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INTERNATIONAL ENFORCEMENT OF JUDGMENTS AND ARBITRAL AWARDS: CHALLENGES FOR CREDITORS, DEBTORS AND INTERNATIONAL BANKS

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As companies do business in increasingly diverse locales, they also find themselves in ever-more-complicated disputes over the enforcement of international arbitration awards and cross-border litigation judgments.

Proper knowledge of the procedures for global enforcement of judgments and awards, once they have been obtained, has never been more necessary. But it is not always sufficient. A recent US court decision confirms how important it is for companies entering into international business transactions to consider the enforcement of judgments and arbitral awards when drafting contracts, long before any dispute has arisen.

Aggressive international judgment enforcement disputes have also entangled international banks and other third parties that hold judgment debtors' assets or accounts, and in some US jurisdictions, third parties have been subjected to an increasingly

complicated and ambiguous judgment enforcement regime.

Does your dispute resolution clause give you the right tools?

Many businesses have learned that an appropriate dispute resolution clause is an indispensable part of an international contract. Will disputes go to litigation or arbitration? Where will the dispute be heard, and what law will apply? By now, addressing these issues at the outset of a relationship hopefully is routine. But it can be just as important to include provisions from the start about will happen *after* the appropriate tribunal has rendered its decision.

This is highlighted by the August 2012 decision in *Zeevi Holdings Ltd. v. Republic of Bulgaria*, No. 11-1705-cv (2d. Cir. Aug. 24, 2012), rendered by the United States Court of Appeals for the Second Circuit, the prominent federal appellate court in New York. In *Zeevi Holdings*, the claimant had obtained an arbitration award in Paris against the Republic of Bulgaria, and it petitioned a federal district court in New York to 'confirm' the award, a significant but usually relatively straightforward step in the enforcement process.

In this instance, however, the district court refused to confirm the award, holding that the parties' contract committed key enforcement proceedings to the courts of Bulgaria, and the Second Circuit affirmed. Thus, even though the contract allowed the claimant to successfully bring its claims in arbitration in Paris, it significantly limited the winning party's options for enforcement of an award outside the Republic of Bulgaria's home courts.

The Second Circuit's opinion makes clear that its overriding consideration in this case was the contractual language agreed to by the parties. A differently drafted clause – perhaps one that allowed the award to be entered and enforced in any court having jurisdiction over any of the parties or any of their assets – might have led to a different result.

Third parties stuck in the middle

Even with carefully crafted contractual language, the international judgment enforcement process is complex, governed by a complicated tapestry of local, national and international law. At times, a judgment creditor will seek to satisfy a judgment or award by using local procedures to try to compel third parties to turn over a judgment debtor's assets, or at a minimum, to restrain the judgment debtor's use of the assets.

For many, the ordinary expectation is that a judgment creditor can only seize a judgment debtor's assets in a jurisdiction where the assets can be found. But the decisions in *Koehler v. Bank of Bermuda Ltd.*, 12 N.Y.3d 533 (2009), and several other recent US cases have muddied the waters, creating ambiguity for international banks and other third parties with respect to judgment enforcement against assets belonging to judgment debtors that the third parties hold outside the United States.

In *Koehler*, the New York Court of Appeals – New York's highest *state* court – opened the door to enforcement efforts in New York against a judgment debtor's assets in the hands of a third party even if the assets themselves are located outside the United States, as long as the court in New York has personal jurisdiction over the third party. Thus, in *Koehler*, the courts in New York held that because they had personal jurisdiction over the Bank of Bermuda, they could compel the bank to bring stock certificates owned by the judgment debtor from Bermuda to New York, and to turn them over in New York to the judgment creditor.

Some courts in other US states have begun to adopt aspects of the view expressed in *Koehler* and subsequent cases into their local practice: a Florida state court in 2010 in *Southern Account Services, Inc. v. Rodriguez*, No. CC-01-CL-1412, 2010 WL 2867208 (Fla.Cir.Ct. July 16, 2012), and in August 2012, a federal district court in Hawaii in *Marisco, Ltd. v. Bank of Hawaii*, Civ. No. 10-00137, 2012 WL 3686088 (D. Hawaii Aug. 23, 2012).

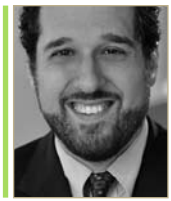
However, certain aspects of the practice remain highly uncertain. Notably, several courts in New York have debated whether the mere presence in New York of an *unincorporated* branch of a foreign bank is sufficient to compel a foreign branch of the same bank to turn over assets in New York. While the courts have divided on the issue, some significant recent decisions say no, including a March 2012 decision by the chief judge of the federal district court in Manhattan. *See Hamid v. Habib Bank Limited*, No. 11-cv-920, 2012 WL 919664 (S.D.N.Y. Mar. 14, 2012).

In *Hamid*, the court ruled that under New York law, banks are protected by the 'separate entity rule', which treats unincorporated bank branches as separate entities from the banks' branches in other countries for judgment enforcement purposes. The court also pointed out that there are "significant policy principles underlying the separate entity rule", including "the 'intolerable burden' that would otherwise be placed on banking and commerce if mere service of a writ to a New York branch could subject foreign bank branches to competing claims" in New York and the foreign jurisdiction. *Id.*

"Notably, several courts in New York have debated whether the mere presence in New York of an *unincorporated* branch of a foreign bank is sufficient to compel a foreign branch of the same bank to turn over assets in New York."

Lessons learned

The lesson of these cases is that contracting parties should begin thinking about judgment enforcement at the same moment they begin thinking about dispute resolution procedures when entering into a cross-border agreement. Likewise, international banks and similarly situated third parties should be aware of the trends in judgment enforcement law and should be prepared to address potential claims and obligations that disputing parties could seek to impose on them under multiple legal regimes. CD



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