New York Law Journal

A NEW YORK LAW JOURNAL SPECIAL SECTION

Litigation

An ALM Publication

WWW.NYLJ.COM

MONDAY, APRIL 12, 2010

Keep an Eye on the **End Game:** Enforcement

BY CLAUDIA T. SALOMON AND J.P. DUFFY

AS THE GLOBALIZATION of business persists, international arbitration continues to be the preferred method for resolving cross-border disputes.[1] The increased prevalence of international arbitration has led to more arbitral awards, which in turn has led to more frequent enforcement actions.

The increasing number of award confirmation proceedings has highlighted the issues that can arise when parties seek to enforce international arbitral awards. This article examines some of those issues and offers practical solutions that should be considered from the time when the arbitration clause is drafted through the enforcement proceedings.

Enforcement Is the Ultimate Goal

Although approximately half of all international commercial arbitrations end in voluntary compliance with a final award,[2] a significant number conclude with contentious and protracted enforcement proceedings.[3]

In light of this reality, practitioners must always keep in mind the ultimate goal: enforcement. A final award that cannot be enforced may not be worth the paper on which it is printed.

Many practitioners lose sight of that fact, however, because of the perceived ease with which international arbitral awards subject to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Award (New York Convention) can be enforced. Indeed, ease of enforcement under the New York Convention is frequently touted as one of the primary benefits of international arbitration,[4] and with its summary enforcement procedures,[5] limited enforcement defenses[6] and near universal acceptance around the globe,[7] the New York Convention's reputation as an attractive reason to select international arbitration for dispute resolution is well deserved.

The perception that New York Convention awards are virtually assured recognition in enforcement proceedings can cause practitioners to overlook critical enforcement issues that should be addressed (i) at the time the arbitration clause is drafted, (ii) during the substantive arbitral proceedings, and (iii) during enforcement proceedings themselves. Failure to consider those issues can unnecessarily prolong enforcement proceedings and can, in the worst case scenario, render an award unenforceable and ineffective.

© BIGSTOCK

Steps to Take at the Drafting Phase

Parties should first consider enforcement issues during the drafting of the arbitration clause. The vast majority of issues that arise in enforcement proceedings can be avoided simply by drafting the arbitration clause correctly.

1. Seat the Arbitration in a New York Convention Country. The most critical step to minimizing enforcement issues is to seat the arbitration in a country that is a signatory to the New York Convention. By seating the arbitration in a country that has acceded to the New York Convention, practitioners ensure that the prevailing party in the arbitration can employ the most potent enforcement tool available today.

The New York Convention currently has 144 signatories.[8] Accordingly, the vast majority of countries that are typically chosen as seats will have acceded to the convention.

Nevertheless, there are still countries in Africa,[9] Asia,[10] Latin America[11] and the Caribbean[12] that have not signed the New York Convention. Many of those countries are rich in natural resources and therefore attract foreign investment. Consequently, practitioners should never assume that a jurisdiction has acceded to the convention and should always ensure a country has ratified the New York Convention before seating an arbitration there.

2. Employ Regional Treaties in Addition to the New York Convention. While the New York

CLAUDIA T. SALOMON *is the global co-chair of DLA Piper's international arbitration practice, and J.P. Duffy is a senior associate in the group. Both authors are resident in the firm's New York office.*

Convention is the enforcement treaty of choice, practitioners should also draft clauses to take advantage of any regional enforcement treaties that may be available.

For instance, if the transaction involves a party from a state that is a member of the Arab League, consider seating the arbitration in a country that has ratified both the New York Convention and the 1983 Arab Convention on Judicial Cooperation (Riyadh Convention). Doing so may facilitate enforcement proceedings and may foreclose potential enforcement issues that might otherwise arise.

Similarly, practitioners drafting clauses for contracts involving Latin American parties may wish to seat the arbitration in a country that has ratified the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention). While the New York Convention is still likely to be the vehicle employed in any eventual enforcement proceeding, the ability to employ a regional treaty for enforcement may have unexpected benefits.

3. Anticipate Where Enforcement Is Likely to Be Sought. A critical consideration at the drafting phase is where parties are likely to attempt to enforce any eventual award they might receive. By properly anticipating this question, parties can draft around known issues in those jurisdictions and can increase the probability that an award will be recognized.

Parties that anticipate enforcing in Qatar, for example, may wish to exclude any right to appeal the merits of the award to the Qatari courts.[13] Parties that expect to enforce in India may wish to expressly waive application of Part I of the Indian Arbitration and Conciliation Act, 1996, which permits parties that are opposing confirmation to raise a broad public policy defense that is akin to a review on the merits.[14] Moreover, parties seating arbitrations in England and Wales may wish to preclude the right to appeal questions of law to the English courts[15] if that right is not foreclosed by the institutional rules chosen.[16]

Those are merely a few examples of enforcement impediments that can be circumvented by thoughtful drafting of the arbitration clause. Practitioners should investigate each jurisdiction in which they anticipate enforcing the award so that issues specific to those jurisdictions can be averted and evaded.

4. Avoid Unnecessarily Restricting the Jurisdictions in Which Enforcement Can Be Sought. While parties must consider drafting around potential enforcement issues, they must also be careful not to prematurely limit the venues in which they can bring enforcement proceedings. Unnecessarily restricting the venues in which an award can be enforced at the drafting phase can ultimately leave the parties with an award that cannot be enforced in any jurisdiction at all.

While it concerned a domestic U.S. award and unique facts, *Park Place Associates, Ltd. v. United States*[17] demonstrates the inherent danger of trying to limit the venue in which an award can be enforced.[18]

In that case, the drafters restricted enforcement to a single venue that was jurisdictionally precluded from entertaining an enforcement proceeding.[19] As a consequence, the prevailing party in the arbitration secured a valid award, but was left without a court in which it could be enforced.[20]

To prevent that dilemma, practitioners should generally permit enforcement in "any court of competent jurisdiction," unless there is a specific reason to restrict enforcement to a more limited universe of jurisdictions.

Issues That Arise During Arbitration

The next phase of a proceeding in which practitioners must consider enforcement issues is the arbitration itself. Parties must not lose sight of enforcement issues during the arbitration or they may win nothing more than a pyrrhic victory.

1. Preventing a Party From Presenting Its Case Can Preclude Enforcement. An interesting enforcement issue arises during the substantive phase of the arbitration when parties seek to limit the scope of the opposing party's case. Restricting a party's right to present its case in international arbitration can constitute a denial of due process and can result in a challenge to enforcement under Article V.1(b) of the New York Convention.[21]

In U.S. courts, and in many courts around the world, evidence is presumptively excluded until the party offering it demonstrates that it is admissible. However, in international arbitration, the general presumption is that all evidence will be accepted into the record by the tribunal, but that the tribunal will only accord the evidence the weight the tribunal deems appropriate.[22]

If a party ignores that practice and successfully argues that evidence cannot be accepted by the tribunal, the party renders any award in its favor vulnerable to a due process challenge at the enforcement stage. Consequently, international arbitration practitioners must carefully consider whether to oppose the introduction of evidence and should choose their battles wisely when doing so.

> Although approximately **half** of all international commercial arbitrations end in voluntary compliance with a final award, **a significant number** conclude with **contentious, protracted** enforcement proceedings.

2. Irregularities in the Arbitral Procedure. Practitioners can also render an award in their favor subject to challenge under Article V.1(d) of the New York Convention[23] by failing to observe any arbitral procedures agreed to by the parties or called for by the applicable institutional rules.

While any number of procedural irregularities could arise in the course of an arbitration upon which a party could rely to challenge enforcement of an award, many courts will only refuse enforcement if the procedural irregularity impacted the outcome of the arbitration.[24] Consequently, minor irregularities that do not rise to the level of due process violations will generally be insufficient to challenge confirmation of an award.[25]

Nevertheless, parties should be cautious during the course of arbitral proceedings to comply with procedures as much as possible so that they do not afford a losing party ammunition for an Article V.1(d) challenge at the time of enforcement. Even if the challenge lacks merit, it will delay confirmation and thereby frustrate quick enforcement of the award.

3. Manifest Disregard of the Law. Parties that anticipate enforcing in the United States should also keep in mind that certain U.S. jurisdictions still permit manifest disregard challenges to international arbitration awards subject to the New York and Panama Conventions.[26] Parties should therefore position themselves during the arbitration to account for that reality.

For example, a party that believes it will be the one enforcing any eventual award should foreclose any potential manifest disregard challenges by demonstrating in the record that it clearly explained the law to the arbitrators and that the arbitrators followed that law (which is different than correctly applying it).[27] Conversely, a party that anticipates opposing confirmation should ensure it builds a sufficient record during the arbitration to support any manifest disregard challenge that may be warranted under the circumstances.[28]

Consequently, practitioners should remain focused on enforcement during the merits phase of an arbitration and should not forget that a valid, but unenforceable, award may be of little utility to the prevailing party.

During Enforcement Proceedings

The final phase in which enforcement issues arise is in enforcement proceedings themselves. However, if practitioners have properly addressed potential enforcement issues while drafting the arbitration clause, and if they have adequately considered enforcement during the arbitration itself, the issues that surface during enforcement proceedings should be minimized. Nevertheless, no amount of planning can eliminate issues altogether, and enforcement proceedings carry their own set of difficulties.

• ***The New York Convention's Public Policy Exception.*** A particularly difficult issue is the public policy exception to enforcement contained in Article V.2(b) of the New York Convention. Pursuant to that exception, a jurisdiction can refuse confirmation of a convention award if enforcement of the award would be contrary to the public policy of the jurisdiction where enforcement is sought.

While U.S. courts have interpreted the public policy exception narrowly,[29] many other countries have taken a more expansive view that can render enforcement in those countries difficult. For instance, Saudi Arabia will employ the public policy exception to refuse enforcement of awards that are not Shari'ah-compliant, which frequently results in Saudi Arabia refusing to enforce foreign arbitral awards.[30]

A trend is developing in India as well to refuse to enforce awards under an expanding understanding of the New York Convention's public policy exception, which has increased the difficulty of enforcing convention awards in that country.[31] Similarly, Russian courts have a reputation for refusing to enforce awards rendered against Russian parties on public policy grounds,[32] although that trend in Russia may be changing.[33]

An interesting point to note with regard to Article V.2(b)'s public policy exception is the misconception among many practitioners that Chinese courts frequently invoke it to refuse

recognition of New York Convention arbitral awards.[34] In fact, China did not refuse recognition to a convention award on public policy grounds until 2008 in the matter of *Hemofarm DD, MAG International Trading Company v. Jinan Yongning Pharmaceutical Co., Ltd.*,[35] which strongly suggests that Chinese courts do not regularly rely on the public policy exception to refuse enforcement.

• ***Sanctions for Opposing Award Confirmation.*** An enforcement issue that has taken on renewed significance in the United States is the extent to which a party can oppose confirmation without being sanctioned. That question has taken on particular relevance in the context of manifest disregard challenges, which remain viable after the U.S. Supreme Court's decision in *Hall Street Associates*, and which can be advanced against New York Convention awards in certain federal circuits.[36]

Manifest disregard challenges, while frequently raised, are rarely successful, and can be employed to improperly frustrate the New York Convention's summary confirmation procedures.[37] In recognition of that fact, certain courts have taken the view that advancing unmeritorious confirmation defenses in enforcement proceedings constitutes sanctionable conduct.[38]

For instance, in *B.L. Harbert International LLC*,[39] the Eleventh Circuit considered sanctioning a party for advancing a frivolous manifest disregard defense to avoid confirmation of an award.[40] Recently, in *DMA International Inc. v. Qwest Communications International Inc.*, the Tenth Circuit sanctioned attorneys for appealing a decision to confirm an arbitral award.[41]

In both *B.L. Harbert International LLC* and *DMA International Inc.*, sanctions were possible because the aggrieved party appealed the district court's confirmation decision on grounds that the circuit courts deemed to be spurious. In that regard, neither decision is altogether surprising because parties advancing frivolous appeals are always subject to sanctions.

A more troubling practice, however, arises when district courts sanction parties merely for advancing defenses to the enforcement of awards.[42] By sanctioning parties at the district court level for advancing permissible defenses, district courts may be effectively denying aggrieved parties their right to defend in enforcement proceedings and may be preemptively preventing parties from opposing confirmation altogether.[43]

Conclusion

Enforcement is the ultimate end-game in any arbitration, regardless of which side of the award a party finds itself. By carefully considering enforcement issues when drafting arbitration clauses, and by not losing sight of enforcement during the substantive dispute, parties can minimize the difficulty of confirming an international arbitral award and ensure that enforcement proceedings will be resolved in their favor in the most efficient manner possible.

1. For a general explanation of the benefits of international commercial arbitration for the resolution of cross-border disputes, see Claudia Salomon and Matthew Saunders, "How to Arbitrate Internationally: A Guide to the Dispute Resolution Process Emerging in Cross-Border Commercial Matters," New York Law Journal (June 26, 2006).

2. See "International Arbitration: Corporate Practices and Attitudes," pg. 2 (PricewaterhouseCoopers, 2008) (relating that 49 percent of international arbitrations considered resulted in voluntary compliance with a final award).

3. See, e.g., *Karaha Bodas Co., LLC v. Perusahaan Pertambagan Minyak Dan Gas Bumi Negra*, 364 F.3d 274 (5th Cir. 2004) (relating difficulties that can arise in contested enforcement proceedings).

4. See Albert Jan van den Berg, "The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation," pg. 1 (Kluwer Law, 1981); see also Emanuel Gaillard and Domenico DiPietro, "Enforcement of Arbitration Agreements and International Arbitral Awards," pg. 21 (Cameron, May 2008).

5. See New York Convention Article IV (requiring presentation of only a certified, translated copy of the award and translated copy of the arbitral agreement to secure recognition of the award); 9 U.S.C. §§6, 207 (collectively relating that enforcement of an award subject to the New York Convention merely requires an application in the form of a motion and compliance with Article IV of the New York Convention).

6. See New York Convention Articles V.1(a)-(d) and V.2(a)-(b) (listing five bases under which parties may oppose confirmation of awards and two additional bases upon which either the parties or a court can deny enforcement); Albert Jan van den Berg, "The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation," pg. 264-65; see also J.P. Duffy, "Hall Street One Year Later: The Manifest Disregard Debate Continues," 19 AM. REV. INT'L ARB. 193 (2009) (examining applicability of manifest disregard of the law to international awards in the United States and similar treatment in jurisdictions outside the U.S.).

7. See New York Convention Status, (relating that 144 countries have acceded to the New York Convention), available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html.

Restricting a party's right to present its case during the substantive phase of an international arbitration can constitute a **denial of due process** and can result in a **challenge** to enforcement under Article V.1(b) of the **New York Convention**.

8. See id.

9. Angola (a diamond and oil exporter), Ethiopia (head of the African Union), and Libya (an oil production center) are notable exceptions.

10. Turkmenistan (oil and gas producer), Tajikistan (a potential mineral exporter) and Yemen (an oil and gas exporter).

11. Belize (a tourism center), Surinam (a precious metals and oil exporter), and Guyana (a mineral exporter).

12. Many of the islands in the Caribbean that are tourist destinations have not acceded to the New York Convention.

13. See Essam al Tamimi, "The Practitioner's Guide to Arbitration in the Middle East and North Africa," pgs. 356, 360 (JurisNet, 2009).

14. See *Venture Global Engineering v. Satyam Computer Services, Ltd.*, Civ. App. No. 309 (Supreme Court of India, Jan. 10, 2008) (holding that broad public policy exception contained in Part I of Indian Arbitration and Conciliation Act, 1996 could apply to international awards falling under Part II of the act unless applicability of Part I is waived).

15. See English Arbitration Act, Sec. 69.

16. See *Shell Egypt West Manzala GmbH and Shell Egypt West Qantara GmbH v. Dana Gas Egypt Ltd. (*formerly *Centurion Petroleum Corporation)* [2009] EWHC 2097 (Comm).

17. 563 F.3d 907 (9th Cir. 2009).

18. For a more complete discussion of *Park Place Associates*, see J.P. Duffy, "Valid but Unenforceable: The Ninth Circuit's Decision in *Park Place Associates, Ltd. v. United States of America*," DLA Piper International Arbitration Newsletter (Aug. 13, 2009), available at http://www.dlapiper.com/valid-but-unenforceable:the-ninth-circuits-decision-in-park-place-associates-v-united-states-of-america/.

19. See id.

20. See id.

21. See Emanuel Gaillard and Domenico DiPietro, "Enforcement of Arbitration Agreements and International Arbitral Awards," pg. 679 (noting that awards can be denied enforcement or set aside under Article V.1(b) for a denial of due process or natural justice); Thomas E. Carbonnean and Jeanette A. Jaeggi, "Handbook on International Arbitration and ADR," pg. 171 (describing due process requirements under Article V.1(b) of the New York Convention and the manner in which U.S. courts treat such challenges).

22. See generally, IBA Rules on the Taking of Evidence in International Commercial Arbitration, Art. 9.1 (granting the arbitral tribunal the right to determine admissibility and weight of evidence).

23. Article V.1(d) of the New York Convention permits parties to challenge recognition and enforcement of an award when the arbitral procedure was not in accordance with the parties' agreement.

24. See Emanuel Gaillard & Domenico DiPietro, "Enforcement of Arbitration Agreements and International Arbitral Awards," pg. 745-46.

25. See *Compagnie des Bauxites de Guinée v. Hammermills Inc.*, No. 90-0169, 1992 U.S. Dist. LEXIS 8046 (D.D.C. May 29, 2002) (relating that Article V.1(d) was not intended to permit a reviewing court to police every procedural irregularity that might occur during an arbitration and that only errors that resulted in "substantial prejudice" should prevent enforcement).

26. See J.P. Duffy, "Hall Street One Year Later: The Manifest Disregard Debate Continues," 19 AM. REV. INT'L ARB. 194-98 (discussing applicability of manifest disregard to awards subject to Chapters 2 and 3 of the FAA).

27. See *Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 548 F.3d 85, 92 (2d Cir. 2008) (noting differences between following the law and correctly applying it).

28. See *B.L. Harbert International LLC v. Hercules Steel Co.*, 441 F.3d 905, 911 (11th Cir. 2006) (relating difficulty of proving manifest disregard); *Duferco Int'l Steel Trading v. T. Klaveness Shipping A/S*, 333 F.3d 383, 389 (2d Cir. 2003) (noting difficulty of establishing manifest disregard of the law).

29. See *Parsons & Whittenmore Overseas Co. v. Societe Generale de l'Industie du Papier (RATKA)*, 508 F.2d 969 (2d Cir. 1974).

30. See Essam al Tamimi, "The Practitioner's Guide to Arbitration in the Middle East and North Africa," pg. 371; see also Association for International Arbitration—October 2009, available at http://www.arbitration-adr.org/documents/?i=62 (relating that Saudi Arabian Court refused to enforce ICC award against Saudi party in *Jadawel International (Saudi Arabia) v. Emaar Property PJSC (Saudi Arabia)* in April of 2009 because the award was deemed not to be Shari'ah compliant).

31. See *Venture Global Engineering v. Satyam Computer Services, Ltd.*, Civ. App. No. 309 (Supreme Court of India, Jan. 10, 2008); see also *Oil & Natural Gas Corp. (ONGC) v. Saw Pipes Ltd.*, 2003 (5) SCC 705 (Supreme Court of India April 17, 2003) (introducing broad ranging interpretation of public policy exception in awards subject to Part I of the Indian Arbitration and Conciliation Act, 1996).

32. See William R. Spiegelberger, "The Enforcement of Foreign Arbitral Awards in Russia: An Analysis of the Relevant Treaties, Laws, and Cases," 16 AM. REV. INT'L ARB. 261, 297 (2005) (noting inconsistent manner in which Russian courts have applied Article V.2(b)'s public policy exception).

33. See Irina Maisak and Alexander Vaneev, "Russia: Sevmash Case Shows Growing Acceptance of Foreign Awards," CDR News (Feb. 17, 2010), available at http://www.cdr-news.com/index.php?option=com_content&view=article&id=614:russia-sevmash-case-shows-growing-acceptance-of-foreign-awards&catid=103:articles&Itemid=207.

34. See Henry Litong Chen and B. Ted Howes, "The Enforcement of Foreign Arbitration Awards in China," Bloomberg Law Reports–Asia Pacific, Vol. 2, No. 6, pg. 2 (Bloomberg 2009).

35. See Richard Clark, "The Dispute Resolution Review," pg. 113 (Law Business Research Ltd., 2009).

36. See J.P. Duffy, "Hall Street One Year Later: The Manifest Disregard Debate Continues," 19 AM. REV. INT'L ARB. 193.

37. See id. at 195.

38. See J.P. Duffy, "Opposing Confirmation of International Arbitration Awards: Is It Worth the Sanctions," 17 AM REV. INT'L ARB. 143, 143 (2006).

39. See n.20, supra.

40. See J.P. Duffy, "Opposing Confirmation of International Arbitration Awards: Is It Worth the Sanctions," 17 AM REV. INT'L ARB. at 145.

41. 585 F.3d 1341 (10th Cir. 2009).

42. See *SII Invs. Inc. v. Jenks,* 2006 U.S. Dist. LEXIS 51753, 2006 U.S. Dist. LEXIS 51753, at *19 (M.D. Fla. July 27, 2006) (recommending that attorneys be sanctioned for advancing manifest disregard defense at confirmation stage); *Rueter v. Merrill Lynch, Pierce, Fenner & Smith*, 440 F. Supp. 2d 1256 (N.D. Ala. 2006) (sanctioning party for opposing confirmation partially on manifest disregard grounds); but see *Fairchild Corp. v. Alcoa Inc.*, 510 F. Supp. 2d 280, 298 (S.D.N.Y. 2007) (denying costs to prevailing party in enforcement proceedings and recognizing parties' right to defend).

43. See J.P. Duffy, "Opposing Confirmation of International Arbitration Awards: Is It Worth the Sanctions," 17 AM REV. INT'L ARB. at 146.