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3 Things GCs Should Know About Enforcing Arbitral Awards

By **Caroline Simson**

Law360 (August 23, 2019, 9:03 PM EDT) -- Companies that prevail in commercial arbitration often devote the full strength of their legal teams to persuading the arbitrators to take their side, and when hard-fought arbitration yields a win, it may seem right to pop the champagne and celebrate. Right?

Not so fast, say arbitration specialists.

"An arbitral award is just a piece of paper — an agreement to pay or execute the relief," said Reed Smith LLP partner James P. "JP" Duffy IV. "It's like a U.N. resolution: It doesn't have any real effect unless a party chooses to follow it or you put boots on the ground to implement it. It's a true pyrrhic victory to win an award and not be able to enforce it, so you need to consider both enforcement and collection early and often."

Here are a few tips that general counsel can use to ensure that any award they win down the road will be enforceable.

It's Never Too Early to Start Thinking Enforcement

It might seem premature to start thinking about enforcing an arbitral award against a business partner at the contracting phase, but doing so is actually one of the most important ways to ensure that an award is enforceable.

"It's good commercial practice to be thinking about enforcement and collection at the contracting phase," Duffy told Law360. "If you're a general counsel, the last thing you want to do is report to the board that you got into a dispute that you won, and you got an award, but you either cannot legally enforce the award or you're able to legally enforce it but haven't been able to collect on it because you didn't think of those issues at the contracting phase."

One particularly important consideration for parties is the primary location for their business partner, and deciding whether arbitration that might arise out of their contract will take place there. The location, or "seat" of arbitration, can have important impacts on whether and how much the local judiciary can get involved in the arbitration while it's ongoing, and it may also affect whether an award is more likely to be set aside once it's been issued.

It's important to consider whether the counterparty comes from a nation that's signed the New York

Convention, an international treaty providing for the reciprocal enforcement of international arbitral awards that's often considered the single most important tool for enforcing arbitral awards across borders. But it's equally important for general counsel not to let their guard down just because a country has signed it.

The New York Convention "gives a false sense of comfort to a lot of people," said Duffy. The fact that a country has signed it "doesn't mean that it's implemented or executed the same in every jurisdiction. The way it's implemented in one country is different than the way it's implemented in others, regardless of the judiciaries' experience with the Convention."

The Arbitration Clause Should Be Airtight

Drafting an arbitration clause might seem like a simple matter, but experts say it's easy to make mistakes or fail to include some crucial detail. And that could transform any eventual disputes into lengthy and costly affairs as the parties battle over ambiguities in the contract and spend more time in court hashing out such details than in arbitration resolving the actual dispute.

One common mistake is to not specifically say that arbitration will be the exclusive dispute resolution process, says Mayer Brown LLP partner B. Ted Howes, who heads the firm's U.S. international arbitration group. Sometimes, contracts will be drafted such that the parties "may" submit disputes to arbitration.

But using "may" instead of "shall" can leave the door open for parties to argue over whether to arbitrate their dispute, which can strip the tribunal of jurisdiction and lead to enforcement issues down the road, he said.

Parties will also want to specifically state which arbitral rules will be used, in addition to the seat of arbitration. Absent that, the parties might spend months in court arguing about where the arbitration will take place, said Howes.

If there are multiple contracts arising from a particular transaction or project, the parties should agree to consolidate any proceedings arising from the contracts. That will help avoid what Howes refers to as the "consolidation dilemma."

"If you have two arbitration tribunals deciding the same factual issues, it can lead to uncertainty, chaos and even possibly contradictory decisions," he said. "You can see how that could lead to enforcement problems."

Other considerations at the contracting phase include deciding which party will bear the cost of enforcement and whether the enforcement will be kept confidential. While arbitration is almost always confidential, enforcement proceedings will typically bring the dispute into the public domain through the court system.

Parties should also consider whether they'll need to have the option to pursue assets from another company in their counterparty's corporate structure — a necessary consideration, particularly if the counterparty is a special purpose vehicle only formed for one project.

"If you make mistakes in the drafting of the arbitration clause, it can affect the enforceability of the arbitration clause itself, not to mention the award," Howes said.

Enforcement Proceedings Should Be Ready to Go

While one might think that enforcement issues are bound to arise in arbitration, experts say that in reality, parties are far more likely to simply pay up or settle for some lesser amount once an award is issued. In fact, it's only the most contentious of disputes that tend to produce enforcement issues.

But that's no reason to get complacent. If a party is paying attention during an arbitration, there may be clues that enforcement issues could come up down the road.

One dead giveaway is when a counterparty's defense during the arbitration is that they're unable to pay at the moment, which means that the company might be insolvent and enforcing any judgment against it will be a race against time as different creditors hurry to stake their claims. Another classic example is when an arbitration begins and the other side declines to participate, says Duffy.

"You should immediately start thinking about enforcement at that point," he said. "If you find yourself in that situation, you can't think small. You have to be thinking globally, aggressively and creatively."

He noted that companies should consider launching enforcement proceedings not just in the counterparty's home country, but also in any other jurisdiction and banking center where that company might have assets. It's also important to look into whether the counterparty might be looking into dissipating its assets.

And in doing so, parties should make sure they're aware of all the pertinent deadlines and procedural rules.

"Each country will have different time periods, and it's always good to research this ahead of time," Howes said. "You want to be ready to go, because if there's an award in your favor you want to know which courts to go to and what the deadlines are either to confirm or enforce an award."

In instances where the counterparty might want to keep the arbitration entirely under wraps, however, it can be useful to use the threat of an enforcement proceeding to encourage a company to either pay up or settle, since enforcement proceedings will generally make an award public, according to Baker Botts LLP partner Michael S. Goldberg, who co-chairs the firm's international dispute resolution section.

"This may be a powerful weapon to help prevent a recalcitrant respondent," he said. "Once filed, however, the weapon is gone. This may be a basis not to file immediately, and to instead begin negotiations — especially if there's still a business relationship between the parties."

--Editing by Breda Lund and Alanna Weissman.