

THE POWER OF THE NEW YORK CONVENTION

WHY NORTH CAROLINA BUSINESSES SHOULD TAKE ADVANTAGE OF IT.



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The best markets for many of our business clients in North Carolina are overseas or online, with customer bases spread across the world. As they grow their business on a global scale, they inevitably grow concerned with being able to “hold the other side” to the deal. International arbitration is one powerful tool businesses engaged in the global economy have to mitigate this risk. When drafted properly in the parties’ contract, a North Carolina company can file a claim in arbitration, have it heard and adjudicated in North Carolina, and then be able to enforce the arbitral award in almost any country in the world where the other side has assets.

The enforcement of arbitral awards is based on a treaty called the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). The United States is a contracting state to the New York Convention along with about 168 other countries and territories.

THE NEW YORK CONVENTION APPLIED IN NORTH CAROLINA-FOREIGN AWARDS ENFORCED.

On June 24, 2022, the Fourth Circuit Court of Appeals affirmed the North Carolina federal court’s ruling in *Reddy v. Buttar*, enforcing a Singaporean arbitration award under the New York Convention, against a citizen and resident of North Carolina. The plaintiff Rachan Reddy initiated arbitration proceedings against the defendant Rashid Buttar after a dispute arose concerning the sale of real property in the Philippines. The parties executed a purchase agreement (Agreement) under which Buttar was to sell Reddy shares of companies, which purportedly owned an island in the Philippines, for \$3 million. Reddy paid several advances totaling \$1.5 million, as well as \$50,000 for taxes. Reddy later alleged that Buttar had breached the Agreement’s warranty of title and demanded a refund of \$1.5 million. However, Buttar refused and instead sought to enforce the Agreement and obtain the remainder of the purchase price, along with applicable fees and costs, for a total of \$1.99 million.

Pursuant to the parties’ Agreement, Reddy commenced arbitration in Singapore, although Buttar objected on the basis that he had not signed the Agreement. Thereafter, Buttar failed to attend the arbitration hearing. After reviewing evidence including emails between Buttar and Reddy, the arbitrator found both parties signed the Agreement, and enforced it against Buttar for \$1.55 million, along with nearly \$500,000 in legal fees and costs.

When Reddy sought to enforce the award in the Western District of North Carolina under the New York Convention, Buttar moved to dismiss. The District Court found Buttar’s arguments unpersuasive and denied his motion to dismiss before ultimately granting Reddy’s motion for summary judgment to enforce the award.

Buttar appealed to the Fourth Circuit and argued the District Court lacked subject matter jurisdiction because the New York Convention required an agreement to be in writing and signed

by the parties to be enforceable. However, the Fourth Circuit disagreed, and held the specific written-and-signed requirements went to the merits of establishing an award's enforceability under the New York Convention, rather than subject matter jurisdiction.

Buttar also argued the District Court lacked general personal jurisdiction over him as he had moved to New Zealand prior to Reddy filing suit. After conducting jurisdictional discovery, the District Court concluded Buttar had *not* overcome the presumption that general personal jurisdiction existed over him in North Carolina. Factors weighing in favor of general jurisdiction included Buttar's involvement in multiple business ventures in the state, maintenance of numerous local utility accounts and addresses, receipt of legal documents within the state, and listing of a local address on his sole bank account. Buttar also maintained North Carolina medical and pharmacy licenses and was registered to vote in the state.

Finally, the Fourth Circuit rejected Buttar's contention that the arbitration agreement was a forgery, finding no evidence to support this claim. Rather, the evidence demonstrated that Buttar attempted to enforce the purchase price against Reddy using the very same agreement and only alleged it was false (or a forgery) after Reddy initiated arbitration proceedings against him. Noting that an arbitrator's findings of fact are entitled to deference, the Fourth Circuit upheld the District Court's opinion in its entirety.

The *Reddy* decision is an example of the powerful enforcement powers that come with international arbitration awards under the New York Convention.

TIME FOR NORTH CAROLINA BUSINESSES TO TAKE ADVANTAGE OF THE NEW YORK CONVENTION.

Recent cases have shown examples of the enforcement of foreign arbitral awards in North Carolina, which means it is time for North Carolina businesses to take advantage of this powerful tool as well.

In a prime example of how powerful the New York Convention can be, the

federal court in the District of Columbia confirmed and enforced a \$27.4 million arbitral award against the Belize government in *BCB Holdings Ltd. v. Gov't of Belize*. On August 18, 2009, the petitioners obtained an arbitral award against the Government of Belize (GOB) before the London Court of International Arbitration. The petitioners sought enforcement of the award in Belize, but Belize's highest court ruled the award was invalid and unenforceable as "repugnant to public policy."

On July 1, 2014, the petitioners filed a confirmation petition in the federal court in the District of Columbia under the New York Convention. The District Court confirmed the award for about \$27,430,000. The GOB subsequently issued legislation that made it a criminal offense to seek enforcement of an "unlawful" judgment against it. The petitioners filed a second action in the federal court in D.C. seeking an injunction to prevent the GOB from interfering with their collection efforts. The District Court ultimately held it was unnecessary to rule on the injunction because property of a foreign state located in the United States "is not immune from attachment" from the judgment being enforced against it. So, the petitioners could collect on the GOB's assets located in the U.S. The GOB's refusal to enforce the award in Belize did not prevent it from being enforced in the U.S. or any other jurisdiction that was a signatory to the New York Convention.

The New York Convention can be a powerful tool, even in the face of a foreign government's refusal to recognize an arbitral award and legislation to criminalize its enforcement. Using international arbitration will afford North Carolina businesses the right to seek enforcement of their awards in any New York Convention contracting state.

PRACTICE TIPS FOR NORTH CAROLINA BUSINESSES

In reviewing and drafting international sales and distributor contracts, we recommend the use of well-recognized arbitral institutions for the dispute resolution clause. Doing so not only provides the company with the potential enforcement power described in this

article but also shows the counterparty that the North Carolina company is sophisticated in international contracts and willing to resolve disputes efficiently and effectively. We often recommend clients review the AAA-ICDR "Clause Builder" tool or stick to the "model clauses" published by international arbitration institutions, like the International Chamber of Commerce (ICC).

Of course, every transaction may be sufficiently unique to call for different terms to be negotiated. When drafted properly, North Carolina businesses will be able to enforce arbitral awards across the globe with the power of the New York Convention. ■



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Mica Nguyen Worthy serves as legal counsel to clients in the aviation and global supply chain industries. As a Certified Global Business Professional, Mica has a specific focus on assisting global clients with their international operations including trade issues, international contracts, trade credit payment disputes, international arbitration, and dispute resolution. Mica has been recognized by North Carolina Super Lawyers® in the field of Civil Litigation and maintains an AV rating with Martindale Hubbell.

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