CHALLENGING AND ENFORCING ARBITRATION AWARDS GUIDE

THIRD EDITION

General Editor
J William Rowley KC

Editor
Benjamin Siino

Challenging and Enforcing Arbitration Awards Guide

Third Edition

General Editor

J William Rowley KC

Editor

Benjamin Siino

Published in the United Kingdom by Law Business Research Ltd
Holborn Gate, 330 High Holborn, London, WC1V 7QT, UK
© 2023 Law Business Research Ltd
www.globalarbitrationreview.com

No photocopying: copyright licences do not apply.

The information provided in this publication is general and may not apply in a specific situation, nor does it necessarily represent the views of authors' firms or their clients. Legal advice should always be sought before taking any legal action based on the information provided. The publishers accept no responsibility for any acts or omissions contained herein. Although the information provided was accurate as at April 2023, be advised that this is a developing area.

Enquiries concerning reproduction should be sent to: insight@globalarbitrationreview.com. Enquiries concerning editorial content should be directed to the Publisher – david.samuels@lbresearch.com

ISBN 978-1-80449-248-2

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

Acknowledgements

The publisher acknowledges and thanks the following for their learned assistance throughout the preparation of this book:

Aequo Law Firm

Alston & Bird LLP

Borden Ladner Gervais LLP

CANDEY Ltd

Cecil Abraham & Partners

Cleary Gottlieb Steen & Hamilton LLP

Debevoise & Plimpton

De Brauw Blackstone Westbroek

EPLegal Limited

FloresRueda Abogados

Freshfields Bruckhaus Deringer

Gaillard Banifatemi Shelbaya Disputes

G Elias

Gernandt & Danielsson Advokatbyrå

Gibson, Dunn & Crutcher UK LLP

Gide Loyrette Nouel

Gün + Partners

Han Kun Law Offices

Hogan Lovells International LLP

Holman Fenwick Willan LLP

Horizons & Co Law Firm

Kellerhals Carrard

Khaitan & Co

Kim & Chang

King & Spalding International LLP

KL Partners

Knoetzl Haugeneder Netal Rechtsanwälte GmbH

Letelier Campora

Loyens & Loeff

Martínez de Hoz & Rueda

Meltem Avocats AARPI

MLL Meyerlustenberger Lachenal Froriep

Reed Smith LLP

Resource Law LLC

Steptoe & Johnson LLP

Stirnimann Fuentes Dispute Resolution

Studio Legale ArbLit

Three Crowns LLP

Tilleke & Gibbins

Torys LLP

Twenty Essex

Whitewell Legal SLP

Wolf Theiss Rechtsanwälte GmbH & Co KG

Publisher's Note

Global Arbitration Review is delighted to publish this new edition of the *Challenging and Enforcing Arbitration Awards Guide*.

For those new to Global Arbitration Review, we are the online home for international arbitration specialists, telling them everything they need to know about all the developments that matter. We provide daily news and analysis, alongside more in-depth books and reviews. We also organise conferences and build workflow tools that help you to research arbitrators and enable you to read original arbitration awards. And we have an online 'academy' for those who are newer to international arbitration. Visit us at www.globalarbitrationreview.com to learn more.

As the unofficial 'official journal' of international arbitration, sometimes we are the first to spot gaps in the literature. This guide is a fine example. As J William Rowley KC observes in his excellent preface, it became obvious recently that the time spent on post-award matters had increased vastly compared with, say, 10 years ago, and a reference work focusing on this phase was overdue.

The *Challenging and Enforcing Arbitration Awards Guide* fills that gap. It is a practical know-how text covering both sides of the coin – challenging and enforcing – first at thematic level, and then country by country. We are delighted to have worked with so many leading firms and individuals to produce it.

If you find it useful, you may also like the other books in the GAR Guides series. They cover construction, energy, evidence, intellectual property, M&A, mining disputes and telecommunications in the same unique, practical way. We also have books on advocacy in international arbitration, the assessment of damages, and investment treaty protection and enforcement.

My thanks to the editors for their vision and energy in pursuing this project and to our authors and my colleagues in production for achieving such a polished work.

David Samuels
London
April 2023

Contents

Preface xiii
J William Rowley KC

PART I: SELECTED ISSUES

1 Awards: Early-Stage Consideration of Enforcement Issues 3
Sally-Ann Underhill and M Cristina Cárdenas

2 The Arbitral Award: Form, Content, Effect 13
Venus Valentina Wong and Dalibor Valinčić

3 Awards: Challenges 24
Shaparak Saleh and Etienne Vimal du Monteil

4 Arbitrability and Public Policy Challenges 38
Penny Madden KC and Ceyda Knoebel

5 Jurisdictional Challenges 54
James Collins, James Glaysher, Petar Petkov, Lilit Nagapetyan and Mukami Kuria

6 Due Process and Procedural Irregularities 69
Juliya Arbisman, Alexandre Genest and Emmanuel Giakoumakis

7 Awards: Challenges Based on Misuse of Tribunal Secretaries 82
Chloe J Carswell and Lucy Winnington-Ingram

8 Substantive Grounds for Challenge 100
John Terry, Emily Sherkey, T Ryan Lax and Chris Kinnear Hunter

9 Enforcement under the New York Convention 114
Emmanuel Gaillard† and Benjamin Siino

10 Enforcement of Interim Measures 133
James E Castello and Rami Chahine

11 Prevention of Asset Stripping: Worldwide Freezing Orders 152
Damian Honey, Nicola Gare and Caroline West

12 Grounds to Refuse Enforcement 160
Sébastien Fries, Martin Molina, Annemarie Streuli and Denise Wohlwend

13 Admissibility of New Evidence When Seeking Set-Aside 173
Joel E Richardson and Sue Hyun Lim

14 ICSID Awards 187
Christopher P Moore, Laurie Achtouk-Spivak and Zeïneb Bouraoui

15 Enforcement Strategies where the Opponent is a Sovereign 202
Alexander A Yanos and Kristen K Bromberek

PART II: JURISDICTIONAL KNOW-HOW

16 Argentina 217
José A Martínez de Hoz and Francisco A Amallo

17 Austria 244
Patrizia Netal, Florian Haugeneder and Natascha Tunkel

18 Belgium 262
Hakim Boularbah, Olivier van der Haegen and Anaïs Mallien

19 Canada 291
Mathieu Piché-Messier, Karine Fahmy, Ira Nishisato and Hugh Meighen

20 Chile 319
Francesco Campora Gatica and Juan Pablo Letelier Ballocchi

21 China 337
Xianglin Chen

22 England and Wales....371
Oliver Marsden and Rebecca Zard

23 France....402
Christophe Seraglini and Camille Teynier

24 Germany....426
Boris Kasolowsky and Carsten Wendler

25 Hong Kong....447
Tony Dymond, Cameron Sim and Lillian Wong

26 India....472
Sanjeev K Kapoor and Saman Ahsan

27 Italy....503
Massimo Benedettelli and Marco Torsello

28 Malaysia....530
Tan Sri Dato' Cecil W M Abraham, Aniz Ahmad Amirudin and Shabana Farhaana Amirudin

29 Mexico....552
Cecilia Flores Rueda

30 Netherlands....567
Marnix Leijten, Erin Cronjé, Abdel Zirar and Eva Koopman

31 Nigeria....597
Gbolahan Elias, Ayodeji Adeyanju and Larry Nkwor

32 Poland....615
Piotr Sadownik, Krzysztof Ciepliński and Małgorzata Tuleja

33 Russia....633
Natalia Gulyaeva

34 Singapore....658
Kohe Hasan, Min Jian Chan and Anand Tiwari

35 South Korea 691
Young Suk Park, Byung Chul Kim, Seulgi Oh and Woo Ji Kim

36 Spain 711
Pablo Martínez Llorente and Daniel Rodriguez Galve

37 Sweden 733
Björn Tude, Daniel Waerme, Oscar Nyrén and Martin Bengtsson

38 Switzerland 753
Franz Stirnimann Fuentes, Jean Marguerat, James F Reardon and Tomás Navarro Blakemore

39 Thailand 787
Michael Ramirez, Noppramart Thammateeradaycho and Anyamani Yimsaard

40 Turkey 803
Asena Aytuğ Keser and Direnç Bada

41 Ukraine 823
Pavlo Byelousov and Ksenia Koriukalova

42 United Arab Emirates 844
Muhammad Mohsin Naseer

43 United States 871
Elliot Friedman, David Y Livshiz and Paige von Mehren

44 Vietnam 889
Nguyen Trung Nam and Nguyen Van Son

About the Authors 911
Contributors' Contact Details 953

Preface

During the past two decades, the explosive and continuous growth in cross-border trade and investments that began after World War II has jet-propelled the growth of international arbitration. Today, arbitration (whether *ad hoc* or institutional) is the universal first choice over transnational litigation for the resolution of cross-border business disputes.

Why parties choose arbitration for international disputes

During the same period, forests have been destroyed to print the thousands of papers, pamphlets, scholarly treatises and texts that have analysed every aspect of arbitration as a dispute resolution tool. The eight or 10 reasons usually given for why arbitration is the best way to resolve cross-border disputes have remained pretty constant, but their comparative rankings have changed somewhat. At present, two reasons probably outweigh all others.

The first must be the widespread disinclination of those doing business internationally to entrust the resolution of prospective disputes to the national court systems of their foreign counterparties. This unwillingness to trust foreign courts (whether based on knowledge or simply uncertainty as to whether the counterparty's court system is worthy – in other words, efficient, experienced and impartial) leaves international arbitration as the only realistic alternative, assuming the parties have equal bargaining power.

The second is that, unlike court judgments, arbitral awards benefit from a series of international treaties that provide robust and effective means of enforcement. Unquestionably, the most important of these is the 1958 New York Convention, which enables the straightforward enforcement of arbitral awards in 169 countries (at the time of writing). When enforcement against a sovereign state is at issue, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1966 requires that ICSID awards are to be treated as final judgments of the courts of the relevant contracting state, of which there are currently 158.

Awards used to be honoured

International corporate counsel who responded to the 2008 Queen Mary/PricewaterhouseCoopers Survey on Corporate Attitudes and Practices in Relation to Investment Arbitration (the 2008 Queen Mary Survey) reported positive outcomes on the use of international arbitration to resolve disputes. A very high percentage (84 per cent) indicated that, in more than 76 per cent of arbitration proceedings, the non-prevailing party voluntarily complied with the arbitral award. Where enforcement was required, 57 per cent said that it took less than a year for awards to be recognised and enforced, 44 per cent received the full value of the award and 84 per cent received more than three-quarters of the award. Of those who experienced problems in enforcement,

most described them as complications rather than insurmountable difficulties. The survey results amounted to a stunning endorsement of international arbitration for the resolution of cross-border disputes.

Is the situation changing?

As an arbitrator, my job is done with the delivery of a timely and enforceable award. When the award is issued, my attention invariably turns to other cases, rather than to whether the award produces results. The question of enforcing the award (or challenging it) is for others. This has meant that, until relatively recently, I have not given much thought to whether the recipient of an award would be as sanguine today about its enforceability and payment as those who responded to the 2008 Queen Mary Survey.

My interest in the question of whether international business disputes are still being resolved effectively by the delivery of an award perked up a few years ago. This was a result of the frequency of media reports – pretty well daily – of awards being challenged (either on appeal or by applications to vacate) and of prevailing parties being required to bring enforcement proceedings (often in multiple jurisdictions).

Increasing press reports of awards under attack

In the year before the first edition of this guide, Global Arbitration Review's daily news reports contained hundreds of headlines that suggested that a repeat of the 2008 Queen Mary Survey today could well lead to a significantly different view as to the state of voluntary compliance with awards or the need to seek enforcement. Indeed, in the first three months of 2023, there has not been a day when the news reports have not headlined the attack on, survival of, or a successful or failed attempt to enforce an arbitral award.

A sprinkling of recent headlines on the subject are illustrative:

- Nigeria seeks to overturn US$11 billion award;
- Russia fails to quash jurisdictional awards in Crimea cases;
- Swiss court upholds multibillion-dollar Yukos award;
- Swedish courts annul intra-EU treaty awards;
- Indian court annuls billion-dollar award for 'fraud';
- Malaysia challenges mega-award in French court;
- GE pays out after losing corruption challenge in legacy case;
- Ukrainian bank's billion-dollar award against Russia reinstated;
- Burford wins enforcement against Kyrgyzstan;
- India loses Dutch appeal over treaty award;
- ECJ dismisses London award in oil spill saga;
- 'Fifteen years is long enough': US court enforces Conoco award;
- Pakistan fails to stay Tethyan award in US; and
- India fails to upend latest award in protracted oil and gas dispute.

Regrettably, no source of reliable data is available as yet to test the question of whether challenges to awards are on the increase or the ease of enforcement has changed materially since 2008. However, the importance of the subject (without effective enforcement, there really is no effective resolution), and my anecdote-based perception of increasing concerns, led me to raise the possibility of doing a book on the subject with David Samuels (Global

Arbitration Review's publisher). Ultimately, we became convinced that a practical, 'know-how' text that covered both sides of the coin – challenges and enforcement – would be a useful addition to the bookshelves of those who more frequently than in the past may have to deal with challenges to, and enforcement of, international arbitration awards. Being well equipped (and up to date) on how to deal with a client's post-award options is essential for counsel in today's increasingly disputatious environment.

David and I were obviously delighted when Gordon Kaiser and the late Emmanuel Gaillard agreed to become partners in the project. It was a dreadful shock to learn of Emmanuel's sudden death in April 2021. Emmanuel was an arbitration visionary. He was one of the first to recognise the revolutionary changes that were taking place in the world of international arbitration in the 1990s and the early years of the new century. From a tiny group defined principally by academic antiquity, we had become a thriving, multicultural global community, drawn from the youngest associate to the foremost practitioner. Emmanuel will be remembered for the enormous contribution he made to that remarkable evolution.

Editorial approach

As editors, we have not approached our work with a particular view on whether parties are currently making inappropriate use of mechanisms to challenge or resist the enforcement of awards. Any consideration of that question should be made against an understanding that not every tribunal delivers a flawless award. As Pierre Lalive said some 40 years ago:

> *an arbitral award is not always worthy of being respected and enforced; in consequence, appeals against awards [where permitted] or the refusal of enforcement can, in certain cases, be justified both in the general interest and in that of a better quality of arbitration.*

Nevertheless, the 2008 Queen Mary Survey, and the statistics kept by a number of the leading arbitral institutions, suggest that the great majority of awards come to conclusions that should normally be upheld and enforced.

Structure of the guide

The guide is structured to include, in Part I, coverage of general issues that will always need to be considered by parties, wherever situate, when faced with the need to enforce or to challenge an award. In this third edition, the 15 chapters in Part I deal with subjects that include initial strategic considerations in relation to prospective proceedings; how best to achieve an enforceable award; challenges generally and a variety of specific types of challenges; enforcement generally and enforcement against sovereigns; enforcement of interim measures; how to prevent asset stripping; grounds to refuse enforcement; and admissibility of new evidence.

Part II of the guide is designed to provide answers to more specific questions that practitioners will need to consider when reaching decisions concerning the use (or avoidance) of a particular national jurisdiction – whether this concerns the choice of that jurisdiction as a seat of an arbitration, as a physical venue for the hearing, as a place for enforcement, or as a place in which to challenge an award. This edition includes reports on 29 national

jurisdictions. The author, or authors, of each chapter have been asked to address the same 58 questions. All relate to essential, practical information about the local approach and requirements relating to challenging or seeking to enforce awards. Obviously, the answers to a common set of questions will provide readers with a straightforward way in which to assess the comparative advantages and disadvantages of competing jurisdictions.

With this approach, we have tried to produce a coherent and comprehensive coverage of many of the most obvious, recurring or new issues that are now faced by parties who find that they will need to take steps to enforce these awards or, conversely, find themselves with an award that ought not to have been made and should not be enforced.

Quality control and future editions

Having taken on the task, my aim as general editor has been to achieve a substantive quality consistent with the *Challenging and Enforcing Arbitration Awards Guide* being seen as an essential desktop reference work in our field. To ensure content of high quality, I agreed to go forward only if we could attract as contributors those colleagues who were some of the internationally recognised leaders in the field. My fellow editors and I have felt blessed to have been able to enlist the support of such an extraordinarily capable list of contributors.

In future editions, we hope to fill in important omissions. In Part I, these could include chapters on successful cross-border asset tracing, the new role of funders at the enforcement stage, and the special skill sets required by successful enforcement counsel. In Part II, we plan to expand the geographical reach even further.

Without the tireless efforts of the Global Arbitration Review team at Law Business Research, this work never would have been completed within the very tight schedule we allowed ourselves; David Samuels and I are greatly indebted to them. Finally, I am enormously grateful to Doris Hutton Smith (my long-suffering PA), who has managed endless correspondence with our contributors with skill, grace and patience.

I hope that all my friends and colleagues who have helped with this project have saved us from error – but it is I alone who should be charged with the responsibility for such errors as may appear.

Although it should go without saying, this edition of the publication will obviously benefit from the thoughts and suggestions of our readers on how we might be able to improve the next edition, for which we will be extremely grateful.

J William Rowley KC
London
April 2023

CHAPTER 39

Thailand

Michael Ramirez, Noppramart Thammateeradaycho and Anyamani Yimsaard[1]

Applicable requirements as to the form of arbitral awards

Applicable legislation as to the form of awards

1 Must an award take any particular form?

The award must be made in accordance with requirements under Section 37 of the Arbitration Act BE 2545 (2002), which reads as follows:

> *The award shall be made in writing and signed by members of the arbitral tribunal. In arbitral proceedings with more than one arbitrator, the signatures of the majority shall suffice, provided that the reason for the omission of any signature is stated.*
>
> *Unless otherwise agreed by the parties, the award shall clearly state the reasons for making such decisions. However, it shall not prescribe or decide on any matters falling beyond the scope of the arbitration agreement or the relief sought by the parties, except an award rendered in accordance with the settlement agreement under Section 36, or the fixing of arbitration fees, expenses or remunerations of the arbitrator under Section 46.*
>
> *The award shall state the date and the place of arbitration under Section 26, Paragraph one and such award shall be deemed to have been made at that place.*
>
> *After the award is made, the arbitral tribunal shall send a copy of the award to all parties.*

1 Michael Ramirez is a counsel, Noppramart Thammateeradaycho is a partner and Anyamani Yimsaard is an associate at Tilleke & Gibbins.

Applicable procedural law for recourse against an award (other than applications for setting aside)

Applicable legislation governing recourse against an award

2 Are there provisions governing modification, clarification or correction of an award? Are there provisions governing retractation or revision of an award? Under what circumstances may an award be retracted or revised (for fraud or other reasons)? What are the time limits?

Pursuant to Section 39 of the Arbitration Act, within 30 days of the date of receipt of the award, a party to the dispute may file a motion requesting the arbitral tribunal to correct any errors in numerical computation, clerical or typographical errors or minor mistakes in the award. Further, if so agreed, a party to the dispute may also file a motion requesting the arbitral tribunal to give an interpretation or clarification of any point or part of the award, provided that a copy of the request is also delivered to the other party. A copy of the request must be delivered to the other party.

If the arbitral tribunal considers the request for correction or interpretation to be justified, it will make the correction or give an interpretation within 30 days of the date of receipt of the request. The interpretation or clarification is deemed to form part of the award.

The arbitral tribunal may correct any errors or mistakes in numerical computation, clerical or typographical errors or minor mistakes on its own initiative within 30 days of the date of the award.

Unless otherwise agreed by the parties, any party to the dispute, with notice to the other party, may file a motion within 30 days of the date of receipt of the award, requesting the arbitral tribunal to make an additional award regarding the claims omitted from the award. If the tribunal considers the request to be justified, it will make the additional award within 60 days of the date of receipt of the request, which can be extended if necessary.

Appeals from an award

3 May an award be appealed to or set aside by the courts? What are the differences between appeals and applications to set aside awards?

An award can only be set aside by the courts. Under Thai law, appeals are for challenges on the merits or on legal issues of the court decision. They must be submitted in the form of an appeal to the court, and the opposing party must reply. Alternatively, an application for setting aside can be submitted as an *ex parte* application, and the opposing party can file an opposition against the application.

Applicable procedural law for setting aside of arbitral awards

Time limit

4 Is there a time limit for applying for the setting aside of an arbitral award?

Yes, applications for setting aside must be filed within 90 days of receipt of a copy of the award. For requests to the arbitral tribunal regarding making a correction or interpretation of the award, or for making an additional award, the 90-day period is counted from the date of correction or interpretation of the award or the additional award by the arbitral tribunal.

Award

5 What kind of arbitral decision can be set aside in your jurisdiction? What are the criteria to distinguish between arbitral awards and procedural orders in your jurisdiction? Can courts set aside partial or interim awards?

Arbitral awards are the only kind of arbitral decisions that can be set aside. Partial or interim awards have unclear legal status in terms of whether the court should consider them as awards. A partial or interim award would be considered as a request from a party asking the court to assist in the arbitral tribunal's order.

Thai courts, therefore, will apply differing approaches to accept or dismiss a partial or interim order of the arbitral tribunal. This would not the same as enforcing or setting aside an arbitral award.

Competent court

6 Which court has jurisdiction over an application for the setting aside of an arbitral award? Is there a specific court or chamber in place with specific sets of rules applicable to international arbitral awards?

The Intellectual Property and International Trade Court has jurisdiction over applications for setting aside. There is no specific court or chamber with specific sets of rules that apply to international arbitral awards.

Form of application and required documentation

7 What documentation is required when applying for the setting aside of an arbitral award?

There are no specific requirements regarding documentation when applying to the competent court for the setting aside of an arbitral award. The applicant must submit the application and the grounds for setting aside.

Translation of required documentation

8 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with the application for the setting aside of an arbitral award? If yes, in what form must the translation be?

There are no required documents regarding setting-aside applications; however, any foreign documentation submitted must be accompanied by certified translations into Thai.

Other practical requirements

9 What are the other practical requirements relating to the setting aside of an arbitral award? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

There are no other practical requirements for setting aside apart from the submission of the setting-aside application pursuant to Section 40 of the Arbitration Act. There is no limitation on the length of the submission or documentation filed by parties. Documents in other languages should be translated into Thai.

Form of the setting-aside proceedings

10 What are the different steps of the proceedings?

Proceedings start with filing the setting-aside application. A copy of the application will be delivered to the opposing party, and the court will schedule a hearing to consider the application. The opposing party can file an opposition. Both parties are allowed to present witnesses and supporting evidence.

Suspensive effect

11 May an arbitral award be recognised or enforced pending the setting-aside proceedings in your jurisdiction? Do setting-aside proceedings have suspensive effect? If not, which court has jurisdiction over an application to stay the enforcement of the award pending the setting-aside proceedings, what are the different steps of the proceedings, and what are the criteria to be met?

No. Courts in Thailand are entitled to enforce or set aside the arbitral award regardless of pending setting-aside proceedings.

For commercial contract disputes, the Intellectual Property and International Trade Court, the court where the arbitration took place and the court for the area where either the claimant or the respondent resides have jurisdiction over an application to stay the enforcement of an award pending setting-aside proceedings.

For disputes over an administrative contact – in which one party is the government, a state enterprise or a local administrative unit – the Administrative Court will have jurisdiction.

Proceedings for the enforcement of such an award do not differ from those for normal arbitral awards.

Grounds for setting aside an arbitral award

12 What are the grounds on which an arbitral award may be set aside?

The grounds for setting aside are prescribed in Section 40 of the Arbitration Act as follows:

> *(1) The party filing the motion can furnish proof that:*
> *(a) a party to the arbitration agreement was under some incapacity under the law applicable to that party;*

(b) the arbitration agreement is not binding under the law of the country agreed to by the parties, or failing any indication thereon, under the law of Thailand;

(c) the party making the application was not given proper advance notice of the appointment of the arbitral tribunal or of the arbitral proceedings or was otherwise unable to defend the case in the arbitral proceedings;

(d) the award deals with a dispute not within the scope of the arbitration agreement or contains a decision on a matter beyond the scope of the arbitration agreement. However, if the award on the matter that is beyond the scope thereof can be separated from the part that is within the scope of the arbitration agreement, the court may set aside only the part that is beyond the scope of the arbitration agreement or clause; or

(e) the composition of the arbitral tribunal or the arbitral proceedings was not in accordance with the agreement of the parties or, unless otherwise agreed by the parties, in accordance with this Act.

(2) Where the court finds that:

(a) the award deals with a dispute that cannot be settled by arbitration under the law; or

(b) the recognition or enforcement of the award would be contrary to public policy.

Scope of power of the setting-aside judge

13 When assessing the grounds for setting aside, may the judge conduct a full review and reconsider factual or legal findings from the arbitral tribunal in the award? Is the judge bound by the tribunal's findings? If not, what degree of deference will the judge give to the tribunal's findings?

No, the judge is bound by the tribunal's findings.

Waiver of grounds for setting aside

14 Is it possible for an applicant in setting-aside proceedings to be considered to have waived its right to invoke a particular ground for setting aside? Under what conditions?

No.

Decision on the setting-aside application

15 What is the effect of the decision on the setting-aside application in your jurisdiction? What challenges or appeals are available?

Under the Arbitration Act, an order or judgment of the court will not be subject to appeal unless:

- the recognition or enforcement of the award would be contrary to public policy or good morals;
- the order or judgment is contrary to provisions of law relating to public policy or good morals;
- the order or judgment conflicts with the arbitral award;

- the judge who tried the case has given a dissenting opinion in the judgment; or
- the order concerns the imposition of provisional measures for the protection of interests of a qualifying party to the dispute.

Effects of decisions rendered in other jurisdictions

16 Will courts take into consideration decisions rendered in relation to the same arbitral award in other jurisdictions or give effect to them?

No, Thai courts do not consider decisions rendered in relation to the same arbitral award in other jurisdictions or give effect to them.

Applicable procedural law for recognition and enforcement of arbitral awards

Applicable legislation for recognition and enforcement

17 What is the applicable procedural law for recognition and enforcement of an arbitral award in your jurisdiction? Is your jurisdiction party to treaties facilitating recognition and enforcement of arbitral awards?

Thailand is a party to the 1958 New York Convention and enacted the Arbitration Act accordingly.

The New York Convention

18 Is the state a party to the 1958 New York Convention? If yes, what is the date of entry into force of the Convention? Was there any reservation made under Article I(3) of the Convention?

Yes, Thailand is a party to the New York Convention, without reservation, effective as of 19 December 1959.

Recognition proceedings

Time limit

19 Is there a time limit for applying for the recognition and enforcement of an arbitral award?

Yes, a party to the dispute who seeks enforcement of the arbitral award must file the relevant motion with the competent court within three years of the date the award became enforceable.

Competent court

20 Which court has jurisdiction over an application for recognition and enforcement of an arbitral award? Is there a specific court or chamber in place with specific sets of rules applicable to international arbitral awards?

The Intellectual Property and International Trade Court has jurisdiction over an application for recognition and enforcement of an arbitral award. There is no specific court or chamber with specific sets of rules applicable to international arbitral awards.

Jurisdictional and admissibility issues

21 What are the requirements for the court to have jurisdiction over an application for recognition and enforcement and for the application to be admissible? Must the applicant identify assets within the jurisdiction of the court that will be the subject of enforcement for the purpose of recognition proceedings?

There is no requirement under the Arbitration Act that an applicant must be able to identify assets within the jurisdiction of the court. The Act only provides that the arbitral award, irrespective of the country in which it was made, is binding on the parties to the dispute and, on application to the competent court, will be enforced.

Form of the recognition proceedings

22 Are the recognition proceedings in your jurisdiction adversarial or *ex parte*? What are the different steps of the proceedings?

Recognition proceedings are *ex parte*, but the opposing party in an arbitral proceeding may file an opposition against the recognition application. The steps in these proceedings do not differ from those in other court proceedings. The proceeding starts with the submission of an application requesting recognition, and a copy is sent to the other party. The court schedules a hearing for the application and the opposition (if any). It then schedules a hearing for the reading of the order.

Form of application and required documentation

23 What documentation is required to obtain recognition?

The following documentation is required:

- the original award or a certified copy thereof;
- the original arbitration agreement or a certified thereof; and
- a Thai translation of the award and the arbitration agreement:
  - prepared by a translator who has taken an oath or made a pledge before the court or in the presence of an official or person with the authority to accept an oath or a pledge;
  - certified by an official with the authority to certify translations; or
  - prepared by a Thai diplomatic agent or consul in the country in which the award or arbitration agreement was made.

Translation of required documentation

24 If the required documentation is drafted in a language other than the official language of your jurisdiction, is it necessary to submit a translation with an application to obtain recognition? If yes, in what form must the translation be?

Yes, a translation is required. A Thai translation of the award and of the arbitration agreement must be:

- prepared by a translator who has taken an oath or made a pledge before the court or in the presence of an official or person with the authority to accept an oath or a pledge;

- certified by an official with the authority to certify translations; or
- prepared by a Thai diplomatic agent or consul in the country in which the award or arbitration agreement was made.

Other practical requirements

25 What are the other practical requirements relating to recognition and enforcement? Are there any limitations on the language and length of the submissions and of the documentation filed by the parties?

There are no other practical requirements relating to recognition and enforcement. The application should follow the requirements prescribed by law. The documentation must be translated into Thai. There are no requirements regarding the length of submissions or of the documentation filed by the parties.

Recognition of interim or partial awards

26 Do courts recognise and enforce partial or interim awards?

Yes.

Grounds for refusing recognition of an arbitral award

27 What are the grounds on which an arbitral award may be refused recognition? Are the grounds applied by the courts different from the ones provided under Article V of the New York Convention?

The grounds for refusing recognition are based on those provided under Article V of the New York Convention.

Scope of power of the recognition judge

28 When assessing the grounds for refusing recognition, may the recognition judge conduct a full review and reconsider factual or legal findings from the arbitral tribunal in the award? Is the judge bound by the tribunal's findings? If not, what degree of deference will the judge give to the tribunal's findings?

No, the judge is bound by the tribunal's finding.

Waiver of grounds for refusing recognition

29 Is it possible for a party to be considered to have waived its right to invoke a particular ground for refusing recognition of an arbitral award?

No.

Effect of a decision recognising an arbitral award

30 What is the effect of a decision recognising an arbitral award in your jurisdiction?

The decision becomes final and is not subject to appeal unless it meets any of the grounds for appeal prescribed in Section 45 of the Arbitration Act. The arbitral award will be binding on the parties to the disputes and will be enforced.

Decisions refusing to recognise an arbitral award

31 What challenges are available against a decision refusing recognition in your jurisdiction?

The applicant can appeal against the decision refusing recognition on the following grounds pursuant to Section 45 of the Arbitration Act:

- the recognition or enforcement of the award would be contrary to public policy or good morals;
- the order or judgment is contrary to provisions of law relating to public policy or good morals;
- the order or judgment conflicts with the arbitral award;
- the judge who tried the case has given a dissenting opinion in the judgment; or
- the order concerns the imposition of provisional measures for the protection of interests of a qualifying party to the dispute.

Recognition or enforcement proceedings pending annulment proceedings

32 What are the effects of annulment proceedings at the seat of the arbitration on recognition or enforcement proceedings in your jurisdiction?

This might result in grounds for the court to issue an order refusing enforcement of an arbitral award, or the court may adjourn the hearing if it deems appropriate on application from the party claiming enforcement of the award. The court might also order the party to provide appropriate security.

Security

33 If the courts adjourn the recognition or enforcement proceedings pending annulment proceedings, will the defendant to the recognition or enforcement proceedings be ordered to post security?

The Arbitration Act has no provision regarding an order to post security if the court adjourns recognition or enforcement proceedings pending annulment proceedings; however, it is possible for the court to order, or the parties to request, a security deposit.

Recognition or enforcement of an award set aside at the seat

34 Is it possible to obtain the recognition and enforcement of an award that has been fully or partly set aside at the seat of the arbitration? If an arbitral award is set aside after the decision recognising the award has been issued, what challenges are available?

No. If an arbitral award is set aside after the decision recognising the award has been issued, no challenges are available.

Service

Service in your jurisdiction

35 What is the procedure for service of extrajudicial and judicial documents to a defendant in your jurisdiction? If the extrajudicial and judicial documents are drafted in a language other than the official language of your jurisdiction, is it necessary to serve these documents together with a translation? When is a document considered to be served to the opposite party?

The procedure for service of extrajudicial and judicial documents is prescribed in the Civil Procedure Code, and service is allowed via international registered postal services. The document must be served with a translation and is considered served when it has been posted at the registered address.

Service out of your jurisdiction

36 What is the procedure for service of extrajudicial and judicial documents to a defendant outside your jurisdiction? Is it necessary to serve these documents together with a translation in the language of this jurisdiction? Is your jurisdiction a party to the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the Hague Service Convention)? Is your jurisdiction a party to other treaties on the same subject matter? When is a document considered to be served to the opposite party?

Thailand is not a party to the Hague Service Convention; however, it has entered bilateral treaties with some countries in relation to the service process. The document must be served with a translation and will be considered served when it has been posted at the registered address.

Identification of assets

Asset databases

37 Are there any databases or publicly available registers allowing the identification of an award debtor's assets within your jurisdiction? Are there any databases or publicly available registers providing information on award debtors' interests in other companies?

No, there is no public database available to identify an award debtor's assets or interests in other companies.

Information available through judicial proceedings

38 Are there any proceedings allowing for the disclosure of information about an award debtor within your jurisdiction?

There are no proceedings allowing for disclosure of information about an award debtor within Thailand. A document is considered to be served when it has been served with the court's summons at the relevant party's registered address.

Enforcement proceedings

Attachable property

39 What kinds of assets can be attached within your jurisdiction?

Movable property, immovable property and intangible assets can be attached within Thailand.

Availability of interim measures

40 Are interim measures against assets available in your jurisdiction? Is it possible to apply for interim measures under an arbitral award before requesting recognition? Under what conditions?

Yes, it is possible to file an application for interim measures against assets before requesting recognition. The possible conditions to request interim measures are prescribed in the Civil Procedure Code and include that (1) to delay or obstruct the execution, the party intends to remove the whole or part of the property in dispute or its property from the jurisdiction of the court or to transfer, sell or dispose of the property, or (2) there is any other necessary reason that the court considers to be just and reasonable.

Procedure for interim measures

41 What is the procedure to apply interim measures against assets in your jurisdiction?

The process is initiated by an application for interim measures showing that:

- to delay or obstruct the execution of any decree that may be made against the debtor or to prejudice the creditor, the debtor of the arbitral award intends to remove the whole or part of the property in dispute or his or her property from the jurisdiction of the court, or transfer, sell or dispose of the property; or
- there are other necessary grounds that the court considers to be just and reasonable.

Interim measures against immovable property

42 What is the procedure for interim measures against immovable property within your jurisdiction?

The procedure for interim measures against immovable property is governed by the provision on the execution of judgments or orders in the Civil Procedure Code *mutatis mutandis*.

Interim measures against movable property

43 What is the procedure for interim measures against movable property within your jurisdiction?

The procedure for interim measures against movable property is governed by the provisions regarding the execution of judgments or orders in the Civil Procedure Code *mutatis mutandis*.

Interim measures against intangible property

44 What is the procedure for interim measures against intangible property within your jurisdiction?

The procedure for interim measures against intangible property is governed by the provisions on the execution of judgments or orders in the Civil Procedure Code *mutatis mutandis*.

Attachment proceedings

45 What is the procedure to attach assets in your jurisdiction? Who are the stakeholders in the process?

The procedure to attach assets is governed by the Civil Procedure Code and the relevant provisions regarding the type of asset. Generally, the process is initiated by an application filed by a creditor, and the court will appoint an executor official to proceed with the attachment.

Attachment against immovable property

46 What is the procedure for enforcement measures against immovable property within your jurisdiction?

The procedure for enforcement measures against immovable property is prescribed in the Civil Procedure Code. In seizing a judgment debtor's immovable property, the executing officer:

1. places the property certificate in his or her custody or deposits the certificate with any person deemed appropriate, unless the property certificate has not yet been issued or cannot be obtained;
2. expressly makes known that the property has been seized by posting a notice; and
3. provides a notification of the list of properties seized to the following persons:
   - the judgment debtor;
   - the other person whose name is indicated on the register as an owner of the property; and
   - the land official or the competent official who has the power and duty to register rights and juristic acts in relation to the property. If the property is on the register, the land official or competent official will record the seizure on the register.

Regarding point (3), if the notification cannot be made as required by law, the list of the properties seized must be posted in locations stipulated by law or posted by other means of notification deemed appropriate by the executing officer.

Attachment against movable property

47 What is the procedure for enforcement measures against movable property within your jurisdiction?

In seizing a judgment debtor's movable property, the executing officer:

- places the property in his or her custody, deposits it at any place or with any person deemed appropriate, or entrusts the property to the judgment debtor for preservation on obtaining the consent of the judgment creditor;
- provides a notification of the list of properties seized to the judgment debtor and the person who possesses or maintains the property. If the notification cannot be made, the list of the property seized is to be posted at the place of seizure, or the notification will be made by other means deemed appropriate by the executing officer; and
- expressly makes known that the property has been seized by affixing a seal or by any other method deemed appropriate by the executing officer.

Attachment against intangible property

48 What is the procedure for enforcement measures against intangible property within your jurisdiction?

The procedure for enforcement measures against intangible property varies depending on the type of intangible property. Generally, the seizure will be carried out by notifying the judgment debtor of the list of rights seized.

Regarding the seizure of securities under securities and exchange of a judgment debtor, the executing officer will carry out the seizure by taking the following actions:

- If the instrument has not yet been issued, the executing officer will provide a notification of the list and number of the securities seized to the judgment debtor and securities issuer. Once the securities have been seized, the executing officer will order the securities issuer to deliver the instrument to the executing officer.
- If the instrument has already been issued, the executing officer will provide a notification of the list and number of the securities seized to the judgment debtor, the securities issuer and the known securities possessor, as well as the persons obliged to perform an obligation under the instrument. Once the securities have been seized, the executing officer will place the instruments in his or her custody, if feasible.
- For securities deposited with the Securities Depository Centre under the law on securities and exchange, the executing officer will provide a notification of the list and the number of the securities seized to the judgment debtor, the securities issuer, the securities depositor and the Securities Depository Centre under the Securities and Exchange Act BE 2535 to ensure compliance with the notification of the executing officer.

- For instruments of securities that do not need to be issued, the executing officer will provide a notification of the list and the number of the securities seized to the judgment debtor and the securities issuer to ensure compliance with the notification of the executing officer.
- If the notification cannot be made to the necessary persons, the list and the number of the securities seized shall be posted in locations stipulated by law or by other means of notification deemed appropriate by the executing officer.

In seizing a judgment debtor's patent rights, trademark rights or other rights of similar nature that have already been registered or listed, the execution officer will carry out the seizure by:

- notifying the judgment debtor of the list of the rights seized. If the notification cannot be made, the list and number of the securities seized shall be posted in locations stipulated by law or by other means of notification deemed appropriate by the executing officer; and
- notifying the registrar or the competent official who has the power and duty regarding the registration under the law to record the seizure on the register.

The first step above also applies to seizing a judgment debtor's rights in unregistered trademarks, copyrights, rights to apply for a patent, rights in trade name or brand, or other rights of similar nature.

Attachments against sums deposited in bank accounts or other assets held by banks

49 Are there specific rules applicable to the attachment of assets held by banks? Is it possible to attach in your jurisdiction sums deposited in bank accounts opened in a branch or subsidiary of a foreign bank located in your jurisdiction or abroad? Is it possible to attach in your jurisdiction the bank accounts opened in a branch or subsidiary of a domestic bank located abroad?

No, there are no specific rules on the attachment of assets held by banks.

Piercing the corporate veil and alter ego

50 May a creditor of an award rendered against a private debtor attach assets held by another person on the grounds of piercing the corporate veil or alter ego? What are the criteria, and how may a party demonstrate that they are met?

No, the grounds of piercing the corporate veil or alter ego are not recognised.

Recognition and enforcement against foreign states

Applicable law

51 Are there any rules in your jurisdiction that specifically govern recognition and enforcement of arbitral awards against foreign states?

There are no rules or laws in Thailand that specifically govern the recognition and enforcement of arbitral awards against foreign states.

Service of documents to a foreign state

52 What is the procedure for service of extrajudicial and judicial documents to a foreign state? Should they be served through diplomatic channels? Is it necessary to serve extrajudicial and judicial documents together with a translation in the language of the foreign state? When is a document considered to be served to a foreign state?

Service of extrajudicial and judicial documents to a foreign state now can be made via international registered post, unless the court has ordered otherwise (e.g., ordered a party to serve via the judicial service of the court or via the Ministry of Foreign Affairs). Documents must be served together with their translations. Documents are considered to be served when they are posted at the address of the recipient.

Immunity from jurisdiction

53 May a foreign state invoke sovereign immunity (immunity from jurisdiction) to object to the recognition or enforcement of arbitral awards?

No.

Availability of interim measures

54 May award creditors apply interim measures against assets owned by a sovereign state?

No.

Immunity from enforcement

55 Are assets belonging to a foreign state immune from enforcement in your jurisdiction? Which classes of assets belonging to states are immune from enforcement as a matter of principle? Are there exceptions to immunity? How can it be proven whether an asset is immune from enforcement? Provide practical examples of assets belonging to states that were successfully attached in your jurisdiction.

Yes, enforcement does not cover assets belonging to a foreign state. There are no specific rules or regulations in relation to this issue.

Waiver of immunity from enforcement

56 Is it possible for a foreign state to waive immunity from enforcement in your jurisdiction? What are the requirements of waiver?

No.

Piercing the corporate veil and alter ego

57 Is it possible for a creditor of an award rendered against a foreign state to attach the assets held by an alter ego of the foreign state within your jurisdiction? What are the criteria, and how may a party demonstrate that they are met? Provide practical examples of assets held by alter egos that were successfully attached by a state's creditor in your jurisdictions.

There are no criteria under Thai law in relation to attaching assets held by an alter ego of a foreign state within Thailand.

Sanctions

58 May property belonging to persons subject to national or international sanctions be attached? Under what conditions? Is there a specific procedure?

No specific procedure is available under Thai law.

Enforcement used to be a non-issue in international arbitration. Most losing parties simply paid. Not so any more. The time spent on post-award matters has increased vastly, and challenges to awards have become the norm.

The *Challenging and Enforcing Arbitration Awards Guide* is a comprehensive volume that addresses this new reality. It offers practical know-how on both sides of the coin: challenging and enforcing awards. Part I provides a full thematic overview, while Part II delves into the specifics seat by seat, now covering 29 jurisdictions.

Visit globalarbitrationreview.com
Follow @GAR_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-80449-248-2