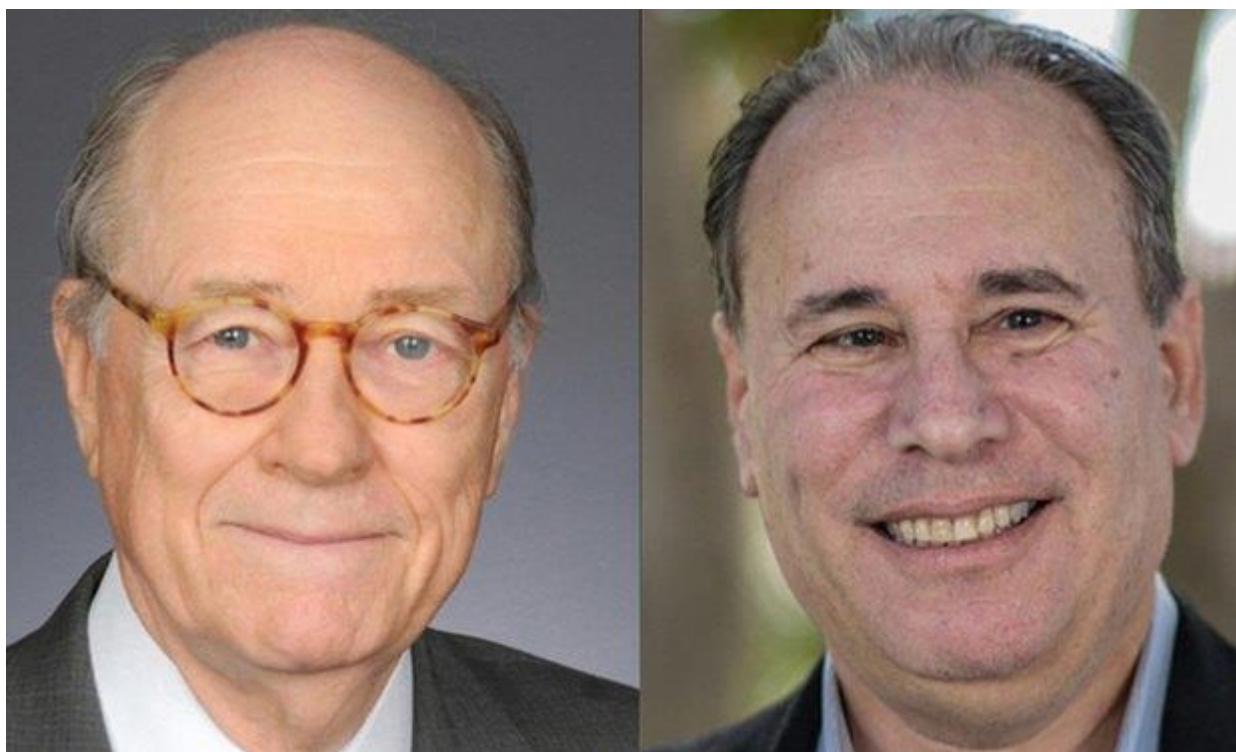


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No Summons Needed To Confirm International Arbitration Award

In their International Litigation column, Lawrence W. Newman and David Zaslowsky discuss a recent decision that the Second Circuit stated was a question of first impression for it, in which the court held that there is no requirement to serve a summons in a proceeding brought to confirm an arbitration award, even when the defendant is a foreign sovereign.

By **Lawrence W. Newman and David Zaslowsky** | January 25, 2023 at 10:00 AM



In a recent decision that the U.S. Court of Appeals for the Second Circuit stated was a question of first impression for it, the court held that there is no requirement to serve a summons in a proceeding brought to confirm an arbitration award under the Federal Arbitration Act (FAA), 9 U.S.C. 1 et seq. or under the New York Convention. The decision was rendered in *Commodities & Minerals Ent. Ltd. [CME] v. CVG Ferrominera Orinco C.A. [Ferrominera]*, 49 F.4th 802 (2d Cir. 2022).

The case arose out of a maritime dispute that was arbitrated in New York pursuant to the rules of the Society of Maritime Arbitrators. The arbitration resulted in a \$12.6 million award in favor of CME and against Ferrominera. The district court confirmed the award over Ferrominera's argument, among others, that the court lacked personal jurisdiction because CME did not serve a summons when it moved to confirm the award.

The Second Circuit's conclusion that there is no requirement to serve a summons in a proceeding brought to confirm an arbitration award was not self-evident. Indeed, in *Global Arbitration Review's* "The Guide to Challenging and Enforcing Arbitration Awards," the chapter about the United States states that a summons is among the documents that need to be obtained when commencing a confirmation proceeding in federal court.

The argument in favor of requiring a summons is straightforward. The New York Convention is codified in Chapter 2 of the FAA. 9 U.S.C. §§201-208. Section 207 authorizes a party to “apply” to a competent court “for an order confirming [an] award.” However, neither Chapter 2 nor the New York Convention specifies how an adverse litigant must be notified of the new proceeding. To fill that gap, Chapter 2 resorts (with some caveats) to the rules governing domestic arbitral awards set forth in Chapter 1 of the FAA.

One of these incorporated provisions is Section 9 of the FAA, which sets forth the procedure for confirming domestic awards, including service-of-process rules. Section 9 provides that “[i]f the adverse party shall be a nonresident [of the district within which the award was made], then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.” 9 U.S.C. §9 (emphasis added).

The “other process of the court” language naturally leads to the Federal Rules of Civil Procedure. Rule 4 states that, to serve process, “[a] summons must be served with a copy of the complaint.” Thus, one could easily conclude that a summons is required (as some courts have, as we discuss below). However, a Southern District of New York case addressed this specific issue in 2010.

In *Scandinavian Reinsurance Co. v. St. Paul Fire & Marine Ins. Co.*, 732 F. Supp. 2d 293, 305-06 (S.D.N.Y. 2010), the court held that service of a summons was not required to commence a proceeding to confirm a foreign arbitral award under the New York Convention and FAA. That court noted that Section 9 of the FAA refers specifically to the service of a “notice of application.”

Similarly, Section 12 of the FAA refers to “serving” on the adverse party a “Notice of a motion to vacate, modify, or correct an award.” Thus, the court reasoned, the FAA’s reference to the Federal Rules of Civil Procedure, of which Rule 4 is one, was only for purposes of the manner of service, and not a requirement as to what documents must be served.

The Second Circuit followed the same reasoning in *CME*. Indeed, it referred specifically to *Scandinavian Reinsurance* and two other Southern District of New York cases that reached the same conclusion. In one way, this should not be considered surprising. As we wrote in this column on May 26, 2021, there are already examples of courts, in award confirmation proceedings, being less formalistic by not always requiring strict adherence to the requirements of the service of process rules. The courts in those cases seemed to focus on fairness and looked to whether the respondent had actual notice and whether confirmation was being done in a court in which the respondent had consented to jurisdiction (such as by having arbitrated there).

In another way, however, *CME* was different. It included an extra layer not present in the other cases in that the Respondent, *Ferrominera*, is a Venezuelan company owned by the Venezuelan government. Thus, the courts in *CME* also had to deal with the requirements of the Foreign Sovereign Immunities Act (FSIA).

Also noteworthy is that the case in New York was not the only case between these parties. In 2017, *CME* sought to confirm, under the New York Convention, an award issued in an arbitration that had taken place in Miami. In that case as well, no summons was served with the petition to confirm the award. The district court in Florida held that service was therefore defective.

The court reasoned, similar to the above reasoning, that the FAA was silent on how to serve an extraterritorial respondent and, therefore, the court looked to Rule 4 of the Federal Rules. It focused on Rule 4(j)(1), which provides that a “foreign state or its political subdivision, agency or instrumentality must be served in accordance with 28 U.S.C. §1608.” Section 1608 has a cascading series of alternative ways to make service, with each succeeding sub-paragraph reached if service cannot be made under the prior one. Significantly, however, each sub-paragraph specifically requires service of a “summons and complaint.” The district court held that, because no summons had been served, service was defective. It therefore granted *Ferrominera*’s motion to quash service.

The Second Circuit said it disagreed with this decision, as well as another Florida district court decision that had held the same way. In winding its way through the relevant rules and statutes, the Second Circuit explained that Federal Rule 4 sets forth the basic procedures for serving process, but includes one important qualification. That qualification, set forth in Rule 81, provides that the Federal Rules of Civil Procedure, “to the extent applicable, govern proceedings under the [FAA], except as [that] law[] provide[s] other procedures.” Thus, according to the Second Circuit, the question is “how Rule 4, only to the extent consistent with the FAA, directs service of process in the circumstances before us.”

The Second Circuit analyzed that issue as follows. Under Section 9 of the FAA, the only thing that must be served is the “notice of application.” And, while it is true that the FSIA mentions delivery of something different from a notice of application—specifically, a “summons and complaint”—Rule 81(a)(6)(B) of the Federal Rules enables only limited incorporation of the FSIA into Rule 4. That is, “except as [the FAA] provide[s] other procedures.” Here, Section 9 of the FAA provides a procedure for the notice that shall be served on the opposing party—“notice of the application”—thereby triggering the exception to incorporation. The Second Circuit concluded that, because the reference in Section 1608(b)(1)-(3) to “the delivery of a copy of the summons and complaint” remains unincorporated, it bears no weight.

The court also noted that a proceeding to confirm an arbitral award under the FAA is commenced by an “application” rather than a “complaint.” Thus, it said, because no “complaint” is involved in a motion to confirm an arbitral award, it would make little sense to read the FAA as incorporating the FSIA’s Section 1608(b) instruction to serve both “a summons and complaint.”

The court explained that it disagreed with the conclusions of the two Florida district court cases because they relied on the phrase “summons and complaint” in Section 1608(b) of the FSIA to conclude that service of a summons was required. In the view of the Second Circuit, though, these courts erred in failing to start their analysis with the FAA, which incorporates the FSIA’s requirements only as to the manner of service, not what must be served.

There is anecdotal evidence that, in the day-to-day conduct of lawsuits, courts often treat sovereigns with greater deference than non-sovereigns. Rules are often interpreted in ways that favor a sovereign. As just one example, courts are often more lax in requiring strict adherence with service of process requirements if it is clear that the defendant actually received the relevant pleadings in a timely manner. But that is not the case with sovereigns that are defendants. Courts have held that there must be strict compliance with the service provisions of the FSIA—as illustrated, for example, in the Supreme Court’s decision in *Sudan v. Harrison*, 139 S. Ct. 1048 (2019).

This deference is understandable. Dealings with foreign sovereigns often raise political questions and sensitive foreign relations issues. Thus, the Supreme Court’s practice has been to “defer to the decisions of the political branches” about whether and when to exercise judicial power over foreign states—first there was deference to the executive branch, and, since the FSIA, to Congress. See *Verlinden B. V. v. Central Bank of Nigeria*, 461 U. S. 480, 486 (1983).

Indeed, it is not unusual for the executive branch to continue to interject its views about how a particular case can have foreign relations implications, as it did, when it warned in 2014 that deciding a case in a certain way could cause “a substantial invasion of [foreign states’] sovereignty,” and “[u]ndermin[e] international comity.” See *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134 (2014).

Nevertheless, on certain issues, the law with respect to sovereigns is as strict, or stricter, than for non-sovereigns. For example, it is axiomatic that U.S. courts must have personal or quasi-in-rem jurisdiction over a party in order to enter a binding judgment against it. And, the Due Process Clause of the Fifth Amendment independently prohibits federal courts from exercising personal jurisdiction over parties that lack “minimum contacts” with the court’s forum. However, foreign states do not enjoy due process protections from the exercise of the judicial power because foreign states, like U.S. states, are not “persons” for the purposes of the Due Process Clause. Thus,

there is no need to establish minimum contacts in case against a foreign state (though it is necessary to do so for cases against agencies or instrumentalities of foreign states).

As another example, in *NML Capital*, *supra*, in federal post-judgment execution proceedings against Argentina, NML sought discovery from third parties of Argentina's extraterritorial assets. Argentina made the following argument as to why such discovery should be denied. It said that, historically, the State Department and American courts routinely accorded absolute execution immunity to foreign-state property.

By codifying in the FSIA this general execution immunity with only a small set of exceptions, "Congress merely partially lowered the previously unconditional barrier to postjudgment relief." Because the FSIA gives no indication that it was authorizing courts to inquire into state property beyond the court's limited enforcement authority, Argentina contended, it should be forbidden to seek discovery concerning assets that do not fall within an exception to execution immunity, which the court said was plainly true of a foreign state's extraterritorial assets.

The Supreme Court disagreed with Argentina. It said there was no authority that, before the FSIA, a foreign state's extraterritorial assets enjoyed absolute execution immunity in United States courts. And, the court explained, NML was seeking discovery because it did not yet know what property Argentina had and where it was, let alone whether it was executable under the relevant jurisdiction's law.

The Supreme Court conceded that there might be a gap in the FSIA on the issue of whether Congress could really have meant not to protect foreign states from post-judgment discovery "clearinghouses." But that was an issue for Congress. The court held that the FSIA does not immunize a foreign-sovereign judgment debtor from post-judgment discovery of information concerning its extraterritorial assets.

In sum, the Second Circuit's opinion in *CME* is important for two reasons. First, it is now the law in the Second Circuit that there is no requirement to serve a summons in a proceeding brought to confirm an arbitration award under the FAA or New York Convention. And, second, the case establishes another area of the law where deference is not being given to foreign sovereigns.

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