



Recent U.S. Case Examines Grounds on Which a U.S. Court May Vacate an ICC Arbitration Award

September 8, 2017

Overview

1. Pre-Arbitral Attachment and Security
2. Applicable Conventions
3. Recent New York Case
4. Tool(s) for Enforcement

Pre-Arbitral Attachment and Security

- » Federal Law: Supplemental Rule B of the Federal Rules of Civil Procedure for Admiralty and Maritime Claims and Asset Forfeiture Actions:
 - “In an in personam action: If a defendant is not found within the district when a verified complaint praying for attachment and the affidavit required by Rule B(1)(b) are filed, a verified complaint may contain a prayer for process to attach the defendant's tangible or intangible personal property—up to the amount sued for—in the hands of garnishees named in the process.”

Pre-Arbitral Attachment and Security

» State-Law Provisional Remedies

- New York:

- “The supreme court in the county in which an arbitration is pending or in a county specified in subdivision (a) of this section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief.” N.Y. C.P.L.R. 7502(c)

- Louisiana:

- “A writ of attachment may be obtained in any action for a money judgment, whether against a resident or a nonresident, regardless of the nature, character, or origin of the claim, whether it is for a certain or uncertain amount, and whether it is liquidated or unliquidated.” La. Code Civ. Proc. art. 3542; or
- “A writ of attachment . . . may issue before the petition[] is filed, if the plaintiff obtains leave of court and furnishes the affidavit and security provided in Article 3501.” La. Code Civ. Proc. art. 3502; see *Daewoo Int’l Corp. v. Thyssenkrupp Manne GmbH*, No. 16-30984 (5th Cir. Sept. 1, 2017) (Louisiana law “allows for attachments to issue in aid of arbitration so long as the party seeking the attachment (1) complies with the requirements of Section 3502 and (2) shows good cause for a pre-petition attachment,”)

Pre-Award Attachment and Security

» Society of Maritime Arbitrators (SMA) Rules:

Section 30. Scope

The Panel, in its Award, shall grant any remedy or relief which it deems just and equitable, including, but not limited to, specific performance. The Panel, in its Award, shall assess arbitration expenses and fees as provided in Sections 15, 36 and 37 and shall address the issue of attorneys' fees and costs incurred by the parties. The Panel is empowered to award reasonable attorneys' fees and expenses or costs incurred by a party or parties in the prosecution or defense of the case.

Applicable Conventions

- » Federal Arbitration Act of February 12, 1925 (9 U.S.C. §§ 1 – 16)
- » Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (New York Convention) (9 U.S.C. §§ 201 – 208)
- » Inter-American Convention on International Commercial Arbitration of January 30, 1975 (Panama Convention) (9 U.S.C. §§ 301 – 307)

Recent Case Law

» *Daesang Corp. v. NutraSweet Co.*, 55 Misc. 3d 1218(A) (May 15, 2017)

- FACTS
- ICC ARBITRATION (in New York)
- U.S. ACTION
 - Daesang petitioned to confirm final arbitration award pursuant to 9 U.S.C. § 207 and CPLR 7510 and 7514(a)
 - NutraSweet moved to vacate 9 U.S.C. §§ 10, 201, 207, and CPLR 7511.
- DECISION
 - In addition to 4 grounds set forth in F.A.A. (fraud, partiality, misconduct, excess of power), Court examined controversial 5th ground: whether award “rendered in manifest disregard of the law.”
- HOLDING: “Tribunal chose to disregard the well-established principle that a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast to future performance) and cause the actual losses claimed.

Recent Case Law

» *Daesang Corp. v. NutraSweet Co.*, 55 Misc. 3d 1218(A) (May 15, 2017)

- First known international arbitral award rendered in New York set-aside for manifest disregard for the law.
- “Manifest disregard for the law” derives from *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953), and requires:
 - Applicable legal principle clearly defined and not subject to reasonable debate, and
 - Arbitrator refused to follow that legal principle.
 - Error in interpretation or application of law insufficient.
- Supreme Court in *Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576 (2008), expressed doubt as to whether “‘manifest disregard’ was meant to name a new ground for review, [or whether] it merely referred to the § 10 grounds collectively, rather than adding to them.”
- Circuit Split
 - 2nd, 4th, 6th, 9th Circuits have held that arbitrators who manifestly disregard law have “exceeded their powers” under § 10(a)(4)
 - 7th, 8th, and 11th Circuits have determined “manifest disregard” no longer a valid basis for vacatur.

Tool(s) for Enforcement

- » 28 U.S.C. § 1782
 - Federal statute which provides for discovery in aid of foreign proceedings.
 - Elements:
 - A. Any “interested party” in
 - B. a foreign proceeding may
 - C. petition the district court of the district in which a witness or documents reside to
 - D. give testimony or produce documents or things.
 - Representative Case(s)

Thank you!

Blythe Daly
New York
212-513-3570
blythe.daly@hklaw.com

