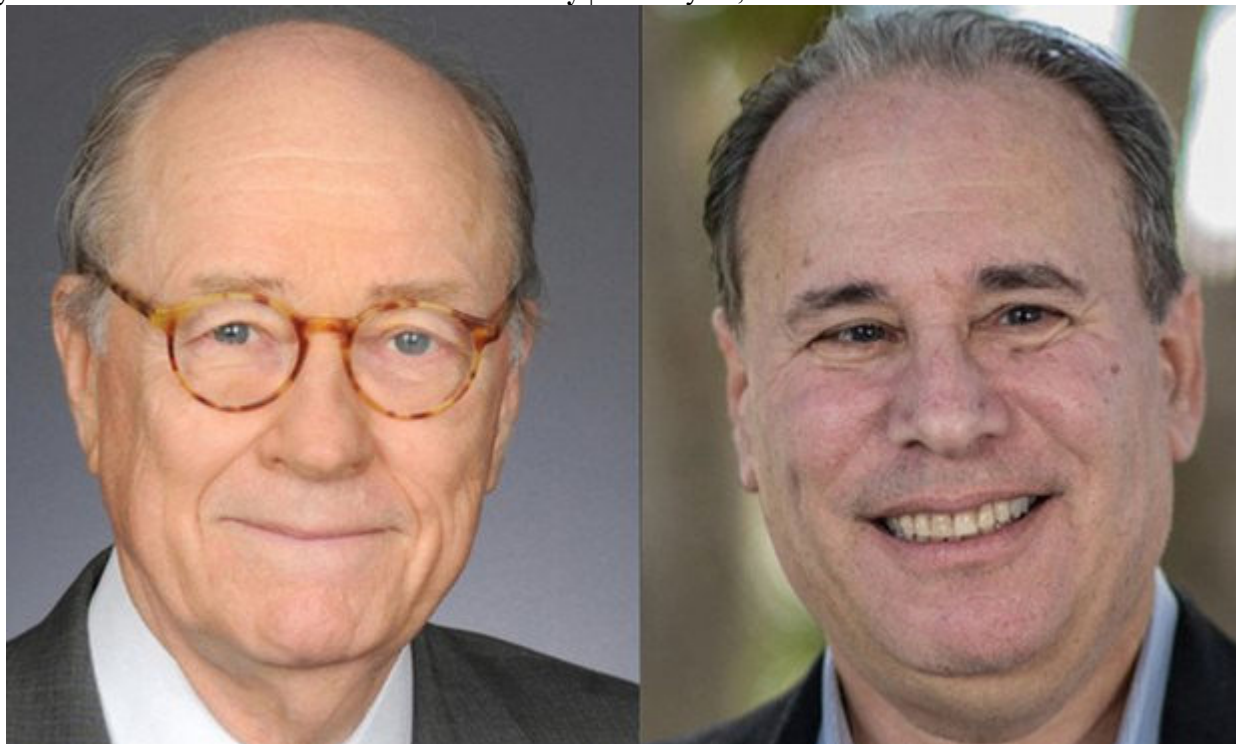


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Statutory Requirements For Enforcing International Arbitral Awards Are Not Jurisdictional

In this article, the authors look at two recent circuit court decisions that held that such requirements under the New York Convention and under the FAA are procedural and, therefore, do not oust a court of subject matter jurisdiction, even if the requirements are not strictly met.

By **Lawrence W. Newman and David Zaslowsky** | January 24, 2024 at 09:38 AM



There are many reasons that parties to international business transaction often decide to resolve their disputes through international arbitration, one of which is the knowledge and comfort that the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517 (commonly known as the New York Convention) is a widely adopted treaty that brings a relative amount of ease to enforcing international arbitration awards. The Convention, however, includes, as it must, a number of mandatory requirements for invoking its coverage.

The same is true for the Federal Arbitration Act (FAA), which sets forth grounds for challenging an arbitration award in domestic arbitrations, but which grounds can also apply where the New York Convention governs and the United States is the so-called “primary jurisdiction.”

In today’s column, we look at two recent circuit court decisions that held that such requirements under the Convention and under the FAA are procedural and, therefore, do not oust a court of subject matter jurisdiction, even if the requirements are not strictly met.

Baker Hughes Services International v. Joshi Technologies International, 73 F. 4th 1139 (10th Cir. 2023) arose out of a contract between Baker Hughes and a consortium under which the former agreed to provide goods and services in connection with the development and operation of the consortium’s oil and gas interests in a block of

the Ecuadorian Amazon region. When the invoices for goods and services went unpaid, Baker Hughes filed a claim against the consortium and its members with the Arbitration and Mediation Center for the Ecuadorian American Chamber of Commerce. The arbitrator awarded damages of about \$500,000. Baker Hughes then sought to confirm the award in the U.S. District Court for the Northern District of Oklahoma against the consortium's two members.

The Convention applied to enforcement of the Ecuadorian award. Article IV of the Convention provides that, in order to obtain recognition and enforcement, it is necessary for the applicant to supply an original or certified copy of the award and an original or certified copy of the underlying contract.

In addition, Article IV(2) states: "If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a [certified] translation of the documents into such language." Baker Hughes provided certified English translations of the agreement and award, but not the original Spanish versions of the award and agreement. Defendants argued that the failure to produce the original Spanish documents violated Article IV and deprived the district court of subject matter jurisdiction.

The U.S. Court of Appeals for the Tenth Circuit disagreed. It explained that Article IV was not the relevant jurisdictional provision. Rather, in 9 U.S.C. §203, Congress vested the federal courts with jurisdiction to hear actions and proceedings "falling under the Convention." Congress defined that phrase in 9 U.S.C. §202 by saying that an arbitration agreement or award "falls under the Convention" when it arises out of a commercial legal relationship, whether contractual or not, unless the relationship is wholly between U.S. citizens and does not involve property in another country, envision performance abroad or have some other reasonable connection to one or more foreign states.

The Tenth Circuit noted that there was a decision from the U.S. Court of Appeals for the Eleventh Circuit, *Czarina v. W.F. Poe Syndicate*, 358 F.3d 1286, 1292 (11th Cir. 2004), that had held that a plaintiff seeking to confirm an international arbitral award must comply with the strict requirements of Article IV to establish the district court's subject matter jurisdiction to confirm the award. That decision reasoned that, because the Convention's prerequisites use mandatory language, a plaintiff must satisfy those requirements for a federal court to have jurisdiction.

But as the Tenth Circuit also noted, there were subsequent circuit court decisions that held that a plaintiff's failure to comply with the Convention's procedural requirements raises the merits question of whether the plaintiff can enforce its award, not the jurisdictional question of whether the court has the power to adjudicate the claim. More important was the Supreme Court precedent that criticized courts for conflating merits issues with jurisdictional deficiencies and adopted the following bright-line rule: a threshold limitation on a statute's scope is jurisdictional only when Congress clearly says it is. *Arbaugh v. Y&H*, 546 U.S. 500, 502 (2006).

Congress can clearly say a statutory limitation is jurisdictional either by placing it in a jurisdictional subsection or describing the limitation as such. Congress did neither with respect to Article IV of the Convention. Thus, the Tenth Circuit held that, even if Baker Hughes did not comply with the requirements of Article IV, the district court properly exercised jurisdiction. In addition, by not arguing that Article IV precluded Baker Hughes from enforcing its award on the merits, Defendant waived that argument.

NuVasive v. Absolute Medical, No. 22-10214 (11th Cir. June 21, 2023), is another recent decision in which a court held that strict compliance with the plain language requirements of the statute was not jurisdictionally necessary. That case concerned an agreement under which Absolute Medical, a company owned by Greg Soufleris, marketed and sold NuVasive's products as an exclusive distributor. Less than a year after a five-year extension of the original contract, Soufleris "resigned," formed a new company (called AMS) and began selling products for one of NuVasive's competitors.

NuVasive sued Soufleris, AMS and two of the AMS's sales representatives, including Dave Hawley. The district court compelled arbitration of the breach of contract claim against Absolute Medical. The arbitration panel concluded that Absolute Medical breached the agreement, but held that damages were not proven.

The parties then returned to the district court for resolution of the remaining claims. In the course of discovery, documents were produced that showed that, during Hawley's testimony before the arbitration panel—which was taken remotely—Soufleris sent him text messages that directed him how to answer questions as Hawley was testifying. NuVasive then sought to vacate the award, arguing that the final award was “procured” through “corruption, fraud or undue means” and, therefore, should be vacated under §10(a) of the FAA.

Section 12 of the FAA states that “notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered.” NuVasive did not meet that deadline, but asked the district court to equitably toll the three-month statutory filing deadline. Defendants argued, as did the defendant in *Baker Hughes*, that the three-month window is not a statute of limitations—and thus eligible to be equitably tolled—but, rather, a “jurisdictional precondition to judicial review of [the] arbitration award.”

The Eleventh Circuit disagreed, relying on a different Supreme Court precedent than did the Tenth Circuit, but to the same end. *Boechler v. Commissioner of Internal Revenue*, 142 S. Ct. 1493 (2022), concerned a statutory provision that says that a person seeking review of a negative result in a tax collection due process hearing “may, within 30 days of a determination under this section, petition the Tax Court for review of such determination (and the Tax Court shall have jurisdiction with respect to such matter).” The petition was filed one day late. Relying on the parenthetical language, the IRS argued that the petition was jurisdictionally deficient. The district court and U.S. Court of Appeals for the Eighth Circuit held that the petition was untimely.

The Supreme Court reversed. As it had said in the *Arbaugh* decision, which was relied on by the Tenth Circuit in *Baker Hughes*, “a procedural requirement” is “jurisdictional only if Congress clearly states that it is.” The Supreme Court acknowledged that the parenthetical part of the statute could be read to condition the Tax Court's jurisdiction on a timely filing. But, the court reasoned, “the text does not clearly mandate the jurisdictional reading,” and “[w]here multiple plausible interpretations exist—only one of which is jurisdictional—it is difficult to make the case that the jurisdictional reading is clear.”

The Supreme Court explained that nothing else in the text or structure of the provision or the statute compelled a jurisdictional interpretation and, thus, held that the 30-day time limit was an “ordinary, non-jurisdictional deadline subject to equitable tolling.”

In this context, it was easy for the Eleventh Circuit to hold that the FAA three-month limitation was not jurisdictional. There was nothing like the parenthetical language in the tax statute. And, the “must be served” language in Section 12 of the FAA did not communicate the sort of “jurisdictional clarity” that *Boechler* required. Because the three-month limitation was not jurisdictional, equitable tolling was an “available” defense.

It would be wrong, however, to read this decision as creating a broad exception to the three-month limitation. As the Eleventh Circuit reminded, “equitable tolling is an extraordinary remedy which is typically applied sparingly” and is “appropriate when a movant untimely files because of extraordinary circumstances that are both beyond his control and unavoidable even with diligence.” Both prongs were satisfied here. The court described it as “shocking conduct” that, in violation of Hawley's oath that nobody was communicating with him during his testimony, Hawley's actual testimony was consistent with the text messages Soufleris sent him.

As to the due diligence prong, NuVasive could not have known about the text messages between Soufleris and Hawley until after the Defendants produced the documents NuVasive requested. The Eleventh Circuit held that equitable estoppel applied, and also that the district court did not err in vacating the award under §10(a) of the FAA.

These two circuit court decisions teach an important lesson. Both reached what appear to be the “right” result. They did so by making clear that certain requirements of both the Convention and the FAA are procedural and not jurisdictional, thus imbuing in them at least some level of flexibility in interpreting the statutes.

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