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With Alexander Yanos

## Treaty Obligations and National Law: Emerging Conflicts in International Arbitration

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*Pacta sunt servanda*<sup>1</sup>

### Introduction

In determining the effect of treaties, the adage *pacta sunt servanda* (“agreements are to be kept”)<sup>2</sup> remains a foundation of international law.<sup>3</sup> By contrast, when American courts consider international conventions, the principle barely rises to the rank of analytic starting point.

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1. Taking its source from Roman and canon law, this principle forms the basis for Article 26 of the Vienna Convention on the Law of Treaties, which states “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” May 23, 1969, 1155 U.N.T.S. 331. Formulated as *Pacta quantumcunque nuda servanda sunt* (“Pacts, however naked, must be kept”) the adage appears in the canon law codification of the 12th century Pope Gregory IX. Decretals of Gregory IX (1234) 1.35.1.2.

2. The essence of the concept appears in Justinian’s Code: *sancimus nemini licere adversus pacta sua venire et contrahentem decipere* (“we shall not allow anyone to contravene his agreements and thereby disappoint (deceive) his contractor”). Code Just. 2.3.29pr (Justinian 531). In the case of a person who agreed not to raise certain defenses, it was said that a mere pact (without special form) could create estoppel even without justifying a claim. Medieval canon lawyers abandoned the Roman requirements of form, to hold all agreements binding unless illegal or immoral. See generally James Gordley, *The Philosophical Origins of Modern Contract Doctrine* (1991); *The Enforceability of Promises in European Contract Law* (James Gordley ed., 2001). The common law, of course, disagreed, and insisted on either consideration or the formality of a deed.

3. See, e.g., Ian Brownlie, *Principles of Public International Law* 591–92 (6th ed. 2003). The corollary, of course, is that treaties are binding “so long as things stand as they are” (the so-called *clausula rebus sic stantibus*). See generally J.L. Brierly, *The Law of Nations* 317–45 (Sir Humphrey Waldock ed., 6th ed. 1963); F.A. Mann, *Studies in International Law* 327–59 (1973).

In the United States, the application and interpretation of international treaty obligations implicate an intricate interplay with Constitutional mandates and federal statutes.<sup>4</sup> As a matter of domestic law, the Constitution trumps treaties.<sup>5</sup> However, the same may not be true of other sources of law. Although not free from scholarly debate,<sup>6</sup> acts of Congress remain on a par with treaties, prevailing over inconsistent treaty provisions only pursuant to either (i) the “later in time” rule<sup>7</sup> or (ii) an explicit congressional pronouncement.<sup>8</sup>

According to rules of international law, however, neither a Constitutional mandate nor the enactment of a statute provides an excuse for a treaty violation.<sup>9</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>10</sup>

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4. See, e.g., *Missouri v. Holland*, 252 U.S. 416, 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). See generally Ian Brownlie, *Principles of Public International Law* 31–53 (6th ed. 2003); Louis Henkin et al., *International Law: Cases and Materials* 149, 153 (3rd ed. 1993); L. Oppenheim, *Oppenheim’s International Law* 85 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1996).

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

6. See Vasan Kesavan, *The Three Tiers of Federal Law*, 100 Nw. U. L. Rev. 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). The precise Constitutional text 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 . . .” U.S. Const. art. VI, § 2

7. *Breard v. Greene*, 523 U.S. 371, 376 (1998) (per curiam) (citing *Reid*, 354 U.S. at 18, *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)). In *Breard*, a Paraguayan citizen sought to invalidate his murder conviction based on the State of Virginia’s failure to advise him of his right to the assistance of the Paraguayan consul, as required in the Vienna Convention on Consular Affairs, Apr. 24, 1963, 21 U.S.T. 77. *Breard*, 523 U.S. at 373. The Supreme Court declined a petition for writ of certiorari, noting, among other things, that the obligations of the United States under the Vienna Convention had been preempted by statute. *Id.* at 376. For a superb summary of both the state of the law and the interpretative uncertainties, see generally Detlev F. Vagts, *The United States and Its Treaties: Observance and Breach*, 95 Am. J. Int’l L. 313 (2001).

8. For an example of “treaty override,” see Foreign Investment in Real Property Tax Act, Pub. L. No. 96-499, § 1125 94 Stat. 2682, 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 I.R.C. §§ 897, 894(a), 7852(d), 871, 882 (2006). On tax treaty interpretation, see Richard L. Doernberg, *Overriding Tax Treaties: The U.S. Perspective*, 9 Emory Int’l L. Rev. 71 (1995); Richard L. Doernberg, *Legislative Overrides of Income Tax Treaties: The Branch Profits Tax and Congressional Arrogation of Authority*, 42 Tax Law. 173 (1989); David Sachs, *Is the 19th Century Doctrine of Treaty Override Good Law for Modern Day Tax Treaties?*, 47 Tax Law. 867 (1994); Robert Thornton Smith, *Tax Treaty Interpretation by the Judiciary*, 49 Tax Law. 845, 848–49 (1996).

9. See, e.g., Vienna Convention on the Law of Treaties art. 27, May 23, 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.”).

10. 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) (“[F]ailure of the United States to carry out an

Moreover, it remains settled law in the United States that courts should not construe a statute to violate international law if any other plausible construction presents itself.<sup>11</sup> Thus, American judges remain under a duty to avoid, if at all possible, placing the United States in breach of its international obligations.<sup>12</sup>

Three controversial court of appeals decisions on arbitration highlight the contours of these conflicts.<sup>13</sup> The cases also serve as a springboard from which to explore several vexing questions related to private dispute resolution. In each instance, the court dismissed a petition to confirm a foreign arbitral award subject to the United Nations Arbitration Convention, commonly known as the New York Convention.<sup>14</sup> The Convention obligates the United States and 136 other signatory countries to enforce foreign arbitration awards, subject to a limited litany of defenses related principally to procedural fairness.<sup>15</sup>

In two of these decisions, *Base Metal*<sup>16</sup> and *Glencore Grain*,<sup>17</sup> the courts

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obligation [of international law] on the ground of its unconstitutionality will not relieve the United States of responsibility under international law.”)

11. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). In language that is now *locus classicus*, Chief Justice Marshall wrote that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Id.* The decision, well-known for this dictum, also rewards readers with a discussion of economic rights. On moving to the Caribbean island of St. Thomas, a Connecticut merchant named Jared Shattuck had become a subject of the Danish crown. *Id.* at 65–66. During undeclared hostilities with the French (1798–1800), Congress passed Acts of Non-Intercourse providing for seizure of American ships trading with France. *Id.* at 64–65. After an armed American ship captured Shattuck’s vessel en route to a French port, the Supreme Court found that the United States had no right under international law to seize a neutral vessel, absent a formal declaration of war, which did not then exist. *Id.* at 125. Thus the Acts of Non-Intercourse could not be interpreted to justify confiscation of Shattuck’s vessel. *Id.*

12. *Id.*; see also *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 178 n.35 (1993) (affirming application of *Charming Betsy* canon to all matters of federal statutory construction); *South Dakota v. Bourland*, 508 U.S. 679, 697 n.16 (1993) (applying canon to administrative regulations).

13. See *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminium Factory,”* 283 F.3d 208 (4th Cir. 2002); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122 & n.5 (9th Cir. 2002); *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 498–501 (2d Cir. 2002).

14. Convention on Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 3 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]. Twenty-four countries originally signed the Convention, and the rest have joined by accession or succession. Ratification by the most recent adherents, Afghanistan, Liberia, and Pakistan, brings to 137 the total number of countries bound by the treaty. The United States ratified the *New York Convention* subject to two limitations: (i) geographical reciprocity (convention to be applied only to awards rendered in the territory of other contracting States); and (ii) applicability to commercial disputes only. Daniel A. Losk, Note, *Section 1782(a) After Intel, Reconciling Policy Considerations and a Proposed Framework to Extend Judicial Assistance to International Arbitral Tribunals*, 27 *Cardozo L. Rev.* 1035, 1053 n. 117 (2005).

15. See *New York Convention*, *supra* note 14, art. 1(3) (“When . . . acceding to this Convention . . . any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.”). Many countries, including the United States, have adopted the Convention subject to a reciprocity reservation making it applicable only to awards made in the territory of another Convention country. Losk, *supra* note 15, at 1053 n.117.

16. *Base Metal*, 283 F.3d at 215–16, (declining to confirm an award made in Russia against a Russian

concluded that they lacked personal jurisdiction over the foreign respondent, and thus could not enforce the awards. The third case, *Monegasque de Reassurances*,<sup>18</sup> decided that award confirmation had been sought in an unsuitable forum, and thus must be refused.<sup>19</sup> In *Base Metal*, the respondent allegedly owned assets within the forum, while such was apparently not the case in *Glencore Grain* or *Monegasques de Reassurances*.

The decisions came as a surprise to an arbitration community that had been accustomed to the judicial emphasis on the pro-enforcement policy created by the Federal Arbitration Act (FAA) and the New York Convention. Under the tutelage of a line of United States Supreme Court cases,<sup>20</sup> American courts have found arbitration agreements and awards to trump vital public interests related to antitrust,<sup>21</sup> securities regulation,<sup>22</sup> maritime transport,<sup>23</sup> RICO,<sup>24</sup> the Bankruptcy Code,<sup>25</sup> consumer protection,<sup>26</sup> and even foreign policy.<sup>27</sup>

The reasoning of these cases has been subject to considerable scholarly comment.<sup>28</sup> Moreover, a report by the Association of the Bar of the City of

manufacturer that was deemed to lack “minimum contacts” with the forum).

17. *Glencore Grain*, 284 F.3d at 1128 (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).

18. *Monegasque de Reassurances*, 311 F.3d at 498–501 (declining on grounds of forum non conveniens to enforce an award made in Moscow against the government of Ukraine and a Ukrainian corporation).

19. The decision in *Monegasque* rested on notions of forum non conveniens, which relate to whether a court is suitable or appropriate to hear a dispute, notwithstanding that it might otherwise have jurisdiction. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 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.

20. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (stating that the United States has an “emphatic public policy” in favor of enforcement, which “applies with special force in the field of international commerce”); *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974) (“The goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”).

21. See *Mitsubishi Motors*, 473 U.S. at 631.

22. See *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 487 (1989); *Scherk*, 417 U.S. at 520 n.15.

23. On arbitration under the Carriage of Goods by Sea Act of 1971, see generally *Vimar v. M/V Sky Reefer*, 515 U.S. 528 (1995).

24. On the arbitrability of claims under the Racketeer Influenced & Corrupt Practices Act, see *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) (holding a RICO claim arbitrable under the Arbitration Act).

25. See, e.g., *Societe Nationale Algerienne pour la Recherche, la Production, le Transport, la Transformation et la Commercialisation des Hydrocarbures v. Distrigas Corp.*, 80 B.R. 606, 613 (D. Mass. 1987).

26. See, e.g., *Doctor’s Associates v. Casarotto*, 517 U.S. 681 (1996); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995); *Southland v. Keating*, 465 U.S. 1 (1984); *Sec. Indus. Assoc. v. Connolly*, 883 F.2d 1114 (1st Cir. 1989).

27. See, e.g., *Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974).

28. See, e.g., Harry Arkin, *Problems of enforcement of foreign arbitral awards in the United States*, 11

New York suggests that a sound basis exists for enforcement of New York Convention awards solely on the basis of assets within the forum.<sup>29</sup>

One line of argument, supported by this Article, suggests that the cases place the United States in breach of its treaty obligations under the New York Convention, which limits non-recognition of foreign awards<sup>30</sup> to a narrowly-drafted litany of defenses.<sup>31</sup> The other principal concern is that the decisions incorrectly applied United States law concerning constitutionally sufficient contacts with the respondent.<sup>32</sup>

Critical to the first issue (whether the decisions put the United States in breach of its treaty obligations) is construction of the Convention itself, which provides for award recognition “in accordance with the rules of procedure of the territory where the award is relied upon.”<sup>33</sup> Until recently, most observers considered that this provision related to the *form* of enforcement,<sup>34</sup> not the *conditions* for enforcement. 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 support exists for the proposition that the “procedure where relied upon” language was

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IBA Arb. Committee Newsl. 44 (2006); D. Brian King & Aaron J. Benjamin, *Enforcing Foreign Arbitral Awards Under the New York Convention: Jurisdiction Over a Party or its Property as a Prerequisite in the United States*, Intl. Arb. Rep., Apr. 2003, at 20, 20; Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. Miami Inter-Am. L. Rev. 23 (2004); William W. Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 Vand. J. Transnat'l L. 1241, 1264 n.99 (2003); Dmitri Santoro, *Forum Non Conveniens: A Valid Defense Under The New York Convention?* 21 A.S.A. Bulletin 713 (2003); Linda J. Silberman, *International Arbitration: Comments from a Critic*, 13 Am. Rev. Int'l Arb. 9, 16 (2002); S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. Int'l Arb. 479 (2004); Russell J. Weintraub, *Jurisdictional Problems in Enforcing Foreign Arbitral Awards*, Int'l Arb. News, Summer 2002, at 2; Pelagia Ivanova, Note, *Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U. L. Rev. 899 (2003).

29. 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), <http://www.nycbar.org/pdf/report/ForeignArbitral.pdf>. [hereinafter New York City Bar Report]. The Report believes that the holding in *Glencore* is correct, but questions the reasoning and result in *Base Metal*. *Id.* Other aspects of the Report include the suggestion 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 be available as a defense in an action against a non-party to the arbitration.

30. 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. See *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997). The United States has opted to apply the New York Convention not only to awards rendered abroad, but also to awards made in the United States but considered “non domestic” because of some relevant international connection.

31. See generally Federal Arbitration Act, 9 U.S.C. § 207 (2006) (“The 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 said Convention.”). These defenses 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.

32. See discussion *infra* Part II.A.3, concerning footnote 36 of *Shaffer v. Heitner*.

33. New York Convention, *supra* note 14, art. III.

34. See Albert Jan van den Berg, *The New York Arbitration Convention of 1958* 236–41 (1981).

intended to serve as a backdoor escape from recognition of legitimate foreign awards.

To illustrate, in the United States an action to enforce a Convention award may be brought in a federal district court by the claimant, or may be removed by the defendant from state to federal court.<sup>35</sup> This is clearly a matter within the province of local (i.e., American) procedure, not subject to any supranational treaty norm. Neither claimant nor respondent can complain that it would rather have the case heard in a state court.

Other Convention countries, of course, are free to create their own rules designating who shall hear enforcement actions. The fact that in Switzerland a similar action might be heard before a cantonal tribunal (the equivalent of an American state court) is irrelevant. The rule relates simply to enforcement modalities, not conditions that serve to bar recognition itself.

Read in context, the “rules of procedure” language in Convention Article III 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, to be determined by the local procedures.

This language relates to *how* recognition will be granted, not whether recognition will be granted at all. To suggest an admittedly imperfect analogy, most universities have procedures whereby admitted students must register and pay tuition before they begin their studies. Individuals failing to follow these procedures will not normally receive instruction. 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 she was required to sit for a set of entrance exams.

The treaty text gives no hint of a suggestion that a contracting state has the right to create roadblocks to award recognition. In consequence, therefore, courts should be extremely reticent in establishing procedural hurdles to award confirmation.<sup>36</sup>

In addition to suggesting that these cases may put the United States in breach of its treaty obligations, this Article questions whether *Base Metal* or *Glencore Grain* properly assessed the constitutional requirements of due process within the context of award confirmation. The United States Supreme Court has distinguished clearly between the jurisdictional predicates for a court purporting to decide the merits of a controversy, and those for a court asked to enforce a judgment already rendered in a forum of competent jurisdiction.<sup>37</sup>

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35. 9 U.S.C. §§ 203–05.

36. With respect to awards not covered by the New York Convention, other standards would apply. *See, e.g., Int’l Bechtel Co. v. Dep’t of Civil Aviation of Dubai*, 360 F. Supp. 2d 136, 137–38 (D.D.C. 2005) (denying enforcement to an award rendered in Dubai, which is not a party to the New York Convention).

37. *See* discussion *infra* Part II.A.3, of *Shaffer v. Heitner*.

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and evenhandedness compels a robust respect for American treaty commitments. As a general matter, this means that the process by which the Convention is implemented must err on the side of facilitating, rather than impeding, award recognition.

## I. The New York Convention

### A. Award Enforcement

#### 1. *Convention Overview*

Beyond cavil, the New York Convention is one of the most successful commercial treaties in history.<sup>38</sup> The treaty creates what might be described as a form of “full faith and credit” obligation toward foreign arbitral awards. However, unlike the constitutional duty toward sister-state judgments, a court’s duty to recognize foreign awards is subject to a defined set of expressly enumerated defenses to award recognition.<sup>39</sup>

Moreover, Convention obligations do more than merely signal national acceptance of a general norm.<sup>40</sup> Rather, its provisions create rights to be invoked by private beneficiaries of arbitration clauses, and are routinely enforced by national courts.

Intended to make arbitration awards transportable from one country to another, the New York Convention was conceived more than a half century ago in a report issued by the International Chamber of Commerce (ICC),<sup>41</sup> underscoring the commercial community’s need for a process streamlining award enforcement by shifting key burdens of proof from the party seeking enforcement to the party resisting recognition.<sup>42</sup> Under the Convention as adopted, an award rendered in Boston is enforceable in Paris or London,

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38. New York Convention, *supra* note 14. Other important international arbitration treaties include the 1965 Washington Convention (Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 158) and the 1975 Panama Convention (Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 248).

39. See New York Convention, *supra* note 14, art. V.

40. For a discussion of treaties that possess a merely “expressive” function (signaling a position rather than applying to determine outcomes), see Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 Yale L.J. 935 (2002). By contrast, the New York Convention creates substantive rights analogous to those that reduce fiscal obligations for beneficiaries of income tax treaties.

41. International Chamber of Commerce, *Enforcement of International Arbitral Awards: Report and Preliminary Draft Convention*, ICC Brochure No. 174 (1953), *reprinted in* U.N. Doc. E/C.2/373 and in 9 ICC Bull. 32 (May 1998).

42. The principal objective at that time was to liberate foreign arbitral awards from burdensome “double *exequatur*” enforcement procedures that had required judicial recognition orders in both the country where the award was made and the enforcement forum. See Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301 [hereinafter 1927 Geneva Convention], which applied to awards made in pursuance to an agreement covered by the 1923 Geneva Protocol on Arbitration Clauses, 27 L.N.T.S. 157. The party relying on the award had to provide documentary evidence that the award “not be considered . . . open to *opposition*, *appel* or *pourvoi en cassation*” and that there exist no pending proceedings for the purpose of contesting the validity of the award. See 1927 Geneva Convention art. 4(2), with cross-reference to the requirements of Convention art. 1(d).

regardless of whether it has been confirmed by a court in Massachusetts.

When a dispute is subject to a written arbitration agreement, the New York Convention requires courts to refer parties to arbitration and to recognize the resulting foreign award.<sup>43</sup> Recognition or enforcement may be refused only for a restricted number of clearly defined defenses, related to procedural fairness and public policy.<sup>44</sup>

Divided into two groups, these protections against abusive arbitration allow courts to avoid lending their power to support proceedings that lack integrity or awards inimical to basic public interests. The first set of defenses, which must be proved by the party resisting the award, includes matters such as an invalid arbitration agreement, lack of opportunity to present one's case, arbitrator excess of jurisdiction, and irregular composition of the arbitral tribunal.<sup>45</sup> The second set of defenses allows a court, on its own motion, to refuse to enforce an award whose subject matter is not arbitrable or whose substance violates the forum's public policy (*ordre public*),<sup>46</sup> which the United States has construed narrowly to include only our "most basic notions of morality and justice."<sup>47</sup> While the first set of Convention defenses are intended to safeguard the parties against private injustice, the second set serves as an explicit catchall for the enforcement of a country's own vital interests.

The Convention's cornerstone lies in Article III, which provides that "[e]ach contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."<sup>48</sup> This language has been understood as generating what is sometimes called "a pro-enforcement bias" for arbitration awards.<sup>49</sup>

Geography is the principal trigger for application of the Convention, which covers primarily foreign arbitral awards.<sup>50</sup> For example, an award rendered in Boston would be covered by the Convention when presented for enforcement against assets in Zürich, Paris, or London, but not when recognition is sought before courts in Atlanta or Los Angeles. Inability to meet

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43. Article II of the New York Convention requires recognition of the agreement to arbitrate, in the form of a stay of court litigation, and Article III calls for award enforcement. New York Convention, *supra* note 14, arts. II, III.

44. *Id.* art. V.

45. *Id.* art. V(1).

46. *Id.* art. V(2).

47. *Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974).

48. Article III also provides a non-discrimination provision, to the effect that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." New York Convention, *supra* note 14, art. III.

49. *See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1120 (9th Cir. 2002).

50. The first sentence of Convention Article I(1) refers to awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." New York Convention, *supra* note 14, art. I.



the geographical test, however, does not mean the award creditor is entirely out of luck. The Convention will also apply to “awards not considered as domestic,” a subtle and multi-faceted notion.<sup>51</sup> Thus, a Boston award might be considered by a United States court as “not domestic” if the factual configuration of the case contained foreign parties or other significant cross-border elements.<sup>52</sup>

## 2. *Taxonomy: Recognition Without Enforcement*

At the outset, a critical distinction must be made between an award’s enforcement and its recognition. Enforcement would normally be sought by the winning claimant, looking to attach the respondent’s assets. By contrast, a winning respondent would ask for award recognition in order to obtain res judicata effect against competing litigation brought by the claimant in disregard of the award.

In an international context, a prevailing claimant might also seek a judgment recognizing the arbitrator’s decision, even absent the identification of assets in the forum belonging to the respondent at that time. The FAA provides a limited period for award confirmation. Thus, any delay might prevent a later attempt to seize property.<sup>53</sup> In more than one case, the victor in an arbitration has found assets justifying jurisdiction, but too late. Enforcement was refused because too many years had elapsed between the arbitrator’s decision and the motion to enforce.<sup>54</sup>

This is particularly important in an international context, where a debtor

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51. *Id.*

52. The concept of a non-domestic award has been given a wide scope, even in disputes entirely between U.S. corporations. *See Lander Co. v. MMP Invs.*, 107 F.3d 476, 482 (7th Cir. 1997) (relating to an ICC arbitration in New York arising from contract between two U.S. businesses to distribute shampoo products in Poland). *Lander* extended the principle endorsed earlier in *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928, 932–34 (2d Cir. 1983) (involving an award in New York between two foreign parties). For an unusual approach to Convention coverage, see *Cavalier Construction Co. v. Bay Hotel & Resort, Ltd.*, No. 97-3833, 1998 WL 961281 (S.D. Fla. July 13, 1998). Offshore companies contracted for construction of a hotel in Turks & Caicos Islands, stipulating that disputes would be arbitrated in Miami. *Id.* at \*1. The court refused to apply the Convention because it deemed a Miami award not to be made “in the territory of *another* signatory to the Convention.” *Id.* at \*2 (emphasis added). *See also* *EnSCO Offshore Co. v. Titan Marine LLC*, 370 F. Supp. 2d 594, 601 (S.D. Tex. 2005) (refusing to apply the Convention to an agreement providing for arbitration in London (under the rules of Lloyd’s Salvage Arbitrators) when both parties were American). Although the contract was concluded in connection with salvage in offshore waters (about ninety miles off the coast of Louisiana), the court in *EnSCO* determined that the parties’ contract had no “reasonable connection between the parties’ commercial relationship and a foreign state that is independent of the arbitral clause itself.” *Id.* at 599. On this issue, *Lander* took a more reasonable view, noting that the awkward reference to “another Contracting State” indicated simply a Convention state (like the United States) as opposed to a country that had failed to adhere to the Convention. *Lander*, 107 F.3d at 482.

53. Parties have three years from the making of the award to seek confirmation. 9 U.S.C. § 207 (2006).

54. *See, e.g.*, *Flatow v. Islamic Republic of Iran*, 76 F. Supp. 2d 28, 29 (D.D.C. 1999) (denying motion to enforce award that had been rendered more than three years prior to filing petition); *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572, 581 (2d Cir. 1993) (declining to apply the New York Convention to enforce an ICC award which had been rendered in Paris more than three years before the enforcement action was brought). This critical need for award confirmation, even in the absence of assets, supplies an important element in the calculus of litigation fairness that lies at the heart of award recognition.

may have several places in which to keep its property. For multinational actors, the absence of assets within one nation's borders need hardly be a perpetual state of affairs, particularly when that nation is the United States, whose markets play so central a role in global financial and commercial life that few large enterprises can ignore them for very long.

In practice, a winning claimant may seek confirmation by an American court in order to be ready to enforce its award if the foreign debtor later brings assets into the United States. In some cases, the claimant may need to move against assets on an ex parte basis to prevent them from being sent abroad with the push of a computer button. Likewise, a winning respondent would seek confirmation immediately in order to foreclose the prospect of a later court action on the merits of the dispute.

## B. The Recognition Forum's Rules of Procedure

### 1. *The Convention Text*

In *Monegasque de Reassurances*, the Second Circuit seized upon the reference in Article III to "rules of procedure of the territory where the award is relied upon." The court found procedural doctrines such as forum non conveniens to be permissible grounds for non-enforcement of otherwise valid New York Convention awards, provided the awards were not subject to discrimination when compared with the treatment of domestic arbitral decisions.<sup>55</sup> This line of reasoning does not seem to have been relevant in *Base Metal* and *Glencore*, since both cases purported to see a conflict between the New York Convention and the Constitution itself.

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 *Monegasque* 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>56</sup>

As a practical matter, one might question whether the effects of forum non conveniens and minimum contacts is indeed more onerous for awards rendered abroad. In a purely domestic context, when both sides are American and have all of their property within the United States, a dismissal in one forum usually does no more than send the award creditor to another state.

By contrast, dismissal may have more disagreeable results in cases that implicate more than one country. In multinational transactions with parties from different countries, assets may be spread throughout the world, sometimes in jurisdictions with financial secrecy statutes. Any attempt to secure enforcement in the United States requires that a motion for confirmation

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55. *Monegasque de Reassurances, S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 494 (2d Cir. 2002).

56. *Id.* at 496.

be made during the three-year window provided by the FAA.<sup>57</sup> Otherwise, the award may not be recognized in the event that the award loser later brings assets into the country.<sup>58</sup> Refusal to recognize the award could prove fatal to the winner's chances of making the award effective, since at that time there may be no other options inside the United States. The property hidden in foreign jurisdictions will be safely kept outside the country until the fourth year after the award was made.

## 2. *Drafting History*

In concluding that the New York Convention imposes no limitations (other than non-discrimination) on procedural rules at the enforcement forum, the Second Circuit seems to have gone astray as a matter of both logic and history. In 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>59</sup>

However, history does not support the Second Circuit'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 Convention Article III originated not with the Belgian delegate,<sup>60</sup> or any other delegate, but was instead taken verbatim from the predecessor to the New York Convention.<sup>61</sup> Article 1 of the 1927 Geneva Arbitration Convention provided that "an arbitral award . . . shall be recognized as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon."<sup>62</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

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57. 9 U.S.C. § 207.

58. For a case in which the failure to act within the three-year limit barred award recognition, see *Seetransport*, 989 F.2d at 581, discussed *supra* note 54.

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

60. 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 (May 27, 1958).

61. van den Berg, *supra* note 34, at 234.

62. 1927 Geneva Convention, *supra* note 42, art. I.

awards in the identical manner as for domestic awards.<sup>63</sup>

More significantly, the comments from delegates most closely involved with the adoption of the present Convention 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>64</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>65</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 Convention Articles V and VI, which relate to basic procedural fairness, substantive public policy and adjournment in deference to foreign court proceedings.<sup>66</sup> Although a Convention country can certainly set up ministerial

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63. See U.N. Doc. E/CONF.26/SR.10, at 5 ("Mr. Herment (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.")

64. *Id.* at 7 (referring to comments of Mr. Wortley).

65. The Secretary-General, *Note on the Comments on Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards of March 6, 1958*, ¶¶ 7-8, U.N. Doc. E/CONF.26/2 (Mar. 6, 1958). The relevant passage of the Secretary General's remarks reads as follows:

Some of the Governments and organizations pointed out the desirability of supplementing Article [III] of the Convention either (a) by including in it standard procedural rules that would be applicable to the enforcement of foreign arbitral awards, (b) by providing that arbitral awards should be enforced by a "summary procedure", or (c) by stipulating that the arbitral awards recognized pursuant to the Convention should be enforceable by the same procedure as that applied to domestic arbitral awards. [citation omitted] The object of such provisions would be to preclude the possibility that the enforcement of foreign awards may be delayed or rendered impractical because of unduly complicated enforcement procedures. Each of the above proposals may give rise to some difficulties: (a) it may not be considered practical to attempt spelling out the applicable enforcement procedures in all detail in the text of the Convention itself; (b) a reference to "summary" enforcement procedures may not be given an identical meaning in countries with different procedural law systems; and (c) the procedures applicable to the enforcement of domestic arbitral awards may contain elements which, if applied to foreign awards, would make the enforcement too cumbersome or time-consuming. A possible solution to these difficulties may be to provide in Article [III] of the draft Convention that arbitral awards recognized pursuant to the Convention should be enforced in accordance with a simplified and expeditious procedure which, in any event, should not be more onerous than that applied to domestic arbitral awards.

*Id.*

66. *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) ("[T]he 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) ("The defenses to

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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 would establish outright procedural bars to award confirmation.

### 3. *The United States Implementing Legislation*

Chapter 2 of the FAA, which implements the New York Convention, supplies an additional element in understanding the scope of any latent exceptions to award recognition based on domestic procedural rules.<sup>67</sup> As discussed below, the most sensible conclusion to be drawn from this legislation is that the “rules of procedure” language in Convention Article III was not intended to serve as a tool for escape from the duty to recognize otherwise valid arbitration awards.

In adopting the Convention, the United States added a second chapter to the FAA, which states explicitly that a federal 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>68</sup> The Convention’s grounds for non-recognition include basic procedural fairness and public policy, but not local rules of civil procedure applicable in normal commercial litigation.

Even absent this legislation, however, good arguments exist for reading the Convention to exclude invocation of national procedural rules that vitiate arbitration awards. To allow an open-ended escape hatch creates the anomalous situation of a nation obtaining treaty benefits for its own awards abroad, while denying enforcement to foreign awards simply by maintaining national rules that refuse to enforce any awards, whether foreign or domestic.

Possibly for this reason, the treaty contains its own explicit provision on non-recognition of awards.<sup>69</sup> The enumerated defenses have traditionally been considered to be exhaustive.<sup>70</sup> Had the Convention wished to provide the debtor with an option to raise additional roadblocks to implementation of the award, this would normally have been done with the addition of another line in the litany of Article V defenses, one providing for the invalidity of awards not in conformity with the law of the recognition forum.

### 4. *Analogies to Federalism Consideration*

Analogies to the interaction of federal and state arbitration law are interesting, but inconclusive. The FAA treats an arbitration agreement like any other contract provision, by making it valid “save upon such grounds as exist

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enforcement of a foreign arbitral award set forth in [Art. V of the Convention] are exclusive.”)

67. See *ILC Report*, *supra* note 10, at 1.

68. 9 U.S.C. § 207 (2006).

69. New York Convention, *supra* note 14, art. V.

70. See also Restatement (Third) of the Foreign Relations Law of the United States 488 cmt. a (“The defenses to enforcement of a foreign arbitral award set forth in [Article V of the Convention] are exclusive.”)

at law or in equity for the revocation of any contract.”<sup>71</sup> Since no federal common law of contracts exists,<sup>72</sup> this requires validity determinations according to state law principles.

Federal case law, however, has consistently held that enforcement of arbitration agreements may not be circumvented by state rules designed to invalidate arbitration clauses.<sup>73</sup> A state might perhaps require that all contracts be written in capital letters and underlined, but could not enact a statute providing that *only* arbitration clauses must be in capitals.

Admittedly, nothing in the rules related to forum non conveniens or personal jurisdiction aims specifically at arbitration awards. In practice, however, the application of these doctrines to arbitration conducted abroad has the effect of making such awards less reliable than awards rendered in the United States.

Another federalism analogy relates to the state enforcement of federally-created rights. While state courts may address such questions, they may not do so in a way that impinges upon vindication of the substantive federal claim.<sup>74</sup> Similarly, the idiosyncrasies of national court should not distort the recognition of treaty claims.

##### 5. *The Three-Year Rule*

As mentioned earlier, the FAA requires confirmation within three years of the date an award is made.<sup>75</sup> Normally, this condition serves sensible ends. Court scrutiny relatively soon after arbitral proceedings permits the creation of a record when documents and witnesses are still available and before recollections become stale, thus increasing the commercial community’s confidence that arbitration will not be a lottery of erratic results.

In some instances, however, this timing prerequisite could yield untoward results if courts persist in denial of recognition for lack of “minimum contacts” or by reason of forum non conveniens. Non-recognition creates the peril that the winner in the arbitration may find attachable property only when it is too late,<sup>76</sup> after the loser has kept its assets out of the United States for a safe

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71. 9 U.S.C. § 2.

72. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“There is no federal common law.”).

73. *See* *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 687 (1996) (Montana may not enact legislation designed specifically to invalidate arbitration clause); *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 281–82 (1995) (reversing an Alabama state court decision holding that the FAA did not apply to an arbitration clause in a termite prevention contract); *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (federal arbitration statute applied even with respect to claims under state regulatory regimes); *Doctor’s Associates, Inc. v. Hamilton*, 150 F.3d 157 (2d Cir. 1998); *Sec. Indus. Ass’n v. Connolly*, 883 F.2d 1114, 1121 (1st Cir. 1989) (state regulations limiting the right of securities brokers to require form arbitration agreements). *See generally* Alan Scott Rau, *The UNCITRAL Model Law in State and Federal Courts: The Case of Waiver*, 6 *Am. Rev. Int’l Arb.* 223 (1995).

74. *See* *Brown v. Western Ry. of Alabama*, 338 U.S. 294, 298–99 (1949) (citing *Davis v. Wechsler*, 263 U.S. 22, 24 (1923)); *see also* Note, *State Enforcement of Federally Created Rights*, 73 *Harv. L. Rev.* 1551, 1560–61 (1960).

75. *See supra* note 53.

76. *See, e.g.,* *Seetransport Wiking Trader v. Navimpex Centrala*, 989 F.2d 572 (2d Cir. 1993), discussed

period. In such instances, the winner will need a confirmed award in advance of the moment when property is present.

To meet such legitimate commercial concerns, the award enforcement should be modified to include a two-step process. First, confirmation hearing should be available in a centralized national forum such as the Court of International Trade (CIT). Thereafter, federal district courts would exercise their present enforcement functions, as long as the creditor had obtained a judicial imprimatur on the foreign award within the three-year statutory period.

The aim of the proposal is to encourage recognition actions within a reasonable time following the arbitration, but not permit gamesmanship that penalizes prevailing claimants. Precedent for such a compromise solution can be found in New York Convention Article V(1)(e), which provides that awards vacated at the arbitral situs “may” (not “must”) be refused enforcement, and explicitly allows application of whatever applicable national law might prove more favorable to the party seeking award enforcement.<sup>77</sup> These rules encourage a robust exchange on award validity at the arbitral situs relatively soon after the arbitrator’s decision has been announced, but without denying later consideration of the award’s integrity when appropriate.<sup>78</sup> A similarly flexible principle would seem appropriate with respect to the time available for award enforcement.

#### 6. *Practice of Other Nations*

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 awards. Except for claims against foreign sovereigns,<sup>79</sup>

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*supra* note 54.

77. New York Convention, *supra* note 14, arts. V(1)(e), VII. Thus courts outside the country of arbitration are generally free either to recognize the arbitral award or to deny recognition and thereby give effect to the annulment. By contrast, the European Arbitration Convention (Geneva 1961) takes a different approach, permitting non-recognition of annulled awards only if vacated on specific grounds listed in the Convention. European Convention on International Commercial Arbitration of 1961 art. IX(2), Apr. 21, 1961, 484 U.N.T.S. 364. These “approved” grounds for vacatur mirror the non-recognition standards found in New York Convention Article V(1)(a)–(d), related to matters such as lack of notice, excess of jurisdiction, and improper constitution of the arbitral tribunal.

78. Nevertheless, situations do arise when recognition of annulled awards might be appropriate. For example, the vacatur action at the arbitral situs might itself be tainted by impropriety, thus the use of a permissive “may” in the Convention. See *supra* note 77 and accompanying text. In a decision by the High Court of South Africa in *Telkom SA Ltd. v. Anthony Boswood, International Chamber of Commerce & Telcordia Technologies Inc.*, a contract between a South African company and an American corporation contained a clause providing for arbitration under the ICC Rules. The South African court vacated an award in favor of the American party and in the same decision went on to disregard the ICC appointment process (requiring an arbitrator of neutral nationality unless otherwise agreed) in favor of naming a new arbitral tribunal composed of three South African arbitrators, all proposed by the South African respondent that had just moved to vacate the award. In connection with an attempt to have the South African award recognized in the United States, see *Telcordia Technologies v. Telkom SA Ltd.*, 95 F. App’x 361, 362–63 (D.C. Cir. 2004).

79. Questions of sovereign immunity pose different concerns, since the objection of the respondent state relates to jurisdiction under 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*)

few non-American jurisdictions condition enforcement of Convention awards on a link with the transaction, the parties or their property.<sup>80</sup> Many Western legal systems exercise jurisdiction without regard to the type of minimum contacts required by the United States,<sup>81</sup> and international law generally prohibits invocation of a country's internal law to eviscerate its international agreement.<sup>82</sup>

## II. Constitutionality of Treaty Obligations

### A. Award Recognition and Foreign Defendants

#### 1. *Due Process: Minimum Contacts with the Forum State*

During the first fifteen years after the United States ratified the New York Convention, no reported cases addressed whether a court must have personal jurisdiction over an award debtor in order to entertain a petition to recognize or enforce a Convention Award.<sup>83</sup> In 1985, however, a federal court decision

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must exist between Switzerland and either the parties or the transaction. *See* Circulaire du Department Federal de Justice et Police, Jurisprudence des Autorités Administratives de la Confédération 224 (Nov. 26, 1979). The principle was applied to one aspect of the LIAMCO saga. *See* Socialist Libyan Arab Popular Jamarihiya v. Libyan American Oil Co., Bundesgericht [BGer] [Federal Court] June 19, 1980, 20 I.L.M. 151, 159–60 (Switz.); Georges R. Delaume, *Economic Development and Sovereign Immunity*, Am. J. Int'l L. 319, 340 (1985). For earlier precedents, see *Royaume de Grece v. Banque Julius Bar et Cie.*, BGer [Federal Court], June 6, 1956, 82 Arrêts du Tribunal Fédéral Suisse I 75, 23 I.L.R. 195 (Switz.). Although the award in Libya was made within Switzerland (at the arbitral seat in Geneva) the New York Convention would still apply to an award “not considered as domestic” pursuant to Convention Article I.

80. *Cf.* New York City Bar Report, *supra* note 29, at 6–7, which suggests that several countries (including China and Japan) impose such restrictions. The authors' own reading of the cited authorities, however, leads to a more nuanced conclusion. General principals 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. *Id.* at 7 n.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.”

81. *See* French Code Civil, Art. 14 C. civ. [Fr.] (jurisdiction based on the nationality of the plaintiff); German Zivilprozeßordnung [ZPO] [civil procedure statute] Art. 23 (Ger.) (jurisdiction on the basis of property alone); English CPR 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* Art. 5, *Loi fédérale sur le droit international privé*. *See also* § 1062 ZPO (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).

82. *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 Jan Paulsson, *May a State Invoke its Internal Law to Repudiate Consent to International Commercial Arbitration?*, 2 Arb. Int'l 90 (1986).

83. The FAA has resolved the question of federal subject matter jurisdiction (whether questions pertaining to the New York Convention must be decided in the federal courts) through provisions that give federal courts independent subject matter jurisdiction in all actions falling under the New York or Panama Convention. 9 U.S.C. §§ 203, 301, 302 (2006). In addition, pursuant to FAA § 205, parties may remove to federal court cases brought in state courts with respect to awards falling under the New York or Panama Convention. No similar independent subject matter jurisdiction exists for actions falling under FAA Chapter 1, although some courts have deemed a federal question to exist by virtue of federal securities law claims raised in the underlying arbitration. *See* *Greenberg v. Bear, Stearns & Co.*, 220 F.3d 22, 25 (2d Cir. 2000).



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stated that the FAA does not give courts power over all persons throughout the world who have entered into an arbitration agreement covered by the Convention.<sup>84</sup> Rather, some basis must be shown, “whether arising from the respondent’s residence, his conduct, his consent, the location or his property or otherwise,” to justify subjecting that person to the court’s power.<sup>85</sup>

Since that time, the view that Constitutional due process requires personal jurisdiction over an arbitration’s loser (or its assets) has gained considerable momentum. As discussed below, this general principle requires greater elaboration, particularly when assets are not present in the state where the district court is located, or the sole basis for personal jurisdiction might lie in the presence of such assets.

In adjudicating cases that involve foreign defendants, courts in the United States must conform to Constitutional requirements for jurisdiction over the person of the defendant. These derive from the prohibition on deprivation of property without “due process of law” found in the Fifth Amendment (imposed directly on federal courts) and the Fourteenth Amendment (imposed on state courts).<sup>86</sup>

Due process, of course, is an elastic and ill-defined notion, not unlike concepts such as justice and equity. The principles underlying the due process limits on personal jurisdiction relate to fairness, legitimacy, and consent. Content must be supplied on a case-by-case basis, and will vary according to the context in which it is invoked. Outside jurisdictional analysis, due process has also been pressed into service in connection with enforcement of foreign

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84. *Transatlantic Bulk Shipping v. Saudi Chartering*, 622 F. Supp. 25, 26–27 (S.D.N.Y. 1985), arose from a ship time charter in which a Liberian company (Transatlantic) attempted unsuccessfully to enforce an award made in London against a Panamanian company with principal place of business in Greece (Saudi Chartering). The court found that Saudi Chartering had no offices, bank accounts, employees, or agents in New York, and did not transact business in New York. *Id.* at 26. *See also* *Italtrade International USA L.L.C. v. Sri Lanka Cement Corp.*, No. Civ.A.00–2458, 2002 WL 59399, at \*2 (E.D. La. Jan. 15, 2002) (citing *Transatlantic Bulk Shipping*, 622 F. Supp. 25). *See generally* Gary B. Born, *International Commercial Arbitration* 885 (2d ed. 2001) (“[I]t is not clear whether the FAA’s second chapter contains a statutory grant of personal jurisdiction.”).

85. *Transatlantic Bulk Shipping*, 622 F. Supp. at 27.

86. U. S. Const. amend. V; *id.* amend. XIV, § 1. The prevailing view now appears to be that foreign states and their instrumentalities, like the states of the union, are not persons within the meaning of the Fourteenth Amendment. *Accord* *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82, 99–100 (D.C. Cir. 2002); *see* *TMR Energy, Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 305 (D.C. Cir. 2005) (enforcing award made in Sweden against agent of Ukraine government). Therefore the enforcement of awards against foreign states or their instrumentalities implicate a different legal posture from those arising with respect to private respondents. For a recent discussion of this subject, *see* S.I. Strong, *Enforcement of Arbitral Awards Against Foreign States or State Agencies*, 26 Nw. J. Int’l L & Bus. 335 (2006). One consequence may well be that by signing an arbitration agreement, states make themselves subject to enforcement in the United States irrespective of assets here or business contacts. For an earlier perspective on the matter, *see* *Creighton Ltd. v. Gov’t of the State of Qatar*, 181 F.3d 118, 126 (D.C. Cir. 1999) (finding it “implausible” that Qatar, by agreeing to arbitrate in France, should be deemed to have waived its right to challenge personal jurisdiction in the United States).

judgments<sup>87</sup> and forum non conveniens analysis.<sup>88</sup> On occasion, due process includes substantive (rather than procedural) safeguards of life, liberty, and property, as well as fundamental constraints on governmental power.<sup>89</sup>

In the context of civil litigation, the United States Supreme Court has interpreted due process to permit adjudication of a foreign defendant's rights only if the defendant has "minimum contacts" with the forum such that the suit does not offend "traditional notions of fair play and substantial justice."<sup>90</sup> Even where a court finds that "minimum contacts" exist, due process dictates that an exercise of jurisdiction must be reasonable.<sup>91</sup>

Although enforcement of foreign arbitral awards normally falls to the federal courts,<sup>92</sup> Constitutional restrictions applicable to states sometimes find their way into the story. In diversity actions, federal courts normally look to a state's "long-arm" statute in determining personal jurisdiction,<sup>93</sup> which in turn implicates the Fourteenth Amendment.<sup>94</sup> This two-part analysis is often collapsed, since many states have adopted jurisdictional analysis (either

87. Restatement (Third) of the Foreign Relations Law of the United States § 482(1)(a) provides for denial of recognition to a foreign judgment "rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law." Commentary provides examples of denial of due process, including: a judiciary dominated by political branches of government or an opposing litigant, inability to obtain counsel, to secure documents, or to secure attendance of a witness and lack of appellate review. § 482 cmt. b. A judicial system may fail in a general way (e.g., the treatment of Jews in Nazi Germany) or in a particular case (e.g., lack of notice to a particular respondent). § 482 cmts. a, b. *See also* Uniform Foreign Money Judgments Recognition Act, § 4. *Compare* Uniform Foreign-Country Money Judgments Recognition Act (2005) (not yet adopted in any state) which also provides in section 4, subsections (c)(7) & (8) for non-recognition of a foreign-country judgment rendered in "circumstances that raise substantial doubt about the integrity of the rendering court" or where "the specific proceeding in the foreign court" was not compatible with the requirements of due process of law.

88. Courts in the United States that consider foreign litigation procedures at odds with American notions of due process might find a foreign tribunal inadequate as an alternative forum, and thus refuse to dismiss actions on forum non conveniens grounds. *See, e.g.,* *Nemariam v. Ethiopia*, 315 F.3d 390, 395 (D.C. Cir. 2003), discussed in Case Comment by Ryan T. Bergsieker, *International Tribunals and Forum Non Conveniens Analysis*, 114 Yale L.J. 443 (2004). Ethiopia had moved to dismiss an action by an expelled Eritrean merchant whose assets had allegedly been confiscated by Ethiopia, arguing that the suit should be heard in the Claims Commission established pursuant to the 2000 peace treaty between Eritrea and Ethiopia (text at 40 I.L.M. 260). *Id.* at 445.

89. *See* *Lochner v. New York*, 198 U.S. 45 (1905) (limits on employees' work hours); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (advice on contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (abortion).

90. *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

91. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *see also* *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987) (applying reasonableness test to find no jurisdiction over Japanese valve manufacturer in indemnity claim brought by Taiwanese tire-tube manufacturer, when the forum state had no substantial interest in sustaining jurisdiction over the action); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985) (placing burden of proof on defendant to prove that exercise of jurisdiction would be unreasonable).

92. *See* 9 U.S.C. § 205 (2006).

93. 28 U.S.C. § 1652; Fed. R. Civ. P. 4(k). For some of the federalism concerns that lead to this result. *See* *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

94. *See* Fed. R. Civ. P. 4(k)(1)(A) (permitting service of summons over defendants subject to courts of general jurisdiction in the state where the district court is located); *see also* *Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1123 (9th Cir. 2002)

statutory or through court interpretation) designed to extend jurisdiction to the limits allowed by the Constitution.<sup>95</sup> Whether the inquiry proceeds in one step or two, however, the “minimum contacts” must normally be with the state in which the federal court is located.<sup>96</sup>

State law may have an impact even in federal question cases, where the constitutional limits of personal jurisdiction are fixed by the Fifth Amendment and claimants need show only the existence of adequate contacts with the United States as a whole. However, some basis for service of process must exist in a federal statute or rule of civil procedure. Thus, personal jurisdiction becomes intertwined with rules on service of process, given that the latter constitutes the vehicle by which a court obtains jurisdiction.<sup>97</sup> Normally, service of process is effective to establish jurisdiction only for defendants within the territorial limits of the state in which the court sits, unless a federal statute otherwise permits nationwide or extraterritorial service.<sup>98</sup>

When the respondent is a foreign sovereign, some courts have attempted to rely on provisions of the Foreign Sovereign Immunities Act (FSIA) to establish personal jurisdiction.<sup>99</sup> The FSIA grants personal jurisdiction over

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95. For example, the Massachusetts long-arm statute, Mass. Gen. Laws ch. 223A, § 3 (2006), has been held to authorize jurisdiction to the limits allowed by the Federal Constitution. “Automatic” Sprinkler Corp. of America v. Seneca Foods Corp., 280 N.E.2d 423, 424 (Mass. 1972). In particular, Mass. Gen. Laws ch. 223A, § 3, as amended by St. 1993, ch. 460, § 86, provides in pertinent part:

A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a cause of action in law or equity arising from the person’s (a) transacting any business in this commonwealth; (b) contracting to supply services or things in this commonwealth; (c) causing tortious injury by an act or omission in this commonwealth; (d) causing tortious injury in this commonwealth by an act or omission outside this commonwealth if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in this commonwealth; (e) having an interest in, using or possessing real property in this commonwealth; . . . (g) maintaining a domicile in this commonwealth while a party to a personal . . . relationship out of which arises a claim for . . . parentage of a child, child support or child custody; or the commission of any act giving rise to such a claim; or (h) having been subject to the exercise of personal jurisdiction of a court of the commonwealth which has resulted in an order of . . . custody . . . [or] child support . . . notwithstanding the subsequent departure of one of the original parties from the commonwealth, if the action involves modification of such order or orders and the moving party resides in the commonwealth, or if the action involves enforcement of such order notwithstanding the domicile of the moving party.

96. One possible exception lies in Fed. R. Civ. P. 4(k)(2), discussed *infra* Part II.A.2.

97. *United Elec. Radio & Mach. Workers v. 163 Pleasant St. Corp.*, 960 F.2d 1080, 1095 (1st Cir. 1992). In a union lawsuit against an employer and its Scottish parent corporation (International Twist Drill Holdings), alleging cessation of health care payments after closing local facilities would violate inter alia Employee Retirement Income Security Act, the court reversed the district court’s refusal to dismiss action to pierce the veil between the Scottish parent and a Delaware corporation with its principal place of business in Massachusetts. *Id.*

98. Fed. R. Civ. P. 4(k)(1); *cf.* Fed. R. Civ. P. 4(k)(2) (allowing service based on contacts with the United States as a whole). *See generally* U.S. v. Swiss Am. Bank, Ltd., 274 F.3d 610, 627 (1st Cir. 2001) (denying jurisdiction in an action brought by the United States against a foreign financial institution to recover drug proceeds forfeited to the United States pursuant to the RICO Act).

99. *See, e.g.,* Seetransport Wiking Trader v. Navimpex Centrala, 989 F.2d 572, 574 (2d Cir. 1993) (addressing enforcement of an ICC award rendered in Paris). While jurisdiction to enforce the award was found to exist, the motion was refused on the basis that more than three years had elapsed from when the award was made and when it was presented for enforcement. *Id.* at 583. The court left open whether a Paris

foreign states when the court possesses subject matter jurisdiction under one of the exceptions to foreign sovereign immunity provided, including an action to enforce an arbitration award.<sup>100</sup> Even so, courts applying the FSIA have been careful to find “minimum contacts” with the United States as a whole, sufficient to satisfy due process requirements.<sup>101</sup>

Well-established law holds that objections to lack of personal jurisdiction can be waived, either expressly or by implication based on prior conduct.<sup>102</sup> In *Burger King Corp. v. Rudzewicz*, the United States Supreme Court noted that because personal jurisdiction rights are waivable, “a variety of legal arrangements” exist by which a litigant may give “express or implied consent” to the court’s personal jurisdiction.<sup>103</sup> No sound policy reason prevents such a principle from being applied to international arbitration.

## 2. *Nationwide Contacts*

The need for federal courts to borrow state long-arm statutes creates an irony in the enforcement of foreign arbitration awards. Given that award confirmation proceeds pursuant to a federal statute,<sup>104</sup> one might expect the measuring rod for “minimum contacts” to be the United States as a whole. Surprisingly, however, the majority view has been that federal courts must borrow the state statute in “lock step” with the state itself, imposing the Fourteenth Amendment limitations based on contacts with the forum state only.<sup>105</sup>

In response to such anomalies, the United States Supreme Court promulgated Federal Rule of Civil Procedure 4(k)(2), applicable when federal courts exercise jurisdiction based on a federal question, which would be the case for enforcement of New York Convention awards.<sup>106</sup> When a foreign

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judicial decision confirming the award would be enforceable in its own right. *Id.*

100. See 28 U.S.C. §§ 1330, 1602–11 (2006). Section 1330(b) provides that “[p]ersonal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.” Under § 1608, several methods of service are permissible, including the use of mail requiring signed receipt. On jurisdiction under the FSIA, see *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480 (1983).

101. In *Seetransport*, the court of appeals emphasized that the district court had found “minimum contacts” existed between the United States and the Romanian state entity in the form of solicitation of business to sell goods of various state-owned entities, including Navimpex. 989 F.2d at 580.

102. The most obvious method of waiving an objection to jurisdiction is in a forum selection clause in a written contract. See *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 589 (1991).

103. 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)); see also *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Earlier the court in *Ins. Corp. of Ir.* stated that the requirement of personal jurisdiction may be intentionally waived, and for various reasons “a defendant may be estopped from raising the issue.” *Ins. Corp. of Ir.*, 456 U.S. at 704. The court cited with approval a Second Circuit decision holding such waiver to be implicit in an agreement to arbitrate. *Id.* (citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354 (2d Cir. 1964)).

104. Award enforcement in federal district courts is based on the FAA. 9 U.S.C. § 203.

105. See *Omni Capital Int’l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 107–08 (1987). See generally Louise Ellen Teitz, *Transnational Litigation* 37–38 (1996).

106. See 9 U.S.C. § 203. By contrast, it has been held that no “federal question” jurisdiction exists for enforcement of domestic (non-Convention) awards, which must normally be based on the existence of

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defendant has contacts nationally to justify personal jurisdiction, then service of process may be effective to establish personal jurisdiction, notwithstanding insufficient contacts with any one state. Jurisdiction must, however, always be “consistent with the Constitution.”<sup>107</sup>

The use of Rule 4(k)(2) was raised in an intriguing case involving awards rendered in Stockholm sought to be enforced against two Russian companies.<sup>108</sup> The district court had dismissed an application to confirm the awards, based on its finding that personal jurisdiction was lacking over the two foreign entities. The court of appeals, however, noted that it had never expressly ruled on the question of whether foreign award enforcement required personal jurisdiction over the respondent or its property.

The court went on to state, however, that it might not be necessary to reach that difficult issue, since several alternative theories of jurisdiction had been advanced. These included consent to the district court jurisdiction (based on language in the arbitration clause) and Rule 4(k)(2), permitting suit based on contacts with the United States as a whole when personal jurisdiction exists in no one state.

On both of these issues, the court of appeals remanded the case to the district court for appropriate findings of fact and conclusions of law. The case then settled before these determinations were made.<sup>109</sup>

### 3. *Lessons from Shaffer v. Heitner*

As mentioned earlier, for all cases heard in United States courts a minimum connection must exist between the defendant and the state where the court is sitting.<sup>110</sup>

Ownership of assets in the state might be indicative of minimum

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diversity of citizenship. *See* PCS 2000 LP v. Romulus Telecomm., 148 F.3d 32, 34 (1st Cir. 1998). Application of the FAA does not in itself create a federal question. *Id.* Thus the FAA is an anomaly in that it creates a body of federal law without creating any basis for federal court jurisdiction, except in international cases. *Id.*; *see also* Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 25–26 (2d Cir. 2000); Kasap v. Folger Nolan Fleming & Douglas, 166 F.3d 1243, 1245–46 (D.C. Cir. 1999). In some cases, however, an underlying federal law claim may create jurisdiction. *See, e.g.,* Greenberg, 220 F.3d at 26–27 (holding that a federal allegation that arbitrator “manifestly disregarded” federal securities laws provided an independent jurisdictional basis).

107. Fed. R. Civ. P. 4(k)(2). The claimant may not, however, pick any state at random. *Id.* Rule 4(k)(2) operates only if personal jurisdiction is absent in courts of general jurisdiction “of any state.” *Id.* Thus, for example, if jurisdiction clearly existed in California, a claimant could not use the rule to create jurisdiction in the Federal District Court in Massachusetts. On the uncertainties of who bears the burden of proof in this regard, *see* Teitz, *supra* note 105, at 39–46.

108. *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202 (2d Cir. 2003).

109. For a recent case on nationwide contacts, *see* *Mwani v. Osama Bin Laden*, 417 F.3d 1 (D.C. Cir. 2005). Under the Alien Tort Claims Act, Kenyan victims of bombing outside American embassy brought action against terrorists and terrorist organizations for orchestrating the bombing. *Id.* at 4–5. The Court held service of process and personal jurisdiction over terrorists valid, and found Afghanistan’s alleged conduct did not constitute a “commercial activity” sufficient to meet the commercial exception to sovereign immunity. *Id.* at 8–17. *See also In re Terrorist Attacks on Sept. 11, 2001*, 392 F. Supp. 2d 539 (D.N.Y. 2005) (dismissing actions against Saudi officials who did not have minimum contacts with the United States).

110. *See, e.g., Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

connection, but the mere presence of property is not dispositive of whether the Constitutional standard has been met.<sup>111</sup> Thus, courts must evaluate the totality of contacts with the defendant.

An action to confirm a New York Convention award, however, is fundamentally different from a normal action for recovery of money. When an award creditor files an action to have an award recognized, the merits of the dispute have already been decided. The court is not asked to decide whether another party breached its contract. That matter has already been adjudicated by the arbitrator, whose award is final.

Rather, the job of a court asked to recognize an arbitral award is to determine whether the parties received the process for which they bargained. For international cases, this implicates a number of special questions. Was there an arbitration agreement?<sup>112</sup> Were the arbitrators honest?<sup>113</sup> Did the loser have an opportunity to present its case?<sup>114</sup> Does the award violate some fundamental public policy?<sup>115</sup>

Consequently, the FAA explicitly provides that federal courts “shall confirm the award *unless* [they find] one of the grounds for refusal or deferral of recognition or enforcement of the award” specified in the New York Convention.<sup>116</sup> Therefore, petitions to recognize Convention awards are routinely granted except in the rare cases where the respondent proves one of the narrow defenses in Convention Article V.<sup>117</sup>

In this context, the U.S. Supreme Court’s reasoning in *Shaffer v. Heitner* might well be the best authority for the proposition that the contacts necessary to enforce a Convention award are not the same as those required in deciding the merits of a normal commercial dispute.<sup>118</sup> In *Shaffer*, a shareholder derivative action against officers of a Delaware corporation alleged breach of duties that caused corporate liability for damages and a fine in an antitrust suit. At the time, a state statute permitted Delaware courts to take quasi in rem jurisdiction by sequestering the defendants’ property in the state, including corporate stock. The U.S. Supreme Court found the minimum contacts test from *International Shoe* should be applicable to such proceedings, and held the attached property insufficient to support jurisdiction over defendants who had conducted no business in the state.

The majority opinion, per Justice Thurgood Marshall, considered the

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111. *Shaffer v. Heitner*, 433 U.S. 186, 210 (1977).

112. See New York Convention, *supra* note 14, art. V(1)(a).

113. See *id.* art. v(ii)(b).

114. See *id.* art. v(i)(b).

115. See *id.* art. v(ii)(b).

116. 9 U.S.C. § 207 (2006) (emphasis added).

117. See *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997). Indeed, Section 6 of the FAA provides that any application to a court to confirm or enforce an arbitral award “shall be made and heard in the manner provided by law for the making and hearing of motions . . .” (and not by service of a summons and complaint) except as otherwise indicated in the statute. 9 U.S.C. § 6; see also *Health Serv. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1257–58 (7th Cir. 1992).

118. 433 U.S. 186 (1977).

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Constitutional requirements for enforcement of judgments already rendered in a foreign jurisdiction. Concluding in footnote 36 that the normal due process considerations did not obtain in such a context, the Court noted that:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a state where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.<sup>119</sup>

This footnote, of course, was written in the context of the Full Faith and Credit Clause of the U.S. Constitution, which requires courts of one state to recognize judgments of another.<sup>120</sup> Clearly, no perfect analogy exists between a state court judgment and a New York Convention award.

The similarities between the two types of decisions (award and judgment) are, however, more important than their differences. In an action to enforce a sister-state judgment, the respondent still has an important defense: that the court deciding the merits lacked personal jurisdiction. As Professor Linda Silberman has rightly noted, “[c]onfirmation and enforcement of an arbitral award are the equivalent of the enforcement of a judgment for purposes of the *Shaffer* distinction.”<sup>121</sup>

Reliance on the teachings of *Shaffer* might be questioned because the discussion of judgment execution was dictum. However, to attack footnote 36 because it was not necessary to the holding of the case would be very odd indeed. Some of the most enduring principles of American law have come from dicta in footnotes. One thinks of the long shadow cast on civil rights litigation by the dictum in the *Carolene Products* decision, providing a special scope of judicial attention for cases implicating “prejudice against discrete and insular minorities.”<sup>122</sup> Likewise, the well-established American doctrine that arbitral awards may be reviewed for “manifest disregard of the law” derives from dictum in the long-since overruled case of *Wilko v. Swan*.<sup>123</sup> Dictum has become a cornerstone of judicial review of arbitration awards rendered in the United States.<sup>124</sup>

119. *Id.* at 210 n.36.

120. U.S. Const., art. iv, § 1 (“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”).

121. Silberman, *supra* note 28, at 15; *see also* William W. Park, *Amending the Federal Arbitration Act*, 13 *Am. Rev. Int’l Arb.* 75, 99–100 (2002).

122. *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

123. 346 U.S. 427, 436–37 (1953). The holding of the case, that securities law issues were non-arbitrable, was progressively overruled in a line of cases ending with *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 485 (1989).

124. Whether this should be so is another matter. To note the influence of dictum is not to be in agreement with its effect. For example, many would view the “manifest disregard” doctrine as unnecessary, pointing out that awards which violate public policy can be set aside under New York Convention Article V(1i)(b), and that such public policy analysis has done a fine job in Continental Europe in addressing the decisions of arbitrators who have strayed too far from their reservations.

In any event, *Shaffer* must be read in the context of the Supreme Court's decision in *Burnham v. Superior Court*, which questions certain aspects of *Shaffer* unrelated to footnote 36.<sup>125</sup> When read in context, that decision casts no doubt on *Shaffer*'s teaching about award execution; in fact, contrary to initial appearances, *Burnham* strengthens the principle announced in *Shaffer*'s footnote 36. *Burnham* involved a due process challenge to a California state court's jurisdiction over a New Jersey husband whose wife sued for divorce in California.<sup>126</sup> Service of process against the husband was based on a brief business trip to California followed by a short visit with his children.<sup>127</sup> The Supreme Court held that an "ancient form" of common law jurisdiction (the husband's physical presence) met the Constitutional standard of fair play and substantial justice, and did not fail for any defect under newer concepts of personal jurisdiction.<sup>128</sup>

While the *Burnham* Court's approach did not contrast *Shaffer*, the approach was different. The plurality opinion by Justice Scalia emphasized its rejection of the need to conduct "independent inquiry into the desirability or fairness" of the prevailing rule on service of process, leaving that matter to the state legislature.<sup>129</sup> The plurality opinion specifically questioned the more flexible standards suggested in a concurrence by Justice Brennan, which had looked to "contemporary notions of due process" to test the adequacy of jurisdiction.<sup>130</sup> Due process should not, suggested Justice Scalia, depend on "individual Justices' perceptions of fairness"<sup>131</sup> or the judiciary's "subjective assessment of what is fair and just."<sup>132</sup>

This latter point bears special emphasis: ad hoc justice based on individualistic perceptions of fairness creates special risks for international trade and investment. In connection with forum selection, American judicial policy has long been guided by the recognition that predictability is at a premium in cross-border business, where the wrong forum can result in dramatically disagreeable surprises related to both language and procedure. Although perhaps overstating its case, the United States Supreme Court more than thirty years ago stated that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade . . . ."<sup>133</sup>

Even for observers not familiar with international trade and investment, the point should not be difficult to grasp. If a Boston seller must sue a Georgia buyer in Atlanta, the dispute will take place within a relatively homogeneous

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125. 495 U.S. 604, 119–22 (1990) (plurality opinion).

126. *Id.* at 607–08.

127. *Id.* at 608.

128. *Id.* at 619.

129. *Id.* at 621.

130. *Id.* at 622–27.

131. *Id.* at 627.

132. *Id.* at 623.

133. *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972).



linguistic and procedural context. If the buyer is located not in Atlanta, however, but in Athens, Algiers, or Aix-en-Provence, the court action may proceed not in the language of Shakespeare, but in the tongue of Demosthenes, Mohammed, or Molière. Even if the linguistic hurdle can be overcome, local counsel must usually be engaged to advise on what to one side will be an unfamiliar code of civil procedure. In some countries, the tradition of judicial independence taken for granted in the United States may also be less than self-evident.

The *raison d'être* for the New York Convention, which the United States is quick to stress when its own nationals face uncertainty abroad, is to enhance predictability in dispute resolution. Confidence in the reliability of cross-border arbitration clauses is put at risk whenever the recognition of awards depends on malleable notions such as “minimum contacts,” “fair play” or “convenience.”<sup>134</sup>

State courts have taken a similar approach in the context of foreign country judgments. *Lenchyshyn v. Pelko* holds that a judgment creditor “need not establish a basis for the exercise of personal jurisdiction” over the debtor by New York courts.<sup>135</sup> This is particularly significant, given that within the United States, other nations’ judicial decisions benefit from neither the “full faith and credit” accorded sister-state decisions,<sup>136</sup> nor from anything like the broad multilateral treaty obligation to recognize given to awards under the New York Convention.<sup>137</sup>

134. For an example of the extent to which American courts can bend “minimum contacts” principles when it seems convenient to do so, see *Nowak v. Tak How*, 94 F.3d 708, 713–16 (1st Cir. 1996) (finding tort jurisdiction in a wrongful death action for drowning in a Hong Kong hotel).

135. 281 A.D.2d 42, 47–48 (N.Y. App. Div. 2001). In *Lenchyshyn*, an Ontario money judgment was presented for enforcement in New York pursuant to Article 53 of the CPLR, New York’s version of the Uniform Foreign Money-Judgments Recognition Act. All parties in this matter were either citizens or residents of Canada. The defendant debtors argued that New York was prohibited from recognizing the Canadian judgment unless they had an “actual current presence” within New York or there was some other basis for New York’s exercise of personal jurisdiction. The court rejected the assertion that any such requirement inhered in either the state judgments statute or the Due Process Clause of the U.S. Constitution. The court explained its holding as a function of logic, fairness, and practicality, emphasizing that the creditor sought no new substantive relief, but merely asked the court to perform the “ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment.” *Id.* at 49 (citing *Breezevale Ltd. v. Dickinson*, 693 N.Y.S.2d 532, 538 (App. Div. 1999)); see also *Pure Fishing, Inc. v. Silver Star Co., Ltd.*, 202 F. Supp. 2d 905, 909–10 (N.D. Iowa 2002) (quoting *Lenchyshyn* and finding its reasoning to be persuasive); Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. h (1987) (“[A]n action to enforce a [foreign] judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum.”). *But see* *Electrolines, Inc. v. Prudential Assurance Co., Ltd.*, 677 N.W.2d 874, 884–85 (Ct. App. Mich. 2003) (disagreeing with *Lenchyshyn*).

136. In general, U.S. courts will enforce a foreign judgment unless (i) the foreign court lacked jurisdiction over the subject matter or person of the defendant; (ii) the judgment was fraudulently obtained; or (iii) enforcement of the judgment would offend the public policy of the state in which enforcement is sought. See, e.g., *Ackerman v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986); *Johnston v. Compagnie Générale Transatlantique*, 152 N.E. 121, 122–23 (Ct. App. N.Y. 1926).

137. See New York Convention, *supra* note 14, art. I. The situation may soon change, however. On June

## B. Assets and Award Execution

### 1. *Prelude: CME v. Zelezny*

As noted above, much of the confusion over personal jurisdiction in award enforcement derives from confusing two different standards of fairness. The first applies to the contacts necessary before a court can assert jurisdiction to decide the dispute on its merits. For example, a court in the United States might be asked to decide whether a foreign manufacturer sent defective goods to an American distributor, thereby breaching the terms of their distribution agreement. For the court to pass judgment on this claim, certain minimum contacts must exist between the manufacturer and the state where the court sits.

By contrast, the situation is quite different if a judgment on the matter has already been rendered by a tribunal overseas with clear jurisdiction over the manufacturer. In such an instance, fairness no longer requires the same level of contacts between the manufacturer and the relevant forum in the United States.

The full contours of the contacts required in this second context remain unclear, as will be discussed later. At the least, however, no unfairness would result if the foreign manufacturer had property within the forum. And indeed, this was the result reached in 2001 by a federal court in the Southern District of New York in a dispute over a media joint venture between a Czech respondent and a Dutch claimant.<sup>138</sup> Although the court lacked the level of jurisdiction over the Czech entrepreneur that would have permitted a decision on the merits, the Czech's ownership of assets in New York (a bank account) proved enough to permit a petition to enforce a foreign arbitral award.<sup>139</sup> Moreover, the presence of assets was enough, regardless of whether the bank account was connected to the underlying dispute.<sup>140</sup> The court also held that its jurisdiction was limited to the attached assets only (at the time of the ruling the assets

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30, 2005, the Conference on Private International Law agreed on the text of a treaty establishing rules for recognition of court selection agreements. *See* Hague Convention on Choice of Court Agreements, 20th Diplomatic Session, June 30, 2005, 44 I.L.M. 1294. The Hague Convention provides that a choice of court clause will be deemed exclusive and recognized as such. *See id.* ch. III, art. 8. Courts other than the chosen forum must decline jurisdiction. *See id.* ch. II, art. 6. Enforcement is to be granted to judgments of the chosen court, with suitable exceptions for consumer and employment contracts, as well as special matters such as wills and personal injury claims. *See id.* ch. III, art. 9. For background on this Convention initiative, see Louise Ellen Teitz, *Both Sides of the Coin: A Decade of Parallel Proceedings and Enforcement of Foreign Judgments in Transnational Litigation*, 10 Roger Williams U. L. Rev. 1, 40–47 (2004) and Ronald Brand, *The New Hague Convention on Choice of Court Agreements*, ASIL Insights, July 26, 2005, <http://www.asil.org/insights/2005/07/insights050726.html>. *Cf.* European Communities Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 8 I.L.M. 229, which has now become Council Regulation 44/2001, On Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2001 O.J. (L 012) 1 (EC).

138. *CME Media Enterprises B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138, at \*3 (S.D.N.Y. Sept. 10, 2001).

139. *Id.* at \*3–4.

140. Such jurisdiction is sometimes referred to as quasi in rem jurisdiction, although the term seems to have come into disfavor, rightly or wrongly, during the past few years.

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constituted only five cents),<sup>141</sup> the resulting judgment could not be used elsewhere,<sup>142</sup> and the creditor was not entitled to discovery concerning the existence of other assets.<sup>143</sup>

## 2. *The Fourth Circuit Decision in Base Metal*

Less than six months after the judgment in *Zelezny*, however, the Fourth Circuit rejected the notion that jurisdiction to recognize an award could be based on the existence of property. In *Base Metal*, a Guernsey company was engaged in the business of buying and selling raw materials used to make aluminum.<sup>144</sup> Arbitration in Russia of a dispute with an aluminum manufacturer led to a \$12 million award in favor of the Guernsey claimant, which it tried to enforce against an aluminum shipment of the debtor that was arriving in Baltimore.<sup>145</sup>

Award confirmation was dismissed for lack of personal jurisdiction.<sup>146</sup> The lower court noted that the Russian respondent's only contact with the district was the single aluminum shipment that had been seized, which was unconnected with the dispute leading to the arbitration.<sup>147</sup> The Fourth Circuit affirmed.

The court of appeals stated that New York Convention awards can be enforced only against parties with "minimum contacts" to the forum such that the suit does not offend "traditional notions of fair play and substantial justice."<sup>148</sup> Citing *Shaffer v. Heitner* for the proposition that the same due

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141. At the time this action was commenced, *Zelezny's* account at Citibank in New York amounted to \$69.65. *Id.* at \*4 The balance was reduced to five cents after deduction of charges. *Id.* The decision was never appealed. An urban legend holds that counsel did exchange five cents at the close of the proceedings.

142. Commentators have questioned why the court believed that the effect of its ruling should be limited to the value of the assets in the district that had been attached. The attached account was unrelated to the subject matter of the award and the parties fully litigated the question of whether any of the New York Convention defenses applied. For a comment on this aspect of the case, see C.R. Ragan, *United States: Recent US Cases on Enforcement of Awards – US Courts Become Enforcement Courts to the World, Or Do They?*, 6 Int'l A.L.R. 1 (2003) and Strong, *supra* note 28, at 487 n.42. Commentators have also questioned the notion that a different court in New York or elsewhere in the United States would not treat the *Zelezny* decision as res judicata as to the enforceability of the award against Mr. *Zelezny*. See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122, 1122 n.5 (9th Cir. 2002). One might ask also why the creditor, having an enforceable award, was denied a right to seek discovery as to the existence of other assets within the jurisdiction. See, e.g., New York City Bar Report, *supra* note 29, at 3 ("[A party] seeking enforcement based upon the presence of the defendant's property within the state, should, in any event, be entitled to jurisdictional discovery based on the same showing required of plaintiffs in other types of actions.").

143. *Zelezny*, 2001 WL 1035138, at \*3.

144. *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminium Factory"*, 283 F.3d 208, 211 (4th Cir. 2002).

145. *Id.*

146. *Id.* at 216.

147. *Id.* at 212. The federal district court asserted that "[b]y no stretch could the single shipment, or even several such shipments, constitute continuous and systematic contacts with Maryland so as to justify general jurisdiction over NKAZ [the respondent]." *Id.* at 211.

148. *Id.* at 213 (internal quotations omitted). The court had begun by noting that the New York Convention confers subject matter jurisdiction on federal courts, but does not grant personal jurisdiction when

process requirement applies regardless of whether property is located in the district,<sup>149</sup> the court affirmed dismissal of the petition to confirm because “the mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action.”<sup>150</sup>

This conclusion is hard to square with either logic or policy, and is at odds with the Restatement (Third) Foreign Relations Law, which provides that “an action to enforce a foreign arbitral award requires jurisdiction over the award debtor *or his property*.”<sup>151</sup> Similarly, the American Law Institute Proposed Federal Statute on Recognition and Enforcement of Foreign Judgments takes the position that an action to recognize or enforce a foreign judgment may be brought either where the judgment debtor is subject to personal jurisdiction, or where its assets are located.<sup>152</sup> Finally, the position in *Base Metal* remains at odds with the principle established in *Shaffer*, that the presence of assets provides an adequate basis for enforcement of a sister-state judgment, regardless of whether the property bears any connection with the underlying claim.<sup>153</sup>

Unfortunately, since *Base Metal* no case has been decided in which the same basic fact pattern was presented.<sup>154</sup> In dicta in *Glencore Grain*, the Ninth Circuit disagreed with the principle announced in *Base Metal*, but decided the case under a different rationale.<sup>155</sup> The Second Circuit, in *Dardana Ltd. v. A.O. Yeganskneftgaz*,<sup>156</sup> examined the question of whether jurisdiction over the award debtor’s assets was sufficient to enforce a foreign award. However, the court remanded the matter to the district court, and the case settled before a

it would not otherwise exist. *Id.* at 212. Determining whether personal jurisdiction exists is normally a two-step process, looking first to the requirement of the long-arm statute of the state where the federal court sits, and second determining whether the exercise of jurisdiction comports with the due process requirements of the Fourteenth Amendment. *Id.* at 213. Since Maryland’s long-arm statute expands the exercise of personal jurisdiction to the full limits allowed by the Due Process Clause, the two-step analysis merges into a single inquiry of whether the exercise of personal jurisdiction would be consistent with due process.

149. *Id.* (“[W]hen 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.”).

150. *Id.* at 211.

151. See Restatement (Third) of the Foreign Relations Law of the United States § 487 cmt. c (1987) (emphasis added).

152. Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute § 9(b)(i) & (ii) (Proposed Official Draft 2005).

153. See discussion *supra* Part II.B.2.

154. The same parties were also involved in litigation in the Third Circuit. *Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminium Factory,”* 47 F. App’x 73 (3d Cir. 2002). In that case, however, *Base Metal* failed to raise the quasi in rem argument until it reached the appellate court level. *Id.* at 78. As a result, the Third Circuit, which held that *Base Metal* lacked the minimum contacts with New Jersey, refused to address the question of quasi in rem jurisdiction. *Id.* at 77

155. See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1122 (9th Cir. 2002).

156. 317 F.3d 202, 207–08 (2d Cir. 2003); see also *Ndeagro B.V. v. ZAO Konversbank*, No. 02 Civ. 3946(HB), 2003 WL 151997, at \*7–8 (S.D.N.Y. Jan. 21, 2003) (refusing to decide whether quasi in rem jurisdiction sufficed in an action to enforce a New York Convention award where an annulment proceeding was pending at the arbitral situs).

decision was rendered.

### 3. *A Further Look at Reasonableness*

In addition to its conclusion that the presence of respondent's assets in the district was insufficient to permit award confirmation, the Fourth Circuit went on to state that the petition must be dismissed because it was unreasonable to assume jurisdiction even if quasi in rem jurisdiction had been sufficient as a general matter. The court of appeals suggested that it was unclear "why the limited resources of the federal courts should be spent resolving disputes between two foreign corporations with little or no connection to our country," and that "the burdens of subjecting a foreign company to suit in this country in this case are not justified."<sup>157</sup>

Most observers can sympathize with the Fourth Circuit's concern about the workload of the federal judiciary. And lawsuits involving foreigners with no connection to the United States might seem like a good place to begin the pruning process.

However, when an award debtor has assets and business in the United States, it is difficult to take seriously the concerns expressed about distance to the forum. If keeping property and doing business in the United States is not too much of a burden for the award debtor, why should the court be solicitous of the burden of defending the enforcement action?

Moreover, the Fourth Circuit's approach gives insufficient weight to the fact that such refusal to recognize a New York Convention award places the United States in breach of an international treaty.<sup>158</sup> As mentioned earlier, the Convention permits non-recognition of an award for a limited number of defenses. Thus, any "reasonableness analysis" must take into account the public interest in having the United States meet its international obligation.

Indeed, failure to comply with treaty obligations could, in some circumstances, create liability under one of the many bilateral investment treaties to which the United States is party.<sup>159</sup> Giving proper weight to these treaty obligations would have gone a long way toward establishing the reasonableness of allowing a motion to confirm the award in *Base Metal*, regardless of concerns about docket crowding. Although the concern about the Russian respondent's burden of defending an enforcement action thousands of miles from home is not entirely unpersuasive, this hypothetical inconvenience must be weighed against the prospect of placing the United States in breach of its international treaty obligation.

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157. *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminium Factory,"* 283 F.3d 208, 215–16 (4th Cir. 2002) (citing *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 114 (1987)).

158. See *ILC Report*, *supra* note 10, at 1.

159. An investor denied an opportunity to enforce an otherwise valid award might argue that such a decision constituted a denial of justice under the applicable bilateral investment treaty. Among the provisions commonly found in bilateral investment treaties is a requirement that the host state accord foreign investments fair and equitable treatment. This provision has been construed to include claims based on a denial of justice. See Jan Paulsson, *Denial of Justice in International Law* 127–30 (2005).

There should be no mystery about the policy behind, and vital significance of, this treaty obligation of award recognition. In a world lacking any neutral supranational courts of mandatory jurisdiction to decide cases or enforce foreign judgments, arbitration bolsters cross-border economic cooperation by enhancing confidence within the business community that commercial commitments will be respected.

When a respondent had been found liable for breach of contract by a tribunal to whose jurisdiction it had freely consented, and has availed itself of the American markets by opening a bank account or shipping goods for sale into the United States, there is nothing about a petition to enforce the award that offends notions of “fair play and substantial justice.”<sup>160</sup> In today’s world of multinational law firms, fax, email, and the Internet, it would be almost surreal to agonize about the fairness of recognizing a respondent’s commercial obligations in a jurisdiction to which it ships goods or owns property.

### C. When Assets Are Absent

The most difficult scenario for recognition of a Convention award arises when the party which lost the foreign arbitration has no assets at all in the district where enforcement is sought. In such circumstances, it is not hard to understand why a reasonable person might perceive a lack of personal jurisdiction based on insufficient contacts with the forum. Appearances can be deceiving, however.

As an initial matter, one must recall the earlier observation that in many situations the winner in an arbitration has sound practical reasons to seek award confirmation. A respondent that has been exonerated from liability will wish to guard against competing litigation by clothing the award with the res judicata imprimatur of an American court. And a winning claimant will wish to be ready to enforce the award in the event the foreign award debtor later brings assets into the United States. Given that the FAA provides only three years for award confirmation, a delay beyond that point could result in a “so sad, too bad” result, with the victor in the arbitral proceedings being out of luck due to delay.

As discussed earlier, footnote 36 of *Shaffer v. Heitner* indicates that the Constitution calls for a significantly lower threshold of contacts to justify “notions of fair play” when a court is asked to hear a matter *after* a judgment on the merits has been rendered in a forum that had jurisdiction over the losing party. Nevertheless, one must still ask whether it is otherwise “fair” to require a foreign party to defend against award confirmation in a district where its property is absent.<sup>161</sup>

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160. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

161. *See, e.g.*, Weintraub, *supra* note 28, at 3. Professor Weintraub notes this to be a legitimate question, but concludes that there is nothing inherently unfair in making a foreign party defend against award confirmation in a forum where assets are absent.

This was the question posed when the Ninth Circuit heard arguments in *Glencore Grain*.<sup>162</sup> A Dutch corporation had sought recognition of a New York Convention award made in England against an Indian rice exporter. Although there was evidence that the Indian company occasionally did business with California parties, and even retained a sales agent there, it had no assets in California at the time the confirmation petition was filed.

In upholding the district court's dismissal of the motion, the Ninth Circuit indicated in dicta that the result might have been different if the award debtor had assets in the forum state, regardless of whether its property was related to the underlying cause of action. Thus, the Ninth Circuit avoided the analytic mistake made in *Base Metal*.

Nevertheless, the court of appeals decisively rejected any argument that it had jurisdiction to hear the confirmation petition in the absence of attachable assets in the forum state. This approach seems to miss the mark. In the context of a New York Convention award, no unfairness results (at least on a constitutional level) from requiring the loser in a foreign proceeding to defend against a confirmation petition regardless of whether it has assets in the forum state.

Sound practical reasons led the drafters of the New York Convention to use the term "recognition" as well as "enforcement."<sup>163</sup> When the winner in a foreign arbitration obtains a court order recognizing the award, the legal and factual findings of the award become incorporated into a juridical act of the forum state. The recognition in itself, however, does not direct one side to pay money to the other. This is of considerable significance since the fairness of any exercise of judicial jurisdiction depends to some extent on context.

The stakes involved in having an award "recognized" are often less than those for "enforcement," since in the former case no assets are seized. This lesser exercise of judicial power means a lesser threshold nexus between forum and person in order to satisfy due process.<sup>164</sup>

### III. Toward a Realistic Assessment of Personal Jurisdiction

#### A. Consent to Jurisdiction Clauses

Perhaps the most pragmatic response to cases such as *Base Metal* and *Glencore Grain* will prove to be the addition of consent to jurisdiction clauses in international arbitration agreements.<sup>165</sup> As the market reacts to the fact that the United States is not as arbitration-friendly as once anticipated, an evolution in arbitration clauses can be expected toward inclusion of language making

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162. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002).

163. New York Convention, *supra* note 14, art. I(1)

164. *Id.*

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

clear that the parties, at least *ex ante*, wish to eliminate the surprise obstacles resulting from uncertain fact patterns. These might one day become as commonplace as “consent to judgment” clauses in domestic arbitration agreements.<sup>166</sup>

At the extreme end of the spectrum one might see clauses explicitly providing for awards to be recognized in any court of all contracting states to the New York Convention. These clauses would expressly waive any objection to the competence of such courts, including without limitation defenses 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.<sup>167</sup> Only time will tell how this branch of transactional law will evolve.

#### B. Implied Waiver: The Significance of the Arbitral Seat

If the Constitution established its mandates for personal jurisdiction with bright lines, courts might be justified in perceiving themselves as limited in recognizing the commercial realities that call for a liberal policy toward enforcement of foreign awards. Little doubt exists, however, that notions such as “minimum contacts” and “fairness” remain chameleon-like and malleable, subject to individual perceptions of fairness.<sup>168</sup> Consequently, there seems little reason for the interpreters of Constitutional requirements to remain blind to the way practical elements of cross-border transactions shape an understanding of proper policy.

In an international business, as in any commercial venture, the contract negotiations provide a useful starting point for understanding the parties’ intentions and expectations. During negotiation of international commercial arbitration agreements, the choice of the arbitral venue generally looms paramount. In some measure, the concept of arbitral situs is being transformed into the notion of “seat of arbitration,”<sup>169</sup> an expression which increasingly serves to designate the country to which the parties have pegged their international arbitration, notwithstanding that the hearings and deliberations

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166. See 9 U.S.C. § 9 (2006). The provisions of FAA § 203 (9 U.S.C. § 203) make such stipulations unnecessary for most international contracts.

167. See New York City Bar Report, *supra* note 29, at 4 (“[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.”); Arkin, *supra* note 28, at 46 (proposing a similar solution).

168. See *Burnham v. Superior Court*, 495 U.S. 604, 623 (1990); text accompanying notes 125–133.

169. See English Arbitration Act, 1996, c. 23, §§ 2–3 (fixing the statutory scope by reference to arbitration with a seat in England, Wales, or Northern Ireland, and providing for designation of the seat by the parties, the arbitral institution or the arbitral tribunal). Thus, the arbitration seat is less a matter of real geography than a link to the legal order of the place whose curial law will govern many aspects of the proceedings. See also, Alan Redfern et al., *Law and Practice of International Commercial Arbitration* 83–88 (4th ed. 2004); Francis A. Mann, *Where Is An Award “Made”?*, 1 *Arb. Int’l* 107 (1985).



take place elsewhere.<sup>170</sup>

The place of arbitration bears directly on award enforceability for reasons other than political and geographic. For example, an award vacated at the place of arbitration loses its international currency under the New York Convention.<sup>171</sup> Thus, one would usually seek an arbitral situs in a country whose arbitration law prohibits judicial meddling with the merits of the case.

More importantly, however, many countries (including the United States) apply the Convention on the basis of geographical reciprocity, recognizing only awards made in the territory of another contracting State.<sup>172</sup> Consequently, informed parties will insist on arbitrating in a country that has ratified or acceded to the Convention,<sup>173</sup> and will reject arbitration in nations that are not parties to the Convention.<sup>174</sup>

From a Rawlsian perspective,<sup>175</sup> award recognition in all Convention countries certainly meets the parties' criteria of fairness. Behind the veil of ignorance at the time of contract signature, each side to the potential arbitration expects that a decision in its favor would receive *res judicata* status. To maximize this prospect, together the two parties selected an arbitral venue in a state where the Convention was in force, not knowing the extent to which (if at all) assets would be present in the territory where confirmation might be sought. Therefore, by recognizing a Convention award, regardless of the presence of property, a court gives effect to the parties' bargain *status quo ex ante*.

170. For a Swedish case rejecting the effect of an arbitral seat deemed a fiction, see *Titan v. Alcatel CIT, Svea Hovrätt* [Court of Appeal] 2005-03-29 (Swed.), reproduced at 20 Int'l Arb. Rep. A-1 (July 2005). For insightful commentary on the case, see Sigvard Jarvin & Carroll S. Dorgan, *Are Foreign Parties Still Welcome in Stockholm?—The Svea Court's Decision in Titan Corporation v. Alcatel CIT S.A. Raises Doubts*, 20 Int'l Arb. Rep. 42 (July 2005). The court held it had no jurisdiction to hear a challenge to an award, notwithstanding that the place of arbitration chosen by the parties' arbitration clause was Stockholm. With the parties' consent, the sole arbitrator had conducted hearings in Paris and London. The Court decided that a "Swedish judicial interest" must exist as a prerequisite for judicial review. *Id.*

171. New York Convention, *supra* note 14, art. V(1)(e). The English version of Article V(1)(e) reads: "Recognition and enforcement of the award may be refused . . . [if the award] has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made." The equally authoritative French text, "lends itself to a more forceful interpretation," providing that "recognition and enforcement will not be refused unless the award . . . was annulled where rendered (*La reconnaissance et l'exécution de la sentence ne seront refusées que si la sentence . . . a été annulée ou suspendue*)." William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l Law 805, 810-11 n.45 (1999). The other three official versions, Chinese, Russian, and Spanish, seem to comport with the permissive English. *Id.* at 811. See generally Richard W. Hulbert, *Further Observations on Chromalloy: A Contract Misconstrued, a Law Misapplied, and an Opportunity Foregone*, 13 ICSID Rev. 124, 144 (1998); Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 Arb. Int'l 227, 229 (1998).

172. Such reservations are explicitly permitted by New York Convention, *supra* note 14, art. I(3).

173. As of October 2005, 136 states were parties to the Convention.

174. See, e.g., Nigel Blackaby, *Arbitration and Brazil: A Foreign Perspective*, 17 Arb. Int'l 129, 129-31 (2001) (discussing problems faced by Brazil in getting international parties to agree to arbitrate there prior to its recent ratification of the New York Convention).

175. See John Rawls, *A Theory of Justice* (1971).

Waiver presents another approach to the same point.<sup>176</sup> Like many other legal rights, the invocation of personal jurisdiction as a litigation defense may be relinquished through informed consent.<sup>177</sup>

When business managers agree to arbitrate in a Convention country, local procedural defenses in the enforcement forum are precisely the type of obstacles to contract implementation that they seek to avoid. The whole purpose of the Convention was to give awards an international currency that would make them transportable from one country to another without reliance on the idiosyncrasies of the place where recognition might be sought. A seat in a New York Convention nation is chosen to enhance the parties' chance of award recognition, foreclosing the loser's option to expand or create defenses not available under New York Convention Article V.<sup>178</sup>

Alternately, the loser in the arbitration might be considered estopped from objecting to the authority of a court to recognize the Convention award.<sup>179</sup> If one side has bargained for a treaty framework that limits the grounds on which its commercial counterparty can escape the award's binding effect, fairness requires symmetrical limits on the right to say that the recognition forum lacked authority to confirm the award, or that the recognition has provided inconvenience.

The court in *Glencore Grain* assumed that any dismissal of recognition now would not foreclose enforcement in the future when the respondent brings property into the forum.<sup>180</sup> As mentioned earlier, this would not normally be so, given the limited time available for confirmation under the FAA.<sup>181</sup>

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176. The notion that an agreement to arbitrate in a signatory country can constitute a basis for finding waiver of the personal jurisdiction requirement was rejected by the District of Columbia Circuit in *Creighton Ltd. v. Gov't of the State of Qatar*, 181 F.3d 118, 125–26 (D.C. Cir. 1999). However, that case involved a foreign state. *Id.* at 120. The court proceeded on the assumption that a foreign state is a “person” under the Constitution. *Id.* at 124–25. That assumption has been subsequently rejected. *See, e.g., Price v. Socialist People's Libyan Arab Jamahiriyah*, 294 F.3d 82, 96 (D.C. Cir. 2002). In any event, to the extent that *Creighton* remains good law in the District of Columbia, its conclusions must be questioned for the reasons set forth *infra*.

177. The United States Supreme Court has squarely held that personal jurisdiction is a right that is waivable by implied conduct or that a party may be estopped from raising based on prior conduct. For example, in *Burger King Corp. v. Rudzewicz*, the Court noted that “because the personal jurisdiction requirement is a waivable right, there are a variety of legal arrangements by which a litigant may give express or implied consent to the personal jurisdiction of the court.” 471 U.S. 462, 472 n.14 (1985) (quoting *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 703 (1982)). The court therefore concluded that enforcement of forum-selection provisions does not offend due process when they have been freely negotiated and are neither unreasonable nor unjust. *See* 471 U.S. at 472 n.14 (quoting *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972)).

178. On implied consent in another context, see John M. Fedders, et al. *Waiver by Conduct – A Possible Response to the Internationalization of the Securities Markets*, 6 J. Comp. Bus. & Capital Market L. 1, 16 (1984) (applying a similar theory to neutralize foreign bank secrecy legislation used to block enforcement of U.S. securities laws by foreign participants in American markets).

179. *See Ins. Corp. of Ir.*, 456 U.S. at 704 (citing *Victory Transport Inc. v. Comisaria General de Abastecimientos y Transportes*, 336 F.2d 354, 363 (2d Cir. 1964)) (noting that lower federal courts have found consent to personal jurisdiction implicit in agreements to arbitrate).

180. *Glencore Grain Rotterdam v. Shivnath Rai Hamarain*, 284 F.3d 1114, 1128 n.9 (9th Cir. 2002).

181. 9 U.S.C. § 207 (2006).

Moreover, when the respondent is an exporter (as in *Glencore Grain*), property is often in the precarious form of account receivables,<sup>182</sup> which in today's world can be transferred electronically to another country before application for enforcement under whatever local procedures may be available.<sup>183</sup> Consequently, important benefits attach to the ability to obtain award confirmation regardless of the existence of assets within the recognition forum.<sup>184</sup>

Broader policy concerns play an important role with respect to matters such as the limits of fairness and "minimum contacts," which by their nature lack bright lines and clear definition. In this connection, the logic of a long line of United States Supreme Court rulings argues for award enforcement, notwithstanding the absence of present assets in the state where the district court sits. The Court has emphasized that confidence in the binding nature of international arbitration and in court selection enhances cross-border trade, finance, and investment.<sup>185</sup>

The corollary to these principles is that economic cooperation suffers when its legal framework permits recalcitrant parties to hide assets.<sup>186</sup> Without reliable recognition of arbitration awards, many business transactions either would remain unconsummated or would be concluded at higher costs to reflect the absence of adequate mechanisms to vindicate contract rights.

Intriguingly, from the perspective of the international practitioner, the Second Circuit in *Monegasque* asserted that broader award recognition would undermine arbitration.<sup>187</sup> Its argument seemed to run that the prospect of greater venues where an award could be confirmed might chill trade, since that possibility would make some litigants more wary of concluding international contracts.<sup>188</sup>

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182. The point was made forcefully in Weintraub, *supra* note 28, at 2.

183. On the absence of district court power to enjoin dissipation of assets prior to entry of money judgment, see *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund Inc.*, 527 U.S. 308, 323–24 (1999).

184. Interestingly, one means of capturing funds of non-domiciliaries (either for enforcement or for jurisdictional purposes) includes attachment of payments made through electronic fund transfers. Correspondent accounts are held in the United States by the banks of non-domiciliaries for the purpose of effecting payments in U.S. dollars from one out-of-state account to another. However, this is not permitted under the Uniform Commercial Code as applicable in most states. *See, e.g.*, New York UCC art. 4–104(3)(2001). But the same attachment actions are permitted if the underlying arbitration includes a maritime claim. *See Winter Storm Shipping, Ltd. v. TPI*, 198 F. Supp. 2d 385, 392 (S.D.N.Y. 2002), *vacated* 310 F.3d 263 (2d Cir. 2002).

185. *See e.g.*, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985); *Scherk v. Alberto Culver Co.*, 417 U.S. 506, 516–17 (1974); *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972).

186. *See, e.g.*, Michael Bobelian, *A Win in Name Only: Enforcing Judgments Against Foreign Entities Is A Long-Term Endeavor*, N.Y.L.J., Mar. 31, 2005, col. 2 (describing multi-year efforts of award creditors to enforce arbitral awards against recalcitrant states).

187. *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 496–97 (2d Cir. 2002).

188. The court stated:

Forcing the recognition and enforcement in Mexico, for example, in a case of an arbitral award

The point has some force, of course. It is certainly true that parties ambivalent about an international commercial relationship will think twice (as well they should) before concluding an agreement that provides multiple jurisdictions around the world in which an adjudication of rights can be given effect. What this approach misses is the concomitant benefit of discouraging economic risk-taking by players unwilling to take responsibility for their breaches of contract. To some extent, this is what the rule of law is all about in an international business context.

Moreover, it would be surprising indeed if award creditors expended funds bringing random confirmation motions in places unconnected with the debtors' commercial activity, and where attachable assets were not likely to exist in the near future. In *Glencore Grain*, for example, the Indian respondent had elected to do business in California on several occasions and maintained a relationship with a California sales agent.<sup>189</sup>

In such circumstances it is hard to see the unfairness of requiring the respondent to live with the consequences of its profit-seeking behavior, by defending itself in a proceeding to enforce an award rendered by a tribunal to whose jurisdiction it had consented. Indeed, the reasonableness of this approach seems to have been accepted in more than one country that has been an active participant in international arbitration, including England,<sup>190</sup> France,<sup>191</sup> and Belgium.<sup>192</sup>

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made in Indonesia, where the parties, the underlying events and the award have no connection to Mexico, may be highly inconvenient overall and might chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of arbitral awards in a petitioner's chosen forum. The Convention was intended to promote the enforcement of international arbitration so that businesses would not be wary of entering into international contracts. It would be counterproductive if such an application of the Convention gave businesses a new cause for concern.

*Id.* (citing *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr.*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001)).

189. See *Glencore Grain Rotterdam B.V. v. Shivnath Rai Hamarain Co.*, 284 F.3d 1114, 1119 (9th Cir. 2002).

190. See V.V. Veeder, *International Handbook on Commercial Arbitration* ch. VII, ¶ 2 (Supp. Mar. 23, 1997) ("Where the defendant is overseas, the applicant [of a motion to enforce the award] must seek the court's leave on affidavit to effect service of the enforcement proceedings outside the jurisdiction; but the court's exercise of jurisdiction is not conditional on the defendant having assets within England."). Such an affidavit must set forth the belief that a good cause of action exists and must indicate the country where the defendant can likely be found; see also *ABCI v. BFT*, [1996] 1 Lloyd's Rep. 485; *FESC v. Sovcomflot*, [1995] 1 Lloyd's Rep. 520, (1996) 21 ICCA Yearbook Comm. Arb. 699; *Rossee NV v. Oriental*, [1991] 2 Lloyd's Rep. 625, 629, (1991) 16 ICCA Yearbook Comm. Arb. 615.

191. A party resisting enforcement of a New York Convention award before a French court may not raise claims based on lack of territorial jurisdiction. See, e.g., *GL Outillage v. Stankoimport*, Cour d'appel [CA] [regional court of appeal] Paris, July 10, 1992, reprinted at 1994 Rev. Arb. 142, 7 Int'l Arb. Rep. B1, B2 (Sept. 1992) (holding inadmissible as grounds of appeal the lack of territorial jurisdiction of the court hearing the enforcement application); see also Philippe Fouchard, Fouchard, Gaillard, & Goldman on International Commercial Arbitration 887-962 (Emmanuel Gaillard & John Savage eds., 1999) (citing *GL Outillage* with approval).

192. See Hans van Houtte & Erik Valgaeren, *The Enforcement Procedure of Foreign Arbitral Awards in Belgium*, 14 Arb. Int'l 431, 433 (1998) (stating that when the person against whom the award is to be enforced "has no domicile or residence in Belgium, the President of the *arrondissement* where the enforcement will take

#### IV. The Role for Forum Non Conveniens

##### A. The Public Interest in Respect for Treaty Obligations

Unlike limits on personal jurisdiction, the doctrine of forum non conveniens does not rest on Constitutional underpinnings,<sup>193</sup> but derives instead from a court's inherent power to manage its own docket.<sup>194</sup> Once described as "a supervening venue provision" that comes into play when a trial court declines jurisdiction,<sup>195</sup> forum non conveniens implicates a multistage analysis. No level of the analysis implicates bright lines.<sup>196</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>197</sup> Consequently, courts do not dismiss on forum non conveniens grounds either if no adequate alternative forum exists, or if a balancing of interests indicates that dismissal would not be appropriate.<sup>198</sup>

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. The United States has a vital public interest in following through with its international commitments, which will normally outweigh the other interest factors (public and private) militating in favor of dismissal.<sup>199</sup>

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place has territorial jurisdiction" (quoting CJ art. 1719(2)).

193. See generally Edward L. Barrett, Jr., *The Doctrine of Forum Non Conveniens*, 35 Cal. L. Rev. 380, 386-89 (1947).

194. See *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 498-501 (2d Cir. 2002).

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

196. See *Gross v. British Broad. Corp.*, 386 F.3d 224, 230 (2d Cir. 2004).

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

198. In *Iragorri v. United Tech. 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, 71 (2d Cir. 2001). The court of appeals instructed the district courts to apply a "sliding scale" of deference to that choice, explaining that U.S. 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. *Id.* at 71 (citations omitted). 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 that considerations of convenience favor conduct of the lawsuit in the United States, the more difficult will be dismissal for forum non conveniens. *Id.*

199. 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. Sept. 4, 1998).

## B. Determining the Proper Party

While *forum non conveniens* rarely justifies refusal to recognize an award covered by the New York Convention, such instances do exist. An exception to the general rule might be found in the very facts that gave rise to *Monegasque*.<sup>200</sup> The Second Circuit 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 Government of the Ukraine. 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>201</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>202</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>203</sup> resisting the temptation to apply vague verbal formulae independent of the commercial context.<sup>204</sup>

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200. 311 F.3d 488, 498–501 (2d Cir. 2002). For an earlier case dismissing award recognition on *forum non conveniens* grounds, see *Melton*, where the Ninth Circuit upheld the district court’s dismissal of an action brought by a purchaser of a yacht who had obtained an award in Finland against a Finnish corporation with a sales agent in California. 1998 WL 613798, at \*\*1–4. The court did not find a lack of jurisdiction over the respondent, presumably because the presence of the sales agent precluded such an argument. *Id.* Instead, the court felt that the Finnish courts were better situated to determine whether the award rendered against Oy Nautor Ab was enforceable or not. *Id.* In another case, *Nedagro B.V. v. Zao Konversbank*, No. 02 Civ. 3946(HB), 2003 WL 151997, at \*7–8 (S.D.N.Y. Jan. 21, 2003), the district court heard argument on the *forum non conveniens* issue but elected not to address the issue because of its decision to stay proceedings pending the resolution of an annulment action in Russia.

201. The term “nonsignatory” 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 parties” in Convention Article II. 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 Int’l Ltd.*, 186 F.3d 210, 218 (2d Cir. 1999) (finding that “signed by the parties” applied to arbitral clauses encapsulated in broader contracts as well as separate arbitration agreements).

202. See *Ceska Sporitelna, a.s. v. Unisys Corp.*, No. 96–4152, 1996 U.S. Dist. LEXIS 15435, at \*12 (E.D. Pa. Oct. 10, 1996) at \*12 (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. Am. Arbitration Ass’n*, 64 F.3d 773, 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).

203. See *Sphere Drake Ins. v. All Am. Ins.*, 256 F.3d 587, 589–91 (7th Cir. 2001).

204. 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

In *Monegasque*, the question that arose was whether a nation, the Ukraine, could be made liable on an award by reason of piercing the corporate veil between the government and a state-owned corporation.<sup>205</sup> The district court felt this was an issue better decided by the Ukrainian courts than those in New York and dismissed the request to confirm the award.<sup>206</sup>

The Second Circuit agreed.<sup>207</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 the Ukraine had a more significant interest than the United States in the award enforcement action.<sup>208</sup>

The Second Circuit has not always shown such shyness in determining whether one entity should be liable for the debts of another. Indeed, the court took a quite different approach three years later in *Sarhank Group v. Oracle Corp.*,<sup>209</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>210</sup> In *Sarhank*, 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>211</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>212</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

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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. However, it might have been more prudent for the court to order arbitration on its own finding of jurisdiction under the relevant facts. Cf. *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.

205. *Monegasque de Reassurances v. NAK Naftogaz of Ukr.*, 311 F.3d 488, 492 (2d Cir. 2002).

206. *Id.* at 493.

207. *Id.* at 500–01.

208. *Monegasque*, 311 F.3d at 498–501.

209. 404 F.3d 657 (2d Cir. 2005).

210. *Id.* at 661. In *Sarhank*, 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 Convention Article V(2)(a), related to “subject matter arbitrability,” rather than excess of authority under Convention Article V(1). See Barry H. Garfinkel & David Herlihy, *Looking for Law in All the Wrong Places: The Second Circuit's Decision in Sarhank Group v. Oracle Corporation*, 20 Int'l Arb. Rep. 18 (June 2005). Cf. *Bridas S.A.I.P.C. v. Gov't of Turkmenistan*, 447 F.3d 411, 420 (5th Cir. 2006) (government manipulation of oil company made it the state's alter ego).

211. *Sarhank*, 404 F.3d at 658.

212. *Id.* 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”).

foreign law in deciding whether to confirm a foreign award against a sovereign state.<sup>213</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>214</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>215</sup>

While not free from doubt, *Monegasque* may well have been correctly decided on the narrow facts of the case.<sup>216</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. The best place to resolve these issues was in the Ukraine.

The decision itself does not operate as a complete bar to award recognition in the United States. If the foreign courts failed to address the matter, this would indicate that an alternate forum did not in fact exist, and the award creditor would be back before the courts in New York to seek recognition. Moreover, if the Ukrainian courts decided in favor of piercing the veil, assets could be attached in New York.<sup>217</sup>

The aspect of *Monegasque* that has concerned some international arbitration lawyers is not so much the case itself, but the danger that in other cases there might be misapplication of its problematic dictum concerning Article III of the New York Convention. As discussed above, this opens the door to an unduly broad scope for the Convention language permitting award non-recognition according to the “rules of procedure” of the territory where the award enforcement is sought.<sup>218</sup> Like many cases that are rightly decided on their facts, *Monegasque* has announced principles that must be handled with great caution.

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213. 361 F.3d 677, 685 (2d Cir. 2004).

214. *Id.* at 678.

215. *Id.* at 690.

216. *Cf.* New York City Bar Report, *supra* note 29, at 22–23 (lamenting 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); Carolyn B. Lamm & Frank Spooenberg, *The Enforcement of Foreign Arbitral Awards Under the New York Convention, Recent Developments*, Presentation at the ICC Conference on International Arbitration (Nov. 5, 2001) (“[S]hould this U.S. Court of Appeal’s decision be echoed in the future court’s practice, one could fear that the objection of forum non conveniens may be extensively addressed by litigants.”).

217. Indeed, in *Monegasque*, the Second Circuit itself acknowledged the unique set of circumstances militating in favor of dismissal. 311 F.3d 488, 500 (2d Cir. 2002). In particular, the court pointed out that “the private interest factors might not ordinarily weigh in favor of forum non conveniens dismissal in a summary proceeding to confirm an arbitration award.” *Id.* In fact, the *Monegasque* court distinguished the confirmation proceeding in that case from the “ordinary” confirmation proceeding, in part because “a trial of the factual issues implicating and establishing” Ukraine’s liability as a non-signer to the agreement was required. *Id.* The court also noted that the witnesses who could testify on this point “were beyond the subpoena power of the district court, that the pertinent documents are in the Ukrainian language and that enforcement or satisfaction of the arbitral award would not be easier here than in Ukraine.” *Id.*

218. *Id.* at 495.



### V. Award Registration: Enforcement as a Multi-Step Process

As suggested above, one approach to confirmation of Convention awards would be to establish a two-step process as an alternative to the present system. Step one would consist of a decision on *recognition* through a motion to confirm the award, analogous to award registration. The second step would be to use the confirming judgment either to *enforce* the award, by giving it effect to attach assets (for an arbitration's winning claimant) or to provide res judicata effect barring a competing lawsuit on the merits of the case (for an arbitration's winning respondent).

This procedure would guarantee due process and fairness to the party resisting the award and would minimize unnecessary burdens on the judiciary. For award creditors wishing a "one-stop" enforcement process, and willing to take their chances with a possible dismissal of confirmation on due process grounds, the existing system would still be available.

The winner in the arbitration would bring the motion to confirm within the time limit prescribed by the Federal Arbitration Act, three years from the date the award was made. At that time, the party resisting the motion would receive notice. Thereafter, it would have two options.<sup>219</sup> The first would be to appear for the purpose of presenting any defenses based on Convention Article V, such as lack of notice or invalidity of the arbitration agreement. In such an instance, the decision would be res judicata to bind both the debtor and the creditor.

Several reasons might lead the loser in an arbitration to contest the award even prior to an enforcement attempt, thus removing the Sword of Damocles. If the award is procedurally defective due to violations of due process, this would be easier to demonstrate when recollections of the procedural irregularity are still fresh and witnesses remain available to testify. Just as importantly, a business enterprise that expects to conduct future operations in the United States will not want its first shipment of goods burdened with an attachment.

The second option for the party resisting the award would be to do nothing at that stage. If so, the debtor would receive notice and opportunity to object during any subsequent attempt to use the confirmation judgment either

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219. An intriguing variation on this theme has been raised by Professor Weintraub, who suggests the possibility of an *ex parte* confirmation, which alone would not affect the defendant's rights sufficiently to require notice and an opportunity to be heard. *See, e.g.*, Weintraub, *supra* note 28, at 4. (Professor Weintraub also explores the possibility of notice to the award debtor as an alternative to *ex parte* confirmation. He notes, however, that courts have upheld, as against due process challenges under the Fourteenth Amendment, the constitutionality of state *lis pendens* statutes that permit *ex parte* notice on land records when the title to real property is subject to litigation that may bind potential purchasers.) *See, e.g.*, *Williams v. Bartlett*, 464 U.S. 801, 801 (1983) (dismissing action for want of substantial federal question, in which the court found that the statute was not constitutionally infirm under principles of procedural due process); *Debral Realty Inc. v. DiChiara*, 420 N.E.2d 343, 348 (Mass. 1981) (finding that a simple notice function does not violate Due Process Clause of the Fourteenth Amendment).

by attaching property or by barring further inconsistent lawsuits on the merits of the dispute.

Under such a process, no unfairness results to the respondent at any stage. If assets do not exist in the United States, and are unlikely ever to exist, then the debtor would not likely appear. Such a default scenario at the confirmation stage would thus involve minimal judicial resources.

The possibility exists, of course, that the debtor will change its mind, and later begin doing business in the forum or become the owner of property within the jurisdiction of the enforcement court. If so, there will be adequate opportunity to present defenses at that moment, when the panoply of Convention defenses under Article V will continue to exist. Any burden on judicial resources would be justified at that point by the prospect of giving effect to the award.

If the award debtor contests the award confirmation and loses, it might arrange not to own property in the United States. On a cost-benefit analysis, however, the United States government would still come out ahead, having met its duty to respect our treaty commitments under the New York Convention. Since American legal doctrines tend to be exported, other countries can be expected to follow the example when the shoe is on the other foot and companies based in the United States attempt to enforce awards overseas.

It might be objected that the award creditor could still be tempted to work mischief by choosing a confirmation court in some inaccessible venue. If the debtor was based in Europe, the action might be brought in Hawaii. And if the debtor was based in Japan, the action might be brought in Maine. On the assumption that such additional travel would place real burdens on modern multinational enterprises, which is not self-evident to all observers, the argument would run that some award debtors might be intimidated from stepping up to the plate to take advantage of the opportunity to oppose the early confirmation.<sup>220</sup>

To meet this objection, the confirmation stage could be centralized in one national court, much as the Court of International Trade now serves that function for litigation related to customs.<sup>221</sup> Indeed, suggestions have already been discussed within the American Bar Association (ABA) Customs Law Committee to substitute the CIT jurisdiction for that of federal district courts in matters related to the New York Convention.<sup>222</sup>

Unlike this ABA discussion draft, however, the proposal put forward in

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220. In federal court, venue transfer might be an option under 28 U.S.C. § 1404 (2006).

221. The Court of International Trade was established in 1980. Pub. L. No. 96-417, tit. V, § 501(17), 94 Stat. 1742 (1980) (codified as 28 U.S.C. ch. 55).

222. See Court of International Trade Improvement Act of 2005, § 7 (proposing the addition of 28 U.S.C. § 1585 to provide the CIT with exclusive jurisdiction over any action or proceeding falling under the 1958 New York Arbitration Convention, and amending FAA § 203 to replace “district courts of the United States” with “the United States Court of International Trade”). See generally Lawrence M. Friedman, Draft Interim Report of the ABA Customs Law Committee on the Proposed Court of International Trade Improvement Act of 2005 (June 28, 2005).

this Article would not eliminate the role of federal district courts. Rather, they would continue to exercise most of their present functions and responsibilities. What would change is simply that in some cases the award creditor would be given the opportunity to obtain for the award the imprimatur of a court in the United States before the three-year statute of limitations had run.

In the alternative, Congress might by statute create a nationwide service of process for district courts being asked to grant recognition or enforcement to foreign awards made in New York Convention countries. The territorial limits of service have already been extended in other cases, such as federal interpleader<sup>223</sup> and antitrust.<sup>224</sup> Similar extensions would be entirely appropriate as a step toward permitting the United States to meet its international treaty obligations, particularly ones that so often benefit American companies when invoked to promote vindication of contract rights through award enforcement abroad.

### Conclusion

In the United States, recognition of arbitration awards increasingly implicates a tension between respect for the international obligations, embodied in the New York Arbitration Convention, and application of procedural rules that under domestic law share an equal status with treaty commitments. The Constitution creates few bright lines to determine when treaty obligations trump established principles of domestic law. As a result, motions for confirmation of foreign arbitral awards often present a choice between competing principles, each of which would be extended but for the existence of the other.

Several recent court of appeals decisions serve as prisms through which to separate themes that inhere in the confrontation between these rival sources of legal authority. While none of the cases yields to facile analysis, all seem less than optimum in their articulation of guiding principles.

Lack of personal jurisdiction was invoked to justify refusal of award recognition in two of these cases, *Base Metal* and *Glencore Grain*. Both decisions misconstrue what is at stake. In neither instance was there a request that the forum take jurisdiction to determine the substantive merits of the dispute as an original matter. In both, the parties' controversy had already been

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223. Fed. R. Civ. P. 4(k)(1)(C); *see also* text accompanying notes 106–109 regarding Fed. R. Civ. P. 4(k)(2).

224. Fed. R. Civ. P. 4(k)(1)(D) provides that service will be effective to establish jurisdiction over the person of a defendant when authorized by federal statute. Section 12 of the Clayton Act provides worldwide service of process against a corporation (“wherever it may be found”) in any action under the antitrust laws. 15 U.S.C. § 22 (2006). Some circuits have held that such service is available only when the venue requirements have already been met, i.e., the corporation transacts business or is otherwise “found” in the district where suit is filed. *See Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 402 (2d Cir. 2005). Others circuits read the statute to require only that the corporation have minimum contacts with the United States as a whole. *See In re Auto Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 297 (3d Cir. 2004); *Action Embroidery Corp. v. Atl. Embroidery Inc.*, 368 F.3d 1147, 1181 (9th Cir. 2004).

determined by a forum (the arbitral tribunal) whose jurisdiction had been explicitly accepted by the debtor.

No unfairness exists in holding sophisticated business managers to their bargain when they engage in international business transactions. The agreement to arbitrate in a forum which triggers application of the New York Convention can reasonably be construed as acceptance of the other party's right to seek award recognition in any of the Convention members.

Even if no property exists at the time confirmation is sought, the winner in the arbitration may have legitimate reasons to seek award recognition. The Federal Arbitration Act gives three years for confirmation. The award creditor will understandably wish to take advantage of this window of opportunity in order to stop the three-year clock from running in the event assets find their way into the United States some years down the road. The process would be similar to an award registry, which the award debtor could contest either at time of registration (when recollections of any alleged procedural defects remain fresh) or at the moment of an enforcement action.

When the prevailing party is the respondent in the arbitration, the need for award recognition takes on a different significance. Notwithstanding the absence of property in the jurisdiction, confirmation should be available to ensure that the award will be clothed with clear *res judicata* effect if the losing claimant seeks to re-litigate the merits of the dispute within the United States.

Invocation of *forum non conveniens* as a bar to award enforcement presents a slightly different challenge. While there may be situations in which a court is justified in finding its forum inconvenient for recognition of a New York Convention award, these will be few and far between. The Second Circuit decision in *Monegasque de Reassurances* presents one such exception, given the intricate and nuanced questions raised about piercing the corporate veil of a foreign state instrumentality governed by Ukrainian law.

The need for a pro-recognition policy in arbitration proves particularly acute to cross-border investments that involve countries without a longstanding tradition of judicial independence. The type of international economic cooperation evidenced by those capital flows rests on a minimum level of investor confidence in fair adjudication. When the deal goes, the investor will look to present its claim before a forum more neutral, both politically and procedurally, than the other side's hometown justice. Nothing in the United States Constitution prevents promotion of such confidence through recognition of awards according to the terms of our country's freely accepted treaty obligations.