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MULTIJURISDICTIONAL ENFORCEMENT OF FOREIGN JUDGEMENTS

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MINI-ROUNDTABLE

MULTIJURISDICTIONAL ENFORCEMENT OF FOREIGN JUDGEMENTS

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Ozan Akyurek practices in the area of commercial litigation. Mr Akyurek assists clients on all issues relating to product liability, industrial risks, business torts, anti-corruption, and white-collar crime. He advises international clients in issues related to litigation and prelitigation case management before French civil and criminal courts. Ozan also has substantial internal investigation and compliance experience. He recently acted on behalf of a leading chemical company and a US pharmaceutical company in Turkey in conducting investigations focused on anti-corruption matters. His recent experience includes a criminal investigation related to alleged credit card fraud committed by the employees of a leading US company in Morocco.

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Elie Kleiman cares deeply about having satisfied clients and sees arbitration and litigation as routes to solving their business problems. That means he puts considerable emphasis on the information that he supplies to them at every stage throughout a case. They need to understand just what options are available to them; as their dispute resolution specialist, he explains as dispassionately as possible what the likelihood of success – as they see it – will be. He also strives to bring a business-centric attitude to his caseload because he needs to present a variety of options capable of delivering practical solutions to his clients.

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Lea Haber Kuck concentrates her practice on the resolution of complex disputes arising out of international business transactions. She regularly advises clients on a variety of issues relating to international dispute resolution, including forum selection, jurisdiction, service of process, extraterritorial discovery, enforcement of judgments, and drafting of arbitration and choice-of-court clauses.

CD: Could you provide an insight into the kinds of hurdles that parties might encounter when attempting to enforce a judgment or award in a foreign jurisdiction? What are the main grounds on which such judgments or awards are usually challenged?

Aitkulov: Our experience shows that parties can be quite creative in evading the enforcement of judgments and awards. The most frequently recurring grounds for objections to recognition and enforcement are: failure to give proper notice of proceedings, the lack of jurisdiction of the court or arbitral tribunal that is hearing the case – in international arbitration this argument often takes the form of objections contending the non-arbitrability of certain issues resolved by the tribunal – and the potential violation of local public policy rules in case of enforcement of the award or judgment. The seeds of the majority of issues that an enforcing party may face are planted at the stage of resolution of the dispute in court or arbitration. Therefore, claimants should bear in mind legal particularities of the enforcement procedure in jurisdictions where enforcement will most likely occur from the very outset of the proceedings.

Kleiman: Enforcement issues that a party may face vary depending on the nature of the legal instrument on which that party relies, namely an arbitral award or a judgment. Enforcing arbitral awards is straightforward in the 152 countries that are parties to the 1958 New York Convention. Pursuant to Article III of the New York Convention, contracting states must recognise awards rendered in other contracting states. Notwithstanding its liberal tone, the Convention provides for limited grounds under which enforcement of an award may be denied. These limited grounds relate to the capacity of the parties and the invalidity of the arbitration agreement, due process, the scope of the arbitration agreement, the composition of the arbitral tribunal, the binding nature of the award or its previous annulment by the courts of the seat in question,

> **"Enforcing foreign judgments varies greatly according to circumstances. Where regional treaties apply, the process is straightforward."**
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> *Elie Kleiman, Freshfields Bruckhaus Deringer*

the inarbitrability of the dispute and finally the infringement of international public policy. However, much more restrictive rules apply in countries that are not parties to the Convention, especially those that are not favourable to arbitration. In certain countries, local courts may even review the merits of a case in the context of annulment proceedings. Enforcing foreign judgments varies greatly according to circumstances. Where regional treaties apply, the process is straightforward. However, there are circumstances where obtaining recognition and enforcement of a foreign judgment may be a daunting task and will depend on the local court's willingness to cooperate. Some countries adopt a hostile position towards foreign judgments and require that a full new local trial be held. Generally, grounds on which the recognition of foreign judgments may be refused relate to the infringement of international public policy or due process, the lack of jurisdiction of the court which rendered the decision, or on the law that was applied to the dispute.

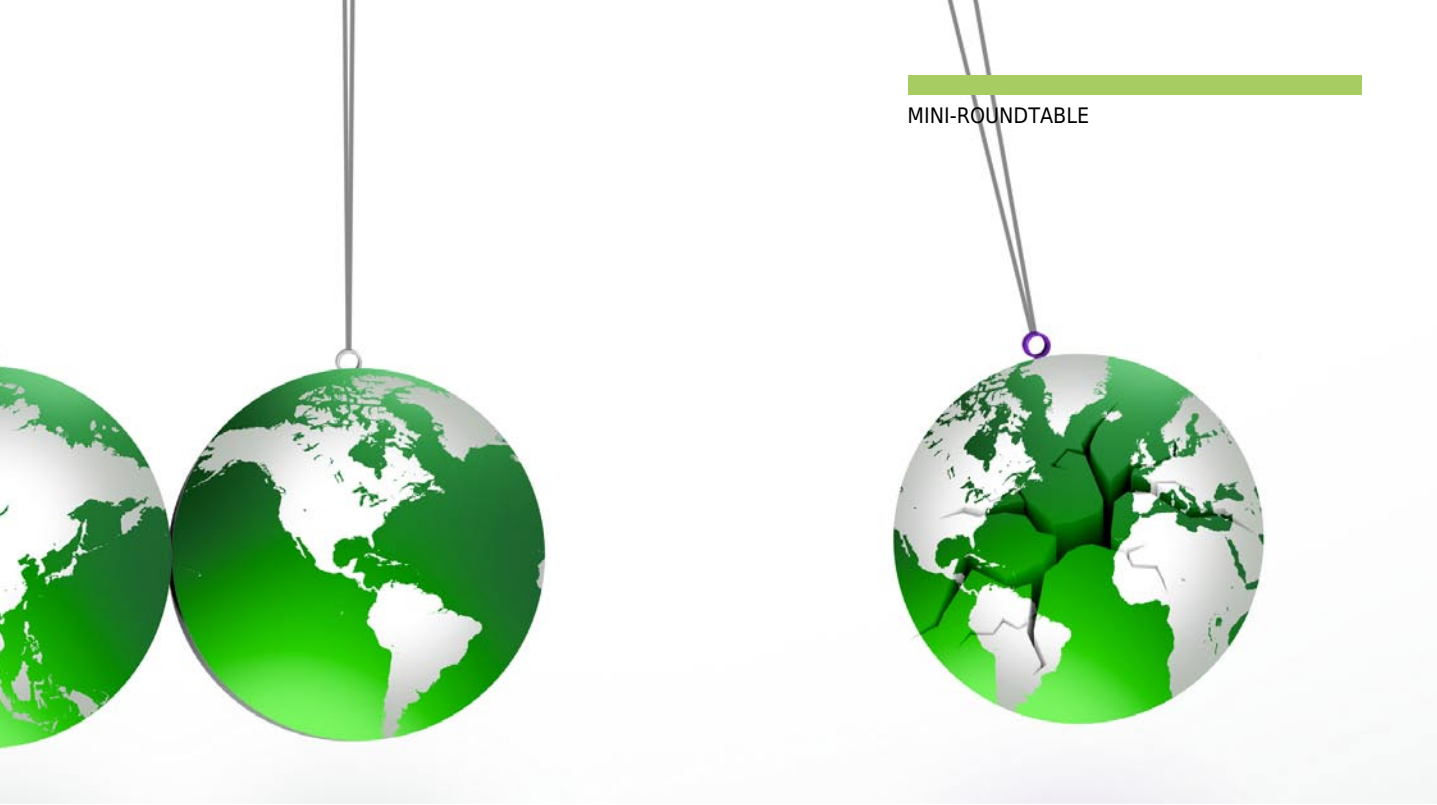
Akyurek: Issues of enforcement of judgments between Member States are governed by EU regulations including the Council Regulation of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters – the Brussels I Regulation – which provides fast enforcement proceedings. Judgments which fall into the scope of the Brussels I Regulation are recognised *ipso jure* in other Member States through a simplified procedure so as to obtain a declaration of enforceability. Hurdles may arise when a party seeking enforcement of a judgment in a foreign country where no bilateral treaty, dealing with the reciprocal recognition and enforcement of foreign judgments, has been signed. Under these circumstances, enforcement may be denied, especially in case of non-compliance with public policy or lack of jurisdiction of the foreign court. Enforcement of arbitral awards is in theory easier than enforcement of court judgments thanks to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards signed by 150 countries. However, in practice difficulties to enforce arbitral awards may arise in countries known to be unfriendly to arbitration. In those countries, the enforcement order to be granted by the judiciary may become a hurdle and enforcement may sometimes be blocked on the ground that the award would breach public policy rules in those countries.

Kuck: The United States is not a party to any judgment recognition treaty, although the US courts regularly enforce foreign judgments. The recognition and enforcement of foreign money judgments is governed by the law of each of the 50 states, so a party seeking to enforce a foreign judgment in the United States will need to determine the law of the particular state in which the debtor's assets may be found. More than half of the states have adopted

the Uniform Foreign Money Judgments Recognition Act. The main grounds for denial of enforcement of a foreign judgment under the Act are that the rendering court lacked personal or subject matter jurisdiction or that the judicial system in which the judgment was rendered does not provide impartial tribunals or due process of law. Public policy grounds are also frequently invoked by parties attempting to avoid enforcement of a judgment. With respect to international arbitration awards, however, the US is a party to the New York Convention and therefore the enforcement of a foreign arbitral awards in the US is relatively more straightforward.

CD: In terms of international litigation in a foreign court, what effect can unfamiliarity or lack of confidence in the process have on the outcome? Are such concerns justified in certain jurisdictions around the world?

Kleiman: Many procedural rules can be counterintuitive for lawyers who find themselves dealing with a legal system they are unfamiliar with. Making strategic judgment calls that involve unknown rules in a foreign judicial system can result in onerous consequences, such as relinquishing rights by missing important time limits. Seeking advice from experienced local counsel is fundamental. Certain countries are known for the lack of transparency in their judicial processes. Others are also known for very high corruption risks. Litigating in the domestic courts of these countries raises justifiable concerns. The best way to pre-empt this situation is to provide for international arbitration in the relevant contract documentation. Where litigation in undesired local courts cannot be avoided, it will be of paramount



importance to take everything necessary step with a view to preserving appeals and, where available, international remedies such as those available under investment treaties.

Kuck: Parties who attempt to pursue claims in a foreign court without heeding the advice of local counsel may encounter numerous pitfalls that could ultimately render any judgment of obtained unenforceable. On the other hand, parties facing claims in foreign jurisdictions should also consult with local counsel at the outset to make sure that none of their rights are waived or that they do not miss an opportunity to raise issues which may subsequently protect them from enforcement of a judgment against them in their home courts. Moreover, not all foreign judicial systems provide impartial tribunals or even the most basic due process. There have been instances where parties have determined to default rather than appear before such tribunals and to focus on defending themselves at the enforcement stage. In all events, corruption or a lack of due process may ultimately provide grounds for a successful challenge to the enforcement of foreign judgments.

Akyurek: When it comes to an international litigation, usual risks are exacerbated by the lack of clarity of foreign laws, procedures or even court case law. If a party cannot have a precise overview of a foreign judicial system, it is unlikely that he will file a claim in this jurisdiction. Therefore, when it comes to international litigation, parties need to pay great attention to the governing law clause and the choice of forum clause depending on the country where the damage occurred and the country where the judgment will be enforced. Recognition and enforcement of foreign judgments may diverge considerably, even within the same

regions. In cases where no multilateral or bilateral treaty has been signed by the country where the enforcement is sought, success of enforcement will mostly depend on how effective the foreign national legal system is and which degree of importance is granted to the respect for the rule of law. Under these circumstances, enforcement may be denied, especially in case of non-compliance with public policy or lack of jurisdiction of the foreign court.

Aitkulov: It would be careless to say that there are jurisdictions where a lack of familiarity with local procedural rules will not, or could not, be fatal for a party's case. Participating in foreign judicial proceedings without the relevant knowledge is in this sense very much akin to finding a safe path through unfamiliar swampland. Putting aside the obvious issues surrounding admission to act in state courts in a range of jurisdictions, a party must plan in advance the procedural steps that should, or could, be taken as the case develops. One of the reasons why this is important is because certain procedural steps are only available at specific, usually early, stages of proceedings. For example, as a matter of Russian law, a party can object to the jurisdiction of a Russian state commercial court by reference to an arbitration clause only before its first submission is made on the merits of the case. By way of a further example, untimely or poorly thought out objections claiming a party was not properly notified of proceedings may effectively deprive that party of a valuable mechanism to protect its rights.

CD: What are some of the common issues and problems that can arise – such as managing expectations, costs and timeframes – when seeking to enforce a judgment?

Akyurek: Issues and problems arising out of the enforcement of a judgment in other jurisdictions will depend on the set of rules that shall apply within the given jurisdiction. For example, enforcement of judgments between Member States will be granted through a simplified procedure so as to obtain a declaration of enforceability. Moreover, from January 2015, recognition and enforcement of judgments issued in a Member State will be recognised in another Member State without any special procedure being required, meaning that no extra delay or extra cost will have to be borne by the party seeking enforcement. However, there are still recurring challenges which are pointed out by parties involved in international litigation when they seek enforcement of a judgment in a foreign country where no bilateral treaty have been signed. Parties mainly complain about the length of legal proceedings. Another recurring theme is the costs of commercial disputes.

Aitkulov: Often a successful party regards a judgment or an award in its favour as the end of the battle, however in reality this is rarely the case. If the losing party is not willing to honour the judgment or award voluntarily, the creditor needs to allocate additional funds and time to collect. Quite often, costs in this respect will include the costs associated with locating assets against which enforcement may be performed, and securing such assets – for example, by obtaining freezing orders. Another cost and time factor that creditors often tend to overlook is the set of procedural requirements applicable to documents to be submitted for the purposes of enforcement. In a number of countries, including most CIS countries, the relevant documents must be translated in their entirety into the national language and legalised. This seemingly technical issue has additional timing and cost implications, and accordingly due account must be taken of it early on in the process in order to avoid delays at the enforcement stage.

Kuck: Parties may believe that once they have obtained a judgment they have succeeded in the litigation, when in fact significant hurdles to collecting the judgment may remain. Accordingly, counsel should take steps from the outset to manage client expectations regarding the likelihood and scope of potential recovery. In the United States, the lack of a judgment enforcement treaty means that parties could encounter significant hurdles, both substantively and in terms of cost and delay, to enforcing a US judgment outside of the United States. This often comes as a surprise to US parties. For example, a US court may consider service on a defendant to be sufficient for a claim to proceed, but a court in the jurisdiction where the resulting judgment must be enforced may have a different view. Certain types of US judgments, such as default judgments or judgments awarding punitive damages, may also prove difficult to enforce in foreign courts. For this reason, counsel should work closely from the outset of the litigation with local counsel where the defendant's assets are located to identify possible enforcement issues early on and to strategise accordingly.

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>
> *Ozan Akyurek, Jones Day*

Kleiman: A common issue that may arise in the context of enforcing a judgment rendered in a commercial matter is that a losing party is either insolvent or organises its own insolvency to escape enforcement. Enforcement proceedings are also both costly and time consuming. Investigations might be required to locate the losing party's assets. Bailiffs' fees may also be significant. Generally, costs and delays increase where the losing party is uncooperative. Local rules of enforcement proceedings may also considerably delay the resolution of the dispute. In cases involving states or state entities, clients should be warned about the state's immunity from execution, which may prevent enforcement. While this immunity from execution is rather restricted in a jurisdiction like France, and in practice limited to diplomatic and military assets, some countries tend to be more protective of state assets.

"With very few exceptions, judgments or arbitral awards are of no value for creditors without meaningful enforcement steps."

Timur Aitkulov, Clifford Chance CIS Limited

CD: What lessons about this issue can we draw from developments in the high-profile *Yukos* case?

Kuck: This year's $50bn Hulley/Yukos v Russia award, arising out of the three investment treaty cases brought by shareholders in the former Yukos, illustrates the challenges presented when trying to enforce a foreign judgment or arbitral award against a sovereign state. If the Russian courts decline to enforce the awards in Hulley/Yukos against the Russian Federation, then the claimants and award creditors will likely also attempt to enforce against state property located outside of Russia – however, most other jurisdictions, including the United States, have laws that immunise non-commercial property held by sovereign states from attachment. Judgment and award creditors often, therefore, seek enforcement of arbitral awards against state-owned entities in addition to the state itself. Even then, parties may face difficult issues of proof relating to veil-piercing and alter ego theories.

Kleiman: Persistence pays off. The next challenge for the victors will most likely be on the execution front. Seizing assets located in Russia may prove

more difficult than, for example, resisting the motion for annulment of the award or trying to obtain enforcement orders in New York Convention countries. As far as execution on Russia's assets is concerned, it may prove difficult to persuade local courts to pierce the corporate veil of major Russian companies, such as Rosneft. Piercing the corporate veil in similar situations has proved significantly difficult in France.

Aitkulov: Recent developments have spurred a new wave of discussions regarding the prospects of enforcement of foreign judgments and awards against states or state-owned companies. Some other cases relating to Yukos have also resurrected an old debate as to the enforceability of an arbitral award that has been annulled in the state where it was rendered. It appears that while enforcement of such awards may be possible in a limited number of countries, parties cannot totally rely on this.

Akyurek: The case demonstrates how the issue of exorbitant exercise of court jurisdiction may become intertwined with the enforcement of arbitral awards. Indeed, courts in some jurisdictions could be of great support to the circulation of arbitral awards. The Yukos case, where an arbitral award was rendered in Moscow against Rosneft and annulled by the Russian courts, is a great example of this issue. However, Yukos Capital managed to have the award recognised by the Dutch and English courts and enforced on assets located in the Netherlands and the UK. This case outlines that recognition of foreign awards that have been successfully challenged and annulled in their original seat can nevertheless be enforced in some arbitration-friendly jurisdictions.

CD: In your opinion, how important is it for parties to consider their ability to enforce or uphold a decision in a foreign jurisdiction, at the earliest possible point?

Aitkulov: In many cases, such an assessment is crucial to be able to say that the outcome of the dispute will be positive for the claimant. It is rarely the case that a party participates in adversarial proceedings solely for the sake of the process. With very few exceptions, judgments or arbitral awards are of no value for creditors without meaningful enforcement steps. Among other things, an accurate grasp of the prospects of successful enforcement allows a party to budget appropriately its legal costs on the proceedings. It should also allow the party to accurately assess the viability of potential settlement arrangements. Last, but not least, an awareness of potential impediments to enforcement which arise at the stage of proceedings in court or arbitration – such as parallel proceedings or attempts to dissipate assets – should allow the party to use appropriate defence mechanisms such as anti-suit injunctions, requests for interim measures and the like.

Kleiman: Enforcement of a decision is the crux of the matter where monetary relief or specific performances are at stake. For cases where a state or a state entity is involved, waivers of the state's immunity from execution should be entered into. In all cases, detailed execution options can be conducted in the pre-litigation case assessment in order to measure the existence of available and efficient means of enforcement. Asset searches will help define an adequate strategy for the efficient preservation of assets by conservatory measures.

Akyurek: This issue is of course of great importance as a party needs to ensure that he or she will be able to enforce a rendered decision in a foreign jurisdiction before instituting any proceedings.

Kuck: The first thing counsel should do when deciding whether to file suit against a foreign party is to consider where the foreign party's assets are located and whether a judgment will ultimately be enforceable in those jurisdictions. A judgment is worthless if it is not enforceable in any of the jurisdictions where the other party's assets are located. Indeed, there may be cases in which a party is better served by filing its claim in the foreign jurisdiction at the outset. If the decision is made to pursue litigation against the foreign party outside of its home court, then the potential enforceability of the resulting judgment should inform counsel's strategy from day one. In framing the complaint, counsel should carefully consider the types of claims asserted and remedies sought in terms of their enforceability in foreign courts, and counsel should confirm that the manner of service of process utilised satisfies the requirements of the foreign jurisdiction.

CD: What advice can you offer to parties on drafting dispute resolution clauses that address the issue of foreign enforcement in advance? Do strong, clear contractual provisions provide the best chance of avoiding problems down the line?

Kleiman: As a matter of principle, the jurisdiction of the court where enforcement is sought has exclusive jurisdiction to order enforcement measures. If this jurisdiction is exclusive, any agreement to the contrary is null and void. With this in mind, parties can nonetheless agree on certain elements that the local courts will take into account in the enforcement process. This is particularly true for cases involving states or state entities. The parties can – and should – agree upfront that the state waives its immunity from execution. This clause should be carefully drafted to ensure that it will be upheld by the local courts requested to order enforcement measures.

Kuck: Drafting a strong dispute resolution clause is a critical first step in avoiding protracted enforcement litigation. Arbitration clauses are frequently the

best option for international commercial contracts because the New York Convention has been adopted by more than 150 countries and provides for the efficient enforcement of arbitral awards around the world. The arbitration clause should expressly provide for the parties' consent to personal jurisdiction for the purposes of enforcement actions where their assets are located. Choice of court clauses can also be effective, although their enforceability varies across jurisdictions. Such clauses should also include an explicit consent to the jurisdiction of the court by the parties, consent to particular method for service of process, and a waiver of any forum non conveniens or improper venue defences. Drafters should also make sure the chosen forum has subject matter jurisdiction over the dispute and will be willing to entertain the dispute. Several US states, including New York, have statutes that permit parties to choose the state as a forum for litigating disputes, even where the underlying transaction has only a weak connection to the state.

Akyurek: With respect to arbitration, parties need to carefully set the conditions of arbitration proceedings – the place of arbitration or of litigation, the applicable law, the language, the number of arbitrators and if the country where they want to enforce the arbitral award is arbitration-friendly. The main point is to select the law of a country where domestic courts will fully recognise the arbitration system and the award. France is known as an arbitration-friendly jurisdiction mainly because it provides the most advanced and liberal legislation. This was particularly outlined by the Hilmarton and Putrabali cases where French Courts accepted to enforce an award that had been cancelled in the country of the seat of arbitration, on the ground of the New York Convention., French courts will apply the 'Cornelissen' case law which requires that a foreign judgment meets the following three requirements: the jurisdiction of the foreign court; that the parties have not seized a foreign court in order to defraud otherwise applicable rules; and compliance with international public order.

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Lea Haber Kuck,
Skadden, Arps, Slate, Meagher & Flom LLP

Aitkulov: Ideally, a party should think about potential enforcement issues – such as the existence

of applicable treaties or other regimes allowing for enforcement in the particular state, the possibility of using investment protection mechanisms, and so on – as early as the drafting of the jurisdictional clause and, more generally, structuring the contractual relationships with its counterparty. There are a range of issues that should be taken into account, from the most obvious – such as avoiding incomplete or incorrect references to arbitration rules, stipulating dysfunctional pre-dispute mechanisms, and so on – to quite complex questions such as the availability of optional jurisdictional clauses, the applicability of mediation, the inclusion of clauses allowing for interference or joinder of third parties, and consolidation of proceedings.

CD: Looking ahead, are treaties and conventions the best way to ensure multijurisdictional enforcement of judgments, to the satisfaction of parties involved in cross-border disputes?

Akyurek: Treaties and conventions guarantee legal certainty for parties seeking enforcement of judgments before foreign courts. Enforcement of judgments in foreign jurisdictions is, in theory, easier thanks to several international conventions, mainly the Hague Convention of February 1971 on enforcement of foreign judgments in civil and commercial matters and the Brussels 1 Regulation of December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

Kuck: Ultimately, the best way to ensure multijurisdictional enforcement is via treaty. However, it has proven difficult to construct an enforcement treaty with worldwide application. The Hague Convention on Choice of Court Agreements grew out of attempts to negotiate a comprehensive multilateral enforcement treaty. It provides for mandatory enforcement of judgments rendered in certain international disputes between contracting parties that have included forum selection clauses in their contracts. Although the United States and the European Union both signed the Convention in 2009, neither has ratified it yet. So far, only Mexico has acceded to the Convention, and the Convention will not come into force until it is ratified by a second signatory state. Even if the Convention does come into force, however, it has significant exclusions of which parties should be aware. Unfortunately, the enforcement of court judgments internationally is not likely to be significantly easier any time soon and advance planning and careful consideration with local counsel will remain crucial to achieving a more predictable outcome.

Aitkulov: The current geopolitical situation and international relations are too volatile to rely solely on non-treaty instruments such as a reciprocity regime. Admittedly, international treaties also do not provide

a bulletproof guarantee of enforcement, but they do allow at least a certain degree of predictability in terms of the prospects of future recovery against a defaulting party.

Kleiman: In the vast majority of cases, arbitral awards are voluntarily enforced by parties or after an expedited judicial process. This is due to the undeniable success of the New York Convention. There is no international instrument of equivalent reach for judgments. This is why court judgments are less likely than arbitral awards to be voluntarily complied with. Rules of enforcement of judgments are, in most cases, domestic rules that are set by each state individually. Some courts may require a full new trial on the merits before accepting to enforce them. Litigators may take advantage of this situation. Progress for the enforcement of judgments should also be addressed in a multilateral convention at a public international law level. A good example is the Brussels Convention that has harmonised the issue of enforcement of EU member state judgments, in civil and commercial matters, in other EU Member States. This regulation has brought significant legal security and predictability. CD