

# Interplay between State Courts and Arbitration: Bless or Curse?

Winter Academy on International Arbitration: Topic 3

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# Overview of Topic 3

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**Court involvement in applications to set aside awards at the seat**



**Court enforcement of foreign awards under the New York Convention**



# Setting Aside Awards at the Seat

## *Article 34. Application for setting aside as exclusive recourse against arbitral award*

- ▶ (1) Recourse to a **court** against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.
- ▶ (2) An arbitral award may be set aside by the **court specified in article 6** only if:
  - ▶ (a) the party making the application furnishes proof that:
    - ▶ (i) a party to the arbitration agreement referred to in article 7 was under some **incapacity**; or the said **agreement is not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the **law of this State**; or
    - ▶ (ii) the party making the application was not given **proper notice** of the **appointment of an arbitrator** or of the **arbitral proceedings** or was otherwise **unable to present his case**; or

Finality of  
award

Grounds to  
set aside

- ▶ (iii) the award deals with a **dispute not contemplated by or not falling within the terms of the submission** to arbitration, or contains **decisions on matters beyond the scope of the submission** to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- ▶ (iv) the **composition of the arbitral tribunal or the arbitral procedure** was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- ▶ (b) the court finds that:
  - ▶ (i) the subject-matter of the dispute is **not capable of settlement by arbitration** under the law of this State; or
  - ▶ (ii) the award is in **conflict with the public policy** of this State.

Grounds to  
set aside

- ▶ (3) An application for setting aside may not be made after **three months** have elapsed from the date on which the party making that application had **received the award** or, if a request had been made under article 33, from the **date on which that request had been disposed of by the arbitral tribunal**.  
Time limit
- ▶ (4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, **suspend the setting aside proceedings** for a period of time determined by it in order to **give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside**.  
Remission to tribunal

- ▶ Limited and exhaustive grounds for setting aside (mirroring New York Convention)
  - » 4 grounds at the request of party seeking to set aside (who carries the burden of proof) → procedural grounds
  - » 2 grounds the court may invoke on its own motion → procedural and substantive grounds
  - » Should be applied restrictively and in exceptional cases – limited court interference with the finality of awards
- ▶ No merits review
  - » But public policy of the State in particular may be invoked for substantive reasons e.g. fundamental provisions misapplied (not de novo review)
- ▶ Setting aside even where grounds made out is discretionary – maximum court control
  - » Discretion should be exercised differently from refusal to enforce, where aim is to correct injustices which occurred at the seat (foreign country)
  - » Refusal to set aside despite presence of grounds to set aside may be denial of justice – court should frame refusal in terms of grounds being insufficient
- ▶ Significant court discretion to remit to tribunal ‘where appropriate’ and requested by party
  - » Court should consider e.g. length, complexity and feasibility of activities arbitrators would need to carry out to remove grounds for setting aside
- ▶ 3-month time limit for challenge

## Section 67. Challenging the award: substantive jurisdiction

- ▶ (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) **apply to the court**—
  - ▶ (a) **challenging any award** of the arbitral tribunal as to its **substantive jurisdiction**; or
  - ▶ (b) for an **order declaring an award made by the tribunal on the merits to be of no effect**, in whole or in part, because the tribunal did not have **substantive jurisdiction**.
- ▶ (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
  - ▶ (a) **confirm** the award,
  - ▶ (b) **vary** the award, or
  - ▶ (c) **set aside** the award in whole or in part.
- ▶ (4) The **leave of the court is required for any appeal** from a decision of the court under this section.

Grounds to  
set aside

Court  
powers

Limited  
appeal



## *Section 68. Challenging the award: serious irregularity*

(1) A party to arbitral proceedings may... **apply to the court challenging an award** in the proceedings on the ground of **serious irregularity** affecting the tribunal, the proceedings or the award.

(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause **substantial injustice** to the applicant—

(a) **failure by the tribunal to comply** with section 33 (general duty of tribunal);

(b) the tribunal **exceeding its powers** (otherwise than by exceeding its substantive jurisdiction: see section 67);

(c) failure by the tribunal to **conduct the proceedings in accordance with the procedure** agreed by the parties;

(d) failure by the tribunal to **deal with all the issues that were put to it**;

(e) any **arbitral or other institution or person** vested by the parties with powers in relation to the proceedings or the award **exceeding its powers**;

Grounds to  
set aside

- ▶ (f) **uncertainty or ambiguity** as to the **effect** of the award;
  - ▶ (g) the award being obtained by **fraud** or the award or the **way in which it was procured** being **contrary to public policy**;
  - ▶ (h) failure to comply with the **requirements as to the form** of the award; or
  - ▶ (i) any **irregularity in the conduct of the proceedings or in the award** which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
- ▶ (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
- ▶ (a) **remit the award** to the tribunal, in whole or in part, for reconsideration,
  - ▶ (b) **set the award aside** in whole or in part, or
  - ▶ (c) **declare the award to be of no effect**, in whole or in part.

Grounds to  
set aside

Court  
powers

- ▶ (3) [cont.] The court **shall not exercise its power to set aside or to declare an award to be of no effect**, in whole or in part, unless it is **satisfied that it would be inappropriate to remit** the matters in question to the tribunal for reconsideration.
- ▶ (4) The **leave of the court is required for any appeal** from a decision of the court under this section.

} Remission  
to tribunal

} Limited  
appeal

## *Section 69. Appeal on point of law*

- ▶ (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) **appeal to the court on a question of law** arising out of an award made in the proceedings.
- ▶ An **agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction** under this section.

} Right of  
appeal

- ▶ (3) Leave to appeal shall be given **only if the court is satisfied**—
  - ▶ (a) that the **determination of the question will substantially affect the rights of one or more of the parties**,
  - ▶ (b) that the **question is one which the tribunal was asked to determine**,
  - ▶ (c) that, on the basis of the findings of fact in the award—
    - ▶ (i) the decision of the tribunal on the question is **obviously wrong**, or
    - ▶ (ii) the question is one of **general public importance** and the decision of the tribunal is at least **open to serious doubt**, and
  - ▶ (d) that, **despite the agreement** of the parties to resolve the matter by arbitration, it is **just and proper in all the circumstances for the court to determine the question**.
- ▶ (6) The **leave of the court is required for any appeal** from a decision of the court under this section to grant or refuse leave to appeal.

Availability  
of appeal

Limited  
appeal

- ▶ (7) On an appeal under this section the court may by order—
    - ▶ (a) **confirm** the award,
    - ▶ (b) **vary** the award,
    - ▶ (c) **remit** the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or
    - ▶ (d) **set aside** the award in whole or in part.
  - ▶ The court **shall not exercise its power to set aside** an award, in whole or in part, unless it is **satisfied that it would be inappropriate to remit** the matters in question to the tribunal for reconsideration.
  - ▶ (8) The decision of the court on an appeal under this section shall be **treated as a judgment of the court** for the purposes of a further appeal. But **no such appeal** lies without the **leave of the court** which shall not be given unless the court considers that the **question is one of general importance** or is one which for **some other special reason** should be considered by the Court of Appeal.
- } Court powers
- } Remission to tribunal
- } Limited appeal

## *Section 70. Challenge or appeal: supplementary provisions*

- ▶ (1) The following provisions apply to an application or appeal under section 67, 68 or 69.
- ▶ (2) An application or appeal may not be brought if the applicant or appellant has not first exhausted—
  - ▶ (a) any **available arbitral process of appeal or review**, and
  - ▶ (b) any available **recourse** under section 57 (correction of award or additional award).
- ▶ (3) Any application or appeal must be brought **within 28 days of the date of the award** or, if there has been any arbitral process of appeal or review, of the **date when the applicant or appellant was notified of the result** of that process.

Precondition  
to challenge

Time limit

- ▶ 3 bases to set aside awards
  - » Lack of substantive jurisdiction – mandatory
    - › Includes validity of arbitration agreement, proper constitution of tribunal and matters submitted to arbitration being in accordance with the arbitration agreement
  - » Serious irregularity causing substantial injustice – mandatory
    - › Exhaustively defined under s 68 – largely matches grounds under Model Law
    - › But also provides for arbitral institution exceeding its powers, uncertainty or ambiguity as to effect of award, failure to comply with form requirements
    - › Broad powers to remit to tribunal, set aside or declare the award to be of no effect
  - » Appeal on point of law – unless parties agree otherwise
    - › Application requires court permission or unanimous agreement of parties
    - › Permission granted sparingly – in 2019-2020, only 7/22 applications granted

# England: Key Features



- ▶ Broad discretionary powers to remit to tribunal and confirm, vary or set aside awards
- ▶ Challenging parties must exhaust any available arbitral appeal or review processes and any available process for correction or supplementation
- ▶ Grounds should be raised promptly after discovery (s 73) & 28-day time limit to file challenge
- ▶ Limited appeals of court decision – with leave



## Article 1503

- ▶ No *opposition* [form of recourse where a default judgment is given because a defendant was not properly notified of a hearing] may be filed against an arbitral award, nor may the *Cour de Cassation* be petitioned to quash the award.

## Article 1518

- ▶ The **only means of recourse** against an award made in France in an international arbitration is an **action to set aside**.

## Article 1519

- ▶ An action to set aside shall be brought before the Court of Appeal of the place where the award was made.
- ▶ Such recourse can be had as soon as the award is rendered. If no application is made within one month following notification of the award, recourse shall no longer be admissible.

Finality of  
award

Time limit

## Article 1520

- ▶ An award may only be set aside where:
  - ▶ (1) the arbitral tribunal **wrongly upheld or declined jurisdiction**; or
  - ▶ (2) the arbitral tribunal was not **properly constituted**; or
  - ▶ (3) the arbitral tribunal ruled **without complying with the mandate conferred upon it**; or
  - ▶ (4) **due process was violated**; or
  - ▶ (5) recognition or enforcement of the award is **contrary to international public policy**.

Grounds to  
set aside

## Article 1522

- ▶ By way of a specific agreement the parties may, at any time, expressly waive their right to bring an action to set aside.

Waiver

- ▶ Limited and exhaustive grounds to set aside – which parties may expressly waive
  - » Essentially the same grounds as Model Law
  - » ‘tribunal wrongfully accepted or declined jurisdiction’ combines ML Art 34(2)(a)(i) and (2)(b)(i)
  - » Refers to *international* public policy – more restrictive as domestic French public policy insufficient to set aside
- ▶ Court discretionary power to set aside
- ▶ 1-month time limit for challenge (3 months if challenging party domiciled abroad per arts 1527 and 643)
- ▶ Grounds should be raised promptly on discovery
- ▶ Court decision may be appealed before the Court of Cassation on matters of law only (or limited ‘revision’ application brought to Court of Appeal)

## Article 190

1. The award is **final** from its notification.
2. The award may only be annulled:
  - (a) if the sole arbitrator was **not properly appointed** or if the arbitral tribunal was **not properly constituted**;
  - (b) if the arbitral tribunal **wrongly accepted or declined jurisdiction**;
  - (c) if the arbitral tribunal's **decision went beyond the claims submitted to it, or failed to decide one of the items** of the claim;
  - (d) if the **principle of equal treatment** of the parties or the **right of the parties to be heard** was violated;
  - (e) if the award is incompatible with **public policy**.

} Finality of  
award

} Grounds to  
set aside

## Article 191

The sole judicial authority to set aside is the **Swiss Federal Supreme Court**.

} Competent  
court

## Article 192

1. If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an **express statement** in the arbitration agreement or by a subsequent written agreement, **waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2).**

Waiver

2. If the parties have **waived fully** the action for [setting aside] awards and if the awards are to be enforced in Switzerland, the [**New York Convention**] applies by analogy.

# Switzerland: Key Features



- ▶ Limited and exhaustive grounds to set aside – which foreign parties may expressly waive
  - » Essentially the same grounds as Model Law
- ▶ Court discretionary power to set aside
- ▶ Grounds should be raised promptly on discovery
- ▶ Exclusive jurisdiction of Federal Tribunal
- ▶ 30-day time limit for challenge & no appeal of court decision
  - » After time limit expired/court decision, only recourse is ‘revision’ application before the Federal Tribunal (very limited grounds e.g. decision affected by criminal offence, infringement on European Convention on Human Rights)

## *Article 34 Application for setting aside of an arbitral award as exclusive recourse against it*

1. Recourse to a court against an arbitral award may be made **only by an application for setting aside** in accordance with paragraphs 2 and 3 of the present Article. The parties may by **direct agreement in an arbitration agreement providing for administration of arbitration by a permanent arbitration institution provide for the arbitral award to be final. A final arbitral award may not be set aside.** To the extent that the arbitration agreement does not provide for the arbitral award to be final, such award may be set aside by a court on the grounds provided in paragraph 2 of the present Article; in the course of the proceedings such arbitral award may be set aside on the grounds established by subparagraph 2 of paragraph 2 of the present Article also if the party seeking the setting aside of the arbitral award does not refer to those grounds.

Finality of  
award

Waiver

2. An arbitral award may be set aside by the competent court if:

(1) the party making the application... furnishes proof that:

a party to the arbitration agreement referred to in Article 7 was under some **incapacity**, or the said **agreement is not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the **law of the Russian Federation**; or

it was not given **proper notice** of the appointment of an arbitrator or of the arbitral proceedings, including, inter alia, time and place of sitting of the arbitral tribunal, or for other legitimate reasons was **unable to present its case**; or

the arbitral award was made regarding a **dispute not contemplated by or not falling within the terms of the submission** to arbitration, or contains **decisions on matters beyond the scope of the submission** to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

Grounds to  
set aside



the **composition of the arbitral tribunal** or the **arbitral procedure** was not in accordance with the agreement of the parties or Federal law [of the Russian Federation]; or

(2) the competent court finds that:

the subject matter of the dispute is **not capable of settlement by arbitration** under the Federal law [of the Russian Federation]; or

the award is in conflict with the **public policy of the Russian Federation**.

3. An application for setting aside of the arbitral award may not be made after **three months** have elapsed from the date on which the party making that application had received the contested award and, if a request had been made under Article 33, from the date on which that request had been disposed of by the arbitral tribunal.

Grounds to  
set aside

Time limit

4. The court, when asked to set aside an award on the grounds provided by subparagraph 1 of paragraph 2 of the present Article, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Remission  
to tribunal

# Russia: Key Features



- ▶ Limited and exhaustive grounds for setting aside
  - » Same as Model Law
- ▶ Court decision may be appealed
  - » Appeal to a competent cassation court within 1 month of the date it was rendered
  - » Judgment of cassation court may be appealed to Supreme Court (subject to preliminary view of admissibility)

# Comparative Table



	Model Law	England	France	Switzerland	Russia
<b>Differences from NYC Grounds</b>	N/A	Arranged by 1. Substantive jurisdiction, 2. Procedural irregularity and 3. Appeal on point of law	Refers to international public policy	N/A	N/A
<b>Power to remit to tribunal before deciding on challenge?</b>	Yes	Yes	No	No	Yes
<b>Able to waive right to challenge?</b>		Yes (for appeal on point of law only)	Yes	Yes (for foreign parties)	No
<b>Appeal of court decision?</b>		Yes	Yes (limited)	Yes (limited)	Yes
<b>Time limit</b>	3 months	28 days	1 month (domestic parties), 3 months (international parties)	30 days	3 months
<b>Other unique features?</b>		- Challenging parties must exhaust any available arbitral appeal or review process - Broad express powers to remit, confirm, vary or set aside awards			



# Discussion

Court involvement in applications to set aside awards at the seat: Bless or Curse?



# Court enforcement of foreign arbitral awards under the New York Convention



# New York Convention

## *Article III*

Each Contracting State **shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure** of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed **substantially more onerous conditions or higher fees or charges** on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of **domestic arbitral awards**.

Default  
enforcement  
of awards

## *Article IV*

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) The **duly authenticated original award** or a duly **certified copy** thereof;

Formalities



# New York Convention

(b) The **original agreement** referred to in article II or a **duly certified copy** thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement... shall produce a **translation** of these documents into such language. The translation shall be **certified** by an official or sworn translator or by a diplomatic or consular agent.

Formalities

## *Article V*

1. Recognition and enforcement of the award **may be refused**, at the request of the party against whom it is invoked, **only if that party furnishes to the competent authority** where the recognition and enforcement is sought, **proof that**:

(a) The parties to the [arbitration agreement] were, **under the law applicable to them, under some incapacity**, or the said **agreement is not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the **law of the country where the award was made**; or

Grounds for  
refusal





# New York Convention

(b) The party against whom the award is invoked was not given **proper notice of the appointment** of the arbitrator or of the arbitration **proceedings** or was otherwise **unable to present his case**; or

(c) The award deals with a **difference not contemplated by or not falling within the terms of the submission** to arbitration, or it contains decisions on **matters beyond the scope of the submission** to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The **composition** of the arbitral authority or the arbitral **procedure** was **not in accordance with the agreement** of the parties, or, failing such agreement, was not in accordance with the **law of the country where the arbitration took place**; or

(e) 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, that award was made.

Grounds for  
refusal



# New York Convention

2. Recognition and enforcement of an arbitral award may also be refused if the **competent authority** in the country where recognition and enforcement is sought **finds that:**

- (a) The **subject matter** of the difference is **not capable of settlement by arbitration** under the law of that country; or
- (b) The recognition or enforcement of the award would be **contrary to the public policy** of that country.

Grounds for  
refusal



- Default enforceability of arbitral awards
- Minimal formalities
- Does not permit merits review
- Limited and exhaustive grounds for refusal of enforcement
  - 5 grounds on which enforcement may be refused at the request of the party against whom the award is invoked (burden falls on party resisting enforcement)
  - Remaining 2 grounds may be invoked by the enforcing court on its own motion
  - Applied restrictively and in exceptional cases
  - Reflected in the Model Law (as grounds to refuse enforcement and to set aside awards)
- Court discretion to enforce even if grounds made out – maximum court control

## *Article 35. Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be **recognized as binding** and, upon **application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.**

Default  
enforceability

(2) The party relying on an award or applying for its enforcement shall supply the **original award or a copy** thereof. If the award is not made in an official language of this State, the court may request the party to supply a **translation** thereof into such language.

Formalities

## *Article 36. Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the **request of the party against whom it is invoked**, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

Grounds to  
refuse  
enforcement

- ▶ (i) a party to the arbitration agreement referred to in article 7 was under some **incapacity**; or the said agreement is **not valid under the law to which the parties have subjected it** or, failing any indication thereon, under the **law of the country where the award was made**; or
- ▶ (ii) the party against whom the award is invoked was not given **proper notice** of the appointment of an arbitrator or of the arbitral proceedings or was otherwise **unable to present his case**; or
- ▶ (iii) the award deals with a **dispute not contemplated by or not falling within the terms of the submission** to arbitration, or it contains **decisions on matters beyond the scope of the submission** to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- ▶ (iv) the **composition of the arbitral tribunal** or the **arbitral procedure** was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

Grounds to  
refuse  
enforcement

- ▶ (v) the award has **not yet become binding** on the parties or has been **set aside or suspended by a court of the country in which, or under the law of which, that award was made**; or
- ▶ (b) if the court finds that:
  - ▶ (i) the subject-matter of the dispute is **not capable of settlement by arbitration** under the law of this State; or
  - ▶ (ii) the recognition or enforcement of the award would be **contrary to the public policy** of this State.
- ▶ (2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, **adjourn its decision** and may also, on the application of the party claiming recognition or enforcement of the award, **order the other party to provide appropriate security**.

Grounds to  
refuse  
enforcement

Court  
powers

# Model Law: Key Features



- ▶ Mirrors New York Convention (with minor amendments)
- ▶ Key differences
  - » Application
    - › Model Law applies irrespective of whether the award was made abroad or in the State where enforcement is sought (implicitly excluding any reciprocity reservation)
    - › New York Convention applies to foreign awards
  - » More minimal formalities
    - › Only award or copy required (does not need to be duly authenticated/certified)
    - › Translation optional (on request of court and without need for certification)

## *Section 66. Enforcement of the award*

(1) An award made by the tribunal pursuant to an arbitration agreement may, **by leave of the court**, be enforced in the same manner as a judgment or order of the court to the same effect.

(2) Where leave is so given, **judgment may be entered in terms of the award.**

(3) Leave to enforce an award shall **not be given** where, or to the extent that, the person against whom it is sought to be enforced **shows that the tribunal lacked substantive jurisdiction to make the award.**

(4) Nothing in this section affects the recognition or enforcement of an award under any other enactment or rule of law, in particular under... the provisions of Part III of this Act relating to the recognition and enforcement of awards under the New York Convention or by an action on the award.

Optional  
enforcement  
procedure

## *Section 101. Recognition and enforcement of awards*

(2) A New York Convention award may, by **leave of the court**, be **enforced in the same manner as a judgment or order of the court to the same effect.**

Concurrent  
application  
of NYC



(3) Where leave is so given, **judgment may be entered in terms of the award.**

*Section 102. Evidence to be produced by party seeking recognition or enforcement*

(1) A party seeking the recognition or enforcement of a New York Convention award must produce—

(a) the **duly authenticated original award** or a **duly certified copy** of it, and

(b) the **original arbitration agreement** or a **duly certified copy** of it.

(2) If the award or agreement is in a foreign language, the party must also produce a **translation of it certified by an official or sworn translator or by a diplomatic or consular agent.**

Formalities

*Section 103. Refusal of recognition or enforcement*

(1) Recognition or enforcement of a New York Convention award **shall not be refused except in the following cases.**

(2) Recognition or enforcement of the award may be refused if the person against whom it is invoked proves—

- (a) that a **party to the arbitration agreement** was (under the law applicable to him) under some **incapacity**;
- (b) that the arbitration agreement was **not valid under the law to which the parties subjected it** or, failing any indication thereon, **under the law of the country where the award was made**;
- (c) that he was not given **proper notice** of the appointment of the arbitrator or of the arbitration proceedings or was otherwise **unable to present his case**;
- (d) that the award **deals with a difference not contemplated by or not falling within the terms of the submission to arbitration** or contains **decisions on matters beyond the scope of the submission to arbitration** (but see subsection (4));
- (e) that 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 in which the arbitration took place**;
- (f) that 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**.

Grounds for  
challenge

(3) Recognition or enforcement of the award may also be refused if the award is in respect of a matter which is **not capable of settlement by arbitration**, or if it would be **contrary to public policy to recognise or enforce the award**.

Grounds for  
challenge

(4) An award which contains **decisions on matters not submitted to arbitration** may be recognised or enforced to the **extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted**.

(5) Where an application for the setting aside or suspension of the award has been made to such a competent authority as is mentioned in subsection (2)(f), the **court before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the recognition or enforcement of the award**. It may also on the application of the party claiming recognition or enforcement of the award order the other party to **give suitable security**.

Court powers

- ▶ Follows New York Convention closely
- ▶ Default enforceability of awards
  - » Enforcement may be sought either under s 66 or s 101 – former is more difficult as enforcement is discretionary
  - » Under s 101, enforcement may only be refused under New York Convention grounds – subject to court discretion
- ▶ Formalities – same as New York Convention
  - » Duly authenticated originals or copies of award and arbitration agreement, and certified translation (if necessary)
- ▶ Discretion to adjourn enforcement proceedings pending conclusion of set-aside proceedings at the seat and order security to the enforcing party
- ▶ Effect of enforcement – judgment entered in terms of the award i.e. award enforced as a judgment of the English courts
- ▶ Decision refusing leave to enforce an award may be appealed with court permission on a point of law

## Article 1514

- ▶ An arbitral award shall be recognised or enforced in France if the party relying on it can **prove its existence** and if such recognition or enforcement is **not manifestly contrary to international public policy**.

Preconditions  
for  
enforcement

## Article 1515

- ▶ The **existence** of an arbitral award shall be proven by **producing the original award**, together with the **arbitration agreement**, or **duly authenticated copies** of such documents. If such documents are in a [foreign language], the party applying for recognition or enforcement shall produce a **translation**. The applicant may be requested to provide a translation by [an accredited translator].

Formalities

## Article 1516

- ▶ An arbitral award may only be enforced by virtue of an **enforcement order** (*exequatur*) issued by the... **Tribunal de grande instance of Paris if the award was made abroad**.

Enforcement  
procedure

## Article 1522

- ▶ Where [the right to bring set-aside proceedings] has been waived, the parties nonetheless **retain their right to appeal an enforcement order** on one of the grounds set forth in Article 1520 [grounds for setting aside].
- ▶ Such appeal shall be brought within **one month following notification of the award** bearing the enforcement order.

## Article 1524

- ▶ **No recourse** may be had against an order granting enforcement of an award, except as provided in **Article 1522**.

## Article 1525

- ▶ An order granting or denying recognition or enforcement of an arbitral award made abroad **may be appealed**. The appeal shall be brought within **one month** following service (*signification*) of the order.
- ▶ The Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520.

Appeals

## Article 1526

- ▶ Neither an action to set aside an award nor an appeal against an enforcement order shall **suspend enforcement** of an award.
- ▶ However, the first president ruling in expedited proceedings (*référé*) or, once the matter is referred to him or her, the judge assigned to the matter (*conseiller de la mise en état*), may stay or set **conditions for enforcement of an award where enforcement could severely prejudice the rights of one of the parties.**

Court powers

## Article 1527

- ▶ A decision **denying an appeal or application to set aside an award** shall be **deemed an enforcement order** of the arbitral award or of the parts of the award that were not overturned by the court.

- ▶ Due to 'more favourable law' provision (New York Convention Art VII(1)), more liberal French regime on enforcement prevails over New York Convention
  - » Enforcement granted at first instance if the award's existence is demonstrated by necessary documentation and enforcement not manifestly contrary to French *international* public policy
  - » On appeal, same grounds as New York Convention except annulment of award at seat
- ▶ Parties must seek a specific enforcement order (exequatur) from courts
- ▶ Similar formalities to New York Convention
  - » Duly authenticated originals or copies of award and arbitration agreement, and translation (if necessary)
- ▶ Enforceable immediately once exequatur granted, even pending challenge against exequatur order or award
- ▶ Parties cannot contract out of right to challenge enforcement
- ▶ First instance court reviews international public policy at prima facie level
  - » Parties can appeal within 1 month → court of appeal may examine award more closely against grounds to set aside (matching New York Convention)
- ▶ Court has similar power to order security in adapting the enforcement of award



## *Article 193*

1. Each party may at its own expense **deposit a copy of the award with the Swiss court at the seat of the arbitral tribunal.**
2. On request of a party, the **court shall certify the enforceability of the award.**

Enforcement  
procedure/for  
malities

## *Article 194*

The recognition and enforcement of a foreign arbitral award is governed by the [**New York Convention**].

Implementation  
of NYC

# Switzerland: Key Features



- ▶ New York Convention directly applicable as Swiss law
- ▶ Court power to certify enforceability of awards facilitates enforcement
- ▶ Distinction between enforcement of debt and enforcement of non-monetary relief
  - » Where award orders sum of money, Federal Debt Collection and Bankruptcy Act applies → summons to pay notified to debtor by local debt collection office
  - » Where non-monetary relief, party seeking enforcement must apply to the competent court of first instance to have performance of relief ordered on pain of criminal or administrative sanctions (CPC art 355 et seq)

## *Article 35. Recognition and enforcement*

1. An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of Articles 35 and 36 [of the present Law], as well as the provisions of the procedural legislation of the Russian Federation.

Default  
enforceability

2. The party relying on an award or applying for its enforcement shall supply the **duly certified copy of the award signed** by the arbitrators, as well as the **documents confirming the execution of the arbitration agreement**. If the award or agreement is made in a foreign language, the party shall supply a **duly certified translation** thereof into the Russian language.

Formalities

*Article. 36 Grounds for refusing recognition or enforcement of arbitral award*

1. Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused on one of the following grounds:

(1) at the request of the party against whom it is invoked, if that party furnishes proof to the competent court where recognition or enforcement is sought that:

- ▶ the award was rendered on the basis of the arbitration agreement referred to in Article 7 and one of the parties thereof was under some incapacity; or
- ▶ the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

Grounds to  
refuse  
enforcement

- ▶ the party against whom the award was made was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings including, inter alia, time and place of sitting of the arbitral tribunal, or for other legitimate reasons was unable to present its case; or
- ▶ the arbitral award was made regarding a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. If the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- ▶ the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or with the law of the country where the arbitration took place; or

Grounds to  
refuse  
enforcement

- ▶ the award rendered in the territory of a foreign State has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which that award was made or [by a competent authority] of the country the law of which applies;

(2) if the competent court finds that:

- ▶ the subject matter of the dispute is not capable of settlement by arbitration under the Federal law [of the Russian Federation]; or
- ▶ the recognition or enforcement of the award would be contrary to the public policy of the Russian Federation.

2. If an application for setting aside or suspension of an award rendered in the territory of a foreign State has been made to a court referred to in the seventh point of subparagraph 1 of paragraph 1 of this Article, the competent court where recognition or enforcement of the award is sought may, if it considers it proper, **adjourn its decision** and may, on the application of the party claiming recognition or enforcement of the award, order the other party to provide **appropriate security**.

Grounds to  
refuse  
enforcement

Court powers



- ▶ Matches Model Law
- ▶ Decision may be appealed to a competition cassation court within 1 month
  - » Judgment of cassation court may be appealed to Supreme Court (subject to preliminary review of admissibility)



# Discussion

Court enforcement of foreign awards under the New York Convention: Bless or Curse?



# Comparative Table



	Model Law	England	France	Switzerland	Russia
<b>Differences from New York Convention grounds</b>	N/A	N/A	First instance review based on international public policy; on appeal, NYC grounds excluding annulment of award at seat	N/A	N/A
<b>How are awards enforced?</b>	Depends on national framework	Judgment entered in terms of award	Enforcement order (exequatur)	Enforcing proceedings (either to recover debt or non-monetary relief)	Writ for execution
<b>Formalities e.g. original/certified copies, translation</b>	Original award or copy & translation if requested	Duly authenticated originals or copies of award and arbitration agreement, and certified translation (if foreign language)	Duly authenticated originals or copies of award and arbitration agreement, and translation (if necessary)	Duly authenticated originals or copies of award and arbitration agreement, and certified translation (if foreign language)	Duly authenticated originals or copies of award and arbitration agreement, and certified translation (if foreign language)
<b>Appeal of court decision?</b>	Depends on national framework	Yes	Yes	No	Yes
<b>Other unique features</b>		Enforcement may also be sought under s 66			



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