

Foreign Arbitration Awards – The Problem with the Mechanistic Approach to Enforcement

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Arbitration is a dispute resolution mechanism that is prevalent throughout the international shipping community. At any given time various foreign arbitration tribunals routinely hear evidence and make orders regarding claims between disputing parties. These bodies also grant monetary awards which a successful claimant may ultimately, although in some cases not 100% successfully, enforce against the assets of the unsuccessful party.

Enforcement of an arbitration award granted within one's own jurisdiction is usually not a complicated matter. However, when the award has been made by a foreign arbitration tribunal then a number of enforcement issues come in to play. By way of background, "foreign" in the international sense means any jurisdiction outside the one in which you reside. Additionally jurisdiction is not just limited to nations or countries. For example, within Canada itself, each province is a separate jurisdiction.

The principles of territoriality dictate that no state or nation can by its laws directly affect or bind persons or property outside of its own territory. The effect of this principle is easily demonstrated by the relationship here in Canada amongst the provinces themselves. For example, laws enacted by the provincial government in British Columbia are not binding on residents of Ontario. A by-product of this principle is the fact that a judgment or award granted in one jurisdiction has no standing in another jurisdiction. However, in the interests of international relations, many provinces, states and countries have enacted legislation or entered into treaties where foreign judgment awards can be recognized and enforced. This can usually be done in two ways: (1) by treating the award as a debt, a claimant can then bring a legal suit in their own jurisdiction to enforce the debt or (2) by the enactment of legislation or through the implementation of treaties which allow the claimant to merely register the award with the court in that claimant's jurisdiction. Registration is a simpler and more economical way for the court to say that it recognizes the validity of the foreign award and that the award should be allowed to be enforced within that court's own jurisdiction.

Most courts have threshold requirements for enforcement of foreign awards. Beyond that there is a strict or "mechanistic" approach to recognize the award and to do so solely against the party or parties named in the award. The mechanistic approach to the enforcement of foreign arbitration awards was set out clearly in a 2002 decision by a United Kingdom Court known as the *Norsk Hydro ASA v. State Property Fund of Ukraine* decision. "The enforcing court is neither entitled nor bound to go behind the award in question, explore the reasoning of the arbitration tribunal or second-guess its intentions."

The reasons for this approach are numerous but can be boiled down to a number of policy rationales. First, courts are hesitant to reinsert themselves back into a fact finding process which has already taken place and in the case of foreign arbitrations, has taken place in a jurisdiction which may have different laws and procedures. Second, public confidence must be maintained. Once an award is granted, both the public and the party that was granted the award must be able to rest safe in the knowledge that that award plus all future awards will not be overturned on a latter date by some other forum when it comes time for enforcement.

However, two recent Canadian cases have demonstrated a problem with the mechanistic approach. What happens when the creditor tries to enforce the award against a debtor who is not the named judgment debtor under the award even if that debtor seems to be the same entity?

TMR Energy Ltd. v. State Property Fund of Ukraine 2005 FCA 28

In 2002, TMR obtained an arbitration award in Sweden against State Property Fund (“SPF”) for an amount of almost \$40 million US. In January of 2003, TMR then attempted to register this award in Canada’s Federal Court. In its application to register, TMR named SPF and described it as “an organ of the State of Ukraine”. The award was subsequently registered but only after an application to the Court by TMR, which required a hearing before a prothonotary (in this case, Prothonotary Morneau).

Based on the registration of the award, TMR had the sheriffs seize an airplane which had landed at the Goose Bay Airport in Newfoundland in June of 2003. The plane was owned by the State of Ukraine but was operated by a separate entity, Antonov. During the course of subsequent months, Antonov, SPF and the State of Ukraine all brought applications to have the registration of the award struck out and the seizure lifted. TMR brought an application to determine if the State of Ukraine itself was actually a judgment debtor as the award was registered against SPF as “an organ of the State of Ukraine”.

The issue of whether the Court could look at any facts to determine the identity of the true judgment debtor was heard before Prothonotary Tabib (*TMR v. State Property Fund of Ukraine* 2003 FC 1517). In her ruling that the Court was entitled to make determinations on the identity of true judgment debtors under foreign arbitration awards Prothonotary Tabib acknowledged that the mechanistic approach was to be followed in most circumstances however, it should not govern where the Court was faced solely with determining this one specific issue. She then went on to state:

“Considering, therefore, the Award as recognized in the Registration Order on the same basis as a judgement, I find that the true identity of the defendant - or eventual judgement debtor - is an issue that can be addressed in the course of enforcement or execution proceedings.”

Prothonotary Tabib found support in provisions of the *Judgment Enforcement Act* which allow for the identification of a judgment debtor and various other cases citing the Court’s jurisdiction to determine the true identity of the actual judgment debtor. As a result and based on evidence presented by TMR, it was held that SPR and the State of

Ukraine were one and the same judgment debtor despite not being so named in the registered award.

However, the separate applications by Antonov, SPF and the State of Ukraine to have the registration of the award struck out and the seizure lifted were argued successfully. The Federal Court set aside the registration of the award on the basis that Prothonotary Morneau had no jurisdiction to actually register the foreign arbitration award.

This ruling was appealed by TMR to the Federal Court of Appeal. The Federal Court of Appeal upheld the trial judge's ruling that the foreign arbitration award had been registered without the proper authority by Prothonotary Morneau. The Federal Court of Appeal did not directly address the issue of whether the Court could look into the true identity of the judgment debtor as Prothonotary Tabib had done. However the Court did comment on the fact that TMR should have told the Court in its application to have the award registered that it was preparing to have the registered award enforced against a party that was not properly named as the judgement debtor.

The result of the Court of Appeal's dismissing TMR's claim meant that the foreign award had not been properly registered and that the seizure of the aircraft was not valid or binding. TMR lost its security and could not collect on the award. Additionally, Prothonotary Tabib's decision on the ability of the Court to determine the true identity of a judgment debtor was left in limbo although the Court of appeal seems to have approved the mechanistic approach in brief comments on the *Norsk Hydro* case.

Pan Liberty Navigation Co. Ltd. v. World Link (H.K.) Resources Ltd. 2005 BCCA 206

Pan Liberty and Blue Arctic ("Pan Liberty") were owners of two ships which were chartered by World Link Transportation Co. Ltd. ("World Link"). World Link defaulted on the charters and Pan Liberty initiated arbitration in England. World Link did not attend the arbitration and awards were rendered.

In late 2003, Pan Liberty became aware that a ship was about to arrive in British Columbia under charter to World Link Resources. Pan Liberty commenced action in the B.C. Supreme Court and sought and obtained a *mareva* injunction against the ship's bunkers. World Link Resources issued security. During the course of an application to stay Pan Liberty's claim to the security monies, it was argued that the fuel and bunkers were owned by World Link Resources rather than World Link. Pan Liberty then alleged that World Link Resources was in fact the alter ego of World Link and that the two were actually one in the same. The issue was whether the British Columbia Court could enforce the awards against World Link Resources rather than sending the case back to London arbitration on the point.

The Court, although acknowledging the reasoning of Prothonotary Tabib in the TMR case, preferred to adopt the mechanistic approach of *Norsk* and agreed that it rested upon the arbitrator to determine if World Link Resources had been a "defaulting charterer". Accordingly, the matter was referred back to arbitration in London for decision.

Leave to appeal to the Supreme Court of Canada has been granted from the Federal Court of Appeal decision in the *TMR Energy* case which had confirmed the overturning of the order registering the arbitral award. As it currently stands, the B.C. Court of Appeal has declined to follow the approach of Prothonotary Tabib of the Federal Court of Canada that the enforcing court can determine the true identity of the judgment debtor when enforcing foreign arbitration awards. The Federal Court and the B.C. Supreme Court are on different paths when it comes to the enforcement of foreign arbitration awards. Certainly, there has been no decision overturning Prothonotary Tabib's reasoning in *TMR Energy*. Furthermore, if the Supreme Court of Canada overturns the Federal Court of Appeal and reinstates the registration order, then, arguably, TMR Energy could seize another aircraft owned by the State of Ukraine in order to satisfy the award based on the decision of Prothonotary Tabib.

Clearly, the question of the appropriate procedures, registration and enforcement of foreign arbitration awards is of national importance given that the Supreme Court of Canada has recently granted leave to TMR Energy. Uniformity in Canada's approach to enforcing foreign awards is necessary to bring a level of certainty to the trade and commerce necessary in the global economy. It remains to be seen whether the Supreme Court of Canada will tackle the issue of enforcement of foreign awards directly in the *TMR Energy* appeal.