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## NOTES AND COMMENTS

### ENFORCEMENT BEGINS WHEN THE ARBITRATION CLAUSE IS DRAFTED

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The globalization of business has continued to make international arbitration the preferred method for resolving cross-border commercial disputes.<sup>1</sup> One feature of international arbitration that makes it attractive for cross-border dispute resolution 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”).<sup>2</sup>

While ease of enforcement is frequently cited as a reason for choosing international arbitration as a dispute resolution mechanism, few practitioners actually consider enforcement issues until confirmation proceedings have begun. By that time, it is typically too late to avoid many hazards that can be prevented simply by focusing on enforcement at the time an arbitration clause is drafted and by remaining focused on enforcement throughout a dispute.

This article examines practical issues that should be considered throughout the international arbitration process to facilitate enforcement of international arbitral awards and offers tips for avoiding problems that can render an otherwise valid international arbitral award unenforceable.

#### *A. Statistics Suggest Enforcement Proceedings Generally Arise in the Most Contentious Matters*

To understand why practitioners must consider enforcement during all phases of an international arbitration, it is first necessary to appreciate that most international arbitrations never result in enforcement proceedings. More than one-quarter of all international arbitrations settle before the tribunal issues a final award,<sup>3</sup>

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<sup>1</sup> See Loukas Mistelis & Crina Baltag, *Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices*, 19 AM. REV. INT’L ARB. 319, 322 (2008) (relating that surveyed companies continue to prefer international arbitration for resolving cross-border disputes).

<sup>2</sup> See ALBERT JAN VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* 1 (1981); see also EMANUEL GAILLARD & DOMENICO DIPIETRO, *ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS* 21 (2008).

<sup>3</sup> See Mistelis & Baltag, *supra* note 1, at 323 (relating that 27% of international arbitrations considered settled before a final award was rendered by the tribunal).

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and another 47% end in voluntary compliance with a final award.<sup>4</sup> In fact, recent studies demonstrate that only 11% of international arbitrations culminate in enforcement proceedings.<sup>5</sup>

Those statistics suggest that only the most challenging and contentious matters end in enforcement proceedings, which indicates that the enforcement proceedings themselves are likely to be litigious.<sup>6</sup> Given that fact, parties must anticipate that adversaries will vigorously oppose confirmation of international arbitration awards and should therefore take steps during all phases of a dispute to ensure that they minimize the possibility of successful enforcement defenses.

### B. *Enforcement Under the New York Convention*

The majority of international arbitral awards are enforced under the New York Convention.<sup>7</sup> With 146 countries having acceded to the treaty,<sup>8</sup> 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.<sup>9</sup>

The New York Convention's streamlined enforcement procedures<sup>10</sup> and limited enforcement defenses<sup>11</sup> can lull parties into overlooking the critical reality the statistics bear out, however – disputes that advance to enforcement proceedings are generally contentious, and parties engaged in contentious

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<sup>4</sup> *See id.* (stating that 47% of international arbitrations surveyed ended in voluntary compliance with a final award).

<sup>5</sup> *See id.* (contending that 11% of cases surveyed ended in enforcement proceedings).

<sup>6</sup> *See, e.g.,* *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004) (demonstrating the contentious nature of some enforcement proceedings).

<sup>7</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38.

<sup>8</sup> *See* New York Convention Status (relating that 146 countries have acceded to the New York Convention), *available at* [http://www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention\\_status.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html).

<sup>9</sup> *See* AMERICAN ARBITRATION ASSOCIATION HANDBOOK ON INTERNATIONAL ARBITRATION & ADR 158-59 (2006).

<sup>10</sup> New York Convention, Art. 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).

<sup>11</sup> *See* New York Convention, Arts. V(1)(a)-(d) & 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); VAN DEN BERG, *supra* note 2, at 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 U.S. and similar treatment in jurisdictions outside the U.S.).

enforcement proceedings are likely to present every plausible defense to enforcement that can credibly be raised. Consequently, parties cannot rely solely on the New York Convention's pro-enforcement procedures to ensure that an award will be enforced, and must instead anticipate potential enforcement defenses at the outset of a contractual relationship to avoid subsequent issues during enforcement proceedings.

### *C. Enforcement Begins When the Arbitration Clause Is Drafted*

Enforcement is the ultimate goal in any arbitration, and practitioners must keep that in mind when drafting arbitration clauses.

#### *1. Seat the Arbitration in a New York Convention Country and Make Use of Regional Enforcement Treaties Where Available*

The paramount enforcement concern when drafting an international arbitration clause is seating the arbitration in a country that has acceded to the New York Convention. There are currently 146 signatories to the New York Convention, and parties should have good reasons if they choose to seat the arbitration in a country that has not ratified it.

Moreover, practitioners should not assume that a country has acceded to the New York Convention when seating an arbitration there. There are still countries in Africa,<sup>12</sup> Asia,<sup>13</sup> Latin America,<sup>14</sup> the Middle East<sup>15</sup> and the Caribbean<sup>16</sup> that have not acceded to the treaty, and unnecessarily seating an arbitration in one of those countries can have dire enforcement consequences.

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.<sup>17</sup> While those regional treaties may not be as favorable in all instances as the New York Convention, they nevertheless provide a better enforcement alternative than no treaty at all.

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<sup>12</sup> Angola, Ethiopia, and Libya, for example.

<sup>13</sup> Turkmenistan and Tajikistan.

<sup>14</sup> Belize, Surinam, and Guyana.

<sup>15</sup> Iraq and Yemen.

<sup>16</sup> Many Caribbean islands have not acceded to the New York Convention.

<sup>17</sup> 2010 Investment Climate Statement – Iraq, U.S. Department of State Bureau of Economic, Energy and Business Affairs (March 2010) (relating that Iraq is a signatory to the Amman and Riyadh Conventions), *available at* <http://www.state.gov/e/eeb/rls/othr/ics/2010/138084.htm>.

Parties should also be aware that in certain instances, regional enforcement treaties may complement the New York Convention. For instance, the 1975 Inter-American Convention on International Commercial Arbitration (“Panama Convention”) can apply along with the New York Convention, albeit with minimal practical impact. Nevertheless, having an alternate vehicle to the New York Convention for enforcement can have unanticipated benefits.

## 2. *Consider Administered Arbitration over Ad Hoc Arbitration*

Practitioners should also consider the impact that choosing administered arbitration over *ad hoc* arbitration will have on the enforceability of any eventual award.

Administered arbitration is arbitration conducted under the auspices of an arbitral institution, such as the International Centre for Dispute Resolution, the International Chamber of Commerce or the London Court of International Arbitration. *Ad hoc* arbitration is generally considered to be any arbitration conducted outside an arbitral institution, typically under the UNCITRAL Rules or rules that the parties have themselves devised.<sup>18</sup>

While *ad hoc* arbitration can have certain advantages,<sup>19</sup> administered arbitration provides two potential enforcement benefits. First, arbitrations administered by recognized institutions are generally conducted under well tested rules that are likely to have been applied by experienced arbitrators, which may give an enforcing court a degree of comfort that the arbitral proceedings were both fair and professional.<sup>20</sup> Second, certain institutions scrutinize awards before issuing them to the parties, which may assure an enforcing court that the award is both sound and well considered.<sup>21</sup> Accordingly, while no statistics about the enforceability of administered awards versus *ad hoc* awards exist, there are enforcement benefits to administered awards that should be considered.

## 3. *Draft Around Known Enforcement Issues in the Jurisdiction Where Enforcement Is Likely*

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 to enforce an award, known enforcement issues in that jurisdiction can be anticipated and avoided.

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<sup>18</sup> See NIGEL BLACKABY & CONSTANTINE PARTASIDES, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION § 1.153 (5th ed. 2009).

<sup>19</sup> See *id.*, §§ 1.155-1.156 (noting that *ad hoc* arbitration may be tailored to meet the parties’ specific needs and can be particularly beneficial in investor-state arbitrations).

<sup>20</sup> See PAUL D. FRIEDLAND, ARBITRATION CLAUSES FOR INTERNATIONAL CONTRACTS 40-41 (2d ed. 2007).

<sup>21</sup> See *id.*

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 that are opposing confirmation of an award to raise broad public policy defenses that can lead to Indian courts reviewing an award on the merits.<sup>22</sup>

If enforcement will be sought in Saudi Arabia, the drafter must be aware that Saudi Arabia will not enforce awards that are not Shari'ah-compliant.<sup>23</sup> Accordingly, to the extent possible, the drafter should require the arbitrators to issue a Shari'ah-compliant award.

If enforcement in Qatar is anticipated, drafters may wish to exclude any right to appeal the merits of the award to the Qatari courts.<sup>24</sup> Similarly, drafters may wish to preclude any right to appeal questions of law to the English courts<sup>25</sup> if the arbitration is seated in England or Wales and that right of appeal is not foreclosed by the institutional rules chosen by the parties.<sup>26</sup>

Those are merely a few examples of potential issues thoughtful drafters can work around if careful consideration is given to the place where enforcement is likely to be sought. Drafters should therefore seek to determine where enforcement will be most likely and should review any unique enforcement issues or requirements in that jurisdiction.

#### 4. *Address Sovereignty Issues Where Necessary*

Practitioners must also consider enforcement implications that arise when contracting with a sovereign or instrumentality that could be construed as a sovereign. First, drafters should include appropriate sovereign immunity waivers in the arbitration clause. While it is generally accepted under public international

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<sup>22</sup> 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); *but see Proposed Amendments to the Arbitration & Conciliation Act, 1996 – A Consultation Paper*, Ministry of Law and Justice, Government of India (discussing recommended revisions to the Indian Arbitration and Conciliation Act, 1996 that would overrule the *Satyam* decision).

<sup>23</sup> See ESSAM AL TAMIMI, *THE PRACTITIONER'S GUIDE TO ARBITRATION IN THE MIDDLE EAST AND NORTH AFRICA* 371 (2009); *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).

<sup>24</sup> See AL TAMIMI, *supra* note 23, at 356, 360.

<sup>25</sup> See English Arbitration Act 1996, Sec. 69.

<sup>26</sup> 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).

law that states are not entitled to sovereign immunity when engaging in activities of a commercial nature,<sup>27</sup> there are distinctions between immunity from jurisdiction and immunity from enforcement or execution,<sup>28</sup> and parties should take all steps necessary to ensure that the arbitration clause maximizes the potential for what the prevailing party can recover.<sup>29</sup>

Second, drafters should account for any special legal rights to which sovereigns may be entitled. For instance, when entering into any agreement with an instrumentality of the Government of Dubai, the governing law of the contract must generally be that of Dubai,<sup>30</sup> and the arbitration should be seated in Dubai.<sup>31</sup> Failure to follow such requirements when contracting with a sovereign will lead to jurisdictional issues and an award that will face significant enforcement hurdles.

##### 5. *Provide for Enforcement Wherever It Is Permissible*

While it is advisable for practitioners to anticipate where enforcement of an award may be sought, it is inadvisable to prematurely limit enforcement only to those jurisdictions. Doing so can result in an award that cannot be enforced in any jurisdiction at all.

The enforcement proceedings in *Park Place Associates, Ltd. v. United States of America*<sup>32</sup> demonstrate the inherent danger of trying to limit the venue in which an arbitral award can be enforced.<sup>33</sup> In that case, which concerned a domestic award and unique facts, the parties to the contract restricted enforcement of any arbitral award to a single venue that was subsequently precluded from entertaining

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<sup>27</sup> See GAILLARD & DIPIETRO, *supra* note 2, at 829; MALCOLM SHAW, *INTERNATIONAL LAW* 640-41 (5th ed. 2003).

<sup>28</sup> See GAILLARD & DIPIETRO, *supra* note 2, at 833; IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 638-39 (6th ed. 2003); see *FG Hemisphere Associates L.L.C. v. Democratic Republic of Congo*, CACV 373/2008 & CACV 43/2009 (Feb. 2010) (Hong Kong Court of Appeal ruling that Democratic Republic of Congo did not waive sovereign immunity to execution by participating in ICC arbitrations).

<sup>29</sup> The full range of sovereign immunity issues is beyond the scope of this article, and practitioners should obtain sovereign immunity advice on a case-by-case basis.

<sup>30</sup> See AL TAMIMI, *supra* note 23, at 518.

<sup>31</sup> See Instructions Concerning Contracts Entered into by the Government of Dubai and its Departments and Corporations (issued Feb. 6, 1988), *as amended by* Instructions dated March 15, 1988; Instructions Concerning the Arbitration Clause in Contracts entered into by the Government of Dubai and its Departments and Corporations (issued Feb. 6, 1988).

<sup>32</sup> 563 F.3d 907 (9th Cir. 2009).

<sup>33</sup> 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>.



enforcement proceedings.<sup>34</sup> As a consequence, the prevailing party in the arbitration secured a valid award, but could not enforce that award in any court.<sup>35</sup>

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 venues.

6. *Consider Addressing Situations Where an Arbitrator Refuses to or Is Unable to Participate*

Given recent decisions from China and Russia, it may also be advisable for drafters to address how the tribunal may proceed if one of the arbitrators refuses to, or is unable, to participate.

Most major institutional rules provide a solution if an arbitrator refuses to or cannot participate.<sup>36</sup> Those rules generally permit the arbitration to proceed to an award with either replacement arbitrators or the remaining members of the tribunal deciding the issues.<sup>37</sup> Recent rulings from Chinese and Russian courts have called into question the wisdom of relying solely on those rules, however.

In a recent enforcement proceeding brought in China to confirm a \$26.4 million award issued against two Chinese respondents,<sup>38</sup> the Supreme People’s Court of China affirmed a decision from the Fujian High People’s Court that refused recognition to an award under Article V(1)(d) of the New York Convention on grounds that only two arbitrators in a three-member tribunal had issued the final award after the third member of the tribunal became unable to participate.<sup>39</sup> The Fujian High People’s Court reasoned that the arbitration clause at issue called for a three-member tribunal, and that having only two members of the tribunal issue the final award therefore violated the parties’ agreement on the composition of the tribunal.<sup>40</sup>

Similarly, in July of last year, Russia’s Supreme Arbitrazh Court affirmed a decision from the Moscow City Arbitrazh Court granting a petition to set aside an award issued by two members of a three-member tribunal after the third member

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<sup>34</sup> *See id.*

<sup>35</sup> *See id.*

<sup>36</sup> *See* ICDR RULES, Arts. 10-11; ICC RULES, Art. 12; LCIA RULES, Arts. 10-12.

<sup>37</sup> *See id.*

<sup>38</sup> *See* First Investment Corporation v. Fujian Mawei Shipbuilding Ltd. and Fujian Shipbuilding Industry Group Corporation, Final Award (June 19, 2006).

<sup>39</sup> *See* Xing Xiusong, *Award by Truncated Tribunal Refused Recognition and Enforcement*, available at [http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=d207afa3-ce06-4ce7-a80b-6d3aa05b6f75&utm\\_source=ILO+Newsletter&utm\\_medium=email&utm\\_campaign=Arbitration+Newsletter&utm\\_content=Newsletter+2010-06-10](http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=d207afa3-ce06-4ce7-a80b-6d3aa05b6f75&utm_source=ILO+Newsletter&utm_medium=email&utm_campaign=Arbitration+Newsletter&utm_content=Newsletter+2010-06-10).

<sup>40</sup> *See id.*; *see also* New York Convention, Art. V(1)(d) (providing in relevant part that an award may be refused recognition where the “composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties”).

died.<sup>41</sup> The Supreme Arbitrazh Court reasoned that the remaining members of the tribunal had violated the principles of equal treatment of the parties and equal representation on the tribunal by rendering the award more than two months after the third arbitrator died,<sup>42</sup> even though the arbitration was being conducted under the rules of the Russian Chamber of Commerce and Industry (“MKAS”),<sup>43</sup> which permitted the remaining arbitrators to issue an award if a member of the tribunal became unavailable after hearings had closed.<sup>44</sup>

#### D. *Enforcement Issues During the Substantive Arbitration*

While 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. It is easy to lose sight of those issues when embroiled in the substantive dispute, but failing to account for enforcement complications can result in an award that is nothing more than a Pyrrhic victory.

##### 1. *Follow Basic Guidelines When Interviewing Party-Appointed Arbitrators*

Virtually all major international arbitration institutional rules provide that arbitrators, including party-appointed arbitrators, must be neutral. Indeed, “[i]t is a fundamental principle in international arbitration that every arbitrator must be and remain independent and impartial of the parties and the dispute.”<sup>45</sup>

It is not uncommon, however, for representatives of a party to interview potential party-appointed arbitrators in advance of appointing them.<sup>46</sup> That practice can impact an arbitrator’s neutrality, and failure to observe certain guidelines when interviewing party-appointed arbitrators can result in subsequent enforcement difficulties.

Several arbitral institutions have promulgated non-binding guidelines that delineate the permissible scope of pre-appointment interviews with party-appointed arbitrators. An examination of those guidelines demonstrates that certain communications are generally unobjectionable. Some of those communications include:

- the identities of the parties, counsel and witnesses;
- the estimated timing and length of hearings;

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<sup>41</sup> See Sebastian Perry, *Russian Award Set Aside After Arbitrator's Death*, GLOBAL ARB. REV. (July 28, 2010).

<sup>42</sup> See Philipp Peters, *Arbitration Decisions by Truncated Tribunals – An All-Time Favorite*, available at <http://www.kj-legal.com/en/dispute-resolution-news/306-arbitration-truncated-tribunals.html>.

<sup>43</sup> See *id.*

<sup>44</sup> See *supra* note 41.

<sup>45</sup> BLACKABY & PARTASIDES, *supra* note 18, § 4.72.

<sup>46</sup> See *id.* § 4.69.

- a general and neutral description of the case that does not advocate for or against any positions;
- the arbitrator's background and qualifications;
- the candidate's prior experience as an arbitrator, including any public awards the arbitrator has rendered; and
- the arbitrator's opinion about his or her competence to entertain the parties' dispute.

Communications that would generally be deemed improper in pre-appointment interviews would include:

- the specific facts of the case;
- discussions of the parties' positions or arguments in the dispute; or
- questions regarding positions the prospective arbitrator might take on any of the issues in dispute between the parties.

While these are merely general guidelines that are not exhaustive, failure to follow those principles when interviewing a potential arbitrator can result in enforcement issues.

## 2. *Do Not Unnecessarily Restrict a Party's Ability to Put on Its Case*

Preventing a party from fairly presenting its case can result in an award being refused recognition under Article V(1)(b) of the New York Convention.<sup>47</sup> Practitioners must keep that fact in mind when seeking to limit the scope of the opposing party's case.

In many national legal systems, evidence is presumptively excluded unless the party offering the evidence demonstrates that it is admissible. In international arbitration, however, that presumption is reversed, and evidence is generally accepted into the record by the tribunal, but then accorded only the weight that the tribunal deems appropriate.<sup>48</sup>

Parties can render an international arbitral award unenforceable if they ignore that practice and successfully limit the other party's ability to introduce evidence. Consequently, international arbitration practitioners must carefully consider

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<sup>47</sup> See GAILLARD & DIPIETRO, *supra* note 2, at 679 (noting that awards can be denied enforcement or set aside under Art. V(1)(b) for a denial of due process or natural justice); THOMAS E. CARBONNEAU & JEANETTE A. JAEGGI, HANDBOOK ON INTERNATIONAL ARBITRATION AND ADR 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).

<sup>48</sup> 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).

whether to oppose the introduction of evidence and should choose their battles wisely when doing so.

### 3. Prepare for “Manifest Disregard” Challenges

The U.S. Supreme Court’s decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*<sup>49</sup> appears to have implicitly acknowledged the continued viability of manifest disregard as a ground for vacating or opposing confirmation of arbitral awards in the U.S. This calls into question the rulings of those courts that have held that manifest disregard did not survive *Hall Street Associates, L.L.C. v. Mattel, Inc.*<sup>50</sup> Consequently, parties that anticipate enforcing in the U.S. 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 address that fact.<sup>51</sup>

For instance, if a party anticipates the need to enforce any eventual award in the U.S., it should seek to prevent a potential manifest disregard challenge at the enforcement stage by creating a clear record that shows that the arbitrators were aware of and followed the applicable law (which is different from correctly applying the law).<sup>52</sup> 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.<sup>53</sup>

Practitioners should also recognize that manifest disregard is not a unique U.S. concept, and that certain aspects of the manifest disregard doctrine are recognized by other legal regimes.<sup>54</sup> Accordingly, practitioners should be

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<sup>49</sup> 130 S.Ct 1758.

<sup>50</sup> 552 U.S. 576, 585 (2008). See Duffy, *supra* note 11, at 196-98 (discussing circuit split on the continued viability of the manifest disregard basis for opposing confirmation of an arbitral award).

<sup>51</sup> See Duffy, *supra* note 11, at 194-98 (discussing applicability of manifest disregard to awards subject to Chapters 2 and 3 of the FAA).

<sup>52</sup> 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).

<sup>53</sup> 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).

<sup>54</sup> See *Sempra Energy International v. Argentine Republic*, ICSID Case No. ARB/02/16, Decision on Annulment, ¶¶ 160-65 (discussing manifest excess of powers under the ICSID Convention and recognizing that manifest errors of law could be so egregious as to constitute a manifest excess of powers); see also *B v A*, [2010] EWHC 1626 (Comm) ¶ 25 (July 1, 2010) (English High Court recognizing that “a conscious disregard of the provisions of the chosen law is a necessary but not a sufficient requirement” to challenge enforcement of an arbitral award for excess of powers or serious irregularity under the English Arbitration Act 1996); *Mexico v. Metalclad Corp.*, 2001 BCSC 664, ¶¶ 67-72 (2001) (British Columbia Supreme Court ruling that arbitrators exceeded their powers by imposing elements of Chapter 18 of NAFTA into a Chapter 11

sensitive to manifest disregard issues in any arbitrations, and not just those in which enforcement in the U.S. is anticipated.

#### 4. *Seek Relief that the Tribunal Can Grant*

International arbitration is a creature of contract, and as such, it can restrict the remedies that arbitrators can grant under certain circumstances. Consequently, practitioners must ensure that they request relief that the tribunal is actually capable of granting.

For instance, while many institutional rules permit arbitrators to grant injunctive relief,<sup>55</sup> as a general matter, an international arbitral tribunal is not empowered to grant injunctive relief against third parties.<sup>56</sup> Moreover, the substantive law of certain jurisdictions, particularly jurisdictions in the MENA (Middle East and North Africa) region, may not permit arbitrators to grant injunctive relief or may only allow such powers if expressly provided for in the arbitration clause.<sup>57</sup>

Similarly, the substantive laws of many civil-law countries, most notably France and Germany, do not permit punitive damages to be awarded.<sup>58</sup> Accordingly, any request for damages beyond mere compensatory damages could render an award unenforceable.

It is therefore critical that parties give sufficient thought to the impact of the relief they seek and that they appropriately limit themselves to those remedies permitted, or any award could be rendered unenforceable.

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arbitration); *Wing Construction (M) Sdn Bhd v. Johor Port Authority*, [2010] 1 LNS 31 (CA) (Malaysian Court of Appeal recognizing that awards may be set aside for errors of law that appear on the face of the award); *Orinoco Steamship Company Case (U.S. v. Venezuela)*, 11 R.I.A.A. 227, 239 (1910) (recognizing that “the excessive exercise of power may consist . . . in misinterpreting the express provisions of the Agreement in respect of the way in which . . . [the arbitrators] are to reach their decisions; notably with regard to the legislation or the principles of law to be applied”).

<sup>55</sup> See ICDR RULES, Art. 21(1) (expressly permitting the tribunal to grant injunctive relief); ICC RULES, Art. 23(1) (permitting the tribunal to grant interim measures); LCIA Rules, Art. 25.1(c) (permitting an LCIA tribunal to issue any provisional relief that could be granted in a final award).

<sup>56</sup> See BLACKABY & PARTASIDES, *supra* note 18, § 9.60 (relating that international arbitral tribunals are generally precluded from issuing injunctive relief against third parties); *but see* PETER TURNER & REZA MAHTASHAMI, *A GUIDE TO THE LCIA ARBITRATION RULES* § 6.144 (2009) (relating that LCIA tribunal employed Article 25.1(c) of the LCIA rules to order a respondent to have its subsidiary stay court proceedings against the claimant until the conclusion of the arbitration).

<sup>57</sup> See AL TAMIMI, *supra* note 23, at 352 (relating that the law of Qatar does not permit arbitrators to grant interim relief); *id* at 148, 184, 271 and 504 (relating that Jordanian, Kuwaiti, Moroccan, and Emirati law permit tribunals to issue interim measures if specifically provided for in the arbitral clause).

<sup>58</sup> See BLACKABY & PARTASIDES, *supra* note 18, § 9.45 (noting that punitive damages are not recoverable under French or German law).

### E. *Issues that Arise During Enforcement Proceedings Themselves*

Sufficient planning when drafting the arbitration clause and during all phases of an actual dispute can minimize the possibility of issues arising during enforcement proceedings. However, even the best planning cannot eliminate enforcement issues altogether. Accordingly, practitioners must be prepared to deal with certain enforcement issues that arise in spite of careful enforcement planning.

#### 1. *The New York Convention's Public Policy Exception to Enforcement*

Article V(2)(b) of the New York Convention embodies a public policy exception to enforcement and can be particularly problematic during enforcement proceedings. The Article V(2)(b) exception permits jurisdictions to refuse recognition to international arbitral awards that are contrary to the public policy of the jurisdiction where enforcement is sought.

U.S. courts have interpreted the New York Convention's public policy exception narrowly,<sup>59</sup> as have courts in other countries.<sup>60</sup> However, some jurisdictions 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 Shari'ah-compliant, which frequently results in Saudi Arabia refusing to enforce foreign arbitral awards.<sup>61</sup> India has employed a broad interpretation of the public policy exception as well, which has resulted in enforcement issues in India.<sup>62</sup>

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<sup>59</sup> See *Parsons & Whittenmore Overseas Co. v. Societe Generale de l'Industrie du Papier (RATKA)*, 508 F.2d 969 (2d Cir. 1974).

<sup>60</sup> K. Shanti Mogan, *Opposing Award Enforcement on the Grounds of Public Policy*, available at [http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=d1ec46b9-6817-42f4-9d84-abc35f34846b&utm\\_source=ILO+Newsletter&utm\\_medium=email&utm\\_campaign=Arbitration+Newsletter&utm\\_content=Newsletter+2010-08-05](http://www.internationallawoffice.com/Newsletters/Detail.aspx?g=d1ec46b9-6817-42f4-9d84-abc35f34846b&utm_source=ILO+Newsletter&utm_medium=email&utm_campaign=Arbitration+Newsletter&utm_content=Newsletter+2010-08-05); *c.f.* Greek Supreme Court Judgment 1665/2009 (holding that certain provisions of the Treaty on the Functioning of the European Union and the European Convention on Human Rights form part of Greek public policy for purposes of Article V(2)(b) of the New York Convention, but refusing to vacate the award).

<sup>61</sup> See AL TAMIMI, *supra* note 23, at 371; see also Association for International Arbitration, IN TOUCH (Oct. 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).

<sup>62</sup> 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); but see *Amendments to the Arbitration & Conciliation Act, 1996 – A Consultation Paper*, Ministry of Law and

Other jurisdictions have a reputation for employing Article V(2)(b)'s public policy exception to refuse recognition that may not be deserved. For instance, Russian courts are reputed to refuse enforcement frequently on public policy grounds,<sup>63</sup> but recent decisions suggest that trend is changing.<sup>64</sup> Similarly, Chinese courts are accused of invoking Article V(2)(b) to refuse recognition of international arbitration awards,<sup>65</sup> but allegations appear unfounded because China did not refuse recognition to a New York Convention award on public policy grounds until 2008 in the matter of *Hemofarm DD, MAG International Trading Company v. Jinan Yongning Pharmaceutical Co., Ltd.*<sup>66</sup>

Nevertheless, parties should always be prepared to oppose public policy arguments in enforcement proceedings.

## 2. Sanctions in Enforcement Proceedings

The issue of sanctions in enforcement proceedings has become significant in the U.S. over the past several years. While not strictly an enforcement issue, practitioners should keep in mind that the acceptable parameters for opposing confirmation of an international arbitral award may be shrinking in certain jurisdictions and should tailor their defenses appropriately.

Enforcement proceedings are the final step in the arbitration process. While those proceedings are meant to offer aggrieved parties an opportunity to oppose confirmation of awards on limited and specific grounds in appropriate cases, some parties have improperly employed enforcement proceedings as an occasion for reopening the substantive dispute addressed in the arbitration and have been particularly quick to employ manifest disregard as a basis for doing so.<sup>67</sup>

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Justice, Government of India (discussing recommended revisions to the Indian Arbitration and Conciliation Act, 1996 that would overrule the *Satyam* decision); see also *Penn Racquet Sports v. Mayor International Ltd.* (Delhi High Court, Jan. 11, 2011) (refusing to apply the *Satyam* decision to a New York Convention award).

<sup>63</sup> 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).

<sup>64</sup> See Tom Toulson, *Russian ruling signals 'friendly' approach to enforcement*, GLOBAL ARB. REV. (March 10, 2010); Irina Maisak & Alexander Vaneev, *Russia: Sev mash 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-sev-mash-case-shows-growing-acceptance-of-foreign-awards&catid=103:articles&Itemid=207](http://www.cdr-news.com/index.php?option=com_content&view=article&id=614:russia-sev-mash-case-shows-growing-acceptance-of-foreign-awards&catid=103:articles&Itemid=207).

<sup>65</sup> See Henry Litong Chen & B. Ted Howes, *The Enforcement of Foreign Arbitration Awards In China*, 2(6)BLOOMBERG L. REP. – ASIA PACIFIC 2 (Bloomberg 2009).

<sup>66</sup> See Xiao Wei, Weining Zou & Xi Deng, *China*, THE DISPUTE RESOLUTION REVIEW 111, 113 (3rd ed. Richard Clark ed., 2009).

<sup>67</sup> See Duffy, *supra* note 11, at 193.

Manifest disregard challenges are difficult to sustain and may be incorrectly employed to frustrate the New York Convention's summary confirmation procedures.<sup>68</sup> To stem the improper use of such defenses, certain courts have sanctioned parties for persistently advancing unmeritorious bases for opposing confirmation.<sup>69</sup>

For instance, in *B.L. Harbert International LLC*,<sup>70</sup> the Eleventh Circuit considered sanctioning a party for appealing denial of a frivolous manifest disregard defense.<sup>71</sup> Recently, in *DMA International, Inc., v. Qwest Communications International Inc.*, the Tenth Circuit sanctioned attorneys for appealing a decision to confirm an arbitral award where a manifest disregard defense was advanced.<sup>72</sup>

In both *B.L. Harbert International LLC* and *DMA International, Inc.*, sanctions were predicated on the aggrieved party appealing 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 at risk of being sanctioned.

A more troubling practice, however, arises when district courts sanction parties strictly for advancing defenses to the enforcement of awards.<sup>73</sup> By sanctioning parties at the district court level for advancing permissible defenses, district courts could deny aggrieved parties their right to defend in enforcement proceedings and could preemptively prevent parties from opposing confirmation altogether.<sup>74</sup>

#### F. Conclusion

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

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<sup>68</sup> See *id.* at 195.

<sup>69</sup> See J.P. Duffy, *Opposing Confirmation of International Arbitration Awards: Is It Worth the Sanctions?*, 17 AM. REV. INT'L ARB. 143, 143 (2006).

<sup>70</sup> *B.L. Harbert International LLC v. Hercules Steel Co.*, 441 F.3d 905 (11th Cir. 2006).

<sup>71</sup> See Duffy, *supra* note 69, at 145.

<sup>72</sup> 585 F.3d 1341 (10th Cir. 2009).

<sup>73</sup> See *SII Invs., Inc. v. Jenks*, 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).

<sup>74</sup> See Duffy, *supra* note 69, at 146.