

International enforcement of arbitral awards – The New York Convention 1958



This article builds on our recent series of blogs:

- [post-Brexit enforcement issues within the EU](#)
- [enforcement in the UAE](#)
- [choice of forum \(Court litigation or arbitration\)](#)
- [proposed reform to the Arbitration Act 1996](#)

Following these articles it is a good time to consider the enforcement of foreign arbitral awards (in the UK and abroad) under the often referenced ‘New York Convention’ (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958). The ease and pitfalls of enforcement under the New York Convention should be considered when choosing the relevant forum for resolving disputes and when establishing international contractual relationships and identifying the location of a party’s assets.

One of the key considerations when deciding to pursue a claim, in either litigious or arbitral proceedings, is the existence and availability of the prospective defendant’s assets and the ease with which any order or award can be converted into financial recovery. The primary aim of the New York Convention was to overhaul the double *exequatur* protocols (which essentially means the Court of the state in which the arbitral award was first issued would first need to ‘recognise’ the award via what is known as an ‘*exequatur*’ process before it going to the Court of the state within which assets were held to be ‘recognised’ again, a so called ‘double *exequatur*’) of the previous Geneva Convention 1927 (the Convention on the Execution of Foreign Arbitral Awards, Geneva 1927) and create a more streamlined and efficient way of binding contracting states to the recognition and enforcement of arbitral awards made in another convention contracting state (“**Contracting State**”). The New

York Convention has been described as one of the most successful private international treaties of all time and is particularly effective given its forward thinking approach in ensuring that foreign arbitral awards are enforced on a similar basis to a Contracting State's domestic arbitral awards, as against the New York Conventions own uniform set of rules and procedures.

How is the New York Convention applied?

Article I sets out the scope of application to foreign awards, and to awards which cannot be considered 'domestic', albeit a reservation to the Conventions' application only to awards made in Contracting States and where the substantive dispute is 'commercial' in nature apply.

Article III states that the recognition and enforcement of foreign arbitral awards shall be granted 'in accordance with the rules of procedure of the territory where the award is relied upon'. This means that domestic laws should be set down in each Contracting State to implement the New York Convention, the domestic laws of the state in which enforcement is sought are applied to the recognition, as opposed to the procedures set out in the Contracting State where the award was granted. In the UK the Arbitration Act 1996, s100-104, sets out the rules for recognition and enforcement of a foreign judgment. This is relevant as often arbitration is sought in a 'neutral location' in accordance with the arbitration agreement itself, as opposed to the state in which the assets are held and/or the wrongdoing has been committed, it should be borne in mind that the rules of this neutral location will not apply to any enforcement action that follows if assets are located in a different Contracting State. More onerous rules on the enforcement of foreign awards than those that apply to a country's domestic awards are prohibited by the Convention.

Article IV set out the parameters of documentation that are required – i.e. the duly authenticated arbitral award and the original arbitration award (plus copies and translations if required and the award is not issued in the language of the country of enforcement). Once these documents have been filed, the applicant has a prima facie right to recognition and enforcement which can only be refused on those ground set out in Article V. The threshold of evidence required to prove the existence of an award is therefore quite simple in practical terms, and is much lower than under the Geneva Convention, which required a Court of the issuing Contracting State to first confirm the arbitral award before it was recognised in another.

Article V details limited and exhaustive grounds upon which recognition and enforcement can be refused, but these relate to an abuse of procedure and violation of due process and opposed to the substance or merits of the award itself, which is not open to challenge. A party against whom an application to enforce an arbitral award is made, can challenge the enforcement on the basis only of the limited grounds set out in Article V.

Application of the New York Convention rules to the recognition and enforcement of arbitral awards granted in Contracting States is therefore uniform and quite simple.

Referral of the Court to Arbitration

Alongside enabling the recognition and enforcement of foreign arbitral awards, a secondary function of the New York Convention is to set out the parameters within which any Contracting State Court must refer a matter to arbitration in the event a party is subject to an arbitration agreement, but seeks to litigate the matter before the Court of any other Contracting State.

Potential issues with international enforcement of arbitral awards

- It is imperative that the existence and location of assets are confirmed prior to enforcement of any award. In reality before engaging in any dispute resolution proceedings the availability of assets, should the

judgment debtor fail to pay any money order or award should be considered. As noted above, this is something that should also be considered at the inception of a contractual relationship. If there are no assets available within any Contracting State, the New York Convention will simply not apply to aid recovery or enforcement.

- Although a country may have signed the New York Convention, it may not have enacted domestic legislation to give it force. In this instance, the absence of domestic legislation means that the Convention does not apply and the arbitral award cannot be utilised in that state – i.e. it is treated as if it is not a Contracting State at all. It is important therefore to seek advice from a local lawyer prior to commencing recognition and enforcement action and to check both whether it has acceded to, and implemented, local law in relation to the New York Convention
- Domestic Legislation – some countries have domestic legislation which makes it more prohibitive to enforce than others and national procedural requirements will apply to the practical process of obtaining a recognition Order. As per the above, local national lawyers should always be consulted and instructed prior to trying to enforce an award. One of the cornerstones of the New York Convention itself however, is that enforcement of a foreign arbitration award will be no more onerous than enforcement of a local/domestic award – Article VII of the Convention codifies this as the ‘favourable right’ provision, i.e. where there are more favourable domestic provisions or treaties, these may be chosen over the Convention rules for enforcement, but no higher or more onerous provisions can be said to apply.
- Interpretation of key terms can vary from state to state and the Convention does not contain definitions which apply across the board – for example what comprises a ‘commercial’ underlying dispute (this may have wide reaching consequences given one of the permitted reservations under the Convention is to disputes other than ‘commercial disputes’.
- The accessibility of local courts with knowledge of the parameters and application of the New York Convention, particularly at a lower /initial level as referrals and appeals through higher and tiered court systems can make the proceeding unduly protracted or costly than in other contracting states. In the UK we are fortunate to have a wealth of knowledge and commercial aptitude available from the outset of proceedings, particularly where actions are commenced within the High Court (of which there is a specific Commercial Division) within which all judges have a good and thorough understanding of the New York Convention and its scope.

Summary and relevance

Despite the potential issues with enforcement, and having been enacted almost 70 years ago, the New York Convention remains relevant and effective today – Surinam is the most recent Contracting State to accede to the Convention, which will enter into force on 8 February 2023; Turkmenistan and Iraq having been Surinam’s predecessors in May 2021. With this latest addition, 171 states have now become designated Contracting States under the New York Convention, which widens the scope and application for recognition and enforcement of foreign awards and makes it an important tool for recovery once a successful arbitral award has been obtained.

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