



# The Arbitration Review of the Americas

2019

**Enforcement in the United States**

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# Enforcement in the United States

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## Summary

RECOGNITION OF ARBITRATION AWARDS IN US COURTS

EXECUTION AGAINST PROPERTY

Prevailing in arbitration does not by itself secure satisfaction of a money award. When dealing with a recalcitrant opponent, the prevailing party may need to resort to judicial enforcement remedies available in jurisdictions where the debtor or its assets may be found. In the United States, enforcement of an arbitration award consists of recognition or confirmation of the award as a judgment and execution against the debtor's assets. Below, we describe common issues encountered by parties seeking to enforce arbitration awards in the United States, drawing attention to recent developments where applicable.

## RECOGNITION OF ARBITRATION AWARDS IN US COURTS

To gain access to the US judicial system to enforce an award, the prevailing party must first obtain recognition of the arbitral award as a court judgment. US courts will recognise commercial arbitration awards and awards rendered in investor-state disputes, but the procedures can 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 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention).<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup>

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'.<sup>4</sup> 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.<sup>5</sup> Instead, the party must file a petition to recognise the award, which can be resolved on the papers without oral argument or discovery.<sup>6</sup>

Despite this summary process, the New York Convention and the FAA provide several defences to recognition. Under the New York Convention, recognition may be refused on any one 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.<sup>7</sup>

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'.<sup>8</sup>

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).<sup>9</sup> To ensure the court has jurisdiction over the parties (or property), award creditors should generally opt to bring the 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.<sup>10</sup> 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.<sup>11</sup>

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 in the proceeding.

Under the FAA, recognition of a foreign award must be sought within three years after the award was rendered.<sup>12</sup>

#### 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 (ICSID Convention) to resolve disputes between private investors from one state and a foreign state or state-owned enterprise.<sup>13</sup> Where ICSID has jurisdiction,<sup>14</sup> its decisions are final and are subject only to review within ICSID itself.<sup>15</sup>

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.<sup>16</sup> 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.<sup>17</sup> 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.<sup>18</sup>

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.[19](#)

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.[20](#) 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.[21](#)

## EXECUTION AGAINST PROPERTY

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.[22](#)

### 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 to 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.[23](#) 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. Under the Federal Rules of Civil Procedure, a subpoena demanding responses to discovery requests may be served nationwide. So 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.[24](#)

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.[25](#) 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.[26](#)

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.[27](#) 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.[28](#)

That a judgment creditor may seek discovery about assets outside the US applies even where the debtor is a foreign sovereign.[29](#) 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.[30](#)

Similarly, although a judgment creditor cannot ordinarily execute on a debtor's bank deposits associated with a foreign bank branch,[31](#) 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.[32](#)

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.[33](#) 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 speaking, 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 noncompliance 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'.<sup>34</sup> 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.<sup>35</sup> However, the courts of other states effectively limit turnover orders to property within the court's territorial jurisdiction.<sup>36</sup>

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.[37](#)

#### 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,[38](#) 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. In cases where 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.[39](#) Priority among judgment creditors is determined based on the date the creditors obtained their liens,[40](#) 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.[41](#) 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.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

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.<sup>45</sup> 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.<sup>46</sup> 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.<sup>47</sup> The proponent must also demonstrate that the arbitration award to which it may be entitled may be rendered ineffectual without such provisional relief.<sup>48</sup>

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.<sup>49</sup> US courts approach questions of personal jurisdiction regarding requests for prejudgment attachment similarly to executions on property.<sup>50</sup>

## Conclusion

As described above, 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 types of 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.

## Notes

<sup>1</sup> The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 UST 2517, TIAS No. 6997, 330 UNTS 38. The United States also recognises the Inter-American Convention on International Commercial Arbitration (Panama Convention), which applies instead of the New York Convention in certain cases. The process for recognising an award under either treaty is similar. See *Corporacion Mexicana De Mantenimiento Integral, S De R.L. De CV v Pemex-Exploracion Y Produccion*, 832 F3d 92, 105 (2d Cir. 2016).

[2](#) New York Convention article I.

[3](#) 9 USC sections 201, 203 (1970).

[4](#) New York Convention article III–IV. An award is considered 'final if it resolves the rights and obligations of the parties definitively enough to preclude the need for further adjudication with respect to the issue submitted to arbitration'. See *Ecopetro SA v Offshore Expl. and Prod. LLC*, 46 F Supp. 3d 327, 336 (SDNY 2014). So-called interim awards, which resolve only certain of the claims brought before the arbitrator, can also qualify as 'final' if they finally and definitely resolve those claims. See *id.* As one federal appeals court has recently held, the prevailing party need not 'confirm' an award at the seat of arbitration before seeking recognition and enforcement. *CBF Industria de Gusa S/A v AMCI Holdings, Inc*, 850 F3d 58, 72 (2d Cir. 2017). Instead, the New York Convention and FAA 'envision a single-step process for reducing a foreign arbitral award to a domestic judgment'. *Id.* at 71.

[5](#) *Mobil Cerro Negro Ltd v Bolivarian Republic of Venezuela*, 87 F Supp. 3d 573, 595 (SDNY 2015), *rev'd on other grounds*, 863 F3d 96 (2d Cir. 2017).

[6](#) *Id.*

[7](#) New York Convention article V. Courts narrowly construe the public policy defence to recognition. See *Venco Imtiaz Constr. Co v Symbion Power LLC*, 2017 WL 2374349, at \*2 (DDC, 31 May 2017) ('[T]he "public policy defence is to be construed narrowly to be applied only where enforcement would violate the . . . most basic notions of morality and justice".') (quoting *TermoRio SA ESP v Electranta SP*, 487 F3d 928, 938 (DC Cir. 2007)).

[8](#) 9 USC section 207 (1970); See also *CBF Industria de Gusa S/A v AMCI Holdings, Inc*, 850 F3d 58, 74 (2d Cir. 2017) ('Section 207 uses the term "confirm" to describe the process by which a district court acts under its secondary jurisdiction to recognise and enforce a foreign arbitral award.').

[9](#) See *Frontera Res. Azerbaijan Corp v State Oil Co of the Azerbaijan Republic*, 582 F3d 393, 398 (2d Cir. 2009) (holding that 'district court did not err by treating jurisdiction over either [debtor] or [debtor's] property as a prerequisite to the enforcement of [creditor's] petition'); see also *First Inv. Corp of Marshall Islands v Fujian Mawei Shipbuilding, Ltd*, 703 F3d 742, 748 (5th Cir. 2012), as revised (17 January 2013) (same); *Glencore Grain BV v Shinvath Rai Harnarain Co*, 284 F3d 1114, 1127 (9th Cir. 2002) ('Considerable authority supports [creditor's] position that it can enforce the award against [debtor's] property in the forum even if that property has no relationship to the underlying controversy between the parties.'). *Crescendo Mar. Co v Bank of Commc'ns Co*, 2016 WL 750351, at \*5 (SDNY, 22 February 2016) (recognising exception to the general rule that 'the presence of a defendant's property within a court's jurisdiction is insufficient to allow the court to hear claims against the defendant unrelated to that property . . . where a petitioner seeks to recover on a judgment already adjudicated in a forum with personal jurisdiction over the respondent') (citing *Shaffer v Heitner*, 433 US 186, 210–12 (1977)); but see *Base Metal Trading Ltd v OJSC Novokuznetsky Aluminum Factory*, 283 F3d 208, 213 (4th Cir. 2002) ('Yet, when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction.').

[10](#) For example, real or personal property located in the territorial jurisdiction of the court or intangible property rights with legal situs in the district (such as a debt owed to the award-debtor by a third party present in the district).

[11](#) Another option is to seek enforcement against alter egos or successors in interest of the award debtor which themselves may be subject to jurisdiction in the United States. In *CBF Industria de Gusa S/A v AMCI Holdings, Inc*, 850 F3d 58 (2d Cir. 2017), the US Court of Appeals for the Second Circuit held that award creditors could seek recognition and enforcement of a foreign arbitration award against certain purported alter-egos of the debtor without first having to seek recognition of the award in a proceeding against the debtor itself (which in that case was a defunct company which the creditors had not named as a defendant in the recognition action); but see *Frontenac Int'l, SA v Glob. Mktg. Sys., JLT*, 2013 WL 2896896, at \*6 (D Md 11 June 2013) (dismissing action seeking recognition and enforcement against award debtor and alter egos where the court lacked jurisdiction over award debtor).

[12](#) 9 USC section 207 (1970).

[13](#) ICSID Convention, 18 March 1965, 17 UST 1270, TIAS 6090, 575 UNTS 159 article 1.

[14](#) ICSID has jurisdiction over investment-related legal disputes between a state party to the ICSID Convention and a national of another state that is also a party to the treaty, where the parties have consented to ICSID's jurisdiction. *Id.*, article 25.

[15](#) *Id.*, article 53 (ICSID awards 'shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention').

[16](#) 22 USC section 1650a(a) (1966) ('The pecuniary obligations imposed by such an award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States.').

[17](#) See 9 USC sections 2, 9 (1947).

[18](#) See *Affymax, Inc v Ortho-McNeil-Janssen Pharm., Inc.*, 660 F3d 281, 284 (7th Cir. 2011); *Sch. City of East Chicago, Indiana v East Chicago Fed'n of Teachers, Local No. 511, AFT*, 622 NE 2d 166, 168 (Ind. 1993).

[19](#) 9 USC section 10 (2002).

[20](#) 9 USC section 9 (1947).

[21](#) See, eg, *Hanson v Larson*, 459 NW 2d 339 (Minn. App. 1990) (applying statute of limitations for a breach of contract action to a recognition action).

[22](#) See 28 USC section 1963 (1996) (providing for registration of judgments for enforcement in other federal judicial districts).

[23](#) See, eg, *EM Ltd v Republic of Argentina*, 695 F3d 201, 207 (2d Cir. 2012) ('The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment.'). Following the 2015 amendments, the Federal Rules of Civil Procedure now provide that discovery must be 'proportional to the needs of the case'. Fed. R. Civ. P. 26(b)(1). Although courts have incorporated the new proportionality standard into the scope of discovery in aid of execution, courts continue to allow judgment creditors to conduct broad post-judgment discovery. See, eg, *Randall Mfg, LLC v Pier Components, LLC*, 2017 WL 1519498, at \*2 (MD Pa 27 April 2017) (noting that the scope of discovery in aid of execution is 'quite broad' but 'must be proportional to the needs of the case').

[24](#) For instance, Florida law provides, as part of its 'proceedings supplementary', that upon motion by the judgment creditor 'the court shall require the judgment debtor to appear before it . . . to be examined concerning property subject to execution'. Section 56.30, Fla. Stat. (Supp. 2016).

[25](#) See, eg, *Vera v Republic of Cuba*, 91 F. Supp. 3d 561, 569 (SDNY 2015) ('It is well-recognised that broad post-judgment discovery in aid of execution is the norm in federal and New York state courts.') (citations omitted).

[26](#) Many states, for example, have adopted the Uniform Interstate Depositions and Discovery Act (UIDDA), which provides a mechanism for a party to an action pending in one state to obtain discovery in another state. See, eg, NY CPLR 3119(b) (incorporating UIDDA procedures into New York state law).

[27](#) See *EM Ltd*, 695 F3d at 208 ('Thus, in a run-of-the-mill execution proceeding, we have no doubt that the district court would have been within its discretion to order the discovery from third-party banks about the judgment debtor's assets located outside the United States.');

see also NY CPLR 5224(a)(4)(a-1) (providing that, under New York law, a post-judgment subpoena subjects the target to disclosure of information, 'whether the materials sought are in the possession, custody or control of the subpoenaed person, business or other entity within or without the state').

[28](#) See, eg, *Chevron Corp v Donziger*, 296 F.R.D. 168, 198 (SDNY 2013) ('[A] court may "impose discovery under the Federal Rules of Civil Procedure when it has personal jurisdiction over the foreign party," notwithstanding provisions of foreign law that would prohibit production.').

[29](#) See *Republic of Argentina v NML Capital, Ltd*, 134 S Ct 2250 (2014).

[30](#) See 28 USC section 1610 (2012).

[31](#) As discussed below in the context of execution, pursuant to a doctrine of New York banking law known as 'the separate entity rule', even where the bank itself is subject to the court's jurisdiction, New York courts treat foreign branches of the bank as separate entities for purposes of execution on a judgment. Thus, the courts cannot order the bank to turn over assets that are associated with foreign branches.

[32](#) See *B&M Kingstone, LLC v Mega Intern. Commercial Bank Co*, 131 A.D.3d 259, 266 (NY App. Div. 1st Dep. 2015) ('Thus, Motorola's expressly limited affirmation of the separate entity

rule does not apply to the instant case, and the rule does not bar the court's exercise of jurisdiction over Mega to compel a full response to the information subpoena.').

[33](#) See Fed. R. Civ. P. 69(a)(1) ('The procedure on execution – and in proceedings supplementary to and in aid of judgment or execution – must accord with the procedure of the state where the court is located . . .').

[34](#) NY CPLR 5222(b); see also *Berkshire Bank v Tedeschi*, 2016 WL 1029526, at \*2 (NDNY 15 March 2016) (ordering brokerage dealer over which court had personal jurisdiction to restrain out-of-state property subject to restraining notice).

[35](#) See *Koehler v Bank of Bermuda*, 911 NE2d 825, 829 (NY 2009).

[36](#) See, eg, *Sargeant v Al-Saleh*, 137 So. 3d 432, 435 (Fla. Dist. Ct. App. 2014) ('[W]e emphasise that allowing trial courts to compel judgment debtors to bring out-of-state assets into Florida would effectively eviscerate the domestication of foreign judgment statutes.'). Note that the law in Florida on this issue is unsettled. The Sargeant decision was issued by an intermediate appellate court and, although the Florida Supreme Court declined an invitation to review, *Al-Saleh v Sargeant*, 157 So.3d 1040 (Fla. 2014), it appears directly contradictory to an earlier ruling of a different intermediate appellate court in Florida and has been criticised by other Florida intermediate appellate courts. See *Schanck v Gayhart*, No. 1D17-1327, 2018 WL 1999841, at \*3 (Fla. Dist. Ct. App. Apr. 30, 2018) (noting that Sargeant reached an 'opposite conclusion'); *Gen. Elec. Capital Corp v Advance Petroleum Inc*, 660 So. 2d 1139, 1142 (Fla. Dist. Ct. App. 1995) ('It has long been established in this and other jurisdictions that a court which has obtained in personam jurisdiction over a defendant may order that defendant to act on property that is outside of the court's jurisdiction, provided that the court does not directly affect the title to the property while it remains in the foreign jurisdiction.').

[37](#) In *Koehler v Bank of Bermuda*, 911 NE2d 825 (NY 2009), the New York Court of Appeals (the state's highest court) affirmed a turnover order against a Bermudan bank requiring it to deliver stock certificates owned by a judgment debtor that were located outside of New York, raising questions about the continued vitality of the separate entity rule. But later, the New York Court of Appeals upheld the doctrine in *Motorola Credit Corp v Standard Chartered Bank*, 24 NY 3d 149, 162 (NY 2014) ('Finally, we decline Motorola's invitation to cast aside the separate entity rule.').

[38](#) In some US states, a writ of execution is operative in relation to property in the hands of the debtor or a third party, while in other states separate writs must issue depending on who has custody of the debtor's property. For example, in New York, a writ of execution can be used to levy against property whether it is in the possession of the judgment debtor or a third party. See NY CPLR 5230. Colorado, however, provides different procedures for execution against property held by a third-party garnishee. See Colo. R. of Civ. P. sections 69(a), 103.

[39](#) *Aspen Indus., Inc v Marine Midland Bank*, 421 N.E.2d 808, 810-11 (NY 1981).

[40](#) See NY CPLR 5202 (providing that delivery of an execution to a sheriff generally establishes priority in personal property vis-à-vis any transferee). Further, where multiple judgment creditors deliver an execution to the same enforcement officer, priority will be determined by the order in which the executions were delivered (although where multiple executions were delivered to different enforcement officers, priority is determined by the moment of levy). See NY CPLR 5234(b).

[41](#) *Grupo Mexicano de Desarrollo v Alliance Bond Fund, Inc*, 527 US 308 (1999).

[42](#) Fed. R. Civ. P. 64.

[43](#) NY CPLR 7502(c) (courts 'may entertain an application for an order of attachment or . . . in connection with an arbitration that is pending or that is to be commenced inside or outside this state, whether or not it is subject to the United Nations convention on the recognition and enforcement of foreign arbitral awards').

[44](#) See Fla. Stat. 76.05. Note also that Florida state courts have issued temporary injunctions to freeze assets pending the outcome of an arbitration claim. See, eg, *Korn v Ambassador Homes, Inc*, 546 So. 2d 756, 757 (Fla. Dist. Ct. App. 1989) ('a temporary injunction is proper to maintain the status quo, as here, pending the outcome of an arbitration claim.').

[45](#) *Stemcor USA Inc v Cia Siderurgica do Para Cosipar*, 870 F.3d 370 (5th Cir. 2017) (finding power to grant provisional remedies prior to filing of arbitration under Louisiana law).

[46](#) See, eg, *Capital Ventures Intern. v Republic of Argentina*, 443 F.3d 214, 222 (2d Cir. 2006); *Discover Growth Fund v 6D Glob. Techs. Inc*, No. 15-CV-7618 PKC, 2015 WL 6619971, at \*4 (SDNY 30 October 2015).

[47](#) Discover Growth Fund, 2015 WL 6619971, at \*3–4 (citing NY CPLR 6212(a)).

[48](#) Id (citing NY CPLR 7502(c)).

[49](#) Stemcor, 870 F.3d at 375 n.2 (gathering cases addressing whether New York Convention divests federal courts of right to issue provisional remedies and noting 'it appears that the courts that read jurisdiction under the Convention restrictively have retreated from their views and now, at least in most circumstances, recognise subject matter jurisdiction to grant provisional remedies in aid of arbitration').

[50](#) See id at 376; Sojitz Corp. v Prithvi Info. Sols. Ltd, 82 AD 3d 89, 96, 921 NYS2d 14, 19 (NY App. Div. 2011) (finding personal jurisdiction where property located in New York and attachment statute used 'for purposes of security rather than to confer in personam jurisdiction' over respondent.



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