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Challenging and Enforcing Domestic and International Arbitral Awards

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Cross-Border Disputes Are Usually Resolved in International Arbitration.

Why Arbitration:

- Ability to choose expert/specialized adjudicators to resolve disputes in areas such as infrastructure, construction, banking, business torts, investment treaty and intellectual property.
- Comparative ease of domesticating and collecting awards.
- Impartial adjudication (avoid domestic/national court of one party).
- Often lower costs (even though paying for arbitrator and arbitral institution).
- Greater efficiency and speed.
- Confidentiality of proceedings.
- No Appeal.

Cross-Border Disputes Are Usually Resolved in International Arbitration.

- **Arbitration vs. Litigation:**
 - Arbitration is preferred because the arbitration clause can be tailored:
 - Select your arbitrator
 - Select your language
 - Faster disposition of dispute
 - Discovery is more limited than litigation
 - Litigation should be considered depending upon:
 - the foreign jurisdiction and
 - the facts,
 - governing law,
 - nationality of the litigants.

Cross-Border Disputes Are Usually Resolved in International Arbitration.

- **Drafting a Cross-Border Agreement:**
 - Consider manner of dispute resolution when drafting cross-border agreements.
 - Mediation, litigation, arbitration.
 - Dispute resolution clause should include governing law and seat of arbitration or judicial system having jurisdiction over dispute.

Major Arbitral Institutions

International Chamber of Commerce (ICC)

International Centre for Settlement of Investment Disputes (ICSID)

International Centre for Dispute Resolution (ICDR) (American Arbitration Association)

London Court of International Arbitration (LCIA)

Netherlands Arbitration Institute (NAI)

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC)

Japan Commercial Arbitration Association (JCAA)

China International Economic and Trade Arbitration Commission (CIETAC)

Singapore International Arbitration Centre (SIAC)

World Intellectual Property Organization (WIPO)

Swiss Chambers' Arbitration Institution (SCAI)

New York International Arbitration Center (NYIAC)

German Arbitration Institute (DIS)



International Arbitration

1. International arbitration - Preferred method of dispute resolution for cross-border agreements.
2. The growth in international trade has led to an increase in international arbitration.
3. Chart shows increase in arbitration in past few years.

	2015	2019	2020	2021
LCIA		376 referrals	444 referrals	Not yet available
ICC	801 new cases	869 new cases	946 new cases	853 new cases
HKIAC			318 new cases	514 new cases
SIAC			1080 new cases	Not yet available
CIETAC		617 cases (foreign related)	739 cases (foreign related)	Not yet available

Annulment / Appeals / Vacatur

Hundred of other cases are filed annually with the many other organizations specialized in handling international arbitrations.

Generally, no right of appeal ----- but, several arbitration institutions have an appeals process.

ICC provides for limited review of final award by ICC Court.

ICSID (International Centre for Settlement of Investment Disputes (World Bank)) provides for annulment proceedings.

ICDR (International Centre for Dispute Resolution (AAA)) provides for an appeals tribunal.



NEW YORK CONVENTION Enforcement of Arbitral Awards

- **The New York Convention:** The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “**New York Convention**”) is the cornerstone of the international arbitration system.
- **Arbitral Awards – More Enforceable:** The New York Convention puts international arbitral awards on a higher level than court judgments regarding recognition and enforcement. An arbitral award governed by the Convention is generally more readily enforceable around the world than a court judgment – between contracting states.
- **166 Member States as of December 31, 2021:** 166 of the 193 UN member states have adopted the NY Convention. Thirty (30) member states have not, but most generally enforce foreign arbitration awards.
- **Limited Non-Mandatory Grounds to Challenge an Award:** The New York Convention provides for very limited grounds for setting aside / challenging an award. None are mandatory, even if one of these grounds exists. This means that the existence of a ground does not automatically result in the setting aside of the award.



The New York Convention

Features of the New York Convention

The Convention consists of 16 articles and is 6 pages long.

Goal of Convention:

To enforce the Parties' agreement to arbitrate

To enforce any resulting award

Presumption as to the binding nature of arbitral awards.

Convention applies to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal.

It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.
(Article I)



Enforcement and Challenges to Arbitral Awards

Once the arbitral award is issued, the prevailing party needs to collect.

In the majority of situations, the unsuccessful party pays voluntarily.

If the unsuccessful party does not pay - we look to the NY Convention – which has been adopted by 166 of the 193 UN member states.

An award that was issued in one state (seat of arbitration) can be enforced in another contracting state – subject to certain limited defenses.



Set Aside / Challenges to Award

- Under the New York Convention, a petition to vacate or set aside an award will be governed by the domestic law of the country in which the award was rendered – i.e., the seat of the arbitration.
- The losing party may:
 - Seek to have the award set aside before the courts of the seat of arbitration (New York Convention, Art. V(1)(e), Or
 - Refuse to execute the award and attempt to challenge recognition and enforcement before the court of the jurisdiction where successful party seeks enforcement.

Set Aside of Award

- Typically, if party seeks to set aside an award, it will look to the UNCITRAL Model Law On International Commercial Arbitration (Model Law), if the country of the seat of arbitration has adopted the Model Law, or the FAA if the request to set aside is sought under U.S. law.
- If a party seeks to prevent recognition and enforcement of an award, the party will turn to the New York Convention – Article V, or turn to the FAA if the proceeding to recognize and enforce is under U.S. law.

Challenges to Award - Set Aside

The New York Convention does not define the circumstances in which an award may be 'set aside or suspended.' (New York Convention, Art. V(1)(e))

The grounds for when an arbitral award may be set aside can be found in national legislation of each jurisdiction.

The majority of jurisdictions have adopted the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") – promulgated in 1985, and amended in 2006.

The Model Law tracks the wording of The New York Convention, Article V, almost verbatim.

United States, France, England and Wales have not accepted the Model Law.



**Commonly
Available
Grounds for
Set Aside of
Award**

The Model Law provides that
an award may be set aside
on the following six grounds:

Set Aside / Vacatur of Award – Model Law

(application to set aside must be made within 3 months from receipt of award)

1. A party to the arbitration agreement pursuant to which an award was rendered did not have the capacity to enter into the agreement or the agreement is not valid under the applicable law. (Model Law, Art. 34(2)(a)(i));
2. A party was not given proper notice of an arbitrator being appointed or of the proceedings, or was otherwise denied the opportunity to present its case. (Model Law, Art. 34(2)(a)(ii));
3. The award deals with a dispute not contemplated by or not falling within the submission to arbitration. (Model Law, Art. 34(2)(a)(iii));
4. The composition of the tribunal or the arbitral procedure was other than as prescribed by any lawful agreement between the parties. (Model Law, Art. 34(2)(a)(iv));
5. The subject of the dispute is not arbitrable (Model Law, Art. 34(2)(b)(i)); or
6. The award is contrary to the state's public policy (Model Law, Art. 34(2)(b)(ii)).



Model Law vs. New York Convention

<p>Article 34 of the UNCITRAL Model Law – Application for setting aside as exclusive recourse against arbitral award</p> <p>An arbitration award may be set aside by the court specified in article 6 only if . . . the party making the application furnishes proof that:</p>	<p>Article V of the New York Convention</p> <p>Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:</p>
<p>1. A party to the arbitration agreement . . . was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or</p>	<p>The parties to the [arbitration] agreement . . . under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; Art. V (1) (a) or</p>
<p>2. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or</p>	<p>The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceeding; or was otherwise unable to present his case; Art. V (1) (b) or</p>
<p>3. The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award that contains decisions on matters not submitted to arbitration may be set aside; or</p>	<p>The 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, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; Art. V (1) (c) or</p>

Model Law vs. New York Convention (cont'd)

Article 34 of the UNCITRAL Model Law	Article V of the New York Convention
<p>4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or</p>	<p>Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:</p> <p>The 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; Art. V (1) (d) or</p>
<p>An arbitration award may be set aside by the court specified in article 6 only if . . . the court finds that:</p>	<p>The award has not yet become binding on the parties, or 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; Art. V (1) (e) or</p>
<p>5. The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or</p>	<p>The subject matter of the difference is not capable of settlement by arbitration under the law of that country; Art. V (2) (a) or</p>
<p>6. The award is in conflict with the public policy of this State.</p>	<p>The recognition or enforcement of the award would be contrary to the public policy of that country. Art. V (2) (b)</p>

Set Aside of Arbitration Award in the U.S.

- The United States has not adopted the UNCITRAL Model Law.
- Instead, arbitration in the federal courts or as incorporated by reference state law contracts – is governed by the Federal Arbitration Act.
- If contracts governed by state law do **not** incorporate the Federal Arbitration Act, such contracts are governed by state arbitration statutes.



Federal Arbitration Act (three chapters)

- **Chapter 1** – generally governs domestic arbitration proceedings. Directs courts to enforce arbitral awards unless narrow grounds for setting aside, vacatur, and modification are present.
- **Chapter 1** also applies to foreign arbitral awards to the extent Chapter 1 does not conflict with the New York Convention.
- **Chapter 2** implements the New York Convention.
- **Chapter 3** implements the Inter-American Convention on International Commercial Arbitration (the Panama Convention”), which largely tracks the New York Convention for purposes of recognition and enforcement.

Federal Arbitration Act (set aside or vacatur of award)

- Under the New York Convention, a petition to vacate or set aside an award will be governed by the domestic law of the country in which the award was rendered – i.e., the seat of the arbitration. (*Hall Street Associates v. Mattel*, 552 US 576 (2008))
- If a domestic or foreign award has been rendered in the United States, Chapter 1, Section 11 of the FAA, permits a party to move to modify or correct an award - within 3 months of receipt - if:
 - The award contains an evident material miscalculation of figures or material mistake in description of a person, thing or property
 - The arbitrators have issued a decision on a matter not submitted to them
 - The form of award is imperfect, but that imperfection does not affect the merits of controversy
- Action to recognize and enforce an award must be brought within 3 years.

Federal Arbitration Act

**(set aside or
vacatur of
award)**

- Under the New York Convention, a petition to vacate or set aside an award will be governed by the domestic law of the country in which the award was rendered – i.e., the seat of the arbitration. (*Hall Street Associates v. Mattel*, 552 US 576 (2008))
- Chapter 1, Section 10 of the FAA provides that a court may vacate an arbitration award only if it finds that one of the limited grounds applies:
 - (1) The award is a result of corruption, or fraud;
 - (2) evident partiality or corruption of an arbitrator;
 - (3) arbitrator misconduct, such as refusing to hear pertinent and material evidence; or
 - (4) the arbitrator exceeded their powers or so imperfectly executed them that a mutual, final and definite awards was not made.

**Federal
Arbitration Act
(set aside or
vacatur of
award)**

**Manifest
Disregard of the
Law**

US federal courts are split as to whether the 'manifest disregard of law' doctrine is a separate basis for vacatur under the FAA.

The Second Circuit says – yes, manifest disregard survives as a judicial gloss on the FAA's statutory grounds for vacatur.

The DC Circuit disagrees, and has expressed skepticism about the survival of the manifest disregard doctrine.

Set Aside / Vacatur of Award– United States

Section 10(a) of the FAA

(application for set aside must be made within 3 months from receipt of award)

A reviewing court may vacate an arbitration award upon the application of any party to the arbitration where:

(1) **Corruption or Fraud:** The award was procured by corruption, fraud, or undue means. (FAA, Section 10 (a)(1))

(2) **Partiality or Corruption of Arbitrator:** There was evident partiality or corruption in the arbitrators, or either of them. (FAA, Section 10 (a)(2))

(3) **Arbitrator Misconduct:** Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced. (FAA, Section 10 (a)(3))

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that mutual, final and definite award upon the subject matter submitted was not made. (FAA, Section 10 (a)(4))

(5) Manifest disregard remains a valid ground for vacating awards in the some but not all Districts.

(6) the United States District Court for the district wherein an award was made . . . may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5. (FAA, Section 10 (a)(6))

Set Aside / Vacatur of Arbitration Award Governed by FAA

Ground For Set Aside / Vacatur Of Award	Federal Arbitration Act – Section 10 (A)
1. Award Procured by Fraud or Corruption	“Where the award was procured by corruption, fraud, or undue means.” 9 U.S.C. § 10(a)(1).
2. Impartiality or Corruption of Arbitrators	“Where there was evident partiality or corruption in the arbitrators, or either of them.” 9 U.S.C. § 10(a)(2).
3. Arbitrator Guilty of Misconduct	“Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.” 9 U.S.C. § 10(a)(3).
4. Arbitrator Exceeded His or Her Powers	“Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.” 9 U.S.C. § 10(a)(4). This exception is applicable if an Award does not “dispose of a particular issue raised by the parties,” or “if it leaves the parties unable to determine their rights and obligations, if it does not resolve the controversy submitted or if it creates a new controversy.” <i>Rosenberg v. Schwartz</i> , 176 A.D.3d 1069, 1071 (2d Dep’t 2019).



Set Aside / Vacatur of Arbitration Award Governed by FAA (cont'd)

Ground For Set Aside / Vacatur Of Award	Federal Arbitration Act – Section 10 (A)
<p>5. Award Rendered in Manifest Disregard of the Law</p> <p>(Common Law Ground)</p>	<p>9 U.S.C. § 10(a)(3) and (4).</p> <p>The circuit courts are split on whether manifest disregard of the law survives under the FAA as a separate ground for vacatur of arbitral awards. The FAA contains no explicit reference to manifest disregard of the law.</p> <p>Some circuits have held that manifest disregard is valid as a judicial gloss on the grounds stated in FAA §10(a)(3) and (4). See <i>Giller v. Oracle USA, Inc.</i>, 512 F. App'x 71, 72 (2d Cir. 2013) (“We continue to recognize ‘manifest disregard of the law’ as a valid ground for vacatur as a ‘judicial gloss’ on the grounds specified by Section 10 of the FAA.”); <i>Amerix Corp. v. Jones</i>, 457 F. App'x 287, 294 (4th Cir. 2011) (“Many courts, including the Fourth Circuit, recognized an arbitrator's manifest. Disregard of the law as a viable common law ground for vacating an arbitration award.”).</p> <p>The concept has also been developed under common law: “The court may set aside an arbitration award if it was rendered in manifest disregard of the law.” <i>Weiss v. Sallie Mae, Inc.</i>, 939 F.3d 105, 109 (2d Cir. 2019).</p> <p>This is a limited ground that is only warranted in exceptional circumstances. For example, “disagreement with the award is not a basis to conclude the award was irrational.” <i>Alpert v. M.R. Beal & Co.</i>, 162 A.D.3d 491, 492 (1st Dep’t 2018).</p> <p>Further, even “manifest disregard of the evidence as a proper ground for vacating an arbitration panel's award” is not a ground to vacate the award, and a court “will only find a manifest disregard for the law where there is no colorable justification for a panel's conclusion.” <i>Pfeffer v. Wells Fargo Advisors, LLC</i>, 723 F. App'x 45, 47 (2d Cir. 2018).</p>



Set Aside / Vacatur of Award– New York CPLR

Ground For Set Aside / Vacatur Of Award	New York Civil Practice Law and Rules (“CPLR”)
1. Award Procured by Fraud or Corruption	“Corruption, fraud or misconduct in procuring the award.” N.Y. CPLR 7511(b)(1)(i)
2. Impartiality or Corruption of Arbitrators	“Partiality of an arbitrator appointed as a neutral, except where the award was by confession.” N.Y. CPLR 7511(b)(1)(ii)
3. Arbitrator Guilty of Misconduct	N/A
4. Arbitrator Exceeded His or Her Powers	“An arbitrator, or agency or person making the award exceeded his power or so imperfectly executed it that a final and definite award upon the subject matter submitted was not made.” N.Y. CPLR 7511(b)(1)(iii)
5. Arbitrator Failed to Follow Arbitration Procedures of the CPLR	“Failure to follow the procedure of this article, unless the party applying to vacate the award continued with the arbitration with notice of the defect and without objection.” N.Y. CPLR 7511(b)(1)(iv)



Enforcement of Arbitration Awards / Set Aside in Federal vs. State Court?

- On March 31, 2022, *Badgerow v. Walters*, 596 U.S. _____ (2022), the U.S. Supreme Court reversed an order of the Fifth Circuit and held that the federal courts do not have authority to “look through” an arbitration dispute for a federal question that would establish jurisdiction to confirm or deny an arbitral award.
- In order to confirm and enforce, or set aside/challenge an arbitration award in federal court, **diversity jurisdiction** must exist.
- If **diversity jurisdiction** does not exist, then the party seeking relief must go to state court.
- We can expect to see an increase in enforcement actions or challenges being resolved in state court.

Questions:

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