

ENFORCING ARBITRAL AWARDS AND JUDGMENTS AGAINST FOREIGN ENTITIES

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Overview

- ✓ Recognition of Foreign Judgments
- ✓ Confirmation and Enforcement of New York Convention Awards
- ✓ Developing an Enforcement Strategy
- ✓ Investigation and Discovery
- ✓ Pre-Judgment Tools for Enforcement
- ✓ Post-Judgment Tools for Enforcement
- ✓ FSIA Issues
- ✓ Key Lessons

Recognition of U.S. Court Judgments

- Judgments issued by a United States court are enforceable in every state as a result of the Full Faith and Credit Clause
 - In New York, the judgment may be registered with the clerk or the plaintiff can bring an action on the judgment or seek summary judgment in lieu of complaint (CPLR § 5406)
 - 28 U.S.C. § 1963 provides for registration of a federal court judgment in any federal court
- Personal jurisdiction over the judgment debtor is not required (*Breezevale Ltd. v. Dickinson*, 262 A.D.2d 248 (1st Dep't 1999))

Recognition of Foreign Judgments

- Covered by the Uniform Foreign Money Judgment Recognition Act
- In New York, Article 53 of the CPLR
- In New York, the judgment creditor can file an action on the judgment or summary judgment in lieu of complaint
- No personal jurisdiction is needed over the judgment debtor (*Abu Dhabi Commercial Bank PJSC v. SAAD Trading, Contracting and Fin. Servs. Corp.*, 117 A.D.3d 609 (First Dep't 2014))
- In federal court, there must be an independent basis for subject matter jurisdiction

The Uniform Foreign Money Judgment Recognition Act

- Civil judgment granting or denying a recovery of a sum of money
- Judgment must be final, conclusive, and enforceable where rendered
- The foreign judgment must NOT be a judgment for:
 - Taxes
 - Fines
 - Other penalties
- In addition, many states have recognition statutes that contain a savings clause: “This Act does not prevent the recognition of a foreign judgment in situations not covered by this Act.”

Key Defenses Against Recognition

CPLR § 5304(a): A foreign judgment is not enforceable if:

- Judgment rendered by a system that does not afford impartial tribunals or procedures compatible with due process
- The foreign court did not have personal jurisdiction over the defendant

CPLR § 5304(b): A foreign judgment *may* not be enforceable if:

- The foreign court lacked jurisdiction over the subject matter
- The defendant in the foreign action did not receive notice of the proceedings in sufficient time to enable him to defend the suit
- Judgment was obtained by fraud
- Judgment is based on a cause of action repugnant to public policy
- Judgment conflicts with another final and conclusive judgment
- Judgment is contrary to an agreement between the parties to resolve the dispute out of court
- In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum
- The cause of action resulted in a defamation judgment outside the United States, unless the court determines the foreign court provided as much protection for freedom of speech in that case as would be provided in the U.S.

Defenses Against Recognition cont'd

Osorio, et al. v. Dole Food Company, Inc.,
665 F. Supp. 2d 1307 (S.D. Fl. 2009)

- Suit against Dole to enforce \$97 million judgment entered in Nicaragua
- Legal Defenses in U.S. Court:
 - The foreign court lacked jurisdiction (subject matter and personal)
 - Lack of impartial tribunals
 - Failure to afford procedures compatible with due process
 - Repugnant to public policy
 - Recognition violates the U.S. Constitution
 - Unenforceable Penalty
 - Fraud in Nicaragua
- Court denied recognition

The New York Convention

- The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the “New York Convention” applies to the recognition and enforcement of foreign arbitral awards.
- Recognition of an international arbitral award may be sought in any member state, and recognition actions in multiple jurisdictions are commonplace.
- Only the “seat” of arbitration, the jurisdiction in which the award was rendered, may annul the award.
- Usually filed in Federal Court as the Federal Arbitration Act provides subject matter jurisdiction.

Confirming Arbitral Awards under the New York Convention

Grounds for Confirmation of Arbitral Awards: 9 USC 207 (Federal Arbitration Act)

- **Within three years** after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award *unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.*

New York Convention: Grounds for Refusing Enforcement

- 1 • The parties to the agreement were under some incapacity or the agreement is not valid under the law to which the parties have subjected it, or, failing any indication, under the law of the country where the award was made.
- 2 • The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
- 3 • The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration
- 4 • The composition of the arbitration authority or the arbitral procedure was not in accordance with the parties' agreement or, failing such agreement, the law of the country where the arbitration took place
- 5 • The award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.
- 6 • The subject matter of the difference is not capable of settlement by arbitration under the laws of the country where recognition is sought.
- 7 • The recognition or enforcement of the award would be contrary to the public policy for that country.

Issues in Confirmation Proceedings

Yukos Capital v. Samaraneftgaz, 592 Fed. App'x 8 (2d Cir. Nov. 4, 2014)

- In 2007, Yukos Capital secured an award in the amount of RUR 3,080,711,971 plus fees and costs against Samaraneftgaz in an ICC arbitration conducted in New York.
- In 2010, Yukos Capital filed a petition to confirm the award in federal court in New York.
- Samaraneftgaz contested the validity of the arbitration agreement, necessitating discovery into the circumstances of the signing of the agreement.
- Samaraneftgaz further alleged that it did not receive proper notice of the arbitration and that enforcement of the award would give effect to tax fraud allegedly committed in Russia, thereby violating public policy.
- The district court upheld the validity of the arbitration agreement and later granted summary judgment in favor of Yukos Capital, rejecting Samaraneftgaz's defenses and confirming the award.
- At the request of Yukos Capital, the district court converted the amounts awarded in Russian rubles into U.S. dollars using the exchange rate as of the date the arbitration award was issued, resulting in a judgment of \$185 million.
- The Second Circuit affirmed the district court's decision to enforce the award and to convert the rubles award into dollars as of the date of the award.

Recognition of ICSID Awards

- Arbitral awards rendered pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (“ICSID”) are not subject to review by national courts in the same manner as awards made pursuant to the New York Convention
- The implementing legislation of the treaty provides that awards will be given the same full faith and credit as a final judgment of one of the several States. 22 U.S.C. § 1650a

Recognition of ICSID Awards cont'd

- In *Mobil Cerro Negro Ltd. v. Bolivarian Republic of Venezuela*, 87 F. Supp. 3d 573 (S.D.N.Y. 2015), the court held that an award creditor could seek recognition on an *ex parte* basis under the New York CPLR.
- Under the New York procedure, once the 30 day statutory waiting period expires, the award creditor can immediately seek an order of execution against the sovereign.
- By contrast, in *Micula v. Romania*, 2015 WL 2354310 (D.D.C. May 18, 2015), the court rejected the approach taken in *Mobil*, concluding that Section 1650a does not permit the use of an *ex parte* state procedure to recognize an ICSID award. Rather, the party seeking recognition of an ICSID award must bring a plenary action and, if the award-debtor is a foreign sovereign, must comply with service of process pursuant to the FISA.

Alternative Route to Enforcing Arbitral Awards

Using the UFMJRA to Enforce Confirmed Arbitral Awards after 3-Year Period

- A judgment creditor may use the UFMJRA to enforce a foreign judgment enforcing an arbitral award.
- Although the time was expired for seeking enforcement of the arbitral award under the New York Convention, the Paris Court of Appeals' ruling confirming the arbitral award ("exequatur") fell within the category of judgments enforceable under the New York Uniform Foreign Money-Judgments Recognition Act. *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).
- The longer (15-year) period to enforce a foreign judgement is not preempted by the shorter three-year limitation period for enforcing international arbitration awards under the Federal Arbitration Act. *Commissions Import Export S.A. v. Republic of the Congo*, 757 F.3d 321 (D.D.C. 2014) (a 2009 English court judgment confirming the arbitral award, which was rendered in 2000).

Developing a Strategy

Plan for Enforcement from the Outset

- Foreign venue: try to carry out your foreign litigation in a venue likely to produce a judgment you can defend later
- Judgment needs to be final and enforceable (determined by the law of the jurisdiction in which it was entered)
- Consider potential for pre-judgment attachment
- Be prepared for counterclaims and key defenses
- Consider statute of limitations
- Consider timing of recognition actions in multiple jurisdictions
- Keep an eye on other creditors of the debtor

Information about the Debtor's Assets is Key

- Clients often have information about debtors' businesses
- Review public filings and financials to understand debtors' flow of funds
- Litigation searches
- Monitor news reports for announcements of impending transactions
- Hire private investigator to assist in locating assets
- Take discovery of judgment debtor's assets under both federal and state law

Ability to Obtain Worldwide Discovery

Gucci Am. Inc. v. Bank of China, 768 F.3d 122 (2d Cir. 2014)

- Gucci sued counterfeiters who transferred the profits of their counterfeit sales to accounts at the Bank of China.
- Gucci served the Bank of China with a subpoena at its New York Branch Office seeking information about the counterfeiters' bank accounts.
- Bank of China refused to produce on grounds of Chinese bank secrecy law.
- The district court ordered Bank of China to produce documents and ultimately found Bank of China in contempt for failure to produce.
- The Second Circuit remanded the case for consideration of whether the district court had specific personal jurisdiction over Bank of China to enforce the subpoena.

Discovery cont'd: *Gucci Am., Inc. v. Bank of China*

- The district court found specific jurisdiction over the bank. *Gucci America, Inc. v. Weixing Li et al.*, 2015 WL 5707135 (S.D.N.Y. Sept. 29, 2015)
- The bank had established correspondent accounts in New York to facilitate dollar transfers from the United States to China, advertised its New York branches as “the first choice of U.S. dollar wire transfers to and from China,” and “frequently and deliberately used its New York correspondent account with Chase in New York to effectuate wire transfers for its U.S. clients, including, critically, Defendants in this action.”

Pre-Judgment Remedies: Attachment

CPLR § 6201

- May be granted in an action in which plaintiff seeks a money judgment, when:
- the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state; or
- the defendant resides or is domiciled in the state and cannot be personally served despite diligent efforts to do so; or
- the defendant, with intent to defraud his creditors or frustrate the enforcement of a judgment that might be rendered in plaintiff's favor, has assigned, disposed of, encumbered or secreted property, or removed it from the state or is about to do any of these acts, or . . .
- the cause of action is based on a domestic or foreign judgment entitled to recognition

Pre-Judgment Attachment cont'd

- Use to gain priority over other creditors
- Use to create security lien where debtor may file for bankruptcy
- Use in connection with a suit seeking recognition of a foreign money judgment

All Property Interests Are Subject to Enforcement

- Real property—filing judgment in county where property is located gives you a lien
- Bank accounts
- Lawsuits (*Breezevale Ltd. v. Dickinson*, 262 A.D.2d 248 (1st Dep't 1999))
- Debts owed to judgment debtor
- Intellectual property
- Receivables
- Dividends paid to shareholders during the lawsuit

Situs of Debt: “Debt Clings to the Debtor”

Hotel 71 v. Falor, 14 N.Y.3d 303 (2010)

- “The principles set forth in *Harris v Balk* (198 US 215 [1905]) to be used to fix the situs of a debt were applicable here. Under *Harris*, where a creditor seeks to attach a debt (an intangible form of property) solely for security purposes (i.e., the debtor is subject to the court's personal jurisdiction), the situs of the debt is wherever the debtor is present. The property interests at issue here were not debt, but there is no real distinction between “debt” and “property” under CPLR 5201. . . .Just as a debt clings to the debtor when he or she enters a state other than the state where the debt was incurred, **it follows that defendants' uncertificated ownership interests, which the defendant possessed or had custody over, traveled with him, and were attachable in New York based on his presence there.**”

Asset Freeze and Attachment—Federal Courts

- If the action seeks equitable relief, the district court may restrain the debtors' assets within or without the state. *Gucci Am. Inc. v. Bank of China*, 768 F.3d 122, 130 (2d Cir. 2014).
- If the action is for money damages only, the court lacks equitable authority to freeze the defendants' assets. *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 119 S. Ct. 1961, 1975 (1999) (holding that the court lacked authority to issue a preliminary injunction preventing disposition of defendant's assets in a suit seeking money damages).
- But an asset restraint can be obtained pursuant to Federal Rule of Civil Procedure 64 if the requirements for a pre-judgment attachment under state law are met.

Asset Freeze and Attachment—English Courts

- Ability to obtain worldwide freezing order
 - English court proceedings
 - Arbitrations seated in England
 - Foreign arbitrations

Pre-Judgment Attachment cont'd:

Yukos Capital v. Rosneft, 09 Civ. 07905
(S.D.N.Y.) (AKH)

- Yukos Capital filed an action in New York federal court to enforce an ICC arbitral award and recognize a Dutch court judgment granting exequatur to the same award under the Foreign Money Judgment Recognition Act.
- Yukos Capital obtained a \$420 million pre-judgment attachment against Rosneft pursuant to CPLR § 6201.
- Yukos Capital was able to use the order of attachment to restrain the payment by oil majors to Rosneft for oil shipments, ultimately forcing Rosneft to post security.



Post-Judgment Remedies

- Post-Judgment Discovery
- Turnover order
- Restraining Notice
- Other Forms of Injunctive Relief
- Appointing a Receiver

Discovery in Aid of Execution

- Broad discovery is available
 - “[B]road post-judgment discovery in aid of execution is the norm in federal and New York state courts.” *EM Ltd. v. Republic of Argentina*, 695 F.3d 201, 207 (2d Cir. 2012), *aff’d sub nom., Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).
- May conduct discovery pursuant to state procedure or Federal Rule of Civil Procedure 69
- CPLR 5224(4)(a-1) expressly provides for discovery of documents within or without the state

Turnover Orders

CPLR § 5225

- Motion may be served on judgment debtor or special proceeding commenced as to garnishee
- Requires showing that the judgment debtor is in possession or custody of money or other personal property in which he has an interest
- As long as the court has personal jurisdiction over the judgment debtor or garnishee, the court can order the turnover of assets from anywhere in the world. *Kohler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533, 541 (2009) (“[W]e hold that a New York court with personal jurisdiction over a defendant may order him to turn over out-of-state property regardless of whether the defendant is a judgment debtor or a garnishee.”)
- Conflict with foreign law analyzed under Restatement (Third) of Foreign Relations Law § 403

Turnover Orders cont'd

Yukos Capital v. Samaraneftgaz, 2014 WL 81563 (S.D.N.Y. Jan. 9, 2014) (PAC)

- As part of its enforcement strategy, Yukos Capital obtained a turnover order pursuant to NY CPLR § 5225, requiring Samaraneftgaz to bring assets into the jurisdiction sufficient to pay the judgment (or post a bond).
- The district court also enjoined Samaraneftgaz from paying further dividends to its parent, finding that it had fraudulently transferred more than \$1 billion while the litigation was pending.
- The Second Circuit later vacated the order without expressing any view on the merits of the order, directing the district court to clarify its rulings with respect to alternative service and comity issues.

Restraining Notices

CPLR § 5222

- May be served by an attorney
- May be served on anyone except judgment debtor's employer
 - Serve on banks or business entities with which the judgment debtor does business
 - Does not create a lien
 - Must follow up with turnover proceeding to obtain the funds

Establishing Jurisdiction Over A Foreign Bank

The Separate Entity Rule:

- Jurisdiction over a foreign bank is not obtained merely by service on the bank's New York branch. *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149 (2014)
- However, jurisdiction over the bank's head office may still be established based on the bank's in-state activities

Establishing Jurisdiction Over A Foreign Bank

- *Licci v. Lebanese Canadian Bank, SAL*, 20 N.Y.3d 327, 339 (2012). The New York Court of Appeals, answering the question certified by the Second Circuit, held that “a foreign bank’s repeated use of a correspondent account in New York on behalf of a client—in effect, a ‘course of dealing’—show[s] purposeful availment of New York’s dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States.”
- The Second Circuit then confirmed that the bank’s recurring use of the correspondent account satisfied due process, even though the bank had no other New York contacts. *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 171 (2d Cir. 2013).

Other Forms of Post-Judgment Relief: Injunctions

- The Second Circuit has held that a judgment debtor’s “persistent efforts to frustrate the collection of money judgments” constitutes irreparable harm warranting equitable relief.
 - *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012): The Second Circuit affirmed the district court’s injunction prohibiting the Republic from making payments to exchange bondholders without making ratable payments to the bondholders whose bonds were in default.
 - *Pashaian v. Eccelston Props., Ltd.*, 88 F.3d 77, 87 (2d Cir. 1996): The Second Circuit affirmed the district court’s injunction against fraudulent transfers intended to frustrate the judgment.

Appointment of a Receiver

CPLR § 5228

- Upon motion of the judgment creditor, the court may appoint a receiver to collect and sell the judgment debtor's property.

Targeting Fraudulent Transfers

- The Uniform Fraudulent Conveyance Act permits avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.
- Transfers are considered fraudulent if:
 - They were made with actual intent to hinder, delay or defraud any creditor; or
 - The transfer was for less than reasonably equivalent value and, post-transfer, the debtor was left with unreasonably few assets such that it risked being unable to pay its debts.
- *Orr v. Kinderhill Corp.*, 991 F.2d 31, 35-36 (2d Cir. 1993): Multilateral transactions may be “collapsed” and treated as phases of a single transaction for analysis.

Conveyances Made During Pendency of Suit

- A conveyance made without fair consideration during the pendency of a lawsuit is fraudulent as to the plaintiff if the defendant fails to satisfy the judgment. N.Y. Debtor & Creditor Law § 276-A.
- This would include the payment of dividends pending a lawsuit.

Fraudulent Transfer: Badges of Fraud

- In determining whether a transfer was made with actual intent, courts consider, among other things, whether:
 - The transfer was to an insider;
 - Before the transfer was made the debtor had been sued or threatened with suit;
 - The debtor removed assets;
 - The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred;
 - The debtor was insolvent or became insolvent shortly after the transfer was made; and
 - The transfer occurred shortly before or shortly after a substantial debt was incurred.

FSIA Immunity Issues

- The Foreign Sovereign Immunity Act (FSIA) provides foreign states with two types of immunity: jurisdictional immunity and execution immunity
- The FSIA provides the exclusive basis for jurisdiction over a foreign state: if you want to bring claims against a foreign state, you must satisfy the FSIA
- Even once you establish jurisdiction under the FSIA, you must satisfy additional requirements to attach and execute on a foreign state's assets
- The FSIA defines “foreign state” to include agencies and instrumentalities of the state, such as state-owned companies.

FSIA: The Exclusive Basis for Jurisdiction Over Foreign States

- 28 U.S. Code § 1605 - General exceptions to the jurisdictional immunity of a foreign state
- (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case— . . .
- (2) in which the action is based upon a **commercial activity** carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States
- Other exceptions include: **waiver** (a)(1); taking in **violation of international law** (a)(3); **real estate** (a)(4); **tort** (a)(5); and **enforcement of arbitration agreement or award** (a)(6)

Overcoming Execution Immunity

- 28 U.S. Code § 1610 - Exceptions to the immunity from attachment or execution
 - (a) The property in the United States of a foreign state, as defined in section 1603 (a) of this chapter, **used for a commercial activity in the United States**, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if— . . .
 - (2) the property is or was **used for the commercial activity upon which the claim is based** . . .
 - Other exceptions include: **waiver**, taking in **violation of international law**, or **judgment based on an order confirming an arbitral award**

Alter Ego Liability of State-Owned Entity

- *Bridas S.A.P.I.C. v. Gov't of Turkmenistan*, 447 F.3d 411 (5th Cir. 2006)
- The court found alter ego liability proper where the corporate relationship was such that:
 - The government caused the company's incorporation;
 - There was identity between high-ranking government and company officials;
 - The oil company was operated as a closely held subsidiary;
 - The oil company's revenues were diverted to the state; and
 - The government did not deal with the oil company at arm's length.



Key Lessons

- Plan for enforcement at the beginning of an arbitration or lawsuit
- Information is key
- Seek to preserve assets through pre-judgment attachment when possible
- Watch out for other creditors
- Watch out for fraudulent transfers