

Execution and Discovery Tools Post-Recognition and Enforcement of Arbitral Awards in US Courts

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Executive summary

We have previously discussed whether a successful party in an arbitration that may have been seated outside of the United States should consider enforcing that award against the award debtor or even a third-party who did not participate in the arbitration in US courts. A key consideration is whether the targets have assets in the United States that may be used to satisfy the unpaid arbitral award.

Confirming a foreign arbitral award as a judgment in US federal courts gives award creditors access to the powers in the Federal Rules of Civil Procedure to execute the judgment. In particular, a confirmed award gives creditors access to two powerful enforcement tools: writs of execution and discovery.

- A writ of execution is an order from the court that enforces the judgment and allows law enforcement to begin transferring the owed funds, assets, or collateral property.
- Discovery is a litigation tool whereby the award debtor or a third party may need to disclose information about assets that could be used to satisfy the confirmed award. Even if the unpaid arbitral award may not be satisfied fully using assets located in the US, the award creditor may use discovery tools to obtain information about the award debtor's assets located globally. Such discovery could be a roadmap to enforcing the arbitral award against the award in those jurisdictions where assets are located.

Execution of awards

Federal Rule of Civil Procedure 69 (Rule 69) provides the tools for creditors to execute confirmed awards¹:

Rule 69(a)(1): Writs of Execution

Under rule 69(a)(1), award creditors can execute monetary judgments against award debtors via a writ of execution. The procedure behind this execution must comport with applicable state law procedure.² The state law applied is the state law where the court enforcing the judgment sits.³

The main judgment collection remedies in New York are:

¹ FED. R. CIV. P 69.

² State law procedure governs unless it is federally "preempted," meaning that federal law controls in those specified situations. The situations where preemption triggers, however, are few and limited to judgments against figures like revenue officers or which involve the execution of sales formalities. *245 Park Member LLC v. HNA Grp. (Int'l) Co. Ltd.*, No. 23-842-cv, 2024 WL 1506798, at *2 (2d Cir. Apr. 8, 2024).

³ *Id.* at *2.

1. Restraining Notice – this freezes the award debtor’s assets irrespective of possession and prohibits alienation of any property in which they have interest.⁴
 - a. A New York electrical supply corporation successfully used a restraining notice to prevent an award debtor power company from transferring funds to a company it claimed was a “distinct entity.”⁵
2. Execution – state law enforcement, such as a sheriff’s office, can seize property a debtor has an interest in and sell it to satisfy a judgment.⁶
 - a. An institutional bank was able to enforce a writ of execution against a Mexican citizen in a breach of contract case when it established that a New York LLC was his alter ego, allowing the court to issue a writ of execution against the LLC’s Manhattan apartment building as a part of satisfaction for the judgment owed.⁷
3. Turnover – the award debtor must surrender its property directly to the judgment creditor or to the sheriff when that property is located in New York.⁸ New York state courts employ a two-step analysis to determine if property in possession of a third party should be turned over to an award creditor: (1) whether the judgment debtor has an interest in the property the creditor seeks to access and (2) whether the judgment debtor is entitled to possess such property, or whether the creditor’s rights are superior to those of the party claiming possession of the property.⁹
 - a. The institutional bank referenced in Section 2.a enforced a turnover against its award debtor and its alter-ego’s bank accounts because all parties had an interest in the collateralized property and had control over it.¹⁰
4. Garnishment – an award creditor can intercept payments of the judgment debtor’s income or property that can be assigned or transferred.¹¹
 - a. A New York LLC was able to force the award debtor to turn over its membership interest in a Delaware LLC under New York law because the sitting federal court was located in the Southern District of New York.¹²
 - b. A Bolivian company was able to force a group of Mexican award debtors to turn over certain assets in Mexico to satisfy an arbitration award under Colorado rules of civil procedure using Rule 69(a).¹³
5. Charging Order – an award creditor can intercept distributions made by the award debtor’s LLC subsidiaries to pay their distributions to the award creditor to satisfy the judgment.¹⁴
 - a. An award creditor owed \$2 million plus interest directed an award debtor to assign to him the debtor’s membership interest in his own LLC when he could not satisfy the judgment.¹⁵
6. Installment Payment Order – the award debtor could be required to make incremental payments if it is shown they receive an income.¹⁶
 - a. An award creditor was able to pursue an extension of its twenty-year installment payment order against an award debtor when, after initiating proceedings in state court

⁴ N.Y. C.P.L.R. 5222 (McKinney 2024).

⁵ *Best Energy Power 2015, LLC v. Fed. Deposit Ins. Corp.*, 198 N.Y.S.3d 179, 180 (2d Dep’t 2023).

⁶ N.Y. C.P.L.R. 5230 (McKinney 2024).

⁷ *Citibank, N.A. v. Aralpa Holdings Ltd. P’ship*, No. 1:22-CV-08842 (JLR), 2024 WL 398094 at *2, *6, *19 (S.D.N.Y. Feb. 2, 2024).

⁸ N.Y. C.P.L.R. 5225, 5227 (McKinney 2024).

⁹ *Id.* at *20.

¹⁰ *Id.*

¹¹ N.Y. C.P.L.R. 5201 (McKinney 2024).

¹² *Id.* at *1–2.

¹³ *Compañía de Inversiones Mercantiles S.A. v. Grupo Cementos de Chihuahua S.A.B. de C.V.*, 58 F.4th 429, 444, 469 (10th Cir. 2023).

¹⁴ N.Y. LTD. LIAB. CO. LAW § 607 (McKinney 2024).

¹⁵ *Sirotkin v. Jordan, LLC*, 35 N.Y.S.3d 443, 444 (1st Dep’t 2016).

¹⁶ N.Y. C.P.L.R. 5226 (McKinney 2024).

requiring debtor to pay \$85 per week towards the judgment, it was still not satisfied after twenty years.¹⁷

7. Receiver – a third party gains control of the award debtor’s assets and/or businesses.¹⁸
 - a. For example, a receiver in New York state could sell the award debtor’s condominium to satisfy a judgment and the award creditor in that case enjoined the debtor from transferring interest in the condominium or interfering with its sale.¹⁹

Discovery: Rule 69(a)(2)

Under Rule 69(a)(2), award creditors can obtain discovery from the award debtor as allowed by the Federal Rules of Civil Procedure or applicable state law.²⁰ This gives an award creditor the choice of compelling discovery either through the discovery rules laid out in FRCP 26–37 or the state law where the district court sits.

Some of the discovery tools available to award creditors after the award has been confirmed as a judgment in New York courts include:

- Depositions: interviews where attorneys can interview any person, they believe have critical information to their case under penalty of perjury, regardless of whether that information is detrimental to the opposing party.²¹
- Interrogatories: legally binding demands that the opposing party answer questions and provide information filed with the state court.²²
- Notices to opposing parties to produce documents or other items valuable to the litigation.²³
 - For example, an indemnity and liability company were able to require the New York City Department of Buildings to send it records related to an incident in a construction project in 2019 dating back three years before the incident.²⁴

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¹⁷ *Clinton Cap. Corp. v. 257 W. 21st St. Assocs., Inc.*, No. 16MC353LAKBCM, 2024 WL 1142210, at *3–4 (S.D.N.Y. Feb. 28, 2024), report and recommendation adopted, No. 16-MC-353 (LAK), 2024 WL 1141045 (S.D.N.Y. Mar. 15, 2024).

¹⁸ N.Y. C.P.L.R. 5228 (McKINNEY 2024).

¹⁹ *Good Gateway, LLC v. Thakkar*, 198 N.Y.S.3d 322, 323 (1st Dep’t 2023).

²⁰ FED. R. CIV. P. 69(a)(2).

²¹ N.Y. C.P.L.R. 3106–3117 (McKINNEY 2024).

²² N.Y. C.P.L.R. 3130 – 3133 (McKINNEY 2024).

²³ N.Y. C.P.L.R. 3120 (McKINNEY 2024).

²⁴ 63rd & 3rd NYC LLC v. Starr Indem. & Liab. Co., 77 Misc. 3d 1201(A), 176 N.Y.S.3d 478 (N.Y. Sup. Ct. 2022).