



Arbitration v. Litigation: How best to speak foreign when disputes arise



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**DEVELOPING AND FINANCING INTERNATIONAL
BUSINESS OPPORTUNITIES**

The Broad Street Capital Group

Penn Club New York, NY



PROFILE

Marks & Sokolov is an international law firm providing a full range of transactional and litigation and arbitration services to international clients throughout the world focusing on :

Businesses and individuals from Russia and countries from the former U.S.S.R in the United States and around the world;

US and other Western clients doing business in Russia and countries of the former Soviet Union.



US LAW

Federal Arbitration Act

The Federal Arbitration Act, 9 U.S.C. § 1 et seq., applies in both state courts and federal courts where the transaction contemplated by the parties "involves" interstate commerce.



1958 New York Convention on the Recognition and Enforcement of Arbitral Awards

The New York Convention applies to the recognition and enforcement of foreign arbitral awards and the referral by a court of a dispute to arbitration. As of 1 December 2012, there are 148 countries which have adopted the New York Convention





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EXPENSE

People believe that arbitration is less expensive



But:

Institution Fee

£ 1750 + Administrative fees (London Court of International Arbitration)

4-11% Administrative Fee of the amount of dispute (Stockholm Chamber of Commerce)

One to Three Arbitrator's Fee

£450 -1000 per hour plus VAT (London Court of International Arbitration)

Counsel Fee

London Barristers: £350 - £2000 + VAT.



FASTER

People believe that arbitration is faster

But:

- i. Arbitrators' schedules
- ii. Counsel's schedules
- iii. Witnesses' schedules



CONFIDENTIALITY

**People believe that
arbitration is confidential**



But:

Enforcement

An award must be filed with the court where an enforcement order is sought. Pleadings are publicly accessible in U.S. Parties may arrange for publication of awards in the media in any case.



DISCOVERY

People believe that arbitration is less intrusive because of less discovery.



But:

i. There is often a need for discovery from third parties which may be difficult to obtain in arbitrations.

ii. 28 U.S.C. §1782

28 U.S.C. § 1782 allows discovery in the United States to be used “in aid” of proceedings, including arbitrations taking place outside the U.S. In order to obtain discovery, a party shall apply to a U.S. federal court, which can order discovery of documents and depositions of witnesses in the U.S.



People believe that arbitration is more efficient

Contracts

Contracts contain Arbitrational clause which provide certainty for arbitration.

But:

Torts

A non-signatory cannot be bound to arbitrate unless it is bound "under traditional principles of contract and agency law" to be akin to a signatory of the underlying agreement. *Bel-Ray Co., Inc. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 444 (3d Cir. 1999). Thus, arbitration may result in piece-meal litigation with conflicting results.





People believe that Arbitration avoids local Bias

But: 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards provides for first level of appeal in country where the award is rendered

Article V (e):

Recognition and enforcement of the award may be refused...if...:

(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.

Law of the Russian Federation on International Commercial Arbitration, Article 34:

(1) the party making the application for setting aside furnishes proof that:

- he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(2) the court finds that:

- the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or
- the award is in conflict with the public policy of the Russian Federation.

Arbitration Procedural Code of the Russian Federation, Article 233.

1. The decision of a reference tribunal may be repealed by the arbitration court only in cases mentioned in the present Article

4. A decision of the international commercial arbitrage may be repealed by the arbitration court on the grounds, which are laid down in the international treaty of the Russian Federation and in the federal law on international commercial arbitrage.



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APPELLATE REVIEW

People believe arbitration is better because it avoids extended appellate review.

But:

Arbitrators make errors which are subject to very limited review by statute.

Parties may not extend the level of review beyond what is in the statute.

Oxford Health Plans LLC v. Sutter, 133 S. Ct. 2064, 2068 (2013):

Under the FAA, courts may vacate an arbitrator's decision "only in very unusual circumstances." *First Options of Chicago, Inc. v. Kaplan*, 514 U. S. 938, 942 (1995) That limited judicial review cannot be expanded by the parties and "maintain[s] arbitration's essential virtue of resolving disputes straightaway." *Hall Street Associates, L. L. C. v. Mattel, Inc.*, 552 U. S. 576, 588 (2008). If parties could take "full-bore legal and evidentiary appeals," arbitration would become "merely a prelude to a more cumbersome and time-consuming judicial review process." *Id.*





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ENFORCEMENT

People believe that Arbitration is needed for enforcement because 148 countries recognize the NY Convention and many countries will not enforce state court judgments.

But:

The 1962 Uniform Foreign Money Judgment Recognition Act allows recognition and enforcement of foreign money judgments. It has been enacted by over thirty-two states.

Under the Act:

SECTION 1: *Definitions*

(2) “foreign judgment” means any judgment of a foreign state granting or denying recovery of a sum of money, other than a judgment for taxes, a fine or other penalty, or a judgment for support in matrimonial or family matters.

SECTION 2: *Applicability*

This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal.



THANK YOU FOR YOUR ATTENTION!

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