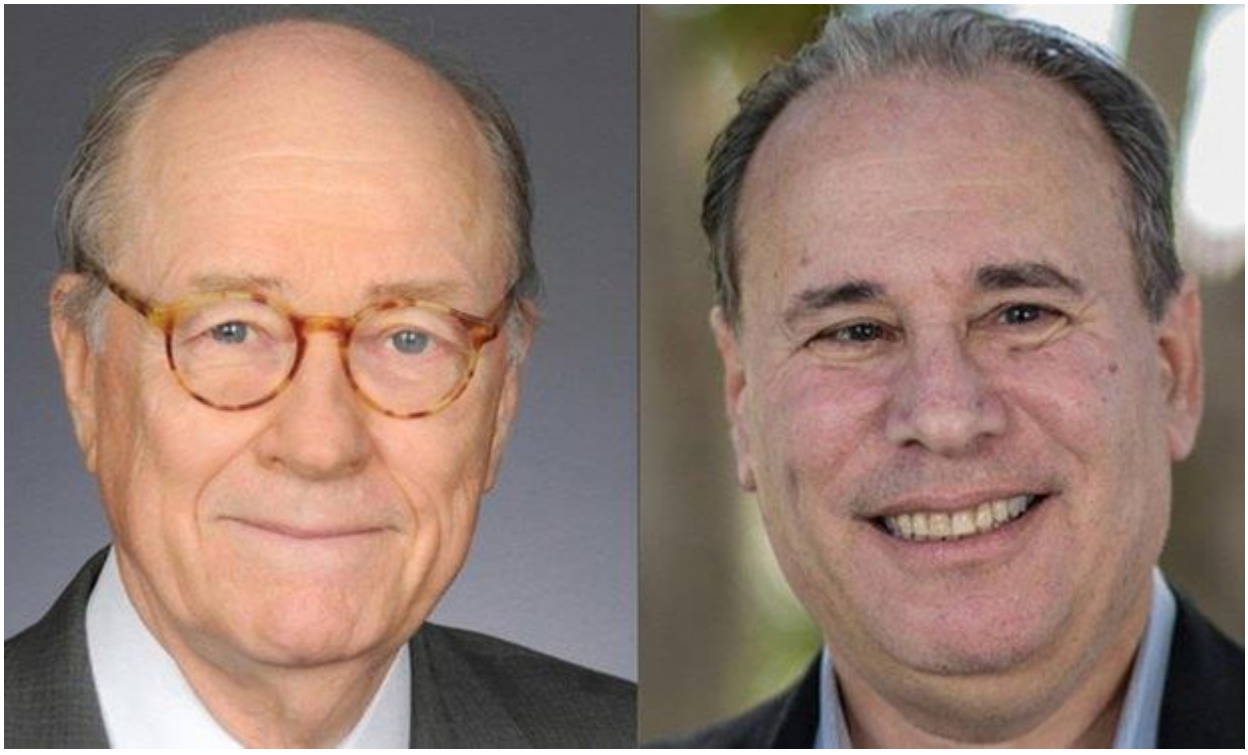
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Service of Process Requirements Can Be Less Rigid in Proceedings To Confirm Arbitration Awards

In their International Litigation column, Lawrence W. Newman and David Zaslowsky discuss how, in cases brought to enforce arbitration awards, rules for serving process on parties located outside the United States are not always as rigid as required by the language of the Federal Rules.

By **Lawrence W. Newman and David Zaslowsky** | May 26, 2021 at 12:00 PM



The plain language of Federal Rule of Civil Procedure 4 (FRCP 4) sets out how service of process is to be effectuated on parties located outside the United States. When, however, it comes to a proceeding to confirm an arbitration award, numerous cases have held that those requirements are not inflexible. Sometimes, in the name of "fairness," a key factor to a court's acceptance of service as effective is whether actual notice was given to the defendant, as distinguished from strict compliance with service of process rules.

The most recent example of a court's adopting this approach is *TLV International v. Zhejiang Shenghui Lighting Co. Ltd*, Case No. 19-cv-00393 (W.D.N.C. Feb. 3, 2021). In that case, the parties had entered into a non-disclosure agreement that provided for arbitration, "administered by the American Arbitration Association [AAA] in North Carolina in accordance with its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) [to] be entered in any court having jurisdiction thereof." The plaintiff brought an arbitration that resulted in a damages award in its favor, which it then sought to confirm. The defendants moved to dismiss for insufficient service of process; one of them, Zhejiang Shenghui, a Chinese company, asserted that it had not been served in accordance with FRCP 4.

The court, while recognizing that FRCP 4 sets forth the requirements for service of process on foreign parties, also referred to Rule 43(a) of the AAA Commercial Arbitration Rules, which provides:

> Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, *for any court action in connection therewith, or for the entry of judgment on any award made under these rules* may be served on a party *by mail addressed to the party or its representative* at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party (emphasis in original).

Commercial Arbitration Rule 43(b) similarly provides that the parties "may also use overnight delivery or electronic facsimile transmission (fax), or electronic (email) to give the notices required by these rules."

The court rejected the improper service of process argument on two grounds. First, relying on AAA Rule 43, it held that the defendants had specifically consented to service via mail and email to their representatives (here, their outside counsel) when they signed the contract that incorporated the AAA Commercial Arbitration Rules, and also when they agreed to the procedures set by the arbitral tribunal indicating that the AAA Rules would govern. (Notably, a recent U.S. Court of Appeals for the Eleventh Circuit decision held that the AAA Rules did not authorize service by *email* in a Federal Arbitration Act (FAA) §9 case because it was not a "notice" required by the AAA rules. See *Oneal Constructors v. DRT America*, Case No. 20-11045 (11th Cir. April 1, 2021)).

The second ground was that the defendants had actual notice of the petition, which the court said was sufficient under the requirements of the FAA when the court action relates to an arbitration proceeding in which the parties consented to personal jurisdiction in the particular court. The court explained that FAA confirmation cases are a different type of proceeding when the parties have consented to jurisdiction (as they did here); "the sole purpose of service is to provide notice that a court action has commenced."

One of the cases that *TLV* relied on was *In re InterCarbon Bermuda, Ltd. v. Caltex Trading & Transp.*, 146 F.R.D. 64 (S.D.N.Y. 1993), which was a proceeding to enforce an award arising out of an arbitration that took place in New York. The court held that it was necessary for the plaintiff to serve the defendant, a foreign corporation, in accordance with the requirements of FRCP 4. The plaintiff admitted that service—accomplished by serving the defendant's lawyer—did not comply with FRCP 4. But the court held that, at least in arbitration cases, "fairness" can operate to excuse failure to meet the requisite service of process rules. It relied on the U.S. Court of Appeals for the Second Circuit decisions that established "that imperfect service of process in an arbitration case may not be fatal where jurisdiction over the arbitration is clear and where notice is sufficient to apprise the opposing party of the action being taken."

Even in the face of Second Circuit precedent saying that, absent waiver, incomplete or improper service will lead to dismissal, the court said service rules are enforced more liberally in the context of arbitration. Thus, even though the plaintiff did not even attempt to effectuate service in accordance with any part of FRCP 4, the court said that "service of process…was defective in form only."

According to the court, in award confirmation cases, the "sole function" of process is to "notify" the defendant that the proceeding has been commenced. Because the defendant had received timely notice, "fairness" required that the defendant not be permitted to use defective service of process as a defense. *In re Lauritzen Kosan Tankers v. Chem. Trading Co*., 903 F. Supp. 635, 637 (S.D.N.Y. 1995), was another award enforcement case in the Southern District of New York in which the court said that FRCP 4 applies but then excused failure to comply. "Considerations of fairness, however, may excuse that failure [if the complaining party has actually received notice and the case involves arbitration proceedings]." The *TLV* court also relied on a more recent award confirmation case, *Power Elec. Distribution v. Hengdian Grp. Linix Motor Co., Ltd.*, 2015 WL 880642, at *6 (D. Minn.) (March 2, 2015), in which the foreign defendant challenged service of process.

As did the courts in the two decisions discussed above, the court explained that FAA §9 included provisions for how to make service on parties in the United States, but was silent regarding service on foreign parties. Thus, the

court ruled (as have almost all other courts in this situation) that one should look to the service requirements in FRCP 4 to fill the void. Those requirements were not met here. But it did not matter.

The court quoted a number of decisions that made the point that service of process requirements are different when it comes to confirming awards: "In cases arising from arbitration proceedings, '[d]efects in service of process may…be excused where considerations of fairness so require'"; "[T]he only purpose of process in cases resulting from arbitration proceedings within a court's jurisdiction is to alert the opposing party that a court action has commenced…"; "the standards for service are to be liberally construed in the context of arbitration." The court said that these exceptions applied to service requirements under the Hague Service Convention as well.

In rejecting the service of process defense, the court stressed the significance of the fact that, in the underlying contract, all parties had consented to the jurisdiction of the courts in Minnesota. In addition, there was no question that the defendant received actual notice of the motion papers.

Furthermore, the papers were sent to the lawyer who had represented the defendant in the arbitration and who said that all future court-related correspondence should be directed to him. Thus, the court ultimately held that any defects in service were excused because of actual notice and because "no unfairness results from giving effect to that notice."

The *TVL*, *InterCarbon*, *In re Lauritzen* and *Power Elec.* cases will be referred to jointly as the "Fairness Cases." It is important to note that not all award confirmation cases apply this more relaxed "fairness" standard of the Fairness Cases to determine whether service of process was made properly. *Marine Trading Ltd. v. Naviera Commercial Naylamp* S.A., 879 F. Supp. 389, 392 (S.D.N.Y. 1995) was a proceeding to enforce an arbitration award issued after an arbitration in New York.

The respondent, a Peruvian corporation, was served by mail in Peru. The district court noted, as had the courts in the Fairness Cases, that §9 of the FAA did not provide a mechanism for service outside the United States. The court therefore looked to F.R.C.P. 4. It held that, because there was no receipt signed by the respondent and no other evidence of delivery, there was not sufficient evidence of actual notice. The court thus refused to confirm the award, but did give the petitioner a further opportunity to effect service.

Dev. Specialists v. Li (In re Coudert Bros.), 2017 U.S. Dist. LEXIS 71435 (S.D.N.Y. May 9, 2017), concerned the enforcement of an award from an arbitration in which the defendant did not participate. The arbitration took place in New York under the rules of the International Centre for Dispute Resolution. The original complaint which sought to compel arbitration had been served on the defendant in Hong Kong by FedEx, as verified in a certificate of service. The court refused to confirm the award because the plaintiff had not complied with any of the methods in FRCP 4 for service of process in Hong Kong.

Is there a way to distinguish these latter two decisions from the Fairness Cases? One might posit that the courts in the Fairness Cases placed great emphasis on the fact that the parties had consented to personal jurisdiction and that, therefore, the service of process was merely a form of notice since award confirmation cases are considered a different type of proceeding than normal lawsuits. But in both *Marine Trading* and *Dev. Specialists*, the courts also noted that they had personal jurisdictions over the defendants. In the latter, for example, the court said, "[b]y consenting to arbitration in New York, Defendant has agreed to be amenable to the personal jurisdiction of this Court."

Two factors do, however, seem significant. First, in *Marine Trading*, there was no evidence before the court that the defendant had received the court papers.

Similarly, in *Dev. Specialists*, although the clerk of the court had mailed the papers regarding the confirmation proceeding to the defendant and had requested a receipt, there was no signed receipt in the record. The second factor is that, in each of the Fairness Cases, the defendant actually appeared in the case and, among other things,

challenged service of process. It was in this context that the courts said it would not be "fair" to allow a defendant who was actually appearing before them to escape award confirmation based on what the courts obviously saw as a technicality.

Perhaps these are distinctions without a difference and it is simply the luck of the draw as to whether a court will apply the less rigid standard applied in the Fairness Cases. More likely, however, there is indeed a lesson for lawyers whose foreign clients are asking them whether to defend against a proceeding to confirm an arbitration award in federal court in the United States.

The first lesson is that the likelihood of a court refusing confirmation will be increased if there is no evidence that the court papers were actually received. And, second, such chances are also enhanced if the defendant does not participate in the U.S. proceeding. Recommending what is essentially a default is always risky advice, but it might very well enhance the possibility of success in this type of scenario, and is anyway easier advice to give if there is not otherwise a sound defense to award confirmation (which there will rarely be).

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