

## *Getting Your Arbitral Award Paid: Twenty-Five Practical Pointers for Success*

by David Zaslowsky & J.P. Duffy<sup>1</sup>

The ultimate objective of a party seeking damages in an arbitration is usually to get paid. This article offers twenty-five practical tips for achieving the objective of converting an arbitral award into money.

While several of the tips that appear below are relevant to both domestic and international awards, the enforcement of international awards can be more challenging. Any discussion of enforcement of international arbitration awards must be done against the backdrop of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which is colloquially known as the New York Convention. Currently, 157 countries have signed the New York Convention.<sup>2</sup> In relevant part, and with limited exceptions, the New York Convention requires the courts of signatory states to convert arbitral awards into national judgments that can then be enforced against the debtor and its assets in the enforcement jurisdiction.

### **Drafting the Arbitration Clause With Enforcement In Mind**

1. Strategic thought about enforcement of an ultimate arbitral award should begin at the contract drafting stage. The arbitration should be seated in a New York Convention country, particularly since one is hard pressed today to find a country that is not a signatory.
2. Article III of the New York Convention allows the courts of signatory states to follow their own judicial procedural rules in enforcement proceedings, which can result in additional requirements being imposed in enforcement proceedings beyond those expressly found in the New York Convention. Parties should try to anticipate the jurisdictions in which enforcement will be likely and draft around known issues in those jurisdictions. As examples:
  - a. If enforcement in Saudi Arabia is anticipated, the arbitration clause should require the award to be Sharia compliant.
  - b. If seating an arbitration in England, parties may wish to opt out of Section 69 of the English Arbitration Act 1996, which allows an award to be challenged on a question of law.
  - c. If enforcement will be sought in the U.S., it is wise to include language stating that "judgment may be entered thereon in any court having jurisdiction thereof" to avoid a split in U.S. courts on the issue of personal jurisdiction.
  - d. If enforcing against a Philippine franchisee, ensure that the arbitration clause imposes one of the three sets of arbitration rules approved by Philippine law for arbitrating against franchisees.
  - e. If enforcement in the PRC will be necessary, select an arbitral institution that PRC courts will recognize and properly identify that institution to avoid confusion.
3. A corollary to drafting around known enforcement issues is to avoid imposing obligations in the arbitration clause that could unnecessarily complicate enforcement or delay satisfaction of the award. For instance, in the U.S., parties are not permitted to expand the scope of judicial review at the enforcement stage to

---

<sup>1</sup> The authors are partners in the New York office of Baker McKenzie and can be reached, respectively, at david.zaslowsky@bakermckenzie.com and jp.duffy@bakermckenzie.com.

<sup>2</sup> Holdouts include Iraq, Libya, Ethiopia, and Guinea Bissau.

include an examination of the underlying merits, and imposing such a requirement in the arbitration clause can allow a recalcitrant party to unnecessarily delay enforcement. Similarly, courts in the U.S. have held that parties cannot waive the right to judicial review of an award at the enforcement stage, and including such a waiver can impede enforcement.

4. Do not impose overly specific arbitrator qualifications in the arbitration clause, because it could lead to unnecessary challenges and delays at the enforcement stage. For instance, while there may be good reason to specify general arbitrator qualifications in the arbitration clause, such as language skills or general industry knowledge, imposing overly didactic requirements can create ready-made enforcement challenges by allowing a party to claim that the arbitrator did not possess the necessary qualifications (which may only become apparent during the arbitration itself).

5. Unique issues arise when dealing with sovereigns because they are typically entitled to sovereign immunity. Thus, when contracting with a sovereign, the arbitration clause should contain as broad a waiver of sovereign immunity as possible, both with respect to jurisdiction and execution. Under the Foreign Sovereign Immunities Act in the U.S., pre-judgment attachment will not be permitted unless immunity therefrom is specifically waived. If dealing with an instrumentality of a sovereign, such as a national oil company or other state-owned entity, determine if national laws impose any restrictions on that entity's ability to agree to arbitration or any special approvals that the entity might need to secure to effectively agree to arbitration.

6. While parties can often anticipate at the drafting phase where enforcement might be likely, they rarely can predict with certainty that those are the *only* places where enforcement might become necessary, and one of the most useful features of the New York Convention is that it permits parties to simultaneously enforce in multiple jurisdictions concurrently. Thus, do not restrict enforcement to only one jurisdiction in the arbitration clause.

#### **Keep Enforcement in Mind After the Dispute Arises**

7. Although "possession is nine tenths of the law" is not a strict legal principle, possession can often give a party leverage. Thus, as soon as it becomes apparent that a dispute might be heading toward arbitration, keeping control over assets that might be used to satisfy an award is oftentimes wise (*e.g.*, by not making a payment that would otherwise be due). Because such conduct could itself give rise to a claim, no such decisions should be taken without understanding its implications under the governing law.

8. When economical to do so, parties should consider retaining an asset tracing firm before even commencing the case, particularly if that party anticipates seeking provisional remedies at the outset, which we turn to next.

9. Under the arbitration statutes of many U.S. states, it is possible to obtain provisional relief (attachment and injunctions) in aid of arbitration. Under New York law, for example (NYCPLR § 7502(c)), provisional relief in aid of arbitration is available if "the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief." The New York statute is also broad and specifically permits provisional relief in aid of arbitrations taking place outside of New York, and even allows such relief even before an arbitration is filed, as long as the arbitration is commenced within 30 days.

10. English law allows for freezing orders in aid of arbitration upon a showing that (i) the claimant has a 'good arguable case' against the defendant, (ii) there is a real risk the defendant will dissipate or otherwise deal with assets to render enforcement impossible (rather than merely difficult), (iii) it is 'just and convenient' to grant the order, and (iv) the applicant has been 'full and frank' with the court. The law permits such orders to be issued in support of arbitrations outside of England, although, as reported anecdotally to the authors, it can be difficult to obtain them as a practical matter.

11. Attachments in aid of arbitration, even foreign arbitrations, are also permitted in many civil law countries for purposes of ensuring that any damages awarded in an arbitration will be paid, or at a minimum, that the prevailing party's costs will be satisfied. Such relief can oftentimes be obtained on an *ex parte* basis in the first instance. Some countries, however, require significant security.

12. Another avenue for securing future payment of an award is to apply to an arbitral tribunal for provisional relief. In exigent cases, and where permitted by the institutional rules at issue, this application can be made to an emergency arbitrator chosen for the express and limited purpose of deciding upon the emergency application. Alternatively, in matters in which the need for an attachment exists but is less immediate, an application can be made to the merits tribunal itself once constituted.

13. While the practice of allowing dispositive motions is becoming more accepted in the international arbitration arena, and while arbitrators are becoming less concerned about Article V.1(b) challenges,<sup>3</sup> in highly contentious cases where enforcement proceedings are anticipated, parties should limit their efforts to summarily dispose of the other party's case. While that can be frustrating during the merits phase, it can pay significant dividends at the enforcement stage by foreclosing a possible enforcement defense, however unlikely that defense might be to succeed.

14. As a general matter, discovery (or disclosure as it is called in many other countries) in arbitration is more narrow than in U.S. litigation (and often significantly more narrow if the arbitrators are from civil law countries). Nevertheless, an astute practitioner should be mindful of using carefully crafted discovery requests as a way of learning about where the other side maintains its assets and what the party is doing with those assets.

#### **Steps to be Taken During Enforcement Proceedings**

15. Identification of assets is a critical prerequisite to any effective enforcement strategy, and asset tracing firms can play a valuable role in that process. Consider engaging an asset tracing firm prior to obtaining an award, and ideally before the disclosure phase begins.

16. Arbitration awards are not self-executing. If the debtor does not pay voluntarily, the award must be judicially enforced -- that is, it must be converted into a court judgment and then the judgment is enforced, just like any other court judgment. Beware of statute of limitations, because they are often shorter for enforcing arbitral awards than they are for enforcing foreign judgments. This can lead to situations in which, if the U.S. statute of limitations has run for enforcing awards, it is still possible to turn the award into a judgment in a foreign jurisdiction and then enforce that judgment in the U.S.

17. In most courts in the U.S., personal jurisdiction over the defendant or the presence of a defendant's assets is a prerequisite to bringing an enforcement action. There are, however, New York state court cases that hold there is no such requirement for enforcing foreign judgments. There can be advantages to having a judgment in the United States even if one cannot locate assets of the debtor in the U.S. at the time the judgment is sought. Thus, one might want to give consideration to turning an award into a judgment outside the U.S. and then enforcing that judgment in New York state courts.

18. We mentioned earlier the use of pre-award attachments. Even in situations in which such attachments are not available pre-award, post-award attachments are more widely available. Moreover, in many jurisdictions, attachments can be obtained, at least initially, on an *ex parte* basis. In New York, there is no explicit authorization for attachments in aid of enforcing arbitral awards the way there is for attachments in aid of enforcing judgments and, thus, the strategy mentioned in the previous paragraph might be considered here as well.

---

<sup>3</sup> A party can challenge an award under Article V.1(b) of the New York Convention on grounds that the party was prevented from "presenting his case."

19. Enforcement is often a multi-jurisdictional effort. It is important to develop a global strategy in which decisions are made about the timing of the enforcement proceedings in different jurisdictions. In some cases, the element of surprise will be important and might result in a strategy in which action is taken simultaneously in multiple jurisdictions. In other situations, it might be more appropriate for proceedings to be staged, where subsequent proceedings are brought only after efforts in other countries prove unfruitful.

20. Discovery is a critical part of an enforcement strategy. Most U.S. states provide for broad discovery in aid of judgment enforcement. In addition, in common law countries like England, one can get documentary disclosure and compel testimony from the debtor in aid of judgment enforcement.

21. There is a U.S. federal statute -- 28 U.S.C. § 1782 -- that permits U.S. discovery (depositions and document demands) in aid of foreign proceedings. The statute is generally construed in a broad manner. Thus, if an arbitration award is being enforced in a foreign country, and even if that country does not permit any discovery, that foreign proceeding can be used as the trigger to permit asset-related discovery in the United States under Section 1782. Furthermore, that discovery does not have to be limited to assets located in the United States.

22. Consider whether 28 U.S.C. § 1783 would be useful. Section 1783 permits U.S. courts to subpoena both U.S. citizens and U.S. residents in foreign countries for the production of documents or testimony and can be an incredibly effective tool in appropriate circumstances.

23. Recent decisions by the Second Circuit in the *Mobil Cerro* and *Micula* cases held that the Foreign Sovereign Immunities Act applies to the procedure for turning investor state arbitration awards under the Washington Convention into court judgments. As a practical matter, that means it will probably take at least 15 months between the time a case is commenced and the time that the award holder can execute against assets. As a result of this decision, one might want to look into how long the same process takes in other countries, where summary type procedures might be available.

24. Third party funding companies have become more active recently in the judgment enforcement space. They offer many varied forms of financing, from funding the legal fees of enforcement proceedings to outright purchase of the award. Furthermore, the third-party funding business has grown to the point that it is no longer used only by entities that cannot otherwise fund the payment of legal fees for their claims or their enforcement efforts. Especially in those situations in which significant sums will have to be spent on enforcement and the possibilities of collection are far from certain, it is an option worth considering.

25. Do not wait for annulment proceedings at the seat to play out before pursuing recovery. In many jurisdictions, annulment proceedings at the seat can take well over a year to be resolved, during which time an award debtor can take numerous steps to hide or secrete its assets. As there is no prohibition against multiple concurrent enforcement proceedings under the New York Convention, award creditors should look to enforce in jurisdictions outside the seat if annulment proceedings are commenced, which could -- at a minimum -- require the award debtor to post security to stay additional proceedings.

\* \* \* \* \*

Because getting paid is almost always the objective in arbitration, it is never too early to think about ways to help achieve that objective. As shown above, a company will put itself in the best position by thinking about enforcement as early as the contract drafting stage. At the very least, the topic should be top of mind as soon as it becomes apparent that there might be an arbitration. And, of course, there are steps that should be taken once an award is obtained.