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Enforcing International Arbitration Awards: US Courts Achieve Prompt and Efficient Enforcement, With Safeguards

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Recent U.S. court decisions demonstrate that international arbitration remains a widely used and potentially attractive method for resolving international business disputes, largely due to the relative ease of enforcing awards under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. U.S. courts, however, are sensitive to cases where a purported foreign "award" was not genuine and will refuse enforcement where serious questions exist.

Companies entering into cross-border transactions often include a clause in their contracts providing for international arbitration of disputes that may arise. These clauses typically provide for arbitration before a three-person tribunal in a neutral seat (*e.g.*, New York, London, Singapore or Hong Kong), conducted under the rules of a major international arbitral institution, such as the International Chamber of Commerce (ICC), the International Centre for Dispute Resolution of the American Arbitration Association or the London Court of International Arbitration.

Companies often choose international arbitration because awards granted by an international arbitral tribunal may be enforced worldwide through the New York Convention. This treaty, which has been ratified by 158 countries, including the major trading nations, rests on two key principles: (i) a written "agreement to arbitrate," including as contained in a contractual arbitration clause, is generally enforceable; and (ii) subject to certain narrow exceptions, an arbitral award may be recognized and enforced as a final judgment in each contracting country. In the United States, the New York Convention has been enshrined in federal law through the Federal Arbitration Act (FAA).

To enforce a foreign commercial arbitral award in the U.S. courts (assuming the losing party is subject to the jurisdiction of the U.S. courts), an award holder need only present an authentic copy of the award to the court, at which point it will be recognized and enforced unless the losing party can establish a basis for nonrecognition under Article V of the New York Convention. Article V allows recognition to be declined if (i) the arbitration agreement was invalid; (ii) the losing party was not properly notified of the arbitral proceedings; (iii) the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration"; (iv) the tribunal composition was improper; (v) the award "has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made;" (vi) the "subject matter" of the dispute is not "capable of settlement by arbitration" under that country's law; or (vii) award enforcement would be contrary to "public policy."

Recent Cases

Federal case law makes clear that the enumerated grounds in Article V are to be read narrowly. As a result, the U.S. courts frequently reject attempts by losing parties to resist enforcement of foreign arbitral awards. Two recent examples include:

KG Schifffahrtsgesellschaft MS Pacific Winter MBH & CO. v. Safesea Transport, Inc., U.S. District Court for the District of New Jersey: A German ship owner obtained a $122,367.86 award against a U.S. company for breach of a charter party agreement and sought enforcement in the United States. The losing party argued that the award should be denied as being contrary to "public policy," claiming that the arbitrator ignored a time bar applicable under maritime law. Rejecting this

argument, the court noted that "courts have strictly applied the Article V defenses and generally view them narrowly," and held that "the Convention does not sanction the second guessing of an arbitrator's interpretation of the parties' agreement as this type of judicial review frustrates the basic purpose of arbitration."

De Rendon v. Ventura, U.S. District Court for the Southern District of Florida: Various parties entered into a settlement agreement concerning the share ownership in a Colombian pharmaceutical company, which provided for arbitration of disputes before an ICC tribunal in Bogota, Colombia. After a dispute arose, one of the parties obtained an arbitral award of $900,000 for breach of the agreement's confidentiality provisions. The losing party opposed enforcement of the award on a variety of grounds under Article V of the New York Convention, including that the arbitration clause, as applied, had become "invalid" because the ICC had improperly treated the case as an international (rather than domestic) arbitration. These and other challenges were rejected, with the court emphasizing "its 'extremely limited' review of arbitral awards" and "the powerful presumption that the arbitral body acted within its powers."

The limits of the courts' pro-arbitration policy, however, were demonstrated in 2019 in *Al-Qarqani v. Chevron Corporation* in the U.S. District Court for the Northern District of California. Saudi Arabian nationals brought a petition to recognize and enforce a purported arbitral award of approximately $18 billion that had been rendered against numerous individuals and companies under the auspices of the International Arbitration Centre in Cairo, Egypt. The case involved unique facts and myriad questions regarding the source of the award and the conduct of the purported arbitration in Egypt. In response to the petition, the U.S. respondents (two Chevron affiliates) argued that:

> [T]he Award was the product of sham proceedings engineered to produce an award in Petitioners' favor, that there was never an agreement to arbitrate between the Petitioners and Respondents, that the arbitral proceedings violated the plain terms of the arbitration agreement the tribunal purported to rely upon, that the claims fell outside the arbitral agreement, and that the arbitral process was riddled with gross irregularities and criminal misconduct.

The court focused on whether there was an arbitration clause between the Saudi individuals and the U.S. companies, noting that the sole basis for arbitration had been a 1933 concession agreement between the government of Saudi Arabia and a Standard Oil affiliate. The Saudi claimants, however, had never been parties to the 1933 concession and, therefore, could not invoke the arbitration clause against Chevron. With no agreement to arbitrate, the court dismissed for lack of jurisdiction.

The court added that had there been an agreement between the parties to arbitrate, recognition still would have been denied, on the grounds that the tribunal's composition had not been "in accordance with the agreement," and that the arbitral tribunal had decided matters outside the scope of the arbitration agreement.

Cases like this may prompt some to rethink whether their disputes clauses should instead specify litigation in an agreed forum, rather than arbitration. Indeed, for decades, efforts have been made to enact a treaty that will facilitate enforcement of court judgments in a similar manner as arbitration awards are subject to enforcement under the New York Convention. A multilateral treaty, the 2015 Hague Convention on Choice of Court Agreements allows for recognition and enforcement of litigation forum selection clauses, and has been ratified by five countries plus the European Union. A more comprehensive mutual judgment recognition treaty, the 2019 Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters, was opened for signature in July 2019 at the Hague Conference on Private International Law. Neither treaty, however, has gained widespread adherence.

Because of the unique facts involved, *Al-Qarqani* does not signal a trend against enforcement of commercial awards generally. Nevertheless, the case illustrates the basic threshold requirements that must be met in order to enforce a foreign arbitration award, including that the award must arise from a genuine arbitration agreement. Where there are questions about the integrity of the foreign arbitral proceeding, U.S. courts may decline to enforce the resulting award.