Enforcement of Foreign Arbitral Awards in U.S. Courts
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The New York Convention
The vast majority of international commercial arbitral awards are paid voluntarily by losing parties, who sometimes are motivated to keep the matter confidential and out of a court record and the press. However, if the losing party refuses to satisfy its arbitral award, the prevailing party needs to obtain a court judgment in the jurisdiction where the other party resides or where its assets are located and enforce that judgment. If the losing party has a U.S. presence, an international commercial arbitration award may be entered by the U.S. federal courts as a U.S. judgment, and the prevailing party can then avail itself of enforcement rights in the United States.

The U.S. federal courts will generally enter foreign arbitration awards under the Federal Arbitration Act, 9 U.S. C. § 1-307 (FAA), and the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the New York Convention. 1

The New York Convention, which is codified as Chapter Two of the FAA, provides a uniform approach for the recognition and enforcement of foreign arbitral awards in courts throughout the world. It was drafted by the International Chamber of Commerce (ICC), presented to the United Nations Economic and Social Council, and finally adopted in 1958 by the International Conference of the United Nations. Since then, 157 countries have become parties to the agreement. Under the New York Convention, the courts in the contracting countries must enforce foreign arbitral awards with few exceptions. The only limitation is that many countries adopted the New York Convention with the reservation that they will apply the provisions only to awards made in other contracting countries. The United States adopted the New York Convention with the reservation that it will apply only if the arbitration is conducted in a contracting country. east inc. v. m/v Alaia, 876 F.2d 1168 (5th Cir. 1989).

The Procedure
The procedure for entering a foreign arbitral award under the New York Convention is found in Section 207 of the FAA. 2 Basically, the prevailing party must open a new matter in the appropriate U.S. District

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1 The United States also has signed on to the Inter-American Convention on International Commercial Arbitrations (Panama Convention) that applies generally to the member states of the Organization of American States (OAS), some of which also signed the New York Convention.
Court and file a Petition for Recognition, Confirmation and Enforcement of a Foreign Arbitral Award along with a Memorandum of Law in Support Thereof with whatever exhibits are necessary.

Once the Judge enters an order confirming the arbitral award, then, pursuant to Section 13 of the FAA, the following documents must be lodged with the court clerk for the entry of judgment thereon:

- The arbitration agreement
- The arbitrators and umpire selected
- All written extensions of time within which the arbitrators had to make the award, if any
- The award
- The full application to a court, including the notice, petition and affidavit or other paper used upon application to confirm
- The order enforcing the arbitral award
- Translation, if necessary.

The Requirements
Section 207 of the FAA provides that:

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this Chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in said Convention.

Accordingly, there are four steps to enforce an award. The first two steps require the following:

(a) The application for confirmation must be made within three years of the award, and

(b) The arbitral award must fall under the New York Convention.

An arbitration award falls under the New York Convention if (i) the award arises from a commercial legal relationship between the parties; (ii) there was a written agreement to arbitrate disputes arising from that relationship; (iii) the agreement provided for arbitration proceedings to take place in a signatory country to the New York Convention; and (iv) at least one of the parties is not an American citizen or, if both parties are Americans, the agreement involves property located abroad, performance abroad, or

(c) The application must be made to a court having jurisdiction.

Pursuant to Section 203 of the Federal Arbitration Act, the Federal District Courts have subject matter jurisdiction over any agreement or award falling under the New York Convention (see Section (b)) regardless of the amount in the controversy. 9 U.S.C. §203.

[The District Court also must have personal jurisdiction over the parties. In other words, in the case of private entities, the losing entity must be a U.S. Citizen or must have a presence in the United States by conducting at least a minimal amount of business here or having assets here. In the case of foreign governments, the U.S. Courts have personal jurisdiction over them under 28 U.S. C. § 1330(b), which provides that personal jurisdiction over a foreign state shall exist for every claim as to which the district court has jurisdiction under 28 U.S.C. § 1330(a) where service has been made pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S. C. § 1608. Under FSIA, “subject matter jurisdiction plus service of process equals personal jurisdiction.” Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 151 (D.C.Cir. 1994); See also Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 89 (D.C.Cir. 2002) (Personal jurisdiction over a foreign sovereign is established through 28 U.S.C. Section 1330(b).

Sometimes, the contract drafters include a consent to personal jurisdiction in the arbitration clause of the contract. Obviously, such a clause is very useful in otherwise questionable cases of jurisdiction.]

(d) The court must confirm the award unless it finds one of the grounds for refusal or deferral of recognition.

Article V of the New York Convention enumerates the limited grounds upon which a court may refuse to enforce a foreign award. The burden of proof is on the party asserting these defenses. The defenses include:

- The parties were under some incapacity.
- The agreement is not valid under the law to which the parties have subjected it or the law of the country where the award was made.

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• A party against whom an award was rendered was not given proper notice of the appointment of the arbitrator, or of the arbitration proceeding.
• The award contains decisions beyond the scope of matters submitted to arbitration.
• The composition of the arbitral authority, or the procedure, was not in accordance with the law of the place of the arbitration of the award.
• The award is not yet binding on the parties or has been set aside by the courts where the award was rendered.

These defenses recognize that an award must be binding under the law of the place where it was rendered before it can be recognized and enforced in the United States or any other contracting country.

It is important to ensure strict compliance with all of the contract procedures for the arbitration, such as the appointment of the arbitrators. Absent specific provisions in the contract, the requirements of the arbitration statute of the country where the arbitration hearing is held should be followed for procedural matters such as notice of the arbitrators; appointment, composition of the panel; and presentation of the evidence. Generally there is no basis for challenging an arbitral award on the grounds of procedural irregularities if the contractual provisions and/or the arbitration statute of the country \textit{lex loci arbitri} are met.

Proper venue for enforcement of an award is any court in which an action on the controversy could have been brought had the parties not agreed to arbitration. This determination turns, therefore, on the facts of each transaction. If the controversy is governed by United States law rather than foreign law, the appropriate district court would be ascertained by reference to the district in which the adverse party resides. If the matter does not fall under substantive law, but is based on diversity of citizenship or alienage, venue is where all plaintiffs or all defendants reside.

If neither of these grounds is appropriate, the FAA permits the action to be brought in the district that embraces the place designated in the agreement as the place of arbitration, if the place is in the United States.\textsuperscript{5}

\textsuperscript{5} There is some question on how venue and jurisdiction are affected if there is a situation where both parties to the agreement or award are foreigners and the losing party has assets in the United States. The District Court for the Southern District of New York touched on this problem in \textit{Metropolitan Tanker v. Pertambangan}, 427 F. Supp. 2 (S.D.N.Y. 1985) a pre-arbitration attachment case involving two foreign parties. The court, in \textit{dicta} stated that if the foreign plaintiff prevailed in arbitration, it would have recourse to the court for attachment under 9 U.S.C. §201 incorporating the Convention, implying that jurisdiction and venue existed in the New York federal court.
The Opposition

If a party opposes entry of the arbitral award against it, it must either initiate an action to set aside the arbitral award or respond to the winning side’s action to enforce the award with a Motion to Set Aside an Arbitration Award. However, there is limited ability to set aside legitimate arbitration awards in the United States. The U.S. courts endorse a strong policy favoring arbitration agreements and awards. The FAA limits the courts’ ability to set aside an arbitral award unless it was rendered by fraud or by arbitrators who were partial, corrupt, guilty of misconduct or acting beyond their powers.6

The Judgment

Once an award is confirmed and entered as a judgment of law with the court clerk, it is entitled to the same force and effect as any U.S. judgment.7 Consequently, execution of the judgment through attachment proceedings can be initiated, and collection of the judgment can be completed.