

Resisting Enforcement of a Foreign Arbitral Award under the New York Convention



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This article explores issues and considerations that may arise in connection with a challenge to the enforcement of an arbitral award under the New York Convention

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1. Introduction: the Legal Framework for the Recognition and Enforcement of Foreign Arbitral Awards

The *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the “New York Convention” or “Convention”), which sets out the basic legal framework for the recognition and enforcement of foreign arbitral awards, has been described as the “[t]he mortar in the edifice of international commercial arbitration”.¹ Indeed, the enforcement regime created by the Convention is “almost universal”,² as all major jurisdictions are parties to the Convention, including the key Asian jurisdictions.³ The Convention focuses on the recognition and enforcement of arbitral awards, whereas annulment proceedings fall outside its scope. It sets out a restrictive list of grounds on which the enforcement of foreign awards can be refused. Grounds for annulment of awards, on the

other hand, are provided for in domestic law, and it is generally recognized that the annulment of an award cannot be sought in a jurisdiction other than the place of arbitration.⁴

The **grounds** on which enforcement of an award can be refused are provided for in article V of the Convention. The list is an exhaustive one,⁵ as has been confirmed by the jurisprudence interpreting the Convention.⁶ Article V(1) sets out five grounds which, in order to be successful, must be proven by the party contesting enforcement: (a) the invalidity of the arbitration agreement, (b) violation of due process, (c) the arbitrator exceeded his or her authority, (d) irregularity in the composition of the arbitral tribunal or the arbitral procedure, and (e) the award is not binding or has been set aside. The grounds in article V(2) can be examined *ex officio*, and therefore can be examined even if the request for enforcement is unopposed.⁷ They are: (a) the non-arbitrability of the subject-matter of the award, and (b) the violation of public policy. An important feature of the Convention is that the grounds in article V do not permit any review of the merits of the arbitral award.⁸

The New York Convention is considered to have a “pro-enforcement” bias. Indeed, it sets out only a minimum standard for the recognition and enforcement of foreign awards,⁹ allowing for the application of other international instruments and

municipal law where they are more favourable to recognition. *The Convention on the Settlement of Investment Disputes Between States and the Nationals of Other States* is an example of such an instrument, as it provides for automatic recognition and enforcement of awards from the International Center for the Settlement of Investment Disputes. This pro-enforcement bias has been reflected in the courts' application of the New York Convention. Indeed, cases in which enforcement has been refused have been quite rare, representing roughly ten percent of the cases reported in the *Yearbook Commercial Arbitration*, which compiles New York Convention decisions.¹⁰

While parties to arbitration agreements are generally expected to comply with any award rendered by the arbitral tribunal, there may be valid grounds to resist enforcement. Yet, the outlook appears to be bleak for any party seeking to resist enforcement of a prejudicial award. Enforcement can, however, successfully be challenged in certain cases, and parties must be cognizant of a number of issues in order to maximize their chances of success in this respect. This article identifies and elaborates on certain of these key issues. We will first briefly deal with the formal and procedural requirements for seeking enforcement, which can at times provide fertile ground for resisting an award. We will then explore the risk a party runs of losing or waiving the already limited grounds they can invoke for challenging enforcement, and what parties can do to prevent that risk from materializing. Lastly, we will provide some examples of grounds for challenging enforcement which have been successful in the relatively rare cases in which enforcement has been refused by a court.

It is generally accepted that the multinational instrument that is the New York Convention should be applied in a **uniform** manner. While no signatory state is bound by the case law of another signatory state, courts should not apply the Convention without taking note of what other courts have decided in similar circumstances.¹¹ Parties wishing to enforce or resist enforcement of an award are therefore well advised to search for New York Convention precedents in other jurisdictions that might support their case.

2. Limitations on the Scope of the New York Convention

It is useful to recall that the Convention is applicable only to arbitral awards, and therefore is not applicable to procedural orders and decisions on interim measures, or decisions rendered by bodies other than arbitral tribunals. The Convention does not define what constitutes an award. Essentially, what is relevant to such

a determination is the content of the decision, not the terms that are used to designate it.¹² Two requirements must be met in order for a decision to qualify as an award: (1) the decision must have been rendered by an arbitral tribunal, *ie* a private body, offering sufficient guarantees of independence and impartiality, and (2) it must decide on a legal dispute between the parties in a final and binding manner.¹³ The decision need not, however, be a final award on the *entire* dispute. Preliminary awards are also enforceable.¹⁴

Many States, including China, Indonesia, Malaysia, Korea and Japan, reserve the application of the Convention to awards made in other Contracting States. The **reciprocity** requirement is explicitly reserved in Article 1(3).

3. Formal and Procedural Requirements for Seeking Enforcement

While the burden of proving that one of the grounds in article V(1) is applicable in a given case falls on the party challenging the enforcement of an award, it is first incumbent on the party seeking enforcement to ensure that certain formal and procedural requirements are satisfied. First, the party *seeking* enforcement must produce to the court the duly authenticated original award and the original arbitration agreement, or a duly certified copy of those documents.¹⁵ What law governs



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authentication or certification is not specified by the Convention, although it appears that if the authentication or certification is valid either pursuant to the law at the place of arbitration or the law at the place of enforcement, it will be considered as valid by the court.¹⁶ Indeed, such an approach is consistent with “the purpose of Article IV to ease as much as possible the conditions to be fulfilled by the party seeking enforcement.”¹⁷ Where the language of either the award or the arbitration clause is not an official language of the country in which enforcement is sought, a certified translation or a translation by a sworn translator must also be produced.¹⁸ These requirements are the only conditions which must be fulfilled pursuant to the New York Convention by the party seeking enforcement,¹⁹ and thereafter the onus shifts to the opposing party.

A number of court decisions applying the New York Convention have relied on the requirements of article IV to refuse enforcement. These include a 2005 decision of the Spanish Supreme Court refusing to enforce an award that had been rendered in London on the basis that the party seeking enforcement had failed to supply a valid arbitration agreement as it was required to do under article IV(1)(b) of the New York Convention.²⁰ In a recent decision of the Swiss Federal Supreme Court, enforcement of an award was refused on

the basis that the arbitration clause on which it was based did not bind the defendant.²¹ In a third such case, a German court refused enforcement because the applicant had failed to show that the parties had concluded a valid arbitration agreement.²² The court found that if the party applying for enforcement does not prove there is an arbitration agreement that satisfies the requirements of article II(2) of the Convention, “the further question whether there is one of the grounds for refusal of art. V(1) is not dealt with.”²³ These cases could suggest an uneasy co-existence between articles IV and V(1)(a) of the Convention, and it has been argued that they “may lead to the mistaken belief that a petitioner must not only submit the original arbitration agreement or a certified copy thereof, but also prove that the agreement is valid.”²⁴

Ambiguities in the operative part of the award may also prove to be a source of problems for a winning party to secure enforcement. Indeed, in many jurisdictions, enforcement courts request that the operative part of an arbitral award set out clearly the specific acts that the award debtor is ordered to perform or refrain from for the award to be enforceable.²⁵ Declaratory relief granted in the award may thus pose problems.²⁶

The party seeking enforcement must also be careful to respect **time limits** for enforcement of arbitral awards. As the New York Convention is silent on the question, these periods of limitation are governed by domestic law and vary greatly from country to country. For example, the time limit imposed under the US Federal Arbitration Act is three years from when the award is made.²⁷ In England, enforcement of an award becomes time-barred six years after the refusal of the debtor to honour it,²⁸ while in Switzerland, the period appears to be ten years.²⁹ In China, the time limit is much shorter. It used to be one year from the date of the award if at least one of the parties was a natural person, and only six months if neither party was a natural person. With the recent amendment of the Civil Procedural Law, the time limit was extended to two years for both individual persons and legal entities.³⁰ Depending on the jurisdiction, winning parties must therefore act rapidly once an award is issued in order to avoid the expiration of the statute of limitations, and losing parties should always be mindful of the potential argument that an action in enforcement is time-barred.

4. Can a Party Lose Grounds on which the Enforcement of an Award Can Be Challenged?

A party must be mindful that its conduct throughout the proceedings and after the issuance of the award in the place of arbitration may affect its ability to subsequently enforce or resist enforcement of the award. First, the manner in which it couches



