When Can Attorneys' Fees Be Recovered in an Award Enforcement Action

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When an international arbitration award is not voluntarily complied with, it may be necessary to seek enforcement of the award in court. This article discusses whether and when a prevailing party in arbitration can recover attorneys’ fees accrued during an award enforcement action in a U.S. district court, and the factors courts consider in determining if attorneys’ fees should be granted.

Parties involved in international commercial transactions often agree to arbitrate for a variety of sound reasons. Their goals are to have an efficient and less expensive process than litigation. However, these goals may not be reached if it becomes necessary to enforce the award in a federal court.

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Because parties do not always comply with arbitration awards, it may be necessary for the prevailing party to seek enforcement of the award in a court of law—typically in a jurisdiction where the losing party has sufficient assets. This article focuses on whether the prevailing party can recover attorneys’ fees accrued during the enforcement procedure in U.S. district court under the Federal Arbitration Act (FAA).

Since the FAA does not authorize attorneys’ fees in enforcement actions, this article also examines the factors courts consider in determining if attorneys’ fees should be granted, including the parties’ intent as evidenced by their contract, the effect of any choice-of-law provisions in the arbitration agreement, as well as whether the party opposing enforcement acted in bad faith or vexatiously. Finally, this article recommends that parties address in their arbitration agreement whether attorneys’ fees should be awarded in an action to confirm an arbitral award. Doing so can help parties reach their goals, avoiding vexatious and expensive enforcement proceedings.

The “American Rule” on Attorneys’ Fees

When faced with a claim for attorneys’ fees, U.S. courts follow what is aptly known as the “American rule.” This rule is simple: the prevailing litigant is not entitled to collect its attorneys’ fees from the losing party. The vast majority of foreign jurisdictions do not follow this rule.

The American Rule dates back to 1796, when the Supreme Court decided that it would not create a general rule—indeed it would not allow awards of attorneys’ fees in federal courts. In over 200 years, the Court has not changed its position on this issue.

Congress has recognized and accepted the American rule. It has provided specific provisions for the allowance of attorneys’ fees under selected statutes granting or protecting various federal rights. For example, under antitrust laws, payment of attorneys’ fees is mandatory to a prevailing plaintiff who is awarded treble damages. In patent litigation, Congress chose to give the court discretion to award reasonable attorneys’ fees to the prevailing party “in exceptional cases.”

The Federal Arbitration Act

The FAA contains the procedures for enforcing domestic and international arbitration awards. Chapter 1 deals with domestic awards and Chapter 2 with international. It is Chapter 2 that implements the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). Neither Chapter 1 nor Chapter 2 provides statutory authorization to award attorneys’ fees to the party awarded enforcement of the award. Section 9 of the FAA, which authorizes enforcement actions, also says nothing about attorneys’ fees. It provides, mainly, that within one year after the award is rendered, any party may apply to a U.S. court for an order confirming the award, and the court must grant such an order unless the award is vacated, modified or corrected as prescribed in Sections 10 and 11 of the FAA.

Perhaps that is because the FAA’s fundamental purpose is to “ensure that private agreements to arbitrate are enforced according to their terms.”

Attorneys’ Fee Provisions in Arbitration Agreements

Accordingly, courts first look to the parties’ agreement in determining whether attorneys’ fees should be awarded in an enforcement action pursuant to the FAA. The reason is that U.S. federal courts seek to carry out the intent of the parties at the time of the contract.

While it is difficult to anticipate disputes at the time of drafting the transaction documents and the arbitration clause, it is important for the parties to anticipate a potential enforcement action in federal court and include specific contractual language incorporating applicable choice-of-law provisions or an attorneys’ fees clause or both.

Because the American Rule is not followed abroad, some foreign laws require a losing party in arbitration to pay the prevailing party’s attorneys’ fees. A U.S. federal court will apply applicable foreign law if directed to do so under the choice-of-law provision. The court may also enforce a direct provision authorizing the payment of attorneys’ fees, or that specifies that a certain foreign law under which attorneys’ fees can be awarded governs the arbitration proceeding. An action in federal court to confirm the
arbitral award will only be governed by that choice-of-law provision if it directly and explicitly relates to the enforcement of the arbitral award. That is, the contractual provision must explicitly state that attorneys’ fees will be awarded in any enforcement actions.9

U.S. federal courts have widely held that they “cannot read general choice-of-law provisions [in contracts] to opt parties out of the FAA default regime and that federal courts cannot apply [foreign] arbitration laws unless the parties’ intent is ‘abundantly clear.’”10 For example, in Volk v. X-Rite, Inc., the petitioner sought to confirm an arbitration award and obtain attorneys’ fees for the review of the award. The contract between the parties contained a choice-of-law clause specifying that state law, which authorized the payment of attorneys’ fees to the prevailing party, governed the terms of the contract.

The district court confirmed the award, but it denied the request for attorneys’ fees because the contract was silent concerning which law governed the enforcement action.11 Moreover, the choice-of-law provision was vague and too generic as to the application of the state law in the action reviewing the arbitration award. Thus, the choice-of-law clause did not make it “abundantly clear” that the parties intended to have federal courts apply state law regarding attorneys’ fees in the enforcement proceeding.12

It is important to note that an action enforcing an international arbitral award is distinct from an appeal on the merits. In Menke v. Monbécourt, for example, the court explicitly noted this distinction when it addressed whether it should grant attorneys’ fees incurred by the petitioner in bringing the confirmation proceeding.13 The petitioner urged the court to rule in her favor under state law, which governed the arbitration. But the court rejected her argument, reasoning that a confirmation of an arbitration award is distinct from an appeal. Despite the choice-of-law clause favoring state law at the arbitration stage, the FAA governed at the award confirmation stage because the contract did not specify that the choice-of-law provision would govern at this later stage.14

Thus, even if a choice-of-law provision is specified, it will not be relevant in an enforcement action if it relates only to disputes concerning the interpretation of the agreement and not to the enforcement action directly.

Vexatious Conduct or Bad Faith Actions
If the relevant contractual language does not allow for an award of attorneys’ fees in an enforcement action pursuant to the FAA, a court may assess attorneys’ fees “when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.”15 U.S. federal courts have further defined this standard. The 9th Circuit held that acts that constitute “an unjustified refusal to abide by an arbitrator’s award may equate [to] an act taken in bad faith, vexatiously or for oppressive reasons.”16 Bad faith may occur when a challenger’s unwillingness to abide by the enforcing party’s clear legal rights—which are set forth in a legitimate arbitral award—required the enforcing party to resort to legal action and all “the expense and delay entailed in litigation.”17 According to the court, the award of attorneys’ fees in this context satisfies two important purposes: “deterrence and compensation.”18

A party’s failure to pay an arbitral award “immediately,” however, does not necessarily constitute bad faith.19 Thus, it may take a considerable amount of time and resources for a prevailing party to demonstrate that the challenger acted vexatiously or in bad faith by simply refusing to immediately abide by an arbitrator’s award.20

Because proving that a party’s actions were in bad faith or vexatious is tedious, costly, uncertain and time-consuming, it is prudent for parties to consider other options to obtain attorneys’ fees. Of course, a party cannot plan to prove bad faith or vexatious conduct.

Conclusion
A properly structured provision that foresees the possibility of an enforcement action in a U.S. federal court should account for how the parties choose to deal with potential attorneys’ fees in
enforcement actions, thereby establishing a framework for prompt and efficient resolution of fees.

Given the complexities involved in obtaining attorneys’ fees in an enforcement of an international arbitral award in a U.S. federal court, it is wise for parties entering into a contract containing an international arbitration clause to include a clear provision requiring the payment of attorneys’ fees in the event of an enforcement action. If parties prefer to use a choice-of-law provision, they should make their intent to extend that provision to the award of attorneys’ fees in an enforcement action abundantly clear.

ENDNOTES

2 Id. at 249-50 (citing Arcambel v. Wiseman, 3 U.S. 306 (1796)).
4 Alyeska, supra n. 1, 421 U.S. at 259-60.
5 “Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore ... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.” 15 U.S.C. § 15.
7 U.S.C. § 1 et seq.
8 Menke v. Monheuse, 17 F.3d 1007, 1009 (7th Cir. 1994) (affirming the denial of attorneys’ fees in award confirmation action because “there is nothing in the Federal Arbitration Act which provides attorneys’ fees to a party who is successful in seeking confirmation of an arbitration award in the federal courts.”). See also Collins v. CSAM, 2005 U.S. Dist. LEXIS 36989 (S.D.N.Y. 2005) (denying a motion for attorneys’ fees in an award enforcement action because CSAM had not “acted in bad faith, vexatiously, wantonly, or for oppressive reasons”); Elite, Inc. v. Texasano Panama Inc., 777 F. Supp. 289, 292 (S.D.N.Y. 1991) (allowing attorneys’ fees and costs under terms of agreement); SailFrog Trans-Asiatic Oil Ltd., S.A. v. UCO Marine Int’l Ltd., 618 F. Supp. 132, 137 (S.D.N.Y. 1985) (awarding court costs and reasonable attorneys’ fees).
10 Volk v. X-Rite, Inc., 599 F. Supp. 2d 1118, 1124 (S.D. Iowa 2009); see also P.R. Tel. Co. v. U.S. Phone Mfg. Corp., 427 F.3d 21, 29 (1st Cir. 2005), rev’d on other grounds by Hall St. Associates LLC v. Malott, Inc., 128 S. Ct. 1396 (2008) (“every circuit that has considered the question ... [has] held that the mere inclusion of a choice-of-law clause within the arbitration agreement is insufficient to indicate the parties’ intent to contract for the application of state law concerning judicial review of awards”); Menke, supra n. 7. See also UHC Mgmt. Co. v. Computer Sciences Corp., 148 F.3d 992, 996-97 (8th Cir. 1998); Dominium Austin Partners, LLC v. Emerson, 248 F.3d 720, 729 n. 9 (8th Cir. 2001).
11 Volk, supra n. 10. Relying on Menke, supra n. 7, the court stated, “Even if attorneys’ fees are mandatory under state statutory law, [it did not] compel federal courts reviewing arbitration awards to award attorneys’ fees in proceedings pursuant to the FAA.”
12 See also P.R. Tel. Co., supra n. 10 (where arbitration clause was governed by Puerto Rican law, but choice-of-law provision was generic and did not mention Puerto Rican law, the FAA applied because FAA “judicial review provisions ... can be displaced only by explicit contractual language evincing the parties’ clear intent to subject the arbitration award to a different standard of review”).
13 Menke, supra n. 7.
14 Id. (“[u]nlike the usual civil appeal, where the successful party is usually defending the lower court’s decision on the merits, an action for confirmation under 9 U.S.C. § 9 is intended to be a summary proceeding that merely makes the arbitrators’ award a final, enforceable judgment of the court.” (citations omitted)).
15 Alyeska, supra n. 1, 421 U.S. at 258-59. See also Dogbear v. Safeway Stores, Inc., 679 F.2d 1293, 1298 (9th Cir. 1982), cert. den’d, 459 U.S. 990 (1982).
17 Id. (quoting Huecker v. Milburn, 538 F.2d 1241, 1245 n. 9 (6th Cir. 1976); International Ass’n of Machinists, Dist. 776 v. Texas Steel Co., 538 F.2d 1116, 1121-22 (5th Cir. 1976), cert. den’d, 429 U.S. 1095 (1977). See also Bell Prod. Eng’rs Ass’n v. Bell Helicopter Textron, 688 F.2d 997, 999 (5th Cir. 1982); Lackawanna Leather Co. v. United Food & Commercial Workers, Dist. 271, 706 F.2d 228 (8th Cir. 1983) (en banc); cf. Chauffeurs Teamsters & Helpers, Local 765 v. Stroehmahl Bros. Co., 625 F.2d 1092, 1094 (3d Cir. 1980).
18 IUPIW, supra n. 16 (“The threat of an award of attorneys’ fees tends to deter frivolous dilatory tactics. The award also compensates a plaintiff for ‘the added expense of having to vindicate clearly established rights in court.’”).
20 Id.
22 Attorneys representing the enforcing party should, of course, set forth in the engagement letter with the client that the client is obligated to pay any and all attorneys’ fees to the attorneys.