Globalization in Latin America: Business Climate and Dispute Resolution

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Current Issues in Enforcing Foreign Arbitral Awards - United States

- U.S.-- Traditionally a pro-enforcement venue for foreign and non-domestic arbitration awards
- Procedural Hurdles to Enforcement in the Courts of the United States
  - Personal Jurisdiction requirements
    - Transatlantic Bulk Shipping - SDNY 1985- need personal jurisdiction over respondent
    - CME Media Enterprises v. Zelezny- SDNY 2001- jurisdiction over seized assets was sufficient for purposes of enforcing an award under the NY Convention- (jurisdiction limited to amount of attached assets)
    - Dardana - 2d Cir. 2003- Court left open question of whether quasi in rem jurisdiction was sufficient for the purposes of enforcing a NY Convention award
    - Glencore Grain - 9th Cir. 2002- Court said in dicta that due process requires jurisdiction over the defendant “or his property”
    - Base Metal Trading - 4th Cir. 2002- Court refused to enforce foreign arbitral award despite fact that losing party had assets in jurisdiction (shipment of aluminum which had been seized in a Maryland port)- Defendant did not have requisite “minimum contacts” with Maryland
Current Issues in Enforcing Foreign Arbitral Awards - United States

- **Forum Non Conveniens**

  • Monegasque de Reassurances case - 2d Cir. 2002- Court refused to enforce NY Convention award based on doctrine of forum non conveniens. Petitioner sought to enforce award against a non-party State (Ukraine). Court concluded that issue of whether corporate veil could be pierced was better left to Ukrainian Courts.

  • Melton v. Oy Nautor Ab: 9th Cir. 1998- Award made in Finland against Finnish corporation that manufactured yachts. Court refused to enforce award on forum non conveniens grounds despite fact that Finnish Corporation had sales agent in California. Court accepted conclusion by District Court that Finnish Courts were better suited to decide issue of enforceability. Court declined to address argument that FNC was inconsistent with NY Convention as argument had not been raised before trial court.
Current Issues in Enforcing Foreign Arbitral Awards - United States

• Manifest Disregard of the Law-Judicially created grounds to set aside arbitration award under the FAA--standard mentioned in dicta in *Wilko v. Swan*, 346 U.S. 27 (1953)
• Standard applied very narrowly
• Manifest Disregard of the Law- 2d Circuit (Toys “R” Us case) and 6th Circuit (Jacada case) have held that manifest disregard standard can be applied to NY Convention awards made in the U.S.

4th Circuit decision: *Patten v. Signator Ins. Agency*, 442 F.3d 230 (4th Cir. 2006). Federal Appeals Court vacated arbitrator’s award that dismissed claims of former insurance agent on grounds that they were barred by one-year time limit in employment contract

– Petitioner sought Cert on grounds that 4th Circuit’s reliance on an arbitrator’s “manifest disregard of the law” fall outside the scope of review allowable under the FAA

– Petitioner asked Court to resolve conflict between Circuits and decide whether such non-statutory merits review is permitted at all under FAA, and if so, what standards should govern such reviews

– Petition for Certiorari DENIED- October 16, 2006
Current Issues in Enforcing Arbitral Awards

- Hall Street Associates v. Mattel
- Decided March 25, 2008
- Court acknowledged but did not embrace manifest disregard standard: “We see no reason to accord it (the Wilko language) the significance that Hall Street urges”.
Current Issues in Enforcing Foreign Arbitral Awards - U.S.

- Gueyffier (French citizen) opened lingerie and sex toys franchise store (Franchisor- British Corporation) in upscale Beverly Hills shopping mall
- Franchise agreement required prompt detailed notice of alleged breach and cure period of 60 days
- Agreement stated “notice and cure provisions are material term of this Agreement and may not be modified or changed by any arbitrator in an arbitration proceeding or otherwise.”
- Arbitrator ruled that Gueyffier was excused from failure to comply with the notice and cure provisions as futile
- Respondent sought vacatur in CA State Court on grounds that arbitrator had “exceeded his authority.” Lower Court enforced award. Appellate Court held arbitrator exceeded his power because “he modified and changed explicit terms of notice and cure requirement when he found it had beenexcused.” Court noted CA has public policy in favor of arbitration
- Court also held that neither FAA nor NY Convention pre-empt CA arbitration legislation setting out the bases for vacating an international arbitration award issued by a tribunal sitting in CA
Current Issues in Enforcing Foreign Arbitral Awards- BRAZIL

• Oleaginosa Moreno Hermano Sociedad Anonima v. Moinho Paulista-Superior Court of Justice (5/17/06) (Published 10/16/06)
• Oleaginosa- Argentinian company sought enforcement of award of $1,579,000 USD rendered in England by Grain and Feed Trade Association (GAFTA) against Moinho Paulista, a Brazilian company

• Moinho Paulista argued that award should not be confirmed as employee who negotiated deal had no power to bind company and arbitral tribunal did not have jurisdiction as there was no written arbitration clause

• Court: Articles 38 and 39 of the Brazilian Arbitration Act provide a list of possibilities to set aside an award--- the Act does NOT allow a review of the merits of the dispute
  1) Issue of employee’s authority to bind company not reviewable
  2) However issue of the competence of the tribunal IS reviewable, as oral contracts are forbidden under Art. 4 of the Brazilian Arbitration Act and there was not sufficient evidence introduced that defendant agreed to arbitration
• Court DENIED recognition and enforcement of award as against public policy
Current Issues in Enforcing Foreign Arbitral Awards-BRAZIL

- Subway Partners CV v. HTP High Technology Foods corporation S/A (Subway Brazil) SEC 833-US (8/16/06)
- Plaintiff sought recognition and enforcement of AAA award. Defendant was not located for service of process and notification of arbitral proceedings although notice was published in official press
- Arbitration agreement provided for AAA arbitration in New York, NY
- Court found due process requires clear proof of notification of parties in order to obtain recognition of arbitration award
- In this case arbitral process occurred without proper notice of one of the parties.
- Brazilian court declined to confirm award which had already been recognized by District Court of Connecticut in November, 1998
- Brazilian legislation no longer requires previous recognition from the court of the country where the award was made
- Nevertheless- because judicial confirmation by US Court stated the impossibility of finding partners of defendant– it served as proof of violation of due process under Brazilian national rules (Article 741 of the Civil Procedural Code)
- Brazilian Arbitration Act Articles 5, 21, 37, 39, and 40 were violated
Current Issues in Enforcing Foreign Arbitral Awards- Brazil

• L’Aiglon S/A (Swiss Company) v. Textil Uniao (Brazilian Company)
• Dispute involved the sale of cotton. Award for $910,297.89 USD was delivered by the Liverpool Cotton Association
• Court: If defendant does not contest the jurisdiction of the arbitral tribunal during the arbitration proceedings, it is prevented from doing so during the recognition and enforcement state
• Court upheld arbitration award (SEC 856, June 27, 2005)
Current Issues in Enforcing Foreign Arbitral Awards-France

- Paris Court of Appeal confirmed readiness of French Courts to enforce international arbitration awards which have been annulled at place of arbitration (La Direction Generale de l’Aviation Civile de L’Emirat de Dubai (DAC) v. Societe International Bechtel Co (Chamber IC, 29 September 2005).
- Sole Arbitrator rendered award against DAC in Dubai in 2002
- French Ct of First Instance issued order enforcing award against DAC in 2003
- May 2004- UAE’s highest civil court annulled arbitral award on grounds that witnesses had not been sworn in-- in breach of procedural provisions of UAE’s arbitration law
- DAC filed appeal in Paris Court of Appeal against execution order- argued it would be contrary to international public policy to enforce award that had been annulled in Dubai (Mutual Enforcement treaty between France and UAE-1991)
- Court of Appeal -- annulment decision of Court in Dubai did not have international effects because it applied only to a defined territorial sovereignty
- French Code of Civil Procedure provides that award will be recognized and enforced once it is proven to exist- so long as it is not manifestly contrary to international public policy
- DG case strengthens position taken by French Cour de Cassation in Hilmartin.

NOTE: DC District Court held that FAA did not apply to this enforcement action because parties had not agreed to enforce award in US under FAA Chapter One and FAA Chapter 2 is inapplicable as UAE is not a signatory to NY Convention (2005) (360 F. Supp.2d 136)
Current Issues in Enforcing Foreign Arbitral Awards- Germany

- July 2006- German Court held that if defendant fails to timely challenge foreign arbitral award in country of origin, respective arguments on which challenge could have been based are precluded in proceedings for declaration of enforceability of foreign arbitral award in Germany.
- Defendant sought declaration of enforceability in Germany of an ICC award rendered in Switzerland- defendant asked arbitral tribunal to correct award and tribunal rejected application for correction.
- In German proceedings for enforceability, defendant argued that applicant’s request for should be denied because arbitral tribunal had ignored relevant factual submissions, had not heard witnesses offered by defendant, and had thus violated D’s right to due process.
- Since defendant failed to move to set aside award within 30 days (Swiss law) in Switzerland, it was precluded from raising objections about enforceability of award in Germany.
- Example of pro-Recognition attitude of the German courts.
Current Issues in Enforcing Foreign Arbitral Awards- Ireland

- Brostrom Tankers AB (Swedish company) v., Factorias Vulcano SA (Spanish Company) (2004)- application to enforce foreign award in Ireland under Section 7 of the Arbitration Act of 1980
- Contract called for arbitration in Norway under Norwegian law
- Plaintiff sought to enforce award in Ireland- inter-company debt owed to defendant by Irish company
- Defendant opposed enforcement of award on public policy grounds- said to enforce award in Ireland would give commercial advantage to plaintiff which it would not get under Spanish law (since defendant had court order in Spain protecting 90% of the debts owed to creditors)
- Court declined to refuse enforcement under public policy grounds, noting that it would be justified only if there were “some element of illegality, or possibly that enforcement would be wholly offensive to the ordinary responsible and informed member of the public
Current Issues in Enforcing Foreign Arbitral Awards - Malaysia

- Federal Flour Mills Bhd v. Fima Palmbuck Services Sdn Bhd (2005) 6 MLJ 525- Court of Appeal held that there was no error on the face of the award warranting judicial intervention. Court held that the evaluation of the evidence was strictly a matter for the arbitrator
- Tai Wah Construction Company v. Government of Malaysia (2005) 2 MLJ 442-
- Section 23 of the Arbitration Act of 1952 confers a wide discretion on the court to remit an award, but discretion will not be exercised merely because parties believe award is bad on the face of it.
- Both of these cases were under the 1952 Arbitration Act which has since been repealed by the Arbitration Act 2005- they signify robust approach taken by the Malaysian Courts when giving effect to arbitral awards and to limiting court intervention
Current Issues in Enforcing Foreign Arbitral Awards-Canada

• Canadian Court rejected arguments that award should be set aside because tribunal had drawn an adverse influence from the failure of Mexico to produce information which could only have been produced in violation of Mexican law (United Mexican States v. Karpa, 74 OR (3d) 180 (CA)(2005)

• Court rejected argument that arbitration award was contrary to public policy in case where two Indonesian state-owned entities argued that they could not be held liable for breaching Indonesian law and that their non-performance was excused by a force majeure provision of the agreement (Kahara Bodas Co, LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 AR 272 (QB) (2004).
Current Issues in Enforcing Foreign Arbitral Awards- Israel

• Katz v. Gotlib (7642/02)
• Can the fact that the arbitrator incorrectly interpreted and implemented the material law be grounds for annulment of the arbitral award?
• Section 24 of the Arbitration Act lists cases in which annulment of arbitrator’s ruling can be requested— it also sets forth the circumstances which are considered to be “special and extreme”
• Court held that such a mistake in the arbitral award is not inherently contradictory to society’s moral, economic or social foundations
Current Issues in Enforcing Foreign Arbitral Awards-China

• Application for Enforcement of a foreign-related award may be made to Court where defaulting is domiciled or has assets. Court should not review substantive merits of the case.
• Enforcement may be refused where:
  • 1) There is no arbitration clause in the contract or a separate written agreement
  • 2) Party did not receive notice of appointment of arbitrator or commencement of arbitration proceedings
  • 3) Arbitral tribunal was not constituted in accordance with the applicable rules of arbitration
  • 4) award deals with matters outside the scope of the arbitration agreement
  • 5) enforcement would offend social and public interest in China

• Enforcing awards in China is still fraught with uncertainty
  – 1) There is no tradition in China of following precedent
  – 2) Few courts have experience with enforcing awards
CONCLUSIONS

• Inherent tension among the Circuit Courts in U.S. regarding enforcement of foreign arbitral awards
• Awaiting guidance from U.S. Supreme Court on jurisdictional issues and grounds for vacatur of arbitral awards
• Non U.S. cases- generally a pro-enforcement bias with certain anomalies thereby requiring practitioner to be fully versed in local law and practice