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RECOVERY OF LITIGATION COSTS IN ARBITRATION AWARD ENFORCEMENT PROCEEDINGS IN THE SECOND CIRCUIT

In the absence of voluntary compliance with an arbitral award, the prevailing party in an arbitration might be forced to resort to judicial recognition and enforcement proceedings. These proceedings will result in further costs for the award creditor. Whether such costs can be shifted to the losing party will depend on municipal rules of the enforcing jurisdiction. In contrast with other legal systems, under the so-called American Rule, litigants in U.S. proceedings are meant to bear their own attorneys' fees, regardless of the outcome of the dispute.¹ Prevailing parties in arbitration are thus generally not entitled to such costs in proceedings to confirm or enforce arbitral awards. New York follows this prevailing rule on fee-shifting, which can be overridden by agreement between the parties, a statute, or a court ruling.² Accordingly, Second Circuit courts have outlined the circumstances in which attorneys' fees and costs may be awarded:

❖ **Statutory fee-shifting provisions:** Although some courts have awarded attorneys' fees and costs in confirmation and enforcement proceedings based on particular statutes,³ neither the Federal Arbitration Act (the "FAA") nor Article 75 of New York's Civil Practice Law and Rules ("CPLR") contain any provisions for awarding attorneys' fees.⁴

❖ **Agreement by the parties:** If the underlying agreement to the arbitral dispute provides for attorney's fees, the prevailing party may be awarded such costs.⁵ However, the language of the agreement should be broadly worded to evidence the parties' intention to include costs arising from post-award proceedings.⁶ Courts have thus granted fees where the provision in the agreement referred to "any and all expenses ... including reasonable attorneys' fees [incurred] in collection of amounts due under [the underlying agreement]"⁷ or "[...] all provable damages, and all costs of suit and attorney fees incurred in

¹ *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). Although highly controversial, the policy is said to be "based upon the high priority accorded free access to the courts and a desire to avoid placing barriers in the way of those desiring judicial redress of wrongs". *A.G. Ship Maint. Corp. v. Lezak*, 69 N.Y.2d 1, 5, 503 N.E.2d 681, 683 (1986). See also *Mighty Midgets, Inc. v. Centennial Ins. Co.*, 47 N.Y.2d 12, 21–22, 389 N.E.2d 1080, 1085 (1979) explaining the rationale behind the American Rule.

² *Oscar Gruss & Son, Inc. v. Hollander*, 337 F.3d 186, 199 (2d Cir.2003).

³ E.g., *Employee Retirement Income Security Act of 1974 (Supreme Oil Co. v. Abondolo*, 568 F. Supp.2d 401, 409 (S.D.N.Y. 2008)); New York Labor Law (*Odeon Capital Grp. LLC v. Ackerman*, 864 F.3d 191, 199 (2d Cir. 2017); or Fair Labor Standards Act (*Johnson v. Parts Auth., LLC*, No. 16CV06852DLIRML, 2021 WL 4221775 (E.D.N.Y. Sept. 16, 2021).

⁴ See *Int'l Chem. Workers Union (AFL-CIO), Local No. 227 v. BASF Wyandotte Corp.*, 774 F.2d 43, 47 (2d Cir. 1985) for FAA and *Joval Paint Corp. v. Drew*, No. 19-CV-2968 (MKB), 2021 WL 2223707, at *3 (E.D.N.Y. June 2, 2021) for N.Y. C.P.L.R. §§ 7501–7515.

⁵ *Universal Computer Servs., Inc. v. Dealer Serve, Inc.*, 2003 WL 21685567, *3 (E.D.N.Y. July 18, 2003); *Page Int'l Ltd. v. Adam Maritime Corp.*, 53 F.Supp.2d 591, 599 (S.D.N.Y.1999); *New York City Dist. Council of Carpenters Pension Fund v. Timberline Interiors Inc.*, No. 10 CIV. 4771 RJH MHD, 2011 WL 6425098, at *3 (S.D.N.Y. Aug. 24, 2011), report and recommendation adopted, No. 10 CIV. 04771 RJH, 2011 WL 6425020 (S.D.N.Y. Dec. 21, 2011).

⁶ *Universal Computer Servs., Inc. v. Dealer Servs., Inc.*, No. 02CV6563(NGG)(CLP), 2003 WL 21685567, at *2 (E.D.N.Y. July 18, 2003).

⁷ *Id.*

any action thereunder.”⁸ By the same token, courts have denied such requests where the language was limited to the costs resulting from the arbitration.⁹

❖ **Unwarranted refusal to comply with the award:** In the absence of agreement or statutory provision, courts have consistently recognized that they are authorized to enter such an award pursuant to its inherent equitable powers when the opposing party acts “in bad faith, vexatiously, wantonly or for oppressive reasons.”¹⁰ Therefore, in spite of the silence of the FAA and the CPLR, the Second Circuit’s standard in the arbitration context is that attorneys’ fees and costs might be awarded “when a challenger refuses to abide by an arbitrator’s decision without justification.”¹¹ While failure to immediately pay the award is an insufficient basis for awarding attorneys’ fees,¹² courts have routinely awarded these costs where a party merely refuses to abide by an arbitrator’s award without challenging or seeking to vacate such award through a motion to the court.¹³ However, where arguments for resisting the award are asserted, such opposition must be frivolous, not merely unsuccessful,¹⁴ and a showing of bad faith is required for fees to be awarded.¹⁵

CONCLUSION

Although the American Rule generally prevents awarding attorneys’ fees generated by enforcement and confirmation proceedings, the Second Circuit has recognized certain exceptions by which arbitral award creditors might be able recover these costs: if it is so authorized by a statutory provision; if it is contemplated in the underlying agreement to the arbitral dispute; or if the opposing party frivolously resists

⁸ *Page Int’l Ltd. v. Adam Maritime Corp.*, 53 F.Supp.2d 591, 599 (S.D.N.Y.1999); *Elite Inc. v. Texaco Panama Inc.*, 777 F.Supp. 289, 292 (S.D.N.Y.1991).

⁹ *EB Safe, LLC v. Hurley*, No. 1:17-CV-06163 (ALC), 2018 WL 2225003, at *4 (S.D.N.Y. May 15, 2018).

¹⁰ *Trustees of the New York City Dist. Council of Carpenters Pension Fund v. Coastal Env’tl. Grp., Inc.*, No. 1:16-CV-6004, 2016 WL 7335672, at *3 (S.D.N.Y. Dec. 16, 2016) (quoting *Int’l Chem. Workers Union, Local No. 227 v. BASF Wyandotte Corp.*, 774 F.2d 43, 47 (2d Cir. 1985)).

¹¹ *Id.*

¹² *In re Arb. Between Westchester Fire Ins. Co. v. Massamont Ins. Agency, Inc.*, 420 F. Supp. 2d 223 (S.D.N.Y. 2005).

¹³ *New York City Dist. Council of Carpenters v. Galt Installations LLC*, No. 18 Civ. 7103 (ER), 2020 WL 2836480, at *5 (S.D.N.Y. May 29, 2020). *See also Soft Drink & Brewery Workers Union Loc. 812 v. Ali-Dana Beverages*, No. 95-CV-8081, 1996 WL 420209, at *3 (S.D.N. Y July 25, 1996) (awarding attorneys’ fees in finding that defendant’s “fail[ure] to either pay the award or file a motion to vacate or modify ... constitutes bad faith”). *A fortiori*, courts have also awarded costs where respondent, who agreed to submit such disputes to arbitration, failed to appear at either the arbitration or confirmation or enforcement proceedings. *Trustees of New York City Dist. Council of Carpenters Pension Fund, Welfare Fund, Annuity Fund, & Apprenticeship, Journeyman Retraining, Educ. & Indus. Fund v. Piccini MNM, Inc.*, No. 19-CV-5258 (RA), 2021 WL 1791591, at *3 (S.D.N.Y. May 5, 2021). *See also New York City Dist. Council of Carpenters Pension Fund v. Eastern Millenium Const., Inc., No. 03-CV-5122 (DAB)*, 2003 WL 22773355, at *8 (S.D.N.Y. Nov. 21, 2003) (awarding attorneys’ fees where defendant failed to participate in arbitration proceedings, respond to petition to confirm arbitration, or pay the award).

¹⁴ *Seneca Nation of Indians v. New York*, 420 F. Supp. 3d 89, 107 (W.D.N.Y. 2019), *aff’d*, 988 F.3d 618 (2d Cir. 2021).

¹⁵ *AmeriCredit Fin. Servs., Inc. v. Oxford Mgmt. Servs.*, 627 F. Supp. 2d 85, 102 (E.D.N.Y. 2008). Courts have awarded fees where a party presented arguments other than those specific limited grounds to oppose the confirmation, in spite of the district judge’s admonition (*Smiga v. Dean Witter Reynolds, Inc.*, 766 F.2d 698, 708 (2d Cir. 1985)) or persisted in bringing frivolous arguments that misrepresented the record (*Prospect Capital Corp. v. Ennon*, No. 08 Civ. 3721(LBS), 2010 WL 907956, at *6-8 (S.D.N.Y. Mar. 9, 2010)).

complying with the award. Yet, the requirements for applying these exceptions are stringent: statutory authority must be clear; the language of the provision must be deemed to cover post-arbitration proceedings; and, finally, the grounds for opposition must not only be rejected, but must be considered meritless or to have been presented in bad faith.

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