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The enforcement of international arbitral awards: strategic considerations when the New York Convention does not apply

"I am finally getting my money!" This is the first thing that crosses someone's mind when he or she gets a favorable arbitral award. Although in more than 90 % of the cases, international arbitral awards are said to be voluntarily complied with by non-prevailing parties,[1] in the remaining 10 %, the prevailing party has to enforce the award.[2] Oftentimes the non-prevailing party's assets are located in its home jurisdiction, which was not the seat of the arbitration. In most of such cases, the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter "the New York Convention") is applicable.[3] But sometimes, the New York Convention does not apply. And this is where things become complicated.

A series of strategies emerged in practice, allowing the prevailing party to recollect its money by other means. The prevailing party should therefore evaluate its case before choosing the adapted tool to its problem. The different tools offered to the prevailing party are shortly presented hereafter.

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[1] *L. Mitselis & C. Baltag*, Special Section on the 2008 Survey on Corporate Attitudes towards recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration : Corporate Attitudes and Practices, 19 The American Review of International Arbitration 319, 339 (2008).

[2] If there is a tendancy at all, it would be that parties are less willing to spontaneously enforce awards. It may therefore be assumed that the percentage of awards which are not spontaneously complied with may nowadays exceed 10%.

[3] As of today the New York Convention was signed and ratified by 156 States http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html
Some New York Convention signatory states such as India are nevertheless known for not always having an arbitration friendly approach.

1. **Settlement**

Enforcement proceedings can be long and costly for both parties. Hence, settlement may always be an option. The award creditor would offer to abandon the enforcement proceedings against payment of a portion of the award by the award debtor. Although it could be painful to abandon part of the amount awarded by the arbitral tribunal, it might be the coherent choice when enforcement proceedings generate even more expenses.

2. **Sale of the award to a third party**

When the prevailing party feels that enforcing the arbitral award will be long, complicated and very costly, it can try to sell the award, again of course for a discounted price. Indeed, engaging in enforcement proceedings could in some cases be excessive when a party had already exhausted its entire financial means to go through the arbitration proceedings.

Several companies, usually investment funds, specialize in this business. Other companies specialize in acting as an intermediary between prevailing parties and investors.

Occasionally, such award sales come to light. For instance, in 2003, a Seychelles-based company purchased an award from a Czech company rendered under the auspices of the Chamber of Commerce and Industry of the Ukraine, against Ukraine.[4]

3. **Investment Treaty Arbitration**

When not only the enforcement proceedings are long and complicated, but also the jurisdiction, where the non-prevailing party's assets are located, wrongfully interferes with the enforcement of the award, a further option is offered to the prevailing party: an investment treaty claim directly against the State whose courts wrongfully refuse the enforcement of the arbitral award.

As a matter of fact, even if the jurisdiction in which enforcement of the award is sought is not a signatory State of the New York Convention, the State will in most cases have adopted arbitration laws providing for the enforcement of foreign arbitral awards. Thus, when a bilateral or a multilateral investment treaty has been entered into between the State where enforcement is sought and the home State of the prevailing party, the latter may use this tool to get compensation.

Under most treaties, the substantive protections provided include, among other things, a prohibition against direct or indirect expropriations without prompt and effective compensation and a guarantee of fair and equitable treatment, including protection against a denial of justice by the courts of the host State.[5]

[4] *Regent Co. V. Ukraine*, European Court of Human Rights, App. No. 773/03, 2008.
[5] *D. Brian King & Rahim Moloo*, Enforcement after the Arbitration: Strategic Considerations and Forum Choice, prepared for the conference on "Forum Shopping in the International Commercial Arbitration Context", NYU's Center for Transnational Litigation and Commercial law, 2013, p. 19.

In order to be able to bring a claim against the State where enforcement is sought, the prevailing party must show that it has made an "investment" under the relevant treaty. An arbitral award may typically qualify as "investment". Indeed, many treaties define the term "investment" very broadly including "every asset" and "claims to money, to other assets or to any performance having an economic value."[6] However, in the decided cases, tribunals have not considered arbitral awards to be investments in and on themselves, but rather to be the "crystallization" of the parties' rights and obligations under the original contract.[7] Hence, the access of the prevailing party to investment treaty arbitration will depend upon whether the underlying contract, out of which the award arose, constitutes itself an "investment" within the meaning of the relevant investment treaty.

As regards the grounds which the prevailing party may invoke, the latter may argue that it has been indirectly expropriated since the wrongful non-enforcement of the arbitral award resulted in the reduction or the elimination of the value of the award.

The prevailing party may also rely on the fair and equitable treatment (hereinafter "FET") standard. As a matter of fact, the assessment of whether the FET standard has been breached focuses on the concept of legitimate expectations specific to each case.[8] In the view of many tribunals, the stability and predictability of the legal framework into which the investment is made form part of what the investor may legitimately expect.[9]

4. Human rights Courts

Another public international law tool is open to the prevailing party in order to enforce the arbitral award: the recourse to human rights courts, established under human rights treaties, such as the European Court of Human Rights, the Inter-American Court of Human Rights and the African Court of Human Rights.

The prevailing party could bring claims before a human rights court on the following grounds: (i) interference with property or expropriation, and/or (ii) the right to a fair trial.

Any claim before these courts must be brought under their constituent treaties.[10] Usually, human rights treaties require the exhaustion of local remedies as prerequisite to accessing their respective courts. Therefore, the road is neither short nor easy.

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[6] See supra *D. Brian King & Rahim Moloo*, p. 20.

[7] *Saipem v. Bangladeh*, ICSID Case No. ARB/05/07, June 30, 2009, para. 127: "*The rights embodied by the ICC Award were not created by the Award but arise out of the Contracts. The ICC Award crystallized the parties' rights and obligations under the original contract*."

[8] *A. Newcombe & L. Paradell*, Law and Practice of Investment Treaties: Standards of Treatment, Kluwer Law Int'l, 2009, paras. 165-169.

[9] *Occidental Exploration and Production Co. V. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award, July 1, 2004, para. 191.; *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, November 3, 2008, para. 173.

[10] See supra *D. Brian King & Rahim Moloo*, p. 32.

5. Diplomatic protection

The last tool is that of Diplomatic Protection.

Diplomatic Protection is a general principle in international law, according to which individuals and legal entities have no capacity to pursue claims against States directly. Hence, their State of nationality must seek redress on their behalf.[11] Thus, an internationally wrongful act committed against a State's national is in reality an injury to the State itself.

The means to be employed by the State could be direct negotiations, formal dispute settlement through arbitration or before the ICJ, retorsion including certain forms of economic pressure or the severance of diplomatic relations.[12] The State could also resort to threat of use of countermeasures, such as temporary non-performance of international obligations owed towards the responsible State.

Although this tool exists not only in theory, there are no reported instances of a State exercising formal diplomatic protection on behalf of a frustrated award creditor.

As a conclusion, it should be remembered that each case is specific and that oftentimes not only one tool will be available to the party seeking enforcement of an arbitral award. Consequently, it is necessary to analyze the facts of each case individually in order to assess the most efficient strategy.

[11] *Draft Articles on Diplomatic Protection*, Article 1, Report of the ILC on its 58th Session, UN Doc. A/61/10, 2006: "*Diplomatic Protection consists of the invocation by a State, through diplomatic action or other means of peaceful settlement, of the responsibility of another State for an injury caused by an internationally wrongful act of that State to a natural or legal person that is a national of the former State with a view to the implementation of such responsibility*."

[12] *Reed & Martinez*, Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection, in *D. Bishop*, Enforcement of Arbitral Awards Against Sovereigns, 2009, para. 23.