

# WHITE PAPER

## AMENDING THE JURISDICTION OF THE U.S. COURT OF INTERNATIONAL TRADE TO ADJUDICATE THE ENFORCEABILITY OF NON-U.S. ARBITRAL AWARDS

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If a recent legislative proposal in the United States were to be enacted, the U.S. would become the first country to establish a court that specializes in the recognition of foreign arbitral awards.

This White Paper examines the proposed legislation – the "Court of International Trade Improvement Act of 2007" (the "Draft Act") – and its likely effect on non-U.S. companies that are involved in disputes with American businesses.

### **Arbitral Awards and Enforcement:**

International arbitration is on the rise. The International Chamber of Commerce, the American Arbitration Association, the London Court of International Arbitration, and several regional arbitral institutions have reported significant increases in the number of cases filed over the past three years.<sup>1</sup> It is widely expected that arbitration will continue to increase as a tool in resolving international business disputes.

Yet the rendering of an arbitral award does not, in and of itself, conclude most disputes. Rather, when an arbitral award is rendered in favor of one party (the creditor), and when that award requires the other party (the debtor) to pay money, if the debtor does not own assets in the country where the award was rendered, the creditor will need to enforce the award in a country wherein the debtor *does* have assets. Usually that place is the debtor's home country.<sup>2</sup>

Because of the need to enforce arbitral awards internationally, the United States and approximately 140 other nations are parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), which governs the recognition and enforcement of foreign arbitral awards.

Under the current practice, when a non-U.S. creditor needs to enforce an arbitral award in the U.S., that party usually commences a recognition proceeding in a court in the state of the U.S. in which the debtor is located. The non-U.S. creditor will have the option of bringing a recognition proceeding in either a state court or a federal court in the defendant's home state. Thus, for example, a German company that obtains an arbitral award (outside the U.S.) against a

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Californian company would usually retain legal counsel in California to file a recognition proceeding in a state or federal court in California.

Once the state or federal court renders a judgment "confirming" the arbitral award, the creditor then attempts to *enforce* that local judgment. Under the Federal Rules of Civil Procedure, the procedure with respect to enforcing judgments is generally carried out in accordance with the "procedure of the state where the court is located."<sup>3</sup>

### **The Court of International Trade:**

Up until now the Court of International Trade (the "CIT") has not had jurisdiction over New York Convention matters. The CIT is a court of limited jurisdiction, and its current jurisdictional mandate primarily involves cases concerning customs duties, unfair trade practices, and disputes regarding Trade Adjustment Assistance.<sup>4</sup>

The CIT is based in New York City, and the court is comprised of thirteen judges.

### **The Draft Act:**

The Draft Act does not remove or cancel the jurisdiction of state or federal district courts over New York Convention recognition proceedings. Rather, the Draft Act would confer upon the CIT *concurrent* (nonexclusive) jurisdiction to adjudicate New York Convention recognition matters.

If enacted, the Draft Act would have several implications in the field of international dispute resolution. First, the Draft Act is expected to result in the CIT developing a specialization in adjudicating the recognition of arbitral awards under the New York Convention. It is also expected that such specialization will result in expediting the resolution of such cases.

From the perspective of non-U.S. business people, no metropolitan area in the United States is a more readily accessible destination than New York City. Although a motion to recognize an arbitral award often does not require a litigant (or another witness) to appear in-person for testimony, in those cases in which in-person testimony would be necessary, holding such proceedings in New York City would ease the travel burden upon many litigants from Europe, Africa, and elsewhere.

Under the Draft Act, a non-U.S. arbitral creditor would have a choice of three courts in which to litigate – the CIT, the federal district court in the defendant's state,<sup>5</sup> or the state court in that state.

The existence of an additional option appears to be *good* news for non-U.S. arbitral creditors.

### **Criticism of the Draft Act:**

A number of international practitioners in the United States have voiced objections to the Draft Act. Those objections can be summarized as follows:

- (a) Even in those cases in which the CIT would confirm a non-U.S. arbitral award, often there would still be a need to *enforce* the CIT's judgment in the state where

the defendant-debtor's *assets* are located, and such a proceeding would be *in addition* to that brought before the CIT. Thus, litigating before the CIT would often create a need for litigating in more than one American forum, which would be an inefficient result.

(b) The CIT has no experience in adjudicating New York Convention matters; and

(c) There would be an increased *inconvenience* (and increased cost) to American parties that would be forced to litigate in New York City.

Each of these objections is addressed below.

*A. The need for enforcement proceedings after recognition by the CIT:*

As noted above, the need for a post-arbitration proceeding in the United States arises from the need to "lay a hand" on the debtor's assets, and those assets are usually located in the debtor's home state. In cases involving a non-New York area debtor, a court based in New York would often not be able to issue any order that could directly affect those assets.

Thus, at first blush, it would appear that there is some validity to the "two American proceedings" criticism of the Draft Act.

Yet the "two American proceedings" argument fails to take into consideration a reality of international arbitration – in many cases, once an American court grants a judgment recognizing a non-U.S. arbitral award, the case promptly settles, which obviates any need for a subsequent proceeding to enforce against assets.<sup>6</sup> In light of such reality, it is expected that, in many cases, once the CIT (based in New York) grants a judgment recognizing a non-U.S. arbitral award, the case will settle, and there will be no need to commence proceedings against the debtor's assets in Texas, Florida, California, etc.

At the same time, undoubtedly there are situations in which an American debtor attempts to hide or transfer assets in order to avoid paying on an arbitral award, and in those cases, the rendering of an American judgment recognizing the foreign award will not trigger a prompt settlement. In many such cases, it would obviously be beneficial to the non-U.S. arbitral creditor to bring the entire American proceeding(s) before one court – a court based in the state where the debtor's assets can be accessed.

Under the Draft Act, the non-U.S. creditor seeking recognition would have the *option* to decide before which court to commence the American proceeding(s). It seems that giving a creditor such an option provides a level of flexibility that is not currently available.

*B. Experience of the CIT judges:*

Although the judges of the CIT do not currently deal (directly) with international arbitration matters, the court does deal regularly with complex disputes arising from international commerce. Most of the judges on the CIT have at least ten year's experience on the court.

In addition, several CIT judges have commercial litigation experience that predates their appointment to the bench. For example, Chief Judge Jane A. Restani served as the Director of the Commercial Litigation Branch in the Civil Division of the Department of Justice. Judge Delissa A. Ridgway is a published authority in the areas of international commercial law and international commercial arbitration and litigation. Prior to her appointment to the CIT, Ridgway served as Chair of the United States Foreign Claims Settlement Commission. Even the newest member of the bench, Judge Leo M. Gordon (appointed in 2006), has experience in commercial law dating back to the late 1970's, when he served as assistant counsel for the Subcommittee on Monopolies and Commercial Law in the U.S. House of Representatives.

Therefore, there can be little doubt that the judges on the CIT would be qualified to deal with issues concerning the enforceability of non-U.S. arbitral awards.

Under the current practice, a new federal district court judge who has no experience with the New York Convention may, despite his/her lack of experience, be assigned a case involving an application to recognize a non-U.S. arbitral award. In other words, insofar as the assignment of cases to *district* court judges is concerned, the field of the New York Convention is not deemed too complex for an inexperienced judge. If the Draft Act were to become law, at the very least, each judge on the CIT would be no less experienced than many federal district court judges who deal, for the first time, with the New York Convention.

It is expected that the volume of New York Convention cases handled by the CIT will eventually give the judges of that court a level of expertise in the field not seen in most district courts.

*C. Increased inconvenience and costs to U.S. litigants:*

It has been suggested that, by giving a non-U.S. creditor the option to seek recognition of arbitral awards before the New York-based CIT, American defendants that are located far from New York will be unduly burdened by being required to litigate before the CIT. The increased burden (it is argued) would be felt through an increase in travel costs, an unfamiliar forum, and the expense of retaining (more expensive) New York counsel.

However, many of the cases brought for the recognition of non-U.S. arbitral awards do not require in-person testimony and, therefore, are resolved based upon the court's review of the papers submitted. The reason that in-person testimony often is not needed is that the New York Convention creates a *de facto* presumption of recognition of arbitral awards. The exceptions to such presumption can be summarized as follows:

- a) The incapacity of the parties, or invalidity of the arbitration agreement;
- b) A lack of proper notice of the arbitration proceedings;
- c) The arbitrator acted beyond the scope of the arbitration agreement;
- d) The composition of the arbitral tribunal was contrary to the arbitration agreement;

- e) The award has not yet become binding upon the parties;
- f) Under the laws of the country in which enforcement is sought, the difference is not capable of settlement by arbitration; or
- g) Recognition would be contrary to public policy.<sup>7</sup>

Without proof of one of these eight exceptions, there is almost no defense to the recognition of an arbitral award that was given in a New York Convention country. A determination of the availability of one or more of the exceptions can frequently be resolved without any need for the court to hear in-person testimony. Therefore, it is far from clear that having the CIT adjudicate cases involving American parties that are not near New York would constitute a serious inconvenience to such parties.

### **Conclusion**

Enactment of the Draft Act would likely be a positive development for non-U.S. companies involved in disputes with businesses based in the United States. Granting to the CIT (nonexclusive) jurisdiction would enable arbitral award cases to be heard by a court that is expected to develop an expertise in the field, while allowing a non-U.S. creditor the flexibility to bring an action for enforcement, as needed, in a federal or state court where the debtor's assets are located.

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<sup>1</sup> See <http://www.siac.org.sg/facts-statistics.htm>

<sup>2</sup> This White Paper uses the term "debtor" for convenience only, recognizing that an American defendant in a recognition or enforcement proceeding may have a valid legal claim against an arbitral award.

<sup>3</sup> Fed. R. Civ. P. 69(a)(1).

<sup>4</sup> Trade Adjustment Assistance is a program of the United States Department of Labor that provides assistance to workers who have suffered a financial detriment due to increased imports or outsourcing.

<sup>5</sup> See 9 U.S.C. § 203 (conferring federal "subject matter" jurisdiction upon any action or proceeding under the New York Convention).

<sup>6</sup> Apparently there are no statistics regarding the settlement rate of applications to enforce arbitral awards under the New York Convention.

<sup>7</sup> New York Convention, Art. V.