Is it true that enforcing an international arbitral award under the New York Convention is easier than enforcing a judgment?

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Report on Arbitration Committee session at the 2019 IBA Annual Conference in Seoul

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Chair
Alexander Fessas  *ICC International Court of Arbitration, Paris*

Speakers
Yoko Maeda  *City-Yuwa Partners, Tokyo*

Fabiano Robalinho  *Sergio Bermudes Advogados, Rio de Janeiro*

May Tai  *Herbert Smith Freehills, Hong Kong SAR*

Philippe Pinsolle  *Quinn Emanuel Urquhart & Sullivan, LLP, Geneva*

Sara Koleilat-Aranjo  *Al Tamimi & Co, Dubai*

Alexander Fessas led the panellists of this session on what he called ‘an infernal gallop’ through a diverse array of topics relating to the enforcement of foreign arbitral awards and foreign court judgments. The panel discussion commenced with an exploration of the successes and limitations of the New York Convention. The panellists then engaged in an analysis of the ‘best and worst’ of arbitral award and judgment recognition and enforcement on a country-by-country basis. This was followed by an assessment of the rise of international commercial courts, a discussion of the new Hague Judgments Convention and a dialogue on unique aspects of enforcement relating to *International Centre for Settlement of Investment Disputes* (ICSID) Convention awards.
Why has the New York Convention been so successful?

Philippe Pinsolle offered two primary reasons for the success of the New York Convention:

even though it is 61 years old, the New York Convention is extremely modern in its underlying concepts and, more importantly, the New York Convention is simple. It is short and one can easily understand its goals. Fabiano Robalinho added that, in addition to simplicity, the other main factors of success for the New York Convention are its efficiency and predictability. It fulfils the needs and demands of international business and satisfies the demands of society.

Limits to the success of the New York Convention

**Reservations – reciprocity and commercial reservations to the New York Convention**

Sara Koleilat-Aranjo, Yoko Maeda and May Tai explored the impact of reservations on enforcement in their jurisdictions. The two main reservations are the commercial reservation – which allows a state to limit the type of awards that would fall within the ambit of the Convention to those involving commercial disputes – and the reciprocity reservation, which allows a state to refuse jurisdiction if the award was not made in the territory of a party to the New York Convention.

Koleilat-Aranjo noted first that, while the Middle East is not known to be very ‘easy’ with enforcement, half of the 15 Middle East states who have become parties to the New York Convention have done so without making any reservations, including her home jurisdiction of the United Arab Emirates. However, while there are no reservations in theory, in practice the attitude of the courts has been somewhat conservative. For example, despite the absence of a reciprocity reservation in the UAE’s adoption of the New York Convention, UAE courts in certain cases have essentially made reciprocity a condition of enforcement (but these are considered outliers). Along these lines, Fessas offered an example of an ICC case where the court of appeal in a UAE enforcement proceeding requested proof that the United Kingdom had acceded to the New York Convention and refused to enforce the award until that proof was furnished.

Next, Maeda and Tai touched upon the situation in Japan and China, as Japan has adopted the reciprocity reservation and China has adopted both the commercial reservation and the reciprocity reservation. Maeda observed that there has not been any negative impact as a result of Japan’s reservation. Tai stated that the China situation with regard to both the commercial and reciprocity reservations is very stable. Interestingly, Chinese state-owned enterprises have thus far not commonly used the commercial reservation as a defence in relation to New York Convention enforcement. Robalinho later commented that, in practice, the reciprocity reservation generates little effect because parties can easily get around it by agreeing, in the first place, to a seat in a state that is a party to the New York Convention.

**Additional limits through legislation to implement the New York Convention or stumbling blocks created through the operation of case law**

Pinsolle said that courts sometimes make enforcement almost impossible by relying on the public policy exception or the validity of the arbitration agreement provision (as the New York Convention adopts a system where there is a governing law to the arbitration agreement, which is slightly dated in some views).

For example, enforcing judges in Indonesia and elsewhere have found that, even though the seat is in Switzerland, their law governs the arbitration agreement and it is void. However, Pinsolle pointed out that if a court applies the New York Convention in a way that is legally wrong, it runs the risk of breaching the...
Convention. Robalinho commented that any treaty runs the risk of not being complied with, and it ultimately depends on the willingness of courts to comply and their interpretation of the treaty provisions.

Best and worst in terms of award enforcement

**Japan**

Maeda explained that Japanese courts rarely set aside awards or refuse enforcement. However, she noted that this is based on a limited sample size as there are few reported decisions on enforcement before Japanese courts.

**Thailand**

Maeda recounted an episode of an award rendered in 2013 in Singapore that was the subject of enforcement proceedings in Thailand. While the Supreme Court of Thailand ultimately decided to enforce the arbitration award in 2018 because part of the award was non-monetary in nature and domestic legal authorities have resisted necessary steps for enforcement, the process to enforce is still ongoing.

**China**

Tai cited the ‘reporting system’ as one of the celebrated best practices of China. The reporting system requires that any decision at the court of first instance (the intermediate court) in which enforcement of an award is refused is automatically appealed to the higher court. If that court also decides to refuse enforcement, then there is another automatic appeal to the Supreme Court. By contrast, if a court decides to grant enforcement, there is no automatic appeal.

According to Tai, the reporting system is good because it guarantees a consistent way of approaching enforcement cases. It also provides helpful guidance from the upper courts to lower courts about what to do in enforcement cases, which is important considering the vastness of China and the sheer number of courts. Another recent positive development is that courts are now required to provide reasons if they decide to refuse enforcement, which also helps with judges’ learning efforts across China. In a recent study of 81 applications for enforcement in China from 2015 to 2017, only seven awards were refused or partially refused enforcement, either on grounds of lack of an arbitration agreement or because the tribunal was found to have gone outside the scope of its jurisdiction.

On a less positive note, Tai remarked that parties can encounter judges who are not as familiar with arbitration and the New York Convention. This is because there are so many Chinese courts and there is no funneling of arbitration cases to judges experienced in arbitration-related issues (as in Singapore and some other jurisdictions). This can result in delays and other challenges.

**Hong Kong**

Tai observed that Hong Kong’s courts will do almost anything to uphold their reputation for being enforcement-friendly. In the face of applications to set aside or efforts to resist enforcement, judges will render judgments saying that enforcement is a very ‘mechanical’ process, and the judge will not look behind the scenes to see whether everything was done properly by the tribunal. The latest statistics, from 2017, reflect
that out of 34 cases in which enforcement was applied for, parties only attempted to resist enforcement in two of those cases, and neither of those two was successful. One of the reasons for this, Tai observed, was that Hong Kong judges can award costs on an indemnity basis, which boosts voluntary compliance.

On the less positive side, Hong Kong operates an absolute immunity on enforcement policy like mainland China, which contrasts with many jurisdictions where more restrictive immunity applies. Thus, even if there is an arbitration agreement and a party gets an award in its favour, the award debtor in theory may say it is not going to comply because it is part of the sovereign and it has sovereign immunity. This could be a huge problem, considering how many state-owned commercial entities there are in China. However, Tai said that the actual situation is not as much of a problem as generally perceived because China has been restrained in declaring that companies have the benefit of immunity. As a matter of domestic law and in terms of immunity, Chinese state-owned entities are treated as operating commercial businesses even though they are state-owned.

**United Arab Emirates**

Koleilat-Aranjo first described the three stages of the UAE’s arbitration law history:

- before the UAE acceded to the New York Convention in 2006;
- the period from 2006 to the enactment of the Federal Arbitration Law in 2018; and
- from 2018 to the present.

Before the UAE’s accession to the New York Convention, the UAE’s legal regime for enforcement of arbitral awards was outdated, subjecting judgments and arbitral awards to the same regime. Enforcement of foreign arbitral awards was subject to a requirement of double exequatur, something that the New York Convention has abrogated. Also, UAE courts would not enforce an award or foreign judgment if UAE courts would have jurisdiction over the matter anyway, even if the parties had chosen to have the dispute seated abroad.

After accession to the New York Convention, Article 238 of the Civil Procedure Code now provides that treaties supersede national internal laws and regulations. This had the effect of expediting the enforcement process for foreign arbitral awards and had an overall positive impact. However, observed Koleilat-Aranjo, the attitude of the courts still was not completely aligned with the nature and spirit of the New York Convention. The first enforcement decision after accession, issued in 2010, was a positive decision that reconfirmed the UAE’s duty to comply with its international obligations. However, the process itself was very costly with the requirement of filing a full-fledged case before the court of first instance at a cost of around $11,000. Then, if an appeal was filed, it had suspensive effect and the award creditor could not proceed with the enforcement during the period of the appeal.

With the enactment of the UAE Arbitration Law in 2018, there was a period of six months where many practitioners were uncertain as to whether the law applied to the enforcement of foreign awards given the absence of express provisions in the law regarding that issue. There were a few decisions relating to the enforcement of foreign arbitral awards using the new arbitration law.

In December 2018, Cabinet Resolution No. 57 of 2018 was promulgated by the UAE government giving legal effect to the executive regulations of the Civil Procedure Law of 1992. These regulations expressly indicate that the regime for foreign and domestic arbitral award enforcement is different. This was a welcome change in terms of best practice, because, an award creditor no longer has to file a full-fledged case before the court for the purpose of filing an application to enforce. Instead, the award creditor merely has to file an application
seeking an order from the execution judge (thus changing the forum). This has resulted in the fee for an initial enforcement action being reduced from $11,000 to $80. Also, the executive regulations mandate that the judge has a duty to render a decision in three days. Although this short time limit has not been met in practice, the average is only about three weeks, and appealing such a decision does not suspend enforcement. In Koleilat-Aranjo’s view, the overall picture now is extremely positive.

France

Pinsolle explained that the regime for recognition and enforcement of arbitral awards in France is favourable, albeit with one caveat: state immunities.

The regime has two steps: exequatur and recognition, which go together (which are arbitration-specific), and enforcement itself, which is about which assets you can seize and freeze (which is not arbitration-specific). For court judgments, the parties go directly to enforcement, so there is no first step. This may seem simpler but it is not. The benefit of the first step is that there is a centralised, consistent and predictable process for arbitral awards as parties appear before a specialised court, the Paris Court of Appeal (now comprised of both international and traditional chambers), and involving one of the handful of judges who handle arbitral award enforcement matters.

For more than 40 years, awards have not been enforced under the New York Convention, because the local law is more favourable, Pinsolle said. The first stage is exequatur, which is granted in 99.97 per cent of cases because it is ex parte and the standard is that the award is not ‘manifestly in contradiction with public policy’. All the litigation takes place on appeal. Refusing recognition is based on the same grounds as those for setting aside an award. The five grounds are:

• jurisdiction;
• due process;
• complying with the mandate conferred upon the tribunal;
• proper constitution of the tribunal; and
• international public policy (which is a very high threshold).

There are not many cases where recognition is refused, and usually only if:

• there is a problem with an arbitrator’s independence or constitution of the tribunal; or
• there are issues related to the arbitration agreement and jurisdiction (but these are very rare).

With regard to enforcement, the process can be either fairly easy if dealing with a private party or not so easy if dealing with a state party. If one has an award against a private party, even before exequatur, one can freeze assets – making enforcement fairly easy. By contrast, the situation can be more difficult with state parties. In 2000, the Supreme Court decided that a state entering into an ICC arbitration agreement waives its immunity from execution (Creighton v Qatar); however, that decision was not followed and, after the Yukos decision, the law changed with the so-called Sapin II Law. As a result, now it is quite difficult to enforce against states in France as it requires:

• obtaining permission from a court to seize anything; and
• an express waiver from the state, which is difficult to obtain.

**Brazil**

Robalinho noted that the recognition and enforcement process is free for both arbitral awards and court judgments. The rules are the same for arbitral awards and court judgments unless the New York Convention applies. Brazil adopts a system of recognition that is concentrated on the top tier of the judiciary, which essentially eliminates concerns about appeals. It also generates stability and certainty in terms of precedents. It is a controlled process in one chamber of one court. You can also request during the recognition and enforcement process that the award be enforced, and interim measures are available to achieve this.

One disadvantage is that recognition and enforcement cases might be lengthy. Most cases are fast and take less than one year. More complex cases can take up to 18 months or two years.

For recognition of court judgments, Brazil is also a favourable jurisdiction. Since 2015, Brazilian law has expressly provided that there is no requirement of reciprocity. From 2005 to the present, there have been around 100 cases in which parties have sought recognition and enforcement of arbitral awards; of these, eight have been denied. Of these eight cases, four were related to evidence of the parties’ agreement to arbitrate – whether the parties had expressed willingness to submit to arbitration. One of the others was related to an award that had been set aside in Argentina because the award had no efficacy in its state of origin.

**The rise of commercial courts**

**France**

Pinsolle examined developments related to two international commercial courts in France, the modernised International Chamber of the Paris Commercial Court and the new International Chamber of the Paris Court of Appeal. At these courts, parties may submit documentary evidence in English directly, briefs may be submitted in English but also must be submitted in French, and a decision will be rendered in English and French (but the French version will govern).

At least before the Paris Court of Appeal, there is a procedural protocol that enables a procedure that is closer to what is seen in arbitration, with cross-examination of witnesses, experts, etc., and the parties can decide whether to adopt that protocol or use the traditional format.

In Pinsolle’s view, although the system is new, it is working well. Nonetheless, the new system will not impact recognition and enforcement because it is simply applicable to the first step (recognition) and does not allow parties to seize state assets or other assets more easily than before.

**Singapore**

Tai opined that it is difficult for courts to shake the perception that if you go to a particular court it is because the dispute has something to do with that jurisdiction. The Singapore International Commercial Court is a good example of a court that has tried to address this challenge head-on by appointing international judge (amongst other things) and working in parallel to ensure that court judgments rendered in Singapore will be recognised elsewhere.

China

Tai also discussed the establishment in 2018 of the Chinese International Commercial Court. It is less supranational than the Singapore International Commercial Court – the language of the proceedings still must be Chinese (although there are some more favorable rules about translation of evidence) and the bench for the court is still all Chinese-qualified judges. Her personal view is that this is more of an extension of the local court system to deal with larger disputes that have some cross-border element.

United Arab Emirates

Koleilat-Aranjo explained the rather unusual situation available in the UAE of dual fora for disputes – the ‘onshore’ mainland UAE courts and the ‘offshore’ UAE courts. The two free zones in which the offshore courts reside are the Dubai International Financial Centre and the Abu Dhabi Global Market. These are independent legal jurisdictions that enjoy an independence in relation to civil and commercial matters. They have their own courts, which are English language courts that apply common law. The rationale for creating these courts was to attract international investments.

Because there were hurdles to the enforcement of awards in onshore UAE courts, the trend has been to seek recognition and enforcement first in the offshore court – even if no nexus existed with the offshore free zone – and then to use the offshore court’s judgment and seek the enforcement/execution of the judgment in the onshore courts.

This so-called ‘conduit jurisdiction’ was more or less the loophole that parties would use to enable award enforcement. This created a conflict of both jurisdictions and laws because the UAE is a civil law jurisdiction and the courts in the UAE are Arabic language courts. These discrepancies led, in 2016, to the creation of a joint judicial tribunal that was tasked with resolving conflicts of jurisdiction and conflicts of law issues. In its first decision, it found that for onshore-seated arbitrations, parties are no longer allowed to commence recognition and enforcement actions in the offshore jurisdiction. Ultimately, the UAE is signalling an end to this use of conduit jurisdiction. Fessas remarked that this is an example of how ‘polyphony can lead to cacophony’.

Harmonisation efforts

Fessas transitioned the panel into a discussion of states’ efforts to harmonise the law on court judgment enforcement. He noted the Brussels Convention and the Brussels Regulation within the EU, the Gulf Cooperation Council (GCC) Convention and the Riyadh Convention within the MENA region. Asia is one notable area in the world where harmonisation has not been significantly attempted or achieved. On a more global scale, the efforts of the Hague Convention on Private International Law resulted in the Choice of Courts Convention, which was concluded in 2005 but has had only limited success. Then, in July 2019, the Hague Judgments Convention was concluded and opened for signing.

Robalinho explained that the process for concluding the Hague Judgments Convention involved almost 200 years of discussions. Still, the question remains of whether numerous states will ratify it. He said disputes lawyers should be aware that the Judgments Convention is intended to be a competitor to the New York Convention. The idea is exactly the same – to create a stable, simple efficient way for court judgments to travel around the world. For example, Article 4(1) of the Judgments Convention, recognition or enforcement may be refused only on the grounds specified in this convention, which are exactly the same terms used in Article 5 of the New York Convention.
According to Robalinho, if ratified on a large scale, the Judgments Convention would result in a huge advance because the complexity of international commercial transactions and especially in international financial structures has increased, and companies now face the possibility of multiple complex disputes in different jurisdictions. In the case of Brazil, Petrobras has faced one of the largest corruption scandals in the world and this has resulted in dispute proceedings in at least four jurisdictions. This raises questions about how parties can co-ordinate such proceedings and prepare for recognition and enforcement. Ultimately, jurisdictions will need to position themselves as being favourable environments for judgment enforcement if they want to remain competitive for legal disputes work.

Fessas remarked that the timing of the conclusion of the Judgments Convention and the Singapore Mediation Convention – coming within roughly a month of each other – is interesting as they are both seen as competing against the New York Convention. He asked Robalinho whether he was optimistic that something good will come out of the Judgments Convention in terms of ratification expectations. Robalinho expressed his view that, in the same way there was a demand that the New York Convention came to fill, the Judgments Convention will fill a demand and many countries are eager for a legal instrument such as this one, and he is hopeful that many countries will ratify it. He also stressed that arbitration practitioners should pay attention to the future effect that the Judgments Convention might have on arbitration.

Enforcement of ICSID Convention Awards versus New York Convention Awards

Pinsolle said that for final awards (after completing the annulment process, if any), Article 54 of the ICSID Convention provides that they are to be treated the same as a final court judgment of last instance, but that is limited to pecuniary judgments. To the extent that an ICSID award asks a state to do something, there is no automaticity. This provision does not take care of the immunities. This is where the difficulties begin, depending on the jurisdiction in which enforcement is sought.

Robalinho explained that for states that are not parties to the ICSID Convention, like Brazil, public entities usually enter into arbitration agreements through commercial contracts. Fessas noted that this is a trend elsewhere in Latin America.

Koleilat-Aranjo explained that the UAE has been an ICSID Convention party since 1982, well before it acceded to the New York Convention, but it has not adopted domestic law mechanisms for the enforcement of ICSID awards. Thus, it is not necessarily fully ‘in’ due to its lack of a domestic enforcement mechanism. Notably, though, there have not been any tests and no practical need for such a mechanism. Koleilat-Aranjo also remarked that the potential for negative publicity relating to ICSID award enforcement difficulties naturally leads states to not want to impose any obstacles to enforcement.

Fessas posed the question of whether investor-state dispute settlement (ISDS) reform would actually change in terms of the enforcement challenges of the current system. Maeda highlighted the commonly cited complaints about how the ISDS system currently operates and noted that reform efforts are underway because of these complaints, including in Europe with its adoption of an investment court system. She said Japan is skeptical about the idea of an investment court and remains supportive of ISDS. Japan is a party to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, for which a typical ISDS clause is included. On the other hand, in the recently enacted Japan-EU free trade agreement, there is no ISDS clause because Japan and the EU could not reach agreement as to whether to use traditional ISDS or an investment court system.

Tai said that China is pretty lucky in the sense that there have been no awards brought against China for enforcement so far. On the issue of ISDS reform, her personal view is that there are some things that could work better, but we should not ditch the current dispute resolution system without first finding a better alternative.
Conclusion

The panellists of this session covered a diverse range of topics and jurisdictions, leaving the audience with much to bear in mind when it comes to award enforcement. The consensus clearly remains that enforcement of New York Convention arbitral awards is easier in most circumstances than enforcement of foreign court judgments, though practitioners will need to keep informed on the developments related to the Hague Judgments Convention.

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