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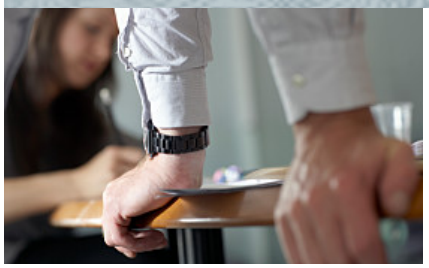

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NEXT EDITION
The next edition of Migalhas on International Arbitration will be published in the summer of 2010.

INTERNATIONAL ARBITRATION EXPRESS
Follow the breaking news and developments in the Migalhas International newsletter.

Edited by Mauricio Gomm-Santos and Quinn Smith

Migalhas on International Arbitration

In this fourth issue of Migalhas on International Arbitration, we feature articles from two nations new to our column plus part 2 of a two-part series on enforcing foreign arbitral awards in the United States.

First, Niccolò Landi and Niccolò Namari of Gianni, Origoni, Grippo & Partners in Italy provide a timely update on Italian law regarding the use of digital signatures on a contract containing an arbitration clause. The conclusion is crucial as electronic signatures increasingly form an important part of international commerce.

Next, Jonathan Pitman of Pitman & Co. in the United Kingdom notes some of the key elements of the award of costs and fees under the English Arbitration Act of 1996. The differences are important, and English law can provide a powerful remedy for frivolous arguments.

Finally, Daniel Gonzalez and Maria Ramirez of Hogan Hartson in Miami, Florida, finish their two-part series on enforcing foreign arbitral awards within the United States. Their helpful insights on service and non-appeal provisions instruct readers on how to avoid some of the more pressing problems in enforcing foreign arbitral awards.

Look for more interesting articles from Migalhas contributors in the future. In upcoming issues, we will continue to cast a wide view over the field of international arbitration throughout the world. Feel free to contact us with your thoughts and opinions so that we can keep providing our readers with timely topics and practical tips.

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Arbitration agreements: the written form requirement and new means of communication under Italian Law

By: Niccolò Landi and Niccolò Namari[3]

The revolution in communications of the last two decades and the dramatic growth of the electronic commerce have created the urgent need to reconsider the notion of written agreement in light of the use of new media.

To use the words of United Nations Commission on International Trade Law (UNCITRAL) "noting that the increased use of electronic communications improve the efficiency of commercial activities, enhances trade connections and allows new access opportunities for previously remote parties and markets, thus playing a fundamental role in promoting trade and economic development, both domestically and internationally" (2005 - United Nations Convention on the Use of Electronic Communications in International Contracts).

In light of this radical change, the Italian legislature through the Legislative Decree of 2 February 2006, No. 40 has modified Chapter I, Title VIII, Book IV of the Italian Code of Civil Procedure (ICCP) regarding arbitration and, in particular, Articles 807 and 808. Article 807 (*Submission to arbitration*) of the ICCP states that:

"The submission to arbitration must, under sanction of nullity, be made in writing and must indicate the subject matter of the dispute. The written form requirement is considered complied with also when the will of the parties is expressed by telegram, telex, telecopier or telematic message in accordance with the legal rules, which may also be issued by regulation, regarding the transmission and receipt of documents which are teletransmitted. (emphasis added)"

Pursuant to Article 808 (*Arbitration clause*) of ICCP:

"The parties may establish, in their contract or in a separate document, that disputes arising out of the contract be decided by arbitrators, provided such disputes may be made subject to an arbitration agreement. The arbitration clause must be contained in a document meeting the form required for a submission agreement by Article 807 […]. (emphasis added)"

Article 807 of ICCP can be considered in line with Article I (2)(a) of the European Convention on International Commercial Arbitration, done in Geneva, 21 April 1961, with Article II(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958 (New York Convention) and with Article 7(4), *Option I*, of the UNCITRAL Model Law on International Commercial Arbitration 1985 (with amendments as adopted in 2006) which provides that:

"The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy."

The *Corte di Cassazione*, in interpreting Article II(2) of the New York Convention, has recently affirmed the validity of an arbitration clause inserted in an agreement concluded by means of an exchange of telefaxes, even if the parties never exchanged the original agreement (Judgment of 14 June 2007, No. 13916). However, the Corte di Cassazione pointed out that the crucial problem pertaining to the use of this mean of communication is the difficulty to verify the origin of the telefax and the genuineness of a fax transmission report. To avoid these potential risks, some prominent Italian scholars believe that, in any case, the original agreement should be physically exchanged between the parties.

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The Italian legislature clearly states that the requirement of the written form is satisfied also in case the arbitration agreement of the parties is contained in a telematic message generated according to the Legislative Decree of 7 March 2005, No. 82, as subsequently amended (Digital Administration Code). In this regard, it shall be pointed out that the Italian Government is currently discussing a further amendment of the Digital Administration Code which, according to the official agenda, shall be voted and enacted by the end of year 2010.

Article 20 of the Digital Administration Code provides that a telematic message, bearing either a "*qualified electronic subscription*" or a "*digital subscription*" is considered as sent by the owner of the signing device and, therefore, satisfies the requirement of the written form provided that the telematic message has been formed according to all the technical rules provided for by the Digital Administration Code. This is due to the fact that such technical rules are aimed at guaranteeing the identity of the sender, the integrity of such message and that such a message cannot be modified by either party.

Pursuant to Article 21 of the Digital Administration Code the probative value of an electronic document bearing a non qualified electronic signature is freely weighed by the judge who, to such purposes, shall take into consideration the security and reliability characteristics of such document. The electronic document, signed with a digital signature or with a qualified electronic signature, shall have the same probatory effect as a private deed (scrittura privata), as per Article 2702 of the Italian Civil Code, unless the signatory challenges in court the accuracy of the statements contained in this document under Article 221 of ICCP.

Thus, an arbitration agreement formed and signed with a digital signature or with an advanced electronic signature will be valid; in particular, e-mails sent using the PEC system (*Posta Elettronica Certificata*), according to the Presidential Decree of 11 February 2005, No. 68, as subsequently amended, shall have a legal status equivalent to that of a registered letter with a return receipt.

Notes on Costs and interest in English litigation and arbitration

By: Jonathan Pitman[4]

These notes deal briefly with two of the conduct related weapons in the armoury of the courts and arbitration tribunals. Under English law the general rule is that a judge or arbitrator will order the losing party to pay the winning party's legal costs and expenses incurred in the litigation or arbitration. In certain circumstances, the level of costs ordered or awarded may be enhanced. The court also has discretion to order enhanced interest in appropriate cases.

Costs

Arbitration in England and Wales is governed by the Arbitration Act 1996. Section 63 provides as follows:

"The recoverable costs of the arbitration,

(1) The parties are free to agree what costs of the arbitration are recoverable.

(2) If or to the extent there is no such agreement, the following provisions apply.

(3) The tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit.

If it does so, it shall specify—

(a) the basis on which it has acted, and

(b) the items of recoverable costs and the amount referable to each."

The Civil Procedure Rules (CPR) of the Supreme Court, applicable to arbitration unless excluded, provide for two alternative bases for awarding costs: the standard basis and the indemnity basis. The usual costs order is the standard basis. This basis allows the winning party to recover costs reasonably incurred and of a reasonable amount. If either of these issues is in doubt, the doubt shall be resolved in favour of the paying party. On the indemnity basis, any doubt is to be resolved in favour of the receiving party. The reversal of the burden of proof can often result in considerable difference in the amount of costs recovered.

The same principles are applied in awarding costs in arbitration proceedings. However, in court proceedings, costs on the standard basis must also be "proportionate", i.e. to the

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amount involved, the importance of the case, the complexity of the issues, and the financial position of each party. It is not entirely clear whether this qualification also applies to arbitration, but it is suggested that it would be unusual or rash for an arbitrator not to do so.

As already mentioned, the distinction is of considerable importance, as the difference in the amount of costs recoverable can be significant.

The question arises: what conditions must be satisfied in order for an order or award of indemnity costs to be made? The short answer is that an order for or award of indemnity costs is strictly conduct related. Given that such an order is intended to be punitive, conduct sufficient to justify it must be serious. Thus in *A v AJ & others*, Colman J granted an order for costs to be assessed on the indemnity basis where court proceedings had been brought in breach of a binding agreement to arbitrate.

As already stated, the usual rule is that costs follow the outcome of the litigation and are awarded on the standard basis. However, the court has discretion to award costs on a full indemnity basis. In a recently concluded case in which we were instructed by the winning side, the court found that the defendant was guilty of persistent and entirely unsubstantiated allegations of fraud and dishonesty in both written and oral evidence. This conduct had considerably lengthened the trial. The net result was that the claimant was kept out of its money based on hopeless and ill conceived allegations, in many of which the defendant could not have had a genuine belief. The delay in the trial compounded costs and the foregoing fully justified the order for costs on an indemnity basis[5].

The court also has power to make an interim award of costs and grant other remedies. In this case we were able to obtain judgment against the directors personally of a limited company and were granted a worldwide freezing injunction against their personal assets up to a certain value.

Interest

Section 49 of the Arbitration Act 1996 provides:

"(1) The parties are free to agree on the powers of the tribunal as regards the award of interest.

(2) Unless otherwise agreed by the parties the following provisions apply.

(3) The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case . . ."

The paying party's conduct may also justify the winning party in seeking interest at a higher rate than would be usual. The court has discretion[6] to award interest on damages at a much higher rate than usual where a party has behaved unreasonably. It is clear that the court has discretion. The power is a compensatory power for losses, some quantifiable and others not, for being kept out of money. In the case alluded to above, we asked for interest at 10% per annum, which is the highest rate under CPR Part 36. The judge went on to say that in the ordinary case he would order interest at the cost of borrowing. In this case he considered 10% appropriate to compensate the winning party.

International Commercial Arbitration: Hurdles when Confirming a Foreign Arbitral Award in the United States[7]

By: Daniel E. González[8] and María Eugenia Ramírez[9]

Given the lack of clear guidance from either international treaties or federal jurisprudence with respect to the important issue of service of process, parties would be well-advised to try and avoid these problems in advance of the confirmation process. That is to say, parties should attempt to deal with the service issue in either the original arbitration clause in their agreements or at least at the outset of the arbitration process. For example, most arbitrations commence with the arbitral tribunal issuing a procedural order. The parties may agree in such initial procedural order that any enforcement petition may be served on the parties' arbitration attorneys of record via Federal Express without the need of requiring a further formal summons. In the end, compliance with all these service of process requirements will help ameliorate some of the hurdles parties seeking to enforce a foreign arbitral award face when confirming such an award in federal court in the United States.

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F. Finality and Confirmation of the Foreign Arbitral Award

Under the plain language of the FAA and the New York and Inter-American Conventions, a federal district court's role in reviewing a foreign arbitral award is strictly limited: "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [sic] said Convention.[10] " In other words, pursuant to Section 207 of the FAA and Article 5 of the New York Convention and the Inter-American Convention, a court must recognize or enforce an arbitral award under the New York or Inter-American Conventions unless one of seven specifically-enumerated grounds are present[11]. In light of the New York and Inter-American Conventions' "general pro-enforcement bias," the party opposing confirmation or enforcement of an arbitral award bears the burden of proving the existence of one of these enumerated grounds.[12]

Notwithstanding the expected finality of an arbitral award pursuant to the FAA, the New York and Inter-American Conventions, another hurdle a party seeking to enforce a foreign arbitral award in the United States will face is that of the finality of the award. Contracting parties should therefore keep this in mind when drafting their arbitration clauses. In order to prevent further review and appeals of the arbitral award once it is rendered, contracting parties should consider expressly providing a statement in their arbitration clause which clearly states that *the arbitral award is binding, final, not subject to review and not subject to appeal by the courts of any jurisdiction*.[13] The addition of such a provision will be particularly helpful in cases where the laws of the country where the arbitration took place specifically allow parties to appeal an award issued in that country. Such a clause may help the winning party in the arbitration to avoid spending additional time and money in its attempts to execute what it thought was a final arbitral award, but which is now an award being appealed by the losing party. It will also help the party seeking enforcement in the United States to actually obtain enforcement of the award rather than obtain a stay of the confirmation proceedings pending the completion of the arbitral award appeal proceedings in the foreign country where the award was issued.[14]

The only federal courts in the United States that have thus far faced a similar dilemma concerning the finality of a foreign arbitral award are the United States District Court for the District of Columbia and the United States Court of Appeals for the District of Columbia Circuit in *Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F. Supp. 907 (D. D.C. 1996) and in *Termorio S.A. E.S.P. v. Electranta, S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

Specifically, in Chromalloy an American company entered into a military procurement contract with the Air Force of the Republic of Egypt. *See generally Chromalloy*, 939 F. Supp. at 907. Due to certain disputes between the parties, the parties commenced arbitration proceedings pursuant to the arbitration clause of their contract. See id. An arbitral award was rendered in Egypt, under the laws of Egypt, and in favor of the United States corporation, and Egypt was ordered to pay damages to the American company. See id. While the American company sought enforcement of the award in the United States under the New York Convention, Egypt sought a nullification of the award before the Egyptian Court of Appeals. *See id*. Although the Egyptian Court of Appeals issued an order nullifying the arbitral award, the federal district court in the United States nevertheless confirmed and enforced the arbitral award. See id. The federal court reasoned that despite the Egyptian Court of Appeals' ruling, the parties had specifically agreed in their contract that the arbitral award would be final and binding upon the parties. See id. In other words, the parties "agreed that the arbitration [would end] with the decision of the arbitral panel." *See id.* at 912. Given that the arbitration agreement precluded an appeal in Egyptian courts, the federal district court applied its discretion and recognized and enforced the arbitral award notwithstanding the Egyptian court's nullification of the award. *See id.* at 914-915.

At the other end of the spectrum is the case of Termorio, where a Colombian entity entered into a Power Purchase Agreement with a Colombian state-owned public utility for the generation and purchase of electricity. *See generally Termorio*, 487 F. 3d at 930. When a dispute arose under the Power Purchase Agreement, the parties resorted to arbitration in Colombia pursuant to the Rules of Arbitration of the International Chamber of Commerce in accordance to the agreement's dispute resolution clause. *See id*. at 931. Although the arbitral tribunal

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awarded Termorio more than $60 million in damages, the state-owned public utility defendant utilized its connections and obtained an "extraordinary writ" from a local Colombian court which overturned and nullified the arbitral award because the agreement's arbitration clause allegedly violated Colombian law. *See id.* Around the same time, Termorio commenced arbitral award enforcement proceedings in the United States to enforce the award pursuant to the FAA, the New York Convention and the Inter-American Convention. *See id.* The United States Court of Appeals for the District of Columbia Circuit affirmed the district court's dismissal of the enforcement proceedings on the grounds that Colombia – the country where the arbitral award was issued – lawfully nullified the award, thus making it unenforceable in the United States. *See id.* at 941. The Termorio court held however, that the Termorio case was clearly distinguishable from Chromalloy because in Chromalloy the parties' express contract provision concerning the non-appealability of the final arbitral award was violated when an appeal to vacate the final arbitral award was sought. *See id.* at 937.

Given the divergent positions and holdings in *Chromalloy and Termorio*, having an express provision in a parties' arbitration clause which precludes the parties from seeking a review and an appeal of the arbitral award anywhere in the world will help to provide the parties greater certainty with regards to the finality of their foreign arbitral award.

In conclusion, being aware of and handling in advance the possible hurdles a party may encounter when attempting to enforce a foreign arbitral award in the United States will help ameliorate some of the challenges a party may encounter when filing a foreign arbitral award enforcement petition in a United States federal court, further confirming the notion that international commercial arbitration continues to be a viable and effective alternative for the resolution of disputes.

References

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5 See Amoco v. British American Offshore Ltd [2002].

6 See Baron v. Lovell, Court of Appeal. The Times 14 September 1999, referred to in the explanatory note to CPR Part 44.4. A.

7 Editors' Note: this is Part 2 of our series on confirming arbitral awards in the United States. Please refer to Issue 3 for Part 1.

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10 9 U.S.C. §§ 207, 302.

11 As enumerated in the Inter-American Convention, for instance, a court may refuse to confirm and enforce an arbitral award only after finding proof of one of the following seven grounds: (i) the parties are under some incapacity with respect to the applicable arbitration agreement, or the agreement is otherwise invalid; (ii) the party against whom the award is invoked was not given proper notice of the arbitration or appointment of an arbitrator or was otherwise unable to present its case; (iii) the award exceeds the scope of the terms of the submission to arbitration; (iv) the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement; (v) the award has not yet become binding on the parties; (vi) the subject matter of the award is not capable of settlement by arbitration under the law of the court where confirmation and enforcement are sought; or (vii) the confirmation or enforcement of the award would be contrary to public policy. See Art. 5, Inter-American Convention. See also Art. 5, New York Convention.

12 The New York and Inter-American Conventions make clear that an arbitral award may be annulled or suspended only by a competent authority of the country in which, or under the law of which, the award was made. See Art. 5(1)(e), New York Convention; Art. 5(1)(e), Inter-American Convention.

13 Query as to whether inclusion of such a clause may be somewhat limited given the recent case of *Hall Street Assoc. L.L.C. v. Mattel, Inc.*, 128 S. Ct. 1396 (2008).

14 In lieu of dismissing an enforcement petition, Article 6 of the New York Convention and the Inter-American Convention authorizes a court where enforcement of the award is being sought to (i) stay the enforcement proceedings pending a decision from the court of the country where the award was issued, and (ii) instruct the party opposing enforcement of the award to provide appropriate guaranties. See Art. 6, New York Convention ("If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security"); Art. 6, Inter-American Convention ("If the competent authority mentioned in Article 5.1.e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.").

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