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Appellate Court Limits "Procedural Loophole" to Enforce Foreign Arbitral Awards in New York Absent Jurisdiction over the Award Debtor or Its Property

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The recent decision by an intermediate New York appellate court in *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*[1] has sharply curtailed "a procedural loophole in Chapter 2 of the Federal Arbitration Act"[2] that some creditors have used to obtain indirect recognition of foreign arbitral awards in New York without having to establish personal jurisdiction over the debtor, or the presence of property belonging to the debtor, in New York.

Background: Different Jurisdictional Rules for Recognition of Foreign Arbitral Awards and Foreign Judgments

In New York, the vast majority of foreign arbitral awards are enforced directly under Chapter 2 of the U.S. Federal Arbitration Act ("FAA"). But unlike in some other jurisdictions, the holder of a foreign award for the payment of money also has the option of first obtaining a foreign court judgment recognizing the award and then seeking recognition of that judgment in New York as a foreign money judgment under Article 53 of the New York Civil Practice Law and Rules ("CPLR").[3] This is known as the "dual enforceability" principle. For a more fulsome discussion of this topic, see Andreas A. Frischknecht, Yasmine Lahlou & Gretta Walters, *Enforcement of Foreign Arbitral Awards and Judgments in New York*, at 210-12 (Kluwer Law International 2018).

A key reason why some holders of foreign arbitral awards have opted to seek recognition of a foreign judgment recognizing their award (rather than the award itself) in New York stems from the requirement that award creditors must establish jurisdiction over the debtor (known as personal jurisdiction) or the debtor's property (known as *quasi in rem* jurisdiction) to obtain recognition of a foreign arbitral award under Chapter 2 of the FAA.[4] In contrast, New York courts have held that the creditor may obtain recognition of a foreign *money judgment* in New York even if the judgment debtor is not subject to personal jurisdiction in New York and has no assets in the state. The rationale for this exception is that proceedings to recognize a foreign judgment are merely "ministerial" where a foreign court with proper jurisdiction over the debtor has already adjudicated the parties' underlying dispute.[5]

***AlbaniaBEG* Reduces the Jurisdictional Gap**

In *AlbaniaBEG*, the Appellate Division, First Department sharply limitecthe scope of this exemption from personal or *quasi in rem* jurisdiction for judgment enforcement proceedings. Going forward, the exemption applies only where the judgment debtor "does *not* contend that substantive grounds exist to deny recognition to the foreign judgment" under CPLR Article 53. Otherwise, the New York court's "function ceases to be merely ministerial," and the judgment creditor must establish either personal or *quasi in rem* jurisdiction. This newly-formulated rule reduces the jurisdictional discrepancy between proceedings to enforce foreign money judgments under the CPLR and proceedings to enforce foreign arbitral awards under the FAA.

The First Department reversed the trial court's ruling and granted the Italian defendants' motion to dismiss the Albanian plaintiff's action to recognize and enforce an Albanian judgment arising from a dispute over the contemplated construction of a hydroelectric power plant in Albania. After one of the defendants prevailed against the plaintiff's parent company in an Italian arbitration, the plaintiff commenced proceedings in Albania and obtained a judgment against the defendant in that country. The plaintiff then filed a motion for summary judgment in lieu of a complaint against the Italian counterparty and its parent company seeking enforcement of the Albanian judgment in New York.

The defendants moved to dismiss, asserting that the plaintiff had established neither personal nor quasi in rem jurisdiction because both defendants were "foreign corporations with no known presence in New York," and the plaintiff neither alleged any dispute-related contacts between the defendants and New York nor identified any property of the defendants within the state. The defendants also planned to assert multiple ground for non-recognition of the Albanian judgment under CPLR Article 53, including that the Albanian proceedings were contrary to the parties' arbitration agreement, and that Albanian tribunals and procedures are not compatible with due process.

Because the defendants "attacked the Albanian judgment as failing to meet the prerequisites for recognition under article 53" and the plaintiff did not seek jurisdictional discovery, the court granted the defendants' motion to dismiss and directed entry of judgment in their favor.

The full impact of *AlbaniaBEG* in practice remains to be seen. In most cases, the creditor will have little incentive to pursue enforcement of a foreign arbitral award in New York unless the debtor is believed to have substantial connections with (and assets in) New York. [6)] In such cases, the creditor should be able to establish either personal or *quasi in rem* jurisdiction, such that the debtor can pursue enforcement directly under Chapter 2 of the FAA. Following *AlbaniaBEG*, however, the holder of a foreign arbitral award desiring to preserve "the opportunity to pursue [further] enforcement steps *in futuro*"[7)] likely can no longer obtain recognition in New York of a foreign judgment recognizing the award if the debtor is not subject to personal jurisdiction in New York, lacks any assets in New York, and contests the enforceability of the foreign judgment on substantive grounds.

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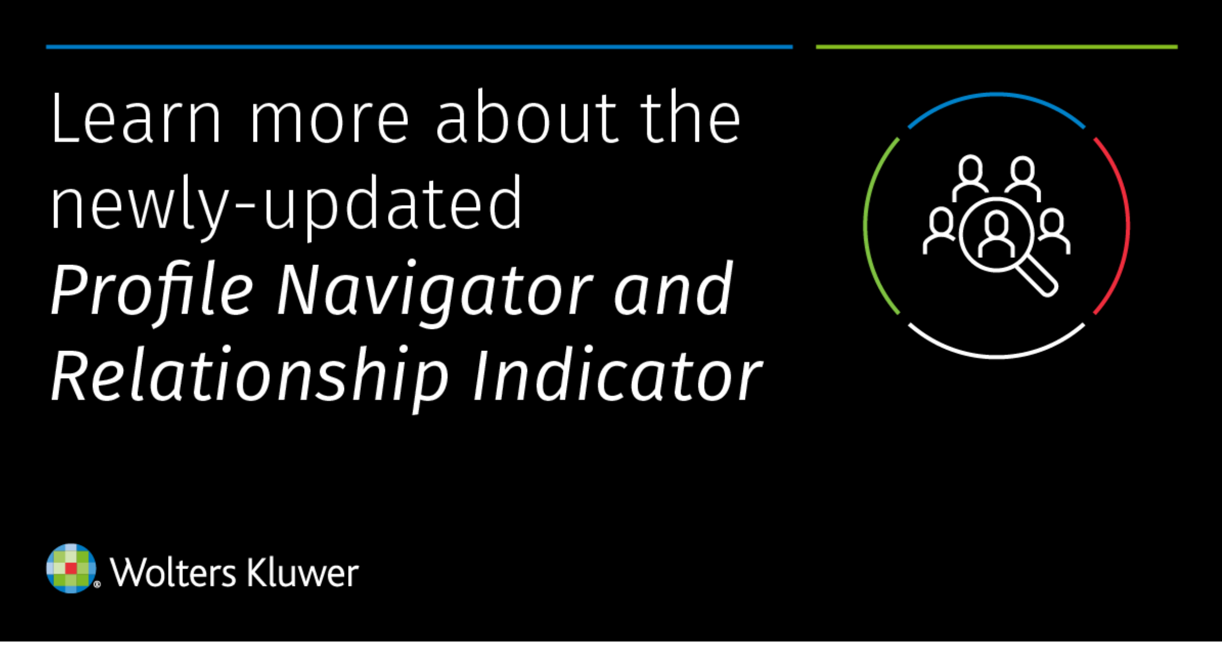

References

?1 A.D.3d, No. 152679/14, 2018 WL 755355 (N.Y. App. Div. 1st Dep't Feb. 8, 2018).

?2 *Commissions Imp. Exp. S.A. v. Republic of Congo*, 916 F. Supp. 2d 48, 49 (D.D.C. 2013), *rev'd and remanded sub nom. Commissions Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321 (D.C. Cir. 2014).

?3 See *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79, 81 (2d Cir. 1994) (French judgment conferring exequatur on an arbitral award issued in a Paris-seated ICC arbitration was entitled to recognition under Article 53 of the CPLR as "the functional equivalent of a French judgment awarding the sums specified in the award"); see also *Commissions*, 757 F.3d at 323 (proceeding to enforce English High Court order recognizing ICC award in Paris-seated arbitration was "a lawful, parallel enforcement scheme" not preempted by the FAA).

?4 See *AlbaniaBEG*, 2018 WL 755355, at *9 (citing *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 398 (2d Cir. 2009) & *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1118, 1122 (9th Cir.2002)).

?5 *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 117 A.D.3d 609, 613 (N.Y. App. Div. 1st Dep't 2014).

?6 For a discussion of New York's significance as a global hub for award enforcement generally, see Andreas A. Frischknecht, Yasmine Lahlou & Gretta Walters, *Enforcement of Foreign Arbitral Awards and Judgments in New York*, 3-5 (Kluwer Law International 2018).

?7 *Lenchyshyn v. Pelko Elec., Inc.*, 281 A.D.2d 42, 50 (N.Y. App. Div. 4th Dep't 2001).

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