

Enforcing arbitral awards in England & Wales



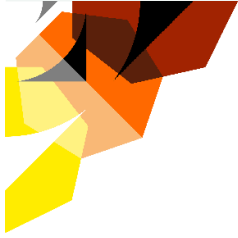
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Introduction

Where a party has obtained a favourable arbitration award in a jurisdiction other than England and Wales and the respondent to those arbitration proceedings has assets in this jurisdiction, the successful party may wish to enforce the arbitration award here.

This guide will consider the steps that the successful party must take in order to be able to do so.

The international framework

The UK (which comprises, England, Wales, Scotland and Northern Ireland) is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention") and as a result will recognize and enforce awards made in other contracting states. Given the number of signatory nations to the New York Convention, in most instances the enforcement of foreign arbitral awards will be governed by the New York Convention. As a result and while there are other ways to enforce foreign arbitral awards apart from the New York Convention, this guide will deal solely with enforcement under the New York Convention.

The hurdle

While in most instances an arbitral award is final and binding on the parties, an arbitral award is incapable of direct enforcement. As a result, it is necessary to enlist the assistance of the court of the country in which the award is to be enforced. The aim of the New York Convention is to provide a common framework which all signatory countries must adopt when deciding whether to enforce a foreign arbitral award. The New York Convention allows foreign arbitral awards to be enforced with some amount of ease in the court of another signatory state.

The law governing arbitrations in England and Wales

The Arbitration Act 1996 (the "Act") regulates matters relating to arbitrations which arise in England and Wales, whether or not the seat (place) of the arbitration is in England. So if a party wishes to enforce a foreign arbitral award in England and Wales, they need to have regard to the Act. The Act gives effect to and implements the New York Convention.

So how can a successful party enforce in England and Wales an arbitration award made in another jurisdiction? Alternatively, how can a respondent seek to resist the enforcement of a foreign arbitral award in England and Wales?

For the purposes of this guide it is assumed that the party seeking to enforce the award was the claimant in the arbitration and so the party against whom the award is being enforced is the respondent.

Recognition and enforcement

The New York Convention and the Act distinguish between the recognition and enforcement of arbitral awards.

As far as recognition is concerned (i.e. treating a "foreign" award as if it were a domestic award), the Act provides that an arbitration award made in the territory of a state (other than the United Kingdom) which is a party to the New York Convention shall be recognised as binding on the parties to the arbitration. That means it can be relied on by way of a defence, set-off or otherwise in any legal proceedings in England and Wales.

As regards enforcement (i.e. treating a "foreign" award as if it were a domestic judgment), the court may give permission for judgment to be entered in terms of the award. Where this is done, the award may be enforced in the same manner as an English court judgment.

The possible escape routes

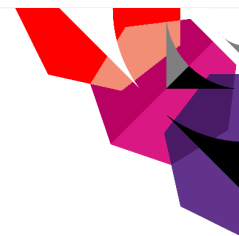
Recognition or enforcement of a New York

Convention award is mandatory, except in eight specified events. It may be refused if the respondent can establish, on the balance of probabilities, one (or more) of the following possible eight defences:

- ▶ A party to the arbitration agreement was (under the law applicable to it) under some incapacity. Usually it will, of course, be the incapacity of the respondent, but it could be the claimant. While it is not clear what law is being referred to in order to define "incapacity", it is thought that the applicable law is the law where the party concerned is domiciled. Expert evidence in respect of that law may be required. So for example, if the applicable law prevents a corporate entity from entering into an arbitration agreement, that will be sufficient to come within this section.
- ▶ The arbitration agreement was not valid under the law which governed the arbitration or, if there is uncertainty as to which law governed the arbitration, under the law of the country where the award was made. In the absence of an express choice of law clause, the fall back position is likely to be the law of the seat (place) of the arbitration. This ground concerns the validity of the arbitration agreement and not the validity of the underlying contract as a whole.
- ▶ A party was (i) not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or (ii) was otherwise unable to present its case.

As regards the first limb, the Act does not define what "proper notice" is. If this challenge is raised, the English court will have to ascertain the procedural rules applicable to the arbitration and determine whether they were complied with.

As regards the second limb, whatever the procedure, the English court will want to ascertain for itself whether the respondent had a proper



opportunity to present its own case and answer that of the claimant. Did the respondent see and have the opportunity to comment upon all the evidence submitted in the arbitration? Did the tribunal consider secret evidence which it did not communicate to the parties? The English court will want to ensure that the rules of “natural justice” have been properly complied with.

The English court will enforce the award if the respondent was given the opportunity to present its case but failed to avail itself of the opportunity to do so.

- ▶ The award deals with a dispute which falls outside the terms of the notice of intention to refer to arbitration or contains decisions on matters beyond the scope of the notice. This ground concerns jurisdictional questions rather than procedural questions. The question for the court will be whether the tribunal exceeded the scope of its jurisdiction.

If the award is capable of separation, it is open to the court to enforce that part of the award which was within the tribunal’s jurisdiction and refuse to enforce that part which went outside the tribunal’s jurisdiction.

- ▶ The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, with the law of the country of the seat (place) of the arbitration.

There are two parts to this ground. The first relates to the composition of the tribunal.

So if, for example, the parties agreed that their dispute should be submitted to three arbitrators but only one determined the dispute, the respondent may have a ground to object.

Notwithstanding that there has been a breach of the agreed rules,

the court will enquire whether there was a waiver of the agreed rules by the objecting party. So for example, the court will enquire whether the objecting party waived its right to object by, for example, taking part in the arbitration without reserving its rights. If the respondent took part in the arbitration without registering its objection and reserving its rights, the court is unlikely to exercise its discretion in that party’s favour.

The second ground of objection depends on whether the correct procedure was adopted. In order to succeed on this ground, the respondent would have to show not only that the procedure was materially different from that which had been agreed but also that the use of the “wrong” procedure adversely affected its ability to present its own case to the tribunal or address the claimant’s case.

- ▶ The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made. If the arbitration agreement or the law which governs it requires another step to be taken e.g. the need to have the award confirmed by a judgment of the local court, the award may not become binding until that step has been taken.

Where the court of the seat has set aside an award, if that decision of the court of the seat is entitled to recognition as a matter of English conflict of law rules, the English court will not enforce the award. Otherwise, the English court still retains a discretion to enforce.

If an application has been made to the supervising court (which is likely to be the court where the seat (place) of the arbitration was) to review the award and that application is still pending at the time of the enforcement hearing in the English court, the English court may adjourn the enforcement proceedings and, in the interim, order

the respondent to give security to the claimant. When deciding whether to order security to be provided, the English court will assess the merits of the challenge and consider the difficulty of enforcement if security is not ordered, especially if there is to be delay in enforcing the award.

- ▶ The award is in respect of a matter which is not capable of settlement by arbitration. The English court will apply English law in deciding whether or not a matter is capable of settlement by arbitration. There are matters under English law which cannot be decided by means of arbitration (e.g. the custody of children).
- ▶ The enforcement of the award would be contrary to English public policy. As a matter of English law, this ground is given a narrow interpretation. An example might be an award enforcing a contract to smuggle artefacts out of a certain country or an agreement to pay bribes or any other contract where the object of the underlying contract was illegal.

How to turn an award into a judgment

An application to enforce a New York Convention award is usually made without notice to the respondent by issuing an Arbitration Claim Form in the English court supported by a witness statement exhibiting:

- ▶ a duly authenticated original award or a duly certified copy
- ▶ the original arbitration agreement or a certified copy
- ▶ where the award or arbitration agreement is in a foreign language, a translation of it certified by an official, sworn translator or by a diplomatic or consular agent

As the application is without notice, the claimant must make full disclosure of all material facts. A failure by the claimant to disclose all material facts may result in the enforcement order made by the English

court being set aside.

Once the English court has made the order recognising the award, it is likely that the court will require the respondent to be served with a copy of the order together with the original application.

If the respondent is not domiciled in England, the claimant will need the permission of the English court to serve the enforcement proceedings abroad on the respondent. The presence of assets in England is not a pre-requisite to the court giving permission.

Once the court has given permission for the enforcement of the award, the respondent will have a limited amount of time to apply to the court to set aside the court's order.

If the order is not set aside it can be enforced as if it was a judgment of the English court. The claimant will then be able to enforce the judgment immediately.

What to do with the judgment

In summary, the main methods of enforcing a judgment in England and Wales are:

Third party debt order:

On the basis of the unsatisfied judgment, the judgment creditor can obtain a (further) order from the court but this time against a third party who owes money to the judgment debtor. The order will require the third party to pay the money which it owes to the judgment debtor directly to the judgment creditor rather than to the judgment debtor. This can be used in relation to a bank account belonging to the judgment debtor (assuming that it is in credit). As a result, it is always useful if you

can obtain details of the judgment debtor's bank account(s).

Charging order and order for sale:

The judgment creditor can obtain a charge over the property belonging to the judgment debtor. A charging order gives the judgment creditor some security in relation to the unsatisfied judgment, which can be enforced if necessary. A charge, however, does not materialise into payment of the judgment sum unless and until the property over which the charge is obtained is sold. You will also need to consider whether there are other charges over the property which will take priority over yours.

Writs and Warrants of control:

This authorises a court enforcement officer, on behalf of the judgment creditor, to seize the judgment debtor's goods up to the value of the judgment debt with a view to selling them at auction. As a result, it is always useful to have some information as to what saleable goods the judgment debtor owns and what the value of those goods is.

Insolvency:

Applying to put the judgment debtor into insolvency results in someone closely supervising the judgment debtor's finances with a view to paying the debtor's creditors. The threat of insolvency alone can be an effective means to persuade the judgment debtor to satisfy the judgment debt, without any further action being required.

Freezing injunction:

If the judgment creditor has reason to believe that the judgment debtor is

attempting to dissipate its assets beyond the reach of the judgment creditor, or may do so in the near future, an injunction may be obtained to prevent the judgment debtor from doing so.

For more information on how to enforce an arbitration award in England and Wales or any other matter covered by this guide, please contact:



Andrew Wanambwa
Partner

+44 (0)20 7074 8160
andrew.wanambwa@lewissilkin.com



Nigel Enticknap
Managing Associate

+44 (0)20 7074 8336
nigel.enticknap@lewissilkin.com