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EXPERT FORUM

# CHALLENGES WHEN ENFORCING ARBITRAL AWARDS

## PANEL EXPERTS

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**Marco Tulio Venegas** is a partner at Von Wobeser y Sierra with 18 years' international experience, both on a professional and educational level. The youngest partner ever promoted by the firm, he has saved his clients billions of dollars and has protected and resolved several of the most complex and consequential litigation and arbitration matters for both multinational clients and governments around the world.

**CD: Why is it important to ascertain the ability to enforce an arbitral award – both practically and legally – at the outset of a dispute? What are the key issues that need to be addressed at this stage?**

**Kleiman:** Ascertaining the ability to enforce an arbitral award is important before a dispute arises. This exercise needs to be conducted as early as possible, and ideally before agreeing the terms of the arbitration clause. The choice of the seat of arbitration, for example, is critical. The seat of arbitration is where the arbitral award can be set aside and some jurisdictions also allow arbitration-unfriendly injunctions. It is therefore crucial for the award-creditor that the seat of arbitration be a 'safe seat', an arbitration-friendly jurisdiction. Regarding practical considerations, a claimant or counterclaimant must, as early as possible, understand where the respondent has assets, including receivables. When dealing with groups of companies, one should think tactically about the possibility of joining affiliates that were involved in the negotiation and performance of the agreement.

**Bédard:** It is important to determine whether it is worthwhile to spend time and resources on the dispute. Many clients, understandably, are not inclined to devote significant time, energy and financial resources to a dispute, if they do not have solid prospects of recovering on the award. Assuming a lack of voluntary compliance with the award, the key is to determine whether, in practice, it will be possible to find assets and execute on them.

> **"Arbitration is just a private form of dispute resolution; however, from an attorney's perspective it shares the same concerns regarding the potential enforcement of the final award."**
>
> *Marco Tulio Venegas, Von Wobeser y Sierra*

A recurring sensitive issue arises when the assets are located only in the home jurisdiction of the defendant, and a concern exists that the courts in that jurisdiction may not be sufficiently independent and impartial to support the enforcement of the award.

**Venegas:** Arbitration is just a private form of dispute resolution; however, from an attorney's perspective it shares the same concerns regarding

the potential enforcement of the final award. Consequently, as in any other type of litigation, the basic recommendation about potential enforcement should be traced back to the moment in which the commercial relationship and the respective contracts were executed. If, from the beginning of the relationship, there are enough legal protections and guarantees, then the ability to enforce during a dispute increases. Additionally, it is healthy, at least in longstanding commercial relationships, to periodically monitor the performance of the obligations and, if possible, the financial situation of the other party. If, at some point, there are signs of the financial capabilities of the other party deteriorating or if the performance of the obligations begins to be defective, then parties should request additional guarantees and reassess the future of the contract.

**Cole:** The goal of nearly all arbitrations is to obtain an award that is capable of being enforced. Article four of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards sets out the grounds on which an international arbitral award may be refused. These include defects in the arbitration agreement, either because of some incapacity in the parties or because the arbitration agreement is not valid under the applicable law. Failure to give proper notice of the arbitration or its proceedings or prevent in any other way a party presenting its case will also prevent enforcement. The arbitration must only deal with that which is within its jurisdiction, by a tribunal composed and operating in accordance with the procedure agreed by the parties or the law of the country where the arbitration took place. The dispute also must be one which is capable of determination by arbitration and the resulting award is not contrary to public policy.

### CD: What strategies might be used by a losing party to challenge an arbitral award and frustrate the enforcement process?

**Bédard:** The losing party may attempt to move to set aside or annul the award in the place of arbitration. This is an uphill battle, and courts in many jurisdictions will not set aside an award lightly. If the place of arbitration is also the home jurisdiction of the losing party and the courts are not necessarily independent or impartial, then it is possible that the losing party may be able to gain more traction with an attempt to set aside the award. We have also seen situations where the losing party moved to annul the award in its home jurisdiction, even though this was not the place of arbitration. This strategy is extreme and normally should not be entertained by courts under any circumstances.

**Venegas:** There are several scenarios in which awards may be challenged or frustrated. First, a losing party may have willingly created several potential arguments of violations of due process

during the arbitration, knowing that the likelihood of losing was high. In this scenario, the other party should be alert and constantly ask the arbitral tribunal to correct any potential breach of due process. Another strategy commonly employed, once the award is rendered, is to try to try to illegally transfer to or hide assets with a third party or to artificially create debts between companies so that the enforcement becomes financially unviable. Other illegal strategies include changing domicile to a place in which the courts may not have much experience in enforcement proceedings of arbitral awards.

**Cole:** Losing parties will often carefully consider national arbitration laws, as well as the New York Convention, to see if any mandatory requirements for recognition and enforcement of arbitral awards have been breached. Particularly fertile complaints are that due process was not followed or that the enforcement of the award is contrary to public policy. In the case of due process, losing parties may seek to assert that the tribunal did not follow the process agreed by the parties or that there was some other impediment to it presenting its case. Public policy, by comparison, is a much more uncertain ground. Often described as an 'unruly horse', public policy is often subjectively applied, with applicable criteria changing from time to time.

**Kleiman:** A losing party may typically attempt to seek the setting aside of the arbitral award before the courts of the seat of arbitration and simultaneously try to defeat or slow down enforcement with stay of execution applications to the courts where assets are located, which many jurisdictions may permit, based on the provisions of Article VI of the New York Convention. In France, such tactics are generally not efficient because arbitral awards are immediately enforceable, even pending set aside applications, unless a stay of execution is ordered which French courts seldom do. French courts also decide matters of arbitral award recognition and enforcement based on their own review without regard to what the courts of the seat of arbitration may have decided.

### CD: Once it is clear that an award will not be honored by the non-prevailing party, what are the main methods of enforcement typically available to the winning side?

**Venegas:** The New York Convention allows the winning party to seek the enforcement of the award in any county in which the losing party may have assets. Thus, parties should identify the location of the assets and, if possible, bring enforcement action before the courts of the relevant countries. In addition to the enforcement proceedings, some jurisdictions allow parties to ask for preliminary measures to secure enforcement. In those jurisdictions, of course, it is advisable to seek this

type of measure. Ultimately, if the enforcing party secures assets and has a strong position before the courts, it is likely that the losing party may try to settle the case to avoid further expenses and losses.

**Kleiman:** The methods of enforcement that can be used by the award-creditor will be those available at the place where enforcement is sought. Under Article III of the New York Convention, arbitral awards must be enforced in accordance with the rules of procedure of the territory where the award is relied upon. In France, a variety of protective and enforcement measures are available that involve the registration of a surety on property, court ordered escrow, attachment of tangible and intangible properties and foreclosure. It is possible to take early interim asset preservation measures in anticipation of future enforcement steps. For example, while a set aside application is pending, the award-creditor may freeze its debtor's assets.

**Cole:** The main methods of enforcement are to bring an action for the recognition and enforcement of an award in courts in which the arbitration was seated or alternatively to bring such an action overseas. In the UAE, this typically involves commencing a court proceeding, either in the local Arabic courts or in the courts of the Dubai International Financial Centre (DIFC) or Abu Dhabi Global Market (ADGM) financial free-zones. The DIFC courts have been a common route to the enforcement of awards in onshore Dubai, and elsewhere in the UAE, through 'conduit jurisdiction' between the DIFC courts and the Dubai courts. However, a series of recent cases determined by the Joint Judicial Tribunal has cast doubt on the effectiveness of the conduit jurisdiction in certain cases.

> **"The methods of enforcement that can be used by the award-creditor will be those available at the place where enforcement is sought."**
>
> *Elie Kleiman, Freshfields Bruckhaus Deringer LLP*

**Bédard:** Enforcement depends on a thorough examination of the location of potential assets available for execution and the assessment of the likelihood of success of enforcement in the relevant jurisdictions.

**CD: In your opinion, how effective are international treaties and conventions in providing effective and robust methods of enforcement around the world?**

**Cole:** Most lawyers would agree that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards is a very successful piece of legislation, facilitating the recognition and enforcement of arbitral awards in nearly 160 countries worldwide. Countries that have not joined the New York Convention tend to suffer from a lack of international investment, as without a reliable means of enforcing foreign arbitral awards, international investors often consider the risk of investing or contracting in such states to be too high. However, the New York Convention is not without its critics. The public policy exception introduces uncertainty and grants high levels of discretion for state courts to refuse enforcement.

**Bédard:** The New York Convention is effective. It does foster, as its name suggests, an easier path for the recognition and enforcement of arbitration awards. This is because it provides for limited grounds upon which the award may be denied enforcement. Courts in numerous jurisdictions have given effect to these provisions. There are, of course, exceptions, but these should not detract from the overall positive track record of the convention.

**Kleiman:** The New York Convention makes enforcing arbitral awards very effective worldwide, almost as effective as the enforcement of judgments in the EU. Pursuant to Article III of the convention, Member States must recognise arbitral awards rendered in other contracting states and they may only refuse to enforce such awards on very limited grounds, such as the invalidity of the arbitration agreement, a breach of due process, *ultra petita* ruling by the tribunal, improper constitution of the tribunal, suspension or annulment of the award at the seat, inarbitrability of the dispute according to the law of the country of enforcement, or infringement of its public policy. These limited grounds and the absence of substantive revision contribute greatly to the success of international arbitration as the preferred means of dispute resolution worldwide.

**Venegas:** The international system is very robust. There are literally thousands of cases evidencing that the enforcement of arbitral awards is usually possible and successful. There are certain atypical cases in which the dynamics between enforcement and setting aside proceedings may create difficult scenarios and further complicate the situation of the prevailing party. However, on average, the rate of success in

enforcing an award or settling the enforcement is high. In connection with the ICSID system and Bilateral Investment Treaties' arbitration, despite the high profile of those cases and the political implications that some of them may have, the system has worked well. Currently, however, there is a trend to disarticulate the more global approach of the system and make more ad hoc systems. This trend is concerning and threatens to jeopardise all the benefits and advances in predictability and legal security achieved during the past decades.

**CD: Have you seen any recent legal or judicial developments which impact the process of enforcing arbitral awards? What insights can we draw from recent cases?**

**Bédard:** The US Court of Appeals for the Second Circuit issued two 2017 rulings – *Micula v. Government of Romania and Mobil Cerro Negro, Ltd. v. Venezuela* – on the applicability of the US Foreign Sovereign Immunities Act to petitions to confirm or enforce ICSID arbitral awards against sovereigns. In both cases, the Second Circuit reversed district court decisions that had confirmed ICSID awards against sovereigns, pursuant to a summary *ex parte* procedure that is available under New York state procedural law. The federal appellate court ruled that the district court did not have jurisdiction over the sovereigns as a result of the summary *ex parte* procedure because the service of process and venue requirements of the FSIA had not been satisfied. These cases caution that parties attempting to enforce an arbitral award against a sovereign must give due consideration of the impact of the FSIA on the procedures that may be available to confirm or enforce the award.

**Kleiman:** Enforcement against sovereigns is impacted by the enactment in France of a statute known as '*Loi Sapin II*'. Under this new regime, enforcement against foreign sovereign assets in France is subject to the prior authorisation of a judge. Moreover, save for commercial assets, express waiver of immunity of enforcement is required – and diplomatic and consular assets require the waiver to be not only express but also specific. In a 10 January 2018 ruling, the French Supreme Court held that strong policy reasons justified that consistent solutions in a matter of state sovereignty and concluded that the requirement of an express and specific waiver for enforcement against diplomatic assets applied even to enforcement governed by the pre-*Sapin II* regime.

> **"One of the common errors made in arbitration agreements in the UAE is for parties to stipulate arbitration under the rules of the DIFC-LCIA and then provide for the seat of Dubai to apply."**
>
> *Adrian Cole, King & Spalding*

**Venegas:** There is definitively a trend to challenge the validity of awards more than in the past. Different grounds have been invoked to oppose enforcement and seek to set aside awards. The most controversial cases are related to arguments about the partiality of arbitrators or failure to adequately perform their duties by delegating most of their material work to

the secretary of the arbitral tribunal. Other common grounds to oppose enforcement relate to a breach of due process during the arbitration, or arguments about *ultra* or *infra petita*. The most interesting cases that we have seen recently refer to the enforcement of nullified awards. Although these types of cases are certainly exceptional, they provide a blueprint for how to take advantage of the New York Convention and to contrast considerations of national public policy against 'international' public policy.

**Cole:** The conduit jurisdiction between the DIFC and Dubai courts has been subject to considerable challenges over the last couple of years. Following the *Banyan Tree* case in 2013, the DIFC courts have recognised foreign and domestic arbitration awards, even where the award debtor had no presence or assets in the DIFC itself. This has allowed award creditors to seek judgment in the terms of the award and then use the 'conduit' afforded by the Judicial Authority Law of the protocol of enforcement between the DIFC and Dubai courts to enforce the DIFC court judgment in the Dubai courts without the courts having jurisdiction to review the merits. This has saved award creditors from being exposed to the sometimes unpredictable ratification process of the Dubai courts.

**CD: What steps can parties take when negotiating and drafting business agreements, to assist the process of enforcing awards should this become necessary down the line?**

**Cole:** It is imperative that the arbitration agreement is effective and enforceable. Many parties, including their lawyers, are inexperienced in drafting binding arbitration agreements. Furthermore, the arbitration agreement, frequently coming at the end of a contract, is often given little consideration, especially when time is short. This can result in pathological arbitration clauses – ones in which there are defects which may permit a party to challenge its recognition and enforcement. One of the common errors made in arbitration agreements in the UAE is for parties to stipulate arbitration under the rules of the DIFC-LCIA and then provide for the seat of Dubai to apply. In doing so, parties think they are getting arbitration seated in the DIFC because they have specified the DIFC-LCIA rules.

**Venegas:** In addition to the general contractual recommendations about the existence of guarantees, and in general having the proper asset and due diligence research in place, it may be useful, when allowed by the corresponding substantive law, to include a formal and explicit waiver to challenge the validity of the award before courts, either through setting aside proceedings or opposing the judicial enforcement proceeding. Other more intrepid solutions may be to add a contractual

penalty or a high rate of post award interests in the contract against the party that does not voluntarily comply within five or 10 days of the award being rendered and notified.

**Kleiman:** One cannot overemphasise the importance of agreeing to an arbitration-friendly seat. Arbitration friendliness requires more than a jurisdiction that has endorsed UNCITRAL model legislation. It requires a well-established legal tradition that is supportive of arbitration and it also demands a strong tradition of independence of the judiciary. Choosing an experienced arbitral institution is also critically important. Parties should be wary of arbitral institutions that have not demonstrated their expertise and independence. Dispute resolution clauses should also be reviewed by specialist counsel.

**Bédard:** Small things can make a big difference. For example, it is useful to think of appointing an agent for the service of process to facilitate judicial proceedings for the purposes of enforcing the award. It is also useful to include a clause pursuant to which the parties recognise that jurisdictions where assets are located are competent to hear actions for the enforcement of an award.

**CD: Going forward, are there any particular developments you expect to see in the way arbitral awards are enforced? What overarching trends are likely to shape this issue?**

> **"Conventional wisdom is that New York Convention enforcement is easier than the recognition of judgments, which admittedly still lacks a treaty framework."**
>
> *Julie Bédard, Skadden, Arps, Slate, Meagher & Flom LLP*

**Venegas:** As more cases arise, it is foreseeable that the criteria adopted by the courts in analysing cases opposing enforcement will begin to standardise. In this regard, it is likely that jurisprudential definitions of what is deemed a breach of public policy in public contracts will be set. Other aspects, such as what type of violations of due process are really causes to deny enforcement, and in general the refusal to revisit the merits of an award, will also be fixed as undisputable criteria. As for the evolution of enforcement proceedings, it is also possible that amendments to local laws

may take place to allow the adoption of provisional measures immediately after an award to secure assets. Generally, I expect that a trend to strengthen the position of the enforcing party and the authority of the courts will prevail in the coming years.

**Cole:** Whether and in what circumstances security should be paid by an award creditor seeking to challenge an award is an issue that frequently comes before the courts of many jurisdictions. In the series of cases concerning *IPCO (Nigeria) Ltd v. Nigerian National Petroleum Corp (NNPC)*, NNPC gave security of over $80m to stay enforcement proceedings commenced in 2004 in the English Commercial Court, pending the determination of a challenge to an arbitration award in Nigeria. In 2014, the challenge in Nigeria still had not been resolved. The stay only came to an end when the English Court of Appeal, apparently swayed by the evidence of a former Chief Justice of Nigeria, said that it was "conceivable that there will be no fixed determination of the issue of whether the arbitral award will be set aside for 20 or 30 years or longer", directed the Commercial Court to determine an allegation of fraud, which was one of the grounds of challenge that the Nigerian court had failed to address.

**Kleiman:** Enforcing arbitral awards – or foreign judgments – against foreign sovereign assets in France will become increasingly difficult on account of more restrictive conditions on waivers of immunity of execution. The perceptive on this evolution will obviously vary if one is a foreign state, a foreign state's debtor or a creditor. From the perspective of French debtors of any given foreign state, their exposure to attachment of tax debts owed by them to creditors of the state will be more limited and will reduce the risk of double payment that arises frequently when there is no recognition between France and that a state that is paying the state's creditor would validly discharge the obligations of the debtor to pay the state itself. The enforcement of arbitral awards against a private party's assets will remain highly efficient in France.

**Bedard:** It is interesting to compare the enforcement of arbitral awards with the recognition of judgments. Conventional wisdom is that New York Convention enforcement is easier than the recognition of judgments, which admittedly still lacks a treaty framework. In practice, however, in many jurisdictions, there is not much difference between the recognition of a foreign judgment and the enforcement of an arbitration award. I would not expect this trend to change. CD


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