New York Law Journal

ALM Properties, Inc.
Page printed from: *New York Law Journal*

Back to Article

Enforcement of International Arbitration Awards in New York

Samaa A. Haridi, Marguerite C. Walter and Sylvana Q. Sinha

New York Law Journal

04-01-2013

This article examines recent developments in New York courts' approach to enforcement of arbitral awards under Chapter 2 of the Federal Arbitration Act and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). An award creditor seeking to enforce an award in New York must first have the award "confirmed," thereby converting the award into a court judgment that may be enforced upon. As discussed below, the Court of Appeals for the Second Circuit recently upheld its view that proceedings regarding such confirmation may be dismissed on grounds of forum non conveniens. Once a final award has been confirmed as a judgment, a party can ask the court to seize any assets of the award debtor found in or outside of New York, so long as personal jurisdiction is satisfied. Most circuit courts, including the Third, Fourth, Seventh, Ninth, Eleventh, and most recently the Fifth, have adopted this approach. However, a recent judgment in New York on a pre-award attachment proceeding has opened the door to the possibility of enforcement where the only nexus to New York is the presence of assets or creditors in New York.

Pre-Award Attachment

Article III of the New York Convention requires that Contracting States recognize and enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon." In a notable development, New York courts have recently demonstrated a willingness to issue orders of attachment in support of arbitration even before an award has been rendered. Pursuant to New York Civil Practice Law and Rules (CPLR) §7502(c), as amended in 2005, a New York court can grant an order of attachment or a preliminary injunction in aid of arbitration outside of the United States. The only basis to obtain such relief is that "the award to which the applicant may be entitled may be *rendered ineffectual* without such provisional relief."

Recently, the Appellate Division for the Supreme Court of New York, First Department, faced the question in *In re Sojitz* of whether it could attach assets under CPLR §7502(c) where there was no connection to New York in terms of either personal or subject matter jurisdiction over either party. The petitioner was a Japanese company; the respondent was an Indian company; the contract was entered into in India and governed by English law; and the seat of arbitration was to be Singapore. The only connection to New York was that a customer based in New York allegedly owed money to the respondent.

The claimant sought a pre-award attachment of $40 million as security for an arbitral claim it intended to submit for resolution within 30 days, in order to prevent the respondent from dissipating its New York assets before the arbitral tribunal could be constituted. The Supreme Court granted an order of attachment of the funds due to the respondent by the customer, and the respondent moved to vacate the order based on the absence of personal jurisdiction.

Despite the tenuous nexus between the arbitration and the forum, the court ultimately affirmed a pre-award attachment of the funds due to the respondent by the customer in New York, relying on the U.S. Supreme Court's decision in *Shaffer v. Heitner*. Although the *Shaffer* court held that jurisdiction over a non-resident defendant could not be based solely on the presence of a defendant's property, it noted in dicta that attachment for the purposes of security for pending litigation would not raise any due process concerns. The *Sojitz* court also pointed out that the Supreme Court had on several occasions approved attachments to

execute foreign judgments against judgment debtors with no contacts with the forum other than ownership of property in the forum. The court also observed that CPLR §7502(c) offered "substantive and procedural safeguards intended to permit attachment consistent with due process," namely, that without the provisional remedy any award issued from an arbitration proceeding would otherwise be "rendered ineffectual," and that if the arbitration did not commence within 30 days after the attachment order it "shall expire and be null and void."

Sojitz marks a departure from previous New York jurisprudence that required a court to have personal jurisdiction over an award debtor before it could order attachment. It opens the door for New York courts to find that the presence of any assets in New York, even those owed to the debtor, may be sufficient to establish jurisdiction for a lawsuit to seize those assets to enforce an award. This would be a remarkable departure from New York's previous line of case law in this regard.

Dismissal Based on Forum Non Conveniens

As noted above, Contracting States are required by Article III of the New York Convention to recognize and enforce arbitral awards except under limited circumstances, and consistent with rules of procedure in the territory where enforcement is sought. In a recent decision, a majority sitting on the Second Circuit upheld previous case law finding that a petition for confirmation of a foreign arbitral award could be dismissed based on the doctrine of forum non conveniens, because the availability of such dismissal is a rule of procedure in New York.

The question arose in *Figueiredo Ferraz e Engenharia de Projeto v. Republic of Peru*, where Figuereido sought to enforce a $21 million arbitral award against Peru pursuant to the Inter-American Convention in International Commercial Arbitration (the Panama Convention), or, alternatively, under the New York Convention. Peru had commenced payments on the award, but under Peruvian law the state agency involved was barred from paying more than three percent of its annual budget to satisfy a judgment in any given year. Figuereido sought to attach assets of Peru held in New York to circumvent Peruvian law.

In proceedings before the Southern District of New York, Peru argued, inter alia, that the petition should be dismissed on the basis of forum non conveniens. The court denied Peru's motion to dismiss on all grounds, and Peru appealed that decision with respect to the determination on forum non conveniens and two other issues. Peru argued that the petition should be dismissed and enforcement pursued in Peru, where a court would be familiar with the statutory three percent limit on payment of awards.

The majority of the Second Circuit court agreed, finding that there was a compelling public interest in giving effect to a sovereign's efforts to limit its liability for payment of judgments and awards. It rejected Figueiredo's argument that Peruvian courts were an inadequate alternative forum, even though Figueiredo might not be able to recover fully in Peru.

In a strong dissent, Judge Gerard E. Lynch emphasized that there was a difference between a petition to enforce an award that had already been rendered, and a proceeding where the merits had yet to be decided. Peru's invocation of forum non conveniens served "to import a substantive and self-serving provision of Peruvian law into what should properly be a summary proceeding," thus undermining the expectation of the parties at the time of contracting. Lynch further observed that the majority's ruling also served to undermine the functioning of both the New York and Panama Conventions, noting that the Ninth Circuit had rejected the application of forum non conveniens in analogous circumstances. In his view, although the U.S. Supreme Court had identified forum non conveniens as a rule of procedure for federal preemption purposes, the doctrine was entirely unknown to civil law countries and could not have been expected by the parties of either convention to prevent enforcement of arbitral awards under either instrument. Lynch also acknowledged the Second Circuit's earlier decision in *In re Arbitration Monegasque* confirming the availability of forum non conveniens dismissal in actions to confirm foreign arbitral awards, but argued that there were "substantial reasons" to believe that *Monegasque* had been wrongly decided. Whether or not *Monegasque* was wrongly decided, it revolved around a key set of facts absent from *Figueiredo*. In *Monegasque*, the petitioner sought to enforce its award against Ukraine, although Ukraine had not been a party to the arbitral proceeding. The court dismissed Monegasque's petition on forum non conveniens grounds because it found that the determination of whether, and to what extent, Ukraine could be held responsible for payment of an award against Naftogaz was an issue of fact that would require extensive discovery and witness testimony, and Ukraine was the better forum for such an inquiry.

The Second Circuit's extension of its ruling in *Monegasque* to a case in which no such inquiry was necessary seems to constitute a significant enlargement of the scope for forum non conveniens dismissal of actions to enforce foreign arbitral awards in New York. The Second Circuit's apparent reluctance to entertain a petition to enforce a duly obtained foreign arbitral award, moreover, appears somewhat contradictory to the increasing openness of New York courts to order pre-award attachment, as discussed in the previous section. In any event, the doctrine of forum non conveniens is certainly one that both award creditors and award debtors should bear in mind when dealing with efforts to enforce foreign arbitral awards in New York.

Post-Award Enforcement

Where a New York court does exercise jurisdiction to hear a petition for enforcement, under recent jurisprudence it may order turnover of assets held outside New York. Since 2009, New York courts have held that §5225(b) of the CPLR empowers a court to order turnover of extraterritorial property as long as the court has personal jurisdiction over the judgment debtor. However, the case establishing that rule, *Koehler v. Bank of Bermuda*, left open the question of whether the long-standing separate entity rule shields assets held by foreign banks from such turnover orders. Recent decisions in New York show that this question remains unsettled.

Under the separate entity rule in New York, "each branch of a bank is a separate entity, [and is] in no way concerned with accounts maintained by depositors in other branches or at the home office." Based on this rule, personal jurisdiction over a foreign bank or corporation cannot be established solely by the presence in New York of a subsidiary or affiliate if the foreign

and local offices are different corporate entities, and assets held by foreign offices cannot be attached. The New York Court of Appeals did not mention the separate entity rule in its analysis in *Koehler*, presumably because the respondent was a wholly-owned New York subsidiary of a Bermudan bank that was also serving as its agent in New York.

New York state courts have subsequently ruled on several occasions that the separate entity rule is still intact after *Koehler* and have not exercised personal jurisdiction over any award debtors where the nexus to New York is exclusively through a subsidiary or other "separate entity."

However, federal courts are split on *Koehler*'s impact on the separate entity rule. The Southern District of New York held in *JW Oilfield Equipment v. Commerzbank,* that *Koehler* had effectively repealed the separate entity rule for post-judgment enforcement proceedings and ordered the respondent to pay the judgment due to the petitioner, "regardless of whether those accounts are held in Germany or New York." Then, in *Shaheen Sports v. Asia Insurance*, a different judge in the Southern District of New York rejected this interpretation, ruling that the separate entity rule remained well settled law in New York, because the public policy reasons underlying it were still intact in the New York Uniform Commercial Code and because the *Koehler* court would have been explicit if it had wished to abolish the separate entity rule. It is therefore unclear whether or under what circumstances federal courts will enforce arbitral awards by ordering respondents to deliver assets held in foreign branches of banks with a presence in New York.

Conclusion

These recent decisions demonstrate an overall favorable approach to enforcing arbitral awards in New York, except where a sovereign respondent successfully raises the defense of forum non conveniens. Nevertheless, parties should be aware of the various factors that may affect their ability to prevail in recognition and enforcement proceedings under the New York Convention in New York courts.

Samaa A. Haridi *is a partner, and* ***Marguerite C. Walter*** *and* ***Sylvana Q. Sinha*** *are associates, in Weil, Gotshal & Manges' international arbitration group. Haridi and Sinha reside in the New York office, and Walter resides in the Washington, D.C., office.*