

## From Judgment Day To Payday In International Disputes

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The case for breach of contract was strong. The lawyers were the best. The victory in the United States federal court was total. The judgment was for millions of dollars. But the defendant refuses to pay and all of the defendant's assets are in China. And China does not readily enforce American court judgments. On the day after judgment day, the judgment on the American court docket has not really moved the client any closer to payment. However, if the contract had contained an arbitration clause, and if the case had gone to arbitration, the client's otherwise pyrrhic victory very well could have been the first step toward its payday.

Whether a young enterprise making its first forays into cross-border contracts or an old-hand multinational entering a new market, businesses engaged in international transactions should consider contracting to arbitrate disputes because arbitration brings several more certain dispute resolution options that traditional litigation does not afford. Arbitration not only has the potential to offer a neutral forum and simplified, uniform rules, but also greater certainty of collecting on hard-fought victories. This article is a reminder to experienced and novice dealmakers and litigators that, when engaged in international business or litigation, ensuring disputes go to arbitration, rather than to unfamiliar court systems, is often the best assurance that litigation victories pay off.



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### Domestic Judgments Get Stuck at the Border

For businesses accustomed to contracting with domestic counterparts and litigating disputes in domestic courts, it can come as a surprise to discover that judgments from domestic courts often do not travel well abroad.

Judgments often get stuck at the border because there is no widely adopted international treaty or regime for their enforcement. In most jurisdictions, a foreign judgment is, at best, evidence of debt, which the claimant must sue on — again — and win before collecting. Attempts to implement treaties for the enforcement of judgments, such as the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments made little headway, and while the 2005 Hague Choice of Court Convention has taken effect, its initial coverage is limited.[1] There are also regional treaties and regimes such as the Brussel I Regulations and the 2007 Lugano Convention in the European Union and neighboring countries, the 1983 Riyadh Convention and 1996 Gulf Cooperation Council Protocol in the

Middle East, and the 1979 Montevideo Convention in Latin America. But these regional treaties only help if both the litigation and the enforcement action happen in state-parties to the treaties.

Where no regional or bilateral treaty applies, a party seeking to enforce a judgment must face off with the local law and courts of the enforcing country. Friendliness to the enforcement of foreign judgments varies greatly, and even the friendliest country's rules can be complex.

For example, courts in the United States generally favor the enforcement of foreign judgments. However, the laws are not uniform. Each state has its own statutes and common law rules about the enforceability of foreign judgments, and federal courts follow the laws of the states in which they sit. Thirty-two states have adopted a version of the model law 2005 Uniform Foreign-Country Money-Judgments Recognition Act or its predecessor. States following the model laws require proof of impartial justice, due process, and personal jurisdiction over the defendant, among other requirements. Several states also require reciprocity. When encountering a judgment from an unfamiliar locale, many states require expert testimony about that country's laws, judicial system, and reciprocity.

The United Kingdom is also friendly to foreign judgments. In addition to its Brussels I Regulation obligations to enforce EU judgments, the 1920 Administration of Justice Act ("AJA") and the 1933 Foreign Judgments Reciprocal Act ("FJRA") provide favorable treatment to judgments arising from commonwealth countries and other former British colonies, subject to defenses of jurisdiction, notice, public policy and, in the case of the AJA, whether enforcement of a judgment would be "just and convenient." Where neither a treaty nor other special rule applies, English common law governs, and provides for defenses to enforcement of consensual or territorial jurisdiction, notice, public policy, and natural justice (i.e., due process).

In the United Arab Emirates, enforcement of judgments is more difficult. By way of example, in the Emirate of Dubai, the Dubai Civil Court ("DCC") applies not only a "public morals" defense to enforcement, but will also refuse to enforce judgments against parties in cases over which the DCC court would have had original jurisdiction. Where, for instance, a plaintiff takes an American court judgment to the DCC to enforce against a resident of Dubai, the DCC will likely say the DCC was the proper forum for the dispute and will refuse to enforce the American judgment unless the Dubai resident has agreed to the American forum. The Dubai International Financial Center ("DIFC") Court is more obliging, so long as the defendant or its assets are located in the DIFC's limited jurisdiction, particularly for English Commercial Court judgments.[2]

On the other hand, the People's Republic of China is not so friendly when it comes to enforcing a foreign judgment.[3] Chinese courts require reciprocity, typically in the form of a treaty, between the originating country and China before they will enforce a judgment. Even then, Chinese courts will evaluate the merits of the judgment for a conflict with Chinese sovereignty, Chinese law, and Chinese security or social interests. Parties seeking to enforce American or English judgments will face substantial hurdles in China. Courts in Russia and India can be similarly unfriendly to enforcing foreign judgments, absent reciprocity with the judgment's country of origin, though English judgments are often enforceable in both countries.

### **Arbitration Treaties Facilitate Enforcement of Arbitral Awards**

Arbitration awards are far more enforceable across international borders than domestic court judgments because the New York Convention has been adopted in all but a handful of countries. Notable holdouts include Iraq, Taiwan, Equatorial Guinea, Angola, Namibia, Sudan, South Sudan, Libya,

Chad, Ethiopia, Yemen and much of sub-Saharan Africa.

In the rest of the world, the New York Convention has the force of law, and awards from arbitrations sited in one state party are enforceable in another state party. The New York Convention requires that the enforcing country “shall not ... impose substantially more onerous conditions ... on the recognition or enforcement of arbitral awards ... than are imposed on the recognition or enforcement of domestic arbitral awards.” That means that if a country would enforce a domestic arbitration award, it must enforce a foreign arbitration award under the same circumstances,[4] subject to many countries’ reservations that they will only enforce arbitral awards related to commercial disputes and from arbitrations held in a party-state to the New York Convention.

The New York Convention does create limited exceptions to the mandate of enforcement of arbitration awards, but they are small compared to the challenges facing court judgments. For instance, enforcement can be refused if the defendant was not given notice of the arbitration or the opportunity to present its case, if the arbitration was illegal under the law of the country where the arbitration was sited or has been set aside by that country, or if the arbitration is “contrary to the public policy of” the country where enforcement is sought. Of these, the public policy exception is the most potentially troublesome to enforcement, but it is often narrowly construed and applied.

The New York Convention vastly increases the likelihood of enforcement while simplifying the procedure. Returning to the earlier examples, United States courts are even friendlier to the enforcement of arbitral awards than to judgments. Unlike for judgments, the law of the enforcement of foreign arbitration awards is governed by uniform federal law in both state and federal courts. Under federal law, as mentioned above, the public policy defense is practically never successful, and a doctrine providing exceptions for “manifest disregard of the law” has also lost favor. There are a few points of caution. First, if attempting to enforce an award against a foreign state-owned company, the Foreign Sovereign Immunities Act might create difficulties. Second, the process of collecting the assets is governed by highly variable state law.

Likewise, in England and Wales, the enforcement of foreign arbitration awards is strongly favored under the 1996 Arbitration Act. The defenses resemble those listed in the New York Convention. In particular, the public policy exception is very limited in application.

In Dubai, both the DCC and the DIFC will enforce foreign arbitral awards relatively reliably. The DCC generally will enforce such an award even if it might arguably have had jurisdiction over the company or assets involved in the dispute. That said, a Dubai intermediary appellate court very recently refused to enforce a U.K. arbitration award against an energy company based in the UAE, claiming there was no evidence that the U.K. was a party to the New York Convention, even though such evidence is readily available and rarely required, and even though the UAE does not have a reciprocity reservation. That decision is being appealed.[5]

And, returning to the beginning, foreign arbitration awards can be successfully enforced in China (with some limitations), even if the arbitration was sited in the United States. In fact, foreign arbitration awards are more readily enforceable than awards from arbitrations seated in China. Importantly, only the Supreme People’s Court can make the final decision to refuse enforcement of a foreign arbitration award, part of a concerted effort by Chinese courts to provide a pro-enforcement environment for foreign arbitration awards.[6]

Russia and India remain trickier prospects even under the New York Convention, though foreign awards

clearly receive more favorable treatment than foreign judgments. Both countries have applied aggressive readings of the public policy exception in the name of domestic interests in the past, though the courts and a recent statutory amendment have recently improved the perceived position in India. And India imposes a burdensome reciprocity requirement that only recognizes awards from the around 50 countries notified in the Official Gazette of India.

In addition to the New York Convention, the 1975 Panama Convention between the United States and Latin American countries and the Riyadh Convention between Middle Eastern countries provide further avenues for the enforcement of awards in circumstances where the New York Convention might be unavailable.

The Panama Convention, which arose out of historical resistance among Latin American countries to the New York Convention, is now largely redundant with the New York Convention and is rarely invoked. Although under United States' law the Panama Convention should override the New York Convention where both apply, American courts treat the two identically. The Panama Convention does remain potentially relevant. For instance, it sets default arbitration rules and requires notice be provided of the applicable rules, and failure to comply with these requirements could render an arbitration unenforceable. Also, the Panama Convention could apply to NAFTA Chapter XI arbitrations between American investors and the government of Mexico,[7] and to similar disputes under the DR-CAFTA trade agreement between the Dominican Republic, Central American countries, and the United States.

The Riyadh Convention is a significant treaty for instances where a plaintiff seeks to enforce an arbitration award in Iraq, Libya, Yemen, Sudan, Somalia or the Palestinian Territories, which are members of the Riyadh Convention but not the New York Convention. Take Iraq, which in the past frowned upon international arbitration generally. Since 2011, some Iraqi courts have shown willingness to recognize and apply principles and rules borrowed from international arbitration absent domestic legislation,[8] and that willingness, combined with the Riyadh Convention, could provide an avenue to enforce awards from arbitrations in, for instance, Dubai. It is worth noting that while the Riyadh Convention resembles the New York Convention, its public policy exception extends to awards contrary to Islamic Shari'a, which complicates the enforcement of any award containing interest or damages for future losses.

### **The Lesson? Remember the Arbitration Clause**

When conducting business with foreign companies without assets in a convenient or friendly jurisdiction, arbitration is often the best way to improve the chances that the business will collect if it wins the dispute on the merits. Many countries important to international commerce will not enforce a foreign judgment, and even those that will enforce will impose complex procedures. On the other hand, nearly all countries will enforce foreign arbitration awards, if sometimes imperfectly. Thus it is critical when negotiating contracts with foreign counterparts to include an arbitration clause so that when disputes arise, the dispute goes to arbitration and the threat of collection after victory day is real.

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[1] The European Union and Mexico have ratified the Convention and it took effect on October 1, 2015. The United States, Singapore, and Ukraine have signed but not ratified the Convention. HCCH, Status Table: Convention of 30 June 2005 on Choice of Court Agreements (June 19, 2015).

[2] DIFC Courts, Memorandum of Guidance as to Enforcement Between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales (2013), <http://difccourts.ae/memorandum-of-guidance-as-to-enforcement-between-the-difc-courts-and-the-commercial-court-queens-bench-division-england-and-wales/>.

[3] The following countries have enforcement treaties with China: Uzbekistan, Kazakhstan, Kirghizia, Tajikistan, Turkey, Cyprus, Laos, Vietnam, Mongolia, Bulgaria, Belarus, Poland, Russia, Romania, Ukraine, Hungary, Lithuania, Spain, Italy, France, Greece, Argentina, Cuba, Egypt, Morocco, and Tunisia. Hong Kong and Macao also have specific reciprocal arrangements.

[4] Note that Article VII of the New York Convention provides that the New York Convention does not alter rights available under existing multilateral or bilateral arbitration treaties.

[5] Global Arbitration Review, Dubai Court Questions UK's Accession to New York Convention (Apr. 7, 2016).

[6] China International Economic & Trade Arbitration Comm'n, Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China; China International Economic & Trade Arbitration Comm'n, Circular of the Supreme People's Court on Issues in the People's Courts Handling of Foreign-related Arbitrations and Foreign Arbitrations (Aug. 28, 1995).

[7] Waste Mgmt., Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, at 9-11, 15-18 (Sept. 26, 2001).

[8] See, e.g., Iraqi Ministry of Finance v Fincantieri-Cantieri Navali Italiani S.P.A., No. 288/B/2011 (Federal Appeal Court of Baghdad – Al-Rusafa Sept. 30, 2012).

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