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Litigants Should Expressly and Unequivocally Assert Arbitration Rights Early in Foreign Litigation—Fourth Circuit Ruling Suggests Failure to Do So Might Result in Forfeiture

In *Iraq Middle Market Development Foundation v. Mohommad Ali Mohammad Harmoosh*, the Fourth Circuit clarified the standard district courts should apply to determine whether an arbitration clause provides a viable means of invalidating an adverse foreign judgment.[1] The Fourth Circuit explained that a party seeking to enforce an arbitration clause must expressly assert the right to arbitrate in both domestic litigation and in foreign tribunals.

BACKGROUND

Harmoosh 1

This case involved a dispute over a promissory note that resulted in three trips to the U.S. District Court for the District of Maryland, two trips to the U.S. Court of Appeals for the Fourth Circuit, and three Iraqi courts.[2] Defendant Harmoosh, a Maryland resident and dual Iraqi-American citizen, was a managing partner of Al-Harmoosh for General Trade, Travel, and Tourism ("AGTTT"), which is headquartered in Iraq.[3] Harmoosh executed a promissory note guaranteeing repayment of a $2 million loan AGTTT obtained from the plaintiff, the Iraq Middle Market Development Foundation ("Foundation"), a non-profit corporation based in Texas.[4] The loan agreement included an arbitration clause requiring that the parties resolve disputes via arbitration in Jordan.[5]

In 2010, after AGTTT and Harmoosh failed to repay the loan, the Foundation sued in Maryland federal court.[6] The district court dismissed the case after Harmoosh asserted the arbitration clause.[7] Despite the court's ruling enforcing the arbitration clause in *Harmoosh 1*, Harmoosh did not move to compel arbitration pursuant to Sections 3 and 4 of the Federal Arbitration Act ("FAA").[8] In 2014, rather than pursuing arbitration in Jordan, the Foundation instead sued Harmoosh in Iraq.

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[1] No. 18-2212 (4th Cir. Jan. 13, 2020) (Slip Opinion) ("*Harmoosh 2*").

[2] *Id.* at 2.

[3] *Id.*

[4] *Id.*

[5] *Id.* at 3.

[6] *Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 769 F. Supp. 2d 838 (D. Md. 2011) (Blake, J.) ("*Harmoosh 1"*).

[7] *Id.*

[8] Slip Op. at 3 (discussing FAA, 9 U.S.C. §§ 3, 4).

The Iraqi Litigation

The Iraqi trial court held five hearings, but, unlike civil litigation in the United States, the Iraqi trial court provided no procedures for pretrial discovery or motions practice.[9] The Iraqi trial court ultimately awarded the Foundation $2 million in damages in addition to legal fees and costs.[10] The Iraqi intermediate appellate court rejected Harmoosh's appeal, which asserted that the trial court had violated his arbitration rights.[11] Thereafter, the Iraqi court of last resort upheld the trial court's judgment.[12]

Harmoosh 2

In 2015, when the Foundation returned to the Maryland federal court and attempted to enforce the Iraqi judgment under the Maryland Uniform Foreign Money-Judgments Recognition Act,[13] Harmoosh moved to compel arbitration and dismiss or stay the suit.[14] The district court agreed with Harmoosh that the Maryland Recognition Act's arbitration clause exception applied,[15] *sua sponte* converted Harmoosh's motion to compel arbitration to one for summary judgment, and ruled in Harmoosh's favor.[16]

The Foundation appealed, and the Fourth Circuit vacated the district court's order and remanded the case because the record was not clear about whether Harmoosh had asserted the arbitration clause in the Iraqi trial court.[17] In reaching that decision, the Fourth Circuit cited the FAA,[18] which provides that an arbitration clause should be enforced if the party seeking to enforce the clause "is not in default in proceeding with such arbitration."[19] The court explained that a party is "in default" if that party "'so substantially utiliz[es] the litigation machinery that to subsequently permit arbitration would prejudice' the party opposing arbitration."[20] The Fourth Circuit directed the district court to "develop the record on this point."[21]

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[9] *Id.*

[10] *Id.*

[11] *Id.* at 4.

[12] *Id.*

[13] Md. Code Ann., Cts. & Jud. Proc., §§ 10-701 *et seq.* (2016) ("Maryland Recognition Act"). Maryland law applied because suit was brought pursuant to diversity jurisdiction. *See Harmoosh 2*, 848 F.3d 235, 238 (4th Cir. 2017).

[14] Slip Op. at 4; *see Iraq Middle Mkt. Dev. Found. v. Harmoosh*, 175 F. Supp. 3d 567 (D. Md. 2016) (Russell, J.).

[15] *See* Maryland Recognition Act § 10-704(b)(4) ("A foreign judgment need not be recognized if . . . [t]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute was to be settled out of court[.]").

[16] Slip Op. at 4; *see Harmoosh 2*, 175 F. Supp. 3d at 572, 580–81 (granting summary judgment without affording discovery because the court considered materials outside of the pleadings).

[17] Slip Op. at 5; *see Harmoosh 2*, 848 F.3d 235.

[18] "The FAA applies to arbitration clauses in contracts evidencing a transaction involving commerce." *Harmoosh 2*, 848 F.3d at 241.

[19] 9 U.S.C. § 2.

[20] Slip Op. at 5; *see Harmoosh 2*, 848 F.3d at 241 (quoting F*orrester v. Penn Lyon Homes, Inc.*, 553 F.3d 340, 342 (4th Cir. 2009)).

[21] Slip Op. at 5.

On remand, the parties produced dueling affidavits about whether Harmoosh had in fact asserted his arbitration rights in the Iraq litigation.[22] The district court, however, held that whether Harmoosh had raised his arbitration rights was immaterial because Iraqi courts resolve disputes quickly without the benefit of pretrial discovery procedures and, thus, Harmoosh did not have access to the "substantial litigation machinery" contemplated by Fourth Circuit in its interpretation of the FAA.[23] Thus, the district court again granted summary judgment in Harmoosh's favor, and the Foundation once again appealed.[24]

Fourth Circuit's January 2020 Opinion

The Fourth Circuit yet again reversed and remanded.[25] The Fourth Circuit concluded that the district court had applied flawed analysis in determining that Harmoosh could not have substantially utilized the litigation apparatus contemplated by the FAA.[26] Specifically, the Fourth Circuit explained that the district court should not have "export[ed] our judicial norms to the Iraqi system."[27] Relying on comity principles, the Fourth Circuit clarified the applicable standard and explained that—despite the absence of pretrial discovery and motions practice in the Iraqi trial court—the district court should have determined whether Harmoosh substantially used "the litigation machinery offered by the judicial system producing the [adverse] foreign judgment."[28] Moreover, the Fourth Circuit emphasized that the district court's contrary analysis would undermine certainty and finality of foreign judgments here and, concomitantly, the finality and predictability of U.S. judgments abroad.[29]

KEY TAKEAWAYS

Harmoosh 2 provides several key takeaways for clients contracting with foreign companies where such agreements contain arbitration clauses:

1. **Assert arbitration rights <u>early</u> in U.S. civil litigation.** Binding arbitration clauses are not self-executing. A party must assert this right should a counterparty bring civil suit in a U.S. court.

2. **Assert arbitration rights early and <u>clearly</u> in foreign proceedings, if you participate in such proceedings.** A party typically may enforce a foreign judgment in U.S. courts under state law absent statutory exceptions based on certain due process concerns (e.g., the affected party did not have adequate notice of the proceedings, the foreign tribunal lacked personal or subject matter jurisdiction, or the judgment was obtained by fraud).[30] Accordingly, litigating in a foreign forum may appear advantageous to a party seeking to avoid arbitration. Litigating abroad can present a significant risk to a party that prefers arbitration. If an adverse party, notwithstanding a valid arbitration clause, sues abroad in what may be a more favorable forum, the party preferring arbitration risks defaulting that right

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[22] Records from the Iraqi trial court did not include any evidence that Harmoosh had asserted his arbitration rights. *Id.* at 3, 5.

[23] *Id.* at 6.

[24] *Id.*

[25] *Id.* at 10.

[26] *Id.* at 7–9.

[27] *Id.* at 8.

[28] *Id.*

[29] *Id.* at 8–9.

[30] *See, e.g.*, Maryland Recognition Act § 10-704; *see also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. §§ 481, 482.

if the party participates in foreign litigation and fails to raise the right to arbitrate expressly. This is so whether or not the foreign forum's procedures and proceedings resemble the U.S. system.

3. **Ensure that foreign tribunals accurately record the assertion of arbitration rights.** The Fourth Circuit recognized that the Iraqi courts did not create a robust record of the foreign proceedings. However, Iraqi law experts explained that the summary hearing minutes signed by the parties and the judge should contain the claims and defenses raised in the proceedings, and those records become binding once signed. Though Harmoosh's attorney gave sworn testimony that Harmoosh raised the arbitration clause at the Iraqi trial court, that court's minutes did not contain a supporting reference. If in fact Harmoosh raised the arbitration clause in the trial court, it would have been prudent to ensure that the Iraqi court's summary minutes reflected as much before signing them. Failure to do so may have cost Harmoosh the right to enforce a valid arbitration clause in U.S. proceedings. Accordingly, parties haled into foreign tribunals that wish to enforce arbitration rights should ensure that records of foreign proceedings clearly document that they asserted their rights to arbitrate; else, they risk forfeiting them.

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