Enforcing Arbitral Awards[†]

By Kevin Nachtrab*

1. Introduction

Having chosen to resolve your issues by use of Mediation/Arbitration to, among other reasons, save costs and time, you are now faced with the problem of having to expend just such costs and just such time to seek enforcement of the judgment and award that you have secured.

One weakness of Arbitration proceedings is that, generally speaking, arbitrators have no legal power to enforce their judgments and awards. While most arbitral awards are voluntarily complied with by the parties, this is not always the case. In those instances when one of the parties does not voluntarily comply with an arbiter's judgment and award, then the other party must seek, judicial intervention to enforce it.

2. Legal Basis for Enforcement of Arbitration Decisions & Awards

There are two primary bases for the recognition of arbitral decisions and enforcement of arbitral awards.

The basis for the recognition/enforcement of "national" or "domestic" arbitral decisions/awards (that is to say, of arbitration proceedings performed in accordance with and under the law of the country in which recognition/enforcement of its decisions/awards is being sought) are the national laws of that country. For example, in the United States, state laws govern[1] except when the matter "involves" interstate commerce. Predicated on an exercise of the powers given to Congress by the Commerce Clause[2] of the U.S. Constitution, in such cases the Federal Arbitration Act[3] is controlling. Another example is China, where there is a separate ordinance that governs the enforcement in Hong Kong of arbitral awards issued on mainland China.[4]

The basis for the recognition/enforcement of "international" arbitral decisions/awards lies in a series of international, regional and bilateral conventions that are well-established and widely accepted and adhered to. These conventions include the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958,[5] the Panama (Inter-American) Convention of 1975,[6] the European (Geneva) Convention of 1961[7] and the Convention of the Arab League on Enforcement of Arbitral Awards.[8]

[†]A contribution from the LESI Life Sciences Committee.

1. Perhaps the earliest of which was the New York Arbitration Act of 1920.

2. Article I, Section 8 of the United States Constitution

3. 9 U.S.C. Section 1 et seq (1988), as amended

4. See §40 et seq., Arbitration Ordinance, as amended in 2000

5. Also known as the "Convention of New York of 1958," opened for signature on 10 June 1958, 330 UNTS 38 (entered into force 7 June 1959). The text of the Convention can be accessed at *http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf.*

6. The Inter-American International Commercial Arbitration Convention.

Opened for signature on 30 Januray 1975 and entered into force on 15 August 1990, the provisions of the Panama Convention of 1975 are almost identical to those of the New York Convention of 1958. However, unlike the NY Convention, the Panama Convention does not distinguish between foreign and domestic awards. The text of the convention can be accessed at *http://www.jus.uio.no/lm/inter-american.international.commercial.arbitration.convention.panama.1975/landscape.*

7. The European Convention on International Commercial Arbitration, 21 April 1961, 484 UNTS 364. Adopted in 1961 to, *inter alia*, facilitate the efficiency of arbitration between the nations of Western and Eastern Europe, the recognition and enforcement of arbitral awards is just one part of this much broader convention. The text of the convention can be accessed at *http://www.jus.uio.no/lm/un.arbitration.recognition.and.enforcement.convention.new.york.1958/doc.*

8. Also known as the Amman Convention of 1987 on Commercial Arbitration or just the "Amman Convention." The Amman convention was opened for signature in 1987 and entered into force in 1993 (following accession by Iraq, Jordan, Libya, Palestine, Sudan, Tunisia and Yemen). In at least as far as it relates to recognition, the Amman Convention is broader than the NY Convention in that the only grounds it provides for to permit refusal to enforce an arbitral award is violation of public policy. Another important closely-related convention is the 1983 Convention on Judicial Cooperation Between States of the Arab League, the so-called "Riyadh Convention" of 1983 (opened for signature 6 April 1983 and in force since 1993, signed by Iraq, Jordan, Libya, Syria, Tunisia and Yemen.

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The primary foundation for the international enforceability of arbitral decisions and awards is found in the New York Convention of 1958 and, in particular, in Article III[9] of that convention, with its pronunciation that:

> "Each 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, under the conditions laid down in the following articles. ..."

With more than 139 countries as signatories,[10] the New York Convention is the leading international convention relating to the enforcement of arbitral awards. Its various provisions have been the subject of more than 1,000 national court decisions which have generally supported the applicability of the convention.[11] Indeed, it has been called a convention which "perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law."[12]

The New York Convention is based on the dual principles that "Contracting States" should recognize: (a) the validity and enforceability of agreements to arbitrate issues that are capable of being settled by arbitration;[13] as well as (b) the decisions/awards of foreign arbiters.[14] Furthermore, the Convention broadly states that when a court is made aware of an issue within its jurisdiction but which is nevertheless the subject of a valid arbitration agreement that is capable of being performed, then it shall (at the request of one of the parties) "refer the parties to arbitration."[15]

3. Grounds to Refuse Recognition of Validity & Enforceability of Arbitration Agreements

The New York Convention also establishes the minimum requirements that must be present in an arbitration agreement for a "Contracting State" to be required to recognize the agreement's validity and enforceability. However, just because an arbitral agreement does not comply with these requirements does not necessarily mean that that agreement is invalid. To the contrary, courts are not duty bound to reject the validity and enforceability of those arbitration agreements that do not comply with these requirements.

The foremost of the minimum requirements specified by the New York Convention for an arbitration agreement to be valid is that the agreement be "in writing."[16]

What this means exactly has been a source of debate. Obviously, oral agreements and contracts formed purely by conduct do not fall within its provisions.[17] But how formal does the writing have to be? Well, evidently, not very formal, for Article II(2) makes it clear that the agreement does not even necessarily have to be found in one document but that it can be deduced from exchanges of letters and telegrams.

Indeed, some jurisdictions, such as Switzerland,[18] England[19] and Belgium,[20] have gone even further in

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9. Article III reads, in full:

"Each 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, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

10. For complete list of signatory countries to the New York Convention of 1958, see *http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.*

11. See Yearbook: Commercial Arbitration, vols. 1-36.

12. Mustil, 6 Journal of International Arbitration 43.

13. See Article II of the Convention.

14. See Article III of the Convention.

15. See Article II(3).

16. Art. II reads:

"1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contact or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a manner in respect of which the parties have made an agreement within the meaning of this article at the request of one of the parties, refer the parties to arbitration unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

17. See, for example, *Smal v. Goldroyce,* [1994] 2 HRC 526 (Hong Kong).

18. See Art. 178 of the Swiss Federal Private International Law Act of 1987 ("... the arbitration agreement shall be valid if it is made in writing, by telegram, telex, telecopier, or any other means of communication that establishes the terms of the agreement by a text."). An English-language text (provided by Umbricht Attorneys, Zurich, Switzerland) is available at *http://www.umbricht.ch.pdf.SwissPIL.pdf.*

19. See Section 5 of the Arbitration Act of 1996 that permits the agreement to be made by an act which is not in writing as long as it is confirmed, noted or somehow memorialized in writing.

20. See Bugerlijke Rechtbank to Brugge, January 15, 2001, Rechtskundig Weekblad 2003-2004, pages 591-592.

liberalizing the form requirements for what may be considered as "agreement in writing" by extending the provisions of the convention to include agreements that have been established through a conclusive action, such as the shipping of goods, and not through "a writing."

In a further twist, under a theory called the "Unified Contractual Scheme," the presence of an arbitration clause in one contract can be relied on as a basis to extend arbitral jurisdiction to disputes between the same parties over other agreements involving the same project.[21]

4. Grounds to Refuse Recognition and Enforcement of Arbitral Decisions and Awards

As with the arbitration agreements themselves, courts are not duty bound to recognize/enforce each and every arbitration decision/award that has been issued by arbiters.

To the contrary, the duty to recognize and enforce arbitral awards is limited to those decisions/awards issued by arbitral panels whose jurisdiction was based on an arbitration agreement that falls under the provisions of the New York Convention. Courts can decide on their own to recognize and enforce other arbitral awards as they see fit.

In this regard, Article III of the New York Convention specifies that the duty to enforce orders and awards is subject to the applicant fulfilling the conditions of "the following articles.," including the administrative requirements of Article IV and the arbitration procedure itself fulfilling the substantive the conditions of Article V.

Article V of the New York Convention specifies seven grounds upon which a court is permitted to refuse to recognize and enforce arbitral judgments and awards. However, it is again noted that a court is not required to refuse such recognition and/or enforcement. Further, in practice, the requirements applied have been those of the enforcing court and not those of the seat of the arbitration. Thus, while a requirement may not be fulfilled in the seat of arbitration, an enforcing court may deem it so fulfilled and enforce the arbiters award.[22]

A. Incapacity of Parties/Invalidity of Agreement

The first of the grounds upon which a court is permitted to refuse to recognize and enforce arbitral awards, set forth in Article V(1)(a), is the incapacity of the parties or invalidity of the agreement.

In regards, as it applies to "incapacity," what is being spoken of here are those traditional factors which limit a party's ability to validly contract. Examples are the age or sanity of a contracting party that can negatively impact on a party's ability to contract. In such cases, the relevant provisions provide that such a determination of incapacity should be made according to the law applicable to the parties.[23] Another example is the inability of certain states to contract to make themselves subject to the decisions and awards of arbiters.[24]

Similarly, the determination of validity of the agreement is to be made under the law to which the parties have chosen for it in the agreement or, failing any indication thereon, under the law of the country where the award was made.

B. Lack of Fair Opportunity to be Heard

The second of the grounds upon which a court is permitted to refuse to recognize and enforce arbitral awards is the lack of fair opportunity for one or more of the parties to be heard.

This requirement that a party have a fair opportunity to be heard is set forth in Article V(1)(b)[25] wherein it is stated that recognition that enforcement may be refused in the event that the person "...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."

In this regard, it is noted that a party's failure to appear before the arbitral tribunal, does not give

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21. See *Southern Pacific Properties, Ltd. v. Arab Republic of Egypt*, ICC Case No. 3493 (16 February 1983) in Collection of Arbitral Awards 1974-1985 at 124, 128 (Kluwer, 1990).

22. *See Chromalloy Aerosciences, Inc. v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C., 1976); *Société Unichips Finanziaria v. Gesnouin* (1993) Cour d'appel de Paris (1re Ch. Suppl.) 12 February. 1993; and *Société Hilmarton v. Société OTV*, Cass. Civ. 1re, 1994 Rev. Arb. At 327-328 (23 March 1994).

23. Article V(1)(a) states that:

"(a) The parties to the agreement referred to in article II 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; ..."

24. Some laws hold, for example, that a State does not have the capacity to arbitrate. See Article 177(2) of the Swiss Federal Private Law Act of 18 December 1987, as amended 1 July 2004.

25. Article V(I)(b) states that:

"(b) 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; ..."

grounds for a claim that that party did not have an opportunity to be heard if the non-appearing party was duly notified of the arbitration and of every step during the arbitration and was also notified of the award.

C. Lack of "Indirect Jurisdiction"

The third of the grounds specified in Artical V upon which a court is permitted to refuse to recognize an arbitral award is if it is an award that is in excess of the scope of the submission to arbitration.[26]

This grounds is sometimes referred to in the literature as "indirect jurisdiction." It means that awards involving disputes over which the arbitration agreement does not give the arbitration panel jurisdiction provides grounds for a court to refuse to enforce the arbitral award. Thus, a court may refuse to recognize or enforce awards on disputes that were neither contemplated by, nor falling within, the terms of the submission to arbitration, or which contain decisions on matters beyond the scope of the submission to arbitration.

It is to be noted that even if a part of the arbitration award may be invalid, the Convention nonetheless does what it can to keep as much of the arbitration as possible by specifying 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 recognised and enforced."[27]

D. Deficiencies in Arbitral Tribunal/Procedure

The fourth of the grounds specified in Article V upon which a court is permitted to refuse to recognize or enforce an arbitral award is an improper composition of the arbitral tribunal or the arbitral procedure.[28]

In this regard, it is specified that the procedure and composition have to be in accordance to the agreement or, failing such agreement, in the law of the country where the arbitration taking place. For example, if an arbitrator turns out not to be impartial or neutral, then it cannot be said that the composition of the arbitral tribunal was proper. In another example, if an arbitrator has improperly refused to accept evidence or refuse to hear a particular party, then it cannot be said that the arbitral procedure was proper.

In other words, what this requirement does is to allow the courts to refuse to recognize and enforcement arbitral awards that were made without appropriate procedural due process.

E. Lack of Finality of Award

The fifth of the grounds specified in Article V upon which a court is permitted to refuse to recognize and enforce an arbitral award is when the award is either not yet binding or is no longer binding or has been stayed.[29]

This ground is based on the concept that courts are only bound to enforce binding judgments.[30] Courts are not required to recognize and enforce judgments that are subject to change, as shall be discussed in more detail later. Under the Convention, an award is considered as being binding when no further arbitral appeals are available.[31]

In this regard, it is noted that, normally, awards and orders that are either of a procedural nature or are interlocutory in character are not considered as being binding. This is because such awards and orders only apply during the pendency of the arbitration proceeding and/or can be subsequently changed by the arbiter(s). Hence, according to the provisions of the New York Convention, such orders/awards are not enforceable.

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26. See Article V(1)(c). Article V(1)(c) recites that:

"(c) 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; ..."

27. Art. V(1)(c)

28. See Article V(1)(d). Article V(1)(d) recites that:

"(d) 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; ..."

29. See Article V(1)(e). Article V(1)(e) recites that:

"(e) 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."

30. It is noted that the language contained within the provisions of the Geneva Convention of 1961 specified that the judgments had to be "final judgments" but such language does not appear in the New York Convention.

31. See Joseph T. McLaughlin, *Enforcement of Arbitral Awards under the New York Convention: Practice in U.S. Courts*, INTERNATIONAL COMMERCIAL ARBITRATION at 275, 300 (1988). United States courts have held that the phrase "final and binding" means "... that the issues joined and resolved in the arbitration may not be tried de novo in any court.", *M&C Corp. v. Erwin Behr, GmbH & Co.*, 87 F.3d 844, 847 (6th Circuit, 1996).

Some courts have rather mechanistically held that orders that are characterized as "interim orders" are not enforceable for those same grounds. However, the Convention does not preclude the recognition and enforcement of partial awards, meaning awards in which part of the dispute is finally resolved.[32]

Further, courts are permitted to look beyond the mere formulation of the wording of the order to its substance to determine if indeed it is really a "binding" award.[33] Accordingly, one should be aware that orders which are characterized as an "interim order" may fall in a "gray area" as to enforceability, and the tendency now is to consider them as being enforceable (U.S. courts are now increasingly taking this view).[34]

F. Lack of Subject Matter Jurisdiction

The sixth of the grounds specified in Article V of the New York Convention upon which a court is permitted to refuse to recognize is that which is sometimes referred to as lack of "subject matter" jurisdiction.

Lack of subject matter jurisdiction can be said to occur when the subject matter of the dispute is not capable of settlement by arbitration under the law of the enforcing country.[35] In other words, to be enforceable, even though the subject matter of the dispute may have been arbitral in the country where the arbitration took place and/or under the laws of the country which governed the subject matter of the dispute, the arbitration panel must also have had the jurisdiction over the subject matter of the dispute according to the laws of the enforcing country. If not, the court of the enforcing country may refuse to enforce the arbitral awards and orders.

Primary examples of types of disputes in the intellectual property field that raise jurisdictional questions are those concerning patent, designs and trademark validity.[36] In this regard, some jurisdictions do not consider disputes concerning patent or trademark or designs validity to be arbitral based on the theory that validity is a governmental decision and cannot order the government to declare a patent/trademark to be invalid. Notable among such jurisdictions are France[37] and China.[38] In such jurisdictions, an arbitral decision concerning validity is not considered as being enforceable, regardless if it was rendered by an arbitration panel sitting in a country where patent validity can be arbitrated and deciding the case in accordance with the law of a country where patent validity may be arbitrated.[39]

G. Contrary to Public Policy

The seventh of the grounds specified in Article V, and perhaps the most common as well as controversial of all grounds which may be relied upon by courts for refusing to enforce the awards of tribunals, is that recognition or enforcement of the award would be contrary to public policy.[40]

This "public policy exception" provides a means whereby a court of an enforcement country can refuse to recognize judgments or enforce awards that are repugnant to its fundamental principles (it's public policy).[41] This is the case even if the arbitral procedure and award are not contrary to the public policy of the country in which the arbitration took place. In this regard, it is important to note that the

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32. Van den Berg, Albert, "The New-York Convention: Summary of Court Decisions" in (1996) ASA Special Series No. 9 p. 46, 58.

33. See, for example, Resort Condominiums International inc. v. Bolwell and another, (1993) 118 ALR 655 (Lexis).

34. See, for example, *Publicis Commun v. True North Communs Inc.* 206 F.3d 725 (7th Cir. III.2000).

35. See Article V(2)(a). Article V(2)(a) recites that:

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; ..."

36. See Smith, M.A., et al., "Arbitration of Patent Infringement and Validity Issues Worldwide", *Harvard Journal of Law & Technology*, Volume 19, Number 2 Spring 2006.

37. French Code Civile Art. 6.

38. See Arbitration Law of the People's Republic of China, Art. 3(2), 6 P.R.C. LAWS 91, (Effective 1995) (disallowing arbitration of administrative disputes). An English-language text of the Chinese Arbitration Law is *available* at *http://www.cietac.org.cn/english/laws/laws_5.htm*; and the Law of Civil Procedure of the People's Republic of China (as adopted by the Fourth Session of the Seventh National People's Congress on 9 April 1991) Art. 217(2) and 260(4), 4 P.R.C. LAWS 183 (Effective 1991) (disallowing enforcement of illegal arbitral awards). An English-language text of the Chinese Arbitration Law is available at *http://www.cietac.org.cn/english/laws/laws_11.htm.*

39. Contrast this situation with 35 U.S.C. §§135(d), 294 (2000) wherein United States law provides an explicit statutory approval for patent arbitration.

40. See Article V(2)(b). Article V(2)(b) recites that:

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

41. See, for example, *Parsons & Whittemore Overseas Co. Inc. v. Societe Generale de l'Industrie du Papier*, 508 F 2d 969, 973-974 (2nd Cir, 1974) (USA) and *Deutsche Schachtbau und Tiefbonhrgesellschaft mbH v. R'as Al Khaimah National Oil Co. & Shell International Petroleum Co. Ltd.* [1987] 2 Lloyd's Rep 246, 254 (England) (DST v Rakoil).

public policy considerations to apply are those of the seat of the recognition court and not those of the seat of the arbitration.

As was noted above, the public policy exception is perhaps the most controversial of grounds provided for in the New York Convention and has been the subject of numerous court decisions and scholarly treatises. A full and detailed discussion of this exception is not possible here, being beyond the scope of this note.

5. Procedural Enforcement Requirements

Assuming that the arbitral procedure, judgment and award are all enforceable, in order to enforce your arbitral award/order, you will still need to jump through various administrative and procedural hoops.

The first of these hoops is to submit a duly authenticated original or a duly certified copy of the original arbitration agreement.[42] In this regard, notarizations must be accompanied by the Hague Apostille in those countries where the Hague Convention applies. Further, notarization, supra-legalization and consularization by the competent consulate of the enforcing country must be obtained.[43]

A second of these hoops is that a translation of the documents entered into during the arbitration will need to be submitted the court in the official language of the jurisdiction.[44] This translation must either be provided by an official translator or accompanied by a translator's attestation.[45]

A third of these hoops is the submission of an original or a certified copy of the award.[46] Once again, notarization of such copies must be accompanied by the Hague Apostille in those countries where the Hague Convention applies and notarization, supra-legalization and consularization by the competent consulate of the enforcing country must be obtained.[47]

A fourth requirement in those cases where recognition and judgment is being sought for an arbitration award granted due to a party's failure to appear before the arbitral tribunal, is the evidence that proves that a non-appearing party was duly notified of the arbitration, of every step during the arbitration and was also notified of the award.[48]

Even upon clearing of these four hoops, enforceability is still subject to the forum countries rules. There are also likely other local requirements that will need to be addressed on an enforcement country-by-enforcement country basis. For these, one must engage competent legal counsel in the country in question.

6. Conclusion

Thus, one can see that an arbitral award that is enforceable in one country may not be enforceable in every country. Further, in those countries where arbitral awards and orders can be and are commonly enforced, you will nonetheless need to jump through some hoops to do secure enforcement. While these hoops are, theoretically at least, not difficult to achieve, one nonetheless needs to be ready to do what is needed to clear them if you wish to enforce your arbitration award. ■

42. See Article IV(1)(a).
43. See Article IV(2).
44. See Article IV(2).
45. Ibid.
46. See Article IV(1)(b).
47. See Article IV(2).
48. See Article V(1)(b).