New York Courts Widen Options for Enforcement of Foreign Arbitral Awards

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In a development that could have substantial benefits for international investors, state and federal courts in New York have issued a series of decisions that significantly facilitate the enforcement of foreign arbitration awards in New York. Because many defendants hold assets in the New York banking system or in New York real estate, the developments are highly relevant to investors seeking recovery for harms suffered around the world. The courts' recent decisions re-affirm New York's commitment to promoting international arbitration and asset recovery.

Enforcement Under the New York Convention

Final decisions (or 'awards') of arbitration panels are not, as such, enforceable and cannot form the basis for a sheriff to collect payment. To become enforceable and serve as a basis for the attachment of bank accounts or other assets in the United States, arbitral awards must be converted into a U.S. court judgment. For domestic awards this process is referred to as 'confirming' the award; for foreign awards it is called 'recognition and enforcement.' These terms mean essentially the same and are often used interchangeably.

Under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the New York Convention, foreign arbitral awards may still be reviewed (confirmed or set aside) in their home countries, where they may be subject to any requirement of the home country's law. *See* N.Y. Conv. Art. V(1)(e). Awards from treaty countries (and often from anywhere in the world) may also be recognized and enforced *directly* in other treaty countries, without need for prior review of the courts at the seat of arbitration. *See* Arts. I(1), III. Such enforcement abroad may only be denied on limited grounds. Article V of the Convention lists as grounds, among others, the invalidity of the arbitration clause, public policy, and the situations that the panel was not properly composed or exceeded its powers, the award is not final, or the matter cannot be subjected to arbitration.

The United States has implemented the Convention in Sections 201 *et seq.* of the Federal Arbitration Act ('FAA'). Section 207 provides that a party may apply to the appropriate U.S federal court 'for an order confirming the [foreign] award.' 9 U.S.C. § 207. In *CBF Indústria de Gusa S/A v. AMCI Holdings, Inc.*, the district court had held that the plaintiff, which sought enforcement against a non-party based on an alter ego theory, should have first applied for an alter ego finding in a confirmation proceeding abroad. 14 F. Supp. 3d 463, 478-79 (S.D.N.Y. 2014). On appeal, the federal appeals court in Manhattan rejected that view: enforcement under the New York Convention does not require such a two-step process; it requires but a single step. *CBF*, 2017 WL 191944, at *10 (2d Cir. Jan. 18, 2017).

If the district court's view had prevailed, it would have thrown enforcement back to the situation before the New York Convention. In the old days, to enforce a foreign arbitration award, the award creditor was required to obtain confirmation of the award from the court in the country that was the official seat of arbitration (which is usually where all the arbitration hearings were held). In many countries such confirmation is known as an *exequatur*. U.S. courts would then recognize and enforce, not the foreign award, but the foreign court's *exequatur* judgment that confirmed that award. This two-step approach was called the 'double *exequatur*.' The *CBF* decision constitutes a firm rejection of the need for such double *exequatur*.

The Advantages of Double *Exequatur*

But to conclude that a double *exequatur* is unnecessary does not mean that it is prohibited. There are at least two circumstances where the more cumbersome two-step process is actually more favorable to an award creditor than the approach under the New York Convention and the FAA. First, the time available to seek confirmation may be longer under foreign law than the three-year limitation under the FAA. *See* 9 U.S.C. § 207. When recognition and enforcement of a foreign award is time-barred, the two-step approach enables the award creditor to seek confirmation abroad and have the *exequatur* judgment, rather than the arbitral award, recognized and enforced in the United States.

Similarly, the two-step approach provides a way around jurisdictional obstacles. A foreign award can only be enforced against a party if the court has personal jurisdiction over it. The Convention does not alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought. *See Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009). If confirmation (or an *exequatur*) of the award is obtained abroad, however, such court judgment *is* enforceable in New York without the judgment debtor maintaining a presence or other ground for jurisdiction in New York, as the court held in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 986 N.Y.S.2d 454 (App. Div. 1st Dep't 2014). The two-step approach thus widens enforcement options beyond the restrictions imposed by the statute of limitations and personal jurisdiction rules.

Enforcement of Annulled Awards

Another recent example of expansive protection of foreign arbitral awards is the enforcement of a Mexican award despite its annulment by a Mexican court in *COMMISA v. Pemex–Exploración Y Producción*, 832 F.3d 92 (2d Cir. 2016). As a general rule, an annulment by a court in the seat of arbitration is ground for a denial of recognition and enforcement under the New York Convention. *See* Art. V(1)(e). The reason is simple: foreign laws may subject

confirmation of local awards to whichever conditions they deem necessary, and they may have good reasons to do so. It is not up to a U.S. judge to second-guess those reasons or conditions.

In *Pemex*, however, the New York federal courts held differently. COMMISA had contracted with Mexican government-owned oil and gas company Pemex to build oil platforms in the Gulf of Mexico. A dispute arose, and both parties began accusing each other of breach of contract. In 2004, Pemex cancelled the contract, seized the platforms, and ejected COMMISA from the work sites. Five years later, an arbitral panel found in COMMISA's favor and ordered Pemex to pay $300 million. *Pemex*, 832 F.3d at 97-98. During the arbitration proceedings, however, the Mexican government changed the law to render all issues related to public contracts non-arbitrable and vest exclusive jurisdiction in an administrative court. It also shortened the applicable limitations period from 10 years to just 45 days. On this basis, Pemex was able to have the administrative court annul the award. *Id*. at 99-100.

The federal courts in New York nonetheless recognized and enforced the arbitral award, despite Mexico's annulment decision, on grounds of public policy. They reasoned that the arbitration clause had been valid when the parties entered into their agreement; and because Pemex had also participated extensively in the arbitration before the intervening statute, accepting the revocation of arbitral jurisdiction would have upset legitimate contractual expectations. The courts also found that cancelling contractual rights through retroactive legislation was repugnant to U.S. law, particularly when in combination with the shortened limitations period of a mere 45 days it effectively deprived COMMISA of any forum to bring its claims. The cancellation of the contract, the forcible removal from the platforms, and the deprivation of an available forum further amounted to a government expropriation without compensation. Accordingly, the courts found Mexico's attempts to interfere with the award to be repugnant to fundamental notions of what is decent and just. *Id*. at 106-11. While the court of appeals underscored the rare and truly unusual circumstances of the case, *Pemex* demonstrates the New York federal courts' willingness to critically examine a foreign court's annulment and to protect foreign arbitral awards against foreign government interference.

Fast-Track *Ex Parte* Enforcement of ICSID Awards

A further demonstration of the courts in New York paving the path for enforcement is *Mobil Cerro Negro Ltd. v. Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015), which concerns the enforcement of arbitral awards under the auspices of the International Center for Settlement of Investment Disputes (ICSID). ICSID awards are not governed by the New York Convention or the Federal Arbitration Act. In accordance with Article 54 of the ICSID Convention, the statute that implements the Convention provides that federal courts have exclusive jurisdiction over ICSID awards and that such awards are to be enforced the same way as state court judgments are enforced. *See* 22 U.S.C. § 1650a(a). Section 1650a does not specify the procedure to be followed, which has left federal courts to reach different approaches as to how to fill that gap—with the district court in Manhattan (the Southern District of New York) taking the most arbitration-friendly approach.

District courts in Washington, D.C., and Virginia require the award creditor to initiate plenary proceedings, which are commenced by the filing of a complaint and followed by service of a summons on the defendant. *Micula v. Romania*, 104 F. Supp. 3d 42, 50 (D.D.C. 2015); *Continental Casualty Co. v. Argentina*, 893 F. Supp. 2d 747 (E.D. Va. 2012). In New York, on the other hand, the procedure may be accelerated by the filing of a short *ex parte* enforcement petition without service on the award debtor. In *Mobil Cerro Negro*, an ICSID tribunal had awarded Exxon Mobil $1.6 billion, with 3.25% compounded interest from 2007 onward, as fair compensation for Venezuela's nationalization of certain oil projects. The district court granted the *ex parte* petition for enforcement expeditiously, the same day it was made.

While the Washington, D.C. and New York courts each raise a variety of points, their key difference was that the D.C. court referred to the Federal Rules of Procedure to fill the gap (which require in Rules 3 and 4 the filing of a complaint and service of a summons), while the New York federal court invoked the Rules of Decision Act (which provides for the application of state law, except when treaties, the Constitution, or "Acts of Congress" provide otherwise). *See* 28 U.S.C. § 1652. Because the Federal Rules were not enacted by Congress, the Southern District appears to have the stronger argument that state law (in this case, New York law) applies. New York provides for an expeditious procedure to register an out-of-state judgments that is entitled to full faith and credit, which may be sought *ex parte* and requires no more than that the judgment creditor must notify the judgment debtor within 30 days of entry of the judgment and wait 30 more days after filing proof of service before executing the judgment. *See* N.Y. CPLR § 5403. New York also does not require that its courts themselves have personal jurisdiction over the out-of-state judgment debtor. By holding that the same rules apply to ICSID awards, the *Mobil Cerro Negro* court has cast New York wide open to the enforcement of ICSID awards from anywhere in the world.

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