Enforcement of South African Arbitral Awards in the UK & Overseas

The Scope of the Fraud & Public Policy Exception to Enforcement

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Part I: International Enforcement

Strategy, the New York Convention & English Courts

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The Enforcement Imperative: Avoiding a Pyrrhic Victory

t *"One more victory over the Romans and we are completely ruined!"*

Pyrrhus of Epirus
after victory over Rome

A pyrrhic victory: won at such a cost to the victor that it is tantamount to defeat.

THE SMART ENFORCER'S CHECKLIST

- Consider enforcement strategy from the start of proceedings and before.
- Do not wait until after the award.
- Look beyond the seat: follow the assets.
- High net worth respondents often hold wealth in overseas bank accounts and offshore corporate and trust structures.
- Identify target jurisdictions early and take local advice on enforcement procedure.

The New York Convention 1958 for Recognition and Enforcement of Foreign Arbitral Awards

172
Signatory States including UK and SA

32 / 44
African Countries
are Signatories

Pro-enforcement
English Court Approach

- **Application:** Recognition and enforcement of foreign arbitral awards.
- **CPR 62.18:** Two-stage: order nisi on without-notice application, then made final unless objections upheld.
- **Effect:** A judgment entered with the full force of any other judgment.

The High Threshold for Resisting Enforcement: Yukos [2026]

Hulley Enterprises Ltd v The Russian Federation [2026] EWHC 456 (Comm) — Bright J

> *"English law and public policy favour enforcing NYC Convention awards, and the threshold for a public policy objection is high… the grounds for refusing enforcement are to be construed narrowly, and the burden is on the party resisting enforcement to establish that one of the exceptions applies."*

Bright J, paras 63–64

- s.103(1) AA 1996: enforcement 'shall not be refused except' on specified grounds — exceptions construed narrowly.
- Burden on the party resisting. If not discharged, the court has no discretion: it must enforce.

Enforcement Mechanisms

- **Examination of means:** Order for examination of the judgment debtor's finances.
- **s.423 Insolvency Act 1986:** Cancellation of transactions to defraud creditors — no proof of fraud required.
- **Domestic freezing orders:** Broad injunctive powers under s.37 Senior Courts Act 1981.

- **Ancillary to foreign proceedings:** Until an award is made in foreign seat, it is unlikely that English court will grant a freezing order in support of the foreign proceedings.
- Expectation that supervising court will consider interim orders.
- The court may consider it inappropriate to make an order due to seat being outside the jurisdiction: see s.2(3) AA 1996.

Worldwide Freezing Orders (WFO's)

s.37 Senior Courts Act 1981 — NOT s.44 AA 1996. Ancillary to judgment not to the arbitral proceedings.

- **Real risk of dissipation:** The foundation for any WFO. Inference of risk can arise from the nature of the cause of action, the type of asset or the manner in which the defendant holds assets (e.g. lack of transparency).
- **Dadourian Guidelines:** *Dadourian Group International Inc v Simms* [2006] 1 WLR 2499 — must include evidence of the nature of the relief and the procedure in the foreign country where the order is to be enforced.
- **Domestication abroad:** The WFO will generally have no effect against third parties in a foreign jurisdiction until formally recognised and domesticated there.
- **Requirement:** Take overseas enforcement advice before, not after, obtaining a WFO.

Reaching Beyond the Respondent: Third Parties

- **When relevant:** Third party holds defendant's assets or owes money to defendant or is subject to transactions reversible under insolvency legislation.

- **TSB Private Bank v Chabra [1992] 1 WLR 231:** Court froze assets of a third party believed to be holding the defendant's assets.

- **C Inc v L [2001] 2 Lloyd's Rep 459:** Third party may have a direct liability to the claimant — injunctive relief available.

- **s.25 CJJA 1982:** Statutory power to grant an injunction to facilitate enforcement even without an independent cause of action.

- Not apply where the fact that there is no jurisdiction to do so but for s.25 makes it inexpedient to do so. Gateway for service out in the UK.

Injunctions Against Third Parties: The Broad Idea Principle

Broad Idea International Ltd v Convoy Collateral Ltd [2021] UKPC 24

- **The Siskina [1979] AC 210:** A case cannot be founded on an injunction alone unless it is free-standing. Modified by s.25 CJJA 1982: see previous slide.

- **Broad Idea Ltd v Convoy Collateral Ltd [2021] UKPC 24:** Where no s.25 CJJA provision and where a court has personal jurisdiction over a respondent, it has power to issue an injunction in support of foreign proceedings likely to result in a judgment enforceable in the domestic court.

- **No hole in favour of third parties:** this prevents the respondent from being able to hide behind the third party or to exclude assets available to them from the third party.

- **Wider adoption:** Similar reasoning applied in Australia, Singapore and Jersey.

Enforcement Strategy: The Global Picture

Start Early

Enforcement strategy must be considered from commencement of proceedings. Advise your client, do the research, identify the jurisdictions.

Follow the Assets

An award may be enforced in more than one country. The choice of jurisdictions for enforcement depends on where assets are located and/or where the respondent is located — not just the seat.

Strategy before tribunal

Bear in mind grounds for non-enforcement and use them as a checklist for what points to cover before the arbitral tribunal e.g. jurisdiction, serious irregularity etc.

Part II: The Fraud & Public Policy Exception

When Can an Award Be Refused? A Narrow Gate

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The Fraud Exception: Common Law Foundations

- **General rule:** A judgment for a sum certain in one country may be enforced in the UK by fresh action or registration. No bilateral treaty between SA and UK.
- **Abouloff v Oppenheimer [1882-1883] LR 10 QBD 259:** If a foreign judgment was based on fraud, even where the fraud defence was rejected or the defendant did not raise the defence in the foreign court despite knowing about the fraud, the judgment debtor could resist enforcement based on the judgment.
- **Retrenchment:** If there is no good reason why the fraud defence was not run, relying on it later may be abuse of process: *Finzi v Jamaican Refoundation Development* [2023] UKPC 29.

Public Policy: Domestic vs International — A Critical Distinction

DOMESTIC ARBITRATION	INTERNATIONAL ARBITRATION

DOMESTIC ARBITRATION

- Challenge under s.68(2)(g) AA 1996.
- Award *"being obtained by fraud or the award in the way in which it was procured being contrary to public policy."*
- Must have caused, or will cause, substantial injustice.
- Dispute as to what amounts to scope of public policy defence in domestic challenge. Still highly confined, but broader than in NYC case.

INTERNATIONAL ARBITRATION

- Confined to international public policy only.
- Must be offensive to universal standards of morality e.g. contract killing, slavery, terrorism, drug-trafficking, prostitution and paedophilia: see *Westacre* [2000] 1 QB 288
- Categories not closed: unlikely to include anything short of fraud or corruption.
- NYC and s.103 AA 1996 construed narrowly — pro-enforcement.
- Yukos (2026): the gate is narrow and the burden heavy.

Public Policy: Other limitations

- NYC enforcement is of award and not of the contract [69].
- Must be degree of connection between fraud and corruption and award which is so great as to justify interference [74-76].
- Tribunal’s decision on facts or law will be taken as final and binding [79].
- If D did not take points before the Tribunal, this may preclude them from doing so on enforcement [80].

Yukos in Context: The Facts & the Outcome

- **Background:** Expropriation of Yukos shareholdings. Arbitration in the Netherlands. Russia ordered to pay shareholders US $50bn by tribunal in Netherlands.
- **Enforcement:** Enforcement of award in Netherlands and before the Netherlands Supreme Court in 2025
- **Russia's allegations:** Resisting enforcement under the NYC in England and Wales, Russia alleged that Yukos shares obtained through bribery; that Yukos operated through tax evasion; that there was fraud during arbitration by concealing documents and paying witnesses.
- **Held:** It was not shown that the investment was illegal. Alleged tax fraud already factored into the award reduction. Even if made out that documents concealed, this would not have affected the result. Witness payments (as opposed to bribes) not unlawful under Dutch law. Challenge rejected.

Yukos [2026]: Principles Governing the Fraud Exception

1 International, not domestic

The public policy ground is confined to more confined international public policy standards.

2 Award, not contract

Focus is on enforcement of the award itself, not the underlying contract [69].

3 Sufficient connection

Connection between fraud/corruption and the award must be sufficiently great to justify interference [74–76].

4 Finality of findings

The tribunal's decisions on facts and law are taken as final and binding [79].

5 Waiver

If respondent did not raise the point before the tribunal, this may preclude reliance on it at enforcement stage [80].

Yukos: international public policy ground is not a moral filter

"...litigation of this kind is not a moral beauty contest... it has not been the function of this judgment to grade either party for morality; nor for beauty. In investor-state disputes, these qualities are not present in abundance.

The New York Convention and ss. 101-103 of the Arbitration Act 1996 are inherently pro-enforcement... they can be relied on by sinners, no less than by saints. It is difficult for any defendant to resist enforcement of a valid New York Convention arbitration award." per Bright J at [364-365]

Part III: Nigeria v P&ID – Fraud on the Tribunal

The Exceptional Case That Asks Bigger Questions

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Nigeria v P&ID: Features of the case according to Robin Knowles J

Federal Republic of Nigeria v Process & Industrial Developments Ltd [2023] EWHC 2638 (Comm) — Robin Knowles J

- **The contract:** Tender for gas supply by a company with 'no apparent assets, experience or finance'. Terms sparse. Neither party performed.

- **The hearing:** Very short. Very little documentary production. Very little evidence tested by Nigeria. Poor representation of Nigeria.

- **The award:** $11 billion including interest — a material percentage of Nigeria's GDP. Seat: London.

- **The tribunal:** Highly distinguished: Lord Hoffmann, Sir Anthony Evans, Chief Bayo Ojo SAN (former AG of Nigeria).

Nigeria v P&ID: The Court's Findings

- **Core finding:** The awards were obtained by fraud or contrary to public policy within s.68(2)(g).
- **The conduct that brought the case within s.68(2)(g) (see 488-496):**
- a. Calling evidence of how contract came about without mentioning bribery of Nigerian civil servants;
- b. Suppressing bribery or corrupt payment during the arbitration period;
- c. Improper retention of Nigeria’s internal legally privileged documents.

- **No fair fight:** No document production that might have revealed fraud. Very limited evidence. Very little tested by Nigeria [588].

Inquisitorial Questions: Should Arbitrators Do More?

- **Danger of hindsight:** The wider ranging remarks of the Judge were after a set aside application of many weeks where evidence of the fraud unravelled for the first time. Could arbitrators have got to that end without such a case being advanced of prepared for by the parties?

- **Questions of the Judge:** The Judge said that the tribunal was on notice (i) how the agreement was so sparse for a multi-billion dollar long term project, (ii) where there was little or no evidence whether the contractor could do its building works, (iii) when it had *"no apparent assets, experience of finance"* and (iv) very limited cross-examination and inquiry by Nigeria.

- Was it enough to focus on whether one side was in repudiatory breach without considering whether the other side was in a position to perform the contract right up to the end?

- *" Should the tribunal have taken the initiative to encourage exploration of new bounds of contract law and the law of damages that made today be required where major long-term contracts are involved?"* [588]

Will Arbitral Culture Change? Arguments & Counter-Arguments

FOR GREATER PROACTIVITY

- Red flags of fraud call for inquiring approach.
- Times when the “traditional” approach may not suffice.
- Arbitrators will not want the embarrassment of being duped.
- Nigeria case shows a more curious approach at hearing might have avoided a catastrophic outcome.
- Trust in arbitration depends on it taking pro-active steps to avoid being used as an instrument of fraud.

AGAINST RADICAL CHANGE

- Section 33 AA 1996 requires the tribunal to act fairly and impartially between the parties and without undue delay.
- It may not be ‘impartial’ or ‘fair’ to raise defences which have not been pleaded and evidence which has not been adduced. Risks of costs and delay.
- Would deeper investigation have uncovered the fraud in any event? Fraud often very difficult to detect. Danger of hindsight after long s.68 trial.
- A one-off case should not herald a new era. The common law operates by incremental change.

Will Arbitral Culture Change? Section 33 AA

- *Bandwidth Shipping Corp v Intaari (A Firm) (The Magdalena Oldendorff)* [2007] EWCA Civ 998: when legitimate to seek further assistance
- ED & F Man Sugar Ltd v. Belmont Shipping Ltd [2011] EWHC 2992 (Comm): risk of intervening to give a party opportunity to put a new case.
- Foxton J (as he then was) at 2023 ICC conference:

"It is of course always open to the tribunal to go back to the parties to ask for further submissions on alternative bases. However, a tribunal's reluctance to do so is easy to understand. There is not only a statutory duty, under s.33 of the Arbitration Act to complete an arbitration as expeditiously as possible…. Further, for the tribunal to "show" its hand in this way, for the purpose of inviting further submissions, risks the parties adjusting their behaviour in anticipation of the terms of the award…. There is a difficult line for the arbitral tribunal to walk here. In my view, it is important when the court is asked to determine whether they have stepped over it to pay appropriate regard to the reasons why the arbitral tribunal found themselves in such a position, and the pressures of finality which they face."

Areas for discussion

1 Danger of confidentiality

Judge raised this concern. Private hearing with no scrutiny from the press and from those attending. Lack of scrutiny of press and public in such a case where county affected by overall result.[589-591]

2 Common law v civil law

Structure of English law contract and seat. Thus, contract for dispute resolution of adversarial and not inquisitorial nature. Is that something which the Court should respect?

3 Greater vigilance now

Although the Nigeria case is a highly unusual case (impossible to say how frequently a case of a fraud on the arbitral tribunal), arbitrators might be more pro-active. Case for incremental change.

4 Limit to arbitral intervention

Limit to the extent that intervention can be consistent with s.33 AA 1996. If uncovering fraud, can say that that trumps fairness and impartiality. But dangers if see fraud where there is none.

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