

Tactics and practical issues when enforcing the award

Luca Beffa

Baker & McKenzie Geneva

The empty chair - arbitrating against absent respondents

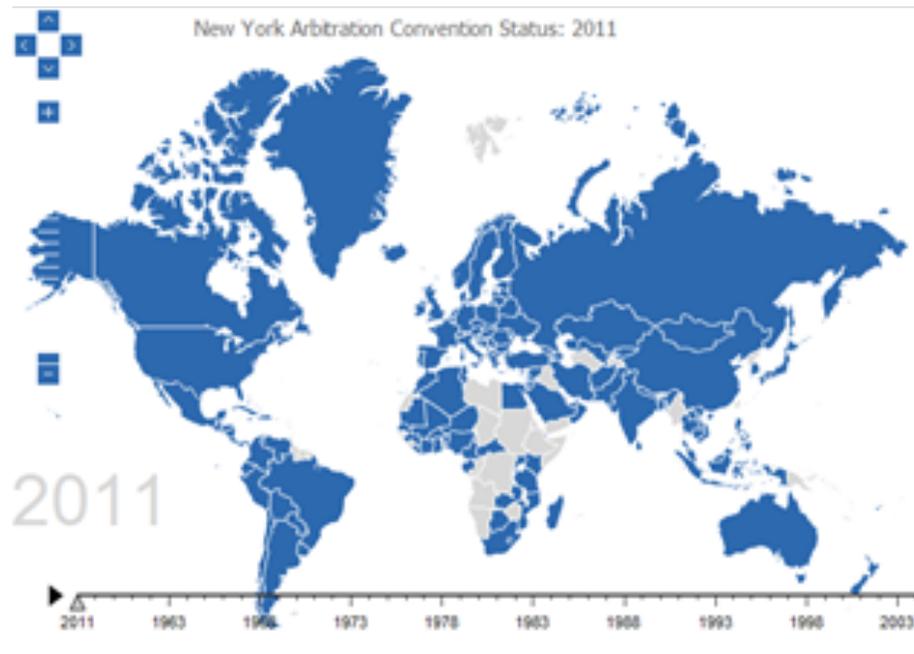
ASA Below 40 / ICDR Y&I Seminar

31 May 2013, Geneva



Determination of the place of enforcement

- Determine the likely place of enforcement as soon as possible
- Choose a State member of the New York Convention (NYC)
 - not too difficult



Determination of the place of enforcement

- Choose a State member of the New York Convention (cont.)
 - uniform treatment of foreign awards
 - exhaustive list of grounds: Art. V NYC
 - exhaustive list of form requirements: Art. IV NYC
 - important also for default awards
 - example: Sudan
 - "The party seeking enforcement of international awards in Sudan is required to satisfy the competent court that: (...) (c) the other party has been put on notice and validly represented (...)"*



General precautions when enforcing a default award under the NYC

- Anticipate Respondent's possible defences under Art. V NYC
- Comply with form requirements under Art. IV NYC



Respondent's possible defences

- Key ground: due process (Art. V(1)(b) NYC)

"Recognition and enforcement of the award may be refused (...) if (...) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case"

- proper notice
- ability to present one's case

Respondent's possible defences (cont.)

- Other grounds:

- public policy (Art. V(2)(b) NYC)

"Recognition and enforcement of an arbitral award may also be refused if (...) the recognition or enforcement of the award would be contrary to public policy of that country"

- incorrect procedure (Art. V(1)(d) NYC)

"Recognition and enforcement of the award may be refused (...) if (...) the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place"



Focus on due process

Principle: Claimant = favourable position

- Defences are seldom successful
- Burden of proof on Respondent
 - but sometimes shift of the burden of proof to Claimant (example: Swedish Supreme Court, *Lernmorniiproekt OAO v. Arne Larsson & Partners Leasing Company Limited*, 16.04.2010, in YCA XXXV at 456-457)

Focus on due process (cont.)

- burden of proof on Respondent (cont.)
 - make sure that you can prove that proper notice was given to Respondent all along the proceedings and that Respondent was always given the opportunity to present its case
 - ✓ ask the arbitral tribunal to record in the award the circumstance of the default, the opportunities given to Respondent to state its case, and the tribunal's satisfaction on all these points
 - ✓ ask the arbitral tribunal to copy in each and every order and communication the confirmation of its notification to Respondent

Focus on due process (cont.)

- Narrow interpretation of due process by national courts
 - but interpretation may sometimes differ
 - no uniform definition of due process
 - no specification of applicable law: *lex fori* as a rule
 - be aware of the standard applied in the enforcing country
 - get local advice, and get it as early as possible

Possible problems - proper notice

- Form of the notice
 - simple mail (Switzerland), fax (Germany), telex (Italy), as long as receipt
 - receipt and knowledge may also be deduced from the Respondent's actions (example: Swiss Federal Tribunal, decision 5P.292/2005, 03.01.2005, in YCA XXXII at 625)
 - but not always easy to establish receipt and knowledge
 - make sure that the documents are served through the most formal channels available

Possible problems - proper notice (cont.)

- Language of the notice
 - if agreement: use of different language ok if Respondent understands the language
 - if no agreement: understanding by Respondent irrelevant (example: Court of appeal Basel, 27.02.1989, in YCA XVII at 583)
 - but not all national courts are so liberal (example: Oregon District Court, *Qingdao Free Trade Zone*, 16.09.2009, 2009 WL 2997184)
 - use the language agreed upon or make sure Respondent understands the language you use

Possible problems - proper notice (cont.)

- Timing of the notice
 - short periods are usually ok
 - 7 (Switzerland), 12 (Italy), 14 (Germany) days to appoint an arbitrator
 - 2 weeks (Germany) or 20 days (Italy) to appear before the tribunal
 - but not always (example: Italian Supreme Court, *SpA Abati Legnami*, 03.04.1987, in YCA XVII at 532–533)
 - be aware of "cultural specificities"
 - agree on or suggest longer deadlines than normal

Possible problems - proper notice (cont.)

- Addressee of the notice
 - usually ok if sent to the Respondent's last known address (Germany, Switzerland, Spain, UK; see also para. 3 (2) ICC Rules or 4 (2) LCIA Rules)
 - sometimes however proof of reasonable inquiry required (example: Germany - Bavarian Supreme Court, 16.03.2000, in YCA XXVII at 448-449)
 - inquire about Respondent's actual address
 - add proof of actual address and/or of inquiry



Form requirements

- Art. IV NYC
 - duly authenticated original award or duly certified copy
 - original arbitration agreement or duly certified copy
 - if award and/or arbitration agreement are not in an official language of the enforcing country, translation certified by an official or sworn translator or by a diplomatic or consular agent



Form requirements (cont.)

- Exhaustive list, but exceptions
 - Proof that award is enforceable in the country of origin (Bulgaria, Romania, Chile, Uruguay)
 - submit evidence that award is enforceable
 - Evidence of proper notice(-s) and service of award?
 - not required, but recommended

Form requirements (cont.)

- Other recommendations
 - follow Art. IV to the letter: originals or certified copies
 - photocopies may not be sufficient
 - mandatory requirement, examined *ex officio* (Italy, Spain)
 - strict interpretation in case of default awards (Romania)
 - ensure as early as possible that you will be able to produce the required documents
 - ask for help to the institution or to the arbitral tribunal
 - file the necessary documents with the application
 - in principle, documents can be provided later on, but not always (example: Italy)

Thank you!

Luca Beffa

Avocat

Baker & McKenzie Geneva

Rue Pedro Meylan 5

1208 Geneva, Switzerland

Tel: +41 22 707 98 30 (dir.)

Tel: +41 22 707 98 00

Fax: +41 22 707 98 01

luca.beffa@bakermckenzie.com

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