

OUTLINE

CIArb NY Branch and NYIAC

Enforcing Awards Against Non-Signatory Sovereign

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- 1) Two typical scenarios:
 - a. Enforcing award against non-signatory state where state-owned entity or instrumentality was contractual counter-party in arbitration.
 - i. Claimant signed contract with state-owned entity or instrumentality but not the state itself.
 - ii. Arguments that state should be bound to contract as non-signatory, could be brought in arbitration or could be brought at enforcement stage, as explained below.
 - b. Enforcing award against non-signatory state-owned entity or instrumentality where state or other sovereign was contractual party in arbitration.
 - i. Claimant signed contract with state itself.
 1. Claimant would need to show that SOE or instrumentality is bound to agreement as non-signatory.
 2. Argument could be brought in arbitration or in enforcement stage in court.
 - ii. Or Claimant signed contract with state owned entity or instrumentality.
 1. Claimant would need to show that another SOE or instrumentality is bound to agreement as non-signatory.
 2. Likely would involve double piercing, piercing state and then piercing another SOE or instrumentality.
 3. Argument could be brought in arbitration or in enforcement stage in court.
- 2) First step is subject matter jurisdiction: in order for the U.S. court to have jurisdiction against sovereign entity, exception to sovereign immunity must exist.
 - a. Most relevant exception: “A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . to

confirm an award made pursuant to such an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards”

- b. New York Convention qualifies as international agreement to enforce arbitration awards.
- 3) Satisfying the arbitration exception to sovereign immunity gives the federal court subject matter and personal jurisdiction over the state.
 - a. With respect to sovereign entities other than the state itself, may also have to show due process (minimum contacts) with the jurisdiction.
 - 4) Once arbitration exception to sovereign immunity is satisfied, test for enforcement against non-signatory should also be satisfied.
 - a. If the court finds that the sovereign entity was a party to the agreement to arbitrate for purposes of waiving sovereign immunity, then the court will likely also find that the award can be enforced against the sovereign for the same reason.
 - 5) The tribunal’s finding either way with respect to whether a non-party sovereign can be bound may not be determinative with respect to the court’s analysis.
 - a. The court has to do its own analysis for exceptions to sovereign immunity for jurisdictional purposes. So:
 - i. a determination by the tribunal that the state **was not** a party to the arbitration agreement should not prevent the court from finding that it was; and
 - ii. a determination by the tribunal that the state **was** a party to the arbitration agreement would not likely stop the court from engaging in its own analysis whether the state was a party to the agreement.
 - 6) Special venue consideration
 - a. In addition to subject matter jurisdiction, the federal court in which the action to enforce the arbitration must be the correct venue.
 - b. Action can be brought “in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated
 - c. If no basis for venue, DC is a default venue for actions against the state itself.