The Rewards of Arbitral Awards: A Recipe for Just Desserts amid Sanctions and Immunity – Mapping, Tracing, Solvency and Award Monetisation

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Introduction

A client, congratulated by his counsel on winning a significant arbitral award, is said to have replied that counsel appeared to have confused an award with money. The panel's chair, Elliot Luke, who told that story against himself, offered the panel a culinary translation: winning the arbitration is like being handed a Michelin-star recipe, and enforcement

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is the business of persuading someone to cook the dinner. The panel's discussion travelled from balance sheets to treaty architecture in under an hour, and returned repeatedly to a single theme, which this article follows. Enforcement is too often treated as the final chapter of a dispute; it belongs in the first.

Start with the balance sheet

The panel's one non-lawyer, Bruce O'Shea, a forensic accountant and asset-tracing specialist, was asked what a party contemplating arbitration should do first. His answer was disarmingly simple: obtain the right documents and then refuse to take them at face value. The profit and loss statement, the balance sheet and the cashflow statement each tell their own story, and those stories may not be consistent with one another. He described a matter in which the counterparty's profit and loss account showed a comfortably profitable business, apparently well able to meet the anticipated award. The true position became clear only when other records were produced after a fight. The balance sheet showed heavy capitalisation of expenses that would never be recovered, and the cashflow statement showed a business with assets depleting over time. Read alone, each document was survivable. Read together, they were a red flag. The task is to reach the narrative behind the numbers early, before years are spent obtaining an award that cannot be collected. He cautioned that while liquidity may give comfort to a credit analyst, for an asset-tracing specialist it often signals mobility. Cash can be moved quickly across borders. Transfers can be masked, for example via cryptocurrency. He would rather see a large physical asset, which can be seen and held, and takes time to transact, than a large cash balance. He recalled an inbound investor that had acquired substantial Australian assets, only for large liabilities to appear on the balance sheet, effectively extinguishing the equity against which any award might have been satisfied. Corporate structure matters for the same reason: a 'hub-and-spoke' arrangement may mean that sums paid to a local subsidiary pass straight through to an affiliate abroad, so that value never accumulates in the jurisdiction in which it is paid.

The exercise is not static. Financial statements are effectively out of date on the day they are produced. Mr O'Shea advocated constant monitoring and mitigation throughout the course of an arbitration. This will often include obtaining updated financial information, where possible; lodging notices against registered property, so that any attempted sale comes to light; and monitoring other proceedings against the counterparty, since multiple adverse awards or judgments would need to be satisfied from the

same pool of assets. Finally, he warned against relying on an assumption, conscious or otherwise, that a corporate group's equity would be available to satisfy an award against a subsidiary. This will often depend on whether the corporate group's directors decide to make a fresh equity contribution, or allow the subsidiary to fall into insolvency. The latter option may well be more appealing to the corporate group's board.

Designing for enforcement from the first draft

Katie Mead advocated placing the enforcement analysis even earlier in the arbitral process. Too often it is approached as among the last steps, when it should be among the first. Enforcement should ideally be considered before any contract is executed, when a prospective counterparty will happily answer questions about what assets it holds and where they are located. She recommended distilling such information into a 'counterparty asset map', which could then inform the procedural framework for dispute resolution, including the choice of arbitral seat (the jurisdiction whose courts supervise the arbitration), and the law governing the arbitration agreement. Once a dispute has crystallised, the map should be refreshed, drawing on specialist forensic expertise where appropriate.

From there, the toolkit divides into measures available from the tribunal, and measures available from courts in support of the arbitration.[1] From the tribunal, a party may seek interim measures directed to preserving the effectiveness of a future award: status quo and anti-dissipation orders restraining the disposal, encumbrance or transfer of specified assets; directions to provide security or to give negative pledges; and orders requiring a party to identify bank accounts, receivables, shareholdings, or the locations of mobile assets such as ships, aircraft or commodities.

Ms Mead cautioned that, for uncooperative counterparties, the courts' assistance will usually be required to secure measures with coercive effect, and to enable their enforcement where necessary. From the courts, the most familiar instrument is the freezing order (Mareva injunction) restraining a respondent from dealing with assets up to a specified value and, in some jurisdictions, extending to assets worldwide. Courts can also assist with asset identification, through disclosure orders against third parties such as banks and custodians, and with pre-award attachment and the arrest of ships,

1 In UNCITRAL Model Law jurisdictions, including Australia, see UNCITRAL Model Law on International Commercial Arbitration (1985, as amended 2006) arts 9, 17 and 17J (interim measures of the tribunal; court-ordered interim measures in support of arbitration), given the force of law in Australia by the International Arbitration Act 1974 (Cth) s 16.

aircraft or goods. An applicant will generally need to show urgency, a prima facie case and real evidence of a risk of dissipation, all of which are easier to marshal before the assets have begun to move. In short, speed matters.

There are practical limits to cross-border enforcement of both provisional measures and arbitral awards. Assets may sit in a jurisdiction where enforcement is systemically difficult, or which is otherwise uninterested in the arbitration or the tribunal's findings. Ms Mead's illustration was *White Industries Australia Ltd v Republic of India*,[2] in which an Australian party secured a favourable award in an arbitration administered by the International Chamber of Commerce, only to spend the better part of a decade attempting to enforce the award in the Indian courts. The investor then commenced a separate arbitration against India pursuant to the Australia–India Bilateral Investment Treaty, alleging that India's failure to provide an effective means of enforcing rights breached the treaty. The tribunal accepted this allegation and awarded damages to the investor, which were ultimately paid voluntarily by India. The vindication was real; the decade was still lost. An award that cannot reach assets, she observed, is not worth the paper it is written on. The panel's chair added that litigation funders undertake precisely this analysis, rigorously and very early. Whether or not a funder is involved, parties would do well to adopt the same discipline.

Two conventions, two philosophies

Leon Firios ventured that the true picture was not as bleak as painted thus far. The available statistics, which he acknowledged are not comprehensive, suggest that parties voluntarily comply in a significant majority of cases that reach a final award.[3] The same statistics show that enforcement against states is materially harder, consistent with the reassertion of sovereignty that had been a theme of the Symposium's sessions earlier that day. Sovereign debtors aside, however, the enforcement war stories that dominate conference discussions are memorable precisely because they are exceptional.

2 *White Industries Australia Ltd v Republic of India* (Final Award) UNCITRAL (30 November 2011). The tribunal held that India's failure to provide 'effective means' of asserting claims and enforcing rights, a standard imported into the Australia–India Bilateral Investment Treaty via its most-favoured-nation clause, was breached by the protracted enforcement proceedings.

3 See Queen Mary University of London and White & Case, '2025 International Arbitration Survey: The Path Forward – Realities and Opportunities in Arbitration' (2025) 13–14, chart 7. The survey reported high rates of voluntary compliance with awards against private commercial parties, with markedly lower rates of compliance where the award debtor is a state, in both ICSID and non-ICSID cases.

Where enforcement is contested, two international regimes do the work, each with a distinct scope of application. There are two because, as explained below, they are intended to solve two different problems. The distinction matters here because the two regimes treat both recourse against awards and state immunity differently, as the recent decisions of the High Court of Australia discussed below illustrate. The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention') was designed for commercial arbitration between private parties, though it is now also used in investor–state cases, and provides for the recognition and enforcement of arbitral awards by the courts of its contracting states. The success of the New York Convention is well known, as are its methods:[4] awards are readily enforced by state courts, and the grounds for resisting enforcement are narrowly confined.[5]

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the 'ICSID Convention') was concluded seven years later under the auspices of the World Bank, to give foreign investors a neutral forum for claims against host states, and to give states an assurance that such disputes would be resolved outside the courts of any single nation. Unlike the New York Convention, it only applies to disputes between host states and foreign investors, and not to disputes between private commercial parties. It establishes a self-contained regime for enforcement of awards from such disputes and, at least in theory, does not depend on the procedure of state courts, nor does it permit such courts to exercise any powers which might circumvent the self-contained regime. This system instead internalises the procedure for recourse against awards,[6] which is limited to an application for annulment before an ad hoc committee of arbitrators.[7] Subject to that procedure, each contracting state undertakes under Article 54(1) of the Convention to enforce its pecuniary obligations 'as if it were a final judgment of a court in that State', with no enumerated grounds of refusal. As Rubino-Sammartano observes, '[t]he

4 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted 10 June 1958, entered into force 7 June 1959) 330 UNTS 3330 UNTS 3 ('New York Convention'). The Convention had 172 contracting states as at August 2026. The description echoes Lord Mustill's assessment of the Convention as perhaps the most effective instance of international legislation in the history of commercial law: Michael J Mustill, 'Arbitration: History and Background' (1989) 6(2) J Intl Arb 43, 49. Mr Firios noted that he is unaware of whether this characterisation has any empirical basis.

5 New York Convention, art V.

6 As to this distinction see Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (6th edn, Oxford University Press 2015) para 10.13.

7 Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159575 UNTS 159 ('ICSID Convention') arts 52–55.

consequences of this provision are the most important of the Convention', namely removing the enforcing court's normal gatekeeping function entirely, treating the award not as a foreign instrument requiring domestic validation, but as if it were already a domestic judgment.[8] The consequence is that resistance to ICSID awards migrates to the one doorway left open: sovereign immunity from execution, which is expressly preserved despite the absolute obligation to enforce under Article 54(1).[9]

Public policy and the sanctions frontier

Within the New York Convention scheme, public policy is the most interesting and nebulous of the grounds for resisting enforcement. It is notoriously narrow, and is sometimes said to be the ground that one runs when one has nothing else.[10] Mr Firios highlighted that the implications of economic sanctions for the public policy ground are nuanced, drawing on two recent court judgments.

A Company v The Bank,[11] a judgment of the Hong Kong Court of First Instance (the 'Hong Kong Court'), concerned a London Court of International Arbitration (LCIA) award in favour of a Russian metals company against a Canadian bank for payment under a performance security. The arbitral tribunal rejected the bank's substantive defence of illegality, advanced on the grounds that payment was prohibited under Canadian sanctions law. In resisting enforcement, the bank recast the argument as a public policy objection, namely that enforcement would expose the bank and its personnel to criminal prosecution in Canada. Even so, it was rejected by the Hong Kong Court, which emphasised that the relevant public policy is that of the enforcing court. In Hong Kong's case, this included the 'countervailing and important public policy of (1) recognising and enforcing an arbitral award, which is final and binding on the applicant and the respondent; and (2) upholding parties' consensual arbitration agreement'.[12] The Hong Kong Court also deferred to the arbitral

8 Mauro Rubino-Sammartano, *International Arbitration Law and Practice* (2nd edn, Kluwer Law International 2001) 91.

9 ICSID Convention, art 55: 'Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.'

10 *Richardson v Mellish* (1824) 2 Bing 229, 252; 130 ER 294, 303 (Burrough J) ('[public policy] is a very unruly horse, and when once you get astride it you never know where it will carry you. It may lead you from the sound law. It is never argued at all but when other points fail'); cited in *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v R'As al-Khaimah National Oil Co* [1987] 3 WLR 1023 (CA) 1035.

11 *A Company v The Bank* [2026] HKCFI 3169.

12 *A Company v The Bank* (n 11) [85].

tribunal's finding that payment would not be unlawful,[13] and expressed doubt that enforcement of the award (as distinct from voluntary payment) would put the bank or its staff at risk of prosecution.[14] Mr Firios observed that the bank's public policy defence had intuitive appeal, making the Hong Kong Court's decision quite remarkable.

In the second judgment, *OWH SE iL v RTI Ltd*,[15] the English Commercial Court reached the same conclusion by a more nuanced route. Enforcement of an LCIA award arising from the close-out of derivative transactions between two Russia-connected parties was sought concurrently in Jersey and England. In Jersey, the contention that payment would sit uncomfortably with the applicable sanctions regime was held not to engage the public policy ground.[16] The English Commercial Court accepted the need to balance competing public considerations,[17] namely the ready enforcement of arbitral awards,[18] and the effectiveness of sanctions against Russia.[19] Ultimately, the court decided that the former prevailed.[20]

Mr Firios noted that continental courts, by contrast, have tended to treat sanctions as mandatory rules forming part of public policy itself. Whether the common law and European approaches continue to diverge is one of the questions to watch.

State immunity

Lee Carroll brought the discussion home to Australia, where state immunity questions have arisen in a series of recent judgments. She first set the scene by outlining the tripartite distinction between recognition, which gives the award preclusive effect; enforcement, which converts the award into a judgment of the court; and execution, which directs the court's processes against the debtor's assets. The taxonomy matters because foreign state immunity operates differently at each stage: jurisdictional immunity bears on recognition and enforcement, while execution immunity bears on execution.

In Australia the doctrine is codified in the Foreign States Immunities Act 1985 (Cth), which confers a general immunity from jurisdiction on foreign states and their separate entities, subject to certain exceptions.

13 *A Company v The Bank* (n 11) [62].
14 *A Company v The Bank* (n 11) [65].
15 *OWH SE iL v RTI Ltd* [2026] EWHC 1015 (Comm).
16 *RTI Ltd v OWH SE iL* [2025] JRC 137[2025] JRC 137. An appeal to the Jersey Court of Appeal was dismissed: *RTI Ltd v OWH SE iL* [2025] JCA 327. Permission to appeal to the Privy Council was sought and refused: *RTI Ltd v OWH SE iL* JCPC/2026/0027.
17 *OWH SE iL v RTI Ltd* (n 15) [61], [90].
18 *OWH SE iL v RTI Ltd* (n 15) [86].
19 *OWH SE iL v RTI Ltd* (n 15) [82].
20 *OWH SE iL v RTI Ltd* (n 15) [90].

Three exceptions matter most here: proceedings concerning a commercial transaction; cases in which the state has submitted to the jurisdiction by agreement (ie, waived its immunity); and an arbitration exception covering the supervisory jurisdiction of the courts and, in defined circumstances, recognition and enforcement proceedings.[21]

Recent decisions of the High Court of Australia (the 'High Court') have tested the waiver exception under the ICSID Convention and New York Convention regimes, with contrasting results. As to the ICSID Convention, the High Court held that, by ratifying the Convention and thereby agreeing to its enforcement provisions, Spain agreed to the jurisdiction of the Australian courts in recognition and enforcement proceedings, and to that extent had waived its jurisdictional immunity.[22] The waiver did not extend to immunity from execution, which the Convention itself expressly preserves.[23] For the New York Convention, the High Court reached the opposite conclusion: ratification involves no comparable waiver, because that convention contains no equivalent of ICSID's express undertaking to treat awards as domestic judgments.[24]

Ms Carroll drew a practical lesson for investors contemplating arbitration under investment treaties, which often provide investors with a choice between arbitral regimes, namely under the ICSID Convention[25] or the New York Convention.[26] The recent judgments of the High Court highlight that arbitration under the ICSID route is likely to be preferable for investors because of the stronger prospects of enforcement against a resisting state. This does not overcome the challenge of executing an award, at least in Australia, since the Foreign States Immunities Act 1985 (Cth) confers a general immunity from execution against the property of a foreign state. In the absence of an express waiver found somewhere other than ICSID ratification, an award creditor must identify and proceed against commercial assets, namely those which are neither diplomatic nor

21 Foreign States Immunities Act 1985 (Cth), ss 9 (general immunity), 10 (submission to jurisdiction), 11 (commercial transactions) and 17 (arbitrations); see s 22 as to separate entities.

22 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11.

23 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (n 22).

24 *CCDM Holdings LLC v Republic of India* [2026] HCA 9.

25 The ICSID Convention is supplemented by the ICSID Rules of Procedure for Arbitration Proceedings (the 'ICSID Arbitration Rules'), most recently amended with effect from 1 July 2022, which govern the conduct of arbitrations administered by the International Centre for Settlement of Investment Disputes.

26 This option is typically framed as arbitration under the UNCITRAL Arbitration Rules (UNCITRAL Arbitration Rules (as revised in 2021), annexed to UNGA Res 76/108 (9 December 2021)), without referring explicitly to the New York Convention.

military in character.[27] The award creditor's task ends where it began: with an asset map.

Is it all worth it?

Returning to a note of optimism for award creditors, Mr Firios noted that enforcement disputes most often end in compliance, typically through a negotiated settlement, and are rarely a fight to the last asset. Counsel's primary task in such cases is to run interference, raise the available grounds, apply pressure and cut a deal. The panel's chair agreed, noting that the practical value of an investor–state award is often found not in execution, but in incentivising the state to come to the table, and to accept a compromise that was previously unappealing. He added a further source of pressure arising from World Bank lending policy: the Bank may restrict or withhold further loans to the state while an award for expropriation remains unpaid.[28] Ms Carroll tempered expectations for voluntary compliance in investment cases within the European Union, since state parties to such disputes face a conflict between their obligation to pay under the ICSID Convention and a prohibition on payment under EU law.[29] In her view it is this conflict, and not intentional recalcitrance, that drives much of the sovereign non-compliance currently occupying enforcement courts.

Ms Carroll noted that the growing market in the purchase and monetisation of arbitral awards may change the economics of enforcement altogether. The legal question is whether a party may purchase and take assignment of an ICSID award, and then enforce against the debtor's assets. Australia and England have just answered in opposite directions, in proceedings arising from awards against Spain. In August 2025, the first Australian decision on point held that assignment of an ICSID award is permissible, and that the assignee may seek recognition and enforcement.[30] Three months later the English Commercial Court reached the opposite conclusion, holding that only a party to the arbitration may invoke the enforcement obligation.[31] Both decisions are under appeal; the Australian

27 Foreign States Immunities Act 1985 (Cth), ss 30–32.

28 See World Bank, 'Operational Policy 7.40: Disputes over Defaults on External Debt, Expropriation, and Breach of Contract', https://documents.worldbank.org/en/publication/documents-reports/documentdetail/099606405052230407 (accessed 28 September 2026), under which disputes of that character bear on the Bank's lending posture towards the member state concerned.

29 Case C-284/16 *Slowakische Republik v Achmea BV* EU:C:2018:158; Case C-741/19 *République de Moldavie v Komstroy LLC* EU:C:2021:655.

30 *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028. Stewart J also rejected defences founded on foreign state immunity and on EU law.

31 *Operafund Eco-Invest SICAV plc v Kingdom of Spain* [2025] EWHC 2874 (Comm).

appeal was listed for hearing in the week following the Symposium.[32] For funders and investors pricing awards on the secondary market, the resolution of this question may determine whether there is a return on the asset at all.

Conclusion

The panel began with a recipe, and ended with a market in which recipes themselves are bought and sold. In between, it offered a coherent discipline. Enforcement analysis should begin before contract execution, and ought to influence the selection of the counterparty, the drafting of the arbitration clause, and the choice of seat and forum. This initial analysis can be neatly tied together as a counterparty asset map, which will then sit ready to be re-enlivened when a dispute arises, and refreshed and monitored until it is resolved. Interim measures reward speed and evidence. The choice between the New York Convention and ICSID Convention regimes carries consequences, especially for the immunity analysis when the debtor is a state. The jurisprudence on sanctions and on assignment continues to evolve, with Australian courts contributing more than their share of the global answers. The panel's empirical reassurance bears repeating: most awards are honoured, and the horror stories are prominent because they are rare. The craft lies in making sure, from the first draft of the contract, that the kitchen chosen at the outset is one that will, in the end, cook the dinner.

32 The position stated is as at the date of the Symposium and remains subject to the outcome of the pending appeals.