

**Enforcement after the Arbitration:  
Strategic Considerations and Forum Choice**

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“Show me the money!”

– Jerry Maguire, from the eponymous film (1996)

## I. INTRODUCTION

One of the most touted advantages of arbitration as a method of international dispute resolution is the neutral forum that it provides. Fears of local bias, and thus a “home court advantage,” have long pervaded our legal consciousness. Even within national systems these concerns exist – as evidenced by the origin and continued existence of diversity and removal jurisdiction within the U.S. federal court system. In the international arena, those same concerns are writ larger. Commercial parties engaged in international transactions will typically resist agreeing to submit to the jurisdiction of their counterparty’s national court system. Understandably, they will fear that the home court may, consciously or unconsciously, favor the local party; and that in any event the familiarity and convenience of the home forum will provide a strategic advantage to the adversary should a dispute arise.

International arbitration solves the home court problem by promising a neutral forum, largely divorced from any national court system, in which the substance of the dispute will be fairly resolved. The arbitrators’ authority, however, ends with the issuance of the final award. They have no *imperium*, and thus no ability to compel compliance with the award they have issued. For this the prevailing party must turn to the national courts – typically those in the State where the losing party’s assets are located – to obtain enforcement.

The good news for the successful award creditor is that in the vast majority of cases, enforcement of the award will not be necessary. Recent statistical studies suggest that non-prevailing parties in international arbitrations comply with the award in approximately 90% of cases.<sup>2</sup> They voluntarily pay up.

This is a testament, not to increasing altruism on the part of arbitrating parties, but rather to the easy enforceability and transportability of international arbitration awards afforded by the New York Convention.<sup>3</sup> Through ratification of the Convention, 146 States have committed to “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon.”<sup>4</sup> The grounds

<sup>2</sup> L. Mistelis & 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).

<sup>3</sup> United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 U.N.T.S. 38 (hereinafter *New York Convention*).

<sup>4</sup> New York Convention, art. III.

upon which enforcement may be refused are narrowly circumscribed, and the burden of proving them rests on the party opposing enforcement.<sup>5</sup> At the same time, a growing number of States have adopted modern arbitration laws, often based on the 1985 UNCITRAL Model Law,<sup>6</sup> which limit the grounds on which an award may be set aside to those the Convention provides for non-recognition or enforcement. The result has been an increasingly harmonized international framework in which an award must be upheld by the courts of the place of arbitration, or enforced by courts elsewhere, except on the narrow grounds for refusing enforcement that the Convention provides.

This international framework provides a strong incentive for voluntarily compliance by the award debtor. Resistance may not be entirely futile, but the costs and difficulties of seeking to have the award set aside or resisting enforcement – in what is likely to be a losing battle – will typically mean that the game is not worth the candle for the non-prevailing party.

Still, a minority of cases do and will remain in which the non-prevailing party declines to comply voluntarily with the award, necessitating active enforcement efforts by the prevailing party. The losing party may legitimately believe that the award has been unfairly or improperly rendered. Or, where an at least colorable basis for complaint exists, the non-prevailing party may come to the strategic conclusion that challenging the award, or resisting enforcement, will give it bargaining leverage vis-à-vis its opponent. After all, the monetary and time costs of enforcement proceedings fall equally, at least in the first instance, on the prevailing and non-prevailing parties. Faced with those difficulties, the winner may be inclined to settle for less.

It is in the context of non-compliance that the specter of the home court advantage can be resurrected. The losing party's assets will often be located in its home jurisdiction, compelling the prevailing party to go there to seek enforcement. Similarly, the arbitration may have been seated in the award debtor's home State, giving those courts jurisdiction over a setting-aside action. Having chosen arbitration to avoid the national courts of its counterparty, the award creditor may be forced to return there to carry out the enforcement battle.

Particular concerns will arise where the award debtor is a State, a State-owned company, or an entity closely connected to either. In the first place, States and State entities typically enjoy immunities from execution that complicate the enforcement process, whatever the forum in which it is played out. But beyond that, worries about the home court advantage will necessarily be more pronounced where the award debtor and the enforcement court are siblings.

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<sup>5</sup> New York Convention, art. V. Note that two of the grounds can be raised *sua sponte* by the enforcing court: where the “subject matter of the difference is not capable of settlement by arbitration under the law of that country” (art. V(2)(a)); and where the “recognition or enforcement of the award would be contrary to the public policy of that country” (art. V(2)(b)).

<sup>6</sup> UNCITRAL Model Law on Commercial Arbitration, UN Doc. A/40/17 Annex I (1985) (amended in 2006).

This article considers enforcement strategy and the available fora in two scenarios. Section II discusses enforcement strategy in the ordinary context, in which the New York Convention regime – and the courts in the place of arbitration and in other enforcement fora – function as expected. It considers how parties can best plan for successful enforcement of an international award, including when that planning should begin, what its contours should be, and the fora in which enforcement may most productively be sought.

Section III of this article considers the exceptional instances in which the New York Convention regime fails to result in the successful enforcement – in other words, where the courts of the place of arbitration wrongfully invalidate the award (or the arbitration agreement), or the courts in an enforcement jurisdiction fail to enforce the award in accordance with the New York Convention’s dictates. In that scenario, as will be seen, public international law remedies may be available to the frustrated award creditor. Three such remedies will be considered – investment arbitration, human rights courts, and diplomatic protection – with the advantages and disadvantages of each being compared.

These issues are of more than academic interest. For the prevailing party, an arbitral award is only as good as the means of enforcing it if necessary. Collection is the ultimate goal of the proceeding, and it is upon the high likelihood of successful enforcement that the integrity of the international arbitration system rests. The system must produce reasonably certain and predictable results in order to maintain the credibility and effectiveness that the needs of international commerce demand.

## **II. ENFORCEMENT STRATEGY: USING THE NEW YORK CONVENTION**

Lawyers are paid to plan for the worst. While most international arbitral awards are complied with voluntarily, that result cannot be assumed. Accordingly, parties are well-advised to design an enforcement strategy at an early stage, and to refine that strategy regularly as the arbitral proceedings commence and progress. In practice, parties and even counsel often turn their minds to enforcement only after an award is obtained. That is far too late.

The present Section of this article discusses enforcement strategy at various points in time, on the generally-justified assumption that the post-award enforcement regime will function as expected. Subsection A addresses enforcement considerations that arise already at the time of contracting. Subsection B surveys the issues relating to enforcement that should be considered once the arbitration has commenced. Finally, Subsection C looks at enforcement strategy once an award has been rendered and voluntary compliance has not been forthcoming. The lesson at each stage is similar: forewarned is forearmed.

As a guide to the choices that must be made in the enforcement process, Annex A to this article compares the laws of six jurisdictions that are often chosen as the place of arbitration, or where enforcement of an award may typically be sought: England, France,

Germany, The Netherlands, Russia, China and the United States (New York). While necessarily a blunt instrument that cannot capture the nuances of the laws of those jurisdictions, the chart in Annex A complements the discussion that follows by providing an overview of the differences between the laws of the fora most relevant to the enforcement of arbitral awards.

## **A. Considerations at the Time of Contracting**

The key goal in international arbitration is to obtain an enforceable arbitral award at the end of the process. Success at that stage will depend, in part, on how well the prevailing party has thought through enforcement issues when negotiating the underlying contract.<sup>7</sup> Below, we discuss some of the key considerations at the time of contracting that are relevant to successful enforcement of the eventual award.

### **1. Selection of the Seat**

An often-ignored consideration in the negotiation of arbitration clauses is the selection of the arbitral seat. Anecdotal evidence suggests that parties not infrequently choose a place because it is perceived as geographically neutral, or happens to be where the chosen arbitral institution is located, or may in negotiations trade away the choice of the seat for the choice of the governing law – all without conducting adequate research into what the arbitration law of the chosen seat provides.

The choice of the seat can, in fact, be of considerable strategic importance. The courts of the seat will exercise supervisory jurisdiction over the arbitration, hearing any applications that may be made during the course of the proceedings – for example, with respect to the appointment or challenge of arbitrators<sup>8</sup> – and will have exclusive jurisdiction over any action to set aside the resulting award.<sup>9</sup> Thus, research into the arbitral law of the seat, and the pro- or anti-arbitration attitude of the courts there, is of substantial significance at the contracting stage.

Of particular importance, as a legal matter, is to choose a seat in a country that is a party to the New York Convention, and that has enacted a modern arbitration law. Seventy-four of the State Parties to the Convention have adopted the Convention's reciprocity reservation, meaning that they will apply the Convention only to awards made in other Convention States.<sup>10</sup> Potential challenges to the ultimate award are, of course, governed

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<sup>7</sup> See generally *C.T. Salomon & J.P. Duffy*, Enforcement Begins When the Arbitration Clause is Drafted, 22 *American Review of International Arbitration*, 2011, 271, 284.

<sup>8</sup> *N. Blackaby, C. Partasides, A. Redfern & M. Hunter*, *Redfern and Hunter on International Arbitration*, 272, ¶ 4.94 (Oxford University Press, 5th ed. 2009).

<sup>9</sup> *Id.* ¶ 10.21, p. 590.

<sup>10</sup> An up-to-date list may be found at the UNCITRAL website, available at [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

by national arbitration law and not the Convention. Accordingly, research into the grounds for setting aside under the law of the place of arbitration is essential. Ideally, parties will select a seat with an arbitration law based on the UNCITRAL Model Law, and which will thus entertain applications to set aside only on the cabined grounds that the New York Convention prescribes for refusals to enforce.

Article VII(1) of the New York Convention preserves the right of parties to take advantage of more favorable enforcement provisions found in national law. Several popular arbitration venues benefit from national arbitration laws that are more pro-enforcement than the New York Convention. The Netherlands and France are well-known examples; in those jurisdictions, parties will typically seek enforcement only under the more favorable provisions of national arbitration law.<sup>11</sup>

At the same time, even the arbitration laws of highly-developed jurisdictions may contain idiosyncratic bases for non-enforcement. United States courts permit setting aside on the ground of “manifest disregard of the law” with respect to international arbitrations seated in the US. While challenges on this basis have rarely been successful,<sup>12</sup> the existence of that ground constitutes a risk element that parties may wish to avoid. On a different score, the Netherlands Arbitration Act provides, somewhat unusually, that if an award is set aside, the jurisdiction of the ordinary courts revives.<sup>13</sup> Thus, research into the *lex fori* is advisable even when with respect to often-used arbitral venues.

Finally, parties will be well-advised to avoid surrendering the home court advantage by agreeing to their counterparty’s country as the place of arbitration. This may sometimes be difficult in practice. States and State-controlled entities will often demand an arbitral seat in their State, the application of their national law, or both, when contracting in respect of major projects. Nonetheless, for reasons described in more detail in Section III of this article, danger lurks in conceding the home court advantage.

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<sup>11</sup> See, e.g., *Netherlands Arbitration Act*, Code of Civil Procedure, art. 1076 (1)-(3) (prohibiting a party from invoking certain grounds for non-enforcement if it failed to raise those objections at appropriate junctures during the original arbitration, such as complaints regarding the jurisdiction of the tribunal on the basis of the validity of the arbitral agreement, the constitution of the tribunal, or the compliance of the tribunal with its mandate); *Portant réforme de l’arbitrage*, Code of Civil Procedure [C.P.C.] arts.1442-1527. See also Linda Silberman, *Forum Shopping and the Response to Set-Asides*, in this volume (noting that French arbitration law does not include the setting-aside of the award at the seat as a ground for non-enforcement).

<sup>12</sup> *Comm. on Int’l Commercial Disputes of the Ass’n of the Bar of the City of New York*, *The “Manifest Disregard of Law” Doctrine and International Arbitration in New York* (Aug. 2012) (“the Committee found that the manifest disregard doctrine has been applied sparingly, especially so in the context of international awards challenged in New York state and federal courts. Indeed, to date, *no* international arbitral award rendered in New York has *ever* been set aside in the Second Circuit on the ground of manifest disregard.”).

<sup>13</sup> *Netherlands Arbitration Act*, Code of Civil Procedure, art. 1067.

## 2. Selection of the Institution

A second choice that must be made at the time of contracting is between institutional and *ad hoc* arbitration. That election, too, may have consequences for the eventual enforcement of the resulting award.

Some commentators have suggested that the selection of an internationally-respected arbitral institution can improve the prospects for enforcement, as national courts may accord greater respect to such awards than to those rendered by *ad hoc* tribunals or lesser-known regional institutions. Like law degrees from Harvard or Cambridge, awards made under the auspices of the major arbitral institutions may travel better.<sup>14</sup> In particular, the literature suggests that ICC awards, which benefit from scrutiny by the ICC Court prior to their release, may enjoy enhanced international currency.<sup>15</sup>

Institutions, or the States in which they are based, may sometimes be of assistance in the enforcement of awards. A recent example is *Petrobart v. the Kyrgyz Republic*.<sup>16</sup> There, the Kyrgyz Republic lost an arbitration under the Energy Charter Treaty to a Cypriot entity. The arbitration had been conducted under the auspices of the Stockholm Chamber of Commerce. Although the claimant was not its national, the Swedish government initiated diplomatic correspondence with the Kyrgyz government, urging the latter to comply with the award issued under the auspices of a Sweden-based institution. Following several diplomatic exchanges, the Kyrgyz Republic paid.<sup>17</sup>

## 3. Waiver of Immunities Where State Entities Are Involved

Of particular moment when contracting with a State or State entity is extracting a waiver of sovereign immunity in the underlying contract. Under the laws of nearly every nation,

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<sup>14</sup> P. Friedland, *Arbitration Clauses for International Contracts* § 4(1)(d) (2d. ed., Juris Publishing, 2007), (“Certain institutions – in particular, the ICC – have developed such an established reputation for international arbitration that parties can expect that courts will accord awards rendered under their aegis a level of respect not accorded the awards of unknown institutions.”); C.T. Salomon & J.P. Duffy, *Enforcement Begins When the Arbitration Clause is Drafted*, 22 *American Review of International Arbitration* 271, 274 (“Accordingly, while no statistics about the enforceability of administered versus *ad hoc* awards exist, there are enforcement benefits to administered awards that should be considered.”).

<sup>15</sup> Friedland, *supra* note 14, at § 4(1)(d) (“A court called upon to enforce an ICC award thus has the comfort of knowing that the award has been reviewed and approved not only by the tribunal but also by the ICC International Court of Arbitration.”).

<sup>16</sup> *Petrobart Ltd. v. the Kyrgyz Republic*, Stockholm Chamber of Commerce, Arbitral Award (29 Mar. 2005).

<sup>17</sup> L. E. Peterson, *Lengthy debt collection battle ends, as former Soviet state pays arbitral award; unusual form of diplomatic assistance seen*, IA Reporter (29 Sept. 2011); *see also* J. Vinuales & D. Bentolila, *The Use of Alternative (Non-Judicial) Means to Enforce Investment Awards Against States*, in L. Boisson de Chazournes, M. Kohen, & J. E. Vinuales (eds.), *Diplomatic and Judicial Means of Dispute Settlement: Assessing their Interactions* (2012).



States enjoy varying degrees of immunity against jurisdiction and execution of judgments and awards.<sup>18</sup> Immunity may also extend to State-owned companies, depending on the degree of control the State exercises over their affairs.<sup>19</sup>

The agreement to arbitrate will typically operate as a waiver by a State entity only from arbitral jurisdiction, and not from execution against sovereign assets. The exception appears to be France, where caselaw has established that the agreement to arbitrate may operate as a waiver of immunity from enforcement.<sup>20</sup>

Still, at least where the place of arbitration is situated outside of France, specific contractual language will be necessary to accomplish the desired waivers of immunity. The waiver should cover pre- and post-award attachment as well as execution. The watchword here is to be as express as possible in drafting. For example, under the Foreign Sovereign Immunity Act, a separate and express waiver from pre-award attachment is necessary.<sup>21</sup>

#### 4. Structuring the Transaction with a View to Enforcement

Lastly at the contracting stage, consideration should be given to structuring the transaction to facilitate later enforcement. Wherever possible, contractual payments should be structured to pass through a financial institution in a pro-enforcement

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<sup>18</sup> See *Jurisdictional Immunities of the State (Germ. v. Ital.)*, 2002 I.C.J., ¶ 56 (3 Feb.), available at <http://www.icj-cij.org/docket/files/143/16883.pdf> (“the International Law Commission concluded in 1980 that the rule of State immunity had been ‘adopted as a general rule of customary international law solidly rooted in the current practice of States.’ That conclusion was based upon an extensive survey of State practice and, in the opinion of the Court, is confirmed by the record of national legislation, judicial decisions, assertions of a right to immunity and the comments of States on what became the United Nations Convention.”), quoting Draft Articles on the Jurisdictional Immunities of States and Their Property, International Law Commission, U.N. Doc. A/46/10, available at 1991 Yearbook of the International Law Commission, vol. 2., 147, ¶ 26.

<sup>19</sup> See, e.g., *RSM Prod. Corp. v. Petroleos de Venezuela Soc. Anonima (PDVSA)*, 338 F.Supp.2d 1208 (2004) (D. Colo. 2004).

<sup>20</sup> See, e.g., *Creighton Ltd. (Cayman Is.) v. Minister of Fin. and Minister of Internal Affairs & Agric. of the Gov’t of the State of Qatar*, decision of the Cour de Cassation of 6 July 2000 reported in XXV Yearbook of Commercial Arbitration 458 (2000); *Société Européenne d’Etudes et d’Entreprises (S.E.E.E.) v. République socialiste fédérale de Yougoslavie*, 98 J.D.I. 131 (1971).

<sup>21</sup> For a specific waiver that covers pre-award attachment, see Oman Model Exploration & Production Sharing Agreement of 2002, in *R. D. Bishop, J. Crawford & M. Reisman*, Foreign Investment Disputes: Cases, Materials and Commentary 309 (Kluwer Law International 2005) (“Each party irrevocably agrees not to claim and irrevocably waives any sovereign or other immunity that it may now or hereafter have to the fullest extent permitted by the laws of the applicable jurisdiction from any arbitration proceedings; any proceeding to confirm, enforce or give effect to any arbitral award by the arbitral tribunal; service of process; suit; jurisdiction; attachment prior to judgment; attachment in aid of execution of judgment; execution of judgment or from any other legal or juridical process or remedy; and to the extent that in any jurisdiction there shall be attributed such an immunity. . . .”). See generally *B. King, A. Yanos, et. al*, Enforcing Awards Involving Foreign Sovereigns, in *J. Carter & J. Fellas (eds.)*, International Commercial Arbitration in New York (Oxford University Press 2010).

jurisdiction – for example, a bank in London or New York. Doing this will ensure that a pool of attachable assets is available should a dispute arise. Furthermore, and irrespective of whether a State or State entity is involved, thought should be given to structuring the transaction to attract the protection of an investment treaty. Typically, this will mean using, as the contracting party, a vehicle incorporated in a jurisdiction that has a bilateral investment treaty (*BIT*) with the country where the project or transaction will occur. BITs provide powerful protections against adverse State actions affecting a contract or project,<sup>22</sup> and, as discussed further below, may provide a public international law remedy in circumstances where national courts wrongfully fail to uphold, or enforce, an arbitral award.<sup>23</sup>

## **B. Considerations Once the Arbitration has Commenced**

The next important moment for enforcement planning comes when a dispute arises, and arbitration is threatened or commenced by one of the parties. At that point, the need to safeguard enforceability moves from the potential to the actual. Serious consideration must be given to the steps that can be taken, prior to the conclusion of the arbitration, to position oneself advantageously for eventual enforcement. Here, we highlight two important options to bear in mind.

### **1. Finding and Attaching Assets**

If not done already, the onset of the dispute marks the point at which the counterparty's assets should be located and itemized. In some instances this may be a relatively straightforward task – that party may have tangible assets such as plants or refineries that cannot be moved (but may possibly be encumbered). In other cases, however, the process of identifying assets can be more difficult, and outside assistance may be needed. There are a number of firms that specialize in asset location and tracing. Familiar names include Omni Bridgeway, based in Amsterdam; Control Risks, based in the U.K.; and a relative newcomer, Multinational Asset Recovery, managed by erstwhile investment treaty claimant Franz Sedelmayer, whose own enforcement efforts made law before the European Court of Human Rights.<sup>24</sup>

Holding the money is always best. Thus, once the counterparty's assets have been located, the next step is to seek pre-award attachment of those assets. As set out in Annex A, a number of key jurisdictions provide for the possibility of pre-award attachment, although the requirements for obtaining that relief vary among them. These

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<sup>22</sup> See generally *R. Dolzer & M. Stevens*, *Bilateral Investment Treaties* (Martinus Nijhoff Publishers, 1st ed. 1995).

<sup>23</sup> See *infra* Section III.A.

<sup>24</sup> See Omni Bridgeway, at [www.omnibridgeway.com](http://www.omnibridgeway.com); Control Risks, at [www.controlrisks.com](http://www.controlrisks.com); and Multinational Asset Recovery (or MARCompany), [www.marcompany.com](http://www.marcompany.com); see also *infra* note 170 and accompanying text (discussing Franz Sedelmayer's saga in the European Court of Human Rights).

include China, England, France, Germany, The Netherlands, Russia and the United States (New York).

The Netherlands is an example of a particularly pro-attachment jurisdiction. A broad category of assets can be attached by *ex parte* application, subject to the requirement that arbitral proceeding be commenced within a reasonable period thereafter (typically being two weeks to three months).<sup>25</sup> The burden then falls on the party whose assets have been attached to seek the lifting of the attachment in summary proceedings.<sup>26</sup> Similarly, in China, assets may be attached prior to the initiation of arbitration, provided that the applicant can show a compelling need for the attachment, posts security and commences arbitration within 30 days.<sup>27</sup>

New York is likewise a favorable jurisdiction for pre-award attachment in commercial cases. Before an arbitration is commenced, a party can apply to a New York court to attach assets if “the award to which the applicant may be entitled may be rendered ineffectual” without attachment.<sup>28</sup> This remedy is particularly notable for the fact that the parties need not have any connection to New York at all, provided that the property in question is located there.<sup>29</sup>

Pre-award attachments, whenever available, provide a powerful enforcement tool. They secure monies to be used to satisfy an eventual award, and avoid the risk that the counterparty will transfer or repatriate assets in anticipation of a possible loss in the arbitration. By the same token, the respondent will be well-advised to consider the potential consequences of having its assets based in enforcement-friendly jurisdictions.

## 2. Requests for Security

Beyond petitions to the courts for pre-award security, many sets of international arbitration rules and national arbitration laws permit applications to the arbitral tribunal for enforcement-related interim measures. Thus, a party may apply to the Tribunal for an order requiring the opposing party to refrain from disposing of particular assets pending the outcome of the proceedings, or to post security for the applicant’s costs of arbitration.<sup>30</sup> Tribunals tend to look upon such applications with circumspection, as they may be perceived as requiring some prejudgment of the merits at an early stage of the

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<sup>25</sup> See *infra* Annex A (Netherlands).

<sup>26</sup> See *infra* Annex A (Netherlands).

<sup>27</sup> See *infra* Annex A (China).

<sup>28</sup> *Matter of Sojitz v. Prithci Info. Solutions*, 921 N.Y.S.2d 14 (N.Y. App. Div. 2011) (citing N.Y.C.P.L.R. § 7502(c)).

<sup>29</sup> *Id.*

<sup>30</sup> *Gary Born*, *International Arbitration: Law and Practice* 209 (Kluwer Law International 2012) (“[A] wide variety of provisional measures are encountered in international arbitration. These include . . . (g) providing security for underlying claims; (h) providing security for costs.”).

proceedings. Nonetheless, such applications do occasionally succeed, and may in any event be of strategic value by providing a means of showcasing the strength of one's own case, or denigrating that of one's opponent, at the start of the arbitration proceedings.

By way of example, in 2001, the ICC arbitral tribunal in a case against Latvian parties ordered the respondents to place certain investment funds or their equivalent into an escrow account to be managed by the presiding arbitrator.<sup>31</sup> The tribunal reasoned that there was a substantial risk of significant prejudice to the claimants' potential recovery if the conservatory relief was not granted.<sup>32</sup> Meanwhile, in *X. S.A.R.L. Germany v. Y. AG Lebanon* (20 November 2001), the ICC tribunal issued an order requiring the claimant to post security to cover the respondent's costs of arbitration.<sup>33</sup> The claimant in that case was manifestly insolvent and appeared to be relying on third-party funding to finance its own costs of arbitration. The tribunal held that the claimant's right to pursue its claims in arbitration would only be allowed on the condition that "those third-parties are also ready and willing to secure the other party's reasonable costs to be incurred" – lest there be no one from whom to collect after the arbitration.<sup>34</sup>

## **C. Post-Award Enforcement Considerations**

By the time an award is issued, significant thought should already have gone into the enforcement phase of the proceedings. As already noted, the statistical probability of voluntary payment of a favorable award is high. However, where voluntary compliance is either not anticipated or not forthcoming, the legwork of enforcement begins. Below, we discuss typical enforcement strategies for the prevailing party in the post-award context, as well as two options that are somewhat further afield. We also summarize the alternatives available to parties across key arbitration jurisdictions in Annex A.

### **1. The Prompt Initiation of Recognition and Enforcement Proceedings**

The confirmation and enforcement regime under the New York Convention is straightforward. The award creditor simply files with the court where enforcement is sought: (a) the original award or a certified copy of the original award; (b) the original arbitration agreement or a certified copy of it; and (c) a certified translation of those documents into the language of the country in which the award is sought to be recognized

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<sup>31</sup> *Trust C (Isle of Sark), US Corporation (US) and others v. Latvian Group (Latvia), Latvian Finance Company (Latvia) and others, Interim Award*, ICC Case No. 10973, 2001, in A. J. van den Berg (ed.), *Yearbook of Commercial Arbitration* (Kluwer Law International 2005 Vol. XXX) 77-84.

<sup>32</sup> *Id.* at 81, ¶ 8.

<sup>33</sup> *See X. S.A.R.L. Leb. v. Y. AG, Ger.*, Procedural Order No. 3, 2008 ASA Bulletin, (Kluwer Law International 2010 Vol. 28 Issue 1) at 44, ¶ 33; *see also Swiss entity v. Dutch entity*, Award, HKZ Case No. 415 (20 November 2001), in ASA Bulletin (Kluwer Law International 2002 Vol. 20 Issue 3) 467-72.

<sup>34</sup> *Id.* at 41, ¶ 21.

and enforced.<sup>35</sup> This streamlined procedure applies, as a matter of international obligation, in the courts of all 148 State Parties to the New York Convention.

Once these materials have been furnished to the court, the burden shifts to the award debtor to prove that one of the five grounds for non-recognition provided for in the New York Convention exists.<sup>36</sup> Two other grounds – non-arbitrability and public policy – may be considered *sua sponte* by the enforcing court.<sup>37</sup> Assuming that none of these limited defenses can be established, recognition and enforcement must be granted, and the domestic court’s enforcement remedies will become available to the award creditor.

Commencing an enforcement action promptly after an award is rendered can provide a substantial advantage to the prevailing party. The losing party’s main potential recourse will be to challenge the award in the courts of the place of arbitration; and under the New York Convention, the filing of such an action may result in the suspension of enforcement proceedings elsewhere.<sup>38</sup> Typically, however, the successful party will have a enforcement “window” of thirty days or more before the non-prevailing party is in a position to file its application for setting aside. Commencing enforcement proceedings during that window is usually advisable – in particular if pre-award attachments have been obtained – as the enforcement proceeding may be completed before the setting aside application is filed.<sup>39</sup> At minimum, the enforcement proceeding may be sufficiently advanced so that the odds of the enforcing court granting a stay are reduced.

Nonetheless, the award creditor should consider the timing of its enforcement actions carefully. *Dallah v. Pakistan* provides a cautionary tale. In *Dallah*, the claimant had contracted to build housing in Mecca for Pakistani pilgrims. When the project was cancelled, Dallah obtained an award against the Pakistani government in a Paris-seated ICC arbitration,<sup>40</sup> and thereafter commenced enforcement proceedings in England. The UK Supreme Court rejected the enforcement application after four years of proceedings up the appellate chain – on the ground that, as a matter of *French* arbitration law, Pakistan was not bound by the underlying arbitration agreement. While the appeal to the Supreme Court was pending, Dallah sought to enforce the award, and Pakistan sought to set it aside, in France.<sup>41</sup> Three months after the UK Supreme Court denied enforcement, the French courts upheld and enforced the award – concluding, as a matter of French

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<sup>35</sup> See New York Convention, art. IV.

<sup>36</sup> New York Convention, art. V(1).

<sup>37</sup> New York Convention, art. V(2).

<sup>38</sup> New York Convention, art. VI.

<sup>39</sup> Note that “an award-creditor need not “confirm” an award in the arbitral seat before seeking recognition abroad.” *G. Born*, *International Commercial Arbitration* (Kluwer, 2009) 399.

<sup>40</sup> See *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Gov’t of Pak.*, [2010] UKSC 46.

<sup>41</sup> *Gouvernement du Pakistan - Ministère des affaires religieuses v. Société Dallah Real Estate and Tourism Holding*, Cour d’appel Paris, n° R/G 09/28533 (17 Feb. 2011).

arbitration law, that a binding agreement to arbitrate existed between the claimant and the government of Pakistan.

In retrospect, the outcome might well have been different had Dallah sought *exequatur* in the French courts prior to seeking enforcement in the UK. A decision by those courts that a binding arbitration agreement existed may have been accorded issue preclusive effect in England,<sup>42</sup> and in any event would have been persuasive authority on the application of French arbitration law. As a result of its timing choices, Dallah now finds itself in the unenviable position of having an award upheld at the place of arbitration, but denied enforcement in a reasoned decision of the UK's highest court.<sup>43</sup>

Despite the outcome in *Dallah*, it is normally still true that seeking to enforce as soon as possible is the preferred strategy. The lesson is simply that timing matters; and that a case-specific analysis of the best strategy is imperative.

## 2. Attachment Proceedings

In conjunction with recognition and enforcement, a party may also under most national laws seek attachment of the award debtor's property. Prompt attachment (pre-award if available) is of considerable strategic importance. Proceeds will be secured to ensure collection of the award, and the award debtor will be prevented from moving and possibly secreting its assets. In some jurisdictions – for example the United States and England<sup>44</sup> – discovery as to the award debtor's assets will also be available in the context of enforcement proceedings.

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<sup>42</sup> *See id.* ¶ 98 (The Court noted that “a determination by the court of the seat may give rise to an issue estoppel or other preclusive effect in the court in which enforcement is sought”).

<sup>43</sup> Consider also the case of *Thai-Lao Lignite (TLL) v. Laos*, where, after winning a \$57M award, TLL commenced enforcement proceedings in the U.S., England, France and Singapore. Enforcement was granted in the U.S., England and France. Thereafter, the courts of the seat (Malaysia) vacated the award. Thereafter, the Paris Court of Appeal reversed the grant of *exequatur*, not because the award had been set aside, but rather on similar grounds to those invoked in the Malaysian court's decision. *See Republique Democratique Populaire du Lao v. Societe Thai Lao Lignite (Thai.) Co., Ltd.*, Cour d'appel Paris, no R/G 12/09983 (19 Feb. 2011).

<sup>44</sup> In New York, Rule 69(a)(2) of the Federal Rules of Civil Procedure allows a judgment creditor to obtain discovery from the judgment debtor under the Federal Rules or the procedure of the forum state. *See Fed. R. Civ. P. 69(a)(2); Universitas Educ., LLC v. Nova Group, Inc.*, 2013 WL 57892 (S.D.N.Y. Jan. 4, 2013) (applying Rule 69(a)(2) following the confirmation of an arbitral award). New York courts have observed that in its efforts to enforce a judgment, “the judgment creditor must be given the freedom to make a broad inquiry to discover hidden or concealed assets of the judgment debtor.” *See Costomar Shipping Co., Ltd. v. Kim-Sail, Ltd.*, 1995 WL 736907, at \*3 (S.D.N.Y. Dec. 12, 1995) (citations omitted). In England, discovery is permitted pursuant to the Civil Procedure Rules, Part 31 (covering disclosure in civil proceedings). Part 2.1 describes the scope of application of the Rules, which “apply to all proceedings in – (a) county courts; (b) the High Court; and (c) the Civil Division of the Court of Appeal” with limited exceptions, not including the enforcement of arbitral awards.

A recent ICC arbitration, *Phillips Petroleum Company Venezuela Limited (Bermuda) and ConocoPhillips Petrozuata B.V. vs. Petroleos de Venezuela, S.A.*, illustrates the advantages that prompt enforcement action can deliver. There, an award was rendered on 17 September 2012 in favor of the claimant in the amount of US\$66.8 million, plus interest.<sup>45</sup> Eight days later, on 25 September 2012, the claimant attached US\$74 million of the respondent's financial assets in the Netherlands, securing full payment of the award.

Other cases can take longer, but still require creative thinking in terms of the types of assets that can be attached to help satisfy an award. *Walter Bau v. Thailand* provides an interesting illustration.<sup>46</sup> Having obtained an award against the Thai government in 2009, the claimant succeeded in attaching a jet owned (and piloted) by the Thai Crown Prince in Munich in July 2012.<sup>47</sup> The Thai government was ultimately able to obtain the release of the jet, but only after posting a €38 million bond in respect of the award debt.<sup>48</sup>

Award creditors are well-advised to think broadly in terms of the categories of property that may be attached. The losing party's assets include not only the things that it owns, but also monies owed to it by third parties.<sup>49</sup> The national laws of many jurisdictions – including all of the enforcement fora surveyed in Annex A – permit the garnishment of third-party debts owed to the award debtor. Levying such attachments not only expands the pool of available assets, but also may deliver strategic advantage by disrupting the award debtor's cash flows and its commercial relationships with third parties.

It remains to mention a final subject that will typically preoccupy claimants who have succeeded in arbitrations against States or State entities: sovereign immunity.<sup>50</sup> While the modern trend is heavily in favor of the restrictive view of immunity – which permits the attachment of and execution against State assets used for commercial purposes<sup>51</sup> – immunity will still often be an impediment to enforcement. The case reporters are replete with examples of failed attempts to attach sovereign assets.<sup>52</sup> It is for this reason that obtaining a waiver of immunity in the underlying contract is of such importance.<sup>53</sup>

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<sup>45</sup> L. Peterson, *ConocoPhillips Wins One and Loses One in Fight With Venezuelan State Oil Company*, I.A. Reporter (23 Sept. 2012). Freshfields acted as counsel to ConocoPhillips in this case.

<sup>46</sup> *Walter Bau AG (In Liquidation) v. The Kingdom of Thailand*, UNCITRAL, Award (1 July 2009).

<sup>47</sup> D. Jolly & T. Fuller, *Thai Prince's Plane is Impounded in Germany*, NY Times (13 July 2011).

<sup>48</sup> *Thailand post German bond to free Prince's plane*, Associated Press (10 Aug. 2011).

<sup>49</sup> See *infra* Annex A, discussing whether certain key jurisdictions permit third-party garnishment.

<sup>50</sup> A summary of these provisions across key arbitration jurisdictions is set out in Annex A.

<sup>51</sup> See generally Draft Articles on the Jurisdictional Immunities of States and Their Property, Int'l Law Comm'n, U.N. Doc. A/46/10, in 1991 Yearbook of the International Law Commission, vol. 2.

<sup>52</sup> For example, the failed attempt by Franz Sedelmayer to attach Russian assets in German Court. See *infra* Section III.B.2.

<sup>53</sup> See *supra* Section II.A.3.

### 3. Challenge of the Award

Fate sometimes favors the vanquished. From the perspective of the losing party in the arbitration, the main strategic alternative is to seek to set aside the award at the seat of the arbitration. Applications to set aside do not succeed with any frequency in the main arbitration venues. Most have national arbitration laws that restrict the grounds for setting aside to substantial procedural errors identical or similar to those identified by the New York Convention as justifying non-recognition and enforcement.<sup>54</sup> But the effort to set aside – assuming there is an arguable basis for commencing the challenge – will pay off in some cases.

Beyond the chance that the application will succeed, filing a setting-aside action may have collateral benefits in other enforcement fora. Under Article VI of the New York Convention, recognition and enforcement of an award may be suspended if an action to set the award aside has been commenced:

If an application for the setting aside or suspension of the award has been made to a competent authority . . . the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Suspension of enforcement is discretionary, and is hardly a foregone conclusion.<sup>55</sup> Accordingly, the chief strategic imperative from the prevailing party's perspective, where a challenge to the award has been raised, will be to avoid a stay in any enforcement courts, or, in the alternative, obtain an order there requiring the party challenging the award to post security as a condition of the stay. In that manner, ultimate recovery can be assured if and when the challenge to the award fails. All of the jurisdictions surveyed in Annex A make provision for the ordering of security where an award debtor seeks to stay enforcement on the ground that a setting-aside application has been filed.

### 4. Enforcement Proceedings in Relation to an Annulled Award

Even where an award is set aside by the courts of the place of arbitration, all is not lost for the prevailing party. Apart from the potential public law remedies discussed in the next Section of this article, enforcement of an annulled award remains possible under the arbitration laws of some jurisdictions. The rationale is that Article V(1)(e) of the

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<sup>54</sup> See *infra* Annex A.

<sup>55</sup> Courts have proceeded to enforce awards prior to the conclusion of the challenge proceedings before the courts of the seat on the basis that: (i) the award is binding; (ii) the award is unlikely to be set aside by the courts at the seat; (iii) the vacatur proceedings before the seat were brought merely as a delay tactic; (iv) the vacatur proceedings are unlikely to be resolved in a short period of time; or (v) the suspension of the enforcement proceedings would substantially prejudice the award creditor. See *Born, supra* note 39.



Convention provides that an enforcing court “may” decline to enforce if an award has been set aside in the courts of the place of arbitration. Thus has arisen a longstanding debate as to the significance the “may” attracts – pitting two of the field’s most venerable scholars on opposite sides of the argument.<sup>56</sup>

In most jurisdictions, it is quite unlikely that the courts would enforce an award that has been set aside in the primary jurisdiction, i.e., the place of arbitration. Of the systems surveyed in Annex A, that list includes China, England, Germany and – despite an initial flirtation in the *Chromalloy* case – the United States.<sup>57</sup> There are, however, notable exceptions.

It is well-established in French law that the mere fact of an award having been set aside at the seat of the arbitration has no bearing on its enforcement in France.<sup>58</sup> More recently, the Netherlands joined the list of jurisdictions prepared to enforce annulled awards, although on a different basis than the French position. In March 2007, Yukos Capital commenced enforcement proceedings in the Netherlands against Rosneft in regard to four arbitral awards rendered in Russia totaling US\$400 million. Those awards, however, were set aside in May 2007 by the Russian courts. Nevertheless, in April 2009, the Amsterdam Court of Appeal permitted enforcement of the awards, reasoning that the judicial process in Russia that had produced the annulments was “partial and dependent,” and that therefore the Dutch courts would decline to recognize the annulment judgments.<sup>59</sup>

## 5. Options Further Afield

Two further options for the award creditor merit brief mention. While the chances of an ultimately successful enforcement effort are high, the costs of enforcement proceedings – often in multiple and diverse jurisdictions – can be substantial. Some award claimants may lack the resources, or the patience, for that effort.

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<sup>56</sup> For the two sides to the debate, see *J. Paulsson*, The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention, 7 *American Review of International Arbitration* 99 (1996); and *A. J. van den Berg*, Enforcement of Arbitral Awards Annulled in Russia, 27 *Journal of International Arbitration* 179 (2010).

<sup>57</sup> See *infra* Annex A, for a summary of the positions taken in key arbitration jurisdictions on this issue. See also *In re Chromalloy Aeroservices Inc. and Ministry of Defence of the Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996).

<sup>58</sup> See Silberman, *supra* note 11, for a discussion on the *Hilmarton* and *Putrabali* decisions, among others.

<sup>59</sup> *Yukos Capital SARL v. OAO Rosneft*, No.200.005.269/01, Judgment, Amsterdam Court of Appeal (28 April 2009). See Silberman, *supra* note 11, for a detailed discussion of the *Yukos* cases.

a. *Settlement*

For such claimants, settlement may be an option. The award debtor may be willing to pay a portion of the award in exchange for enforcement efforts being abandoned. Taking the settlement haircut will be painful, but is sometimes the rational choice for the award creditor.

Indeed, the available data indicates that settlement is a not infrequent occurrence. In a survey of corporate counsel conducted in 2010, 40% of those responding indicated that they had settled an award at some point.<sup>60</sup> Though the terms of these settlements are rarely made public, an example from investment treaty arbitration is illustrative of the broader point. In *Siag v. Egypt*, an ICSID tribunal awarded the claimant US\$133 million on 1 June 2009; on 19 June 2009, Siag successfully moved in the New York courts to recognize and enforce the award; and in November 2009, Siag settled the dispute with Egypt for \$80 million.<sup>61</sup>

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

A further option for the award creditor is to sell the award – again, naturally at a discount. The amount of the discount is likely to be inversely proportional to the progress made by the original party in its enforcement efforts prior to the sale. Due largely to the enforcement power of the New York Convention, the award itself has an estimable value in the market, based on the buyer’s prospects of ultimate collection.<sup>62</sup>

Although it is difficult to estimate the size and scope of this market, it appears that the sale and purchase of arbitral awards is becoming more common.<sup>63</sup> Indeed, a number of companies now engage in the sale of arbitration awards, acting as an intermediary with investors or purchasing awards themselves. Notable among that group of companies are Blue Ridge Investment (owned by Bank of America) and Omni Bridgeway.

The fact or details of such sales occasionally come to light. In 2004, FG Hemisphere, a Delaware-based company, purchased two ICC awards against the Democratic Republic of the Congo. Its ownership of them was revealed when FG Hemisphere sought to enforce the awards in various jurisdictions – including in the Hong Kong Special Administrative region by attempting (unsuccessfully) to execute against US\$104M due

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<sup>60</sup> See *L. Mistelis & C. Baltag*, *supra* note 2.

<sup>61</sup> See *Siag v. King & Spalding LLP*, S.D. Tex. Jun. 30, 2010, available at <http://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2010cv02096/769952/19>.

<sup>62</sup> See generally *Loukas A. Mistelis*, Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement, Queen Mary University London, School of Law, Legal Research Paper No. 129/2013, available at <http://ssrn.com/abstract=2195016>.

<sup>63</sup> International Arbitration: Corporate attitudes and practices 2008, at 2, available at [http://www.arbitrationonline.org/docs/IAstudy\\_2008.pdf](http://www.arbitrationonline.org/docs/IAstudy_2008.pdf) noting that “almost one in five of the interviewed corporations realized value from the claim or award by selling or assigning it.”

from Chinese entities to the DRC.<sup>64</sup> Similarly, in 2003, a Seychelles-based company purchased an award rendered in an arbitration under the auspices of the Chamber of Commerce and Industry of the Ukraine. The sale came to light in a 2008 action before the European Court of Human Rights brought against the Ukraine by the purchaser of the award.<sup>65</sup>

Further, albeit not in the New York Convention context, ICSID awards have also been valued or sold in recent years. For instance, the award in *CMS v. Argentina* was sold to Blue Ridge Investments, a Bank of America subsidiary, in 2008.<sup>66</sup> Notably, as discussed further below, the purchaser of the CMS award (along with others) has been successful in convincing the U.S. Government to provide assistance in its enforcement efforts.<sup>67</sup>

#### **D. Conclusion on the Normal Enforcement Scenario**

The deterrent effect created by the enforcement power of the New York Convention makes enforcement unnecessary with respect to the great majority of international commercial arbitration awards – the non-prevailing parties comply voluntarily with the awards against them. Still, a minority of cases remains, and will always remain, in which enforcement is necessary to secure recovery.

Planning for enforcement should begin long before the successful party obtains its award. Indeed, strategic choices made at the time of contracting can impact upon the prospects for enforcement after disputes arise.

Designing an enforcement strategy must therefore begin at an early stage. It is necessarily a case-specific effort, but one that demands attention from the onset of the transaction through the successful conclusion of the arbitration, and beyond.

### **III. STRATEGIC OPTIONS WHEN THE NEW YORK CONVENTION SYSTEM BREAKS DOWN**

The previous Section of this article proceeded on the assumption that the New York Convention system functions as expected. Where voluntary compliance with an award is not forthcoming, conscientious enforcement efforts would be expected to lead, eventually, to full collection of the amounts awarded. The courts of the place of arbitration would uphold the award if challenged, and other national courts would enforce the award against the debtor's assets in their territories.

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<sup>64</sup> *FG Hemisphere Associates LLC v. Democratic Republic of Congo*, CACV 373/2008, and CACV 43/2009 (10 Feb. 2010).

<sup>65</sup> *Regent Co. v. Ukraine*, Eur. Ct. H.R., App. No. 773/03 (2008).

<sup>66</sup> *See* Foreign-Investment Disputes: Come and Get Me, *The Economist* (18 Feb. 2012).

<sup>67</sup> *See infra* Section III.C.

The present Section considers the award creditor's options when the expected result is not obtained. What can be done if the courts of the place of arbitration annul the award on arbitrary or parochial grounds? Or if the courts in another jurisdiction wrongfully fail to enforce the award?

In the first circumstance – wrongful setting aside – the award arguably ceases to exist, preventing enforcement in other fora.<sup>68</sup> In the second circumstance – an improper failure to enforce – the award continues to exist and can be enforced in other jurisdictions; but that may be cold comfort to the prevailing party if the award debtor has no assets outside the non-enforcing jurisdiction.

The main concern in both circumstances is the revival of the “home court” advantage that international arbitration is typically chosen to avoid. That concern will be particularly acute where the recalcitrant forum is the award debtor's home State – and especially where the award debtor is the State itself, a State-controlled company, or an entity closely connected to either.

The good news for the frustrated award creditor is that it may have public international law remedies in the event of wrongful setting-aside or non-enforcement of an award. In particular, three sources of international law obligations may potentially be invoked:

- (1) The New York Convention, which obliges all contracting States to (i) enforce agreements to arbitrate, and (ii) recognize and enforce foreign awards except in the limited circumstances provided for by the Convention;<sup>69</sup>
- (2) Customary international law, which requires States and their courts to respect certain minimum standards in their treatment of foreign nationals and their property; and
- (3) Obligations undertaken by States in bilateral or multilateral treaties, where the award creditor can qualify for protection under those instruments.

Thus, a wrongful failure to enforce an arbitral award or the underlying arbitration agreement, or the improper setting aside of an award, may invoke the international responsibility of the State whose courts have taken one of those actions.

Though what mechanisms, and in what fora, may the award creditor be able to vindicate those international law obligations? This Section will discuss three: investment treaty

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<sup>68</sup> See generally A. J. van den Berg, *supra* note 56; Silberman, *supra* note 11.

<sup>69</sup> New York Convention, arts. II, V. The Panama Convention imposes the same obligations on its contracting parties, which are: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; Guatemala; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; United States; Uruguay; and Venezuela. Inter-American Convention on Int'l Commercial Arbitration, O.A.S. T.S. No. 42, adopted 30 Jan. 1975, entered into force 16 June 1976, arts. 1, 4.

arbitration (Section A); adjudication by regional human rights courts (Section B); and diplomatic protection (Section C). Finally, a comparative analysis of these three potential options will be presented (Section D).

There is a caveat to be made at the outset. Each of these mechanisms or fora will be available only in a minority of instances – there are significant gateway issues to accessing each. Cases will exist, however, in which pursuing one or more of these options is possible and makes commercial sense for the frustrated award creditor. Indeed, we have recently seen, in practice, a number of examples in each category.

### **A. Investment Treaty Arbitration**

An aggrieved party may be able to bring an investment treaty claim directly against the State whose courts wrongfully interfere with the arbitral process or the resulting award. Six published cases involving claims based upon such interference have arisen in the past four years; these are summarized in Annex B to this article.<sup>70</sup> There is at least one other unpublished jurisdictional award on the same issues, bringing the total to seven.<sup>71</sup> While hardly a trend, these numbers suggest the likelihood of more investment treaty claims brought by frustrated award creditors – and therefore that investor-State arbitration is an option worthy of consideration when the normal processes for seeking enforcement fail.

Investment treaties afford to qualifying investors the right to initiate arbitration directly against the host State. 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, which includes protection against a denial of justice by the host State's courts.<sup>72</sup> Some treaties also include an “effective means” clause, designed to ensure that the investor will have access to effective methods of asserting claims and enforcing its rights in the host State.<sup>73</sup> Investment treaties generally provide for investors' claims to be adjudicated by

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<sup>70</sup> *Saipem S.p.A v. The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award (30 June 2009); *Romak S.A. v. The Republic of Uzbekistan*, PCA Case No. AA280, Final Award (26 Nov. 2009); *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 Nov. 2010); *ATA Construction, Industrial and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010); *White Indus. Austrl. Ltd. v. The Republic of India*, UNCITRAL, Final Award (30 Nov. 2011); *GEA Grp. Aktiengesellschaft v. Ukraine*, ICSID Case No. ARB/08/16, Award (31 Mar. 2011).

<sup>71</sup> *See Kaliningrad Region v. Lithuania*, ICC (28 Jan. 2009); *see also* Order, Cour d'appel Paris, no 09/19535 (18 Nov. 2010) (denying the request to set aside the award in *Kaliningrad Region*).

<sup>72</sup> *See, e.g., White Indus. Austrl.*, ¶ 10.4.

<sup>73</sup> *See generally R. Dolzer & C. Schreuer*, *Principles of International Investment Law* 333 (Oxford Univ. Press, 2nd ed. 2012); *Dolzer & Stevens*, *supra* note 22 at 69.

international arbitration, with the State’s consent to arbitrate contained in the investment treaty itself.<sup>74</sup>

Below we discuss in further detail the investment treaty arbitration regime as it relates to claims for interference by the State with the arbitral process or an arbitral award. In particular, we evaluate: the gateway conditions that an aggrieved award creditor must satisfy in order to access investment treaty protection (Subsection 1); the relevant standards of protection, including expropriation (Subsection 2), fair and equitable treatment (Subsection 3) and effective means of asserting and enforcing claims (Subsection 4); and the remedies available to frustrated award auditors in investment treaty arbitration (Subsection 5).

### 1. Standing to Bring Claims: A Qualifying “Investor” and “Investment”

A party whose award has been wrongfully set aside or left unenforced will need to satisfy two threshold hurdles in order to access the protections offered by investment treaties. *First*, there will need to be an investment treaty in place between the party’s State of nationality and the State whose courts or other organs have interfered with the award. This will make the party a qualifying “investor” for purposes of that investment treaty.

*Second*, the party must show that it has a qualifying “investment” under the relevant treaty. Thus the question arises: is an arbitral award an “investment” for purposes of bilateral (or multilateral) investment treaties?

A purely textual reading of many investment treaties might suggest that the answer is “yes.”<sup>75</sup> The approach taken in the decided cases, however, has been different. Tribunals

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<sup>74</sup> See generally *J. Paulsson*, Arbitration Without Privity, 10 ICSID Review—Foreign Investment Law Journal 232 (1995).

<sup>75</sup> Many treaties define the term “investment” with great breadth as including “every asset” and “claims to money, to other assets or to any performance having an economic value.” See, e.g., Netherlands-Mexico BIT, art. 1; Ethiopia-Sudan BIT, art. 1. Where the investment treaty arbitration is brought before an ICSID tribunal, there must also be a qualifying investment within the meaning of Article 25(1) of the ICSID Convention. Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art. 25(1), 18 Mar. 1965, 575 U.N.T.S. 159 [hereinafter *ICSID Convention*] (“The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.”). Thus, the transaction at issue must constitute an investment under both the investment treaty and Article 25(1) – the so-called “double keyhole” test. See *Malicorp Ltd. v. The Arab Republic of Egypt*, ICSID Case No. ARB/08/18, Award (7 Feb. 2011), ¶ 107; *Salini Costruttori S.p.A. v. Kingdom of Morocco*, ICSID Case No. ARB/00/4, Decision on Jurisdiction (23 July 2001), ¶ 44; see also *C. Schreuer*, *The ICSID Convention*, A Commentary (Cambridge Univ. Press, 2nd ed. 2009), art. 25, ¶¶ 122 *et seq.* Recently, there has been a trend towards focusing on the definition of “investment” in the relevant treaty, given that the ICSID Convention purposefully did not define the term. See, e.g., *Malaysian Historical Salvors Sdn BHD v.*

have not viewed arbitral awards as investments in and of themselves, but rather as the “crystallization” of the underlying contract rights at issue in the dispute resulting in the award. In the words of the tribunal in *Saipem v. Bangladesh*:

The rights embodied in 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.<sup>76</sup>

As a result, whether the disappointed claimant with whom we are concerned can access investment treaty protection will likely depend upon whether the underlying contract, out of which the award arose, itself constitutes an “investment” within the meaning of the relevant investment treaty. The fact pattern most likely to satisfy that requirement is where the award arises out of a contract for carrying out a project or similar transaction in the State whose courts have set aside or denied enforcement to the award. And indeed, that is the fact pattern that has been present in the cases decided thus far.

Assuming that our hypothetical award creditor is able to satisfy the gateway requirements for the assertion of an investment treaty claim – *i.e.*, that the creditor is a qualifying “investor” with a qualifying “investment” – then the next question to arise is what type of State conduct will trigger liability. We address this issue in the following Subsections.

## 2. Expropriation

Where an arbitral award is wrongly denied enforcement or set aside, the value of the award will be reduced or potentially eliminated altogether. It will therefore be open to the award creditor to argue that the award has been indirectly expropriated by the State.

*Saipem v. Bangladesh* involved a claim for expropriation based on what was, effectively, the wrongful setting-aside of an award by the Bangladeshi courts.<sup>77</sup> The underlying arbitration in that case arose out of a construction contract between Saipem and Petrobangla, the Bangladeshi national oil company. The contract provided for ICC arbitration in Dhaka, Bangladesh. After several facially frivolous procedural objections advanced by the Petrobangla were rejected by the tribunal, Petrobangla applied to the Bangladeshi courts to revoke the Tribunal’s mandate on grounds of bias.<sup>78</sup> This the

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*the Government of Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment (16 Apr. 2009).

<sup>76</sup> *Saipem* ¶ 127; *Romak*, ¶ 211; *White Indus. Austl.*, ¶ 7.6.10. *But see GEA*, ¶¶ 161-64 (“[T]he Tribunal considers that the fact that the Award rules upon rights and obligations arising out of an investment does not equate the Award with the investment itself. In the Tribunal’s view, the two remain analytically distinct . . . .”); *see also Loukas A. Mistelis*, Award as an Investment: The Value of an Arbitral Award or the Cost of Non-Enforcement, Queen Mary University London, School of Law, Legal Research Paper No. 129/2013, available at <http://ssrn.com/abstract=2195016>.

<sup>77</sup> *Saipem*, ¶ 35.

<sup>78</sup> *Id.* ¶ 31 (rejecting, for example, Petrobangla’s request that written transcripts be made of the tape recording of the hearings).

courts did. The Tribunal nonetheless proceeded to render an award in favor of Saipem, which the Bangladeshi courts declared to be a “nullity.”<sup>79</sup> Its traditional options exhausted – Petrobangla’s assets appear to have been uniquely located in Bangladesh – Saipem commenced an ICSID arbitration against Bangladesh under the Italy-Bangladesh BIT. The BIT provided for international arbitration only in respect of expropriation claims, so it was on this basis that the claim was pleaded and decided.<sup>80</sup>

In international law, expropriation requires a substantial deprivation of property; and in deciding whether an expropriation has occurred, tribunals normally look primarily to the effect of the challenged measure as opposed to the State’s intention in taking the measure.<sup>81</sup> The *Saipem* tribunal affirmed this approach, noting that “according to the so-called ‘sole effects doctrine’, the most significant criterion to determine whether the disputed actions amount to indirect expropriation or are tantamount to expropriation is the impact of the measure. As a matter of principle, case law considers that there is expropriation if the deprivation is substantial . . . .”<sup>82</sup>

The *Saipem* tribunal went on, however, to conclude that where annulment of an arbitral award (or the arbitrators’ authority) was concerned, deprivation alone was not enough. The tribunal reasoned that if “substantial deprivation of Saipem’s ability to enjoy the benefits of the ICC Award” was sufficient to establish an expropriation, then “any setting aside of an award could . . . found a claim for expropriation, even if the setting aside was ordered by the competent state court upon legitimate grounds.”<sup>83</sup> Instead, the tribunal held, something more was required to justify a finding of expropriation: that the courts had acted “illegally” in undermining the arbitration agreement or the award.<sup>84</sup>

The tribunal found that the Bangladeshi courts did indeed act illegally in revoking the arbitrators’ authority and declaring the resulting award to be a nullity. In particular, the courts: (a) had committed an “abuse of right” in violation of international law by “abusing their supervisory jurisdiction over the arbitration process”<sup>85</sup>; and (b) had

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<sup>79</sup> *Id.* ¶ 50.

<sup>80</sup> *Id.* ¶ 97.

<sup>81</sup> *See, e.g., Telenor Mobile Commc’ns A.S. v. The Republic of Hungary.*, ICSID Case No. ARB/04/15, Award (13 Sept. 2006), ¶ 65; *Corn Prods. Int’l, Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility (15 Jan., 2008), ¶ 87(c); *Metalclad Corp. v. the United Mexican States*, NAFTA, ICSID Case No. ARB(AF)/97/1, Award (30 Aug. 2000), ¶ 112; Rosalyn Higgins, *The Taking of Property by the State: Recent Developments in International Law*, 176 *Recueil des Cours* 259, 324 (1982).

<sup>82</sup> *Saipem*, ¶ 133.

<sup>83</sup> *Id.* ¶ 133. Note that where the action complained of is simply a delay of the enforcement or set-aside action, it is unlikely that a Tribunal would find that the arbitral award has been “taken.” *See White Indus. Austl.*, ¶ 12.3.6.

<sup>84</sup> *Saipem*, ¶ 134.

<sup>85</sup> *Id.* ¶ 159.



“frustrat[ed] if not the wording at least the spirit of the [New York] Convention.”<sup>86</sup> Thus, the tribunal found that Saipem had been substantially deprived of its investment – consisting of the underlying contractual rights embodied in the award – and that the deprivation was the result of illegal conduct by the Bangladeshi courts. As such, an expropriation had been established, and Saipem was entitled to compensation.

While the result reached by the *Saipem* tribunal seems compelling on the facts, one might still question the theoretical basis of the Tribunal’s ruling. Effectively, the tribunal grafted an additional element on to the test for expropriation – the “plus” of illegality. Can that be reconciled with the traditional “effects” test for indirect expropriation?

There would seem to be two possible explanations. The first has to do with the nature of the instrument at issue – an arbitral award. Until a commercial award is recognized by a national court, it constitutes a kind of defeasible entitlement – there are legitimate, internationally-accepted grounds on which the award may be denied enforcement, or set aside. Thus, the annulment of an award might be analogized to a regulatory taking. In that context, in addition to the effect of the measure, the character of the State action and the legitimate expectations of the investor may be taken into account.<sup>87</sup> An investor would expect the possibility of setting-aside on the grounds provided for by the arbitration law of the place of arbitration – and should probably also expect that there is some chance of the reviewing court getting it wrong, and setting aside an award where a proper application of national law would have led to the opposite result. On that view, only an arbitrary or wholly ungrounded setting aside would violate the investor’s legitimate expectations.

The second paradigm for explaining the *Saipem* test for expropriation relates to the nature of the State organ that took the challenged action – the national courts. Traditionally in international law, a State’s courts cannot be impugned unless their actions have been “clearly improper and discreditable” – that is, unless they amount to a denial of justice.<sup>88</sup> However – in part because of the peculiarities of the BIT – the *Saipem* tribunal examined the Bangladeshi courts’ actions under the rubric of expropriation. The tribunal found that no exhaustion requirement applies under expropriation law (unlike in a claim for denial

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<sup>86</sup> *Id.* ¶ 166.

<sup>87</sup> *See, e.g., Tecnicas Medioambientales Tecmed SA v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2 (NAFTA Ch. 11) ¶ 122 (“establishing that regulatory actions and measures will not be initially excluded from the definition of expropriatory acts, in addition to the negative financial impact of such actions or measures, the Arbitral Tribunal will ... determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation.”); *Methanex v. United States of America*, NAFTA/UNCITRAL (9 Aug. 2005), Part IV, Ch. D ¶ 9; 2012 US Model BIT, Annex B, available at <http://www.ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf>. *See also R. Moloo & J. Jacinto*, Environmental and Health Regulation: Assessing Liability Under Investment Treaties, *Berkeley Journal of International Law* 1, 24 (2011).

<sup>88</sup> *Mondev Int’l Ltd. v. United States*, ICSID Case No. ARB(AF)/99/2, NAFTA Ch. 11, ¶ 127 (11 Oct. 2002).

of justice).<sup>89</sup> But the Tribunal did require a showing of court misfeasance – “abuse of right” – not dissimilar to the substantive test applied in the denial of justice context.

Interestingly, the Court of Appeals of Amsterdam took a not dissimilar similar tack in the *Yukos* enforcement action referred to above.<sup>90</sup> Finding that the Russian courts had acted in a biased fashion in annulling the *Yukos* awards, the Amsterdam court disregarded those annulments. Thus, in the presence of court misfeasance, the claimant was held entitled to the benefits of the award.

Finally, it is worth noting that the reverse of the *Saipem* fact pattern may also provide the grist for an investment treaty claim. In *Kaliningrad v. Lithuania*, the claimant brought an expropriation claim based on the theory that an award had been wrongfully enforced. There, an LCIA tribunal had issued an award in favor of Duke Investment Limited (a Cypriot company) against Kaliningrad, an administrative region in Russia. Duke enforced the award in 2004 against two buildings owned by Kaliningrad in Lithuania. In 2006, Kaliningrad brought an investment treaty claim against Lithuania (under the auspices of the ICC) claiming that Lithuania wrongly enforced the LCIA award and thereby expropriated its two buildings. In an unpublished award, the ICC tribunal found that it did not have jurisdiction over the dispute. Kaliningrad’s subsequent challenge to the award before the French courts – in which the existence of the arbitration and the content of the jurisdictional ruling were revealed – was unsuccessful.<sup>91</sup> Nonetheless, the claim raises the specter that a State court’s wrongful enforcement of an award might be collaterally challenged in the same way as an unwarranted denial of enforcement.<sup>92</sup>

### 3. Fair and Equitable Treatment

Most investment treaties require that the host State accord “fair and equitable treatment” (*FET*) to foreign investors. This frequently-encountered guarantee derives from the minimum standard of treatment due to foreign nationals under customary international law.<sup>93</sup>

The assessment of whether the FET standard has been breached is a fact-specific inquiry and focuses on the concept of legitimate expectations.<sup>94</sup> The ICSID tribunal in *Biwater Gauff v. Tanzania* explained that “the purpose of the standard is to provide to

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<sup>89</sup> *Saipem*, ¶ 151.

<sup>90</sup> *See supra* Section II.C.4.

<sup>91</sup> *Kaliningrad v. Lithuania*, Cour d’appel Paris, no 09/19535.

<sup>92</sup> Similar claims could theoretically also be brought under the other standards discussed herein, especially the fair and equitable treatment standard.

<sup>93</sup> On the FET standard generally, see *I. Tudor*, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (2008); and *A. Newcombe & L. Paradell*, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law Int’l, 2009) 232-319.

<sup>94</sup> *Id.* at 165-69.

international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment.”<sup>95</sup> In the view of many (but not all) tribunals, the stability and predictability of the legal framework into which the investment is made form part of what the investor may legitimately expect.<sup>96</sup> Regarding actions by courts that detrimentally affect an investment, it is important to note that the FET standard “includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world.”<sup>97</sup>

In *White Industries v. India*, the tribunal applied the FET standard in the context of State interference with an arbitral award.<sup>98</sup> That case arose out of a mining project in Paparwar, India. White Industries, an Australian company, had entered into a contract with Coal India, a State-owned entity, for the supply of equipment and development of a coal mine. A dispute arose between the parties regarding the payment of penalties and bonuses, as well as with regard to the quality of the extracted coal. Pursuant to the underlying contract, White Industries commenced proceedings before a Paris-seated ICC tribunal, which, in May 2002, awarded the claimant just over \$4 million in damages and interest.

In September 2002, and despite the fact that the place of arbitration was Paris, Coal India applied to the Indian courts (in Calcutta) to have the ICC award set aside. At the same time, White Industries sought enforcement in India (before the court in New Delhi). The New Delhi court eventually stayed the enforcement proceedings pending the outcome of the setting-aside action. After significant delays in the courts – culminating in a critical appeal languishing on the Indian Supreme Court’s expedited docket for five years<sup>99</sup> – White Industries brought an investment treaty claim against India in 2010 for failing to enforce its arbitral award.

The tribunal in *White Industries* found that the Indian courts did not breach the FET standard. The tribunal reasoned that at the time White Industries negotiated its contract in 1989, “the Indian courts were regularly entertaining set aside applications in respect of

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<sup>95</sup> *Biwater Gauff Ltd v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), ¶ 602.

<sup>96</sup> *Occidental Exploration and Production Co. v. The Republic of Ecuador*, LCIA Case No. UN 3467, Final Award (1 July 2004) ¶ 191 (“The relevant question for international law is . . . whether the legal and business framework meets the requirements of stability and predictability under international law. . . . [T]here is certainly an obligation not to alter the legal and business environment in which the investment has been made. In this case it is th[is] question that triggers a treatment that is not fair and equitable.”); *National Grid P.L.C. v. Argentine Republic*, UNCITRAL, Award (3 Nov. 2008) ¶ 173.

<sup>97</sup> 2012 US Model BIT, Art. 5(2)(a). See generally *J. Paulsson*, *Denial of Justice in International Law* (Cambridge Univ. Press, 2005).

<sup>98</sup> *White Indus. Austrl.* ¶¶ 10.1-10.4.24.

<sup>99</sup> *Id.* ¶ 11.4.18.

. . . foreign awards.”<sup>100</sup> As such, “White could not legitimately have expected that India would ‘apply the [New York] Convention properly and in accordance with international standards.’”<sup>101</sup> The tribunal further found that India’s conduct had not given rise to any other legitimate expectations on White Industry’s part – such as that the India was a safe place to invest, or that the Indian court system functioned transparently – that might have been capable of founding a FET claim.<sup>102</sup>

Having dealt with the issue of legitimate expectations, the tribunal then turned to White Industry’s argument that the nine-year delay in the adjudication of the enforcement and setting-aside proceedings constituted a denial of justice by the Indian courts.<sup>103</sup> The tribunal reasoned as follows:

Bearing in mind these various factors, the Tribunal concludes that, while the duration of the proceedings overall, as well as the delay by the Supreme Court in hearing and determining the jurisdiction appeal, is certainly unsatisfactory in terms of efficient administration of justice, neither has yet reached the stage of constituting a denial of justice.

While the most recent delay [resulting from the Supreme Court’s inability to impanel a three-judge bench within any reasonable timeframe] is regrettable, there being no suggestion of bad faith, it does not amount in the Tribunal’s mind to “a particularly serious shortcoming” or “egregious conduct that ‘shocks or at least surprises, a sense of judicial propriety’.”<sup>104</sup>

*White Industries* thus appears to set a relatively high bar for FET claims arising out of a State’s interference with the enforcement of an arbitral award. As discussed further below however, the tribunal had available under the BIT another, less demanding standard, which it found India had breached.<sup>105</sup> This may potentially have influenced the tribunal’s decision to take a more cautious approach with respect to the FET claim.

A more permissive approach to the FET standard was taken by the tribunal in *ATA v. Jordan*.<sup>106</sup> In that case, a Turkish company, ATA, had contracted with the State-owned

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<sup>100</sup> *Id.* ¶ 10.3.12.

<sup>101</sup> *Id.* ¶ 10.3.13.

<sup>102</sup> *Id.* ¶¶ 10.3.14-10.3.21 (finding that “it is simply not possible for White, legitimately, to have had the expectation as to the timely enforcement of the Award that it now asserts”; that any representations on behalf of India that it was a safe place to invest were not capable of giving rise to legitimate expectations that are amenable to protection; and, that there was no reasonable expectation of transparency in court proceedings that was breached).

<sup>103</sup> *Id.* ¶ 10.4.4.

<sup>104</sup> *Id.* ¶¶ 10.4.22-10.4.23.

<sup>105</sup> *See supra* Section III.A.4.

<sup>106</sup> *ATA Constr., Indus. and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010).

Arab Potash Company (*APC*) to build a dike. After a section of the dike collapsed, APC commenced an arbitration against ATA under the FIDIC contract between them. The tribunal in the contractual arbitration rejected APC's claims and granted ATA's counterclaims, ordering APC to compensate ATA in the amount of US\$ 5,906,828.30.<sup>107</sup> Shortly thereafter, the Jordanian government sold a majority interest in APC to a Canadian company, and APC applied to the Jordanian courts to annul the award. The courts granted the application on the ground of misapplication of the governing law. Further, due to an intervening change in Jordanian legislation, the courts found that the arbitration agreement in the underlying contract was extinguished.<sup>108</sup> Relying on this judgment, APC renewed its original contractual claims before the Jordanian courts, at which point ATA commenced an investment treaty claim against Jordan.

Due to temporal issues involving the date of coming into force of the Turkey-Jordan BIT, the tribunal lacked jurisdiction over most of the claims asserted.<sup>109</sup> The sole exception was the claim relating to the extinguishment of the arbitration clause in the underlying FIDIC contract, as to which the tribunal reached an interesting, and perhaps surprising result. The arbitration clause, the tribunal ruled, was in itself a separate "investment" under the BIT.<sup>110</sup> The retroactive extinguishment of the right to arbitrate by the Jordanian courts constituted a violation of the FET standard: it deprived ATA of the neutral forum it legitimately expected to receive, and breached the State's obligation to recognize and enforce agreements to arbitrate in accordance with Article II of the New York Convention.<sup>111</sup>

Regrettably, the *ATA* tribunal was terse in its discussion of the applicable standard when reviewing a State court's treatment of an arbitral agreement or award. It is clear that the tribunal did not require the existence of a denial of justice, but it did not articulate the elements it viewed as necessary to justify a finding of violation of the FET standard.<sup>112</sup> The case does, however, suggest that contravention of the New York Convention can provide the predicate for an FET violation by the State. The award is also interesting in the emphasis it placed on the arbitration right. Consistent with developments in the European Court of Human Rights, discussed further below, the tribunal viewed the right

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<sup>107</sup> *Id.* ¶ 44.

<sup>108</sup> The Jordanian arbitration act had been amended to provide that in the event an award was set aside, the jurisdiction of the competent courts would revive. *Id.* ¶ 116. This is the same position taken by the *Netherlands Arbitration Act*, Code of Civil Procedure [Rv] art. 1067.

<sup>109</sup> *ATA Constr.* ¶ 115.

<sup>110</sup> *See id.* ¶ 117 (finding that "the right to arbitration is a distinct 'investment' within the meaning of the BIT because Article I(2)(a)(ii) defines an investment *inter alia* as 'claims to [...] any other rights to legitimate performance having financial value related to an investment'").

<sup>111</sup> *Id.*, ¶¶ 124, 128.

<sup>112</sup> *See R. Moloo & J. Jacinto*, Standards of Review and Reviewing Standards: Public Interest Regulation in International Investment Law, in *K. Sauvart* (ed.), Yearbook on International Investment Law & Policy 2011-2012 (Oxford University Press 2013), for a discussion of how to determine the applicable standard of review under the FET standard.

to arbitrate as a kind of “golden” right – it survives whatever fate is inflicted on the underlying contract, and States interfere with that right only at their peril.<sup>113</sup>

A more extensive analysis of the test for assessing when a State’s interference with an award will violate the FET standard is provided by *Frontier Petroleum v. Czech Republic*.<sup>114</sup> That case involved a Stockholm Chamber of Commerce award in Frontier Petroleum’s favor against two, apparently privately owned, Czech companies. The companies went bankrupt, and the Czech courts refused to enforce the award on public policy grounds, reasoning that enforcement would unfairly favor Frontier Petroleum above the companies’ other creditors.<sup>115</sup> Its enforcement efforts stymied, Frontier Petroleum commenced an UNCITRAL arbitration against the Czech Republic under the Canada-Czech BIT.<sup>116</sup>

The issues facing the *Frontier Petroleum* tribunal were whether it had the power to review a State court’s application of the public policy exception contained in Article V(2)(b) of the New York Convention, and if so under what standard. The tribunal, framing its analysis under the FET and Full Protection and Security (*FPS*) provisions of the BIT,<sup>117</sup> answered the first question in the affirmative. It went on to conclude that the Czech courts’ application of the Convention could not be condemned unless it amounted to “an abuse of rights contrary to the international principle of good faith,” meaning in particular that the interpretation was “made in an arbitrary or discriminatory manner” or was otherwise fundamentally unfair.<sup>118</sup> As to the question of public policy in particular, the tribunal held that Article V(2)(b) refers to “international public policy,” but found that the Convention affords States the leeway to apply their own “national conception[s]” of what international public policy entails.<sup>119</sup> As such, the tribunal found it unnecessary

to determine whether the findings of the Czech courts meet the applicable standard of international public policy or to determine the precise contents of that standard. States enjoy a certain margin of appreciation in determining what their own conception of international public policy is.<sup>120</sup>

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<sup>113</sup> See *infra* note 162 and accompanying text.

<sup>114</sup> *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award (12 Nov. 2010).

<sup>115</sup> *Id.* ¶¶ 527-28.

<sup>116</sup> *Id.* ¶ 421.

<sup>117</sup> The Tribunal seems to have viewed the test for a violation of the FET and FPS standards as equivalent in assessing the State’s treatment of a foreign arbitral award. *Id.* ¶¶ 273, 527 (articulating the relevant standard of review as “*reasonably tenable* and made in *good faith*”) (emphasis in original). The Tribunal noted that analysis under the FPS standard might be more appropriate than the FET standard in respect of complaints about a lack of due process in disputes concerning private parties (as opposed to where one party was a State entity). *Id.* ¶ 296.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* ¶ 527.

<sup>120</sup> *Id.*

The tribunal went on to frame the test for a FET/FPS violation as being (a) whether the courts had acted in good faith in denying enforcement of the award, and (b) if so, whether their interpretation of the Convention was “reasonably tenable.”<sup>121</sup> Applying that test, the tribunal found no breach by the Czech courts. Their view that public policy encompassed protecting the integrity of bankruptcy proceedings was reasonable, in the tribunal’s estimation, and it found that the courts’ application of that approach was neither arbitrary nor done in bad faith.<sup>122</sup>

The *Frontier Petroleum* standard would appear to be a serviceable test in a variety of contexts where courts are alleged to have interfered with an arbitral clause or award. Whether the question relates to the propriety of a setting-aside at the seat under domestic arbitration law (*Saipem*), extreme delay in enforcement (*White Industries*), the revocation of the arbitration agreement (*ATA*) or non-enforcement of the arbitral award (*Frontier Petroleum*), a court decision that is reasonably tenable on the merits and made in good faith would not violate the FET (or FPS) standards. Arguably, application of this approach would correspond with the legitimate expectations of the parties. At the same time, it would effectively permit a form of appellate review of State courts’ merits decisions in these regards, albeit under a deferential standard.

#### 4. “Effective Means” Clauses

Some investment treaties include a so-called “effective means” clause, providing that the host State “shall . . . provide effective means of asserting claims and enforcing rights with respect to investments.”<sup>123</sup> Applying the most-favored-nation provision of the Australia-India BIT,<sup>124</sup> the *White Industries* tribunal found that the claimant could rely on the effective means clause contained in the India-Kuwait BIT.<sup>125</sup> This turned out to be the determinative ground for the ultimate decision in the case.

Relying on an earlier decision in the *Chevron v. Ecuador* case,<sup>126</sup> the *White Industries* tribunal found that the effective means clause provides for “a distinct and potentially less-demanding test . . . as compared to denial of justice under customary international

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<sup>121</sup> *Id.*

<sup>122</sup> Of note, the tribunal emphasized that “even a decision that in the eyes of an outside observer, such as an international tribunal, is ‘wrong’ would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*.” *Id.* ¶ 273.

<sup>123</sup> *See, e.g.*, The Treaty Between the United States of America and the Republic of Turkey Concerning the Reciprocal Encouragement and Protection of Investments, 18 May 1990, art. II(8); Agreement between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment, India-Kuwait, 27 Nov. 2001, art. 4(5).

<sup>124</sup> That clause provided that India must “at all times treat investments in its own territory on a basis no less favorable than that accorded to investments or investors of a third country.” *Id.*

<sup>125</sup> *White Indus. Austrl.*, ¶ 11.2.1.

<sup>126</sup> *Chevron Co. & Texaco Petroleum Co. v. Ecuador*, UNCITRAL, Partial Awards on the Merits (30 Mar. 2010), ¶ 244.

law.”<sup>127</sup> Applying that more flexible standard, the tribunal found that the delay associated with the enforcement proceedings in India did not fail to provide effective means for White Industries to enforce its rights under the arbitral award. This was particularly the case because White Industries had not appealed the decision staying the enforcement proceedings, which accounted for six years of the overall delay, and had not demonstrated that pursuing this appeal would have been futile.<sup>128</sup>

On the other hand, the tribunal found that the nine-year delay associated with White Industries’ attempt to obtain dismissal of the Indian setting-aside proceedings did breach the “effective means” clause. The tribunal reasoned:

Having already applied for and obtained an order for expedited hearings in 2006 and 2007, White appears to have done everything that could reasonably be expected of it to have the Supreme Court deal with its appeal in a timely manner.

...

In these circumstances, and even though we have decided that the nine years of proceedings in the set aside application do not amount to a denial of justice, the Tribunal has no difficulty in concluding the Indian judicial system’s inability to deal with White’s jurisdictional claim in over nine years, and the Supreme Court’s inability to hear White’s jurisdictional appeal for over five years amounts to undue delay and constitutes a breach of India’s voluntarily assumed obligation of providing White with “effective means” of asserting claims and enforcing rights.<sup>129</sup>

Having found a violation of the BIT, the tribunal proceeded to carry out itself the task that the Indian courts had avoided – considering, and deciding, whether the award should be set aside under the standards contained in India’s arbitration law. The tribunal concluded that the award was valid as a matter of Indian law, and proceeded to order the State to compensate White Industries for the value of the award.<sup>130</sup>

## 5. Remedies

The type of remedy available in investment arbitration will depend on the particular breach found by the tribunal. In all three of the above-mentioned cases where State courts have been found in breach of an investment treaty for interfering with arbitral proceedings or awards, the tribunals sought to remedy the wrongful conduct according to the *Chorzow* standard. That is, “reparation must, as far as possible, wipe-out all the consequences of the illegal act and re-establish the situation which would, in all

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<sup>127</sup> *White Indus. Austrl.*, ¶ 11.3.1.

<sup>128</sup> *Id.* ¶¶ 11.4.13-11.4.15.

<sup>129</sup> *Id.* ¶¶ 11.4.18-11.4.19.

<sup>130</sup> *Id.* ¶ 14.3.6.



probability, have existed if that act had not been committed.”<sup>131</sup> In *Saipem*, this meant awarding damages in the amount of the underlying ICC award, plus interest.<sup>132</sup> The *White Industries* tribunal likewise imposed that same remedy.<sup>133</sup> In *ATA*, the Tribunal ordered what was effectively specific performance, requiring Jordan to terminate the court proceedings that APC had initiated and to permit the claimant to re-arbitrate its dispute with APC in accordance with the underlying FIDIC contract.<sup>134</sup>

Notably, the respondents in the underlying arbitrations in *Saipem* and *White Industries* were State-owned companies. One might ask whether this fact should have any bearing on the remedy for a State court’s wrongful interference with an arbitration agreement or award. On one view, it might: where a State-owned entity is involved, the State is the (indirect) beneficiary of the wrongful act and should arguably be liable for the full relief granted in the underlying award; while where private parties are involved, what the claimant has lost is arguably only the opportunity to pursue enforcement, *i.e.*, the loss of a chance.<sup>135</sup> The cases decided thus far, however, have drawn no such distinction. Notably, in *ATA*, the underlying respondent had become majority privately owned prior to the commencement of the ICSID arbitration.<sup>136</sup>

## 6. Conclusion on Investment Treaty Arbitration

What are the lessons to be drawn from the investment arbitration cases surveyed above? We suggest that there are essentially three.

*First*, the wrongful setting-aside of an award by the courts, or the improper non-enforcement of an award, may violate investment treaty standards. In particular, actions by the courts that are taken in bad faith, are untenable in their reasoning, or are simply too long in coming, may amount to an expropriation, a violation of the FET/FPS standards, or a contravention of the “effective means” clause where that is available under the applicable investment treaty.

*Second*, a violation by the courts of the New York Convention may form the predicate for a finding of liability. Thus, the failure to enforce a valid arbitration agreement in accordance with Article II of the Convention, or the misapplication of the grounds for

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<sup>131</sup> *Factory at Chorzow (Germ. v. Pol.)*, 1928 PCIJ (ser. A) Vol. 17 (13 Sept.) at 47.

<sup>132</sup> *Saipem*, ¶¶ 201-12.

<sup>133</sup> *White Indus. Austl.*, ¶¶ 14.3.1-14.3.6

<sup>134</sup> *ATA Constr.*, ¶¶ 131-33.

<sup>135</sup> See *José Alberro*, Estimating Damages when an Investment Treaty Arbitration is used to Enforce a Commercial Arbitration Award, *International Arbitration Law Review* 195 (2012, Issue 5) (discussing appropriate damages in investor-state arbitrations used to enforce commercial arbitration awards).

<sup>136</sup> *ATA Construction, Industrial and Trading Co. v. The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award (18 May 2010), ¶ 34.

refusing enforcement set out in Article V – if sufficiently severe – may give rise to a compensation obligation on the part of the State.

*Finally*, although it is the national courts that have taken the impugned action, something less than a denial of justice may suffice for a finding of liability.<sup>137</sup> Accordingly, the claimant can likely avoid the stringent exhaustion requirement that forms part of a cause of action for denial of justice in international law.<sup>138</sup>

## **B. Regional Human Rights Courts**

A second public international law option potentially available to a party whose arbitral award has been wrongfully annulled or left unenforced is to seek redress before one of the regional human rights courts. The three major institutions established by international human rights treaties are: the European Court of Human Rights (*ECtHR*), whose jurisdiction extends to all 47 States of the Council of Europe (*COE*);<sup>139</sup> the Inter-American Court of Human Rights (*IACtHR*), with competence in respect of the 20 States within the Organization of American States that have adhered to its jurisdiction (out of 35);<sup>140</sup> and the nascent African Court of Human and Peoples' Rights (*ACtHPR*), covering the 26 member States of the African Union to accept its jurisdiction (out of 54).<sup>141</sup> Any claim before these tribunals must be brought under their discreet constituent treaties – respectively the European Convention on Human Rights (*ECHR*),<sup>142</sup> the American

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<sup>137</sup> See, e.g., *White Indus. Austl.* ¶¶ 11.4.13-11.4.15.

<sup>138</sup> See Articles on the Responsibility of States for Internationally Wrongful Acts, Report of the ILC on its 53d Session, UN Doc. A/56/10 (2001) (ARSIWA), art. 44(b).

<sup>139</sup> The membership of the Council of Europe is far broader than that of the European Union, and includes: Albania; Andorra; Armenia; Austria; Azerbaijan; Belgium; Bosnia and Herzegovina; Bulgaria; Croatia; Cyprus; Czech Republic; Denmark; Estonia; Finland; France; Georgia; Germany; Greece; Hungary; Iceland; Ireland; Italy; Latvia; Liechtenstein; Lithuania; Luxembourg; Malta; Republic of Moldova; Monaco; Montenegro; Netherlands; Norway; Poland; Portugal; Romania; Russian Federation; San Marino; Serbia; Slovak Republic; Slovenia; Spain; Sweden; Switzerland; “The former Yugoslav Republic of Macedonia”; Turkey; Ukraine; and the United Kingdom.

<sup>140</sup> Members of the OAS who have accepted the jurisdiction of the IACtHR are: Argentina; Bolivia; Brazil; Chile; Colombia; Costa Rica; Dominican Republic; Ecuador; El Salvador; Guatemala; Haiti; Honduras; Mexico; Nicaragua; Panama; Paraguay; Peru; Suriname; Uruguay; and Venezuela. At the time of this writing, Venezuela has announced its withdrawal from the ACHR and the jurisdiction of the Court with effect as from September 2013.

<sup>141</sup> Members of the African Union that have accepted the jurisdiction of the ACtHPR are: Algeria; Burkina Faso; Burundi; Cote d’Ivoire; Comoros; Congo; Gabon; The Gambia; Ghana; Kenya; Libya; Lesotho; Malawi; Mali; Mauritania; Mauritius; Mozambique; Nigeria; Niger; Uganda; Rwanda; Senegal; South Africa; Tanzania; Togo; and Tunisia.

<sup>142</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 Nov. 1950, E.T.S. 5, available at <http://www.unhcr.org/refworld/docid3ae6b3b04.html>.

Convention on Human Rights (*ACHR*),<sup>143</sup> and the African Charter on Human and Peoples' Rights (*ACHPR*).<sup>144</sup>

In addressing the human rights courts in greater detail, we first discuss the threshold matter of who can bring claims before them (Subsection 1). Next, we consider the relevant human rights that can be invoked in cases involving the non-enforcement or annulment of arbitral awards, in particular interference with property (Subsection 2), and the right to a fair trial (Subsection 3). Finally, we discuss the remedies available (Subsection 4). Annex C provides a summary of the relevant human rights cases decided to date.

## 1. Standing to Bring Claims

The three regional human rights bodies differ materially in their jurisdictional structures. The ECtHR affords the greatest degree of access. There, both natural and legal persons may bring direct complaints before the Court on their own initiative, provided that the offending State is a party to the ECHR. By contrast, under the IACHR, a claimant must petition the Inter-American Commission on Human Rights to begin an investigation on his or her behalf, and can reach the IACtHR only on the latter's recommendation. The Convention applies uniquely to natural persons, thus depriving corporations of any access to the IACtHR – although the Court has extended the Convention's protection to injured shareholders in their personal capacities.<sup>145</sup> The ACtHPR lies somewhere between the two: individuals and Non-Governmental Organizations may bring claims against States who have signed on to an optional protocol assenting to such jurisdiction (including only five State Parties to date);<sup>146</sup> and at the same time, the African Commission on Human and Peoples' Rights and/or any State party can bring a complaint against another State party before the Court.<sup>147</sup> Further, unlike the ECtHR and the IACtHR, the substantive jurisdiction of the ACtHPR extends not only to its underlying regional human rights

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<sup>143</sup> Organization of American States, American Convention on Human Rights, "*Pact of San José*," *Costa Rica*, 22 Nov. 1969, available at <http://www.unhcr.org/refworld/docid/3ae6b36510.html>.

<sup>144</sup> Organization of African Unity, *African Charter on Human and Peoples' Rights* ("*Banjul Charter*"), 27 Jun. 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.unhcr.org/refworld/docid/3ae6b3630.html>; and Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court of Human and Peoples' Rights, 9 Jun. 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT(III) (establishing the Court).

<sup>145</sup> See *Cantos v. Arg.*, Preliminary Objections, ¶ 29 (2001); *Ivcher Bronstein v. Peru*, Judgment, Inter-Am. Ct. H.R. (Ser. C), No. 74 (6 Feb. 2001); *J. M. Pasqualucci*, *The Practice and Procedure of the Inter-American Court of Human Rights*, 105–107 (Cambridge Univ. Press, 1st ed. 2003).

<sup>146</sup> See ACtHPR Protocol, arts. 5(3), 34(6) (including Burkina Faso, Ghana, Malawi, Mali and Tanzania).

<sup>147</sup> ACtHPR Protocol, art. 5(1).

treaty, but also to any other “relevant human rights treaty ratified by the States concerned” in a particular dispute subject to the Court’s jurisdiction.<sup>148</sup>

Notably, all three of the Conventions require exhaustion of national remedies as prerequisite to accessing their respective Courts.<sup>149</sup> The road to relief will, thus, be neither short nor easy.

In the discussion that follows we focus on the ECHR and the ECtHR, because thus far only the ECtHR has rendered judgments in respect of claims involving the setting-aside or non-enforcement of commercial arbitration awards.<sup>150</sup> While the IACtHR and ACtHPR have yet to confront those issues, the principles enunciated by the ECtHR are likely to provide guidance as to how such claims would be adjudicated by those other courts.<sup>151</sup>

As with investment arbitration, an initial caveat is in order. The threshold issues just discussed, as well as the still-developing nature of the jurisprudence, mean that the human rights option will be available to only a relatively small minority of frustrated award creditors. Nonetheless, as set out below, the developments in the jurisprudence of the ECtHR over recent years suggest both the potential viability of this remedy and that further growth in the law is to be expected.

## 2. Interference with Property / Expropriation

### a. *The Stran Case*

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<sup>148</sup> ACtHPR Protocol, art. 3. It should be noted, however, that the ECtHR and IACtHR have proven willing to “read in” standards from external treaties to their own underlying treaties through interpretation in accordance with the Vienna Convention on the Law of Treaties (in particular article 31(3)(c)). *See e.g., Demir & Baykara v. Turkey*, App. No. 34503/97, 48 Eur. H.R. Rep. 54 (2008) (interpreting the ECHR *inter alia* in light of ILO instruments and non-binding ILO Committee resolutions); *The Right to Information on Consular Assistance In the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion OC-16/99, Inter-Am. Ct. H.R. ¶¶ 113-15. *See also J. Arato*, Constitutional Transformation in the ECtHR: Strasbourg’s Expansive Recourse to External Rules of International Law, 37 Brooklyn Journal of International Law, 349 (2012) (assessing the breadth with which the ECtHR understands its mandate under VCLT 31(3)(c)).

<sup>149</sup> *See* ECHR, art. 35; IACHR, art. 46; ACHPR, art. 50.

<sup>150</sup> *Stran Greek Refineries & Stratis Andreadis v. Greece*, Eur. Ct. H.R., No. 13427/87 (9 Dec. 1994); *see also Sedelmayer v. Germany*, Eur. Ct. H.R., Nos. 30190/06 & 30216/06 (10 Nov. 2006); *Regent Company v. Ukraine*, Eur. Ct. H.R., No. 773/03 (3 Apr. 2008); *Kin-Stib & Majkić*, Eur. Ct. H.R., No. 12312/05 (20 Apr. 2010).

<sup>151</sup> *See J. Arato*, Subsequent Practice and Evolutive Interpretation: Techniques of Treaty Interpretation over Time and Their Diverse Consequences, 9 The Law & Practice of International Courts and Tribunals 443, 489 (2010) (noting that in interpreting the Organization of American States Charter and the American Convention on Human Rights, the IACtHR frequently relies on the jurisprudence of the ECtHR – both as regards the content of particular rights and even drawing inspiration from the latter’s characterization of the object and purpose of the ECHR).

The ECtHR first articulated the principles by which it would afford protection to award creditors in its 1994 decision in *Stran Greek Refineries & Stratis Andreadis v. Greece* (*Stran*). The *Stran* case concerned the validity and enforcement of a purely domestic arbitral award – although the Court would extend the same principles to international arbitral awards in its subsequent jurisprudence.

*Stran* originated in an application against Greece lodged by two Greek nationals – a private limited company and its sole shareholder. The underlying dispute arose out of a construction contract concluded in 1972 between Stran and the then-existing Greek military regime, which the State unilaterally terminated in 1977 after the restoration of democracy. Stran commenced a domestic contractual arbitration against the State and received a multi-million dollar final award in 1984. In subsequent challenge proceedings, the Greek courts upheld the validity of the award at first instance and in the court of appeals. Then in May 1977, after the judge-rapporteur of the Court of Cassation had circulated a draft opinion ruling in favor of Stran, the Greek legislature passed a law retroactively voiding the contract and its arbitration clause, as well as any arbitration awards resulting from the contract.<sup>152</sup> The Court of Cassation ultimately upheld the constitutionality of that law and, accordingly, annulled Stran’s award.<sup>153</sup>

Before the ECtHR, Stran claimed that by annulling the award, the Greek legislature and judiciary had violated its right to property under Article 1, Protocol 1 of the ECHR (*P1-I*), as well as its right to a fair trial under the Convention’s Article 6 (as to which more will be said below). P1-1 provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.<sup>154</sup>

In assessing Stran’s claim that Greece wrongfully interfered with its property, the ECtHR divided its analysis into three questions: (i) whether the arbitral award was a “possession” within the meaning of P1-1; (ii) whether the State interfered with Stran’s rights in the award; and (iii) whether any such interference was justifiable under the “fair balance” test typically applied by the Court in P1-1 cases.

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<sup>152</sup> *Id.* ¶ 19.

<sup>153</sup> *Id.* ¶ 22.

<sup>154</sup> ECHR, Protocol 1, art. 1.

As to the first question, the Court held that an arbitral award constitutes a “possession” for purposes of P1-1, so long as it has “given rise to a debt in [the applicant’s] favor that was *sufficiently established to be enforceable*.”<sup>155</sup> The ECtHR looked to domestic law in answering that question, determining that that “[u]nder Greek legislation arbitration awards have the force of final decisions and are deemed to be enforceable,” and are not subject to appeal on the merits.<sup>156</sup> The Court further noted that in *Stran*’s case, “the ordinary courts had . . . already twice held – at first instance and on appeal – that there was no ground for . . . annulment.”<sup>157</sup> Accordingly, and despite the contrary ruling by the Court of Cassation, the Court held the award to be sufficiently enforceable to constitute a “possession” within the meaning of P1-1.<sup>158</sup>

The Court had no difficulty finding governmental interference with *Stran*’s property, carried out by both the Greek legislature and the judiciary. Through those organs, the underlying contract, the arbitration clause and the subsequent award had all been voided.<sup>159</sup>

The ECtHR then turned to the third prong, assessing whether in acting as it did, the Greek State had struck “a fair balance . . . between the demands of the general interest to the community and the requirements of the protection of the individual’s fundamental rights.”<sup>160</sup> Greece attempted to justify its actions as being “part of a body of measures designed to cleanse public life of the disrepute attaching to the military regime.”<sup>161</sup> In assessing this submission, the Court acknowledged the State’s sovereign prerogative to amend or terminate contracts concluded with private individuals, but determined that the exercise of that right entails an obligation to pay compensation. Further, and similar to the reasoning of the investment tribunal in *ATA*,<sup>162</sup> the Court found that Greece had acted improperly by voiding the underlying contract’s arbitration clause.<sup>163</sup> In the Court’s words, “to alter the machinery set up by enacting an authoritative amendment to such a clause would make it possible for one of the parties to evade jurisdiction in a dispute with respect to which specific provision was made for arbitration.”<sup>164</sup> Taking all of these

<sup>155</sup> *Stran*, ¶ 59 (emphasis added).

<sup>156</sup> *Id.* ¶ 61.

<sup>157</sup> *Id.* ¶ 62.

<sup>158</sup> *Id.* ¶ 62.

<sup>159</sup> *Id.* ¶¶ 65–66.

<sup>160</sup> *Id.* ¶ 69, citing *Sporrong and Lönnroth v. Sweden*, Series A no. 52, ¶ 69 (23 Sept., 1982).

<sup>161</sup> *Stran*, ¶ 70.

<sup>162</sup> See *supra* note 113 and accompanying text.

<sup>163</sup> *Stran*, ¶ 72. The Court further noted that Greek law recognizes the principle of the autonomy of the arbitration clause. *Id.* ¶ 73.

<sup>164</sup> *Id.* ¶ 72, citing *Losinger* decision of 11 October 1935, P.C.I.J. Series C no. 78, p. 110; *Lena Goldfields Co. v. Soviet Gov’t*, Annual Digest and Reports of Public International Law Cases, vol. 5 (1929-1930) (case no. 258); *Texaco Overseas Petroleum v. Libya*, preliminary decision of 27 Nov. 1975, at 53 I.L.R. 393 (1979).

factors into consideration, and while recognizing Greece’s legitimate interest in expunging vestiges of the dictatorship period, the Court determined that Greece’s actions had upset the balance between protection of the right to property and the requirements of the public interest, resulting in a violation of P1-1.<sup>165</sup> As explained further below, the Court also found Greece’s actions to be in violation of the right to a fair trial under Article 6(1).<sup>166</sup> The Court proceeded to award Stran full compensation, ordering Greece to pay the entire value of the award, plus 6% interest as provided for in the award itself.<sup>167</sup>

*b. Developments after Stran*

The ECtHR has expounded upon the principles articulated in *Stran* in a series of cases decided in the period 2008 to 2010. The result has been the extension of the coverage of P1-1 to the recognition and enforcement of international arbitral awards, and expansion of the scope of protections due.

*First*, as regards the threshold question of when an arbitral award constitutes a “possession,” the Court has confirmed that the protections of P1-1 extend to arbitral awards rendered in international cases, irrespective of the nationality of the parties to the underlying arbitration, or how the applicant came into possession of the award. *Regent Company v. Ukraine*, decided in 2008, involved an arbitral award rendered under the auspices of the Ukrainian Chamber of Commerce in favor of a Czech company and against a State-owned corporation. After seeking to enforce the award in the Ukraine for four years, during which period the State-owned respondent entered bankruptcy, the Czech company sold its award to Regent Company. The latter, incorporated in the Seychelles and thus outside the CoE region, continued enforcement efforts in the Ukraine, but was stymied by recalcitrant bailiffs and a law staying the enforcement of debts against State-owned entities. Regent Company then turned to the ECtHR, which found the award to be sufficiently enforceable to constitute a “possession” for P1-1 purposes.<sup>168</sup> The Court applied a similar analysis two years later in *Kin-Stib & Majkić v. Serbia*, which involved an award rendered under the auspices of the Yugoslavia Chamber of Commerce in favor of a Congolese company and against a State-owned company. The courts in Belgrade enforced the award’s pecuniary obligations but not its provisions on specific performance. As in *Regent Company*, the Court had little difficulty in concluding that the award – the validity of which had not been contested before the Serbian courts – was sufficiently enforceable so as to constitute a “possession.”<sup>169</sup> That the award was rendered in favor of a non-CoE national was irrelevant to the Court’s determination.

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<sup>165</sup> *Stran*, ¶¶ 46, 74, 75.

<sup>166</sup> *See infra* Section III.B.3.

<sup>167</sup> *Stran*, ¶¶ 80–82.

<sup>168</sup> *Id.* ¶ 61.

<sup>169</sup> *Id.* ¶ 83.

The Court went further still in *Sedelmayer v. Germany*, which concerned a US\$ 235 million award rendered by a Stockholm Chamber of Commerce tribunal in favor of a German national, Franz Sedelmayer,<sup>170</sup> and against the Russian Federation.<sup>171</sup> There, the applicant brought suit against the German State for its courts' failure to enforce the award against Russian property in Germany. Though dismissing the case on other grounds (as to which more is said below), the Court nevertheless ruled that the award – which had been upheld by the Swedish courts against a setting-aside action and recognized by the German courts – constituted a “possession” that Germany was obliged by P1-1 to protect.<sup>172</sup> This was so although Germany's only role was as the enforcement forum: it was not a party to the underlying arbitration, and the award debtor was a third party (Russia) unconnected to the German State.

*Second*, the post-*Stran* cases have defined more expansively the types of interference with arbitral awards that may give rise to liability under P1-1. Specifically, the ECtHR has held that a State may contravene P1-1 not only by refusing recognition or enforcement of an award, but also by taking inadequate steps to ensure that enforcement is effective. In *Kin-Stib*, the Court held that by enforcing the applicants' valid arbitration award only in part, Serbia had effectively expropriated the remaining value in the applicants' award in violation of P1-1. The breadth of the Court's language is striking. A Member State, the Court ruled, has a “responsibility to make use of all available legal means at its disposal in order to enforce a binding arbitration award providing it contains a sufficiently established claim amounting to a possession.”<sup>173</sup> To that end, “the State must make sure that the execution of such an award is carried out without undue delay and that the overall system is effective both in law and in practice.”<sup>174</sup> On the facts of *Kin-Stib*, Serbia fell short of the mark. The Serbian authorities had “clearly not taken the necessary measures to fully enforce the arbitration award in question.”<sup>175</sup>

*Finally*, the Court's recent jurisprudence has clarified the contours of the “fair balance” test used to determine whether an interference with a possession ripens into a violation of P1-1. Here, the ECtHR seems to have set a relatively high bar for the State to meet in justifying interference with the arbitral process or the resulting award. In *Stran* itself, the Greek State's policy of eradicating contractual vestiges of the dictatorship period was deemed an insufficient justification.<sup>176</sup> Similarly, in *Regent Company*, the State's defense that the bankruptcy of the State-owned respondent justified partial non-enforcement was rejected.<sup>177</sup> On the other hand, Germany's failure to enforce Mr. Sedelmayer's award

<sup>170</sup> See *supra* note 24 and accompanying text.

<sup>171</sup> *Sedelmayer*, at 2.

<sup>172</sup> *Id.* at 7.

<sup>173</sup> *Kin-Stib*, ¶ 83, citing *Stran*, ¶¶ 61-62.

<sup>174</sup> *Kin-Stib*, ¶ 83.

<sup>175</sup> *Id.* ¶ 85.

<sup>176</sup> *Stran*, ¶ 46.

<sup>177</sup> *Regent Co.*, ¶ 59.



against Russian Federation assets in Germany was held proper by the Court. Those assets, the national courts had ruled, were protected from attachment and execution by sovereign immunity under German law.<sup>178</sup> In assessing this defense, the Court balanced Germany's obligation under the New York Convention to enforce foreign arbitral awards against the rules of sovereign immunity applied by the German courts, which were broadly consistent with the ECtHR's own caselaw on sovereign immunity.<sup>179</sup> In those circumstances, the ECtHR found that Germany's unwillingness to enforce the applicant's award against the sovereign assets in question struck a fair balance between the demands of the general interest and the applicant's right to property.<sup>180</sup> Mr. Sedelmayer thus remained a disappointed award creditor.

In sum, the ECtHR's jurisprudence establishes that a Member State may violate P1-1 where its courts fail to recognize or enforce a commercial arbitration award, provided three conditions are met. *First*, to be protected under P1-1, an award must be "a possession" – meaning that it must be "sufficiently established to be enforceable."<sup>181</sup> *Second*, the State must have interfered with this possession. Interference is a relatively broad concept that includes not only a State's outright refusal to enforce an award, but also a failure to enforce fully and within a reasonable time. *Third*, the Court must determine whether any such interference is proportional – in the sense of pursuing a legitimate aim and fairly balancing that objective against the individual's right to property. This will necessarily be a fact-specific inquiry, as to which the Court has reached divergent results in the cases decided thus far.<sup>182</sup>

Going forward, the chief open question relates to the first prong of the P1-1 test. In all of the cases so far adjudicated, the underlying arbitral awards have either been upheld by the national courts against challenge (in *Stran* and *Sedelmayer*) or not challenged there (in *Regent Company* and *Kin-Stib*). It remains to be seen how the ECtHR would view a case in which an arbitral award had been set aside in the country of origin, or denied enforcement in another forum, on arguably proper grounds. If the investment treaty cases are any guide, one might surmise that the Court would require evidence of court

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<sup>178</sup> *Sedelmayer*, at 8–9 (noting that the German courts found in particular that the funds in question were earmarked for sovereign purposes and thus did not fall into the "commercial exception" to the immunity of sovereign property).

<sup>179</sup> See *Al-Adsani v. United Kingdom*, Eur. Ct. H.R. App. No. 35763/97 (2001); *Fogarty v. United Kingdom*, Eur. Ct. H.R. App. No. 37112/97 (2001); *McElhinney v. Ireland*, Eur. Ct. H.R. App. No. 31253/96 (2001).

<sup>180</sup> *Sedelmayer*, at 10.

<sup>181</sup> *Stran*, ¶ 59.

<sup>182</sup> In both *Stran* and *Regent Co.*, the Court was unconvinced by the States' respective justifications, relating to the general need to restore democracy and undo the effects of the previous military dictatorship in the former case, and to the current insolvency of the state-owned company in question in the latter. *Stran Greek*, ¶ 46; *Regent Co.*, ¶ 59; *Sedelmayer*, at 10. In *Sedelmayer*, by contrast, the Court held that Germany's refusal to enforce based on the doctrine of sovereign immunity was proportional. But again, in *Sedelmayer* the State's rationale conformed to the ECtHR's own jurisprudence on the immunity of States and their property. See *Al-Adsani*; *Fogarty*; *McElhinney*.

malfeasance – or at least misfeasance – before finding a violation of P1-1 in such circumstances.

As noted earlier, neither the IACtHR nor the ACtHPR has yet faced a case involving the annulment or non-enforcement of an arbitral award. Notably, however, their constitutive instruments – the IACHR and the ACHPR – both enshrine the right to property in broadly similar terms to the ECHR.<sup>183</sup> Further, the IACtHR has looked to ECtHR jurisprudence in its past cases.<sup>184</sup> Accordingly, it seems reasonable to expect that the IACtHR and the ACtHPR might be inclined to follow the European Court’s jurisprudence when dealing with a claim involving an arbitral award.

### 3. Right to a Fair Trial: Unfair Processes and Unreasonable Delay

In addition to finding a violation under P1-1, *Stran* opened a second avenue through which a State may incur liability for preventing or impeding the enforcement of an arbitral award. That avenue is the right to a fair and reasonably timely trial, as enshrined in Article 6(1) of the ECHR. Article 6(1) provides: “In the determination of his civil rights and obligations . . . everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. . . .”<sup>185</sup>

As a threshold matter, the Court confirmed in *Stran* that the right to recover the proceeds of an arbitral award constitutes a “civil right” within the meaning of Article 6(1). That civil right, the Court clarified, exists on the international plane under the ECHR, such that its content may not be assessed “solely by reference to the respondent State’s domestic law.”<sup>186</sup> And as *Regent Company* makes clear, that civil right extends to any subsequent purchaser of the arbitral award, enabling the latter to pursue claims before the ECHR.<sup>187</sup>

Article 6(1), as interpreted by the ECtHR in *Stran* and the subsequent cases cited above, imposes two obligations on ECHR Member States in respect of their treatment of arbitral awards: (a) a prohibition on unfair treatment of the award creditor in the courts, and (b) a requirement of reasonably prompt enforcement action.

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<sup>183</sup> See IACHR, art. 21 (“(1) Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment in the interest of society; (2) No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law”); ACHPR, art. 14 (“The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws”).

<sup>184</sup> See, e.g., *Right of Information in Consular Assistance*, *supra* note 148, ¶¶ 114-15.

<sup>185</sup> ECHR, art. 6(1).

<sup>186</sup> *Stran*, ¶ 39.

<sup>187</sup> *Regent Company*, ¶ 55.

With respect to the first obligation, the ECtHR has held that the principle of equality of arms lies at the heart of the fair trial right.<sup>188</sup> “In litigation involving opposing . . . interests, that equality implies that each party must be afforded a reasonable opportunity to present his case – under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent.”<sup>189</sup> In *Stran*, the Court thus found fault with both the timing and manner of Greece’s legislative intervention into the applicant’s enforcement proceedings in the Greek courts. As explained above, after the Court of Cassation had indicated to the parties that it would rule in favor of Stran, the legislature passed a law retroactively nullifying Stran’s claim and the underlying arbitration agreement. The ECtHR ruled that Article 6(1) precludes “any interference by the legislature with the administration of justice designed to influence the judicial determination of the [particular] dispute.”<sup>190</sup> Applying that standard to the facts, the Court held the Greek State in violation of Article 6(1) for “intervening in a manner which was decisive to ensure that the – imminent – outcome of proceedings in which it was a party was favourable to it.”<sup>191</sup>

The second standard imposed by Article 6(1) relates to reasonableness of the duration of enforcement proceedings. As noted earlier, *Regent Company* concerned an arbitration award originally rendered in favor of a Czech company against a Ukrainian State-owned company (Oriana), which later became insolvent. The original award creditor and its successor-in-interest pursued enforcement of the award in the Ukrainian courts beginning in 1999, but to no avail. By 2005, the responsible State entities had ceased any effort to enforce the award against Oriana’s assets.<sup>192</sup> Ruling in 2008, the Court determined that ten years was an unreasonably long delay for the enforcement of an arbitral award, especially given that no recent steps had been taken by Ukrainian authorities to remedy the situation.<sup>193</sup> In the Court’s view, neither the insolvency of the State-owned company, nor the delays inherent in appropriations for the payment of State debts, could excuse such a long delay. As a result, the Court held the Ukraine in violation of Article 6(1).

Thus, while the ECtHR has enunciated an aggressive standard for expedition in the enforcement of arbitration awards – stating in *Kin-Stib* (in the context of its P1-1 analysis) that States are obliged to “make sure that the execution of [a binding] award is carried out without undue delay”<sup>194</sup> – the only case to date to condemn delay under Article 6(1), *Kin-Stib*, has involved a lengthy delay indeed. It therefore appears that while prompt enforcement is a right under the ECHR, patience is a necessary virtue for the frustrated award creditor.

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<sup>188</sup> *Stran*, ¶ 46.

<sup>189</sup> *Id.* ¶ 46.

<sup>190</sup> *Id.* ¶ 49.

<sup>191</sup> *Id.* ¶ 50.

<sup>192</sup> *Regent Co.*, ¶¶ 19–32.

<sup>193</sup> *Id.* ¶¶ 59–60.

<sup>194</sup> *Kin-Stib*, ¶ 83.

Moving to the other human rights courts, the IACHR codifies a robust right to a fair trial in Article 8(1), guaranteeing a hearing by a “competent, independent, and impartial tribunal, previously established by law . . . for the determination of . . . rights and obligations of a civil, labor, fiscal, or any other nature.” That same Article further provides that such a hearing must occur “within a reasonable time.”<sup>195</sup> Although the question of procedural fairness in the context of the enforcement of arbitral awards has not yet been tested in the IACtHR, the text of the Convention thus appears to provide similar guarantees to those articulated in the case law of the ECtHR. By contrast, the text of the ACHPR is more laconic in respect of civil (or any non-criminal) rights, guaranteeing to every individual only “the right to have his cause heard” (Article 7)<sup>196</sup> – although the African Commission on Human and Peoples’ Rights has referred to Article 7 as enshrining the “right to a fair trial” more generally.<sup>197</sup>

#### 4. Remedies

In each of the above-cited cases in which a violation was found, the ECtHR ordered the State to compensate the applicant in the amount of the underlying award (less any payments already received).<sup>198</sup> In one instance, the ECtHR awarded the applicants additional compensation for non-pecuniary damages arising out of the State’s violation of the ECHR rights in question.<sup>199</sup> Finally, the Court has shown itself willing to award interest and costs.<sup>200</sup>

Notably, however, each of the cases in which the applicant succeeded featured the State or a State-owned entity as the underlying award debtor. In *Stran* the award debtor was the State itself, meaning that the failure to enforce amounted to a refusal by the State to pay a direct debt to the applicant.<sup>201</sup> In *Regent Company* and *Kin-Stib* the award debtors were State-owned companies, and the Court appears to have taken the view that, as a result, the State could fairly be held fully responsible for honoring their debts.<sup>202</sup> It therefore remains unclear whether the same remedy – full payment of the underlying award with

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<sup>195</sup> ACHR, art. 8(1).

<sup>196</sup> ACHPR, art 7.

<sup>197</sup> *Amnesty Int’l v. Sudan*, Afr. Comm’n H.R., Comm. Nos. 48/90, 50/91, 52/91, 89/93 (1999-2000), ¶ 31.

<sup>198</sup> *Stran*, ¶ 81; *Regent Co.*, ¶ 66; *Kin-Stib*, ¶ 96.

<sup>199</sup> *Kin-Stib*, ¶ 95 (awarding €8,000 on an “equitable basis” for non-pecuniary damage caused by Serbia’s violation of P1-1). *But see Regent Co.*, ¶ 67 (denying the applicant additional compensation for its claim to non-pecuniary damage, and finding a declaration of the State’s violation of Art. 6(1) and P1-1 sufficient under the circumstances. The Court noted in particular that the applicant had “purchased the debt in question... taking a commercial risk by that transaction.”).

<sup>200</sup> Whereas in *Stran* the Court assessed interest at six percent on an equitable basis, see *Stran*, ¶ 82, in the two more recent cases the Court awarded default interest based on the marginal lending rate of the European Central Bank plus three percentage points, see *Regent Co.*, ¶ 69; *Kin-Stib*, ¶ 102.

<sup>201</sup> *Stran*, ¶ 80.

<sup>202</sup> *See Kin-Stib*, ¶ 96; *Regent Co.*, ¶¶ 59–60.

interest – would be applied by the Court in a case involving a private award debtor. On one view the remedy should be the same – liability covers the full deprivation arising from the misconduct of the State’s judicial (or other) organs. However, as noted earlier in regard to investment arbitration,<sup>203</sup> it could also be defended that what the applicant has actually lost is the *chance* to have its award enforced – an injury that might, depending on the facts, call for a lesser amount of compensation.

Like the ECtHR, the IACtHR has the authority to order a respondent State to pay the victim “fair compensation.”<sup>204</sup> In general, this means “re-establishing the previous situation and repairing the consequences of the violation, as well as payment of an indemnity as compensation for the damage caused.”<sup>205</sup> At least in principle, in the case of improper interference with an arbitral award (especially going so far as annulment), it should be open to the Court to award the full value of the award as compensation. Similarly the ACtHPR enjoys authority to order “fair compensation or reparation” for violations of its Convention.<sup>206</sup>

## 5. Conclusion on the Human Rights Courts

The regional human rights courts – and in particular the ECtHR – provide a potential avenue of public law redress to award creditors frustrated by a State’s interference with the arbitral process or an arbitral award. While there are substantial gateway issues limiting access to the three human rights courts surveyed above, the jurisprudence of the ECtHR has developed in a reasonably protective manner. A State’s wrongful annulment of an arbitral award or agreement, or its failure to enforce a binding award in full and within a reasonable (if expansive) timeframe, can result in liability under either P1-1 or Article 6 of the ECHR. The chief open question concerns when an arbitral award will be sufficiently enforceable to constitute “property” for purposes of the P1-1 (or Article 6) analysis, and in particular the level of scrutiny the Court would be willing to apply in cases of arguably justified setting-aside or non-enforcement.

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<sup>203</sup> See *supra* Section III.A.5.

<sup>204</sup> ACHR, art. 63(1). See Pasqualucci, *supra* note 145, at 255.

<sup>205</sup> *Ivcher Bronstein*, ¶ 178. However, the Court has taken a somewhat inconsistent approach to determining the value of such damages. In the case of *Velásquez Rodríguez v. Hond.*, the Court held that this standard of compensation comes not from the domestic law of the Respondent State but rather the American Convention itself, “and the applicable principles of international law.” *Velásquez Rodríguez v. Honduras*, Judgment, Inter-Am. Ct. H.R. (ser. C) no. 4, ¶ 31 (21 Jul. 1989). However in *Ivcher Bronstein v. Peru* the Court did not resolve the question of compensation, but rather left to the national courts the determination *under domestic law* of how much compensation the victim should be awarded for the loss of dividends and other payments that he would have received had he continued as majority shareholder and officer of the company in question but for Peru’s intervention. *Ivcher Bronstein*, ¶181.

<sup>206</sup> ACtHPR Protocol, art. 27.

While the Inter-American and African Courts have not yet encountered a case involving the non-enforcement of an arbitral award, their constitutive instruments are reasonably similar to the ECHR. Accordingly, one may expect that their approach to those issues would be similar.

Thus, while not an easily available remedy, or one involving a short road to enforcement, the regional human rights courts represent an option that is worthy of consideration by frustrated award creditors.

### C. Diplomatic Protection

The previous two Sections have discussed the public international law fora that may be available to frustrated award creditors under special regimes that allow the aggrieved party to pursue recourse directly against the State that committed the allegedly wrongful act. These regimes – investment arbitration and the regional human rights courts – are exceptions to the general position under international law, which is that natural and legal persons have no capacity to pursue claims against States directly. Instead, their State of nationality must seek redress on their behalf. This process is known as diplomatic protection.

The 2006 Draft Articles on Diplomatic Protection (*DADP*) prepared by the International Law Commission (*ILC*) define the term as follows:

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.<sup>207</sup>

The underlying rationale is that an internationally wrongful act committed against a State's national is in reality an injury to the State itself.<sup>208</sup>

A State that chooses to exercise diplomatic protection on behalf of one of its nationals has, in principle, a variety of tools available. A State may simply initiate direct negotiations with the offending nation. It may request voluntary formal dispute settlement through arbitration or before the International Court of Justice (*ICJ*).<sup>209</sup> The

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<sup>207</sup> See Draft Articles on Diplomatic Protection, art. 1, Report of the ILC on its 58th Session, UN Doc. A/61/10, 2006; see also ARSIWA, *supra* note 138.

<sup>208</sup> See *Mavrommatis Palestine Concessions* (Greece v. Gr. Brit.) Judgment, 1924 P.C.I.J. (ser. A) no. 2 at 12 (“By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights, its right to ensure, in the person of its subjects, respect for the rules of international law.”); *Malcolm Shaw*, *International Law* 809 (6th ed., 2008).

<sup>209</sup> *Id.* To proceed before the ICJ, the home State would have to secure the offending State's consent to submit the case to the Court's binding “contentious jurisdiction.” ICJ Statute, art. 36; *L. Reed & L.*

protecting State may also engage in retorsion, including for example certain forms of economic pressure or the severance of diplomatic relations.<sup>210</sup> In the face of continued intransigence, a State may resort to the threat or use of countermeasures, meaning the temporary non-performance of international obligations owed toward the responsible State.<sup>211</sup> Countermeasures may include, *inter alia*, withholding payments due to the offending State and/or freezing assets belonging to it, or the suspension of formal treaty obligations such as those affording favorable terms of trade.<sup>212</sup> Any such countermeasures must, however, be proportional to the offense and may be taken only with an eye to compelling the offender to discharge its responsibility.<sup>213</sup>

Where a State refuses to recognize or enforce a foreign arbitral award, or wrongfully sets the award aside, it may breach its international law obligations. Specifically, the failure to recognize and enforce may violate the State's duties under the New York Convention, assuming the State is a party to the Convention (as all major trading nations are).<sup>214</sup> While the setting-aside of an arbitral award is governed by national arbitration law and not the New York Convention, an illegitimate set-aside could potentially contravene customary international law, in particular the duty to afford foreign nationals a minimum standard of treatment, including the prohibition on denial of justice in a State's courts.<sup>215</sup> Thus, in principle, a predicate violation capable of triggering diplomatic protection will (or may) be available in such circumstances. This provides a third potential public international law remedy to the aggrieved award creditor.

The award creditor would have to satisfy two thresholds in order to qualify for the exercise of diplomatic protection by his home State: (a) qualifying nationality (and continuity of it), and (b) the exhaustion of local remedies. As to the former, the determination of nationality is relatively straightforward in the case of natural persons,<sup>216</sup>

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*Martinez*, Treaty Obligations to Honor Arbitral Awards and Diplomatic Protection, in *D. Bishop* (ed.), *Enforcement of Arbitral Awards Against Sovereigns*, 2009, 13, 23. Of interest, an earlier draft of the New York Convention contained an Article providing that "any dispute which may arise between contracting States concerning the interpretation or application of the Convention shall be referred to the International Court of Justice at the request of any one of the parties to the dispute, unless the parties agree to another mode of settlement." Report of the Committee on the Enforcement of International Arbitral Awards, UN Economic and Social Council, Doc. E/AC.42/4/Rev.1 (28 Mar. 1955). That language was opposed by some of the States, including the USSR, and was ultimately removed.

<sup>210</sup> See *Reed & Martinez*, *supra* note 209, at 23.

<sup>211</sup> ARSIWA, art. 49(2).

<sup>212</sup> ARSIWA, arts. 49, 50. *Schreuer*, *supra* note 75, 1089; *Reed & Martinez*, *supra* note 209, at 23.

<sup>213</sup> ARSIWA, arts. 49(1), 51.

<sup>214</sup> See list maintained at <http://www.newyorkconvention.org/>.

<sup>215</sup> See *Paulsson*, *supra* note 97.

<sup>216</sup> See DADP, art. 4 ("For the purposes of the diplomatic protection of a natural person, a State of nationality means a State whose nationality that person has acquired, in accordance with the law ...[and] not inconsistent with international law."); *Shaw*, *supra* note 208, at 813–14.

although complications may arise in the case of dual nationals.<sup>217</sup> The law governing corporate nationality is more complex. In general, the nationality of a corporation will depend on its place of incorporation.<sup>218</sup> However, the DADP provide for a narrow exception “in a particular situation where there is no other significant link or connection between the State of incorporation and the corporation itself, and where significant connections exist with another State.”<sup>219</sup> In particular, a corporation may be held to possess the nationality of other than its State of incorporation where it “is controlled by nationals of another State or States and has no substantial business activities in the State of incorporation, and the seat of management and the financial control of the corporation are both located in another State.”<sup>220</sup> In those circumstances, the State from which management and financial control are exercised may be the State of nationality.<sup>221</sup> Further, and with respect to both natural and legal persons, the injured party must possess the nationality of the espousing State continuously from the date of the injury to the date of presentation of the claim.<sup>222</sup>

The second requirement for obtaining diplomatic protection is the exhaustion of local remedies. In general a State may not present an international claim in respect of an injury to one of its nationals before the injured person has pursued all legal remedies open to him before the judicial or administrative bodies of the offending State.<sup>223</sup> Limited exceptions may be available where pursuit of a particular remedy would be futile or result in “undue delay,” or where the aggrieved party is somehow precluded from pursuing the remedy in question.<sup>224</sup> Even so, the exhaustion requirement may impose a significant burden, in terms of cost and delay, in many cases: the claimant, or its finances, may

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<sup>217</sup> See DADP, art. 7; *Mergé* claim, Italian-U.S. Claims Comm’n. 22 ILR 443, 445 (1955); *Islamic Republic of Iran v. United States*, Case No. A/18, 5 Iran-U.S. C.T.R. 251 (1986).

<sup>218</sup> DADP, art. 9.

<sup>219</sup> DADP, art. 9 comment (4).

<sup>220</sup> DADP, art. 9; see also *Barcelona Traction*, ICJ Reports 1970, at 42–43. The ILC provides for an additional (limited) exception with regard to exercising diplomatic protection on behalf of injured shareholders in a corporation where the corporation has ceased to exist, or had the nationality of the offending State (and incorporation in that State was required as a precondition for doing business there). DADP, art. 11.

<sup>221</sup> This rule may give rise to difficulties in the common situation in which an investor uses a special purpose vehicle incorporated in a different State as the owner of an investment. If the SPV exercises some control over the investment, it may be deemed a national of that third State, in which case the actual investor’s home State will be unable to exercise diplomatic protection. At the same time, the third State may have no interest in exercising protection on behalf of a legal person controlled by foreigners and incorporated within its territory for reasons of convenience. See *V. Pérez*, *Diplomatic Protection Revival for Failure to Comply with Investment Arbitration Awards*, 3 *Journal of International Dispute Settlement*, 455 (2012).

<sup>222</sup> DADP, art. 5. *But see Loewen v. United States*, ICSID Case No. ARB(AF)/98/3, NAFTA Ch. 11 (26 Jun. 2003).

<sup>223</sup> DADP, art. 14; *V. Pérez*, *supra* note 221.

<sup>224</sup> DADP, art. 15.



become exhausted before local remedies are. In the present context, the requirement would be to exhaust all reasonably available appellate remedies against the setting-aside or non-enforcement of the arbitral award in question.

Despite these threshold hurdles, the fact remains that diplomatic protection provides a potential remedy for a frustrated award creditor, who may have no other available means of international redress. It will then be incumbent on the award creditor to convince its home government to espouse the claim, in which case the claim will become the State's to pursue in the manner, and to the extent, it considers appropriate. Again, this is unlikely to be an easy road. As Professor Douglas has noted:

the state of the injured national has full discretion as to whether to take up the claim on behalf of its injured national at all. It may waive, compromise, or discontinue the presentation of the claim irrespective of the wishes of the injured national. In exercising this discretion, the state often gives paramount consideration to the wider ramifications of the espousal of a diplomatic protection claim so far as it concerns the conduct of its foreign policy vis-à-vis the host state.<sup>225</sup>

Perhaps as a result of these impediments, there are no reported instances to date of a State exercising formal diplomatic protection on behalf of a frustrated award creditor. Interestingly, however, in the investment treaty context, States have been willing to pursue less formal means of diplomatic pressure on behalf of their nationals.<sup>226</sup>

In two long-running investment disputes between US investors and Argentina, the American investors (Azurix, and Blue Ridge Investment, which had been assigned an arbitral award from CMS Energy) sought the assistance of the US government in 2010. Specifically, the investors petitioned the US Trade Representative (*USTR*) to withdraw Argentina's benefits under the Generalized System of Preferences program. The USTR acted on the petitions, and in March 2012 announced that it was suspending those trade benefits for Argentina.<sup>227</sup> In 2011, the US had imported US\$477 million of goods from Argentina under the trade preference regime.<sup>228</sup> Although the financial benefit to Argentina of the program represented only a portion of that amount, the withdrawal will still be unwelcome news to the Argentine government, and thus a potential source of

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<sup>225</sup> Z. Douglas, *The Hybrid Foundations of Investment Treaty Arbitration*, 74 *British Yearbook of International Law* 151, 169 (2003) (footnotes omitted).

<sup>226</sup> In the context of an ICSID dispute, contracting States are not permitted to exercise diplomatic protection, in the formal sense, with respect to an ongoing claim. States are, however, permitted to engage in "informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute." ICSID Convention, art. 27. See generally J. Viñuales & D. Bentolila, *supra* note 17.

<sup>227</sup> Doug Palmer, *Obama says to suspend trade benefits for Argentina*, Reuters (26 Mar. 2012), available at <http://www.reuters.com/article/2012/03/26/us-usa-argentina-trade-idUSBRE82P0QX20120326> (noting that the U.S. has also voted against new loans for Argentina at the World Bank and Inter-American Development Bank).

<sup>228</sup> *Id.*

pressure. The European Union (*EU*) considered taking equivalent action against Argentina at the behest of Spanish award creditor Repsol – but ultimately opted against doing so, given that the benefits to Argentina under EU law are set to expire at the end of 2013 in any event.<sup>229</sup>

If award creditors have it their way, Ecuador may be the next in line. In September 2012, U.S. oil major Chevron petitioned the USTR to suspend preferential trade benefits to Ecuador under the Andean Trade Promotion and Drug Eradication Act (*ATPDEA*), based on the latter's failure to comply with interim measures orders issued by the arbitral tribunal in Chevron's BIT claim against Ecuador.<sup>230</sup> At the time of this writing, Chevron's petition remains under review by the USTR.<sup>231</sup>

The investment treaty context is of course potentially a better candidate for attempts to obtain diplomatic protection, as the recalcitrant award debtor is the State itself, and – at least for ICSID cases – the State is subject to a self-standing treaty obligation to comply with the pecuniary obligations of any award.<sup>232</sup> In the commercial award context, by contrast, the award debtor may be unrelated to the State, and the offending entity may be only the State's courts. While these form part of the State itself, diplomatic pressure, directed essentially at the executive branch, may be less effective (and less likely to be pursued by the home State) than in the case of investment treaty awards.

As several authors have noted, diplomatic protection is a remedy not well attuned to protecting business interests in modern international economic life.<sup>233</sup> It is for this reason that the BIT revolution has been so important in providing protection to investors, and the number of claims under those instruments so substantial. Nonetheless, diplomatic protection remains an option for frustrated award creditors, in particular when other public international law remedies are unavailable to them. The recent actions of the USTR show that, at least in some cases, States may be willing to take diplomatic action in support of award creditors, using trade mechanisms that are capable of exerting meaningful pressure on the offending State. This will only be the case, of course, where the home State has a big trade stick to wield.

#### **D. Comparing the Public International Law Options**

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<sup>229</sup> See *The EU's New Generalised Scheme of Preference (GSP)*, European Commission, at 3, [http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc\\_150028.pdf](http://trade.ec.europa.eu/doclib/docs/2012/october/tradoc_150028.pdf) [hereinafter *EU GSP Factsheet*].

<sup>230</sup> See *W. Reinsch*, Nat'l Foreign Trade Council, Inc., Petition Requesting Withdrawal or Suspension of the Designation of Ecuador as an Andean Trade Preference Act Beneficiary Country (17 Sept. 2012).

<sup>231</sup> Jorge Viñuales and Dolores Bentolila discuss in further detail additional examples where diplomatic exchanges have occurred in the investment treaty context. For instance, they reference the dispute between Aucoven and Venezuela, where the State of Aucoven's parent company (Mexico) engaged in diplomatic correspondence with Venezuela in an attempt to facilitate a solution to the dispute between the parties. *Viñuales & Bentolila*, *supra* note 226, at 23.

<sup>232</sup> ICSID Convention, art 54(1).

<sup>233</sup> See *Paulsson*, *supra* note 74, at 255; *Reed & Martinez*, *supra* note 209, at 34.

The availability and attractiveness of the public international law options surveyed above will depend on the circumstances of the dispute and the positioning of the award creditor. In this Section, we provide a summary comparison of the options and the differing circumstances in which each might be pursued.

## 1. Standing

The first issue to consider is standing – i.e., the threshold hurdles that a frustrated award creditor must surmount in order to access the public law remedies discussed above. With respect to investment treaty arbitration, two threshold issues arise. First, there must be an investment treaty in place between the home State of the aggrieved party and the State whose organs interfered with the arbitral process or award. Assuming an applicable investment treaty exists, the aggrieved party must further demonstrate that it has an “investment” in the host State. Under the decided cases thus far, it is unlikely that an arbitral award will itself qualify as an “investment.” Rather, the award will be seen as “crystallizing” the rights contained in the underlying contract, meaning that those contract rights will need to constitute an “investment” in the State whose courts or other organs have acted improperly. This will most likely be the case where the contract relates to a project being carried out in that State. In those circumstances, any later State court interference with the arbitration or the resulting award will constitute interference with the investment writ large.

In the human rights context, no such “investment” threshold exists. Any person who is aggrieved by the conduct of a party to one of the regional human rights conventions may initiate a claim against that State.<sup>234</sup> However, the applicant will need to exhaust local remedies as a pre-condition to doing so. The ECtHR has applied substantially the same approach in adjudicating claimed violations of both P1-1 and Article 6 in its arbitral award cases. Under either provision, the applicant must show that the award is sufficiently enforceable to qualify as a “possession” (for purposes of P1-1) or a “civil right” (for purposes of Article 6). The chief open question is whether an award that has been set aside or denied enforcement on arguably appropriate grounds will meet this standard.

Diplomatic protection probably poses, at least from a functional prospective, the most substantial threshold hurdles. The frustrated award creditor must continuously possess the requisite nationality and must exhaust all local remedies. Further, he must convince his home government to espouse the claim – a decision in which political considerations will doubtless play a role. In all events, the petitioner will likely be required to provide convincing evidence to his home State that a violation of international law has occurred.<sup>235</sup>

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<sup>234</sup> Note that in the IACtHR context, a corporation is not entitled to bring claims. *See supra* Section III.A.1.

<sup>235</sup> *See Reed & Martinez, supra* note 209, at 28.

## 2. Substantive Standards

The need to surmount these gateway issues can be expected in most instances to limit the public law fora or mechanisms available to a disappointed award creditor. However, assuming that more than one option remains open, the next consideration relates to the relative ease with which a claim can be made.

In the investment treaty context, proving expropriation appears likely to be difficult – the claimant will need to show, at minimum, “illegal” conduct by the courts under a standard that seems not dissimilar in stringency from the traditional denial of justice test. Proving that the investor has been treated unfairly and inequitably will likely be easier, requiring less extreme conduct than a denial of justice analysis would demand. If the test applied in *Frontier Petroleum* is adopted by future tribunals, a State court’s setting-aside or non-enforcement of an arbitral award will be assessed on the basis of whether the decision was taken in good faith *and* is reasonably tenable in its reasoning – thus opening the way for review on the merits, albeit under a deferential standard. Finally, where an “effective means” clause is available, the test for a violation will, once again, likely be less stringent than that for a denial of justice. Under the decided cases, undue delays by a State’s courts in dealing with setting-aside applications or enforcement can give rise to a breach of this provision. The effective means clause could also be applied, it would seem, to a wrongful failure to uphold or recognize an arbitral award.

In the human rights context, demonstrating an interference with, or deprivation of, property requires a lower threshold than proving expropriation. Less than a complete taking is required to establish an “interference” under ECtHR jurisprudence. Similarly, in the IACtHR, the protection against a “deprivation” of property has been interpreted to give rise to the sorts of claims one sees in the ECtHR context for an “interference” with property.<sup>236</sup> With respect to the right to a fair trial, the standard applied has been similar to the “effective means” analysis in the investment treaty context. Thus, undue delay in the enforcement of an award has been held by the ECtHR to violate that right.<sup>237</sup>

Diplomatic protection differs from the investment treaty and human rights regimes in that, in the first instance, the legal standard is applied by the award creditor’s own home State as opposed to an external tribunal. The international wrong, for purposes of invoking diplomatic protection with respect to a non-enforced or annulled arbitral award, would be a breach of the New York Convention or of the minimum standard of treatment due to foreign nationals. As already noted, it seems likely that only very clear cases of a

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<sup>236</sup> See *Chaparro Alvarez & Lapo Iniguez v. Ecuador*, Judgment, Inter-American Ct. H.R. Series C, No. 170 (21 Nov. 2007); *Abrillo Alosilla et. al. v. Peru*, Judgment, Inter-American Ct. H.R. Series C, No. 223 (1 July 2009) (both relying on ECtHR jurisprudence); see also *Ivcher-Bronstein* (interpreting the “deprivation” requirement broadly).

<sup>237</sup> See *Regent Co.; Kin-Stib*.

violation of international law would suffice to convince the home State to espouse the claim.

### 3. Remedies

In both the investment treaty and human rights contexts, the cases to date have been fairly consistent in their approach to remedies. Except for *ATA*, in all cases where the claimant has been successful, the State was ordered to pay the full amount of the underlying arbitral award, plus interest. The remedy applied in *ATA* was arguably even more far-reaching: the respondent State was required to terminate ongoing legal proceedings in its courts and cause the underlying respondent in the dispute to submit to a new arbitration. In the human rights context, the ECtHR is likewise entitled to order specific performance, including in cases involving interference with property,<sup>238</sup> though it has not yet done so in the context of interference with arbitral awards.

The principal open question – in both contexts, but in particular in respect of the human rights jurisprudence – is whether the full value of the underlying award would be granted where the respondent in the arbitration was a private party unconnected to the State. Arguably a different standard of compensation might be applied, in order to take account of the normal risks and uncertainties inherent in the enforcement of any arbitral award.

In the diplomatic protection context, the remedies available are in principle much broader, but far less certain. It is for the State to pursue the claim as it sees fit, and there is no requirement in international law that any proceeds be turned over to the underlying claimant.<sup>239</sup> Ultimately, the home State might request the offending State to enforce the arbitral award in question, but the coercive tools that the home State would be able (or willing) to employ to achieve this end are likely to be limited. As such, it appears that diplomatic protection is the least favorable option in terms of the likelihood of achieving meaningful redress.

## IV. CONCLUSION

A fable is sometimes told about a Supreme Court justice choosing between three applicants for a position as his law clerk. The justice tells the three a story and invites each to ask one question, based upon which he will make his decision. The story goes as follows. A farmer sees a squirrel perched on the weathervane atop his barn. He picks up his gun and fires at the interloper. The impact of the bullet rains showers on the barn

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<sup>238</sup> See, e.g., *Papamichalopoulos and Others v. Greece*, App. No. 14556/89, 21 Eur. H.R. Rep. 439 (1995); *Brumarescu v. Romania*, App. No. 28342/95, 33 Eur. H.R. Rep. 36 (2001). See generally *I. Nifosi-Sutton*, The Power of the European Court of Human Rights to Order Specific Non-Monetary Relief: A Critical Appraisal from a Right to Health, 23 *Harvard Human Rights Journal* 51, 56 (2010).

<sup>239</sup> See DADP, art. 19 cmm't (1) (noting that while Article 19 *recommends* the practice of compensating the injured national, there is no positive obligation on States to do so under the general international law of diplomatic protection).

roof, which is soon ablaze. Owing to the wind, the fire then spreads to the farmer's house. Hearing the story, the first applicant, knowing the Justice to be an environmentalist, asks as his question: "Did the farm animals get out of the barn unharmed?" "Not the right question," says the Justice. The second applicant, aware of the Justice's humanitarian tendencies, asks: "Did the farmer's family escape the fire in the house?" "Also incorrect," responds the Justice. The third applicant then tries her luck: "Did the farmer's shot hit the squirrel?" Whereupon the Justice announces, "You're hired!" The moral of the tale: keep your eye on the ball.

So it is with international commercial arbitration. The arbitration process is a means to the end of recovering money. Ultimately, it's all about enforceability.

The happy news for the victor in the arbitral process is that the great majority of international commercial awards are complied with voluntarily, thanks largely to the enforcement power of the New York Convention. But experience teaches that it is unwise to bank upon that result. Prudent parties and their counsel will plan for enforcement from the very beginning – indeed, starting at the time of contracting – in respect of issues such as choosing the place of arbitration, obtaining waivers of immunity if the counterparty is State-related, and structuring the transaction to make assets more easily available and to attract investment treaty protection. Once a dispute arises, the well-advised claimant will turn its mind to identifying the respondent's assets and obtaining pre-award attachments whenever possible; by the same token, the respondent will want to consider the advisability of leaving its assets in attachment-friendly jurisdictions. Once the award is rendered, and absent immediate compliance, the prevailing party will wish to commence enforcement proceedings promptly, and typically in every forum where the respondent's assets can be found. History shows that relentless enforcement efforts are difficult for all but truly impecunious award debtors to resist. The losing party's best play will normally be to challenge the award in the courts of the place of arbitration, if there are arguable grounds for doing so, and resist enforcement elsewhere on that basis – hoping for either a victory in the challenge proceeding, or in any event to complicate matters to the extent that settlement at a discount may appear attractive to its opponent.

Sometimes, however, the expected result of successful enforcement will prove elusive. The courts at the place of arbitration may wrongfully set the award aside, or those in a jurisdiction in which the losing party has assets may incorrectly refuse to enforce the award. Worries about these outcomes will be the greatest where the arbitral or enforcement forum is the respondent's home State, and in particular where the respondent is the State itself, a State entity or a State-owned company.

Where that occurs, the frustrated award creditor may be able to avail itself of public international law fora or mechanisms. The past four years have seen six published investment treaty awards in proceedings commenced on the basis of the annulment or non-enforcement of arbitral awards – resulting in victories for the claimant in three of the six. A second potentially-available public law forum consists of the regional human rights courts. Again, recent jurisprudence in the ECtHR confirms that relief may be

available for both the wrongful annulment or non-enforcement of commercial arbitration awards. Finally, although probably the least attractive option, the disappointed award creditor may seek to invoke diplomatic protection by its home State. While this avenue may be of limited utility in the commercial award context, claimants have recently had success in lobbying their home State to retract trade preferences from States that have reneged on paying arbitral awards.

The legal developments with respect to all three of these mechanisms are of relatively recent vintage, and important questions as to each remain unanswered. This article has sought to address some of those questions, but firm conclusions must await the still-developing jurisprudence and practice in the field. The future of enforcement strategy remains unwritten.

## ANNEX A: ENFORCEMENT AND CHALLENGE CONSIDERATIONS IN KEY JURISDICTIONS

	Pre-award attachment	Post-award attachment	Special rules for State-owned property	Provision of suitable security required for set aside-action	Grounds for set-aside action/refusal of enforcement	Stay of enforcement during set-aside action	Enforcement despite set-aside
<b>China</b>	<p>Yes. Before commencing arbitration, a claimant may apply to the Court for an order preserving a respondent’s properties, if the claimant’s “legitimate rights and interests would suffer irreparable damage”.</p> <p>The claimant must:</p> <p>(a) provide security in the application; and</p> <p>(b) commence arbitration within 30 days after the Court order.</p> <p>(Article 101 of the PRC Civil Procedure Law (as amended)).</p>	<p>Yes. Upon obtaining an award, the claimant may apply to the Court for an order enforcing the award. (Article 62 of the PRC Arbitration Law; Article 236 of the PRC Civil Procedure Law (as amended)).</p> <p>The Court has the power to, among other things,</p> <p>(a) compel the respondent to produce a report detailing the respondent’s properties; and</p> <p>(b) seize the</p>	<p>Yes. The PRC appears to subscribe to the doctrine of absolute immunity, such that all State properties enjoy immunity from execution. (National People’s Congress Instrument 22. Interpretation of Articles 13 and 19 of the Basic Law of the Hong Kong Special Administrative Region).</p> <p>The PRC also specifically confers immunities on foreign central banks’ properties. (Article 1 of the PRC Law on Judicial Immunity from Compulsory</p>	<p>No. Neither the PRC Arbitration Law nor the PRC Civil Procedure Law (as amended in 2012) stipulates that a party seeking to set aside an award needs to provide security. As a result, the party opposing a set aside action cannot apply for a Court order requiring the applicant to provide security.</p>	<p>The Court may set aside a foreign-related award (involving a foreign legal entity, for example) on the grounds of Article 274 of the PRC Civil Procedure Law (as amended), which are broadly similar to the ones in the Model Law.</p> <p>The grounds for setting aside a domestic award are slightly broader and not restricted to procedural and jurisdictional grounds only. For example, the Court may set aside a domestic award if one party “withheld</p>	<p>Yes. The Court will grant a stay of execution of an award if a party has applied to set aside the award (Article 64 of the PRC Arbitration Law).</p>	<p>Probably not. Neither the PRC Arbitration Law nor the PRC Civil Procedure Law (as amended) addresses a <i>Chromalloy</i>-type situation.</p>



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		<p>respondent’s properties for satisfying the award.</p> <p>(Chapter 21 of the PRC Civil Procedure Law (as amended in 2012)).</p> <p>In addition, Article 243 of the PRC Civil Procedure Law provides for third-party garnishment to satisfy the award.</p>	<p>Measures Concerning the Property of Foreign Central Banks).</p>		<p>material evidence impairing the fairness of the award” or “forged the evidence on which the arbitral award is based” (Article 58 of the PRC Arbitration Law).</p> <p>Enforcement of a foreign award may be denied only on New York Convention grounds (Article 283 of the PRC Civil Procedure Law (as amended)).</p>		
<b>England</b>	<p>Yes. An arbitral tribunal (if seated in England) may make orders for the detention of property that is the subject of the proceedings or owned by or in the possession of a party</p>	<p>Yes. Once the English courts have given permission to enforce an award, the award can be enforced as if it was an English</p>	<p>Yes. If a State agrees in writing to submit a dispute to arbitration, the State is no longer immune with respect to proceedings in the</p>	<p>Yes. Under s70(6) of the Act, the English courts may order the provision of security for the costs of an application or appeal</p>	<p>An award made in England may be challenged on the grounds that the tribunal lacked substantive jurisdiction (s67 of the Act); or</p>	<p>Yes. If the English courts grant permission to enforce an award, they may also stay the execution of that order for a limited period</p>	<p>Probably not, although the English courts have the discretion to enforce a foreign award that has been set side or that</p>

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	<p>to the proceedings (s38(4) of the Arbitration Act 1996 (the “Act”). In general, the Act requires parties to seek provisional measures from the arbitral tribunal, and only in exceptional circumstances, from the courts.</p> <p>The English courts have a broad power, i.e., in respect of property that is the subject of the proceedings or as to which questions arise (s44(2)(c)(i) of the Act). Generally, the courts will intervene only if the tribunal is unable to act effectively (s44(5)) (e.g. it is not yet constituted, or lacks power over the relevant party, e.g. a bank) or in urgent cases (s44(3)).</p>	<p>court judgment, including, for example, via a freezing injunction or a writ of Fieri Facias (seizing the debtor’s goods with a view to selling them).</p> <p>In addition, “third party debt orders” have replaced what were formerly known as “garnishee orders” (governed by part 72 of the Civil Procedure Rules), allowing garnishment of the award-debtor’s assets held by third parties.</p>	<p>courts which relate to the arbitration (s9 of the State Immunity Act 1987 (the “SIA”).</p> <p>The SIA generally prevents a party from enforcing an award against State-owned property (s13(2) of the SIA); however an exception exists in relation to arbitration awards for the issue of any process in respect of property that is for the time being in use or intended for use for “commercial purposes” (s13(4) of the SIA).</p>	<p>challenging an award (s70(6)) or for the money payable under the award to be brought into court or otherwise secured pending the determination of the application or appeal (s70(7)), and may direct that the application or appeal be dismissed if the order is not complied with.</p> <p>In accordance with s103(5) of the Act on foreign awards, the English courts may on the application of the party claiming recognition or enforcement of the award, order</p>	<p>there has been a serious irregularity affecting the tribunal, the proceedings or the award (s68 of the Act). On appeal, the court may confirm, vary or set aside the award.</p> <p>There also exists a right to appeal on a question of law (s69 of the Act) but this is rare in practice given it is usually waived by the parties in the arbitration agreement.</p> <p>Denial of enforcement of a foreign award may occur only on the grounds set out in the New York Convention</p>	<p>(pending an application to challenge the award).</p> <p>Where there are claims to set aside or suspend a foreign award pending in a foreign court, s103(5) of the Act permits the English courts to “adjourn the decision on the recognition or enforcement of the award” until the challenge has been finally determined in the foreign jurisdiction.</p>	<p>has been suspended by the courts in the seat of arbitration (s103(2)(f) of the Act and s104).</p>

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				the party seeking to set aside the foreign award to give suitable security.	(s103(2) and (3) of the Act).		
<b>France</b>	Yes. Before an arbitral tribunal is constituted, courts may order interlocutory measures. Even once an arbitral tribunal is constituted, a party can apply to a French court to attach assets in order to prevent the losing party from disposing of the goods. The requirements are twofold: (i) the debt must appear “in principle to be founded”; and (ii) a threat to the debt’s recovery must exist.	Yes. As soon as a final award has been rendered, and thus before obtaining leave to enforce ( <i>exequatur</i> ) by the court, a creditor may ask a bailiff to take immediate protective measures in order to prevent the losing party from disposing of the goods. The test is that: (i) the debt must appear “in principle to be founded”; and (ii) a threat to the debt’s recovery must	Yes. As a matter of principle, foreign States benefit from both immunity from jurisdiction and execution. However, in the <i>SEEE</i> case, the French Supreme Court found that by entering into an arbitration agreement, a State waives its immunity from jurisdiction (including its immunity in the framework of an action to obtain leave to enforce an award).  Moreover, in the <i>Creighton</i>	No. French law does not require the party attempting to set aside the award to provide suitable security to the court or the other party.	If the award has been made in France in an international arbitration, the only means of recourse is an action to set aside. Less than 10% of actions to set aside are successful.  There is no judicial review of the merits of an award. Legal or factual errors, or contradictions in the reasoning, cannot be invoked as a means to set aside the award.  Article 1520 of	No. As a general rule (except in domestic arbitration), actions to have an award set aside or to appeal the decision granting leave to enforce the award do not suspend its enforcement in France (Article 1526 of the French Code of Civil procedure, paragraph 1).  However, by way of an exception to the general rule, the judge ruling in expedited proceedings	Yes. The mere fact that the award has been set aside at the seat of the arbitration does not prevent its enforcement in France (see the decisions of the Court of Cassation in <i>Norsolor</i> (Civ 1, 9 October 1984, No. 83-11355), <i>Hilmarton</i> (Civ 1, 23 March 1994, No. 92-15137, and 10 June 1997, No. 95-18402), and <i>Putrabali</i> (29 June 2007, No. 05-18053)).

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		<p>exist.</p> <p>Once a final award has been rendered and leave to enforce has been obtained and notified to the losing party, a party can ask the court to seize assets of the debtor in France.</p> <p>Further, garnishment of debts owed to the award-debtor is also permitted.</p>	<p>decision, it was found that by agreeing to ICC arbitration (and to the application of article 34(6) of the ICC Rules), the State undertook to comply with the award and waived its immunity from execution.</p> <p>Finally, not all State assets can be seized. A party can only attempt to seize: (i) State-owned assets used in the activity pursuant to which the dispute arose; and more generally (ii) any asset utilized in relation to a commercial, as opposed to public-related, activity.</p>		<p>the French Code of Civil Procedure lists the grounds for setting aside an award:</p> <p>1° the arbitral tribunal wrongly upheld or declined jurisdiction;</p> <p>2° the arbitral tribunal was not properly constituted;</p> <p>3° the arbitral tribunal violated its mandate;</p> <p>4° due process was not respected; or</p> <p>5° recognition or enforcement of the award would be contrary to international public policy (the violation of</p>	<p>(<i>référé</i>) or the judge assigned to the matter before the Court of Appeal (<i>conseiller de la mise en état</i>), may stay or set conditions for enforcement of the award where enforcement could severely prejudice the rights of one of the parties (Article 1526 of the French Code of Civil procedure, paragraph 2).</p> <p>.</p>	

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					international public policy must be flagrant, effective and concrete).  A foreign award may be denied enforcement only on grounds (1) to (4) above.		
<b>Germany</b>	Yes. The German Code of Civil Procedure (§ 916 et seq.) generally provides for provisional seizure by arrest order, if the applicant can credibly substantiate its claim and the risk that enforcement without the arrest order would be substantially impeded.	Yes. Once a final award has been declared enforceable by the German courts, a party can ask the competent authority to seize movable and immovable property, claims for money and other economic rights of the debtor in Germany.  Garnishment of third-party debts owed to	Yes. Assets of other States which are used for sovereign purposes cannot be subject to enforcement measures. Property used for commercial purposes may be attached and executed upon.	No. Moreover, until the decision to declare the award enforceable has become <i>res judicata</i> (i.e. as long as a remedy is still available or pending), the enforcement of the award may be subject to the provision of adequate security by the award creditor.	German awards are subject to the annulment grounds laid out in §§ 1059, 1060 of the German Code of Civil Procedure. The grounds are similar to those in the Model Law.  Awards rendered outside Germany may only be denied enforcement on New York Convention grounds (most-	Possibly. The court may, on application by a party, order a stay of enforcement or permit the award debtor to continue only if he posts security.	No. Further, if an award has been recognized in Germany, the award debtor may apply for the revocation of enforcement under § 1061 III of the German Code of Civil Procedure if the award has been set aside at the seat of arbitration.

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		the award debtor is also possible.			favorable-treatment-principle applies).		
<b>Netherlands</b>	Yes, before an arbitration is commenced, a party whose claim on the face of it appears to be justified may be granted leave by the court to levy pre-award attachments. The court determines a time period within which the (arbitral) proceedings relating to the underlying claim should be instituted (generally two weeks to three months after the attachments were levied).	Yes, as soon as leave has been granted to enforce the arbitral award and the award has been served on the losing party by a bailiff, the award can be enforced by means of post-award attachments on the assets of the losing party in the Netherlands.  A broad category of assets can be attached, including debts owed to the respondent party by third parties.	Yes. Under Dutch Law it is not allowed to attach State-owned property that is meant for public services (article 436 Dutch Code of Civil Procedure (DCCP)). That is property that is “necessary and essential for the well-functioning of the public service in question”. The same applies for foreign State-owned property.	No. In principle the enforcement of the arbitral award is not suspended during setting-aside proceedings and therefore no security is required. However, a party may request suspension of execution during setting-aside proceedings. If that is granted, the requesting party may be required to provide security to the other party. If suspension is denied, the party opposing suspension may be required to	An arbitral award may only be challenged and set aside on the following restrictive grounds (article 1065 DCCP): (i) there was no valid arbitration agreement; (ii) the tribunal was constituted in violation of the applicable rules; (iii) the arbitral tribunal did not comply with its mandate; (iv) the award is not signed or does not state the grounds on which the decision is based; or (v) the award, or the manner in	Possibly. A party may request suspension of execution during the setting-aside proceedings.	Dutch courts normally give effect to setting-aside judgments rendered by the courts of the place of arbitration. However, in exceptional circumstances where the foreign court that set aside the award was not considered to be impartial and independent, Dutch courts could still allow the recognition and enforcement of the arbitral award (see <i>Yukos</i> cases).

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				provide security (article 1066, paragraph 5, DCCP).	which it was constituted, is in violation of public policy or good morals.  Enforcement of a foreign award may be denied only on New York Convention grounds.		
<b>Russia</b>	Yes. Upon a request of a party to a pending or potential arbitration, courts can attach assets in situations where the applying party shows that failure to do so could make enforcement of the award impossible, significantly complicate enforcement or cause the applicant to incur substantial damages.	Yes. Once a final award has been rendered, a party can apply to attach assets of (or depts. owed to) the debtor in conjunction with an application for recognition and enforcement of the award. Courts will grant such applications on the same grounds as for pre-award attachments.	Yes. Foreign States acting in a sovereign capacity enjoy legal immunity with respect to attachment of their assets located on the territory of the Russian Federation. As a general rule, enforcement against foreign State-owned property is admissible only with the consent of the competent authorities of the	Yes, upon a request of the party claiming enforcement of the award, the court may order the party which filed the application for the setting aside of the award to give suitable security.	A Russian court may set aside an award on Model Law grounds. Courts interpret very broadly the concept of public policy, which may include contradiction with Russian law rules or principles.  A foreign award may be denied enforcement based on the New York Convention grounds only.	Yes. If an application for the setting-aside of the award has been made to a competent court, the court before which the award is sought to be enforced may, if it considers it proper, adjourn the consideration of an application for enforcement of the award.	Possibly. If a Russian court set aside the award, it cannot be enforced by Russian courts. However, Russian courts may grant applications for enforcement of foreign awards despite the set-aside of these awards by foreign courts.

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			<p>relevant foreign State. Foreign States acting in a commercial capacity do not enjoy these immunities.</p> <p>Disputes involving Russian State-owned property, including issues related to privatization and compulsory alienation of property for State purposes, are within the sole jurisdiction of the Russian courts and cannot be referred to arbitral tribunals. As a practical matter, creditors experience difficulties enforcing arbitral awards against Russian State-owned enterprises</p>		<p>However, as noted, the concept of public policy is broadly interpreted by the Russian courts.</p>		



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			or companies in which federal or local authorities have a substantial interest.				
<b>USA (New York)</b>	<p>Yes. Before an arbitration is commenced, a party can apply to a New York court to attach assets if “the award to which the applicant may be entitled may be rendered ineffectual” without attachment. <i>See, e.g., Matter of Sojitz v. Prithci Information Solutions</i>, 921 N.Y.S.2d 14 (N.Y. App. Div. 2011).</p> <p>A broad class of assets can be attached, including third-party debts, and the proceeds of claims of the prospective award debtor. <i>See, e.g., Motorola Credit Corporation and</i></p>	<p>Yes. Once a final award has been rendered and confirmed as a judgment, a party can ask the court to seize assets of the debtor held by any party found in New York.</p> <p>In addition, a New York court can order the debtor or third parties holding assets belonging to the award debtor to turn over assets to satisfy a judgment, even if the assets are outside the United States. <i>See, e.g.,</i></p>	<p>Yes. Under the Federal Sovereign Immunities Act, sovereign property is generally immune from attachment.</p> <p>Section 1610(a)(6) of the FSIA allows for the post-judgment attachment (and in limited circumstances, the pre-judgment attachment) of the property of a foreign State that is used for commercial activity in the US. The FSIA defines commercial activity as “either a regular course of commercial conduct or a</p>	<p>Yes. New York courts can and do order provision of security for set-aside actions. <i>See, e.g., Caribbean Trading and Fidelity Corp. v. Nigerian Nat’l Petroleum Corp.</i>, 1990 U.S. Dist. LEXIS 17198 at *18 (S.D.N.Y. 1990).</p>	<p>Awards made in the U.S. that fall under the New York or Inter-American Conventions are subject to the FAA Chapter 1 grounds to vacate.</p> <p>Awards made outside the United States may only be denied enforcement on the grounds set out in the New York or Inter-American Conventions.</p>	<p>Yes. A court in New York has discretion to adjourn or suspend enforcement proceedings when an application has been made to have the arbitral award set aside or suspended. <i>See, e.g., Caribbean Trading and Fidelity Corp. v. Nigerian Nat’l Petroleum Corp.</i>, 1990 U.S. Dist. LEXIS 17198 at *18 (S.D.N.Y. 1990).</p>	<p>Unlikely, since U.S. courts accord considerable importance to the jurisdiction of the courts in the arbitral seat. <i>See, e.g., Spier v. Calzaturificio Tecnica, SpA</i>, 71 F.Supp.2d 279 (S.D.N.Y. 1999). However, U.S. courts have permitted annulled awards to be recognized in some circumstances. <i>See Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt</i>, 939 F.Supp. 907</p>

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	<i>Nokia Corporation v. Uzan</i> , Case 1:02-cv-00666-JSR-FM, Slip. op. at 9 (S.D.N.Y. Sept. 27, 2010).	<i>Koehler v. Bank of Bermuda Ltd.</i> , 12 N.Y.3d 533 (2009).	particular commercial transaction or act.... The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.”				(D.D.C. 1996).

**ANNEX B: COMPARISON OF INVESTMENT TREATY CASES**

<b>Case</b>	<b>Issue</b>	<b>Result</b>	<b>Investment?</b>	<b>Substantive Ground/Test</b>	<b>Quantum</b>
Saipem (ICSID)	Revocation/ Annulment	Claimant wins	Yes. Residual contractual rights as “crystallized” in ICC Award.	Expropriation. Revocation of authority of arbitrators and declaration of nullity of award violated “the principle of abuse of rights and the New York Convention.”	Full amount of ICC Award plus interest
Romak (UNCITRAL)	Non-enforcement	Claimant loses	No. Underlying transaction not an investment.	N/A	N/A
Frontier Petroleum (UNCITRAL)	Non-enforcement	Claimant loses	Yes. Underlying investment “transformed” into Award.	(i) Full Protection and Security: requires that courts are available, act in good faith and render decision that is “reasonably tenable.” (ii) Fair and Equitable Treatment: same.	N/A
ATA (ICSID)	Annulment/arbitration agreement voided	Claimant wins	Not decided if award is an investment. Right to arbitrate is a “distinct investment.”	Fair and Equitable Treatment: retroactive extinguishment of arbitration clause violated legitimate expectations and Article II of New York Convention.	Court proceedings stayed; new arbitration ordered
White Industries (UNCITRAL)	Annulment/delay in enforcement	Claimant wins	Yes. Award is “crystallization” of rights under contract.	Effective means clause: 9-year delay in deciding setting aside issues was denial of “effective means of asserting claims and enforcing rights”	Full amount of award
GEA (ICSID)	Non-enforcement	Claimant loses	No. Award is not equivalent to investment itself.	(i) Expropriation: no “egregious” or bad faith conduct by courts (ii) FET: no denial of justice (iii) Discriminatory treatment: not shown	N/A

### ANNEX C: COMPARISON OF ECtHR CASES

Case	Issue	Result	Threshold for Protection?	Substantive Ground/Test	Quantum
Stran Greek Refineries	Annulment / arbitration agreement voided	Applicant wins	P1-1: Yes. A claim, if sufficiently established, is a “possession.”	P1-1: Voiding of award and arbitration agreement violates fair balance	Full amount of award plus interest (at 6% rate granted in original award)
			Art. 6: Yes. Right to recover sums awarded is a “civil right.”	Art. 6: legislative intervention in court process constitutes violation	
Kin-Stib	Partial non-enforcement	Applicant wins	P1-1: A claim, if sufficiently established, is a “possession.”	P1-1: State must “use all available legal means in order to enforce a binding arbitral award”	Full outstanding amount of award plus interest (at marginal lending rate of the European Central Bank + 3%); Moral damages
			Art: 6: Court did not reach.	N/A	
Regent Company	Non-enforcement	Applicant wins	P1-1: Yes. A claim, if sufficiently established, is a “possession.”	P1-1: Continued non-enforcement constitutes a violation.	Full amount of award plus interest (at marginal lending rate of the European Central Bank + 3%)
			Art. 6: Yes. Right to recover sums awarded is a “civil right”	Art. 6: undue delay in enforcement proceedings constitutes violation	
Sedelmayer	Non-enforcement	Applicant loses	P1-1: Yes. Award is a “possession.”	P1-1: State struck fair balance where denied enforcement against property subject to sovereign immunity	N/A