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International Arbitration Report

Looking to Enforce a Foreign Arbitral Award in the United States? Do Not Forget About Personal Jurisdiction

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**A commentary article
reprinted from the
May 2013 issue of
Mealey's International
Arbitration Report**



Commentary

Looking to Enforce a Foreign Arbitral Award in the United States? Do Not Forget About Personal Jurisdiction

By
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Parties engage in international arbitration proceedings to obtain a final, binding and enforceable arbitral award. A strong enforcement regime, created by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), ensures that an international arbitration award is readily enforceable in nearly 150 countries that are signatories to the New York Convention. A court in the United States petitioned to confirm a foreign award under the New York Convention "shall" do so "unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention."¹ Seven exclusive non-recognition grounds are specified in the New York Convention. However, in addition to these grounds, a party opposing enforcement of an award in the United States may also raise a procedural defense that is second nature to all familiar with US litigation – lack of personal jurisdiction.

In a recent decision, the Fifth Circuit Court of Appeals answered the question of first impression in that circuit

and held that a lack of personal jurisdiction is a valid defense to the enforcement of a foreign award under the New York Convention. The Fifth Circuit affirmed a Louisiana district court's dismissal of a petition to confirm an award for lack of personal jurisdiction over the defendants, and found that the dismissal was appropriate as a matter of constitutional due process. The Fifth Circuit's decision is in line with decisions from a number of other circuits, and serves as a reminder to parties and practitioners in international arbitration not to lose sight of due process requirements under the United States Constitution.

First Investment Corporation of the Marshall Islands ("First Investment") and two Chinese companies, Fujian Shipbuilding Industry Group Corp. ("FSIGC") and Fujian Mawei Shipbuilding Ltd. ("Mawei"), were parties to a number of shipbuilding contracts. In 2004, First Investment initiated arbitration in London alleging breach of contract by FSIGC and Mawei. Arbitration was conducted under the rules of the London Maritime Arbitration Association and resulted in an award in favor of First Investment of approximately US \$26 million in damages. After the Chinese court refused to enforce the award, First Investment turned to the United States District Court for the Eastern District of Louisiana. The district court dismissed the enforcement petition for lack of personal jurisdiction over the Chinese defendants.² First Investment appealed, arguing that standard personal jurisdiction criteria do not preclude US courts from enforcing awards under the New York Convention.³ First Investment reasoned

that personal jurisdiction may not block the enforcement proceedings, since it is not among the non-recognition grounds listed in the New York Convention.

The Fifth Circuit disagreed. The court noted that personal jurisdiction is “an essential element of the jurisdiction” of a district court – without personal jurisdiction, the court has no power to proceed.⁴ Thus, even though personal jurisdiction is not mentioned in the New York Convention or the United States Federal Arbitration Act implementing the New York Convention, personal jurisdiction is grounded in constitutional due process concerns, and therefore, takes precedence over the language of the New York Convention and its implementing statute.⁵

Relying on established US Supreme Court personal jurisdiction precedent, the Fifth Circuit explained that the personal jurisdiction requirement protects an individual’s liberty interests.⁶ It guarantees that a party will not be “haled into court” and subjected to proceedings in a forum with which it has no meaningful contacts, ties, or relations.⁷

To satisfy the due process requirement, there must be constitutionally sufficient contacts between the defendant and the state where the court is located, and subjecting the nonresident defendant to jurisdiction must be consistent with “traditional notions of fair play and substantial justice.”⁸ A court, in essence, determines whether the exercise of jurisdiction over a defendant would be reasonable, considering a number of factors, including the burden on the defendant, the interests of the forum state and of the plaintiff, the interest in obtaining efficient resolution of controversies, and the interest in “furthering fundamental substantive social justice.”⁹ Hence, the decision whether sufficient minimum contacts exist involves a fact-specific inquiry, and depends on the particular circumstances of each case. The personal jurisdiction requirement may also be satisfied if the defendant consents to jurisdiction or has a principal place of business or residence in the forum. In addition, in the absence of personal jurisdiction over the defendant’s person, *quasi in rem* jurisdiction may be exercised over the defendant’s property located in the forum state, if the property is related to the dispute.¹⁰

Neither FSIGC nor Mawei had contacts with Louisiana or the United States. Hence, the arbitral award could not be enforced against them in the United States.

The Fifth Circuit cited decisions from the Second, Third, Fourth, Seventh, Ninth and Eleventh circuits that have also held that personal jurisdiction over the defendant is a prerequisite to seeking confirmation of awards under the New York Convention.¹¹

Thus, parties and practitioners looking to the United States to enforce a foreign award must be able to demonstrate a proper constitutional basis, whether arising from the defendant’s residence, his conduct, the location of his property, or his consent that would justify making the defendant subject to the court’s adjudicatory and compulsory powers. The personal jurisdiction requirement may indeed impede enforcement of many arbitral awards. However, it is unlikely that this and similar decisions will make the United States a less attractive enforcement forum, especially where a defendant’s assets can be located within the United States’ territory.

Endnotes

1. United States Federal Arbitration Act, 9 U.S.C. § 207. Article V(1) of the New York Convention similarly provides that recognition and enforcement of the award “may be refused . . . only if” one of the listed grounds is shown to exist.
2. *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd. of People’s Republic of China*, 858 F. Supp. 2d 658 (E.D. La. 2012).
3. *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742 (5th Cir. 2012).
4. *First Inv. Corp.*, 703 F.3d at 749.
5. *Id.* at 749-50.
6. *Id.* at 749 (quoting *Rubrgas AG v. Marathos Oil Co.*, 526 U.S. 574 (1999)).
7. *Id.* (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), citing *Int’l Shoe Co. v. Washington*, 326 U.S. 310 (1945) and *ITL Int’l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 498 (5th Cir. 2012)).

8. *Id.*
9. *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (putting forth the seven factor test to assess the reasonableness of exercising jurisdiction); *First Inv. Corp.*, 858 F. Supp. 2d at 668-69.
10. *Shaffer v. Heitner*, 433 U.S. 186 (1977); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002) (mere presence of seized property in New Jersey was insufficient to assert jurisdiction where there was no relationship between the property and the court proceeding).
11. *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Rep.*, 582 F.3d 393, 397-98 (2d Cir. 2009) (confirmation proceeding under New York Convention requires personal or *quasi in rem* jurisdiction over parties. "[The New York Convention] 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."); *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178-79 (3d Cir.2006) ("[T]he New York Convention does not diminish the Due Process constraints in asserting jurisdiction over a nonresident alien"); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212 (4th Cir.2002) ("[T]he [New York] Convention . . . does not confer personal jurisdiction when it would not otherwise exist."); *Emp'rs Ins. of Wausau v. Banco De Seguros Del Estado*, 199 F.3d 937, 941-43 & n. 1 (7th Cir. 1999) (observing that personal jurisdiction would be required under New York Convention); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002) ("We hold that 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."); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000). ■

MEALEY'S: INTERNATIONAL ARBITRATION REPORT

edited by Lisa Schaeffer

The Report is produced monthly by



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ISSN 1089-2397