

Linklaters



Cross-Border Guide

Arbitration-Related Court Proceedings – April 2023

Introduction

Starting with interim measures, passing through setting aside actions and going all the way to both domestic and international enforcement efforts, arbitration-related court proceedings often have a significant impact during an arbitration, and beyond it.

National courts play a fundamental role in how arbitral proceedings are conducted and what the ultimate fate of the award resulting from them will be. Understanding the varying approaches among the various domestic legal frameworks and the municipal nuances and intricacies within them can be the difference between a smoothly-run and effective process and a cumbersome and potentially ineffective one.

Arguably, the main goal of parties involved in an arbitral proceeding is to obtain a final and enforceable decision in an efficient manner. This is true in both commercial and investment arbitration settings. Understanding the legal framework and the main traits of the systems in which such enforcement efforts will take place is key. This is also the case where the enforcement and execution of an arbitral award is sought in more than one jurisdiction. There, instruments such as the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and the ICSID Convention of 1965 stand out as two of the main pillars upon which the efficiency and international success of the system rest. But the global success and wide-spread adoption of these instruments must not take a party's focus away from the importance of domestic considerations.

Just as awards can be enforced, discontented parties may also wish to invoke grounds that could lead to a refusal of enforcement or may

wish to seek to have awards annulled or set aside. Although, by rule of thumb, it may be expected that national courts in most jurisdictions will exercise restraint when carrying out such review, no general “one size fits all” exists. In the vast majority of arbitral proceedings (with the notable exception of ICSID arbitration), the courts at the seat will constitute the most important layer of control over the arbitration and its outcome. Thus, being familiar with the grounds, knowing the approaches and understanding the local lenses through which national courts will review an award and the proceedings leading to it can have fundamental consequences for the survival of the award and, naturally, for its potential enforcement.

In this comparative review, we take a practical look at some of the most relevant questions that parties to arbitral proceedings have when it comes to the role that national courts may play in relation to arbitration. We examine, for example, in which context national courts will step in to provide support, the availability of interim relief (including anti-suit injunctions), what the approach of national courts may be in setting aside proceedings, how domestic and foreign awards are enforced, and how long setting aside proceedings and enforcement proceedings usually last.

This comparative review is intended to highlight some of the most relevant issues rather than to provide comprehensive advice. If you have any particular questions about arbitration-related court proceedings, please do not hesitate to reach out to the Linklaters lawyers with whom you work or to any of the Key Contacts listed below.

Key Legal Issues

What is the New York Convention?

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention (**NYC**), was adopted in New York and entered into force on 7 June 1958. The NYC, ratified by 172 Contracting States as of January 2023, is the key legal instruments governing the recognition and enforcement of foreign awards and the recognition by courts of the jurisdiction of arbitral tribunals over national courts in disputes arising under valid arbitration agreements.

Under the NYC, recognition and enforcement of an award may be refused on a limited number of grounds. Similarly, a party may seek annulment of an award only by invoking one of the grounds provided in an exhaustive list under Article V of the NYC.

The NYC aims to standardise, under Article II, the criteria for assessing the validity of arbitration agreements and referral by courts to international arbitration when seised with a request to hear a dispute involving an arbitration agreement. The arbitration agreement must be in writing and apply to all or specific differences that arise between the parties' contractual or non-contractual relationship, as long as the subject matter is arbitrable under the applicable law.

When seised to hear a dispute arising under such an agreement, the national court must decline jurisdiction in favour of arbitration unless the said agreement is null and void, inoperative or incapable of being performed.

The NYC also simplifies the procedure for obtaining recognition and enforcement of awards which enter its scope of application (**NYC awards**). A party seeking recognition and enforcement must submit the duly authenticated original award (or a certified copy thereof) and the original arbitration agreement (or certified copy thereof). If the documents are in a language other than the official language of the country where an application is filed, certified translations are required. After reviewing these formalities, the competent court will grant recognition and enforcement, unless any of the grounds of refusal listed in Article V apply. Under the NYC, the court has no power to review the merits of the arbitral award.

A party may seek to resist enforcement and recognition of an award only on the following enumerated grounds:

- > lack of legal capacity of the parties to the agreement or invalidity of the agreement under the law applicable to it (Article V.1(a));
- > improper notice of the arbitrator's appointment or of the arbitral proceedings, or lack of due process (Article V.1(b));

- > arbitral tribunal's lack of jurisdiction to address issues not falling within the scope of the arbitration agreement or request for arbitration (Article V.1(c));
- > improper constitution of the arbitral tribunal (Article V.1(d)); and
- > the award being set aside or suspended by a competent court at the seat of arbitration (Article V.1(e)), meaning that setting aside proceedings may only be brought before such court.

Under Article V.2(a)-(b), the court may refuse recognition and enforcement if it finds that, under its laws, the subject matter of the dispute is non-arbitrable, or recognition and enforcement would breach the country's public policy, for example in the presence of allegations of fraud or corruption. In some jurisdictions, such as France, the rules on recognition and enforcement are more favourable than those in the NYC, as the same formalities and grounds for annulment and refusal of recognition and enforcement would apply equally to NYC awards and to awards rendered in jurisdictions that have not ratified the NYC.

What is the 1965 ICSID Convention?

The International Centre for the Settlement of Investment Disputes (ICSID) was established as a branch of the World Bank in Washington under the ICSID Convention (or **Washington Convention**) which was signed on 18 March 1965 (in force on 14 October 1966). As of January 2023, the Washington Convention has 165 Signatory and Contracting States.

The ICSID was created to facilitate and promote foreign investments between its Member States. Its dispute resolution facility offers investors from Member States the possibility to resolve disputes relating to their investments by initiating international arbitration against the host state of their investment. Recourse to ICSID arbitration must be provided for in the applicable bilateral investment treaties entered into between the investor's home state and the host state.

In terms of recognition and enforcement of awards rendered in arbitrations before ICSID, by adhering to the Washington Convention, Member States agree to recognise an ICSID award as a judgment rendered by its national courts and to enforce it accordingly (Articles 53-54).

Key Legal Issues

The Washington Convention contains an autonomous mechanism allowing parties to seek revision (Article 51) or annulment of ICSID awards on specific grounds provided for in Article 52(1). If an award is annulled, the parties may file a new request for arbitration at ICSID in respect of the same dispute. The case would be heard by a newly constituted arbitral tribunal.

When an arbitral award rendered in investment arbitration proceedings is not rendered by an arbitral tribunal established under the ICSID Convention, investors may still benefit from the enforcement regime provided for by the NYC.

What is the UNCITRAL Model Law on Arbitration?

The UNCITRAL Model Law on International Commercial Arbitration (the **Model Law**) was adopted in 1985 and amended in 2006. The objective of the Model Law is to assist states in reforming and modernising their arbitration legislations and to work towards a harmonised legal framework for international arbitration. The Model Law provides a set of procedural rules drafted in simple and clear language governing all stages of arbitration, including actions available before national courts in support of arbitration, that may serve as a basis for a modernised arbitration law.

Under the Model Law, parties may seek the assistance of the national courts in various aspects of the arbitral process. In terms of interim relief, the courts may assist in the enforcement of interim measures ordered by an arbitral tribunal (Articles 17H-17I) and in the issuance of court-ordered interim measures (Article 17J). The parties may also seek the support of the courts in the taking of evidence (Article 27).

Once the award has been rendered, a party against whom an award is rendered may apply to set aside the award at the seat of arbitration on the following grounds:

- > lack of legal capacity of the parties to the arbitration agreement or invalidity of the said agreement (Article 34(2)(a)(i));
- > improper notice of the arbitrator's appointment or of the arbitral proceedings, or lack of due process (Article 34(2)(a)(ii));
- > arbitral tribunal's lack of jurisdiction to address issues not falling within the scope of the arbitration agreement or request for arbitration (Article 34(2)(a)(iii));
- > improper constitution of the arbitral tribunal (Article 34(2)(a)(iv)).

Under Articles 34(2)(b), the competent court may refuse recognition and enforcement if it finds that, under its laws, the subject matter of the dispute is non-arbitrable, or recognition and enforcement would breach the country's public policy.

Article 36 lists the grounds on which a court may refuse recognition or enforcement of *foreign awards* (i.e., awards issued in other jurisdictions). In addition to the grounds listed in Article 34(2)(a), a party may also challenge an award that was suspended or set aside by a court at the seat of arbitration.

To date, nearly 118 jurisdictions worldwide have adopted the Model Law or have arbitration laws based on the Model Law. These include Australia, Belgium, Canada, Hong Kong, Germany, Greece, Japan, Poland, Singapore, and the United Kingdom.

The role of the courts in institutional vs ad hoc arbitration

The role of the courts in facilitating arbitral proceedings varies from jurisdiction to jurisdiction. Most jurisdictions have implemented or adopted similar statutory provisions to the Model Law. Under the Model Law, the courts play a role in:

- > determining challenges on the appointment of arbitrators (Article 13);
- > deciding whether to terminate the mandate of an arbitrator (Article 14);
- > assisting with the recognition and enforcement of interim measures granted by the tribunal or issuing interim measures to the same effect (Articles 17H & 17J);
- > providing assistance in relation to the taking of evidence (Article 27);
- > determining applications to set aside arbitral awards (Article 34); and
- > recognising and enforcing arbitral awards (Article 35).

Whether the aforementioned provisions apply to both institutional and ad hoc arbitrations would largely be jurisdiction specific, although they would apply equally to both ad hoc and institutional arbitrations in the majority of jurisdictions.

Key Legal Issues

In an ad hoc arbitration, the parties would preferably specify certain procedures in the arbitration agreement in order to avoid uncertainty in case of disagreement on key procedural issues.

In case of disagreement on a procedural issue and in the absence of any applicable arbitration rules, the parties would have no other choice than to seise the national court at the seat of arbitration for assistance. Such actions may increase the duration and cost of the overall arbitration and may not necessarily lead to the desired outcome, depending on the applicable arbitration laws and the practices of the national courts.

The extent of powers exercised by national courts varies from one jurisdiction to another. For example: the French arbitration law empowers the “*judge acting in support of the arbitration*” to appoint arbitrators in ad hoc arbitration, resolve challenges to arbitrators, and extend procedural time limits. Meanwhile, under the Hong Kong Arbitration Ordinance, the Hong Kong International Arbitration Centre (HKIAC) has been designated to deal with any issues relating to the constitution of the tribunal in ad hoc arbitrations, whilst the Court retains the power in determining challenges on the appointment of arbitrators and on whether to terminate the mandate of an arbitrator.

In terms of assistance in the constitution of the arbitral tribunal, most major arbitral institutions, including the ICC, International Centre for Dispute Resolution (ICDR), London Court of International Arbitration (LCIA) and the Permanent Court of Arbitration (PCA) offer their services as appointing authority for a fee. The advantage of these institutions over national courts is their experience with international arbitration and their ability to select arbitrators with the necessary skills and experience to hear specific types of disputes.

In practice, the parties are more likely to turn to national courts for assistance in ad hoc arbitration than in institutional arbitration, where the arbitral institution can help resolve procedural disputes in accordance with the relevant institutional rules. This is the case for, among others, arbitrator appointments, arbitrator challenges and replacements, and any disagreement on fees.

The adoption of a set of non-institutional rules such as the UNCITRAL Arbitration Rules would help to enhance predictability and ensure a smoother and more efficient arbitration. Parties may agree to adopt such rules once a dispute has arisen.

Are anti-suit injunctions available in international arbitration?

Anti-suit injunctions (**ASI**) are generally available in common law jurisdictions (England, Singapore, Canada, United States, Bermuda, Hong Kong, South Africa, India and Australia), and under certain laws may be granted by arbitral tribunals as well as by the courts, on both an interim and permanent basis. Such injunctions are however generally not available under civil law systems. Following the European Court of Justice’s decision in *Allianz SpA v West Tankers Inc.* (Case C-185/07), the courts of European Union Member States are also not permitted to issue ASI in respect of proceedings in other Member States, even where those proceedings constitute a breach of a valid arbitration agreement. English courts have resumed the issuance of ASI vis-à-vis proceedings in EU Member States after Brexit.

The criteria for obtaining an ASI vary from one jurisdiction to another. However, a generally accepted consideration is whether the requesting party is able to demonstrate a breach of a valid arbitration agreement, on the basis that parties ought to abide by their agreement to arbitrate.

Other relevant factors include whether the injunction would cause undue prejudice in the form of the responding party being deprived a legitimate juridical advantage of commencing court proceedings, the stage of the court proceedings, or overriding considerations of international comity.

As to the power of an arbitral tribunal to grant anti-suit relief, most modern arbitration laws and institutional rules are widely drafted to acknowledge the power of arbitrators to order various interim measures, arguably including the power to grant ASI. For instance, the English and Singapore courts have confirmed the competence of arbitral tribunals to issue ASI; the UNCITRAL Working Group has also agreed that a tribunal constituted under the UNCITRAL Arbitration Rules is empowered to grant such relief.

It should be noted that in any event, an ASI if granted will bind the responding party, and not the foreign court. However, the order will usually be sent to the foreign court, so that it is aware of the existence of the order.

Key Legal Issues

Which options are available in case of urgency before the beginning of an arbitration?

In some instances, parties to a potential arbitration may need to obtain urgent temporary measures in order to prevent further harm (e.g. preservation of evidence, continuation of contractual relationship despite a termination, etc.). In virtually all jurisdictions, an application for urgent or conservatory measures may be filed in the national courts under summary proceedings, and such proceedings are also available for disputes covered by arbitration clauses. Arbitral tribunals usually have the power to revisit the interim measures adopted by state courts in such proceedings.

In addition, most arbitral institutions (including the ICC, LCIA, SIAC, etc.) offer in their sets of rules a procedure for parties to seek urgent temporary relief from a so-called “Emergency Arbitrator” before the constitution of the arbitral tribunal that will rule on the merits of the dispute. The Emergency Arbitrator will not be part of the arbitral tribunal. The emergency measure, that should in principle be rendered within a deadline fixed by the arbitration rules (usually around 14 days), may be later revisited by the arbitral tribunal once constituted.

If the party against whom an emergency measure is issued does not abide voluntarily, the requesting party will have to go through enforcement proceedings before state courts. Most arbitration rules provide that emergency arbitration does not prevent any party from seeking urgent interim or conservatory measures from national courts at any time.

Under most arbitration laws, the parties have the choice between the two remedies. The interactions between emergency arbitration and interim national court proceedings (e.g. whether emergency arbitration should take precedence over national court proceedings or vice versa; whether the Emergency Arbitrator may revisit an order rendered by a national court; whether a national court may review an Emergency Arbitrator’s order, etc.) vary from one arbitration law to the other.

Although an efficient tool available to arbitration users, some uncertainty remains regarding the enforceability of emergency arbitrators’ decisions. While some jurisdictions such as Hong Kong and Singapore have amended their arbitration laws in order to expressly allow for enforcement of such decisions, most of the other major seats of arbitration have not yet taken such measures.

National courts in these countries have adopted diverging approaches, in particular in light of considerations under the New York Convention and the UNCITRAL Model Law, if applicable.

Emergency arbitration should be distinguished from expedited or “fast-track” arbitration proceedings, which are proceedings on the merits but conducted under simplified procedural rules to lower the costs and duration of the arbitration. While the specific rules vary from one arbitral institution to another, expedited proceedings usually allow the institution to shorten certain time limits, to restrict the number of submissions, to favour a written procedure and/or to appoint a sole arbitrator.

Is an award set aside at the seat of arbitration enforceable in other countries?

Article V(1)(e) of the NYC provides that recognition and enforcement of an award *may* be refused if the award has been set aside by the courts of the seat. The wording of this article (“may”) grants leeway to the court before which the enforcement is sought, which could exercise a discretion to recognise or enforce an annulled award.

In addition, Article VII of the NYC allows a party to avail itself of the most favourable provisions of the country where such award is sought to be relied upon.

Some national laws (such as France) do not include the annulment of an award at the seat amongst the ground for refusal of recognition and enforcement. As such, awards that have been set aside at the seat of arbitration may still be enforced by French courts (see the decisions rendered by the French Cour de cassation in *Norsolor* (1984), *Hilmarton* (1991), *Chromalloy* (1997) and *Putrabali* (2007)).

Key Legal Issues

English courts will ordinarily give effect to the decision rendered by the seat annulling an arbitral award, unless said decision is deemed to be contrary to the basic principles of honesty, natural justice or public policy. As such, in a case *Yukos Capital SARL v OJSC Rosneft Oil Company*, several awards that had been set aside in Russia were recognised and enforced by English courts, as the annulment was found to be a result of a “partial and dependent judicial system”.

Similarly, in *Yukos Capital SARL v Rosneft*, Dutch courts gave effect to awards that had been annulled at the seat, as said annulment resulted from a partial and dependent judicial process in Russia. In another case (*Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*), the Dutch Supreme Court confirmed that it has discretion to enforce an annulled award under the NYC, but held that this power can only be exercised in exceptional circumstances (i.e. where the annulment decision was based on grounds that do not comply with internationally acceptable standards).

What happens to an arbitral award in case of parallel court proceedings?

High stake, global, disputes often lead to a series of parallel proceedings spanning, inter alia, the arbitral tribunals, civil and commercial courts, and criminal courts, leading to multiple legal issues. As the global economy is slowing down, insolvency procedures will also increasingly affect arbitration proceedings (read our insights [here](#)).

Faced with parallel proceedings, arbitral tribunals may notably be called to rule on requests to stay the proceedings (for instance, pending the resolution of criminal proceedings that have been launched before national courts), or to issue anti-suit injunctions with the aim of restraining the foreign proceedings, if provided for under the applicable law.

If parallel proceedings are allowed to continue, the rules of *res judicata* could be relied upon to prevent two contradictory awards/judgments being given.

Arbitral awards are also increasingly subject to parallel and successive enforcement and annulment proceedings. Parallel proceedings may not only lead to conflicting results on the merits of the dispute, but issues arise in particular when a party is looking to enforce an award despite the existence of a parallel procedure, as has been recently demonstrated in the CJEU’s *Prestige*-case.

In certain civil law jurisdictions, such as France and Belgium, the principle “*le criminel tient le civil en l’état*” (criminal action takes precedence over civil action) imposes on arbitral tribunals to stay the proceedings for the duration of started criminal proceedings where the result of such criminal proceedings may influence the result of the arbitration proceedings.

It will be for the national court where the enforcement is sought to rule on the question whether *lis alibi pendens* is a restraint of enforcement according to the applicable rules of private international law, including – if applicable – the New York Convention and potentially even the European regulations and the CJEU’s case-law.

Key Legal Issues

What is asset tracing?

Thanks to instruments such as the New York Convention and other regional agreements, arbitral awards benefit from near-worldwide enforceability. For this reason, it is essential to develop a clear understanding of where a counterparty's assets are located in order to decide where to seek enforcement of the award. To this end, so-called asset tracing may be conducted with the help of a global network of lawyers and specialised investigators. Asset tracing may be carried out at any stage of a dispute, not only after the award has been issued. For example, in some instances, it may be useful to know the financial resources of a counterparty when defining the amount of a claim. Similarly, the availability of a state counterparty's assets and the possibility of enforcement against those sovereign assets could strongly impact one's decision to bring an arbitration claim.

Asset tracing typically consists of three elements:

- > an initial mapping phase to gain a clear overview of the global assets held by the counterparty, as well as its overall financial situation, including liabilities vis-à-vis other creditors. This mapping phase will allow for an assessment of the counterparty's financial capabilities, inform any interim measures and identify the most promising jurisdictions for future enforcement actions;
- > on that basis, a deep dive into specific jurisdictions serves to ascertain and track enforceable assets on an individual basis; and
- > continuous monitoring of identified assets and the overall financial situation is advisable where some time will pass before enforcement, e.g., because the asset tracing was conducted before initiating arbitration.

To uncover and trace enforceable assets, a broad range of investigative measures is available, including:

- > use of proprietary databases collating financial information, corporate and property records, aircraft and watercraft ownership, as well as information on litigation and regulatory sanctions;
- > live GPS tracking and geofence alerting for vessels, airplanes, and other movable assets;
- > site visits and other investigative measures; and
- > inquiries with well-placed human sources.

It is important to conduct asset tracing in unison with specialised legal advice. This is because the rules regarding enforcement vary from jurisdiction to jurisdiction and the hurdles may range from low (ie, quick enforcement) to insurmountably high.

Thus, after having identified the jurisdictions where the counterparty's main assets are located, the respective legal requirements of enforcement must be analysed. Beyond the general prerequisites, specific questions frequently come up, such as to what extent enforcement may be levied against assets held only proportionately (e.g., attachment of company shares), or when enforcement is possible against assets held only indirectly (e.g., letterbox companies or straw men).

Asset tracing is also of paramount importance for enforcement against states and state entities, to identify their commercial assets that may be seized. Commercial assets are indeed usually excluded from states' immunity from enforcement.

Introduction



 [Click on a region for more information](#)

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Australia (Allens)

1. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, Australia is a Contracting State to the 1958 New York Convention (the **NYC**) since 26 March 1975, which was enacted into Australian domestic law through the International Arbitration Act 1974 (Cth) (the **International Arbitration Act**). Australia ratified the NYC without reservations.

The Commonwealth of Australia is a federation of six states (New South Wales, Victoria, Queensland, South Australia, Western Australia and Tasmania) and two self-governing territories (the Northern Territory and the Australian Capital Territory). Although each state and territory has its own constitution, parliament, government and laws, in certain areas the states and territories are subject to Commonwealth legislation and governance. As Commonwealth legislation, the International Arbitration Act applies equally in all states and territories.

b. Is your jurisdiction a party to the ICSID convention?

Yes, although a signatory since 24 March 1975, Australia became a Contracting State to the 1965 ICSID Convention since 1 June 1991.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Australia has adopted the UNCITRAL Model Law (the **Model Law**), including the 2006 amendments, as its procedural law for international arbitration under the International Arbitration Act.

Domestic arbitration is governed by Commercial Arbitration Acts applicable in each state and territory. These acts are substantially the same in each state and territory and are collectively known as the Uniform Arbitration Acts (the **Uniform Arbitration Acts**). The Uniform Arbitration Acts generally follow the Model Law, but also contain some additional provisions not present in the Model Law.

To aid efficient presentation, and given that it is the largest state in Australia, unless referring to the International Arbitration Act, the following responses are based on New South Wales' *Commercial Arbitration Act 2010* (NSW) (the **Commercial Arbitration Act**).

d. Does your local law distinguish between domestic and international arbitration?

Yes. International arbitration is governed by the International Arbitration Act, including:

1. international commercial arbitrations to which the Model Law applies;
2. investment treaty arbitrations; and
3. enforcement of awards made in foreign countries to which the NYC applies.

In contrast, domestic arbitration is where the parties to an arbitration agreement have their places of business in Australia, domestic arbitration is governed by the Uniform Arbitration Acts, and the International Arbitration Act does not apply.

2. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

The Australian courts may assist an arbitration in a number of ways, including taking evidence (with the approval of the tribunal); making orders prohibiting the disclosure of confidential information relating to the arbitral proceedings; issuing subpoenas; at a party's request, and provided the arbitration agreement does not specify a different procedure, appointing arbitrators where parties fail to agree on an appointment; and hearing challenges against an arbitrator's appointment (only after the tribunal itself has determined the matter).

Further, if a tribunal determines that it has jurisdiction as a preliminary question, within 30 days of that ruling a party may request that the court decide that matter.

Australia (Allens)

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, the courts can order interim relief in relation to the arbitration. Interim measures may be ordered before or during arbitral proceedings. Pursuant to Article 17 of the Model Law (reflected in s 17 of the Uniform Arbitration Acts), courts are empowered to grant any form of interim relief which would be available in court proceedings. Examples include: injunctive relief, freezing orders and security for costs. However, Australian courts have stressed that powers to grant interim relief should be used sparingly and only if there are compelling reasons to do so. Further, the courts have acknowledged that court-ordered interim measures are designed to facilitate and protect the arbitration process.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

If parties have agreed to refer disputes to arbitration, and a dispute arises, a court must (at the request of a party) stay any legal proceedings that a party might bring in relation to the same dispute. The exception is where the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

Australian courts also have an inherent power to grant anti-suit injunctions to restrain foreign litigation brought in breach of exclusive jurisdiction clauses. In addition, the High Court has endorsed English case law in which anti-suit injunctions were granted to safeguard domestic arbitrations. Finally, there is authority (at state Supreme Court level) for a court granting an anti-suit injunction to restrain interstate court proceedings while a domestic arbitration is pending. However, Australian courts may refuse to grant an anti-suit injunction where the order would be futile or offend the comity (the processes and judicial authority) of foreign courts.

3. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

In accordance with Article 34 of the Model Law, Australian courts may only set aside an arbitral award where:

- > the arbitration agreement is not valid under the governing law;
- > the party seeking to set aside the award was not given proper notice of the arbitral proceeding or was otherwise unable to present his case;
- > the award dealt with matters that exceeded the tribunal's jurisdiction. If the decisions on matters that exceeded the tribunal's jurisdiction can be separated from those properly submitted to arbitration, only the former may be set aside;
- > the composition of the tribunal or the arbitral procedure was not in accordance with the parties' agreement, unless that agreement conflicts with a Model Law provision from which the parties cannot derogate;

- > the court finds that the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Australia; or
- > the court finds that the award is in conflict with the public policy of Australia, including if it was induced or affected by fraud or corruption, or made in connection with a breach of natural justice.

A breach of the rules of natural justice or real unfairness will generally be required in order to justify setting aside an award.

While the Uniform Arbitration Acts permit appeals on a question of law, the parties to the arbitration must agree that an appeal may be brought and the court must grant leave. Such an agreement can be contained in the parties arbitration agreement. Leave will only be granted where the question will affect substantive rights, where the tribunal was asked to determine the question, and where the tribunal's determination is obviously wrong, or where the question is open to serious doubt and is a matter of general public importance.

Under the Uniform Arbitration Acts, parties to a domestic arbitral award can also apply to have the award set aside in limited circumstances.



Australia (Allens)

b. How is a setting aside application filled and how long do proceedings take?

Setting aside proceedings under the International Arbitration Act may always be commenced in the Federal Court of Australia. If the place of the arbitration is an Australian state or territory, they may also be commenced in the Supreme Court of the relevant state or territory. Applications must be made no more than three months from the date on which the party making the application received the award, or the date on which the tribunal disposed of a request for interpretation or correction of the award.

The duration of such proceedings under the International Arbitration Act will vary depending on the circumstances of each case. Some recent proceedings have taken between one to eight months from commencement to judgment.

An application to set aside a domestic award should be directed to the Supreme Court of the relevant state or territory. The same time-limits apply as set out above. The time frame will again vary depending on the individual case but would likely take between three to twelve months from commencement to judgment.

c. Does an application to set aside an award suspend its enforcement?

An application under either the International Arbitration Act or Uniform Arbitration Acts to set aside an award does not automatically suspend enforcement of that award.

However, the courts have a discretionary power to suspend enforcement pending the determination of a setting-aside application. Factors which the courts will consider include the duration of the proposed stay of enforcement, and whether the setting-aside application has reasonable prospects of success. The courts may make suspension of enforcement conditional upon the provision of security by the applicant in the setting aside proceedings.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

Australia is a “pro-arbitration” jurisdiction. As discussed in response to Question 1(c), international arbitration in Australia is conducted in accordance with the Model Law. Australian law does not permit arbitral awards to be challenged on their merits. Awards may only be challenged in accordance with the grounds set out in Article 34 of the Model Law. Australian courts recognise that Article 34 seeks to significantly limit the circumstances in which an award may be set aside.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

If appropriate and at a party’s request, the court may suspend setting aside proceedings in order to allow the tribunal an opportunity to resume the arbitration or take action which the tribunal believes will eliminate the grounds for setting aside.

Foreign awards which are successfully challenged in accordance with Article 34 of the Model Law may only be set aside and may not be remitted to an arbitral tribunal.

Where an award is appealed on a question of law under the Uniform Arbitration Acts, the court may endorse or change the award to accord with the outcome of the appeal, or remit the award – together with the court’s opinion on the question of law – to the tribunal for reconsideration. The court may also set aside the award in whole or in part, although it must not do so unless satisfied that it would be inappropriate to remit the matter back to the tribunal.

4. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Recognition and enforcement of “foreign arbitral awards” is governed by Part II of the International Arbitration Act. Recognition and enforcement of domestic arbitral awards is governed by the Uniform Arbitration Acts.

Foreign awards are recognised as binding on all parties to the award by virtue of the International Arbitration Act. Domestic arbitral awards are recognised in all Australian states and territories under the Uniform Arbitration Acts, regardless of the state or territory in which the award was made.

In both the International Arbitration Act and the Uniform Arbitration Acts, the grounds on which enforcement of foreign and domestic awards can be resisted closely resemble the grounds for refusing enforcement in the Model Law.

Australia

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Under the Uniform Arbitration Acts, domestic arbitral awards are recognised in all Australian states and territories, regardless of the state or territory in which the award was made. A party relying on a domestic award (for example, as the basis for *res judicata*) must submit an application for enforcement to the Supreme Court in any Australian state or territory. The application must be filed with the original award or a copy of it. On written application, a court may enforce a domestic award, subject to the grounds for refusing enforcement which are substantively similar to those in Article 36 of the Model Law.

Where none of the grounds for refusing enforcement apply, a court may make any orders it considers appropriate for the enforcement of the award, including judgment for the amount of the award, specific performance, injunctions, or damages where a party has failed to perform the award.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Recognition and enforcement of foreign arbitral awards is dealt with by both Part II of the International Arbitration Act and Chapter VIII of the Model Law. Where both would apply in relation to an award, Chapter VIII of the Model Law is deemed not to apply.

Section 8 International Arbitration Act provides that, *prima facie*, a foreign award is recognised as binding on all parties to it by virtue of the Act itself. An arbitral award under the Model Law is also recognised in Australia, regardless of the country in which the award was made.

Applications for the enforcement of a foreign award may be made to the Federal Court of Australia, or the court of any Australian state or territory. A foreign award may be enforced in the same manner as a judgment or order of an Australian court.

The party seeking to enforce a foreign award must supply the court with an authenticated or certified copy of the original award, along with the original arbitration agreement or a certified copy. The applicant must also provide certified translations, where applicable. The award is then presumed to be enforceable unless a defence to enforcement is made out.

d. How long does it take to have an arbitral award recognised and enforced?

The duration of proceedings concerning the recognition and enforcement of arbitral awards is largely dependent upon whether or not recognition or enforcement is resisted. Recognition and enforcement may be resisted on the same grounds on which an award is liable to be set aside. Accordingly, in practice, a party resisting enforcement or recognition will often simultaneously apply to have the award set aside, and will rely upon the same submissions for both applications.

Absent any grounds for resisting enforcement, an award will be capable of being enforced quickly (within weeks, or even shorter if there is a basis to demonstrate urgency).

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

The Australian courts may refuse to enforce an award that has been set aside or suspended at the seat. Although there is no definitive authority on the matter, it is thought that Australian courts would be likely to exercise that discretion and decline to enforce an award if it would be invalid under the law of the seat.

The courts may refuse to enforce an award found to be contrary to public policy.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

The Foreign States Immunities Act 1985 (Cth) (the **FSIA**) provides that a foreign State is generally immune from the jurisdiction of the courts of Australia. However, a foreign State will submit to the jurisdiction by instituting proceedings or by intervening in, or taking steps in a proceeding (other than to apply for costs, or to assert immunity or an interest in property).

The FSIA further provides that jurisdictional immunity will not be available if the foreign State has entered into an arbitration agreement, and if the foreign State would not be immune in court proceedings regarding the dispute, for example proceedings determining the validity of the arbitration agreement.

Note that even where a foreign State is found to have waived immunity or submitted to the jurisdiction of the Australian courts, its property (other than its commercial property) may still be found to be immune from the execution of court judgments.

In *Kingdom of Spain v Infrastructure Services Luxembourg* [2021] FCAFC 3, the Full Federal Court of Australia allowed Spain's appeal, pursuant to the FSIA, in relation to two ICSID awards obtained against Spain for breaches of the Energy Charter Treaty. The Court distinguished between the recognition and enforcement of the awards, holding that Spain, having ratified the ICSID Convention, had expressly agreed to submit to the jurisdiction of the Court. Consequently immunity was not available in respect of recognition of the awards. However, the High Court of Australia has granted special leave to appeal the decision, so it is not yet settled whether immunity would apply to the execution and enforcement of an arbitral award.

Belgium



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Belgium

1. Recent example of our work

We successfully represented Bank of New York Mellon (**BNYM**) in various Belgian court proceedings, after BNYM froze the assets of the National Fund of Kazakhstan, worth some US\$22bn, as a result of a third party garnishment order obtained by investors attempting to enforce an arbitral award against Kazakhstan.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Belgium is a Contracting State to the 1958 New York Convention (the **NYC**) since 16 November 1975. In accordance with Article I(3), Belgium applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

Belgium also signed the European Convention on International Arbitration of 1961. Belgium has concluded five bilateral treaties on the enforcement of arbitral awards with France, the Netherlands, Germany, Switzerland and Austria.

b. Is your jurisdiction a party to the ICSID Convention?

Belgium is a Signatory of and Contracting State to the 1965 ICSID Convention since 26 September 1970.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Arbitrations seated in Belgium are governed by the Belgian Law on Arbitration (the **BLA**), which is set out in Part VI of the Belgian Judicial Code (the **BJC**). The BLA is largely based on, and consistent with, the UNCITRAL Model Law.

d. Does your local law distinguish between domestic and international arbitration?

No, domestic and international arbitrations are governed by the same provisions.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Belgian law allows parties to request the court to assist with the following:

- > appointment, removal and challenge of arbitrators;
- > all necessary measures for the taking of evidence (e.g., ordering a (third) party to disclose documents directly to a party or an expert, ordering a (third) party to appear as a witness before the arbitral tribunal, allowing access to a property for inspection, etc);
- > setting a time limit on the arbitral tribunal; and
- > order for security for costs and other conservatory attachment orders (arbitral tribunals cannot order attachments).

Belgium

b. Is interim relief by national courts available before and during arbitral proceedings?

In principle, the existence of an arbitration agreement does not prevent the parties from seeking relief for interim and conservatory measures from national courts, including foreign-seated arbitrations if Belgian courts are competent pursuant to the applicable private international law rules. Belgian courts may order any interim or conservatory measures they deem necessary, including penalties.

The exact conditions of the coexistence of the powers of national courts and arbitral tribunals/emergency arbitrators to issue interim and conservatory measures is subject to debates which have not yet been settled by the Belgian Supreme Court.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

No, anti-suit injunctions are not available under Belgian law.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Parties may only provide for an appeal before another arbitral tribunal, composed of new arbitrators. Parties may not provide for an appeal before national courts.

The only recourse made available by the law against an arbitral award is setting aside proceedings before the competent Court of First Instance, on one of the grounds enumerated by law. The parties may exclude the recourse for setting aside an award if none of them is a natural person of Belgian nationality or a natural person having domicile or normal residence in Belgium, or a legal person having its registered office, its main place of business or a branch office in Belgium.

b. How is a setting aside application filed and how long do proceedings take?

Setting aside proceedings must be filed with the competent Court of First Instance, whose decision is not subject to appeal before the Court of Appeal but only to cassation recourse (i.e., review limited to points of law, as opposed to points pertaining to the facts of the case) before the Supreme Court.

Setting aside proceedings must be filed within three months from the notification of the award (or, in case of fraud and as per a recent decision of the Belgian Constitutional Court, within “a reasonable period given the circumstances, from the point of the discovery of the fraud”).

Setting aside proceedings last for around 12 to 18 months before the Court of First Instance, and around 12 months before the Supreme Court.

c. Does an application to set aside an award suspend its enforcement?

No, unless granted by the court in exceptional circumstances.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The courts exercise a review of the award limited to the grounds enumerated by law and usually abide by the *favor arbitrandum* principle. In the leading case on this question, the Brussels Court of Appeal ruled that “an annulment constitutes an extraordinary recourse. The causes listed in Article 1704 of the Judicial Code must be interpreted strictly. The judge may not review whether the arbitrator has ruled appropriately on the merits and may not replace the appreciation of the arbitrator by its own.”

e. Do the national courts have the power to remit an award to an arbitral tribunal?

Belgian courts may, at its own motion or the request of a party, suspend setting aside proceedings for a period it determines to remit the award to the arbitral tribunal to correct an annulment ground.

Belgium

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

No.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

An arbitral award has *res judicata* as soon as it has been issued and prior to its enforcement.

The enforcement of an award requires an *exequatur* from the competent Court of First Instance. The application for *exequatur* is filed *ex parte* by means of a unilateral request. The party against whom enforcement is sought is therefore not informed during this initial stage. The Court of First Instance seized with the request will not review the merits of the case, but only control that it received the original award (or a certified copy), that the dispute was arbitrable and that the award is not contrary to public policy.

If the Court of First Instance orders the enforcement of the award, its decision will have to be formally served to the debtor by act of bailiff. The debtor will then have one month to file a request to oppose this order in third-party opposition proceedings.

The decision of the Court of First Instance is subject to cassation proceedings (i.e., review limited to points of law, as opposed to points pertaining to the facts of the case) before the Supreme Court.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Same as above, as Belgian law does not distinguish Belgian awards from international awards. The award creditor may rely on the NYC or other applicable international treaties, but the procedure and causes for refusal of recognition and enforcement will usually be similar.

d. How long does it take to have an arbitral award recognised and enforced?

The *ex parte* *exequatur* proceedings usually last as little as a few days. In case of opposition by the debtor, the proceedings last around 12 to 18 months. Supreme Court proceedings last around 18 months.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Conservatory attachments (including garnishment orders) are allowed on the basis of an arbitral award, even prior to its enforcement procedure. Garnishment orders will impose on the garnishee (usually banks) the obligation to freeze all the funds of the award debtor, as opposed to merely the amount of the award claim. The award debtor may, however, request from courts the limitation of the order to the amount of the claim.

In accordance with the Model Law, Belgian law provides that the annulment of a foreign award in the state of the seat is a ground for refusal of enforcement.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Conservatory attachment and enforcement against assets owned by states and state entities is subject to strict conditions:

- > only the assets of Belgian state entities that have been subject to a specific declaration by the Belgian State or state entities can be seized. Assets that do not appear on such declaration cannot be seized unless it has been demonstrated that they are manifestly not useful for the continuity of public service; and
- > enforcement against assets belonging to foreign states requires prior leave from the attachment court. Such leave is only possible in cases of:
 - > express and specific consent to attachment of the goods;
 - > reservation or designation of the assets to satisfy the claim in question; or
 - > where it is established that the asset is located on Belgian territory and is used or intended for use for “other than non-commercial public service purposes”, with the further condition that such assets must relate to the entity against which the title underlying enforcement is directed.

France



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France

1. Recent example of our work

We successfully secured a landmark decision by the Paris Court of Appeal setting aside a US\$90m ICC arbitral award rendered against our clients, the Republic of Gabon and the City of Libreville, in an application brought by Webcor ITP Ltd. The Court held that the award gave effect to underlying public contracts that were obtained by corruption, notably in exchange for a wedding gift offered to the mayor of Libreville.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

France is a Contracting State to the 1958 New York Convention (the **NYC**) since 24 September 1959 and declared that the NYC extends to all territories of the French Republic. In accordance with Article I(3), France applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, France is a Signatory of and Contracting State to the 1965 ICSID Convention since 20 September 1967.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

France has not adopted the UNCITRAL Model law. The French Code of Civil Procedure (the **CCP**) and Civil Code regulate domestic and international arbitration.

d. Does your local law distinguish between domestic and international arbitration?

Yes, Articles 1442 et seq CCP regulate domestic arbitration, while Articles 1504 et seq apply to international arbitration. Article 1504 provides that “an arbitration is international when international trade interests are at stake.” In practice, whether the underlying business/economic relationship is cross-border in nature generally defines whether an arbitration is domestic or international.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

A party may apply to the French supervisory court for assistance in the constitution of the arbitral tribunal (Articles 1451-1455 CCP), in resolving certain issues regarding an arbitrator’s participation in the proceedings (Articles 1456-1458 CCP), and in extending the tribunal’s time-limit to render an award (Article 1463 CCP). The French supervisory judge is seized of such matters only in the absence of an arbitral institution administering the arbitration.

Once the award has been rendered, the French courts may be asked to interpret, supplement or materially correct an award if the tribunal cannot be reconvened (Articles 1485-1486 CCP).

b. Is interim relief by national courts available before and during arbitral proceedings?

A party may request the French court to order interim measures before the constitution of the arbitral tribunal (Article 1449 CCP). These measures include (1) the conservatory and provisional measures available under Articles 835 and 836 CCP and Articles 872 and 873 CCP subject to the proof of urgency, as well as (2) the pre-trial investigative measures available under Article 145 CCP. Once the tribunal has been constituted, the French courts may be seized to provide assistance in obtaining an attachment order (Article 1468 CCP) or documentary evidence from third parties (Article 1469 CCP).

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions are not in principle available under French law. In a limited number of cases, French courts have enforced anti-suit injunctions where proceedings were initiated in breach of contractual obligations or of a valid jurisdiction or arbitration clause in an agreement. Such injunctions are however unavailable to restrain proceedings before national courts within the European Union, even when they have been brought in breach of an arbitration agreement.



France

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

In international arbitration, a party may apply to set aside an arbitral award on the grounds listed in Article 1520 CCP, namely an arbitral tribunal's lack of jurisdiction, improper constitution of the arbitral tribunal, an arbitral tribunal's exceeding of its mandate, breach of due process, and breach of international public policy. Additional grounds to set aside an award are provided for in domestic arbitration.

Parties may also request the arbitral tribunal (or, in domestic arbitration, the competent French court when the tribunal cannot be reconvened), to interpret, supplement or materially correct the award. French arbitration law also allows parties to request the arbitral tribunal (or, in domestic arbitration, the competent French court when the tribunal cannot be reconvened) to review awards where fraud may have been involved (*recours en revision*). As for appeal of an arbitral award, such an action is unavailable in international arbitration but is possible in domestic arbitration, with the express consent of the parties.

b. How is a setting aside application filled and how long do proceedings take?

The application to set aside an award must be filed within one month of the notification date of the award (such notification must be made through a bailiff, unless otherwise agreed by the parties). If the applicant for setting aside is located abroad, this time-limit is extended by two months. The application must be submitted to the court of appeal that has jurisdiction over the place where the award was rendered. In Paris, the Paris Court of Appeal has a dedicated chamber that deals with appeals of decisions in cross-border disputes and setting aside applications for awards issued in Paris. Decisions by the Paris Court of Appeal may be appealed before the Supreme Court. The duration of setting aside proceedings in France varies depending on the occurrence of procedural incidents but generally is between 18 to 24 months.

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not suspend its enforcement (Article 1526 CCP). A party however may file a request to stay or adapt enforcement proceedings if it can prove that it is likely to suffer severe harm if the award is enforced.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

French arbitration law provides for very limited grounds to set aside awards at the annulment stage. The French courts adopt a pragmatic approach giving due deference to arbitrators' powers and discretion when hearing such applications, and unless there is solid evidence that one of the grounds for annulment is met (Article 1520 CCP for international arbitration), most setting aside applications tend to be dismissed. In recent years, the courts have tended to conduct a more in-depth analysis of the award in particular when dealing with awards potentially involving allegations of corruption, money laundering and fraud. This trend is consistent with the government's overall policy to combat corruption in all aspects of business and trade.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

French law considers that once the arbitral tribunal has rendered its award, its mandate is officially terminated. Remission to the same tribunal is possible only when requested to interpret, supplement or materially correct specific parts of the award, or when a party invokes allegations of fraud or previously unknown evidence likely to affect the outcome of the dispute (in which case the arbitral tribunal may review the award pursuant to Article 1502 CCP).

If an arbitral award is set aside and the arbitration agreement is considered to be valid, the dispute shall be brought before a newly constituted arbitral tribunal.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

The CCP provides for separate rules that apply to arbitral awards rendered in domestic cases in France (Article 1487 et seq CCP) on the one hand, and on the other hand, arbitral awards rendered in international cases in France and those rendered abroad in both domestic and international matters (Article 1514 et seq CCP).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

The party seeking enforcement must submit its application for leave for enforcement (*exequatur*) to the first instance court in charge of civil matters (*Tribunal judiciaire*) that has jurisdiction over the place where the award was rendered. The application must include the original award or an authenticated copy of the award and of the arbitration agreement.

France

The order granting leave for enforcement is delivered *ex parte* and stamped on the last page of the award. Leave may be denied if the award is manifestly in breach of public policy.

The applicant for enforcement may lodge an appeal before the court of appeal against the reasoned decision denying leave. An order granting leave for enforcement may not be challenged alone but may be challenged in the context of an application to set aside an arbitral award.

The court decision dismissing an action to set aside an arbitral award automatically grants leave for enforcement of the award.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The party seeking enforcement must submit an application for leave for enforcement (*exequatur*) to the Paris court in charge of civil matters (*Tribunal Judiciaire de Paris*). The application must include the original award or an authenticated copy of the award and of the arbitration agreement, and French translations thereof if the documents are not in French. After a *prima facie* review of the award, verifying that it does not violate French international public policy, the court will grant leave for enforcement.

For foreign arbitral awards, both orders granting leave and those denying leave may be challenged before the Paris Court of Appeal within a one-month time-limit as of the notification of the order.

The Paris Court of Appeal may deny recognition and leave for enforcement on the same limited grounds as for setting aside arbitral awards (Article 1520 CCP), namely an arbitral tribunal's lack of jurisdiction, improper constitution of the arbitral tribunal, an arbitral tribunal's exceeding of its mandate, a breach of due process, and breach of international public policy.

For arbitral awards rendered in international cases in France, an order granting leave for enforcement may not be challenged alone but may be challenged in the context of an application to set aside an arbitral award.

The court decision dismissing an action to set aside an arbitral award automatically grants leave for enforcement to the award.

d. How long does it take to have an arbitral award recognised and enforced?

The procedure to obtain leave for enforcement of an arbitral award would generally last only a few months. The duration of the enforcement proceedings will vary significantly depending on the number, type, and value of assets available for enforcement. A party wishing to enforce an award in France must identify the debtor's assets available in France and introduce one or several enforcement measures, such as attachments on bank and securities accounts, seizure of immovable property, etc. Any difficulty in the execution of such measures must be submitted to the court in charge of enforcement matters (*Juge de l'exécution*).

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

French arbitration law offers a framework in terms of recognition and enforcement of arbitral awards that is more favourable than the grounds provided under Article V(1) NYC. The French courts may recognise and enforce arbitral awards that have been annulled abroad at the seat. This approach has been established since the 1994 *Hilmarton* decision and confirmed in 2007 in the *Putrabali* case. When deciding whether to grant leave for enforcement, the courts will only consider the grounds for annulment set forth by Article 1520 CCP, which do not include the said award having been annulled in another jurisdiction.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

The participation of a state or state entity does not affect, in principle, the jurisdiction of or the rules applied by the French courts in charge of civil matters in considering applications for recognition and enforcement of arbitral awards.

If an arbitral award is rendered in an international arbitration involving the French State or a French state entity, the administrative court may have jurisdiction to hear setting aside or enforcement proceedings if the underlying agreement was performed in France, the arbitral award was rendered in France, and the dispute relates to contracts subject to French mandatory administrative law concerning state-owned property, public services, or public procurement. Decisions rendered by the administrative court may be appealed before the *Conseil d'Etat*, the highest instance court dedicated to administrative/public law matters in France.

To enforce an arbitral award against assets located in France and belonging to foreign states and state entities, the party seeking enforcement must apply for a leave for enforcement by submitting its application to the Paris Court in charge of civil matters. Pursuant to Article L. 111-1-2 of the Code of Civil Enforcement Procedures, it must demonstrate one of the three following grounds: (1) the state or state entity has agreed to the enforcement measure or (2) the state or state entity has reserved or affected the targeted asset to the satisfaction of the claim at the heart of the pending enforcement proceedings, or (3) the targeted asset is specifically used or intended to be used by the state for purposes other than to render non-commercial public service and is connected with the state or the state entity against which the enforcement proceedings are brought.

Germany



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Germany

1. Recent example of our work

We successfully coordinated the client's defence against an unfavourable partial award concerning a dispute regarding the delivery and installation of telecommunications equipment. We advised the client with respect to annulment proceedings in Austria and represented the client in resisting enforcement of the award in various jurisdictions including in France, Germany, Ireland, Poland, the Netherlands, the United Kingdom, and the United States. Further to these efforts, we were able to negotiate a favourable overall settlement for the client, which also settled the remainder of the dispute that was still pending before the arbitral tribunal.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Germany is a Contracting State to the 1958 New York Convention (the **NYC**) since 30 January 1961. In accordance with Article I(3), Germany applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Germany is a Signatory and Contracting State of the 1965 ICSID Convention since 18 May 1969.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Yes, Germany has been an UNCITRAL Model Law (the **Model Law**) country since 1998. The Model Law forms the basis of Sections 1025-1066 of the German Code of Civil Procedure (the *Zivilprozessordnung*— link to an informal English translation [here](#)) (**ZPO**). These provisions govern all arbitral proceedings, i.e., not only international but also domestic arbitration.

d. Does your local law distinguish between domestic and international arbitration?

There is no general distinction between domestic and international arbitration, but foreign arbitral awards require recognition in addition to leave for enforcement (see below, Question 5.c). The seat of arbitration determines whether proceedings are domestic or international.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

National courts may assist on the following matters (see Section 1062(1) ZPO):

- > appointment and recusal of arbitrators, and terminations of arbitrators' mandates;
- > admissibility of arbitral proceedings and review of interim decisions by arbitral tribunals which have affirmed the admissibility of arbitral proceedings;
- > enforcement, reversal or modification of arbitral tribunals' orders for provisional measures or measures serving to provide security;
- > setting aside of arbitral awards;
- > leave for enforcement of arbitral awards.

b. Is interim relief by national courts available before and during arbitral proceedings?

An arbitration agreement or pending arbitration does not preclude the parties from applying to national courts for interim measures, even when the arbitration is seated abroad (Section 1033 ZPO). Courts can thus seize assets (*Arrest* – Section 916 et seq. ZPO), issue injunctions (*einstweilige Verfügung* – Section 935 et seq. ZPO) and even conduct independent evidentiary proceedings (*selbständiges Beweisverfahren* – Section 485 et seq. ZPO).

In accordance with Article 17 Model Law, German law also allows arbitral tribunals to grant interim relief (Section 1041(1) ZPO). When granting leave for enforcement of such orders, national courts will only subject the arbitral decisions to a summary review (Section 1041(2) and (3) ZPO).

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

In line with the ECJ's *West Tanker* decision (C-185/07), anti-suit injunctions against proceedings before EU courts are inadmissible. Parties can even obtain an injunction against an anti-suit injunction (i.e., an "anti-anti-suit injunction") if the opponent has threatened to launch one. It is debated in German literature whether anti-suit injunctions would be admissible with regards to non-EU courts, but the prevailing opinion rejects this as well.

Germany

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Once an award has been issued, the only available remedy is a petition to set aside the award. Setting aside proceedings are governed by Section 1059 ZPO and restricted to a review of the integrity of the arbitral proceedings and award (see Question 4.d. below).

Once recognition and enforcement proceedings have been initiated, a party seeking annulment of the award cannot lodge separate setting aside proceedings. Grounds for setting aside must be raised in the recognition and enforcement proceedings (Section 1060 et seq. ZPO). The court hearing the case is competent to grant leave for enforcement or to set aside the award, as required.

b. How is a setting aside application filed and how long do proceedings take?

Setting aside proceedings must be brought before the Higher Regional Court (*Oberlandesgericht – OLG*) specified in the arbitration agreement or – if the agreement does not specify a court (which is mostly the case in practice) – the Higher Regional Court that has jurisdiction at the seat of arbitration (Section 1062(1)(4) ZPO). The Higher Regional Courts are primarily courts of second instance (they rank above Local Courts (*Amtsgericht*) and Regional Courts (*Landgericht*) but below the Federal Court of Justice (*Bundesgerichtshof*)). Setting aside proceedings are one of the few proceedings which begin at the Higher Regional Court level.

The Higher Regional Court will decide by court order (*Beschluss*) which may be challenged before the Federal Court of Justice on points of law (*Rechtsbeschwerde*).

The duration of the proceedings depends on the courts' workload and the particularities of each case. Some petitions to set aside an award may be rejected without an oral hearing, so the proceedings may end very quickly. If a hearing is held, a typical time frame for setting aside proceedings at first instance (Higher Regional Court) is six to ten months, and for appeal (Federal Court of Justice) another 10-15 months. Again, these time frames are estimates.

c. Does an application to set aside an award suspend its enforcement?

No, but in practice awards do not become enforceable without a review of grounds for setting them aside. This is because leave for enforcement will only be granted upon a review of grounds for setting aside. Thus, in recognition and enforcement proceedings, a party opposing enforcement may raise any ground for annulment which will be reviewed by the court. If the party which was unsuccessful in the arbitration first launches setting-aside proceedings, the other party may petition the court to declare the award enforceable in the setting-aside proceedings, i.e., it must not first defend against the setting-aside proceedings and then initiate separate enforcement proceedings – both may be combined.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The judicial review of arbitral awards is limited to procedural errors and conformity with public policy. German courts do not review the substance or the merits of the dispute.

Grounds for setting aside arbitral awards are (exhaustively) enumerated in Section 1059(2) ZPO: (1) invalidity of the arbitration agreement; (2) due process, particularly failure to properly notify the proceedings; (3) the dispute falling out of the scope of the arbitration agreement; (4) improper constitution of the arbitral tribunal; (5) arbitrability of the subject matter of the dispute under German law; and (6) violation of public policy.

In practice, we observe that courts that have jurisdiction in cities frequently chosen as seats of arbitration exercise more restraint when reviewing arbitral awards. For example, the Higher Regional Courts of Frankfurt and Munich have issued decisions that advocate a very arbitration-friendly stance with extremely limited judicial review. As a general tendency, it can also be said that the Federal Court of Justice leans towards more judicial review and sets aside arbitral awards more easily than the Higher Regional Courts.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

In general, after an arbitral award has been set aside, the arbitral proceedings are automatically terminated (Section 1059(1) and (2) ZPO), and the arbitral tribunal's mandate ends (Section 1056(3) ZPO). This means that a new arbitral tribunal must be constituted, and new arbitral proceedings initiated. However, Section 1059(4) ZPO allows the court to remand the matter to the original arbitral tribunal "where appropriate", upon petition by at least one party. This decision is at the discretion of the court and will usually depend on the ground for annulment and considerations of practicality.



Germany

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Yes, although the differences are not that pronounced in practice. All arbitral awards must be granted leave for enforcement. However, unlike domestic awards, foreign awards require the court to recognise the award before enforcing it (Section 1061 ZPO).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Yes, although the differences are not that pronounced in practice. All arbitral awards must be granted leave for enforcement. However, unlike domestic awards, foreign awards require the court to recognise the award before enforcing it (Section 1061 ZPO).

A petition for leave of enforcement must be submitted to the Higher Regional Court specified in the arbitration agreement or – if the agreement does not specify a court (this is more usual in practice) – that has jurisdiction at the seat of arbitration (Section 1062(1)(4) ZPO). The petition will succeed if no grounds for setting aside the award exist (see Question 4.d. above).

The decision can be appealed on points of law (*Rechtsbeschwerde*) before the Federal Court of Justice.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

A petition for leave of enforcement must be filed with the Higher Regional Court in whose district (1) the other party has its seat (or habitual place of abode), or (2) enforcement is sought. In these proceedings, the court will also decide on the award's recognition. There are no separate or isolated recognition proceedings.

Recognition usually follows the NYC and is thus limited to a high-level review (Section 1061(1) first sentence ZPO in conjunction with Article V NYC). However, where other treaties such as the ICSID Convention are applicable, these will prevail in line with international law (Section 1061(1) second sentence ZPO).

Against a decision on recognition and enforcement, an appeal on points of law (*Rechtsbeschwerde*) before the Federal Court of Justice is possible.

d. How long does it take to have an arbitral award recognised and enforced?

The duration of the proceedings depends on the courts' workload and the particularities of each case. A court may dismiss a petition for leave for enforcement without an oral hearing, so the proceedings may end very quickly. If a hearing is held, a typical time frame for setting aside proceedings at first instance (Higher Regional Court) is six to ten months, and for appeal (Federal Court of Justice) another 10-15 months. Again, these time frames are estimates.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

As German law follows the NYC (or another prevailing treaty), there are no noteworthy particularities. Awards which have been annulled in another jurisdiction will not be recognised and enforced in Germany (Section 1061(1) first sentence ZPO in conjunction with Article V(1)(e) NYC). If an arbitral award is annulled after it has received leave for enforcement in Germany, the debtor may request the court to reverse its decision granting leave for enforcement (Section 1061(3) ZPO).

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

The issue of state immunity does not play a role in decisions on the recognition and enforceability of arbitral awards. They may, however, be raised in the subsequent enforcement (execution) proceedings. In line with general principles of international law, German courts will not enforce an award against foreign assets located in Germany which serve a public function.

Arbitral awards (and any other titles) may therefore be enforced against states and state entities as long as they do not interfere with the exercise of their sovereign activities. Enforcement may not be sought against assets used for public purposes at the time at which enforcement is sought. The asset's use for public service must be demonstrated by the respective state. To this end, the state must plead, substantiate, and prove the use for public service to the extent this does not interfere with the state's sovereignty. For example, if the state shows that further pleadings would reveal internal information, the court will assume the use for public service without requiring these revealing pleadings.

Greece



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Greece

1. Legal framework

a. Is your jurisdiction a party to the New York Convention? Do reservations apply?

Yes, Greece is a Contracting State to the 1958 New York Convention (**NYC**) since 14 October 1962, pursuant to Legislative Decree 4220/1961 (Government Gazette A173). In accordance with Article I(3), Greece applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State, and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under Greek law.

b. Is your jurisdiction a party to the ICSID Convention?

Greece is a Signatory of and Contracting State to the 1965 ICSID Convention since 21 May 1969.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Greece initially adopted the UNCITRAL Model Law 1985 through Law 2735/1999, subject to minor amendments.

On 4 February 2023, Greece enacted Law 5016/2023 - titled as the "International Commercial Arbitration Act" - which repeals Law 2735/1999 and conforms with the UNCITRAL Model Law 2006, thereby establishing a modern legal framework for the conduct of international arbitration proceedings seated in Greece.

d. Does your local law distinguish between domestic and international arbitration?

Greece has adopted a dualistic legal regime which distinguishes between international and domestic arbitration proceedings. As of February 2023, international arbitration is governed by Law 5016/2023, whereas domestic arbitration is regulated by the Greek Code of Civil Procedure (**GCCP**) Chapter 7, Articles 867-903. Parties may, however, agree that the International Arbitration Act also applies in respect of domestic arbitration proceedings.

Pursuant to Article 3.2 of Law 5016/2023, an arbitration is deemed international if

1. parties have, at the time their arbitration agreement was concluded, their place of business in different jurisdictions;
2. the place of arbitration (or any place where substantial part of obligations is performed or the place with which the subject-matter of the dispute is closely connected) is situated outside the state in which parties have their business; or
3. parties have expressly agreed so.

2. Court proceedings before and during arbitration

a. In relation to which issues, other than interim measures, can national courts provide assistance/support?

A party may apply to the Greek courts to seek assistance in relation to the appointment of the arbitral tribunal (Articles 15-17, Law 5016/2023); arbitrator challenges (Articles 19-21, Law 5016/2023); and the taking of evidence (Article 36, Law 5016/2023).

b. Is interim relief by national courts available before and during arbitral proceedings?

A party may apply to the Greek courts to seek an order of interim measures, prior to as well as after the commencement of arbitration proceedings (Article 13, Law 5016/2013).

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions are not available under Greek law.



Greece

3. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

A party may apply to set aside an arbitral award on the grounds listed in Article 43 of Law 5016/2023, namely in circumstances where:

- > a party lacked capacity to conclude the arbitration agreement, the arbitration agreement was invalid, or the tribunal declined jurisdiction notwithstanding a valid arbitration agreement;
- > a party was not given proper notice of an arbitrator's appointment or of the arbitral proceedings, or was otherwise unable to present its case for no fault of its own;
- > the award pertains to a dispute falling outside the scope of the arbitration agreement or goes beyond the parties' request for relief;
- > the composition of the arbitral tribunal or the arbitral procedure was in breach of the parties' agreement or Law 5016/2023; or
- > a ground for revision of court judgements is extant as per Article 544(6)-(10) GCCP.

The courts may also determine, on its own motion, whether:

- > the subject matter is not capable of settlement by arbitration under Greek law; and
- > the arbitral award violates international public policy.

By express and specific agreement in writing, parties may waive their right to seek to set aside an arbitral award. In such case, parties maintain the right to raise, in the context of enforcement proceedings, grounds which constitute setting-aside grounds (Article 43(7), Law 5016/2023).

In relation to domestic arbitrations the following grounds may be invoked to challenge domestic arbitral awards (Article 897, GCCP):

- > the provisions of Article 886(2) (principle of equality), or Article 891 (decision by majority vote) and Article 892 (form of arbitral award) of the GCCP were breached;
- > the award is contrary to the rules of public policy;
- > the award is incomprehensible or contains contradictory provisions;
- > there are grounds for the reopening of a contested judgment pursuant to Article 544 GCCP;
- > the arbitration agreement is null;
- > the award was rendered after the arbitration agreement ceased to have effect;

- > the arbitrators who issued the award were appointed in violation of the provisions of the arbitration agreement, or of the law, or had been revoked by the parties, or if they adjudicated despite their disqualification for reason of challenge; and
- > the arbitral tribunal acted in excess of the powers granted to them by the arbitration agreement or by the law.

In relation to domestic arbitrations, Article 901 GCCP provides an additional remedy, i.e. to seek a binding declaration that the award is non-existent on the grounds that (i) the arbitration agreement was never concluded; (ii) the subject matter was non-arbitrable; and (iii) the award was rendered against a non-existent respondent.

b. How is a setting aside application filed and how long do proceedings take?

An application to set aside an international award must be filed within three months from the date of formal service of the award (Article 899(2) GCCP; Article 43(3), Law 5016/2023).

Setting-aside applications will be determined by the Court of Appeal in the district in which the award was issued, or, if the relevant district cannot be determined, the Athens Court of Appeal (Article 898 GCCP; Article 43(2), Law 5016/2023). The judgment of the Court of Appeal is subject to appeal before the Supreme Court, in both domestic and international arbitration proceedings.

Proceedings before the Court of Appeal and Supreme Court may take several months – or even years – to conclude, depending on the courts' workload.

c. Does an application to set aside an award suspend its enforcement?

The enforcement of an award is not automatically suspended upon filing of an application to set aside the award. However, the competent court may order that enforcement is suspended, if it establishes that a ground for annulment is likely to be upheld (Article 899(3) GCCP; Article 44(3), Law 5016/2023).

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

There are limited grounds upon which arbitral awards may be set aside, which are exhaustively set out in Article 43 of Law 5016/2023 (see Question 3(a) above). Greek courts generally adhere to the grounds listed therein and will not conduct a review on the merits.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

In case of domestic arbitration, the court examining a setting-aside application may not remit the case to the arbitral tribunal. It is to be noted, however, that if an arbitral award has been set aside, the effects of a successful challenge differ depending on the grounds of the challenge.

On the one hand, if the award has been set aside on the basis that the arbitration agreement was null or void or had ceased to have effect (Articles 897(1) and (2) CCP), the parties may have no other alternative than initiate local court proceedings.

Greece

On the other hand, if an award has been annulled on other grounds (e.g., procedural defects), the arbitration agreement would generally still be effective, and the dispute may be submitted to arbitration again. In both cases, however, further difficulties may arise due to the lapse of time (e.g., if the claim has become time-barred).

In case of international arbitration, Greek courts may, upon the request of a party or on their own motion, remit the dispute to the tribunal which has issued the award, directing that defect be rectified and setting a time-limit of no more than 90 days for a new award to be issued (Article 43(5), Law 5016/2023).

4. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

As a dualistic regime, Greek law distinguishes between domestic and foreign arbitral awards.

The recognition and enforcement of foreign arbitral awards is subject to the terms of the NYC (Article 45(1), Law 5016/2023). International conventions and bilateral treaties prevail over domestic law on the enforcement of foreign arbitral awards, but they are complemented by the GCCP (Article 903 GCCP), if certain aspects are not addressed thereto.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Awards rendered in domestic arbitral proceedings in Greece constitute *res judicata* (Article 896(2) GCCP).

In domestic arbitration, upon the signing of the award, the sole arbitrator or chairperson of a multi-member tribunal, must file the original award with the secretariat of the Single-Member Court of First Instance in the district in which the award is issued, and deliver copies of the award to the parties (Article 893(2), GCCP).

A party seeking enforcement must apply for leave for enforcement before the Single-Member Court of First Instance (Article 918(2)(d) GCCP). Leave is granted in favour of a legally authorised party. If such leave is refused, the party may exercise all means of recourse (eg, appeal, etc) against the judgment rejecting its application for exequatur.

Once leave is granted, enforcement proceedings may commence. A formal notice will be delivered to the party against whom enforcement is sought and, if the said party fails to comply, the party initiating the enforcement may issue an order to the bailiff (Articles 924, 926(1) and 927 GCCP).

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Foreign arbitral awards may be recognised and enforced pursuant to Legislative Decree No 4220/1961, by which Greece ratified the NYC.

Irrespective of the country in which it was issued, an arbitral award may be recognised as binding and declared enforceable upon written application to the competent court.

A party applying for recognition and enforcement of a foreign arbitral award must submit to the competent court an original of the award or an authenticated copy thereof. In respect of awards drafted in foreign language, the court may require the applicant to submit an official translation.

d. How long does it take to have an arbitral award recognised and enforced?

Timing and duration of recognition and enforcement proceedings will largely depend on the workload of the court and generally ranges from two months to one year.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Greek courts will not, in principle, recognise and enforce a foreign arbitral award that has been set aside by the courts of the seat of the arbitration.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

State entities are generally subject to immunity, unless they perform commercial acts akin to acts performed by private commercial parties. Immunity may also be waived by entering into an arbitration agreement.

Enforcement against state entities is in principle prohibited, unless such enforcement is against property being the subject of commercial acts on the part of the state, or if immunity has been waived. Property aimed at serving public purposes is also exempt. Moreover, enforcement against property of foreign state entities is subject to permission granted by the Greek Minister of Justice (Article 923 GCCP).



Hong Kong SAR



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1. Recent example of our work

We represented a Malaysian property developer in an HKIAC arbitration where we successfully made one of the first applications to obtain an asset preservation order from the PRC courts pursuant to the Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR. At the enforcement stage, we also successfully persuaded the Hong Kong court to reject a setting aside application by the award debtor at the first hearing on the basis that the application was out of time and no good reasons had been demonstrated to justify an extension of the three-month statutory time limit.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

The People's Republic of China (**PRC**) is a Contracting State to the 1958 New York Convention (the **NYC**) since 22 January 1987 and as a signatory, has extended its rights and duties to the Hong Kong Special Administrative Region (**Hong Kong**). In accordance with Article I(3), the PRC applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State, and only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the PRC.

b. Is your jurisdiction a party to the ICSID Convention?

Hong Kong is not a direct signatory to the 1965 ICSID Convention. In disputes involving Hong Kong, jurisdiction under ICSID may be derived from the accession of the PRC to the ICSID Convention. The PRC is a Signatory and Contracting State to the ICSID Convention since 6 February 1993.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The principal statute is the Arbitration Ordinance (Cap 609) (the **AO**), which came into effect on 1 June 2011. It gives effect to the provisions of the UNCITRAL Model Law (the **Model Law**) by reproducing its text verbatim in the body of the Ordinance. In addition, relevant principles of common law, for example, confidentiality of arbitral proceedings, also apply.

d. Does your local law distinguish between domestic and international arbitration?

Prior to 1 June 2011, the old Arbitration Ordinance (Cap 341) distinguished between domestic and international arbitration. The international regime was based on the Model Law. The distinction has now been abolished, and under the AO, the Model Law provisions apply to both domestic and international arbitration in Hong Kong.

Schedule 2 of the AO provides opt-in sections that enable certain provisions in the old Arbitration Ordinance that applied to domestic arbitration to continue to apply. For example, this is the case for appeals against arbitral award on question of law.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Besides court-ordered interim measures, matters handled by the Hong Kong Court of First Instance (the **CFI**) include:

- > dealing with applications to terminate an arbitrator's mandate (Section 27 AO) and applications to challenge an arbitrator if the challenge was unsuccessful before the arbitral tribunal (Section 26 AO);
- > dealing with an application to set aside an award (Section 81 AO);
- > assistance in taking evidence, such as ordering a person to attend before an arbitral tribunal to give evidence or to produce documents or other evidence (Section 55 AO);
- > granting leave to enforce an arbitral order or direction made whether in or outside Hong Kong (Section 61 AO);
- > extending time for making an arbitral tribunal (Section 72 AO);
- > granting leave to enforce an arbitral award (Section 84 AO); and
- > enforcing a NYC award, Mainland award or Macao award (Sections 87, 92 and 98A AO).



Hong Kong SAR

b. Is interim relief by national courts available before and during arbitral proceedings?

The CFI is expressly authorised to grant interim relief in aid of arbitrations commenced, or yet to be commenced, in or outside of Hong Kong, irrespective of whether or not similar powers may be exercised by an arbitral tribunal in relation to the same dispute (Sections 45 and 60 AO; Section 21M High Court Ordinance (Cap 4)).

The applicable principles for an injunction in aid of arbitration in Hong Kong are the same as interlocutory injunctions pending resolution of court disputes. Where the relief sought is for a Mareva injunction, the test would be:

1. whether the applicant can show a good arguable case, that there is a real risk of dissipation of assets and that the balance of convenience is in favour of the grant; and
2. whether the relief sought in aid of arbitral proceedings should be declined because the interim measure sought is currently the subject of arbitral proceedings and it is more appropriate for the interim measure sought to be dealt with by the arbitral tribunal.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

The CFI has power to issue anti-suit injunctions (Section 45 AO; Section 21L High Court Ordinance). Foreign proceedings in breach of an arbitration agreement are a breach of contract. Such breach ordinarily will be restrained by the grant of an injunction restraining the party in breach from conducting such proceedings unless there are strong reasons to the contrary (*Giorgio Armani SPA v Elan Clothes Co Ltd* [2019] HKEC 577).

In deciding whether to impose an anti-suit injunction, the court will take into account considerations such as whether the anti-suit injunction application had been made without delay, how far the foreign proceedings had advanced and whether interest of third parties would be prejudiced (*Sea Powerful II Special Maritime Enterprises (ENE) v Bank of China Ltd* [2016] 1 HKLRD 1032).

A court may decline to grant an anti-suit injunction where there is a real risk of parallel proceedings and inconsistent decisions because the interests of parties in the foreign proceedings who are not bound by the arbitration clause are involved or part of the claim is not within the scope of the arbitration clause (*Giorgio Armani SPA v Elan Clothes Co Ltd* [2019] HKEC 577).

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

A party may make an application to the CFI to set aside an arbitral award rendered by a tribunal seated in Hong Kong. The AO provides six exhaustive grounds for setting aside an award made in Hong Kong, incorporating Article 34 of the Model Law. They include:

- > incapacity of a party or invalidity of the arbitration agreement;
- > failure to give a party proper notice of the arbitration process or a proper opportunity to present its case;
- > the award was made in excess of the submission to arbitration;
- > the composition of the arbitral tribunal or arbitral procedure adopted was not in accordance with the arbitration agreement;
- > the subject matter of the arbitration was not arbitrable; and
- > the award is in conflict with public policy.

A party may also make an application to the CFI challenging an award on the ground of serious irregularity affecting the tribunal, the arbitral proceedings or the award (Section 4 of Sch 2 AO). However this provision only applies where parties entering into arbitration agreements expressly opt-in (Section 99 AO).

b. How is a setting aside application filed and how long do proceedings take?

The CFI has jurisdiction to set aside an award (Section 81 AO). A decision of the CFI may be appealed before the Court of Appeal, after leave has been granted by the CFI (Section 81(4) AO). The relevant threshold is whether the intended appeal had reasonable prospects of success (*American International Group, Inc v Huaxia Life Insurance Co Ltd* [2017] HKEC 80). If leave to appeal is refused by the CFI, the decision is final, and the Court of Appeal has no jurisdiction to entertain any application for leave.

An application for setting aside must be made within three months of the date on which the applying party received the award (Section 81(1) AO), although the court has retained discretion to grant an extension of time for the application to set aside an award in exceptional circumstances (*AW v PY* [2022] HKCFI 1397).

Hong Kong SAR

The setting aside hearing is heard *inter-partes*. Our experience suggests that from the filing of an application for setting aside an award, it may take six to nine months to receive the decision from the CFI.

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not suspend its enforcement. The court may however suspend recognition and enforcement proceedings and order the provision of security, taking into consideration the merits of the setting-aside proceedings and the potential difficulties of delaying enforcement proceedings. Enforcement proceedings may also be suspended if the matter is remitted to the tribunal for reconsideration.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The courts in Hong Kong have taken a strict view on unmeritorious challenges to awards. The courts have a residual discretion to refuse to set aside an award despite the proven existence of a valid ground, for example when there is no real impact on the result. An unsuccessful party in setting aside proceedings will, in the absence of special circumstances, be ordered to pay costs on an indemnity basis.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

Upon the application of a party, the CFI may suspend the setting aside proceedings and remit the award for reconsideration by the same tribunal (Section 86(4) AO). However, the court does not have jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award (Section 81(3) AO).

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

An arbitral award, whether made in or outside Hong Kong, is recognised and enforceable in the same manner as a judgment of the CFI, with the leave of the CFI (Section 84 AO). If leave is granted, the CFI may enter judgment in terms of the award.

The AO contains the following regimes for the enforcement of arbitral awards: awards made in or outside Hong Kong; awards made under the NYC; and awards rendered pursuant to the Arbitration Law of the PRC or the Macao SAR (**Macao**). Awards rendered in the PRC and Macao are neither foreign awards that fall within the scope of the NYC, nor domestic Hong Kong awards. They therefore fall within their own categories.

In addition, a party may enforce the award under the common law proceeding of enforcement of the award by action.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

An application to the CFI for leave to enforce the award may be made *ex-parte* with supporting affidavit (O 73, r 10(3) Rules of the High Court):

- > exhibiting the arbitration agreement and the original award, or a copy thereof;
- > stating the name and the usual or last known place of abode or business of the applicant, and the person against whom it is sought to enforce the award; and
- > stating either that the award has not been complied with, or the extent to which it has not been complied with, at the date of the application.

An order giving leave to enforce an award must be served on the award debtor by delivering a copy to him personally at his usual or last known place of abode or business (O 73, r 10(4) Rules of the High Court). The award may be enforced after the expiration of 14 days after service of the order (O 73, r 10(6) Rules of the High Court). If the debtor applies within that period to set aside the order, the award cannot be enforced until after the application is finally disposed of (O 73, r 10(6) Rules of the High Court).

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

An arbitral award to which the NYC applies is enforceable in Hong Kong. A party seeking to enforce such an award may apply *ex-parte* to the CFI for leave to enforce the award in the same manner as a judgment or order of the court (O 73, r 10(1) Rules of the High Court). The application for leave must be supported by an affidavit (Section 88 AO) exhibiting:

- > the duly authenticated original award or a duly certified copy of it;
- > the original arbitration agreement or a duly certified copy of it; and
- > where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Leave to enforce is ordered subject to the other party having an opportunity to apply to set aside the order within 14 days after service of the order (or, if that party is out of the jurisdiction, within such period as the court may direct).

Awards rendered in Mainland China and Macao are enforceable under the *Arrangement Concerning Mutual Enforcement of Arbitration Awards between the Mainland and Hong Kong SAR 1999 (Supplemented)* and *Arrangement on Mutual Recognition and Enforcement of Arbitral Awards between Hong Kong SAR and Macao SAR 2013* respectively, which are based largely upon the NYC. The principles, rules and procedures applicable to the enforcement of NYC awards apply also to awards rendered in Mainland China and Macao.

Hong Kong SAR

d. How long does it take to have an arbitral award recognised and enforced?

Enforcement of an arbitral award is a two-stage procedure. First, an applicant for enforcement applies *ex-parte* to the court for an order granting leave for enforcement. Secondly, once the court's order has been served on the debtor, the debtor has 14 days (or, if the order is to be served out of the jurisdiction, such other period as the court may decide) in which to apply to set it aside. The award may not be enforced until the relevant time-limit has lapsed or application to set aside the court's order has been disposed of. We estimate that it would take approximately three to six months from filing an application for leave for enforcement until enforcement is permitted, if enforcement is unopposed.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

The grounds on which the enforcement of a NYC award may be refused are set out in Section 89 AO, and they substantially replicate Articles V and VI NYC. These grounds are exhaustive, and the court also has a residual discretion to allow enforcement even if one or more refusal grounds have been established. There is a presumption in favour of enforcement of NYC awards, and enforcement may be refused only in exceptional circumstances such as the presence of a real risk of injustice, a serious procedural error, or where obvious and substantial prejudice will be caused to the party resisting enforcement.

Where application has been made to set aside the award in a competent court at the seat of arbitration, the Hong Kong CFI may, if it thinks fit, adjourn the enforcement proceedings (*Hebei Import and Export Corporation v Polytek Engineering Co Ltd* [1996] 3 HKC 725) and may, at the application of the party seeking to enforce the award, order the other party to give security for the sum awarded (Section 89 AO).

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states or state entities?

Since the return of Hong Kong's sovereignty to the PRC on 1 July 1997, Hong Kong adopts the absolute doctrine of immunity, mirroring the law of the PRC. This is because Hong Kong is merely a region and cannot adopt a principle of state immunity which departs from those adopted by the PRC. As a result, a foreign arbitral award obtained by a state enjoying state immunity cannot be enforced in Hong Kong.

The doctrine of absolute immunity is subject to the exception of waiver or submission to the forum state's jurisdiction, and states can waive any immunity they may have. The Hong Kong Court of Final Appeal identified the following three situations (*Democratic Republic of Congo and Ors v FG Hemisphere Associates LLC* [2011] 4 HKC 151, para 378) in which a waiver may be relevant:

1. by taking part in an arbitration, a state is agreeing to submit to the contractual jurisdiction of the arbitrators;
2. where there has been a waiver of immunity from suit and a submission by the state to the jurisdiction of the Hong Kong courts; and
3. where there has been a waiver by the state of the immunity of its property from execution by the forum state's process.



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Italy

1. Recent example of our work

We assisted Froneri International Ltd in the context of setting aside proceedings before the Court of Appeal of Milan and the Italian Supreme Court of two awards rendered under the auspices of the National and International Chamber of Arbitration of Milan in a dispute against the former shareholder of Eskigel Srl, in connection with a framework agreement aimed at transferring to Froneri the entire share capital of Eskigel.

We assisted the Swedish company Husqvarna AB in the context of recognition proceedings before the Court of Appeal of Bologna relating to an SCC award rendered in connection with a dispute related to the breach of a supply agreement by the Italian company Ciemme Group Srl, as well as in the context of the subsequent opposition proceedings brought by the other party before the same Court of Appeal.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, Italy is a Contracting State to the 1958 New York Convention (**NYC**) since 31 January 1969. Italy ratified the NYC without reservations.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Italy is a Signatory of and Contracting State to the 1965 ICSID Convention since 28 April 1971.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Italy has not adopted the UNCITRAL Model Law. Articles 806 et seq. of the Italian Code of Civil Procedure (as lastly amended by Legislative Decree No. 149/2022 – the **ICCP**) regulate domestic and international arbitration.

d. Does your local law distinguish between domestic and international arbitration?

Since the 2006 reform, Italian law does not distinguish between domestic and international arbitration. It however distinguishes between domestic and foreign awards, for the purposes of recognition and enforcement (see Question 5.a. below).

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Italian courts may provide assistance/support to arbitration in relation to:

- > the constitution of the arbitral tribunal;
- > the disqualification for default and/or replacement of arbitrators, e.g., in case of failure by the parties or designated third-party to proceed with the replacement;
- > disagreement between the arbitral tribunal and the parties on the arbitrators' fees and expenses;
- > challenge of arbitrators;
- > participation of recalcitrant witnesses at hearings;
- > extension of the time-limits to render arbitral award;
- > correction of clerical errors/omissions in case of the arbitral tribunal's failure to do so, or in case the award has been filed for (and granted leave for) enforcement;
- > challenge to the authenticity of a certified legal document (querela di falso); and
- > obtention, in cases of urgency, of evidence from fact witnesses and expert analyses and inspections (e.g., on location, things and/or persons).

b. Is interim relief by national courts available before and during arbitral proceedings?

If the parties agreed on the arbitral tribunal's power to grant interim relief, a party may request the Italian court to order interim measures only before the arbitration. If no such power is granted to arbitrators, Italian courts will have exclusive jurisdiction to issue interim measures before and during the arbitral proceedings.

These measures include, among others, orders relating to property which is disputed in the proceedings (e.g., judicial seizure of the assets subject-matter of the dispute), orders for preservation of evidence or for preservation of a debtor's assets, and interim injunctions.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

No, Italian courts have no power to issue anti-suit injunctions.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Under Italian law, arbitral awards may be challenged in three ways. First, an award may be set aside pursuant to Articles 828 et seq. ICCP.

Italy

Second, a party may request the courts to revoke the award on the specific grounds (mainly relating to fraud) provided for under Article 831 ICCP, read in conjunction with Article 395 ICCP. For example, it may be demonstrated that the award was obtained by a party's fraudulent behaviour, by evidence subsequently recognised as or declared false, based on decisive evidence subsequently found and not timely produced due to force majeure or to the other party's concealment, or by the arbitral tribunal's fraudulent behaviour, as ascertained by a final judgement.

Third, an award may be challenged in opposition proceedings brought by a third party on the grounds that the award violates a third-party's rights or is a result of fraud to the detriment of a party's transferees/ assignees or creditors.

b. How is a setting aside application filed and how long do proceedings take?

The application to set aside an award must be filed within 90 days of the notification of the award and, in any case, no later than six months after the date of the last arbitrator's signature. The application must be submitted to the Court of Appeal that has jurisdiction at the seat of arbitration. Proceedings before the Court of Appeal may last, on average, from 18 months to three years.

The decision of the Court of Appeal may be further appealed before the Italian Supreme Court. These appeal proceedings may last, on average, an additional one to two years.

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not automatically suspend its enforcement. However, the applicant may request the Court of Appeal to suspend the execution of the challenged award, on the grounds of serious reasons (*gravi motivi*). The court would consider the consequences that such a suspension would have on each of the parties (for example, the prejudice that could potentially be suffered by the award-debtor in case of enforcement for a significant amount, the lack of collection of such amount by the award-creditor pending the setting aside proceedings) and the existence of a *prima facie* case.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

At the setting aside stage, the Court of Appeal's review is limited to the specific grounds for annulment invoked by the applicant. In such a context, an award could be set aside on the grounds of violation of the rules of law applicable to the merits of the case (thus entitling the Court of Appeal to annul the challenged award upon review of the merits of the case) only if expressly provided for by the arbitration agreement or by law.

Except in certain specific cases (e.g., invalid arbitration agreement, improper constitution of the arbitral tribunal, an award rendered by a person without legal capacity, an award exceeding the limits of the arbitration agreement, an award illegitimately not dealing with the merits of the case), upon – partially or totally – setting aside the award under the specific grounds invoked by the applicant, the Court of Appeal shall then rule on the merits of the case in lieu of the set aside award (unless the parties agreed to exclude such court power).

The Italian courts may not so rule on the merits of the case if the underlying arbitration agreement was concluded by a party incorporated or domiciled abroad unless the parties expressly agreed or requested so.

When Italian courts do not rule on the merits of the case after having set aside an award, the arbitration agreement – if not declared invalid and/or ineffective – shall apply.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

Under Italian law, the Court of Appeal has no power to remit the award to an arbitral tribunal.

If an award is set aside and the Court of Appeal is not entitled to rule on the merits of the case, a party may commence new arbitral proceedings in accordance with the arbitration agreement (provided that such agreement has not been declared invalid by the Court of Appeal).

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Yes. Italian law provides for separate rules on recognition and enforcement of arbitral awards for awards rendered in arbitrations seated in Italy and for awards rendered in arbitrations seated abroad.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Under Italian law, from the date of the last arbitrator's signature, a domestic arbitral award has the same effects as a national court's judgment.

However, to be enforced, an ad hoc application with an original copy of the award and of the arbitration agreement must be filed with the court (*tribunale*) that has jurisdiction at the seat of arbitration.

The seized court verifies the formal requirements of the award and declares it enforceable by means of a "homologation" order (*decreto*). The court has no power to review the merits of the decision contained in the award.

The court's order may be challenged before the competent Court of Appeal within 30 days of its communication.

Italy

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The party seeking enforcement must submit an ad hoc application with the President of the Court of Appeal that has jurisdiction at the place of residence or incorporation of the party against which enforcement is sought. If enforcement is sought against a party residing abroad, the application must be submitted to the President of the Court of Appeal of Rome. The application must include original copies of the award and of the arbitration agreement and certified Italian translations thereof if the documents are not in Italian.

The President of the Court of Appeal verifies the formal requirements of the award and declares it binding and immediately enforceable in Italy by order (*decreto*) unless: (1) the subject-matter of the dispute is not arbitrable under Italian law; and/or (2) the award is contrary to public policy. The court has no power to review the merits of the decision contained in the award.

The order granting or denying recognition and enforcement of the foreign award may be challenged by means of an opposition procedure before the court of appeal, within 30 days of its notification or communication (as the case may be). An opposition procedure may be brought on the basis of the limited grounds listed in Article 840 ICCP (which are substantially those provided for under Article V NYC).

d. How long does it take to have an arbitral award and enforced?

Recognition of a domestic or foreign award by a Court (*tribunale*) or a Court of Appeal respectively may last, on average, two to three months. In case of opposition brought against the order granting or denying recognition, proceedings before the Court of Appeal may last from 18 months to three years.

Enforcement for both domestic and foreign awards is the same, and its duration depends, *inter alia*, on the specific asset(s) against which enforcement is sought, on the type of procedure chosen by the creditor (attachment of movable or immovable assets, attachment against third parties). For instance, while enforcement on cash/instruments deposited on the debtor's bank account would not be very time-consuming (six to twelve months on average), enforcement on real estate assets located in Italy may last even three to five years.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Effective on 28 February 2023, a foreign award will be immediately enforceable in Italy upon issuance by the President of the Court of Appeal of the order (*decreto*) granting leave for enforcement (see Question 5.c above).

However, in case an opposition procedure is brought against such an order, the Court of Appeal may, upon a party's request, stay the enforcement or suspend the enforceability of the award in case of serious reasons (*gravi motivi*).

A party may also request interim measures to be enforced in Italy to protect its interests both before and during the award's recognition proceedings.

If an award has been annulled or suspended at the seat of arbitration, the party contesting recognition and enforcement of the award may bring opposition proceedings before the Court of Appeal against the order granting leave for enforcement.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Under Italian law, state immunity issues, for example arising in the context of investor-state arbitration, do not affect the recognition of arbitral awards.

At the enforcement stage, Italian law provides that, in order to avoid application of state immunity, the award-creditor must prove that a targeted asset belonging to a state is specifically used or intended to be used by the state for commercial purposes. The burden of proof in this regard lies on the award-creditor and, in case of doubt, Italian courts would tend to uphold the state immunity defence in enforcement proceedings.



Japan



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Japan

1. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, Japan is a Contracting State of the 1958 New York Convention (the **NYC**) since 20 June 1961. In accordance with Article I(3), Japan applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. However, it should be noted that the Japanese Arbitration Act (Act No. 138 of 2003) (the **JAA**) does not differentiate between awards made in NYC and non-NYC jurisdictions when prescribing the grounds for resisting recognition and enforcement.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Japan is a Signatory of and Contracting State to the 1965 ICSID Convention since 16 September 1967.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The JAA is based on the 1985 UNCITRAL Model Law.

d. Does your local law distinguish between domestic and international arbitration?

Yes, the Act on Special Measures concerning the Handling of Legal Services by Foreign Lawyers (Act No. 66 of 1986, as amended), defines international arbitration as a civil arbitration where: (1) some or all of the parties have an address or head office overseas (including majority foreign-owned); (2) the governing law of the dispute is not Japanese law; or (3) the arbitration is seated outside of Japan. However, the rules for the enforcement of international and domestic awards are the same.

2. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Under the JAA, the competent district court may provide the following assistance/support (including in cases where the place of arbitration has not been designated under Article 8):

- > delivery of written notice in arbitral proceedings, where it is difficult for the sender to obtain materials to certify that the delivery has been made (Article 12(2) JAA);
- > determine the number of arbitrators upon request of a party (Article 16(3) JAA);

- > appoint arbitrators where there is no agreement on the appointment process, parties fail to appoint arbitrators, or at a party's request (Article 17 JAA);
- > challenging the decision made in an unsuccessful challenge of an arbitrator to the arbitral tribunal (Article 19 JAA);
- > dismissal of an arbitrator (Article 20 JAA);
- > challenging the jurisdiction of an arbitral tribunal, where a party has been unsuccessful in challenging the jurisdiction before the arbitral tribunal itself (Article 23(5) JAA);
- > examining evidence at the request of the arbitral tribunal or a party (Article 35 JAA); and
- > setting aside an arbitral award (Article 44 JAA).

b. Is interim relief by national courts available before and during arbitral proceedings?

Article 15 JAA, provides that a party may request interim measures from a court before or during arbitral proceedings. The interim measures available to a party are set out in the Civil Provisional Remedies Act (Act No. 91 of 1989) and include attachments and injunctions. Note that an interim order made by an arbitral tribunal cannot be enforced by a Japanese court.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Article 14(1) JAA, provides that a court may issue anti-suit injunctions, where an action is brought before a court in respect of a dispute that is the subject of an arbitration agreement. However, a court will not issue an anti-suit injunction where:

1. the arbitration agreement is not valid due to nullity, rescission or for any other reasons;
2. it is impossible to carry out an arbitration procedure based on an arbitration agreement, for example where there is a valid arbitration agreement but an arbitrator with the prescribed characteristics in the arbitration agreement is not identifiable to hear the dispute; or
3. if the petition for an anti-suit injunction was filed after the defendant presented oral arguments on the merits or made statements on the merits in preparatory proceedings.

Japan

3. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

A party may petition a competent Japanese court to set aside an arbitral award under Article 44 JAA.

b. How is a setting aside application filed and how long do proceedings take?

Under Article 5 JAA, a competent court for the purpose of setting aside proceedings is (1) the district court designated by the parties in the arbitration agreement; (2) the district court which has jurisdiction over the place of arbitration; or (3) the district court which has jurisdiction over the respondent. A district court's decision may be appealed to the High Court in that region, and a High Court's decision may be appealed to the Supreme Court of Japan.

The grounds for setting aside an arbitral award are in substance the same as those under the NYC and the Model Law, and are set out in Article 44(1) JAA.

An application must be filed within three months from the date on which the party received a copy of the arbitral award, or before any order made on enforcement of the award has become final and binding.

The duration of setting aside proceedings will vary depending on the circumstances of the case. Proceedings at first instance typically take between six months to a year, while appeals may take up to six months.

c. Does an application to set aside an award suspend its enforcement?

Under Article 46(3) JAA, an application to set aside an award may suspend enforcement proceedings if the court considers it necessary. Note that the court may order the party that commenced the setting aside application to provide security.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

There have been relatively few settings aside applications before the Japanese courts, and to date the grounds for challenge have been of a procedural nature. Therefore, there is no discernible trend in terms of the national courts' general approach in relation to the level of review of an award during setting aside applications. That said, it is more likely that a court will exercise restraint.

e. Does the national court have the power to remit an award to an arbitral tribunal?

There are no provisions to remit an award to an arbitral tribunal.

4. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

The JAA does not distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes and applies the same rule to both (see Article 45(1) JAA).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Under Article 46 JAA, a party seeking enforcement of an arbitral award may apply to a competent court for an execution order and then an application for an enforcement decision against the award debtor.

The party seeking to enforce the award must provide a copy of the arbitral award, a document certifying that the content of this copy is identical to the arbitral award, and a Japanese translation of the arbitral award if it was not made in Japanese.

A party may challenge the recognition of an arbitral on the following grounds: (1) validity of the arbitration agreement, whether based on a party's capacity or otherwise; (2) procedural grounds such as insufficient notice, composition of the tribunal; (3) procedural fairness grounds; (4) jurisdictional grounds, namely exceeding the scope of the arbitration agreement; (5) the award is not yet binding, or has been set aside or suspended; (vi) arbitrability; or (6) public policy.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

As stated in Question 5.b., as Japan does not distinguish between domestic and foreign arbitral awards for the purposes of recognition and enforcement.

d. How long does it take to have an arbitral award recognised and enforced?

The duration of recognition and enforcement proceedings varies depending on the circumstances of the case. Based on case statistics from the Tokyo District Court, enforcement proceedings last on average nine months, and a third of enforcement cases have been disposed of within three months. If the arbitral award is challenged, proceedings may take between two to four years.

Japan

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Only final and binding awards are enforceable in Japan (and a ground for resisting recognition of an arbitral award under Article 45(2)(vii) JAA is in circumstances where the award is not yet binding or has been set aside or suspended). Therefore, it is notable that interim awards are not recognisable and enforceable in Japan as they are not yet final and binding.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Sovereign immunity for foreign states before Japanese courts is provided for under the Act on the Civil Jurisdiction of Japan with respect to Foreign States (Act No. 24 of 2009) (the **Civil Jurisdiction Act**), except in proceedings regarding commercial transactions under Article 8, unless immunity is expressly agreed.

The Civil Jurisdiction Act also specifically provides that a foreign state does not have immunity from jurisdiction in relation to a written arbitration agreement related to commercial transactions between that state and a citizen of another state, including in relation to judicial proceedings concerning the existence or nonexistence or effect of the arbitration agreements, or arbitration procedures based on the arbitration agreements (Article 16 Civil Jurisdiction Act).



Luxembourg



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Luxembourg

1. Recent example of our work

We assist Enel (being Italy's largest power company) before the Luxembourg courts in challenging an *ex-parte* exequatur order to prevent a ruling of an Albanian court having sentenced Enel to pay an amount in excess of €430m to become enforceable in Luxembourg. A salient element is that Enel obtained a favourable arbitral award contradicting the Albanian judgment but is seeking the annulment thereof due to a manifest conflict of interest of the arbitrator appointed by Enel.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, Luxembourg is a Contracting State to the 1958 New York Convention (the **NYC**) since 20 May 1983. In accordance with Article I(3), Luxembourg applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Luxembourg is a Signatory of and Contracting State to the 1965 ICSID Convention since 30 July 1970.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Luxembourg law on arbitration is not based on the UNCITRAL Model Law. Luxembourg has no specific law governing international arbitration. The current provisions on arbitration are encompassed in the New Code of Civil Procedure (the **NCPC**) (Articles 1224-251 NCPC). However, some provisions of the NCPC are similar to the UNCITRAL Model Law and are compatible with international arbitration requirements. As of January 2023, the provisions on arbitration are under review.

d. Does your local law distinguish between domestic and international arbitration?

Luxembourg arbitration law does not make the distinction between domestic and international arbitral proceedings. However, different provisions would apply to national and foreign arbitral awards at the stage of the enforcement proceedings.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Luxembourg courts can intervene in the appointment process of an arbitrator. First, where a party fails to appoint an arbitrator, the defaulting party is summoned to appoint an arbitrator within eight days after the receipt of a registered letter sent by the other party. Absent any reaction, the President of the District Court (*Tribunal d'arrondissement*) shall appoint an arbitrator upon request of the other party. Second, if the party appointed arbitrators fail to designate the third one, the President of the District Court shall appoint the presiding arbitrator of the tribunal.

The procedure regarding the challenge of an arbitrator is not explicitly provided for by law, but pursuant to case law and doctrine, challenges of arbitrators (for failure to be impartial and independent) should be brought before the District Court.

b. Is interim relief by national courts available before and during arbitral proceedings?

Luxembourg law does not provide for specific procedural rules on provisional measures in the presence of an arbitration clause. Pursuant to case law, the President of the District Court, sitting in summary proceedings, can order provisional or conservatory measures before arbitral proceedings at the request of a party, such as expert reports, conservation of documents, etc.

During arbitral proceedings, Luxembourg case law already ruled that once the tribunal arbitral is constituted, national courts lose their competence to order interim relief.

However, the Draft Bill No 7671 will reform the Luxembourg arbitration law and, in its current draft (as of June 2022), provides for the possibility for national courts to grant interim relief as long as the arbitral tribunal has not yet been constituted or where it appears that the arbitral tribunal cannot grant the relief sought.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

No, anti-suit injunctions are not available under Luxembourg law.

Luxembourg

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

A party can challenge a domestic arbitral award only by way of annulment based on the grounds listed in Article 1244 NCPC, in particular if the award violates public policy, if the award was obtained through fraud or if the evidence that was submitted has been declared false by an irrevocable judicial decision.

b. How is a setting aside application filed and how long do proceedings take?

A request for annulment can only be sought once the arbitral award can no longer be challenged before the arbitral tribunal.

Under the current legal provisions, the District Court is competent to rule on a request for annulment of an arbitral award.

The admissibility of an application to set aside an arbitral award is subject to the prior issuance of an enforceable copy of the award by the President of the District Court. Luxembourg law does not allow an application to set aside an unenforceable Luxembourg arbitral award.

The application must be filed within one month:

- > from the notification of the award to the parties; or
- > from the discovery of the fraud, of the document or other evidence, or from the date where the evidence was declared false, without exceeding the time limit of five years from the notification of the enforcement order to the parties.

Setting aside proceedings before the District Court usually take between 12 and 18 months, depending on the volume of arguments raised by either side.

The decision of the District Court can be appealed before the Court of Appeal. In turn, the decision by the Court of Appeal may be appealed before the Luxembourg Supreme Court. Appeal proceedings are generally quicker than first instance proceedings but may, depending on the complexity of the matter, take another two years. Cassation proceedings will take approximately one year.

Arbitral awards may however not be invoked against third parties (Article 1243 NCPC).

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not automatically suspend the enforcement of an arbitral award. The arbitral tribunal can order the provisional enforcement of its arbitral award notwithstanding a setting aside application. However, national courts may, upon a party's request, order the suspension of the enforcement of the relevant arbitral award pending setting aside proceedings.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The general approach in Luxembourg is that courts have the willingness to ensure the effectiveness of arbitral awards. National courts may not review the merits of the arbitral award or of the case. Therefore, the general approach of courts is a restrained review of awards.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

The District Court has the power to remit an award to the arbitral tribunal only if the arbitral tribunal has omitted to rule on one or more points of the dispute which can be dissociated from the points on which the arbitral tribunal has ruled.

The arbitral tribunal may, at the request of a party, complete its award, unless the other party disputes that points have been omitted or that the omitted points can be dissociated from the points on which it has ruled.

In this case, the dispute is brought before the District Court. If the District Court rules that the omitted points can indeed be dissociated from the points on which the award was made, it shall refer the parties back to the arbitral tribunal to complete the award.



Luxembourg

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Luxembourg arbitration law does not make a proper distinction between domestic and international arbitration as such. However, different rules apply when it comes to the recognition and enforcement of any such awards.

Articles 1241 and 1242 NCPC apply to domestic arbitral awards, whereas Articles 1250 and 1251 NCPC apply to foreign awards. Both sets of rules provide that the enforcement of an arbitral award will be subject to an enforcement order of the President of the District Court.

Moreover, when the NYC is applicable, the provisions of the NCPC do not apply before the national courts.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

In Luxembourg, a domestic arbitral award has *res judicata* as soon as it has been issued and prior to its enforcement.

The enforcement of an award requires an exequatur order from the President of the District Court. The exequatur request is filed *ex parte*. The party against whom enforcement is sought is thus not informed during this initial stage.

If the President of the District Court orders the enforcement of the award, its decision will have to be formally served to the debtor by act of bailiff. The debtor will then have one month to file a request to oppose this order in third-party opposition proceedings (unless the award was obtained by fraud, on the basis of fraudulent evidence or that a piece of crucial evidence was withheld by one of the parties).

The decision of the District Court can be challenged before the Court of Appeal. An extraordinary appeal against the Court of Appeal judgment is possible with the Supreme Court.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

In order to be enforceable in Luxembourg, an *ex parte* leave for enforcement (exequatur) must be granted by the President of the District Court. The President of the District Court seized with the request will not review the merits of the case but will verify that it received the original award and the arbitration agreement (or a certified copy) and that the rules that apply to the execution of foreign judgments are complied with.

Article 1251 NCPC provides that, subject to the provisions of international conventions, a judge may refuse to enforce a foreign award on the following grounds:

- > the award can still be challenged before the arbitrators and the arbitrators did not order its provisional enforcement notwithstanding an appeal;
- > the award or its enforcement is contrary to public policy or the dispute was not arbitrable; or
- > there are grounds for annulment pursuant to Article 1244(3)-(12) NCPC (notably fraud).

d. How long does it take to have an arbitral award recognised and enforced?

Generally, it takes a couple (two to four) of weeks to have an arbitral award recognised and enforced in Luxembourg at first instance.

The court's decision to grant or deny enforcement is subject to a right of appeal before the appeal court. An extraordinary appeal against the Court of Appeal judgment is possible with Supreme Court, whose review is limited to the legal questions and does not pertain to the facts/merits of the case. Appeal proceedings may, depending on the complexity of the matter, take two years. Cassation proceedings will take approximately one year.

Limitation periods or time limits for the recognition and enforcement of arbitral awards are not provided for by Luxembourg law.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Traditionally, Luxembourg courts have adopted a liberal regime in favour of the recognition and the enforcement of arbitral awards, whereby effect was given to awards even if they were annulled at the seat. However, in recent years, that liberal approach seems to have been abandoned, with a tendency to refuse enforcement if the award has been set aside in the country of the seat of arbitration.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

There is no specific legal basis in Luxembourg in relation to the recognition and enforcement of awards against states.

Luxembourg is a party to the European Convention on State Immunity of 16 May 1972, which protects states from measures of execution, except where the state has expressly consented thereto in writing.

Waiver of immunity from jurisdiction does not automatically entail waiver of immunity from execution; the waiver of immunity from execution must be special and unequivocal.

Generally, a state will raise the immunity defences at the stage of the execution of the arbitral award before national courts.



The Netherlands



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The Netherlands

1. Recent example of our work

We represent Mauritius-based investors in setting aside proceedings, including a recent win before the Dutch Supreme Court, initiated by the Republic of India in relation to awards rendered in an investment arbitration under the Mauritius-India BIT, revocation proceedings against the awards before Dutch courts, and enforcement proceedings in several jurisdictions including Canada, the United States, France, England and Australia. The dispute further led to an ICC arbitration and related court proceedings in India, including before the Supreme Court, and a second investment treaty arbitration with related litigation in Mauritius.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, the Netherlands is a Contracting State to the 1958 New York Convention (**NYC**) since 24 April 1964. In accordance with Article I(3), the Netherlands applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State. The Kingdom of the Netherlands consists of four countries (Aruba, Curaçao, Sint Maarten and the Netherlands) and three public bodies located in the Caribbean: Bonaire, Sint Eustatius and Saba. The NYC applies in all these territories.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, The Netherlands is a Signatory of and Contracting State to the 1965 ICSID Convention since 14 October 1966.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Although the Netherlands is not a Model Law country, the Dutch Arbitration Act (Articles 1020-1076 of the Dutch Code of Civil Procedure) has drawn inspiration from the UNCITRAL Model Law.

d. Does your local law distinguish between domestic and international arbitration?

The Dutch Arbitration Act does not make a distinction between domestic and international arbitration for arbitrations seated in the Netherlands. However, it does consist of two separate legal regimes for arbitral proceedings seated in the Netherlands and foreign-seated arbitral proceedings.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

If a dispute in respect of which an arbitration agreement exists (providing for arbitration in the Netherlands or abroad) is brought *before* a Dutch court before arbitral proceedings are commenced, the court is obliged to decline jurisdiction if one of the parties timely invokes the existence of the valid arbitration agreement. If the same dispute is brought before a Dutch court *after* arbitral proceedings have been commenced and these proceedings are still pending, the court is not entitled to investigate the validity of the arbitration agreement before the arbitral tribunal has made a decision on its jurisdiction.

Dutch courts can, in specific cases, also determine the number of arbitrators, appoint arbitrators, release arbitrators from their mandate, decide on challenges to arbitrators and order consolidation of arbitral proceedings.



The Netherlands

Finally, another significant tool available for parties seeking to enforce an award is to request a pre-judgment attachment, which allows assets to be frozen pending a final decision in arbitral proceedings and subsequent recognition and enforcement proceedings. Importantly, the judge will, in principle, decide the request for a pre-judgment attachment on an *ex parte* basis (ie, without hearing the counterparty) after limited review of the petition. This prevents the counterparty from dissipating assets.

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes. Parties can request courts to grant conservatory measures or other measures, such as preliminary witness examination, preliminary expert reports, preliminary on-site examination and viewing, inspection of, copies or extracts and conservation of documents, prior to or pending an arbitration seated in the Netherlands or abroad. Dutch courts may order such measures only if they cannot be obtained in arbitration or cannot be granted in a timely manner in arbitral proceedings.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions as such are not available in the Netherlands, but if the arbitration agreement contains a prohibition to submit disputes before national courts, in theory, a similar measure could be requested in accordance with Article 3:296 of the Dutch Civil Code.

In practice however, obtaining such an injunction might be difficult. Under Dutch law, sufficient interest is required to demand an injunction. When it comes to an obligation to refrain from acting, a real threat of violation of this obligation is required in order to constitute sufficient interest. Referring to a past violation of such obligation is, in principle, not considered to constitute sufficient interest. However, if such an injunction cannot be obtained and court proceedings are initiated, Dutch courts will declare that they lack jurisdiction if a party relies on a valid arbitration agreement. This applies both to domestic and foreign arbitral proceedings.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Dutch arbitration law provides for setting aside proceedings (see Questions 3b-d below) and revocation proceedings (in cases of fraud, forgery and/or a party obtaining documents earlier withheld in the arbitration that would have had an influence on the decision of the arbitral tribunal).

b. How is a setting aside application filed and how long do proceedings take?

Two instances are available. A setting aside application must be made to the Court of Appeal in whose district the place of arbitration is located. Such application should be made within three months after the day in which the award was sent to the parties or three months after the deposit of the award with the court registry, if the parties agree to such deposit. The law also provides another period within which a party may make an application to set aside an award, i.e., within three months after the party has officially been served with the award together with the leave for enforcement.

Setting aside proceedings before the Court of Appeal usually take twelve to eighteen months. Appeal in cassation before the Dutch Supreme Court is possible. Appeal in cassation proceedings is not a retrial of the entire case. There are only limited grounds that are examined by the Dutch Supreme Court, which does not conduct its own investigation into the facts. Appeal in cassation proceedings take, on average, approximately thirteen months. Parties may agree to exclude the possibility of appeal in cassation unless one of the parties is a consumer.

The legislature does not lay down any formal requirements regarding this exclusion possibility (it can be included in, e.g., general terms and conditions or in a bill of lading). Importantly, in relation to arbitral proceedings initiated before 1 January 2015 (i.e., governed by the previous Arbitration Act), three instances are available for setting aside proceedings, starting at the District Court in whose district the place of arbitration is located.

c. Does an application to set aside an award suspend its enforcement?

A setting aside application does not automatically suspend the enforcement of an arbitral award. A party may request the court that will decide on the setting aside application to suspend the enforcement of the arbitral award until a final decision has been made on setting aside. The court has discretionary power in this respect. When deciding the application for suspension, the courts make a provisional assessment of the setting aside application and balance the interests of the parties. In this case, the request to suspend the enforcement of an arbitral award and the setting aside proceedings are two different and separate procedures conducted before the same court.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

In the Netherlands, the general rule is that courts must exercise restraint when deciding on a setting aside application and such proceedings must not be used as an appeal in disguise. Thus, in principle, courts may not review the merits of the award in setting aside proceedings.

In practice, generally courts will show great deference towards the findings of arbitrators. However, based on the fundamental right to access to national courts, Dutch courts may conduct an unrestrained review in order to determine the existence of a valid arbitration agreement.

The Netherlands

The Dutch Supreme Court has also accepted an exception to the rule of restraint in case of a violation of the right to be heard. In practice, awards are rarely set aside in the Netherlands.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

The courts in setting aside proceedings have the discretionary power to suspend said proceedings in order to allow the arbitral tribunal to reverse the ground(s) for setting aside. The courts may not only refer the case back at the request of a party but is also authorized to do so *ex officio*. If the courts remit the case to the arbitral tribunal, the latter regains its jurisdiction and is authorized to amend the original award. When remitting the case, the Court of Appeal must indicate the specific ground(s) on which the award is subject to setting aside. The arbitral tribunal can either reopen the arbitral proceedings or take any other measures it deems appropriate. The arbitral tribunal may come to a different substantive decision or reasoning as compared to the original award. Before the arbitral tribunal makes a decision on the remitted dispute, it shall give the parties an opportunity to be heard.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

There are a number of differences in this regard. The most relevant ones include the fact that, in practice, the procedure of enforcing a domestic award is *ex parte* (although the judge may require both parties to appear), and that, if the time period to set aside the award has elapsed, the judge's review is limited to a *prima facie* violation of public policy.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

In the Netherlands, before a domestic arbitral award can be enforced, leave for enforcement needs to be granted by the provisional relief judge of the district court within whose district the place of arbitration is located. A party may institute appeal proceedings before the Court of Appeal against the decision in which the request for leave for enforcement is refused. However, it is not possible to appeal the provisional relief judge's decision to grant leave for enforcement. Instead, the means of recourse in that case is for a party to apply for the setting aside, remission, or revocation of the arbitral award. Leave for enforcement is automatically annulled when an arbitral award is set aside or revoked.

Once leave for enforcement is granted, the award can be executed in the same manner as a court judgment.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

A petition for leave for enforcement needs to be submitted to the Court of Appeal of the place where enforcement is sought. Such proceedings may not be brought on an *ex parte* basis, without the award-debtor being heard. Virtually all proceedings regarding the enforcement of foreign arbitral awards are brought under the NYC. In such cases (i.e., when the NYC is relied upon), in principle, only the refusal of a request to enforce a foreign arbitral award may be appealed before the Supreme Court (i.e., no recourse is available against a decision *granting* leave for enforcement).

Although, in theory, there is also the possibility to enforce a foreign arbitral award even if there is no applicable treaty (i.e., under domestic law), as mentioned above, this avenue is very rarely chosen. Importantly, parties can also rely on the NYC and the domestic law route 'simultaneously' by using a "primary/alternative" structure in their enforcement application.

d. How long does it take to have an arbitral award recognised and enforced?

The duration of recognition and enforcement proceedings varies depending on the circumstances of the case. However, complex proceedings brought under the NYC may last between nine to twelve months, with many enforcement proceedings (especially those of domestic awards) lasting (sometimes significantly) less than that. The time limit to bring an action to seek recognition and enforcement of an arbitral award is twenty years as of the next day after the award is rendered. This applies both to domestic and foreign arbitral awards. It is, however, only applicable to awards that are eligible for enforcement. Thus, mere declaratory awards may be invoked even after the twenty-year prescription period has lapsed.

Importantly, when it comes to the execution stage itself, parties will need to go through regular civil court proceedings resembling preliminary relief proceedings. In those execution proceedings, a judgment will often be rendered within eight weeks from the filing of the application. In cases of exceptional urgency, a judgement may be obtained within days of the date of the application.

The Netherlands

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Generally speaking, Dutch courts would not enforce arbitral awards that have been annulled in the country of origin. However, Dutch courts have the discretion, under the NYC, to enforce awards annulled in the country where they were made but only in exceptional circumstances. For example, where giving effect to the setting aside judgment would violate Dutch public policy if the judgment in question was rendered in proceedings that did not follow a fair trial. This approach has been confirmed by the Dutch Supreme Court.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states or state entities?

The Dutch system distinguishes between recognition and enforcement proceedings and execution proceedings. Recognition and enforcement proceedings, if successful, result in a judgement in which the arbitral award is declared to be recognised and enforceable in the Netherlands.

State immunity issues, arising in the context of investor-state arbitration, for example, do not play a role in recognition and enforcement proceedings. State immunity comes into play during execution proceedings where the award-creditor attempts to seize the assets of the state located in the territory of the Netherlands.

In determining the scope of state immunity from execution, the Dutch Supreme Court ruled that the various articles of the United Nations Convention on Jurisdictional Immunities of states and their Property (which has not yet entered into force) reflect international customary law. In that sense, the award-creditor must prove that the asset is specifically in use or intended for use by the State for other than sovereign purposes (i.e., that the asset has a commercial purpose). The burden of proof in this regard lies on the award-creditor.

The Dutch Supreme Court ruled that there is a presumption that state immunity from execution applies unless proven otherwise by the award-creditor.





Poland



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Poland

1. Recent example of our work

We supported PL Holdings, a subsidiary of Abris Capital Partners, in setting-aside proceedings in Sweden after a successful investment arbitration against the Republic of Poland. The case concerns an intra-EU investment arbitral award and our involvement at the setting-aside stage has focused on the Polish law aspects of the case.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Poland is a Contracting State to the 1958 New York Convention (**NYC**) since 1 January 1962. Initially Poland acceded to the Convention on the basis of reciprocity and a reservation regarding the commercial nature of disputes. The applicability of those reservations remains debatable as Poland did not repeat them at the ratification phase.

b. Is your jurisdiction a party to the ICSID Convention?

No, Poland is not a signatory of the 1965 ICSID Convention.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Arbitration law in Poland is based on the UNCITRAL Model Law. Section 5 (Articles 1154-1217) of the Polish Code of Civil Procedure (**CCP**) regulates domestic and international arbitration.

d. Does your local law distinguish between domestic and international arbitration?

The provisions of the CCP regarding arbitration apply to both domestic and international arbitrations if the place of arbitration is in Poland, and in certain cases when the place of arbitration is abroad or not designated. At the recognition and enforcement phase, there are some distinct features for domestic and international arbitration.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Under the general principles of the CCP, national courts may provide assistance/support in arbitral proceedings only if explicitly provided by the law. In several instances national courts may review the arbitral tribunal's jurisdiction over a dispute. The arbitral tribunal's jurisdiction may be reviewed by a national court in case a claim is filed with the court and an objection as to the court's jurisdiction raised by a party before entering into the merits of the dispute.

A party may also ask a national court to rule on jurisdiction, in case the arbitral tribunal issues a decision to dismiss a party's objection to jurisdiction. It does not, however, result in the stay of the arbitration.

The arbitral tribunal's jurisdiction can also be reviewed at the setting aside stage, as well as during the recognition and enforcement proceedings or as part of the court-recognised settlement agreement.

Aside from the question of jurisdiction national courts may also assist in the constitution of the arbitral tribunal, including appointing or replacing arbitrator and deciding on a challenge, issues relating to arbitrator fees and expenses, compelling reluctant witnesses or experts to participate in arbitration, and obtaining evidence from third parties, as well other measures which the tribunal cannot take.

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, a party may request the Polish court to order interim measures before the constitution of the arbitral tribunal and during the arbitration. The national court may be requested to order pre-judgment attachment on an *ex parte* basis, to grant enforcement of interim measures ordered by the arbitral tribunal. Polish courts may order such interim relief in arbitrations seated in Poland or abroad or if the place of arbitration has not been agreed.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

No, anti-suit injunctions are not available in Poland.

Poland

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

A party may request a court to set aside an arbitral award on the limited grounds listed in the CCP, namely absence or invalidity or ineffectiveness of the arbitration agreement, improper constitution of the arbitral tribunal, breach of due process, *res iudicata*, lack of arbitrability of the dispute or violation of public policy.

b. How is a setting aside application filed and how long do proceedings take?

An application to set aside should be filed within two months of the issuance of the award by the arbitral tribunal (or a correction or interpretation thereof) with the Court of Appeal in the district of the court which would otherwise be competent to hear the case (in the absence of an arbitration agreement). The Court of Appeal decision rendered in the setting aside proceedings may be appealed to the Supreme Court. However, the availability of the appeal, as well as the scope of assessment by the Supreme Court, is subject to limited grounds and strict formal requirements.

In specific circumstances, a party may request that the setting aside proceedings which ended in a final judgment to be resumed or that such judgment be declared unlawful.

Generally, the duration of the proceedings depends on the complexity of the case and the pending caseload at the competent court. Proceedings before the Court of Appeal take approximately 12-18 months. As the Supreme court is currently undergoing significant structural changes, the duration of such proceedings may take longer than usual and last approximately 18-24 months.

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not automatically suspend its enforcement. However, a court may decide in camera to stay the enforcement of an award. By doing so, a court may condition such stay on the provision of security. The decision to stay the enforcement may be appealed to the same court but with different composition of the ruling bench.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

A Polish court does not, in principle, review the arbitral tribunal's decision on the merits.

The Court of Appeal may only set aside the arbitral award or dismiss the application. The scope and level of review are determined by the grounds invoked in the setting aside application. The scope of review is limited to the list of grounds enumerated in the CCP. In practice, Polish courts may broaden the scope of review in cases which raise potential violation of public policy.

e. Do the national courts have the power to remit an award to an arbitral tribunal (same tribunal or newly constituted tribunal)?

A court hearing an application to set aside an arbitral award may in certain cases, upon a party's request, stay the setting aside proceedings for a fixed period of time in order to allow the arbitral tribunal to reconvene and resume the arbitration to remedy the grounds for setting aside. The court should indicate the identified shortcomings or errors to the arbitrators. However, in determining the scope of action of the arbitrators in remission proceedings, the court is limited to the grounds invoked by a party in the setting aside application.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

In principle, the CCP does not distinguish between domestic and foreign arbitral awards except with respect to enforcement. Recognition and enforcement of foreign awards are based either on the NYC or on the provisions of the CCP. If the award was rendered in a country which is a signatory of the NYC, the NYC prevails over the rules of the CCP.



Poland

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

To have legal effect, an arbitral award (or a settlement agreed before the arbitral tribunal) must be granted leave for enforcement by the national court. If the award is not subject to enforcement (eg, due to its declaratory nature), the national court will determine whether such award requires recognition. The court will not review the merits of the case but will assess whether the subject matter of the dispute was capable of settlement by arbitration, and whether the recognition or enforcement of the award would be contrary to Polish public policy.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

A foreign award may be recognised or declared enforceable only after a court hearing. The CCP provisions on recognition and enforcement of arbitral awards apply only to awards rendered in jurisdictions that are non-signatories of the NYC. Other awards are recognised and enforced through the Polish courts in accordance with Article V of the NYC.

d. How long does it take to have an arbitral award recognised and enforced?

Recognition and enforcement of an arbitral award would usually take approximately six months. If an appeal is lodged, the process may take from six to nine months, provided no setting aside proceedings are initiated by the other party. The enforcement of an arbitral award will be stayed pending the setting aside proceedings.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

An arbitration agreement contained in general conditions or in a contractual document that has not been individually negotiated with the consumer is considered to be an abusive clause and deprived of legal effect. Employment disputes may be subject to arbitration, provided that the arbitration agreement is explicit, made in writing and only applies to an existing dispute.

A Polish court would generally refuse to recognise an award that has been set aside by the court at the seat. There are no reported cases of an award annulled at the seat to be recognised and enforced in Poland.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Foreign states' sovereign immunity is not regulated by Polish law and remains subject to public international law principles. Such immunity may be invoked as a possible defence against enforcement. Sovereign immunity covers only property designated for the exercise of public authority, and enforcement against such assets is allowed if immunity is waived by the state. It is debatable whether a valid arbitration agreement precludes a state from raising a sovereign immunity defence.

Enforcement against the Polish State is limited to the bank accounts of the state entity or agency, which is a party to the arbitral proceedings. Security for monetary claims against the Polish State is not available.



Portugal



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Portugal

1. Recent example of our work

After the arbitral tribunal ordering the Municipality of Lisbon to pay a compensation of approximately €138m plus default interest, in the context of a dispute concerning the sale of emblematic properties in a historical area in the centre of Lisbon - where the claimant was asking for a compensation of approximately €350m, we successfully represented the Municipality of Lisbon in setting aside proceedings in the Administrative Court of Appeal, which decided in favour of the annulment of the arbitral decision. An appeal on the annulment decision is now pending at the Administrative Supreme Court.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Portugal is a Contracting State to the 1958 New York Convention (**NYC**) since 16 January 1995. In accordance with Article I(3), Portugal applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Portugal is a Signatory of and Contracting State to the 1965 ICSID Convention since 1 August 1984.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The current Portuguese Voluntary Arbitration Law (**VAL**), enacted in December 2011 and which entered into force in March 2012, is based on the UNCITRAL Model Law. Specific issues, such as the recognition and enforcement of arbitral awards, are governed by both the VAL and the Portuguese Civil Procedure Code (**PCPC**).

d. Does your local law distinguish between domestic and international arbitration?

Yes, according to Article 49(1) VAL, the definition of “international arbitration” (as opposed to “domestic arbitration”) is based on the scope of the dispute, ie, it includes any dispute in which the interests relating to international commerce are at stake.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

In addition to interim measures, national courts may be called upon to:

- > provide assistance in the constitution of the arbitral tribunal;
- > decide on the challenge or removal of arbitrators;
- > decide on the reduction of arbitrators' fees and expenses determined by the arbitral tribunal; and
- > provide assistance on the production of evidence that is dependent upon the cooperation of one of the parties or upon the cooperation of a third party that refuses to cooperate.

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, the VAL expressly foresees that parties may request national courts to order interim measures and that these may be issued before or during arbitral proceedings.

Interim measures issued by national courts are governed by the PCPC and may have several purposes such as maintaining or restoring the *status quo* pending the arbitration or preserving assets while the arbitration is pending.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions are not available in Portugal as such. Following an ECJ ruling – *Allianz SpA and Generali Assicurazioni Generali SpA v West Tankers Inc.* (10 February 2009) – it is incompatible with Council Regulation (EC) No 44/2001 of 22 December 2000 (meanwhile replaced by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012) for a court of a Member State to issue an order to restrain a person from commencing or continuing proceedings before the courts of another Member State on the grounds that such proceedings would be contrary to an arbitration agreement.



Portugal

Furthermore, anti-arbitration injunctions are expressly excluded by Article 5(4) VAL, which determines that the invalidity or unenforceability of an arbitration agreement cannot be litigated autonomously in proceedings or interim measures brought before a national court with the aim of preventing the constitution or functioning of an arbitral tribunal.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Generally, an arbitral award is only appealable if the parties expressly agreed to that possibility in the arbitration agreement (in certain public law arbitration disputes other particularities apply) and the award was not decided according to *ex aequo et bono* or amiable composition. In international arbitrations, arbitral awards are not appealable unless the parties have agreed to appeal to another arbitral tribunal and regulated the proceedings therein.

Simultaneously, the VAL foresees a non-waivable right to set aside an arbitral award based on limited grounds foreseen in Article 46(3), which relate to the violation of procedural principles and rules or an offense to the Portuguese public policy principles.

b. How is a setting aside application filed and how long do proceedings take?

Setting aside proceedings are submitted before the Court of Appeal. The decision issued by Court of Appeal may be appealed to the Supreme Court of Justice. As such, there are two instances available in setting aside proceedings.

According to Article 46(6) VAL, an application to set aside an award must be filed within 60 days from the date in which the party was notified of the arbitral award. However, if one of the parties requests the arbitral tribunal to correct and/or clarify the arbitral award (which is expressly foreseen in Article 45 VAL), the 60 days' period will start from the date in which the parties are notified of the decision on the correction and/or clarification request.

It is extremely difficult to provide an estimate of timings for setting aside proceedings, as it often depends on the complexity of the dispute and the workload of the Court of Appeal at that given time. Nevertheless, according to our experience, the Court of Appeal decision on setting aside proceedings is usually issued within a one-year period and, if such decision is later challenged, the Supreme Court of Justice decision usually takes another year to be issued.

c. Does an application to set aside an award suspend its enforcement?

According to Article 47(3) VAL, the application to set aside an award will not suspend its enforcement unless the challenging party requests the national court to determine such suspensive effect and offers to provide security (*caução*) to that effect.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

At the setting aside stage, Portuguese courts are limited to the grounds invoked by the parties, which, in turn, are limited to the grounds foreseen in Article 46(3) VAL and which include violation of procedural principles and rules, the non-arbitrability of the dispute or an offense to the Portuguese public policy principles.

Accordingly, Portuguese courts are not able to scrutinize the merits of an arbitral award in setting aside proceedings and usually take a very strict view of the grounds foreseen in Article 46(3) VAL.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

The Court of Appeal in setting aside proceedings can, if it deems appropriate or at the request of either party, suspend the setting aside proceedings and remit the arbitral proceedings to the original arbitral tribunal, which may resume the arbitral proceedings and adopt any measure capable of eliminating the grounds for setting aside the award.

Nevertheless, as a rule and provided that the parties have not agreed otherwise, if the arbitral award is set aside (unless the award is set aside because the arbitration agreement is deemed invalid), new arbitral proceedings may be initiated by the parties.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

In order to be enforceable, domestic arbitral awards are not subject to prior recognition by a Portuguese court. They have the same effect, for the purposes of enforcement, as a decision issued by a national court and, as such, are enforceable once rendered.

On the contrary, in order to be enforceable, foreign arbitral awards are subject to prior recognition proceedings in Portugal, which are regulated both by the PCPC and the VAL.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

As mentioned, domestic arbitral awards are not subject to prior recognition by a Portuguese court, as they have the same effect, for purposes of enforcement, as a decision by a national court. Moreover, as referred in Question 4.c. above, arbitral awards may be enforced even if setting aside proceedings are still pending.

The party seeking to enforce an arbitral award must deliver an original copy or a certified copy of the award to the competent court on the date of submission of enforcement proceedings and, if the award is not drafted in Portuguese, a certified translation of the award.

Portugal

The enforcement proceeding will follow the rules established in the PCPC. In broad terms, according to such rules, the other party may oppose to the enforcement of the award based on any of the grounds established for the setting aside of the award in Article 46(3) VAL (mentioned in Question 4.d. above), provided that setting aside proceedings have not already been submitted on the same grounds and decided against the opposing party by the competent court.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Recognition proceedings of foreign arbitral awards are submitted in the Court of Appeal of the same location as the domicile of the person against whom the award was rendered. The applicant must provide an authenticated copy of the award and an original copy of the arbitration agreement (or duly certified copies), together with certified translations (if not written in Portuguese).

Following the application, the party against whom recognition is sought may challenge it within 15 days. The applicant may subsequently respond within 10 days. After written pleadings have been made and the procedural steps deemed necessary by the court have been taken, the parties (and the Public Prosecutor) will be granted a 15-day period to submit closing arguments. The decision of the Court of Appeal on the recognition of a foreign arbitral award may be appealed to the Supreme Court of Justice.

Both the recognition and enforcement of foreign arbitral awards are subject to specific grounds of refusal set out in Article 56 VAL. Such grounds are similar to the ones set out in the NYC with the exception of the ground referring to the *internacional* public policy of the Portuguese State (cf. Article 56(1)(b)(ii) VAL).

After recognition of the foreign arbitral award is completed, enforcement proceedings may be initiated in the first instance Court of the domicile of the defendant. Apart from the grounds for refusal, the enforcement proceedings of foreign arbitral awards follow the same procedure described in Question 5.b. above for domestic arbitral awards.

d. How long does it take to have an arbitral award recognised and enforced?

It is extremely difficult to provide an estimate for the duration of recognition and enforcement proceedings of an arbitral award, as it often depends on external factors (e.g., the workload of the Court of Appeal at that given time). Nevertheless, according to our experience, the decision of the Court of Appeal on recognition proceedings is usually issued within a one-year period and enforcement proceedings of arbitral awards usually take another two years to be completed.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

As a general rule and according to Article 56(1)(v) VAL, Portuguese courts will reject the recognition and enforcement of awards that have been annulled at the seat of arbitration. In very exceptional circumstances (e.g., the decision annulling the award was obtained in violation of due process or against Portuguese international public policy principles), a number of Portuguese legal authorities consider that an arbitral award annulled at the seat of arbitration may still be recognised and enforced by national courts. However, we are not aware of any relevant case law in this regard.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Arbitral awards rendered in cases in which a third state or state entity is a party are recognised and enforced according to the rules of enforcement described in Questions 5.a. to 5.e. above.

If the arbitral award is being enforced against assets located in Portugal belonging to states and state entities, sovereign immunity is, as a general rule, treated as a procedural exception to national courts' jurisdiction and, therefore, addressed in a preliminary stage of the recognition and enforcement proceedings. Portuguese legal authorities and case law are of the view that the various articles of the United Nations Convention on Jurisdictional Immunities of States and their Property (to which Portugal is a party but has not yet entered into force) reflect international customary law and should be considered when assessing the validity of a state immunity defence. As such, national courts will usually consider the nature of the relationship, the object of the dispute (i.e., whether the state is acting as a party to a contractual relationship entered into with an individual or a company or whether the state is acting under its *ius imperii* status), as well as the nature of the relevant assets.

Finally, if the arbitral award is being enforced against the Portuguese State, under the PCPC, property in the public domain of the Portuguese State may not be seized in enforcement proceedings.



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Singapore

1. Recent example of our work

We acted for Noble Resources International Pte Ltd (**Noble**) in SIAC arbitration and related court proceedings in Singapore and India relating to its coal offtake agreements with an Indonesian mining company, PT Asmin Koalindo Tuhup (**AKT**). Following Indonesian debt restructuring proceedings commenced by AKT, AKT sought to disclaim its supply obligations and to seize coal at the mine site for which Noble had pre-paid. We commenced SIAC arbitration and secured a series of urgent injunctions from the Singapore courts and an emergency arbitrator over the stockpiled coal to which Noble had an interest, and commenced court proceedings in India against certain Indian purchasers to whom AKT had sold portions of the stockpile. We subsequently advised Noble on its settlement of a portion of its claims in the arbitration.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, Singapore is Contracting State to the 1958 New York Convention (**NYC**) since 21 August 1986. In accordance with Article I(3), Singapore applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Singapore is a Signatory of and Contracting State to the 1965 ICSID Convention since 13 November 1968.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

Yes, the 1985 UNCITRAL Model Law was adopted in 1994 as the framework for Singapore's International Arbitration Act (**IAA**), which governs the conduct of international commercial arbitration.

d. Does your local law distinguish between domestic and international arbitration?

Yes. There are separate regimes governing domestic and international arbitration – the former is governed by the Arbitration Act (**AA**), and the latter by the IAA. The key criteria is the parties' place of business vis-à-vis the elements of the dispute or the arbitration – an arbitration would fall within the international regime where at least one party has its place of business outside of Singapore; or the seat of arbitration, the place where a substantial part of the obligations are to be performed, or the place with which the subject matter of the dispute is most closely connected, is different from the jurisdiction where the parties have their places of business. The other criteria is party consent – the international regime will apply where the parties expressly agree that the subject matter of the agreement relates to more than one country.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Aside from interim measures, the issues in relation to which the Singapore court may provide assistance in support of, or relating to, intended, pending or concluded arbitral proceedings, include the following:

- > granting a stay of national court proceedings in favour of arbitration;
- > determining challenges against an arbitrator's appointment where the challenge had been rejected under the tribunal or the appointing institution at the first instance;
- > hearing appeals against the tribunal's determination as to whether it has jurisdiction;
- > determining applications to set aside an arbitral award issued in a Singapore-seated arbitration; and
- > making orders for the production of documents or attendance of witnesses.



Singapore

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes. Parties can request the Singapore court to grant interim relief including interim conservatory measures, taking of evidence, security for the amount in dispute, freezing orders, interim injunctions, and orders enforcing confidentiality obligations. Under the international regime, the court must be satisfied that the tribunal is not empowered to act or is unable to do so effectively. The court's power to grant interim relief extends to both Singapore and foreign-seated arbitrations, and to intended or pending arbitrations (*Front Carriers Ltd v Atlantic & Orient Shipping Corp* [2006] 3 SLR(R) 854; [2006] SGHC 127, at [18]).

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Yes. The Singapore courts may issue anti-suit injunctions to restrain parties from commencing or continuing local or foreign proceedings where there is a *prima facie* breach of an arbitration agreement. The applicant must establish that the injunction is required by the ends of justice, that the court has jurisdiction over the party against whom the injunction is sought, and that the injunction would not be inconsistent with international comity (*WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 1 SLR(R) 1088).

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Under both the domestic and international regimes, a party may apply to the High Court of Singapore to set aside an arbitral award on grounds of fraud, breach of natural justice, or the grounds under Article 34(1) of the Model Law including the tribunal's lack of jurisdiction or invalidity of the arbitration agreement.

An appeal against an award is only available under the domestic regime in relation to a question of law arising out of the award. There is presently no right of appeal against an international award, although the Ministry of Law is considering potential amendments to the IAA to allow for an opt-in avenue for appeal.

b. How is a setting aside application filed and how long do proceedings take?

Two instances are available – the application should be made by Originating Summons to the High Court of Singapore and is subject to one round of appeal with leave of court. The setting aside application must be filed within three months of the applicant's receipt of the award. Setting aside proceedings at the first instance can last between six to nine months, and up to about 18 months if there is an appeal.

c. Does an application to set aside an award suspend its enforcement?

No, a setting aside application does not automatically suspend the enforcement of an award, although a party may apply for a stay of execution pending the determination of the application. The grant of a stay of execution is based on the court's discretion.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The Singapore courts generally exercise great restraint in determining a setting aside application. They will not review the merits of the award and will show great deference toward the findings of the arbitral tribunal. It is rare for awards to be set aside by the Singapore courts given their pro-arbitration approach.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

The court has the discretion to remit an award, in whole or in part, pursuant to Article 34(4) of the Model Law. The award must be remitted to the same tribunal – the Singapore courts have determined that Article 34(4) of the Model Law does not allow for remission to a newly-constituted tribunal. An award may only be remitted if the court is satisfied that it is appropriate to suspend the setting aside proceedings and remit the award to give the tribunal the opportunity to take steps to cure any defect in the award. If the award has been set aside, it ceases to exist and cannot be remitted.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Yes, there are separate regimes for the recognition and enforcement of a domestic award, an award rendered in an international arbitration seated in Singapore, and a foreign award arising from arbitration seated in a NYC jurisdiction (**NYC award**). The recognition and enforcement of domestic awards is provided for under the AA (Sections 44 and 46 AA), while the recognition and enforcement of international awards rendered Singapore and NYC awards are governed by the IAA (Sections 19, 19B and 29 IAA).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction (including leave for enforcement, if any)?

The application for leave to enforce a domestic award should be made by *ex parte* Originating Summons to the High Court of Singapore, supported by an affidavit exhibiting the original or certified true copy of the award and the arbitration agreement under which the award was made, stating the name and usual or last known place of abode of the award debtor and award creditor, and stating that the award has not been complied with or the extent to which it has not been complied with at the date of the application.

Singapore

If the application is granted, the order for enforcement must be served on the debtor by personally delivering a copy to the debtor or by sending the debtor a copy at its usual or last known place of abode or business or in such manner as the court may direct.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The application for leave to enforce an international award rendered in Singapore and a NYC award under the IAA are the same as that in the case of domestic awards under the AA (as explained above). For foreign awards which are not in the English language, the affidavit supporting the application must additionally exhibit a certified English translation of the award and the arbitration agreement by a sworn translator, an official or a diplomatic or consular agent of the country in which the award was made (Singapore Rules of Court, Order 69 Rule 14 and Order 69A Rule 6). In relation to both international awards rendered in Singapore and NYC awards, the award debtor may resist enforcement on the grounds set out under Section 31 IAA (which incorporates the grounds under the NYC), including invalidity of the arbitration agreement or the tribunal's lack or excess of jurisdiction. Where an award is made in a non-NYC jurisdiction, such award must first be converted into a judgment of the seat court, before seeking recognition and enforcement as a foreign court judgment in Singapore.

d. How long does it take to have an arbitral award recognised and enforced?

The duration of recognition and enforcement proceedings varies depending on the circumstances of the case, but in general may last between nine to twelve months, and potentially less in the case of an unopposed domestic award.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

The annulment of an award at the seat constitutes a ground upon which the Singapore courts may refuse enforcement. However, as the court retains the discretion to enforce an award even where the grounds to resist enforcement have been established, there is in theory a residual discretion for the court to enforce an award that has been annulled at the seat. The issue has never been tested in the Singapore courts, but the Court of Appeal has indicated that it is unlikely to enforce the award in such circumstances (*PT First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57 at [76]).

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Where a state party has agreed to submit a dispute to arbitration, it would not benefit from state immunity in respect of Singapore court proceedings relating to the arbitration (Section 11 SIA). However, issues of state immunity would also arise at the point of service of any enforcement order on the state party and execution against the state party's assets in Singapore. Service of an enforcement order must comply with the provisions of the State Immunity Act (**SIA**), such as the requirement that such order be served through diplomatic channels (by the Singapore Ministry of Foreign Affairs to the ministry of foreign affairs of the state party) (Section 14 SIA).

The jurisdiction of the court to enforce the arbitral award against a state party would also be subject to immunity of state property from process of execution (Section 15(2) SIA), though there are certain exceptions such as where the assets against which enforcement is sought are commercial assets.





South Africa (Webber Wentzel)



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South Africa (Webber Wentzel)

1. Recent example of our work

We represented an international motor vehicle manufacturer with a Tanzanian entity, following cancellation of their dealership agreement. The Tanzanian entity instituted proceedings in the Tanzanian High Court for damages. Our client successfully petitioned the High Court of Tanzania to refer the dispute to arbitral proceedings in South Africa. When the Tanzanian entity failed to progress the arbitration, our client succeeded in having the claim in the Tanzanian High Court dismissed.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, South Africa is a Contracting State of the 1958 New York Convention (**NYC**) since 3 May 1976. South Africa ratified the NYC without reservations.

b. Is your jurisdiction a party to the ICSID Convention?

No, South Africa is not a signatory of the 1965 ICSID Convention.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

International arbitration seated in South Africa is governed by the International Arbitration Act 15 of 2017 (**IAA 2017**). The IAA 2017 has incorporated the **Model Law** into the Act as Schedule 1 thereof. Domestic arbitral proceedings are governed by the Arbitration Act 42 of 1965 (the **Arbitration Act 1965**), which does not incorporate, nor is based on, the Model Law.

d. Does your local law distinguish between domestic and international arbitration?

Yes, domestic arbitrations are governed by the Arbitration Act 1965 and international arbitrations are governed by the IAA 2017.

Article 1 of Schedule 1 to the IAA 2017 sets out the characteristics of an international arbitration. These requirements are the same as Article 1(3) of the Model Law.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Under the IAA 2017, South African courts may provide the following assistance/support:

- > in the constitution of the arbitral tribunal;
- > making an order on a challenge to an arbitrator;
- > decisions on the termination of an arbitrator's mandate;
- > where a party may refer a ruling on a preliminary question to a court; and
- > in the taking of evidence.

Under the Arbitration Act 1965, South African courts have the power to:

- > order that the dispute between parties to an arbitration agreement be determined by way of interpleader proceedings;

- > extend time fixed in an arbitration agreement for commencing arbitral proceedings;
- > appoint an arbitrator;
- > terminate of an arbitrator's mandate;
- > make an arbitral award an order of court;
- > make orders in respect of;
- > security for costs or the quantum in dispute;
- > discovery;
- > the examination of any witness;
- > the giving of evidence by affidavit;
- > the inspection or the interim custody or the preservation or the sale of goods or property;
- > substituted service; and
- > the appointment of a receiver.

South Africa (Webber Wentzel)

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, the IAA 2017 provides for a national court to grant an interim measure of protection before or during arbitral proceedings. A national court may also grant various interim measures, including an interim interdict in urgent matters before the appointment of the arbitral tribunal, where the arbitral tribunal is not competent to grant the order or where the urgency of the matter makes it impractical to seek such order from the arbitral tribunal.

Under the Arbitration Act 1965, interim relief is available during and before arbitral proceedings.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Yes, on a domestic level, the Arbitration Act 1965 allows a party to seek a stay of legal proceedings where its opponent has instituted court proceedings relating to a dispute which has been agreed to be referred to arbitration.

On an international level, in terms of Article 8 of Schedule 1 to the IAA 2017, a court may stay court proceedings and refer the parties to arbitration where a matter is subject to a valid arbitration agreement.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

Article 34 of Schedule 1 to the IAA sets out the grounds for setting aside an award from an international arbitration:

- > a party to the reference was incapacitated or was not given proper notice of the proceedings or the appointment of the arbitrator;
- > the award exceeds the terms of the submission to the arbitration;
- > the arbitration agreement was invalid under the law to which it is subject;
- > the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties;
- > the subject-matter of the dispute is not arbitrable under South African law; or
- > the award is contrary to public policy.

A court's power to set aside such an award is restricted to these grounds.

Under the Arbitration Act 1965, a court may, on application of any party to the reference, set aside an arbitral award on the following grounds: misconduct of the arbitrator; gross irregularity in the conduct of the proceedings; the arbitrator has exceeded his/her powers; or the award was improperly obtained. The courts will only interfere with the award of an arbitrator on these specific grounds.

Parties may also request the arbitral tribunal to interpret, supplement or correct certain errors in the award.

b. How is a setting aside application filed and how long do proceedings take?

In respect of both international and domestic arbitral proceedings, a party must file a setting-aside application to the High Court which has jurisdiction over the parties and/or the dispute. Jurisdiction is determined by a number of factors including: the domicile of the parties, consent to jurisdiction, where the applicable contract was entered into, where performance of the contract took place, and/or where the property at the centre of the dispute is located.

The decision of a High Court may be appealed to a full bench of that court, alternatively or in the third instance to the Supreme Court of Appeal, and then to the Constitutional Court.

Section 33 of the Arbitration Act 1965 states that a party is required to apply for an award to be set aside within six weeks after its publication. Article 34 of Schedule 1 to the IAA 2017 states that a setting-aside application must be made within three months from the date of receipt of the award.

From date of the commencement of an application to judgment, parties can expect proceedings to run for nine to 18 months depending on the complexity of the matter, the conduct of the parties, whether the matter is case managed or subject to the commercial court, and the busyness of the motion court roll in the particular court.

c. Does an application to set aside an award suspend its enforcement?

The Arbitration Act 1965 and the IAA 2017 are silent on this issue. However in *Kolber v Sourcecom Solutions (Pty) Ltd; Sourcecom Technology Solutions (Pty) Ltd v Kolber* 2001 2 SA 1097 (C) the Court held that where there is a valid and final award, that award is enforceable until the award is set aside or remitted to the arbitral tribunal by the Court.

South Africa (Webber Wentzel)

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

The South African courts adopt an arbitration-friendly approach and respect the decision of parties to agree to refer their disputes to arbitration. As such the courts approach the setting awards aside of award with caution.

Both foreign and domestic arbitral awards must be in accordance or comply with domestic public policy of South Africa, and it is a vital consideration of the courts. As is common in many jurisdictions, in South Africa, public policy is not static, but varies from time to time and from place to place. When approaching the question of public policy, the interest of the community or public is very important, but simple justice between parties must also be pursued. Public policy in South Africa is rooted in the Constitution and the fundamental values that underlie it. As such it is a fairly broadly construed concept.

Notwithstanding the above, South African courts usually exercise restraint when considering public policy. The courts recognise that it is important that there be certainty about the validity of agreements, and this certainty could be undermined by an arbitrary and indiscriminate use of the power to declare agreements contrary to public policy.

South African courts are thus reluctant to set aside arbitral awards easily and have construed the statutory and common law requirements for setting-aside awards quite strictly in the context of private arbitration.

Article 36 of Schedule 1 to the IAA 2017 goes a step further than Article 36 of the Model Law by setting out two situations where the recognition and enforcement of an award would be contrary to public policy. It provides that, for the purposes of avoiding any doubt and without limiting the generality of Article 36(1)(b)(ii), the following circumstances would be contrary to public policy:

- > a breach of a tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement; and
- > the making of the award was induced or affected by fraud or corruption.

In respect of cases involving fraud/corruption, the Supreme Court of Appeal has held, having regard to principles of fairness, that fraud invalidates the contract as well as the arbitration clause. Disputes regarding the validity or enforceability of contracts induced by fraud or corruption are not generally intended to be arbitrable.

e. Do the national courts have the power to remit an award to an arbitral tribunal

Under the Arbitration Act 1965, within six weeks after the issuance of an award, any party to the arbitration may approach a court, on good cause shown, requesting the remittal of any matter which was referred to arbitration, to the arbitrator for reconsideration and to make a further or new award, or for such other purpose as the court may direct. The court is required to remit the award to the original arbitral tribunal (except in the circumstances where the arbitral tribunal cannot be reconvened, in which case it will be remitted to a new arbitrator appointed by the parties). A court is generally called upon to either set aside or to remit a matter back to the arbitral tribunal for reconsideration.

The IAA 2017 does not have a similar provision regarding remittal. A party may only approach a court to set aside a decision rendered in international arbitration governed by the IAA 2017.

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

South African law makes a distinction between arbitral awards rendered in domestic arbitration and those rendered in international arbitration. Recognition and enforcement proceedings of domestic awards are governed by the Arbitration Act 1965, whereas foreign awards are governed by the IAA 2017.

Under the Arbitration Act 1965, arbitral awards are considered binding and enforceable. An award, which is made an order of court, may be enforced in the same manner as any judgment or order to the same effect.



South Africa (Webber Wentzel)

Under the IAA 2017, a foreign arbitral award is considered binding and may be relied on by the parties by way of defence, set-off or otherwise in legal proceedings. A foreign arbitral award is also enforceable as any judgment or order, once made an order of court. The recognition and enforcement of foreign arbitral awards are dealt with under Chapter 3 IAA 2017 which incorporates the NYC, provided that the requirements of Section 17 and Article 35 of Schedule 1 to the IAA 2017 are met and no grounds of refusal as set out in Section 18 and Article 36(1) of Schedule 1 to the IAA 2017 apply.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Final and valid arbitral awards rendered under the Arbitration Act 1965 are immediately binding, and the parties are required to adhere to the terms thereof.

Any party to the arbitration may request the High Court with jurisdiction to issue an order making the arbitral award an order of court. Once an award is made an order of court, it becomes enforceable in the same manner as any other court order. The subject of the award is also treated as a judgment debt for the purposes of prescription, and therefore only prescribes in 30 years from the date the award was made an order of court.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The IAA 2017 provides that a foreign arbitral award must, on application, be made an order of court and may then be enforced in the same manner as any judgment or order of court provided that the party seeking recognition or enforcement is able to produce either the original award, duly authenticated, or a certified copy of the award, and if the award is not in an official language of the Republic, then a translated version; and the foreign arbitral award does not breach Section 18 and Article 36(1) of Schedule 1 to the IAA 2017.

A foreign arbitral award must be recognised and enforced as required by the NYC (Schedule 3 to the IAA 2017), subject to the provisions of Chapter 3 IAA 2017.

d. How long does it take to have an arbitral award recognised and enforced?

The recognition and enforcement of arbitral awards is made by application in the ordinary course to the High Court with jurisdiction. Parties may expect a decision to be rendered 9 to 18 months from the date of service of the application papers. Under Section 17 IAA 2017, and Article 4 of Schedule 3 to the IAA 2017, a party must “obtain” recognition and enforcement of a foreign arbitral award, meaning that these awards are not automatically recognised and enforceable in South Africa.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Section 18 IAA 2017 sets out the grounds upon which a foreign arbitral award will not be recognised in South Africa. It places the onus on the party against whom the award is invoked in so far as their opposition is based on an issue with the arbitration agreement or proceedings.

Article 36 of Schedule 1 to the IAA, 2017 allows a South African court to refuse to recognise or enforce an award where the award has been set aside or suspended by a court of the country in which, or under the law of which, that award was made. If an application for setting aside or suspension of an award has been made to a court of the country in which or under the law of which the award was made, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and, on the application of the party claiming recognition or enforcement of the award, may order the other party to provide appropriate security.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Section 4 IAA 2017 states that the IAA 2017, subject to the provisions of Section 13 of the Protection of Investment Act, 22 of 2015 (the **PIA**), binds public bodies and applies to any arbitration arising under an arbitration agreement between an investor and a public body. “Public body” is defined to include any department of State or municipal, provincial, or national sphere of government or any other functionary or institution when exercising a power or performing a duty in terms of the Constitution or when exercising a public power or performing a public function in terms of any legislation. Section 13 PIA provides certain time-limits and procedures to be undertaken where actions of the South African government affect the investment of an investor.

The Foreign States Immunities Act 87 of 1981 states that a foreign state shall not be immune from the jurisdiction of the South African courts in proceedings relating to a commercial transaction by a foreign state or an obligation of the foreign state which by virtue of a contract falls to be performed wholly or partly in South Africa. A foreign state which is party to an arbitration agreement, shall not be immune from the jurisdiction of the South African courts in any proceedings which relate to arbitration.

Spain



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Spain

1. Recent example of our work

We represent Galp Energía, SGPS in the enforcement of a foreign arbitral award in Spain. The award was rendered in Portugal under the auspices of the ICC after a construction arbitration between GALP and Técnicas Reunidas in relation to the upgrade and refurbishment of two oil refineries. GALP wishes to enforce the award in Spain while setting-aside proceedings are ongoing in Portugal.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Spain is a Contracting State of the 1958 New York Convention (**NYC**) since 10 August 1977. Spain ratified the NYC without reservations.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, Spain is a Signatory of and Contracting State to the 1965 ICSID Convention since 17 September 1994.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The Spanish Arbitration Act 60/2003 of 23 December 2003 (the **SAA**), which entered into force on 26 March 2004, is based on the UNCITRAL Model Law on International Commercial Arbitration 1985 (the **Model Law**).

d. Does your local law distinguish between domestic and international arbitration?

The SAA follows a monist approach and opts for a unitary regulation, with very limited practical differences between domestic and international arbitrations. Despite the limited effect of such differences, the SAA establishes a distinction based on the domicile of the parties, the seat of the arbitration, the place of performance of the obligations and whether the arbitration concerns international trade interests.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

Arbitrators do not have *ius imperium* and assistance from national courts is needed with certain matters. However, judicial intervention is limited by the so-called “negative effect” of the arbitration agreement, which prevents national courts from hearing disputes submitted to arbitration.

In particular, the SAA empowers national courts to:

- > hear motions for lack of jurisdiction (*declinatoria*) if a claim is brought before a national court in breach of parties’ arbitration agreement (Article 11.1 SAA);
- > appoint arbitrators if they cannot be appointed under the procedure agreed by the parties and if any party submits the question to the competent court (Article 15.4 SAA);
- > remove arbitrators (if he/she is de facto or de jure unable to perform his/her functions or acts with undue delay);
- > give assistance in the taking of evidence (Article 33 SAA);

- > grant interim relief/injunctions (Article 23 SAA), or enforce the interim measures issued by the arbitral tribunal;
- > enforce awards rendered by arbitral tribunals seated in Spain;
- > set aside arbitral awards; and
- > recognise and enforce foreign arbitral awards.

Article 8 SAA establishes which national court is competent to carry out each of the above.

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, according to Article 11.3 SAA, the existence of an arbitration agreement does not prevent the granting of interim relief by national courts, which is available both before and during arbitral proceedings (provided that the requirements stated in Article 722 of the Spanish Code of Civil Procedure (**CCP**) are met). However, pursuant to Article 23 SAA, arbitrators may, at the request of either party, grant such interim relief as they deem necessary in respect of the subject matter of the dispute.

As a result of the urgency of interim measures, which often require that their adoption take place prior to the appointment of the arbitrators, in practice, interim relief is still being requested to a greater extent before national courts.

Spain

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions as such cannot be issued by national courts. However, there are other measures that could be requested to national courts and that could have similar effects to an anti-suit injunction.

If there is an arbitration agreement in place and a party submits a dispute to, e.g., its national courts (other than Spanish ones) in violation of the arbitration agreement, the other party could request Spanish national courts to grant interim relief seeking a declaration of the validity and ordering the compliance with the arbitration agreement in accordance with Articles 726 and 727 CCP.

As stated in Question 3.a above, national courts are empowered to grant interim relief/injunctions and could therefore order such injunction once reviewed whether the requested injunction complies with the requirements of Spanish applicable law. However, in practice, enforcing such injunction might be difficult, especially if the party to whom the injunction is addressed does not voluntarily comply with it.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

In accordance with Article 43 SAA, the mechanisms provided for challenging an arbitral award are setting aside proceedings and, when applicable, review proceedings in accordance with Articles 509 to 513 CCP.

It is worth noting that both the action for setting aside and the review of the arbitral award can only be instituted in the cases expressly provided for in the SAA and the CCP. In this sense, they are aimed at correcting potential non-compliance with procedural rules throughout the arbitral proceedings but can never be aimed at reviewing and/or re-examining, in general, the facts and the merits discussed during the arbitration.

b. How is a setting aside application filed and how long do proceedings take?

According to Article 42.2 SAA, only one instance is available in setting aside proceedings. Notwithstanding, there are certain arbitral institutions in Spain (e.g., *Corte Civil y Mercantil de Arbitraje* or *Centro Internacional de Arbitraje de Madrid*) which rules establish the possibility of appealing the award (*impugnación opcional del laudo*) before the arbitral institution if agreed by the parties in the arbitration agreement.

The time limit for filing a setting aside application is two months from: (1) the notification of the award; or (2) in the event that its clarification, correction or supplementation have been requested, from the notification of the decision on this request or from the expiry of the time limit for adopting it (Article 41.4 SAA).

The court that would have jurisdiction to hear setting aside proceedings is the Civil and Criminal Division of the High Court of Justice (**H CJ**) of the Region (*Comunidad Autónoma*) where the award was rendered (Article 8.5 SAA).

According to recent data published by the Spanish General Council of the Judiciary, the average duration of setting aside proceedings in Spain was 6.5 months in 2019.

c. Does an application to set aside an award suspend its enforcement?

An application to set aside an award does not suspend its enforcement, in accordance with Article 45.1 SAA. A respondent may, however, file a request with the competent court for stay of enforcement proceedings, if it provides security for the value of the award plus any damages that may result from the delay in enforcing the award. The security may be constituted in any of the forms provided for in Article 529.3 CCP.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

In Spain, setting aside proceedings are not a second instance with respect to the arbitral proceedings in which the award was rendered. Hence, national courts are not entitled to review and/or re-examine, in general, the facts and the merits discussed in the arbitration.

Spain

Indeed, the SAA itself and Spanish courts reject the “appellate” nature of setting aside proceedings and only allow recourse to them on the limited grounds (*numerus clausus*) listed in Article 41 SAA, which relate to:

- > lack of jurisdiction of the arbitral tribunal;
- > lack of opportunity of a party to defend its rights;
- > procedural breaches; and
- > breaches of public policy.

However, HCJs may exceptionally carry out a review of the merits, insofar as it may be necessary to determine the existence of a ground for annulment and for these sole purposes. It is worth flagging that the most recent court decisions in Spain on this matter have substantially narrowed the level of review of awards at the setting aside stage.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

There is no power for national courts on a setting aside application to remit an award to an arbitral tribunal (either to the same tribunal or to a newly constituted tribunal).

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Article 44 et seq SAA distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes. As it will be explained below, while domestic arbitral awards are enforceable once rendered (Article 517.2.2 CCP), the general rule is that foreign arbitral awards (as defined by Article 46.1 SAA) need to be recognised in Spain prior to initiating enforcement proceedings.

ICSID awards, however, are an exception to this rule and do not need to be recognised prior to their enforcement. In this sense, pursuant to Article 54(1) of the ICSID Convention, national courts shall treat them as if they were a final judgment of Spanish courts.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Domestic arbitral awards are enforceable titles that do not need prior recognition by national courts. Applications for enforcement of domestic arbitral awards shall be submitted to the Court of First Instance of the place where the award was rendered.

The enforcement procedure is initiated by means of an enforcement claim (*demanda ejecutiva*), which must include:

- > the enforceable title (i.e., the arbitral award) upon which the claim is based and the documents evidencing the notification of the award to the party against whom enforcement is sought;
- > identification and description of the persons or entities against whom enforcement is sought;
- > a description of the protection sought with the enforcement; and
- > information about the defendant’s assets that may be subject to seizure, and an indication of whether the claimant deems them sufficient.

The court will grant or deny the enforcement after a prima facie review of the award to verify that it has no formal irregularities and that the enforcement is in accordance with the nature and content of the award. The order granting or denying the enforcement shall be served to the defendant within ten days, who may oppose the enforcement on the grounds specified in the law.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Foreign arbitral awards (except ICSID awards) shall be enforceable in Spain once leave for enforcement (*exequatur*) is obtained. Leave for enforcement is governed by both the NYC and domestic law (the Spanish International Legal Cooperation in Civil Matters Act 29/2015 of 30 July 2015 or the **Spanish Legal Cooperation in Civil Matters Act**).

Leave for enforcement is initiated by means of a claim (*demanda de exequatur*), which must meet the following requirements:

- > the claim must be accompanied by a legalised and apostilled copy of the arbitral award, of the document containing the arbitration agreement and by proof of notification or delivery of the award to the opposing party;
- > the arbitral award must be binding, i.e., it must be “final” under the rules governing the arbitration and the definition of “final decision” in Article 43(b) of the Spanish Legal Cooperation in Civil Matters Act; and
- > the party seeking leave for enforcement must be represented by a lawyer and a court agent.

Once leave for enforcement is granted and the arbitral award is recognised, applications for enforcement of foreign arbitral awards can be submitted to the relevant Court of First Instance following the procedure described in Question 5.b above.

Spain

d. How long does it take to have an arbitral award recognised and enforced?

Whilst the most recent available data (2019) shows that the average duration of a proceeding to recognise a (foreign) arbitral award in Spain is eight months, this estimate depends on the workload of the Civil Chamber of the competent HCJ, as well as on whether there is an objection from the other party (in which case, the processing time could be close to a year).

In any case, we estimate that, if there is no undue delay, both procedures (recognition and enforcement, in the case of foreign arbitral awards) could take between 18 and 36 months.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

If there is an arbitral award that has been set aside by the courts of the state where the award was rendered, Spanish courts will always deny its leave for enforcement (*exequatur*). The Spanish Supreme Court has established that the leave for enforcement is a mere homologation procedure and, as such, cannot validate an arbitral award that has been previously set aside. In this sense, the Supreme Court has stated that an arbitral award which has been set aside has no validity and that it would be pointless to request its leave for enforcement. Otherwise, a mechanism of “mere homologation” would result in a mechanism of “legal production”.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

In Spain, the recognition of arbitral awards against states and state entities follows the same proceedings explained in Question 5.c above. However, there are certain specificities in relation to the enforcement of arbitral awards against states.

In this sense, Law 16/2015 of 27 October 2015 on Privileges and Immunities of Foreign States, International Organizations with Headquarters or Office in Spain and International Conferences and Meetings held in Spain (***Law on Privileges and Immunities***) sets out more restricted criteria for Spanish national courts to enforce an award against a state.

According to Law on Privileges and Immunities, Spanish courts will refrain from adopting interim relief or enforcing awards against states, unless such state has expressly or tacitly consented to it (this consent is usually included in the arbitration agreement, when they accept the binding effect of the future award).

Even if states do not give their consent, Spanish courts may adopt enforcement measures after issuing a decision if the following three conditions are met: (1) the relevant assets are *iure gestionis* (i.e., their purposes are private and commercial and not official and non-commercial); (2) such assets are in Spain; and (3) they have a direct link with the respondent state.



Sweden



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Sweden

1. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes. Sweden is a Contracting State to the 1958 New York Convention (**NYC**) since 28 January 1972. Sweden ratified the NYC without reservations.

b. Is your jurisdiction a party to the ICSID Convention?

Yes. Sweden is a Signatory of and Contracting State to the 1965 ICSID Convention since 28 January 1967.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The Swedish Arbitration Act (*Sw. lag (1999:116) om skiljeförfarande*) (the **SAA**) was drafted in close consideration of the UNCITRAL Model Law (the **Model Law**). Although the Swedish legislator did not formally use the Model Law as a blueprint for drafting the SAA, the Model Law served as a significant source of inspiration.

d. Does your local law distinguish between domestic and international arbitration?

No, the SAA applies equally to domestic and international arbitral proceedings seated in Sweden.

2. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

In addition to interim measures, Swedish courts may provide assistance with the following main procedural topics: the appointment and removal of arbitrators, the taking of evidence (e.g. hearing a witness or an expert under oath), issuing orders for production of documents, and challenges to the jurisdiction of the arbitral tribunal.

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes, a party may request interim measures before a Swedish court of general jurisdiction prior to or during an arbitration. A request for interim relief before a court has no effect on the jurisdiction of the arbitral tribunal. The procedure is subject to the ordinary provisions of the Swedish Code of Judicial Procedure (*Sw. Rättegångsbalk (1942:740)*), which set out the conditions for interim measures that may be issued by a court. Examples of interim measures include order of provisional attachment or injunction upheld with a fine.

To be granted such measures, the applicant must as a general rule provide full and adequate security. Unlike interim decisions issued by an arbitral tribunal, court orders on interim measures are enforceable by law in Sweden.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

No, Swedish courts do not have authority to issue anti-suit injunctions in aid of arbitration.

3. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

The SAA distinguishes between grounds that render an arbitral award invalid *ab initio* and grounds to challenge and set aside an arbitral award. Thus, a party may initiate an action to have an arbitral award declared invalid or challenge proceedings to have an award wholly or partially set aside.

b. How is a setting aside application filed and how long do proceedings take?

The competent court for setting aside proceedings is the Court of Appeal with jurisdiction at the seat of the arbitration. If the seat of arbitration is undetermined and is not stated in the award, setting-aside proceedings may be brought before the Svea Court of Appeal in Stockholm. A setting-aside application must be filed within two months from the date upon which the party received the award, or, if the award has been corrected, supplemented or interpreted, within two months from the date when the party received the award in its final wording. Setting aside proceedings usually last approximately 12 to 18 months.

As a general rule, the decision rendered by the Court of Appeal may not be appealed. However, the Court of Appeal may grant permission to appeal to the Supreme Court if it is important as a matter of precedent that the appeal be considered by the Supreme Court. If the Supreme Court agrees that the matter is of precedential value, the Supreme Court can in turn grant leave to appeal and review the Court of Appeal's determination.

Sweden

c. Does an application to set aside an award suspend its enforcement?

A setting-aside application does not automatically suspend enforcement of the challenged award. An arbitral award can be enforced without prejudice to an action to set aside the award. Thus, the award debtor cannot prevent enforcement by invoking grounds for setting aside the award before the Enforcement Authority, since such grounds can only be tried by a court. However, the party applying to set aside the award may request the court in the setting aside proceedings to issue a decision on suspension of enforcement of the award.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

One of the main principles of Swedish arbitration law is that an arbitral award is final and cannot be challenged on its merits. This is generally reflected in the approach of Swedish courts, including in setting aside proceedings where only serious procedural irregularities may serve as a basis for setting aside an arbitral award.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

No, the Swedish courts will not remit an award after it has been set aside. It will be left to the parties to initiate arbitration anew if the arbitration agreement is still valid.

However, courts may stay invalidity or challenge proceedings for a certain period of time in order to provide an arbitral tribunal with an opportunity to resume the arbitration or to take measures aimed at eliminating the circumstances which constitute grounds to invalidate or set aside an award. The court may stay the proceedings upon request of one of the parties if the court finds the challenge to the award to be substantiated, or if both parties request a stay.

4. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Yes, the SAA draws a distinction between Swedish and foreign arbitral awards in terms of recognition and enforcement. The SAA contains provisions on recognition and enforcement of foreign awards, which is subject to an *exequatur* process, while the enforcement of Swedish arbitral awards is governed by the Swedish Enforcement Code (*Sw. Utsökningsbalk (1981:774)*).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Swedish arbitral awards are automatically recognised in Sweden and enforced in a similar way as Swedish court judgments, i.e. by an application directly to the Swedish Enforcement Authority (*Sw. Kronofogdemyndigheten*).

The Enforcement Authority will only conduct a summary review of the award prior to enforcement. Enforcement may be refused by the Enforcement Authority if (i) the arbitral award does not meet the requirements for written form and signature, or (ii) the arbitration agreement contains a reservation on the right to challenge the award on the merits and the time limit for such challenge has not expired.

Moreover, if the Enforcement Authority has reason to believe that an award is invalid, it shall order the applicant to initiate court proceedings against the respondent in this regard, if such proceedings are not already pending. It should be mentioned that the respondent in the enforcement proceedings cannot prevent enforcement by invoking grounds for setting aside an award before the Enforcement Authority, as these grounds can only be addressed in challenge proceedings in court.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

Foreign arbitral awards may be enforced in Sweden following an *exequatur* procedure before the Svea Court of Appeal. A party wishing to enforce a foreign arbitral award must file a petition for leave for enforcement to the Svea Court of Appeal. The award debtor is given the opportunity to comment on the application before leave for enforcement is granted.

As Sweden ratified the NYC without exercising the reciprocity or commercial nature reservation, all foreign arbitral awards are as a general rule enforceable regardless of where they are rendered and whether they are of a commercial nature or not. The provisions of the NYC have been incorporated into the SAA. In deciding matters relating to the recognition and enforcement of foreign awards, the Swedish Supreme Court has stressed the importance of respecting the objective and purpose of the NYC and ensuring conformity between the NYC and the SAA. The grounds for refusing recognition and enforcement, modelled after the relevant provisions of the NYC, are set out in the SAA. These grounds involve issues related to form, procedure and public policy, but not the substance of the case.

Sweden

d. How long does it take to have an arbitral award recognised and enforced?

Depending on the circumstances of the case, recognition and enforcement proceedings in Sweden usually take between three to twelve months.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

No, there are no salient particularities under Swedish law in relation to the recognition or enforcement of arbitral awards. Enforcement of a Swedish arbitral award is no longer possible if it has been set aside or declared invalid through a binding court judgement. Likewise, a foreign arbitral award will not be recognised and enforced in Sweden if the opposing party proves that the award has been set aside or suspended by a competent court in the jurisdiction in which, or under the law of which, the award was made.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states or state entities?

Under Swedish law, a state is generally considered to have waived its immunity from jurisdiction once it has agreed to submit a dispute to arbitration by e.g., entering into commercial agreements containing an arbitration clause. However, a state may still have sovereign immunity from enforcement of an arbitral award, which shall be assessed separately.

The Swedish Supreme Court has noted that the United Nations Convention on Jurisdictional Immunity of States and their Property, while not yet in force, may shed light on the content of customary international law. Guidance can also be found in case law where the Swedish Supreme Court has taken a restrictive approach to immunity from enforcement.

In NJA 2011 p. 475, the court relied on a distinction between a state's property used for *official* purposes and property used for commercial purposes. It found that the property was not protected by immunity given that the property was not primarily used for state official activities. Further, in Case Ö 3828-20, the Supreme Court found that a foreign state did not enjoy immunity from enforcement of an arbitral award since the nature of the purpose of the holding was not sufficiently qualified to shield the property from enforcement.



United Kingdom



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United Kingdom

1. Recent example of our work

Linklaters represented one of the co-respondents, a global energy company, in both the English High Court and the Court of Appeal in relation to an application to compel witness evidence from a UK-resident by way of deposition to be used in a foreign-seated arbitration. The matter involved questions on the much-debated scope of the English court's supportive powers in relation to foreign-seated arbitrations.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, the United Kingdom is a Contracting State to the 1958 New York Convention (the **NYC**) since 24 September 1975. In accordance with Article I(3), the United Kingdom applies the NYC on the basis of reciprocity, to the recognition and enforcement of awards made only in the territory of another Contracting State.

b. Is your jurisdiction a party to the ICSID Convention?

Yes, the United Kingdom is a Signatory of and Contracting State to the 1965 ICSID Convention since 18 January 1967.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

English law has not adopted the entirety of the UNCITRAL Model Law. However, the Arbitration Act 1996 (the **AA**) contains many provisions based upon it. Unlike the UNCITRAL Model law, however, the application of the AA is not limited to international commercial arbitration.

d. Does your local law distinguish between domestic and international arbitration?

The AA applies to arbitrations seated in England, Wales and (with some exceptions) Northern Ireland.

In addition, Sections 9 to 11 (regarding stay of proceedings) and Section 66 (regarding enforcement) apply to foreign arbitrations. Similarly, Section 43 (regarding securing the attendance of a witness) and Section 44 (regarding supportive court powers) may apply to foreign arbitrations, subject to the court's discretion.

The AA also provides that many of the powers it confers may be exercised to support arbitrations where: (1) the seat is not designated; and (2) there is a sufficient connection to this jurisdiction.

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

As a general note, not all provisions of the AA are mandatory and the parties are free to contract out of many of the powers conferred to the English courts by the AA. For details on the AA's mandatory provisions, please refer to Schedule 1 AA.

The English courts' supportive powers are wide ranging and varied. Important examples (excluding interim relief and anti-suit injunctions, which are discussed below) include the power to:

- > appoint or remove arbitrators in certain circumstances;
- > extend time limits for arbitral proceedings;
- > enforce compliance with a tribunal's "peremptory" order (a peremptory order is a final order from the tribunal which requires the defaulting party to comply with the original order within a prescribed time);

- > make orders for service of documents as directed;
- > determine a preliminary point of law;
- > secure the attendance of witnesses/the taking of evidence of witnesses;
- > make various orders in relation to property (such as inspecting, photographing and detaining property);
- > make orders in relation to the sale of goods which are the subject of the proceedings; and
- > appoint receivers.

b. Is interim relief by national courts available before and during arbitral proceedings?

The English court's key powers to order interim relief in arbitration-related proceedings are set out in Section 44 AA. In particular, these powers include:

- > making orders in relation to preservation of evidence or assets; and
- > granting interim injunctions, including freezing orders, other restraining orders and mandatory injunctions.

Interim relief is available both before and during arbitral proceedings. However, the English court will only exercise these powers where the arbitrators themselves have no power to make the orders or are otherwise unable to act. These powers are commonly used to maintain the 'status quo' until the tribunal is formed.

United Kingdom

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Where court proceedings are commenced in breach of an arbitration agreement, there are two main remedies which a party may seek from the English courts:

1. first, in relation to English court proceedings, a party may apply to the English courts for a stay or dismissal of the proceedings; and
2. second, in relation to foreign court proceedings, a party may apply to the English courts for an anti-suit injunction to prevent the party from commencing or continuing the court proceedings.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

The AA sets out three different grounds for challenging arbitral awards in court:

1. a challenge to the tribunal's substantive jurisdiction (Section 67 AA);
2. a challenge on the basis of serious irregularity in relation to the tribunal, the proceedings or the arbitral award (Section 68 AA); and
3. an appeal on a question of English law (Section 69 AA).

b. How is a setting aside application filed and how long do proceedings take?

Arbitration claims should be issued in accordance with the Civil Procedure Rules, Practice Direction 62.3. The courts in which an arbitration claim forms may be issued include the: Admiralty and Commercial Registry at the Royal Courts of Justice; Technology and Construction Court Registry; District Registry of the High Court; District Registry of the High Court. In addition, in the case of an appeal or an application for permission to appeal, the arbitration claim form must be issued in the Civil Division of the Court of Appeal. Claims over £200,000 and/or of general importance to non-parties usually go to the High Court.

An application under any of the grounds for challenge should be made within 28 days from the date of the award (absent any extension that may be granted).

Before applying to the court, an applicant must exhaust all available arbitral procedures. These may include review, appeal and correction. Where these procedures apply, the 28-day limit runs from the conclusion of that process.

Any appeal against a court's first instance decision on a setting aside application requires the original court's permission before being referred to the Court of Appeal. The usual restrictions on appeals (exceptional circumstances, compelling reason, and real prospect of success) apply and are rarely granted in practice. An appeal against a Court of Appeal decision to the Supreme Court will be available (albeit on the usual very restricted grounds).

The length of set aside proceedings depends on the number and complexity of issues which arise. A straightforward challenge would likely be heard within six months of being served.

c. Does an application to set aside an award suspend its enforcement?

Provided that a setting aside application is made within the time specified, an award cannot be enforced until after the application to set aside has been finally disposed of. Even where no application is made, an award cannot be enforced until expiry of the period to make a setting aside application.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

Given the overriding principles of "fair resolution by an arbitral tribunal without unnecessary delay or expense" and "minimal court interference" set out in Section 1 AA, English courts generally take a restrained approach to the review of arbitral awards.

Accordingly, in the rare cases where the English court is asked and agrees to review on a point of law (Section 69), it most often remits the award decision to the tribunal for reconsideration.

Similarly, where challenges are brought for serious process irregularity, the English courts generally uphold the award.

By contrast, where a challenge is brought on jurisdiction grounds, a number of cases have successfully asserted an applicant's right to a full rehearing, i.e., a complete retrial, rather than a more restrained judicial review.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

For challenges under Sections 68 and 69 AA, the English courts have a discretionary power to remit the award for reconsideration to the arbitral tribunal.

By contrast, Section 67 AA does not expressly include an option to remit the award to the tribunal. The three options set out in relation to Section 67 are:

- > confirming the award;
- > varying the award; and
- > partially or completely setting aside the award (with remission in cases where the tribunal has wrongly declined jurisdiction).

Remission is generally to the same tribunal.

Remission is treated as a separate remedy from setting aside, though depending on the circumstances, it is possible to combine the two remedies. If an award is set aside in part, the court may remit the award to the tribunal and direct it to re-determine certain matters in light of the court's judgment.

United Kingdom

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

The English court's general powers to recognise/enforce arbitral awards are set out in: Section 66 AA (primarily in relation to domestic awards); and Sections 101 to 103 AA (in relation to foreign awards under the NYC).

One of the key differences between the two regimes is that Section 66 AA does not offer the same set of defences as Sections 101 to 103 AA.

b. How are domestic arbitral awards recognised and enforced in your jurisdiction?

Under English law, the concept of "recognition" is limited to NYC awards.

There are two key methods of enforcement: The first is to obtain a leave for enforcement from the court to enforce the award, "*in the same manner as a judgment or order of the court to the same effect*", under section 66(1) AA. Judgment may also be entered in terms of the award by Section 66(2) AA. Parties often make combined applications under these sections. An alternative (and rarely used) method for cases where Section 66 is not available is to bring an action on the award. This entails seeking a judgment from the court for the same relief granted by the award.

The summary procedure in Section 66 AA is intended to be straightforward. The application for a leave for enforcement can be made without notice and is made through an arbitration claim form, accompanied by a witness statement, the court fee, a draft of the order sought and copies of the award and the arbitration agreement.

The English courts usually give leaves for enforcement of awards. However, the AA prevents the English courts from granting leaves for enforcement where the tribunal lacked substantive jurisdiction.

c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The grounds on which recognition/enforcement of NYC awards will be refused are limited. They are set out in Section 103 and broadly track the wording of the NYC. These defences concern: legal incapacity; invalidity of the arbitration agreement; inability to present case; excess of jurisdiction; improper constitution of tribunal or procedure; award set aside or attacked at the seat; and public policy.

If none of these grounds are proven, the English courts will recognise and enforce a NYC award. The English courts also have the discretion to allow enforcement where one or more grounds have been proven.

The provisions for enforcement of a NYC award under Sections 101(2) and 101(3) AA mirror those under Section 66 AA. A NYC award can, by permission of the court, be enforced in the same way as a judgment or order of the court to the same effect.



United Kingdom

The procedure is largely identical to the procedure for domestic awards. However, the party must also produce the authenticated original award and the original arbitration agreement (or certified copies), together with certified translations (if relevant).

Though foreign awards can also be enforced under Section 66 AA, this is unusual as foreign awards are almost invariably enforced under Sections 101(2) and 101(3) AA.

d. How long does it take to have an arbitral award recognised and enforced?

This will depend on the circumstances of the individual case. In our experience, it can range from a few months for a simple case to as long as a year. If enforcement is challenged, the timeframe is likely to be at the longer end of the range.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

English law on the enforcement of arbitral awards reflects a clear pro-enforcement approach, which reflects the English law's supportive stance for arbitrations generally.

In relation to the enforcement of awards which have been set aside, as discussed above, the English courts retain the discretion to enforce awards where one of the defences to enforcement has been established (including where the award has been set aside at the seat). Though rare, this discretion may be exercised in cases where the decision made at the court of the seat offended basic principles of honesty, natural justice and domestic concepts of public policy.

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Section 1 of the State Immunity Act 1978 (the **SIA**) affords statutory immunity to states from the jurisdiction of the English courts.

However, Section 9(1) SIA provides that, if a state agrees to submit a dispute to arbitration in writing, the state is not immune when it comes to proceedings before the English courts relating to arbitration. This provision does not override any contradictory terms in the arbitration agreement. It also does not apply to state-to-state arbitrations.

Section 13(2)(b) SIA extends immunity from the enforcement of a judgment or arbitral award against the property of a state. This does not apply if the state has given written consent or in respect of property which is in use or intended for use for commercial purposes.

As a result, it is possible for a party to raise state immunity issues both at the recognition and enforcement stage and the English courts must give effect to Section 1 SIA unless the exceptions under the SIA apply.



United States



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United States

1. Recent example of our work

We advised a major telecommunications group in resisting enforcement proceedings in the United States of a partial award rendered in an UNCITRAL arbitration seated in Vienna. The arbitration related to the performance of an agreement for the supply and installation of a telecommunications link. The winning party sought enforcement proceedings and/or attachments in seven jurisdictions in Europe and in the United States.

2. Legal framework

a. Is your jurisdiction a party to the New York Convention (NYC)? Do reservations apply?

Yes, the United States is a Contracting State to the 1958 New York Convention (**NYC**) since 30 September 1970. Chapter 2 of the Federal Arbitration Act (**FAA**) implements the NYC. The United States made the two reservations set forth in Article I(3) (21 U.S.T. 2517 (1 September 1970)), pursuant to which: (1) the United States applies the NYC to foreign awards rendered in the territory of other contracting States; and (2) the NYC applies to awards arising out of a “legal relationship” which is also “considered as commercial” (9 USC §202).

The NYC also applies to non-domestic awards, which include awards rendered in the United States with an “international element,” i.e., involving property located abroad, envisaging performance or enforcement abroad, or having some other reasonable relation with one or more foreign states, even if they arise out of a relationship between two US citizens (9 USC §202).

b. Is your jurisdiction a party to the ICSID Convention?

Yes, the United States is a Signatory of and Contracting State to the 1965 ICSID Convention since 14 October 1966.

c. Is the arbitration law in your jurisdiction based on the UNCITRAL Model Law?

The FAA is not based on the UNCITRAL Model Law. However, certain US states (i.e., California, Connecticut, Florida, Georgia, Illinois, Louisiana, Oregon, Texas) have passed international arbitration laws that are based on the UNCITRAL Model Law. The FAA pre-empts state arbitration laws that are in conflict with the provisions of the FAA, including superseding those state laws that are in conflict with the FAA’s pro-arbitration policy.

d. Does your local law distinguish between domestic and international arbitration?

Yes. In practice, however, Chapter 1 FAA applies to both domestic and international arbitration, to the extent its provisions do not conflict with the NYC or the Panama Convention. Internationality of an arbitration agreement is defined by reference to 9 USC §202, which provides the NYC’s scope of application. Arbitration is considered domestic when it arises out of a relationship entirely between US citizens with no foreign nexus. As discussed above, an arbitration is international whenever the underlying relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states such as foreign nationality of the parties (9 USC §202).

3. Court proceedings before and during arbitration

a. In relation to which issues other than interim measures can national courts provide assistance/support?

One of the most notable devices of US judicial assistance to international arbitration is 28 USC §1782 discovery in aid of arbitration. Under this provision, district courts may issue an order requiring a party who “resides or is found” within that district to produce evidence for use in proceedings before “a foreign or international tribunal.”

US Circuit Courts were split on the issue of whether this provision includes proceedings before foreign private arbitral tribunals, or is limited to state-sponsored tribunals or courts. Finally in June 2022, the Supreme Court took up this issue in *ZF Automotive US, Inc. v. Luxshare, Ltd.*, 142 S. Ct. 2078 (2022). The Court held that neither commercial arbitration tribunals nor ad hoc investor-state tribunals qualified as foreign or international tribunals under Section 1782. In so holding, the Court explained that a “foreign tribunal” is “imbued with governmental authority by one nation,” and an “international tribunal” is “imbued with governmental authority by multiple nation.”

The Southern District of New York followed up on this issue in *In re Webuild S.p.A.*, 22-mc-140 (LAK)(S.D.N.Y. Dec. 19, 2022), and held further that the ICSID tribunal before it did not constitute “a foreign or international tribunal” within Section 1782 because the two parties to the BIT did not “imbue it with governmental authority.” US courts may also provide assistance in providing orders to compel arbitration (9 USC §§4, 206, 303(a)), compelling the attendance of witnesses and the disclosure of documents, applying punishment for contempt (9 USC §7) and appointing of arbitrators in accordance with the agreement of the parties (9 USC §§5, 206, 303(a)).

United States

b. Is interim relief by national courts available before and during arbitral proceedings?

Yes. While the FAA only refers to interim relief in aid of arbitration in the context of a narrow class of maritime cases (9 USC §8), many US courts have granted interim relief in aid of arbitral proceedings. While certain courts have understood that interim relief before courts is not available for disputes subject to arbitration agreements governed by the NYC (*McCreary Tire & Rubber Co. v. CEAT, SpA*, 501 F.2d 1032 (3d Cir. 1974)) or absent contractual language providing for said authority (*Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286), the majority view is that such interim relief is available under the FAA (see for example *Aggarao v. MOL Ship Mgmt. Co.*, 675 F.3d 355, 376 (4th Cir. 2012); *Karaha Bodas Co. v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 365 (5th Cir. 2003); *Benihana Inc. v. Benihana of Tokyo LLC*, 784 F.3d 887, 894-895 (2d Cir. 2015); *Carolina Power & Light Co. v. Uranex*, 451 F.Supp. 1044 (N.D. Cal. 1977)).

Many state laws also provide for court granted interim relief in aid of arbitral proceedings. Under New York law, for example, courts have the power to grant attachments or preliminary injunctions in connection with both pending or to be commenced arbitral proceedings, upon the ground that an award may be rendered ineffectual without such relief (New York Civil Practice and Law Rules §7502(c)). Finally, most of the institutional rules commonly used in the United States such as Article 28.3 of the ICC Arbitration Rules, Article 27(3) of the ICDR Arbitration Rules, or Article R-37(c) of the AAA Commercial Arbitration Rules contemplate court-ordered interim relief.

c. Are anti-suit injunctions issued by national courts available in your jurisdiction?

Anti-suit injunctions are available in the United States, albeit generally considered as an exceptional remedy, particularly when it involves enjoining foreign proceedings. While the different Circuits are split on the precise requirements applicable to enjoining foreign proceedings, many have granted such measures. In this context and consistent with the FAA's pro-arbitration policy, US courts have granted anti-suit injunctions in favour of arbitration.

Regarding anti-arbitration injunctions, while US courts have generally understood they have the power to enjoin domestic arbitral proceedings, they have exercised much more restraint with regards to foreign international arbitral proceedings. In this sense, different Circuits are split on whether, under the FAA or the NYC, US courts have authority to enjoin international arbitral proceedings.

4. Setting aside or challenge proceedings before national courts

a. Which court proceedings can a party institute to set aside or otherwise challenge an arbitral award?

For an arbitral award to be enforced in the United States, the winning party must have a court confirm the award and enter it as a judgment. The losing party may file a petition to vacate the award, or a motion to do the same in the event that the winning party has already filed for enforcement of the award. If the losing party only disputes the amount of the award, they may instead file a petition to modify or correct the award.

b. How is a setting aside application filed and how long do proceedings take?

Two instances are available for setting aside proceedings in the United States. The losing party may file a petition to vacate an award in either state or federal court. US courts are competent to adjudicate the vacatur (or setting aside proceedings) of (1) domestic arbitrations and (2) international arbitrations seated in the US. International awards are governed by the New York Convention and Panama Convention (implemented by §§2 and 3 FAA, respectively). Under the FAA, the US court with jurisdiction to set aside an award is the federal district court in the district where the award was made (9 USC §10).



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If the winning party has moved to confirm and enforce the award, then the losing party does not need to file a petition and may instead file a motion to vacate the award in the same court where the case is already pending. Under §12 FAA, a party seeking to vacate, modify, or correct an arbitral award must serve notice of the application on all parties within three months after the award is filed or delivered. Depending on the court's docket at the time, and the speed at which the given court typically reviews arbitration enforcement proceedings, the timeline for resolution ranges between just a few months to more than a year.

c. Does an application to set aside an award suspend its enforcement?

Set-aside proceedings do not automatically suspend recognition and enforcement proceedings, especially when these proceedings are pending under different courts. However, US courts often stay recognition and enforcement proceedings if made aware that setting aside proceedings are pending.

d. What is the general approach of national courts in relation to the level of review of awards at the setting aside stage?

Judicial review of an arbitral award operates under an extremely limited standard that relies on “established deference to arbitration as a favoured method of settling disputes when agreed to by the parties” (9 USC §10).

In scrutinising arbitral awards, US courts do not examine the arbitration proceeding for errors or misinterpretations of fact or law, evidentiary missteps, flawed procedural rulings, or the general merits of the ruling. Courts must confirm the award even where the tribunal made serious error, so long as the tribunal is arguably construing or applying the contract and acting within the scope of its authority. Awards are construed liberally, and every reasonable assumption is made in their favour.

e. Do the national courts have the power to remit an award to an arbitral tribunal?

Generally, the only actions available in US courts under the FAA are for either vacating or modifying or correcting the award. Modification or correction changes an award but does not remand or remit it to the arbitral tribunal. The FAA does not permit the appeal of an arbitral award.

However, if an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators (9 USC §10(b)). A court order directing a rehearing is appealable if it re-opens the arbitration (*Sanchez v. Elizondo*, 878 F.3d 1216, 1220 (9th Cir. 2018)).

5. Recognition and enforcement proceedings before national courts

a. Does your local law distinguish between domestic and foreign arbitral awards for recognition and enforcement purposes?

Yes, and different governing law applies to domestic and international arbitral awards. Domestic awards are those made in the United States, involving US parties and without any foreign nexus. The domestic arbitration provisions under Chapter 1 FAA govern these awards. In contrast, international awards (described above) are governed by the NYC and the Panama Convention (implemented by Chapters 2 and 3 FAA, respectively).

b. How are domestic arbitral awards recognised and enforced in your jurisdiction

An arbitral award is binding on parties and does not require affirmation from a court to take effect (*Centurion Air Cargo, Inc. v. United Parcel Service Co.*, 420 F.3d 1146 (11th Cir. 2005)). This applies similarly to international arbitral awards. *Daihatsu Motor Co. v. Terrain Vehicles, Inc.*, 13 F.3d 196, 201 (7th Cir. 1993) (quoting *Rainwater v. National Home Ins. Co.*, 944 F.2d 190 (4th Cir.1991)). A party seeking enforcement of an arbitral award against a noncompliant party may petition a state or federal court within one year after the award is made.

The FAA's domestic arbitration provisions in Chapter 1 (9 USC §§1-16) apply to domestic awards not governed by the NYC or the Panama Convention. Because these provisions also apply where they do not conflict with the Conventions, they govern arbitral awards in international arbitrations seated in the United States. Enforcement of awards (both domestic and international) is accomplished by filing a petition or motion to confirm the award in a US state or federal court. Once the award is confirmed, the court enters a judgment that has the same effect as any other judgment in an action. Parties seeking confirmation of arbitral awards under the FAA's domestic arbitration provisions must apply within one year after the award was made.

In applying the FAA to domestic awards, a court reviews *de novo* whether a party assented to a contract that includes an arbitration clause. Judicial review is not available if the party challenging the award did not object during the arbitration. Some US courts have also held that arbitral awards may be vacated for “manifest disregard of the law” when an arbitrator ignores well-defined legal principles.

Section 16 FAA permits an immediate appeal from orders confirming an award, denying confirmation of an award, or vacating, modifying, or correcting an award.

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c. How are foreign arbitral awards recognised and enforced in your jurisdiction?

The United States is a party to the NYC and the Panama Convention, and foreign arbitral awards under these conventions are enforceable in US courts. The statute of limitations for enforcing a foreign arbitral award in US federal court is three years after the arbitral award is made.

The laws of individual states govern the enforcement of foreign judgments in the United States. A party seeking enforcement of a foreign award may file suit in state or, if federal subject matter jurisdiction exists, a federal district court. A majority of the 50 US states enforce foreign judgments under a uniform act adopted by the state, and the rest do so under principles of comity. Generally, a US court under a uniform act recognizes non-US money judgments if they are final, conclusive, and enforceable where they were rendered. A judgment is conclusive if it grants or denies the recovery of a sum of money, and final even if it is subject to appeal or if appeal is pending. A judgment is enforceable where rendered if the party seeking enforcement could use the judgment to secure the award.

While most non-US arbitral awards are governed by either the NYC or the FAA, state arbitration law covers any gaps, such as with awards rendered by countries not party to the NYC.

d. How long does it take to have an arbitral award recognised and enforced?

Judicial confirmation of awards is usually a summary proceeding with an expedited process for the prevailing party to receive an award. The party seeking confirmation submits a motion or petition which attaches the arbitration agreement and award and establishes the identity of the parties, describes the arbitration agreement, refers to the arbitral award, and provides a statement of relief sought. Assuming enforcement is not challenged and no grounds for modifying or vacating the award are found, the court will confirm the arbitral award and enter a judgment.

However, if a party contests confirmation (as discussed in the responses to Question 4 above), the ensuing enforcement proceedings will take longer. Depending on the court's docket at the time, and the speed at which the given court typically reviews arbitration enforcement proceedings, the timeline for resolution ranges between just a few months to more than a year.

e. Are there any salient particularities in your jurisdiction in relation to the recognition and enforcement of arbitral awards?

Yes, under Article V of the NYC, as implemented by the FAA, one of the grounds for vacating a judgment is whether the award has been set aside by a competent authority of the country where it was made. However, this ground is not a mandatory basis for the refusal of enforcement and, while important, is not dispositive on whether an award is enforceable in the United States.

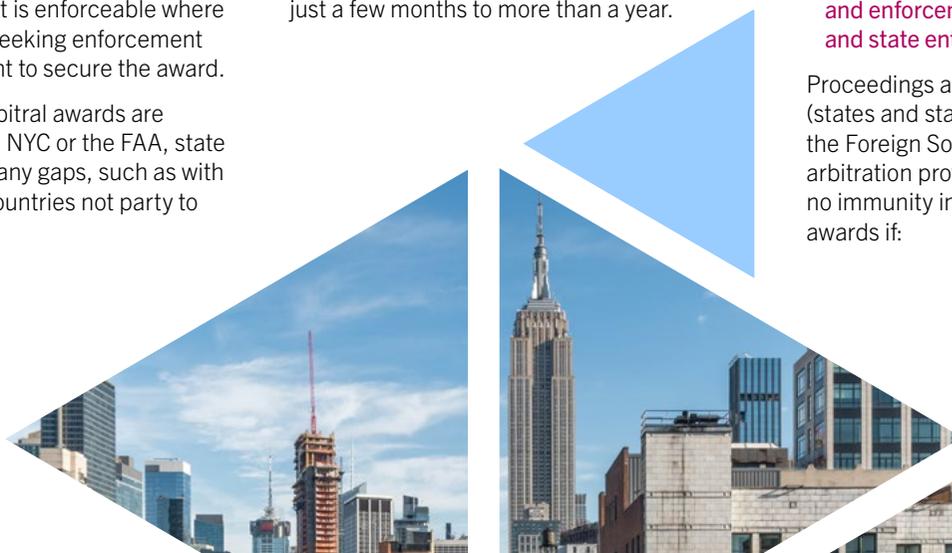
Thus, although rare, a US court may still choose to enforce an arbitral award where it has been annulled at the seat, for example, if giving effect to the set-aside decision at the seat would be “repugnant to fundamental notions of what is decent and just” in the United States (*Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración y Producción*, 832 F.3d 92 (2d Cir. 2016)).

f. Are there any specificities in your jurisdiction in relation to the recognition and enforcement of awards against states and state entities?

Proceedings against foreign governments (states and state entities) are governed by the Foreign Sovereign Immunities Act (**FSIA**) arbitration provisions. Foreign States enjoy no immunity in actions to enforce arbitral awards if:

1. the arbitration takes place or is intended to take place in the United States;
2. 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;
3. the underlying claims, but for the arbitration agreement, could have been brought in the United States under the FSIA; and
4. the foreign state has waived its immunity under FSIA “either explicitly or by implication” as specified in §1605(1). States can explicitly waive their immunity via a clear and unambiguous statement in a contract, international agreement, or authorized declaration (see Federal Judicial Center, *The Foreign Sovereign Immunities Act: A Guide for Judges* 50 (2d ed. 2018)). A state may implicitly waive its immunity when:
 1. it agrees to arbitrate in the United States;
 2. it agrees that US law governs a contract; or
 3. when it files a responsive pleading without invoking the defence of sovereign immunity.

Courts have routinely applied the FSIA arbitration provisions to recognise and enforce arbitral awards against foreign states under the NYC (see state immunity exception under the FSIA, 28 USC §1605(a)(6)). Importantly, service of process must be made by one of the means identified in §1608 FSIA.



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