

With us magazine: litigation needn't be a gamble

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Turning a judgment of a court or an award by an arbitration tribunal into actual money can be a challenging, expensive and time-consuming process, even where the assets awarded are held in the same jurisdiction. Problems can quickly multiply when parties are seeking to enforce judgments overseas. Withers partners in London, New York, Singapore and the British Virgin Islands share their experience of finding solutions.

Globalisation has fuelled commercial activity in many areas. The recognition and enforcement of foreign judgments and arbitral awards is a prime example and it's an issue that makes headlines every day.

Take Yukos, for instance. In June 2015, the Kremlin announced that its lawyers were investigating France and Belgium's moves to freeze Russian state assets in their respective jurisdictions. The four main shareholders in Yukos had been awarded US\$50 billion damages against Russia by an arbitration panel in The Hague – the largest arbitration award in history. When Russia refused to pay the damages, the shareholders were forced to have the ruling enforced in other countries where they would be allowed to seize Russian assets in compensation.

International investment treaty lawyer Hussein Haeri explains: "In many cases, foreign judgments and arbitral awards will be recognised in overseas jurisdictions under bilateral or multilateral treaties. Obtaining a judgment or arbitral award in your favour is often the easiest part of the process. The difficulties begin when you seek to enforce these awards overseas to actually receive the money."

Planning ahead

So what do you do if you are based in Latin America and you obtain a judgment against a party whose assets are located in Germany, or Malaysia, or New York?

Dean Nicyper, co-head of US Litigation continues: "Often we see people trying to bring lawsuits in jurisdictions where they think the courts will be most favourable towards them. That can be a serious error. Before you even consider litigation, it's absolutely vital when drafting clauses in contracts to make sure parties have the ability to proceed in any jurisdiction where the other party's assets are located. There is a danger in using an exclusive jurisdiction clause (for example, stating that all parties must litigate in New York). It will serve little purpose if the other party's assets are mainly in Mexico."

Talking tactics

Reaching agreement on the preferred forum for litigation or arbitration is an important decision. In addition to dictating the speed, cost and effectiveness of proceedings, the choice of forum can also directly impact recognition and enforcement of any subsequent judgment or award.

Of course, where possible, the best advice is nearly always to resolve a dispute before any proceedings begin. Dean explains: "An approach that clients often find beneficial and less expensive is mandatory mediation, pre-litigation. We all forget that the courts exist to resolve disputes, but they are not perfect, and there is no guarantee that they will make the correct decision." Once seen as a cost-effective alternative to litigation, arbitrations today have moved closer to lawsuits. Peter Wood, Global Head of Litigation, based in London, points out: "It's essential to get your choice of law and/or choice of jurisdiction right. First, choice of law: it's quite commonplace for cross-border contracts to be written under English law. That's because the neutrality of the UK's judges is well recognised, and also because fair decisions are usually reached in a reasonable period of time. It's also easy to enforce the awards across Europe and in the Commonwealth. But it can be much harder to enforce them in the US – and this is often overlooked."

Deborah Barker, managing partner of Withers KhattarWong in Singapore, continues: "Arbitration provides a neutral forum. It's consensual and, in Singapore at least, it's still considered to be relatively quick compared to court proceedings in many other countries. Until recently, where contracts were governed by English law, it's been usual for the parties to select London as the location. Now, however, the increase in commercial

activity involving at least one Asian country has fuelled a need for rapid resolution of disputes within the region.”

Finding the most effective tools

Peter adds: “It’s important to weigh the pros and cons of litigation and arbitration very carefully. Arbitration makes sense when parties wish to keep the award confidential. And provided enforcement of that award will be taking place in a country that has adopted the New York Convention, there shouldn’t be too many problems. Remember too that there are only very limited grounds for appeal against arbitral awards, as compared to judgments from a court.”

Hussein notes that: “The two most significant multilateral treaties for enforcing arbitral awards internationally are the New York Convention and the Washington (or ICSID) Convention. These add a valuable additional layer of enforcement protection for investors against governments that wrongfully treat their investments unfairly or discriminate or expropriate them.”

“For litigation within the EU,” Peter adds, “there are regimes in place to assure reciprocal enforcement of judgments in civil and commercial matters. For example, a Russian client was exclusive agent for the sale of an Italian company’s assets in Russia. When a dispute escalated, she had to sue them under contract in Italy. And because she knew that that could take three to four years, and that was too long to wait for a commercial outcome, it pushed her into doing a different deal and settling out of court. Ask yourself what matters most. Relatively inexpensive court proceedings, or obtaining an award as rapidly as possible?”

Looking to Asia

What about the enforcement of awards in Asia? Deborah explains: “Arbitration has become increasingly popular here for settling cross-border disputes involving at least one Asian country. There’s an assumption that enforcement will be relatively straightforward where countries have adopted the New York Convention (within Asia-Pacific, these countries are Australia, Singapore, Hong Kong and Indonesia).”

As a result, Singapore is now one of Asia’s most popular arbitration locations, with the Singapore International Arbitration Centre established as a leading forum for commercial dispute resolution, as Deborah explains: “Singapore has adopted the UNCITRAL Model Law, and implemented the appropriate international conventions so recognition and enforcement of awards will usually be straightforward. And it offers sophisticated support facilities, legal expertise and communications infrastructure in a geographically convenient location.”

Withers KhattarWong litigation partner Chia Ho Choon highlights a recent development that, he predicts, could see Singapore becoming an increasingly popular hub for cross-border litigation: “The start of 2015 saw the opening of the Singapore International Commercial Court (SICC), a forum that seeks to integrate the best of international arbitration and Singapore judicial procedures. Over time, once more reciprocal enforcement has been agreed, the SICC could prove to be a very attractive ‘neutral’ option for litigants from certain countries, including India and Indonesia, where court proceedings can last for years.”

Enforcing in the BVI

Estimates indicate that more than 40 percent of the world’s offshore companies are registered in the British Virgin Islands (BVI). As a result, international litigation, such as insolvency litigation, fraud and asset tracing, often involves a BVI offshore component.

Niki Olympitis, Head of Withers’ BVI office, picks up the story: “Before enforcing a judgment here, it is vital to consider whether the other party has assets within the jurisdiction that can actually be enforced against. Provided that is the case, there are two main options: a simplified and relatively straightforward procedure for judgments obtained from the UK, New South Wales, Belize, Guyana, Nigeria and certain Caribbean territories; for territories outside that list, enforcement at common law is the only way.”

Having signed up to the New York Convention in 2014, the BVI also provides for straightforward enforcement of arbitration awards from over 150 countries. “Without challenge, which is only permitted in limited circumstances,” Niki continues, “it takes weeks, or at most months, for an award to be enforced here. A new arbitration law, based on the UNCITRAL Model Law, has also paved the way for a new international arbitration centre.”

Summing up

Enforcement of judgments and awards in cross-border disputes can often be a complex, three-dimensional puzzle. It’s often a costly error to bank on a successful economic outcome, simply because a contract appears to be watertight, and strategic legal advice, early on, is critical to ensuring that a successful enforcement of a judgment can be achieved.

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