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Client Alert

International Arbitration Practice Group

May 20, 2016

New York Enforcement Update

New York has long been a critical enforcement venue for parties holding unsatisfied arbitral awards and/or judgments. New York is the financial capital of the United States, and that reality, coupled with the state's expert courts and a body of law that affords award and judgment creditors a broad array of effective remedies to satisfy judgments, means that many award and judgment creditors seek judicial enforcement in New York as a key component of their enforcement strategy. Two recent rulings by New York federal courts illustrate the approach and legal tools available to creditors seeking to enforce adjudicated, but unsatisfied, liabilities.

Arbitral Enforcement – *Quasi In Rem* Jurisdiction/*Forum Non Conveniens*/Arbitral Jurisdiction
Crescendo Maritime Co. v. Bank of Communications Co., Ltd.[1]

Crescendo Maritime arose out of a dispute over a shipbuilding contract. Crescendo Maritime Co. (Crescendo) is a special purpose entity incorporated and doing business in the Marshall Islands. In 2007, it entered into an agreement for the construction of a large cargo ship. Bank of Communications (BOC), a Chinese bank, guaranteed any refunds that might become due to Crescendo under the shipbuilding agreement. The guarantee agreement was governed by English law, and the parties agreed to refer any dispute to arbitration in London. Following several delays in the construction of the vessel, the parties to the shipbuilding agreement attempted unsuccessfully to renegotiate the terms, and the sellers terminated the shipbuilding agreement one day before Crescendo would have been entitled to cancel it. The sellers commenced arbitration under the shipbuilding contract, and Crescendo demanded a refund of the installment payments that it had made to date. Crescendo demanded repayment from BOC under the refund guarantee, and BOC refused to make payment, leading Crescendo to commence arbitration against BOC. Because Crescendo had, in connection with financing it had obtained, assigned its rights under the shipbuilding and refund guarantee contracts to Alpha, its lender, BOC claimed that the arbitration was invalid because Crescendo lacked the ability to commence it. BOC did not attend the arbitration hearings, despite the tribunal's demand that it do so; it instead commenced litigation in a Chinese court, which issued a ruling that prohibited BOC from paying on the guarantees. In response, Crescendo and Alpha sought and obtained an anti-suit injunction from a London court prohibiting BOC from prosecuting the Chinese court

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proceedings. The tribunal ultimately issued several awards in Crescendo's favor, totaling $18.6 million.

BOC refused to satisfy the awards, leading Crescendo to commence recognition and enforcement proceedings in the U.S. District Court for the Southern District of New York. BOC defended on three grounds: that the court lacked jurisdiction, that the United States was an inconvenient forum, and that the arbitrators exceeded their jurisdiction.

A. Jurisdiction

Crescendo invoked the court's *quasi in rem* jurisdiction, claiming that BOC's assets in New York were sufficient to support jurisdiction to recognize and enforce the awards. BOC disputed this, claiming that because the New York assets were unrelated to the dispute, they could not provide a basis for jurisdiction, and further because only assets at BOC's Qingdao branch – the branch against which the awards were specifically issued – could be used to satisfy the awards. The court disagreed. As to the first argument, the court noted the general rule that property provides a basis for jurisdiction only where the property has a connection to the controversy, thus satisfying the "minimum contacts" test used to determine the appropriateness of jurisdiction in U.S. judicial proceedings. The court noted, however, that footnote 36 of the Supreme Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1977), created an exception to that rule in cases where a petitioner seeks to recover on a judgment already adjudicated in a forum with personal jurisdiction over the defendant. While *Shaffer* created this exception in a case involving the recognition of a sister state judgment under the U.S. Constitution's full faith and credit clause, the *Crescendo* court, like other federal courts before it, held that the exception should apply where the plaintiff is seeking to enforce an arbitration award rendered in a proceeding in which the defendant was subject to the tribunal's jurisdiction. The court concluded that "[a]n arbitration panel with personal jurisdiction over BOC has already adjudicated the underlying claims and determined that BOC is a debtor of Crescendo" and that, as a result, "because BOC maintains sufficient assets in New York to satisfy the awards, the Court has *quasi in rem* jurisdiction to hear the petition and enforce the awards."

Crescendo thus clarifies that where a party seeks to enforce an arbitration award in a jurisdiction where the award debtor maintains assets, no connection between those assets and the underlying controversy is necessary to support jurisdiction.

BOC next argued that the "separate entity rule," which generally provides that when a bank with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for purposes of attachments and garnishment proceedings, precluded the court from enforcing the award against its New York branch and New York assets. The court rejected this argument as well, noting that BOC had misconstrued the context in which the separate entity rule applies. Specifically, the court noted that the separate entity rule applies when a bank is a garnishee, *i.e.*, where process is directed at a bank because it holds assets of a customer against whom a judgment has been entered, not where the bank is itself subject to the liability that is being enforced. The court thus found that the separate entity rule did not apply under these circumstances.

B. Forum Non Conveniens

The court turned next to BOC's *forum non conveniens* argument. The U.S. Court of Appeals for the Second Circuit has held that petitions to confirm arbitration awards under the New York Convention are subject to *forum non conveniens* dismissal,[2] and the doctrine is uniquely applicable in cases where, as in *Crescendo*, all the parties are from outside the United States. The court's discussion of the issues, however, demonstrates that *forum non conveniens*, despite being invoked as a defense by many non-U.S. award debtors in response to U.S. enforcement proceedings, has limited applicability in arbitration cases and that dismissals will continue to represent the exception rather than the rule. In the first step of the forum analysis, the degree of deference that Crescendo's choice of a U.S. forum was entitled to, the court held that Crescendo was entitled to deference, noting that its choice to enforce the awards in the United States

appeared to be "based on genuine considerations of convenience," and noting further that "because this is a proceeding to confirm an arbitration award, there is little tactical advantage for Crescendo to gain through local laws, the habitual generosity of juries in the forum, or the inconvenience and expense to BOC resulting from litigation in New York." Finally, while noting that the events at issue took place outside the United States, the court found that consideration to be of less significance "because the facts underlying the dispute are not directly at issue in this proceeding."

A successful *forum non conveniens* defense also relies on the existence of a suitable alternative forum. BOC claimed that China was such a forum. The court agreed, noting that BOC is subject to service of process and China is a party to the New York Convention. Finding that China was an adequate alternative forum, the court moved to consider the private and public factors governing *forum non conveniens* analysis. As to the private factors,[3] the court found that the "summary nature of this proceeding significantly mitigates the burden on BOC of litigating in New York," noting that "[t]he petition has been fully briefed and argued by both sides and, as a result, the usual difficulties associated with conducting discovery or trial abroad are not implicated[.]" The court likewise found that the public interest factors[4] did not weigh in favor of dismissal, holding that a summary proceeding to confirm an arbitral award "contributes only mildly to court congestion and imposes no burden on the local community in connection with jury duty."

Finally, while it had found that China constituted an appropriate alternative forum, the court rejected BOC's suggestion that it was a more appropriate forum. Here the court observed that BOC, "having raised its fraud claims at arbitration and lost…chose to proceed with an action in China in what appears to be an effort to obtain a contrary decision through a collateral attack. As a result, it is not unreasonable to infer that BOC's preference for China as an alternative forum is motivated by tactical reasons rather than genuine concerns of convenience."

As noted above, the court's focus on the summary nature of New York Convention proceedings and the unlikelihood that they will cause any genuine inconvenience to either a non-U.S. defendant or to the court itself, appears to underscore that the factors upon which the doctrine of *forum non conveniens* rests should seldom weigh in favor of dismissing a New York Convention case, particularly where there are assets in the U.S. jurisdiction that may be executed and lead to the conclusion of an arbitration that, by virtue of the award debtor's refusal to pay, has resulted in subsequent litigation.

C. Arbitral Jurisdiction

Finally, BOC argued that the award should not be recognized because the tribunal exceeded its jurisdiction. Specifically, BOC argued that the tribunal erred by allowing Alpha to join the arbitration and by considering BOC's allegations of fraud against Crescendo. The court made quick work of rejecting both arguments, concluding that the tribunal's joinder of Alpha did not cause the awards to contain any decisions on matters beyond the scope of submission to arbitration, and that, because English law governed the contract and provides for a broad scope of arbitration, the fraud allegations fell within the arbitration provision's scope.

Notably, the court's decision appeared to focus on the outcome and correctness of the tribunal's jurisdictional determinations. It did not, as it likely should have, discuss the proper scope of its own review. Second Circuit law is clear that where parties have agreed to arbitrate under rules that empower an arbitral tribunal to determine the scope of its jurisdiction, the tribunal's determinations will lie beyond the scope of judicial review. *See Schneider v. Kingdom of Thailand*, 688 F.3d 68, 72 (2d Cir. 2012). The rules under which the parties arbitrated appear to confer such authority on the arbitrators, though the court's decision did not reflect that fact or the effect it had on the court's review. In any event, the court appears to have reached the correct decision, and avoided the type of appellate-style review that U.S. law clearly provides is inappropriate in New York Convention proceedings.

Effect of Restraining Notices
CSX Transportation, Inc. v. Emjay Environmental Recycling[5]

The dispute in *CSX* arose out Emjay Environmental's sale of substantially all of its assets to Island Rail Terminal, Inc. (Island Rail) through an Asset Purchase Agreement and Promissory Note. Island Rail's obligations under the agreement was guaranteed by Maggio Sanitation Service, Inc. (Maggio) and Eastern Resource Recycling, Inc. (ER).

CSX Transportation, Inc. (CSX) held a judgment against Emjay for approximately $1.05 million. It served restraining notices against Maggio and ER, which collectively owed Emjay approximately $3.5 million under the promissory note. Restraining notices are a post-judgment enforcement remedy authorized under Section 5222 of the New York Civil Practice Law and Rules (CPLR). Where served on a party who possesses a judgment debtor's property or owes the judgment debtor a debt, a restraining notice operates in the manner of an injunction preventing the restrained party (typically referred to as the "garnishee") from disposing of the property or extinguishing the debt by repaying the judgment debtor, except in accordance with a court order, for a presumptive period of one year.

Despite service of the restraining notices, Maggio and ER negotiated settlements of two other lawsuits (which were consolidated) relating to Emjay. While CSX had been invited to participate in the settlement conference, it ultimately opted out, and when the settlement agreement was finalized – and "so-ordered" by the court in which the settled cases was pending (the "state court") – CSX was paid approximately $8,000. CSX accordingly sought an order directing Maggio and ER to satisfy the judgment, on the ground that they had violated the restraining notices.

ER and Maggio contested the turnover motion by claiming (a) that CSX was obligated to seek to recover the funds paid out in the settlement through a plenary lawsuit, and (b) that because CSX knew of the ongoing settlement negotiations and allowed the state court to enter the settlement, it was barred by laches from recovery. The court rejected each of these arguments. The court noted first that where a party seeks to recover funds that were wrongfully paid out despite the existence of a restraining notice, it could do so by a motion made under Rule 69 of the Federal Rules of Civil Procedure, which governs post-judgment enforcement proceedings in federal court, rather than through a plenary action. The court also rejected the laches argument, noting that CSX issued the restraining notices before the settlement was entered, was neither a party to the settled case nor obligated to take part in the settlement negotiations, and that none of the settling parties sought to join CSX, and that accordingly there was no prejudice to Maggio or ER as the doctrine of laches requires.

The court then turned to the question of whether the funds held by the garnishees was required to be turned over to CSX. The court noted that this inquiry involved two steps: whether Emjay is entitled to possession of the property, and whether CSX had superior rights to the persons actually in possession of the property. Finding the first step to be undisputed, the court observed that CSX might not have a superior right, but nonetheless held that it could prevail by showing that the judgment debtor is entitled to possession of any money or property held by the garnishees. It held that Emjay, which was owed $3.5 million by Maggio and ER, was entitled to such possession, and that turnover was appropriate. Maggio and ER next claimed that because the settlement was endorsed by the state court, disposition of the restrained funds was permissible. The court rejected this argument as well, holding that only an order of the court with jurisdiction over the restraining notices could excuse compliance with the restraining notices. For that reason, and because the record showed that the state court had not been apprised of the restraining notices, the court held that the garnishees "may be held liable to a judgment creditor for [their] negligence in complying" with the restraining notice; no willfulness is required. The court therefore ordered Maggio and ER, who had paid $2.2 million under the settlement (and thus should have had the amount due CSX available for turnover), to reimburse CSX.

The court refused, however, to find Maggio and ER in contempt of the restraining notices, finding that CSX had failed to carry its burden of demonstrating by clear and convincing evidence that the garnishees had willfully violated the orders.

The New York restraining notice provides a very effective enforcement device, and the court's ruling in *CSX* demonstrates how third party garnishees can face significant liability – virtually to the point of becoming a guarantor for a judgment – once they have been properly served with a restraining notice.

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[1] No. 15 CIV. 4481 (JFK), 2016 WL 750351 (S.D.N.Y. Feb. 22, 2016).

[2] *See, e.g., Figueiredo Ferraz E Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 392-93 (2d Cir. 2011) (holding that forum non conveniens defenses apply in confirmation proceedings as the "Convention contemplate[s] application of a signatory forum's procedural doctrine"); *In re Arbitration between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 496 (2d Cir. 2002) (dismissing confirmation proceeding on forum non conveniens grounds).

[3] The private interest factors are "the convenience of the litigants...includ[ing] 'the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.'" *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 70-71 (2d Cir. 2001) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508, 67 S.Ct. 839, 91 L.Ed. 1055 (1947)).

[4] The public interest factors include whether the dispute is sufficiently local to justify potentially burdening local jurors. As the Supreme Court explained in *Gilbert*, "[i]n cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only," and "[t]here is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself." *Gilbert*, 330 U.S. at 508-09.

[5] No. 12-CV-1865(JS)(AKT), 2016 WL 755630 (E.D.N.Y. Feb. 25, 2016).