As Virginia Companies Conduct Business Abroad, Arbitration Clauses Ensure They Can Collect When Legal Disputes Occur

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The International Court of Justice, The Hague, Netherlands | shutterstock.com

Virginia businesses are part of the global market, and the global market touches every part of Virginia business. About 700 internationally-owned businesses are located in Virginia.[1] Foreign direct investment in Virginia amounts to $1.3 billion over the past two years and includes cities from all across Virginia—from Martinsville to Virginia Beach to Richmond to Arlington.[2] Exports are just as active. Virginia exported $36.1 billion in products and services in 2014, from industries as diverse as industrial machinery and vehicles to energy to information technology to agricultural goods.[3] These exports come from all parts of the state.[4] Whether it is a Virginia Beach defense contractor providing naval training in Senegal,[5] or an Eastern Shore farmer selling soy beans to Saudi Arabia,[6] Virginia companies are global players.

Through international investment and the export and import of services and products, Virginia businesses are engaged in transactions ranging from simple to complex with foreign companies. Those counterparties could be foreign investors in Virginia, foreign purchasers of Virginia products or services, foreign partners for distribution of Virginia products, or foreign sellers of products and services to Virginia businesses. Unfortunately, just like with domestic transactions, Virginia businesses always face the risk that their transactions will sour — a risk increased when dealing with a foreign counterparty not accustomed to US business and legal practices, or vice-versa for the Virginia business abroad.

When a domestic transaction results in a dispute, a Virginia business can turn to Virginia's state and federal courts — in fact, any American court — to resolve the dispute, no matter where in the United States the counterparty is from. Further, if the Virginia company prevails, it can collect the damages awarded. That confidence in collection does not exist if the judgment debtor is a foreign counterparty with its assets located abroad.

No matter the definitiveness of victory in Virginia court, or the quality of the Virginia company's lawyers, when litigating against a foreign business, on the day after judgment day, the judgment from the Virginia court might be unenforceable against a foreign business in that business's home country.

Arbitration clauses are the key to holding the parties to an international transaction accountable in the case of disputes. Virginia companies, and especially those new to business with foreign counterparties, should always consider contracting to arbitrate disputes. Arbitration not only has the potential to offer a neutral forum and simplified, uniform rules, but even more importantly, arbitration also offers greater certainty of collecting on hard-fought victories against foreign businesses.

Judgments Get Stuck at the Border

For Virginia businesses (and Virginia lawyers) accustomed to contracting with domestic counterparts and litigating disputes in domestic courts, it can come as a surprise to discover that judgments from Virginia and other US courts often do not travel well abroad. Judgments often get stuck at the border because there is no widely adopted international treaty or regime for their enforcement. In most jurisdictions, an American judgment is, at best, evidence of debt, which the claimant must sue on and win — again — before collecting.

Attempts to implement treaties for the enforcement of judgments, such as the 1971 Hague Convention on the Recognition and Enforcement of Foreign Judgments, have made little headway, and while the 2005 Hague Choice of Court Convention has taken effect, its initial coverage is limited.[7] There are also regional treaties and regimes, but the US is not a member to any treaty for the enforcement of judgments.

Since no regional or bilateral treaty applies, a Virginia company attempting to enforce an American court judgment must face off with the local law and courts of the enforcing country. Friendliness to the enforcement of foreign judgments varies greatly, and even the friendliest country's rules can be complex.

Take, for instance, England, where $1.2 billion in Virginia products were exported and from where $406 million in foreign direct investment came into Virginia between 2011 and 2015.[8] English law is relatively friendly to foreign judgments, and in particular to American judgments. There are no real language barriers, and the common law English procedure is comprehensible to American practitioners. Enforcing a foreign judgment involves moving for an action on the American judgment as a debt. English common law offers limited defenses to enforcement: consensual or territorial jurisdiction, notice, public policy, and natural justice (i.e., due process). Adding a wrinkle, however, the laws of enforcement in Northern Ireland and Scotland are different from those applicable in England and Wales.

In the United Arab Emirates (UAE), destination of $157 million in Virginia exports, enforcement of judgments is more difficult. By way of example, in the Emirate of Dubai, the Dubai Civil Court (DCC) applies not only a "public morals" defense to enforcement, but will also refuse to enforce judgments against parties in cases over which the DCC court would have had original jurisdiction. Where, for instance, a plaintiff takes an American court judgment to the DCC to enforce against a resident of Dubai, the DCC will likely say the DCC was the proper forum for the dispute and will refuse to enforce the American judgment unless the Dubai resident has agreed to the American forum. The Dubai International Financial Center (DIFC) Court is more obliging, so long as the defendant or its assets are located in the DIFC's limited jurisdiction.[9]

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On the other hand, the People's Republic of China, Virginia's number one source of imports ($6.9 billion)[10] and foreign direct investment ($2.1 billion for 2011–2015),[11] and second-place for Virginia product exports ($1.7 billion) after Canada,[12] is not so friendly when it comes to enforcing an American judgment.[13] Chinese courts require reciproc-

ity, typically in the form of a treaty, between the originating country and China before they will enforce a judgment. Even then, Chinese courts will evaluate the merits of the judgment for a conflict with Chinese sovereignty, Chinese law, and Chinese security or social interests. Parties seeking to enforce American judgments will face substantial hurdles in China. Courts in Russia and India can be similarly unfriendly to enforcing American judgments.[14]

Arbitration Treaties Facilitate Enforcement of Arbitral Awards

Arbitration awards are far more enforceable across international borders than domestic court judgments because the New York Convention has been adopted in all but a handful of countries. Notable holdouts include Iraq, Taiwan (Virginia's No. 7 export destination[15] and No. 17 import source[16]), Equatorial Guinea, Angola, Namibia, Sudan, South Sudan, Libya, Chad, Ethiopia, Yemen, and much of sub-Saharan Africa.

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In the rest of the world, the New York Convention has the force of law, and awards from arbitrations sited in one state party are enforceable in another state party. Article III of the New York Convention requires that the enforcing country "shall not . . . impose[] substantially more onerous conditions . . . on the recognition or enforcement of arbitral awards . . . than are imposed on the recognition or enforcement of domestic arbitral awards." That means that if a country would enforce a domestic arbitration award, it must enforce a foreign arbitration award under the same circumstances,[17] subject to many countries' reservations that they will only enforce arbitral awards related to commercial disputes and from arbitrations held in a party-state to the New York Convention.

The New York Convention does create limited exceptions to the mandate of enforcement of arbitration awards, but they are small compared to the challenges facing court judgments. For instance, enforcement can be refused if the defendant was not given notice of the arbitration or the opportunity to present its case, if the arbitration was illegal under the law of the country where the arbitration was sited or has been set aside by that country, or if the arbitration is "contrary to the public policy of" the country where enforcement is sought. Of these, the public policy exception is the most potentially troublesome to enforcement, but it is often narrowly construed and applied.

The New York Convention vastly increases the likelihood of enforcement while simplifying the procedure. Returning to the earlier examples, in England and Wales, the enforcement of foreign arbitration awards is strongly favored under the 1996 Arbitration Act. The defenses resemble those listed in the New York Convention. In particular, the public policy exception is very limited in application.

In Dubai, both the DCC and the DIFC will enforce foreign arbitral awards relatively reliably. The DCC generally will enforce such an award even if it might arguably have had jurisdiction over the company or assets involved in the dispute.

Foreign arbitration awards can be successfully enforced in China (with some limitations), even if the arbitration proceedings were held in the US. In fact, foreign arbitration awards are more readily enforceable than awards from arbitrations seated in China. Importantly, only the Supreme People's Court can make the final decision to refuse enforcement of a foreign arbitration award, part of a concerted effort by Chinese courts to provide a pro-enforcement environment for foreign arbitration awards.[18]

Russia and India remain trickier prospects even under the New York Convention, though foreign awards clearly receive more favorable treatment than foreign judgments.

Both countries have applied aggressive readings of the public policy exception in the name of domestic interests in the past, though the courts and a recent statutory amendment have recently improved the perceived position in India. And India imposes a burdensome reciprocity requirement that only recognizes awards from the around fifty countries notified in the Official Gazette of India, but the US has been recognized.

In addition to the New York Convention, the 1975 Panama Convention between the United States and Latin American countries and the Riyadh Convention between Middle Eastern countries provide further avenues for the enforcement of awards in circumstances where the New York Convention might be unavailable.

The Panama Convention, which arose out of historical resistance among Latin American countries to the New York Convention, is now largely redundant with the New York Convention and is rarely invoked. Although under US law the Panama Convention should override the New York Convention where both apply, American courts treat the two identically. The Panama Convention does remain potentially relevant. For instance, it sets default arbitration rules and requires notice be provided of the applicable rules, and failure to comply with these requirements could render an arbitration unenforceable. Also, the Panama Convention could apply to NAFTA Chapter XI arbitrations between American investors and the government of Mexico,[19] and to similar disputes under the DR-CAFTA trade agreement between the Dominican Republic, Central American countries, and the US.

The Riyadh Convention is a significant treaty for instances where a plaintiff seeks to enforce an arbitration award in Iraq, Libya, Yemen, Sudan, Somalia, or the Palestinian Territories, which are members of the Riyadh Convention but not the New York Convention. Take Iraq, which in the past frowned upon international arbitration generally. Since 2011, some Iraqi courts have shown willingness to recognize and apply principles and rules borrowed from international arbitration absent domestic legislation,[20] and that willingness, combined with the Riyadh Convention, could provide an avenue to enforce awards from arbitrations in, for instance, Dubai. It is worth noting that while the Riyadh Convention resembles the New York Convention, its public policy exception extends to awards contrary to Islamic Shari'a, which complicates the enforcement of any award containing interest or damages for future losses.

The Lesson? Remember the Arbitration Clause

For a Virginia company engaged in business with a foreign counterpart without assets in a convenient, friendly jurisdiction, arbitration is often the best way to improve the chances that the Virginia company will collect if it wins the dispute on the merits. Many countries important to Virginia's international commerce will not enforce a foreign court judgment, and even those that will enforce judgments will impose complex procedures full of traps for the unwary. On the other hand, nearly all countries relevant to Virginia businesses will enforce foreign arbitration awards, if sometimes imperfectly. Thus it is critical for any Virginia company, when negotiating a contract with a foreign counterpart, to include an arbitration clause so that if a dispute arises, it

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is resolved by arbitration and the likelihood of collection after victory day is strong.

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Endnotes:

1 *Global Focus*, YesVirginia.org, http://www.yesvirginia.org/GlobalFocus (last visited Sept. 16, 2016).

2 *Explore the Data*, fDiMarkets.com, https://www.fdimarkets.com/explore/ (last visited Sept. 16, 2016).

3 *Fast Facts: Virginia Exports*, Virginia Economic Development Partnership (2015), http://exportvirginia.org/wp-content/uploads/2014/11/Fast-Facts-Topics-Virginia-Product-and-Service-Exports-2015.pdf.

4 *International Trade Across the Commonwealth*, Virginia Economic Development Partnership, http://exportvirginia.org/international-market-research/economic-impact-map/ (last visited Sept. 16, 2016).

5 Hugh Lessig, *To Expand Overseas, Virginia Defense Firms Eye Africa*, Daily Press, Jan. 20, 2016, http://www.dailypress.com/business/dp-nws-virginia-africom-20160120-story.html.

6 *See* Travis Fain, *Virginia Ag Exports Up; List of Top 20 Countries, Top 15 Products,* Daily Press, Mar. 10, 2015, http://www.dailypress.com/news/politics/shad-plank-blog/dp-virginia-ag-exports-up-list-of-top-10-countries-20150310-post.html.

7 The European Union and Mexico have ratified the Convention and it took effect on October 1, 2015. The United States, Singapore, and Ukraine have signed but not ratified the Convention. HCCH, *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=98 (last updated June 2, 2016).

8 *State Exports from Virginia*, U.S. Census Bureau, https://www.census.gov/foreign-trade/statistics/state/data/va.html#ctry (last visited Sept. 16, 2016).

9 DIFC Courts, *Memorandum of Guidance as to Enforcement Between the DIFC Courts and the Commercial Court, Queen's Bench Division, England and Wales* (2013), http://difccourts.ae/memorandum-of-guidance-as-to-enforcement-between-the-difc-courts-and-the-commercial-court-queens-bench-division-england-and-wales/.

10 *State Imports from Virginia*, *supra* note 9.

11 *International Investment*, YesVirginia.org, http://www.yesvirginia.org/GlobalFocus/InternationalInvestment.

12 *State Exports from Virginia*, *supra* note 9.

13 The following countries have enforcement treaties with China: Uzbekistan, Kazakhstan, Kirghizia, Tajikistan, Turkey, Cyprus, Laos, Vietnam, Mongolia, Bulgaria, Belarus, Poland, Russia, Romania, Ukraine, Hungary, Lithuania, Spain, Italy, France, Greece, Argentina, Cuba, Egypt, Morocco, and Tunisia. Hong Kong and Macao also have specific reciprocal arrangements.

14 A cautionary note: While foreign courts disfavor American judgments, Virginia courts are open to recognizing foreign judgments. This unlevel playing field means that if the Virginia company is the defendant, and loses, in a foreign forum, the foreign counterparty might be able to enforce its foreign judgment in the United States and in Virginia with relative ease. *See* Va. Code § 8.01-465.13:3

15 *State Exports from Virginia*, *supra* note 9.

16 *Id.*

17 Note that Article VII of the New York Convention provides that the New York Convention does not alter rights available under existing multilateral or bilateral arbitration treaties.

18 China Int'l Econ. & Trade Arbitration Comm'n, *Circular of Supreme People's Court on Implementing Convention on the Recognition and Enforcement of Foreign Arbitral Awards Entered by China*, http://www.cietac.org/index.php?m=Article&a=show& id=2413&l=en (last visited Sept. 23, 2016); China Int'l Econ. & Trade Arbitration Comm'n, *Circular of the Supreme People's Court on Issues in the People's Courts Handling of Foreign-related Arbitrations and Foreign Arbitrations* (Aug. 28, 1995), http://www.cietac.org/index.php?m=Article&a=show&id=2414&l=en.

19 *Waste Mgmt., Inc. v. United Mexican States*, ICSID Case No. ARB(AF)/00/3, at ¶¶ 9-11, 15-18 (Sept. 26, 2001).

20 *See, e.g.*, *Iraqi Ministry of Finance v Fincantieri-Cantieri Navali Italiani S.P.A.*, No. 288/B/2011 (Federal Appeal Court of Baghdad – Al-Rusafa Sept. 30, 2012).