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Recent Cases Shed Light on Enforcement of Foreign Arbitration Awards

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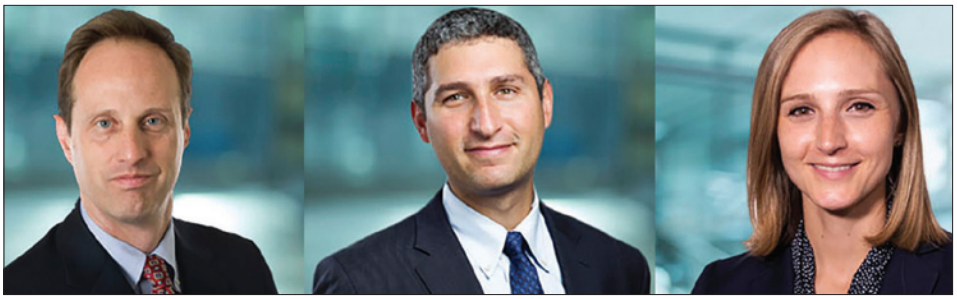

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Notwithstanding certain burgeoning nationalist sentiments and brewing international trade wars, ours is a global economy that depends on the rule of law to function efficiently. For international trade to take place, both parties must have confidence in the ability to enforce contracts. And frequently the enforcement of international contracts involves the recognition and enforcement of foreign arbitral awards.

Foreign arbitral awards can be enforced in the United States through the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly referred to as the "New York Convention," and the Federal Arbitration Act, 9 U.S.C. Sections 201-208 (the FAA). The United States has been a contracting state of the New York Convention since 1970, and in total, 159 countries have signed the New York Convention. Arbitration awards from any of the signatory states can be entered as judgments and enforced in the United States in much the same way as domestic arbitral awards.

Public policy strongly favors the confirmation of international arbitration awards, and the district court's role in reviewing a foreign arbitration award is "quite circumscribed." See *Ministry of Defense of Islamic Republic of Iran v. Gould*, 969 F.2d 764, 770 (9th Cir. 1992) (citing *Fotochrome v. Copal*, 517 F.2d 512, 516 (2d Cir. 1975)); see also *Wires Jolley v. Shlaimoun*, 2013 U.S. Dist. LEXIS 97739, at *3-4 (C.D. Cal. July 8, 2013). To enforce a foreign arbitration award, a party "need only submit an authentic copy of the award, the agreement to arbitrate and, if the award is in a language other than English, a duly certified translation," see *Jiangsu Changlong Chemicals v. Burlington Bio-Medical Science*, 399 F. Supp. 2d 165, 168 (E.D. N.Y. 2005) (citing Convention, Art. IV). If the petitioner submits these materials, the burden then shifts to the respondent to prove one of the seven defenses to enforcement under the New York Convention.

There are only limited means to challenge a foreign arbitral award under the New York Convention. "The confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court," see *Yusuf Ahmed Alghanim & Sons v. Toys* "R" Us, 126 F.3d 15, 23 (2d Cir. 1997) (citing *Florasynth v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984)). Accordingly, federal courts are required to confirm the award unless it finds one of the seven grounds for refusal or deferral of recognition of the award under the New York Convention. The seven grounds for challenging a foreign arbitral award are: the parties were under some incapacity or their agreement is otherwise invalid; the party against whom the award is invoked was not given proper notice of the arbitration proceedings; the award deals with matters beyond the scope of the submission to arbitration; the composition of the arbitral authority or procedure was not in accordance with the parties' agreement or with the law of the country where the arbitration occurred; the award has not yet become binding; in the country where enforcement of the award is sought, the subject matter is

not capable of settlement by arbitration; and the enforcement of the award would be contrary to the public policy of that country.

These defenses are narrowly construed, and the burden of proving them is on the party opposing recognition of the award, as in *Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems*, 665 F.3d 1091, 1096 (9th Cir. 2011).

Because of the strong presumption in favor of enforceability of the foreign arbitral award and the narrow grounds for challenging them, it is imperative for U.S. companies to participate in foreign arbitrations to protect their interests. Two recent cases demonstrate the danger for U.S. companies in disregarding notices of foreign arbitrations and instead attempting to litigate merits-based defenses in the federal courts in the context of contesting enforcement of the foreign arbitral awards. In *Tianjin Port Free Trade Zone International Trade Services v. Tiancheng Chempharm*, 2018 U.S. Dist. LEXIS 90106 (E.D. NY May 30, 2018) and *Tianjin Port Free Trade Zone International Trade Services v. Tiancheng International*, 2018 U.S. Dist. LEXIS 160390 (C.D. Calif. Sept. 18, 2018), the respondent companies purchased goods from a Chinese business. Although neither company denied receiving the goods, neither paid for them, and the seller commenced arbitration before the China International Economic Trade Arbitration Commission (CIETAC) in accordance with the terms of the parties' respective sales contracts. Despite receiving arbitration notices from CIETAC providing the opportunity to participate and present evidence, neither purchaser attended the foreign arbitration or defended the claims against them. Without the participation of the U.S. companies, the foreign arbitrators considered and weighed the evidence presented by the seller and issued reasoned awards against the respondent U.S. companies, requiring them to pay the purchase price of the goods, interest and fees.

To enforce the foreign arbitral awards, the seller hired U.S. counsel and filed petitions to confirm under the New York Convention and the FAA in the Eastern District of New York and the Central District of California. Both federal courts prohibited the respondent-U.S. companies from relitigating substantive defenses to nonpayment. Relying on U.S. Court of Appeals for the Second Circuit precedent, both courts ruled that "the issue of whether the underlying contract is the subject of the arbitrated dispute was forged or fraudulently induced is a matter to be determined exclusively by the arbitrators." See *Eurocar Italia v. Maiellano Tours*, 156 F.3d 30, 315 (2d Cir. 1998) (collecting cases). A party that fails to raise those issues in a foreign arbitration proceeding forfeits the issue and cannot relitigate them in the context of defending a petition for confirmation of an arbitration award. Because these federal courts ruled that issues relating to the enforceability of the contracts could not be relitigated and because the respondents did not establish any of the seven permissible defenses under the New York Convention, judgment was entered against the respondents, confirming the CIETAC arbitration awards.

The recent decisions from the federal courts in New York and California demonstrate the importance for companies buying and selling goods internationally to participate in contractually required foreign arbitration proceedings. U.S. companies that have valid defenses to claims cannot sit idly by after the commencement of foreign arbitrations. Rather, it is imperative that they hire foreign counsel and arbitrate their defenses. If U.S. companies do not participate in foreign arbitrations, federal courts will not permit them to litigate defenses other than the seven narrow defenses identified in the New York Convention and FAA, on which they will bear the burden of proof. The only opportunity for U.S. companies to present most substantive defenses is in an arbitration in a foreign land.

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