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INTERNATIONAL ARBITRATION

Expert Analysis

Enforcing Foreign Arbitral Awards: Should Jurisdictional Defenses Apply?

In New York there are two obstacles to enforcing foreign arbitral awards that do not apply to foreign judgments. The U.S. Court of Appeals for the Second Circuit and other circuit courts have held that a party seeking to enforce a foreign arbitral award must establish personal jurisdiction over the award debtor and that forum non conveniens is a permissible defense. *Frontera Res. Azer. Corp. v. State Oil Co. of Azerbaijan*, 582 F.3d 393 (2d Cir. 2009) (personal jurisdiction); *Monegasque Du Reassurances v. Nak Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (forum non conveniens). By contrast, New York's First Department recently held that in an action to enforce a foreign judgment it is not necessary to establish personal jurisdiction over the judgment debtor and that the defense of forum non conveniens is inapplicable. *Abu Dhabi Commercial Bank PJSC v. Saad Trading*, 117 A.D.3d 609 (1st Dept. 2014).

This article argues that, when it comes to the hurdles of personal jurisdiction and forum non conveniens, there is no good reason for arbitral awards to be held to a higher standard. In particular, in the light of *Daimler v. Bauman*, 134 S. Ct. 746 (2014) — where the U.S. Supreme Court recently made it harder to clear the jurisdictional hurdle — it is necessary to rethink whether personal jurisdiction over the award debtor should be a precondition to the enforcement of a foreign arbitral award.

The Impact of 'Daimler'

While it is too early, and this is not the place, to assess the full impact of *Daimler*—where the court eliminated the "doing business" test for general, personal jurisdiction, asking instead whether a defendant is "at home" in the state—its waves have already surged over the law governing the enforcement of foreign arbitral awards. In *Sonera Holding v. Çukurova Holding*, 750 F.3d 221 (2d Cir.), cert. denied, 189 L.E.2d 837 (2014), the Second Circuit reversed a decision of a district court—rendered before *Daimler*—enforcing a Swiss arbitral award against Çukurova, a Turkish corporation, which it found to be subject to personal jurisdiction on the basis that it was "doing business" in New York. The Second Circuit rendered its decision after *Daimler*, and, in reversing, held that as a result of *Daimler* there was no jurisdiction over Çukurova because it was not "at home" in New York.

By **John Fellas**

Daimler has limited the number of states in which a foreign defendant might be subject to personal jurisdiction; while a foreign defendant may be "doing business" in many U.S. states, it is not likely to be "at home" in more than one, if any. A central justification offered by the court for the elimination of "exorbitant" doing-business jurisdiction is to permit out-of-state defendants "to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit."

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Because defending a case on the merits is typically burdensome, it makes sense, for reasons of fairness, to give a potential defendant some control—through the way it structures its primary conduct—over where it may be sued for claims arising out of that conduct. There is, however, no reason the same solicitude should extend to a potential defendant when it comes to an action to enforce an arbitral award. At that point, the defendant's liability is fixed; an arbitral tribunal has considered the merits and found it to be liable, subject only to certain narrow defenses under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) which are nowhere near as burdensome to assert as compared to defending a case on the merits. Moreover, the award enforcement process finds its occasion only because the award debtor has failed voluntarily to comply with the award. In these circumstances, concerns of fairness to the defendant must give way to concern for an award creditor who has prevailed on the merits and is put to the burden of enforcing an award only because the award debtor has failed to abide by it.

Matter of Treaty Obligation

At first blush, the notion that it is easier to enforce a foreign judgment than an arbitral award appears puzzling in light of the different sources of law that apply to each. The enforcement of foreign judgments is a matter of state law, with the majority of states—including New York—adopting the Uniform Enforcement of Foreign Money Judgments Act (CPLR, Article 53), and the rest following common law principles based on comity. *Hilton v. Guyot,* 159 U.S. 113 (1895). By contrast, the enforcement of foreign arbitral awards is a matter of a treaty obligation incorporated in a federal statute said to embody a national policy in favor of arbitration.

Section 207 of the Federal Arbitration Act (FAA) provides that a court "shall confirm" an arbitral award falling under the New York Convention "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in [Article V of] said Convention." It is baffling, therefore, given the special weight accorded to treaty obligations, that it is harder to enforce a foreign arbitral award than a foreign judgment. See, e.g., *Murray v. The Charming Betsey,* 6 U.S. 64 (1804) (a court should not interpret a statute to violate the law of nations if there is any other possible construction).

The question, therefore, arises as to why New York courts, applying state law, have jettisoned the defenses of personal jurisdiction and forum non conveniens in actions to enforce foreign

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judgments, and why the Second Circuit, applying the New York Convention, has found them to be indispensable when it comes to foreign arbitral awards.

New York and Federal Courts

The starting point is *Lenchyshyn v. Pelko Electric*, 281 A.D.2d 42 (4th Dept. 2001), where the court enforced a Canadian money judgment even though the award debtor was not subject to personal jurisdiction in New York. It is worth making three points about this decision. First, the court offered a rationale based on the text of the CPLR: "There is no mention in CPLR article 53 of any requirement of personal jurisdiction over the judgment debtor in New York, a telling omission in our view." Second, the court offered a policy rationale based on "[c]onsiderations of logic, fairness, and practicality." In particular the court stressed that a party seeking to enforce a foreign judgment "does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment."

Third, the court found it irrelevant that the judgment debtor had no assets in New York. "[E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendants are maintaining assets in New York…"

In *Abu Dhabi Commercial Bank*, the First Department recently endorsed the reasoning in *Lenchyshyn* and extended its holding to cover forum non conveniens. "Dismissal of the action under the doctrine of forum non conveniens was properly denied, because inconvenience is not one of the grounds for non-recognition specified in CPLR 5304…[the] defendant bears no hardship, since there is nothing to defend. The merits were decided in England, and plaintiff seeks no new relief."

As noted, the Second Circuit takes a different view when it comes to arbitral awards. The Frontera court's rationale for a requirement of personal jurisdiction rests partly on the text of the New York Convention and partly on its view that it is a "fundamental requirement." While the Second Circuit acknowledged that Article V of the Convention contains the exclusive defenses to the enforcement of an award, it stated that "Article V's exclusivity limits the ways in which one can challenge a request for confirmation but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."

In *Monegasque* a court dismissed on grounds of forum non conveniens an action to enforce an award against a party to the arbitration, the award debtor, Naftogaz, and a non-party, the State of Ukraine. But while an arbitral tribunal had resolved the merits of the case against Naftogaz and found it to be liable, it had not as to Ukraine.

The Monegasque court's ra-tionale for finding that forum non conveniens is an available defense in the award enforcement context rests on the text of the Convention. The court relied on Article III, which states that a court shall enforce an award "in accordance with *the rules of procedure* of the territory where the award is relied upon (emphasis added)." It reasoned that because forum non conveniens is a matter of procedure rather than substance, so it is a "rule of procedure" within Article III and thus a valid defense.

To allow a judgment debtor to raise the defenses of personal jurisdiction and forum non conveniens, which can involve intensive factual and legal inquiries, is to make a straightforward enforcement process more costly and time-consuming.

Textual Arguments

It is submitted that none of the textual arguments relied upon either by the state or federal courts is conclusive. Thus, while it is reasonable for the state courts to assert that the absence of any explicit mention of New York jurisdiction or forum non conveniens in Article 53 of the CPLR entails that those defenses do not apply, it is equally reasonable for the Frontera court to assert that, because personal jurisdiction is such a "fundamental requirement," it can be disregarded only if there is explicit language to that effect. Similarly, while the words "rules of procedure" in Article III could plausibly be read to include the defense of forum non conveniens, as the Monegasque court suggested, that is not the only way to read them. The words could reasonably be read in a narrower way to refer to the formal steps involved in an action to enforce an award, such as how to commence an action, the timing of any response and so on, and not to include the type of intensive legal and factual inquiry contemplated by a forum non conveniens defense.

Because the textual arguments seem inconclusive, it is important to examine the policy rationale offered by the state courts: Since CPLR Article 53(a) requires that the foreign court have personal jurisdiction over the defendant in order to render a judgment, there is no unfairness to the judgment debtor if the New York court—which is not addressing the merits or granting any new relief—enforces that judgment without itself having jurisdiction. The same goes for forum non conveniens; the New York court is only enforcing what a foreign court (with jurisdiction) has done; it is not reaching the merits or granting new relief.

In fact, one could go further and argue that given that the judgment creditor is forced to commence an enforcement action only because the debtor has failed voluntarily to comply with the judgment, deference should be given to its choice of where to bring that action on the theory that it would be unfair to allow the debtor to avoid its obligations under an otherwise enforceable judgment by relying on defenses that have nothing to do with that judgment's validity. Moreover, to allow a judgment debtor to raise the defenses of personal jurisdiction and forum non conveniens, which can involve intensive factual and legal inquiries, is to make a straightforward enforcement process more costly and time-consuming.

These policy arguments apply with equal force to arbitral awards. The fundamental aim of an enforcement action—whether it relates to a foreign judgment or arbitral award—is the same. It is not to resolve the merits of the case, since ex hypothesi a foreign court or arbitral tribunal has already done so. Rather, it is to ensure that the judgment or award debtor complies with its obligations, subject only to certain narrow defenses that are similar both in the judgment and award contexts. For example, in deciding whether to enforce a foreign judgment or arbitral award, courts look to issues of: (i) the jurisdiction of the foreign court or arbitral tribunal (compare CPLR §5304(a)(2) with New York Convention Article V(1)(c)); (ii) due process (compare CPLR §5304(a)(1) and (b) with Article V(1)(b)); and (iii) local public policy (compare CPLR §5304(b)(5) with Article V(2)(b)).

Given that the award debtor has subjected itself to the jurisdiction of an arbitral tribunal through its own consent, there seems little unfairness in a court enforcing an award rendered by a tribunal acting within the scope of its jurisdiction, even if the court itself lacks personal jurisdiction. Moreover, as with a judgment creditor, an award creditor is likely to select a forum for enforcement where the debtor has assets or is likely to have assets in the future, the last point being an important consideration given the relatively short three-year limitations period for an enforcement action under section 207 of the FAA. Moreover, the same considerations of fairness to the award creditor and efficiency apply equally in the arbitration context as they do in the judgments context.

This policy-based approach has the merit of explaining, in part, the decision in *Monegasque*. The enforcement action against Ukraine was precisely to determine its liability on an alter ego theory, not to enforce an award that had already done so. Thus, the policy considerations that justify dispensing with the defense of forum non conveniens simply did not apply to Ukraine.

When it comes to the defenses of personal jurisdiction and forum non conveniens, there is no good reason for foreign arbitral awards to be held to a higher standard than foreign judgments.