



Focusing on enforcement early and often

Counsel should consider practical issues throughout the process to facilitate enforcing awards.

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As business continues to globalize, international arbitration remains the preferred method for resolving cross-border disputes. One feature of international arbitration that makes it attractive for resolving cross-border disputes is the ease with which international arbitral awards can be enforced under the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).

Although ease of enforcement is frequently cited as a reason for choosing international arbitration, few practitioners actually consider enforcement until after confirmation proceedings have begun. By that time, it is usually too late to avoid many hazards that can be prevented simply by focusing on enforcement from the time an arbitration clause is drafted to the time enforcement proceedings begin.

Parties and counsel should consider practical issues throughout the international arbitration process to facilitate enforcement and avoid problems that can render an otherwise valid international arbitral award unenforceable.

To understand why practitioners must consider enforcement during all phases of an international arbitration, it is first neces-

sary to appreciate that most international arbitrations never result in enforcement proceedings. Approximately one-third of all international arbitrations settle before the tribunal issues a final award, and another 49% end in voluntary compliance with a final award. See PricewaterhouseCoopers, *International Arbitration: Corporate Practices and Attitudes 2008*, at 2. Only 11% result in enforcement proceedings.

Those statistics imply that only the most difficult and contentious matters end in enforcement proceedings, which suggests that the enforcement proceedings themselves are likely to be antagonistic. Given that reality, parties must anticipate that adversaries will vigorously oppose confirmation proceedings and should therefore take steps during all phases of a dispute to minimize the possibility that successful defenses will be raised.

With 144 countries having acceded to the treaty, the New York Convention has achieved widespread acceptance and provides universally recognized procedures for enforcing international arbitral awards rendered in a New York Convention state. The convention's streamlined enforcement procedures and limited enforcement defenses can lull parties into overlooking the statistical fact, however, that disputes that advance to enforcement proceedings are generally contentious, and parties engaged in contentious enforcement proceedings are likely to present every plau-

sible defense to enforcement that can credibly be raised. Consequently, parties cannot rely solely on the New York Convention's pro-enforcement procedures to ensure an award will be enforced.

Enforcement is the ultimate goal in any arbitration, and practitioners must keep that fact in mind when drafting the arbitration clause. The paramount enforcement concern is seating the arbitration in a country that has acceded to the New York Convention. Given the number of signatories to the treaty, parties should have good reasons if they choose to seat the arbitration in a country that has not ratified the New York Convention.

If an arbitration must be seated in a jurisdiction that has not acceded to the New York Convention, parties should seek to take advantage of any regional enforcement agreements that may be available. For instance, if an arbitration must be seated in Iraq, which has not acceded to the New York Convention, regional enforcement treaties such as the 1983 Arab Convention On Judicial Cooperation (Riyadh Convention) or the 1987 Arab Convention On Commercial Arbitration (Amman Convention) can provide alternate means of enforcing arbitral awards.

Practitioners should anticipate where any award is likely to be enforced when drafting international arbitration clauses. If thought is given to where a party may seek enforcement, known enforcement issues in that juris-

diction can be anticipated and avoided. For instance, if enforcement is anticipated in India, the drafter may wish to expressly waive application of Part I of the Indian Arbitration and Conciliation Act, 1996, which permits parties to raise broad public policy defenses.

If enforcement will be sought in Saudi Arabia, the drafter must be aware that Saudi Arabia will not enforce awards that are not Shariah-compliant. Accordingly, the drafter should require the arbitrators to issue a Shariah-compliant award if possible. If enforcement in Qatar is anticipated, drafters may wish to exclude any right to appeal the merits of the award to the Qatari courts. Similarly, drafters may wish to preclude any right to appeal questions of law to the English courts if the arbitration is seated in England or Wales.

Practitioners must also consider enforcement implications that arise when contracting with a sovereign. First, drafters should include

mon, however, for representatives of a party to interview potential party-appointed arbitrators in advance of appointing them. That practice can affect an arbitrator's neutrality, and failure to observe guidelines that preserve neutrality when interviewing candidates can result in subsequent enforcement difficulties.

MANIFEST DISREGARD

The U.S. Supreme Court's recent decision in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 2010 WL 1655826 (U.S. 2010) appears to have implicitly acknowledged the continued viability of manifest disregard as a ground for opposing confirmation of arbitral awards in the United States. Thus, parties that anticipate enforcing awards in the United States should keep in mind that certain U.S. jurisdictions permit manifest-disregard challenges to international arbitration awards and should position themselves in the substantive arbitration to account for that fact.

dictions have interpreted the exception broadly to deny enforcement to otherwise valid awards. For instance, Saudi Arabia employs Article V.2(b)'s policy exception to refuse recognition to arbitral awards that are not Shariah-compliant, which frequently results in Saudi Arabia refusing to enforce foreign arbitral awards. India appears to be expanding its interpretation of the public-policy exception as well.

Other jurisdictions have an undeserved reputation for employing Article V.2(b)'s public-policy exception to refuse recognition. For instance, Russian courts are reputed to frequently refuse enforcement on public-policy grounds, but recent decisions suggest that trend is changing. Similarly, Chinese courts are accused of invoking Article V.2(b) to refuse recognition of international arbitration awards, but the allegations appear unfounded because China did not refuse recognition to a New York Convention award on



Of paramount importance is seating the arbitration in a nation that has ratified the New York Convention.



appropriate sovereign-immunity waivers in the arbitration clause. While it is generally accepted under public international law that states are not entitled to sovereign immunity when engaging in activities of a commercial nature, there are distinctions between immunity from jurisdiction and immunity from enforcement, and parties should take all steps necessary to ensure that the arbitration clause maximizes the potential for enforcement. Second, drafters should account for any special legal rights to which sovereigns may be entitled. For instance, when entering into any agreement with the government of Dubai, the laws of Dubai must govern the contract and the arbitration should be seated in Dubai. Failure to follow such requirements will lead to an award that will face significant enforcement hurdles.

Although parties must consider enforcement at the time the arbitration clause is drafted, they must also continue to consider enforcement issues during the substantive arbitration itself. Virtually all major international arbitration institutional rules provide that arbitrators, including party-appointed arbitrators, must be neutral. It is not uncom-

For instance, if a party anticipates the need to enforce any eventual award in the United States, it should seek to prevent potential manifest-disregard challenges by creating a clear record that shows that the arbitrators were aware of and followed any applicable laws (which is different than correctly applying laws). Conversely, if a party expects the need to oppose confirmation, it should create a record during the arbitration that is sufficient to support any appropriate manifest-disregard challenges that can be raised.

Sufficient planning when drafting the arbitration clause and during all phases of an actual dispute can minimize the possibility of problems arising during enforcement proceedings. However, even the best planning cannot eliminate enforcement problems altogether.

Article V.2(b) of the New York Convention embodies a public policy exception that permits jurisdictions to refuse recognition to international arbitral awards that are contrary to the public policy of the jurisdiction where enforcement is sought. While U.S. courts have interpreted the New York Convention's public-policy exception narrowly, other juris-

public-policy grounds until 2008. That matter, *Hemofarm DD, MAG International Trading Co. v. Jinan Yongning Pharmaceutical Co. Ltd.*, concerned an ICC award rendered in France that was refused recognition in China on the ground that the award conflicted with previous decisions issued by a Chinese court in the same dispute.

Enforcement is the fundamental goal in international arbitration and begins when the arbitration clause is drafted. Practitioners that remain focused on enforcement from the time the arbitration clause is drafted until the enforcement proceedings will avoid numerous pitfalls and increase their chances of enforcing their award.

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