INTERNATIONAL COMMERCIAL ARBITRATION: HURDLES WHEN CONFIRMING A FOREIGN ARBITRAL AWARD IN THE UNITED STATES

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Over recent years, international commercial arbitration has gained worldwide acceptance as one of the preferred means of international dispute resolution. One of the primary reasons for the prevalence of arbitration is the expectation that the awards issued by an international arbitral tribunal will receive worldwide recognition by countries that are members of one of the international conventions on the enforcement of arbitral awards. Yet, a growing number of parties face various procedural and substantive hurdles and obstacles when attempting to enforce an arbitral award rendered in their favour. Viewed from the context of a confirmation proceeding in the United States, this article will provide a practical approach on how to avoid and overcome the hurdles to confirming a foreign arbitral award that will apply in any jurisdiction worldwide.[1]

Statute of limitations

In the United States, arbitral award confirmation petitions are governed by the Federal Arbitration Act ("FAA") 9 U.S.C. ss.1 et seq. The FAA provides a three-year statute of limitations for the filing of arbitral award confirmation petitions. Specifically, the FAA provides that:

> "Within three years after an arbitral award falling under the Convention[2] 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." (9 U.S.C. ss.207, 302.)

Therefore, a party seeking the confirmation of a foreign arbitral award in the United States must comply with this requirement to avoid having its enforcement petition dismissed for being time-barred.

Subject matter jurisdiction

Parties seeking to enforce a foreign arbitral award must also ensure that the federal court has subject matter jurisdiction over the enforcement proceedings. This, however, can be established through 28 U.S.C. s.1331. This is because US federal district courts have original subject matter jurisdiction over arbitral award confirmation proceedings pursuant to the federal question jurisdiction statute given that this type of proceeding is a civil action arising under the laws and treaties of the United States, specifically 9 U.S.C. s.203 (the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958) (the "New York Convention") and 9 U.S.C. ss.203, 302 (the Inter-American Convention on International Commercial Arbitration, Panama City, Panama, January 30, 1975) (the "Inter-American Convention"). See 28 U.S.C. s.1331.

Personal jurisdiction

Another hurdle that a party seeking to enforce a foreign arbitral award must overcome is that of personal jurisdiction. In the United States, the federal district court where the enforcement petition has been filed must have

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1. In the United States, foreign arbitral awards are those not necessarily issued in a foreign jurisdiction, but simply those made: "[W]ithin the legal framework of another country, e.g. pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction." (*Bergesen v Joseph Muller Corp* 710 F.2d 928, 932 (2nd Cir. 1983).)
2. The "Convention" refers to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, as well as to the Inter-American Convention on International Commercial Arbitration, Panama City, Panama, dated January 30, 1975. Please visit *http://www.wipo.int/amc/en/arbitration/ny-convention/parties.html* [Accessed September 2, 2009] and *http://www.sice.oas.org/dispute/comarb/intl_conv/caicpae.asp* [Accessed September 2, 2009] for a current list of signatories to each Convention.

personal jurisdiction over the respondent. In the United States, a federal court may exercise personal jurisdiction in any of two ways: specific personal jurisdiction and/or general personal jurisdiction. The exercise of specific personal jurisdiction is appropriate when the nature of the arbitrated issues arises, "out of or [are] related to [respondent's] contacts with the forum"—*SEC v Carillo*, 115 F.3d 1540, 1542 n. 2 (11th Cir. 1997), citing *Helicopteros Nacionales de Colombia v Hall*, 466 U.S. 408, 414 n.8, 104 S.Ct. 1868, 1872 n.8, 80 L.Ed.2d 404 (1984). General personal jurisdiction is appropriate when the respondent has contacts with the United States, but the suit does, "not aris[e] out of or is related to [respondent's] contacts with the forum"—*Carillo*, 115 F.3d at 1542 n.2.

Federal courts have "widely adopted" a test for the sufficiency of minimum contacts in order to exercise personal jurisdiction over a respondent. See Fed. R. Civ. P. 4(k)(2). The factors identified as part of this test are the following: (i) whether the respondent transacts business in the United States; *or* (ii) whether the respondent is doing an act in the United States; *or* (iii) whether the respondent's actions done elsewhere have an effect in the United States. See *Western Equities Ltd v Hanseatic Ltd* 956 F. Supp. 1232, 1237 (D.V.I. 1997), citing *Eskofot A/S v E.I. Du Pont De Nemours & Co* 872 F. Supp. 81, 87 (S.D.N.Y. 1995), which in turn cites *Leasco Data Processing Corp v Maxwell*, 468 F.2d 1326, 1340 (2d Cir. 1972). See also *Eskofot* 872 F. Supp. at 87–89 (holding that defendant alleged to conduct no business, with no office or employees, and without license to conduct business in the United States by any state, was subject to general jurisdiction based on defendant's actions elsewhere having effect in terms of competition between business rivals and cash flows in the United States).

Based on the above, when a party is seeking to enforce a foreign arbitral award in the United States, it must confirm that the respondent has minimum contacts with the United States so that the federal court does not dismiss the enforcement petition for lack of personal jurisdiction over the respondent.[3]

Venue

Venue refers to the place within a jurisdiction in which a particular action is to be brought. It becomes a consideration once jurisdiction over the parties has been established. Although venue will not be discussed in detail in this article, it is also a requirement that needs to be met by the party seeking confirmation of a foreign arbitral award in the United States. Venue in federal district court cases is controlled by the general federal venue statue. See 28 U.S.C. s.1391. See also 9 U.S.C. ss.204, 302:

> "An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such a place is within the United States."

Service of process

In line with its policy of effectuating the speedy resolution of disputes, the FAA provides that confirmation of arbitral awards are intended to be summary in nature, and should be initiated through federal motion practice. See 9 U.S.C. ss.1 et seq.; *Booth v Hume Pub. Inc* 902 F.2d 925, 931–33 (11th Cir. 1990); see also *SmartPrice.com Inc v Long Distance Services Inc* 2007 WL 1341412, *2 (W.D. Tex. 2007) (holding that under the FAA, a petition for confirmation of an arbitral award shall be made and heard in the manner provided by law, "for the making and hearing of motions"). The court's function in confirming an arbitral award is therefore limited, "since if it were otherwise, the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated" (*Booth* 902 F.2d at 932 citing *Amicizia Societa Navegazione v Chilean Nitrate and Iodine Sales Corp* 274 F.2d 805, 808 (2d Cir.), cert. denied 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960)).

The 11th Circuit in the *Booth* decision described the summary procedure for the confirmation of an arbitral award under the FAA as follows:

> "A party initiates judicial review of an arbitration award not by filing a complaint in the district court, but rather by filing either a petition to confirm the award or a motion to vacate or modify the award. *See* 9 U.S.C. §9 (explaining procedure for making petition to confirm the award); §12 (explaining procedure for making motion to vacate, modify, or correct an award); §§ (providing that any application to the court under the Act should be made in the form of a motion). These rules further the [FAA's] policy of expedited judicial action because they prevent a party who has lost in the arbitration process from filing a new suit in federal court and forcing relitigation of the issues ... Moreover, the district court need not conduct a full hearing on a motion to vacate or confirm; such motions may be decided on the papers without oral testimony." (*Booth* 902 F.2d at 932 (internal citations omitted).)

Notwithstanding the FAA's policy of effectuating the speedy resolution of disputes and that arbitral award confirmation proceedings in the United States are intended to be summary in nature, a party seeking

3. A federal court may also exercise quasi in rem jurisdiction over any assets that the respondent has in the United States. Federal law holds that District Courts may exercise quasi in rem jurisdiction in order to enforce judgments against property to, "collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant". *Frontera Resources Azerbaijan Corp v State Oil Co of Azerbaijan* 479 F.Supp.2d 376, 387 S.D.N.Y. (2007), citing *R.F. Shaffer v Heitner* 433 U.S. 186, 210 n.36, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).

enforcement of a foreign arbitral award must review the FAA, as well as the New York and Inter-American Conventions,[4] when determining how to effectively serve a petition to confirm an arbitral award.

Specifically, the FAA at 9 U.S.C. s.9 governs service of an arbitral award confirmation petition in ordinary circumstances, that is, on a domestic respondent. See 9 U.S.C. s.9. The statute, however, provides no guidance as to how to serve an extraterritorial respondent. The New York Convention and Inter-American Convention are also silent with respect to the proper manner of effecting service of the confirmation petition on an extraterritorial respondent.

Accordingly, we are left with only US jurisprudence for the answer. Although service of process of a foreign arbitral award enforcement petition is a topic that has been addressed by only a handful of federal courts in the United States, the few courts that have reviewed service of process of a confirmation petition on an extraterritorial respondent agree that a party seeking such a confirmation in the United States must serve the petition pursuant to r.4 of the Federal Rules of Civil Procedure. See, e.g. *In the Matter of Arbitration between Marine Trading Ltd v Naviera Comercial Naylamp, S.A.* 879 F. Supp. 389, 391-392 (S.D.N/Y. 1995); *Canada Life Assurance Co v Converium Ruckversicherung* No.06-3800, 2007 WL 1726565 at *4–5 (D. N.J. June 13, 2007). In turn, a party wishing to confirm an arbitral award in the United States must review r.4 of the Federal Rules of Civil Procedure in order to determine the best manner in which to serve the confirmation petition to ensure that the US court does not dismiss its enforcement petition for insufficient service of process.

For instance, if the respondent is a citizen of a foreign state, then the party seeking enforcement in the United States must review r.4(f) and 4(h) of the Federal Rules of Civil Procedure to determine the best manner to effectuate service on the extraterritorial respondent. Key factors to consider in such an analysis will be: (i) whether the applicable foreign law requires that such a petition be served through the issuance of a summons; (ii) whether the applicable foreign law identifies the individuals who are authorised to receive service of process on behalf of the foreign corporation in the foreign country; and (iii) whether the applicable foreign law allows for such an enforcement petition to be served via mail, via certified mail requiring a signed receipt, or via Federal Express. See Fed. R. Civ. P. 4(f).

Given the lack of clear guidance from either international treaties or federal jurisprudence with respect to the important issue of service of process, parties would be well-advised to try and avoid these problems in advance of the confirmation process. That is to say, parties should attempt to deal with the service issue in either the original arbitration clause in their agreements or at least at the outset of the arbitration process. For example, most arbitrations commence with the arbitral tribunal issuing a procedural order. The parties may agree in such initial procedural order that any enforcement petition may be served on the parties' arbitration attorneys of record via Federal Express without the need of requiring a further formal summons. In the end, compliance with all these service of process requirements will help ameliorate some of the hurdles parties seeking to enforce a foreign arbitral award face when confirming such an award in federal court in the United States.

4. Both the New York Convention and the Inter-American Convention are enforceable in the United States through the FAA. See 9 U.S.C. ss.201, 301.

Finality and confirmation of the foreign arbitral award

Under the plain language of the FAA and the New York and Inter-American Conventions, a federal district court's role in reviewing a foreign arbitral award is strictly limited:

> "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 the [sic] said Convention." (9 U.S.C. ss.207, 302.)

See *Four Seasons Hotels and Resorts B.V. v Consorcio Barr, S.A.* 267 F. Supp. 2d, 1335, 1342 (S.D. Fla. 2003), abrogated on other grounds by *Four Seasons Hotel & Resorts, B.V. v Consorcio Barr, S.A.* 377 F.3d 1164 (11th Cir. 2004). In other words, pursuant to s.207 of the FAA and art.5 of the New York Convention and the Inter-American Convention, a court *must* recognise or enforce an arbitral award under the New York or Inter-American Conventions unless one of seven specifically-enumerated grounds are present.[5] See 9 U.S.C. ss.207, 302; art.5 of the New York Convention; art.5 of the Inter-American Convention. See *Four Seasons* 267 F. Supp. 2d at 1343:

> "[T]he goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."

In light of the New York and Inter-American Conventions' "general pro-enforcement bias", the party opposing

5. As enumerated in the Inter-American Convention, for instance, a court may refuse to confirm and enforce an arbitral award only after finding proof of one of the following seven grounds: (i) the parties are under some incapacity with respect to the applicable arbitration agreement, or the agreement is otherwise invalid; (ii) the party against whom the award is invoked was not given proper notice of the arbitration or appointment of an arbitrator or was otherwise unable to present its case; (iii) the award exceeds the scope of the terms of the submission to arbitration; (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement; (v) the award has not yet become binding on the parties; (vi) the subject matter of the award is not capable of settlement by arbitration under the law of the court where confirmation and enforcement are sought; or (vii) the confirmation or enforcement of the award would be contrary to public policy. See art.5 of the Inter-American Convention. See also art.5 of the New York Convention.

confirmation or enforcement of an arbitral award bears the burden of proving the existence of one of these enumerated grounds.[6] See *Four Seasons* 267 F. Supp. 2d at 1343. See also *In the Matter of the Arbitration Between Trans Chemical Ltd* 978 F. Supp. 266, 304 (S.D. Tx. 1997).

Notwithstanding the expected finality of an arbitral award pursuant to the FAA, the New York and Inter-American Conventions, another hurdle a party seeking to enforce a foreign arbitral award in the United States will face is that of the finality of the award. Contracting parties should therefore keep this in mind when drafting their arbitration clauses. In order to prevent further review and appeals of the arbitral award once it is rendered, contracting parties should expressly provide a statement in their arbitration clause which clearly states that *the arbitral award is binding, final, not subject to review and not subject to appeal by the courts of any jurisdiction.*[7] The addition of such a provision will be particularly helpful in cases where the laws of the country where the arbitration took place specifically allow parties to appeal an award issued in that country. Such a clause will help the winning party in the arbitration to avoid spending additional time and money in its attempts to execute what it thought was a final arbitral award, but which is now an award being appealed by the losing party. It will also help the party seeking enforcement in the United States to actually obtain enforcement of the award rather than obtain a stay of the confirmation proceedings pending the completion of the arbitral award appeal proceedings in the foreign country where the award was issued.[8]

The only federal courts in the United States that have thus far faced a similar dilemma concerning the finality of a foreign arbitral award are the US District Court for the District of Columbia and the US Court of Appeals for the District of Columbia Circuit in *Chromalloy Aeroservices v The Arab Republic of Egypt* 939 F. Supp. 907 (D. D.C. 1996) and in *Termorio S.A. E.S.P. v Electranta, S.P.* 487 F.3d 928 (D.C. Cir. 2007).

Specifically, in *Chromalloy* an American company entered into a military procurement contract with the Air Force of the Republic of Egypt. See generally *Chromalloy* 939 F. Supp. at 907. Due to certain disputes between the parties, the parties commenced arbitration proceedings pursuant to the arbitration clause of their contract.[9] An arbitral award was rendered in Egypt, under the laws of Egypt, and in favor of the US corporation, and Egypt was ordered to pay damages to the American company.[10] While the American company sought enforcement of the award in the United States under the New York Convention, Egypt sought a nullification of the award before the Egyptian Court of Appeals.[11] Although the Egyptian Court of Appeals issued an order nullifying the arbitral award, the federal district court in the United States nevertheless confirmed and enforced the arbitral award.[12] The federal court reasoned that despite the Egyptian Court of Appeals' ruling, the parties had specifically agreed in their contract that the arbitral award would be final and binding upon the parties.[13] In other words, the parties, "agreed that the arbitration [would end] with the decision of the arbitral panel".[14] Given that the arbitration agreement precluded an appeal in Egyptian courts, the federal district court applied its discretion and recognized and enforced the arbitral award notwithstanding the Egyptian court's nullification of the award.[15]

At the other end of the spectrum is the case of *Termorio*, where a Colombian entity entered into a Power Purchase Agreement with a Colombian state-owned public utility for the generation and purchase of electricity. See generally *Termorio* 487 F.3d at 930. When a dispute arose under the Power Purchase Agreement, the parties resorted to arbitration in Colombia pursuant to the Rules of Arbitration of the International Chamber of Commerce in accordance to the agreement's dispute resolution clause.[16] Although the arbitral tribunal awarded Termorio more than $60 million in damages, the state-owned public utility defendant utilised its connections and obtained an "extraordinary writ" from a local Colombian court which overturned and nullified the arbitral award because the agreement's arbitration clause allegedly violated Colombian law.[17] Around the same time, Termorio commenced arbitral award enforcement proceedings in the United States to enforce the award pursuant to the FAA, the New York Convention and the Inter-American Convention.[18]

6. The New York and Inter-American Conventions make clear that an arbitral award may be annulled or suspended *only* by a competent authority of the country in which, or under the law of which, the award was made. See art.5(1)(e) of the New York Convention; art.5(1)(e) of the Inter-American Convention.

7. Query as to whether inclusion of such a clause may be somewhat limited given the recent case of *Hall Street Assoc. L.L.C. v Mattel, Inc.*, 128 S. Ct. 1396 (2008).

8. In lieu of dismissing an enforcement petition, art.6 of the New York Convention and the Inter-American Convention authorises a court where enforcement of the award is being sought to: (i) stay the enforcement proceedings pending a decision from the court of the country where the award was issued; and (ii) instruct the party opposing enforcement of the award to provide appropriate guaranties. See art.6 of the New York Convention ("[i]f an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security"); art.6 of the Inter-American Convention ("[i]f the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties").

9. *Chromalloy* 939 F. Supp. at 907.
10. *Chromalloy* 939 F. Supp. at 907.
11. *Chromalloy* 939 F. Supp. at 907.
12. *Chromalloy* 939 F. Supp. at 907.
13. *Chromalloy* 939 F. Supp. at 907.
14. *Chromalloy* 939 F. Supp. at 912.
15. *Chromalloy* 939 F. Supp. at 914–915.
16. *Termorio* 487 F.3d at 931.
17. *Termorio* 487 F.3d at 931.
18. *Termorio* 487 F.3d at 931.

The US Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the enforcement proceedings on the grounds that Colombia—the country where the arbitral award was issued—lawfully nullified the award, thus making it unenforceable in the United States.[19] The *Termorio* court held however, that the *Termorio* case was clearly distinguishable from *Chromalloy* because in *Chromalloy* the parties' express contract provision concerning the non-appealability of the final arbitral award was violated when an appeal to vacate the final arbitral award was sought.[20]

Given the divergent positions and holdings in *Chromalloy* and *Termorio*, having an express provision in a parties' arbitration clause which precludes the parties from seeking a review and an appeal of the arbitral award anywhere in the world will help to provide the parties greater certainty with regards to the finality of their foreign arbitral award.

In conclusion, being aware of and handling in advance the possible hurdles a party may encounter when attempting to enforce a foreign arbitral award in the United States will help ameliorate some of the challenges a party may encounter when filing a foreign arbitral award enforcement petition in a US federal court, further confirming the notion that international commercial arbitration continues to be a viable and effective alternative for the resolution of disputes.

19. *Termorio* 487 F.3d at 941.
20. *Termorio* 487 F.3d at 937.