

# ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS IN THE UNITED STATES



Most international commercial contracts contain arbitration clauses, which require disputes arising under the contract to be resolved through arbitration, rather than resorting to courts of law. As international commercial transactions continue to grow in frequency, international arbitration can be expected to mirror this growth.

The importance of crafting a proper arbitration clause for inclusion in any international contract cannot be overstated. This article will examine the other end of the process, enforcing a favorable arbitration award in the United States.

The New York Convention and the Panama Convention are the two main vehicles used to enforce international arbitration awards in the United States. The New York Convention, adopted by the United Nations in 1958, is recognized as a foundational instrument of international arbitration and requires courts of signatory states to give effect to an agreement to arbitrate and also to recognize and enforce awards made in other states, subject to specific limited exceptions. Congress adopted the Convention by amendment as Chapter 2 of the Federal Arbitration Act (“FAA”) in 1970. The Convention’s purpose was to “encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the stan-

dards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”

Chapter 3 of the FAA was added in 1990 and is made up of the Inter-American Convention on International Commercial Arbitration, (the “Panama Convention”), which was established in 1975.

Because the New York and Panama Conventions are nearly identical and because most awards are enforced under the New York Convention, here we will discuss

enforcement under that Convention only.

## NEW YORK CONVENTION (“THE CONVENTION”)

U.S. courts have broken down awards into three categories: purely domestic, foreign, and non-domestic. The Convention applies to awards “not considered as domestic,” in other words, those that are either “foreign” or “non-domestic.” A general rule of thumb for distinguishing a “foreign” award from a “non-domestic” award is that a “foreign” award

will always be made abroad, while a “non-domestic” award will usually be made in the U.S., but can also be made abroad under U.S. law.

The distinction is important because it determines whether the court may refuse to enforce the award under the Convention or whether it may also have the power to set aside the award under domestic law, known as “vacatur.” Foreign awards are subject only to the Convention, whereas non-domestic awards are subject to both the Convention and domestic law. The New York Convention enumerates very limited grounds on which a court may refuse to enforce an award.

## ENFORCEMENT UNDER THE NEW YORK CONVENTION

Enforcement can be sought in any

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country in which the losing party has assets. The U.S. District Courts have jurisdiction when a party seeks to enforce a foreign or non-domestic award in the United States. An action to enforce or confirm an award must be commenced within three years of the award being issued. The party seeking to enforce the arbitral award can establish a prima facie case for enforcement by providing the original or a certified copy of the written arbitration agreement and award. Once a party has made a prima facie case for enforcement, a District Court “shall confirm” the arbitral award unless it finds one of the grounds for refusal specified in the Convention to exist.

Article V of the Convention provides the exclusive grounds by which to refuse to enforce an award. The burden is on the party seeking to prevent enforcement to produce competent authority that one of the enumerated grounds exists. The grounds for refusing to enforce an award are:

**(1) The parties were suffering under some incapacity or the arbitration agreement was invalid.**

No U.S. Court has denied enforcement of an arbitration award because of either lack of capacity of one or both of the contracting parties, or invalidity of the agreement to arbitrate under the applicable law. Incapacity at the time of the arbitration hearing is not a defense. A party must show incapacity at the time of the signing of the contract containing the arbitration agreement if they are to use this defense to an enforcement action.

**(2) The party against whom the award is sought to be enforced was not given proper notice of the arbitration proceedings or was unable to present their case.**

This defense has not often been successful as U.S. Courts have narrowly construed the due process defense by looking at the overall result and determining whether the defendant got a fair hearing. Arbitrators rulings are given great deference and absent a showing of abusive discretion, the court should not refuse to enforce an arbitration award based on allegations of improper evidence or the lack of proper evidence.

**(3) The arbitration award exceeds the scope of the arbitration agreement.**

Article V (1)(c) provides that a court can refuse to enforce an arbitration award when the award is beyond the scope of the dispute submitted to arbitration. This defense is not often successful as arbitration

agreements, and what they encompass, are generally interpreted broadly. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.

**(4) The arbitration panel or procedure was not in accordance with the parties’ agreement or applicable law.**

U.S. decisions that have addressed the question of the improper composition of the arbitration panel based on the Convention, have upheld the award. Courts have upheld arbitration awards even when the arbitration agreement called for three (3) arbitrators and a sole arbitrator decided the case, and when one of the arbitrators previously worked for one of the parties, in violation of the arbitration agreement.

**(5) The arbitration award is not yet binding or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.**

If an appeal to a court is pending, the arbitration award is considered binding and should be enforced. If a court has actually issued a ruling setting the award aside, the award is not binding and should not be enforced.

**(6) The subject matter is not subject to arbitration.**

In order to take advantage of this defense, a party must prove that the enforcing nation attaches a special national interest to the dispute that makes it incapable of being settled by arbitration. The national interest must be more than “incidentally” involved in the dispute for the court to find that the matter is non-arbitrable.

**(7) Enforcement of the award would be contrary to public policy.**

As with other grounds for non-enforceability of arbitration awards, this ground is narrowly construed. The ground applies only when enforcement would violate the most basic notions of morality and justice of the foreign state.

In one case the public policy defense was used successfully when the interest rate used by the arbitrators to determine interest payments was so excessive that it was penal in nature. The penal nature of the interest was held to be a violation of public policy.

### VACATING NON-DOMESTIC ARBITRAL AWARDS

An action to vacate a non-domestic award can overlap with an action to enforce the same award. The following grounds to vacate an arbitration award are found in Section 10 of the FAA:

**(1) where the award was procured by cor-**

ruption, fraud, or undue means;

**(2) where there was evident partiality or corruption in the arbitrators;**

**(3) where the arbitrators were guilty of misconduct; or**

**(4) where the arbitrators exceeded their powers.**

The U.S. courts have supplemented the narrow procedural grounds for vacatur with a handful of non-statutory grounds, including awards that are “arbitrary and capricious,” “completely irrational,” the award’s “failure to draw its essence from the underlying contract,” and those in “manifest disregard of the law.”

Among these, manifest disregard is the most widely recognized ground upon which courts set aside arbitral awards. The standard for finding manifest disregard is extremely high. The challenging party must show that 1) the law was unambiguous and clearly applicable, 2) the arbitrator knew the law, and 3) the arbitrator chose to ignore the law despite his or her knowledge of it.

The use of “manifest disregard of the law” has come under fire in recent years and courts are split on whether this is still a valid ground to vacate an arbitration award.

### CONCLUSION

While the New York and Panama Conventions are the principal vehicles for enforcement of international arbitration awards, they are not the only such vehicles. There are also various treaties and common law, however, these are subjects for another day.



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