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New York Appellate Court Imposes Jurisdictional Requirements in Foreign Judgment Recognition Actions

The First Department Appellate Division in New York recently issued a ruling that will make the recognition of foreign country money judgments more difficult in New York. The decision, issued in *AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A.*, No. 152679/14 (Feb. 8, 2018), requires that a party seeking recognition of a foreign judgment in New York establish the court's jurisdiction by demonstrating either that the judgment debtor is subject to personal jurisdiction in New York or that it has property in the state against which the judgment could be enforced.

Going forward, judgment creditors seeking recognition in New York should present evidence that the judgment debtor maintains a presence or assets in New York. This sort of evidence may be available through investigation or in the context of the underlying foreign proceeding. If those methods do not yield sufficient evidence, it may be possible for a judgment creditor to seek jurisdictional discovery in the recognition proceeding or to petition a U.S. court for discovery using 28 U.S.C. § 1782 before filing a recognition action.

The *AlbaniaBEG* decision has created confusion because it seems to directly contradict a previous decision of the same court which rejected the notion that a judgment recognition proceeding required a jurisdictional finding. One thing seems certain: the issue of what must be established to obtain recognition of a foreign judgment in New York will be vigorously litigated in upcoming cases, at least until New York's high court, the Court of Appeals, takes the issue up and resolves it.

The Decision

The *AlbaniaBEG* case involved a dispute over a contract to do a feasibility study for a power plant in Albania. Competing suits were filed abroad, one in arbitration in Rome and the other in the Albanian courts. The proceedings reached opposite conclusions: the arbitrators determined, and the Italian Supreme Court affirmed, that the defendant, Enel S.p.A. ("Enel"), owed nothing to AlbaniaBEG while the Albanian court awarded AlbaniaBEG a judgment of €433 million against Enel. AlbaniaBEG then brought the Albanian judgment to New York for recognition, the first step in U.S. enforcement. Enel moved to dismiss for lack of personal jurisdiction—the parties did not dispute that the defendants had no known presence in New York—and indicated that it intended to raise substantive defenses to recognition that would have required the court to engage in fact finding and adjudication of the dispute on the merits. The trial court denied Enel's motion to dismiss, citing *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, 117 A.D.3d 609 (N.Y. App. Div. 1st Dep't 2014), which held that

personal jurisdiction is not a statutory prerequisite to the court's performance of "its ministerial function of recognizing the foreign country money judgment."

The First Department of New York's Appellate Division overturned the lower court's decision and ruled that a judgment creditor *cannot* obtain recognition of its foreign country money judgment if it does not establish that the New York court has jurisdiction over the judgment debtor or its property, citing constitutional due process requirements. This decision appears to be in direct conflict with the *Abu Dhabi Commercial Bank* decision in which the same court held that the only jurisdictional inquiry in foreign judgment recognition cases is whether the *foreign court* had jurisdiction over the judgment debtor.

Where Does This Leave Us?

This ruling will have an especially broad impact: New York, with its international stature, sophisticated court system and many financial institutions in which judgment debtors may hold deposits or securities, is often the first stop for foreign judgment creditors seeking recognition and enforcement of their judgments. The *AlbaniaBEG* decision gives judgment debtors increased due process protections which they can assert to preclude recognition of foreign judgments in New York. But while the ruling is a departure from recent precedent, and is likely to increase the difficulty of obtaining recognition of a foreign judgment in New York, there may be a silver lining for judgment creditors in the *AlbaniaBEG* decision. Following it will force foreign judgment creditors to provide the information necessary to permit their judgments, once recognized, to be enforced in states other than New York.

United States law requires that states accord "full faith and credit" to each other's judgments. But the extension of this type of recognition requires that the state court that originally issued the judgment have personal jurisdiction over the defendant. If not, a second state is not required to, and usually will not, recognize the judgment. Foreign judgment creditors have previously had difficulty with this requirement. In *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998, 1006 (D.C. 2014), for example, a judgment creditor obtained recognition in New York of a judgment originally issued in Bahrain. The creditor then sought automatic recognition of the New York judgment in Washington, D.C. on the basis of "full faith and credit." The Washington, D.C. court refused on the basis that there had been no showing that the New York court had personal jurisdiction over the judgment debtor.

By imposing the requirement to establish the court's jurisdiction in connection with the recognition of foreign judgments, the *AlbaniaBEG* decision may force foreign judgment creditors to make a showing that, in the end, will actually benefit them if they seek to enforce their judgments in states other than New York. But that showing may be difficult to make unless the foreign creditor has access to information about the judgment debtor's residences, business affairs, and assets. To obtain such information, litigants before a foreign tribunal should conduct discovery to the extent possible during those proceedings, or post-judgment, if mechanisms to do

so are available in that jurisdiction. In the absence of (or even as an adjunct to) such mechanisms, a foreign litigant may wish to engage an investigator or international forensic expert to seek out that type of information.

Judgment creditors also may consider petitioning a U.S. federal court under 28 U.S.C. § 1782 during the pendency of the foreign proceedings. This statute permits litigants in a foreign tribunal to obtain evidence located in a U.S. jurisdiction for use in proceedings in foreign tribunals. Some U.S. courts take a broad view of the term “proceeding,” and have granted these petitions for use in foreign post-judgment asset discovery proceedings long after the merits of the foreign case have been decided. *In re Clerici*, 481 F.3d 1324, 1332 (11th Cir. 2007). This statute may be used to serve discovery—requesting documents or testimony—on any entity or person within that jurisdiction, including financial institutions, accountants, lawyers, trading partners, or brokers. The statute is a powerful tool for locating assets, and can be equally instrumental in proving cases relating to fraud or embezzlement.

If a judgment creditor has not obtained discovery before seeking recognition in New York, and cannot definitively assert that jurisdiction over the judgment debtor or its property exists, the creditor may ask the court for jurisdictional discovery. When there is a dispute over jurisdiction in civil litigation, courts may exercise the discretion to permit limited discovery to resolve the question. Thus, a judgment creditor could require a debtor disclaiming jurisdiction to disclose the presence of any assets in New York. This discovery is not freely available; courts require a litigant to provide a factual, non-frivolous basis for believing that jurisdiction exists before permitting discovery. *McBride v. KPMG Int’l*, 135 A.D.3d 576, 577 (N.Y. App. Div. 1st Dep’t 2016).

As foreign judgment recognition becomes more complicated and less predictable, judgment creditors should seek the assistance of experienced U.S. counsel in their efforts to get their judgment recognized and enforced in the United States.

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