Arbitration has increasingly become a favored means of transnational dispute resolution, primarily because of a desire to avoid the complex and prolonged process of international litigation. Parties to an arbitration with a foreign company can get tripped up, however, by seemingly simple procedural issues like service of process, because the governing statutes are unclear. Any claimant in an arbitration of course hopes that it will result in an enforceable order. But if issues like service of process and personal jurisdiction are not resolved at the outset of international arbitration, parties can face significant headaches after its conclusion.

For example, if a foreign party does not respond to a demand to arbitrate, any resulting award will not be enforceable, either in the United States or abroad, if process was not properly served. And even if the foreign party does appear and defend itself at the arbitration, it may later argue that the award is unenforceable because of the absence of personal jurisdiction.

This article addresses the procedural issues most likely to be faced by parties involved...
in a commercial arbitration with a foreign entity, and provides practical guidance to the practitioner regarding steps that should be taken when drafting arbitration agreements, and at the outset of an arbitration, to ensure that an award granted by the tribunal will be confirmed and enforced.

**Location Is Key to Jurisdiction**

One decision faced by all parties prior to the commencement of arbitration proceedings is where the arbitration will take place.

It is critical for companies that are contemplating commercial arbitration with a foreign entity to seek arbitration in a location where personal jurisdiction can be exercised over the foreign party.

If the foreign party agrees to arbitrate in a specific state, for example, personal jurisdiction problems are unlikely to arise because courts, including those in New York, have long held that the foreign party has impliedly consented to the jurisdiction of courts in that state. Indeed, even if a specific location is not expressly agreed upon in the arbitration clause, some—but not all—cases hold that arbitration clauses that identify a specific organization before which the arbitration will be held are enough to imply the parties’ consent to the jurisdiction of courts in the state where that organization is based.

Under the logic of these cases, parties who agree to arbitrate before organizations like the New York Stock Exchange or the National Association of Securities Dealers have in effect consented to the jurisdiction of courts in New York, where those organizations are based.

If an arbitration agreement with a foreign party says only that the arbitration will be in the United States, it is imperative to select a location for the arbitration where the foreign party is subject to personal jurisdiction.

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**Serving a Foreign Company**

Service of an arbitration demand on a foreign company can be problematic, since the statutes and treaties governing commercial arbitrations are not much help in determining how to proceed.

Neither the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New York Convention”) nor the Inter-American Convention on International Commercial Arbitration (the “Panama Convention”), the principal treaties governing arbitrations between citizens of the United States and foreign citizens, identifies how service should be made on a foreign company.

These treaties do, however, provide warnings about the consequences of not providing adequate notice.

The New York Convention specifies that courts may refuse to recognize and enforce an arbitration award where the respondent “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings.” Likewise, the Panama Convention permits courts to refuse “recognition and execution” of an arbitration decision if the respondent “was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed.”

Because the New York and Panama Conventions do not specify how notification should be provided to a foreign entity, parties must look elsewhere for guidance. Unfortunately, the Federal Arbitration Act is not much more help: It refers to service of process only in the context of a motion to compel arbitration, requiring that service be made in accordance with the Federal Rules of Civil Procedure.

Nor do the Federal Rules give sufficient guidance: Under Fed. R. Civ. P. 4(h)(2), parties are instructed that service upon a foreign company may be made as prescribed by Fed. R. Civ. P. 4(f), except for personal delivery. But the methods of service prescribed in Rule 4(f) all require the intervention of domestic or foreign courts or agencies, which makes no sense in the context of an arbitration.

Thus, for example, Rule 4(f)(1) permits service under the Hague Convention or its equivalent—an onerous process that requires intervention of a foreign country’s “Central Authority” that must itself serve the document or arrange to have it served by an appropriate agency.

Rule 4(f)(2)(A) provides for service in the manner prescribed by the law of the foreign country for service in that country—which, depending on the country, may require the intervention of foreign courts and a long, expensive and drawn-out procedure.

Rule 4(f)(2)(B) allows service in response to a letter rogatory—another expensive and time consuming process. Rule 4(f)(2)(C) is a little more reasonable, permitting service by any form of mail requiring a signed receipt, provided it is addressed and dispatched by the clerk of the court to the party to be served—but even that rule requires court intervention, and it is also subject to the significant caveat that it does not apply if prohibited by the law of the foreign country.

If parties have previously agreed to an institutional arbitration under the auspices of a particular organization like the American Arbitration Association (AAA), another source of guidance regarding how to properly notify an opposing party of the arbitration proceedings is the governing rules of that organization.
For instance, Article 18(1) of the AAA's International Arbitration Rules instructs parties that unless they have otherwise agreed to a different set of standards, "all notices, statements and written communications may be served on a party by air mail, air courier, facsimile transmission, telex, telegram or other written forms of electronic communication addressed to the party or its representative at its last known address or by personal service." Presumably "all notices" includes the initial demand.

Similarly, parties that agree to arbitrate under the World Intellectual Property Organization (WIPO) Rules are informed that "any notice or other communication that may or is required to be given under these Rules shall be in writing and shall be delivered by expedited postal or courier service, or transmitted by telefax, e-mail or other means of telecommunication that provide a record thereof." These liberal rules are typical of the rules of many international arbitration organizations and suggest that almost any reasonable form of notice will be considered sufficient.

The strict, formalistic requirements of the Federal Rules of Civil Procedure on the one hand, and the more liberal rules of international arbitration organizations on the other hand, provide mixed messages to the practitioner whose arbitration agreement does not specify what rules apply. Fortunately, despite that confusion, most courts do not require court intervention in order to achieve valid service of process, and instead adopt a due process standard.

The Courts' Due Process Test

For example, the Second Circuit has interpreted Article V(1)(b) of the New York Convention—the section of the Convention that permits a court to deny enforcement of an arbitral award if a party was "not given proper notice"—as sanctioning "the application of the forum state's standards of due process." But what exactly does due process—a term primarily developed in the context of American domestic proceedings—mean in the context of service of process on a foreign entity in international arbitration proceedings?

In *Employers Insurance of Wausau v. Banco de Seguros Del Estado*, 199 F.3d 937, 942 (7th Cir. 1999), a case arising under the Panama Convention, the Seventh Circuit concluded that the due process notions implicit in Article 5(1)(b) of the Panama Convention mean that a party to an arbitration is entitled to "[t]he right to adequate notice." Relying on the Supreme Court's decision in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the Seventh Circuit concluded that the requirement of "adequate notice" includes the obligation that a party give "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and "that the notice provided 'be of such nature as reasonably to convey the required information.'"

*Employers Insurance* arose from an arbitration between Wausau, a Wisconsin insurance company, and Banco, a bank in Uruguay. When Wausau petitioned a Wisconsin state court for an order compelling Banco to proceed with arbitration, it served a copy of the petition on the New York law firm designated in the arbitration agreement as a party to accept service for Banco. Banco later claimed that the firm did not notify it of the petition. The Wisconsin trial court granted Wausau's motion to compel arbitration. After prevailing in the arbitration, in which Banco did not participate, Wausau filed a petition to confirm the award, and Banco sought to vacate on the ground that service of process was ineffective.

The Seventh Circuit first considered Wausau's argument that Banco had waived its right to notice reasonably calculated to apprise it of the pending arbitration by designating a special agent for service of process. The court decided that there was "no evidence that Banco knowingly waived its right to 'notice reasonably calculated,'" and concluded that "Banco's designation of an agent for service of process did not constitute a waiver of its right to notice reasonably calculated to allow it to be heard."

The court next considered Banco's argument that it did not receive proper notice, because Wausau did not follow Wisconsin's state law procedures or comply with the Foreign Sovereign Immunities Act, and that even if Wausau had followed those procedures, they did not provide "notice reasonably calculated" as required by the United States and Wisconsin Constitutions.

The Seventh Circuit disagreed with Banco's contention that Article 5(1)(b) of the Panama Convention required service of process to be made in accordance with the forum state's service of process statute. The court noted that while service of process according to statute raises the presumption that due process has been met, "Article 5(1)(b) only provides Banco with the protection of due process, and due process does not require Wausau to meet state statutory requirements for service of process."

Ultimately, the court concluded that Banco's designation of a registered agent for service of process created an agency relationship from which actual notice could be inferred. Because "service upon a duly appointed agent comports with the due process clause," the Seventh Circuit decided that "Wausau's motion to compel arbitration effectively gave notice of arbitration proceedings" and affirmed the district court's grant of Wausau's petition to confirm the arbitration award.

A host of other cases also prove the point that, notwithstanding the language of the Federal Arbitration Act, "adequate notice" does not mean strict technical adherence to the legal requirements of state service of process statutes or the Federal Rules of Civil Procedure.

In *Merrill, Lynch, Pierce, Fenner & Smith Inc. v. Lecopolous*, 553 F.2d 842, 845 (2d Cir. 1977), for example, plaintiff sought to compel arbitration against a Greek national and served his attorney with a demand to arbitrate. Even though the portion of the Federal Arbitration Act relevant to that demand explicitly requires service of the petition in the manner provided by the Federal Rules of Civil Procedure, the Second Circuit reversed the lower court's dismissal for lack of personal jurisdiction, concluding that the receipt of notice by defendant's attorneys was sufficient.
“Regardless of the precise legal status of [defendant’s] attorneys when they appeared in the district court, no unfairness results from giving effect to the notice they actually received.”

Similarly, in Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes, 336 F.2d 354, 364 (2d Cir. 1964), the Second Circuit affirmed an order compelling arbitration where the foreign company had been served by registered mail pursuant to an ex parte court order. Since by signing the arbitration agreement “the appellant consented beforehand to the jurisdiction of the district court, the sole function of process in this case was...to notify the appellant that proceedings had commenced. This function was certainly performed.”

And in InterCarbon Bermuda, Ltd. v. Caltex Trading & Transport Corp., 146 F.R.D. 64, 68 (S.D.N.Y. 1993), the court held that “[d]efects in service of process may nevertheless be excused where considerations of fairness so require, at least in cases that arise pursuant to arbitration proceedings.”

Conclusion

When drafting an arbitration agreement it is of utmost importance to keep in mind the ultimate goal of obtaining a judgment from the arbitration tribunal that can be enforced in the United States and abroad. To that end, the best practice is to specify where the arbitration will be held and, if possible, to include a clause indicating that both parties consent to the jurisdiction of the courts in a particular state.

No matter what the arbitration clause states, it is also critical to give adequate notice when serving process. While complying with Fed. R. Civ. P. 4(f), or even state statutes on service of process, will likely give rise to a presumption that the notice is adequate, it is generally not necessary to meet the technical requirements of those rules or statutes as long as process is served in a manner reasonably calculated to inform the opposing party of the pendency of action and to give it an opportunity to defend itself.

1. See Victory Transp. Inc. v. Comisaria Gen. de Abastecimientos y Transportes, 336 F.2d 354, 364 (2d Cir. 1964) (by agreeing to arbitrate in a state, a party is “deemed to have consented to the jurisdiction of the court that could compel the arbitration proceeding in [that state]. To hold otherwise would be to render the arbitration clause a nullity.”); see also Doctor’s Assoc., Inc. v. Smart, 85 F.3d 975, 979 (2d Cir. 1996); Uniointrust Stock Life Ins. Co. of Am. v. Beneficial Life Ins. Co., 774 F.2d 524, 527 (1st Cir. 1985) (“When Beneficial agreed to arbitrate in Portland, Maine...it impliedly consented to the personal jurisdiction of Maine courts.”).


3. See, e.g., PaineWebber Inc. v. Chase Manhattan Privy Bank (Switzerland), 260 F.3d 453, 463-64 (5th Cir. 2001) (because arbitration clause made no “mention of a specific geographic location for arbitration,” did not include “selection of an arbitral forum such as the NYSE or the NASD,” and did not include “language requiring arbitration,” jurisdiction did not exist over Chase Manhattan).

4. See, e.g., Dayhoff Inc. v. H.J. Heinz Co., 86 F.3d 1287, 1302-03 (3d Cir. 1996) (reversing dismissal of Heinz’s Italian subsidiary for lack of personal jurisdiction because, inter alia, agreements were performed in the United States); Jain v. de Merle, 51 F.3d 686, 692 (7th Cir. 1995) (“One foreign party can compel another foreign party to arbitrate in the United States...where the second party...has contacts with that forum sufficient to meet the requirements of personal jurisdiction.”)

5. The New York and Panama Conventions are largely similar and, according to the House Report by the Judiciary Committee accompanying the bill implementing the Panama Convention in the United States, were “intended to achieve the same results.” 21 U.S.T. 2517, 330 U.N.T.S. 1958, reprinted at 9 U.S.C.A. §201 (1999); 14 I.L.M. 336, reprinted at 9 U.S.C.A. §301 (1999); see H.R. Rep. No. 101-501, 101st Cong., 2d Sess. 5 (1990). In 1990, reprinted in 1990 U.S.C.C.A.N. 675, 678. Indeed, the Judiciary Committee noted its expectation “that courts in the United States would achieve a general uniformity of results under the two conventions.” Id. Both Conventions require member states to recognize the validity of written agreements to arbitrate, provide a procedure for parties to confirm arbitration awards in court, and provide similar grounds for refusing recognition or enforcement of awards. Whereas the New York Convention applies to any country that ratifies the agreement, signatories to the Panama Convention are limited to members of the Organization of American States. Where the requirements for application of both the Panama and New York Conventions are met—i.e., where the contracting parties are from states that are signatories to both conventions—the Panama Convention will apply only “if a majority of the parties to the arbitration agreement are citizens of a state or states” that have ratified the Panama Convention and are members of the Organization of American States. See 9 U.S.C. §305.


7. Panama Convention Article 5(1)(b).


9. Before the 1993 amendments to Fed. R. Civ. P. 4, the previous version of this rule permitted service of process outside the United States where authorized by state or federal law. See Fed. R. Civ. P. 4 advisory committee’s notes. Under that version of the rule, looser forms of service, such as U.S. mail to the headquarters of the foreign company, were permitted so long as the manner of service complied with state long-arm statutes. Under the current version of Rule 4, it is likely that this type of service would be prohibited under the Federal Rules.


11. Panama Convention Article V(1)(b).

12. Parsons & Whinmore Overseas Co., v. Societe Generale de L’Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) (rejecting appellant’s attempt to state a due process claim under Article V(1)(b) of the New York Convention based on arbitration court’s refusal to delay proceedings to accommodate speaking schedule of one of appellant’s witnesses).


14. Id. at 943.

15. Id. at 944.

16. Id. at 944, 947.


18. See also Lauritzen Kosan Tankers v. Chem. Trading, Inc., 903 F. Supp. 635, 636 (S.D.N.Y. 1995) (rejecting claim for ineffective service of process in action to confirm arbitration award where attorney was served with process; respondent “actually received notice through its attorney and no injustice results from giving effect to that notice”); Marine Trading Ltd. v. Nustera Comercial Naylamp S.A., 879 F. Supp. 389, 392 (S.D.N.Y. 1992) (any of the following will suffice as service of process: personal service; leaving service with a person over 21 years of age at the meeting place; mailing a return receipt); Lucent Techs., Inc. v. Tatung Co., No. 02 Civ. 8107 (JSR), 2003 WL 402539, at *1 (S.D.N.Y. Feb. 20, 2003) (concluding that service on respondent’s counsel and service by mail and personal delivery to respondent’s headquarters met “the fair notice requirements of due process”).

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