

CLEARY GOTTLIB

Enforcing Foreign Money Judgments & Recognizing Foreign Arbitral Awards in New York

Carmine D. Boccuzzi, Jr.
October 25, 2018

clearygottlieb.com 

ENFORCING A MONEY JUDGMENT IN NEW YORK

CLEARY GOTTLIB 2

Mechanisms to Enforce a Money Judgment

- Under Fed. R. Civ. P. 69(a), the execution of a money judgment must follow state law procedure.
- In New York, CPLR Article 52 provides for the enforcement of money judgments.
 - Section 5201 of the CPLR permits a judgment creditor to enforce a judgment against any nonexempt property or interest of the judgment debtor, which includes any debt which is past due or yet to become due, certainly or upon demand of the judgment debtor.
 - Sections 5230 and 5232 provide for the issuance of a property execution upon personal property. The property execution is just a paper delivered to the court's enforcement officer, usually the sheriff, directing the sheriff to levy against any non-exempt property that can be found belonging to the judgment debtor. The most common type of property execution involves a levy upon bank accounts of the judgment debtor by the sheriff. The bank or other third party must deliver the funds in the account of the sheriff, who will then apply the funds to the debt.
- But let's assume a debtor or third-party refuses to respond to a Sheriff's levy. What recourse is available?

CLEARY GOTTLIB 3

Turnover Order or Judgment – NY CPLR §§ 5225/5227

- If a judgment debtor refuses to comply with a sheriff levy, a judgment creditor should commence a turnover proceeding
- Sections 5225 and 5227 permit a creditor to commence a special proceeding against a judgment debtor or non-party to compel payment of money or turn over attachable property.
 - Section 5225 provides that a judgment creditor may obtain an order (or judgment) from a New York court, requiring a defendant who is in possession or custody of money or other personal property in which a judgment debtor has an interest to turn over the property or pay the money to the judgment creditor.
 - Section 5227 provides a similar mechanism as that in Section 5225, but applies when it is a debt owed to the judgment debtor that is being sought by the judgment creditor.

CLEARY GOTTLIB

4

Restraining Notice - CPLR § 5222

- Section 5222:
 - empowers a judgment creditor to serve a restraining notice on judgment debtor or a garnishee.
 - The party served is prohibited from assigning, selling, and transferring the property in which the judgment debtor has an interest
 - Disobedience is punishable by contempt (See CPLR § 5251)
 - can be issued by the judgment creditor's attorney without a court order.
- Most effective when served on a garnishee, who, because of obvious personal risks, is more likely to comply.
- Given the low threshold to which a party can issue a restraining notice, it is only effective if, at the time of service, the garnishee:
 - (1) owes a debt to a judgment debtor; or
 - (2) is in possession or custody of property in which he knows or has reason to believe the judgment debtor has an interest.
 - If the garnishee has such debt or property at the time of service, the restraint will apply to that property, as well as to all other property "hereafter coming into" the garnishee's possession.
 - If the garnishee lacks any such debt or property at the time of service, the restraint never takes effect at all.

CLEARY GOTTLIB

5

The Reach of Turnover Orders and Restraining Notices

- Is a Judgment Creditor Limited to the Debtors Property Located in New York? **It depends.**
- In a seminal case, the New York Court of Appeals held that, if a New York court has personal jurisdiction over defendants (either a judgment debtor or third-party garnishee), then the property subject to the turnover order or restraining order can be located anywhere, in or out of the state. *Koehler v. Bank of Bermuda*, 12 N.Y.3d 533, 539-40 (2009).
 - In *Koehler*, a garnishee bank located in Bermuda that had consented to New York jurisdiction was directed to turn over shares of stock located in Bermuda even though the judgment creditor, the judgment debtor and the property in question were all located out-of-state and were not subject to NY jurisdiction.

CLEARY GOTTLIB

6

The Reach of Turnover Orders and Restraining Notices
(Cont'd)

- But, several years after *Koehler*, the Court of Appeals seemed to limit the reach of *Koehler*.
- It held, in *Commonwealth of the N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 57-58 (2013), that a New York bank subject to a CPLR § 5225(b) turnover proceeding could not be compelled to deliver property held by its foreign subsidiary (if it is not subject to personal jurisdiction in NY) because it was not “in possession or custody” of the property as required by statute.
- The court explained that, “for a court to issue a postjudgment turnover order pursuant to CPLR 5225(b) against a banking entity, that entity itself must have actual, not merely constructive, possession or custody of the assets sought. That is, it is not enough that the banking entity’s subsidiary might have possession or custody of a judgment debtor’s assets.”
Commonwealth of the N. Mariana Is., 21 N.Y.3d at 57-58.

The Reach of Turnover Orders and Restraining Notices
(Cont'd)

- The Court of Appeals further chipped away at the reach of the turnover statutes in *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 158 (2014). The court held that the separate entity doctrine prevents a judgment creditor from ordering a garnishee bank operating branches in New York to restrain a judgment debtor’s assets held in foreign branches of the bank.
- The **Separate Entity Doctrine** provides that, “even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, particularly with respect to . . . article 52 postjudgment restraining notices and turnover orders.” *Motorola Credit Corp. v. Standard Chartered Bank*, 24 N.Y.3d 149, 158 (2014).
- A “restraining notice or turnover order served on a New York branch will be effective for assets held in accounts at that branch but will have no impact on assets in other branches.”
Motorola Credit Corp., 24 N.Y.3d at 159.

Policy Concerns Underlying the Separate Entity Rule

The separate entity rule was adopted to ameliorate two concerns:

1. the risk of competing claims and the possibility of double liability in separate jurisdictions; and
2. the reality that foreign branches are subject to a multitude of legal and regulatory regimes.

Limiting the reach of a turnover order or restraining notice is considered to “promote[] international comity and serve[] to avoid conflicts among competing legal systems.” *Motorola Credit Corp.*, 24 N.Y.3d at 162.

Property Under the Foreign Sovereign Immunity Act

- Under FSIA (28 U.S.C. § 1610), post-judgment attachment and execution is available only for property **located in the United States that is used for commercial activity in the U.S.**, and if:
 - there is explicit waiver of immunity,
 - the property was used for the commercial activity on which the claim is based,
 - the judgment is based on an order confirming an arbitral award rendered against the foreign state, or
 - certain other limited exceptions.
- Complex issues may arise as to whether the sovereign owns the property at issue and whether that property is “in the United States.” See *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 313 F.3d 70 (2d Cir. 2002).
- Special protection is afforded to property of international organizations, foreign banks, and militaries, as well as diplomatic and consular real property. See 28 U.S.C. § 1611; Vienna Convention on Diplomatic Relations and Optional Protocol on Disputes, Apr. 18, 1961, T.I.A.S. No. 7502, 23 U.S.T. 3227.

DISCOVERY OF ASSETS IN NEW YORK

Disclosure in Aid of Enforcement

— The most difficult task in enforcing a judgment is most often locating the assets of a judgment debtor.

— “The rules governing discovery in postjudgment execution proceedings are quite permissive.”
Republic of Argentina v. NML Capital, Ltd., 134 S. Ct. 2250, 2254 (2014).

- Fed. R. Civ. Proc. 69 provides that, “[i]n aid of the judgment or execution, the judgment creditor . . . may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located.” (emphasis added).
- In New York, CPLR Section 5223 provides that “a judgment creditor may compel disclosure of all matters relevant to the satisfaction of the judgment.”
- It is not uncommon to seek asset discovery from third parties, including banks and accountants, that possess information about assets held by a judgment debtor.

Disclosure Devices Available In New York

- The **Information Subpoena** – CPLR § 5224(a)(3): requires a sworn response to a set of questions (much like interrogatories).
 - An information subpoena is the simplest and most practical post-judgment discovery device for attorneys.
 - It can be issued by the judgment creditor's attorney and served by registered or certified mail, return receipt requested.
 - Information subpoenas are commonly served with a Section 5222 restraining notice since each constitutes judicial process under the signature of the creditor's attorney. This means that neither requires leave of a court and thus can be drawn and served quickly.
- The **Testimony Subpoena** – CPLR § 5224(a)(1): requires attendance for examination on oral or written questions at a designated time and place.
- The **Subpoena Duces Tecum** – CPLR § 5224(a)(2): requires the production of books and records or other papers at a designated time and place.
 - Testimonial subpoenas and the subpoena duces tecum must be served in the same manner as a summons, a more complex process than service through the mail.

CLEARY GOTTLIB

13

The Reach of Disclosure Devices

- The separate entity rule may also bar a judgment creditor's request for information and documents outside of New York relating to assets located at a foreign branch.
 - *Ayyash v. Koleilat*, 957 N.Y.S.2d 574, 582-83 (Sup. 2012), *order aff'd*, 115 A.D.3d 495, 981 N.Y.S.2d 536 (1st Dep't 2014). In *Ayyash*, the court denied plaintiff's motion to compel a non-party New York financial institution to produce documents held abroad by foreign branches and affiliates.
- That said, the First Department held just a year later that, if it has personal jurisdiction over the New York branch of a foreign bank, the New York branch may be compelled to "produce any requested information that can be found through electronic searches performed there [*i.e.*, in the New York branch]"
 - *Matter of B&M Kingstone, LLC v. Mega Int'l Commercial Bank Co., Ltd.*, 15 N.Y.S.3d 318, 131 A.D.3d 259, 267 (1st Dep't 2015).

CLEARY GOTTLIB

14

Sovereign Entities & Discovery

- Sovereigns are not afforded any special protection from these disclosure devices. *See Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014).
 - Foreign Sovereign Immunities Act "generally shields property in the United States of a foreign state from attachment, arrest, and execution" but does not "forbid[] or limit[] discovery in aid of execution of a foreign-sovereign judgment debtor's assets." *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014) (internal quotations omitted).
- However, sovereigns are "entitled to a degree of grace and comity" particularly related to their "diplomatic and military affairs." Summary Order, *NML Capital, Ltd. v. Republic of Argentina*, No. 13-4054(L) (2d Cir. Dec. 23, 2014), ECF No. 170-1.

CLEARY GOTTLIB

15

RECOGNIZING FOREIGN ARBITRAL AWARDS IN THE U.S.

CLEARY GOTTLIB 16

Fundamental Framework


- An arbitral award is “made” in the country of the arbitral seat
- Three types of arbitral awards:
 - foreign arbitral award
 - domestic arbitral award
 - non-domestic arbitral award.
- Depending on the type of arbitral award, U.S. courts are able to perform different functions.

CLEARY GOTTLIB 17

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”)

- The New York Convention:
 - It has 150+ signatory states, and
 - requires that an arbitral award rendered in one state (or an arbitration agreement from one state) shall be recognized in another signatory state subject to the specific exclusions.
- The New York Convention applies to:
 - foreign arbitral awards that a party seeks to enforce in the United States,
 - domestic arbitral awards that a party seeks to enforce in a different country, and
 - nondomestic arbitral awards that a party seeks to enforce in the United States.

See CBF Industria De Gusa SA, et al. v. AMCI Holdings, Inc., et al., 850 F.3d 58 (2d Cir. 2017).
- If we have an award subject to the New York Convention, domestic law applies.
 - “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles.”
Art. 3



UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL ARBITRATION

CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

UNITED NATIONS
1958

CLEARY GOTTLIB

Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*

- FAA Chapter 1: general provisions for domestic arbitrations.
- FAA Chapter 2: implements the New York Convention.
 - FAA, 9 U.S.C. § 202: “An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”
 - See also FAA, 9 U.S.C. § 208: “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.”
- FAA Chapter 3: implements the Panama Convention.

Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*

- All analyses of whether you can bring suit against a foreign government, including in the rbitration context, need to start with the FSIA.
 - “[The FSIA] must be applied by the District Courts in every action against a foreign sovereign, since subject matter jurisdiction in any such action depends on the existence of one of the specified exceptions to foreign sovereign immunity.” *Verlinden B. V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983).
- Under FSIA, 28 U.S.C. § 1605(a)(6), a foreign state **shall not be immune** in an action:
 - to enforce an agreement made by the foreign state with a private party to submit to arbitration, or
 - to confirm an award made pursuant to such an agreement to arbitrate, if
 - the arbitration takes place or is intended to take place in the United States,
 - the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards,
 - the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under FSIA, or
 - the sovereign has waived its immunity explicitly or implicitly.

Requirements for Recognizing (or “Confirming”) a Foreign Arbitral Award in the U.S.

- In order for an arbitral award subject to the New York Convention to have the same “force and effect” as a court judgment in the United States, the prevailing party must first file a petition in a state or federal court to confirm or “recognize and enforce” the award.
- Like in any other case, a U.S. court needs subject matter jurisdiction, personal jurisdiction, and venue to adjudicate a claim regarding an arbitration.

Personal Jurisdiction

— Jurisdiction over a defendant's person or property is required to enforce an arbitral award in the U.S.

— The FAA does not confer personal jurisdiction over the parties to an arbitral award.

- "Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."
- *Frontera Res. Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009).

— The existence of an arbitral agreement establishing the U.S. as the place of arbitration is often sufficient to confer personal jurisdiction by consent.

- "The Second Circuit has repeatedly upheld the rule that arbitration forum clauses confer personal jurisdiction by consent. . . . It is, therefore, well-settled that federal courts applying New York law have personal jurisdiction over parties that agree to arbitrate their disputes in New York."
- *Stolt Tankers BV v. Allianz Seguros, S.A.*, No. 11 Civ. 2331 (SAS), 2011 WL 2436662, at *2 (S.D.N.Y. June 16, 2011) (internal quotation marks and citations omitted).

Subject Matter Jurisdiction

— Matters that a court can decide regarding an arbitration:

- Enforcement of an arbitration agreement.
- Provisional remedies.
- **Enforcement and (if primary jurisdiction) annulment of an arbitral award.**
- Enforcement of a money judgment.
- Appeals from prior court decisions about an arbitration.

- Section 9 U.S.C. § 203 grants federal courts subject matter jurisdiction over enforcement of awards issued pursuant to the New York Convention

New York Convention: Primary v. Secondary Jurisdiction

— The New York Convention establishes a difference between a **primary and a secondary jurisdiction** in actions to enforce or annul arbitral awards.

- The primary jurisdiction is "the country in which, or under the law of which, [the] award was made." New York Convention, Art. V(1)(e).
- All other signatory states are secondary jurisdictions.

— Only courts with primary jurisdiction have the authority to vacate an arbitral award.

Enforcement of an Arbitral Award

- Under Article III of the New York Convention, a court with secondary jurisdiction shall recognize and enforce arbitration awards issued by any signatory state.
 - *See also* FAA, 9 U.S.C. § 207: “Within three years after an arbitral award falling under the [New York] 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 [New York] Convention.”
- Under Article V of the New York Convention, a court with secondary jurisdiction may refuse to enforce an award only if the opposing party proves:
 - Invalid arbitration agreement.
 - Lack of due process.
 - Award exceeding arbitrator’s authority.
 - Composition of the tribunal was not in accordance with the parties’ agreement.
 - Award has not become binding on the parties, or has been set aside or suspended by court in country in which the award was made.
 - Subject matter of dispute is not capable of settlement by arbitration or enforcement would be contrary to public policy.

ICSID Awards

- International Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (“ICSID Convention”).
 - “The Federal Arbitration Act shall not apply to enforcement of awards rendered pursuant to the [ICSID] convention.” Instead, “[t]he pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.”

22 U.S.C. § 1650a

Post-Judgment Attachment

- After a U.S. court has confirmed an arbitral award, the claimant is a creditor with a money judgment against the respondent, who is now a judgment debtor. If the respondent does not pay the judgment voluntarily, the claimant may need to pursue legal remedies to recover the money it is owed.
- The execution of a money judgment must follow state law procedure.
 - Fed. R. Civ. P. 69(a).
- FSIA exception for post-judgment attachment of commercial property.
 - “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 . . . (6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement”

28 U.S.C. § 1610(a)