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Enforcing Foreign Arbitral Awards as Foreign Judgments in the United States

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The statute of limitations for confirming a foreign commercial arbitral award in the United States is typically three years. This relatively short statute of limitations may pose a challenge on award creditors, especially if they discover later in the enforcement process that the award debtor has assets in the United States. However, the award creditor may consider first converting the award into a foreign judgment, then seeking recognition and enforcement of that foreign judgment in U.S. courts to take advantage of the longer statute of limitations for enforcing foreign judgments, specifically, foreign money judgments. This workaround is possible because a judgment, even if it enforces an arbitral award, is considered a separate instrument from the award itself. This article highlights four strategic considerations for a party seeking to recognize and enforce a monetary award in the United States using this method.

What Is the Statute of Limitations?

Foreign Arbitral Awards. Because the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) is silent on the statute of limitations for recognizing and enforcing an arbitral award, the law of the recognizing and enforcing jurisdiction generally determines the statute of limitations. In the United States, foreign awards are typically subject to the Federal Arbitration Act (FAA) Chapter 2's limitations period of three years. See 9 U.S.C. §207. Tolling for this three-year limitations period is relatively limited. Some courts have held that tolling is possible "only if [a party] shows (1) that [the party] has been pursuing his rights diligently, and (2) that some extraordinary circumstances stood in [the party's] way and prevented timely filing." *BCB Holdings Ltd. v. Gov't of Belize*, 110 F. Supp. 3d 233, 245 (D.D.C. 2015); see also *Ramirez v. Yates*, 571 F.3d 993, 997 (9th Cir. 2009).

The United States has one of the shorter ranges of statutes of limitations. According to a UNCITRAL report, a significant number of countries do not stipulate a time limit, and when they do, the time limit ranges from three months to 30 years and is most typically three, six, or 10 years. See UNCITRAL, *Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, U.N. Doc. A/CN.9/656/Add.1, ¶ 8 (2008).

Foreign Judgments. On the other hand, the statute of limitations for recognizing a foreign

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monetary judgment in U.S. jurisdictions is typically longer. State law generally governs the recognition and enforcement of foreign monetary judgments according to the *Erie* doctrine, as there is no equivalent federal statute like the FAA for foreign judgments. The limitations period in California, Delaware, the District of Columbia, and New York, for example, ranges from 10 to 20 years.

There is some uniformity among state laws due to the Uniform Law Commission's Uniform Foreign Money Judgments Recognition Act (1962 Act) and the Uniform Foreign-Country Money Judgments Recognition Act (2005 Act), two model laws that create a legal framework for recognizing a foreign judgment that "grants or denies recovery of a sum of money." 2005 Act, §3; 1962 Act, §3. These model laws stipulate that the court shall recognize the foreign judgment unless one of the mandatory or discretionary grounds for denying recognition apply. While a model law is only effective if a state enacts it as law, 31 states, the District of Columbia, and the U.S. Virgin Islands have enacted the 1962 Act, and 25 states and the District of Columbia have enacted the 2005 Act.

The 1962 Act does not address statutes of limitations, but the 2005 Act provides that "[a]n action to recognize a foreign-country judgment must be commenced within the earlier of the time during which the foreign-country judgment is effective in the foreign country or 15 years from the date that the foreign-country judgment became effective in the foreign country." 2005 Act, §9. In other words, the statute of limitations is 15 years from the date the foreign judgment becomes effective, or earlier if the judgment loses its effectiveness before then. This applies in Delaware and the District of Columbia, both of which enacted the 2005 Act. See Del. Code tit. 10, §4811; D.C. Code §15-369. California also enacted the 2005 Act, but modified the limitations period to 10 years. See Cal. Civ. Proc. Code §1721. New York enacted the 1962 Act, which does not stipulate the statute of limitations. Thus, the limitations period in New York is the earlier of either the general statute of limitations for money judgments of 20 years or the foreign period of limitations. See N.Y. C.P.L.R. 202, 211(b), cmt. 211:3 (McKinney 2019).

> Recognition and enforcement of a foreign monetary arbitral award through the enforcement of a foreign judgment generally offers award creditors a much longer limitations period.

Four Strategic Considerations

While case-specific planning with U.S. counsel is critical, once the creditor has initially identified the location and content of the assets, there are four strategic considerations in identifying and selecting the best forum to recognize and enforce the foreign judgment: (1) the creditor should identify which forum has jurisdiction and venue; (2) the creditor should check the forum's law on recognition and enforcement of a foreign judgment; (3) the creditor should determine if pre-judgment attachment is possible in that jurisdiction; and (4) if the creditor wishes to recognize and enforce the judgment in different forums, the creditor should determine whether the judgment from the first forum can be registered in the second forum, or whether a new action must be brought in the second forum.

(1) Where is the proper U.S. forum? The forum generally must have proper jurisdiction and venue, though some requirements may be relaxed when enforcing foreign judgments.

Subject matter jurisdiction: The creditor can seek recognition and enforcement in state or federal court. It is typically easier to get subject matter jurisdiction in state court than in federal court. Most state courts have general subject matter jurisdiction, while federal courts are courts of limited jurisdiction. While §203 of the FAA grants federal courts subject matter jurisdiction to confirm arbitral awards under §207, a federal court only has subject matter jurisdiction over the enforcement of a foreign

judgment if the court has an independent ground for jurisdiction, such as diversity jurisdiction over disputes between citizens of the United States and a foreign state. See, e.g., 28 U.S.C. §1332(a).

Personal or in rem jurisdiction: Plaintiffs generally must show that the court has jurisdiction over the defendant debtor or its property. See, e.g., *Ardalan v. Sadri*, No. 2:15-CV-0591-HRH, 2015 WL 6661378 (D. Ariz. Nov. 2, 2015); *Electrolines v. Prudential Assurance Co., Ltd.*, 260 Mich. App. 144, 163 (2003). Some courts have held that the existence of such jurisdiction is not a prerequisite to recognition or enforcement of foreign judgments. See, e.g., *Lenchyshyn v. Pelko Elec.*, 281 A.D.2d 42, 43 (2001); *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 36 Misc.3d 389, 392 (N.Y. Sup. Ct. 2012); *Haaksman v. Diamond Offshore (Bermuda), Ltd.*, 260 S.W.3d 476, 481 (Tex. App. 2008). However, even courts that relaxed jurisdictional requirements may still require a jurisdictional showing when the defendant raises "substantive defenses to the recognition." *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93, 106-12 (N.Y. App. Div. 2018). This is in contrast to the enforcement of arbitral awards, for which personal or quasi-in-rem jurisdiction is required by "every … [c]ircuit court that has considered the issue." Andreas A. Frischknecht et al., Enforcement of Foreign Arbitral Awards and Judgments in New York 16 (2018); see, e.g., *Frontera Res. Azerbaijan v. State Oil Co.*, 582 F.3d 393, 396 (2d Cir. 2009) (citations omitted).

Venue: The case must be brought in the correct geographical district within the state or district court. The party should look to the applicable federal or state law, which considers, for example, the parties' residency, the location where the actions related to the suit occurred, or the location of the property that is related to the suit. See, e.g., 28 U.S.C. §1391; Cal. Civ. Proc. Code §§392-403; N.Y. C.P.L.R. 501-13.

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(2) What is the forum's law on recognition and enforcement of foreign judgments in lieu of enforcing foreign awards? The creditor should confirm the process and requirements for recognizing and enforcing a foreign judgment, including the statute of limitations, under the forum's state law. As discussed above, many but not all states have enacted the 1962 Act or 2005 Act. Even states that enacted the 1962 Act or 2005 Act may have chosen to modify the model law.

The creditor should also confirm that the jurisdiction has not denied this workaround of enforcing arbitral awards through the enforcement of foreign judgments. The Second Circuit (which includes New York), the District of Columbia, and at least a few other jurisdictions have either enforced such foreign judgments or at least indicated it would be amenable to do so. See *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321, 324-25, 333 (D.C. Cir. 2014); *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 751 (5th Cir. 2012) (dicta); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Cent. Navala*, 29 F.3d 79, 79-83 (2d Cir. 1994); *Nat'l Aluminum Co. v. Peak Chem. Corp., Inc.*, 132 F. Supp. 3d 990, 992, 994, 997-1002 (N.D. Ill. 2015).

Lastly, the creditor should determine whether the specific type of property can be subject to execution under the law applicable in the jurisdiction where they will seek enforcement—again, typically the state law.

(3) Does the forum allow pre-judgment attachment of assets? The judgment creditor may be able to attach the defendant's property pre-judgment to prevent the defendant from disposing of the property during the enforcement proceeding and to compel the defendant to appear. Both in federal and state

court, state law typically governs such attachments, as Rule 64 of the Federal Rules of Civil Procedure stipulates that attachment is available to the extent permitted under the law of the state in which the federal court is located. Some state laws specifically contemplate attaching a foreign defendant's property. For instance, one ground for pre-judgment attachment under New York law is when the cause of action is based on a foreign-country judgment that qualifies for recognition under Article 53 of the New York Civil Practice Laws and Rules, or in other words, the 1962 Act. See N.Y. C.P.L.R. 6201(5). Another ground is when the defendant is "a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business in the state." Id. 6201(1); see, e.g., *ITC Entm't, Ltd. v. Nelson Film Partners*, 714 F.2d 217 (2d Cir. 1983). Similarly, Delaware law permits attachment of a defendant's property before trial and permits the court to issue a writ of foreign attachment against foreign individuals and corporations. See Del. Code tit. 10, §§3501-13. The types of property that can be attached include the debtor's shares in a Delaware corporation, which may be especially useful if the debtor has U.S. operations in Delaware. See *Crystallex Int'l v. Bolivarian Rep. of Venezuela*, 333 F. Supp. 3d 380, 388 (D. Del. 2018).

(4) How do the recognizing and enforcing forums interact? The most straightforward approach is to seek recognition and enforcement in the jurisdiction where the asset is located. If the creditor chooses to recognize in one jurisdiction and enforce in another jurisdiction—which may be considered, for example, when the jurisdiction where the debtor has assets has unfavorable law on recognition—U.S. counsel should map out the full process in advance. In general, a federal court judgment can be registered in another federal court according to 28 U.S.C. §1963; a state or federal court judgment can be enforced in another state court according to the Uniform Enforcement of Foreign Judgments Act, which is enacted by 48 states, the District of Columbia, and the U.S. Virgin Islands and provides a registration procedure for enforcement of sister-state and federal court judgments; and a state court judgment is given full faith and credit by another state court according to Article IV, §1 of the U.S. Constitution, absent limited exceptions. Some courts have accordingly enforced another U.S. jurisdiction's judgment that enforced a foreign judgment according to this general principle. See, e.g., *Alberta Sec. Comm'n v. Ryckman,* No. N13J-02847, 2015 WL 2265473, *1-2, *7-8 (Del. Super. Ct. May 5, 2015); *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros. Co.,* 2014 PA Super 179 (2014). However, other courts have declined to do so. See, e.g., *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank,* 98 A.3d 998 (D.C. 2014); *Reading & Bates Constr. v. Baker Energy Res.,* 976 S.W.2d 702, 712-15 (Tex. App. 1998); cf. Restatement (Second) of Conflicts §10, Reporter's Notes (Am. Law Inst. 1971). If that is the case, a separate action for recognition may be required.

Conclusion

Recognition and enforcement of a foreign monetary arbitral award through the enforcement of a foreign judgment generally offers award creditors a much longer limitations period. This is especially helpful given the often global nature of the debtor's activity and the likelihood that the debtor may have assets in the United States, even if the creditor was initially unaware of them. However, given the complicated web of federal and state laws and courts, it is especially important to strategize the recognition and enforcement process before initiating an action, including assessing the above four considerations.