

Deference To An Arbitration Award Is Not Without Limits

Law360, New York (January 13, 2016, 11:35 AM ET) --



James R. Nelson



Meghan Paulk Ingle

United States courts strongly favor alternative dispute resolution as a matter of public policy and show great deference to awards made by arbitration tribunals. Nevertheless, confirmation of an arbitration award is more than a “rubber stamp” procedure. In late May 2015, the U.S. District Court for the District of Colorado provided a reminder of this fact by denying the petition of a Chinese company to enforce an award of more than \$1.6 million against a Colorado-based company, Lumos Solar LLC, in a proceeding under the auspices of the China International Economic and Trade Arbitration Commission (CIETAC).

Pursuant to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), a foreign entity who obtains an international arbitration award against a United States-based respondent must file a petition with the United States District Court where that respondent resides in order to enforce the award. The district court then must enforce the award unless the court finds that doing so would run afoul of the New York Convention or due process. Significantly, a party’s participation in an arbitration proceeding does not preclude that party from subsequently challenging enforcement of the resulting award under the New York Convention or on due process grounds.

The New York Convention lists seven bases upon which a court may refuse to enforce an international arbitration award. Each of these seven bases is directed toward process and policy-based concerns (e.g., the respondent did not receive proper notice of the arbitration or was otherwise unable to properly present its case before the arbitral tribunal, the composition of the arbitration panel or the arbitration procedure was not in accordance with the parties’ agreement or enforcement of the award would be contrary to public policy).[1] Thus, although a reviewing court may *not* consider the merits of the underlying dispute when determining whether to enforce an international arbitration award, the court

may and should closely scrutinize the process through which the award was obtained.

For example, in *Iran Aircraft Industries v. Avco Corp.*,^[2] the Second Circuit Court of Appeals affirmed a district court's refusal to enforce an arbitration award issued by the Iran-United States Claims Tribunal at the Hague where the party resisting enforcement had received conflicting instructions from the arbitral tribunal regarding proper presentation of its evidence, resulting in disallowance of some of that party's claims by the tribunal. The Second Circuit concluded that, although the tribunal had misled the appellee "unwittingly," the tribunal nevertheless had denied the appellee the opportunity to present its claims in a "meaningful manner" as required under the New York Convention.

The Second Circuit again affirmed a district court's refusal to confirm an arbitration award in *Encyclopaedia Universalis SA v. Encyclopaedia Britannica Inc.*^[3] The *Encyclopaedia Universalis* court held that appointment of a third arbitrator in the underlying proceeding had failed to comply with the parties' arbitration agreement, which expressly provided that any arbitration panel would initially be composed of two arbitrators, one arbitrator appointed by each party, and that a third arbitrator would be appointed by the president of the Tribunal of Commerce of Luxembourg only *if* (1) the two previously appointed arbitrators disagreed on an issue; and (2) the two arbitrators attempted (and failed) to choose a third arbitrator. The Second Circuit concluded that one party's appointed arbitrator had prematurely sought appointment of the third arbitrator by the Tribunal's president *before* conferring with the other party's appointed arbitrator and attempting to reach an agreement on choice of the third arbitrator.

The Second Circuit rejected the appellant's argument that denial of the award's enforcement would improperly elevate "form over substance," concluding, "While we acknowledge that there is a strong public policy in favor of international arbitration, we have never held that courts must overlook agreed-upon arbitral procedures in deference to that policy." The Second Circuit further noted that the New York Convention itself indicated the importance of the composition of the arbitration panel because failure to comport with agreed procedures in appointing the panel is one of the New York Convention's seven exclusive grounds for refusal to enforce an award.

Five years later, the Ninth Circuit Court of Appeals also refused to enforce an international arbitration award where the underlying proceeding had failed to comply with the parties' arbitration agreement. In *Polimaster Ltd. v. RAE Systems Inc.*,^[4] the relevant arbitration clause provided that disputes should be settled through arbitration at the defendant's site. In accordance with the arbitration agreement, Polimaster Ltd., a company based in Belarus, brought claims in arbitration in California against RAE Systems Inc., a company with its principal place of business in California. However, the California-based arbitrator found the parties' arbitration clause to be ambiguous as to the location where counterclaims should be arbitrated and concluded that, for efficiency, RAE's counterclaims should also be heard in the California arbitration. The U.S. District Court for the Northern District of California confirmed the resulting arbitration award, rejecting Polimaster's argument that counterclaims should have been arbitrated in Belarus pursuant to the parties' arbitration agreement. The Ninth Circuit reversed the district court and held that, when read in context, the arbitration clause was not ambiguous and that all counterclaims should have been tried at the counter-defendant's site (i.e., Belarus).

The New York Convention does not list lack of personal jurisdiction as a basis for denying enforcement of an international arbitration award, but courts have held that due process considerations, including lack of personal jurisdiction, are implicitly included in determinations regarding enforcement of such awards. For example, in *First Investment Corp. v. Fujian Mawei Shipbuilding, Ltd.*,^[5] the Fifth Circuit Court of Appeals affirmed a district court's dismissal of a petition to enforce an arbitration award issued

in London, England, against two Chinese companies after concluding that the U.S. courts lacked personal jurisdiction over the two Chinese companies against whom the award had been entered. (The claimant, First Investment Corp., had previously attempted to enforce the award in China, without success.) The Fifth Circuit concluded that due process considerations extend to foreign entities and that a confirmation proceeding under the New York Convention affected a party's rights such that due process must be considered.

Due process also requires that a party receive notice of the underlying arbitration reasonably calculated, under all the circumstances, to apprise that party of the pendency of the arbitration and to afford it a meaningful opportunity to be heard. In *Qingdao Free Trade Zone Genius International Trading Co. Ltd. v. P&S International Inc.*,^[6] the District Court of Oregon refused to enforce an arbitration award obtained in China, finding that, because the United States-based respondent was not notified of the arbitration in English, the respondent did not receive due process. The court rejected the petitioner's arguments that the respondent received sufficient notice because it was aware of the dispute, previously had agreed to arbitrate in China under the rules of the Chinese commission and had received copies of the commission's rules and the list of arbitrators in English. The court concluded that, while those circumstances could lead to an inference that the respondent knew that it had agreed to arbitrate disputes in China, and had reason to suspect that arbitration proceedings in China might be brought against it, those circumstances were not sufficient to establish that the respondent had actual knowledge that the petitioner had commenced an arbitration proceeding that would take place on a particular date in a particular place.

The recent decision by the U.S. District Court for the District of Colorado in *CEEG (Shanghai) Solar Science & Technology Co. Ltd. v. Lumos Solar LLC* (No. 14-CV-3118) underscores the importance to a determination regarding enforcement of an award under the New York Convention of due process, in this case in the form of both the procedure used to appoint the tribunal and the giving of proper notice of the arbitration proceeding.

The underlying dispute in Lumos related to two shipments of solar modules that Lumos asserted to be defective and CEEG's demand for payment for the same shipments. After months of communications regarding the dispute, all of which were in English, in April 2013, Lumos received a document written in Chinese with no English translation or any explanation. Lumos eventually learned that document was notice that CEEG had instituted arbitration proceedings against Lumos under the rules of the China International Economic and Trade Arbitration Commission (CIETAC). Despite a choice of language provision in the parties' initial agreement that required all notices be provided in English, CEEG's knowledge that Lumos personnel were not fluent in Chinese and the fact that all the dealings between the parties to that point, including those relating to the dispute, had been in English, CEEG and its counsel did not request that the notice of the request for arbitration sent by CIETAC to Lumos be in English and did not notify Lumos that the request for arbitration had been filed. Eventually, in response to an inquiry from Lumos regarding the status of settlement discussions, CEEG informed Lumos that CEEG had requested arbitration. However, CEEG still failed to explain the Chinese document or reference any deadlines. By the time Lumos was able to have the notice translated and retain counsel, the tribunal had been appointed, with no participation by Lumos. The arbitration proceeded and in due course an award was issued in favor of CEEG.

CEEG subsequently filed a petition in the U.S. District Court for the District of Colorado to recognize and enforce the arbitration award. In opposing the motion to confirm the award, Lumos argued that confirmation should be denied because:

- Lumos did not receive proper notice of the arbitration proceedings;
- Lumos had been denied the opportunity to participate in the selection of the tribunal as required by the arbitration clause; and
- the arbitration procedure was not in accordance with the agreement of the parties.

CEEG argued in response that it was *not* required to provide notice of the arbitration to Lumos in English because the contract sued upon did not contain a choice of language clause; that providing the notice of the arbitration to Lumos solely in Chinese was adequate because CIETAC’s default rules designate Chinese as the appropriate language; and that Lumos was not prejudiced because Lumos was granted a delay in commencement of the arbitration hearing and it participated in the hearing.

After reviewing the parties’ briefing and holding a hearing on the matter, Senior Judge Wiley Y. Daniel of the Colorado District Court granted Lumos’s motion to dismiss the petition for confirmation of the award. Judge Daniel found that because the overall governing contract contained a choice of language provision requiring all notices to be “drawn up in the English language” and the parties had always communicated in English, CEEG’s failure to provide notice of the arbitration to Lumos in English was contrary to the agreed procedures between the parties and resulted in Lumos being deprived of the opportunity to participate in selection of the arbitration panel. Therefore, Lumos “did not receive notice reasonably calculated to apprise it of the pendency of the arbitration and allow it a meaningful opportunity to be heard, as required to satisfy due process.” Accordingly, Judge Daniel held pursuant to Article V(1)(b) and (d) of the New York Convention that CEEG’s arbitration award would not be confirmed.[7]

The ruling by Judge Daniel again demonstrates that despite the strong public policy in favor of international arbitration, a court is not required to ignore due process and fundamental fairness to “rubber-stamp” approval of an arbitration award.

—By James R. Nelson and Meghan Paulk Ingle, DLA Piper

DISCLAIMER: Lumos Solar LLC is represented by the authors.

James Nelson is chairman of DLA Piper's Texas litigation group and is based in Dallas.

Meghan Paulk Ingle is an attorney in DLA Piper's Austin, Texas, office.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] New York Convention, art. V.

[2] 980 F.2d 141 (2nd Cir. 1992).

[3] 403 F.3d 85 (2nd Cir. 2005).

[4] 623 F.3d 832 (9th Cir. 2010).

[5] 703 F.3d 742 (5th Cir. 2012).

[6] No. 08-1292-HU, (D. Or. Sept. 16, 2009).

[7] CEEG has appealed the Colorado District Court's decision to the Tenth Circuit Court of Appeals.

All Content © 2003-2016, Portfolio Media, Inc.