannot be settled through arbitration under Portuguese law, or (2) recognition of the award would lead to a result that is clearly incompatible with the international public policy of the Portuguese state.

Portuguese courts have repeatedly adopted a strict interpretation of these rules emphasising the exhaustive nature of the grounds for refusal of recognition and enforcement of foreign arbitral awards and by refusing to review the merits of the dispute (this also applies to the recognition and enforcement of interim measures).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

A foreign award recognised by a Portuguese court is immediately enforceable in substantially the same way as a domestic award. Additionally, upon recognition, parties may assert the *res judicata* effect of the award or use it to raise a set-off defence in any legal proceedings.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The decision of the court of appeals refusing to recognise the arbitral award can only be subject to appeal to the Supreme Court.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Recognition or enforcement proceedings may be stayed pending annulment proceedings at the seat under the New York Convention or, when the Convention is not applicable, under the VAL, but stay is not mandatory. When deciding the request for suspension, Portuguese courts enjoy wide discretion and will particularly weigh the prospects of success of the annulment proceedings, the foreseeable duration of the suspension, the damage that it may cause to the plaintiff and the adequacy of a security to prevent such damage.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The party requesting the suspension of the recognition or enforcement proceedings may be ordered to post security, usually a deposit or a bank guarantee, either as a condition to the adjournment or during the suspension of the proceedings at the request of the plaintiff. The court's power in this regard is discretionary and will be exercised in light of the specific circumstances of the case, in particular the prospects of success of the annulment proceedings, the solvability of the debtor and the prospects of success of the seizure of his or her assets after the suspension period. The court will also balance the benefits and damage that the security may cause to both parties.

The amount of the security should cover the quantum awarded and foreseeable delay interests.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Portuguese courts will in principle reject the recognition and enforcement of awards that have been set aside at the seat of arbitration pursuant to the New York Convention or, when the Convention is not applicable, under the VAL.

However, it is recognised by Portuguese legal scholars that a foreign award set aside at the seat may be recognised in Portugal in exceptional circumstances if the decision annulling the award was obtained in breach of due process or was contrary to Portuguese international public policy. Nevertheless, to the best of our knowledge, this issue has not yet been discussed by Portuguese courts.

If the award is set aside at the seat after the decision recognising the award has been issued by a Portuguese court, the judgment on the annulment may still be used as grounds to oppose enforcement of the award.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

In civil proceedings before Portuguese courts, documents will usually be served by registered mail, with acknowledgement of receipt, although service may also be performed

in person by a judicial officer or by a lawyer. If the addressee is a legal entity, service must be made at its registered office. In very exceptional cases, service may be performed by public announcement. Documents to be served must be translated into Portuguese.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The procedure for service of documents abroad is governed by one of three sets of rules, depending on the defendant's state of domicile:

Service to an addressee located in an EU Member State is governed by Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters, which shall be made through direct communication between transmitting and receiving agencies designated by Member States, consular or diplomatic channels, post or direct service on the addressee.

Service to an addressee located outside the European Union but in a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, which shall be made through the competent authorities designated in the states of origin and destination or by post, direct communication between the states' central authorities or diplomatic channels.

Where there is no applicable international convention or EU regulation, service will be performed in accordance with the PCPC by registered mail, with acknowledgement of receipt, or through diplomatic channels.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Yes, there are several publicly available registries allowing for the identification of different types of assets, namely land registry (immovable property), vehicle registry, aeronautical registry, ship registry, commercial registry (companies) and industrial property registry (trademarks, utility models, patents, designs).

Moreover, there is an Enforcement Public List available online, which identifies debtors whose assets subject to seizure were found to be insufficient to pay their debts (www.citius.mj.pt/portal/execucoes/listapublicaexecucoes.aspx).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Judicial proceedings are public in Portugal, as a matter of principle. Additionally, there is a list available online reporting on whether a given company is facing, or has previously faced, any bankruptcy proceedings (www.citius.mj.pt/portal/consultas/consultascire.aspx).

Moreover, enforcement agents may obtain information regarding identification and location of the debtor's assets (located in Portugal) subject to seizure, as they are given access to databases of the tax authority, social security and the various public registers. As regards banking information, the Bank of Portugal must disclose to enforcement agents the name of the financial institution where the debtor has bank accounts and bank deposits. When this information is protected by tax secrecy or some other confidentiality regime, enforcement agents need the court's authorisation to request said information.

Furthermore, under a general duty to cooperate with the court, parties (including debtors or third parties) may be forced to disclose information, including specific documents that are relevant to the enforcement, whether or not they relate to the debtor's assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, interim measures against assets are available under Portuguese law and they are relevant, notably, in the context of a pending award recognition procedure.

The interim measures' procedure is set out in the PCPC (see question 24) and they may be granted by the state courts against assets owned by the Portuguese state, though limited to assets that are not part of the public domain – deemed absolutely unseizable – or used for public utility – deemed relatively unseizable.

Regarding assets owned by a sovereign state other than the Portuguese state, see question 34.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

The PCPC sets forth two types of interim measures: non-specified and specified.

A non-specified interim measure is one that allows the party to request the adoption of any protective or pre-emptive interim measure that is not specified, provided it is adequate to secure enforcement of the award. If this is the case, the applicant must demonstrate the fulfilment of three legal conditions: (1) *periculum in mora*; (2) *fumus bonus iuris*; and

(3) adequate balance of interests (the harm resulting from the measure cannot outweigh the damage that the requesting party wants to avoid).

Before granting the non-specified interim measure, the court hears the opposing party, except when that may endanger the effectiveness of the interim measure.

Regarding specified interim measures against assets, the PCPC provides the following: (1) attachment; (2) listing of assets; and (3) interim restitution of possession. These measures may be *ex parte* or not, depending on the specific measure in question or the specific circumstances of the case.

If and when the court grants any of the above-mentioned specified interim measures without hearing the respondent, the latter can present its defence subsequently. The court's ensuing decision (and the court's potential decision to attribute a definitive nature to the interim measure) is subject to appeal.

All proceedings regarding interim measures are treated as urgent.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures regarding immovable property other than those outlined in question 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There are no specific rules governing the procedure for interim measures against movable property other than those outlined in question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

It is possible to seek interim measures against industrial and intellectual property rights in accordance with the Industrial Property Code and the Code of Copyright and Related Rights.

Courts have the power, at the request of a party, to grant any appropriate measures to prevent any imminent violation or prohibit a current violation of the alleged right, whenever there is a violation of, or justified concern that another party may cause serious and difficult-to-repair harm to, an industrial or intellectual property right. The applicant shall demonstrate that (1) he or she is the holder of the property right in question and (2) a violation of that right exists or is imminent.

Furthermore, courts have the power, upon request, to grant interim and urgent measures to preserve evidence of the violation of industrial or intellectual property rights, including

a detailed description of the situation (with or without the collection of samples) and actual attachment of assets or the materials used for their production.

Finally, courts can order pre-emptive attachment of assets in two circumstances:

- When an infraction at the commercial scale (i.e., acts that violate industrial or intellectual property rights and of which the purpose is to obtain an economic or commercial advantage) exists or is imminent, the court may grant the pre-emptive attachment of the movable and immovable assets owned by the alleged violator, or the communication of or access to banking, financial or commercial data and information relating to the violator, or both.
- When there is a violation of industrial and intellectual property rights, the court may order the attachment of the assets suspected of being used in that violation, or of any instruments that can only be used for the purposes of the violation.

The applicant of both types of pre-emptive attachment of assets shall provide all reasonable evidence of his or her ownership of the right and that the possibility of obtaining compensation for losses and damage is compromised.

Any of these measures shall be granted only after the court hears the respondent, except when that may cause irreparable damage to the applicant. In the latter case, after the granting of the measure, the respondent is immediately notified and may request a revision of the implemented measures within a period of 10 days, providing evidence and presenting arguments that have not yet been considered by the court.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The judicial attachment or seizure (*penhora*) of the debtor's assets in the context of enforcement proceedings may only target assets that are sufficient to cover the amount in debt and the foreseeable costs of the enforcement proceedings. Hence, only assets and rights that can be evaluated in pecuniary terms may generally be seized.

Enforcement proceedings begin with an application filed by the creditor based on an existing enforcement title (court ruling or arbitral award; documents issued or authenticated by a notary public or by other entities with the same qualifications, which either originate or recognise a valid obligation; credit instruments such as cheques, promissory notes; or documents to which the law has conferred direct enforceability). Besides indicating the underlying facts of the enforcement and the net value of the credit in question, the application should also indicate the assets to be seized, bank accounts owned by the debtor and the identity of the debtor's employer, as well as the identity of the enforcement agent.

In what concerns the enforcement of arbitral awards, and when there are no grounds to summon the debtor prior to the attachment of the assets, assets will be seized immediately after the enforcement application has been filed. Attachment is carried out by the enforcement agent, who normally also acts as the asset's custodian. Once seizure of the assets has been secured, the debtor is made aware of the same. The debtor may then challenge the enforcement application itself or the specific enforcement measures, or both.

The attachment may be suspended if security has been provided by the debtor in the meantime; nevertheless, the enforcement proceedings will still proceed.

Creditors with registered and known rights over the seized assets may claim their credits thereafter. The enforcement judge will then review their credits and, if necessary, rank them accordingly.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Please refer to question 28. In addition, it should be noted that attachment of immovable property is undertaken via electronic communication thereof by the enforcement agent to the relevant land registry. Once the asset's attachment has been duly registered, notice of the attachment will be made public and affixed at the property's door. Unless expressly excluded, the attachment will automatically encompass the property's proceeds.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

Please refer to question 28. In addition, it should be noted that if the movable assets are subject to registry, then their attachment will be carried out according to the rules governing the attachment of immovable assets.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Please refer to question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

No, there are no specific rules.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Portuguese law does not provide for specific rules on the matter. Yet, jurisprudence has consistently asserted that foreign states may be summoned to proceedings as any other parties are (see response to question 20).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Foreign state immunity is not dealt with expressly by Portuguese law. However, the courts and authorities widely recognise foreign state immunity as an international custom, which, in turn, and pursuant to the Portuguese Constitution, is an integral part of the Portuguese legal order.

Notwithstanding, the notion of foreign state immunity is interpreted restrictively, that is to say, it is limited to *ius imperii* acts (although the exact meaning of the contemporary notion of restrictive state immunity is still subject to a wide level of controversy among Portuguese jurisprudence and scholars).

In late 2006, Portugal ratified the Convention on Jurisdictional Immunities of States and Their Property. Upon entry into force of this Convention (which is dependent on a minimum number of signatory states being reached), it will become a part of the Portuguese legal order, pursuant to the Portuguese Constitution.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Yes, it is possible for a foreign state to waive immunity from enforcement in Portugal, but only to the extent that it is allowed for under customary law. However, such a waiver must be express and clear.

35

Qatar

Matthew R M Walker, Marieke Witkamp and Claudia El Hage[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Arbitration and post-arbitration proceedings in Qatar are governed by:

- the Law of Arbitration in Civil and Commercial Matters (entered into force via Law No. 2 of 2017 Promulgating the Civil and Commercial Arbitration Law – Issuing the Law of Arbitration Civil and Commercial Matters) (the Qatari Arbitration Law) – based primarily on the UNCITRAL Model Law;
- the respective provisions of the Civil and Commercial Procedures Law (CCPL) that are applicable to arbitration and post-arbitration proceedings, and are not repealed by Law No. 2 of 2017 (Articles 190 to 210 of the CCPL were repealed by Law No. 2 of 2017), and that do not contravene the provisions of the Qatari Arbitration Law; and
- the New York Convention.

The formal procedure requires that the award shall be issued in writing and shall be signed by the arbitrator or, if more than one arbitrator, by the majority of the arbitrators, unless agreed otherwise by the parties, provided that the reason for any omitted signatures is stated in the award (awards on procedural matters may be issued by the president of the tribunal if authorised to do so by the parties or all members of the arbitral tribunal).

The award must state the reasons upon which the decision is based, unless the parties agree otherwise or if the applicable legal rules do not require it, or if the award is made

1 Matthew R M Walker is a partner and Marieke Witkamp is an associate at K&L Gates LLP. Claudia El Hage is managing partner at Rashed R al Marri Law Office.

upon the parties' settlement. It must also state the name of the parties and their addresses; the nationalities, names, addresses and capacity of the arbitrators; a copy of the arbitration agreement; the date of the issuance of the award; and the seat of arbitration. The award must include a summary of the requests, statements and documents submitted by the parties and the award ruling and its reasons, if it is required that they be stated. Finally, the award shall state the costs and fees of the arbitration, the party responsible for paying costs, and the procedures for payment, unless agreed otherwise by the parties.

Although there is no explicit legal requirement under the abolished arbitration law or any other law, or in the constitution of Qatar, there have been several court decisions, given under the now-repealed parts of the 'old' arbitration law, which ruled that Qatar-seated arbitral awards must be issued in the name of His Royal Highness, the Emir of the State of Qatar. Since those judgments also cited Article 69 of the Procedural Code, which was not expressly repealed by the new arbitration law, it remains to be seen how prevalent the practice of seeking domestic awards being issued in the name of His Highness the Emir will continue to be.

Each party to an arbitral award shall be given a copy within 15 days of the date of the issuance of the award, and the tribunal is required to send an electronic copy thereof to the administrative department in the ministry concerned with arbitration affairs, within two weeks of issuance. In practice, we are aware that arbitral tribunals appear to be complying with this requirement, and that the arbitration department at the Ministry of Justice is handling this particular requirement as set down in Article 31(11) of the Law.

Although it does not, technically, relate to the form of arbitral awards, it should be noted that 'interest' as a form of compensation for damages is recoverable under Qatari law only if mutually agreed by the parties. Additionally, unless mutually agreed by the parties, costs are a matter reserved solely to the tribunal's discretion.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Unless the parties agree otherwise, any party may, within seven days of receipt of an arbitral award, or within the period agreed by the parties, provided that it notifies the other parties, request the arbitral tribunal to correct any material computation or typographical errors that may have occurred in the arbitral award, or give an interpretation of a specific point or part of the arbitral award, if so agreed by the parties.

If the arbitral tribunal considers the request to be justified, it shall make the correction in writing or give the interpretation within seven days of the date of receipt of the request. The interpretation or correction shall form part of the final arbitral award.

The arbitral tribunal may, provided that it notifies the parties, correct on its own motion any material computation or typographical errors that may have occurred in the arbitral award within seven days of the date of issuance.

Unless the parties agree otherwise, any party, provided that it notifies the other party, may request the arbitral tribunal, within seven days of the date of receipt of the arbitral award, to issue an additional arbitral award as to the requests submitted during the arbitral

proceedings but which were omitted from the award. If the tribunal considers the request to be justified, it shall issue the additional award within seven days of the date of the petition submission.

In the event that it is proven that it is impossible for the arbitral tribunal that has issued the award to reconvene to reconsider the request to correct, clarify or decide on the omitted requests, the matter can be raised with the competent court to decide thereon, unless otherwise agreed by the parties.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award may not be appealed by any method of appeal except by way of setting aside before the competent court.

The competent court for setting aside an award is by default the Civil and Commercial Arbitration Disputes Circuit of the Court of Appeals (i.e., local courts) or the Court of First Instance of the Civil and Commercial Court of the Qatar Financial Centre (i.e., the QFC courts) as designated in the agreement by the parties.

The Qatari Arbitration Law sets out limited grounds for setting aside an arbitral award. An application for setting aside an award shall not be accepted unless the applicant furnishes proof of the following:

- any party to the agreement was, at the time of concluding it, incompetent or under some incapacity, or the arbitration agreement is invalid under the Law chosen by the parties or according to the Qatari Arbitration Law by default;
- the party making the application to set aside was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings, or was unable to present its defence for any other reasons beyond its control;
- the award has decided matters outside the scope of the arbitration agreement or in excess thereof (if it is possible to separate the parts of the award that are related to arbitration from the parts unrelated to arbitration, only the latter parts shall be set aside); or
- the composition of the arbitral tribunal, the appointment of the arbitrators or the arbitral proceedings was not in accordance with the agreement of the parties unless that agreement was in conflict with a provision of the Law, from which the parties cannot derogate, or failing such agreement, was not in accordance with the Law.

Grounds that a court may consider of its own initiative to set aside an award are non-arbitrability of the subject matter of the dispute or violation of public policy, which is to be understood as a serious departure from fundamental notions of procedural justice although it may be construed more widely.

Any such challenge must be made within one month of the date (1) of receiving the award, (2) on which the party making the application is notified of the award, or (3) of issuing a correction, interpretation or additional award, unless the parties agree in writing to extend the time limit for filing the application to set aside.

Unless otherwise agreed between the parties, the competent court may stay the proceedings before it upon the request of one of the parties, for such period that the court will determine if it finds it convenient to grant the arbitral tribunal the chance to complete the arbitration proceedings or to take any other procedure that the arbitral tribunal deems necessary to eliminate the grounds for annulment.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Qatari Arbitration Law, with the New York Convention, provides for the procedural rules for recognition and enforcement of arbitral awards in Qatar.

Qatar is a party to the New York Convention and the ICSID Convention, as well as 55 bilateral investment treaties (of which 23 are in force), and an additional 12 treaties with investment provisions (of which six are in force). Qatar is also a party to the Convention on Judicial Cooperation between States of the Arab League (Riyadh Convention) of 1983 and the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications of 1996.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Qatar acceded to the New York Convention on 30 December 2002. The Convention entered into force by ratification via Emiri Decree No. 29 of 2003 on 15 March 2003, which was published in the Official Gazette on 20 July 2003. No reservation was made under Article I(3).

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

The competent judge is the enforcement judge in the First Instance Circuit of the Plenary Civil Court by default, or the enforcement judge in the Civil and Commercial Court of the Qatar Financial Centre pursuant to the agreement of the parties. In the Grand Civil Court, the enforcement judge sits in a different court (and branch of the courts) from the judges in the first instance addressing civil claims.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

There is no mandatory requirement under the laws of Qatar for an applicant to identify assets within Qatar. Instead, on enforcement, the execution judge automatically notifies the commercial register at the Ministry of Industry and Commerce, the banks (through the Qatar Central Bank), the real estate register and the traffic department, unless the applicant seeks an attachment on specific assets (such as funds in the hands of third parties), in which case the party must identify such assets.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Whereas arbitration law makes a distinction between a refusal to recognise an award based on grounds submitted by the other party and grounds to be examined *ex officio*, recognition proceedings in Qatar are currently by means of an application submitted by the successful party to the enforcement judge for the recognition and granting the *exequatur*. The judge, after examining *ex officio* that all conditions are met *prima facie*, will recognise the award and grant it *exequatur*.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

An application for recognition and enforcement of the arbitral award shall be submitted in writing to the competent judge, with a copy of the arbitration agreement, and the original award or a copy of it in the language in which it was issued, with a certified Arabic translation if it was issued in a foreign language, unless the parties agreed on alternative methods to enforce the arbitral award.

An application for enforcement of the arbitral award shall not be accepted until expiry of the time limit of one month set for submission of the application for setting aside the arbitral award.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

By law all documents submitted to the court must be in Arabic or translated into Arabic by a licensed translator. There are no sworn translators in Qatar; however, there are translation companies licensed to operate by the Ministry of Commerce and Industry.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

The court fee for submission of an application for recognition and enforcement is 100 riyals, in addition to any translation costs. Once the enforcement is granted, a fee of 750 riyals has also to be paid. Any request submitted to the court is subject to a fee of 10 riyals. On a practical level, our experience is that recognition and enforcement of awards is currently taking much longer than many might have hoped for or envisaged under the new Arbitration Law.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

A party in whose favour an order for provisional measures or an interim award is issued may, after obtaining written permission from the tribunal, request the competent judge to order the enforcement of the order or award issued by the tribunal. The competent judge shall then enforce the order or award, unless the order contradicts the law of public policy.

Additionally, the tribunal, or any of the parties, may, with the approval of the tribunal, request the assistance of the competent court in taking evidence relating to the subject matter of the dispute, including technical expertise services and examination of evidence. The tribunal may stay the proceedings until it has obtained such assistance. The competent court may then enforce this request for assistance by, *inter alia*, sentencing hostile witnesses who fail to appear before the court to give evidence or who fail to respond to any of the questions put to them.

There is no specific distinction regarding partial awards. However, the Qatari Arbitration Law – mirroring the New York Convention – allows partial recognition or enforcement of arbitral awards. By way of analogy and in light of the fact that the recognition of partial awards is not prohibited under the laws of Qatar, it is safe to assert that the Qatari courts would recognise and enforce partial awards.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds for refusal of recognition mirror those provided under Article V:

- Upon a request made by a party against whom an award is invoked, if it is brought before the competent judge to whom the application of recognition or enforcement has been submitted, proof of one of the following grounds:
  - one party to the arbitration agreement, at the time of the conclusion of that agreement, was incompetent or under some incapacity under the law governing its capacity, or the arbitration agreement is invalid under the law to which the parties have agreed to apply to the arbitration agreement or under the law of the country where the award was made if the parties fail to agree on that;
  - the party against whom the enforcement is sought was not duly notified of the appointment of the arbitrator or of the arbitral proceedings, or was unable to present its defence for any reason beyond its control;
  - the award has decided matters that fall outside the scope of the arbitration agreement, or in excess of the arbitration agreement. However, if it is possible to separate parts of the awards relating to the arbitration from the parts not relating to the arbitration, it is allowed to recognise or enforce the award deciding matters within the scope of the arbitration agreement or the matters that did not exceed the agreement;
  - the composition of the arbitral tribunal, appointment of arbitrators, or the arbitral proceedings was in contradiction of the law or the agreement of the parties, or, in the absence of an agreement, was in contradiction of the law of the country where the arbitration took place; or
  - the arbitral award is no longer binding to the parties or has been set aside, or enforcement of the award has been stayed by a court of the country in which the award was issued or in accordance with the law thereof; or
- the competent judge on his or her own motion refuses to recognise or enforce the arbitral award in the following two cases:
  - if the subject matter of the dispute cannot be settled by arbitration under the law of the state; or
  - recognition or enforcement would be contrary to the public policy of the state.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The award becomes enforceable immediately through an enforcement lawsuit. A recognition order is subject to a grievance before the competent judge within 30 days of the date of issuance of the execution order.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A grievance against a decision to refuse or enforce an arbitral award may be brought before the competent court within 30 days of the date the decision is issued.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

If the competent judge becomes aware that an arbitral award for which recognition or enforcement is sought is subject to setting aside before the court of the country where the award was issued, he or she may adjourn the order of enforcement as he or she deems fit. In addition, the competent judge may, upon the request of the party seeking recognition or enforcement, require the other party to provide suitable security.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

See question 16.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

The Qatari Arbitration Law provides that an enforcement application can only be accepted after the time limit for annulment has expired; however, it does not provide for any stay of proceedings for any other reason apart from what is discussed in question 16. Articles 380 and 381 of the CCPL provide that a foreign arbitration award can be enforced after checking that Qatari courts are not the sole courts that have jurisdiction over the matter; that the foreign courts have jurisdiction in accordance with international judicial jurisdiction as stated in their own laws; that the parties to the arbitration have been duly summoned to appear and were duly represented; that the award is final in accordance with the law of the

court that issued it; that the award does not contradict another judgment previously issued by a Qatari court; and that it does not contravene the public policy or morals of Qatar.

For partially annulled awards, see question 12.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Under the Qatari Arbitration Law, unless the parties agree otherwise, written notices or correspondence shall be served for arbitration proceeding purposes as follows:

- personal service to the addressee, or service to the addressee's place of business, habitual residence or mailing address that is known to the parties or specified in the arbitration agreement, or in the document regulating the relationship under the arbitration;
- if none of the aforementioned addresses can be found after making a reasonable enquiry, a written notice or correspondence is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence or mailing address, email address or fax known to the addressee, by registered mail or by any other means that provides written proof of receipt;
- written notice or correspondence sent by fax or email is deemed to have been received on the date on which it is sent if no automatic error message is received by the sender;
- in any situation, written notice or correspondence is deemed to have been received if it is received or sent before 6pm in the country where it is received; otherwise, receipt will be deemed to have occurred on the following day; or
- for the purposes of calculating the periods stipulated in the Law, the calculation of a time limit shall begin on the day following the day on which it is received. If the last day of that period falls on an official holiday or a business holiday at the main office or the place of business of the recipient, the time limit shall be extended until the next working day. However, official holidays or business holidays that fall during the established time limit shall be taken into account.

This procedure does not apply to judicial notices before the courts.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

See question 19.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Registers are held at various government departments, such as the commercial register at the Ministry of Commerce and Industry, the traffic department, the real estate register, banks, and the intellectual property register. However, in practice, data from these registers can only be obtained through a court order.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

See question 21.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures are available against movables, including funds in the hands of third parties. The same legal provisions apply to disputes relating to public services and public works contracts, supply contracts and any other administrative contracts. The CCPL provides for the right to ban an award debtor from leaving the country if there are genuine concerns that the debtor may smuggle its assets or flee the country to avoid enforcement of the dispute.

The authors are aware of at least one case in which interim measures were granted against the assets of a quasi-state entity and the assets of that entity were attached and the assets in that entity's account were seized and transferred to the court treasury.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

The procedure is filing an adversarial application to the execution judge, who will issue an order for attachment, or an *ex parte* application to seize the assets in the hands of third parties.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

Only execution measures are allowed against immovable property.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

See questions 29 and 30.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

After filing an adversarial application to the execution judge, a debtor is summoned to defend himself or herself and to settle. A request to seize property includes the name of the applicant, its capacity and (elected) domicile, the name of the debtor and his or her domicile, the type of execution deed and its date, the date of notification of the debtor and the summon to settle, the debt value, a description of the immovable property, its location, dimension, borders, and all information enabling it to be identified.

The enforcement judge will issue an order to seize the property within two weeks at most of the request date. Upon seizing the property, the real estate registry is informed so as to register the attachment on the property's register. Minutes of the attachment are drawn up and submitted to the judge, who will issue within seven days, *inter alia*, a list of sale conditions and the auction price. Within the following 15 days, the debtor, creditors and right holders are informed of the sale auction procedure.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

After filing an adversarial application to the enforcement judge, the debtor is summoned to defend and to settle. A request to seize the property includes the name of the applicant, his or her capacity and (elected) domicile, the name of the debtor and his or her domicile, the type of execution deed and its date, the date of notification of the debtor and the summons to settle, the debt value, and a detailed description of the property at the location. The minutes will be signed by the court clerk and the debtor if present (without prejudice). The property will have to be sold within three months of the attachment date, although this can be extended by mutual agreement of the parties for another three months, by court order or by law.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See question 30.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

No. The same rules apply, save for any international treaties and reciprocity of recognition and enforcement.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Service is through diplomatic channels.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

As regards the immunity of foreign states and foreign state entities, Qatar acceded to the Vienna Convention on Diplomatic Relations (the Vienna Convention) on 6 June 1986 and entered three reservations: (1) the right for the State of Qatar to open a diplomatic bag if it has strong suspicions that it is being used for purposes that are unlawful and incompatible with the aims of the relevant rule of immunity; (2) the non-applicability to the State of Qatar of Article 37(2) of the Vienna Convention (concerning the immunity

granted to the administrative and technical staff of the mission and members of their families; and (3) the fact that the Qatar does not recognise the State of Israel as a result of its accession to the Vienna Convention.

Apart from these reservations, Qatar is bound to enforce all other provisions of the Vienna Convention, including those dealing with judicial immunity of assets pertaining to foreign states located on its territory. In particular, the judicial authorities in Qatar will be precluded from enforcing any domestic or foreign judgment or arbitral award against any assets belonging to the diplomatic mission of a foreign state. Indeed, pursuant to the provisions of Article 22(3) of the Vienna Convention, 'the premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution'.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

It would not appear that a foreign state (defined in the Vienna Convention as the Sending State) could waive its immunity from enforcement as far as the premises, properties and means of transport belonging to its diplomatic mission in Qatar are concerned. However, the foreign state could validly waive the immunity from jurisdiction and enforcement enjoyed by its diplomatic officers pursuant to the provisions of Article 32 of the Convention. For this waiver to be valid, it should always be express. Note that in respect of civil or administrative proceedings involving diplomatic officers, a waiver of immunity from jurisdiction shall not be deemed to imply waiver of immunity in respect of the execution of a judgment, for which a separate waiver shall be necessary.

36

Romania

Cosmin Vasile[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

According to the Code of Civil Procedure, the arbitral award shall be drawn up in writing and shall include:

- the names of the members of the arbitral tribunal, the place and date of rendering the award;
- the names of the parties, their domicile or residence – or, as the case may be, the name and registered office – and the names of the parties' representatives and of the other persons having attended the hearings of the dispute;
- the arbitration agreement based on which the arbitral proceedings were initiated;
- the object of the dispute and a summary of the parties' respective claims;
- the factual and legal grounds for the award, or, if the arbitration was decided *ex æquo et bono*, the grounds considered by the tribunal;
- the operative part; and
- the signatures of all arbitrators, and the signature of the arbitral assistant, if appropriate.

1 Cosmin Vasile is managing partner at Zamfirescu Racoți & Partners.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

If clarifications are necessary with respect to the meaning, extent and application of the operative part of the award, or if the operative part of the award includes inconsistent terms, any party may request the arbitral tribunal that made the award, within 10 days of the date of notification of the award, to give an interpretation of the operative part or to remove the inconsistencies.

If the arbitral tribunal omitted in its award to issue a decision with respect to a main or secondary claim, or with respect to a related or associated claim, any party may request that the award be supplemented within 10 days of notification thereof.

Clerical errors in the award, or any other errors that do not change the merits of the solution, and any errors in calculations may be corrected at the tribunal's own behest or following a request by a party, which must be filed within 10 days of the date of notification of the award.

The award clarifying, supplementing or rectifying the errors will be issued immediately and forms an integral part of the arbitral award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award may not be appealed. Further, an arbitral award may only be set aside on one of the following limitative grounds:

- the dispute was non-arbitrable;
- the arbitration agreement did not exist or was invalid or ineffective;
- the constitution of the arbitral tribunal was not in accordance with the arbitration agreement;
- the party requesting the setting aside of the award was not duly notified of the hearing when the main arguments were heard and was absent when the hearing took place;
- the arbitral award was rendered after expiry of the time limit, even though at least one party submitted its intention to object to the late issuance of the award and the parties opposed the continuation of the proceedings after expiry of the time limit;
- the award granted something that was not requested (*ultra petita*) or more than was requested (*plus petita*);
- the award failed to mention the tribunal's decision on the relief sought and did not include the reasoning behind the decision, the date and place of the decision or the signatures of the arbitrators;
- the award violated public policy, mandatory legal provisions or morality; or

- subsequent to issuance of the final award, the Constitutional Court has declared unconstitutional the legal provisions challenged by a party during the arbitral proceedings or other legal provisions included in the challenged piece of legislation that are closely related to and inseparable from those challenged.

The request to set aside the arbitral award may be filed within one month of service of the award on the parties, unless the request is grounded on the subsequent issuance of the Constitutional Court of a ruling declaring provisions unconstitutional, where the time limit is three months after publication of that court's decision. Certain reasons for setting aside an arbitral award may be deemed waived if they are not raised before the arbitral tribunal at the beginning of the process (particularly those relating to the jurisdiction and constitution of the arbitral tribunal). A request to set aside is subject to a fixed court fee under the law.

The jurisdiction to settle the set-aside claim belongs to the court of appeal of the county where the arbitration took place. The ruling issued by the court of appeal is subject to a higher appeal before the High Court of Cassation and Justice.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The recognition and enforcement procedure of arbitral awards is governed in Romania by Articles 1124 to 1133 of the Code of Civil Procedure (note that this procedure applies only to foreign arbitral awards). In accordance with Article 615 of the Code of Civil Procedure, domestic arbitral awards are enforceable and can be enforced in the same manner as a domestic court decision. A similar regime is set forth in Article 1121 of the Code of Civil Procedure, which provides that Romanian international awards are enforceable and binding, starting with the date on which the parties are notified.

Romania is party to several treaties facilitating recognition and enforcement of arbitral awards, such as the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 July 1958 (the New York Convention), the European Convention on International Commercial Arbitration of 21 April 1961 (the Geneva Convention), and the Convention on the Settlement of Disputes between States and Nationals of Other States of 18 March 1965 (the ICSID Convention).

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes. Romania acceded to the New York Convention in 1961, but expressed commercial relationship and reciprocity reservations. In accordance with Decree No. 186/24 July 1961, Romania mentioned that it would apply the Convention only to disputes arising out of legal relationships, whether contractual or not, that are considered as commercial under the national law of the state making the declaration. In addition, Romania stipulated that application of the Convention would be limited to awards made only in the territory of another contracting state. As to awards made on the territory of a non-contracting party, the Convention will be applied only on the basis of reciprocity.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

An application for enforcement of a domestic award (including international awards rendered in Romania) should be made to the court of first instance in whose jurisdiction the debtor is domiciled, or, if the debtor has no domicile in Romania, to the court of first instance in whose jurisdiction the creditor is domiciled or the enforcement officer (bailiff) is seated. More precisely, an application for enforcement should be submitted to the competent court by the enforcement officer within three days starting of the date when a request for enforcement was registered with the enforcement officer's office by the creditor, and submitted with the original or a certified copy of the award.

The competent court to decide on an application for recognition and enforcement of a foreign arbitral award is the tribunal in whose jurisdiction the debtor has its domicile or headquarters. If the debtor's domicile or headquarters cannot be established, then the competent court is the Bucharest Tribunal. The Court of Appeal handles appeals against the decisions rendered by the tribunals.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

There are no specific requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards. Therefore, the applicant does not have to identify assets within the jurisdiction of the court. The general condition that should be complied with by the applicant is the existence of a legitimate interest in obtaining the recognition and enforcement of an award in Romania.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

The proceedings for the recognition of foreign awards are adversarial. Pursuant to Article 1131 of the Code of Civil Procedure, an application for recognition of a foreign arbitral award is decided by the court following the summoning of the parties. In exceptional cases, an application can be reviewed *ex parte* if it is clearly shown by the award that the defendant agreed to the claimant's claims.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

In accordance with Article 1128 of the Code of Civil Procedure, an application should be accompanied by the arbitration agreement and the arbitral award (the originals or duly certified copies that are subject to over-legalisation, except for states that apply the Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents, which was ratified by Romania on 7 June 2000). As the opposite party has to be summoned, the applicant should submit two copies of the application and the corresponding documents, one for the court and one for the other party (if there are more parties, then a copy for each party should be submitted).

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

An application for recognition and enforcement should be submitted in Romanian. All supporting documents (in particular the arbitration agreement and the arbitral award) that are in a foreign language should be accompanied by a certified full translation.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An applicant seeking the recognition and enforcement of an arbitral award is required to pay a stamp duty in the amount of 20 lei. Representation by a lawyer is allowed but not imposed by the law.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Courts may recognise partial awards provided that they resolve, in a final and binding manner, part of the dispute, with no possibility of being further reviewed or revoked by the arbitral tribunal. As regards interim awards (i.e., awards by which certain measures are ordered or by which the dispute is only provisionally settled, pending the final resolution of the dispute by means of a final award), the courts will generally be reluctant to enforce an award with a provisional effect, irrespective of the label given to it by the arbitral tribunal (interim or partial award).

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The main grounds for refusing the recognition or enforcement are stipulated under Articles 1125 and 1129 of the Code of Civil Procedure, which are similar to those provided under Article V of the New York Convention, namely: arbitrability issues; issues concerning a breach of public policy; incapacity of the parties to conclude an arbitration agreement; invalidity of an arbitral agreement; the absence of a proper notice to a party regarding the appointment of an arbitrator or to arbitral proceedings; the composition of an arbitral award or arbitral proceedings did not observe the parties' agreement or the law of the country where the arbitration took place; jurisdictional issues, such as deciding a dispute not contemplated by the parties; or the award has not become binding, has been suspended or set aside in the country in which that award was rendered.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The enforcement of a foreign arbitral award can start once 30 days have passed since notification of the decision rendered in the recognition and enforcement procedure, unless an appeal is submitted by the opposite party. In the latter case, the enforcement can start immediately after the tribunal's decision becomes final (i.e., after rejection of the appeal).

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The decisions rendered in recognition and enforcement proceedings are subject to appeal before the Court of Appeal, regardless of whether the application was granted or refused.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Pursuant to Article 1.130 of the Code of Civil Procedure, the court may stay the recognition and enforcement proceedings pending the outcome of an application for annulment or suspension of the award filed at the seat of arbitration. Note that, although the court will have to analyse whether the application to stay the enforcement is based on sound grounds, it has a wide discretion to render a decision in this respect, depending on the exact circumstances encountered in each case.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

At the request of the party seeking recognition and enforcement, the court may order the opposite party to give security as a condition-precedent for granting a stay of the recognition or enforcement proceedings. In establishing the amount of the security, the court will take into consideration the amount of the damages that may be incurred by the party seeking the enforcement. Nevertheless, the value of the security cannot exceed 20 per cent of the total amount claimed. As a rule, a security deposit is required. Provided that the other party agrees, the security may be also posted in the form of a bank guarantee, or in another suitable form, including a mortgage. However, most commonly, parties provide security deposits.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Based on the provisions of Article 1129 of the Code of Civil Procedure, the court shall refuse the recognition and enforcement of an award that has been set aside by the competent authority at the seat of arbitration.

A decision granting recognition of an arbitral award can be reversed by the appellate court if the award is subsequently set aside at the seat of arbitration.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of the judicial documents issued in the course of civil and commercial proceedings may be conducted by registered letter with declared value against acknowledgment of receipt or by court officers. The documents are to be served at the place of residence or the domicile of the consignee.

Service of extrajudicial documents may be carried out by an enforcement officer (bailiff) or, in some cases, by a notary public.

As regards documents coming from abroad, international regulations are applicable (such as Regulation (EC) No. 1393/2007, bilateral or multilateral treaties, etc.). If there is no international regulation in place, the documents are received by the Ministry of Justice and are forwarded to the competent court for service to the defendant.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

When judicial or extrajudicial documents are sent by a Romanian authority to a defendant domiciled abroad, service is carried out in accordance with international provisions, such as the Hague Convention of 1965 or Regulation (EC) No. 1393/2007. When the international conventions are not applicable, service of documents is entrusted to the Ministry of Justice in accordance with Law No. 189/2003 regarding international judicial assistance in civil and commercial matters.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several databases or publicly available registers that may be used for identifying a debtor's assets, such as the Land Registry for immovable assets and the Electronic Archive for Security Interests in Movable Property for movable assets.

Moreover, during an enforcement procedure, a bailiff can request information from banks relating to a debtor's bank accounts. Further, the bailiff can request competent authorities to provide other relevant information (e.g., information from fiscal authorities regarding movable or immovable assets for which the debtor pays taxes).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Information about a debtor's involvement in public court proceedings is publicly available on the official website of the Romanian courts at http://portal.just.ro/SitePages/acasa.aspx. However, court files are kept confidential and only the parties have access to them.

Nevertheless, in insolvency proceedings, many documents are published in the Insolvency Proceedings Bulletin and thus become generally accessible.

With respect to a debtor's assets, information can be obtained only by a bailiff, once the enforcement procedure has started, as discussed in question 21.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures can be ordered against a debtor's assets located in Romania. The courts can grant the interim measures provided in Articles 952 to 979 of the Code of Civil Procedure, such as conservatory or judiciary seizure of assets or conservatory garnishment.

There is no provision in the procedural law forbidding interim measures against assets owned by a sovereign state, except for the assets that are in the public domain of the state, which are inalienable. Moreover, there may be certain situations in which such measures cannot be awarded against the assets of another sovereign state: for example, in the case of diplomatic missions and the assets of the personnel of diplomatic missions.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Interim measures can be granted by means of a decision rendered by the competent court in *ex parte* proceedings (except if conservatory seizure of ships is requested, when the proceedings are adversarial). With a conservatory seizure, the party requesting the interim measure against assets should prove that it has filed a claim in court or before an arbitral tribunal.

The decision of the court can be challenged by the opposite party, the proceedings becoming adversarial in the appellate phase.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure is similar, up to a certain point, for immovable and movable property. After an application is made and the court renders its decision, as discussed in question 24, the measure is enforced by an enforcement officer. As far as immovable assets are concerned, the enforcement procedure implies the fulfilling of the necessary formalities for seizing the assets in the land register.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for interim measures against movable property is similar to that described in question 25, except that the necessary formalities are made in the Electronic Archive for Security Interests in Movable Property.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

For intangible properties, such as securities or other intangible assets, a creditor can apply to the court for a conservatory pledge. If the conservatory pledge refers to shares, then the measure must be recorded in the Companies Trade Register, whereas if it refers to other intangible assets, the measure must be registered with the Electronic Archive for Security Interests in Movable Property.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

There is no requirement for a prior authorisation of the court for attachment proceedings to start (except for decisions authorising the start of an enforcement procedure or enforcement procedures against immovable assets). The creditor that holds an enforceable title, and has obtained court approval to start the enforcement procedure, can opt for the measure that it considers to be appropriate for the recovery of its debts: garnishment, enforcement against the debtor's movable assets or enforcement against immovable assets.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Enforcement measures against immovable assets must be authorised by the court, either when authorising the enforcement of the writ of execution or afterwards.

After receiving the court's authorisation, the bailiff sends a notice in which it requests the debtor to pay the debt within 15 days. At the same time, the bailiff registers a notice in the land register, which has the effect of forbidding the alienation or encumbrances. Afterwards, the immovable property is evaluated and the date for a public auction is established. The money raised through the public auction is distributed to the creditors – those that hold mortgages or other security rights are given priority. Any residual amount left after all creditors are paid is returned to the debtor.

Attachment against movable property

30 What is the procedure for enforcement measures against moveable property within your jurisdiction?

The enforcement procedure against movable assets starts with a notice sent by the bailiff requesting the debtor to pay the debt within one day. If no payment is made by the given deadline, the bailiff seizes the debtor's assets. Within 15 days of the date when the assets are seized, the bailiff sells the assets in a public auction. If the parties agree, the debtor itself can be authorised to sell the assets or the bailiff can sell them in a direct sale-purchase procedure.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

Enforcement against intangible property observes the procedures established for garnishment combined with the enforcement procedure against movable assets. Thus, the procedure starts with the bailiff seizing the intangible property and then continues with the procedure for selling the property as described in question 30.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no specific rules in place for the recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

In the absence of international regulations signed or ratified by Romania, the service will be regulated by Law No. 189/2003 regarding international judicial assistance in civil and commercial matters.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

There are no specific regulations issued by the Romanian state on foreign sovereign immunity. Therefore, the provisions of international treaties and conventions apply, such as the United Nations Convention on Jurisdictional Immunities of the States and their Property of 2 December 2004 (signed by Romania in 2005 and ratified in 2006).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

The issue of a foreign state waiving immunity from enforcement is not regulated any domestic legislation.

37

Russia

Dmitry Dyakin, Evgeny Raschevsky, Dmitry Kaysin, Maxim Bezruchenkov and Veronika Lakhno[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

An applicant must submit an original award or a certified copy thereof. An award must be rendered in writing and must contain the date and place of its rendering. An original award must be signed by all arbitrators (or by a sole arbitrator).

According to Article 237(4) of the Commercial Procedure Code of the Russian Federation (the CPC) and Article 35 of the Law of the Russian Federation on International Commercial Arbitration (the ICA Law), a certified copy of an arbitral award shall be attested by a permanent arbitration institution (if any) or shall be certified by a notary (for an *ad hoc* arbitration).

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Under Article 33 of the ICA Law, any party may request an arbitral tribunal to correct or clarify an award, to give an interpretation of a specific point or part of an award within

1 Dmitry Dyakin and Evgeny Raschevsky are partners, Dmitry Kaysin is counsel and Maxim Bezruchenkov and Veronika Lakhno are junior associates at Egorov Puginsky Afanasiev and Partners.

30 days of receipt of the award. If an arbitral tribunal considers the request to be justified, it shall make the correction or give the clarification within 30 days of receipt of the request.

Moreover, any party may request an arbitral tribunal to make an additional award as to claims submitted in arbitral proceedings but not resolved in an award, within 30 days of receipt of the award. If an arbitral tribunal considers the request to be justified, it shall deliver an additional award within 60 days. An arbitral tribunal may correct any of its errors on its own initiative within 30 days of rendering an award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Courts in the Russian Federation are not empowered to hear appeals from arbitral awards. Awards are immune from judicial review on the merits or on the point of Russian law that applied to the merits of the dispute. At the same time, Russian courts can set aside arbitral awards in a limited number of cases within the procedure under Chapter 30 of the CPC.

Article 233 of the CPC provides that an award can be set aside if any of the following grounds exist:

- a party to an arbitration agreement was under some incapacity or the agreement was not valid under the applicable laws;
- an award deals with disputes falling outside an arbitration agreement;
- the composition of an arbitral tribunal or an arbitral procedure was not in accordance with the valid agreement between the parties or imperative requirements of applicable laws;
- a party was not given proper notice of the appointment of an arbitrator or of arbitral proceedings, or was unable to present its case for other valid reasons; or
- an arbitral award may also be set aside if the subject matter of the dispute could not have been resolved by arbitration under the federal law of Russia or an arbitration award is contrary to Russian public policy.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Two separate sets of rules apply to the recognition and enforcement of arbitral awards. Articles 236 to 240 of the CPC, Articles 423 to 427 of the Civil Procedure Code, and the Federal Law on Arbitration (Arbitration Proceedings) in the Russian Federation relate to domestic arbitral awards, whereas Articles 241 to 246 of the CPC, Articles 416 and 417 of the Civil Procedure Code, and the ICA Law apply to international arbitral awards.

The Russian Federation is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 and the European Convention on International Commercial Arbitration 1961. Like some former members of the Council for Mutual Economic Assistance, Russia is still a party to the Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Arising from Relations of Economic, Scientific and Technical Cooperation 1972. Russia is also a signatory to the Washington (ICSID) Convention 1992, but this treaty is not yet ratified.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes, it is. In 1960, this Convention entered into force for the USSR, which made a reservation that reciprocity shall apply to non-parties to the Convention.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Both foreign and domestic arbitral awards can be recognised and enforced in Russia by commercial courts of first instance at a debtor's location or, if a debtor's location is unknown, at the location of property owned by the debtor.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As described in question 6, an application for recognition and enforcement of both domestic and foreign arbitral awards shall be filed by an applicant with the commercial court of the constituent entity of the Russian Federation at a debtor's location or, if a debtor's location is unknown, at the location of property owned by the debtor. The latter is the case when an applicant shall specify debtor's property that can be the subject of enforcement at that particular location. Generally, an applicant is required to identify assets within the jurisdiction of the court.

As regards domestic arbitration, parties also can agree that an application may be filed with the commercial court of the constituent entity of the Russian Federation in which territory the arbitral award was rendered, or with the commercial court of the constituent entity at the location of the party to arbitration proceedings in whose favour the arbitral award has been delivered (Article 236(3) of the CPC).

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

All proceedings on recognition and enforcement of arbitral awards are adversarial.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

According to Articles 237 and 242 of the CPC, an applicant shall provide the following documents:

- an original of an arbitral award or its properly certified copy;
- an original arbitration agreement or its properly certified copy;
- a document confirming payment of the state fee in the manner and amount established by a federal law;
- proof of delivery or another document confirming that a copy of an application for the recognition and enforcement of an arbitral award has been sent to the other party of the arbitration proceedings; and
- a certificate of authority or another document confirming the powers of the person to sign an application.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

Proceedings in commercial courts are carried out in Russian only. All documents, including arbitration awards and arbitration agreements, shall be translated into Russian and a translator's signature shall be certified by a public notary. This requirement is mandatory in all cases. In practice, it is possible to submit translations of excerpts from supportive documents.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An application for recognition and enforcement of arbitral awards can be filed by the successful party with the competent court within three years of the date when the award became effective. The application must also be accompanied by a document confirming payment of the state fee (3000 roubles). Other costs can include charges for legal representation, which may be borne by an award debtor if enforcement is successful.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Russian courts do not recognise interim awards. In refusing to recognise such awards, the courts rely on Article V(1)(e) of the New York Convention, which – in its Russian translation – provides that a court may refuse enforcement if the award has not yet become 'final' (rather than 'binding' as in the English text of the Convention).

Court practice in regard to partial awards is less consistent. For example, in Case No. A55-27265/2010, the courts recognised and enforced a 'partial final' award rendered by a London Court of International Arbitration tribunal. However, in Case No. A54-3603/2016, the courts refused to enforce the second partial award rendered by a German Arbitration Institute tribunal. Having enforced the first partial award produced in the same arbitration several years earlier, the courts refused recognition of the second partial award, holding (quite controversially) that enforcement of the second partial award would upset the 'finality' of a court judgment and affect the earlier judgment in the same dispute.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The grounds for refusing recognition or enforcement of arbitral awards are stipulated in Article 36 of the ICA Law (as referred to by Article 244(3) of the CPC) and are the same as those provided under Article V of the New York Convention.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

The decision on recognition and enforcement of an award enters into force on the day when it was rendered. It is thus immediately enforceable.

A decision recognising an arbitral award can be challenged in several instances. Although most disputes need to be taken to a court of appeals, this step is excluded for judgments dealing with enforcement or set-aside proceedings of an arbitral award. A decision recognising an arbitral award may be appealed to a cassation circuit court within one month of the decision being rendered. In high-stake disputes, parties then very often appeal judgments of cassation circuit courts to the Supreme Court. These appeals are subject to a separate admissibility review and only a fraction of cases are revised by the Supreme Court on the merits.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

The decision refusing recognition and enforcement of an arbitral award can be challenged in the same manner as described in question 14.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

As is established in Article 233(5) of the CPC, if an application to set aside or suspend the enforcement of a foreign arbitral award is pending in a foreign court, the court that considers an application for recognition and enforcement of this award may, at the request of one of the parties, stay the recognition or enforcement proceedings pending the outcome of annulment proceedings.

The court considers only one relevant factor – proof of the existence of pending annulment proceedings at the seat of the arbitration.

For example, in Case No. A76-26938/2018, the courts stayed enforcement of a Stockholm Chamber of Commerce award pending annulment proceedings initiated by the award debtor in Sweden.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Article VI of the New York Convention provides a court that is adjourning a decision on enforcement of an arbitral award with the discretion, upon an application by the award creditor, to order the award debtor to provide suitable security. Russian law has the same provision in Article 243(6) of the CPC.

The court shall consider the same factors as for any other interim measure, namely:

- whether a failure to issue these measures may make it difficult or impossible to execute the decision; and
- whether the appellant would suffer significant damage in the absence of such measures.

We were able to locate only one reported case in which the applicant, pending the annulment proceedings, sought the defendant to be ordered to post security (in the amount of US$16,691,176.95, a sum equal to the amount of award). The outcome of that case

was negative as the court found that the appellant failed to prove that the debtor took measures to evade further execution of the award; a person's subjective fear about the future impossibility or difficulty of the execution of an award is not a good enough reason for the court to take interim measures.

Moreover, the court considered the debtor's quarterly report, the balance sheet and the financial results report, and concluded that there was no risk that the debtor would not be in a position to pay under the award. In these circumstances, the court considered that the funds that could be gained from the sale of the debtor's fixed assets would be sufficient to satisfy the interests of the applicant if the award were not to be set aside.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Arbitral awards set aside at the seat of arbitration may not be recognised and enforced by the Russian courts (Article 36(1)(6) of the ICA Law).

Formally, there are no challenges available against a decision on the recognition and enforcement of an award under these circumstances. However, one possibility could be to try for a 'revision based on new circumstances' in the court that granted the enforcement. The decision setting aside the award could be presented as the 'new circumstance' (Article 311(3)(1) of the CPC). However, this is likely to be unsuccessful, as the list of permitted 'new' circumstances contained in Article 311(3) of the CPC is a closed one and a decision setting aside an arbitral award is not included.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of judicial documents in Russia is governed by Article 123 of the CPC. A natural person is considered to be duly served if the documents are handed to him or her personally, or to an adult living with this person; a receipt or other document indicating the date and time of service should be returned to court. Documents addressed to a legal entity shall be served to the person authorised to receive the correspondence.

If the recipient's domicile in Russia is unknown, then the service is considered to be effected if the documents are sent to the last known location or place of residence of the defendant.

Russian law does not contain any specific provisions on the service of extrajudicial documents.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Pursuant to the CPC, foreign defendants will be informed by letter rogatory. The detailed rules for applying the CPC are set out in a 2017 Decree of the Supreme Court of Russia. It provides, *inter alia*, that for the service of process on foreign parties, a Russian court will issue a letter of rogatory to a foreign court.

Russia is also a party to the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Thus, if the defendant is located in a country that is a party to this convention, the service will be effected according to the mechanism established in the Convention.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

A debtor's assets are identified by bailiffs during the process of execution of the judgment. However, certain registers allow the identification of certain types of debtor's assets in Russia:

- Uniform State Register of Legal Entities (subsidiary companies); and
- Federal Institute for Industrial Property database (paid version) (trademarks and licences).

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

There are no direct mechanisms within the judicial proceedings allowing an award debtor to be ordered to disclose the existence or location of assets.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Yes, as provided in Article 91 of the CPC:

- to impose an arrest on cash or other property owned by a defendant and held by the defendant or other persons;
- to prohibit a defendant and other persons from performing certain actions concerning the subject of the dispute;
- to impose on a defendant the obligation to perform certain actions so as to prevent damage to, or deterioration of the condition of, the disputed property;

- to transfer the property for storage to a claimant or another person;
- to suspend enforcement under the executive or other document disputed by the plaintiff, the enforcement for which is carried out in an indisputable (without acceptance) procedure; and
- to suspend the sale of property in the event that a claim for release of property from arrest has been filed.

The court may impose other interim measures, and several interim measures may be imposed at the same time. All interim measures must be proportionate to the amount of debt.

An award creditor may obtain interim measures against assets owned by a sovereign state, provided that the assets are not subject to immunity (for more details, see question 34).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Interim measures are allowed at any stage of the court proceedings if the failure to take these measures may make it difficult or impossible to execute the judicial act, including if the judicial act is supposed to be performed outside the Russian Federation or to prevent significant damage to the applicant.

An applicant must submit a motion to the court, which must indicate:

- the name of the court with which the motion is filed;
- the name of the claimant and the defendant, and their location or place of residence;
- the subject of the dispute;
- the amount of property claims;
- justification of the reason for filing an application for interim measures;
- the interim measure requested by the claimant; and
- a list of attached documents.

The court will consider an application for interim measures within one day of the date on which the application was submitted to the court, without informing the parties.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The main interim measure against immovable property is an arrest order. The details of the procedure are as discussed in question 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The main interim measure against movable property is an arrest order. The details of procedure are the same as discussed in question 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no special procedure for interim measures against intangible property, but it could also be arrested. The details of procedure are the same as discussed in question 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Attachment (execution) procedures are regulated by the Law on Enforcement Procedure and the CPC.

After a judgment enters into force, the claimant will receive a writ of execution from the court that issued the judgment. Based on the writ of execution, the assets can be attached through either the federal bailiffs' service or the debtor's bank. (The federal bailiffs' service is a state authority responsible for the attachment of assets on all types of claims (both monetary and non-monetary).)

Alternatively, judgments relating to monetary claims can be executed by the bank where the debtor has an account. The bank must debit the amount claimed directly from the account of the judgment debtor within five days of the claimant's request. If the claimant does not have information about the debtor's accounts, it can submit an enquiry to the Federal Tax Service, which will provide this information after the debt is confirmed by the court. Executing a judgment through a bank is not a universal way of enforcement and will not help if the debtor has no money in the account, but it is much quicker than executing a judgment through bailiffs.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

There is no special procedure established by the law; see question 28.

Attachment against movable property

30 What is the procedure for enforcement measures against moveable property within your jurisdiction?

There is no special procedure established by the law; see question 28.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

There is no special procedure established by the law; see question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Yes. The Federal Law on Jurisdictional Immunities of Foreign States and Assets of Foreign States in the Russian Federation (the Law on Jurisdictional Immunities) came into force on 1 January 2016. The Law largely resembles the rules of the UN Convention on Jurisdictional Immunities of States and Their Property, although Russia has not ratified the latter. Unlike the Convention, the Russian legislator embodied the rule of reciprocity, meaning that Russian courts may not apply the favourable Russian regime to a foreign state if the laws of that state provide for a lower standard of protection.

In addition, civil procedure is governed by Chapter 33.1 of the CPC and Chapter 45.1 of the Civil Procedure Code. Chapter 12.1 of the Federal Law on Enforcement Proceedings laid down the particularities of enforcement (execution) proceedings against the assets of foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Service shall be executed under an international bilateral or multilateral treaty if there is one is in effect between Russia and the other debtor state. In the absence of any treaty, the Russian Ministry of Justice shall procure the service through diplomatic channels. Russian courts cannot schedule a preliminary hearing or a main hearing earlier than six months before such a hearing.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Russia follows the restrictive doctrine of sovereign immunity. Essentially, Russian laws protect the same categories of assets as provided for in Article 21 of the UN Convention on Jurisdictional Immunities of States and Their Property. They are declared immune from pre- and post-judgment measures.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Under Article 6(2) of the Law on Jurisdictional Immunities, foreign states may waive immunity from the jurisdiction of Russian courts trying cases of enforcement of arbitral awards rendered against such states. Having said that, the Russian legislator has specifically provided that such a waiver is not tantamount to a waiver from interim relief or execution. To that extent, and in the absence of developed case law on this point, there are no other regulations in Russia.

38

Singapore

Kohe Hasan and Shourav Lahiri[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Under Section 38(1) of the Arbitration Act (Cap. 10) (AA), or Article 31(1) of the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law), which is given the force of law in Singapore under Section 3(1) of the International Arbitration Act (Cap. 143A) (IAA), an arbitration award must be made in writing and be signed by the arbitrator in person (in the case of a sole arbitrator) or at least the majority of the arbitrators (in the case of two or more arbitrators), provided that the reasons for any omitted signatures of any arbitrators is stated.

The award must state the reasons upon which it is based (Section 38(2), AA; Article 31(2), Model Law). The award must also state the date of the award and place of arbitration (Section 38(3), AA; Article 31(3), Model Law). After the award is made, a copy of the signed award must be delivered to each party (Section 38(5), AA; Article 31(4), Model Law). The award is deemed to have been made at the place of arbitration (Section 38(4), AA).

1 Kohe Hasan and Shourav Lahiri are partners at Reed Smith LLP. Kohe Hasan is also a director of Resource Law LLC, the Formal Law Alliance partner of Reed Smith in Singapore.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

For international arbitrations and domestic arbitrations, the applicable provisions are Article 33 of the Model Law and Section 43 of the AA, respectively. The grounds under the AA are the same as those under the Model Law.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An arbitral award is final and binding under Singapore law pursuant to Section 19B of the IAA and Section 44 of the AA. For domestic arbitrations (i.e., those governed by the AA), a limited ground of appeal is available where a question of law arises out of an award. Arbitral awards can be set aside by Singapore courts under the IAA and the AA.

Appeals (under the AA only)

A party to the arbitral proceedings may appeal (upon notice to the other parties and to the arbitral tribunal) to the Singapore courts on a question of law arising out of an award (Section 49, AA). The right of appeal, however, can be excluded by agreement, while an agreement to dispense with reasons for the tribunal's award is deemed an agreement to exclude the right to appeal (Section 49(2), AA).

An appeal from a decision of the High Court to the Court of Appeal is permitted with leave of the High Court; a decision of the High Court to deny leave to appeal to the Court of Appeal is not subject to appeal (Section 49(7) and (11), AA; *Ng Chin Siau v. How Kim Chuan* [2007] SGCA 46).

As a prerequisite to making an appeal, the applicant must exhaust all available arbitral processes of appeal or review and any available recourse under Section 43 of the AA (Section 50(2), AA).

Unless the appeal is being brought by consent of the parties, there are various conditions with which the court must be satisfied before leave to appeal may be granted (Section 49(5), AA). In addition, the application must be made within 28 days of the award being made (Section 50(3), AA).

Not every decision on a question of law made in an award is appealable. A 'question of law' is a finding of law that the parties dispute and requires the guidance of the court to resolve. However, when an arbitrator incorrectly applies a principle of law, that is an error of law against which the aggrieved party is not entitled to appeal (see *Econ Piling Pte Ltd v. Shanghai Tunnel Engineering Co Ltd* [2011] 1 SLR 246).

On appeal, the court may confirm, vary or remit the award to the tribunal, in whole or in part, for reconsideration in light of the court's determination, or set aside the award in whole or in part (Section 49(8), AA). However, the court will not exercise its power to

set aside the award unless satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration (Section 49(9), AA).

Setting aside

Under the AA

Arbitral awards made under the AA may be set aside. The application to set aside an award must be made by originating summons within three months of the date of receipt of the award by the applicant (Section 48(2), AA). The grounds (Section 48(1), AA) are:

- the incapacity of a party;
- an arbitration agreement that is invalid under the law of the agreement;
- a lack of proper notice of the appointment of arbitrators or commencement of proceedings, or a party's inability to present his or her case;
- a dispute or award falls outside the submission to arbitration;
- the composition of the arbitral tribunal, or conduct of the arbitral proceedings, is contrary to the parties' agreement;
- any fraudulent or otherwise corrupt act has induced or affected the making of the award;
- a breach of natural justice;
- the subject matter of the dispute cannot be resolved through arbitration; and
- the award is contrary to the public policy of Singapore.

Under the IAA

Under the IAA, the only recourse against an award is to set it aside. The grounds to do so are similar to those under the AA (see Section 24, IAA read with Article 34(2), Model Law; see also *Soh Beng Tee & Co Pte Ltd v. Fairmount Development Pte Ltd* [2007] SGCA 28).

The grounds to set aside an award are exhaustive and the court hearing an application to set aside an award under the IAA has no power to investigate the merits of the dispute or to review any decision of law or fact made by the tribunal.

The Singapore courts have consistently applied a policy of minimal curial intervention even with regard to domestic cases. In *Tjong Very Sumito v. Antig Investments Pte Ltd* [2009] 4 SLR(R) 732 at [28], the Court of Appeal described the court's approach to arbitration proceedings as an 'unequivocal judicial policy of facilitating and promoting arbitration'. The Court of Appeal in *BLC and others v. BLB and another* [2014] 4 SLR 79 went further in stating that '[i]t is now axiomatic that there will be minimal curial intervention in arbitration proceedings'. Thus, it is clear that the courts will adopt a generous approach and will not examine an award assiduously, looking for blame or fault in the arbitral process (for awards under the IAA, see Article 34(3), Model Law and Order 69A, rule 2(4), Rules Of Court (2014 Rev. Ed.) (ROC); for awards under the AA, see Section 48(2), AA and Order 69, rule 2(1), ROC).

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Singapore is a signatory to the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards (the New York Convention) and enforces awards from other states on the basis of reciprocity.

Both the IAA and the AA govern the recognition and enforcement of arbitral awards in Singapore. The IAA applies to arbitral awards made in international arbitrations seated in Singapore (Section 19, IAA) and to arbitral awards made in pursuance of an arbitration agreement in the territory of a New York Convention state other than Singapore (Section 29, IAA).

Section 5 of the IAA sets out the elements in determining whether an arbitration seated in Singapore is to be treated as an international arbitration. The AA applies to the recognition and enforcement of arbitral awards made in domestic arbitration proceedings to which the AA applies (Section 46(1), AA), and to arbitral awards that are made in a non-New York Convention state (Section 46(3), AA).

Sections 19 and 29 of the IAA and Section 46(1) of the AA provide that an award made by the arbitral tribunal pursuant to an arbitration agreement may, with leave of the court, be enforced in the same manner as a judgment or order to the same effect of the High Court in Singapore. Where leave is so given, judgment may be entered in terms of the award.

Matters of Singapore procedure relating to the recognition and enforcement of an arbitral award are governed by the Singapore ROC, in particular, Orders 69 and 69A.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes, Singapore is a signatory to the New York Convention, which was enacted into Singaporean law on 19 November 1986. A reciprocity reservation made under Article I(3) of the New York Convention is in effect.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

An application for leave to enforce an arbitral award is made to the High Court in Singapore.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The Singapore High Court is bound to recognise and enforce arbitral awards falling under the IAA unless one of the grounds for refusing recognition and enforcement is established (Article V, New York Convention; Section 31, IAA).

Singapore courts may assume jurisdiction over an award debtor where one or more of the conditions under Section 16(1) of the Supreme Court of Judicature Act (Cap. 322) are met. Before Singapore courts may assume jurisdiction over the debtor of a foreign arbitral award, an application for leave to enforce must be made by the award creditor by way of an originating summons supported by an affidavit (Order 5, rule 3, ROC).

For the purpose of the recognition proceedings, there is no express requirement that the applicant must first identify assets within the jurisdiction of the courts that will be the subject of enforcement.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

The ROC permits the application for leave to enforce an award under Section 19 of the IAA and Section 46(1) of the AA to be made *ex parte* (see Order 69A, rule 6, ROC for enforcement under the IAA, and Order 69, rule 14, ROC for enforcement under the AA).

If the court grants leave to enforce the award *ex parte*, the defendant will be served with the order and will have a period of 14 days after service of the order to apply to set aside the order. If the order is served out of jurisdiction, the court may fix a longer period, during which the debtor may apply to set aside the order (see Order 69, rules 14(2), 14(3) and 14(4), ROC for enforcement under the AA, and Order 69A, rules 6(2), 6(3) and 6(4) for enforcement under the IAA).

The court adopts a 'mechanistic' approach to determining whether there has been a valid and binding arbitration agreement and award, which means it does not seek to look beneath the agreement or award (*Aloe Vera of America, Inc v. Asianic Food (S) Pte Ltd* [2006] 3 SLR(R) 174 at [42] – a case under the IAA, and *AUF v. AUG and other matters* [2016] 1 SLR 859 at [163] – a case under the AA).

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

An application for leave to enforce an award is required to be made by way of originating summons (or by summons if there is already an action pending). An application to enforce an award under the IAA must be supported by an affidavit exhibiting the duly authenticated original award and the original arbitration agreement under which the award was made. If an original cannot be produced for either, a duly certified copy must be produced instead.

An application to enforce an award under the AA must be supported by an affidavit exhibiting the arbitration agreement, a record of the content of the arbitration agreement and the original award, or, in either case, a copy thereof (Order 69, rule 14(1)(a), ROC).

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

For applications under the IAA, if the arbitration agreement, award or records are in a language other than English, a translation into English is required, duly certified in English as a correct translation by a sworn translator, an official or a diplomatic or consular agent of the country in which the award was made (see Order 69A, rule 6, ROC).

A translation must also be filed for an application under the AA if the award or agreement is in a language other than English. The translation must be certified by a court interpreter or verified by the affidavit of a person qualified to translate the application (Order 92, rule 1, ROC).

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A party seeking leave to enforce an award will need to pay court fees of S$3,300 upon filing of the originating summons (see Order 110, rule 47, ROC). For the actual filing of the originating summons, the applicable filing fee is S$500 (for matters with a value of up to S$1 million) or S$1,000 (for matters with a value of more than S$1 million) (see Appendix B (Court Fees) of the ROC).

On filing the supporting affidavit, for every page or part thereof (including any exhibit annexed thereto or produced therewith), the filing fees are S$2 per page, subject to a minimum fee of S$50 per affidavit (see Appendix B (Court Fees) of the ROC). Additional court fees are payable when applying for execution against the award debtor's assets.

The estimated costs recoverable for an uncontested hearing of an *ex parte* application for leave to enforce an award are between S$500 and S$1,000 (excluding disbursements). The estimated costs recoverable for a contested hearing of a setting aside of the order granting leave to enforce an award are between S$4,000 and S$15,000 (excluding disbursements), depending on the complexity and length of the application (see Appendix G of the Supreme Court Practice Directions).

A party seeking leave to enforce an award on an *ex parte* basis is subject to a duty of full and frank disclosure.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Yes. The arbitral tribunal may make more than one award either at different points in time, or on different aspects of the matter (Section 19A(1), IAA; Section 33(1), AA). This may be for the whole award, or for part of the claim or of any counterclaim or cross-claim (Section 19A(2), IAA; Section 33(2), AA). If multiple awards are made, the tribunal must specify the subject matter of each award on its face (Section 19A(3), IAA; Section 33(3), AA).

Under Section 19 of the IAA and Section 46 of the AA, only awards can be enforced. An 'award' is further defined under the IAA and AA as 'a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award' (Section 2(1), IAA; Section 2(1), AA).

Both partial and interim awards are considered awards for the purposes of the IAA or AA, and can be recognised and enforced (*PT Perusahaan Gas Negara (Persero) TBK v. CRW Joint Operation* [2015] 4 SLR 364 at [46]-[58]).

A 'partial award' is defined as one that finally disposes of part, but not all, of the parties' claims in arbitration, leaving some claims for further consideration and resolution in future proceedings under the arbitration. By contrast, an 'interim award' is one that does not dispose finally of a particular claim but instead decides a preliminary issue relevant to the disposing of such claim.

Interim measures issued by an arbitral tribunal, such as measures covering security for costs or specific disclosure, are not awards for the purposes of the AA and the IAA. However, under Section 28(4) of the AA and Section 12(6) of the IAA, all orders or directions made or given by the tribunal are, with leave of court, enforceable in the same manner as if they were orders made by the court and, where leave is given, judgment may be entered in terms of the order or direction.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The enforcement of an award is preceded by its recognition and, under Singapore law, no specific distinction is made between the grounds for recognition of an award and its enforcement. Under Section 31 of the IAA, the following are the grounds to resist enforcement of an award:

- there is evidence of the incapacity of a party to the arbitration agreement, under the law applicable to the party, when the agreement was made;
- the arbitration agreement is invalid under the law to which the parties are subject, or in the absence of any indication in that respect, under the law of the country where the award was made;
- a party was not given proper notice of the appointment of the arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case in the arbitration proceedings;

- the award deals with a dispute not contemplated by, or not falling within the terms of, the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration (save that where such an award contains decisions on matters not submitted to arbitration but those decisions can be separated from decisions on matters submitted to arbitration, the award may be enforced to the extent that it contains decisions on matters so submitted);
- the composition of the tribunal or conduct of the arbitral proceedings was not in accordance with the parties' agreement or the law of the country where the arbitration took place;
- the award is not yet binding on the parties, or has been set aside or suspended by a competent authority of the country in which the award was made, under the law of that country;
- the subject matter of the dispute between the parties to the award cannot be settled by arbitration under the law of Singapore; or
- the enforcement of the award would be contrary to the public policy of Singapore.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once an award has been recognised, a party seeking to enforce the award has to seek leave from the Singapore court and the order obtained must be served on the award debtor (Order 69, rule 14(1), ROC). The debtor has 14 days after the service of the order granting leave or, if the order is to be served out of jurisdiction, within such period as the court granting leave may stipulate, to apply to set aside the order.

The grounds a debtor may rely on to set aside an order are as stipulated in question 13.

The award must not be enforced during that period or, if the debtor applies within that period to set aside the order, until after the debtor's application is finally disposed of (Order 69, rule 14(4), ROC and Order 69A, rule 6(4), ROC). Subsequently, a judgment may be entered in terms of the award and the award can be enforced in the same manner as any judgment of the Singapore courts.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

There is an automatic right of appeal to the Court of Appeal against a decision of the High Court refusing leave to enforce an award (Order 57, rule 4, ROC).

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Section 31(5) of the IAA provides the Singapore courts with the option to adjourn an application to enforce a foreign award, if an application to set aside or suspend an arbitration award is pending in the courts of the seat of the arbitration.

Where the Singapore court elects to do so, it may (1) if the court considers it proper to do so, adjourn the proceedings or, as the case may be, that part of the proceedings that relates to the award, and (2) on the application of the party seeking to enforce the award, order the other party to give suitable security (Section 31(5), IAA).

In *Man Diesel & Turbo SE v. IM Skaugen Marine Services Pte Ltd* [2018] SGHC 132, the Singapore High Court refused to adjourn an enforcement application on the grounds that an application to set aside the award was pending in the Danish courts, noting that Section 31(5) of the IAA gave a wide discretion to the Court. In exercising its discretion to refuse the adjournment, the Court took into account the merits of the set-aside application, the impact on the award creditor of the delay in obtaining the fruits of the award and the chances of disippation of assets by the judgment creditor during the period of adjournment.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

If a court adjourns recognition or enforcement proceedings pending annulment proceedings at the seat of the arbitration, the court may (but is not obliged to), on the application of the party seeking to enforce the award, order the other party to give suitable security (Section 31(5)(b), IAA).

This provision has not been examined by the Singapore courts. However, given that the statute does not expressly dictate the factors that Singapore courts may take into account when dealing with the issue of security in the above circumstances, the Singapore courts are likely to take the view that they have broad discretion to take into account any relevant factor. The Singapore courts would also refer to decisions from other jurisdictions for guidance on the issue.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Where an award has been set aside at the seat of the arbitration, it is likely that the Singapore courts would refuse enforcement of that award as Section 31(2)(f) of the IAA (which is modelled after Article V(1)(e) of the New York Convention) provides that:

> *(2) A court so requested may refuse enforcement of a foreign award if the person against whom enforcement is sought proves to the satisfaction of the court that . . .*
> *(f) the award has not yet become binding on the parties to the arbitral award or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.*

Further, the Singapore courts in *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* [2014] 1 SLR 372 at [76], in *obiter* comments, expressed 'serious doubt' as to whether it would retain a discretion to enforce an award that has been set aside at the seat of the arbitration.

The Singapore courts have not yet had occasion to consider how an award duly recognised and cleared for enforcement is to be treated should it subsequently be set aside in a court at the seat of the arbitration. It is anticipated that such instances would be rare as the law of most countries sets out strict time limits for the institution of applications to set aside an award, and Section 31(5) of the IAA allows a party to apply for enforcement proceedings to be adjourned pending disposal of the application to set aside. Having said that, as seen in the *Man Diesel* case (see question 16), this could become a live issue depending on the outcome of the set-aside proceedings in the Danish courts. Also, in *BAZ v. BBA and others* [2018] SGHC 275, the Singapore High Court had to consider a set-aside application (which it refused) after the enforcement proceedings, since the Singapore-seated award had been completed in India (the Indian court having refused a challenge to enforcement).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

In the context of the service of *ex parte* orders granting leave to enforce an award, the applicable rules for service within the jurisdiction are set out in Order 69A, rules 6(2) and 6(4) of the ROC (for proceedings under the IAA) and Order 69, rules 14(2) and 14(4) of the ROC (for proceedings under the AA).

Once a court order for leave to enforce an award is obtained, the creditor must draw up the order and serve it on the debtor by delivering a copy of the order to them personally, or by sending a copy to their usual or last known place of residence or business, or in such other manner as the court may direct.

Within 14 days of service of the order or, if the order is to be served out of the jurisdiction, within such other period as the court may fix, the debtor may apply to set aside the order and the award shall not be enforced until after expiry of that period or, if the debtor applies within that period to set aside the order, until after the application is finally disposed of.

The copy of the order granting leave to enforce must state the effect of the foregoing paragraph.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

In the context of the service of *ex parte* orders granting leave to enforce an award, the applicable rules for service out of the jurisdiction are set out in Order 69A, rule 6(3) of the ROC (for proceedings under the IAA) and Order 69, rule 14(3) of the ROC (for proceedings under the AA).

Service out of the jurisdiction of such orders is permissible without leave of court. The order need not be served personally on the award debtor so long as it is served in accordance with the law of the country in which service is effected (see Order 11, rule 3(3) of the ROC).

The copy of the order granting leave to enforce that is served on the debtor must contain a statement of the debtor's right to apply to set aside the order within such period as the court may dictate, and a statement that the award will not be enforced until that period has expired or an application made by the debtor within the time limit has been finally disposed of (see Order 69, rule 14(5) of the ROC for the AA and Order 69A, rule 6(5) for the IAA).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

Certain databases are publicly available and can be used to identify assets. For example, land records with information about property assets are kept by the Singapore Land Authority, which is open to public searches.

The Accounting and Corporate Regulatory Authority (ACRA) also allows searches in the ACRA register to ascertain the particulars of business entities that currently exist and are operating (including a business entity's registered address) and those of their shareholders, directors or partners. Depending on the status of a business entity and filings made with ACRA, it may also be possible to obtain recent financial statements.

Searches can also be conducted through ACRA for the profiles of individuals to ascertain any registered addresses and business dealings in Singapore.

Asset investigation services are also provided by a number of companies.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Once an *ex parte* order for enforcement has been obtained and served on an award debtor, and the award debtor has not applied to set aside the award within the permitted time limit, Order 48, rule 1(1) of the ROC provides that the award creditor may make an *ex parte* application for an order requiring that the award debtor attend court to provide information that may assist in the enforcement of the award. If the award debtor is a company, an officer of the company shall be called upon.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Interim measures against assets are available in Singapore in support of the enforcement of arbitration awards. Thus, freezing *Mareva* injunctions have been granted in support of the enforcement of local and foreign awards.

In *Strandore Invest A/S v. Soh Kim Wat* [2010] SGHC 151, the Singapore High Court exercised its power to grant a worldwide *Mareva* injunction in aid of enforcement of a foreign arbitration award. Further, in *AYK v. AYM* [2015] SGHC 329, the Singapore High Court made an injunction order preventing the award debtor from dissipating its assets on the basis that there was a real risk that it might do so, or that it might move the assets around to frustrate attempts to satisfy the final award.

For awards under the AA, Section 31 of the AA sets out the Singapore High Court's powers in support of arbitral proceedings. Section 31(1)(d) of the AA specifically grants the Court the power to order an interim injunction or any other interim measure.

For assets owned by a sovereign state, Singapore law does not allow for injunctive relief against a foreign state (Section 15(2) of the State Immunity Act (Cap 313) (SIA)) unless the state consents under Section 15(3) of the SIA.

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

To apply for interim measures against assets in Singapore, pursuant to Order 29, rule 1 of the ROC, an application has to be made by way of a summons supported by an affidavit that sets out the grounds of the application. This must be served at least two clear days before the hearing (see Order 32, rule 3 of the ROC).

If a case is urgent, parties can make an *ex parte* application. Note, however, that there is an obligation to make full and frank disclosure of all material facts (*The Vasiliy Golovnin*

[2008] 4 SLR 994). The respondent to an *ex parte* obligation should be notified of the application and invited to attend the application, although the respondent cannot challenge the application, unlike in an *inter partes* hearing (Paragraph 41(1) of the Supreme Court Practice Directions).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

See questions 23 and 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See questions 23 and 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See questions 23 and 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The procedure to attach assets in Singapore is to apply to the court for such orders.

One of the main methods by which assets may be attached is through garnishee orders. Pursuant to Order 49, rule 1 of the ROC, the court may, subject to the provisions of this Order and of any written law, order the garnishee to pay the judgment creditor the amount of any debt due or accruing that is due to the judgment debtor from the garnishee, or so much thereof as is sufficient to satisfy that judgment or order and the costs of the garnishee proceedings.

Order 49, rule 2 of the ROC states that an application for a garnishee order must be made *ex parte*, supported by an affidavit or affirmation: (1) identifying the judgment or order to be enforced and stating the amount under it that is still unpaid at the time of the application; and (2) stating that, to the best of the information or belief of the deponent, the garnishee (who must be named) is within the jurisdiction and is indebted to the judgment debtor, and providing the sources of the deponent's information or the grounds for this belief.

There are other orders whereby an award is for the payment of a sum of money. Measures for levying execution are listed in Order 45 of the ROC and include writs of

seizure and the sale of movable and immovable property (Orders 46 and 47, ROC), stop orders (Order 50, ROC) and the appointment of receivers (Order 51, ROC).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

After an award is made and the award creditor wishes to satisfy the award debt, leave of court is required for an order for the writ of seizure and sale of immovable property.

Under Order 47 of the ROC, an application is required to be made by *ex parte* summons under Form 83, supported by an affidavit. The award creditor files the writ of seizure and sale in Form 83 and an undertaking, declaration and indemnity in Form 87, and then serves a copy of the writ of seizure and sale, with the order and notice of seizure in Form 97, on the award debtor (Order 47, rule 4(1)(e), ROC). Upon receipt of the writ of seizure and sale, the award debtor must register it with the Singapore Land Authority and must give the notice of seizure in Form 97 to the judgment debtor (Order 47, rule 4(1)(e)(iii), ROC).

If the order is for the giving of possession of immovable property, the procedure is to issue a writ of possession. Based on Order 45, rule 3 of the ROC, a judgment or order giving possession of immovable property may be enforced by a writ of possession or an order of committal. An application for leave to issue a writ of possession is made *ex parte* with a supporting affidavit.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

After an award is made and the award creditor wants to satisfy the award debt, leave of court is required for an order for a writ of seizure and sale of movable property. The writ of seizure and sale can be filed under Order 46, rule 1 of the ROC. Leave is generally not required unless the writ falls is enumerated in Order 46, rule 2 of the ROC.

Once the writ of seizure and sale is filed, the actual seizure and sale of the property seized is carried out by the office of the sheriff. Notice of seizure under Form 90 is given to the award debtor. Execution is usually carried out between 9am and 5pm.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The process is similar to that set out in question 30, although there are certain additional documents that need to be filed.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

The SIA governs the immunity of states. If a state has agreed in writing to submit a dispute that is subject, or may become subject, to arbitration, the state is not immune to proceedings in the Singapore courts that relate to arbitration (Section 11(1), SIA) and this is likely to apply to court proceedings relating to the recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Section 14(1) of the SIA requires a writ or other document served when instituting proceedings against a state to be transmitted through the Ministry of Foreign Affairs of Singapore, to the equivalent ministry in that state. Service is deemed to have been effected when the writ or document is received at the ministry. Section 14(2) of the SIA provides that the time for entering an appearance shall begin to run two months after the date on which the writ or document is received. However, these provisions do not apply if the state has agreed to the service of a writ or other document in another manner (Section 14(6), SIA).

Further procedures for service of extrajudicial and judicial documents to a foreign state are governed by Order 11, rule 7 of the ROC.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Pursuant to Section 15(2) of the SIA, relief may not be given against a state by way of injunction or order for specific performance or for the recovery of land or other property, and the property of a state is not subject to any process involving the enforcement of a judgment or arbitral award or, in an action *in rem* for its arrest, detention or sale. There are two exceptions to this rule. The first is when, on the basis of Section 15(3) of the SIA, the state expressly agrees in writing to waive its immunity from execution or injunctive relief. The second exception is set out in Section 15(4) of the SIA, under which enforcement proceedings (but not injunctive relief) are permitted in respect of property belonging to the state where the relevant property is in use, or is intended for use, for commercial purpose.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Pursuant to Section 15(3) of the SIA, courts are not prevented from giving relief or commencing procedures with the written consent of the state concerned, and any such consent (which may be contained in a prior agreement) may be expressed so as to have limited or general application; however, a provision merely submitting to the jurisdiction of the courts is not to be regarded as consent for the purposes of this subsection.

39

Spain

Jesús Remón, Álvaro López de Argumedo, Jesús Saracho, Atenea Martínez[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Article 37 of Law 60/2003, of 23 December, on Arbitration (the Arbitration Law) establishes the requirements regarding the form of an arbitration award, which are that the award must:

- be in written form, which shall be deemed to be the case if its content and the signatures of the arbitrators are recorded and accessible so as to be usable for subsequent consultation in electronic, optical or other format;
- be signed by the arbitrator, or, when there is more than one arbitrator, it may be signed by the majority of the arbitrators or by the president of the arbitral tribunal, provided that the reasons why the other signatures are missing are stated in the award;
- be reasoned, unless it consists of an award issued to record an agreement reached by the parties in the arbitration proceedings pursuant to Article 36 of the Arbitration Law;
- state the date and place of arbitration, where the award is to be considered issued;
- the award must contain the decision by the arbitrators on costs in accordance with the agreement of the parties; and
- be rendered by the arbitrators, unless otherwise agreed by the parties, within six months of the submission of the statement of defence (the arbitrators may order a two-month extension unless otherwise agreed by the parties).

1 Jesús Remón and Álvaro López de Argumedo are partners and Jesús Saracho and Atenea Martínez are associates at Uría Menéndez.

These requirements apply to any kind of award, including final, partial and interim awards and awards to correct, supplement, clarify or rectify a previous one.

The Arbitration Law also establishes that failure to issue an arbitral award within the aforementioned term would not affect the effectiveness of the arbitration agreement or the validity of the award, unless otherwise agreed by the parties.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

Article 39 of the Arbitration Law provides that an award can be (1) corrected regarding any miscalculation, typographical error, error in the copies made or similar; (2) clarified with respect to a particular part of the award; (3) supplemented in connection with claims made by the parties and not decided in the award; and (4) rectified when the award rules on matters that were not submitted to the decision of the arbitrators or on subjects that are not arbitrable.

The parties may request the correction, clarification, supplementation or rectification of an award within 10 days (one month in the case of an international arbitration) of notification of the award (unless another period is agreed). This request will be notified to the other parties, who will be heard before a decision is reached. The arbitrators will decide on requests for correction and clarification within 10 days (one month in the case of an international arbitration) of submission of the relevant petition. Requests for supplementation and rectification will be attended to in the 20 days (two months in the case of an international arbitration) following submission of the relevant petition.

Correction of the award may be decided on their own initiative by the arbitrators within 10 days of rendering the arbitral award (one month in the case of an international arbitration).

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

According to the Arbitration Law (Articles 40 and 43), an award may be set aside by the High Court of Justice of the Spanish autonomous region in which the award is issued (Article 8(5), Arbitration Law; Article 73(1)(c) of the Organic Law 6/1985, of 1 July, of the Judiciary (the Organic Law of the Judiciary)).

The grounds to set aside an award are limited to the following (Article 41, Arbitration Law):

- the arbitration agreement does not exist or is not valid;
- a party was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his or her case;
- the arbitrators have decided on questions not submitted to their decision;

- the appointment of the arbitrators or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a mandatory provision of this law, or, failing any such agreement, was not in accordance with this law;
- the arbitrators have decided on questions that cannot be settled by arbitration; and
- the award is in conflict with public policy.

An application to set aside an award may be submitted to the relevant High Court of Justice in the two months following notification of the award, or, following notification of a decision to correct, clarify, supplement or rectify the award, on expiry of the term to make the decision, if said decision has been requested (Article 41(4), Arbitration Law).

The request must meet the same requirements applicable to ordinary claims before the Spanish courts (Article 399, Law on Civil Procedure) and the proceedings include the submission of a statement of defence by the counterparty within 20 days and a hearing, if so requested by the parties and deemed necessary. The judgment deciding on the request for set-aside cannot be appealed (Article 42, Arbitration Law).

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention or the Convention) (ratified by Spain without reservation in 1977) is the cornerstone of the Spanish system for the recognition and enforcement of foreign awards, without prejudice to the provisions of other, more favourable, international conventions (Article VII(1), New York Convention; Article 46(2), Arbitration Law).

Besides the New York Convention, the two most significant multilateral arbitral treaties are the European Convention on International Commercial Arbitration (the Geneva Convention) (ratified by Spain in 1975) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) (ratified by Spain in 1994).

Spain is also a party to a number of bilateral treaties dealing with the recognition and enforcement of arbitral awards with other countries, including Switzerland (1896), France (1969), Italy (1973), the Czech Republic (1987), Slovakia (1987), Uruguay (1987), Brazil (1989), Mexico (1989), China (1992), Bulgaria (1993) and Morocco (1997).

The set of rules governing the procedure for recognition and enforcement of foreign arbitral awards in Spain is contained in Law 29/2015, of 30 July, on International Judicial Cooperation on Civil Matters (the Law on International Judicial Cooperation) as set out in Article 46(2) of the Arbitration Law.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention was ratified by Spain on 12 May 1977 and entered into force on 10 August 1977. Since Spain made no reservation under Article I(3) of the Convention, its scope of application is not narrowed by either the 'reciprocity reservation' or the 'commercial reservation'. As a result, the Convention applies to all foreign awards irrespective of the country where they were made, and regardless of the nature – commercial or otherwise – of the legal relationship from which the dispute arose, provided that it can be settled by arbitration.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

Jurisdiction over applications for recognition of foreign awards lies with the High Court of Justice of the corresponding Spanish autonomous region (*Tribunal Superior de Justicia*) pursuant to Article 73(1)(c) of the Organic Law of the Judiciary and Article 8(6) of the Arbitration Law, whereas the subsequent enforcement proceedings must be brought before the appropriate court of first instance in accordance with Article 85(5) of the Organic Law of the Judiciary and Article 8(6) of the Arbitration Law.

Jurisdiction for enforcement of domestic awards lies with the courts of first instance of the place where the award was rendered in accordance with Article 545(2) of the Law on Civil Procedure and Article 8(4) of the Arbitration Law.

Notwithstanding the above, note that the courts of first instance have jurisdiction over applications for the recognition and enforcement of foreign awards rendered in the following specific countries with which Spain has signed bilateral treaties: Uruguay (1987), Brazil (1989), China (1992), Bulgaria (1993) and Morocco (1997) (see, for example, the Judgment of the High Court of Justice of Navarra of 30 May 2012).

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

From a territorial standpoint, pursuant to Article 8(6) of the Arbitration Law, jurisdiction over recognition applications of foreign arbitral awards is vested in the high court of justice of the autonomous region of the domicile or place of residence of the party against whom recognition is sought, or the domicile or residence of the person affected by the award.

Subsidiarily, the territorial competence of the court will be determined by the place where the award must produce effects.

The courts of first instance will have territorial jurisdiction to enforce previously recognised awards according to the same criteria set out in the preceding paragraph, in accordance with Article 8(6) of the Arbitration Law. However, if the foreign award has its origin in Uruguay, Brazil, China, Morocco or Bulgaria, pursuant to the bilateral treaties signed between these countries and Spain (referred to in question 3), the courts of first instance of the domicile or place of residence of the party against whom recognition is sought, or the domicile or residence of the person affected by the award, will have jurisdiction to both recognise and enforce it. Subsidiarily, as in the previous case, the territorial competence of the court of first instance will be determined by the place where the award must produce effects.

An applicant must include in its claim a description of all the debtor's assets that, to its knowledge, could be subject to enforcement pursuant to Article 549(1)3 of the Law on Civil Procedure. This may be relevant in determining jurisdiction if the territorial jurisdiction of the court is exclusively based on the existence of assets within its boundaries.

The court of first instance of the place where the award was rendered is competent to enforce domestic awards in accordance with Article 545(2) of the Law on Civil Procedure; Article 8(4) of the Arbitration Law.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings in Spain are adversarial pursuant to Article 54 of the Law on International Judicial Cooperation. Once an application for recognition has been filed, the court grants the party against whom recognition is sought 30 days to raise objections and to submit any supporting documents (Article 54(5), Law on International Judicial Cooperation). The court must then render its ruling within 10 days of the objections being submitted or of expiry of the time limit to submit them, as established by Article 54(7) of the Law on International Judicial Cooperation.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Applications for recognition of foreign awards must be drawn up in the form of a complaint and must therefore clearly set out the factual and legal allegations on which the application is based, as well as a statement of the relief sought, as established by Article 54 of the Law on International Judicial Cooperation; Article 399 of the Law on Civil Procedure.

The New York Convention establishes that the following documents must be submitted with an application for recognition of an arbitral award:

- the arbitral award, specifically 'the duly authenticated original award or a duly certified copy thereof' (Article IV(1)(a));

- the arbitration agreement, specifically 'the original agreement referred to in Article II or a duly certified copy thereof' (Article IV(1)(b)). This requirement is construed broadly by the Supreme Court and can be met, in the absence of an agreement in writing, by evidencing the parties' intent to submit to arbitration, including written communications and their conduct throughout the arbitral proceedings, among other means; and
- the corresponding translations (see question 10).

In addition to the above, in relation to default awards, Article 54(4)(b) of the Law on International Judicial Cooperation requires that the applicant submit evidence that the parties have been notified of the award.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

If the required documents referred to in question 9 are drafted in a language other than Spanish (or, as the case may be, the official language of the relevant autonomous region), the party seeking recognition must submit a translation of the documents (Article IV(2), New York Convention; Article 54(4)(d), Law on International Judicial Cooperation).

It is advisable that the translations of the arbitral award and the arbitration agreement be certified by either a sworn translator or a diplomatic or consular officer (Article IV(2), New York Convention), although Article 144 of the Law on Civil Procedure does not specifically require it.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

Pursuant to Article 54(1) of the Law on International Judicial Cooperation, applicants must be advised by a lawyer and represented by a court representative. The court representative is an independent legal professional acting as an intermediary between the party and the court, filing the briefs that the party's lawyer prepares and notifying the party of the resolutions issued by the court.

With respect to litigation costs, which include but are not limited to the lawyers' and court representatives' fees, the general rule is that they must be borne by the unsuccessful party (Article 394(1), Law on Civil Procedure). In the event of partial success, each party will bear its own costs; exceptionally, however, a single party may be ordered to bear all costs if the court finds that the party's actions in court were ill-intentioned (Article 394(2), Law on Civil Procedure).

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Partial and interim awards are generally recognised and enforced by Spanish courts provided that they contain an order that is both binding on the parties and enforceable outside the arbitral proceedings (Article 23(2), Arbitration Law).

By contrast, procedural orders, directions or decisions dealing with the conduct of the procedure and evidentiary measures are not recognisable or enforceable in Spain.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

Under Spanish law, recognition of a foreign arbitral award may only be refused on the grounds listed in Article V of the New York Convention, namely:

- incapacity of the parties or invalid arbitration agreement;
- lack of due process, including no proper notice of the appointment of the arbitrators or of the proceedings;
- jurisdictional issues;
- irregularity in the composition of the arbitral tribunal or arbitral procedure;
- award not binding, suspended or set aside;
- arbitrability issues; and
- public policy issues.

According to consolidated case law, the merits of the dispute are not subject to review in recognition proceedings. Rather, the scope of these proceedings is strictly limited to examining whether the recognition requirements under the New York Convention are met. Therefore, the court will be exclusively concerned with confirming the existence of both the award and the arbitration agreement (Article IV, New York Convention) and considering the specific grounds for refusal of recognition upon which the party against whom recognition is sought may rely (Article V, New York Convention).

Note that Spanish courts tend to favour the recognition and enforcement of awards unless there is a flagrant reason affecting the validity of the award that cannot be overlooked by the court. In this respect, it is well-established in case law that there is a presumption of legality of the award, which derives from Articles II and V of the New York Convention. As a consequence, there is a restriction on the causes that can be alleged to challenge the recognition of an award, and the burden of proof is on the party opposing recognition (see the judgments of the High Court of Justice of the Community of Valencia of 8 June 2012 and of the High Court of Justice of the Basque Region of 19 April 2012).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Upon recognition in Spain, a foreign award can produce the same legal force and effect as in the country where it was rendered (Article 44(3), Law on International Judicial Cooperation). As a result, the award may be relied on to assert its *res judicata* effect or to raise a set-off defence in any legal proceedings. In addition, the award may be enforced by Spanish courts in substantially the same way as a domestic award (Article 50, Law on International Judicial Cooperation).

The rulings granting recognition of a foreign arbitral award rendered by the corresponding high court of justice – the competent tribunal in most of the cases – are final and cannot be appealed. Nevertheless, those judgments issued by courts of first instance granting recognition of awards rendered in Uruguay, Brazil, China, Bulgaria or Morocco may be appealed before the provincial courts (Article 55(1), Law on International Judicial Cooperation; Article 455 of the Law on Civil Procedure). These provincial courts' rulings granting recognition of a foreign award could be appealed before the Supreme Court pursuant to legal scholars' interpretation of Article 55(2), Law on International Judicial Cooperation.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A ruling refusing recognition of a foreign arbitral award rendered by a high court of justice is final and cannot be appealed. Nevertheless, decisions refusing to recognise awards originating in Uruguay, Brazil, China, Bulgaria and Morocco issued by courts of first instance may be appealed before the provincial courts (Article 55(1), Law on International Judicial Cooperation; Article 455, Law on Civil Procedure). Decisions by provincial courts could be appealed before the Supreme Court pursuant to legal scholars' interpretation of Article 55(2) of the Law on International Judicial Cooperation.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

Recognition proceedings in Spain may be stayed pending annulment proceedings, pursuant to Article VI of the New York Convention.

In the view of Spanish courts, Article VI of the Convention does not provide for an automatic stay of the recognition proceedings merely because an application to set aside an

award is pending in the courts of the place where the award was made (see, for example, the judgment of the High Court of Justice of Catalonia of 15 December 2016).

According to a landmark decision on this subject (judgment of the Court of First Instance of Rubí, Barcelona, of 11 June 2007), courts should only stay recognition proceedings in limited circumstances after weighing up whether the challenge of the award is based on sound grounds or is simply a delaying tactic with the aim of avoiding the immediate enforcement of an award.

Enforcement proceedings in Spain may also be stayed pending annulment proceedings, pursuant to Article 45 of the Arbitration Law. This provision enables the party against whom enforcement is sought to request the stay of the enforcement proceedings if it offers security. Once the request to stay has been filed, the court, after hearing the applicant seeking enforcement, will decide – according to Article 45(1) in fine of the Arbitration Law – on the amount of security to be furnished. However, both case law and scholars question whether Article 45(1) of the Arbitration Law confers a right to automatically stay enforcement proceedings solely on the basis of offering security and argue that courts ultimately have discretion to reject the stay of enforcement proceedings when this measure is not justified.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

Recognition and enforcement proceedings will not be effectively stayed by the competent court until security has been duly posted (Article 45(1), Arbitration Law).

Security may be provided in cash, by an indefinite joint bank guarantee payable on first demand issued by a credit institution or a mutual guarantee company (e.g., bank bond), or by any other method that, in the opinion of the court, ensures the immediate availability, as the case may be, of the relevant amounts (Article 45(1), Arbitration Law; Article 529(3), Law on Civil Procedure).

Security must be posted in the amount awarded plus any damages that could arise from delays in enforcing the award, which, in our experience, courts generally set at around 30 per cent of the amount awarded.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

Awards fully or partially set aside at the place of arbitration are not generally recognised in Spain, pursuant to Article V(1)(e) of the New York Convention. Case law and scholars

note, however, that a foreign award set aside in the country of origin may exceptionally be recognised in Spain, thus suggesting a certain degree of discretion in the application of Article V(1)(e). That solution rests, at least partially, on the Geneva Convention rule that awards may still be recognised if they have been set aside for reasons other than those established in Article IX, namely:

- invalidity of the arbitration agreement;
- violation of due process;
- excess of powers by the arbitrators; or
- irregularities in the arbitral procedure.

Spain is one of 31 state parties to the Geneva Convention; therefore, it is applicable in Spain to the recognition of awards falling under its scope and may, in any event, be relied on as a more favourable international convention, pursuant to Article VII(1) of the New York Convention and Article 46(2) of the Arbitration Law. Notwithstanding the foregoing, note that the scope of application of the Geneva Convention is more limited than that of the New York Convention.

First, the Geneva Convention (Article I(1)(a)) requires that the parties be connected with two or more different signatory states. This means that the Geneva Convention does not apply if parties come from different territorial units of the same contracting state or from one country that is not a party to the Geneva Convention.

Second, the Geneva Convention only applies to disputes that are international and commercial in nature (Article I(1)(a)).

According to legal scholars, if the award is vacated in the country of origin after recognition has been granted in Spain, the party defending an attempt to enforce the award in Spain might be able to submit a motion to the corresponding high court of justice seeking the revocation of its decision to grant recognition based on the fact that the award has been set aside (although this procedure is not specifically regulated under Spanish law).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of process to a defendant in Spain is essentially governed by three regulations, depending on the state in which the documents originate, as follows:

- if the documents originate in another Member State of the European Union, service of process is governed by Council Regulation (EC) No. 1393/2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (the EU Service Regulation);
- if the documents originate outside the European Union but in a state that is a party to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965 (the Hague Service Convention), service of process is governed by the set of rules of this convention; and
- beyond the scope of the EU Service Regulation and the Hague Service Convention, service of process is governed by the Law on International Judicial Cooperation.

The aforementioned regulations are analysed further in question 20, which deals with the service of process outside Spain, as that is the kind of service relevant to recognition and enforcement proceedings brought in Spain. Note here, however, that direct service by registered mail with acknowledgement of receipt or equivalent proof of delivery is admitted as a valid means to serve extrajudicial and judicial documents to a defendant in Spain pursuant to Article 22 of the Law on International Judicial Cooperation. In addition, the documents to be served must be translated into Spanish (or, as the case may be, the official language of the relevant autonomous region), unless they are drafted in a language that the addressee understands, pursuant to Article 25 of the Law on International Judicial Cooperation.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Service of process out of Spain is essentially governed by three sets of regulations, depending on the state in which the documents must be served.

Within the European Union, service of process is governed by the EU Service Regulation, which provides for the service of process through, *inter alia*, direct communication between the agencies designated by the Member States (rather than the usual method of transmitting notifications through central authorities), which are referred to as transmitting and receiving agencies.

The transmitting agency – in Spain, the court clerk – will transmit the documents directly and as soon as possible to the receiving agency by any appropriate means, provided that the content of the documents is true and faithful and that all the information in it is clearly legible (Article 4, EU Service Regulation).

The documents to be served must be translated into a language that the addressee understands or into the official language of the Member State where service is to be effected (Article 8(1), EU Service Regulation). The documents are exempt from legalisation or any equivalent formality (Article 4(4), EU Service Regulation).

The receiving agency should either serve the document itself or have it served within one month of receipt in accordance with the law of the Member State addressed, or by a particular method if so requested by the transmitting agency, unless that method does not conform to the national law of that Member State (Article 7, EU Service Regulation).

If a defendant resides outside the European Union but in a state that is a party to the Hague Service Convention, service of process is governed by the set of rules of that Convention, under which the main channel for transmitting requests for service of process is through the central authorities designated by the contracting states. In Spain, the central authority is the International Legal Cooperation Department of the Ministry of Justice. Requests for service of process must conform to the model provided by the Hague Service Convention and enclose the documents to be served, without any further requirement of legalisation or other equivalent formality (Article 3, Hague Service Convention).

Beyond the scope of the EU Service Regulation and the Hague Service Convention, service of process is governed by the Law on International Judicial Cooperation. This piece of legislation provides for service of process through a variety of procedures, including

direct communication between agencies competent for the transmission of judicial and extrajudicial documents, transmission through central authorities – in Spain, the Ministry of Justice – service through diplomatic or consular agents, and direct service by registered mail with acknowledgement of receipt or an equivalent proof of delivery, provided the direct service is not contrary to the law of state addressed.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

The major sources of publicly available information allowing the identification of award debtor's assets in Spain are the Commercial Registry for companies, the Land Registry for immovable property, the Registry of Movable Goods, the Intellectual Property Registry, the Spanish Patent and Trademark Office, and the European Union Intellectual Property Office.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

Enforcement proceedings specifically provide for the disclosure of information about award debtors' assets in Spain held by third parties, such as banking information (Articles 590 and 591, Law on Civil Procedure). In particular, Spanish courts have access to a specific tool (*Punto Neutro Judicial*), which allows them to locate specific assets of the debtor.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

Spain is considered a particularly effective jurisdiction for obtaining and enforcing interim measures in support of arbitral proceedings, regardless of the place of the arbitration. Spanish law confers ample powers upon arbitrators and courts alike to order interim measures, provided there is a comprehensive yet flexible procedural framework under which interim relief applications are handled with efficiency and certainty.

Unless otherwise agreed by the parties, arbitrators sitting in Spain are vested with the broadest powers to grant, at the request of any party, any interim relief that they may consider necessary to safeguard the effectiveness of the future award on the merits (Article 23, Arbitration Law). Interim relief decisions are immediately enforceable when the arbitrators are sitting in Spain; otherwise, prior recognition is necessary.

However, Spanish courts are expressly empowered to grant interim relief in support of arbitration, irrespective of the place of arbitration and regardless of the stage of the arbitral proceedings (Article 11(3), Arbitration Law).

The Law on Civil Procedure does not list or in any other way restrict the range of interim measures available to Spanish courts, so the petitioner may call for the adoption of any interim measure appropriate for securing the future enforcement of the award. Article 727 of the Law on Civil Procedure provides a sample list of interim measures, summarised as follows:

- provisional attachment of assets, which is particularly appropriate to secure the enforcement of monetary awards;
- court control or administration of productive assets;
- deposit of movable property;
- inventory of defendant's assets;
- cautionary notice of arbitration or judicial proceedings at the land registry and other public registries, which pre-empts subsequent third-party rights to the property that is the subject of arbitration proceedings;
- other registry entries if registry publication is useful to ensure adequate enforcement;
- court order to refrain from conducting certain activities;
- intervention and deposit of income obtained through an activity considered unlawful and of which prohibition or cessation is sought;
- temporary deposit of the works or objects allegedly produced contrary to the rules on intellectual and industrial property; and
- stay of resolutions adopted by either a general meeting of a company or its board of directors.

An application for a judicial interim measure pursuant to Article 726 of the Law on Civil Procedure will be successful if the court is satisfied that:

- the party seeking interim relief is likely to succeed on the merits (*fumus boni iuris*);
- the effectiveness of any redress that may eventually be granted in the relevant arbitral or judicial proceedings would be jeopardised should the interim measure be denied (*periculum in mora*);
- the requested measure is proportional to, and consistent with, the main action; and
- the applicant has offered (and will provide) security sufficient to compensate any damage resulting from the adoption of the interim measure.

Property of a foreign state is immune from interim measures unless the state has consented, either expressly or impliedly, to the taking of such measures. Express consent must be given by international agreement, by a written contract, or by a declaration before the court, or by a written communication in a specific procedure. Implied consent is only deemed fulfilled upon allocation by the foreign state of property for the satisfaction of the claim that is the subject of the relevant proceeding (see question 34).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

An interim measure may be requested from a court, even before arbitration or judicial proceedings are brought, as long as the applicant proves the existence of urgent and exceptional circumstances (Article 11(3), Arbitration Law). This preliminary measure will nevertheless expire if a request for arbitration is not lodged within 20 days of the date on which the interim measure was ordered.

Interim measures are not generally granted before the party against whom the measures are sought has been afforded an opportunity to be heard. The traditional reluctance of Spanish courts to order *ex parte* measures may be overcome, however, if there are reasons of extreme urgency or if hearing the party against whom interim relief is sought before ruling on the issue may jeopardise the effectiveness of the measure requested (Article 733(2), Law on Civil Procedure). In these cases, any parties not heard before the interim measure was ordered will subsequently have an opportunity to challenge the measure, and eventually have it lifted or replaced with alternative security (Articles 739, 740 and 741, Law on Civil Procedure).

The ruling on an application for interim measures is subject to appeal (Articles 735(2), 736(1) and 741(3), Law on Civil Procedure). However, should the measure be granted, the filing of the appeal will not prevent the measure from being enforced (Articles 735(2) and 741(3), Law on Civil Procedure).

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

There are no specific rules dealing with interim measures against immovable property other than those outlined in questions 23 and 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

There are no specific regulations governing the procedure for interim measures against moveable property other than those outlined in questions 23 and 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There are no specific regulations governing the procedure for interim measures against intangible property other than those outlined in questions 23 and 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Attachment proceedings are triggered by enforcement applications. Courts of first instance have jurisdiction over both applications for enforcement of previously recognised awards and domestic awards (Article 8(4) and (6), Arbitration Law; Article 545(2), Law on Civil Procedure; Article 85(5), Organic Law of the Judiciary).

Enforcement is granted by the court by means of an order (*orden general de ejecución*) provided that the enforcement application meets the procedural requirements and conforms with the nature and content of the award upon which enforcement is sought (Article 551(1), Law on Civil Procedure).

No appeal may be brought against the order granting the enforcement, although the enforcement debtor may raise objections within 10 days of the date the enforcement order was notified (Article 551(4), Law on Civil Procedure). Enforcement may only be objected to on very limited grounds, such as expiry of the enforcement action (Article 518, Law on Civil Procedure; Article 50(2), Law on International Judicial Cooperation), and payment or settlement recorded in a public document (Articles 1156 and 1819, Spanish Civil Code). However, enforcement proceedings will not be stayed as a result of any of these objections being raised (Article 556(2), Law on Civil Procedure).

The court clerk responsible for the enforcement proceedings will, on the same day or on the day following the granting of enforcement by the court, issue a ruling ordering, *inter alia*, the attachment of assets indicated in the application for enforcement or, as the case may be, the measures aimed at locating assets available for attachment (Article 551(3), Law on Civil Procedure). Specifically, the court clerk may order financial institutions, public entities, public registries, companies and individuals to disclose information about any assets and rights owned by the enforcement debtor that they may be aware of (Articles 590 and 591, Law on Civil Procedure).

Unless otherwise agreed by the parties, the court clerk responsible for the enforcement proceedings will attach the enforcement debtor's assets, taking into account their greater liquidity or ease of realisation (Article 592(1), Law on Civil Procedure).

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

Should the attached assets be real estate property or any other assets or rights subject to registration, the court clerk responsible for the enforcement will, at the request of the party seeking enforcement, order that a cautionary notice of attachment be recorded at the land registry or an equivalent notice at the registry in question to pre-empt any subsequent third-party rights to the attached assets (Article 629, Law on Civil Procedure).

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

If bank accounts are attached, the court clerk responsible for the enforcement will issue a withholding order against the bank for the specific amounts attached. The bank must fulfil the order as soon as it has been served, issuing a receipt setting out the amounts the party subject to enforcement owns at that specific moment (Article 621(2), Law on Civil Procedure).

Should the assets attached be securities or other financial instruments, a notice of attachment will be given to whomever may be obliged to pay them or to the issuing institution, as the case may be (Article 623(1), Law on Civil Procedure).

Should titles, securities or particularly valuable objects or anything needing special conservation be attached, these may be deposited in the most suitable public or private establishment (Article 626(1), Law on Civil Procedure).

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

There are no specific regulations governing the procedure for enforcement measures against intangible property other than those outlined in question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Article 16 of the Organic Law 16/2015, of 27 October, on the privileges and immunity of foreign states, international organisations with headquarters or branches in Spain and international conferences and meetings held in Spain (Law on the Privileges and Immunity of Foreign States) specifically provides that foreign states are prevented from asserting immunity against proceedings for the recognition of foreign arbitral awards before Spanish courts.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

As a general rule, service of extrajudicial and judicial documents to a foreign state will be transmitted through diplomatic channels or by any other means accepted by the state concerned (see question 20).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

According to Article 17 of the Law on the Privileges and Immunity of Foreign States, property of a foreign state is immune from enforcement measures unless the state has consented, either expressly or implicitly, to the taking of such measures, or it has been established that the property is specifically in use or intended for use by the state for other than government non-commercial purposes, provided that the property is within Spanish territory and has a connection with the foreign state against which the proceedings were brought, even if it is destined for an activity other than that which gave rise to the dispute.

Pursuant to Article 18(1) of the Law on the Privileges and Immunity of Foreign States, express consent must be given by an international agreement, a written contract, a declaration before the court or a written communication in a specific procedure. Implied consent is only considered to be fulfilled upon allocation by the foreign state of property for the satisfaction of the claim that is the subject of the relevant proceeding as set out in Article 18(2) of the Law on the Privileges and Immunity of Foreign States.

The following properties will be deemed specifically in use or intended for use by foreign states for government non-commercial purposes (Article 20, Law on the Privileges and Immunity of Foreign States):

- property, including bank accounts, that is used or intended for use in the performance of the functions of the diplomatic mission of the state or its consular posts;
- military property;
- property of the central bank or other monetary authority of the state;
- property forming part of the cultural heritage of the state or part of its archives or part of an exhibition of objects of scientific, cultural or historical interest, provided that they are not placed or intended to be placed on sale; and
- the foreign state's vessels and aircraft.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Article 17(1) of the Law on the Privileges and Immunity of Foreign States provides that a foreign state may waive immunity from enforcement in Spain. Requirements for such a waiver are contained in Article 18(1) of the Law on the Privileges and Immunity of Foreign States (see requirements in question 34).

40

Sweden

James Hope[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

The following requirements are set out in the Swedish Arbitration Act.

An award must be in writing and it must be signed by the arbitrators. If there is more than one arbitrator, it is sufficient that the majority of the arbitrators sign the award, as long as the reason for this is noted in the award. Further, the parties may decide that it is sufficient that the chairman of the arbitral tribunal alone signs the award. The award should also include the date when the award is made and the place of the arbitration, and it must be delivered to the parties immediately. The award must also include a clear reference as to what a party wishing to challenge the award must do.

It should be noted that the government has proposed that the Swedish Arbitration Act should be updated and slightly amended. The amendments entered into force on 1 March 2019.

In relation to the requirements mentioned above, the wording of the Act has now been slightly changed. In particular, the phrase 'place of the arbitration' has been changed to 'seat of the arbitration'. Further, instead of stating that the award should be delivered to the parties, the new paragraph states that the award should be immediately 'left or sent to the parties'.

1 James Hope is a partner at Advokatfirman Vinge KB.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The following requirements are set out in the Swedish Arbitration Act.

If arbitrators reach the conclusion that there is an obvious inaccuracy in an award, they may decide to correct or supplement the award pursuant to the Swedish Arbitration Act. For the arbitrators to be able to correct or supplement the award, the inaccuracy must be a consequence of a typographical, computational, or other similar mistake, made by the arbitrators or another person, or the arbitrators must by oversight have failed to decide on an issue that they should have dealt with in the award. The arbitrators may also decide to correct or supplement the award or interpret the decision in the award if a party requests them to do so.

In the *travaux préparatoires* to the Swedish Arbitration Act (Proposition 1998/99:35), it is emphasised that arbitrators have the right to correct, supplement or interpret an award, but they do not have any obligation to do so. Before the arbitrators decide to correct, supplement or interpret the award, they should give the parties an opportunity to make submissions in relation to the decision.

There are certain time limits within which a decision to correct or supplement an award, or to interpret a decision in an award, must be made. If the arbitrators themselves decide to correct or supplement the award, they must do so within 30 days of when the award is made. If a party wants the arbitrators to correct or supplement the award or interpret a decision in the award, that party must make such a request within 30 days of receipt of the award. Thereafter, the arbitrators have 30 days to correct or interpret the award and 60 days to supplement the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

An award may only be appealed or set aside on certain grounds specified in the Swedish Arbitration Act.

Invalidity

An award is invalid, as a whole or in part, if it includes a question which, according to Swedish law, may not be tried by arbitrators; if the award, or the way in which it was made, is clearly incompatible with the foundation of the Swedish legal system; or if the award does not fulfil the requirement in relation to the written form and the signing of the award (as described in question 1).

The *travaux préparatoires* to the Swedish Arbitration Act (Proposition 1998/99:35) state that the above list is exhaustive.

Amendment of an award that has not ruled upon the substantive issues

The court may, upon application, amend an award, in whole or part, if the arbitrators concluded the proceedings without ruling on the issues on which they should have ruled. This happens, for example, if the arbitrators conclude that they do not have jurisdiction to rule upon the merits.

An action for amendment must be brought within three months of the date on which the party received the award in its final form (the possibility to amend, supplement or interpret the award is discussed in question 2). If the action relates only to the questions of payment of legal costs and the arbitrators' costs, the award may only be amended if the arbitrators decide that they lacked jurisdiction to determine the dispute.

Set-aside

If an award is not invalid or cannot be amended as described above, it may be set aside, partly or as a whole, based on the following grounds: (1) the award is not covered by a valid arbitration agreement between the parties; (2) the award has been made by the arbitrators after the period set by the parties has expired or the arbitrators have otherwise exceeded their mandate; (3) the arbitral proceedings should not have taken place in Sweden according to the Swedish Arbitration Act; (4) an arbitrator has been appointed contrary to the parties' agreement or the Swedish Arbitration Act; (5) an arbitrator was unauthorised because he or she did not possess full legal capacity in relation to his or her actions and his or her property, or because he or she was not impartial; or (6) another irregularity had occurred during the course of the proceedings, without fault of any party, and that irregularity may have influenced the outcome of the matter.

A party is not allowed to rely on a circumstance that the party, through acting in the proceedings without objection or in any other way, may be deemed to have refrained from claiming.

An action under Section 34 of the Act must be brought within two months of the date on which the party received the final award (in relation to the possibility to amend, supplement or interpret the award, see question 2). When this time limit has expired, the party is not allowed to invoke another ground for objection. Note that there are specific rules and time frames if a party wants to rely on a circumstance mentioned in point (5) above.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral?

The applicable procedural law for recognition and enforcement of an arbitral award, foreign and domestic, is set out in the Swedish Arbitration Act, the Enforcement Code and in general procedural law, including the Swedish Code of Judicial Procedure.

Sweden is a party to the New York Convention and to the ICSID Convention. Sweden is also a Member State of the European Union and as such is bound by rules and regulations within the context of EU cooperation.

Further, Sweden has entered into bilateral treaties with other countries. (It is not possible to give an exhaustive list here of the conventions and bilateral treaties that Sweden is bound by.)

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Sweden is a party to the 1958 New York Convention, which entered into force in Sweden on 27 April 1972. No reservations under Article I(3) have been made.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

A domestic arbitral award may be enforced by the Swedish Enforcement Authority pursuant to the Enforcement Code. No recognition proceedings are necessary; however, the Swedish Enforcement Authority will, before enforcing the award, examine whether the domestic award satisfies certain requirements for enforceability.

A foreign award is defined in the Swedish Arbitration Act as an award made abroad. An award is deemed to be made in the country where the seat of arbitration is situated.

Before a foreign award may be enforced by the Swedish Enforcement Authority, a declaration of enforceability must be obtained. An application for a declaration of enforceability should, pursuant to the Swedish Arbitration Act, be made to the Svea Court of Appeal in Stockholm. If the application is granted, the foreign award is enforceable in Sweden in the same way as a Swedish legally binding judgment, if nothing else is decided by the Supreme Court upon appeal. It should be noted that no declaration of enforceability is necessary for the foreign award to be recognised in Sweden.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards (domestic and foreign awards)? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As stated in question 6, the Svea Court of Appeal in Stockholm has jurisdiction. There are no such requirements.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

An application for a declaration of enforceability of a foreign award may not be granted unless the other party has been offered an opportunity to give his or her opinion on the application. As such, the proceedings are *inter partes*.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

To obtain a declaration of enforceability from the Svea Court of Appeal regarding a foreign arbitral award, an application must be submitted with the original or a certified copy of the award. Further, unless the Svea Court of Appeal decides otherwise, a certified translation of the award into Swedish must also be submitted to the court. If the other party contests that an arbitration agreement was entered into, the applicant must also submit the original or a certified copy of the arbitration agreement, as well as, if nothing else is decided by the court, a certified translation into Swedish, or prove that an arbitration agreement was entered into in some other way.

It is sufficient to submit one copy of the required documentation.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

A certified copy of the award into Swedish should be submitted to the court, if nothing else is decided by the court. Further, if the applicant is required to submit the arbitration agreement, it may be necessary to submit a certified translation of the arbitration agreement into Swedish if the court does not decide otherwise. Note that the requirement to translate documents may vary depending on the language of the documents.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A domestic award is enforceable by the Swedish Enforcement Authority straight away upon application. However, the Enforcement Authority will, before enforcing the domestic award, examine whether the award satisfies certain formal requirements to be enforceable.

Moreover, if the Enforcement Authority has reason to believe that the award is invalid and there are no ongoing proceedings regarding this issue, it may order the applicant to commence such proceedings within one month of service of the order.

There are no fees for applying for a declaration of enforceability of a foreign award in the Svea Court of Appeal. However, note that the 'losing party' in the proceedings, in certain situations, has been ordered to pay the other party's legal costs (see case NJA 2001 p. 738).

Once the foreign award has been declared enforceable, the award may, upon application, be enforced by the Swedish Enforcement Authority. During these enforcement proceedings, the applicant may be required to pay some of the costs incurred – this applies to enforcement of foreign awards as well as domestic awards. The costs vary, depending on what type of enforcement measures the Swedish Enforcement Authority is required to take.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

The general rule is that a foreign award based on an arbitration agreement is recognised and enforceable in Sweden, except in certain situations explicitly stated in the Swedish Arbitration Act.

However, a foreign award is not recognised or enforced in Sweden if the counterparty can prove that the award is not yet binding upon the parties, that it has been set aside, or that the enforcement has been postponed by a competent authority in the other country or under which legislation it has been made.

Thus, interim awards will not be enforced unless they can be shown to be final and binding in respect of the issues that they determined.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The general rule is that a foreign award based on an arbitration agreement is recognised and enforced in Sweden. However, there are a few exceptions to this rule. An award that includes a question that, according to Swedish law, may not be determined by arbitrators, or if it would be manifestly incompatible with the grounds of the Swedish legal system to recognise or enforce the award, cannot be recognised or enforced in Sweden. Further, the other grounds for refusal may be summarised as follows.

- The parties lacked capacity pursuant to the applicable law to enter into the arbitration agreement or they were not properly represented, or the arbitration agreement is invalid pursuant to the agreed law or, if there is no agreed law, the law in the country where the award was made.
- The respondent did not receive proper notice of the appointment of arbitrators or the arbitration proceedings, or was for some other reason unable to present his or her case.
- The award includes a dispute not contemplated by or which was not part of the parties' request for arbitration, or the award includes decision in a matter outside of the parties' arbitration agreement. However, if a decision in a matter that was included in the mandate may be separated from any that fall outside the mandate, the part of the award containing the decision on the matter falling within the mandate may be recognised and enforced.

- The composition of the arbitration tribunal or the arbitral procedure was not in accordance with the parties' agreement or, absent such an agreement, not in accordance with the law in the country of the seat of arbitration.
- The award has not yet become binding upon the parties or has been set aside, or the enforcement has been suspended by the foreign competent authority in which, or according to the law of which, the award was made.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

If an application for a declaration of enforceability of a foreign appeal is granted by the Svea Court of Appeal, the award is enforceable in the same way as a final and legally binding Swedish judgment, subject to any decision by the Supreme Court upon appeal.

Decisions refusing to recognise the award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A decision in relation to a declaration of enforceability of a foreign award may be appealed to the Supreme Court, subject to applicable procedural rules.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The Svea Court of Appeal may postpone its decision on enforcement if the other party states that a petition has been lodged to set aside the award, or a motion has been submitted for stay of execution with the foreign competent authority of the country in which, or under the law of which, the award was made.

It is not necessary that the petition has been granted, but it must be somewhat probable that the petition may be accepted. When deciding the matter, the court may take into account that there is a general interest in facilitating the enforcement of foreign arbitration awards. (See the Supreme Court's judgments in NJA 1979 p. 527 and NJA 1992 p. 733. In both these cases, the Supreme Court found that the decision should not be postponed.)

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

If the court postpones its decision for recognition and enforcement, the court may, upon request from the applicant, order the other party to provide reasonable security – failing which, enforcement would otherwise be ordered.

In the legal literature it is stated that an applicant's request for security should in general be granted by the court, unless it is exceptionally likely that the foreign authority's decision will be an impediment to the enforcement (see Stefan Lindskog, *Skiljeförfarande*, Zeteo, 7 September 2018, Chapter 58, Section 5.2.1).

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If the award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

If the award has been set aside by a foreign competent authority in which, or according to the law of which, the award was made, it is not possible to obtain enforcement or recognition of the award in Sweden.

A decision regarding enforcement of an arbitral award may, subject to applicable procedural rules, be appealed to the Supreme Court.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

There are several ways to serve judicial documents in Sweden, depending on the type of document and the circumstances in the specific case.

A document may for example be served orally, by post, through use of a process server or by publication in a specific magazine. If the defendant is a legal entity, it may be possible to serve a document on the entity by sending it to the registered address. In certain situations, it is possible to serve documents using a simplified means of service.

The procedure for service to be used in a specific case will depend on the circumstances and on the document being served.

Note that not all documents must be formally served upon the other party.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The common law requirement of seeking permission for service out of the jurisdiction has no equivalent in Sweden.

Service of documents on a defendant outside the Swedish jurisdiction may be performed if it is allowed by the other country. It is the law at the place of service that is applicable, provided service is not contrary to the general principles of Swedish law.

Sweden is party to several treaties that allow for service of documents in other jurisdictions. Sweden is, for example, a Member State of the European Union and, as such, is such bound by several rules and regulations regarding service of documents in other EU Member States. One example is the Regulation (EC) No. 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No. 1348/2000. Further, outside the European Union, Sweden is a party to the Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Furthermore, Sweden has several agreements with the other Nordic countries regarding service of judicial documents.

Several of the above-mentioned agreements include specific requirements regarding the manner and form of service, for example in relation to specific certificates or translation requirements.

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

No such database or publicly available register exists. However, companies' annual accounts are publicly available in Sweden.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

All information held by public authorities in Sweden is public, with only limited exceptions. This includes, for example, information on income and ownership in relation to property.

When the Swedish Enforcement Authority is enforcing an award, it will, if necessary, investigate the debtor's employment and income, and whether the debtor has any assets that may be subject to attachment.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

It is possible to seek interim measures against assets. An application for interim measures should be made to the court.

In relation to interim measures against assets owned by a sovereign state, Sweden is a party to several international agreements relating to state immunity.

There is no recent case law in relation to interim measures against assets owned by a sovereign state. In older case law, sequestration orders against assets owned by states have been refused with reference to state immunity (see the Supreme Court's judgments in NJA 1942 p. 65 and NJA 19452 p. 342). However, in more recent case law about enforcement in general against assets owned by sovereign states, it has been concluded that enforcement in relation to assets belonging to a foreign state is possible if the property is used for a purpose other than a government non-commercial purpose (see the Supreme Court's judgment in NJA 2011 p. 475). The property must also be located within Swedish territory (see *travaux préparatoires*, Proposition 2008/09:204 p. 45).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

An application for an interim measure is made to the court, and no prior court authorisation is necessary. In general, the opponent should be given the opportunity to respond to the application. However, if there is an imminent risk in letting the opponent respond, the court may grant the application without giving the opponent that opportunity.

There are a few interim measures available pursuant to Swedish law, including:

- provisional attachment of a person's property to secure a debt;
- provisional attachment of a specific property if there is a question regarding superior right to the property; or
- other suitable measures to secure the applicant's right, for example a prohibition order against performance of a specific activity, subject to a default fine.

For an interim measure to be granted, the applicant must deposit security with the court for the loss that the other party may suffer. Such security must normally be provided in the form of a bank guarantee or other similar instrument. If the applicant cannot deposit security and has shown an extraordinary reason, the court may, however, waive the requirement to deposit security. The state, municipalities, county councils and local community organisations are exempted from the requirement to deposit security. If the other party does not accept the security, the security should be examined by the court.

The granted interim measures are executed by the Swedish Enforcement Authority.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

An application for interim measures is made to the court. The general rule is that the opponent should be given the opportunity to respond to the application. However, if there is an imminent risk in letting the opponent respond, the court may grant the application without giving the opponent the opportunity to respond.

The granted interim measures are executed by the Swedish Enforcement Authority.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure as described in question 25 also applies to enforcement measures against movable property.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure as described in question 25 also applies to enforcement measures against intangible property.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

The Swedish Enforcement Authority executes the attachment proceedings. Attachment proceedings may take place if there is a writ of execution (e.g., a judgment or an award), if the amount expected from the attachment proceedings after deduction of costs exceeds the debt and if the action is reasonable.

For assets to be attached, they must belong to the debtor. Some assets may not be attached (e.g., clothes and other objects that are necessary for the debtor), if the value is reasonable. Further, attachment on salary may be granted in certain situations.

Attachment proceedings may be executed in the absence of the debtor, if it is not necessary that the debtor is afforded an opportunity to express his or her view on the proceedings.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The Swedish Enforcement Authority executes the attachment proceedings. Attachment proceedings may take place if there is a writ of execution (e.g., a judgment or an award), if the amount expected from the attachment proceedings after deduction of costs arising exceeds the debt and if the action is reasonable. For assets to be attached, the asset must belong to the debtor.

Immovable property is often sold by public auction. However, in certain situations, an immovable property may be sold privately.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

The rules as described in question 29 also apply to enforcement measures against movable property.

Movable property is sold either by public auction or in private. Some assets may not be attached (for example, clothes and other objects that are only used for the debtor's personal use, if the value is reasonable, or other objects that are necessary for the debtor, such as certain furniture, tools, or items with a significant personal value, which would make it manifestly unjust to claim that property.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The rules as described in question 29 also apply to enforcement measures against intangible property.

Further, tenancy rights or tenant-owner rights to an apartment may be exempted as well as, in certain situations; for example, money up to an amount required for the debtor's maintenance.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Sweden is a party to the Vienna Convention on Diplomatic Relations of 18 April 1961 and the Vienna Convention on Consular Relations of 24 April 1963, which have been incorporated in Sweden as Swedish law. Further, Sweden has ratified the Convention on Jurisdictional Immunities of States and Their Property of 2 December 2004 (i.e., the UN Convention), which has also been incorporated into Swedish legislation.

However, the UN Convention and the law incorporating the Convention have not entered into force yet (the Convention will enter into force 30 days after the 30th instrument of ratification, acceptance approval or accession).

Sweden is not a party to the European Convention on State Immunity.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Service of documents on a defendant outside Swedish jurisdiction may be performed if it is allowed by the other country. It is the law at the place of service that is applicable, if it is not contrary to the general principles of Swedish law.

Sweden is also a party to several international agreements in relation to service of documents, for example as an EU Member State.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

In Swedish case law, it has been concluded that the UN Convention in large part is a codification of customary law.

Swedish case law provides that enforcement in relation to assets belonging to a foreign state is possible if the property is used for a purpose other than a government non-commercial purpose (NJA 2011 p. 475). The property must be located in the Swedish territory (Proposition 2008/09:204 p. 45).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

According to the *travaux préparatoires* on Swedish legislation, it is possible for a foreign state to waive immunity from enforcement in Swedish jurisdiction. Generally, the waiver must be explicit and clear, and an implicit waiver may only be accepted in special circumstances (Proposition 2008/09:204 p. 45).

However, the legal situation in this regard does not seem to be completely clear.

41

Switzerland

Franz Stirnimann Fuentes, Jean Marguerat, Tomás Navarro Blakemore and James F Reardon[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Following the principle of party autonomy, Article 189(1) of the Swiss Private International Law Act (PILA) – which governs international arbitration – establishes that the arbitral award shall first of all 'be rendered in conformity with the rules of procedure and in the form agreed by the parties'. This means that it will be necessary to first review the applicable arbitration rules or, if any, applicable procedural rules as set forth in the arbitral proceedings whether there are any specific requirements as to the form of the award (or both). Unless the parties have agreed otherwise, Article 189(2) of the PILA provides that the award 'shall be in writing, supported by reasons, dated and signed. The signature of the chairman is sufficient'. Though extremely rare in practice, the parties are therefore free to waive the written-form requirement and can agree that the award be rendered orally. If the presiding arbitrator is in the minority and declines to sign, the award is still valid with the signatures of two other arbitrators.

While the PILA does not mention any other details that the award must contain, in practice tribunals tend to follow the rules set out in Article 384 of the Code of Civil Procedure (CCP), which regulates domestic arbitration. As such, an award would also usually contain the composition of the arbitral tribunal, the seat of the arbitration, the designation of the parties and their representatives, the parties' prayers for relief, the

1 Franz Stirnimann Fuentes and Jean Marguerat are partners, and Tomás Navarro Blakemore and James F Reardon are associates at Froriep Legal SA.

operative part of the award on the merits, and the amount and allocation of the costs and party compensation.

As to the form of notification of the award, Chapter 12 of the PILA does not deal with such detail. It is therefore a question primarily determined by means of the parties' agreement, if any, or by the applicable arbitration rules, if any, or ultimately by the arbitral tribunal. It is common practice to notify the parties of the award by mail, be it registered mail or by courier service, in order to have a record of the date of receipt. On this matter, the Swiss Federal Supreme Court, for example, has recently stated that the valid notification upon which the time limit for the challenge of an award commences will have to be assessed in view of the applicable arbitration rules. Indeed, in its decision of 26 September 2018, the Swiss Federal Supreme Court confirmed that the 30-day time limit under Article 100 of the Swiss Federal Supreme Court Act (SFSCA) to challenge an award rendered under the International Chamber of Commerce (ICC) arbitration rules commences with the notification of the signed original arbitral award, in view of Article 35(1) of the 2017 ICC arbitration rules, and not with the advance courtesy electronic copy sent by the ICC.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

The PILA does not contain any provision governing modification, clarification or correction of an award. However, such a possibility is generally provided in most arbitration rules and would be acceptable under Swiss law in application of the principle of party autonomy. Moreover, the Swiss Federal Supreme Court has confirmed that an arbitral tribunal has the power to interpret an award or rectify an inadvertent mistake.

The Swiss Federal Supreme Court has also ruled that the interpretation or correction of an award will have to be contained in a fresh award, which will be capable of being challenged as any award under Article 190(2) of the PILA.

According to the legislative proposal to reform Chapter 12 of the PILA (the Draft), currently under consideration before the Swiss Parliament, new specific provisions on the interpretation and correction of awards by the arbitral tribunal are being debated (Article 189a Draft PILA). Under the proposed provision, the parties may request the arbitral tribunal to rectify within 30 days of notification of the award, or the arbitral tribunal may *sua sponte* rectify within the same deadline, any arithmetical or typographical error, interpret any section of the award or render an additional award on such allegations submitted in the proceedings but omitted in the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

Under the PILA, an award may only be set aside before the Swiss Federal Supreme Court (see Article 191 PILA and Article 77 SFSCA). There is no 'appeal' as such against an award before a court with full power of review as to the findings of fact and law.

The Swiss Federal Supreme Court has exclusive jurisdiction to hear applications for the setting aside of international arbitral awards rendered by arbitral tribunals seated in Switzerland. This exclusive jurisdiction is a key feature under Swiss law: there is only one level of court review and that is before the highest court of Switzerland. Moreover, the Swiss Federal Supreme Court interprets restrictively the grounds to set aside awards, explained below, and therefore would only set aside an international award under very limited circumstances. Statistically, only around 7 per cent of challenged awards have been set aside since 1989.

The grounds to set aside final and partial awards are provided in Article 190(2) of the PILA: (1) improper constitution of the arbitral tribunal; (2) incorrect ruling on jurisdiction; (3) decision beyond the claims submitted to the arbitral tribunal or failure to decide a claim; (4) violation of the right to be heard or equal treatment of the parties; and (5) violation of Swiss public policy. Article 190(3) of the PILA provides that preliminary awards can also be annulled on the grounds of improper constitution of the arbitral tribunal and incorrect ruling on jurisdiction. This list of grounds to set aside an award is exhaustive.

According to Article 77 of the SFSCA, the procedure for setting aside an arbitral award is governed by the provisions of the Swiss Federal Supreme Court Act regarding applications for judicial review in civil matters, except for the following Articles: 48(3), 90 to 98, 103(2), 105(2), 106(1) and 107(2) of the SFSCA. The formal and substantive requirements for a setting aside application provided in the SFSCA must be strictly followed, failing which the Swiss Federal Supreme Court will declare the application inadmissible and not examine the application on its merits.

The setting aside application must be submitted in one of the official languages of Switzerland – French, German or Italian. While the Swiss Federal Supreme Court may request a translation of the award, this is usually not the case when it is drafted in English. The Draft currently being debated in Parliament also proposes that briefs can be submitted to the Swiss Federal Supreme Court in English (Article 77(2bis) of the SFSCA as modified by the Draft). The party seeking annulment of the award must file its written application within 30 days of notification of the award, following which the Swiss Federal Supreme Court will require the applicant to provide security for the court costs within the usual time limit of 20 days. The Swiss Federal Supreme Court will then verify that the application is admissible and not patently unmeritorious, and then communicate the application to the arbitral tribunal and the opposite party and invite them to file comments. There are usually two exchanges of briefs among the parties. Thereafter, the Swiss Federal Supreme Court usually renders its decision within four to six months after receipt of the application to set aside the award, first in the form of a summary order, with the reasoning communicated later.

To increase the user-friendliness of the PILA, the Draft proposes stating the time limit of 30 days for challenging an award explicitly in the PILA (Article 190(4) of the Draft).

Another salient feature of Swiss arbitration law is that the parties that have no domicile, habitual residence or place of business in Switzerland may, according to Article 192(1) of the PILA, waive in advance their right to challenge the award in its entirety or limit the challenge to one or several of the grounds listed in Article 190(2) of the PILA. Such a waiver must be explicit and must express the clear intention of the parties to waive the action for setting aside the award.

While not a setting aside proceeding *per se*, the Swiss Federal Supreme Court has also admitted the revision of awards, whereby the Swiss Federal Supreme Court may revoke an award in the same way as Swiss Federal Supreme Court judgments may be revoked under Articles 123, 124(1)(d) and (2)(b), 126 to 128 of the SFSCA. The revision of an award is only possible under two circumstances: (1) when criminal proceedings establish that, by the commission of a crime, the arbitral decision was influenced to the detriment of the applicant; or (2) when the applicant learns of important and cogent evidence that it could not have discovered and produced during the arbitration proceedings and that would have been likely to change the tribunal's decision.

The party seeking a revision of an award must file its petition with the Swiss Federal Supreme Court within 90 days of becoming aware of the ground for the revision from the date of discovery and in any event within the absolute deadline of 10 years from the date on which the award has become final and binding, except if a criminal offence is the ground for revision, in which case the absolute deadline of 10 years does not apply. When the Swiss Federal Supreme Court grants a petition for revision, it annuls the award and remits the matter to the same arbitral tribunal for a new ruling, or to a newly constituted tribunal. Such a remedy is of extraordinary nature and rarely successful. Since 1992, the Swiss Federal Supreme Court has only upheld a petition for revision on three occasions.

The Draft includes a comprehensive provision in Article 190a of the PILA regarding the revision of awards with three alternative grounds for the revision of an arbitral award: (1) when a party subsequently discovers significant facts or decisive evidence that it could not submit in the earlier proceedings despite applying the required due diligence; (2) in the event that criminal proceedings have established that the arbitral award was influenced to the detriment of a party by a criminal act; and (3) in the event that a ground to challenge an arbitrator is discovered only after an award is rendered and if no other appellate remedy is available.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Chapter 12 of the PILA regulates international arbitration, defined as arbitral proceedings seated in Switzerland if, at the time of the conclusion of the arbitration agreement, at least one of the parties did not have its domicile or habitual residence in Switzerland.

The resulting award, an international Swiss award, must be distinguished from a domestic Swiss award. This is the case when both parties have their domicile or habitual residence in Switzerland and the domestic arbitration proceedings are governed by Part 3 (Articles 353 to 399) of the Swiss Code of Civil Procedure of 19 December 2008 (CCP), in force since 1 January 2011.

International Swiss awards are considered 'final' under Article 190(1) of the PILA, which is understood to mean that they have the effect of a final and enforceable court judgment and thereby enjoy automatic enforceability. In the rare case that the parties to the arbitration agreement have expressly agreed to waive some or all grounds for annulment pursuant to Article 192(1) of the PILA, the New York Convention will be deemed applicable to the resulting award, pursuant to Article 192(2) of the PILA. However, such a waiver is available only when none of the parties has its domicile, habitual residence or a business establishment in Switzerland.

Domestic Swiss awards, like international Swiss awards, have the effect of a final and enforceable court judgment pursuant to Article 387 of the CCP. They are therefore immediately enforceable.

With regard to international awards rendered in a seat outside Switzerland (i.e., foreign arbitral awards), their recognition and enforcement are governed directly by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (the New York Convention), pursuant to Article 194 of the PILA, even in the event the country of the seat is not a contracting state to the New York Convention. The New York Convention is directly applicable as Swiss law. Moreover, Switzerland has signed a number of bilateral treaties (in particular with Germany, Sweden, Austria, Belgium, Italy, Liechtenstein, the Czech Republic and Slovakia) that cover arbitral awards.

In addition to being a party to the New York Convention, Switzerland is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Washington Convention), which entered into force for Switzerland on 14 June 1968. The Protocol on Arbitration Clauses of 24 September 1923 and the Convention on the Execution of Foreign Arbitral Awards of 26 September 1927, of which Switzerland is a party, both ceased to have effect between contracting states of the New York Convention the moment the contracting states became bound by the treaty (Article VII(2) of the New York Convention).

Switzerland has signed more than 140 bilateral investment treaties (BITs) and other treaties containing investment provisions, most of which are currently in force. To date, only Germany and China have signed more BITs than Switzerland.

The detailed procedures applicable to the enforcement of arbitral awards, including both those rendered in and those rendered outside Switzerland, are set forth in federal statutes. Enforcement of monetary claims is governed by Articles 38 to 55 of the Federal Act on Debt Collection and Insolvency of 11 April 1889 (DEBA). Enforcement of non-monetary claims is governed by Articles 335 to 346 of the CCP.

In view of Swiss case law and doctrine, it is fair to say that Switzerland adopts a pro-enforcement bias to the New York Convention in practice. Swiss courts are very reluctant to review an arbitral tribunal's determination on the merits and have interpreted narrowly the grounds on which enforcement may be denied.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes. The New York Convention entered into force for Switzerland on 30 August 1965. Upon accession, Switzerland had made a reciprocity reservation. However, the reservation was withdrawn on 23 April 1993 when Chapter 12 of the PILA, and Article 194 thereof, entered into force.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

For recognition and enforcement of domestic and foreign arbitral awards granting monetary relief, a request for debt collection must be filed with the local debt collection office (which is not a court) located, in general, at the award debtor's place of domicile or registered office, pursuant to Articles 46 to 55 of the DEBA. If the award debtor objects to payment within 10 days, then the creditor can request a competent court at the place of the debt collection proceedings (the competent court within a particular canton is determined by cantonal legislation) to set aside the debtor's objection in summary proceedings. However, the debtor can still appeal this decision, and the appeal proceedings may take several months.

For recognition and enforcement of domestic and foreign arbitral awards granting non-monetary relief, under Article 339(1) of the CCP, the award creditor must file its request with the court located (1) at the domicile or seat of the unsuccessful party, (2) where the measures are to be taken, or (3) where the decision to be enforced was rendered.

Though not necessary considering the direct enforceability of arbitral awards, for mere recognition (stand-alone *exequatur*) of foreign arbitral awards, a request must be filed with the court defined by Article 339 of the CCP and the applicable cantonal legislation.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

The court will have jurisdiction over an application for recognition and enforcement if (1) the debtor is domiciled in Switzerland; (2) the debtor has a branch in Switzerland and the claim to be enforced is derived from the operations of that branch; (3) the debt is secured by a pledge or mortgage and the chattel or the real estate is located in Switzerland; or (4) the foreign debtor has assets located in Switzerland and the creditor has obtained an attachment order against those assets pursuant to Articles 271 to 281 of the DEBA.

For the purposes of mere recognition proceedings, the applicant need not identify assets in Switzerland.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings in Switzerland are adversarial.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

An application for recognition of a foreign arbitral award must be accompanied by the following documents, as per Article IV of the New York Convention: the duly authenticated original award, or a duly certified copy thereof (Article IV(1)(a)); the original of the arbitration agreement or a duly certified copy thereof (Article IV(1)(b)); and translations of the award and the arbitration agreement into one of the official languages of Switzerland: German, French or Italian (Article IV(2)).

The Swiss courts, in general, do not take a formalistic approach to these requirements. For example, if the award is rendered in English and the particular Swiss court is comfortable with using English, the court might not require a translation into one of the official Swiss languages. Furthermore, authentication of the award will not be required if the award debtor does not dispute its authenticity.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

As noted in question 9, Swiss courts may dispense with the requirement of submitting the award and the arbitration agreement in an official Swiss language in accordance with Article IV(2) of the New York Convention. According to Swiss legal scholars, the Swiss enforcement court must accept a translation of a foreign award into any of the three official languages (German, French or Italian), even if the translation is not in the official language of the enforcement court.

Rules on authentication and certification vary from canton to canton. Some provide for sworn translators, while others authorise public notaries to certify translations as to their correctness; in yet other cantons, the court may appoint a translator to prepare a translation. Swiss consular and diplomatic agents can also certify translations. Consistent with the less formalistic approach of Swiss courts, in general, it is only necessary that the consular agent certifies the correctness of the first and last page of the translation of an arbitral award, including the particulars of the parties and the dispositive part of the award.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

An application to a Swiss debt collection office to enforce a monetary award must be accompanied by a maximum filing fee of 400 Swiss francs for a claim over 1 million Swiss francs. If the debtor files a formal opposition, the applicant must pay a maximum court fee of 2,000 Swiss francs to commence summary court proceedings. Other costs may apply depending on the complexity of the case and the applicable legislation of the canton in which the enforcement is sought.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

Swiss courts recognise and enforce partial awards that decide on one or more prayers for relief or claims and finally resolve a part of the dispute. Such awards have *res judicata* effect.

In contrast, interim or preliminary awards, understood as decisions that clarify a preliminary issue, are not enforced but may be recognised. For example, a preliminary award by a tribunal in Switzerland upholding its jurisdiction has *res judicata* effect and will bind a court or tribunal later seised with the matter.

The determination of whether a decision constitutes an 'award' depends not on the words used to describe it but rather on the contents of the decision. Procedural orders and orders of provisional measures are not enforceable as awards, but costs awards are considered final decisions constituting awards. A settlement embodied in a 'consent award' that finally resolves one or more of the claims may be recognised and enforced as an award.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

With respect to foreign awards, the grounds enumerated in Article V of the New York Convention are the exclusive grounds on which a Swiss court may refuse recognition and enforcement. Swiss courts interpret these grounds restrictively. Even if one of the grounds is found to have been established, the Swiss courts have discretion to grant enforcement and recognition. In the past 20 years, enforcement has been denied in a very limited number of cases, evidencing Switzerland's stance as an arbitration-friendly jurisdiction.

Regarding international Swiss awards, the available grounds for annulment are those provided for in Article 190(2) of the PILA, which are largely similar to those under the New York Convention (see question 3).

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

There are three types of decisions recognising an award in Switzerland. First, it is possible to request from a competent court (defined by Article 339 of the CCP and by cantonal legislation) a stand-alone *exequatur* decision declaring the recognition and enforceability of an award without further proceedings. Such a decision gives the award *res judicata* effect and makes the award immediately enforceable. Second, an award creditor may initiate execution proceedings for monetary or non-monetary relief without requesting a declaration of recognition and enforceability. In this case, *exequatur* is decided only as a preliminary question, does not appear in the operative part of the court's decision, and lacks *res judicata* effect. Third, a party may combine its request for *exequatur* with execution proceedings.

A party may appeal a decision granting *exequatur* to the higher cantonal court and, if unsuccessful, may appeal to the Swiss Federal Supreme Court. However, the appeal has no automatic suspensive effect on the decision on *exequatur* or the decision on execution.

A party may appeal a decision to set aside the debtor's objection in debt enforcement proceedings to the higher cantonal court and, if unsuccessful, to the Swiss Federal Supreme Court.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

If *exequatur* is denied, a party may appeal to the higher cantonal court, and again to the Swiss Federal Supreme Court.

A decision granting the debtor's objection in debt enforcement proceedings may be appealed to the higher cantonal court and, if unsuccessful, to the Swiss Federal Supreme Court.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

The enforcement court has discretion to adjourn enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration (Article VI, New York Convention). The award debtor must establish on a *prima facie* basis that the award is likely to be set aside, and that its request is not merely a delaying tactic. The enforcement court may consider all relevant factors, including the likelihood of success of the annulment proceedings, although the award debtor's financial stability is not likely to be considered as a sufficient reason to stay enforcement.

Recognition proceedings, unlike enforcement proceedings, are not subject to adjournment in Switzerland, consistent with Article VI of the New York Convention.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

The enforcement court may, at the request of the party seeking enforcement, require the award debtor to post suitable security. The practice of courts regarding the ordering of security varies to a large extent from one canton to another. In principle, the security needs to be paid in cash or provided in the form of a bank guarantee issued by a Swiss bank.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

An award that has been fully set aside at the seat of arbitration will, in general, be denied recognition and enforcement, consistent with Article V(1)(e) of the New York Convention. Although current Swiss case law does not entirely exclude the possibility that an award that was set aside at the seat of the arbitration might be enforced under extraordinary circumstances, the Swiss courts have not been called upon to address such circumstances.

If an award has been partly set aside at the seat of the arbitration, and the portion that is set aside is severable from the portion that has not been set aside, leading Swiss scholarly writing indicates that it is possible to obtain recognition and enforcement of the portion that has not been set aside.

If the award is set aside at the seat of the arbitration after a Swiss court has issued a decision recognising or granting enforcement of the award, scholarly writing supports the view that the award debtor may request cancellation of the decision granting enforcement, applying Article V(1)(e) of the New York Convention by analogy.

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

Service of procedural documents issued during arbitral proceedings, including orders and awards, is to be effected according to the applicable, relevant rules chosen by the parties – be it directly or by reference to specific arbitration rules or decided by the arbitral tribunal.

If the seat of arbitration is in Switzerland and a party in Switzerland refuses to accept delivery of an international award, the arbitral tribunal may request judicial assistance under Article 185 of the PILA. The Swiss court will then apply Articles 136 to 141 of the CCP.

Service of judicial documents in Switzerland (i.e., documents issued within state court proceedings) is governed by Articles 136 to 141 of the CCP. In general, service is effected through the court by means of registered mail or mail with return receipt or, upon agreement of the recipient, by electronic means. In addition, if the recipient's domicile in Switzerland is unknown or service of process is impossible or impracticable, or the recipient has not named an agent for service of process, then service may be effected by publication in the official cantonal or federal gazette.

Swiss law does not contain provisions on service of extrajudicial documents.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

Service of procedural documents issued during arbitral proceedings, including orders and awards, is to be effected according to the applicable, relevant rules chosen by the parties – be it directly or by reference to specific arbitration rules – or decided by the arbitral tribunal.

If a party prevents service from being effected, the arbitral tribunal can request a Swiss court to proceed by way of judicial assistance in accordance with the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters (the Hague Service Convention) or the Hague Convention on Civil Procedure of 1 March 1954.

The provisions governing the service of judicial and extrajudicial documents on a defendant located outside Switzerland depend on the defendant's state of domicile.

Switzerland is party to the Hague Service Convention and to the Hague Convention on Civil Procedure. If the defendant is located in a country not party to said Conventions and no bilateral treaty exists, the Swiss authorities apply the Hague Convention on Civil Procedure (as per Article 11a(4), PILA).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several databases and publicly available registers that may be useful for identifying an award debtor's assets, as well as the status of a debtor. Some of the registers allow one to search by the owner's name.

- The Swiss Land Registry provides public access to ownership details for identified properties and details of certain registered charges, and a person showing a legitimate interest may request additional information.

- The Swiss Car Registry, Ship Registration Office and Maritime Navigation Registry Office provide ownership and other information regarding motor vehicles, inland ships, deep-sea vessels and yachts sailing under Swiss flag, respectively.
- The Swiss Aircraft Registry provides information regarding Swiss-registered aircraft, and it is possible to search by the owner's or holder's name.
- Trademarks, patents and designs are registered with the Swiss Federal Institute of Intellectual Property, and may be searched by the owner's name.
- Financial and auditing reports of companies listed in Switzerland are published on the website of the relevant exchange: the SIX Swiss stock exchange or the BX Berne eXchange.
- Information regarding individual debtors and corporations subject to debt enforcement or bankruptcy proceedings may be obtained from the debt collection and bankruptcy offices by certain persons demonstrating a legitimate interest.
- Ownership of certain tangible assets may be registered at the debt collection office where the acquirer of the asset is domiciled; these records are publicly accessible.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

An award debtor will not be compelled to disclose the existence and location of assets during attachment or enforcement proceedings.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

As described in question 28, the courts may order the attachment of assets as an interim measure, including on an *ex parte* basis, pursuant to Articles 271 to 281 of the DEBA. Alternatively, and only in the case of fraudulent or criminal acts, a creditor may request a freezing order under Swiss criminal procedure law.

An award creditor may obtain interim measures against assets owned by a sovereign state, provided that the assets are not subject to immunity. For instance, the asset must not have been allocated to activities of the sovereign state in the exercise of its sovereign powers (*jure imperii*). (For more details, see question 34.)

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

The main interim measure against assets is an attachment order (Articles 271 to 281, DEBA). An award creditor may seek an order of attachment on an *ex parte* basis. The procedures are described in question 28.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

The main interim measure against immovable property is an attachment order (Articles 271 to 281, DEBA). Special regulations on enforcement against real estate will apply (e.g., the Ordinance of the Swiss Supreme Court on the Enforcement on Real Estate).

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

The main interim measure against movable property is an attachment order (Articles 271 to 281, DEBA). In the context of enforcement against movable property, Switzerland has special legislation and is a signatory state to a number of specific conventions containing provisions on the seizure of and enforcement against movable property, including aircraft and ships.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

There is no specific procedure in place, but trademarks and patents registered with the Swiss Federal Institute of Intellectual Property may be seized according to normal attachment proceedings.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

A party seeking enforcement may obtain a civil attachment order (freezing order) pursuant to Articles 271 to 281 of the DEBA. Attachment proceedings may be conducted *ex parte* before a competent court at the award debtor's seat in Switzerland or where the assets are

located. The requirements for an attachment depend on whether it is requested prior to, or after, issuance of an award.

At the pre-award or prejudgment stage, a party seeking an attachment must establish *prima facie* that:

- it has a mature and unsecured claim against the debtor;
- at least one of the statutory reasons under Article 271(1)(1) to (6) of the DEBA is fulfilled, namely:
  - the debtor has no permanent place of residence in Switzerland;
  - the debtor is concealing its assets, absconding or making preparations to abscond in order to evade the fulfilment of its obligations;
  - the debtor is travelling through Switzerland or belongs to the category of persons who visit fairs and markets and the creditor's claim is to be fulfilled immediately;
  - the debtor does not have its residence or seat in Switzerland, and the claim has a sufficient connection with Switzerland or is backed by a signed acknowledgment of debt;
  - the creditor holds a certificate of shortfall against the debtor; or
  - the creditor holds against the debtor a title allowing the final lifting of the opposition in debt enforcement proceedings according to Article 80ff of the DEBA (typically an enforceable award or judgment); and
- the debtor has assets located in Switzerland.

The condition of a sufficient link with Switzerland is often one of the main issues that arises in a civil attachment proceeding. Such a link will be found to exist when, for instance, the underlying agreement has been entered into or must be performed at least partially in Switzerland or when a payment must be made in Switzerland, or when the contract is subject to Swiss law or provides for Swiss jurisdiction.

Based on Article 271(1)(6) of the DEBA, once an award or judgment confirming the claim has been issued (and in other cases determined by Article 80(2) of the DEBA), it is not necessary to establish a sufficient link with Switzerland, and a party seeking an attachment need only establish *prima facie* that it has a mature and unsecured claim against the debtor, and the debtor has assets located in Switzerland.

The assets and their location must be precisely indicated in the request. As a preliminary question, the judge will examine *prima facie* whether the formal and substantive requirements of the New York Convention are met.

Court fees for a civil attachment request are a maximum of 2,000 Swiss francs. The court may require the applicant to provide security. Documents produced by the applicant must be translated into the language of the specific court (either German, French or Italian), depending on the region. The court typically renders a decision within a day.

Once the attachment is granted, the debtor may file an objection with the judge within 10 days of receipt of the attachment minutes, and an adverse decision on the objection may be appealed to the higher cantonal court, and then to the Swiss Federal Supreme Court. However, an objection or appeal will not render the attachment ineffective during the course of those proceedings. If the attachment is granted and the debtor does not successfully challenge it, the award creditor must commence debt collection proceedings or file a claim on the merits within 10 days, or the attachment order will lapse.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

See questions 25 and 28.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See questions 26 and 28.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See questions 27 and 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

Switzerland has not enacted legislation specifically governing recognition and enforcement of arbitral awards against foreign states. In general, Switzerland applies the doctrine of restricted immunity of states, whereby the foreign state generally enjoys immunity from claims arising out of activities performed in the exercise of sovereign authority (*jure imperii*). Activities performed by the foreign state of a commercial nature (*jure gestionis*) do not generally enjoy immunity.

Switzerland is an early signatory to the 1972 European Convention on State Immunity (the Convention on State Immunity), and ratified the Convention on Jurisdictional Immunities of States and their Property (the UN Convention) on 16 April 2010, which also regulates state immunity questions. The UN Convention, which codifies the principle of restricted immunity, is not yet in force, as it has yet to be ratified by 30 countries.

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Since Switzerland is a party to the Convention on State Immunity, service of judgments and of documents by which proceedings are instituted is governed by Article 16 of the Convention on State Immunity, which provides that service is deemed to have been effected by the receipt of such documents by the Ministry of Foreign Affairs.

Service of documents on foreign countries that are not party to the Convention on State Immunity would have to be effected in accordance with the laws of the relevant foreign state.

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

As a preliminary comment, under Article 177(2) of the PILA, states and state entities cannot assert immunity from the jurisdiction of an arbitral tribunal or contest their capacity by invoking the state's own laws.

The fact that a state has entered into an arbitration agreement does not, by itself, allow the award to be executed against the foreign state's assets. There are three conditions that must be fulfilled for the award creditor to execute against state assets: (1) the claim to be enforced arose from an act performed in a commercial capacity (*acta jure gestionis*); (2) there is an 'appropriate connection' between the legal relationship giving rise to the claim and Switzerland; and (3) the assets of the state against which enforcement is sought are neither allocated to or earmarked for nor intended for the state's sovereign activities, pursuant to Article 92(1)(11) of the DEBA.

The requirement of an 'appropriate connection' is fulfilled where the legal relationship underlying the claim arose, was performed, or was required to be performed, in Switzerland. It is not sufficient that a debtor has assets or the claimant is domiciled in Switzerland or if the award was issued by an arbitral tribunal seated in Switzerland.

If it comes into effect, the UN Convention may change Swiss law by restricting parties' ability to seek interim relief against sovereign assets, and may change the presumption that sovereign immunity only covers monetary assets that have been earmarked for public purposes.

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

A foreign state may waive immunity from execution. If a state expressly and without reservation waives execution immunity upon entering into an agreement, even the state's assets being used for government purposes will become subject to execution, except for certain classes of assets, such as military goods or an embassy building.

42

United States

Elliot Friedman, David Y Livshiz and Shannon M Leitner[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form (e.g., in writing, signed, dated, place, the need for reasons, delivery)?

Recognition and enforcement of arbitral awards is governed in the United States chiefly by the Federal Arbitration Act (FAA), although other provisions of law can apply as well, as discussed throughout this chapter. The FAA is divided into three chapters. Chapter 1 generally governs domestic arbitration proceedings and directs courts to enforce arbitral awards unless the narrow grounds for *vacatur*, modification or correction are present. Chapter 1 also applies to foreign arbitral awards to the extent that it does not conflict with the New York Convention. Chapter 2 implements the New York Convention, and Chapter 3 implements the Inter-American Convention on International Commercial Arbitration (also known as the Panama Convention), which largely tracks the New York Convention for the purposes of recognition and enforcement.

The body of law governing the enforcement of a particular arbitral award will depend on whether the award is domestic or foreign. Awards arising out of domestic arbitrations are governed primarily by Chapter 1 of the FAA. Unless otherwise indicated, this chapter addresses the enforcement of foreign arbitral awards, which is governed by US federal law and applicable international treaties to which the United States is a party, namely the New York Convention, the Panama Convention and the Washington (ICSID) Convention (which is enforced by 22 USC Section 1650a).

1 Elliot Friedman is a partner, David Y Livshiz is a counsel and Shannon M Leitner is an associate at Freshfields Bruckhaus Deringer US LLP. The authors gratefully acknowledge the assistance of Allison Kowalski, Amy Tan, Timothy Chen, Rachel Johnson and Paige von Mehren, who contributed to this chapter.

The FAA does not explicitly state what form an arbitral award must take. However, Section 13(b) of the FAA implies that an award must be in writing, as that provision requires a party moving to confirm, modify or correct an award to file a copy of the award with the court. Likewise, Article IV(1)(a) of the New York Convention requires presentation of a 'duly authenticated original award or a duly certified copy thereof' as a condition for recognition.

Because the FAA does not dictate the form that an award should take, strictly speaking tribunals need not provide reasons for their awards under US federal law. Even so, issuance of a 'reasoned award' is advisable, and will almost always be required under the parties' arbitration agreement or the applicable rules of arbitration. Questions of whether an award is sufficiently 'reasoned' sometimes arise in the contexts of *vacatur* and enforcement (discussed in questions 3 and 13). While there is no bright-line rule, there appears to be a consensus in several federal courts of appeal that a reasoned award is one that provides more explanation than a simple announcement of a result, but the explanation need not provide detailed findings of fact and conclusions of law.

Applicable procedural law for recourse against an award

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award?

If an award (domestic or foreign) has been rendered in the United States, Chapter 1, Section 11 of the FAA permits a party to move to modify or correct an award if (1) the award contains 'an evident material miscalculation of figures or an evident material mistake in the description of any person, thing or property', (2) the arbitrators have issued a decision on a matter not submitted to them, or (3) the form of the award is imperfect, but that imperfection does not affect the merits of the controversy. Any such petition must be served within three months of the parties receiving the award.

Appeals from an award

3 May an award be appealed to or set aside by the courts? If so, on what grounds and what procedures? What are the differences between appeals and applications for set-aside?

US federal law does not permit the appeal of an arbitral award. However, it does provide for the *vacatur* or set-aside of arbitral awards rendered in the United States in certain limited circumstances. Any such petition must be served within three months of the parties receiving the award.

Under the New York Convention, a petition to vacate or set aside an award will be governed by the domestic law of the country in which the award was rendered (US courts refer to that jurisdiction as the primary jurisdiction). The US Supreme Court has held that the FAA provides the exclusive grounds for vacating an arbitral award issued in the United States (*Hall Street Associates v. Mattel*, 552 US 576 (2008)). Specifically, Chapter 1, Section 10 of the FAA states that a court may vacate an arbitral award only if it finds that

one of the following limited grounds applies: (1) the award is a result of corruption or fraud; (2) evident partiality or corruption of an arbitrator; (3) arbitrator misconduct, such as refusing to hear pertinent and material evidence; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award was not made.

In addition to the four statutory grounds, US federal courts are split as to whether the 'manifest disregard of the law' doctrine remains a separate basis for *vacatur* under the FAA. The Second Circuit (which encompasses New York and therefore hears many cases relating to international arbitration proceedings) has held that 'manifest disregard' survives as a 'judicial gloss' on the FAA's statutory grounds for *vacatur* and, so interpreted, remains a valid ground for vacating arbitration awards. Meanwhile, the DC Circuit (which hears many award enforcement proceedings involving sovereigns) has expressed scepticism about the survival of the 'manifest disregard' doctrine.

US courts have emphasised that they will not vacate awards lightly. In particular, under US law, showing that the tribunal committed an error, even if that error is significant, is ordinarily not sufficient to set aside the award.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

4 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Most relevantly, the United States is a party to the following treaties facilitating the recognition and enforcement of arbitral awards: the New York Convention (entered into force on 29 December 1970), the Panama Convention (entered into force on 27 October 1990) and the ICSID Convention (entered into force on 14 October 1966).

The applicable procedural law for recognition and enforcement of most foreign arbitral awards is the FAA, which requires that an action to enforce a foreign award be brought within three years.

Separately, actions to enforce an ICSID award are governed by the statute implementing the ICSID Convention (22 USC Section 1650a).

In addition, US courts may apply procedural rules set out in the Federal Rules of Civil Procedure, the local procedural rules of the judicial district in which the enforcement action is brought, and the individual practices of the judge adjudicating the enforcement action.

The New York Convention

5 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

The New York Convention entered into force in the United States on 29 December 1970. Although the United States did not make any reservations upon ratifying the treaty, it did make two declarations: the Convention only applies to the recognition and enforcement

of awards made in the territory of another contracting state, and the Convention only applies to differences arising out of legal relationships that are considered commercial (whether or not they are contractual) under national law.

As noted in question 1, the Convention is incorporated into US law through Chapter 2 of the FAA. Chapter 2, Section 202 of the FAA clarifies the scope of 'non-domestic' awards that fall under the Convention: the Convention will govern the enforcement of an arbitration award between citizens of the United States if 'that relationship involves property located abroad, envisages performance or enforcement abroad or has some other reasonable relation with one or more foreign states'. Further, US courts consider that awards rendered in the United States qualify as non-domestic if they are issued in accordance with foreign law or involve parties domiciled, property located or contractual performance outside the United States.

Recognition proceedings

Competent court

6 Which court has jurisdiction over an application for recognition and enforcement of arbitral awards?

There is no one specific court with jurisdiction over all recognition and enforcement proceedings in the United States. Any court with subject-matter jurisdiction over the dispute and personal jurisdiction over the defendant may hear an application for recognition and enforcement of arbitral awards, whether domestic or foreign.

In general, the FAA gives federal district courts subject-matter jurisdiction over recognition and enforcement of foreign awards that fall under the New York Convention. For recognition and enforcement of ICSID awards, 22 USC Section 1650a is the source of a federal district court's subject-matter jurisdiction.

Whether a court adjudicating an action to enforce an arbitral award has personal jurisdiction over the award debtor is a question of US constitutional law and will depend on the facts of a particular case. Historically, there has been some question as to whether a party seeking to enforce an ICSID award is required to make a showing of personal jurisdiction. This debate appears to have been put to rest in 2017, when the Second Circuit ruled in *Mobil Cerro Negro v. Venezuela* that a jurisdictional showing under the Foreign Sovereign Immunities Act (FSIA) will be required to obtain enforcement of an ICSID award.

Jurisdictional issues

7 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement of arbitral awards? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

As noted in question 6, to have jurisdiction over an application for recognition and enforcement of arbitral awards, a US court must have personal jurisdiction over the award debtor. Personal jurisdiction in award enforcement cases can generally be satisfied by

showing that the award debtor is either headquartered or incorporated in the forum in which proceedings are brought, or has sufficient claim-related contacts or assets within that forum. While the presence of assets within the jurisdiction may provide a basis for a court to exercise quasi *in rem* jurisdiction, a party seeking recognition and enforcement of an arbitral award need not identify such assets if it can establish that a court has personal jurisdiction over the award debtor based on the award debtor's claim-related contacts with the forum.

In an action to enforce an arbitral award against a sovereign, a US federal court will have jurisdiction if the petitioner has effected service in accordance with the FSIA; the court will not need to undertake a minimum contacts analysis required by the Due Process Clause in the Fifth Amendment to the US Constitution.

Form of the recognition proceedings

8 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*?

Recognition proceedings are adversarial.

Form of application and required documentation

9 What documentation is required to obtain the recognition of an arbitral award?

Recognition of an arbitral award is usually sought by filing a petition to confirm or recognise an arbitral award. Both the FAA and the New York Convention require a party seeking confirmation or recognition of an award to submit to the court a copy of the award and the parties' arbitration agreement (9 USC Section 13; New York Convention, Article IV). In addition to these required filings, parties seeking confirmation of an arbitral award will routinely submit a memorandum of law in support of their petition, with factual and legal support. All foreign language documents should include a certified translation into English. Typically the award and related documents are authenticated through a short affidavit from counsel confirming that the copies are true and correct. Local court rules may contain additional requirements.

Translation of required documentation

10 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition of an arbitral award? If yes, in what form must the translation be?

US federal courts require that documents be submitted in English and that foreign language documents be accompanied by a certified English translation. A translator must provide a certification that he or she is competent to translate the documents and that the translation is true and accurate to the best of the translator's abilities.

Other practical requirements

11 What are the other practical requirements relating to recognition and enforcement of arbitral awards?

A party commencing an action in federal court – including an action to confirm or recognise an arbitral award – is required to pay a US$400 filing fee. Furthermore, in addition to the substantive legal documents described in question 9, a party commencing an action will need to submit certain ministerial forms, including a civil cover sheet and a corporate disclosure statement, and will be required to obtain a summons. Finally, some courts have additional requirements, such as submission of separate affidavits that set out the facts of the arbitration agreement, hearing and award. It is therefore important to check the local rules of the judicial district in which enforcement will be sought.

Recognition of interim or partial awards

12 Do courts recognise and enforce partial or interim awards?

US courts generally recognise the right of arbitrators to issue partial or interim awards prior to the final award. Although in general only a final award is enforceable under the FAA, a number of federal courts will recognise and enforce a partial award when it conclusively disposes of a separate and independent claim.

Grounds for refusing recognition of an award

13 What are the grounds on which an award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the Convention?

The FAA implements all seven of the non-enforcement grounds in the New York Convention, explicitly stating that 'the court shall confirm the award' unless it determines that one of the grounds for non-recognition under the Convention has been met. US courts generally interpret these exceptions strictly, and will limit rather than expand their discretion to refuse recognition of an award.

In addition, as a matter of US constitutional law, a US court could decline to recognise an arbitral award because it does not have jurisdiction over the defendant.

US courts are even more limited in their power to refuse to recognise an ICSID award and will generally only refuse to do so if they lack personal jurisdiction over the award debtor.

Effect of a decision recognising an award

14 What is the effect of a decision recognising an award in your jurisdiction? Is it immediately enforceable? What challenges are available against a decision recognising an arbitral award in your jurisdiction?

Once a party's petition to confirm an arbitral award is granted, the court enters a judgment for the relief provided in the award. The award creditor may then seek to execute upon the award by attaching, garnishing or seizing the award debtor's assets necessary to discharge

the debt owed under the award. The procedure for executing a judgment in federal court is governed by Rule 69 of the Federal Rules of Civil Procedure (FRCP), which provides that a judgment is enforced in accordance with the law of the appropriate state, which is usually the state in which the assets sought to be executed against are located.

Typically, courts in the United States do not permit immediate execution of a judgment. For example, FRCP 62(a) provides for an automatic stay of 30 days, during which a party may seek to appeal the judgment. In addition, if the judgment is rendered against a sovereign or a state-owned entity, the party seeking to enforce the judgment will need to comply with the FSIA.

Decisions refusing to recognise an award

15 What challenges are available against a decision refusing to recognise an arbitral award in your jurisdiction?

A party may contest a court's decision refusing to recognise an arbitral award by filing an appeal. The Federal Rules of Appellate Procedure provide that a party should file a notice of appeal within 30 days of entry of a judgment refusing to recognise an award.

Stay of recognition or enforcement proceedings pending annulment proceedings

16 Will the courts adjourn the recognition or enforcement proceedings pending the outcome of annulment proceedings at the seat of the arbitration? What trends, if any, are suggested by recent decisions? What are the factors considered by courts to adjourn recognition or enforcement?

US courts have the discretion to stay proceedings seeking to recognise an arbitral award when an annulment proceeding is pending at the seat of the arbitration. In considering whether to stay enforcement proceedings, the court will generally consider six criteria enumerated by the Second Circuit in *Europcar Italia v. Maiellano Tours* (156 F.3d 310 (2d Cir. 1998)): (1) the general efficiency objectives of arbitration; (2) the status of, and estimated time required to resolve, the foreign proceedings; (3) whether the award will be subject to greater scrutiny in the foreign proceedings; (4) the characteristics of the foreign proceedings; (5) a balance of possible hardships to each party; and (6) any other relevant circumstances.

While the *Europcar* decision is only binding on courts in the Second Circuit, a number of other courts in the United States have adopted these same factors.

Security

17 If the courts adjourn the recognition or enforcement proceedings pending the annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security? What are the factors considered by courts to order security? Based on recent case law, what are the form and amount of the security to be posted by the party resisting enforcement?

A US court has the power to order security pursuant to Article VI of the New York Convention, including in circumstances when an enforcement action is stayed pending a foreign annulment.

There is no clear guidance on (1) what specific factors a court will consider in determining whether to order the posting of security or (2) the appropriate form and amount of the security to be posted if security is ordered. A court has broad discretion over these matters.

Recognition or enforcement of an award set aside at the seat

18 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an award is set aside after the decision recognising the award has been issued, what challenges are available against this decision?

The Second Circuit's decision in the *Pemex* case confirms that US courts may recognise and enforce an award that has been set aside at the seat of arbitration if giving effect to the set-aside decision would be 'repugnant to fundamental notions of what is decent and just' in the United States (*Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016)).

In the event that a decision setting aside an award is issued after a US court has recognised or enforced an award, a party can file a motion for relief from judgment under FRCP 60 (see, for example, *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*, 864 F.3d 172 (2d Cir. 2017)).

Service

Service in your jurisdiction

19 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction?

For a suit in federal court, service must accord with Rule 4 of the FRCP. If the award debtor is located within the district in which enforcement proceedings are brought, then service can usually be effected by delivering copies of the relevant documents to the defendant or a person of suitable age at the defendant's home or place of business. There are additional ways to effect service, which may vary by court.

Service out of your jurisdiction

20 What is the applicable procedure for service of extrajudicial and judicial documents to a defendant out of your jurisdiction?

The United States is a party to the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention). Accordingly, if the defendant is located in a state that has ratified the Hague Service Convention, then the procedures provided in that treaty will apply. The US Supreme Court has confirmed that unless the state within which service is being made has objected to service by mail, the Hague Service Convention permits service of process by this means (*Water Splash, Inc. v. Menon*, 137 S. Ct. 1504 (2017)).

If the defendant is an individual and is located in a state that has not ratified the Hague Service Convention (and if no other treaty or agreement between the parties applies), then the defendant must be served according to FRCP 4(f)(2), which may require compliance with the foreign country's service requirements. If the defendant is a corporation, partnership or association, and is located in a state that has not ratified the Hague Service Convention, then the defendant must be served according to FRCP 4(h), which may require compliance with the foreign country's service requirements.

If the defendant is a state or a state-owned entity, the FSIA contains a hierarchy of methods of service to which plaintiffs must strictly adhere (28 USC Section 1608).

Identification of assets

Asset databases

21 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction?

There are several publicly available registries that can be used to identify an award debtor's assets within the United States. They include real estate property registries, motor vehicle registries, watercraft registries, aircraft registries, Uniform Commercial Code (UCC) filings (to determine whether the debtor has disclosed any collateral in UCC filings), state and federal civil litigation filings (to determine whether the debtor has previously received, or may soon expect, an award or settlement), Securities and Exchange Commission filings (to determine whether a debtor that is a publicly traded company has made disclosures concerning assets), and intellectual property registries.

Many of these registries are only available on a state-wide (as opposed to nationwide) basis and a fee may be payable for use. Parties can also use specialist tracing services to help identify assets.

Information available through judicial proceedings

22 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

An award creditor may ask a US court to authorise discovery so as to identify and attach assets to satisfy an award. Rule 69 of the FRCP allows for post-judgment discovery from any

person, including the award debtor. This rule is often interpreted broadly, and means that an award creditor will be able to request documents from the debtor (and any institution that may hold the debtor's assets), and to depose people with relevant information.

In addition, 28 USC Section 1782 may allow for the disclosure of information about an award debtor. Section 1782 authorises a district court to 'order [a person residing in the district] to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal' if the request is made by an 'interested person'. Generally, Section 1782 allows litigants to obtain evidence for use in litigations and arbitrations abroad, but at least one appellate-level court in the United States has applied Section 1782 to aid in asset recovery.

Enforcement proceedings

Availability of interim measures

23 Are interim measures against assets available in your jurisdiction? May award creditors apply such interim measures against assets owned by a sovereign state?

As a general rule, US courts may grant interim relief, including freezing orders, by granting a temporary restraining order or a preliminary injunction. However, there is a high bar to obtaining such interim relief.

Under the FSIA, the property of a foreign sovereign is generally immune from attachment, and can only be attached once an award has been recognised (28 USC Section 1610(a)).

Procedure for interim measures

24 What is the procedure to apply interim measures against assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before applying interim measures? If yes, are such proceedings *ex parte*?

Provisional relief can be obtained by applying to a US court for either a preliminary injunction, which may be done only through an *inter partes* hearing, or for a temporary restraining order, which may be obtained *ex parte*.

To succeed on an application for a preliminary injunction, an applicant must show irreparable harm plus a likelihood of success on the merits. Alternatively, the applicant may succeed be showing irreparable harm, plus sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly in the applicant's favour. The standard to obtain an *ex parte* temporary restraining order is higher still, and requires that: (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or that party's attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting the claim that notice should not be required.

FRCP 65 requires that the movant for either a preliminary injunction or a temporary restraining order post as security an amount the court deems fit to indemnify the adverse party in the event the order is later found to be improper.

Interim measures against immovable property

25 What is the procedure for interim measures against immovable property within your jurisdiction?

See questions 23 and 24.

Interim measures against movable property

26 What is the procedure for interim measures against movable property within your jurisdiction?

See questions 23 and 24.

Interim measures against intangible property

27 What is the procedure for interim measures against intangible property within your jurisdiction?

See questions 23 and 24.

Attachment proceedings

28 What is the procedure to attach assets in your jurisdiction? Is it a requirement to obtain prior court authorisation before attaching assets? If yes, are such proceedings *ex parte*?

Post-judgment attachment proceedings in the United States are generally governed by the law of the state where the court is located, but a federal statute governs to the extent it applies (see FRCP 69). There is no uniform rule in the states as to the procedure for attaching assets.

Attachment against immovable property

29 What is the procedure for enforcement measures against immovable property within your jurisdiction?

See question 28.

Attachment against movable property

30 What is the procedure for enforcement measures against movable property within your jurisdiction?

See question 28.

Attachment against intangible property

31 What is the procedure for enforcement measures against intangible property within your jurisdiction?

See question 28.

Enforcement against foreign states

Applicable law

32 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

The Foreign Sovereign Immunities Act, 28 USC Section 1602 et seq. (1976), provides the sole jurisdictional basis for bringing claims in the United States against a foreign state, including actions to recognise and enforce arbitral awards. The FSIA provides an exception for state immunity in an action to confirm an arbitral award if the arbitration agreement or award is governed by a treaty such as the New York, Panama or ICSID Conventions (see 28 USC Section 1605(a)(6)).

Service of documents to a foreign state

33 What is the applicable procedure for service of extrajudicial and judicial documents to a foreign state?

Under US law, service on foreign states (or state-owned entities) must be effected pursuant to the FSIA, which provides a four-step process for service in descending order of preference: (1) pursuant to a special arrangement between the plaintiff and the foreign state; (2) as prescribed in an applicable international convention (such as, for example, the Hague Service Convention); (3) via mail from the clerk of court to the head of the foreign state's ministry of foreign affairs; or (4) via diplomatic channels (28 USC Section 1608(a)). The FSIA provides a similar process for serving state-owned entities (28 USC Section 1608(b)).

Immunity from enforcement

34 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? If yes, are there exceptions to such immunity?

Under the FSIA, the property of a foreign sovereign is generally immune from attachment or execution. However, certain exceptions exist. For example, when the attachment or execution is based on a judgment confirming an arbitral award rendered against the foreign state, the FSIA allows for execution on the property of a foreign sovereign if the property is located within the United States and used for commercial activity in the United States (28 USC Section 1610(a)(6)). To execute upon non-immune sovereign assets, an award creditor will also need to comply with other requirements of the FSIA, including 28 USC Section 1610(c).

To distinguish between sovereign and commercial property, courts will examine whether the particular actions that the foreign state performs are the types of actions

by which a private party engages in trade or commerce. For example, in the words of one frequently cited decision, even a contract to buy military equipment, including 'army boots or even bullets', constitutes 'commercial activity' under the FSIA 'because private companies can similarly use sales contracts to acquire goods' (*NML Capital v. Argentina*, 680 F.3d 254 (2d Cir. 2012) [citing *Republic of Argentina v. Weltover*, 504 US 607 (1992)]).

Waiver of immunity from enforcement

35 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? If yes, what are the requirements of such waiver?

Under the FSIA, a foreign state can waive immunity from execution (28 USC Section 1610(a)(1)). An explicit waiver can take the form of a contractual provision (see, for example, *Karaha Bodas v. Pertamina*, 313 F.3d 70 (2d Cir. 2002). Further, the FSIA provides an exception to a foreign state's immunity from attachment if the judgment in satisfaction of which execution is sought is based on an order confirming an arbitral award and where the assets sought to be executed against are used for commercial activity in the United States (28 USC Section 1610(a)(6)).

Appendix 1

About the Authors

Cecil W M Abraham
Cecil Abraham & Partners

Tan Sri Dato' Cecil W M Abraham is senior partner at Cecil Abraham & Partners. He obtained his LLB Hons from Queen Mary College, University of London, in 1968 and is a barrister at law of the Middle Temple. He was admitted as an advocate and solicitor of the High Court of Malaya in 1970. He is a chartered arbitrator and a Fellow of the Chartered Institute of Arbitrators UK, Malaysian Institute of Arbitrators, Singapore Institute of Arbitrators and Australian Centre for International Commercial Arbitration Limited. He is also a Fellow of Queen Mary and Westfield College, University of London.

He has an extensive arbitration practice and appears as counsel in both domestic and international arbitrations. He has arbitrated under UNCITRAL, ICC, SIAC, Asian International Arbitration Centre (AIAC, formerly known as KLRCA) and LCIA rules since the 1990s and has sat as chairman, sole arbitrator and co-arbitrator in international commercial arbitrations in Asia and Europe. He is currently a member of the Advisory Council of the International Council for Commercial Arbitration (ICCA), the Advisory Panel of the AIAC and the Board of the National Committee of ICC Malaysia.

Laurie Achtouk-Spivak
Cleary Gottlieb Steen & Hamilton LLP

Laurie Achtouk-Spivak is a counsel at Cleary Gottlieb Steen & Hamilton's Paris office. Her practice focuses on international arbitration and litigation, with a particular emphasis on public international law.

Saman Ahsan
Khaitan & Co

Saman Ahsan is a principal associate in the firm's commercial litigation and arbitration team. Prior to joining Khaitan & Co, Saman worked in the litigation and international commercial arbitration team of a reputed law firm in London. During the past eight years, he has gained rich experience in the field of dispute resolution and has advised clients on a wide variety of claims under Indian arbitration laws, SIAC, LCIA, ICC and HKIAC. Saman regularly advises clients on issues relating to enforcement of foreign decrees and awards in India, service of foreign summons in India and bilateral investment treaties entered into with India. Saman has previously advised clients on complex disputes arising out of shareholder agreements, construction contracts and production sharing agreements, among other things. Saman also regularly advises clients on litigation before the Supreme Court of India and various state High Courts in connection with disputes in the fields of infrastructure, natural resources, environment and other regulatory laws.

Saman has written articles for reputed resources such as International Law Office and Mondaq.

Kamel Aitelaj
Milbank LLP

Kamel Aitelaj is a senior associate in the Washington, DC, office of Milbank LLP. Kamel's practice focuses on complex international dispute resolution and matters of public international law. He has represented sovereign states and major international companies (telecommunications, financial, chemical and biosciences, energy and mining) in a wide range of proceedings, including investment treaty-based arbitration and commercial arbitration conducted under UNCITRAL, ICSID, ICC, ICDR, LCIA and SCC rules as well as *ad hoc* arbitral proceedings. Kamel also has substantial experience in matters involving sovereign immunity and award enforcement.

Kamel is licensed to practise at the New York and District of Columbia bars, the Barreau de Paris and was called to the Bar of England and Wales. He is a member of the Chartered Institute of Arbitrators, the International Law Association, the Energy Charter Secretariat Legal Advisory Task Force and the CPR Brazil Advisory Board, and is a Fellow of the Royal Geographical Society. A native French speaker, Kamel is also proficient in Portuguese.

Babatunde Ajibade
SPA Ajibade & Co

Dr Babatunde Ajibade is the managing partner of SPA Ajibade & Co. Since his admission to the Nigerian Bar in 1989, Dr Ajibade has been engaged in active corporate and commercial practice. His area of academic specialisation is in the field of private international law, with a particular interest in the law relating to the recognition and enforcement of foreign judgments.

Dr Ajibade has been involved in all aspects of commercial dispute resolution in Nigeria, and has expertise in litigation involving the recognition and enforcement of foreign judgments, banking law, intra-company shareholder disputes, and insolvency and insurance

litigation. Several of the matters in which he has been involved have come before the highest appellate courts in Nigeria, and are reported in various law reports. Dr Ajibade also has extensive experience in all aspects of commercial arbitration and in investment treaty arbitration.

Dr Ajibade was elevated to the rank of Senior Advocate of Nigeria in 2007. He is an International Practice Fellow of the International Bar Association and a Fellow of the Chartered Institute of Arbitrators. Dr Ajibade is a vice president of the ICC Arbitration Commission's Steering Committee and co-vice chair of the IBA's African Regional Forum.

Francisco A Amallo
MHR | Martínez de Hoz & Rueda

Francisco A Amallo is a founding partner of MHR | Martínez de Hoz & Rueda. He is a specialist in international dispute settlement and international business law, with experience in foreign investment, oil and gas, construction, international sale and transport of goods, sports, and general corporate and commercial transactions.

He has represented clients in international arbitrations under different rules, in complex litigations, and in corporate and commercial transactions relating to different industries. He is listed as an arbitrator with various arbitral institutions and is a member of the Fédération Internationale de Volleyball's FIVB Tribunal.

He is a professor of international arbitration and private international law in both graduate and postgraduate courses at Universidad Católica Argentina and Universidad del Salvador. He is a member of the executive board of the International Centre for Dispute Resolution's Young & International networking group.

David Ament
Von Wobeser y Sierra, SC

David Ament obtained his law degree (JD) from Universidad Panamericana campus Guadalajara. He is an assistant professor of international litigation at Escuela Libre de Derecho, Mexico City.

He is currently an associate at Von Wobeser y Sierra, SC. He specialises in domestic and international commercial and investment arbitration, and in civil, commercial and administrative litigation.

His professional associations and memberships include the International Bar Association, Young International Council for Commercial Arbitration Mentoring Programme 2018-2019, Young International Centre for Settlement of Investment Disputes and ICC Young Arbitrators Forum (ICC YAF). He speaks Spanish and English.

Aniz Ahmad Amirudin
Cecil Abraham & Partners

Aniz Ahmad Amirudin is a partner at Cecil Abraham & Partners and has been in active practice for 10 years. He graduated with a degree in law (LLB Hons) from Middlesex University, London, and thereafter obtained an LLM in international commercial law from the University of Nottingham. He is a barrister-at-law of the Honourable Society of

Lincoln's Inn, London, and was admitted as an advocate and solicitor of the High Court of Malaya in September 2005. Aniz is primarily involved in construction disputes and has been involved in both international and domestic arbitrations held under the SIAC, ICC, LMAA, KLRCA rules and *ad hoc* arbitrations. He is also involved in commercial and insurance disputes and in addition to his contentious work, Aniz advises and drafts building contracts for construction projects.

Rui Andrade
Vieira de Almeida

Rui Andrade is a partner in the litigation and arbitration practice. He has extensive experience in coordinating matters of litigation, arbitration and labour in Angola, Mozambique, East Timor, Equatorial Guinea, São Tomé and Príncipe, Guinea-Bissau and Cape Verde, representing and advising the most relevant national and international companies, including oil industry corporations.

He has a law degree from the University of Lisbon, Faculty of Law, and is a postgraduate in community law from the Faculty of Law at the Catholic University of Louvain, Belgium.

Claudia Annacker
Cleary Gottlieb Steen & Hamilton LLP

Dr Claudia Annacker is a partner at Cleary Gottlieb Steen & Hamilton's Paris office. Her practice focuses on international arbitration and public international law matters, including investor-state disputes, disputes involving international organisations, state succession issues and state immunity, as well as disputes before the European Court of Human Rights.

David Araque Quijano
Gómez Pinzón Abogados

David Araque Quijano is partner and co-director of the dispute resolution and investment protection practice group.

He has a degree in industrial engineering from the Universidad Javeriana, a law degree from the Universidad de los Andes, specialising in financial law, and an LLM, with distinction, from the University of London (Queen Mary), specialising in international dispute resolution, international arbitration, international litigation and dispute resolution associated with investment projects.

He is a professor at Universidad de los Andes in Roman law, business law and obligations (civil liability, effects, transmission and termination of obligations).

He has more than 15 years of experience in commercial transactions, litigation and national and international arbitration in sectors including construction, commercial distribution of goods and services, infrastructure and, in general, in complex commercial disputes.

David has represented several national and multinational companies in commercial litigation before Colombian courts and national and international arbitration courts. Likewise, he has provided advice on contractual and extracontractual liability issues, as well as several group and popular actions in defence of multinationals in environmental matters, personal injuries and consumer protection rules.

Álvaro López de Argumedo
Uría Menéndez

Álvaro López de Argumedo joined Uría Menéndez in 1992 and has been a partner since 2003. He focuses his practice on domestic and international arbitration, international civil litigation and mediation. He has considerable experience in the recognition and enforcement of foreign judgments and arbitral awards, and in interim measures in judicial and arbitration proceedings.

He has taken part in more than 60 international and domestic arbitration proceedings before the main arbitral institutions (ICC, LCIA and CAM, among others), particularly in matters relating to construction, energy distribution and M&A, and in judicial proceedings regarding those sectors.

He is a member of the governing board of the Club Español del Arbitraje, an officer of the IBA's Arbitration Committee (and President of its Soft Law Commission) and a member of the UIA's International Arbitration Committee.

Massimo Benedettelli
ArbLit Radicati di Brozolo Sabatini Benedettelli Torsello

Massimo Benedettelli has been a partner at ArbLit since 2014 and a full professor of international law at the University of Bari Aldo Moro.

He has been a member of the ICC Court of Arbitration since July 2018. Until that month, Massimo led the Italian delegation to the ICC Commission of Arbitration. He is also a member of the Arbitration Council of ACIAM, Atlanta (GA).

Massimo also taught private international law, international economic law, EU law and European commercial law. He obtained an LLM from the University of Pennsylvania and a PhD from the European University Institute.

He started his professional practice in 1986 in the legal department of ENI. In 1990, Massimo joined Chiomenti Studio Legale, where he was a partner from 1996 until November 2001, when he left the firm to join Freshfields and its international arbitration and corporate groups.

One of Italy's main arbitration specialists, throughout his career Massimo has acted as counsel or sat as chairman, sole or co-arbitrator in several international and domestic arbitrations.

Massimo is the author of one book and of various articles published in the most prestigious Italian and international law reviews and co-editor of an authoritative commentary on arbitration law and practice in Italy. Massimo has been invited to deliver a course in 2022 at the Hague Academy of International Law.

Maxim Bezruchenkov
Egorov Puginsky Afanasiev & Partners

Maxim Bezruchenkov is an attorney at Egorov Puginsky Afanasiev & Partners. He specialises in dispute resolution and international commercial arbitration and advises clients on recognition and enforcement of foreign international arbitral awards and judgments in the Russian Federation and of Russian judgments abroad.

His recent highlights include acting for Irish Bank Resolution Corporation under the enforcement against Russian assets, representing a large Danish agricultural company in a corporate dispute before the Arbitration Institute of the Stockholm Chamber of Commerce and advising a construction company headquartered in the UAE on a dispute with a Russian developer arising under the implementation of a large residential development project.

Maxim graduated from the National Research University Higher School of Economics in 2015. He holds the Oxford Russia Fund scholarship.

Hakim Boularbah
Loyens & Loeff

Hakim Boularbah is recognised as an expert in civil and commercial litigation and arbitration at national, European and international levels. His practice covers civil and commercial litigation and arbitration, especially if it presents an urgent or cross-border dimension. Hakim has an extensive practice in enforcement of foreign judgments and awards (especially against sovereign states) as well as in obtaining interim relief measures and protective measures or in opposing them. Hakim is professor of civil procedure law at the University of Liège. He is the author of numerous books and publications on judicial law, private international law and arbitration. He holds a law degree (1996) and a PhD (2007) from the University of Brussels. Hakim heads the litigation and arbitration practice of Loyens & Loeff's Brussels office.

Zeïneb Bouraoui
Cleary Gottlieb Steen & Hamilton LLP

Zeïneb Bouraoui is an associate at Cleary Gottlieb Steen & Hamilton. Her practice focuses on international arbitration and public international law.

M Cristina Cárdenas
Reed Smith LLP

M Cristina Cárdenas focuses her practice on international arbitration and complex commercial litigation. She is a native Spanish speaker and has experience in representing clients in a variety of complex international arbitrations and business disputes. Cristina has served as counsel, both in Spanish and in English, before many of the most important arbitral institutions, including the International Chamber of Commerce, the International Centre for Dispute Resolution, the American Arbitration Association and the Inter-American Commercial Arbitration Commission. She also coordinates and oversees the work of local counsel in connection with litigation proceedings in Latin America.

Miguel Pinto Cardoso
Vieira de Almeida

Miguel Pinto Cardoso is a partner and head of the litigation and arbitration practice. His activity is focused in arbitration, both national and international, and commercial litigation (finance disputes, shareholder disputes, construction disputes, distribution disputes, professional negligence disputes). He is often appointed as arbitrator. He also has considerable experience in criminal litigation and labour litigation.

He has a law degree from the University of Lisbon, Faculty of Law.

Chloe J Carswell
Reed Smith LLP

Chloe J Carswell's practice is almost entirely focused on international arbitration, in particular investment treaty arbitration and public international law. Chloe has been involved with both *ad hoc* arbitrations and arbitrations under the rules of major international arbitration institutions, including the ICC, ICSID and *ad hoc* arbitration under the UNCITRAL Rules. She acts for claimant investors and respondent states, and has handled cases in the mining, energy, hotel, construction, banking and telecommunications sectors. She has a wealth of experience dealing with disputes arising out of bilateral investment treaties and the Energy Charter Treaty, dealing with such issues as jurisdiction, unlawful expropriation, unfair and inequitable treatment, and denial of justice. She also advises clients on pre-contract structuring and the restructuring of investments. Her recent experience includes disputes about the transfer of licences, the alleged nationalisation of strategic assets, the interpretation of provisions in production sharing agreements, the effect and enforceability of stabilisation provisions, and breaches of other commercial agreements. Chloe also has significant experience of rail-related disputes, having acted for train operating companies against the national infrastructure provider and the regulator in arbitration, adjudication, expert determination, industry-specific dispute resolution procedures, mediation and judicial review.

James Carter
DLA Piper

James Carter is a partner in DLA Piper's London international arbitration team. He acts for clients across a broad spectrum of sectors, including energy, banking and financial services, construction and telecommunications. His practice spans a number of geographies, but he has particular experience of dealing with disputes in Africa.

Clients appreciate, among other things, that 'his advice is always very polished and commercial in its outlook' (*Chambers and Partners*, 2018), that he 'has a good sense of what will work' (*The Legal 500*, 2018) and that he is 'bright and fun to work with and a great team-building person' (*The Legal 500*, 2017).

James Castello
King & Spalding International LLP

James Castello, a partner in King & Spalding's Paris office, has advised and represented clients in a wide range of commercial and investor-state arbitrations under multiple rules and *ad hoc* procedures. For nearly 20 of his 32 years in practice, James has been based in Europe, where he serves as both counsel and arbitrator. According to *Who's Who Legal: France*, he is 'an "illustrious" senior arbitrator and counsel [who] is seen as a "top specialist" in large infrastructure and commercial projects, especially in the energy sector'.

Having served since 2001 on the US delegation to the Arbitration Working Group at the United Nations Commission on International Trade Law (UNCITRAL), James has worked on all the UNCITRAL instruments relating to arbitration or mediation that have been drafted or revised in the past two decades. James has also written extensively on UNCITRAL's Arbitration Rules, including in books published by Oxford, Kluwer and Juris. Appointed in 2007 to the London Court of International Arbitration (LCIA), James sat on its subcommittee that drafted the 2014 LCIA Rules and now serves on the LCIA's board of directors and as president of the LCIA's European Users Council. He also sits on the International Advisory Board of the Vienna International Arbitral Centre. He obtained his university degrees from Yale and Berkeley and is admitted to practise in Paris, New York and Washington, DC.

Rami Chahine
King & Spalding International LLP

Rami Chahine is a senior associate in King & Spalding's international arbitration practice group in Paris. He concentrates his practice on international litigation and arbitration matters, including proceedings under the ICSID, ICC, LCIA and CRCICA arbitration rules, with a particular emphasis on the Middle East. Rami has been involved in disputes relating to a wide variety of sectors, including the energy, construction, telecommunications, waste management, luxury and hospitality industries. He also has experience in French domestic litigation, specifically in the fields of civil, commercial and criminal law. He obtained his university degrees from Paris II Pantheon-Assas and Versailles universities and is admitted to practise in Paris.

Michaela Croft
Jenner & Block London LLP

Michaela Croft is an associate in Jenner & Block's litigation department. Ms Croft's practice covers both international arbitration and commercial litigation, in which she has experience of dealing with a broad range of commercial disputes across a number of industry sectors.

Ms Croft has particular experience of contractual disputes in the mining and natural resources sectors, as well as financial, corporate and competition disputes. She has experience of acting for clients in cross-border disputes under a number of arbitral rules, including UNCITRAL, LCIA and ICC, and more specialist bodies, such as the London Metal Exchange and the Competition Appeal Tribunal.

Prior to joining Jenner & Block, Ms Croft worked in the London and Bangkok offices of an international firm as part of its dispute resolution group on matters in the United Kingdom, Asia and Africa.

Erin Cronjé
De Brauw Blackstone Westbroek NV

Erin Cronjé is a senior associate in the litigation and arbitration department. Erin specialises in international dispute resolution, including international arbitration, cross-border litigation and mediation. She has extensive experience in commercial dispute resolution and has advised multinational entities on litigation strategy in disputes spanning numerous jurisdictions.

Catarina Cunha
Vieira de Almeida

Catarina Cunha is a senior associate in the litigation and arbitration practice and has been actively involved in civil and commercial litigation, international and national commercial arbitration, and insolvency and restructuring.

She has a law degree from the Portuguese Catholic University of Lisbon, Faculty of Law.

Ella Davies
Freshfields Bruckhaus Deringer LLP

Ella Davies is an associate in the Freshfields international arbitration group. She has acted as counsel in investment treaty and commercial arbitrations in the oil and gas, mining and telecommunications sectors. Her recent experience includes advising a number of oil companies in relation to potential claims against an African state, representing a European telecommunications company in an UNCITRAL arbitration against India under a bilateral investment treaty, and advising a consortium of oil and gas majors in an *ad hoc* arbitration with an African state oil company in which the consortium successfully secured an award for specific performance of a production sharing contract, including advising on related enforcement proceedings.

Ella is qualified as a solicitor advocate in England and Wales. She holds a first-class BA and an MSt in history from Oxford University.

Dmitry Dyakin
Egorov Puginsky Afanasiev & Partners

Dmitry Dyakin, LLM, is a partner and co-head of the litigation practice at Egorov Puginsky Afanasiev & Partners, with more than 20 years of experience in litigation and international arbitration. He particularly specialises in large, complex and multinational disputes involving various jurisdictions.

He has considerable expertise in international arbitration (both commercial and investment cases) with extensive experience of arbitrating under ICC, SCC, LCIA, ICDR, UNCITRAL, GAFTA and ICAC (MKAS) rules.

Dmitry's career milestones include the role of general counsel at a Russian holding company and managing partner roles at two law firms.

GAR 100 lists Dmitry as one of Russia's top arbitration practitioners. He is also recommended by *Chambers Global*, *Chambers Europe*, *Best Lawyers* and *Who's Who Legal*, among others. He holds an Honourable Attorney Award.

Dmitry acts as vice chair of the Presidium of Arbitration Centre at the Russian Union of Industrialists and Entrepreneurs and heads the Russian Arbitration Association workgroup on investment disputes. He is a member of the Advocacy and Notariat Committee of the Association of Lawyers of Russia, the Eurasia/Russia Committee of the American Bar Association, the British Institute of International and Comparative Law, the International Bar Association and the SIAC Users Council.

Dmitry holds a master's degree in law from New York University School of Law (US), an executive MBA from London Business School and Columbia Business School, an honours degree in law from Moscow State Social University and a master's degree in private law from the Russian School of Private Law.

Tony Dymond
Debevoise & Plimpton

Tony Dymond is a partner at Debevoise & Plimpton and co-chair of the firm's Asian arbitration practice. His practice focuses on complex, multi-jurisdictional disputes, in both litigation and arbitration. Mr Dymond joined Debevoise in 2014. He has advised clients in a wide range of jurisdictions, having spent the past 20 years in London, Hong Kong and Seoul. He is widely acknowledged as a leading lawyer in high-value disputes arising from large-scale projects, particularly in the energy and infrastructure sectors. He regularly acts on shareholder and joint venture disputes and on corporate governance disputes. He has appeared as advocate in arbitrations under the principal arbitration rules and in the English and Hong Kong courts.

Mr Dymond was called to the Bar of England and Wales in 1993, and was admitted as a solicitor in Hong Kong in 2000 and in England and Wales in 2002.

Claudia El Hage
Rashed R al Marri Law Office

Claudia El Hage is Lebanese, holds a master's in law from St Joseph University, Beirut-Lebanon and is a member of the Beirut Bar Association. She has more than 20 years of legal experience. She started working in Qatar as senior counsel at Qatar Financial Centre Authority for three years and subsequently worked as managing partner in a private practice. In 2013, she partnered in Qatar with advocate Rashed R Al Marri and has been the managing partner since.

Claudia works mostly in arbitration and litigation and dispute resolution, and gives legal advice in property, real estate, contracting, construction, corporate, and commercial industries. She advises international and local firms regarding their projects and activities and all legal aspects pertaining thereto. She has advised clients and acted for them on major projects in Qatar.

Claudia also advises on all aspects of corporate and commercial matters, setting up with Qatar Financial Centre, regulatory investigations and compliance and all related lawsuits and disputes, provides legal counsel and support to many construction and commercial companies and corporations and in institutional and *ad hoc* arbitration.

Claudia is fluent in Arabic, English and French.

Elliot Friedman
Freshfields Bruckhaus Deringer US LLP

Elliot Friedman is a partner in Freshfields' international arbitration practice based in New York. He focuses on international arbitration (investor-state and commercial) and international litigation, with a particular emphasis on disputes in the pharmaceutical and energy sectors.

Elliot also represents companies in transnational litigation in US courts, including the enforcement of arbitral awards. Elliot was part of the team that represented BG Group in its victory before the Supreme Court of the United States, in the very first case concerning a bilateral investment treaty to be considered by the Supreme Court. Elliot also has extensive experience in enforcing arbitral awards in the United States, including awards issued under the New York and ICSID Conventions.

Elliot was recently named a rising star in international arbitration by *Law360* and *New York Law Journal*. He is a graduate of the University of Melbourne, Australia (LLB) and Harvard Law School (LLM).

Emmanuel Gaillard
Shearman & Sterling

Emmanuel Gaillard founded and heads Shearman & Sterling's 100-lawyer international arbitration practice. He advises and represents clients in commercial and investment treaty arbitrations, and regularly acts as arbitrator and expert witness. He is universally regarded as a leading authority and a star practitioner in both these fields.

A professor of law in France and teaching as a visiting professor of law at Yale Law School and Harvard Law School, Emmanuel Gaillard has written extensively on all aspects of arbitration law, in French and in English. He is a co-author of a leading treatise in the field (*Fouchard Gaillard Goldman on International Commercial Arbitration*) and has authored the first published essay on the legal theory of international arbitration; the volume, originally published in French (*Aspects Philosophiques du droit de l'arbitrage international*), was subsequently published in English (*Legal Theory of International Arbitration*), Arabic, Chinese, Spanish and other languages. He also co-authored the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Arbitral Awards.

Emmanuel Gaillard chairs the International Arbitration Institute and was the first president and a co-founder of the International Academy for Arbitration Law.

Robert B García
Curtis, Mallet-Prevost, Colt & Mosle LLP

Robert B García is a partner in the international arbitration and litigation groups, where he advises individuals, corporations and sovereign entities in high-stakes dispute resolution proceedings. He has handled arbitrations under the rules of the International Chamber of Commerce, the International Centre for Settlement of Investment Disputes and the American Arbitration Association. Mr García has also represented clients in litigation before the United States District Court for the Southern District of New York, the Second, Fifth and District of Columbia Circuits of the United States Court of Appeals and the United States Supreme Court.

Kohe Hasan
Reed Smith LLP

Kohe Hasan is a Reed Smith partner and a director of Resource Law LLC, Reed Smith's partner in Singapore. She is experienced in all forms of litigation and arbitration, particularly in power, international trade, commodities, infrastructure and transportation disputes. She has represented international oil companies, Fortune 500 companies, ultra-high-net-worth individuals and government-linked organisations in a multitude of large-scale, complex arbitrations. Uniquely, Kohe is equally adept in non-contentious matters and has represented clients in the acquisition of significant mining and power assets in the region. Her contentious experience has been extremely helpful in assisting clients with troubleshooting and mitigating risks at the outset of any transaction.

Fluent in Malay and Bahasa Indonesia, Kohe has built a thriving energy practice in Southeast Asia. She is recognised as one of Singapore's 40 outstanding lawyers under 40 and has been consistently ranked in Band 1 for her work in Cambodia. She writes extensively on developments in arbitration, power and offshore, and her commentaries have been featured in the press and industry publications, including *Singapore Business Times*, *The Phnom Penh Post* and *Sri Lankan Daily News*.

Daniel Hayward
Fieldfisher LLP

Daniel Hayward is a partner in the Fieldfisher dispute resolution team specialising in international arbitration and cross-border disputes. Daniel is particularly noted for his expertise in commercial arbitrations with a link to Russia or the CIS region. Daniel is described as 'one of the most prominent upcoming stars' in the London dispute resolution market for international arbitration.

James Hope
Advokatfirman Vinge KB

James Hope is head of international arbitration at the Stockholm office of Vinge in Sweden.

He is a dual-qualified Swedish *advokat* and English solicitor-advocate, and is well placed to compare common law and civil law practices and procedures.

He has acted as counsel or arbitrator in more than 80 international arbitration cases, ranging from small cases worth around US$100,000 to highly complex cases worth more than US$50 billion.

James has sat as arbitrator in international arbitrations under the ICC, SCC, Danish Institute of Arbitration, UNCITRAL and Finnish Chamber of Commerce arbitration rules, in Stockholm, London, Paris, Oslo, Copenhagen and Helsinki, under Swedish, English, Danish, Norwegian, Russian, Ukrainian and Finnish substantive laws, as well as under CISG. He is a member of the ICDR international panel of arbitrators, the CIETAC panel of arbitrators and the Asian International Arbitration Centre panel of arbitrators. He is also a CEDR accredited mediator.

In addition to private practice, James is a part-time supervisor and lecturer for the master's programme in international commercial arbitration law at Stockholm University, and a guest lecturer at both Edinburgh University and Uppsala University. He is the author of a number of articles on dispute resolution issues and is a frequent speaker at conferences.

From 2013 to 2018, James was a member of the Board of the Arbitration Institute of the Stockholm Chamber of Commerce, and prior to that he was a member of the executive committee of the Swedish Arbitration Association.

James is fluent in English and Swedish, and he is learning Russian.

Ardak Idayatova
Aequitas Law Firm

Ardak Idayatova is a leading dispute resolution lawyer with a primary focus on construction arbitration and litigation. In 2018, she was promoted to the position of deputy head of dispute resolution. Ardak is a mature and senior lawyer running dispute projects quite independently with limited involvement of partners. She represents clients before the Kazakhstan courts at all levels and acts as counsel in commercial arbitrations, seated both in Kazakhstan and abroad.

Ardak has published extensive articles on complex legal issues of arbitration, constructions and enforcement in leading professional journals in Kazakhstan and abroad.

Gordon E Kaiser
Energy Arbitration Chambers

Gordon E Kaiser is an arbitrator and settlement counsel in Toronto and Washington, DC. His practice involves domestic and international disputes in energy and technology. He served as vice chairman of the Ontario Energy Board for six years. Prior to that he was a partner in a national law firm, appearing in the Federal Court of Appeal, the Supreme Court of Canada and courts and regulatory agencies across the country.

He has advised the Ontario Energy Board, the Alberta Utilities Commission, the Commissioner of Competition, the Ontario Independent Electricity System Operator and the Competition Tribunal.

Mr Kaiser has mediated disputes on multi-year rate plans between public utilities and their major customers and long-term contracts for the pricing of gas, electricity and wireless data. He has advised the Alberta Utility Commission and the Independent Electricity System Operator, Ontario, on settlements under the Market Rules and the

Attorney General Canada on settlements under the Competition Act. He has arbitrated disputes dealing with the construction of transmission and pipeline facilities, power purchase agreements, gas supply contracts, the construction of power plants, and wind and solar interconnection.

Mr Kaiser is an adjunct professor at Osgoode Hall Law School, co-chair of the Canadian Energy Law Forum, and editor of *Energy Regulation Quarterly*. He is recognised as one of Canada's leading arbitrators by *Chambers Global*.

Ewelina Kajkowska
Norton Rose Fulbright LLP

Dr Ewelina Kajkowska is an associate at Norton Rose Fulbright in London specialising in international arbitration, litigation and alternative dispute resolutions (ADR). She has a range of experience in advising clients in a wide variety of international arbitration proceedings, including those before the London Court of International Arbitration, International Chamber of Commerce and the Dubai International Financial Centre DIFC-LCIA. Prior to joining Norton Rose Fulbright, Ewelina worked as an adviser to the State of Poland in investment and commercial arbitration cases.

Ewelina also has extensive academic experience, having worked as a researcher at the University of Cambridge, where she specialised in international arbitration and ADR. She has published a book entitled *Enforceability of Multi-Tiered Dispute Resolution Clauses* (Bloomsbury and Hart Publishing, Oxford, 2017) and is the author of a number of articles on international arbitration and dispute resolution.

Sanjeev Kapoor
Khaitan & Co

Sanjeev K Kapoor is a partner in the litigation department of Khaitan & Co. Sanjeev, through a rich and diverse practice of nearly 20 years, has gained invaluable experience in constitutional law, general trade and commercial laws, arbitration and laws relating to environment, energy, infrastructure and mining. Sanjeev has been registered with the Supreme Court of India as an advocate since 2003. Alternative dispute resolution before national and international forums has been one of his areas of expertise. He has assisted at and appeared before domestic arbitral tribunals, tribunals constituted under bilateral investment treaties and institutional arbitral tribunals constituted under the ICC, LCIA, SIAC, JAMS, LMAA, among others, and has assimilated an in-depth knowledge and understanding of commercial and investment arbitrations covering a vast array of issues. He has also assisted clients in proceedings for enforcement of arbitral awards. Sanjeev has appeared and successfully handled, and argued, cases before various forums and courts, including the Supreme Court of India, various state High Courts and domestic and international arbitral tribunals. He has appeared and assisted in prominent and landmark public interest cases. He has also been a speaker and a panellist at various conferences and seminars organised by august bodies such as the International Association of Lawyers, Global Arbitration Review, the International Bar Association, the London Court of International Arbitration and the Indian Council of Arbitration.

He is also an avid writer and has written articles for reputed publications and online services, such as *International Law Office*, *Financier Worldwide*, *MoneyControl*, *India Business Law Journal*, *Practical Law*, *Mondaq*, *Bar & Bench*, to name a few. He has been highly recommended as a leading dispute resolution lawyer by reputed legal publications.

Boris Kasolowsky
Freshfields Bruckhaus Deringer LLP

Boris Kasolowsky is a partner and co-head of Freshfields Bruckhaus Deringer's international arbitration group in Frankfurt; he previously practised in the firm's London and Vienna offices. His arbitration experience includes numerous *ad hoc*, DIS, ICC, ICSID, LCIA, Vienna Rules and UNCITRAL arbitrations. He also represents clients in cross-border, international litigation matters, including in the English High Court and the German courts. Boris regularly appears as counsel and sits as arbitrator in commercial arbitrations concerning long-term supply agreements, M&A transactions, infrastructure and oil and gas projects. He also represents and advises governments and commercial entities on disputes under relevant bilateral and multilateral investment treaties, including under the Energy Charter Treaty.

Boris holds a law degree from Oxford University, a master's degree from the School of Oriental and African Studies, London University, and a doctorate from Hamburg University. He is qualified as a solicitor (England and Wales), a solicitor advocate and a German *Rechtsanwalt*. He speaks English, German, French and Arabic.

Dmitry Kaysin
Egorov Puginsky Afanasiev and Partners

Dmitry Kaysin, LLM, PhD, is a counsel at Egorov Puginsky Afanasiev & Partners. His sphere of professional interests covers resolution of cross-border commercial and insolvency cases, and concurrent litigation and arbitration proceedings conducted in multiple jurisdictions with the involvement of states and their constituencies. He has experience of arbitrating under SCC, LCIA, UNCITRAL, ICAC (MKAS), Swiss and WIPO Arbitration rules.

Prior to joining Egorov Puginsky Afanasiev & Partners, Dmitry worked for Russian Standard Corporation as the deputy director of legal affairs, focusing on international commercial litigation and arbitration, and on the resolution of domestic commercial, intellectual property and bankruptcy disputes.

He graduated from Moscow State Academy of Law with distinction. He holds an LLM degree from NYU School of Law in international business transactions, litigation and arbitration, and a PhD from Moscow State Academy of Law.

Dmitry is an author of several articles and studies dedicated to the enforcement of foreign judgments and arbitral awards, sovereign immunity and cross-border insolvency issues.

Dmitry has been a member of the Moscow Region Bar Association since 2007.

Sae Youn Kim
Yulchon LLC

Sae Youn Kim is a partner and co-chair of the international dispute resolution practice at Yulchon. Ms Kim practises primarily in the areas of litigation and arbitration with an emphasis on commercial and international law. Before joining Yulchon, she served as a judge at various Korean district courts, including in Seoul, Daejeon and Suwon. Ms Kim is currently an arbitrator at SIAC, KCAB and KLRCA and is licensed to practise in both Korea and New York. She is regularly selected as a leading lawyer by publications such as *Chambers Global* and *Asialaw* in the fields of arbitration and litigation. Ms Kim also advises the Korean government, particularly the Ministry of Foreign Affairs and the Ministry of Justice, on issues involving international law and dispute resolution, including revisions to the Arbitration Act.

She received an LLM from Duke Law School and a bachelor of laws degree from Seoul National University.

Elie Kleiman
Jones Day

Elie Kleiman has 30 years of experience in dispute resolution, with a significant focus on cross-border litigation, international arbitration and crisis management. He also has experience in competition, intellectual property, bankruptcy and white-collar crime. He has advised large French and international companies as lead counsel in many high-profile disputes involving complex, business-sensitive issues, bringing many of the disputes to an optimal conclusion, either in court, through arbitration or through imaginative settlement solutions.

Elie's arbitration experience covers investment, trade, joint ventures and shareholders' agreements, as well as long-term contracts, representations and warranties, licensing, distribution and construction, particularly in the energy and natural resources, chemicals, life sciences, infrastructure and transport, telecommunications, media and technology sectors. He has in-depth knowledge of many institutional arbitration rules and *ad hoc* arbitration. He regularly sits as an arbitrator and as a mediator.

Elie is very active in the French legal community, serving as a member of several think tanks and promoting Paris as a hub for international dispute resolution. He writes on international arbitration and litigation and teaches at several Paris universities.

Christian W Konrad
Konrad Partners

Dr Christian W Konrad is the founding and managing partner of Konrad Partners. He is an Austrian *Rechtsanwalt*, a solicitor of England and Wales, and admitted as *Euroadvokat* in the Czech and Slovak republics.

He is an advocate in the fields of international arbitration, international litigation and public international law. He has extensive experience in arbitral practice, procedure and advocacy both in civil and common law systems. His practice covers inter-state, international and commercial disputes. He has represented international organisations and businesses in a broad range of cases involving, *inter alia*, long-term energy contracts,

concession agreements, and entitlement to natural resources, immunities from jurisdiction, infrastructure projects, mergers and acquisitions. He also advises clients on the protection of their investment and enforcement of arbitral awards and state court judgments. As a chartered arbitrator, he frequently acts as arbitrator and is a member of panels of various arbitral institutions worldwide. He regularly lectures about his field of expertise and serves as vice president of the Kosovo Permanent Tribunal of Arbitration.

Shourav Lahiri
Reed Smith LLP

Shourav Lahiri is a partner in the firm's energy and natural resources group. He is a specialist arbitration lawyer with more than 22 years of experience in advising on oil and gas and infrastructure disputes. He represents clients in the onshore and offshore oil and gas, petrochemicals, power, infrastructure and building sectors on the procurement, design, engineering and construction of major projects.

Shourav founded and led his own law firm in Singapore and Hong Kong for several years before joining Reed Smith in 2018, and prior to that, he spent 10 years as a partner at a leading international law firm. He is a barrister and door-tenant with Francis Taylor Buildings, Chambers of Andrew Tait QC, in London. Routinely rated as a leading individual in *Chambers and Partners*, *Chambers Asia-Pacific* 2018 described him as having a 'good grasp of the law, particularly international arbitration law, . . . articulate and also creative in his approach to the legal dispute . . . attributed to his vast knowledge and experience in handling complex construction disputes'.

Shourav is qualified to practise in Singapore, Hong Kong and in England and Wales. He is a Fellow of the Singapore Institute of Arbitrators and teaches arbitration on the International Entry Course of the SIArb and on the LLM programme at Hong Kong University.

Veronika Lakhno
Egorov Puginsky Afanasiev & Partners

Veronika Lakhno, a junior associate at Egorov Puginsky Afanasiev & Partners, focuses on international arbitration and litigation disputes and international trade law. She acts in teams representing clients in complex litigation cases abroad, and is experienced in advising clients on arbitration proceedings in ICC and LCIA.

Her career highlights include many achievements and awards relating to moot courts. In 2016, she was named 12th top advocate at the Foreign Direct Investment Arbitration Moot global oral rounds, and in 2017 received the Martin Domke Award for Individual Oralists of the Willem C Vis International Commercial Arbitration Moot Court. Veronika has also acted as an arbiter of Willem C Vis International Commercial Arbitration Moot, Foreign Direct Investment International Arbitration Moot, The European Human Rights Moot Court Competition, and several national moot court competitions in Russia. She coaches the Moscow State University Vis Moot Team.

Marnix Leijten
De Brauw Blackstone Westbroek NV

Marnix Leijten is a noted specialist in cross-border litigation and international arbitration. His experience includes a wide variety of high-stakes international disputes, commercial and investor-state arbitrations, as well as complex enforcement and setting aside disputes. According to *Chambers* 2019, he is 'widely regarded as a leading international arbitrator' and an 'equally adept civil litigator'. He has been consistently ranked in the highest category of Dutch litigators by the leading guides since 2010. In *Who's Who Legal: Arbitration* 2018, Marnix is described as 'one of the best arbitration practitioners in the Netherlands' and 'a master of his arguments, particularly on highly technical points'. Further, Marnix was highlighted in *Who's Who Legal: Thought Leaders – Arbitration* 2018.

Marnix was the Dutch member of the ICC International Court of Arbitration from 2006 to 2015, and has been vice president of the Court since 2015. Marnix is a co-chair of the ICC Commission's Task Force on Emergency Arbitration. He is also an active member of the ICC Institute of World Business Law, the ICC Commission on Arbitration, the ICCA and the IBA Arbitration Committee.

Marnix frequently speaks and publishes on topics relating to cross-border litigation and arbitration.

Shannon M Leitner
Freshfields Bruckhaus Deringer US LLP

Shannon M Leitner is an associate in Freshfields' dispute resolution group, based in New York. Shannon represents a variety of domestic and multinational businesses, hedge funds and banks in a wide array of international litigations and arbitrations. She regularly works on international arbitration mandates at all stages of proceedings, including evaluating post-award enforcement prospects and litigating petitions to confirm awards. Recently, her work has included representing affiliates of ExxonMobil and Shell in New York in an action to confirm an arbitral award set aside at the seat of arbitration. Shannon received her JD (*magna cum laude*) from the University of Michigan Law School, where she was a Clarence Darrow Scholar, and her BA (*magna cum laude*) from Kenyon College.

Charlie Lightfoot
Jenner & Block London LLP

Charlie Lightfoot is the managing partner of Jenner & Block's London office and co-chair of the firm's international arbitration practice. He has extensive experience in handling notable international arbitrations in both the commercial and investor-state arenas concerning claims running to many hundreds of millions of dollars.

Mr Lightfoot has appeared as advocate in the English High Court and in many arbitral proceedings. His recent experience includes advising on international disputes in a variety of sectors, including energy, defence, infrastructure and telecommunications. He is also a frequent speaker and author concerning matters of international arbitration and both private and public international law.

Mr Lightfoot is listed in the annual *Who's Who Legal: Arbitration* guide featuring the foremost arbitration practitioners aged 45 and under, which notes that he is 'a well-known and effective advocate' endorsed for his 'brilliant strategic mind and masterful advocacy'. He is also recommended in *The Legal 500 UK*, with clients noting that he 'cuts to the chase', 'listens to clients' needs' and displays 'impressive advocacy skills'.

Z J Jennifer Lim
Debevoise & Plimpton

Z J Jennifer Lim is a senior associate at Debevoise & Plimpton. Her practice focuses on international dispute resolution and arbitration. Ms Lim joined Debevoise in the New York office in 2013 and transferred to the Hong Kong office in June 2016. From 2012 to 2013, she clerked for Judge Hisashi Owada and Judge Leonid Skotnikov at the International Court of Justice in The Hague, Netherlands. Ms Lim received a JD from Columbia Law School, where she was a James Kent scholar, recipient of the David Berger Memorial Prize and a senior editor of the *American Review of International Arbitration*. She received an LLB with first class honours from University College London in 2012. While in law school, Ms Lim participated in the Philip C Jessup International Law Moot Court Competition, and remains the only person in the history of the competition to receive the Stephen M Schwebel Award for best oralist in the World Championship Round for two years in a row. Ms Lim is fluent in Mandarin Chinese.

Ms Lim is a member of the HK45 Committee for 2018–2020.

Nicholas Lingard
Freshfields Bruckhaus Deringer

As the head of the firm's international arbitration group in Asia, Nicholas Lingard leads the most active investor-state arbitration practice in the region, representing both states and investors in high-profile, politically complex cases across Asia and the world. He also represents clients in commercial disputes in a variety of industries, under all the major arbitral rules, including ICSID, ICC, SIAC, UNCITRAL, KLRCA, HKIAC, AAA and NAI, and under all major systems of law. Nick is an expert member of the Energy Charter Treaty Secretariat's Legal Advisory Taskforce and writes and speaks widely on international arbitration.

Nick is recognised as a Leader in his Field by *Chambers Asia-Pacific*. He is also recognised by *Who's Who Legal* as one of the leading practitioners globally for international arbitration, and is recommended for international arbitration in all major legal directories. A former law clerk to the Chief Justice of Australia, the Honourable AM Gleeson AC, Nicholas was educated at the University of Queensland, where he graduated at the top of his class in law and Japanese, and at Harvard Law School, where he was a Frank Knox Memorial Fellow. Nick is a registered lawyer with the Singapore International Commercial Court.

David Y Livshiz
Freshfields Bruckhaus Deringer US LLP

David Y Livshiz is a counsel in Freshfields' dispute resolution group, based in New York. He frequently represents clients in a wide array of complex cross-border litigations pending before federal and state courts in the United States, and in criminal, regulatory and internal investigations. David has extensive experience in arbitration-related litigation in US courts, including actions to enforce or vacate arbitral awards. He also has substantial experience of representing, and litigating against, sovereigns and sovereign-owned entities in US courts.

David has been recognised as a rising star by the *New York Law Journal* and has been recommended by *The Legal 500* for general commercial disputes.

David received his JD from New York University School of Law in 2005, where he was a member of the Annual Survey of American Law. In 2002, he graduated with the highest distinction from the University of Michigan. David previously worked as a legal adviser to the Permanent Mission of the Republic of Palau to the United Nations and in 2006 clerked for Judge Theodor Meron of the International Criminal Tribunal for the former Yugoslavia.

Rebecca McKee
Fieldfisher LLP

Rebecca McKee is a senior associate in the Fieldfisher dispute resolution team. She has experience in high-value, complex commercial litigation and international arbitration in a wide range of disputes, including finance-related disputes, fraud and shareholder disputes.

Adrián Magallanes Pérez
Von Wobeser y Sierra, SC

Adrián Magallanes Pérez obtained his law degree (JD, *summa cum laude*) from the Escuela Libre de Derecho, Mexico City. He holds a master of laws degree (LLM) from New York University School of Law, where he received the Arthur T Vanderbilt Scholar Award for academic merit. Admitted to practise in Mexico and New York, he is a professor of international litigation at the Escuela Libre de Derecho, Mexico City.

He is currently a partner at Von Wobeser y Sierra, SC. His areas of practice are civil, commercial and administrative litigation, commercial arbitration, constitutional *amparo* and administrative proceedings, energy and natural resources, foreign investment, government procurement and public works, investor-state arbitration, oil and gas and public-works arbitration, and class actions.

He is chair of the arbitration committee of the Mexican Bar Association and a member by invitation of the Argentine Centre for International Studies. He has been a global advisory board member (2007–2010) and an executive board member (2010–2013) of the International Centre for Dispute Resolution's Young & International networking group. He speaks Spanish and English.

Jean Marguerat
Froriep Legal SA

Jean Marguerat is a partner at Froriep in Geneva and specialises in international arbitration and international commercial litigation. He has been involved in more than 70 international arbitration proceedings (ICC, Swiss Rules, CAS, VIAC, LCIA, UNCITRAL, DIA and *ad hoc*) acting in the capacity of both counsel and arbitrator, as well as legal expert. These proceedings have involved sale of goods (including commodity trading), distribution, construction (including marine works), joint ventures, M&A and sport-related disputes. Furthermore, he regularly acts as counsel in Swiss court proceedings, in particular with an international dimension (attachment proceedings, recognition and enforcement of foreign court decisions and arbitral awards, challenge of arbitral awards, etc.). Mr Marguerat is a member of several professional associations, including the Swiss Arbitration Association (ASA, co-chair of the Geneva Group), the London Court of International Arbitration (LCIA), the Spanish Arbitration Club (CEA – vice president of the CEA Swiss chapter) and the German Institution of Arbitration (DIS). He is listed on the panel of arbitrators of a number of arbitral institutions (ICC, LCIA, WIPO and the Court of Arbitration of Madrid).

He is ranked by *Who's Who Legal*, *Chambers Europe* and *Expert Guides*, among others. He has published several articles and is a frequent speaker on international arbitration. Mr Marguerat studied at the universities of Basle and Neuchâtel (*lic iur*, 1996) and was admitted to the Bar in Berne in 1999. He graduated from Cambridge University with an LLM (British Chevening Scholar) in 2000. He has worked in business law firms in Barcelona (2000–2002) and London (2007–2008). Mr Marguerat joined Froriep in 2003 and was made a partner in 2010. He works in French, English, Spanish and German.

Oliver Marsden
Freshfields Bruckhaus Deringer LLP

Oliver Marsden is a specialist in international arbitration and has a broad practice advising and representing corporates and state governments in their most complex and challenging disputes, under commercial contracts and investment treaties. In particular, he has extensive experience of post-M&A, joint venture and tax-related disputes, and has developed particular expertise in the oil and gas, private equity, banking and satellite communications sectors. He has appeared as oral advocate before arbitral tribunals and in the English courts, where he holds higher rights of audience.

His recent publications include the 'Arbitration and ADR' volume of the *Encyclopaedia of Forms and Precedents*, which contains a new commentary on the Arbitration Act 1996 (the legislation that governs London-seated arbitrations). He has been identified by *Who's Who Legal* as a Future Leader in the field in its 2018 and 2019 directories and is included in *The Legal 500*'s new International Arbitration Powerlist.

Atenea Martinez
Uría Menéndez

Atenea Martinez is a Spanish-qualified lawyer in Uría Menéndez's international litigation and arbitration team. Her practices focuses on domestic and international arbitration and international civil litigation.

She advises domestic and foreign companies in complex disputes involving cross-border commercial agreements and M&A transactions in the engineering, construction, energy distribution, and oil and gas sectors. Atenea is a member of the Spanish Arbitration Club.

Atenea holds a law degree from the Universty of Santiago de Compostela and two LLMs from the Instituto de Empresa (Madrid).

José Martínez de Hoz
MHR | Martínez de Hoz & Rueda

José Martínez de Hoz is a founding partner of MHR | Martínez de Hoz & Rueda. He is listed as a leading practitioner in energy and arbitration by international and domestic publications.

He has a strong practice in energy and in both investment and commercial arbitration, having led the firm's arbitration group in numerous international arbitration hearings, both in English and Spanish, representing clients from a variety of sectors and working within different regulatory frameworks. He has represented investors in several International Centre for Settlement of Investment Disputes cases against Argentina arising from the measures taken since 2002 that abrogated various investment regulatory frameworks. He is also very active in International Chamber of Commerce (ICC) and other types of commercial arbitration, including complex multiparty, multi-contract cases arising out of cross-border transactions.

He is a member of the International Court of Arbitration of the ICC representing Argentina, and is listed as an arbitrator in several institutions, including the Energy Arbitrator's List of the International Centre for Dispute Resolution.

Kolawole Mayomi
SPA Ajibade & Co

Kolawole Mayomi is a partner in the dispute resolution practice of SPA Ajibade & Co. He is a prize-winning graduate of the Faculty of Law, Obafemi Awolowo University, Ile-Ife, and holds an LLM from the same university. He was called to the Nigerian Bar in 2003 and had his legal pupillage in the Chambers of Chief I N Umezuruike, SAN (Aba). He subsequently gained extensive litigation experience with some leading Nigerian commercial law firms.

Kolawole has been involved as counsel in many high-stakes arbitration disputes that have taken place in Nigeria during the past decade, and is particularly noted for his expertise in handling complex claims arising from construction and infrastructure projects, trade finance and shareholders' derivative rights.

Kolawole is widely considered to be a thought leader on the law relating to guarantee obligations in Nigeria, and has authored many articles and book chapters on this subject. In addition, he has advised several banks and construction companies on the nature of the payment obligation arising from demand guarantees, performance bonds, advance payment guarantees, among others.

Kolawole is a trustee of the Society for Construction Law Nigeria and a Fellow of the Chartered Institute of Arbitrators.

Lucie Mikolandová
Barbora Šnáblová Attorneys

Lucie holds a master's degree in law from Charles University in Prague. She also studied a management course in Australia. Before joining Barbora Šnáblová Attorneys in 2016, she worked in the legal department of a major telecommunications company.

At Barbora Šnáblová Attorneys, Lucie is part of the international arbitration team. She also focuses on domestic litigations, in particular on civil matters.

She is proficient in English and Czech, and fluent in German.

Matilde Líbano Monteiro
Vieira de Almeida

Matilde Líbano Monteiro is a senior associate working in the litigation and arbitration practice. She has been actively involved in civil, corporate and commercial litigation and, particularly, arbitration. She has also worked on criminal and misdemeanour/administrative offences.

She has a law degree from Nova University of Lisbon, Faculty of Law, a master's degree in global legal studies from the Portuguese Catholic University of Lisbon, Faculty of Law, and Duke University Law School, and an advanced postgraduate degree in arbitration from the University of Lisbon, Faculty of Law.

Tomás Navarro Blakemore
Froriep Legal SA

Tomás Navarro Blakemore is an associate at Froriep in Geneva and Madrid who focuses on domestic and international arbitration. He also advises private clients as well as non-profit organisations and social enterprises on structuring, tax advice and governance. He has been involved in numerous commercial and investment arbitration proceedings under the ICC, UNCITRAL, CAS, Swiss and ICSID Rules, and in *ad hoc* proceedings related to construction, distribution, corporate and sport-related matters. He is a member of the Madrid Bar Association, the Foreign Lawyers Section of the Geneva Bar Association, the Swiss Arbitration Association Below 40, the Club Español de Arbitraje (CEA-40) and sits on the executive committee of the Swiss Chapter of the CEA.

He studied law and political science at the University of Granada (2011) with exchanges at the University of California in Berkeley and the University of Geneva and was admitted to the Spanish Bar in 2013. He also holds an LLM in international dispute settlement (MIDS) from the University of Geneva and the Geneva Graduate Institute (2015).

Previously, Mr Navarro Blakemore has worked at the International Criminal Court and as a legal consultant for a non-profit in Cambodia. Before joining Froriep in October 2015, he also interned for a renowned international arbitrator in Switzerland. His working languages are French, English and Spanish.

Joana Neves
Vieira de Almeida

Joana Neves is a managing associate working in the litigation and arbitration practice. Her main areas of practice are civil and commercial litigation and arbitration, both national and international. Joana has also experience in insolvency and restructuring.

She has a law degree and a postgraduate degree in arbitration from the Nova University of Lisbon, Faculty of Law, and an LLM in international business law from King's College London.

Michael Nolan
Milbank LLP

Michael Nolan is a partner in the Washington, DC, office of Milbank LLP. During the past two decades, Michael has served as counsel or arbitrator in cases under AAA/ICDR, ICC, HKIAC, SIAC, SCC, ICSID, UNCITRAL and other rules. His arbitrations have involved electricity, gas, transportation and mining concessions; joint-venture and management agreements; satellite and other insurance coverages; construction; energy distribution; and intellectual property patents and licences. Michael has represented both investors and states in arbitrations pursuant to bilateral investment treaties and the Energy Charter Treaty. He also has represented companies and states in connection with court proceedings involving sovereign immunity, act of state, and the recognition and enforcement of foreign judicial and non-judicial awards. Michael has substantial experience with the US Foreign Corrupt Practices Act, other anti-bribery laws and sanctions programmes. Michael is consistently recognised as a leading international arbitration practitioner by *Chambers USA*, *Chambers Global*, *The Legal 500*, *Benchmark Litigation*, *Euromoney* and Super Lawyers. He was named International Arbitration Lawyer of the Year for 2018 and 2019 by *Benchmark Litigation*.

Michael is a member of the board of directors and the International Advisory Committee of the American Arbitration Association, the Users Council of the Singapore International Arbitration Centre, the British Virgin Islands International Arbitration Centre panel of arbitrators, and the ICSID panel of arbitrators, as well as a fellow of the Chartered Institute of Arbitrators. Michael also teaches international commercial arbitration as an adjunct professor at the Georgetown University Law Center.

Michael Ostrove
DLA Piper

Michael Ostrove is the global co-chair of DLA Piper's international arbitration group. A member of both the Paris and New York bars, he has 25 years' experience in handling international commercial arbitrations, investment arbitrations and other public international law disputes. Michael has advised and represented clients in scores of arbitrations, litigations

and mediations – including English and French-language cases administered by the ICC, ICSID, the LCIA, the PCA and Swiss Chambers, as well as *ad hoc* arbitrations pursuant to the UNCITRAL Arbitration Rules and the OHADA Uniform Arbitration Act. His cases include numerous investment treaty disputes both for and against sovereign states. He also has extensive experience in corruption investigations, advising both multinational corporations and state authorities.

Michael teaches international arbitration in an advanced degree programme and in the IHEI summer programme at the University of Paris II (Panthéon-Assas) and is one of the editors of Choice of Venue in International Arbitration (OUP, 2014). He speaks frequently on international disputes and is regularly named as a leading practitioner by the specialist press.

Michael is ranked in *Chambers and Partners Global* 2019, which quotes clients as saying he is 'an excellent tactitian and strategist' and is praised by market commentators Africa-wide for having an 'active and prominent practice in Africa'. In 2018, Michael was listed fourth on *Jeune Afrique*'s list of Top 50 Business Lawyers in Francophone Africa for 2017.

Claire Pauly
Jones Day

Claire Pauly is a senior associate practising in the areas of international arbitration and complex disputes. She advises and represents companies and state entities operating in various industries, with a particular emphasis on energy, distribution (particularly the automotive, pharmaceutical and wine sectors), aeronautics and infrastructure (particularly telecoms), before domestic courts and international arbitral tribunals (ICC, ICSID, LCIA and *ad hoc* under the UNCITRAL Rules). She also has considerable experience in post-M&A disputes, and assists clients in drafting contracts and in mediation proceedings.

Claire teaches arbitration and litigation strategy courses at the University of Paris II-Panthéon Assas, University of Paris-Saclay, the Centre for Mediation and Aritration (CMAP) and Sciences Po Paris.

Frederico Gonçalves Pereira
Vieira de Almeida

Frederico Gonçalves Pereira is dispute resolution group executive partner and a litigation and arbitration partner. He has been involved in many cases representing several domestic and international clients in disputes involving commercial law before judicial courts as well as in arbitration before Portuguese and international entities. In addition, he has been active in out-of-court negotiations involving groups of companies and public entities. More recently, he has gained extensive experience in insolvency and restructuring under Portuguese law, having represented clients in many of the most important cases in Portugal in the past five years.

He has a law degree and a master's degree in civil law from the University of Lisbon, Faculty of Law, and has been admitted for the preparation of a PhD thesis on corporate law, also at the University of Lisbon, Faculty of Law. He completed the Harvard Business School leading professional services firm course in 2009.

Juan O Perla
Curtis, Mallet-Prevost, Colt & Mosle LLP

Juan O Perla is an associate in the international arbitration and litigation groups. He represents foreign states, state-owned entities and private companies located around the world. He has experience with investor-state and commercial disputes, including arbitrations brought under the auspices of the International Centre for Settlement of Investment Disputes and conducted under the United Nations Commission on International Trade Law Arbitration Rules. He has also litigated international disputes in the United States at both the trial and appellate levels, including before the United States Supreme Court. Mr Perla also served as a law clerk to the Honourable C Darnell Jones II of the United States District Court for the Eastern District of Pennsylvania.

Philipp A Peters
Konrad Partners

Philipp A Peters is an Austrian *Rechtsanwalt* and a partner at Konrad Partners. He acts both as counsel and arbitrator in international *ad hoc* and institutional arbitration proceedings. He regularly represents clients in disputes involving international delivery and supply contracts, complex engineering and construction projects and joint ventures, in particular in the area of industrial engineering. Furthermore, he advises clients in relation to the preparation and drafting of international project and delivery contracts, on the growing impact of data protection and data privacy laws, and on the legal structuring of commercial projects.

He regularly lectures on his fields of expertise, in particular on issues of international arbitration, international contract law and international sales law. He is a member of the advisory board and a former chairman of the Young Austrian Arbitration Practitioners, and a member of the Austrian Arbitration Association, the German Institution of Arbitration (DIS), DIS 40, ASA below 40, CEPANI 40, ICDR Young and International, Group 1031 and the Vienna Association of Young Entrepreneurs.

Sherina Petit
Norton Rose Fulbright LLP

Sherina Petit is a partner at Norton Rose Fulbright in London and heads the international arbitration practice across Asia, Europe and the Middle East. She also heads the firm's India practice.

Besides arbitration, she has significant experience in investor-state disputes resolution, alternative dispute resolutions, litigation and regulatory investigations. In addition to acting as counsel in arbitrations, she regularly sits as an arbitrator.

Sherina has a wide range of experience in all key aspects of international arbitration across a broad range of industries, including energy, construction, oil and gas, trade, transport, pharmaceuticals, commodities, finance and technology. She represents clients across the globe in a wide variety of commercial and investment arbitration proceedings, including those before the London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), United Nations Commission on International Trade Law, Singapore International Arbitration Centre (SIAC), and in *ad hoc* proceedings.

Sherina is chair of the European Federation of Investment Law and Arbitration and is on the LCIA board of directors. She is part of the ICC Indian Arbitration Group, the SIAC Users Council, the SIAC Users Council's Regional/National Committee for the United Kingdom and the Kuala Lumpur Court of Arbitration. Sherina is also on the Steering Committee of the Pledge for Equal Representation for Women in Arbitration.

Sherina is a published writer and speaker on international arbitration. She has recently co-authored a chapter of the book *Arbitration in England*, edited by Julian Lew QC, and a chapter of the book *Enforcing Arbitral Awards in India*, edited by Nakul Dewan.

Joseph D Pizzurro
Curtis, Mallet-Prevost, Colt & Mosle LLP

Joseph D Pizzurro is managing partner and a member of the international arbitration and litigation groups. He has been with the firm since 1976 and became a partner in 1985. Mr Pizzurro has a wide range of experience in international litigation and international commercial arbitration, having acted as counsel for both claimants and defendants in proceedings conducted in the United States and abroad, including proceedings conducted under the auspices of the American Arbitration Association, International Chamber of Commerce and arbitrations utilising the United Nations Commission on International Trade Law Arbitration Rules. He has represented foreign states, state-owned entities and intergovernmental organisations as well as publicly and privately held companies located throughout the world. Mr Pizzurro also has extensive experience in a full range of commercial, securities and business-related litigation throughout the United States, at both the trial and appellate levels.

Evgeny Raschevsky
Egorov Puginsky Afanasiev & Partners

Evgeny Raschevsky, PhD, is a partner, and head of the international arbitration and litigation practice at Egorov Puginsky Afanasiev & Partners. He specialises in international arbitration and litigation, international public law, insolvency procedures and dispute resolution in the energy sector. He is experienced in international arbitration proceedings under the ICAC of CCI of Russia (MKAS), ICC, LCIA, SCC and Swiss Rules, as well as coordination of litigation cases in the United Kingdom, the United States, Germany, Turkey and other countries.

Evgeny is recommended by *Chambers Global*, *Chambers Europe*, *The Legal 500* and is listed as a prominent Russian arbitration and mediation expert by *GAR 100* and *Best Lawyers*.

Evgeny has authored numerous articles in specialised Russian and international legal publications in the area of international arbitration and civil law, and several leading Russian commentaries in the field of international arbitration. He is a member of the Chartered Institute of Arbitrators and the International Council for Commercial Arbitration, and holds a position with the Arbitrators Nominating Committee of the Russian Arbitration Association. He is a member of the SIAC Users Council's Russia Committee.

Evgeny graduated from the Law School of Volgograd State University in 1999, received his master's degree at the Russian School of Private Law in 2001 and his PhD in law in 2004. He has been a member of the Moscow Bar Association since 2003.

Jasmine Rayée
Loyens & Loeff

Jasmine Rayée (junior associate) specialises in international dispute resolution, and has experience in advising on issues of public international law, and in advising and representing foreign states or corporates in (international) arbitration and complex civil and commercial litigation. Jasmine is dual-qualified in civil and common law as an attorney-at-law admitted to practise law in New York State (2019) and a trainee lawyer of the Brussels Bar (2017), with a law degree from Columbia Law School (LLM, 2017) and Ghent University (2016).

James F Reardon
Froriep Legal SA

Dr James F Reardon is an associate at Froriep Legal SA whose practice focuses on complex international litigation and arbitration, and on a variety of regulatory matters, in particular in the fields of competition law and banking and finance. He joined the firm in 2018.

Dr Reardon is trained in both civil and common law and admitted to practise in Geneva, Illinois (inactive status) and Washington, DC. He holds a doctor of laws degree from the University of Fribourg (*magna cum laude*), a *juris doctor* from Northwestern University and a master's (*magna cum laude*) and bachelor of law from the University of Fribourg. He is also an alumnus of the American Swiss Young Leaders of the American Swiss Foundation (2016 Young Leader).

Dr Reardon was previously an associate in a global law firm based in Washington. Prior to moving to the United States, he worked as Special Assistant to the President of the Swiss Competition Commission, and with a boutique law firm in Geneva, where he worked on a variety of corporate and litigation matters.

He regularly publishes in his fields of work, particularly in antitrust and complex litigation, and also speaks and gives lectures in these areas.

Of Swiss and US origin, he works in English and French and is also fluent in German.

Jesús Remón
Uría Menéndez

Jesús Remón joined the firm as a partner in 1996, having previously worked as a lawyer for the state in the Spanish Constitutional Court. He heads the firm's litigation, arbitration and public law practice area. His professional practice is focused on national and international arbitration, litigation, in both civil and administrative jurisdictions, and advising on administrative and constitutional issues.

Jesús is a permanent member of the Comisión General de Codificación, Honorary President of the Club Español del Arbitraje, a member of the International Court of Arbitration – ICC (Paris) and a member of the Comisión Jurídica of the Consejo General de la Abogacía. He is also a member of the board of trustees of the Fundación Wolters Kluwer and of the academic board of the Fundación para la Investigación sobre el Derecho y la Empresa (Fide).

He has been awarded the Cross of Merit for Services to the Legal Profession.

Maxence Rivoire
Freshfields Bruckhaus Deringer

A member of the Paris Bar, Maxence Rivoire is an associate in the Paris office of Freshfields Bruckhaus Deringer. He has experience representing private and sovereign entities in commercial arbitrations under a variety of institutional rules and applicable laws, as well as in annulment proceedings before French courts.

Prior to joining Freshfields, Maxence worked in several leading international firms and taught private international law at Paris 1 Panthéon-Sorbonne University.

Maxence holds a *magister juris* from the University of Oxford, an LLM in private international law from Paris 1 Panthéon-Sorbonne University, and an LLB from the University of Grenoble. He has also studied at McGill University, where he worked as a research assistant.

He regularly publishes on arbitration, private international law and intellectual property topics. Maxence speaks fluent French, English and Italian.

Johan Rodríguez Fonseca
Gómez Pinzón Abogados

Johan Rodríguez Fonseca is an associate of the dispute resolution and investment protection practice group of Gómez Pinzón Abogados. Prior to joining the firm, Johan was an intern in the international arbitration department at Dechert (Paris) LLP. He also interned at the Constitutional Court of Colombia.

He has a law degree from the Universidad Nacional de Colombia, where he is an assistant professor on civil and commercial contracts, and corporate law.

He gained first place in the First Debate on Customary Law, the X Competition on International Arbitration and in the 14th Competition on Human Rights. He was also a semi-finalist in the IV International Investment Arbitration Competition and participated in the XXII Interamerican Human Rights Moot Court Competition and in the 25th Willem C Vis International Commercial Arbitration Moot.

J William Rowley QC
20 Essex Street Chambers

J William Rowley QC has chaired or participated as a tribunal member or counsel in more than 200 international arbitrations, involving more than 50 national or state laws or treaty systems. He is described as 'one of the elite international arbitrators' (*The New Peace Keepers*); a 'Star Performer' (*Legal Business Arbitration Report*); one of London's 'Super-Arbitrators' (*Global Arbitration Review*); 'Exceptional', 'Olympian', 'no one ever leaves the chamber with a sense of injustice', a 'big character on the scene' (*Chambers UK*); a 'superb' arbitrator and a 'sensible chairman', who is 'very efficient and extremely charming', an 'extremely strong' arbitrator and a 'sensible' chairman (*Chambers Global* 2018's Most In Demand Arbitrators). *Who's Who Legal* includes him on its Most Highly Regarded list, saying 'he boasts "a giant reputation" in the international arbitration space' as 'a top arbitrator' who 'possesses vast experience in handling both commercial and public international law disputes'; he is 'regarded as one of the leading arbitrators in the world for international disputes', and is 'widely acknowledged to be "as good as it gets", particularly for energy disputes'.

He served as board chairman of the LCIA from 2013 to 2017 and is a former member of the LCIA Court. He is a member of the ICSID Panel of Arbitrators, the ICC Canadian Panel and multiple regional panels (including AAA/ICDR, SCC, DIAC, KLRC, SIAC, HKIAC). He is a former member of the NAFTA 2022 Committee.

He was general editor of *Arbitration World* from 2004 to 2012. He is chairman of the editorial board of *Global Arbitration Review*, a former chairman of the IBA Business Section and IBA Antitrust Committee, and co-author of *Rowley & Baker: International Mergers – The Antitrust Process*. He served as chairman at McMillan LLP from 1996 to 2009, and as chairman emeritus and special counsel from 2009 to 2014.

Noah Rubins
Freshfields Bruckhaus Deringer

A US-qualified lawyer and barrister of England and Wales, Noah Rubins is the head of the international arbitration group in the Paris office of Freshfields Bruckhaus Deringer LLP. He has lived and worked in France for more than 15 years, advising and representing clients in nearly 100 arbitrations around the world, conducted under the International Centre for Settlement of Investment Disputes (ICSID), ICSID Additional Facility, London Court of International Arbitration (LCIA), International Chamber of Commerce (ICC), American Arbitration Association, Stockholm Arbitration Institute, and United Nations Commission on International Trade Law (UNCITRAL) rules.

He specialises in disputes in the former Soviet Union and investment treaty arbitration. In addition to advising clients, Noah has served as arbitrator in more than 30 disputes, conducted under the ICC, ICSID, LCIA, Vienna International Arbitral Centre, Independent Commission Against Corruption, Stockholm Chamber of Commerce and UNCITRAL rules.

Noah is widely published in the field of arbitration and is a frequent conference speaker. He has taught arbitration law at the University of Dundee, Scotland, and Georgetown Law Center in Washington, DC. His most recent publications include the monographs *Investor-State Arbitration* (with Dugan, Wallace and Sabahi), *Digest of ICSID Awards and Decisions 1974–2002* (with Happ), *Digest of ICSID Awards and Decisions* 2003–2007 (with Happ) and *International Investment, Political Risk and Dispute Resolution: A Practitioner's Guide* (with Kinsella).

Noah received a master's degree in dispute resolution and public international law from the Fletcher School of Law and Diplomacy, a JD from Harvard Law School, and a bachelor's degree in international relations from Brown University. He speaks fluent English, French and Russian, and also speaks Spanish, Hebrew and some Turkish.

Ben Sanderson
DLA Piper

Ben Sanderson is of counsel and DLA Piper's global practice manager for international arbitration. Ben has extensive experience in advising clients in international arbitration disputes across a range of sectors, including energy, mining and technology. He has represented both states and commercial parties in investment treaty claims. Clients have acknowledged that he is a 'first-rate of counsel' (*The Legal 500* UK, International Arbitration, 2019).

Jesús Saracho
Uría Menéndez

Jesús Saracho is an associate in Uría Menéndez's international arbitration department. His practice focuses on international commercial and investment arbitration in Europe and Latin America. He has handled disputes under the rules of all the leading institutions, including the ICC and ICSID.

He has been a visiting scholar at Fordham Law School (New York), teaching about the relationship between investment law and EU law, and a visiting fellow at Jindal Global Law School (New Delhi), teaching international commercial arbitration. He has also been a coach of the Comillas Pontifical Univerity-ICADE's team at the Willem C Vis – and Vis Est – International Arbitration Moot and of the Universidad CEU San Pablo's team at the Moot Madrid.

Jesús is a member of the Chartered Institute of Arbitrators. He is also Secretary of the International Bar Association Arbitration Guidelines and Rules Subcommittee.

Benjamin Siino
Shearman & Sterling

Benjamin Siino is counsel in Shearman & Sterling's international arbitration and public international law practices. He acts as counsel in litigation proceedings before French courts, with a focus on proceedings to seek the recognition and enforcement of arbitral awards and foreign judgments. His experience also includes international *ad hoc* arbitrations, including under UNCITRAL Rules, and institutional arbitrations under the Rules of the ICC and ICSID, with a strong focus on energy, investment and general commercial arbitrations, as well as arbitrations related to Africa. Benjamin Siino acts as a research assistants' team leader for the New York Convention Guide Project, a joint research project by UNCITRAL, Shearman & Sterling and Columbia University, which led to the publication of the UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Arbitral Awards (co-authored by Emmanuel Gaillard, head of Shearman & Sterling's international arbitration practice) and its online platform, newyorkconvention1958.org, which notably contains more than 3,000 decisions from national courts throughout the world.

Simon Sloane
Fieldfisher LLP

Simon Sloane, a partner in Fieldfisher's dispute resolution team, has more than 25 years' experience of international arbitration, having arbitrated under all the major institutional rules, including ICC, LCIA, SCC, ICSID, SIAC, BANI, HKIAC, CIETAC, THAC, KLRCA, AAA and ARIAS. He has particular expertise in high-value disputes in the energy, construction, insurance and hotels and leisure sectors. Currently, he leads a number of significant investment treaty arbitrations relating to the CIS region and the Energy Charter Treaty. Simon is a Fellow of the Chartered Institute of Arbitrators.

Barbora Šnáblová
Barbora Šnáblová Attorneys

Barbora Šnáblová is the founding partner of Barbora Šnáblová Attorneys, an arbitration boutique based in Prague. Before founding her law firm in 2015, Barbora worked for more than 10 years as part of the litigation and arbitration teams of leading international law firms in Prague, and served as independent consulting counsel in treaty disputes and international commercial disputes. Barbora has represented domestic and foreign companies and sovereign governments in both *ad hoc* arbitrations and arbitrations under the ICC and UNCITRAL rules. She has extensive experience arbitrating claims under bilateral investment treaties and has also represented clients before a variety of courts, including the Supreme Administrative Court, the Supreme Court and the Constitutional Court of the Czech Republic. Barbora has been involved in complex national and international litigations and commercial arbitrations in a variety of sectors, such as electric energy production, banking, real estate, gaming and telecommunications. She advises clients on cross-border issues, the drafting of arbitration agreements and pre-dispute strategy and enforcement of arbitral awards.

Barbora is listed as an arbitrator by the Ministry of Internal Affairs of the Czech Republic and is a member of the Arbitration Commission of the Czech Basketball Federation. Barbora holds a law degree from Utrecht University and master's degrees from Charles University in Prague and London School of Economics and Political Science, where she studied international dispute resolution and financial law. She is a solicitor for the Czech Republic. She is proficient in English and Czech, and fluent in German.

Franz Stirnimann Fuentes
Froriep Legal SA

Dr Franz Stirnimann Fuentes is a partner in Froriep's Geneva office who focuses his practice on international arbitration and litigation as well as Swiss commercial law. Dr Stirnimann has acted as counsel and arbitrator (chair, party-appointed, sole) in well over 50 international arbitrations (ICC, ICC, ICSID, Swiss Rules, SCC, DIS, LCIA, UNCITRAL and *ad hoc*), commercial as well as investor-state, and governed by various procedural and substantive laws. Several of those cases relate to transactions in Latin America or Spain. He also regularly acts as counsel in related proceedings before Swiss courts, including the Swiss Supreme Court. Dr Stirnimann is a Fellow of the Chartered Institute of Arbitrators and is listed in the panel of arbitrators of a number of arbitral institutions (e.g., ICC, SCAI, LCIA, WIPO, CIMA, KLRCA). He is ranked by *Who's Who Legal*, *Chambers Global*, *Chambers Europe* and

Expert Guides, among others, for arbitration and dispute resolution. He specialises in disputes relating to international joint ventures, M&A, shareholders, manufacture, licensing/IP, sales and investment disputes in the energy, mining, aviation, telecommunications, construction, infrastructure and finance sector. He also regularly acts as transactional counsel in these areas.

Dr Stirnimann, who is of Swiss and Latin American origin, is fluent in English, German, Spanish and French, and also works in Portuguese and Italian. He is trained in both civil and common law and admitted to practise in Geneva, England and Wales, and New York. He holds a PhD from the University of Zurich, an LLM from Georgetown University and a JD from the universities of Fribourg and Durham. He is a regular speaker and author of dozens of publications on arbitration-related topics and has been a lecturer on arbitration at a number of Swiss and Latin American universities.

Syukran Syafiq
Cecil Abraham & Partners

Syukran Syafiq is an associate at Cecil Abraham & Partners. He graduated with a degree in law (LLB Hons) and thereafter obtained an MA in international law and international relations, both from Oxford Brookes University. He is a barrister-at-law of the Honourable Society of the Inner Temple, London, and was admitted as an advocate and solicitor of the High Court of Malaya in April 2016. Syukran is developing a practice covering commercial, corporate, land and arbitration disputes.

Lyailya Tleulina
Aequitas Law Firm

Lyailya Tleulina has more than 15 years of experience as a litigator and commercial arbitration lawyer, focusing on complex multi-jurisdictional commercial disputes and domestic litigation. She exclusively focuses on dispute resolution. She has represented clients, predominantly foreign investors, in commercial arbitrations over disputes involving debt recovery and in courts over cases for enforcement of foreign judgments and awards. She has successfully applied pre-judicial and extrajudicial methods of dispute resolution. Clients praise her as a supremely intelligent litigator, with a thorough knowledge of the law and the ability to find creative solutions.

Lyailya Tleulina has published profound articles on complex legal issues of civil procedure, civil law and enforcement in leading professional journals in Kazakhstan and abroad.

Marco Torsello
ArbLit Radicati di Brozolo Sabatini Benedettelli Torsello

Marco Torsello has been a partner at ArbLit since 2017, having been of counsel between 2014 and 2017. He is also a full professor of comparative private law at the University of Verona and global professor of law at NYU School of Law (Law-Abroad Programme in Paris).

A dual citizen (Italy and the United States), Marco uniquely combines the competences and experience of a successful transnational litigator and those of a highly regarded transactional lawyer. In more than 20 years of practice, Marco has successfully represented top foreign and domestic clients in a variety of business-related matters and has developed specific skills and knowledge in transnational and multi-jurisdiction commercial litigation.

As regards scholarly work, Marco is the author of several books and papers and has taught in some of the most prestigious universities in Europe and the United States. In this capacity, he has often advised top foreign and domestic clients on complex, multi-jurisdiction transactions and has served as an expert before foreign and domestic courts.

He often appears as counsel and sits as presiding, sole and party-appointed arbitrator in *ad hoc* and institutional, international and domestic arbitrations under a variety of rules and governing laws.

Sally-Ann Underhill
Reed Smith LLP

Sally-Ann Underhill deals with disputes arising out of all types of shipping contracts (including charterparty, bill of lading, ship management and shipbuilding disputes) and issues relating to sale contracts and worldwide logistics. She represents clients across the full spectrum of disputes, from highly technical shipbuilding disputes and cargo claims (including claims relating to the carriage of oil and gas products, dry bulk cargoes and containers, and pharmaceutical products) to simple defence issues. Sally-Ann works largely with clients based in Europe (including the United Kingdom, Italy and Greece), the United States, India, China and Saudi Arabia, acting for the full range of shipping players, including owners, charterers, traders, ship managers and insurers. She has considerable experience of drafting standard form amendments to charterparties, contracts of affreightment, pool agreements, ship management agreements and freight forwarding agreements. The economic downturn led to her being involved with a number of high-profile insolvency issues. Her experience also includes the exercise of liens and arrests in many jurisdictions, anti-suit injunctions and enforcement.

Sally-Ann has recently been advising on the impending sulphur limits, cyber issues and the EU General Data Protection Regulation. She regularly lectures on bill of lading and charterparty issues, and is responsible for in-house training in the transportation group.

Olivier van der Haegen
Loyens & Loeff

Olivier van der Haegen (counsel) specialises in complex and international dispute resolution. He has represented clients in several national and international arbitration proceedings (under various institutional rules) and in judicial court litigations, notably in the construction, energy and financial sectors. He holds a law degree from the Université Catholique de Louvain (2008), LLM degrees from the College of Europe (Bruges, 2009) and the University of Chicago (2010). He has been a member of the Brussels Bar since 2010.

Cosmin Vasile
Zamfirescu Racoţi & Partners

Dr Cosmin Vasile is managing partner of Zamfirescu Racoți & Partners and head of the firm's arbitration practice group. He has gained extensive experience during more than 15 years of handling cross-border disputes and already boasts an outstanding track record of around 100 international arbitration proceedings as counsel and arbitrator conducted under various laws and sets of arbitration rules.

Cosmin has successfully coordinated an impressive number of significant and mission critical disputes for his clients, often in the glare of media attention. As one of the leading experts in construction, capital markets, privatisation and energy arbitrations in Romania, Cosmin is called upon to provide legal counsel to both government institutions and private companies. In court, Cosmin has an equally impressive record, being popular among major domestic and international corporations for advice in high-profile commercial, administrative-contentious and public procurement disputes.

He holds a doctorate degree from the University of Bucharest and defended his doctoral thesis on the topic 'The Applicable Law in the Ad Hoc Commercial Arbitration' (2011). Cosmin is a Fellow of the Chartered Institute of Arbitrators in London since 2012, and holds a diploma in international arbitration from this institute. He has been awarded the Certificate of the ICC Advanced Arbitration Academy for Central and Eastern Europe and the Certificate of the International Academy for Arbitration Law (Paris).

Filipe Rocha Vieira
Vieira de Almeida

Filipe Rocha Vieira is a managing associate in the litigation and arbitration practice, where he acts as counsel in commercial and civil litigation and in arbitration, both national and international, with a focus on corporate and commercial disputes.

He has a law degree from the University of Lisbon, Faculty of Law, a postgraduate degree in arbitration from the Nova University of Lisbon, Faculty of Law, a postgraduate degree in corporate law from the Portuguese Catholic University of Lisbon, Faculty of Law, and a postgraduate degree in listed companies and capital markets law from the Portuguese Catholic University (Lisbon), Faculty of Law.

Matthew R M Walker
K&L Gates LLP

Matthew R M Walker, a partner in the Doha and London offices of K&L Gates, focuses his practice in construction law and dispute resolution. He has acted as advocate and counsel in ICC arbitrations in Qatar, the UAE, Saudi Arabia, Turkey, India and the United Kingdom, as well as in the Qatar International Court, the High Court of England and Wales, and an international adjudication on a gas facility in Tanzania. He has acted as sole arbitrator in a QICCA arbitration, in which he issued a final award, and has been appointed to QICCA's panel of arbitrators. He is a Fellow of the Chartered Institute of Arbitrators, a Fellow of the Chartered Institute of Building and has been accredited as a mediator by the Royal Institute of Chartered Surveyors.

He also gives non-contentious construction advice, particularly in the rail sector. He has undertaken secondments to Qatar Rail and London Underground. He has advised on procurement for Doha Metro and has drafted construction contracts (including FIDIC, NEC, JCT, ACE, RIBA and bespoke forms) on construction projects of varying size and complexity. He has also been listed in *Who's Who Legal* 2015, 2016, 2017 and 2018 as one of the six leading construction lawyers currently working in Qatar.

Carsten Wendler
Freshfields Bruckhaus Deringer LLP

Carsten Wendler is a principal associate in the dispute resolution group at Freshfields Bruckhaus Deringer and is a member of the firm's international arbitration group in Frankfurt. He specialises in litigation and arbitration regarding all areas of business and commercial law, including international investment disputes. He regularly acts as counsel in national and international arbitration proceedings under ICSID, ICC and DIS arbitration rules.

Carsten completed his legal education at the University of Passau and University of Bonn (Germany), Universidad Complutense Madrid (Spain) and New York University (NYU) School of Law (US), where he was awarded a master of laws degree (LLM). He was a visiting scholar at UC Berkeley (Boalt Hall) and the University of Cambridge (Lauterpacht Centre for International Law). He is qualified as a German *Rechtsanwalt* and as an attorney-at-law in New York.

Carsten is the author of numerous articles on international and national arbitration. He speaks English, Spanish and German.

Andrew White
Yulchon LLC

Andrew White is a senior foreign counsel and co-chair of the international dispute resolution practice at Yulchon. His practice focuses on international disputes and cross-border commercial transactions involving business and investment interests in Korea, North America, Indonesia, Singapore and the Middle East. Backing up his effectiveness as a persuasive cross-border and cross-cultural negotiator, Mr White has practised internationally for more than 35 years as a litigation lawyer (trial and appellate, arbitration, mediation). He has been admitted to the State Bars of Florida, Georgia, North Carolina and Colorado, as well as the United States District (trial courts) and United States Circuit Courts of Appeals in those states. Since 1992, he also has been admitted to, and has appeared as counsel before, the United States Supreme Court.

Prior to joining Yulchon, Mr White was head of a practice group for a London-based international law firm. He was also a partner and manager of a regional office for a major US-based law firm, and a partner in a German law firm. From the early 1980s, he specialised his law practice in construction transactions and arbitration, and he was a co-author of a leading American treatise and digest of construction and design law. More recently, Mr White has broadened his expertise to include commercial interests between the United States, Asia and the Middle East, including Islamic law, finance and insurance

(*takāful*). Mr White is a Fellow of the Singapore Institute of Arbitrators and is appointed to the International Chamber of Commerce (ICC-Paris) Task Force on Financial Institutions and International Arbitration.

As a professional arbitrator, he has arbitrated extensively through the American Arbitration Association, and is appointed to the Singapore International Arbitration Centre Panel of Arbitrators and the Asian International Arbitration Centre. Mr White was formerly an adjudicator in Singapore's Financial Industry Disputes Resolution Centre. He also was trained as a court-certified mediator in 1992 and certified by the North Carolina Dispute Resolution Commission (Administrative Office of the Courts) as a mediator in the Mediated Settlement Conference Program of the State Courts.

Lucy Winnington-Ingram
Reed Smith LLP

Lucy Winnington-Ingram is an associate in the commercial disputes group advising on international arbitration, in particular cases relating to investment treaty arbitration and public international law. Since joining the team, Lucy has been involved in cases in the mining, energy, construction and telecommunications sectors. She has experience of acting on arbitration cases for both the claimant and the respondent under UNCITRAL and ICSID rules, particularly on disputes arising out of bilateral and multilateral investment treaties. Lucy's recent experience includes disputes about the transfer of licences, the alleged nationalisation of strategic assets, the alleged state expropriation of mineral and petroleum assets, the effect and enforceability of stabilisation provisions, and breaches of other commercial agreements and international law.

Marieke Witkamp
K&L Gates LLP

Marieke Witkamp is an associate at K&L Gates. She has more than 15 years of legal experience, focusing her practice on construction law, litigation and dispute resolution. Marieke has acted for a variety of clients in international and domestic commercial and construction disputes and also provides non-contentious legal advice on various matters, including Dutch law. Marieke has served as a judge in the Netherlands since 2003 and continues to sit as a substitute judge for the Court of Rotterdam.

James Woolrich
Jenner & Block London LLP

James Woolrich is a partner in Jenner & Block's London office. He is a solicitor advocate with a broad practice encompassing international arbitration (commercial and investor-state) and complex commercial disputes for corporate and banking clients.

With a strong international perspective, Mr Woolrich has acted for clients in litigation before the English High Court and Court of Appeal as well as in numerous offshore jurisdictions, including the British Virgin Islands, the Isle of Man, Cyprus and India. Mr Woolrich has also acted in numerous international arbitrations, both institutional and

ad hoc. Mr Woolrich has gained substantial experience of applying for post-judgment and post-award enforcement measures, and has dealt with a wide range of applications for relief and related jurisdictional issues.

Mr Woolrich has spoken and published in the areas of international arbitration, civil procedure, the law of obligations, corporate finance and private international law.

Toshiki Yashima
Freshfields Bruckhaus Deringer LLP

Toshiki Yashima is an associate in the Tokyo office of Freshfields Bruckhaus Deringer. He has extensive experience in advising clients across a broad range of practice areas, including in Japanese domestic disputes, international arbitrations, M&A and general corporate matters. Before joining Freshfields, he worked as an in-house counsel at a Japanese company, and also has experience practising at a major Japanese law firm.

Karim A Youssef
Youssef & Partners

Dr Karim A Youssef, JSD, is the managing partner and head of international arbitration and international law practices at Youssef & Partners in Cairo, Egypt. His practice focuses on commercial arbitration, investment treaty arbitration and international law. Karim has acted as counsel, party-appointed or presiding arbitrator in more than 85 international arbitrations under a variety of rules, including ICC, CRCICA, DIAC, LCIA, UNCITRAL and ICSID rules. He has also acted in *ad hoc* arbitrations governed by national laws. Karim represents regional and international clients in high-profile local and regional disputes and large-value claims, across a wide array of industries and key sectors. Highlights of Karim's counsel work include representing investors in investment treaty claims, including in *Cementos La Union SA & Aridos Jativa SLU v. The Arab Republic of Egypt* and, previously, representing the CBC channel in commercial claims against Egyptian satirist Bassem Youssef. Karim also acts as counsel or arbitrator in some of the largest commercial claims arising from the Arab Spring, including in disputes concerning the post-2011 unwinding of privatisation transactions during the Moubarak era.

He holds rankings on *Chambers Global*, Egypt – Dispute Resolution (Band 1) and *Who's Who Legal: International Commercial Arbitration* – Egypt (2014–2017). Karim was educated at Yale Law School (receiving LLM and JSD degrees), the University of Paris and the University of Cairo.

Abdel Zirar
De Brauw Blackstone Westbroek NV

Abdel Zirar is a senior associate in the litigation and arbitration department. Abdel specialises in international arbitration and cross-border litigation. He advises and acts in disputes involving investment treaties, M&A contracts, gas purchase agreements and other commercial contracts. Abdel also regularly acts in proceedings concerning the enforcement of international arbitral awards.

Appendix 2

Contact Details

20 Essex Street Chambers
20 Essex Street
London, WC2R 3AL
United Kingdom
Tel: +44 20 7842 1200
Fax: +44 20 7842 1270
wrowley@20essexst.com
www.20essexst.com

Advokatfirman Vinge KB
Stureplan 8
Box 1703
111 87 Stockholm
Sweden
Tel: +46 10 614 30 00
james.hope@vinge.se
www.vinge.se

Aequitas Law Firm
Office 2, 47 Abai Avenue
Almaty 050000
Kazakhstan
Tel: +7 727 3 968 968
l.tleulina@aequitas.kz
a.idayatova@aequitas.kz
www.aequitas.kz

ArbLit Radicati di Brozolo Sabatini Benedettelli Torsello
Via Alberto da Giussano 15
Milan 20145
Italy
Tel: +39 2 8425 4810
Fax: +39 2 8425 4810
massimo.benedettelli@arblit.com
marco.torsello@arblit.com
www.arblit.com

Barbora Šnáblová Attorneys
Šítkova 233/1
Prague 1, 110 00
Czech Republic
Tel: +420 222 516 845
barbora@snablova.com
lucie.mikolandova@snablova.com
www.snablova.com

Cecil Abraham & Partners
Suite 12.01, Level 12 Menara 1MK
1 Jalan Kiara
Mont' Kiara
50480 Kuala Lumpur
Malaysia
Tel: +603 2726 3700
Fax: +603 2726 3733
cecil@cecilabraham.com
aniz@cecilabraham.com
syukran@cecilabraham.com
www.cecilabraham.com

Cleary Gottlieb Steen & Hamilton LLP
12, rue de Tilsitt
75008 Paris
France
Tel: +33 1 40 74 68 00
cannacker@cgsh.com
lachtoukspivak@cgsh.com
zbouraoui@cgsh.com
www.clearygottlieb.com

Curtis, Mallet-Prevost, Colt & Mosle LLP
101 Park Avenue
New York 10178-0061
New York
United States
Tel: +1 212 696 6000
Fax: +1 212 697 1559
jpizzurro@curtis.com
robert.garcia@curtis.com
jperla@curtis.com
www.curtis.com

De Brauw Blackstone Westbroek NV
Claude Debussylaan 80
1082 MD, Amsterdam
Netherlands
Tel: +31 20 577 1771
Fax: +31 20 577 1775
marnix.leijten@debrauw.com
erin.cronje@debrauw.com
abdel.zirar@debrauw.com
www.debrauw.com

Debevoise & Plimpton
21/F, AIA Central
1 Connaught Road Central
Central
Hong Kong
Tel: +852 2160 9800
Fax: +852 2810 9828
tdymond@debevoise.com
jlim@debevoise.com
www.debevoise.com

DLA Piper
27 rue Laffitte
75009 Paris
France
Tel: +33 1 40 15 24 00
Fax: +33 1 40 15 24 01
michael.ostrove@dlapiper.com

160 Aldersgate Street
London, EC1A 4HT
United Kingdom
Tel: +44 20 7349 0296
Fax: +44 20 7796 6666
james.carter@dlapiper.com
ben.sanderson@dlapiper.com

www.dlapiper.com

Egorov Puginsky Afanasiev & Partners
21, 1-Ya Tverskaya-Yamskaya Str
Moscow, 125047
Russia
Tel: +7 495 935 8010
Fax: +7 495 935 8011
dmitry_dyakin@epam.ru
evgeny_raschevsky@epam.ru
dmitry_kaysin@epam.ru
mow_office@epam.ru
www.epam.ru

Energy Arbitration Chambers
Toronto Dominion Center
77 King Street West
Suite 2020
Toronto M5K 1A1
Canada

Suncor Energy Centre
150 6th Avenue SW
Suite 500
Calgary T2P 3Y9
Canada

Tel: +1 855 736 4608
gordon.kaiser0@gmail.com
energyarbitration.ca

Fieldfisher LLP
Riverbank House
2 Swan Lane
London, EC4R 3TT
Tel: +44 20 7861 4000
Fax: +44 20 7488 0084
simon.sloane@fieldfisher.com
daniel.hayward@fieldfisher.com
rebecca.mckee@fieldfisher.com
www.fieldfisher.com

Freshfields Bruckhaus Deringer LLP
2 rue Paul Cézanne
75008 Paris
France
Tel: +33 1 44 56 44 56
noah.rubins@freshfields.com
maxence.rivoire@freshfields.com

Bockenheimer Anlage 44
60322 Frankfurt
Germany
Tel: +49 69 27 30 80
Fax: +49 69 23 26 64
boris.kasolowsky@freshfields.com
carsten.wendler@freshfields.com

Akasaka Biz Tower, 36F
5-3-1 Akasaka Minato-Ku
Tokyo 107-6336
Japan
Tel: +81 3 3584 8348
Fax: +81 3 3584 8501
toshiki.yashima@freshfields.com

10 Collyer Quay 42-01
Ocean Financial Centre
Singapore 049315
Tel: +65 6908 0796
Fax: +65 6636 7000
nicholas.lingard@freshfields.com

65 Fleet Street
London, EC4Y 1HT
United Kingdom
Tel: +44 20 7936 4000
Fax: +44 20 7832 7001
oliver.marsden@freshfields.com
ella.davies@freshfields.com

Freshfields Bruckhaus Deringer US LLP
601 Lexington Avenue, 31st Floor
New York, NY 10022
United States
Tel: +1 212 277 4000
Fax: +1 212 277 4001
elliot.friedman@freshfields.com
david.livshiz@freshfields.com
shannon.leitner@freshfields.com

www.freshfields.com

Froriep Legal SA
4 Rue Charles-Bonnet
1206 Geneva
Switzerland
Tel: +41 22 839 63 00
Fax: +41 22 347 71 59
fstirnimann@froriep.ch
jmarguerat@froriep.ch
tnavarro@froriep.ch
jreardon@froriep.ch
www.froriep.com

Gómez Pinzón Abogados
Calle 67 No. 7-35
Oficina 1204
Bogotá, 110231
Colombia
Tel: +571 319 2900
Fax: +571 321 0295
daraque@gomezpinzon.com
johanrodriguez@gomezpinzon.com
www.gomezpinzon.com

Jenner & Block London LLP
25 Old Broad Street
London, EC2N 1HQ
United Kingdom
Tel: +44 33 0060 5400
Fax: +44 33 0060 5499
clightfoot@jenner.com
jwoolrich@jenner.com
mcroft@jenner.com
jenner.com

Jones Day
2 rue Saint-Florentin
75001 Paris
France
Tel: +33 1 56 59 39 39
Fax: +33 1 56 59 39 38
ekleiman@jonesday.com
cpauly@jonesday.com
www.jonesday.com

K&L Gates LLP
31st Floor Tornado Tower
Al Funduq Street
PO Box 26100
West Bay
Doha
Qatar
Tel: +974 4424 6100
Fax: +974 4424 6101

One New Change
London, EC4M 9AF
United Kingdom
Tel: +44 20 7648 9000
Fax: +44 20 7648 9001

matthew.walker@klgates.com
marieke.witkamp@klgates.com
www.klgates.com

Khaitan & Co
Ashoka Estate
12th Floor
24 Barakhamba Road
New Delhi 110 001
India
Tel: +91 11 4151 5454
Fax: +91 11 4151 5318
sanjeev.kapoor@khaitanco.com
saman.ahsan@khaitanco.com
www.khaitanco.com

King & Spalding International LLP
12 Cours Albert 1er
75008 Paris
France
Tel: +33 1 7300 3900
Fax: +33 1 7300 3959
jcastello@kslaw.com
rchahine@kslaw.com
www.kslaw.com

Konrad Partners
Rotenturmstrasse 13
1010 Vienna
Austria
Tel: +431 512 95 00
Fax: +431 512 95 00 95
c.konrad@konrad-partners.com
p.peters@konrad-partners.com
www.konrad-partners.com

Loyens & Loeff
Woluwe Atrium
Neerveldstraat 101-103
1200 Brussels
Belgium
Tel: +32 2 743 43 43
Fax: +32 2 743 43 10
hakim.boularbah@loyensloeff.com
olivier.van.der.haegen@loyensloeff.com
jasmine.rayee@loyensloeff.com
www.loyensloeff.com

MHR | Martínez de Hoz & Rueda
Torre Fortabat
Bouchard 680, 19th floor
C1106ABJ Buenos Aires
Argentina
Tel: +5411 2150 9779 / 9788
jose.martinezdehoz@mhrlegal.com
francisco.amallo@mhrlegal.com
www.mhrlegal.com

Milbank LLP
1850 K Street, NW
Suite 1100
Washington, DC 20006
United States
Tel: +1 202 835 7500
Fax: +1 202 263 7586
mnolan@milbank.com
kaitelaj@milbank.com
www.milbank.com

Norton Rose Fulbright LLP
3 More London Riverside
London, SE1 2AQ
United Kingdom
Tel: +44 20 7444 5573
Fax: +44 20 7283 6500
sherina.petit@nortonrosefulbright.com
ewelina.kajkowska@nortonrosefulbright.com
nortonrosefulbright.com

Rashed R al Marri Law Office
Grand Hamad Street
Al Fardan Centre, Floor 3
PO Box 15786
Doha
Qatar
Tel: +974 444 30651 / 444 2067
c.elhage@marri-hage.com

Reed Smith LLP
10 Collyer Quay
#23-01 Ocean Financial Centre
Singapore, 049315
Tel: +65 6320 5300
Fax: +65 6320 5399
khasan@reedsmith.com
slahiri@reedsmith.com

Broadgate Tower
20 Primrose Street
London, EC2A 2RS
United Kingdom
Tel: +44 20 3116 3000
Fax: +44 20 3116 3999
ccarswell@reedsmith.com
lwinnington-ingram@reedsmith.com
sunderhill@reedsmith.com

1001 Brickell Bay Drive, 9th Floor
Miami, FL 33131
United States
Tel: +1 786 747 0200
Fax: +1 786 747 0299
ccardenas@reedsmith

www.reedsmith.com

Shearman & Sterling LLP
7 rue Jacques Bingen
75017 Paris
France
Tel: +33 1 53 89 70 00
Fax: +33 01 53 89 70 70
egaillard@shearman.com
benjamin.siino@shearman.com
www.shearman.com

SPA Ajibade & Co
Suite 201, SPAACO House
27A Macarthy Street
Onikan, Lagos
Nigeria
Tel: +234 1 460 5091 / 270 3009
bajibade@spaajibade.com
kmayomi@spaajibade.com
www.spaajibade.com

Uría Menéndez
Príncipe de Vergara 187
Plaza de Rodrigo Uría
28002 Madrid
Spain
Tel: +34 915 860 400
Fax: +34 915 860 403 / 404
www.uria.com

Vieira de Almeida (VdA)
Rua Dom Luís I, 28
1200-151 Lisbon
Portugal
Tel: +351 21 311 3400
Fax: +351 21 311 3406
fgp@vda.pt
mipc@vda.pt
rsa@vda.pt
frv@vda.pt
jcn@vda.pt
acc@vda.pt
mllm@vda.pt
www.vda.pt/en

Von Wobeser y Sierra, SC
Paseo de los Tamarindos No. 60, piso 4
Col. Bosques de las Lomas
Del. Cuajimalpa
05120 Mexico City
Mexico
Tel: +52 55 5258 1000
amagallanes@vwys.com.mx
dament@vwys.com.mx
www.vonwobeserysierra.com

Youssef & Partners
3 Yemen (Al-Yaman) Street
off Nile Street
Giza 12511
Cairo
Egypt
Tel: +2 2374 99 100
k.youssef@youssef.law
www.youssef.law

Yulchon LLC
Parnas Tower, 38th Floor
521 Teheran-ro
Gangnam-gu
Seoul 06164
Korea
Tel: +82 2 528 5200
kimsy@yulchon.com
awhite@yulchon.com
www.yulchon.com

Zamfirescu Racoţi & Partners
12 Plantelor Street
District 2
Bucharest RO-023974
Romania
Tel: +40 21 311 05 17 / 18
Fax: +40 21 311 05 19
cosmin.vasile@zrp.ro
www.zrp.ro

Enforcement used to be an irrelevance in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly.

The Guide to Challenging and Enforcing Arbitration Awards is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging, and enforcing, awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat. It covers 29 seats.

Visit globalarbitrationreview.com
Follow @garalerts on Twitter
Find us on LinkedIn

ISBN 978-1-83862-205-3