Compelling Arbitration and Enforcing Awards under the New York Convention in U.S. Courts

By Larry J. Saylor, Miller, Canfield, Paddock and Stone, P.L.C.

Introduction

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention")[1] is the most widely-recognized international treaty obligating signatories to enforce arbitration agreements and awards. The U.N. adopted the Convention in 1958, and by 2011, 146 countries were parties.[2] The United States ratified in 1970 with two conditions: First, the subject matter of the arbitration must be commercial.[3] Second, the award must be rendered in a country that is also a party.[4] Chapter 2 of the Federal Arbitration Act (FAA)[5] adopts and implements the New York Convention. The provisions of FAA Chapter 1 also apply to the New York Convention "to the extent that chapter is not in conflict with" Chapter 2.[6]

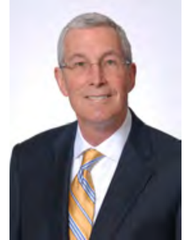
Compelling Arbitration

Article II.1 of the New York Convention provides:

> Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

Article VII.2 defines "agreement in writing" as "an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams." The courts have held that an agreement to arbitrate signed by only one party was not "in writing" under Article II.2,[7] while an arbitration agreement in a purchase order, accepted by a sales confirmation, was enforceable.[8]

In ratifying the Convention, Congress decreed that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States."[9] Thus, the Convention is part of the "the supreme law of the land, as enforceable as [other] Congressional enactments."[10] Congress further decreed that federal courts have "original jurisdiction over . . . an action or proceeding" under the Convention, "regardless of the amount in controversy."[11] In contrast, Chapter 1 of the FAA, which governs domestic arbitration, establishes substantive federal law governing arbitration, but creates no federal question jurisdiction.[12] Chapter 2 also allows a defendant to remove "at any time before the trial thereof . . .." Further, "the ground for removal . . . need not appear on the face of the complaint but may be shown in the petition for removal."[13] The Supreme Court has held that the FAA applies in state as well as federal court,[14] but because of the broad jurisdictional provisions, virtually all reported cases involving Chapter 2 are in the federal courts.


Larry J. Saylor

Venue of an action under Chapter 2 resides "in any [district] court in which . . . an action or proceeding with respect to the controversy between the parties could be brought," or in the place of arbitration if is in the United States.[15]

A court may compel arbitration at the place provided for in the agreement, "whether that place is within or without the United States."[16] The court may also appoint arbitrators in accord with the provisions of the agreement.[17] Thus, a U.S. court is required to refer a dispute to arbitration when:

(1) There is an agreement to arbitrate.

(2) Providing for arbitration in the territory of a Convention signatory.

(3) Arising out of legal relationship "considered as commercial."

(4) One party is not an American citizen or the commercial "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states."[18]

If the answers to all four of these questions are "yes," the court must order arbitration "unless it finds that the said agreement is null and void, inoperative or incapable of being performed."[19]

In *Scherk v. Alberto-Culver Co.*,[20] and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[21] the Supreme Court read the Convention and FAA Chapter 2 as expressing a strong national policy in favor of arbitration and choice of forum in international commerce.[22] In *Sole,* the Court reasoned:

> The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes

> must be resolved under our laws and in our courts. . . . We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.[23]

The First Circuit applied these holdings in *Ledee v. Ceramiche Ragno*.[24] In that case, plaintiff, a tile distributor, entered into a distribution agreement with Italian tile manufacturer that required disputes to be arbitrated in Italy. Defendant terminated the agreement and plaintiff sued, alleging that the termination violated the Puerto Rico Dealer Act. Defendant removed under 9 U.S.C. § 205, and moved to compel arbitration in Italy. The Dealer Act requires just cause for termination, and provides:

> Any stipulation that obligates a dealer to adjust, arbitrate or litigate any controversy that comes up regarding his dealer's contract outside of Puerto Rico, or under foreign law or rule of law, shall be considered as violating the public policy set forth by this chapter and is therefore null and void.

Ledee argued that the requirement to arbitrate in Italy was void and unenforceable. The court held that "null and void" under the Convention "must be interpreted to encompass only those situations – such as fraud, mistake, duress, and waiver – that can be applied neutrally on an international scale."[25]

In *Riley v. Kingsley Underwriting Agencies, Ltd.*,[26] the plaintiff sought to litigate fraud claims arising out of an agreement by which he became a Lloyd's underwriter, which required claims to be arbitrated in England. Applying the policy articulated in *Soler* and *Scherk*, the Tenth Circuit reasoned that "The fact that an international transaction may be subject to laws and remedies different or less favorable than those of the United States is not a valid basis to deny enforcement, provided that the law of the chosen forum is not inherently unfair."[27] Further, "Riley's suggestion that everyone in England will be biased against him has no basis in the record and we will not assume that Riley would get anything other than a full and fair hearing."[28] The court held that "null and void" must be narrowly construed and compelled arbitration in England.

Although the Convention allows the courts to decide whether the agreement is "null and void" as a threshold matter, contract validity is ultimately for the arbitrator to decide, absent a claim that the arbitration clause itself was fraudulently induced. For example, in *Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*,[29] the Supreme Court held that a claim that the contract was fraudulently induced was arbitrable.[30]

Despite some earlier doubt, it is now well-settled that statutory issues must be arbitrated.[31] In *Stawski Distributing Co. v. Broware Zwiec, S.A.*,[32] the plaintiff, a beer distributor in Chicago, entered into a distribution agreement with defendant, a Polish brewer. The agreement required disputes to be arbitrated in Poland, under Polish law. Zywiec notified Stawski that it was terminating the agreement, and Stawski sued under the Illinois Beer Industry Fair Dealing Act (IBIFDA). IBIFDA (1) required good cause for termination; (2) made pre-dispute agreements to arbitrate unenforceable; and (3) required the application of Illinois substantive law to any dispute. Zywiec moved to compel arbitration in Poland. The district court denied the motion, holding that the Twenty-First Amendment, which reserves the regulation of alcoholic beverages to the states, trumped the Convention.[33] Zywiec appealed, and the Seventh Circuit reversed. While it held that Illinois law applied and invalidated the agreement's choice of law, the Convention trumped the IBIFDA provision regarding arbitration. It therefore ordered arbitration in Poland and directed the parties to arbitrate under Illinois law.

Recognition and Enforcement of Awards

Chapter 2 allows any party "[w]ithin three years after an arbitral award falling under the Convention is made," to apply to a court for an order any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award.[34] "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 said Convention."[35]

Article V.1(e) of the Convention provides that recognition and enforcement may be refused where "[t]he 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." Some courts and commentators read this language as authorizing the filing of a motion to ***vacate*** an award only in the "country in which, or under the law of which, that award was made," and that held that "the law [under which an] award was made" refers to the ***procedural*** law of the place of arbitration, not the substantive law.[36]

The "SUBSTANCE and effect," rather than form, of the arbitral decision determines whether a particular arbitral decision is an "award" under the New York Convention. In *Publicis Communication v. True North Communications, Inc.*,[37] the Seventh Circuit held that a tribunal's "order" requiring respondent to turn over records was an award subject to confirmation under the New York Convention. However, in *M & C Corp. v. Erwin Behr GmbH & Co.*,[38] the Sixth Circuit held that an arbitrator's "clarification" of an earlier award for specific performance was not itself an award and did not require confirmation.

Article V.1 of the Convention provides that recognition and enforcement of the award "may be refused" if the party opposing enforcement establishes that:

> (a) The parties to the agreement . . . were . . . under some incapacity, or the said agreement is not valid

under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award . . . contains decision on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated . . . that part of the award which contains decision on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or arbitral procedure was not in accordance with the agreement of the parties, . . . or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by competent authority in the country in which, or under the law of which, that award was made.

Article V.2 further provides that "recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that":

(a) The subject matter . . . is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Much of the litigation about enforcement of international arbitration awards deals with "public policy" in Article V.2(a). The federal courts have concluded that it "'is to be construed narrowly to be applied only where enforcement would violate the forum state's most basic notions of morality and justice."[39] Similarly, the Sixth Circuit reasoned that "manifest disregard of the law" cannot be 'pigeonholed into the 'violation of public policy' basis for refusing to confirm an award."[40]

Under Article V.1(c), an award can be challenged on the ground that it is beyond the terms of reference to arbitration. The courts, however, generally view the submission broadly.[41]

Article V.1(b) guarantees a fundamentally fair hearing, but does not require application of the rules of evidence or other due process that would apply in a domestic court.[42]

The district court in *Chromalloy Aeroservices v. Arab Republic of Egypt*,[43] enforced an award even though it was set aside by an Egyptian court, where the award was otherwise valid under domestic law. The court construed Article V.1(e) as a "discretionary standard". The *Chromally* court also relied on Article VII.1, which provides:

The provisions of the present convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by law . . . of the country where such award is sought to be relied upon.

This Article can form an independent basis for enforcement of an award, even if vacated by a court in the seat of arbitration.

As noted above, the provisions of FAA Chapter 1 also apply to the New York Convention "to the extent [they are] not in conflict with this chapter [Two] or the Convention".[44] The grounds for refusing to confirm and enforce an award in Chapter 1[45] are similar to those in the New York Convention, and some courts have applied to international awards the grounds under Chapter 1.[46] There is, however, no express counterpart in the New York Convention to 9 U.S.C. § 11(a), which allows vacation or modification of awards where there is "evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property".[47] Similarly, "manifest disregard of the law" has been recognized as a "non-statutory" ground for review of arbitration awards under Chapter 1. Some courts have assumed that "manifest disregard" applies to international awards without specifically analyzing the language of Article V.[48] Other courts have held that Chapter 2 provides the exclusive grounds for declining to enforce an award covered by the Convention.[49]

There is some doubt about the continued vitality of "manifest disregard" following the Supreme Court's decisions in *Hall Street Associates, L.L.C. v. Mattel, Inc.*,[50] and *Stolt-Nielsen S.A. v. Animalfeeds International Corp.*,[51] but as of this writing the courts have not resolved the issue.

Appeal of Orders Regarding Arbitration

Chapter 1 of the FAA governs appeals to the federal courts of appeal under Chapters 1 and 2. Reflecting the policy in favor of arbitration, 9 U.S.C. § 16(a)[52] provides a right to appeal from an order blocking arbitration, but 9 U.S.C. § 16(b) provides that there is no right to appeal from an order allowing arbitration to proceed.[53] Thus, 9 U.S.C. § 16(b) carves orders allowing arbitration to proceed out of 28 U.S.C. § 1292(a), which would otherwise allow an appeal of right from an order granting or denying a stay.

About the Author

Larry J. Saylor, a principal in the Detroit office of the law firm of Miller Canfield, litigates complex business disputes in state and federal courts throughout the country, and in domestic and international arbitration. He has experience compelling arbitration

and enforcing arbitration awards, and serves as an arbitrator on the American Arbitration Association's commercial, complex commercial and franchising panels. Larry also serves as Chair of the firm's Antitrust and Trade Regulation Section, and as an adjunct professor at University of Detroit Mercy School of Law, where he teaches a course on franchising and dealer law. He was chair of the Antitrust, Franchising and Trade Regulation Section of the State Bar of Michigan and Article Editor of the Michigan Law Review, and writes and speaks regularly on antitrust, franchising, business torts, and arbitration. He received his J.D., magna cum laude, from the University of Michigan Law School, his M.C.R.P. from Ohio State University and his A.B. from Miami University, Ohio.

Endnotes

1 3 U.S.T. 2517 (June 10, 1958).

2 *See* http://www.newyorkconvention.org/new-york-convention-countries (last accessed December 5, 2011).

3 *See* 9 U.S.C. § 202.

4 *See* New York Convention Article I.3; *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932-33 (2d Cir. 1983), *citing* Presidential Proclamation dated September 1, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997.

5 9 U.S.C. §§ 201-208.

6 9 U.S.C. § 208. Similarly, Chapter 3 of the FAA, 9 U.S.C. §§ 301-307, implements the Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), adopted Jan. 30, 1975 The Panama Convention applies "unless otherwise agreed," if "a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States . . . ." Otherwise, the New York Convention applies.

7 *See Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999).

8 *See Genesco, Inc. v. T. Kakiuchi & Co.*, 815 F.2d 840, 845-46 (2d Cir. 1987)

9 9 U.S.C. § 203.

10 *Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 958 (10th Cir. 1992), *citing Sedco, Inc. v. Petroleos Mexicanos, Mexican Nat'l Oil Co.*, 767 F2d 1140, 1145 (5th Cir. 1985).

11 9 U.S.C. § 203.

12 *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 26 n. 32 (1983).

13 9 U.S.C. § 205.

14 *Southland Corp. v. Keating*, 465 U.S. 1, 11-16 (1984).

15 9 U.S.C. § 204.

16 9 U.S.C. § 206.

17 *Id.*

18 *See* 9 U.S.C. § 202. *See Riley*, 969 F.2d at 959; *Ledee v. Ceramiche Ragno*, 684 F.2d 184, 186-87 (1st Cir. 1982).

19 New York Convention, Article II, ¶ 3 (emphasis added).

20 417 U.S. 506, 516-17 (1974).

21 473 U.S. 614, 629 (1985).

22 *Also see M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972).

23 473 U.S. at 629, *quoting M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. at 9.

24 684 F.2d 184, 186-87 (1st Cir. 1982).

25 684 F.2d at 187. Also see *Soler,* 473 U.S. at 621.

26 969 F.2d 953, 958 (10th Cir. 1992).

27 969 F.2d at 958.

28 *Id.* at 960.

29 *See Prima Paint Corp. v. Flood & Conklin Manufacturing Co.*, 388 U.S. 395 (1967)

30 *Also see Scherk*, 417 U.S. at 519 n. 14 ("an arbitration or forum-selection clause in a contract is not enforceable if the inclusion of that clause in the contract was the product of fraud or coercion"); *Riley*, 969 F.2d at 960 ("[a] plaintiff seeking to avoid a choice provision on a fraud theory must . . . plead fraud going to the specific provision").

31 *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) (securities); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985) (antitrust).

32 349 F.3d 1023 (7th Cir. 2003).

33 2003 WL 2290412.

34 9 U.S.C. §207.

35 *Id.*

36 *See, e.g., M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-49 (6th Cir. 1996); A. Redfern, Law and Practice of International Commercial Arbitration, § 10-49 (4th ed. 2004). But *see Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D. D.C. 1996), discussed below.

37 206 F.3d 725, 728, 729 (7th Cir. 2000).

38 289 Fed. Appx. 927, 2008 WL 3889739, (6th Cir. 2008).

39 *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975). *In accord is Slaney v. International Amateur Athletic Federation*, 244 F.3d 580, 593-94 (7th Cir. 2001).

40 *M&C Corp v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-48 (6th Cir. 1996). In accord is *Stawski Distributing Co. v. Browary Zywiec S.A.*, 126 Fed.Apx. 308, 2005 WL 545702 (7th Cir. March 1, 2005) ("an error in the application of substantive law does not authorize a court to annul the outcome of arbitration").

41 *See, e.g., M&C, supra*, 87 F.3d at 849-50; *Willoughby Roofing and Supply Co., Inc. v. Kajima Intern., Inc.*, 776 F.2d 269 (11th Cir. 1985).

42 *Compare Slaney*, 244 F.2d at 592-93; with *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papiere (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

43 939 F. Supp. 907 (D. D.C. 1996).

44 9 U.S.C. § 208.

45 9 U.S.C. § 10 provides that a court can decline enforcement:
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 11 provides that a Court can also refuse enforcement:
(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award[; or]
(b) Where the arbitrators have awarded upon a matter not submitted to them, ...

46 *See, e.g., Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19-20 (2d Cir. 1997).

47 9 U.S.C. § 11(a).

48 See, e.g., *Yusuf, supra; Stawski Distributing Co. v. Browary Zywiec S.A.*;126 Fed. Apx. 308, 2005 WL 545702 (7th Cir. March 1, 2005); *Carte Blanche (Singapore) Pte., Ltd. v. Carte Blanche International, Ltd.*, 888 F.2d 260, 265 (2d Cir. 1989).

49 *See, e.g., Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH*, 141 F.3d 1434, 1444 (11th Cir. 1998); *M&C Corp. v. Erwin Behr GmbH & Co., KG*, 87 F.3d 844, 847-48 (6th Cir. 1996) (declining to apply manifest disregard under the Convention).

50 552 U.S. 576, 584-85 (2008).

51 130 S.Ct. 1758, 1767-68 & n.3 (2010).

52 That section provides:

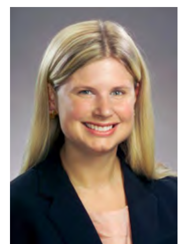
(a) An appeal may be taken from--
(1) an order--
(A) refusing a stay of any action under section 3 of this title,
(B) denying a petition under section 4 of this title to order arbitration to proceed,
(C) denying an application under section 206 of this title to compel arbitration,
(D) confirming or denying confirmation of an award or partial award, or
(E) modifying, correcting, or vacating an award;
(2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
(3) a final decision with respect to an arbitration that is subject to this title.

53 That section provides:
(b) Except as otherwise provided in section 1292(b) of title 28 [allowing certification of "a controlling question of law"], an appeal may not be taken from an interlocutory order--
(1) granting a stay of any action under section 3 of this title;
(2) directing arbitration to proceed under section 4 of this title;
(3) compelling arbitration under section 206 of this title; or
(4) refusing to enjoin an arbitration that is subject to this title.

Sobriety After the Zeal: What's Next for the Arab Spring?

By Heather Pillot

To date, the "Arab Spring" has toppled three regimes marked by dictatorial repression: that of Colonel Muammar Gaddafi in Libya, President Honsi Mubarak in Egypt and President Zine El Abidine Ben Ali in Tunisia.[1] Leading the way was Tunisia, which held its first post-revolution election in October of this year. The Nahda, a moderate Islamist party, won the day, taking forty-one percent of the assembly's seats.[2] Following suit, on November 28 and 29, 2011, Egypt commenced voting for its new Parliament, a process designated to occur in stages over the course of the next several months. Egypt's Muslim Brotherhood, by way of its political arm, the Freedom and Justice Party, emerged as the front-runner and winner of the largest bloc in parliamentary elections, along with the ultraconservative Salafis who have taken nearly a quarter of the vote.[3] Finally, Libya's "Public National Conference" is due to be elected by June of 2012 and is charged with drawing up a new constitution within 60 days. If approved by referendum, Libyan elections will occur six months thereafter.[4]


Heather Pillot

The widely-publicized photos of enthusiastic voters in Tunisia and Egypt are meant to evoke the success of the revolutions and a triumph for western liberal democracy over