
# The Arbitration Review of the Americas

2021

## Enforcement in the United States

# The Arbitration Review of the Americas

2021

Across 18 chapters, and spanning 120 pages, this edition provides an invaluable retrospective from 39 leading figures.Together, our contributors capture and interpret the most substantial recent international arbitration events of the year just gone, supported by footnotes and relevant statistics. Other articles provide valuable background so that you can get up to speed quickly on the essentials of a particular country as a seat.This edition covers Argentina, Bolivia, Canada, Ecuador, Mexico, Panama, Peru and the United States; has overviews on nascent Brazilian jurisprudence on arbitration and corruption (in the wake of Operation Carwash) and on the coronavirus and investment arbitration, among other things; and an update on how Mexico's federal courts are addressing the problem of personal injunctions against arbitrators that have brought Mexico grinding to a halt as a seat.

**Generated: February 8, 2024**



# Enforcement in the United States

**Jef Klazen**, **Marcus J Green** and **Chris Cogburn**
Kobre & Kim LLP

## Summary

## IN SUMMARY

In this chapter, lawyers from Kobre & Kim describe the challenges and opportunities that frequently arise in the enforcement of arbitration awards in the United States.

In the United States, enforcing an arbitration award involves two steps, each of which presents distinct issues. First, a party must have the award recognised – that is, converted from a private arbitration award to a public judgment that can be enforced by or with the assistance of law enforcement personnel. Second, a party must use the judgment to execute against the debtor's assets until the debt is satisfied.

US courts are generally receptive to applications for the recognition of arbitration awards. The lawyers take a look at recognition of awards in US courts under different statues, including the New York Convention as well as the International Centre for Settlement of Investment Disputes (ICSID), followed by domestic arbitration awards. On the execution side, the lawyers take a look at in personam remedies and remedies in rem. Finally, the lawyers pay special consideration to prejudgment attachments in aid of arbitration, as well as special issues in the investor-state context.

## DISCUSSION POINTS

- The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.
- The New York Convention.
- Federal Arbitration Act (FAA).
- Foreign Sovereign Immunities Act (FSIA).
- 'Separate Entity Rule' under New York banking law.
- Uniform Interstate Depositions and Discovery Act.

## REFERENCED IN THIS ARTICLE

- *Crystallex Int'l Corp v Bolivarian Republic of Venezuela*.
- *Koehler v Bank of Bermuda*.
- *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela*.
- *Frontera Res. Azerbaijian Corp v State Oil Co of the Azerbaijian Republic*.

## RECOGNITION OF ARBITRATION AWARDS IN US COURTS

To enforce an award through the US judicial system, the prevailing party must convert the award to a court judgment, a process known as recognition (or confirmation, to use the technical term favoured by an increasing number of US federal courts). US courts will recognise commercial arbitration awards and awards rendered in investor-state disputes, but the procedures involved will vary depending on the type of award.

## RECOGNITION UNDER THE NEW YORK CONVENTION

Judicial recognition of foreign arbitration awards in the United States is governed by treaty. Most often, recognition is governed by statutes implementing the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York

Convention).[1] The New York Convention is implicated when a foreign arbitral award sought to be enforced in the United States was made in a state that is a party to the treaty.[2] Chapter 2 of the Federal Arbitration Act (FAA) incorporates the New York Convention into US federal law and grants subject-matter jurisdiction over recognition and enforcement proceedings to US federal district courts.[3]

The New York Convention provides that, to have a court recognise a final arbitration award, the winner of the award shall supply the court with the original award or a certified copy, after which the court 'shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon'.[4] Pursuant to the New York Convention and the FAA, a party seeking recognition of a foreign arbitration award can proceed on an expedited basis without filing a complaint.[5] Instead, the party must file a petition to recognise the award, which can be resolved on the papers without oral argument or discovery.[6]

Despite this summary process, the New York Convention and the FAA provide several defences to recognition. Under the New York Convention, recognition may be deferred or refused on any of the following grounds:

- a party is suffering from incapacity or the arbitration agreement is otherwise invalid;
- there is insufficient notice to the party against whom the award is invoked;
- the award is outside the scope of the arbitration agreement;
- the composition of the arbitral tribunal or procedure was not compliant with the parties' agreement or, absent such an agreement, the laws of the jurisdiction where the arbitration took place;
- the award has not yet become binding on the parties;
- the dispute was not arbitrable; or
- recognition of the award would be against public policy.[7]

The FAA provides that a '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 [New York] Convention'.[8]

Award creditors should further remain mindful of jurisdictional defences. In the United States, a court ordinarily cannot adjudicate a matter – including the recognition of an award under the New York Convention – unless it has jurisdiction over both the subject matter of the action and jurisdiction over the parties (or, in certain circumstances, over property in which the debtor has an interest).[9] To ensure the court has jurisdiction over the parties (or property), an award creditor should generally bring its petition in a state or federal judicial district where the defendant has a presence or has some property that can be used to satisfy a resultant judgment.[10] Where court jurisdiction over the award debtor is lacking, the award creditor should explore converting the award to a judgment in a jurisdiction other than the US and thereafter seeking recognition of a foreign judgment in US courts, which would enable the award creditor to obtain discovery to identify assets over which US courts may have jurisdiction.[11]

Award creditors should also keep in mind that, in a recognition action, the award debtor must be served with process in accordance with the Federal Rules of Civil Procedure. For service

outside the US, this may require service under the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, which could cause substantial delays.

Under the FAA, recognition of a foreign award must be sought within three years after the award was rendered.[12]

### RECOGNITION UNDER THE ICSID CONVENTION

Many investor-state disputes are arbitrated before the World Bank's International Centre for Settlement of Investment Disputes (ICSID), which was created by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) to resolve disputes between private investors from one state and a foreign state or state-owned enterprise.[13] Where ICSID has jurisdiction,[14] its decisions are final and are subject only to review within ICSID itself.[15]

Under the ICSID Convention and the US legislation implementing it, a final ICSID award is meant to be treated as a final judgment of a domestic court. Thus, unlike an award subject to recognition under the New York Convention, against which a party can invoke several defences to recognition, judicial review of an ICSID award is circumscribed.

### RECOGNITION OF DOMESTIC ARBITRATION AWARDS

Unlike international awards, the recognition of domestic arbitration awards in the United States is governed not by treaty, but by state and federal law. Where the underlying arbitration case involves interstate commerce (ie, commerce in multiple states), Chapter 1 of the FAA governs recognition.[16] Otherwise, state law governs. Many states have adopted legislation, based on a model law titled the Uniform Arbitration Act, to govern the recognition of an arbitration award that is not subject to Chapter 1 of the FAA.

Chapter 1 of the FAA and the Uniform Arbitration Act both create a strong presumption in favour of the validity of arbitration awards. Upon application to the appropriate court, the court must grant the application and recognise the arbitration award as a judgment unless one of a limited number of bases for vacating the award exists.[17]

Chapter 1 of the FAA includes four such bases, which are also contained within the Uniform Arbitration Act:

- where the award was procured by corruption, fraud or undue means;
- where there was evident partiality or corruption;
- where the arbitrators were guilty of misconduct, such as refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; and
- where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.[18]

Parties seeking recognition of a domestic arbitration award should also be aware of limitations periods. Chapter 1 of the FAA states that a party seeking recognition of a domestic arbitration award must do so within one year after the award is issued.[19] The Uniform Arbitration Act does not include an express limitations period, but in some jurisdictions a court may choose to import a limitations period from a related statute – such as the statute of limitations that would govern the underlying claim.[20]

### TRANSITIONING FROM RECOGNITION TO ENFORCEMENT

Having converted an arbitration award into a court judgment, the arbitration winner becomes a judgment creditor. Assuming no obstacles to enforcement are present, such as a stay of enforcement or annulment of the award by a court in the seat of the arbitration, the now-judgment creditor can use the post-judgment devices available under state and federal law to identify and seize non-exempt property of the debtor to satisfy the judgment. The execution process may involve registering the judgment in other US states or federal judicial districts where the property is believed to be located and then taking discovery and execution steps through the courts in those jurisdictions.[21]

### DISCOVERY IN AID OF EXECUTION

US state and federal law provide a judgment creditor with a variety of tools for locating property of the judgment debtor.

When enforcing a US federal judgment, including a money judgment based on an arbitration award, the Federal Rules of Civil Procedure allow a judgment creditor to use all of the discovery devices available to ordinary civil litigants, including obtaining judicially compelled disclosure of financial records and other documents, answers to written questions, and sworn testimony from both the judgment debtor and from third parties. The substantive scope of post-judgment discovery is very broad, especially when compared with the disclosure regimes in civil law countries. A judgment creditor may require the judgment debtor or any third party to disclose all relevant non-privileged matter so long as the request is proportional to the needs of the case.[22] Counsel for the judgment creditor can serve discovery demands on other parties without seeking leave from the court, although the party served can challenge the discovery demands in court if it deems them to be overly broad or burdensome. And, once a US federal judgment has been obtained, discovery can be sought from parties located anywhere in the United States without having to register the judgment in other federal districts.

In addition, the federal rules allow a judgment creditor to use the post-judgment remedies, including discovery devices that are available under the laws of the US state in which the federal court sits. Some state laws provide for powerful discovery tools. For example, in certain states, a judgment creditor can compel the debtor to appear before the court to submit to an examination regarding the debtor's assets and affairs.[23]

When enforcing a US state court judgment (as opposed to a federal court judgment), a judgment creditor ordinarily must rely on the state's post-judgment laws and procedures, including those providing for discovery in aid of execution. State court procedures throughout the United States, like the federal rules of procedure, support broad post-judgment discovery in aid of execution.[24] Although subpoenas based on state-court judgments can be served only within the state itself (nationwide service is not available), procedures are available to obtain discovery from persons or entities located in other states.-[25]

Post-judgment disclosure in the United States can embrace information concerning a debtor's assets, wherever in the world those assets may be located and wherever in the world the information may be kept. If the court has personal jurisdiction over the judgment debtor, or a third party from whom discovery is sought, the judgment creditor may seek any information relevant to the debtor's assets that the judgment debtor or third party has in its possession, custody or control, regardless of the location of the debtor's assets or the

location of the records or other information sought.[26] Where the information sought is subject to a foreign blocking statute, bank secrecy law or data privacy law, the discovery target may object to producing information on that basis, although US courts will not necessarily defer to those foreign legal protections.[27]

That a judgment creditor may seek discovery about assets outside the US applies even where the debtor is a foreign sovereign.[28] This is notable because under the Foreign Sovereign Immunities Act (FSIA), a judgment creditor can only execute against property of the sovereign that is used for commercial activity in the United States.[29]

Similarly, although a judgment creditor cannot ordinarily execute on a debtor's bank deposits associated with a foreign bank branch,[30] the creditor is nonetheless entitled under current US law to obtain the account records, so long as the bank itself is subject to the court's jurisdiction (eg, because it is present in New York) and the bank has possession, custody or control of the records sought.[31]

Thus, US courts have the authority to compel discovery regarding assets that would not be subject to execution under US law. Consequently, even if the debtor does not have readily seizable property in the United States, a judgment creditor may still benefit from taking enforcement steps in the United States to obtain information about assets that may be subject to execution elsewhere. For example, because US dollar-denominated international wire transfers are ordinarily cleared through New York banks, serving post-judgment subpoenas on banks in New York can yield considerable information about the debtor's finances around the world.

## EXECUTION

In the United States, there is no general national law of execution (except in certain maritime matters). Whether an arbitration award is confirmed as a federal or state court judgment, the procedures for execution are supplied by the laws of the state in which enforcement or execution is sought.[32] Thus, except to the extent necessary to accommodate differences in specific court practices, the procedures followed in federal and state courts are generally the same.

Each US state has its own execution laws, and while there can be substantial overlap, a judgment creditor should be aware that the procedures available in different states can vary. Generally, though, there are two broad categories of execution available to a judgment creditor: in personam remedies and remedies in rem. Creditors should keep in mind that US courts may enforce judgments only against assets located within the court's territorial jurisdiction or against persons subject to the court's jurisdiction personally, which means that the creditor may need to register the judgment in other federal judicial districts or state courts where the assets are located or where jurisdiction over the person exists.

### In Personam Remedies

In personam remedies refer to court orders, or their equivalents, directed against either the debtor or a third party over which the court has jurisdiction, where non-compliance is ordinarily punishable by contempt. These can take the form of debtor or third-party turnover or conveyance orders, restraining orders or notices, or in personam garnishment or third-party debt orders. In personam remedies may be particularly useful when the property of the debtor against which a judgment creditor seeks to execute is beyond the territorial jurisdiction of the court in which enforcement is sought, thus precluding direct execution on

the asset. In New York, for example, a lawyer for a judgment creditor is authorised, without the need for approval from the court, to issue restraining notices to the debtor and to any third party holding assets of the debtor, having the effect of a court order prohibiting 'any sale, assignment, transfer or interference with any property in which [the judgment debtor] has an interest'.[33] The restraint operates on the person (in personam) and does not have an effect on title or priority among competing creditors. In certain other US jurisdictions, a restraint may only issue from the court upon application and hearing.

If the debtor's property cannot be reached directly through levy or execution (in rem remedies discussed below), the laws of many states provide that a judgment creditor may seek an order from the court directing the debtor or a third party in possession of the debtor's property to deliver or convey the property to the judgment creditor or to a sheriff. These types of orders are commonly known as 'turnover orders'. As with most court orders, compliance may be coerced through the threat of fines or even imprisonment for contempt.

Whether a court can order a party to turn over property situated outside of the territorial jurisdiction of the court depends on the state in which the post-judgment proceedings are brought. The courts of some states, most notably New York, have held that they may order a debtor or a third party (over whom the court has personal jurisdiction) to bring the debtor's personal property situated anywhere in the world into New York to turn it over to the creditor.-[34] However, the courts of other states effectively limit turnover orders to property within the court's territorial jurisdiction.[35]

Even where a court's turnover orders can direct a debtor to deliver out-of-state property into the state, such as in New York, they are subject to common law limitations. For example, the New York courts have recently confirmed the continuing effect of the common law 'separate entity rule', a doctrine of New York banking law. The rule provides that, even when a bank is present in New York and subject to the court's personal jurisdiction, the bank's foreign branches are to be treated as separate entities for purposes of attachment, execution and turnover orders. As a result, New York courts cannot order a bank to turn over a judgment debtor's deposits that are associated with foreign branches.[36]

**Remedies In Rem**

In addition to in personam remedies, a judgment may be enforced against the debtor's property itself through execution by attachment, levy, garnishment or the appointment of a receiver. These are in rem proceedings where jurisdiction derives not from the court's personal jurisdiction over the judgment debtor or a third party, but rather from the court's jurisdiction over real or personal property located within its territorial jurisdiction.

Execution against the debtor's property is typically accomplished by a writ of execution or its functional equivalent,[37] issued by the court in the federal district or state where the property is situated. The writ empowers a levying officer, such as a sheriff in state court or a US marshal in federal court, to seize and liquidate non-exempt real or personal property located within the court's territorial jurisdiction. The proceeds, subject to the claims of any secured or superior creditors, are then applied to satisfy the judgment. If the debtor's property is difficult to value or cannot be readily liquidated, the courts in many jurisdictions can appoint a receiver to administer the assets for the benefit of a judgment creditor.

In the United States, the recognition of an award as a judgment does not itself create a lien such that the award creditor obtains a priority right in the debtor's property that could trump claims of other unsecured creditors, for example, other parties that subsequently obtain

an arbitration award or judgment against the same debtor. Ordinarily, a lien on the debtor's property is created by certain execution devices. For example, under New York law, delivery of a writ of execution to the proper law enforcement officer creates a lien on the judgment debtor's personal property, regardless of whether or when the sheriff or marshal is able to actually levy on the property. By contrast, service of a restraining notice in New York does not confer a lien.[38] Priority among judgment creditors is determined based on the date the creditors obtained their liens,[39] which execution devices create a lien and which do not, depends on the law of the state in which execution is sought.

The creditor should be mindful not only of steps the debtor may take to frustrate his or her enforcement efforts, but also how the enforcement efforts of other creditors can impact his or her ability to satisfy his or her award or judgment.

**PREJUDGMENT ATTACHMENT IN AID OF ARBITRATION**

Parties engaged in or considering engaging in arbitration should also consider the availability in the United States of provisional, or prejudgment, attachment remedies, which may be used in aid of enforcing an anticipated domestic or international arbitration award. Prejudgment attachment remedies, where available, may be used to enjoin a respondent from transferring or otherwise disposing of assets in anticipation of an adverse arbitration award.

Prejudgment attachment remedies in the United States are governed by state law, not federal law (except in certain maritime matters). Federal law supplies no authority and federal courts have no inherent authority to temporarily freeze a respondent's assets in order to secure payment on a potential arbitration award.[40] Claimants seeking to use prejudgment attachment as security for a potential award must rely on the law of the US state considered to be the situs of the property sought to be attached. The applicable US state statute applies even if attachment in aid of arbitration is sought in federal court, as the federal rules of civil procedure permit seizure of property to secure satisfaction of a potential judgment under the law of the state where the federal court is located.[41] In most instances, an application for provisional attachment in aid of arbitration will be viewed as a request for prejudgment attachment, as it is rare for state law to specify the availability of provisional remedies in aid of domestic or international arbitration, with New York being a notable exception in that it expressly allows prejudgment attachment in the context of arbitrations, whether domestic or international.[42] Other states, such as Florida, do not expressly address the availability of prejudgment attachment in aid of arbitration, but rather allow for prejudgment attachment on 'debts not due' when the defendant is removing from the state or fraudulently disposing of property.[43]

State laws further vary widely as to what forms of property may be attached before a judgment, a defendant's right to notice, the procedure for obtaining prejudgment attachment, whether attachment remedies are available even prior to commencing arbitration.[44] Despite these variations, prejudgment attachment is generally considered a harsh remedy that is within the discretion of the court to grant or deny and courts typically strictly construe the requirements of the applicable state law against those who seek to invoke the remedy.-[45] For example, in New York, which has a comparatively well-developed body of statutory and case law concerning attachment in aid of arbitration, the proponent of attachment must show, among other things, that it has a cause of action against a defendant, that it is probable that the proponent will succeed on the merits, and that the amount sought to be attached exceeds the value of all known counterclaims the respondent has against the proponent.[46]

The proponent must also demonstrate that the arbitration award to which it may be entitled may be rendered ineffectual without such provisional relief.[47]

Parties seeking prejudgment attachment should be mindful not only of the specific requirements of the US state law they intend to invoke, but also of subject matter and personal jurisdictional defences. Most federal courts have held that the FAA, which implements the New York Convention, supplies subject matter jurisdiction to entertain applications for attachment in aid of arbitrations under the New York Convention.[48] US courts approach questions of personal jurisdiction regarding requests for prejudgment attachment similarly to executions on property.[49]

## SPECIAL CONSIDERATIONS IN THE INVESTOR-STATE CONTEXT

Since the United States entered into its first bilateral investment treaty over 30 years ago, campaigns to enforce awards against foreign states in US courts have increased in number and magnitude. Over the same period, US law has evolved to accommodate situations unique to investor-state enforcement disputes. Although this evolution is certain to continue, there are several basic principles of which parties seeking enforcement against foreign states should be aware.

As a general rule, foreign states are immune from suit in the courts of the United States.[50] The exceptions to this general rule are set forth in the FSIA.[51] For holders of arbitration awards against foreign states, two exceptions are particularly relevant. First, the FSIA does not immunise foreign states from actions 'to confirm an award made pursuant to' an arbitration agreement, provided that the arbitration either 'takes place or is intended to take place in the United States', or 'is or may be governed by a treaty or other international agreement . . . calling for the recognition and enforcement of arbitral awards', including the New York Convention and the ICSID Convention.[52] In addition, the FSIA permits actions against a foreign state that 'has waived its immunity either explicitly or by implication' – a condition that, as one US court of appeals recently held, is satisfied by virtue of the foreign state's having signed the New York Convention.[53]

Even where a sovereign debtor is not immune from suit and an award against it is recognised in the United States, the debtor's US-located assets may nonetheless be immune from execution. The FSIA provides that, with limited exceptions, 'the property in the United States of a foreign state shall be immune from attachment, arrest and execution'.[54] The principal exception to this immunity is for property that is 'in the United States' and is 'used for a commercial activity in the United States'.[55]

Foreign states largely conduct their commercial activities through separate state-owned entities (SOEs). This reality is a double-edged sword for award creditors seeking to enforce against foreign states. However, the assets of SOEs are not protected as fully as property owned by a state itself: provided an SOE is 'engaged in commercial activity in the United States', all of its property in the US is subject to execution, regardless of how the property itself is used.[56] But a creditor who seeks to satisfy its judgment against a foreign state by seizing an SOE's assets will often encounter a separate difficulty. As the Supreme Court held in 1983, SOEs organised as separate entities under applicable corporate laws are presumed to be legally distinct from the foreign states that own them – and, as a result, cannot be held responsible for the state's liabilities unless the presumption of separateness is overcome.-[57] To overcome that presumption, a creditor must demonstrate either that the SOE 'is so extensively controlled by its owner that a relationship of principal and agent is created' or that

treating the SOE as legally separate from its sovereign owner 'would work fraud or injustice'.-[58] US courts have demonstrated a willingness to disregard the corporate separateness of SOEs whose day-to-day operations are controlled by a foreign state, as one US court of appeals did recently in permitting an award creditor of Venezuela to attach the property of Venezuela's state-owned oil company.[59] But, where the foreign state exercises more passive control and has not otherwise abused the corporate form, award creditors should expect that an SOE's assets likely will not be a viable target in enforcing an award against a sovereign state.

**CONCLUSION**

US courts are generally receptive to applications for the recognition of arbitration awards. Once the award is converted into a US money judgment, the prevailing party can take advantage of the broad discovery powers available to US litigants to identify the debtor's assets, whether they may be located in the United States or another jurisdiction. Although the scope of interim attachment remedies and execution devices differ from state to state, and the applicable procedures must be carefully followed, a judgment creditor has an array of tools at its disposal to seize assets located in the United States, and in some instances to obtain orders directing the delivery of assets located abroad into the United States for turnover in satisfaction of a judgment.

Endnotes

KOBRE & KIM LLP
THE GLOBAL LITIGATION BOUTIQUE

**Jef Klazen** jef.klazen@kobrekim.com
**Marcus J Green** marcus.green@kobrekim.com
**Chris Cogburn** christopher.cogburn@kobrekim.com

800 Third Avenue, New York 10022, United States

**Tel:** +1 212 488 1200

https://kobrekim.com/