Enforcing a New York Convention award in the USA

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In general, there is a clear policy preference for the enforcement of arbitral awards in the United States and this pro-enforcement preference extends to awards made under the United Nations Conference on the International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed 10 June 1958 (the New York Convention), where courts typically limit an award debtor's defences to enforcement to those found in the Convention itself.

References: New York Convention

Practitioners must be aware of potential pitfalls in enforcement and seek skilled counsel for complex issues, particularly those involving personal jurisdiction, forum non conveniens and sovereign immunity. In all cases, parties should consult counsel for guidance on local rules and procedure and to ascertain the latest case law on specific New York Convention enforcement action.

The Federal Arbitration Act

Under US law, the enforcement of an arbitral award issued pursuant to the New York Convention is governed by the Federal Arbitration Act (9 U.S.C. § 1 et seq) (the FAA).

References: New York Convention

The FAA is divided into three chapters:

- Chapter One of the FAA (9 U.S.C. §§ 1-16) is primarily applicable to arbitrations with a US seat and not to foreign awards, but its provisions apply to awards enforced under both Chs Two and Three if the question is not covered in Chs Two or Three
- Chapter Two of the FAA (9 U.S.C. §§ 201-208) incorporates the New York Convention into US law
- Chapter Three of the FAA incorporates the separate, yet related treaty, the 1975 Inter-American Convention on International Arbitration (9 U.S.C. §§ 301-307) (the Panama or Inter-American Convention). Under the provisions of the FAA, if both the New York Convention and the Inter-American Convention are applicable to the enforcement of your award, the Inter-American Convention will apply

This Practice Note focuses on the enforcement of New York Convention awards under Chapter Two of the FAA. It is important to ensure that the New York Convention is the applicable convention for enforcement in the United States, not Ch One of the FAA nor the Inter-American Convention. Experienced counsel may be needed to advise on which chapter of the FAA applies.

Steps to enforce a New York Convention award in the USA

Ensure that the New York Convention (and thus Ch two of the FAA) applies to your award.

In the United States, the New York Convention (Ch Two of the FAA) will apply to:

- a ‘foreign’ or ‘non-domestic’ commercial arbitral award
- rendered in the territory of a state that has ratified the New York Convention

unless a majority of parties to the arbitration agreement are citizens of states that have ratified or acceded to the Inter-American Convention (ie are members of the Organization of American States).

Is your award as ‘foreign’, ‘non-domestic’ or ‘domestic’?
It is important to determine whether the award is considered 'domestic', 'foreign' or 'non-domestic'. 'Non-domestic' awards and 'domestic' awards are subject to vacatur (or set aside) under 9 USC § 10; 'foreign awards' are not.

The New York Convention, art V applies to foreign and non-domestic awards. The art V grounds for refusal to enforce differ from grounds for vacatur under the FAA. Thus, 'foreign' awards under the New York Convention offer fewer means of resisting enforcement of the award than 'non-domestic' or 'domestic' arbitral awards.

To clarify:

- Foreign arbitral awards are awards rendered outside of the territory of the United States. Foreign awards are not subject to vacatur, but they can be refused enforcement on the grounds in art V of the New York Convention
- For non-domestic awards, 9 U.S.C. § 202 provides that an award arising out of a relationship entirely between citizens of the United States does not 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

- Domestic awards are all other awards that do not qualify as foreign or non-domestic. Chapter One of the FAA applies to domestic awards made within the territory of the United States. Chapters Two and Three of the FAA do not apply to domestic awards

Categorising your award as a 'commercial' arbitral award

If the arbitral award arises out of a legal relationship that is considered commercial, even if there is no contract, the New York Convention applies; see 9 U.S.C. § 202 which states that:

'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.'

'Rendered in the territory of a state that has ratified the New York Convention'

As at January 2014, 149 countries have ratified the New York Convention. A list of all contracting states can be found here.

Article I (3) of the New York Convention provides a 'reciprocity reservation' that limits the enforcement of awards to those awards made in countries that have ratified the convention. In other words, US courts will not enforce awards rendered in countries that have not ratified the New York Convention. Notable non-signatories to the New York Convention include Taiwan and Equatorial Guinea.

'Unless a majority of parties to the arbitration agreement are citizens of states that have ratified or acceded to the Inter-American Convention'

Section 9 U.S.C. § 305 provides that:

'If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.'

In all other cases, the New York Convention will apply to the enforcement of a foreign arbitral award in the United States.

Suit to enforce a New York Convention award

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Proving jurisdiction

In the United States, the party filing suit must demonstrate that the court in which it is filing has jurisdiction to hear the case. This requirement applies to all actions, including an action to enforce an arbitration award.

In general, a federal court must have both:

- subject matter jurisdiction over the controversy, and
- personal jurisdiction over the award debtor (or the property of the award debtor)

Chapter Two of the FAA (9 U.S.C. §§ 203, 205, supra) establishes subject matter jurisdiction over actions relating to the New York Convention.

The FAA does not expressly waive the requirement of personal jurisdiction. US courts have held that the New York Convention does not dispatch with the US constitutional due process requirements of personal jurisdiction. See First Inv Corp of Marshall Islands v Fujian Mawei Shipbuilding 703 F.3d 742, 748 (5th Cir 2012) (dismissal of a petition under the New York Convention for lack of personal jurisdiction is appropriate as a matter of constitutional due process) (not available in Lexis®Library).

Even though Chapter Two of the FAA establishes that the court will have subject matter jurisdiction over a New York Convention enforcement action, the enforcing party must still show that the court can establish personal jurisdiction over the defendant or the award debtor's property. (Note that this is an additional requirement on top of proving subject matter jurisdiction.)

While there has been much academic debate over the issue, US courts have routinely held that there must be an independent basis for personal jurisdiction that satisfies the due process clause of the US Constitution. See Frontera Res Azerbaijan Corp v State Oil Co of the Azerbaijan Rep, 582 F.3d 393, 397 (2d Cir. 2009), Base Metal Trading v OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 213 (4th Cir. 2002), Glencore Grain Rotterdam BV v Shivnath Rai Hanarian Co, 284 F.3d 1114, 1122 (9th Cir. 2002) (not available in Lexis®Library).

The plaintiff (award creditor) may establish personal jurisdiction by showing that the defendant (award debtor) either has:

- minimum contacts with the forum (place of jurisdiction), or
- assets located within the forum

Personal jurisdiction and jurisdiction in rem

It is not within the scope of this Practice Note to describe in full the intricacies of the constitutional requirements of due process as it applies to the personal jurisdiction analysis. However, these are the main points of personal jurisdiction and jurisdiction over property (in rem) under U.S. law.

Minimum contacts

The constitutional requirement of due process provides that it is unfair for a court to assert jurisdiction over a party unless that party's contacts with the forum are such that the party 'could reasonably expected to be haled into court' there (see International Shoe Co v Washington, 326 U.S. 310 (1945) (not available in Lexis®Library)).

An award debtor typically has minimum contact with a forum if it, inter alia:

- has direct contact with the state
- has a contract with a resident of the state
- has placed products into the stream of commerce such that it reaches the state, or
- if the litigation arises out of the arbitral debtor's contacts within the forum (ie specific jurisdiction)

Furthermore, a foreign award debtor’s consent to the jurisdiction of the arbitration proceeding does not constitute consent to personal jurisdiction of the enforcement forum in US law.

This Practice Note deals primarily with foreign awards where consent to the arbitral proceeding is not equivalent to consent to an enforcement action. Practitioners should consult with local counsel regarding these and other complex legal issues regarding enforcement of ‘non-domestic’ awards under the New York Convention, because consent to arbitration may constitute consent to jurisdiction of the enforcing court where the seat of the arbitration is the United States.

Assets within the forum

The presence of the award debtor’s assets may suffice to establish an independent basis for personal jurisdiction, but US courts are divided as to whether the arbitral debtor’s assets within the forum must relate to the underlying commercial relationship between the parties.

The US Supreme Court held in Shaffer v Heitner 433 U.S. 186, 210, n. 36 (1977) (not available in Lexis®Library) that there:

‘is no unfairness in allowing an action to realize on [a] debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.’

Therefore, most US courts have held that assets in the forum need not be related to the underlying transaction for the court to have jurisdiction to enforce the award, see Glencore, 284 F.3d at 1122, CME Media Enterprises BV v Zelezn, No 01 CIV 1733 (DC), 2001 WL 1034138 at *3 (SDNY Sept. 10, 2001) (not available in Lexis®Library) (quasi in rem jurisdiction based on property alone was appropriate, but only up to the value of the property located in the jurisdiction).

However, precedent in the Third and Fourth Circuit Courts of Appeals indicates that courts in that jurisdiction may refuse to find jurisdiction over an arbitral debtor solely based on assets in the jurisdiction if those assets do not relate to the underlying action (Base Metal Trading v OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 213 (4th Cir. 2002) (Base Metal I) (not available in Lexis®Library) (‘the mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action,’ but the presence of property ‘may have an impact on the personal jurisdiction inquiry’), Base Metal Trading v OJSC Novokuznetsky Aluminum Factory, 27 Fed. Appx. 73 (3d. Cir. 2002) (Base Metal II), (not available in Lexis®Library). These decisions have been roundly criticised and parties should take extra care in establishing personal jurisdiction in a forum based on the arbitral debtor’s assets alone and should consult US counsel.

No jurisdiction in any state

If the defendant is not subject to the courts of general jurisdiction of any state, jurisdiction may still be proper under Federal Rule of Civil Procedure Rule 4(k)(2). Federal Rule of Civil Procedure 4(k)(2) provides that a district court may exercise jurisdiction over a defendant where:

- the plaintiff’s claim ‘arise(s) under federal law’
- the defendant ‘is not subject to the jurisdiction of the courts of general jurisdiction of any state’, and
- the court’s exercise of jurisdiction ‘is consistent with the Constitution and laws of the United States’

Parties should consult counsel in regards to the application of this rule (see Base Metal Trading Ltd v OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 212 (4th Cir. 2002) (not available in Lexis®Library)).

The practicalities of filing suit

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Where to file suit
While parties seeking enforcement of arbitral awards may file proceedings in either state or federal court, enforcement actions are adjudicated typically in federal court because:

- Section 9 U.S.C. § 203 grants federal courts subject matter jurisdiction over enforcement of awards issued pursuant to the New York Convention by stating:
  
  ‘an action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States ... shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.’

- Section 9 U.S.C. § 205 provides further that any defendant may, at any time before trial, remove an action relating to an arbitration agreement or award from state court to federal district court.

When to file the suit
Section 9 U.S.C. § 207 states that:

‘within three years after an arbitral award falling under the 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.’

While the statute states ‘may’, US courts have uniformly viewed application within three years as a mandatory requirement, see Transport Wiking Trade Schifffarhtsgeseellschaft MBH & Co v Nivimpex Centrala Navala, 989 F.2d 572, 580-81 (2d Cir. 1993) (not available in Lexis®Library).

The statute of limitations begins to run from the date that the award was signed by the arbitrators, not when all recourse against the award and appeals therefrom are exhausted, see Transport Wiking, 989 F.2d at 581, Kerr-McGee v Triumph Tankers, 740 F.Supp. 288, 289 (S.D.N.Y. 1990) (not available in Lexis®Library).

What to file
You must file a petition for enforcement of an award. In most jurisdictions, you should allege and give facts that make out a prima facie case for jurisdiction. With this petition, include:

- Certified copies of the arbitration agreement and the arbitral award. The party seeking enforcement must supply the court with a certified copy of the arbitration agreement and award at issue, which will serve as prima facie evidence of enforcement (art IV New York Convention)
- Check the rules regarding the translation of foreign documents if any of your submissions, including the certified copy of the arbitral award, are in a language other than English. The translation may need to be accompanied by a translator affidavit or may need to be certified, as per local rules

Service of process and fees

Service of process
The defendant (arbitral debtor) must be served with process (ie service of the petition and supporting documents) in accordance with the due process requirements of the United States Constitution.

The requirements for service will depend on the location of the arbitral debtor. Each state and jurisdiction has varying requirements and forms to use in regards to service of process, especially as those rules apply to foreign parties.

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It is therefore important to consult US counsel as to the applicability of local rules and state long-arm statutes to the enforcement of your New York Convention award.

**Applicable fees**

Fees for service vary by jurisdiction according to the local rules of each court, but, as specified in art III of the New York Convention, the fees will not be more than those imposed for enforcing a US domestic award.

**Local rules of enforcing court.**

There are likely to be specific requirements of the local court for filing suit to enforce a New York Convention award. The local rules for each court are usually available online and provide essential information for filing requirements, such as:

- formatting of documents, including margins, typeface, etc
- required fees
- translations

In all cases, practitioners should consult qualified local counsel for the particular requirements of each jurisdiction.