

YOU WON THE ARBITRATION. NOW WHAT?

By Matthew H. Kirtland

While the United States has a long-standing and well-established policy in favor of arbitration, an arbitral award cannot be enforced within the United States until it is confirmed by an appropriate federal or state court. This article provides a basic overview on the procedures and considerations for such confirmation proceedings in federal court with respect to both international and domestic arbitral awards.¹

The Federal Arbitration Act

The Federal Arbitration Act (“FAA”)² governs the confirmation of arbitral awards in federal court. Chapter 1 of the FAA governs the enforcement of domestic arbitral awards rendered pursuant to a written contract that evidences a transaction involving interstate or foreign commerce or maritime transactions.³

Chapters 2 and 3 of the FAA govern the enforcement of international arbitral awards subject to, respectively, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention)⁴ and the Inter-American Convention on International Commercial Arbitration (Panama Convention).⁵

Petition to Confirm

Confirmation of an arbitral award usually is requested by filing a petition to confirm (or motion to confirm). For domestic arbitral awards, 9 U.S.C. § 13 specifies the supporting documents that must be filed with the petition, e.g., a copy of the arbitration agreement and a copy of the award. For international arbitral awards, counsel should refer to Chapters 2 and 3 of the FAA for what supporting documents are required. For example, in the case of awards subject to the New York Convention, a petition to confirm must also attach a duly authenticated original or certified copy of the award and the original arbitration agreement, along with an official or sworn translation into English if necessary.

Statute of Limitations

For domestic awards, a petition to confirm “may” be filed “at any time within one year after the award is made.”⁶ The question of whether this one-year time period is a mandatory or permissive requirement has been debated by the courts.⁷ The FAA’s one-year time period does not limit potentially longer periods available under state law.⁸ For international arbitral awards, a petition to confirm must be filed within three years from the date the award was made.⁹

Venue and Jurisdiction

Proper venue, personal jurisdiction, and subject matter jurisdiction must each be established to successfully confirm an award.¹⁰ For domestic awards, a petition to confirm may be filed in any court specified in the arbitral agreement or, failing that, the district where the arbitral award was made. In addition to establishing proper venue, filing in any of these courts establishes personal jurisdiction over the parties.¹¹

In addition, 9 U.S.C. § 9 provides that domestic awards may be confirmed “[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration.” There is a split of authority on whether this language requires express consent to judicial confirmation in the parties’ arbitration agreement, and such language thus is often included in model arbitration clauses.¹² Counsel should check the underlying arbitration agreement and law of the applicable jurisdiction(s) on this point.

For international awards, a petition to confirm may be filed in any court in which the underlying dispute could have been initiated absent the agreement to arbitrate, or in the location designated for

arbitration in the arbitration agreement if that location is within the United States. The traditional “minimum contacts” due process test for personal jurisdiction over the respondent’s property must also be satisfied.

Federal courts have original subject matter jurisdiction over arbitral awards governed by the New York and Panama Conventions pursuant to 9 U.S.C. §§ 203, 302. However, for domestic awards, Chapter 1 of the FAA does not create an independent basis for subject matter jurisdiction. Instead, the petitioner must establish either diversity jurisdiction or that the arbitration “arises under” or involved an interpretation of federal law.

Service of the Petition to Confirm

For international and domestic awards, if the respondent is a resident of the district where the arbitral award was made, service of the petition to confirm “shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court.” For nonresidents, service shall be made “by the marshal of any district within which the adverse party may be found in like manner as other process of the court.”¹³

Scope of Judicial Review of the Award

For domestic awards, a court may confirm, vacate, modify, correct or remand the award for rehearing.¹⁴ There are four grounds for vacatur: (1) the award was obtained by corruption, fraud or undue means; (2) any of the arbitrators were partial or corrupt; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing on sufficient cause shown; refusing to hear evidence pertinent and material to the controversy; or any other behavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers or so imperfectly executed them that they did not make a mutual, final and definite award on the subject matter submitted.¹⁵

A court also may modify or correct a domestic arbitral award: (a) where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award; (b) where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted; and (c) where the award is imperfect in matter of form not affecting the merits of the controversy. The court may also modify and correct the award, so as to effect the intent thereof and promote justice between the parties.¹⁶

For international awards, the FAA provides that “[t]he 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 said Convention.”¹⁷ In turn, the New York Convention and Panama Convention each set out the following seven defenses: (1) the parties were incapacitated or the agreement was invalid under applicable law; (2) the party against whom the arbitration was awarded did not have notice of the arbitrator or arbitration, or was denied the opportunity to present a case; (3) the award went beyond the matters submitted to the arbitrator or the scope of the arbitration; (4) the composition of the arbitral authority or arbitral procedures were not in accordance with the arbitral agreement; (5) the award is not yet binding, or has been set aside or suspended by a competent authority; (6) the subject matter is not capable of settlement by arbitration under the applicable law; and (7) recognition or enforcement of the award would be contrary to public policy.

Post-Confirmation

Upon the conclusion of successful confirmation proceedings, for both domestic and international awards, the court enters judgment on the award which “shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be

enforced as if it had been rendered in an action in the court in which it is entered.”¹⁸ The judgment then can be enforced under the standard procedures applicable for enforcement of federal judgments.¹⁹

Conclusion

While the procedure for confirming an arbitral award is relatively straight-forward and intended to be summary in nature, each of the above points can, depending on the circumstances of the case, raise issues of law that may vary both between federal jurisdictions as well as from state to state. Parties are thus well-advised to consider each such issue carefully in formulating an effective and efficient strategy with respect to enforcement of an arbitral award.

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¹ This article focuses on proceedings in U.S. federal court. Arbitral awards also can, and in some circumstances must, be enforced in state court. This can occur when the parties have specified state court enforcement in their underlying arbitration agreement or if the dispute does not involve interstate commerce. Many states have specific statutes governing such enforcement, and certain have provisions that can vary significantly from the FAA. Accordingly, in analyzing the prospective enforcement of any arbitral award, counsel should be certain to review any applicable state statutes before determining whether and where to proceed.

² 9 U.S.C. §§ 1-16, 201-208, 301-307.

³ 9 U.S.C. §§ 1, 2.

⁴ 9 U.S.C. §§ 201-208.

⁵ 9 U.S.C. §§ 301-307.

⁶ 9 U.S.C. § 9.

⁷; *See, e.g., FIA Card Servs., N.A. v. Gachiengu*, 571 F. Supp. 2d 799, 803-804 (S.D. Tex. 2008) (discussing Circuit split).

⁸ The FAA provides a three-month limit for motions to vacate, modify or correct an award (9 U.S.C. § 12).

⁹ 9 U.S.C. §§ 207, 302.

¹⁰ 9 U.S.C. §§ 204, 302.

¹¹ 9 U.S.C. § 9.

¹² *See Qorvis Communs., LLC v. Wilson*, 549 F.3d 303, 311 (4th Cir. 2008); *see, e.g., JAMS Standard Arbitration Clause for Domestic Commercial Contracts* (2015), available at: <http://www.jamsadr.com/clauses/>.

¹³ 9 U.S.C. §§ 9, 208, 307.

¹⁴ 9 U.S.C. §§ 9, 10, 11.

¹⁵ 9 U.S.C. § 10.

¹⁶ 9 U.S.C. § 11.

¹⁷ 9 U.S.C. §§ 207, 302.

¹⁸ 9 U.S.C. §§ 13, 208, 307.

¹⁹ *See, e.g., Fed. R. Civ. P.* 69(a).