Avoiding Time Bar for Enforcing International Arbitral Awards

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The statute of limitations for enforcing international arbitration awards in the United States is shorter than that for enforcing judgments. If the former period has run, can one turn an arbitration award into a judgment outside the United States and then use the longer period to enforce the award that has now metamorphosed into a foreign judgment? This article addresses that question, which was recently answered in opposite ways by the district court and the U.S. Court of Appeals for the D.C. Circuit in Comm'ns Import Exp. v. Republic of the Congo, 2014 U.S. App. Lexis 13158 (D.C. Cir. July 11, 2014).

Enforcement Under the FAA

be enforced in United States courts in accordance with this chapter," and Section 202 limits the
application of the Convention to international commercial disputes. The chapter also establishes
a federal forum for disputes concerning arbitrations falling under the Convention, see id. §§ 203–
204. Of significance here, it imposes a time limit for seeking confirmation of an arbitral award.
Section 207 provides:

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. The court shall confirm the award unless it
finds one of the grounds for refusal or deferral of recognition or enforcement of the award
specified in the said Convention.

This three-year limitation is two years more than the one-year limitation in the FAA for

This provision lay at the heart of the dispute in the Comm'ns Import Exp. case, which arose from
the following facts. The plaintiff, Commisimpex, a company organized under the laws of the
Congo, held promissory notes issued by the Republic of the Congo and the Caisse Congolaise
D'Amortissement (CCD), a department of the Congo's Ministry of Economy, Finance, and
Planning. The Congo and CCD failed to make payment under the promissory notes, leading
Commisimpex to seek arbitration before an arbitral tribunal established by the International
Chamber of Commerce (ICC). The tribunal issued a final award against the Congo and CCD for
over $31 million.

Commisimpex tried for several years to enforce the arbitral award in courts all over the world but
was unsuccessful. In 2009, Commisimpex commenced an action in England against the Congo
and CCD to enforce the ICC arbitral award. An English court ruled that the arbitral award was
enforceable, and issued a money judgment against Congo and CCD.

Commisimpex then brought suit in federal court in New York to enforce the English judgment,
which case was transferred to the District of Columbia. The judgment-enforcement statute in the
District of Columbia provides that "[a]n action to recognize a foreign-country judgment" must be
commenced before the judgment expires in the rendering country or within 15 years of the
judgment's becoming effective in the foreign country, whichever is earlier. D.C. Code § 15-369.
The statute further provides that "a court of the District of Columbia," subject to limited
exceptions, "shall recognize a foreign-country judgment" that "[g]rants or denies recovery of a
sum of money" and is final, conclusive, and enforceable where rendered.

The Courts' Decisions

The district court denied Commisimpex's motion for summary judgment and dismissed the
complaint on the ground that the three-year period for confirmation of foreign arbitral awards in
Section 207 preempted the D.C. statute's longer enforcement period for foreign money
judgments. The court ruled that, by acting at the federal level in enacting Chapter 2 of the FAA,
Congress ensured that the enforcement of foreign arbitral awards in the United States would be
governed by one set of uniform rules of procedure, rather than a diversity of state ones.
According to the court, Commisimpex's maneuver frustrated Congress' objective in promoting procedural uniformity because, if permitted, it would change a single, uniform three-year limitations period into a multitude of diverse limitations. And, according to the district court, Commisimpex's interpretation also obstructed potential defendants' interest in the finality offered by the three-year statute of limitations.

The Congo also offered further arguments in support of its position. It said that its interpretation was consistent with the practice in other countries, where courts have held that the enforcement of an award in a particular country should be limited to that country. Bundesgerichtshof [BGH] [Federal Court of Justice] July 2, 2009 (IX ZR 152/06) ¶6, 33 (Germany); Yukos Capital S.A.R.L. v. OJSC Rosneft Oil, [2012] EWCA (Civ) 855, ¶138-157 (England).

In addition, U.S. courts have refused to permit recognition of so-called judgments on judgments. For example, in Reading & Bates Constr. v. Baker Energy Res., 976 S.W.2d 702, 715 (Tex. App. 1998), the court refused a "back door" recognition in Texas of a Louisiana money judgment that recognized a Canadian judgment because to do so would prevent the Texas courts from "looking behind the judgment to evaluate both the law upon which it is based…and the jurisdictional environment in which it was rendered."

Commisimpex appealed the dismissal of its suit, and the D.C. Circuit invited the United States to submit an amicus brief. It did, and took the position that enforcement of a foreign judgment arising out of an arbitral award is distinct from enforcement of an arbitral award and is not governed by the New York Convention.

The D.C. Circuit agreed and reversed the district court. It looked at the issue as one of preemption and explained that federal law preempts state law where, "under the circumstances of [a] particular case, [the challenged state] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 54, 67 (1941).

In this case, however, as the D.C. Circuit explained, the overriding purpose of FAA Chapter 2 is to facilitate international commercial arbitration by ensuring that valid arbitration agreements are honored and valid arbitral awards are enforced. Chapter 2 reflects a congressional judgment that the emphatic federal policy in favor of arbitral dispute resolution applies with special force in the field of international commerce. Allowing recourse to parallel enforcement mechanisms that exist independently of the FAA and that effectively extend the time for enforcing awards does not undermine congressional objectives; rather, it advances those objectives.

The D.C. Circuit also relied on the language of the statute. Congress set a three-year limit for seeking summary confirmation of "an arbitral award falling under the Convention." 9 U.S.C. § 207. Since neither Section 207 nor any other provision of Chapter 2 mentions foreign court judgments, the court concluded that, as a matter of textual analysis, Section 207's relatively demanding statute of limitations is tied to its relatively generous summary confirmation process. It evinces an interest in finality in the specific context of foreign award enforcement under the streamlined procedures of FAA Chapter 2 but does not preclude the use of procedures outside the FAA.
Since the enactment of Chapter 2 of the FAA in 1970, there has been only one other reported case that involved an effort to enforce a time-barred Convention award through a foreign judgment. See Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navală, 29 F.3d 79, 82 (2d Cir. 1994). According to the Congo, however, that decision was distinguishable because the court did not address the preemption issue. That argument cannot be made about Comm'ns Import Exp., which makes clear that Chapter 2 does not preempt state judgment enforcement statutes and that international arbitral awards may be converted abroad into judgments that are then domesticated in the United States.

Unintended Consequence?

In Comm'ns Import Exp., the defendant was a foreign sovereign and the court determined that there was subject matter jurisdiction under the Foreign Sovereign Immunities Act, meaning that it was not necessary to do a minimum contacts, personal jurisdiction analysis. In New York, however, combining Comm'ns Import Exp. with the decision in Lenchyshyn v. Pelko Electric, 723 N.Y.S.2d 285 (4th Dept. 2001), might lead to some creative judgment enforcement lawsuits.

Lenchyshyn was an action brought under New York's version of the Uniform Foreign Country Money-Judgments Recognition Act, which is codified in New York as CPLR Article 53. All of the parties in Lenchyshyn were Canadian, and the plaintiffs sought to enforce their multimillion-dollar Canadian money judgment in New York. Defendants sought dismissal on the ground that they were not subject to the personal jurisdiction of the New York courts.

The Fourth Department rejected the defendants' argument, explaining that the U.S. Constitution does not require that there be present traditional minimum contacts supporting original personal jurisdiction for a New York court to assert jurisdiction over a defendant for purposes of enforcing a foreign judgment against it. The court specifically held that a foreign judgment could be enforced even if the defendant had neither minimum contacts with, nor assets in, New York. In this manner, the court adopted an approach different from the traditional quasi in rem enforcement jurisdiction, under which a prerequisite to the enforcement of a judgment is a showing by the plaintiff that assets of the judgment debtor have been attached or could be levied on in execution of the judgment. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977).

Lenchyshyn—which, as an Appellate Division decision, is binding on the state courts of first instance—concerned the enforcement of foreign judgments, not arbitral awards. And, although the New York state courts have not decided the issue of whether a foreign arbitral award can be enforced in the absence of minimum contacts, the U.S. Court of Appeals for the Second Circuit has held that minimum contacts are a requirement for federal courts to enforce an arbitral award. Fronterera Resources Azerbaijan v. State Oil Company, 582 F.3d 393 (2d. Cir. 2009).

Under the reasoning of Comm'ns Import Exp., however, there is no restriction under Chapter 2 of the FAA to an award's being turned into a judgment outside the United States. Once that were done, the holder of the award might then domesticate that award in the New York state courts—assuming that the defendant did not remove the case to federal court—and, based on Lenchyshyn, might do so even if the award had no contacts with New York. With such a judgment could
come the many judgment enforcement rights afforded under New York law, such as discovery and attachment of assets.

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