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New York Convention Makes Doing Business Abroad Easier

One hundred forty nine nations have adopted the New York Convention of 1958, an agreement that makes it easier for businesses to arbitrate disputes with entities around the globe. With a thorough understanding of the Convention, companies doing business abroad can reduce risk and save substantial time and money resolving disputes that cross national borders.

Many executives fear unfamiliar foreign legal practices and laws in locations unfriendly to their interests when engaging in international commerce. The New York Convention can provide a solution. Mastering the principles of this virtually universal agreement allows companies to choose the place, process and law for resolving disputes, with confidence that these choices will be respected by courts nearly everywhere in the world.

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (often called the New York Convention) creates a process for compelling arbitration and enforcing arbitration awards rendered in foreign countries or involving foreign parties. The Convention is a model of simplicity comprising a mere four pages of text (compare that to the recent trend of legislation often thousands of pages long).

Each of the 149 adopting countries has agreed to recognize written agreements to arbitrate disputes, and to compel arbitration at the request of either one of the parties (unless the contract is unenforceable or the matter is not capable of arbitration).

Once the arbitration panel makes a decision, one simply needs to submit the decision and a copy of the arbitration agreement to a court in any of 149 countries for recognition of the award. Once recognized, the award has the force and effect of a domestic judgment. This allows the prevailing party to use any and all domestic methods for enforcement and collection.

There are only a few reasons why a court may refuse to recognize an arbitration award, including invalidity of the arbitration agreement, failure to obey the arbitration procedure specified in the agreement, immaturity of the award (if it is not yet binding), or if the court determines that enforcement would be flatly contrary to the enforcing country's public policy.

These exceptions are sparingly invoked. Further, the Convention forbids countries from charging higher fees or creating procedural hurdles more onerous than are required for enforcement of domestic arbitration agreements. The spirit of the Convention is to encourage arbitration, and to keep it as simple as possible for companies to resolve foreign business disputes.

Application of the Convention in the United States is limited to commercial disputes. In the spring of 2014, the United States Supreme Court (*BG Group PLC v. Republic of Argentina*) affirmed the bedrock principles of the Convention and the great deference courts should grant arbitrator decisions. The Court held that decisions, regarding whether parties have properly followed any pre-arbitration procedure required by an agreement (for instance, conducting a

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settlement conference before proceeding with arbitration), should be made by arbitrators, not courts.

Thus, any business that signs an arbitration agreement subject to the Convention faces an uphill battle if it later attempts to resist arbitration or enforcement of an arbitral award.

While the basic principles of the Convention are straightforward and relatively easy to understand, there are a number of pitfalls that arise if an arbitration agreement is not carefully considered and properly drafted. For instance, here are a few of the mishaps we have seen:

- **Failure to specify in the agreement the law governing the arbitration**. The choice of law governs everything, most importantly, the law under which an arbitration agreement or award can be challenged in court. When drafting an arbitration agreement, we always carefully match a company's business objectives to the legal system most harmonious with those objectives.
- **Failure to understand that there are many different possible arbitration procedures, and one size does not fit all**. Some procedures are simple, quick and final. Others can be nearly as costly and time-consuming as full-blown litigation. Planning for the types of disputes that might arise and the ideal process for resolving them is a worthy investment. By selecting the right procedure, a company minimizes cost, stress and the level of disruptive havoc that business disputes can cause.
- **Failure to understand, with respect to the United States, that we have over 50 different jurisdictions and that each is different**. It is critical to consider which jurisdictions are pertinent to the arbitration contract, and which system is best suited to a company's business needs. Moreover, the language specifying the arbitration forum has to be precisely drafted, or it will not be respected by the courts. We have seen many sophisticated businesses get stuck for years in a forum they don't want because they used the wrong language in their agreement.

The New York Convention can be a powerful tool for controlling legal risk. Parties bound by a contract under the Convention can typically be compelled to arbitrate and be confident that any award can be converted into a domestic judgment in the country where enforcement is needed.

However, like any tool, effective use of the Convention requires a skilled and knowledgeable hand. The downside of its simplicity is the need for deft navigation: businesses including arbitration agreements in their transnational contracts need to have substantial discussions with experienced counsel to craft the right agreement for their unique situation. Businesses already in the midst of a dispute need counsel who are knowledgeable as to the best way of advancing their interests, or they may waste resources fighting costly battles they are likely to lose. P