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# Challenging the Validity and Enforceability of Arbitral Awards is a Risky Endeavor: US Courts Warn That Parties and Counsel Risk Costs and Sanctions

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# Commentary

## Challenging the Validity and Enforceability of Arbitral Awards is a Risky Endeavor: US Courts Warn That Parties and Counsel Risk Costs and Sanctions

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In a number of recent decisions, US courts have warned that parties should not seek annulment of arbitration awards or resist enforcement of awards simply for the purpose of delay. If an award debtor unsuccessfully attempts to annul the award or to resist enforcement, it risks being assessed litigation costs and, in appropriate circumstances, further sanctions.

Under the so-called "American Rule," each party in litigation normally bears its own costs, legal fees and expenses, including its own attorney fees. Similarly, the ordinary rule is that the US Federal Arbitration Act does not provide for the award of litigation costs to a party who successfully confirms an arbitration award in a US federal court. However, there are well-established exceptions to this general rule. US courts have held that they have inherent equitable power to award litigation costs, including attorney fees, in arbitral award confirmation proceedings where the party challenging the award confirmation (i) has refused to comply with the award without justification, or (ii) has presented meritless arguments, or (iii) has raised frivolous arguments in bad faith for the purpose of harassment, or (iv) has failed to respond to a petition to confirm the award.[1] US courts also have inherent power to impose sanctions on parties, as well as their counsel, for dilatory and bad faith tactics.[2]

The US Court of Appeals for the Seventh Circuit recently observed that "*[a]ttempts to obtain judicial review of an arbitrator's decision undermine the integrity of the arbitral process*" and deprive the successful party of the value of the arbitration to which both parties had agreed.[3] Hence, the Court warned that "*challenges to commercial arbitral awards bear a high risk of sanctions.*"[4]

In *Enmon* v. *Prospect Capital Corp.*, the Second Circuit Court of Appeals affirmed a district court order that imposed sanctions on a law firm that unsuccessfully opposed a petition to confirm an arbitration award.[5] Among other arguments raised to challenge the award, the law firm objected to the arbitrator's calling of witnesses out of order, even though it was the law firm itself that had requested that it be able to call witnesses out of order. The district court also found that the law firm had grossly mischaracterized the facts from the arbitral proceedings and engaged in other dilatory tactics. The district court noted that "*[f]rivolous claims are particularly egregious when*

*brought to frustrate arbitration*," and found that opposition to the award enforcement proceeding lacked a colorable basis and was brought in bad faith.[6] The district court's sanctions order against the law firm included a monetary sanction of approximately US$354,000, as well as a requirement that all lawyers from the law firm attach the court's sanctions order to any future request for permission to appear in the US District Court for the Southern District of New York.[7]

In another recent decision, *Concesionaria Dominicana de Autopistas y Carreteras, S.A.* v. *The Dominica State*, the US District Court for the District of Columbia stated that "*a party seeking to confirm a foreign arbitral award under the New York Convention may recover reasonable attorneys' fees and costs, at least where the respondent unjustifiably refused to abide by the arbitral award.*"[8] The district court awarded US$324,932.76 in fees and costs incurred by the party in seeking confirmation of the award, where the respondent defaulted in the confirmation proceedings and thus, did not object to the application to confirm the arbitral award. The district court did point out that, at first blush, US$324,932.76 in fees and costs seemed to be an exorbitant amount to spend on a relatively routine proceeding to confirm an arbitration award, especially where the respondent had defaulted and had not opposed the confirmation proceedings. Nevertheless, the court found that the scope of the request for attorney fees and costs was "*fair and reasonable, particularly given the complexity of the issues involved in this case and the international implications of [the] arbitral award.*"[9]

Both parties and counsel must carefully consider the strength of their arguments before deciding whether to challenge an arbitral award in US courts. Meritless arguments lacking legal or factual basis may attract a court's order of costs or even sanctions against the parties, as well as their counsel, who challenge an arbitral award. Ignoring award confirmation proceedings may also prove to be an expensive strategy.

## Endnotes

1. *See e.g. Noble Americas Corp. v. Iroquois*, No. 12 Civ. 3236 (JMF), 2012 WL 5278505, at * 3 (S.D.N.Y. Oct. 25, 2012) (observing that the defendant's "failure to abide by the arbitrator's determination was based on a meritless argument that was squarely rejected by the Second Circuit only two years ago," and "[t]hat alone might be enough to warrant the award of attorney's fees and costs"); *Mandell v. Reeve*, No. 10 Civ. 6530, 7389 (RJS), 2011 WL 4585248, at *12 (S.D.N.Y. Oct. 4. 2011) ("Courts have routinely deemed an award of attorney's fees justified where a defendant has failed to pay an arbitral award and failed to respond to the petition to confirm the award."); *DMA Int'l, Inc. v. Qwest Communs. Int'l, Inc.*, 585 F.3d 1341, 1345, 1346 (10th Cir. Colo. 2009) ("Because arbitration presents such a narrow standard of review, sanctions are warranted if the arguments presented are completely meritless. . . . No objectively reasonable interpretation of our case law could have justified DMA's apparent belief that it would prevail given that such an outcome would require us to substitute our interpretation of the contract for that of the arbitrator. We fully appreciate the financial burden this decision will impose upon DMA's counsel. But only by imposing sanctions in cases like this can we give breath to the 'national policy favoring arbitration.' ") (internal quotes and citations omitted); *Abondolo v. H. & M. S. Meat Corp.*, No. 07 Civ. 3870 (RJS), 2008 WL 2047612, at *4 (S.D.N.Y. May 12, 2008) (awarding attorney's fees and costs where a losing party failed to participate in the arbitration proceedings, failed to pay the full award, did not file a motion to modify or vacate the arbitral award, and did not contest award's validity).

2. In addition, US district courts have statutory authority under 28 U.S.C. § 1927 to impose sanctions on counsel for "unreasonably and vexatiously" multiplying the proceedings in any case.

3. *Johnson Controls, Inc.* v. *Edman Controls, Inc.*, 712 F.3d 1021, 1028 (7th Cir. 2013). The court ultimately decided not to impose sanctions in that case but largely because the contract included a fee-shifting clause, which assured that the successful party would not have to pay the costs incurred in litigation.

4. *Id.*

5. *Enmon* v. *Prospect Capital Corp.*, 675 F.3d 138, 149 (2d Cir. 2012).

6. *Prospect Capital Corp.* v. *Enmon*, No. 08 Civ. 3721 (LBS), 2010 WL 907956, at *6-7 (S.D.N.Y. Mar. 9, 2010).

7. *Enmon*, 675 F.3d at 143. The Second Circuit remanded this part of the sanctions order for the district court to consider whether to impose a temporal limit on this component of the sanctions order, and whether to exclude from the order all attorneys who joined the law firm after the litigation had already concluded. *Id.* at 148.

8. *Concesionaria Dominicana de Autopistas y Carreteras, S.A.* v. *The Dominica State*, 926 F. Supp. 2d 1, 2 (D.D.C. 2013).

9. *Id.* at 3. ■

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