The Evolving Landscape for Enforcement of International Arbitral Awards in the United States

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Introduction

Parties seeking to enforce international arbitration awards in the United States should be aware of two potential procedural defences that may be available to parties seeking to resist such enforcement. Although the United States is a party to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") and the 1975 Inter-American Convention on International Commercial Arbitration ("Panama Convention")[1] which limit the grounds on which courts may decline recognition and enforcement of international arbitral awards, several U.S. federal courts have held that confirmation may also be refused (1) on the grounds that the court lacks jurisdiction over either the debtor or the debtor's assets, or (2) on the basis of the doctrine of *forum non conveniens*. This chapter discusses the current state of the law with respect to these two evolving issues.

The Personal Jurisdiction Requirement

Several federal appellate courts have held that in order to satisfy the requirements of the Due Process Clause of the U.S. Constitution, a court must possess jurisdiction over either the debtor (personal jurisdiction) or the debtor's property (*quasi in rem* jurisdiction) as a prerequisite to the enforcement of an international arbitral award. These courts have distinguished between the substantive grounds for recognition set forth in the New York Convention and the procedural prerequisites that must be satisfied for a U.S. court to exercise its authority.

As the Ninth Circuit has explained, "neither the [New York] Convention nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant in suits to confirm arbitration awards".[2] Thus, the Courts of Appeals for the Second, Third, Fourth, Fifth, Ninth and D.C. Circuits have all held that the federal courts must have jurisdiction over the defendant in order for the courts to confirm or recognise an award under the New York Convention.[3]

The U.S. Supreme Court's Most Recent Articulation of the Test for Personal Jurisdictional over Corporate Entities

In order to comply with the Due Process Clause, it has long been established that a defendant must have "certain minimum contacts" with the forum "such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'".[4] In 2014, in its landmark decision in *Daimler AG v. Bauman*,[5] the U.S. Supreme Court provided guidance on how this standard must be applied to determine whether the Due Process Clause has been satisfied for corporate entities.

In *Daimler*, a group of 22 Argentine residents brought tort and statutory claims against Daimler AG (a German company) in the U.S. District Court for the Northern District of California, alleging that they and/or their relatives were victims of mistreatment and torture by Argentine police and military forces.[6] These plaintiffs alleged that Daimler AG's Argentinian subsidiary, Mercedes-Benz Argentina, collaborated with state security forces to injure the plaintiffs and/or their relatives.[7]

The *Daimler* plaintiffs attempted to establish general personal jurisdiction over Daimler AG in California, based on alleged contacts that one of its U.S. subsidiaries had with California.[8] That U.S. subsidiary was incorporated in Delaware with its headquarters in New Jersey.[9] The plaintiffs contended, however, that because the U.S. subsidiary undertook the distribution and sale in California of Mercedes-Benz vehicles allegedly manufactured by Daimler AG, the U.S. subsidiary was the "agent" in California of Daimler AG, and thus Daimler AG itself should be viewed as being present in California.[10]

Notably, the *Daimler* plaintiffs were seeking to establish *general* jurisdiction over Daimler AG. Thus, even though the case involved "events occurring entirely outside the United States", the plaintiffs claimed that Daimler AG had a sufficient connection with California such that it could literally be subject to "any" claims in that forum.[11] The Supreme Court flatly rejected this theory.

In its opinion rendered on January 14, 2014, the Court unanimously held that the exercise of jurisdiction over Daimler AG by the California courts was "barred by due process constraints on the assertion of adjudicatory authority".[12] In order to reach this conclusion, the Court rejected the "doing business test" that had been in place for more than 50 years and that permitted courts to exercise general jurisdiction over a foreign corporation in any state where it "engages in a substantial, continuous, and systematic course of business".[13]

The Court instead established a new test for ascertaining whether general jurisdiction exists over corporate entities. That test requires a U.S. court to inquire whether the corporation must be viewed as "'essentially at home'" in the forum state; that is, a state court may exercise general jurisdiction over a foreign corporation "only when the corporation's affiliations with the State in which suit is brought are so constant and pervasive 'as to render [it] essentially at home in the forum State'".[14] Under the new *Daimler* test, except in the "exceptional case" which the

Court did not clearly define, a defendant is "at home" only in the state where it is incorporated and in the state where it maintains its principal place of business.[15]

In the final section of its opinion, the Court discussed "the transnational context of th[e] dispute" and was plainly conscious that the previously expansive position taken by the U.S. courts on the issue of general jurisdiction was out of step with the views of other nations.[16] Indeed, *Daimler* should be seen as part of an ongoing effort by the Supreme Court to curtail the use of the U.S. courts in cases by foreign plaintiffs trying to gain redress from foreign defendants for events that took place outside of the United States.[17]

Implications for Enforcement of International Arbitral Awards

Because of the requirement that proceedings for confirmation or recognition under the New York Convention are subject to the Due Process limitations, *Daimler* may have a significant impact on such cases and limit parties' ability to confirm foreign awards in the United States. The impact is illustrated by the Second Circuit's decision in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*[18] in which, only a few months after the *Daimler* decision, the Second Circuit applied the new *Daimler* test to dismiss an action seeking enforcement and recognition of a foreign arbitral award for lack of personal jurisdiction over the party against whom the award was entered.

The *Sonera* dispute arose from a $932 million arbitration award obtained by Sonera, a Dutch corporation, against Çukurova, a Turkish company headquartered in Turkey, from an ICC arbitral tribunal in Geneva, Switzerland.[19] Sonera sought enforcement of the Geneva award in several jurisdictions around the world, including the U.S. District Court for the Southern District of New York.[20] The district court held, prior to the *Daimler* decision, that it had general jurisdiction over Çukurova based on alleged contacts with New York by certain of its affiliates. Those contacts included the use of an office in New York by two affiliates of the debtor and statements on the website of one of those affiliates that it had been "[f]ounded in New York City in 1979" and was Çukurova's "gateway to the Americas".[21] The district court not only confirmed the award, but also granted post-judgment discovery in aid of judgment enforcement and enjoined Çukurova from engaging in certain property or assets transfers.[22]

Reversing in light of *Daimler*, the Second Circuit noted that "only a limited set of affiliations with a forum will render a defendant amenable to all-purpose jurisdiction there".[23] Under the new *Daimler* test, the Second Circuit concluded that Çukurova had insufficient contacts with New York because "even a company's 'engage[ment] in a substantial, continuous, and systematic course of business' is alone insufficient to render it at home in a forum", and, therefore, the exercise of general jurisdiction over Çukurova violated the Due Process Clause.[24] The result of finding that Çukurova was not subject to personal jurisdiction was that the Geneva award could not be enforced in New York courts.

Should other courts follow the Second Circuit's lead, U.S. courts will no longer provide a vehicle for many creditors to obtain the type of broad discovery and relief in aid of enforcement that was ordered by the lower court in *Sonera* prior to *Daimler*.

Application of the *Forum Non Conveniens* Doctrine

Even where a court has personal jurisdiction over the parties in an action, it may use its discretion to decline jurisdiction on the ground of *forum non conveniens*, a common law doctrine by which courts may, in some circumstances, decline jurisdiction. The U.S. Supreme Court has described the doctrine as "essentially, 'a supervening venue provision, permitting displacement of the ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined'".[25] Several federal courts in the United States have accepted the argument that actions to confirm an international arbitral award may be dismissed under this doctrine, but in their application of the doctrine, the outcomes of the cases have been mixed.

The Second Circuit has denied enforcement of arbitral awards in two cases on the basis of *forum non conveniens*. In *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, a case involving an $88 million award rendered in Moscow, the Second Circuit held that the doctrine of *forum non conveniens*, "a procedural rule", may be applied in enforcement actions under the New York Convention; it rejected the argument that Article V of the New York Convention "sets forth the only grounds for refusing to enforce a foreign award" and noted that Article III of the Convention "allow[s] for the application of the 'rules of procedure where the award is relied upon'".[26] Because the U.S. Supreme Court has classified *forum non conveniens* as "'procedural rather than substantive'", the Second Circuit concluded that the doctrine "may be applied under the provisions of the Convention".[27] It then affirmed the district court's dismissal because the creditor's choice of forum deserved little deference – an alternative forum (Ukraine) was available – and private as well as public interests weighed in favour of dismissal.[28]

In *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, the Second Circuit again considered the applicability of *forum non conveniens* to actions to enforce foreign awards, and the court's majority held that the district court erred in refusing dismissal on this ground.[29] *Figueiredo* involved a Peruvian arbitration award directing an agency of the Peruvian government to pay the creditor, a Brazilian company, $21 million.[30] The decisive factor with respect to the "public interest" at stake was a Peruvian statute that imposed a "limit" of three percent of the budget of a government entity on the amount the entity may pay annually to satisfy a judgment.[31] Although it was undisputed that the statute did not apply to Peru's assets located in the United States,[32] the majority stated that "the cap statute is a highly significant public factor warranting [*forum non conveniens*] dismissal".[33]

The dissenting judge, however, argued that "a strong case can be made" that the United States made *forum non conveniens* inapplicable to enforcement actions because it does not appear as a defence to enforcement in the New York or Panama Conventions.[34] In his view, the doctrine is inconsistent with the Conventions because the Conventions sought to unify the standards for non-enforcement in signatory countries; *forum non conveniens* "introduces a highly significant inconsistency into the international regime of reciprocal enforcement" and "would seem to dramatically undermine this country's obligations under the treaties to grant enforcement in most cases".[35] Further, he noted that "we should be especially wary of applying that doctrine expansively or in novel ways that suggest that enforcement plaintiffs should be referred back to the very courts they sought to avoid in resorting to arbitration".[36]

The Courts of Appeals for the Sixth, Ninth and D.C. Circuits have also considered the applicability of *forum non conveniens* in

actions to enforce international arbitral awards. The D.C. Circuit has both granted and refused dismissal when presented with this issue. In *TMR Energy Ltd. v. State Property Fund of Ukraine*, it affirmed a judgment enforcing a Swedish award against an entity which the court held was an "agent" of the State of Ukraine.[37] The court rejected the argument that the enforcement action should be dismissed on the ground that the debtor had no property in the United States, concluding that "[e]ven if the [debtor] currently has no attachable property in the United States, however, it may own property here in the future, and [creditors] having a judgment in hand will expedite the process of attachment".[38]

The D.C. Circuit then affirmed dismissal of an enforcement action in *TermoRio S.A. E.S.P. v. Electranta S.P.*[39] In that case, the appellate court upheld the district court's refusal to enforce an award that had been set aside at the seat (Colombia), but it did not decide whether the action "might have been dismissed on the ground of *forum non conveniens*, the alternative basis announced by the District Court".[40] The district court had indeed granted dismissal on that ground, noting that "[t]his matter is a peculiarly Colombian affair, and should properly be adjudicated in that country".[41]

In *Venture Global Engineering LLC v. Satyam Computer Services, Ltd.*,[42] the Sixth Circuit affirmed enforcement of an award rendered in England and refused to dismiss on the basis of *forum non conveniens*. Specifically, the Sixth Circuit appeared to endorse the district court's reasoning that no public interest of India (the purported adequate alternative forum) outweighed the interest in having the case resolved in Michigan: the debtor was a Michigan company, the award involved the transfer of the assets of a Michigan company, and the agreements at issue were governed by Michigan law.[43]

On the other hand, a majority of a Ninth Circuit panel affirmed dismissal of an enforcement action in *Melton v. Oy Nautor Ab*.[44] Because the defendant had not challenged the application of *forum non conveniens* in the district court, the majority found that the argument had been waived, and it issued its decision assuming that the doctrine was applicable, noting that "[o]ur decision is limited to the application of the doctrine of *forum non conveniens* to the specific facts of this case. We express no opinion as to interpretation of the [New York Convention]".[45] Upholding dismissal, the judges noted that an alternative forum existed (Finland, the seat of arbitration) and held that the district court did not abuse its discretion in concluding that the private and public interest factors weighed in favour of dismissal.[46]

The dissent, however, disagreed with the majority's refusal to consider the applicability of the doctrine. The dissenting judge then expressed his view that "[i]t seems unwise to apply *forum non conveniens* to an action to enforce a foreign arbitration award under the Convention, in the absence of any law that *forum non conveniens* applies to cases arising under the Convention".[47] He concluded that dismissal based on *forum non conveniens* was not appropriate, recognising that in a "summary proceeding to confirm an arbitration award . . . the proof and logistics factors attendant to trial are non-existent".[48]

The application of *forum non conveniens* in this context has been widely criticised by bar associations and commentators.[49] And even if the doctrine is applied, it does not necessarily result in dismissal even within the circuits in which the Courts of Appeals have found it applicable. For example, in *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People's Democratic Republic*,[50] a district court in the Southern District of New York acknowledged that the creditor's choice of forum was "entitled to a presumption of validity"; that despite the existence of an adequate alternative forum, the private and public interests weighed against dismissal because enforcement "is typically a summary proceeding"; and the case was "connected to the forum" (the parties had travelled to preliminary conferences in New York, retained New York counsel and did not identify any foreign law to be applied to decide the case).[51] As another example, in *Higgins v. SPX Corporation*, the U.S. District Court for the Western District of Michigan stayed an action pending *vacatur* proceedings in Brazil, but refused to dismiss on the basis of *forum non conveniens*.[52] That court acknowledged that "there will remain a second aspect of this suit, enforcement of the arbitration award, which will nevertheless be proper following the presumed confirmation of the arbitration award. In other words, Michigan, because of the location of [debtor's] assets, may be a proper and convenient forum for Plaintiff to enforce the arbitration award upon successful completion of the nullification suit".[53]

Conclusion: Other Avenues for Enforcement

While a lack of personal jurisdiction or the *forum non conveniens* doctrine may present hurdles for enforcement of certain international arbitral awards in the United States, they are not insurmountable. First, with some foresight, parties may dispose of these potential obstacles by specifically providing in their arbitration agreements for consent to the jurisdiction of the U.S. courts for purposes of recognition and enforcement of any arbitral award, and for a waiver of any defence of *forum non conveniens* in connection with any enforcement proceedings. The U.S. courts are likely to respect such an agreement between the parties. At the time of enforcement, the parties may also explore whether the potential defendant has taken some other action, or engaged in activities, that make it susceptible to general or specific jurisdiction in a particular U.S. forum.

Secondly, parties seeking to enforce an award may attempt to determine what assets a debtor may have in the jurisdiction and, assuming that there are some assets, whether the particular U.S. jurisdiction will consider the presence of those assets sufficient to satisfy the jurisdictional requirement.

Finally, a party seeking recognition might be able to circumvent these hurdles by converting its award to a judgment in a foreign jurisdiction and then seeking recognition of that foreign judgment in the United States. This may be possible because of an anomaly of U.S. law in certain jurisdictions in which a lack of personal jurisdiction and *forum non conveniens* may be invoked to prevent enforcement of foreign arbitral awards in the federal courts, but they are not applicable defences to the enforcement of foreign *judgments* in a state court.[54]

Endnotes

1. *See* New York Convention art. V, *opened for signature* June 10, 1958, 330 U.N.T.S. 3; Panama Convention art. 5, 1438 U.N.T.S. 249 (entered into force June 16, 1976).
2. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002).
3. *See Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177-79 (3d Cir. 2006), *cert. denied*, 549 U.S. 1206 (2007); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002); *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748-52 (5th Cir.

2012); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 817 (D.C. Cir. 2012). *See also S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000) (assuming without discussion that personal jurisdiction is required).

4. *Frontera*, 582 F.3d at 396 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).
5. 134 S. Ct. 746 (2014).
6. *Id*. at 750-51.
7. *Id*. at 751.
8. *Id*.
9. *Id*.
10. *Id*. at 752.
11. As the Supreme Court discussed in *Daimler*, U.S. courts may exercise either "specific" jurisdiction or "general" jurisdiction over a party. *See id*. at 753-58. Specific jurisdiction may be exercised where the lawsuit arises out of or relates to the defendant's contacts with the forum; general jurisdiction may be exercised when a foreign corporation's "continuous corporate operations within a state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities". *Id*. at 754 (quoting *Int'l Shoe*, 326 U.S. at 318) (alteration in original).
12. *Id*. at 751.
13. *Id*. at 761.
14. *Id*.
15. *Id*. at 761 n.19.
16. *Id*. at 762-63.
17. Such cases have become known as "F-cubed" cases. In 2010, the Supreme Court limited the extraterritorial reach of the Exchange Act in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), to preclude F-cubed actions in the securities law context. In its 2012 decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), it dismissed on subject matter jurisdiction grounds a series of Alien Tort Act claims against Royal Dutch/Shell arising out of alleged human rights abuses in Nigeria. The Court then addressed the F-cubed issue again a year later in *Daimler*, but because it decided the case based on the constitutional limitations of personal jurisdiction, *Daimler* has far broader implications than the earlier cases that involved setting limitations on the reach of particular federal statutes.
18. 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014).
19. *Id*. at 223.
20. *Id*.
21. *Id*. at 223-24.
22. *Id*. at 223.
23. *Id*. at 225 (quoting *Daimler*, 134 S. Ct. at 760).
24. *Id*. at 226.
25. *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429-30 (2007) (quoting *Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994)).
26. 311 F.3d 488, 496 (2d Cir. 2002) (quoting New York Convention art. III) (alteration added). The Second Circuit stated that "the items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than procedure". *Id*.
27. *Id*. at 495, 496 (quoting *Am. Dredging*, 510 U.S. at 453).
28. *Id*. 498-501. The court noted, *inter alia*, that a trial might be required on the issue of the State of Ukraine's potential liability as a non-signatory and that "[t]he case before us simply has no connection with the United States other than the fact than the United States is a Convention signatory". *Id*.
29. 665 F.3d 384, 386 (2d Cir. 2011).
30. *Id*. at 386-87.
31. *Id*. at 387.
32. *Id*. at 389.
33. *Id*. at 392.
34. *Id*. at 397 (Lynch, J., dissenting).
35. *Id*. at 397-98.
36. *Id*. at 402.
37. 411 F.3d 296, 300-03 (D.C. Cir. 2005), *reh'g en banc denied* Aug. 29, 2005.
38. *Id*. at 303; *accord Belize Social Development Ltd. v. Gov't of Belize*, 5 F. Supp. 3d 25, 34 (D.D.C. 2013), *appeal filed* Jan. 14, 2014.
39. 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
40. *Id*. at 932.
41. *TermoRio S.A. E.S.P. v. Electranta del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 103 (D.D.C. 2006), *aff'd*, 487 F.3d 928 (D.C. Cir. 2007), *cert. denied*, 552 U.S. 1038 (2007).
42. 233 F. App'x 517 (6th Cir. 2007).
43. *Id*. at 521.
44. 161 F.3d 13 (9th Cir. 1998) (unpublished).
45. *Id*. at *1.
46. *Id*.
47. *Id*. at *2.
48. *Id*. (also quoted in *Figueiredo*, 665 F.3d at 402 (Lynch, J., dissenting)).
49. *See, e.g.*, ABA Resolution 107C (adopted by the House of Delegates Aug. 12-13, 2013) (affirming that the "U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the [New York Convention] or the [Panama Convention] and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. supporting implementing legislation"); Report of the International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards* (April 2005) (expressing the view that *forum non conveniens* should not be a ground for dismissal of an action to confirm or enforce an arbitral award because a convenient forum is not a requirement for constitutional due process); GARY B. BORN, 3 INTERNATIONAL COMMERCIAL ARBITRATION 2985 & n.508 (2d ed. 2014) (agreeing with *Figueiredo* dissent, and stating, *inter alia*, that it is "both inconsistent with the [New York] Convention and unjust to more broadly rely on the *forum non conveniens* doctrine to deny recognition of foreign awards where there are assets of an award-debtor within the recognition forum or reasonable grounds for believing that assets might be transferred to or through the recognition forum in the future"). *See also* RESTATEMENT OF THE LAW OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-29(a) (Tentative Draft No. 3 Apr. 16, 2013) ("An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favour of a foreign court on forum non conveniens grounds".).
50. No. 10 Civ. 5256 (KMW), 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 F. App'x 150 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1473 (2013).

51. *Id*. at 9-12 (internal quotation marks and citation omitted). *See also Constellation Energy Commodities Grp. Inc. v. Transfield ER Cape Ltd.*, 801 F. Supp. 2d 211, 218-21 (S.D.N.Y. 2011) (refusing to dismiss under *forum non conveniens* where award creditor was incorporated in the United States and adequate alternative fora were available in the United Kingdom and Hong Kong).
52. No. 1:05-CV-846, 2006 WL 1008677, at *4 (W.D. Mich. Apr. 18, 2006).
53. *Id*.
54. *See, e.g., Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 611 (1st Dep't 2014) (affirming an order for the recognition and enforcement of a $40 million English judgment and holding that under New York law, a judgment creditor need not establish a basis of personal jurisdiction over the judgment debtor and rejecting application of *forum non conveniens* doctrine); *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 50-51 (4th Dep't 2001) (holding that a party seeking recognition of a foreign money judgment need not establish a basis for personal jurisdiction over the debtor).

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