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INTERNATIONAL COMMERCIAL ARBITRATION: THINK AHEAD – TO ENFORCING ANY AWARD

You have a commercial claim for money. You want payment. You may have to litigate or go to arbitration.

In litigation the theoretical end-product is a judgment. You really want payment, not judgment (unless you need a precedent). But if you are stuck with a defendant who can't or won't pay, you may have to go to judgment. If he still doesn't pay, you will have to enforce the judgment, by finding his assets (he won't help) and converting them into money. The judgment may be not the end but only a step towards recovery.

If the assets are in a foreign state you will not be able to enforce an English judgment there unless there is a bilateral agreement for reciprocal enforcement or a multilateral convention such as the Brussels Convention regime now in Regulation 44/2001 for the EC. But these apply only to a limited number of countries: do not assume that you can enforce your judgment elsewhere.

Happily most claims are resolved along the way and frequently long before judgment. In England about 1% go the whole way to a judgment. But if you discover only after obtaining judgment that enforcement is impossible or too costly, the "success" may turn out to be an expensive disaster.

Are you better off if your claim has to go to arbitration? In international arbitration (increasingly common as trade becomes more international) two things should be borne in mind: the percentage of awards which have to be enforced is about 20% (compare 1% for judgments), and it is almost certain that you will have to go to another jurisdiction to enforce. Here, too, there is the risk of an expensive disaster if you obtain an award but cannot enforce it.

Enforcement of international arbitration awards is enormously assisted by the 1958 New York Convention which provides a useful and very successful code. 144 states are signatories – broadly all commercially significant states with certain notable exceptions, e.g. Angola and Iraq. Many more states will permit the enforcement of a foreign arbitration award than a foreign judgment.

However (there is always a "however": dispute resolution is never straightforward if, typically, your opponent is determined to obstruct the process indefinitely) whatever the NYC says about the obligations of the enforcement state, you will still have to make use of its national courts. Some national courts are pro-enforcement and reasonably quick. Others (e.g. India) are regarded as slow. Others again (e.g. China and Russia) as being difficult (although some commentators say this is changing). Much may depend on the jurisdiction (province, canton etc). Formalities aside, attitudes vary to matters such as sovereign immunity and public policy.

National courts have different time limits for enforcing awards: Austria and Cameroon 30 years, USA and South Africa 3 years, Alberta and China 2 years. Many have no time limit, e.g. Germany and Japan. In Romania and Denmark it depends on the nature of the award, in Ireland and New Zealand it depends on whether the arbitration agreement was under seal or in a deed.

Understanding of the problems of enforcement is helped by a recent ICC guide to national rules. This is useful at the dispute stage, and even more at the contract stage. The guide sets out the law of about half the NYC signatories including time limits, evidence, and formalities.

It also reveals many idiosyncrasies, from the requirement for the consent of a government minister in SA if the subject-matter is natural resources to the terms on which a stay might be granted in Brazil and the requirement for security.

As in Aesop's Fables, the moral: do not defer thinking about enforcement until the judgment or award. Think about enforcement when drafting the contract. Are you likely to be the judgment/award creditor? If so, where are the assets of the debtor? How easily could you enforce a judgment or an award there? Is that state a signatory to the NYC? What is the attitude of its national courts to enforcing foreign awards or judgments? What time limits apply? Consideration at the contract stage of the possibilities for enforcement may pay dividends later.

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