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International Arbitration

Expert Analysis

Jurisdictional Obstacles and Enforcing Foreign Arbitral Awards

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The U.S. Court of Appeals for the Second Circuit and other circuit courts have held that the defenses of lack of personal jurisdiction and forum non conveniens can be asserted in actions to enforce international arbitration awards governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009) (personal jurisdiction); *Monegasque De Reasurrances v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (forum non conveniens).

In an earlier article in this column ("Enforcing Foreign Arbitral Awards: Should Jurisdictional Defenses Apply?" NYLJ, Feb. 6, 2015), I argued that, as a matter of principle, there is no good reason these jurisdictional obstacles should apply in an action to confirm a foreign arbitral award when they do not apply in the analogous context of an action to enforce a foreign judgment. *Abu Dhabi Commercial Bank v. Saad Trading*, 117 A.D.3d 609 (1st Dept. 2014) (in action to enforce a foreign judgment in New York it is not necessary to establish personal jurisdiction over the judgment debtor and defense of forum non conveniens is inapplicable). In this article, I put aside the issue of principle and focus, instead, on practice: how to avoid the jurisdictional obstacles to the enforcement of foreign arbitral awards.

The New York Convention obligates the courts in its over 150 signatory countries to recognize international arbitration awards that fall under the Convention, subject to the limited defenses set forth in Article V (e.g., the arbitrators exceeded their jurisdiction, or a party did not have a full and fair opportunity to be heard). When a foreign court in a New York Convention country confirms an arbitration award, that decision is embodied in a judgment of that court.

Given the differences in the treatment by New York courts of foreign arbitral awards and foreign judgments when it comes to the applicability of jurisdictional defenses, a question arises: Is it possible to avoid the jurisdictional obstacles to the enforcement of foreign arbitral awards by seeking to enforce not the arbitration award itself, but rather the foreign judgment confirming that award? A recent case affirms that this is indeed possible, and that there may be other advantages to enforcing a foreign judgment confirming an arbitration award rather than the award itself.

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Passport Case

Specifically, in *Passport Special Opportunities Master Fund v. ARY Communications*, 49 Misc.3d 1216 (Sup. Ct. Nassau County 2015), the court attached ARY's assets in connection with Passport's action to enforce a foreign judgment confirming an arbitration, noting that it was not necessary to establish personal jurisdiction over the award-debtor (ARY) in such an action.

Passport involved a dispute between Passport, a BVI company, and ARY, a Pakistan corporation, that arose out of an Investment Funding Agreement, which contained an arbitration clause providing International Chamber of Commerce (ICC) arbitration in the event of a dispute. When a dispute arose, Passport commenced an arbitration in Singapore (a New York Convention country) and prevailed, securing an award of over $5 million. And in February 2015, Passport brought an action in New York state court to confirm that award. ARY removed the case to the U.S. District Court for the Eastern District of New York and then moved to dismiss the case on grounds of lack of personal jurisdiction. While that action was pending, Passport commenced an action in the Singaporean High Court to confirm the award.

After the Singaporean court confirmed the arbitral award, Passport withdrew its enforcement action then pending in the Eastern District and commenced a new action in New York state court seeking recognition of the Singaporean judgment confirming the arbitral award.

Passport relied upon a provision of New York state law—CPLR 5302—which governs the recognition of foreign country money judgments. Passport also sought to attach ARY's assets pursuant to CPLR 6201(5), which authorizes attachment where the "cause of action is based…on judgment which qualifies for recognition" under Article 53 of the CPLR, i.e., is an action to recognize a foreign country judgment.

In its decision, the New York court noted that attachment against a non-domiciliary has two purposes: (i) to secure assets for a money judgment or (ii) to provide a basis for quasi in rem jurisdiction. The court found that no attachment could be granted on the ground that it was necessary to secure personal jurisdiction because "actions pursuant to CPLR 5303 for enforcement of foreign country money judgments have been 'exempted from the due process requirements of personal jurisdiction' (*Abu Dhabi Commercial Bank PJSC v. Saad Trading*, 117 A.D.3d 609 (1st Dept. 2014)." In other words, the court found that it was not necessary to establish personal jurisdiction in an action to enforce a foreign judgment confirming a foreign arbitral award.

The court then went on to grant the attachment remedy sought by Passport on the ground that ARY had engaged in conduct designed to frustrate the judgment of the Singaporean court by having, among other things, "contested jurisdiction in New York…"

Thus, in New York there is authority that one can avoid the jurisdictional obstacles to enforcing foreign arbitral awards by seeking to enforce, instead, a foreign country judgment confirming that award. But *Passport* also highlights that there may be additional advantages to enforcing

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a foreign judgment confirming an award rather than the award itself—the ability to attach the award-debtor's assets in New York.

While it is possible under CPLR 6201(5) to obtain an attachment from a New York court in an action for recognition of a foreign judgment, it is less than clear that one can obtain an attachment in an action to confirm a foreign arbitral award. Thus, New York law is explicit that an attachment or other injunctive relief is available in the arbitration context before an arbitral award has been rendered and available after an award has been confirmed by a New York court. But, unlike the case with foreign judgments, there is no provision equivalent to CPLR 6201(5) explicitly permitting such relief in an action to confirm a foreign arbitral award (i.e., after the award is rendered but before it is confirmed by the New York court).

Thus, CPLR 7502(c), which authorizes New York courts to grant an order of attachment in aid of arbitration, applies only to "an arbitration that is *pending or that is to be commenced*" (emphasis added). As a result, a party cannot rely on CPLR 7502(c) to attach assets in an action to enforce an arbitration award because at that point, the arbitration would typically no longer be "pending." (An exception may be where the arbitrators have rendered a partial final award, but the arbitration continues in order to address other issues.)

In addition to authorizing an attachment before an arbitration is commenced or while it is pending, New York law also permits a party to apply for an attachment after an arbitration award has been confirmed by a court. Thus, once an arbitral award has been recognized by a New York court, the award-creditor can use the post-judgment remedies, including attachment, set forth in Article 52 of the CPLR. *Prudential Blake Realty v. Schenectady Indus. Development Agency*, 255 A.D.2d 622 (3d Dept. 1998) ("Inasmuch as petitioner seeks to enforce a confirmed arbitration award, it may take full advantage of the enforcement devices set forth in CPLR article 52.")

But in the arbitration context, there is no comparable provision to CPLR §6201(5), which explicitly empowers courts to attach assets in an action to enforce a foreign judgment (i.e., to attach assets after a foreign judgment has been rendered by a foreign court but before that judgment is recognized by a New York court). Rather, there appears to be a gap in the law when it comes to a party's ability to obtain attachment relief in New York between the time when an arbitration award is rendered (which typically means it is no longer pending) and the time the award is confirmed.[1] This gap can be avoided if a party enforces a foreign judgment confirming an arbitration award rather than the award itself.

Other Advantages

In addition to the ability to obtain attachment relief in an action to enforce a foreign judgment, there are other advantages to enforcing a judgment confirming a foreign arbitral award rather than the award itself.

One advantage relates to the statute of limitations. The statute of limitations for enforcing a New York Convention award is three years from when the award is made (9 USC §207). The statute of limitations for enforcing a foreign judgment in New York is 20 years (CPLR §211(b); *Servaas Incorporated v. Republic of Iraq*, 2012 WL 335654 *5 (S.D.N.Y., Feb. 1)). U.S. courts have recognized foreign judgments confirming arbitral awards—even in circumstances where an action to enforce the award itself would be untimely. See, e.g., *Commissions Import Export v. Republic of the Congo*, 757 F.3d 321 (D.C. Cir. 2014) (three-year statute of limitations period for New York Convention awards did not preclude the applicability of the longer limitations period of D.C.'s foreign money judgments act); *Seetransport Wiking Trader Schiffahrtsgesellschaft Mbh & Co., v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1993) (enforcing foreign judgment confirming award that was itself time-barred).

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Moreover, in many cases, courts have permitted parties seeking to enforce foreign judgments confirming awards to take advantage of certain other provisions favorable to arbitration awards and avoid those that are unfavorable. Thus, on the one hand, in *Seetransport Wiking Trader Schiffahrtsgesellschaft Mbh v. Navimpex Centrala Navala*, 989 F.2d 572 (2d Cir. 1993), the court extended a waiver of foreign sovereign immunity based on an agreement to arbitrate to a foreign judgment enforcing an arbitral award. In that case, the plaintiff brought an action seeking recognition of (i) a French judgment declining to annul an ICC arbitration award rendered in Paris, and (ii) the award itself.

The Second Circuit found that the defendant, Navimpex, an instrumentality owned by Romania, had implicitly waived foreign sovereign immunity under the Foreign Sovereign Immunities Act because it had agreed to arbitrate under the ICC Rules in a contract governed by French law. Although the court found that the action to enforce the award was time-barred, it nonetheless extended the waiver of immunity to the action to enforce the foreign judgment, noting that "[t]he cause of action [to enforce the French judgment] is within the scope of the waiver because the cause of action is so closely related to the claim of enforcement of the arbitral award." Id. at 584.

On the other hand, New York courts have not permitted defendants to rely upon the grounds for non-recognition of arbitration awards set forth in the New York Convention to oppose actions to enforce foreign judgments confirming arbitral awards. Rather such defendants are permitted to rely only upon the grounds for non-recognition that pertain to foreign judgments. *Ocean Warehousing v. Baron Metals and Alloys*, 157 F.Supp.2d 245, 249 (SDNY 2001) ("a New York court's decision whether to recognize a foreign judgment is governed only by Article 53 [of the CPLR]… even where the foreign judgment is based on an arbitral award.").

It is worth noting, however, that some federal courts have held that an action to enforce a foreign judgment, which is governed by state law in the New York courts, cannot rely on the provision of the Federal Arbitration Act (FAA) granting courts subject matter jurisdiction to enforce New York Convention awards (9 U.S.C. §203). *Albaniabeg Ambient Sh.p.k. v. ENEL S.p.A.*, 2016 WL 1060333 (March 11, S.D.N.Y.); *Mont Blanc Trading v. Khan*, 2014 WL 116733 (SDNY 2014). Thus, in order to bring an action to enforce a foreign judgment in federal court—even one confirming an arbitration award—there must exist diversity jurisdiction, and in *Mont Blanc*, because both parties were alien, there was no such jurisdiction. *Universal Licensing Corp. v. Paola del Lungo*, 293 F.3d 579, 580-81 (2d Cir. 2002) (diversity jurisdiction does not extend to cases in which only aliens are parties).

Conclusion

In summary, it is possible to avoid the jurisdictional obstacles to enforcing foreign arbitral awards by seeking recognition not of the award itself but of a foreign judgment recognizing that award. Moreover, there may be other advantages to this manner of proceeding, including a longer statute of limitations and a more extensive attachment remedy. But in many cases such actions may be brought only in state court, since, according to at least one court, parties cannot rely on the FAA to bring such actions in federal court.

1. There is a possible exception to this based on CPLR 5229, which provides: "In any court, before a judgment is entered, upon motion of the party in whose favor a "verdict or decision has been rendered, the trial judge may order examination of the adverse party and order him restrained with the same effect as if a restraining notice had been served upon him after judgment." Even though the language of this provision deals with proceedings in "any court," one court has held it extends to arbitration proceedings. *Loew v. Kolb*, 2003 WL 22077454 (S.D.N.Y. 2003) (applying CPLR §5229 to permit attachment in an action to confirm an arbitration award, by characterizing confirmation action as post-judgment proceeding on grounds that arbitration awards are to be summarily confirmed). But see *Unex Ltd. v. Arsygrain Int'l Corp.*, 102 Misc.2d 810, 424 N.Y.S.2d 583 (Sup. Ct. N.Y. Co. 1979) (court declined to grant relief under CPLR 5229 in an action to confirm an arbitration award because provision on its face applies only to court actions).