

Kluwer Arbitration Blog

Enforcement of Foreign Arbitral Awards in the U.S. Post *Daimler AG v. Bauman*

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In this post, we discuss some of the challenges created by the personal jurisdiction requirements under U.S. law (explained below) in enforcement of foreign arbitral awards in the U.S. We also delve into details of hurdles posed by the implementation of the personal jurisdiction standard as enunciated in *Daimler AG v. Bauman* to recognition and enforcement proceedings. Personal Jurisdiction is a U.S. law concept that signifies the power of a court to determine the rights and liabilities of a party involved in a lawsuit.

Given these challenges, we propose a potential solution to bypass these hurdles, to wit, modifying arbitration clauses to include a waiver of jurisdictional objections to the subsequent enforcement of an arbitration award.

A Primer: Enforcement of Foreign Arbitral Awards in the U.S.

While the vast majority of arbitration awards are voluntarily complied with, there are still many cases in which a losing party will refuse to satisfy an outstanding award against it. Because “[a]rbitral awards are not self-enforcing” in the U.S., they must therefore “be given force and effect by being converted to judicial orders by courts.” *Power Partners MasTec, LLC v. Premier Power Renewable Energy, Inc.*, 2015 WL 774714 (S.D.N.Y. Feb. 20, 2015). To that end, many U.S. courts require a party seeking to reduce a foreign arbitral award to a judgment to establish compliance not only with the relevant provisions of the New York Convention and the Panama Convention (the “Conventions”) but also federal and state constitutional and legal requirements governing personal jurisdiction. In that connection, the U.S. Court of Appeals for the Second Circuit (the “Second Circuit”) has held that both Conventions limit the ways of challenging a request for recognition and enforcement of an arbitration award. *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 397 (2d Cir. 2009). However, the Conventions do not alter the fundamental constitutional requirement that the party against whom enforcement is sought be subject to personal jurisdiction of the court before which enforcement is sought. *Id.* The Second Circuit has also found that, even when jurisdictional

requirements are satisfied, it has authority to dismiss an enforcement proceeding on the grounds that the state in which it was initiated is an inconvenient forum. *Monegasque De Reassurances S.A.M. (monde Re) v. Nak Naftogaz of Ukr.*, 311 F.3d 488, 495-96 (2d Cir. 2002).

Broadly speaking, there are three ways that an enforcing party can meet U.S. federal and state constitutional and legal requirements governing personal jurisdiction. First, the enforcing party can seek to establish “general” or “all purpose” jurisdiction based on the award debtor’s ties to the state where enforcement is sought. Second, an enforcing party may seek to establish so-called “specific” jurisdiction based on the commission of some single or occasional acts of the corporate agent or individual in a state that gives rise to the lawsuit. Third, there is case law permitting a party to rely on the U.S. assets of the award debtor to establish so-called “in rem” (property based) jurisdiction. *CME Media Enters. B.V. v. Zelezny*, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001).

Daimler Standard

In 2014, the U.S. Supreme Court (the “Supreme Court”) issued an opinion in *Daimler AG v. Bauman* 134 S. Ct. 746 (2014) which has been described [here](#) as “almost certainly its most important jurisdiction decision in some seventy years.” In that case, the Supreme Court essentially held that, in the absence of extraordinary circumstances, a party will only obtain “all purpose” jurisdiction over a corporation by suing it at its place of incorporation or principal place of business and, over a foreign individual, by suing the individual at her or his domicile. The Supreme Court’s decision is [discussed](#) to have “mark[ed] a dramatic change in the law” since it arguably abrogated “[t]he once familiar standard for general jurisdiction—corporate ‘presence’ in a state in which it ‘does business’ both ‘continuously and systematically.’” Naturally, it has had a significant impact on arbitration award enforcement proceedings in the U.S.

Implementation of the Daimler Standard

Federal appellate courts in the U.S. have applied the rule articulated in *Daimler* to recognition and enforcement proceedings. *See, e.g., Sonera Holding B.V. v. Cukurova Holding A.S.*, 750 F.3d 221, 223 (2d Cir. 2014). This shift in the threshold requirement of “general” jurisdiction to a stricter threshold of having a place of incorporation from the erstwhile lower threshold of having continuous and systematic business activities has created potential hurdles for parties in such proceedings that cannot establish the kind of contacts with a state that would authorize “all purpose” or “general” jurisdiction. Consequently, foreign parties may find themselves potentially engaged in expensive and/or otherwise protracted litigation aimed at finding assets and/or contacts that will authorize a U.S. court to exercise “specific jurisdiction” with no ultimate guarantee of success. In practice, this means that a foreign party may be involved in a litigation in the U.S. over several years only to find out that they will be

unable to enforce their arbitration award.

Does Property-based Jurisdiction Provide a Respite from the Daimler Standard?

As noted above, a party seeking to enforce a foreign award may rely upon the assets of a foreign award debtor to establish jurisdiction. However, there are certain limitations when relying upon such property-based jurisdiction. Generally, there is a limit on the recovery amount, as courts will confirm the award only to the extent of assets present in the jurisdiction. *See, e.g., CME Media Enters. B.V. v. Zelezny*, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001). In addition, courts may be reluctant to order any kinds of additional remedies besides orders against the property. *Id.* Because such jurisdiction relies on the contemporaneous presence of the property in the forum state, award debtors can also potentially defeat in rem jurisdiction by moving their property out of the forum state. To preempt such situations the award creditors often obtain a pre-judgment attachment of properties under the applicable state law (For example: under [N.Y. C.P.L.R. § 5305 \(2016\)](#)) which is possible when the foreign arbitral award is converted into a foreign judgment, as explained below.

Thus, an enforcing party may also rely upon a double exequatur or dual enforceability approach as discussed in a previous [post](#). This is an indirect route to enforce a foreign arbitration award by converting the award into a foreign judgment recognizing the award, and then seeking recognition of that foreign judgment in the U.S. The personal jurisdiction rules for recognition of foreign judgments are somewhat more flexible when there is no opposition to the enforcement proceeding but not when the defendant challenges or opposes the enforceability of the judgment on substantive grounds. *AlbaniaBEG Ambient Sh.p.k v. Enel S.p.A.*, 160 A.D.3d 93 (N.Y. 1st Dept 2018).

Although “specific” jurisdiction may offer an easier alternative to satisfying a party’s jurisdictional burden, an enforcing party seeking to rely on such a basis for asserting personal jurisdiction will generally need to show that the award debtor “transacts any business within the state or contracts anywhere to supply goods or services in the state” and the cause of action arises from this conduct. [N.Y. C.P.L.R. § 302\(a\)\(1\)](#).

A Plausible Way for Establishing Personal Jurisdiction

Faced with the above conundrums, parties may want to include a provision in their arbitration clause addressing enforcement issues in the U.S.

Many U.S. courts have found consent of parties as a valid way of establishing personal jurisdiction for purposes of enforcing a foreign arbitral award, as courts have recognized that personal jurisdiction stems from due process rights of the parties itself, rather than Article III powers of the judiciary, and hence parties can consent to personal jurisdiction. *Brown v. Lockheed Martin Corp.*, 814 F.3d 619, 625 (2d Cir. 2016). Parties usually express their consent through forum selection clauses or

contractual consent provisions. For instance, in the case of *EGI-VSR, LLC v. Huber*, 2020 U.S. Dist. LEXIS 54405 (S.D.N.Y. Mar. 27, 2020) concerning enforcement of a Chilean arbitration award, the court held that the award debtor's (a Chilean resident) agreement with a forum selection clause providing that "*any dispute under this Agreement shall be resolved in a court of competent jurisdiction in New York, New York*" conferred personal jurisdiction over the award debtor. Similarly, in the case of *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006), the court found that the award debtor (a Florida resident) was subject to personal jurisdiction of the court for purposes of a confirmation proceeding to reduce an award to a judgment, as the defendants had consented to personal jurisdiction through forum-selection clauses.

Contractual consent to personal jurisdiction should eliminate the need for a separate due process analysis required by the U.S. constitution. *See, e.g., EGI LLC*, 2020 U.S. Dist. LEXIS 54405 at *14; *Recurrent Capital Bridge Fund I, LLC v. Isr Sys. & Sensors Corp.*, 875 F. Supp. 2d 297, 306 (S.D.N.Y. 2012). Forum selection clauses are especially useful insofar as courts have generally interpreted forum selection clauses broadly and enforced them, unless the clause was obtained through fraud, *D.H. Blair & Co., Inc. v. Gottdiener*, 462 F.3d 95, 104 (2d Cir. 2006) or enforcing it would be unreasonable or unjust, *see, e.g., EGI LLC*, 2020 U.S. Dist. LEXIS 54405 at *15-16. Thus, a party may be able to construct a forum selection clause designating New York as the seat of the arbitration which would permit it to enforce an award stemming from such an arbitration in New York. Similarly, a party may also theoretically designate a seat of arbitration in another, foreign jurisdiction while including a provision in their arbitration clause that would permit them to enforce their arbitral award in the U.S.

Thus, given that "general" jurisdiction is the preferred way of establishing personal jurisdiction in recognition and enforcement proceedings, and the U.S. courts have applied *Daimler's* more stringent threshold of establishing "general" jurisdiction over foreign parties, parties may want to include a forum selection clause in their arbitration agreement to address enforcement issues in the U.S.

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