

Frequently Invoked but Rarely Successful: Objections to Non-domestic and Foreign Arbitral Awards in U.S. Federal Courts

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Courts occasionally remind litigants that challenges to arbitral awards, whether motions to vacate or objections to recognition, enforcement or confirmation,¹ are “frequently invoked but rarely successful.” The aphorism articulates the consequence of the U.S. emphatic federal policy favoring arbitral resolution. The U.S. interest in promoting enforcement of international arbitral awards is even more acute. This paper tests the accuracy of the aphorism, as applied to objections to arbitral awards subject to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention” or “Convention”) through a survey of federal court decisions from 2010 to 2015. The findings of the survey overwhelmingly confirm the truth of the aphorism — objections to New York Convention awards though often asserted are rarely sustained.

Methodology

This survey considered only those decisions analyzing awards pursuant to the New York Convention. References herein to awards or arbitral awards mean arbitral awards subject to the New York Convention.

The decisions surveyed were identified through searches of multiple online databases. The goal of the database searches was to identify all cases during the survey period mentioning the New York Convention. From that collection of almost 700 decisions, those cases addressing whether to enforce or reject an arbitral award were reviewed. Decisions addressing a motion to compel arbitration or to remand a case removed to federal court under section 202 of the U.S. Federal Arbitration Act (the “FAA”), or other issues were not included in the survey.

For the decisions reviewed, the objections considered, the court’s decision on each objection and the resulting impact on the award were noted. Most of the decisions were explicit as to the objections considered while some required the application of judgment to categorize the objection. Unless otherwise indicated, the survey counts every decision considering a motion to confirm, enforce, recognize or vacate an award, and every objection addressed in each decision, even if the decision was reconsidered or overturned on appeal.

¹ For ease of reference, efforts to obtain recognition, enforcement or confirmation are generally referred to herein as efforts to enforce.

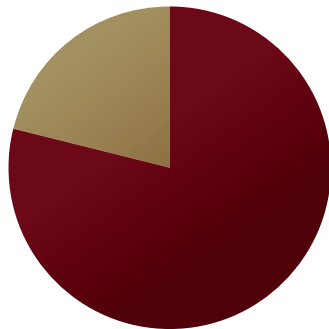
A typical decision to enforce an arbitral award may not be viewed as important from a publishing perspective. A court enforcing an award could easily justify a one page order or final judgment rather than a multipage opinion. A judgment alone is unlikely to be picked-up for publication or available in online databases. Therefore, this survey likely overstates the relative frequency of decisions sustaining objections and rejecting awards.

Awards are Overwhelmingly Enforced

The survey identified 195 decisions entered from 2010-2015 where federal courts considered the validity of arbitral awards. In 41 of those decisions, a court either sustained an objection to an award or refused to consider enforcement of the award for a reason external to the New York Convention.

ALL AWARDS

- Enforced
- Not Enforced



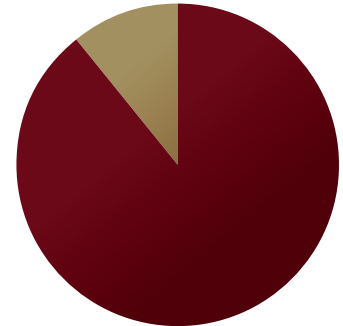
Of the 41 decisions rejecting an award, 20 rejected an award for a reason external to the New York Convention. The most common of the reasons external to the Convention that were relied on to refuse consideration of an award were lack of personal jurisdiction or the application of the U.S. Foreign Sovereign Immunities Act.

The survey identified only 11 decisions that rejected arbitral awards for one of the reasons specified in Article V of the Convention or Section 10 of the FAA. Ten other decisions rejected awards for other reasons

that are arguably tied to the New York Convention such as the lack of an arbitration agreement, limitations or that the dispute was non-commercial.

AWARDS REJECTED BASED ON A CONVENTION OBJECTION

- Awards
- Convention Objection



Excluding those decisions for which a reason external to the New York Convention was relied upon to refuse consideration of the award or for which an agreement to arbitrate was lacking, 92% of the decisions during the survey period enforced the awards under review.

Considering only challenges based on Article V and Section 10 objections, Convention awards fared even better. Excluding those decisions that considered awards, but were focused solely on objections other than Article V or Section 10, 95% of those decisions enforced the award at issue. Taking into consideration that three of the decisions rejecting awards under Article V or Section 10 were reversed on appeal, the ultimate success rate for awards during the survey period was 98%.

Objections to Arbitral Awards

In the 195 decisions reviewed, the survey identified a total of 281 objections to arbitral awards. Many decisions considered multiple objections while others analyzed whether to enforce an award despite the lack of an opposition. Of the 281 objections, 35 were external to the Convention, 118 were based on Article V, 69 were based on Section 10, 31 were based on manifest disregard for the law, and 31 were based on other Convention or FAA provisions.

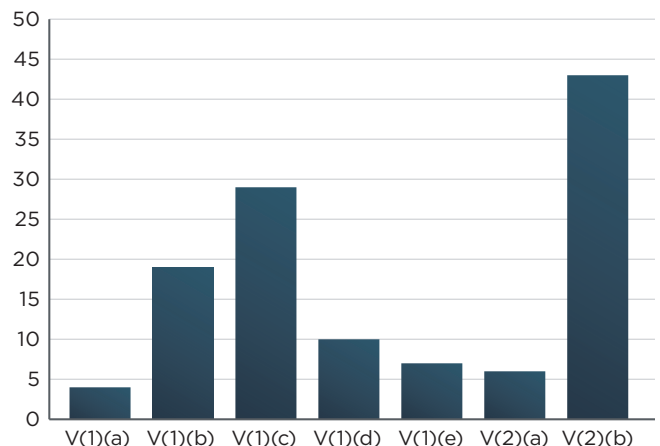
Objections to Arbitral Awards Based on Article V of the New York Convention

Pursuant to Section 207 of the U.S. Federal Arbitration Act, a court “shall confirm [an arbitration award falling under the New York Convention] unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention.” The New York Convention specifies only seven bases upon which a court may decline to recognize or enforce an award. Those bases are found in Article V of the Convention:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
 - (a) the parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
 - (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
 - (c) the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
 - (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
 - (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Each of the Article V objections was entertained at least once by a U.S. federal court during the survey period with objections based on Article V(1)(c) and V(2)(b) being the most frequently asserted.

ARTICLE V OBJECTIONS



Article V Objections in the Aggregate

The 118 Article V objections identified in the survey comprised 54% of the objections to awards that were based on Article V, Section 10 or manifest disregard of the law. Only nine instances of an Article V objection being sustained were identified with one of those reversed on appeal. As a group, 92% of all Article V objections were denied. Taking the one reversal into consideration, 93% of Article V objections were unsuccessful.

Objections Based on Article V(1)(a)

Article V(1)(a) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the parties to the arbitration agreement were, under the law applicable to them, under some incapacity, or the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.

Only four instances of an Article V(1)(a) objection were identified in the survey making it the least often asserted objection during the survey period. No decision was identified during the survey period that sustained a V(1)(a) objection.

Objections Based on Article V(1)(b)

Article V(1)(b) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.

Objections under Article V(1)(b) were the second most frequently identified Article V(1) objection and is third among all Article V objections. Nineteen instances were identified comprising 28% of Article V(1) objections and 16% of the Article V objections identified in the survey. Of the 19 Article V(1)(b) objections identified, only one was sustained.

Objections Based on Article V(1)(c)

Article V(1)(c) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the award deals with a difference not contemplated by or not falling within the term of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

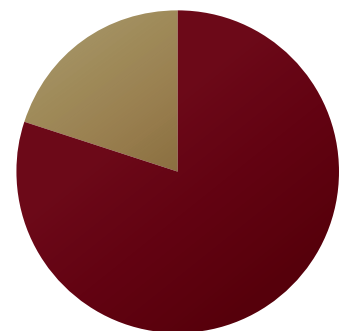
Article V(1)(c) objections were the most frequently asserted objections under Article V(1), and the second most frequently asserted of all Article V objections. Article V(1)(c) objections represent 42% of the Article V(1) objections identified in the survey and 25% of the all Article V objections identified. Despite the frequency with which Article V(1)(c) objections are asserted, no instance of an Article V(1)(c) objection being sustained was identified.

Objections Based on Article V(1)(d)

Article V(1)(d) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the composition of the arbitral authority or the arbitral procedure was not in accordance with the parties' agreement, or failing such agreement, was not in accordance with the law of the country where the arbitration took place.

ARTICLE V(1)(d) OBJECTIONS

- Overruled
- Sustained



Article V(1)(d) objections comprise 14% of the Article V(1) objections identified in the survey, and 8% of all Article V objections identified. Two instances of a court sustaining an Article V(1)(d) were identified. Article V(1)(d) objections experienced a 20% success rate.

Objections Based on Article V(1)(e)

Article V(1)(e) authorizes a court to refuse recognition and enforcement of an award if it is demonstrated that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Article V(1)(e) objections comprise 10% of Article V(1) objections identified and 6% of all Article V objections identified. Only one instance was identified where a court sustained an Article V(1)(e) objection giving Article V(1)(e) objections a 14% success rate.

Objections Based on Article V(2)(a)

Article V(2)(a) authorizes a court in the country where recognition and enforcement is sought to refuse recognition and enforcement of an arbitral award if the court finds that the subject matter of the parties' dispute is not capable of settlement by arbitration under the law of that country.

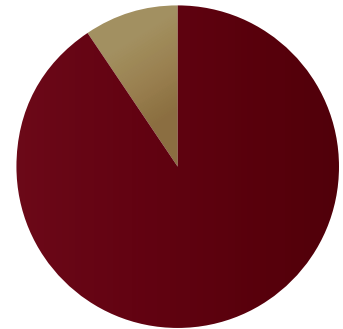
Article V(2)(a) objections comprise 12% of the V(2) objections identified in the survey and 5% of all Article V objections identified. Only one instance of a court sustaining an V(2)(a) objection was identified giving V(2)(a) objections a 17% success rate.

Objections Based on Article V(2)(b)

Article V(2)(b) authorizes a court in the country where recognition and enforcement of an arbitral award is sought to refuse recognition and enforcement if the court finds that doing so would be contrary to the public policy of that country.

ARTICLE V(2)(b) OBJECTIONS

■ Overruled
■ Sustained



Objections under Article V(2)(b) were the most often asserted of any objection to a New York Convention award. Article V(2)(b) objections identified comprise 36% of all Article V objections and 88% of Article V(2) objections. While Article V(2)(b) objections were the most frequently sustained Article V objection, with four such instances identified, only 9.5% of all Article V(2)(b) objections identified were sustained and one of those was reversed leaving V(2)(b) objections with a 7% success rate.

Objections Based on Section 10(a) of the U.S. Federal Arbitration Act

Most, but not all, federal courts agree that a New York Convention award entered in the United States is subject to the vacatur provisions of Chapter 1 of the FAA. Assuming that a motion to vacate is authorized, the bases for such a motion are found in Section 10(a), and are:

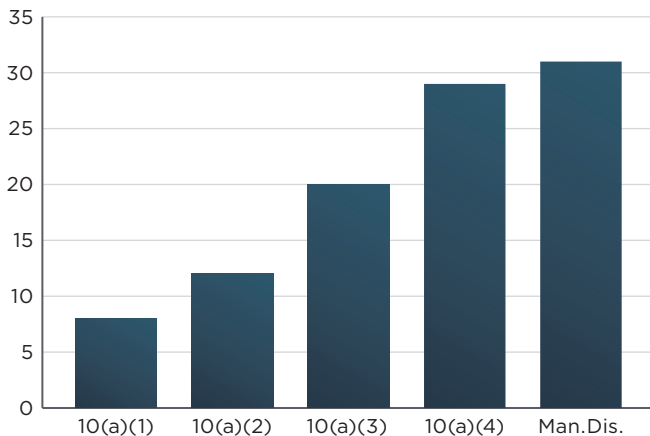
- (a) In any of the following cases, the U.S. court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
- (1) where the award was procured by corruption, fraud, or undue means;
 - (2) where there was evident partiality or corruption in the arbitrators, or either of them;

- (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
- (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Some, but not all, federal circuits will also entertain a motion to vacate based on an objection that the arbitrators committed “manifest disregard for the law.”

Each of the Section 10(a) objections was entertained at least once by a U.S. federal court during the survey period. Objections based on Section 10(a)(4) and 10(a)(3) were the most common of the numbered objections. Manifest disregard, though not universally recognized as a basis to vacate an award, was the most commonly asserted of the objections.

OBJECTIONS BASED ON SECTION 10(a) AND MANIFEST DISREGARD FOR THE LAW



Among the decisions reviewed for the survey, efforts to vacate arbitral awards under Section 10(a) were rarely successful.

The 69 Section 10(a) objections identified in the survey comprised 32% of objections based on Article V, Section 10 and manifest disregard of the law. Only three instances of a Section 10(a) objection being sustained were identified with two of those reversed on appeal.

Objections to awards based on alleged manifest disregard for the law fared the worst of any group of objections to arbitral awards. A total of 31 objections based on manifest disregard for the law were identified, comprising 14% of the objections based the Article V, Section 10 and manifest disregard for the law. None of the identified manifest disregard for the law objections was sustained.

Section 10(a) Objections in the Aggregate

The survey identified a total of 69 Section 10(a) objections. Of those, only three were sustained, and two of those were reversed on appeal. As a group, 96% of all Section 10(a) objections were denied. Taking the two reversals into consideration, 99% of Section 10(a) objections to Convention awards that identified in the survey were unsuccessful.

Objections Based on Section 10(a)(1)

Section 10(a)(1) authorizes a court to vacate an award where the award was procured by corruption, fraud or undue means.

Section 10(a)(1) objections were the least frequently asserted of the Section 10(a) objections. Eight instances of a Section 10(a)(1) objection were identified in the survey, however none of those objections were sustained.

Objections Based on Section 10(a)(2)

Section 10(a)(2) authorizes a court to vacate an award where there was evident partiality or corruption in the arbitrators.

Section 10(a)(2) objections were the second least frequently asserted 10(a) objections comprising 17% of the 10(a) objections identified. Of the objections identified, only one was sustained, but that ruling was reversed on appeal. Taking that reversal into consideration, the survey identified no successful Section 10(a)(2) objections.

Objections Based on Section 10(a)(3)

Section 10 (a)(3) authorizes a court to vacate an award where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

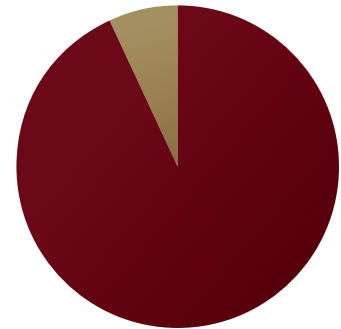
Objections under Section 10(a)(3) were the second most commonly asserted of the Section 10(a) objections comprising 29% of the Section 10(a) objections identified. None of the 10(a)(3) objections identified was sustained.

Objections Based on Section 10(a)(4)

Section 10(a)(4) authorizes a court to vacate an arbitration award where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

SECTION 10(a)(4) OBJECTIONS

- Overruled
- Sustained



The most frequently asserted Section 10(a) objection was Section 10(a)(4) comprising 42% of the Section 10(a) objections identified. Only two of the 10(a)(4) objections identified were sustained, and one of those was reversed on appeal. As a result of that reversal, Section 10(a)(4) objections saw a 4% success rate.

Objection for Manifest Disregard of the Law

Manifest disregard for the law is not universally recognized as a valid objection to an arbitral award. Some federal courts recognize the objection while others do not. Those federal courts that recognize the objection generally require a showing that what the law allegedly ignored was well defined, explicit and clearly applicable, and that the arbitrators appreciated the existence of the clearly governing legal principle but decided to ignore it or pay no attention to it. Despite the split among federal courts on the existence of manifest disregard for the law as a valid objection, it remained the second most commonly asserted of all objections identified. Thirty-one instances of a party claiming manifest disregard for the law were identified in the survey. None of those instances were sustained.