Difficulties Enforcing New York Convention Awards in the U.S. Against Non-U.S. Defendants: Is the Culprit Jurisprudence on Jurisdiction, the Three-Year Time Bar in the Federal Arbitration Act, or Both?

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The emerging rule in the U.S. that, to recognize and enforce an arbitral award under the New York Convention, a U.S. court must have personal jurisdiction over the award debtor or his or her property in the forum, has attracted criticism. International arbitration specialists argue that this requirement restricts enforcement of valid arbitral awards in the U.S., in violation of the New York Convention. Upon reflection, the enforcement difficulty has perhaps more to do with the fact that the U.S. Federal Arbitration Act imposes a three-year statute of limitations on actions to recognize and enforce New York Convention awards.

U.S. courts have interpreted the Due Process Clause of the U.S. Constitution, which provides that no person shall be deprived of life, liberty or property without due process of law, to mean that jurisdiction can be maintained over a non-resident defendant (whether an individual or a corporation) only if that defendant has "certain minimum contacts with [the forum] such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (*quoting Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). Courts have held that this "minimum contacts" requirement is also applicable in proceedings to recognize or enforce arbitral awards under the New York Convention.[1] In its recent decision in *Frontera Resources Azerbaijan Corporation v. State Oil Company of the Azerbaijan Republic*, 2009 WL 3067888 (2d Cir. 2009), the U.S. Court of Appeals for the Second Circuit (the "Second Circuit") – the highest federal court in New York – confirmed this approach.

Some have criticized this approach, arguing that it is inconsistent with Article V of the New York Convention, which limits the grounds for non-recognition or enforcement to a narrowly-drafted list.[2] However, Article III of the New York Convention provides that contracting states shall recognize and enforce arbitral awards "in accordance with the rules of procedure of the territory where the award is relied upon." The jurisdictional requirement arguably is nothing more than a local "rule of procedure."[3] In the Second Circuit's view, "Article V [of the New York Convention]'s exclusivity limits

the ways in which one can challenge a request for [enforcement], but it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."[4] Nor does such a requirement constitute a "substantially more onerous condition" prohibited by Article III of the Convention, as it applies also to actions to recognize and enforce domestic awards.[5]

In practice, the *Frontera* approach is unlikely to result in many denials of recognition and enforcement. As the Second Circuit confirmed, the jurisdictional requirement can be satisfied by showing either that the award debtor has enough contacts with the United States to establish jurisdiction over his or her person, or that the award debtor has assets in the forum out of which the award could be satisfied (*e.g.*, a bank account).[6] At least one of these circumstances will obtain in most cases. Indeed, if neither the award debtor nor its assets are present in the forum, one may question the fairness of forcing the award debtor to defend an action there.

However, the *Frontera* approach can impact enforcement if the award debtor does not have "minimum contacts" with the forum and the award creditor is unable to locate assets in the forum until after the three-year statute of limitations under the U.S. Federal Arbitration Act (9 U.S.C. § 207) has run. Locating assets against which to enforce an arbitral award is notoriously difficult. In a major commercial and financial center such as New York, it is not unreasonable for an award creditor to expect that the award debtor will have assets in the forum at some point in the future. But, as the law currently stands, the award creditor runs the risk of being time barred at that stage.

Thus, upon reflection, the difficulty appears to have more to do with the imposition of a limitation period, than with the U.S. jurisdictional due process requirements. The imposition of local limitation periods on enforcement actions under the New York Convention has given rise to surprisingly little debate, given the dire consequences for unfortunate award creditors.[7] It is often assumed without discussion that limitation periods are among the local "rules of procedure" contemplated in Article III of the New York Convention.[8] This is possibly so because a majority of jurisdictions apply some sort of limitation period to proceedings under the New York Convention.[9] But, even if a state practice relevant to the interpretation of the New York Convention could be established, the question remains whether the application of local limitation periods – diverging widely from jurisdiction to jurisdiction and at times much shorter than those applicable to the enforcement of judgments – is desirable and consistent with the object and purpose of the New York Convention. Further, if local jurisdictional rules are inconsistent with Article V, it is hard to see how local statutes of limitations could be consistent with Article V. Both are arguably "rules of procedure of the territory where the award is relied upon" within the meaning of Article III, both are not mentioned in Article V, and both may lead to a valid arbitral award not being enforced.

All these are reasons to keep our eye on Canada where, in the case of *Yugraneft Corporation v. Rexx Management Corporation*, the Supreme Court heard oral argument earlier this month on whether the courts of Alberta were well-founded in applying a local two-year statute of limitations to the enforcement of a New York Convention award.

By Ank Santens & Damien Nyer

[1] *See, e.g., Telcordia Tech Inc. v. Telkom SA. Ltd.*, 458 F.3d 172, 178-79 (3d Cir. 2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002); *Base Metal Trading v. OJSC Novokuzmetsky Aluminum Factory*, 283 F.3d 208, 212 (4th Cir. 2002).

[2] *See, e.g.*, William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 Hastings L.J. 251, 255 (Dec. 2006) ("Park & Yanos").

[3] *See*, by way of analogy, *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) (finding that the doctrine of *forum non conveniens* was applicable as a "rule of procedure" under Article III of the New York Convention) (the authors do not take a view here on the correctness of this decision); Aristides Diaz-Pedrosa, *Shaffer's Footnote*, 109 W. Va. L. Rev. 17, 24 (assuming that the due process jurisdictional requirement falls within the local "rules of procedure" in Article III). *But see* Park & Yanos at 262 (maintaining that such approach is not supported by the drafting history of the New York Convention).

[4] *Frontera*, 2009 WL 3067888, at *4.

[5] Indeed, this issue does not arise in most other countries because they do not require "minimum contacts" of the defendant or its property with the forum for the exercise of jurisdiction to decide a dispute on the merits, and thus a fortiori not for the exercise of jurisdiction to enforce a judgment or award.

[6] *Frontera*, 2009 WL 3067888, at *4. The latter type of jurisdiction is called "quasi in rem." Note that some U.S. courts require a connection between the property and the dispute. *See, e.g.*, *Base Metal Trading v. OJSC Novokuzmetsky Aluminum Factory*, 283 F.3d 208, 212 (4th Cir. 2002).

[7] The draft of a revised "New York Convention" presented by Professor van den Berg at the last ICCA Congress is silent on the issue of limitation periods. The only explanation offered by the accompanying explanatory note is that limitation periods vary considerably, from six month in the People's Republic of China to 20 years in the Netherlands. Albert van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards in* Albert J. van den Berg, ed., 50 YEARS OF THE NEW YORK CONVENTION 649, 658 (2009).

[8] Albert J. van den Berg, *The New York Convention of 1958: An Overview in* Emmanuel Gaillard & Domenico Di Pietro, eds., ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS – THE NEW YORK CONVENTION IN PRACTICE 39, 54 (2008); *see also* Jean-François Poudret & Sébastien Besson, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 869 (2d ed. 2007). Note that in many jurisdictions statutes of limitations are considered substantive.

[9] A recent study conducted by the ICC found that 53 out of the 66 countries surveyed imposed such a limitation period. *Guide to the National Rules of Procedure for Recognition and Enforcement of New York Convention Awards*, ICC Bulletin 343-46 (Special Supplement 2008).