OBSTACLES TO ARBITRATION AWARD CONFIRMATION UNDER THE INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION

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ABSTRACT

The Inter-American Convention on International Commercial Arbitration was promulgated by nations of the Organization of American States to provide enforceability of international arbitration awards. Eighteen OAS member nations, including the United States, have ratified this Convention. The Inter-American Convention is controlling law in the United States. The Convention mandates that arbitral awards shall have the force of judicial final judgments. The laws of the United States support this policy and provide a method for award confirmation and enforcement. However, the Convention and the laws of the United States also provide obstacles to award confirmation. Recent United States court cases interpreting the Inter-American Convention have recognized many grounds for denial of arbitration award confirmation. The purpose for this paper is to identify the grounds that may be asserted in United States courts to thwart confirmation of arbitral awards governed by the Convention.

INTRODUCTION

Businesses that engage in global commerce rely on the enforceability of international arbitration awards (Slate 2002). In theory, award confirmation is a summary proceeding (American Life Insurance Company v. Parra 2003). Unfortunately, many times the proceeding is derailed by objections to the arbitration process and to the award. Objections may result in vacatur or mire the process in litigation. An awareness of the barriers to confirmation of arbitral awards governed by the Inter-American Convention in United States courts may reduce the exposure for confirmation refusal.

THE INTERAMERICAN CONVENTION

The Inter-American Convention is a treaty that mandates the enforceability of written commercial arbitration agreements in the Western Hemisphere. It provides that arbitral awards shall have the force of final judgments (Federal Arbitration Act Chapter 3, 1990). The Convention was promulgated in 1975. Eighteen OAS member nations, including the United States, have ratified the Convention. The Inter-American Convention is controlling law in the United States (American Life Insurance Company v. Parra 2003). Article 5 of the Inter-American Convention provides seven grounds upon which to deny confirmation of arbitral awards (Federal Arbitration Act Chapter 3, 1990).

INTER-AMERICAN CONVENTION AND THE FEDERAL ARBITRATION ACT

The Inter-American Convention is codified at chapter 3 of the Federal Arbitration Act ("FAA") (Federal Arbitration Act, 1947). It incorporates the FAA's terms unless they are in conflict (Banco De Seguros Del Estado v. Mutual Marine Offices, Inc., 2002). In court proceedings

in the United States to confirm arbitral awards governed by the FAA and the Inter-American Convention, the court is required to confirm the award unless it finds grounds for refusal to do so (Employers Insurance of Wausau v. Banco de Seguros Del Estado, 1999). Chapter 1 of the FAA contains four additional grounds upon which to vacate or deny award confirmation (Federal Arbitration Act Chapter 1, 1947).

THE INTER-AMERICAN CONVENTION AND THE NEW YORK CONVENTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards is known as the New York Convention. It was designed to empower U.S. courts to recognize and enforce arbitration agreements between parties of signatory nations (Energy Transport, Ltd. v. Cabot Indonesia, 2004). In 1970, Congress implemented the New York Convention as Chapter 2 of the FAA (Federal Arbitration Act Chapter 2, 1970). Congress intended the Inter-American Convention to reach the same results as those reached under the New York Convention (Productos Mercantiles v. Faberge USA, Inc., 1994). The New York Convention contains seven grounds upon which to deny arbitral award confirmation that are almost identical to the seven grounds set forth in the Inter-American Convention (Federal Arbitration Act, 1970).

BASIS UPON WHICH TO DENY ARBITRATION AWARD CONFIRMATION

First, The FAA provides that the Inter-American Convention incorporates the seven grounds to deny confirmation stated in the New York Convention (Nicor International Corporation v. El Paso Corporation, 2003). Second, the Inter-American Convention also incorporates the FAA's terms unless the terms of the FAA are in conflict (Federal Arbitration Act, 1990). It has been held in some jurisdictions that United States courts may employ domestic law and the four additional grounds set forth in the FAA to refuse to confirm arbitration awards governed by the Conventions (Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc, 1994). Cases arising under the Inter-American Convention have been accorded this treatment. Third, two common law defenses termed "manifest disregard of the law" and denial of "fundamental fairness" have also been considered in cases governed by the Inter-American Convention.

DEFENSES TO CONFIRMATION

Stated in summary fashion, the categories permitting an attack upon an arbitral awards include: (1) incapacity of a party or invalidity of the agreement; (2) lack of due process in the arbitration proceedings; (3) exceeding the scope of arbitration; (4) improper arbitration panel; (5) a vacated or not-yet-binding award; (6) arbitral consideration of an issue prohibited under domestic law; (7) forum public policy; (8) bad faith; (9) corruption or partiality of an arbitrator; (10) arbitrator misconduct; (11) arbitrator overreaching; (12) manifest disregard of the law and; (13) denial of fundamental fairness.

GROUNDS FOR DENIAL OF ARBITRATION AWARD CONFIRMATION UNDER THE CONVENTIONS

1 The parties to the agreement were under some incapacity
or
The agreement is invalid under the law designated in the agreement or in the country where the award was made.

First, Legal incapacity means there exists some defect in the party's legal status to act (Harris v. Averick, 1960). Second, incapacity of a party can refer to incapacity to contract due to a physical or mental condition (Contracts 17A Corpus Juris Secundum, 1936-).

2. 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
   The party against whom the award is invoked was unable to present a defense.

The U.S. Supreme Court has established a federal due process standard that only requires that "proper notice" is "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (Mullane v. Central Hanover Bank & Trust Co., 1950).

3. The award deals with matters beyond the scope of the issues submitted to arbitration.

The gravamen of this defense involves an inquiry into the authority of the arbitrator to fashion the relief complained of. The arbitral award must draw its essence from the substantive contract. (United Steelworkers of America v. Enterprise Wheel & Car Corp., 1960).

4. The composition of the arbitration panel or the arbitral procedure was not in accordance with the contract.

A party's contractual intent cannot be modified by the court (Gutfreund v. Weiner, 1995).

5. The award has not yet become binding on the parties, or 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.

A U.S. court will refuse to confirm an award where a court of another nation has previously invalidated it (Baker Marine (NIG.) Ltd. v. Chevron (NIG.) Ltd., 1999).

6. The subject matter of the difference is not capable of settlement by arbitration under the law of the country where the enforcement is sought.

Anti-trust issues are about the only bright line arbitration subject matter prohibition in the United States (Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth, Inc., 1983).

7. Enforcement of the award would be contrary to the public policy of the forum nation.

International arbitration award confirmation may be denied where enforcement would violate the forum state's most basic notions of morality and justice (Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier, 1974).

GROUNDS FOR DENIAL OF ARBITRATION AWARD CONFIRMATION UNDER THE FAA

1. the award was procured by corruption, fraud or undue means.

This provision means that bad faith has been employed in the procurement of the arbitral award (Shearson Hayden Stone, Inc. v. Liang, 1980).

2. there was evident partiality or corruption in the arbitrators.

This ground in opposition to award confirmation involves the failure of a party or an arbitrator to disclose prior or ongoing business dealings between them that might create an impression of possible bias (Commonwealth Coatings Corp. v. Continental Casualty Co., 1968).

3. the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear relevant evidence or of any other misbehavior prejudicing the rights of any party.

Most of the cases invoking this provision in opposition to award confirmation assert that the arbitrators entered a ruling that resulted in rejection of relevant evidence and therefore denied the parties a full and fair hearing (Hoteles Condada Beach, La Concha and Convention Center v. Union de Tronquistas Local 910, 1985).

4. the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award was not made.

In order for an arbitration award to be final and definite it must both resolve all the issues submitted to arbitration, and determine each issue finally, so that no further litigation is necessary to finalize the obligations of the parties under the award (Konkar Maritime Enterprises, S.A. v. Compagnie Belge D'Affretement, 1987).

GROUNDS FOR DENIAL OF ARBITRATION AWARD CONFIRMATION UNDER THE COMMON LAW

1. the arbitrator acted in manifest disregard of the law.

Manifest disregard of the law means that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether and (2) the law ignored by the arbitrators was well defined, explicit and clearly applicable to the case (LaPrade v. Kidder, Peabody & Co., Inc, 1997).

2. a party to the arbitration was denied fundamental fairness.

The courts of the United States hold that a fundamentally fair arbitration hearing requires notice, an opportunity to be heard and to present proper evidence together with a requirement that the arbitrator not be infected with bias (Bowles Financial Group, Inc. v. Stifel, Nicolaus & Company, Inc., 1994).

CONCLUSION

The Inter-American Convention was promulgated to assure enforcement of arbitral awards. The summary confirmation process envisioned by the Convention does not always occur. There are numerous grounds for denial of confirmation contained in the Convention itself, the FAA and the Common Law. The possible impediments to judicial confirmation of arbitral awards made under the Convention can be minimized by knowing about them beforehand and taking precautionary measures to avoid the pitfalls when negotiating the arbitration agreement and conducting the arbitration hearing.

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