THE FLORIDA BAR
INTERNATIONAL LAW SECTION
QUARTERLY
www.floridabar.org • www.internationallawsection.org

IN THIS ISSUE: 2008 STUDENT COMPETITION WINNERS

Sponsored by the International Law Section and created to foster an interest in the international community and discover emerging issues in the field of international law, the annual Student Paper Competition invites articles, the primary focus of which is international law, by students enrolled in a Florida law school. Monetary prizes for first, second, and third place as judged by the Executive Committee are awarded, and those articles are published in the *Quarterly*.

In This Issue:

SAVE THE DATE!

2nd International Business Transactions Conference

(#0787R)

May 21, 2009
The Four Seasons
Miami, Fla.

U.S. Patent Reform and International Public Health: Issues of Law and Policy

First Place

By Kevin McGarry

While technology continues to advance in many countries, the developing countries of the world are still playing catch-up. Technological progress is a key element of economic development but only when adapted properly and affordably to meet the needs of the recipient country and population. However, development plans involving technology transfers to developing countries often encounter difficulties in the form of conflicting private sector patent[1] interests, inter-governmental

See "U.S. Patent Reform," page 16

Message From the Chair:

Sea Change for the ILS?

BROCK MCCLANE

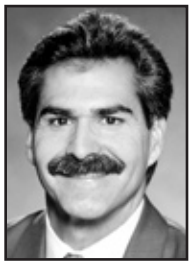
By now, most of our members have begun to see the changes we have put in place across the scope of ILS programming, the most obvious of which is the ILS's new appearance, from the web site to the ILQ to the Section membership materials. For the Executive Committee, this has been a year of rolling up our sleeves and making some important decisions for the Section.

The impetus for the changes was the budget surprise we experienced in July when reports from the Bar indicated that the new revenue sharing rules for CLE programming resulted

continued, next page

Collecting on Your Winnings: Recognition and Enforcement of Foreign Arbitral Awards

By Luis Perez, Frank Cruz-Alvarez, Salo Kozolchyk, and Mark Schweikert, Miami


L. PEREZ


F. CRUZ-ALVAREZ


S. KOZOLCHYK

International arbitration of commercial disputes has developed considerably with the globalization of business and the growth of international trade and investment. Not only is arbitration confidential, cost-effective, and efficient, but it is also a practical alternative to adjudicating disputes in potentially hostile or incompetent judicial forums. Success in international arbitration, however, depends on the ability to enforce arbitral awards rendered in foreign countries. To that end, this article surveys various mechanisms for enforcing a foreign arbitral award in the United States generally and in Florida more specifically.

I. The Federal Arbitration Act

A. Chapter 1: The Domestic FAA

Chapter 1 of the Federal Arbitration Act (the "Domestic FAA") establishes a substantive body of federal law that promotes the strong public policy favoring arbitration.[1] It was designed to reverse centuries of judicial hostility to arbitration agreements by placing them on the same footing as other contracts.[2] The Domestic FAA applies to any maritime transaction or any transaction involving commerce "among the several States or with foreign nations."[3] Thus, when a foreign arbitral award does not arise under either the New York or Panama Conventions, the Domestic FAA may apply.

To enforce an arbitral award under the Domestic FAA, a party must seek confirmation of the award within one year of the date of the award and serve notice on the adverse party.[4] When the parties have agreed to entry of a judgment upon the making of the arbitral award and have specified the court, a party may seek a confirmation order from that court.[5] If no court was specified, the application for a confirmation order may be made to the federal court in the district where the award was made.[6] The Domestic FAA, however, does not establish an independent basis for federal court jurisdiction.[7] Rather, the onus is on the party seeking enforcement of an arbitral award to establish some basis of federal jurisdiction.[8]

A party seeking to vacate, modify, or correct an arbitral award under the Domestic FAA must notify the adverse party within three months after the award is filed or delivered.[9] The district court where the award was made may then vacate the award if it was procured through "corruption, fraud, or undue means" or was based on an arbitrator's "evident partiality or corruption"; there was misconduct in refusing to postpone the hearing, upon sufficient cause shown, or as to certain evidentiary issues; or there was misbehavior that prejudiced a party's rights, or the use of excessive power or imperfect execution of power that resulted from failure to enter a mutual, final, and definite award on the subject matter submitted.[10] In addition, the court may vacate the arbitral award if the arbitrator manifestly disregarded the law.[11]

If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may order the arbitrators to rehear the proceeding.[12] Finally, so long as a timely request is made, the court may also modify or correct any mistakes in an award.[13]

B. Chapter 2: The New York Convention

1. Background

The New York Convention[14] was adopted at the United Nations in 1958. The United States acceded to the New York Convention in 1970 and enacted Chapter 2 of the FAA to implement its provisions.[15] According to the United States Supreme Court, the purpose of the United States' accession to the New York Convention 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 signatory countries."[16]

2. General Provisions of the New York Convention

The New York Convention consists of 16 articles. Articles I through VII contain the major provisions of substantive interest. The scope of the New York Convention is set

forth in article I. By its terms, the New York Convention applies to two types of arbitral awards: (1) awards made in a country other than the one in which enforcement is sought; and (2) awards "not considered as domestic awards"[17] in the country where enforcement is sought.[18]

Article I further provides two reservations that a country may adopt when acceding to the New York Convention. The first is the "reciprocity reservation" which allows a Contracting State to apply the New York Convention on the basis of reciprocity.[19] This limits recognition and enforcement of foreign arbitral awards to those made in another Contracting State.[20] The second is the "commercial reservation"[21] which allows a Contracting State to limit recognition and enforcement to only those transactions considered commercial under its own national law.[22] The United States adopted both reservations upon acceding to the New York Convention.[23]

Article II provides for the enforcement of agreements to arbitrate.[24]

Article III requires a Contracting State to recognize an arbitral award under article I as binding.[25] It also requires arbitral awards to be enforced under the procedural rules of the territory where enforcement is sought.[26] Contracting States cannot, however, impose "substantially more onerous conditions or higher fees or charges" on the recognition and enforcement of foreign arbitral awards than are imposed on domestic arbitral awards.[27]

Article IV provides the procedure for obtaining recognition and enforcement of an arbitral award and is discussed further below.[28]

Article V provides seven grounds for refusing recognition of an arbitral award.[29] Article VI provides that if the court finds that an application has been made to a competent authority for the setting aside or suspension of the award, the court may adjourn its decision.[30] The court may also, upon application of the party seeking enforcement of the award, order the opposing party to provide suitable security.[31] Article VI, however, is discretionary and the court is free to refuse adjournment and enforce the award.

Article VII provides that the New York Convention does not affect the validity of a Contracting State's other international agreements regarding arbitration.[32] Finally, articles VIII through XVI contain procedural provisions that are not of interest here.

3. Implementation of the New York Convention in the U.S.

Under section 202 of the FAA, the provisions of the New York Convention are applicable to "any arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title."[33]

However, because the United States adopted the reciprocity and commercial reservations, the New York Convention does not apply to awards rendered in non-convention countries and awards not involving commercial disputes. Moreover, an arbitration agreement or arbitral award that is exclusively between United States citizens is not covered by the New York Convention unless the relationship involves property located outside the United States, contemplates performance or enforcement abroad, or has some reasonable connection to a foreign country.[34]

Section 203 of the FAA gives United States federal district courts original jurisdiction over actions arising under the New York Convention regardless of the amount in controversy.[35] They do not, however, have exclusive jurisdiction.[36] State courts may also hear such actions. But when the subject matter of a proceeding pending in a state court "relates to an arbitration agreement or award falling under the [New York] Convention," the opposing party has the prerogative of removing the case to federal court.[37] Venue lies in the district designated in the agreement or in any other district where an action concerning the dispute could have been brought.[38]

4. Procedure for Confirmation of an Arbitral Award

The procedure for enforcing a foreign arbitral award under the New York Convention is relatively straightforward. First, a party must apply for a confirmation order to a United States court having jurisdiction within three years of the date of the award.[39] In addition, the party must supply the court with the original or certified copy of both the arbitration agreement and award.[39] If necessary, both documents must be translated.[41]

Once the court has received the application for the confirmation order, 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."[42] The opposing party has the burden of establishing the grounds for non-recognition under article V.[43] Absent a "convincing showing" that one of these narrow exceptions applies, the arbitral award will be confirmed.[44] If confirmed, the arbitral award becomes a judgment of the court and is entitled to enforcement as such. The enforcement procedures under the New York Convention do not, however, govern foreign arbitral awards that have already been confirmed and converted into a judgment by a foreign court.[45]

5. Grounds for Non-recognition of an Arbitral Award

United States courts have recognized article V as the exclusive source of authority to deny recognition or enforcement of a foreign arbitral award under the New York Convention.[46] Article V establishes seven

See "Collecting Your Winnings," page 45

COLLECTING YOUR WINNINGS
from page 9

grounds on which the recognition and enforcement of an award may be challenged and denied. Challenges based on the first five grounds must be brought by the party contesting the award. These grounds include:

(a) the parties to the agreement were under some incapacity, or the arbitral agreement is not valid under either the law to which the parties have subjected it or under the law of the country where it was made; or

(b) the losing party was not given proper notice of the arbitration proceedings or was unable to present his case; or

(c) the award decides matters not within the scope of the arbitration agreement; or

(d) the composition of the arbitral authority or the arbitral procedure used did not accord with the parties' agreement or applicable law; or

(e) the award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was rendered.[47]

Article V(2) provides two further grounds, which may be raised by the court or by the challenging party, for refusing to recognize and enforce an award. These grounds include:

(a) the subject matter is nonarbitrable under the law of that country; or

(b) the recognition and enforcement of the award would be contrary to public policy.[48]

Absent a finding that grounds for non-recognition exist, the court will confirm the foreign arbitral award. Thereafter, the arbitral award may be enforced in accordance with the rules of procedure where enforcement is sought.[49]

C. Chapter 3: The Panama Convention

1. Background

The Inter-American Convention on International Commercial Arbitration (the "Panama Convention") came into force for the United States in 1990.[50] The Panama Convention is essentially a regional duplicate of the New York Convention.[51] As a result, both conventions are subjected to the same general procedural regime. Even the grounds for non-recognition of a foreign arbitral award are nearly identical.[52] In fact, the legislative history recognizes the congressional intent to produce uniform results under both the Panama Convention and the New York Convention.[53]

Nevertheless, some differences exist between the two conventions. Unlike the New York Convention, the Panama Convention does not distinguish between foreign and domestic arbitral awards. Rather, the Panama Convention includes a reciprocity provision that requires recognition and enforcement of only those arbitral awards "made in the territory of a foreign state" that has ratified the Panama Convention.[54]

Under certain circumstances, it is possible that both the New York and Panama Conventions could apply to a foreign arbitral award. Thus, the Panama Convention provides that if a majority of the parties to the arbitration agreement are citizens of countries that have ratified the Panama Convention, then the Panama Convention applies.[55] Otherwise, the New York Convention applies.[56]

2. Procedure for Confirmation of an Arbitral Award

The Panama Convention fails to prescribe the procedure for enforcing a foreign arbitral award, and this area of law remains largely unsettled.[57] Some cases, however, suggest that United States courts are likely to adopt the guidelines of the FAA and the New York Convention in determining whether to modify, vacate, or confirm a foreign arbitral award under the Panama Convention.[58]

II. Florida International Arbitration Act

Chapter 684 of the Florida Statutes, the Florida International Arbitration Act (the "FIAA"), governs the confirmation of foreign arbitral awards under Florida law. The purpose of the FIAA is to assure access to Florida courts and "to encourage the use of arbitration to resolve disputes arising out of international relationships."[59] To that end, the FIAA applies to arbitration disputes between:

(a) Two or more persons at least one of whom is a nonresident of the United States; and

(b) Two or more persons all of whom are residents of the United States if the dispute:

(1) Involves property located outside the United States;

(2) Relates to a contract that envisages performance or enforcement in whole or in part outside the United States;

(3) Involves an investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is affected, or any agreement pertaining to such an entity; or

(4) Bears some relation to one or more foreign countries.[60]

But the FIAA does not generally apply to the arbitration of disputes involving real property in Florida,[61] domestic relations, or political dis-

continued, next page

COLLECTING YOUR WINNINGS
from page 45

putes between nations.[62]

To enforce a foreign arbitral award under the FIAA, a party must submit an application for a confirmation order to a Florida circuit court.[63] The application must be filed within the time constraints imposed on the enforcement of judgments under § 95.051(1).[64] The court will then dispose of the application "without regard to the law of the place of arbitration, the law governing the award, or whether a court of law or equity would apply the law or decisional principles applied by the arbitral tribunal or would grant the relief provided for in the award."[65]

Thereafter, the court must confirm the award "unless one or more of the grounds set forth in §684.25 is established by way of an affirmative defense."[66] The grounds for vacating an arbitral award or declaring it not entitled to confirmation under § 684.25 include:

(a) there was no written undertaking to arbitrate, there was fraud in the inducement of that undertaking, or a tribunal had previously determined that the dispute was nonarbitrable or invalid, unless the challenging party participated in the proceeding without first having submitted such questions to the tribunal; or

(b) the challenging party was not given notice of the appointment of the tribunal or of the proceedings, unless notice was impossible or such party waived notice or participated in those proceedings on the merits of the dispute; or

(c) the tribunal conducted its proceedings so unfairly as to substantially prejudice the rights of the challenging party; or

(d) the award was obtained by corruption, fraud, or undue influence or is contrary to public policy; or

(e) any neutral arbitrator had a material conflict of interest with the challenging party; or

(f) the award resolves a dispute which the parties did not agree to refer to the arbitral tribunal; or

(g) the arbitral tribunal was not constituted in accordance with the agreement of the parties.[67]

In addition, the court may ask the arbitral tribunal to clarify the award or the court may modify the award for any imperfection not affecting the merits.[68] But once the court confirms a foreign arbitral award, it becomes a judgment of the court and is entitled to enforcement as such.[69]

III. General Enforcement Theory

Absent a specific enforcement mechanism, both state and federal courts in the United States have long recognized foreign arbitral awards regardless of reciprocity.[70] Generally stated, so long as the foreign arbitral award is rendered in compliance with the laws of the country where rendered, a United States court will likely enforce the award.[71]

IV. Conclusion

The success of international arbitration of commercial disputes depends on the global confidence that arbitral awards will be readily enforceable. In this respect, the United States is commendable. Not only does the United States promote a policy of favoring arbitration of international commercial disputes, but the United States also provides a host of enforcement mechanisms to ensure that arbitral awards are carried out. Thus, parties engaging in international commerce can take comfort knowing that, should a dispute arise, arbitration is available as a practical and effective alternative to litigation.

Luis A. Perez *is a partner in the Miami office of Shook, Hardy & Bacon, LLP. His practice involves commmercial litigation, general corporate work, international transactions, and international litigation. The focus of his international practice is in Latin America. His undergraduate and law degrees are from Loyola University, New Orleans.*

Frank Cruz-Alvarez *is a partner in the Miami office of Shook, Hardy & Bacon, LLP. He is a member of the firm's national products liability division and its international litigation and dispute resolution practice group. He received both his undergraduate and and his law degree from the University of Florida with honors.*

Salo Kozolchyk *is an associate in the Miami office of Shook, Hardy & Bacon, LLP. His undergraduate degree is from the University of Pennsylvania . His law degree is from the Washington University School of Law where he served as associate editor of the Law Quarterly.*

Mark Schweikert *was a summer associate at Shook, Hardy & Bacon, LLP when this article was written.*

Endnotes:

1 *Southland Corp. v. Keating*, 465 U.S. 1, 10-11 (1984).

2 *Pritzker v. Merrill Lynch Pierce Fenner & Smith*, 7 F.3d 1110, 1113 (3d Cir. 1993).

3 9 U.S.C. § 1 (2000).

4 *Id.* § 9 (2000). Courts disagree as to whether the one-year period is permissive or mandatory. *See* Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 Geo. Wash. Int'l L. Rev. 17,n. 50 (2002).

5 9 U.S.C. § 9 (2000).

6 *Id.*

7 *Moses. H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25 n.32 (1983).

8 *Id.*

9 9 U.S.C. § 12 (2000).

10 *Id.* § 10.

11 Karamanian, *supra* note 4, at 27.

12 9 U.S.C. § 10(a)(5) (2000).

13 *Id.* § 11. An arbitral award may be modified or corrected if (a) "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;" (b) "the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted"; or (c) "the award is imperfect in matter of form not affecting the merits of the controversy." *Id.* § 11(a)-(c). The party must submit to the court the papers identified in section 13. *See id.* § 13.

14 Convention on the Recognition and Enforcement of Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 [hereinafter "New York Convention"].

15 9 U.S.C. §§ 201-208 (2000).

16 *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

17 An example of a "nondomestic award" is an award rendered inside one country but under the law of another. The question of what constitutes a "nondomestic award" has been one of the most complicated issues posed by this treaty. *See* Dr. Albert Jan van der Berg, *When is an Arbitral Award Non-domestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 26 (1985).

18 New York Convention, *supra* note 14, at art. I.

19 *Id.* at art. I(3).

20 Hans Harnik, *Recognition and Enforcement of Foreign Arbitral Awards,* 31 Am. J. Comp. L. 703, 705 (1983).

21 The scope of the 'commercial reservation' has been narrowly defined. See *Sumitomo Corp. v. Parakopi Compania Maritima*, 477 F. Supp. 737 (S.D.N.Y. 1979), *aff'd*, 620 F.2d 286 (2d Cir. 1980) (concluding that the definition of 'commerce' under the FAA could not be applied to limit the application of the New York Convention).

22 New York Convention, *supra* note 14, at art. I(3).

23 *See* 9 U.S.C. § 201 (2000).

24 New York Convention, *supra* note 14, at art. II.

25 *Id*. at art. IV.

26 *Id.*

27 *Id.*

28 *Id.* at art. IV.

29 *Id.* at art. V.

30 *Id.* at art. VI.

31 *Id.*

32. *Id.* at Art. VII

33 9 U.S.C. § 202 (2000).

34 *See id.*

35 *Id.* § 203.

36 *See id.* § 205.

37 *Id.* § 205.

38 *Id.* § 204.

390 9 U.S.C. § 207 (2000).

40 New York Convention, *supra* note 14, at art. IV.

41 *Id.*

42 9 U.S.C. § 207 (2000).

43 *Imperial Ethiopian Gov't v. Baruch-Foster Corp.,* 535 F.2d 334, 336 (5th Cir. 1976).

44 *Trans Chemical Ltd. v. China Nat'l Machinery Import and Export Corp.*, 978 F. Supp. 266, 309 (S.D. Tex. 1997), *aff'd*, 161 F.3d 314 (5th Cir. 1998) (citing *Fitzroy Eng'g, Ltd. v. Flame Eng'r, Inc.*, 2000 U.S. Dist. LEXIS 17781, at *3 (N.D. Ill. Dec. 13, 2000).

45 For example, the Second Circuit has held that the New York Convention applies only "to the enforcement of foreign judgments confirming foreign arbitral awards." *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973), *cert. denied*, 416 U.S. 986 (1974).

46 *See Ipitrade Int'l. S.A. v. Fed. Rep. of Nig.*, 465 F. Supp. 824, 826 (D.D.C. 1978).

47 New York Convention, *supra* note 14, at art. V.

48 *Id.* This ground for non-recognition has evoked the most discussion. *See* Joseph T. McLaughlin, *Enforcement of Arbital Awards Under the New York Convention: Practice in the U.S. Courts,* International Commercial Arbitration at 287 (1988).

49 New York Convention, *supra* note 14, at art. III.

50 Inter-American Convention on International Commercial Arbitration, 14 I.L.M. 336 (1975) [hereinafter "Panama Convention"]. In addition to the United States, these include Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Panama, Paraguay, Peru, Uraguay, and Venezuela.

51 *See* David R. Rivkin, *International Arbitration and Dispute Resolution*, 765 P.L.I./COM. 183, 222 (1998).

52 *See* Panama Convention, *supra* note 49, at art. V.

53 *Productos Mercantiles e Industriales, S.A., v. Faberge USA, Inc.*, 23 F.3d 41, 45 (2d Cir. 2000).

54 9 U.S.C. § 304 (2000).

55 *Id.* § 305(1).

56 *See id.* § 305(2).

57 Pedro Menocal, *We'll Do It For You Any Time: Recognition and Enforcement of Foreign Arbitral Awards and Contracts in the United States*, 11 St. Thomas L. Rev. 317, 339 (1999).

58 *Id.*

59 § 684.02(1), Fla. Stat. (2008).

60 *Id.* § 684.03(1)(a)-(b).

61 The parties may agree otherwise in writing. *Id.* § 684.03(2)(a).

62 *Id.* § 684.03(2)(a)-(b).

63 *Id.* § 684.24(1).

64 § 684.24(3)(a), Fla. Stat. (2008).

65 *Id.* § 684.24(1).

66 Id. §684.24(1)(a).

67 *Id.* § 684.24(1)(a)-(g). Note that a foreign court's determination of whether the grounds described in paragraphs (c), (f), or (g) exist is final so long as certain prerequisites are met. *Id.* § 684.24(2).

68 § 684.24(4). Fla. Stat. (2008).

69 *Id.* § 684.27. The court may also award costs and disbursement. *Id.*

70 *See* McLaughlin, *supra* note 48 at 302-303.

71 *Id.*

STRICT COMPLIANCE

from page 11

letter of credit by asking questions that address the effect of documentary discrepancies on the document checker's mind.[31] In the same vein, the "reasonable compliance" test asks whether, under the circumstances, it is reasonable to read the credit requirements literally.[32]

Some other commentators, however, have defended these decisions as introducing only "a very tiny measure of flexibility" to avoid absurd results.[33] A careful review of those decisions reveals that the courts had, in effect, gone a little bit further.[34]

Several subsequent decisions have taken similar approaches.[35] For example, the Eleventh Circuit in 1985 appeared *in dicta* to subscribe to the substantial compliance doctrine and cited with approval *Banco Espanol*, *Flagship Cruises* and their progeny.[36] The case addressed the legal significance of the beneficiary's non-compliance with the terms of the credit by failing to present two documents required by the letter of credit: an ocean bill of lading and an inspection certificate. The very fact that the court considered whether the beneficiary's failure to provide the required documents could be cured by the application of the principle of "substantial compliance" is hardly indicative of a "small measure of flexibility,"[37] but rather is reflective of the unwieldy and ultimately unpredictable applica-

continued, next page