

Enforcing international arbitral awards: new issues in US courts



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The final arbitral award in an international arbitration typically marks the end of the dispute. After the extensive preparation and careful presentation of claims and defenses in written pleadings and at the hearing, the award in such cases is a welcome resolution. The prevailing party is vindicated, the losing party pays, and both sides return to their normal routines. But that is not always the case.

For various reasons, the end of an arbitral proceeding may simply mark a shift to a new battlefield. If the party held liable in the award is sufficiently dissatisfied with the process and/or the result, or is under some legal or financial disability, or if the stakes are sufficiently high, court litigation is likely. The losing party may seek to set aside the award in the country where it was rendered. Or the prevailing party

could file suit in any of 134 jurisdictions that are party to the New York Convention, which governs the recognition and enforcement of arbitral awards. Under the New York Convention, the process generally is assumed to be straightforward, with only six narrowly drawn grounds – specified in Article V of the Convention – potentially available to defeat such a lawsuit.

But what happens when the prevailing party files suit in a country that is party to the New York Convention but in which the opponent has no assets and no business activity of any kind? Perhaps the plaintiff in such cases is seeking to use the court proceedings to obtain American-style discovery to find assets elsewhere that may be attached to enforce the award. Or possibly the plaintiff will file suit simultaneously in many jurisdictions – a shock and awe strategy – in an effort to force a quick settlement.

In the United States, courts are beginning to recognize that, apart from Article V grounds, there may be sound reasons not to enforce an arbitral award under the New York Convention where the defendant has no presence or property, and where a nexus is lacking between the forum and the parties and their underlying dispute. For example, enforcement actions under the New York Convention were dismissed in several recent cases where the foreign defendant lacked minimum contacts with the United States, which are generally understood to be necessary for the assertion of personal jurisdiction. In one, an American contractor was unable to enforce a French arbitral award against the Government of Qatar arising out of a failed construction project in the emirate, because the dispute had nothing to do with the United States and Qatar had no relevant contacts with which to establish personal jurisdiction under the Constitution's Due Process Clause.¹ More recently, enforcement of an arbitral award against the Swedish national telephone company was refused based on a finding that the Foreign Sovereign Immunities Act, which governs actions against foreign states and their instrumentalities, requires a nexus between a plaintiff's claims and the United States, comparable to the constitutional minimum contacts requirement.²

The parties seeking to enforce their arbitral awards in those cases assumed that there were no “local law” hurdles under the New York Convention, but they overlooked two constraints. First, the language of Article III of the Convention conditions recognition and enforcement of foreign arbitral awards on satisfying “the rules of procedure of the territory where the award is relied upon.” Second, US courts are hesitant to disregard the absence of minimum contacts when called upon to exercise jurisdiction over foreign parties.

The other doctrine that has been used to reject a petition for recognition and enforcement of a foreign arbitral award is *forum non conveniens*. Under that rule, courts may exercise discretion not to enforce the award if doing so would require adjudicating the merits of a dispute; if the parties, the underlying events and the award have no

connection to the forum; and if there is some other “more convenient” forum. The Second Circuit recently dismissed a petition by a Russian corporation to confirm an arbitral award rendered abroad against a Ukrainian agency, holding that Ukraine was a more appropriate alternative forum in which to resolve disputed issues of Ukrainian law implicated in the petition to confirm the arbitral award.³

Enforcement under the New York Convention, as these cases suggest, is not as automatic and straightforward as once was thought. Whether or not this is a positive development in the law relating to international arbitration will depend on how the principles are applied in cases yet to come.

¹ *Creighton Ltd. v. Government of Qatar*, 181 F.3d 118 (D.C. Cir. 1999). The D.C. Circuit has since held that foreign sovereigns are not persons and thus not entitled to Due Process protections. See *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

² *BPA International, Inc. v. Kingdom of Sweden*, No. CIV. A. 1:02-1025RMC, 2003 WL 22110323 (D.D.C. Sept. 5, 2003).

³ *Monegasque de Reassurances S.A.M. v. NAK Naftogaz*, 311 F.3d 488 (2d Cir. 2002) (“*Monde Re*”).