

# Respecting the New York Convention

By William W. Park\*

## I. Rights in search of remedies

In theory, treaty commitments remain a foundation of international law, often expressed in the adage *pacta sunt servanda* (agreements are to be kept).<sup>1</sup> In practice, however, some treaty violations remain without realistic sanctions. Here, as elsewhere, theory and practice diverge.

When national judicial decisions interfere with respect for the New York Convention,<sup>2</sup> the availability of remedies remains highly fact-specific.<sup>3</sup> In some instances, investment treaties offer a way to close the gap between theory and practice, permitting investors to bring private actions against a host country rather than relying on government-to-government measures.

Not all failure to respect the New York Convention fits within the framework of investment treaties. Many clear Convention violations remain without remedy, due to the absence of any relevant ‘investment’ providing the jurisdictional hook on which to hang a claim.

The contours of national respect for the New York Convention might be addressed by comparing two strands of analysis. The first, represented by the ICSID decision *Saipem v. Bangladesh*, implicate arbitral tribunal jurisdiction with respect to domestic court decisions that allegedly run afoul of the New York Convention. By contrast, in another line of cases no practical mechanism seems to exist for challenge to the invocation of parochial American procedure to defeat award recognition under the Convention.

The modest aspiration of this note lies in an exploration of how and why the two types of cases differ. As we shall see, a key distinction lies in the existence of an ‘investment’

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<sup>1</sup> The duty to respect commitments appears early in Western law, expressed in Justinian’s Code as *sancimus nemini licere adversus pacta sua venire et contrahentem decipere* (we shall not allow anyone to contravene his agreements and thereby disappoint [or deceive] his contractor), Code Just. 2.3.29pr (Justinian 531). Medieval canon lawyers abandoned requirements of form to hold all agreements binding unless illegal or immoral. English common law disagreed, and insisted on either consideration or a formal deed. The corollary principle that treaties bind so long as things remain unchanged has been expressed as the doctrine of *rebus sic stantibus*. On treaty commitments, see I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford University Press, 2003) at 579–609; J.L. Briery, *The Law of Nations*, 6th ed. by Humphrey Waldock (Oxford University Press, 1963) at 317–45; F.A. Mann, *Studies in International Law* (Oxford University Press, 1973) at 327–59.

<sup>2</sup> For a decision confirming, in the context of an investment treaty, that governmental measures include judicial decisions, see *Loewen Group, Inc. & Raymond L. Loewen v. USA*, ICSID Case No. ARB (AF)/98/3, Interim Award on Jurisdiction, 5 January 2001.

<sup>3</sup> In summary, Article II of the New York Convention provides that national courts should respect the agreement to arbitrate, and Article III imposes a duty to recognize and enforce awards. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 3 U.S.T. 2517, 330 U.N.T.S. 38. Twenty-four countries originally signed the Convention. The rest have joined by accession or succession. The most recent ratifications (United Arab Emirates, Montenegro, Gabon, Bahamas and Marshall Islands) bring to 142 the total number of countries bound by the treaty.

to trigger arbitration of treaty breaches by the country allegedly failing to respect the New York Convention.

## II. Recourse to investment treaties: *Saipem v. Bangladesh*

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### A. The underlying dispute

In March 2007, an arbitral tribunal opened the door to a damages award for breach of the New York Convention.<sup>4</sup> An Italian construction company (Saipem) had contracted to build a gas pipeline in northeastern Bangladesh. The counterparty was a State entity, the Bangladesh Oil Gas & Mineral Corporation, commonly called Petrobangla.

Ultimately, the transaction went sour. The contractor claimed additional costs that Petrobangla refused to pay. Controversy also arose with respect to return of a warranty bond and retention monies requested by the Italians.

Saipem referred its claim to arbitration, pursuant to a clause in the parties' agreement that provided for dispute resolution in Dhakar under the Rules of the International Chamber of Commerce (ICC). An arbitral tribunal was constituted,<sup>5</sup> and proceeded to render awards in favor of Saipem with respect to jurisdiction, liability and quantum of damages.<sup>6</sup>

During and after the proceedings, courts in Bangladesh made various orders with respect to the arbitration. The Supreme Court issued an injunction restraining Saipem from continuing with the ICC arbitration. Ultimately, that Court ruled that there was 'no award in the eye of the law', finding that the arbitral proceedings were illegal and without jurisdiction.

### B. The ICSID proceeding

In response to the alleged interference with the ICC arbitration by Bangladeshi courts, Saipem filed a second arbitration, this one under the rules of the International Centre for Settlement of Investment Disputes (ICSID). This new claim (for US\$ 12.5 million plus relief concerning the warranty bond) was brought pursuant to the bilateral investment treaty between Bangladesh and Italy (the Italo-Bangladeshi BIT),<sup>7</sup> with the respondent as the Republic of Bangladesh itself, rather than the State agency. Article 5 of the BIT provides that investments may not be expropriated (nor subject to measures equivalent to expropriation) without prompt, adequate and effective compensation.

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<sup>4</sup> *Saipem S.p.A. v. People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, 21 March 2007. The tribunal was composed of Professor Kaufmann-Kohler, Professor Christoph Schreuer and Sir Philip Otton.

<sup>5</sup> The eminent tribunal included Dr Werner Melis as chairman, and Professor Riccardo Luzzatto and Professor Ian Brownlie. The laws of Bangladesh were applicable to the merits of the dispute. English was the language of the arbitration.

<sup>6</sup> In May 2003, the tribunal found Petrobangla to have breached its obligations and awarded Saipem US\$ 6 million plus 110,000 plus interest and return of the bond.

<sup>7</sup> Agreement of 20 March 1990 between Government of the Republic of Italy and Government of the People's Republic of Bangladesh on the Promotion and Protection of Investments. The treaty entered into force on 20 September 1994.

Contending that immaterial rights can be expropriated, Saipem asserted that Bangladesh had expropriated not only its contract claims, but also an entitlement to arbitrate under the ICC Rules. According to Saipem, this was covered by the Italo-Bangladesh BIT, which in Article 1 extends its protection to any ‘right accruing by law or by contract’. In response, Bangladesh raised jurisdictional objections based on both the BIT itself and Article 25 of the ICSID Convention, which extends jurisdiction to ‘any legal dispute arising directly out of an investment’ between the host State and the foreign investor.

The ICSID tribunal accepted jurisdiction.<sup>8</sup> In so doing, the arbitrators had to address multiple questions related to the nature of investments and the type of fact patterns capable of constituting an expropriation.

Noting that the notion of investment in the Italo-Bangladeshi BIT includes ‘credit for sums of money’,<sup>9</sup> the tribunal construed those words to cover rights under an award ordering payment of amounts due to the prevailing party. In so doing, the tribunal focused on the rights arising out of the underlying contractual relationship. These rights were found to have been crystallized by the ICC award.<sup>10</sup> Consequently, the arbitrators did not need to make a final ruling on the argument that the arbitration agreement itself constituted a financial right covered by Article 1 of the BIT.<sup>11</sup>

Having determined that Saipem had made an investment as defined under the Italo-Bangladeshi BIT, the tribunal went on to find that the facts as alleged by the claimant were capable of constituting an expropriation under Article 5 of the BIT. The essence of the allegation was that an unlawful disruption and a *de facto* annulment of the ICC arbitration by Bangladeshi courts deprived Saipem of the amounts awarded in the ICC arbitration, thus amounting to an illegal expropriation.

Finally, the tribunal rejected the contention that the substance of Saipem’s claim constituted a private contract action rather than an investment treaty claim. Bangladesh had argued that the claim was nothing more than a contract action ‘dressed as a treaty claim’. In response, the tribunal noted that Saipem did not request relief under its agreement with Petrobangla, but rather claimed that the alleged breach of the New York Convention constituted a violation of the protection mandated for foreign investors under the investment treaty.<sup>12</sup>

The tribunal determined only that the alleged violation of the New York Convention could constitute a breach of the investment treaty. Whether the conduct of the Bangladeshi courts did in fact amount to a ‘denial of justice’ (thereby breaching treaty protections against improper expropriation) was left to the merits phase of the arbitration. Doubtless the award will serve as a springboard for future claims related to the New York Convention.

<sup>8</sup> Jurisdictional Award of 21 March 2007, ICSID Case. No. ARB/05/07.

<sup>9</sup> Italo-Bangladeshi BIT, Art. 1(1)(c).

<sup>10</sup> Jurisdictional Award of 21 March 2007 at paras. 125–127.

<sup>11</sup> *Ibid.* at para. 128.

<sup>12</sup> ‘[T]he essence of Saipem’s case is that the courts of Bangladesh acted in violation of the New York Convention . . .’ *Ibid.* at para. 141.

Not all State practices that disregard the Convention will be actionable, however. Some investment in the offending country must provide a jurisdictional underpinning for actions against the breaching State. Breach without remedy will likely continue in instances exemplified by certain American decisions that invoke notions of *forum non conveniens* and lack of ‘minimum contacts’ to justify failure to recognize arbitral awards. To these cases we now turn our attention.

### III. Jurisdiction and *forum non conveniens*

#### A. An American trilogy

In many countries, implementation of international conventions implicates an intricate interplay of the treaty text with constitutional mandates and federal statutes. This complexity presents itself crisply in three American federal appellate decisions: *Base Metal*,<sup>13</sup> *Glencore Grain*<sup>14</sup> and *Monégasque de Réassurances*,<sup>15</sup> which under one line of argument place the United States in breach of its obligations under the New York Convention.

In each instance, the court dismissed a petition to confirm a foreign arbitral award subject to the New York Convention. In the first two, the courts concluded that they lacked personal jurisdiction over the foreign respondent, and thus could not enforce the awards. The third case, *Monégasque de Réassurances*, decided that award confirmation had been sought in an unsuitable forum and thus had to be refused.

With respect to all of these cases, any investment treaty remedy for breach of the New York Convention (a matter to be explored below) appears conceptually far-fetched. Bilateral and multilateral investment treaties, as well as the ICSID Convention, presuppose an investment within the country whose responsibility has been invoked. Without some investment, the jurisdictional predicate for arbitration remains absent.

Unlike the *Saipem* case, no investment had been made in the United States by the prevailing party in the arbitrations which gave rise to the trilogy of above-cited cases. Indeed, the heart of these decisions lies in the court’s inability to find connections between the arbitration’s winner and the United States such as to justify (under American principles) consideration of a recognition request.

**13**

*Base Metal Trading, Ltd. v. OJSC 'Novokuznetsky Aluminium Factory'*, 283 F.3d 208 (4th Cir. 2002), declining to confirm an award made in Russia against a Russian manufacturer that was deemed to lack ‘minimum contacts’ with the forum. In *Base Metal* the respondent allegedly owned assets within the forum, while such was apparently not the case in the other two cases *Glencore* and *Monégasque de Réassurances*.

**14**

*Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 at 1122 and note 5 (9th Cir. 2002), upholding a district court decision refusing to recognize an award made against an Indian rice exporter deemed not to be present in or having assets in the district).

**15**

*Monégasque de Réassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 at 498–501 (2d Cir. 2002), declining on grounds of *forum non conveniens* to enforce an award made

in Moscow against the government of Ukraine and a Ukrainian corporation. The decision rested on American doctrines regarding when courts are suitable to hear a dispute, notwithstanding that it might otherwise have jurisdiction. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 at 248–49 (1981). The appropriateness of the court depends on convenience to the litigants as well as factors related to the public interest in proper administration of justice. Whether a court is inconvenient constitutes one element among many that must be balanced in determining that the forum is (or is not) an appropriate one to hear the case.

## B. Interplay of national law and the New York Convention

These controversial cases highlight the contours for interaction of the New York Convention and national law. All three decisions came as a surprise to an arbitration community, among which considerable scholarly comment has been generated.<sup>16</sup> Moreover, a report by the Association of the Bar of the City of New York suggests that a sound basis exists for enforcement of New York Convention awards solely on the basis of assets located within the forum.<sup>17</sup>

To understand what happened, one must recall that the US Constitution speaks of 'supreme law of the land' with respect to three (not one) sources of legal authority: the Constitution itself, federal statutes, and international treaties.<sup>18</sup> While the Constitution has long been deemed to trump other sources of law,<sup>19</sup> the interaction between treaties and statutes remains less clear.<sup>20</sup> Although not free from scholarly debate,<sup>21</sup> acts of Congress and treaties would normally remain on the same level. One might prevail over the other due to a 'later in time' rule or some indication of congressional intent, but not to any inherent value derived from status as either treaty or legislation. Conflict over application of treaties has been addressed in contexts as mundane as real estate taxation<sup>22</sup> and as emotionally charged as capital punishment.<sup>23</sup>

### 16

See e.g. W.W. Park & A. Yanos, 'Treaty Obligations and National Law' (2006) 58 *Hastings Law Review* 251; J.E. Neuhaus, 'Current Issues in the Enforcement of International Arbitration Awards' (2004) 36 *University of Miami Inter-American Law Review* 23; L.J. Silberman, 'International Arbitration: Comments from a Critic' (2002) 13 *The American Review of International Arbitration* 9, 16; R.J. Weintraub, 'Jurisdictional Problems in Enforcing Foreign Arbitral Awards', *The International Arbitration News* (Summer 2002) at 2; P. Ivanova, Note, 'Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention' (2003) 83 *Boston University Law Review* 899.

### 17

The International Commercial Disputes Committee of the Association of the Bar of the City of New York, 'Lack of Jurisdiction and Forum Non Conveniens As Defenses To The Enforcement Of Foreign Arbitral Awards' (Apr. 2005), reprinted (2006) 15 *The American Review of International Arbitration* 407 (hereinafter 'New York City Bar Report'). The Report suggests that the holding in *Glencore* is correct, but questions the reasoning and result in *Base Metal*. The Report also argues that an agreement to arbitrate in one New York Convention country is not sufficient to constitute consent to enforcement in other Convention States, and that *forum non conveniens* should not generally serve as a ground for dismissing an action to confirm or enforce a Convention award.

### 18

Article VI, Section 2 of the US Constitution reads as follows: 'The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land . . .'

### 19

*Reid v. Covert*, 354 U.S. 1 at 16–17 (1957); *Asakura v. City of Seattle*, 265 U.S. 332 at 341 (1924); *Geofroy v. Riggs*, 133 U.S. 258 at 267 (1890); *Mayor of New Orleans v. United States*, 35 U.S. 662 at 736–37 (1836); Restatement (Third) of the Foreign Relations Law of the United States § 115(3) (1987).

### 20

See generally *Missouri v. Holland*, 252 U.S. 416 at 435 (1920), upholding the Migratory Bird Treaty Act of 1918, which gave

effect to an earlier treaty between the United States and Great Britain providing for the protection of birds that traveled between the United States and Canada.

### 21

See V. Kesavan, 'The Three Tiers of Federal Law' (2006) 100 *Northwestern University Law Review* 1479 (arguing that statutes are superior to treaties irrespective of time, based on what that author called the Constitution's 'lexical priority' in Article VI, Section 2, which lists Constitution, statutes, and treaties in just that order).

### 22

See Foreign Investment in Real Property Tax Act, Pub. L. No. 96-499, § 1125 94 Stat. 2682 at 2690 (codified in scattered sections of 26 U.S.C.), which provides that no treaty shall exempt or reduce the tax otherwise imposed on gain by foreigners from disposition of American real estate. See generally D.F. Vagts, 'The United States and Its Treaties: Observance and Breach' (2001) 95 *American Journal of International Law* 313.

### 23

See *Breard v. Greene*, 523 U.S. 371 at 376 (1998), where a Paraguayan citizen sought to invalidate his murder conviction based on the State of Virginia's failure to advise him of a right to the assistance by the Paraguayan consul, as required in the 1963 Vienna Convention on Consular Affairs. The Supreme Court declined a petition for writ of certiorari, noting *inter alia* that obligations under the Vienna Convention had been preempted by statute. As this article goes to publication, the Supreme Court is considering similar questions that arose in *Medellin v. Texas* (cert. granted, 127 S.Ct. 2129, 2007), where a Mexican national was convicted of capital homicide for gang rape and murder of two teenage girls. Analogous claims by other Mexican nationals awaiting execution were heard by the International Court of Justice in *Avena and other Mexican Nationals (Mexico v. United States of America)*, 2004 I.C.J. No. 128, (2004) 43 *International Legal Materials* 581, which found that the United States breached Article 36 of the Vienna Convention on Consular Relations, a decision held non-binding by Texas courts.

According to rules of international law, neither a constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation.<sup>24</sup> Prevailing opinion holds that an act wrongful under the law of nations remains so even if a nation's internal law deems otherwise.<sup>25</sup> Observers are thus led to a closer examination of what the New York Convention has to say about award recognition.

## C. Construing the New York Convention

### 1. Rules of procedure where relied upon

The New York Convention mandates award recognition subject to a narrowly drafted litany of defences.<sup>26</sup> None of these includes either lack of 'minimum contacts' (the ground for non-recognition in *Base Metal* and *Glencore Grain*) or *forum non conveniens* (invoked in *Monégasque de Réassurances*).

The Convention does, however, provide in Article III for award recognition 'in accordance with the rules of procedure of the territory where the award is relied upon'. Until recently, most observers considered that this provision related to the *form* of enforcement, not the *conditions* for enforcement.<sup>27</sup> Contracting States certainly possess discretion with respect to minor ministerial matters, such as the amount of filing fees or rules about where enforcement motions must be brought. However, no clear support exists for the proposition that the 'procedure where relied upon' language was intended to serve as a backdoor escape from recognition of legitimate foreign awards.

To illustrate, determining where to seek award enforcement takes on a special dimension in countries with a federal system. In the United States, enforcement motions are normally brought in federal (not state) courts.<sup>28</sup> By contrast, in Switzerland such actions will be heard by the cantonal (not federal) judiciary.<sup>29</sup> The difference relates simply to enforcement modalities, not conditions that serve to bar recognition itself.

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#### 24

See e.g. Article 27 of the Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331 ('A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46.').

#### 25

Under Article III of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, '[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law'. *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/56/10 (2001), hereinafter 'ILC Report'; see also Restatement (Third) of the Foreign Relations Law of the United States § 111 cmt. a (1987) ('failure of the United States to carry out an obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law').

#### 26

These defences relate both to procedural fairness (invalid arbitration agreement, lack of opportunity to present one's case, arbitrator excess of jurisdiction, and irregular composition of the arbitral tribunal) and to the forum's public policy. Different considerations may obtain in respect to awards rendered in the United States, even when the New York Convention applies because the dispute implicates international commerce or involves foreign parties and is thus considered 'non domestic'. See *Yusuf Ahmed Alghanim &*

*Sons v. Toys 'R' Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). With respect to awards not covered by the New York Convention, other standards would apply. See e.g. *International Bechtel Co. v. Department of Civil Aviation of Dubai*, 360 F. Supp. 2d 136 at 137–38 (D.D.C. 2005), denying enforcement to an award rendered in Dubai, before the United Arab Emirates became a party to the New York Convention.

#### 27

See A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer, 1981), hereinafter 'Van den Berg', at 236–41.

#### 28

In addition, a respondent may remove an enforcement action from a state to a federal court. See 9 U.S.C. §§ 203–205.

#### 29

On the enforcement of a foreign award under Article 194 of the Swiss Private International Law Statute ('LDIP/IPRG'), see P.M. Patocchi & C. Jermini, 'Foreign Arbitral Awards' in S. Berti, ed., *International Arbitration in Switzerland* (2000) at 625–75. Foreign arbitral awards are enforced in Switzerland in the same way as foreign judgments in cantonal courts. By contrast, a motion to set aside an award in an international arbitration with its seat within Switzerland must be brought before the Federal Supreme Court in Lausanne pursuant to LDIP/IPRG, Art. 191.

Read in context, the ‘rules of procedure’ language in Article III of the New York Convention gives contracting States latitude in fashioning the practical mechanics of award enforcement. The provision indicates that the process for obtaining award enforcement or recognition is flexible, being determined by local procedures. This language relates to *how* recognition will be granted, not *whether* recognition will be granted at all.<sup>30</sup>

## 2. The approach in *Monégasque de Réassurances*

The decision in *Monégasque de Réassurances* took a different view, however, seizing upon the reference to ‘rules of procedure’ to justify invocation of *forum non conveniens*, and recognizing limitations only with respect to measures that discriminate against foreign awards when compared with domestic arbitral decisions.<sup>31</sup>

In taking this approach, the court included an extended discussion of the United States Supreme Court characterization of *forum non conveniens* as ‘procedural rather than substantive’, emphasizing that the doctrine is applied in the enforcement of domestic awards as well. The conclusion in *Monégasque* was that the Convention’s only limitation on procedural rules was ‘the requirement that the procedures applied in foreign cases would not be substantially more onerous than those applied in domestic cases’.<sup>32</sup>

## 3. Drafting history

In concluding that the New York Convention imposes no limitations other than non-discrimination on procedural rules at the enforcement forum, the court in *Monégasque de Réassurances* seems to have gone astray as a matter of both logic and history. Relying on the drafting history of the New York Convention, the court suggested that the non-discrimination language was proposed by Belgium, and supported by the United States, only after efforts to establish uniform standards had failed.<sup>33</sup>

History does not support the court’s conclusions. To the contrary, the debate on Article III confirms that the reference to ‘rules of procedure’ relates simply to formalities for an application to confirm or enforce, including fees and the pro forma structure of the request. There is no evidence that the language was intended to incorporate doctrines that permit or require courts to prune their dockets in normal commercial litigation.

As an initial matter, it is important to remember that the relevant language in Article III of the Convention originated not with the Belgian delegate,<sup>34</sup> or any other delegate, but

**30** To suggest an admittedly imperfect analogy, universities have procedures whereby admitted students must pay tuition before they begin their studies. Individuals failing to follow these procedures will not normally be registered. However, registration formalities are not intended to include a second set of entrance requirements. A student having already met standards for admission would be understandably perplexed to find, on arrival at the registrar’s office, that s/he was required to sit for a set of entrance exams. Likewise, the New York Convention gives no hint that a contracting State may create roadblocks to recognition of otherwise valid awards.

**31** *Monégasque de Réassurances v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2d Cir. 2002) at 496.

**32** *Ibid.* at 496.

**33** The chief source of the Second Circuit’s information seems to have been a law review article, L.V. Quigley, ‘Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards’ (1961) 70 *Yale Law Journal* 1049.

**34** Indeed, the comments of the Belgian delegate actually run counter to the argument that Article III of the draft Convention was concerned principally with making the award operative. ‘In reply to the French representative, he explained that the procedures which, under the Belgian proposal, would be identical with those for national awards included not only the modalities of enforcement but also those necessary to secure enforcement, such as the rules governing the presentation of documents.’ U.N. Doc. E/CONF.26/SR.10 at 7 (27 May 1958).

was instead taken verbatim from the predecessor to the New York Convention.<sup>35</sup> Article 1 of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards provided that ‘an arbitral award . . . shall be recognised as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon’.<sup>36</sup> In contrast, the Belgian proposal that the Second Circuit referred to would have resulted in a substantially different version of the New York Convention. Each country would have enforced foreign arbitral awards in the identical manner as for domestic awards.<sup>37</sup>

More significantly, the comments from delegates most closely involved with the adoption of the present Convention’s wording show an expectation at odds with the Second Circuit’s interpretation of that article. For example, the representative from the United Kingdom (author of the prohibition on fees more onerous than those applicable to domestic awards) explained that the purpose of his proposal was to ensure that a foreign award that met the conditions of the Convention should be ‘enforceable without unnecessary inconvenience’.<sup>38</sup> Similarly, the report of the Secretary General of the United Nations Economic and Social Council highlights that reference to ‘rules of procedure’ was not an attempt to incorporate by reference all of the arcane rules of procedure applicable in each jurisdiction in which the Convention would be applicable, but rather to refer to the basic method by which a party must file an application to have an arbitral award recognized or enforced.<sup>39</sup>

Thus, the Convention’s drafting history indicates that it was not meant to authorize courts to provide open-ended grounds on which to dismiss recognition of otherwise valid awards. To the contrary, the prevailing view supports the exclusivity of the reasons for refusal of recognition as set forth in Articles V and VI of the Convention, which relate to basic procedural fairness, substantive public policy and adjournment in deference to foreign court proceedings.<sup>40</sup> Although a Convention country can certainly set up ministerial conditions for award enforcement, such as making the application to the correct court or paying a reasonable filing fee, the Convention drafters did not expect the recognition forum to establish outright procedural bars to award confirmation.

## D. National practice

The practice of countries other than the United States provides little support for the acceptance of local procedural impediments to enforcement of New York Convention

<sup>35</sup> Van den Berg, *supra* note 27 at 234.

<sup>36</sup> 1927 Geneva Convention, Art. I.

<sup>37</sup> See U.N. Doc. E/CONF.26/SR.10 at 5, recording the following: ‘Mr. [H]erment (Belgium) said that the rules of procedure governing the two types of award should be not only comparable but identical. The articles should therefore state explicitly that once it had been established that a foreign award met the requirements of the Convention, the régime applicable to its enforcement, including the issue of the enforcement order, would be the one governing domestic awards.’ An improper spelling lists the delegate’s name as ‘Ferment’ on page 5, although later references (such as page 7) correctly indicate Mr Herment.

<sup>38</sup> *Ibid.* at 7 (comments of Mr Wortley).

<sup>39</sup> Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Note by the Secretary-General, U.N. Doc. E/CONF.26/2 (6 Mar. 1958) at ¶¶ 7–8.

<sup>40</sup> *Yusuf Ahmed Alghanim & Sons v. Toys ‘R’ Us, Inc.*, 126 F.3d 15 at 23 (2d Cir. 1997) (‘the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention’); Restatement (Third) of the Foreign Relations Law of the United States § 488 cmt. a (1987) (‘[t]he defenses to enforcement of a foreign arbitral award set forth in [Art. V of the Convention] are exclusive’).

awards. Except for claims against foreign sovereigns,<sup>41</sup> few non-American jurisdictions condition enforcement of Convention awards on a link with the transaction, the parties or their property.<sup>42</sup> Many Western legal systems exercise jurisdiction without regard to the type of minimum contacts required by the United States,<sup>43</sup> and international law generally prohibits invocation of a country's internal law to eviscerate its international agreement.<sup>44</sup>

## E. Public interests and proper parties

Unlike limits on personal jurisdiction, the doctrine of *forum non conveniens* does not rest on constitutional underpinnings,<sup>45</sup> but derives instead from a court's inherent power to manage its own docket.<sup>46</sup> Once described as 'a supervening venue provision' that comes into play when a trial court declines jurisdiction,<sup>47</sup> *forum non conveniens* implicates a multistage analysis. No level of the analysis implicates bright lines.<sup>48</sup> Determining whether to honor the plaintiff's choice of forum requires first a finding on whether an adequate alternative forum exists. If so, courts may proceed to balance what have been called 'the private and *public* interests' that bear on where the case should be adjudicated.<sup>49</sup> Consequently, courts do not dismiss on *forum non conveniens* grounds when no adequate alternative forum exists, or when a balancing of interests indicates that dismissal would not be appropriate.<sup>50</sup>

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Questions of sovereign immunity pose different concerns, since the objection of the respondent State relates to jurisdiction under the principle of *international* (not just local) law. For example, before Swiss courts will execute an award against the assets of a foreign sovereign, an 'internal connection' (*Binnenbeziehung*) must exist between Switzerland and either the parties or the transaction. See *Circulaire du Département fédéral de justice et police, Jurisprudence des autorités administratives de la Confédération* 224 (26 Nov. 1979). The principle was applied to one aspect of the LIAMCO saga. See *Socialist Libyan Arab Popular Jamarihiya v. Libyan American Oil Co.*, German Federal Court (*Bundesgerichtshof*), 19 June 1980, (1981) 20 *International Legal Materials* 151 at 159–60. See also G.R. Delaume, 'Economic Development and Sovereign Immunity' (1985) 79 *American Journal of International Law* 319 at 340.

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New York City Bar Report, at 6–7, suggests that several countries (including China and Japan) impose such restrictions. The author's own reading of the cited authorities, however, leads to a more nuanced conclusion. General principles of judicial jurisdiction and service of process do not necessarily control in situations governed by an international treaty. Moreover, the Report itself notes that the laws of many countries (including France, Germany, Italy and Sweden) enforce awards notwithstanding the absence of connection between the award debtor or his property and any particular location within the forum. *Ibid.* at 7, note 26. As a practical matter, of course, it is difficult to prove the negative. One is not likely to find court decisions stating 'we enforce this award even though it has nothing to do with our forum'.

### 43

See French *Code civil*, Art. 14 (jurisdiction based on the nationality of the plaintiff); German *Zivilprozessordnung* ('ZPO'), Art. 23 (jurisdiction on the basis of property alone); English Civil Procedure Rules, Part 6.20 (jurisdiction based on applicable substantive law). Compare the position in Switzerland, where the applicability of Swiss law requires courts to accept jurisdiction in the context of a forum selection clause. See Swiss LDIP/IPRG, Art. 5. See also ZPO, Art. 1062 (providing simply that when awards are made outside Germany, enforcement competence lies with the Berlin *Kammergericht* (Higher Regional Court) when the party

resisting enforcement has no residence or place of business in Germany).

### 44

See Restatement (Third) of the Foreign Relations Law of the United States, § 311(3) (1987). For a discussion of a related (but conceptually distinct) point, see J. Paulsson, 'May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?' (1986) 2 *Arbitration International* 90.

### 45

See generally E.L. Barrett, Jr., 'The Doctrine of Forum Non Conveniens' (1947) 35 *California Law Review* 380 at 386–89.

### 46

See *Monégasque de Réassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 at 498–501 (2d Cir. 2002).

### 47

See also *American Dredging Co. v. Miller*, 510 U.S. 443 at 453 (1994); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 at 241 (1981). For a recent discussion of the doctrine as a means to defend against lawsuits in federal courts, see D.W. Rivkin & S.M. Grosso, 'Forum Non Conveniens: A Doctrine on the Move' (2004) 5 *Business Law International* 1.

### 48

See *Gross v. British Broadcasting Corporation*, 386 F.3d 224 at 230 (2d Cir. 2004).

### 49

*Piper Aircraft Co.*, 454 U.S. at 246 (emphasis added).

### 50

In *Iragorri v. United Technologies Corp.*, the Second Circuit considered *en banc* the degree of deference that should be afforded to a plaintiff's choice of forum, when that forum is different from the one in which the plaintiff resides, 274 F.3d 65 at 71 (2d Cir. 2001). The court of appeals instructed the district courts to apply a 'sliding scale' of deference to that choice, explaining that US courts 'give deference to a plaintiff's choice of her home forum because it is presumed to be convenient', a presumption that is much less reasonable when the plaintiff is foreign. *Ibid.* at 71. Consequently, the greater the plaintiff's or the lawsuit's bona fide connection to the United States and to the forum of choice, and the more considerations of convenience favour conduct of the lawsuit in the United States, the more difficult will be dismissal for *forum non conveniens*.

Under a proper application of these principles, the instances will be few and far between when the doctrine of *forum non conveniens* justifies dismissal of a motion to confirm a New York Convention award. The breach of a treaty obligation is no light matter, and the United States has a vital public interest in following through with its international commitments. Treaties should normally outweigh the other interest factors (public and private) that militate in favor of dismissal.<sup>51</sup>

Rare as they may be, some instances will exist when courts may be justified in refusing, on *forum non conveniens* grounds, to recognize an award covered by the New York Convention. One example might be found in the need to determine what entities were properly subject to the arbitrators' jurisdiction—a problem that existed in the very facts that gave rise to *Monégasque de Réassurances*.<sup>52</sup> We remember that the court upheld dismissal of an action brought by a foreign reinsurer that had been subrogated to rights against a Ukrainian entity called Naftogaz, which was arguably an instrumentality of the Ukrainian government. On the face of the arbitration agreement, the State was not a party to the arbitration agreement.

The question of who is the proper party is not uncommon to international or domestic arbitration, and arises frequently in connection with actions against so-called non-signatories.<sup>53</sup> Courts must often determine whether arbitration is appropriate with respect to a person that did not agree to arbitrate. Parent-subsidiary relationships provide fertile ground for disagreements,<sup>54</sup> leading courts occasionally to extend the burdens and benefits of an arbitration clause. In such instances, courts must be rigorous in their investigation of the parties' real intentions on the existence or scope of arbitral authority,<sup>55</sup> resisting the temptation to apply vague verbal formulae independent of the commercial context.<sup>56</sup>

In *Monégasque de Réassurances*, the question arose whether Ukraine could be made liable on an award by reason of piercing the corporate veil between the government and

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For example, under this analysis, the Ninth Circuit's decision in *Melton v. Oy Nautor Ab* should not stand given that the respondent in that case had assets in the district and it was unreasonable to compel the petitioner to travel to Finland to get paid. No. 97-15395, 1998 WL 613798, at \*\*2-3 (9th Cir., 4 Sept. 1998).

**52**

311 F.3d 488 at 498-501 (2d Cir. 2002).

**53**

The term 'non-signatory' has long served as a useful shorthand reference to persons whose right or obligation to arbitrate may be problematic, even though the FAA provides for enforcement of an unsigned written provision to arbitrate, such as an exchange of telegrams, emails or sales forms. Lack of signature does not in itself, however, taint an arbitration clause under the FAA. When enforcement under the New York Convention is in question, the issue becomes more complex. Some agreements to arbitration must be signed, while others need not be. The nub of discord centers on punctuation, with the focus of attention on the comma preceding the phrase 'signed by the parties' in Article II of the Convention. Some courts interpret the signature requirement to apply only to the words 'an arbitration agreement' found just before the comma. Others apply the signature requirement to everything in the early part of the sentence, including reference to arbitral clauses in contracts. The answer may be significant where the Convention provides the only basis for federal courts to exercise jurisdiction. See *Kahn Lucas Lancaster v. Lark International Ltd*, 186 F.3d 210 at 218 (2d Cir. 1999) (finding that 'signed by the parties' applied to arbitral clauses encapsulated in broader contracts as well as separate arbitration agreements).

**54**

See *Ceska Sporitelna, a.s. v. Unisys Corp.*, No. 96-4152, 1996 U.S. Dist. LEXIS 15435, at \*12 (E.D. Pa. 10 Oct. 1996) (remarking that the general rule is 'that only signatories to a contract can be bound by an arbitration clause found within the contract'); *Thomson-CSF v. American Arbitration Association*, 64 F.3d 773 at 776 (2d Cir. 1995) (recognizing five exceptions to the general rule that arbitration agreements do not bind non-signatories: incorporation by reference, assumption, agency, piercing of corporate veil and estoppel).

**55**

See *Sphere Drake Insurance v. All American Insurance* 256 F.3d 587 at 589-91 (7th Cir. 2001).

**56**

For a problematic case in this connection, see e.g. *Contec Corp. v. Remote Solution Co. Ltd*, 398 F.3d 205 (2d Cir. 2005) (finding that it was for arbitrators, not courts, to decide whether a corporation that had not signed an arbitration clause could compel arbitration). The result in the case may be unobjectionable, since the non-signatory was the surviving entity from a merger involving a contracting party. Compare *JSC Surgutneftegaz v. Harvard College*, 2005 WL 1863676 (S.D.N.Y. 2005) involving investors' class action arbitration over dividend policy of a Russian company whose shares were evidenced by American Depository Receipts held in New York. Here the contest was not about who had agreed to arbitrate, but rather the scope of an arbitration clause that had clearly been signed by both sides.

a State-owned corporation.<sup>57</sup> The district court felt this issue was better decided by the Ukrainian courts than those in New York and dismissed the request to confirm the award.<sup>58</sup>

The appellate court agreed.<sup>59</sup> Dismissal of the confirmation motion was held justifiable not only because the Ukrainian courts were deemed to provide an adequate forum for resolution of the corporate veil question, but also because Ukraine had a more significant interest than the United States in the award enforcement action.<sup>60</sup>

One might be puzzled that the appellate court decided to show such timidity in determining whether one entity should be liable for the debts of another, or agreed implicitly to be bound by an arbitration agreement.<sup>61</sup> Indeed, the court took a quite different approach three years later in *Sarbank Group v. Oracle Corp.*,<sup>62</sup> deciding that a parent corporation, Oracle Corporation, would *not* answer for the obligations of its subsidiary, Oracle Systems, pursuant to an arbitration clause signed only by the latter.<sup>63</sup> In *Sarbank*, a contract performed in Egypt had been interpreted under Egyptian law by an arbitral tribunal sitting in Cairo, finding that the parent was bound by the signature of its wholly-owned subsidiary.<sup>64</sup> Citing what it called ‘the customary expectations of experienced business persons’, the court vacated a lower court decision that had recognized the Egyptian award.<sup>65</sup>

A year earlier, in *Compagnie Noga d’Importation et d’Exportation S.A. v. Russian Federation*, the Second Circuit had also agreed to confront an issue of foreign law in deciding whether to confirm a foreign award against a sovereign State.<sup>66</sup> The Russian Federation opposed confirmation of an award rendered in Sweden on the ground that the proper party to these proceedings was the ‘Government of Russia’, a political organ of the Russian state.<sup>67</sup> Overturning a decision of the Southern District, the court of appeals concluded that the Russian Federation and the Government of Russia were the same party.<sup>68</sup>

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*Monégasque de Réassurances v. NAK Naftogaz of Ukraine*, 311 F.3d 488 at 492 (2d Cir. 2002).

**58**

*Ibid.* at 493.

**59**

*Ibid.* at 500–501.

**60**

*Ibid.* at 498–501.

**61**

Not all State agency cases necessarily turn on *forum non conveniens* arguments. See *Frontera Resources Azerbaijan Corp. v. State Oil Company of Azerbaijan Republic (SOCOR)*, 479 F. Supp. 2d 376 at 384–385 (S.D.N.Y. 2007), dismissing a petition to enforce an arbitral award after finding, *inter alia*, that the parties’ briefs failed to describe with sufficient detail the relationship between a State and a State-owned company to determine whether the company was an ‘agent of the State’. The court also held that the company did not have ‘minimum contacts’ with the United States to justify enforcement of an arbitration award rendered in Sweden.

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404 F.3d 657 (2d Cir. 2005).

**63**

*Ibid.* at 661. In *Sarbank*, of course, the parent and subsidiary were both incorporated in the United States. The principle announced by the court, however, would seem to apply equally to foreign and American entities. The case has been subject to criticism on the basis that the court looked to Article V(2)(a) of the New York Convention, related to ‘subject matter arbitrability’, rather than excess of authority under

Article V(1) of the Convention. See B.H. Garfinkel & D. Herlihy, ‘Looking for Law in All the Wrong Places: The Second Circuit’s Decision in *Sarbank Group v. Oracle Corporation*’, *Mealey’s International Arbitration Report*, Vol. 20, Iss. 6 (6/05) 18. Compare *Bridas S.A.I.P.C. v. Government of Turkmenistan*, 447 F.3d 411 at 420 (5th Cir. 2006) (government manipulation of oil company made it the State’s *alter ego*).

**64**

*Sarbank*, 404 F.3d at 658.

**65**

*Ibid.* at 662 (remanding the case to the district court to find whether, as a matter of fact, the parent by its actions or inactions had given its subsidiary apparent or actual authority to consent to arbitration, which such determination to be made under ‘American contract law or the law of agency’).

**66**

361 F.3d 677, 685 (2d Cir. 2004).

**67**

*Ibid.* at 678.

**68**

*Ibid.* at 690.

While not free from doubt, *Monégasque de Réassurances* may well have been correctly decided on the narrow facts of the case.<sup>69</sup> In essence, it was less than self-evident that the proper party was before the court. Determination of this matter raised complex issues of Ukrainian public and private law that had to be resolved before consideration of award recognition. Ukraine seemed the best place to resolve the issue.

The aspect of *Monégasque de Réassurances* that has concerned some arbitration lawyers lies not so much in the case itself, but the danger that other courts might misapply its problematic dictum concerning Article III of the New York Convention. An unduly broad scope for ‘rules of procedure’ would create a risk of excessive disregard of awards.<sup>70</sup> Like many cases that are rightly decided on their facts, *Monegasque* has announced principles that must be handled with great caution.

## F. Consent to jurisdiction clauses

Pragmatic reactions can be expected to the risk that the recognition of awards becomes contingent on the loser’s ‘minimum contacts’ with the United States.<sup>71</sup> One response might be the routine inclusion of consent to jurisdiction clauses in international arbitration agreements.<sup>72</sup> As the market reacts to the fact that the United States is not that arbitration-friendly, an evolution in arbitration clauses can be expected to include language making clear that the parties, at least *ex ante*, wish to eliminate the surprise obstacles resulting from uncertain fact patterns.<sup>73</sup>

The direction of such clauses could take different routes. It might be that some clauses explicitly provide for awards to be recognized in any court of a contracting State to the New York Convention. These clauses would expressly waive any objection to the competence of such courts, including without limitation defences based on lack of personal jurisdiction or the absence of property in the recognition forum. The drafters might go on to provide that neither side will, on the basis of *forum non conveniens* or similar notions, seek dismissal of a motion for award confirmation. Simpler clauses might state that both parties consent to the personal jurisdiction of any court where award recognition may be sought.

**69** Compare New York City Bar Report at 22–23 (lamenting the court’s failure to ‘limit its dismissal to the enforcement action against Ukraine’ rather than confirming dismissal of the enforcement in its entirety, including the claim against the award debtor); C.B. Lamm & F. Spoorenberg, ‘The Enforcement of Foreign Arbitral Awards Under the New York Convention, Recent Developments’ (Paper presented to ICC Conference on International Arbitration, New Orleans, 5 Nov. 2001) <[www.sccinstitute.com/\\_upload/shared\\_files/artikelarkiv/lamm\\_spoorenberg.pdf](http://www.sccinstitute.com/_upload/shared_files/artikelarkiv/lamm_spoorenberg.pdf)> (‘Should this U.S. Court of District’s decision be echoed in the future courts’ practice, one could fear that the objection of *forum non conveniens* may be extensively addressed by litigants.’).

**70** *Ibid.* at 495.

**71** By contrast, problems raised by *forum non conveniens* (as evidenced in *Monégasque de Réassurances*) remain less amenable to contractual remedy, given that public interests as well as private affect a court’s determinations on the appropriateness of the forum.

**72** For cases evidencing a long-standing benevolent attitude toward judicial jurisdiction clauses, see *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 at 16 (1972) and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 at 596 (1991).

**73** The New York City Bar Report, at 4, notes: ‘[arbitration clauses] provide that the parties consent to recognition and enforcement of any resulting award in any jurisdiction and waive any defense to recognition or enforcement based upon lack of jurisdiction over their person or property or based upon *forum non conveniens*’. One can only speculate whether such clauses might one day become as commonplace as ‘consent to judgment’ clauses in domestic American arbitration. See FAA § 9, providing that in domestic arbitration the parties must ‘have agreed that a judgment of the court shall be entered upon the award’ and must also specify the court for entry of judgment. By contrast, FAA § 203 makes such stipulations unnecessary for most international contracts.

#### IV. Whence and whither

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Assuming damages can be proven, breach of obligations under the New York Convention may in some instances give rise to an actionable claim under a bilateral investment treaty. As in other areas of the law, much will depend on the factual configuration of the particular case.

The recent decision in *Saipem v. Bangladesh* illustrates how disruption of an ICC arbitration, allegedly in breach of a New York Convention obligation, can also implicate a bilateral investment treaty that gives direct rights to the prevailing party. By contrast, much judicial failure to respect the Convention will likely remain without practical sanction. Such seems to be the case with respect to the American decisions that rely on parochial notions of jurisdiction and discretion as grounds for non-recognition of foreign awards.

Only time will tell whether the international legal order can evolve to accord new mechanisms to promote respect for the New York Convention. As Rudyard Kipling (and others) might have written, that is a story for another day.

