

Enforcement of Foreign Arbitral Awards in the United States*

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In this article, Mr. McClendon describes the requirements and procedures for enforcing foreign arbitral awards in the United States. The author examines the provisions of both the New York Convention and the United States Arbitration Act. Mr. McClendon focuses on the substantive and procedural defenses to enforcement of foreign arbitral awards, and reviews the relevant United States case law.

I. INTRODUCTION

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of . . . [that state]"¹ and "any court having jurisdiction . . . shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement

* This article is an extension of one prepared originally for the Practising Law Institute in the course handbook INTERNATIONAL LITIGATION (1980) (H4-4831).

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¹ The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38 (effective for the United States on Dec. 29, 1970), reprinted in 9 U.S.C.A. in conjunction with § 201 *et seq.* (West Supp. 1982) [hereinafter cited as the Convention or the New York Convention]. For an excellent discussion of the Convention as applied in the United States, see Aksent, *Application of the New York Convention by United States Courts*, Y.B. COM. ARB. 341 (1979).

of the award specified in the said Convention."²

Success in litigation or arbitration is ultimately determined by successful enforcement of the judgment or award. As the quotations above from the Convention on the Recognition and Enforcement of Foreign Arbitral Awards³ (hereinafter the New York Convention or the Convention) and the United States Arbitration Act⁴ indicate, there is broad recognition of the proposition that arbitral awards should be enforceable anywhere, regardless of where made. This is a principal advantage of arbitration over litigation because there is no similar convention or United States federal legislation on the enforcement of foreign judgments.⁵

There are several bases for the enforcement of foreign arbitral awards in the United States. The most useful is the New York Convention and its enabling legislation, Chapter 2 (Sections 201-08) of the United States Arbitration Act. In addition, there is the federal Arbitration Act of 1925, codified as Chapter 1 (Sections 1-14) of the United States Arbitration Act, which is incorporated by reference into Chapter 2 to the extent it is not in conflict with Chapter 2 or the Convention.⁶ Chapter 1 was utilized prior to 1970 and can still be used if the Convention does not apply because the foreign award was made in a country not a party to the Convention.⁷ The two chapters, therefore, should be read together. The other bases are enforcement without a treaty or statute, enforcement according to bilateral treaties, and enforcement through the recognition of a foreign judgment.

This article reviews the provisions of the New York Convention and the United States Arbitration Act applying to enforcement proceedings in the United States, particularly defenses to award enforcement, and examines the relatively few United States cases on the subject. It comments briefly on bases for enforcement of awards other than the New York Convention and on enforcement abroad. References hereinafter to "Articles" refer to the Convention; references to "Sections" refer to the United States Arbitration Act.

² United States Arbitration Act, 9 U.S.C. § 207 (1976).

³ Convention, *supra* note 1.

⁴ 9 U.S.C. § 207 (1976).

⁵ There are, however, state laws. See *infra* note 85.

⁶ 9 U.S.C. § 208 (1976).

⁷ See *infra* notes 20-23 and accompanying text.

II. PROCEDURE FOR ENFORCEMENT

One wishing to enforce an award in the United States under the Convention need only supply the authenticated original award or a certified copy thereof, the original or certified copy of the arbitration agreement, and official or sworn translations, if appropriate,⁸ within three years after the award.⁹ It is immaterial whether the award is the result of an institutional or *ad hoc* arbitration.¹⁰ United States district courts have original jurisdiction to hear applications to confirm or challenge awards,¹¹ which are then tried as motions¹² without jury trial.¹³ The court may require the deposit of security if the award is challenged,¹⁴ and a judgment of confirmation has the same force and may be enforced as a judgment in an action.¹⁵

III. CHALLENGE TO ENFORCEMENT

United States courts have many times affirmed that "the public policy in favor of international arbitration is strong."¹⁶ There are, nevertheless, two kinds of possible challenges to awards: those arising out of the limited coverage of the Convention and those provided in Article V.

A. Limits on Coverage

The Convention applies broadly to disputes between natural and legal "persons,"¹⁷ including sovereign states.¹⁸ It also applies to awards

⁸ Convention, *supra* note 1, art. IV.

⁹ 9 U.S.C. § 207 (1976). An action for confirmation of an award under 9 U.S.C. § 9 (1976), however, must be commenced within one year after the award.

¹⁰ Convention, *supra* note 1, art. I, para. 2.

¹¹ 9 U.S.C. § 203 (1976).

¹² 9 U.S.C. §§ 6, 208 (1976).

¹³ See *Audi NSU Auto Union A.G. v. Overseas Motors, Inc.*, No. 6-71054 (E.D. Mich. Mar. 15, 1977), *digested in* 1 AAA DIG. CT. DEC. 18-2 (June 1978) and in Y.B. COM. ARB. 291, 292 (1978).

¹⁴ Convention, *supra* note 1, art. VI.

¹⁵ 9 U.S.C. §§ 13, 208 (1976).

¹⁶ See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975), *citing Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

¹⁷ Convention, *supra* note 1, art. I, para. 1.

¹⁸ The issue of whether a sovereign state is a "person" under Article I of the Convention has not been raised directly. Awards, however, have been enforced against them, either under U.S.C. § 207 (1976) (see *Ipirade Int'l v. Federal Republic of Nigeria*, 465 F. Supp. 824 (D.D.C. 1978)), or under 9 U.S.C. § 9 (1976) (see *Maritime Int'l Nominees Establishment v. Republic of Guinea*, 505 F. Supp. 141 (D.D.C. 1981); *Birch Shipping Corp. v. Embassy of the United Republic of Tanzania*, 507 F. Supp. 311 (D.D.C. 1980)). For other countries' treatment of the question, see references under the article I, paragraph 1 heading "Persons whether Physical or Legal (including

made in the territory of another state and to those not considered domestic in the enforcing state.¹⁹ The importance of a distinction between foreign and domestic awards, in the United States, at least questionable. An award made in the United States in an arbitration between foreign parties is enforceable under Section 9 if its requirements are met,²⁰ and has also been enforced under Section 207.²¹ Similarly, an award made in the United States in an arbitration between United States parties is enforceable under Section 9 and, if not a domestic concern, should be enforceable under Section 207.²² If an award is made abroad, it is by definition enforceable under Section 9 and will undoubtedly be enforceable under Section 9 as well.²³

The Convention permits a contracting state to make two reservations or limitations on applicability. One is based on reciprocity and other limits Convention obligations to commercial disputes.²⁴

State as party)" in van der Berg, *Index of Court Decisions New York Convention 1958*, ARB. 277, 278 (1980).

¹⁹ Convention, *supra* note 1, art. I, para. 1.

²⁰ Section 9 states:

If the parties in their agreement have agreed that a judgment . . . shall be enforceable . . . then at any time within one year after the award . . . any party may apply to the court . . . for an order confirming the award, and thereupon the court shall make such an order unless the award is vacated, modified, or corrected as prescribed in Article 11 of this title.

²¹ U.S.C. § 9 (1976). For a discussion of Section 10 defenses, see *infra* notes 36-46 and accompanying text. See also *infra* note 79 and accompanying text with respect to the requirement for an entry of judgment clause in the arbitration agreement.

²² *Transmarine Seaways Corp. of Monrovia v. Marc Rich*, 480 F. Supp. 352 (S.D.N.Y. 1980), *aff'd*, 614 F.2d 1291 (2d Cir. 1980). In contrast, in the earlier case of *I/S Stav Metal Converters, Inc.*, 500 F.2d 424 (2d Cir. 1974), the court, in affirming an award rendered in New York under Section 9, declined to consider whether it was enforceable under the Convention, but observed that "the commentators appear to be in disagreement as to whether the Convention applies to awards made in the United States. *Id.*, at 424-425."

²³ See *Fuller Co. v. Compagnie des Bauxites de Guinee*, 421 F. Supp. 938 (S.D.N.Y. 1976), *aff'd*, 537 F.2d 1000 (2d Cir. 1976), which the court ordered arbitration between two United States companies pursuant to Section 201 *et seq.* after considering Section 202. Section 202 provides that "an agreement which is entirely between citizens of the United States shall be deemed not to be an arbitration agreement under this Convention unless that relationship involves . . . [a] reasonable relation with the United States." 9 U.S.C. § 202 (1976).

²⁴ The question of whether a foreign arbitral award involving foreign parties is enforceable under Section 9 was discussed, but not resolved, in *Konstantinidis v. S.S. "M. S. S."*, 280 F.2d 288 (S.D.N.Y. 1965), *aff'd per curiam*, 354 F.2d 240 (2d Cir. 1965). The absence of controlling authority and cited *Danielsen v. Entre Rios Rys. Co.*, 18 F.2d 144 (E.D.La. 1927), for the contrary proposition. Neither *Danielsen*, nor *Entre Rios*, however, since both dealt with enforcement of agreements to arbitrate, should be cited as authority for the result in *The Silverbrook* appears to have been discredited, see *Batson Group, Inc. v. Saurer-Allima GmbH-Allgauer Maschinenbau*, 311 F. Supp. 1000 (S.D.N.Y. 1970). There should be no impediment to using Section 9.

²⁵ Convention, *supra* note 1, art. I, para. 3.

arbitrator to determine the procedures to follow and therefore French procedural law would not apply.¹⁰⁰

VII. CONCLUSION

United States courts have a strong bias in favor of enforcement of arbitral awards. For instance, the courts find that an agreement to arbitrate contains an implied agreement for judgment to be entered on the award. This bias is also evident in the willingness of courts to find an alternative basis for enforcement if there is a defect in one of the available procedures. At least since *Scherk*, this bias is particularly strong in international cases.¹⁰¹ The New York Convention limits the defenses to enforcement essentially to two: lack of procedural due process at the hearing, and a result which is offensive to the forum's public policy. These defenses are construed narrowly, and the burden is on the party seeking to overturn the award.

In conclusion, it may be observed that in spite of the number of defenses available in the United States to the enforcement of foreign arbitral awards and the many pages of opinion discussing these defenses, there is no case yet arising under the Convention in which a United States court declined to enforce the award.

Injury Standards In Section 337 Investigations

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INTRODUCTION

In this article the authors analyze the impact of the Trade Act of 1974 on Section 337 cases. They focus on the standards the International Trade Commission (ITC) uses in making its injury determinations in Section 337 cases. The authors also address the limited nature of judicial review over final ITC determinations, and conclude that the enhanced role of the ITC in Section 337 proceedings brought about by the Trade Act of 1974 creates a need for private litigants to build a thorough record on the issue of actual or incipient injury in proceedings before the ITC.

The United States International Trade Commission (the "ITC" or "Commission") administers various trade statutes, including Section 337 of the Tariff Act of 1930, as amended.¹ The purpose of this statute is to prevent unfair methods of competition and unfair acts in import trade. In investigations under the statute, the Commission is required to determine whether unfair trade practices exist and whether those unfair trade practices have the effect or tendency to destroy or injure sub-

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¹ 19 U.S.C. § 1337 (1976 & Supp. IV 1980).

¹⁰⁰ Judgment of Feb. 21, 1980, Cour d'appel, Paris, 1980 D.S. Jur. 568.
¹⁰¹ See Aksen, *International Arbitration Received Favorably in U.S.*, N.Y.L.J., Nov. 5, 1976, J. 1, col. 1.