Global Arbitration Review

The Guide to Challenging and Enforcing Arbitration Awards

General Editor
J William Rowley QC

Editors
Emmanuel Gaillard and Gordon E Kaiser

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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

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.

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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.

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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.

Appendix 1

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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.

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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.

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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.

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