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Enforcement of foreign arbitration awards not always a slam-dunk in U.S. courts

By Jack Boos

With the welcome emergence of arbitration as an attractive form of dispute resolution in developing countries, U.S. practitioners are increasingly tasked to effect, or thwart, the recognition and enforcement of foreign arbitral awards in U.S. courts.

Arbitration

While many arbitration regimes are exemplary, losing

parties often feel shortchanged and seek a second swipe at the dollar by trying to block enforcement in the U.S. This can be a daunting task. The smug practitioner, who assumes U.S. courts will rubber-stamp clearly correct foreign awards and reject those that are clearly incorrect, can be rudely surprised.

This was abundantly clear in June at a conference held in the Russian Far East which I addressed, sponsored by the Russian-American Rule of Law Consortium and the Russian-American Judicial Partner-

ship. Judging from the high level of participation from attorneys around the Pacific Rim, Russian judges and legal practitioners, there is keen interest in legal developments and pitfalls in international enforcement.

At the conference, Russian representatives proudly pointed out that they have established their own Arbitrazh Courts which already have attained praise both domestically and internationally. At the same time, they expressed puzzlement at U.S. courts' rejections of some awards out of Russia.

They pointed with dismay to the recent Washington, D.C., federal court decision that allowed superstar hockey player Alexander Ovechkin to play for the National Hockey League's Washington Capitals despite a Russian arbitral award of his contractual rights to a far less lucrative spot with a team in the Russian league.

Competition for global business, booming investment in countries with relatively undeveloped legal systems and investors' knee-jerk distrust that they will be disadvantaged when disputes arise have made

reliable arbitration regimes necessary to inspire investor confidence. The ability to enforce awards once rendered — or to prevent enforcement — is an important part of the equation.

International arbitration enforcement proceedings are governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, codified at 9 U.S.C. 201 et seq., which replaced a similar, but ineffective, regime under the old League of Nations. Some 135 countries have ratified the convention, including the United States in 1970 (with un-surprising reservations that it will enforce only commercial awards and only those made in ratifying countries.) The most recent signatories are Liberia and Afghanistan in 2005. China and the Russian Federation are long-time signatories as well.

The convention provides the following seven grounds for rejection of an award:

1. Invalidity of the agreement to arbitrate under the law of the place where made, for example, where it clashes with other law specifying that a dispute is not arbitrable;

2. Insufficient notice of the appointment of the arbitrator or the proceeding or insufficient opportunity to defend. This can implicate subsidiaries, against whom enforcement is sought when only the parent took part in the arbitration. But beware advising your client to disregard irregularities or take a head-in-the-sand approach where one has actual knowledge of problems; this is a dangerous roll of the dice to assume that you can have it both ways — win in arbitration or, if you lose, to challenge irregularities at the enforcement stage. An error-free proceeding is not required. For example, courts will defer to an arbitrator's discretion in not granting continuances to accommodate the testimony of an expert with visa problems, or in declining to receive testimony similar to that already received;

3. The award concerns matters not falling under, or beyond the scope, of the submission to arbitration;

4. The composition of the arbitral authority or the arbitral procedure was not

according to the agreement of the parties or the law of the host country, for example in the arbitrator selection process;

5. The award is not yet binding under the law of the place of arbitration or already has been purportedly set aside by a tribunal in the place where the award was rendered. Parties sometimes “forum shop” when a challenge is pending elsewhere.

6. The subject matter is not capable of arbitration under the laws of the place where enforcement is sought; and

7. The award is contrary to the public policy where enforcement is sought, not where the award was rendered. The U.S. courts have interpreted this to involve only those situations where “fundamental notions of morality and justice are involved.” This provision is very narrowly construed. Nonetheless, it has become a favorite, but seldom fruitful, default for award-resisters. Imaginative resisting parties have tried and failed to invoke this provision where the award enforced business arrangements purportedly inconsistent with the spirit of U.S. foreign policy objectives.

The last provision is clearly a difficult, but not impossible, standard to meet. A U.S. court opined in dicta, for example, that if a foreign arbitral award went directly against a U.S. party because it did not comply with the Iranian boycott, a U.S. court would probably refuse to enforce it on public policy grounds.

To state the obvious, courts in different countries often can have very different views of public policy. A Russian court recently refused to enforce a foreign arbitral award against a Russian member of a German-Russian joint venture on the public policy grounds that the German member who was to receive the award had not yet made a capital contribution to the venture. The Russian court apparently found the prospect of recovery by someone who had not contributed anything to be an offensive windfall.

While this can be criticized as a “home town” decision, the point is to consider carefully where enforcement is sought.

In addition to the seven grounds for rejection of an award, there are two other newly popular and extra-convention “hooks” to try to thwart enforcement. That is where the court's jurisdiction over the resisting party is questioned, also known as *forum non conveniens*.

Foreign parties seek enforcement in U.S. courts, even against non-U.S. entities, because of the internationally respected and well-developed U.S. court system as well as the likelihood of reachable assets in a U.S. jurisdiction. However, the courts are not always hospitable to enforcement efforts. Even where the losing party has assets in the forum, courts still may refuse enforcement on the grounds that the losing party has not had regular business contacts there. Others courts take an easygoing approach, likening the enforcement proceeding to a collection effort and enforcing to the extent those assets are available. In one celebrated case to collect on a multimillion dollar award in a foreign forum, the court found a bank account balance of only a few dollars, nearly depleted by bank fees. It enforced the award to that amount only, giving new meaning to the term “pennies on the dollar.”

Pro-enforcement is the name of the game in enforcing international arbitral awards. To be successful in resisting awards, U.S. practitioners need to heed the convention's ground rules.

First, the deck is stacked. Courts have readily acknowledged the strong “pro-enforcement bias.” There is a heavy presumption in favor of enforcement of a foreign award rendered in a signatory country.

Second, take nothing for granted. The burden of proof is on the party resisting the award.

Third, the “kitchen sink” approach to resisting an award does not work. The convention provides enumerated and very limited bases to prevent enforcement; “implied defenses” are rejected. Except as discussed below, these are the exclusive grounds that a court will consider.

Fourth, courts can, and do, enforce “wrong” outcomes. Much like intra-U.S. arbitration, the reviewing court

sees foreign arbitration as a creature of contract and is disinclined to upset the decision of the agreed-upon arbitrator without clearly compelling indications of corruption. It is not interested in, and will not revisit, whether the arbitral result was factually or legally correct.

Naturally, there can be exceptions. In a recent case involving an international toy retailer and a former Middle Eastern franchisee, the court mused that there was at least a theoretical interest in nonenforcement when arbitrators “manifestly disregard” applicable law, even while enforcing a very generous award that seemed to shred applicable New York law on speculative damages. However, short of the arbitrator setting fire to the statute book, there seems a disinclination to infer manifest disregard.

Fifth, beware waivers. The courts are ever on the lookout for indications that the resisting party has waived even apparently egregious procedural irregularities in the selection of arbitrators and the conduct of the proceedings. In one alarming situation, the court disregard-

ed the fact that one of the parties had conducted a “sting” operation that clearly demonstrated the other side’s willingness to accept a bribe because the bribe was not actually delivered and no effort was made to remove the allegedly greedy arbitrator. Unless an aggrieved party immediately objects to the arbitrator and makes a suitable record, the reviewing court will not provide relief. That means vigilance and aggressiveness during arbitration by local counsel for your client; the enforcement stage is too late.

International arbitration is a complex arena and there are many factors to weigh. The worst thing a foreign party can do is take the proceedings less seriously than warranted, for example, retaining inexperienced local counsel or conducting a less than robust defense. Even with the best efforts, perceived hometown advantage, language misunderstandings and logistical issues can all lead to a loss overseas. Worse, the winners may retain American counsel to get the award enforced in U.S. courts so

that collection efforts can take place here.

The strong “pro-enforcement bias” does not mean that your client necessarily is without means to defeat enforcement. In the case of hockey star Ovechkin, enforcement was denied by the U.S. court because he was careful to avoid the appearance of waiver. He did not take part in the Russian arbitration nor did he agree to arbitrate or recognize the tribunal’s jurisdiction over him. While Ovechkin is mainly known for his hockey prowess on offense, he came out millions of dollars ahead in this case because of strong defense.

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