LOOKING BACK AT 2007:
Another Good Year
For the Enforcement of
International Arbitral
Awards in the U.S.

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The authors discuss the latest U.S. cases arising out of international arbitration awards, focusing on enforcement battles and the arguments that the challengers made, in most cases unsuccessfully.

When Vince Lombardi, the legendary coach of the Green Bay Packers, said of football, “Winning isn’t everything; it’s the only thing,” he might just as easily be describing the attitude of parties who are disputing the enforcement of foreign arbitral awards in the courts. In 2007, the parties challenging enforcement were remarkably unsuccessful. U.S. district courts confirmed international arbitration awards almost across the board.

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This article is based on a paper presented at the International Centre for Dispute Resolution (ICDR) 6th Annual Miami International Arbitration Conference March 30-April 1, 2008. The authors can be reached at lschaner@jenner.com or jschleppenbach@jenner.com.

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Overall, federal district courts took a dim view of attempts by parties to avoid the results of international arbitration proceedings. Most of these cases were decided in the Southern District of New York, but there were a few noteworthy appellate decisions by the 2nd Circuit and the District of Columbia Circuit.

This article surveys the enforcement battles waged in 2007. It focuses on the arguments the challengers made against recognition and enforcement of foreign arbitral awards under the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and in one case under the Inter-American Convention on International Commercial Arbitration (Panama Convention).

Defenses under the New York Convention

The New York Convention, which is celebrating its 50th anniversary, liberalized the procedures for enforcing foreign arbitration awards by shifting the burden of proof to the party opposing enforcement and expressly limiting the available defenses to enforcement.

Article V of the New York Convention sets out seven defenses to enforcement of a foreign arbitration award. These grounds have been held to be exclusive. Because of the New York Convention’s pro-enforcement bias, the grounds for opposing enforcement have been narrowly construed. Next we look at each defense.

Article V(1)(a): Incapacity of a Party or Invalidity of Agreement

The New York Convention provides that a court may refuse to enforce a foreign arbitration award where the parties to the agreement to arbitrate were “under some incapacity, or the said agreement is not valid under the laws the parties have subjected it to or, failing any indication thereon, under the law of the country where the award was made.”

This defense has not been much litigated in the United States. The few cases that have considered it have focused on validity, dealing with arguments based on, for instance, improper oral modification or even outright forgery.

In 2007, a Kansas headwear distributor argued that it had never formed a contract with a Chinese manufacturer because the documents it signed were mere “verifications of orders,” and not contracts under the Convention for the International Sale of Goods. The U.S. District Court for the District of Kansas rejected this argument in *Guang Dong Light Headgear Factory Co. v. ACI International,* finding that there was objective proof of the existence of a contract in the parties’ performance. That evidence consisted of the parties’ words and actions—specifically their acknowledgments in emails that payment was owed for products received pursuant to the sales contracts. The court found this trumped the Kansas company’s subjective statements of its intent in signing the documents.

**Article V(1)(b): Improper Notice or Being Unable to Present a Case**

A more frequently invoked defense in the New York Convention is Article V(1)(b). This provision allows a losing party to argue that it was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or it was otherwise unable to present its case. This provision has been construed to encompass allegations that the arbitration lacked due process.

Due process entails a fundamentally fair hearing, which generally requires adequate notice, a hearing on the evidence, and an impartial decision. But only serious breaches of fairness that prevent a party from presenting its case will typically convince a district court to refuse to recognize an arbitral award.

A due process argument based on the alleged inability to present evidence was overruled last year in *Telenor Mobile Communications AS v. Storm LLC,* a colorful case involving an arbitration conducted under the United Nations Commission on International Trade Law (UNCITRAL) Rules on International Commercial Arbitration and a competing proceeding in the Ukrainian courts.

In *Telenor,* two telecommunications firms—one Ukrainian and one Norwegian—got into a dispute over the corporate governance provisions of their shareholder agreement. The Norwegian firm commenced arbitration in New York in accordance with that agreement. But while the arbitration was ongoing, the majority shareholder...
of the Ukrainian firm turned to its local court (without informing the Norwegian firm), seeking a declaration that the shareholder agreement was invalid and an injunction prohibiting the arbitration. After the Ukrainian court granted the requested relief, the Ukrainian firm withdrew from the arbitration. Nevertheless, the arbitration continued and the arbitral tribunal ruled in favor of the Norwegian firm, which sought to enforce the award in federal court in New York.

The Ukrainian firm opposed enforcement of the award, asserting a litany of defenses, including the claim that it had been unable to present its case because it withdrew from the arbitration pursuant to the Ukrainian court’s injunction.

The district court rejected this defense. It observed that the Ukrainian firm presented 11 witnesses and briefed a number of issues before the arbitral tribunal and after it withdrew, the tribunal guarded the firm’s rights with “scrupulous care.” The court also noted that the firm could not identify any evidence or arguments it had actually been unable to present. Therefore, the court concluded that the Ukrainian firm had received a “meaningful opportunity to present its case” and should be bound by the award.

**Article V(1)(c): Award Exceeds the Scope of the Parties’ Agreement**

The New York Convention also provides a defense to enforcement where a foreign “award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration.”

This defense has traditionally been raised when the arbitrators are alleged to have exceeded their authority. Great deference is usually accorded to the exercise by arbitrators of their jurisdiction. For this reason, Article V(1)(c) has been construed narrowly.

The *Telenor* case, discussed above, also involved an Article V(1)(c) defense. The Ukrainian firm argued that by ordering a conditional divestiture of its stock in the joint venture, the tribunal exceeded its powers because the Norwegian firm only asked for monetary damages in the arbitration. The Ukrainian firm also alleged that the tribunal acted outside the scope of its powers by ordering an anti-suit injunction as part of the award in order to prevent further collateral attacks on the award. The district court rejected both arguments because there was no express limitation on the arbitrators’ remedial powers in the shareholder agreement. It said, “[A] respondent must overcome a powerful presumption that the arbitral body acted within its powers.”

In *Halcot Navigation Limited Partnership v. Stolt-Nielsen Transportation Group*, the district court rejected the respondent’s claim that the arbitrators exceeded their powers by deciding an issue not put before them. The respondent argued that it never agreed to submit to the arbitrators the issue of arbitrability—i.e., whether their specific dispute was within the scope of the arbitration agreement. The court was unmoved, finding that the respondent had, in fact, briefed and argued that issue to the tribunal.

**Article V(1)(d): Defects in Composition of the Tribunal or the Selection Procedure**

Under Article V(1)(d) of the New York Convention, a court may refuse enforcement of a foreign arbitration award on the grounds that “[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.”

This defense seemingly opens the door to a wide variety of procedural challenges. But courts have severely limited the success of these challenges by requiring a showing of “substantial prejudice.” Parties opposing enforcement of a foreign award on this ground must also make a timely objection or the defense will be considered waived.

*Zelier v. Deitsch*, surely one of the more interesting cases of 2007, involved a challenge to enforcement premised on the composition of the panel. In that case, members of an Orthodox Jewish family residing in the United States and Israel decided to sever some of their intra-family business relationships and agreed to submit their disputes to arbitration before a Beth Din, a Jewish religious tribunal composed of three named rabbis who would decide the issues according to Jewish law. The Beth Din arbitration commenced under the direction of these individuals. But before it concluded, one rabbi resigned from the tribunal, whereupon the party who appointed him refused to participate any further in the arbitration, claiming that a new Beth Din must be formed. The remaining two rabbis disagreed and issued an award in the objecting party’s absence. The losing party commenced a lawsuit, seeking an order vacating the award. He successfully argued to the district court that the award should not be enforced because the composition of the tribunal was not in accordance with the parties’ agreement.

However, the 2nd Circuit reversed on appeal. It
found that the parties had merely summarized the composition of a tribunal that had already been chosen when they named specific arbitrators in their agreement. Thus, the court found that the parties had not limited the authority of the tribunal in the event one member should resign.

It was especially important to the 2nd Circuit’s decision that the tribunal had considered the majority of the case before one rabbi resigned. Allowing the resignation of one arbitrator to halt the proceedings, the court said, would create the opportunity for bad faith manipulation of the arbitration process.

**Article V(1)(e): Award Not Yet Binding or Set Aside**

A number of interesting cases were decided in 2007 involving Article V(1)(e), which permits a court to refuse to enforce a foreign award if it “has not yet become binding on the parties.” Whether an award is binding is judged by its substance rather than any formal labels attached to it. The question is whether the award resolved the main dispute so that no further recourse to the arbitral tribunal is necessary.20

In *Hall Steel Co. v. Metalloyd Ltd.*, the U.S. District Court for the Eastern District of Michigan denied enforcement of an interim arbitration award of legal costs on the ground that the award was not yet final or binding.21 The court accepted the proposition that an interim award need not conclusively resolve all matters in dispute to be considered enforceable under the New York Convention. After reviewing the cases in which interim awards had been deemed sufficiently final to be enforceable, the court said there must be “some reason to overcome [the] usual resistance to piecemeal confirmation of a series of interim awards.” It concluded that an interim award was not enforceable unless (1) it finally and definitely disposed of a separate, independent claim, and (2) there was an immediate need for relief. “Immediate need,” the court explained, occurred in situations where the *status quo* had to be preserved to ensure that the final award would be capable of meaningful enforcement. Because the court saw no such need in this case, it denied enforcement of the interim award of costs.

Not all courts require a showing of immediate need to obtain enforcement of an interim award. In *Zeiler v. Deitsch*, the 2nd Circuit enforced foreign arbitral “orders” for an accounting and the transfer of documents, holding that these orders were sufficiently binding because they “finally and conclusively disposed of a separate and independent claim.”22 In fact, the party opposing enforcement argued that there was no need for the relief sought because the orders in question had already been complied with. But the court did not believe that an award’s purported mootness provided a basis to avoid enforcement.

Article V(1)(e) of the New York Convention also provides a defense to enforcement of a foreign award that “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.”

The District of Columbia Circuit addressed this defense last year in *Termorio S.A. v. Electranta S.P.* when it affirmed the basic principle that nullified awards may not be enforced.23 However, the court left open the possibility of enforcement if the nullification was contrary to the “basic notions of justice to which we subscribe.”

*Termorio* dealt with a Colombian electric power producer that had obtained a $60 million arbitration award in Colombia against a Colombian state-owned utility. A Colombian court had vacated the award on the ground that the arbitration was not in accordance with Colombian law when the parties entered into their agreement because, at that time, the law did not authorize the use of arbitration under the rules of the International Chamber of Commerce. The Colombian electric power producer sought to enforce the award in federal court in the District of Columbia. It argued that the Colombian court’s setting aside of the award was contrary to U.S. public policy because the ground on which that court relied “demonstrated the Colombian government’s determination to deny it fair process.” The district court dismissed the application for enforcement.

On appeal, the D.C. Circuit affirmed. It explained that the New York Convention does
not permit a U.S. court to “second guess the judgment” of a court in the jurisdiction where the award was made. The fact that a U.S. court would not have vacated the award was beside the point.

However, the D.C. Circuit left the door open to enforce a nullified award if the actions of the nullifying court were “repugnant to fundamental notions of what is decent and just” in the state where enforcement is sought. But it emphasized that this was a very high standard. A nullified award could potentially be enforced, the court said, only where a foreign judgment nullifying an award “tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property.”

**V(2)(a) and V(2)(b): Lack of Arbitrability or Violation of Public Policy**

The last two grounds for refusing enforcement under Article V of the New York Convention are in subsections V(2)(a) and V(2)(b). These defenses may be raised either by a party or by the court in which enforcement is sought. The court may decline to enforce a foreign award if “the subject matter ... is not capable of settlement by arbitration under the law of that country,” or “the recognition or enforcement of the award would be contrary to the public policy of that country.”

The first defense to enforcement is probably intended to apply to subject matter that is made inarbitrable by statute. The fact that there is a statute governing the matter is also an expression of public policy, so it seems likely that the former defense is embraced by the public policy defense as well. However, the public policy defense is narrowly construed and will be successful only “where enforcement would violate the forum state’s most basic notions of morality and justice.”

The public policy defense was argued in the Telenor case, which involved an arbitration and court proceedings in the Ukraine. The Ukrainian court had issued an injunction against enforcing the arbitration award. The Ukrainian party argued that enforcement of the award would violate this court order and thus be a violation of public policy. The district court found this argument unconvincing. The court observed that it was far from clear that New York had a public policy against compelling individuals to violate foreign law and, even if it did, that policy would be outweighed by the public policy in favor of encouraging arbitration.

**Defenses Outside the New York Convention**

Though U.S. courts have held that the defenses enumerated in Article V of the New York Convention are the exclusive defenses to the enforcement of an international arbitration award, other defenses to enforcement have been asserted, some of which the courts have upheld. These defenses have been based on the failure of the party seeking enforcement to comply with the procedural requirements for bringing suit in a U.S. court.

In 2002, for instance, the 4th Circuit upheld a district court’s refusal to enforce a foreign award on the ground that the court lacked personal jurisdiction over the defendant. Also in 2002, in a controversial decision, the 2nd Circuit refused to enforce a foreign award on forum non conveniens grounds. In 2001, a federal district court limited enforcement of an award to the value of the property the defendant actually had within the court’s jurisdiction.

Last year, in Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan, a federal district court dismissed an action to enforce a Swedish arbitration award for lack of personal jurisdiction. An oil exploration company based in the Cayman Islands won that award against an oil company owned by the Republic of Azerbaijan. When the Cayman company sought to enforce the award in the United States, the state-owned Azerbaijani company argued that the court lacked both personal and subject matter jurisdiction under the Foreign Sovereign Immunities Act. The court quickly rejected the latter argument, finding that the FSIA provides for subject matter jurisdiction over a foreign state when it is a signatory to the New York Convention and it has agreed to arbitrate. As to personal jurisdiction, however, the court concluded that it needed to analyze whether the Azerbaijani company had minimum contacts with the jurisdiction such that due process was satisfied. The only contacts before the court were a number of contracts the Azerbaijani company had with U.S. companies and a bank for oil production in Azerbaijan. The court held that these contacts were insufficient to establish general jurisdiction. The Azerbaijani company did not allege that its claim arose out of the Cayman company’s contacts with the United States, thus eliminating the possibility of specific personal jurisdiction. The Cayman company also was unable to identify assets within the district court’s jurisdiction that might support the exercise of quasi in rem jurisdiction. Accordingly, the court dismissed the petition to enforce the award for want of personal jurisdiction.

**Defenses Under the Panama Convention**

The Panama Convention was promulgated in 1975 at the Inter-American Conference on Private International Law. Its aim was to combat distrust towards foreign arbitrators in Latin...
American courts.10 Eighteen countries in the Americas are parties to the Panama Convention. This convention applies to commercial transactions between parties from signatory countries that have entered into arbitration agreements. Since the Panama Convention was modeled on the New York Convention, the grounds for refusing enforcement of arbitration awards are essentially identical.32

Under the FAA, an arbitral tribunal is virtually free to decide any issue that is presented to it, even if that issue has not been submitted to the tribunal at an arbitration hearing. However, a tribunal may not exceed its powers, or so impermissibly execute them that a mutual, final and definite award upon the subject matter submitted was not made.14

The only case this year to discuss the Panama Convention, Sanluis Developments v. CCP Sanluis LLC, applied the grounds to vacate awards in the FAA.33 In this case, a Mexican investment company tried to vacate an award against it, arguing that the arbitrator exceeded his powers in awarding relief no party had requested. Each party had agreed to the arbitrator’s remedial powers. Therefore, he could award whatever remedy he deemed appropriate.

The investment company also challenged the award on the basis of alleged arbitrator misconduct and manifest disregard of the law—the latter being a common law defense that many courts recognize—but both challenges were quickly rejected.

Anti-Suit Injunctions to Prevent a Collateral Attack on an Award

In one case decided in 2007, a U.S. court went beyond enforcing an international arbitration award by entering an injunction barring enforcement of a foreign court’s injunction annulling the award.36 In the case, Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara,17 involved a joint venture between two oil companies, one controlled by American power companies and the other controlled by the Indonesian government. The parties’ agreement called for disputes to be settled by arbitration in Geneva and for Indonesian law to govern the contractual relationship. Four years after entering into the joint venture, the Indonesian government suspended the project and Karaha Bodas commenced arbitration, which resulted in an award in its favor. This led to 10 years of litigation in numerous countries and in two U.S. federal circuits in which the Indonesian party sought to enjoin enforcement, while Karaha Bodas sought to confirm the award and enjoin foreign litigation challenging its enforcement.

Karaha Bodas was successful in obtaining enforcement of the award in various jurisdictions. It also received partial payment of the award. But then it saw collection of the full award threatened by the Indonesian party’s filing of a lawsuit in the Cayman Islands, where Karaha Bodas, a limited liability company, was formed. In that lawsuit, the Indonesian party sought to present so-called “new evidence” that the arbitration award had been obtained through fraud. In the next installment of the dispute, Karaha Bodas commenced proceedings to collect the rest of the award against the Indonesian party’s assets and sought an anti-suit injunction prohibiting the Indonesian party from pursuing its suit in the Cayman Islands. The court granted a temporary restraining order. Later, the Indonesian court issued its own anti-arbitration injunction enjoining enforcement of the award. The district court then issued an injunction against enforcement of the Indonesian court’s injunction.

The 2nd Circuit affirmed. It applied the China Metals test to determine whether an anti-suit
injunction is appropriate. This involved deciding whether the parties were the same in both actions, and if so, whether resolution of the case before the enjoining court would be dispositive of the action being enjoined. The court also analyzed whether parallel litigation would (1) frustrate the enjoining forum’s policies, (2) be vexatious, (3) threaten the issuing court’s in rem jurisdiction, (4) prejudice other equitable considerations, or (5) result in delay, inconvenience, expense, inconsistency, or a race to judgment.

The 2nd Circuit found that the parties in the arbitration and Indonesian action were the same and that the district court’s resolution was dispositive of the Indonesian action. After considering the likely vexatiousness of dual proceedings and the threat to the district court’s jurisdiction, the court concluded that the strong U.S. public policy in favor of international arbitration supported the issuance of the injunction.

Conclusion

None of the reported decisions in 2007 involving the enforcement of foreign arbitration awards was particularly groundbreaking. On the other hand, the year offered a number of interesting cases that helped further define the limited defenses to the enforcement of foreign awards. As in past years, parties seeking to confirm awards fared vastly better than parties attempting to defend against them. With the New York Convention now 50 years young, the United States remains a reliable venue in which to enforce international arbitration awards.