

Kluwer Arbitration Blog

ICCA 2014. How to Avoid Cold Sweat and Have Sweet Dreams

Maria Camila Tobón (Shook Hardy & Bacon LLP) · Saturday, April 12th, 2014

On Monday, April 8, Shook, Hardy and Bacon LLP presented a breakfast program moderated by John Barkett and featuring Frank Cruz-Alvarez, Marike Paulsson, and Sergio Pagliery discussing how to make the New York Convention your best friend. In a nutshell, the panel gave three helpful practice pointers, as discussed below.

First, make sure that when entering into an agreement, you take a close look at the arbitration clause and understand its terms. To enforce an agreement to arbitrate, the New York Convention requires an agreement in writing. Article II(2) provides: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.” An arbitral clause in a contract is clear. So is an arbitration agreement. But does the phrase “signed by the parties or contained in an exchange of letters or telegrams” apply to both the words “contract” and “arbitration agreement”? The Fifth Circuit Court of Appeals held that it applied only to an “arbitration agreement” (See *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666 (5th Cir. 1993)) while the Second and Third Circuit Courts of Appeal held that it applied to both “contract” and “arbitration agreement” (See *Kahn Lucas Lancaster, Inc. v. Lark International Ltd.*, 186 F.3d 210 (2d Cir. 1999) and *Standard Bent Glass Corp. (US) v. Glassrobots Oy (Finland)*, 333 F.3d 440 (3d Cir. 2003)). No matter the jurisdiction, parties would be well served in understanding what exactly they are obligating themselves to when they enter into an agreement with another party.

Second, do not fear a *forum non conveniens* challenge to a proceeding seeking enforcement of a foreign arbitral award, notwithstanding the Second Circuit’s decision in *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011). Article V of the New York Convention lists the grounds on which courts may refuse to recognize or enforce international arbitral awards and *forum non conveniens* is not one of those grounds. However, having opened the door in *Figueiredo* to *forum non conveniens* motions in confirmation and enforcement actions, the Second Circuit has invited every foreign arbitral award loser whose dispute arose, or is centered, abroad to raise that argument to prevent confirmation and enforcement of the award in that circuit. But have no fear. The doctrine is a discretionary doctrine, meaning that the determination is left to the sound discretion of the trial court. There is established precedent in favor of according substantial deference to a party’s choice of forum. And forum selection is a procedural matter to be addressed before reaching the merits of the claim; not after the claim has already been litigated and decided. Therefore, outside of the Second Circuit the holding in *Figueiredo* is not binding precedent; inside the Second Circuit, there is a lot of room for argument as to why the court’s decision in *Figueiredo* is distinguishable.

Finally, don't treat the New York Convention as a static document. Instead, treat it as a living document and understand the applicable jurisprudence of the forum you are working in. In the U.S., as articulated by the district court in *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, ___ F.Supp.2d ___, 2013 WL 4517225 (S.D.N.Y. Aug. 27, 2013), U.S. courts presented with a request to enforce a foreign arbitral award that was annulled at the seat of the arbitration are permitted to exercise a narrow discretion and disregard a foreign annulment judgment if the court concludes that the annulment violated fundamental notions of what is fair and just in the United States. When involved in an enforcement proceeding in the U.S., or elsewhere, practitioners should familiarize themselves with the applicable case law on judicial discretion under Article V(1)(E) of the New York Convention.

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