Recognition of Foreign Arbitral Awards and Money Judgments in the US

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Introduction[1]

In this paper we review the legal framework under which a foreign judgment would be recognised and enforced in the United States of America, and more particularly, the challenges - statutory and case law - creditors face when they ask US courts to recognize and enforce the judgments. **The working hypothesis** is that all foreign money judgments and arbitral awards face similar hurdles in asserting their claims in the United States. The research question is to determine whether that is, indeed, the case, and if not, why is one type of foreign judgments treated differently from the other..

In the normal course of events, one would expect that when a foreign judgment creditor asks the US court to recognize the foreign judgment, a challenge would be lodged by the non-prevailing party in the foreign forum. There is one important difference between the challenge of a foreign monetary judgment and the challenge of a foreign judgment that confirms or sets aside an arbitral award. In the former, the challenge is to the adjudication process itself, as we will explore further in this paper. That means that in certain situations, the American court may force the re-litigation of the case, while in the latter, the foreign court confirmation or set-aside is being challenged, and not the arbitral adjudication process itself.

While a party to treaties governing the enforcement of foreign arbitral awards[2], the United States is not a party to any treaty on the acknowledgement and execution of foreign judgments, nor does it have federal laws governing such judgments[3]. The applicable legal framework for enforcing foreign judgments in the United States is found in the local laws of the different states, and these local state laws should be the first stop for any acknowledgement and enforcement of a foreign judgment in the U.S.

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[1] CITING: Books, articles, websites and UK cases are cited as per OSCOLA guidelines; US cases are cited in the source.

[2] Burton Dewitt, *'A Judgment without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards'* [2015] 50(2-3) Texas International Law Journal 495-518

[3] AJ Sorkowitz, 'I ' [1991] 37(5) Practical Lawyer 57-68

The various state laws, however, share certain basic principles. State courts will generally follow the principle of comity, as expressed by the U.S. Supreme Court,[4] in respecting foreign judgments. As Justice Gray said,

> [w]here there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh.[5]

But as we will see later, constitutional protections trump comity.

Further, most states, including major commercial hubs such as New York, Florida, California and Texas, have enacted some version of the Uniform Foreign Money Judgments Recognition Act of 1962[6] which governs the recognition of foreign money judgments. A number of states, including California and the District of Columbia, have enacted some version of the revised 2005 Uniform Foreign-Country Money Judgments Recognition Act[7]. Yet Louisiana, home of a major port of entry (New Orleans), has not enacted either version of the Foreign Money Judgment Recognition Act. Even where individual state statutes are modelled on one of the Uniform Acts, such statutes can differ between states, as do different state courts' interpretations of the statutes.

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[4] *Hilton v Guyot*, 159 [1895] US 113

[5] Id. The US Supreme Court declined to recognize this French judgment due to lack of reciprocity in recognizing foreign judgments, explaining that reciprocity was necessary before comity could be applied.

[6] Uniformlawsorg, 'Uniform Foreign Money Judgment Recognition Act of 1962' (*Uniformlawsorg*, 1962)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_62.pdf> accessed 22 May 2017

[7] Uniformlawsorg, 'Uniform Foreign Money Judgment Recognition Act of 2005' (*Uniformlawsorg*, 2005)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf> accessed 22 May 2017

Foreign money judgments subject to recognition and enforcement under the Uniform Acts must grant or deny recovery of a sum of money. Judgments granting declaratory or injunctive relief are excluded from coverage by the Uniform Acts, as are judgments for taxes, fines or other penalties, or judgments for support in matrimonial or family matters. The fact that a particular type of judgment is not covered by the Uniform Acts does not necessarily mean that such judgment is unenforceable. As the 2nd Circuit Court of Appeal explained, "*[A] plaintiff seeking enforcement of a foreign country judgment granting or denying recovery of a sum of money must establish prima facie: (1) a final judgment, conclusive and enforceable where rendered; (2) subject matter jurisdiction; (3) jurisdiction over the parties or the res; and (4) regular proceedings conducted under a system that provides impartial tribunals and procedures compatible with due process*[8]*.*"

2.1 Scope

This study concerns itself with the obstacles and challenges faced by foreign judgment creditors as they seek to have them recognized and enforced in the United States of America. It is not a state-by-state survey of obstacles and remedies, but rather an overview of the challenges facing creditors.

The holders of foreign arbitral awards will find that some federal appellate courts will allow a challenge to the award only if is permitted by the New York Convention, while other appellate courts will insist on the more stringent requirements usually ascribed only to domestic awards. As to the holders of foreign money judgments, they will find that while some states have adopted either the 1962 or the 2005 Uniform Recognition Acts, others use common law precedents. But regardless of the governing Act or model law, there are common elements shared by all.

2.2 Survey of Literature

While there is an abundance of journal articles concerning the recognition and enforcement of foreign money judgments in the US, there are precious few that compare them to the recognition of foreign arbitral awards. Both Vaisanen,[9]Hulbert[10] and Dewitt[11]are cognizant of the various

[8] *Ackermann v. Levine,* 788 F.2d 830, 842 n. 12 (2d Cir.1986)

[9] T Vaisanen, '*Incompetent Drafting and Complex Laws: Automatically Waiving Set-Aside of Foreign Arbitration Awards in the United States*' [2013] 45(1) Cornell Int'l Law Journal 723

forum considerations facing arbitral award creditors, since courts that follow the guidelines of the 2nd Circuit Court of Appeals fare differently than others. The question as to when an arbitral award issued in the US is a 'nondomestic' award, which qualifies for the New York Convention, is tackled by Van der berg.[12]

The sheer number of the various guidelines found in the 50 states can lead to potential legal errors when a jurisdiction is chosen for the recognition of foreign money judgment, a subject ably handled by Brand.[13]Thomson, in an article written for the US Chamber of Commerce, bemoans the 'predatory' foreign lawsuits against American companies abroad, instigated by American lawyers.[14]

1 Rules

3.1 The 1962 Uniform Foreign Money Judgment Recognition Act[15] was promulgated as a model law by the National Conference of Commissioners on Uniform State Laws, and has been so far adopted by 32 states. The stated purpose of the Act was to serve as a companion to the 1948 Uniform Enforcement of Foreign Judgment Act, which was itself replaced by the 1962 Revised Uniform Enforcement of Foreign Judgments Act,[16]and provide a uniform method for the states in recognizing or denying foreign judgments. As some foreign countries refused to recognize American judgments unless reciprocity could be shown, it was felt that this Act would meet any reciprocity challenges.

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[10] RW Hulbert, *'The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act'* [2011] 22(1) American Review of International Arbitration 45,52

[11] Burton Dewitt, *'A Judgment without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards*' [2015] 50(2-3) Texas International Law Journal 495-518

[12] AJ Van der berg, *'When is an Arbitral Award Nondomestic Under the New York Convention of 1958?*' [1985] 6(1) Pace Law Review 25-26

[13] RA Brand, *'Recognition and Enforcement of Foreign Judgments'* [2013] 74(Spring) Univ Pittsburgh Law Review, at 10

[14] https://tollefsenlaw.com/wp-content/uploads/2014/08/2011-US-Chamber-AbusiveForeignJudgments.pdf

[15] Uniformlawsorg, *'Uniform Foreign Money Judgment Recognition Act of 1962'* (*Uniformlawsorg*, 1962)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_62.pdf> accessed 22 May 2017

[16] Nccusl, *'Revised Enforcement of Foreign Judgments Act'* (*Uniformlawsorg*, 1964)<http://www.uniformlaws.org/shared/docs/enforcement%20of%20judgments/enforjdg64.pdf> accessed 13 June 2017

Section 4 of the Act lists three mandatory and six discretionary grounds for nonrecognition of the foreign judgment, which are listed in Table 1. To be considered, the foreign judgment must be final and enforceable in the country of origin, even when an appeal there is pending.

3.2 The 2005 Uniform Foreign-Country Money Judgment Recognition Act[17] is a revision of the 1962 Act. Since the 1962 Act did not specify a procedure for recognizing a foreign judgment, some states assumed that a simple registration of the foreign claim was sufficient. The 2005 Act clarifies that by requiring a court action for either a recognition or denial. The 2005 Act adds three discretionary grounds for nonrecognition (table 1), and establishes a statute of limitations on the foreign judgment, so that in no case can it exceed the expiration date in its country of origin[18].

3.3 The 1964 Revised Uniform Enforcement of Foreign Judgments Act*:* Some confusion surrounds The 1964 Revised Uniform Enforcement of Foreign Judgments Act[19], which does not apply to foreign country judgments. "Foreign judgment", in the context of the Act, is a judgment issued by a court of a sister state, rather than a foreign country[20].

3.4 The Restatement (Third) of Foreign Relations Law: Although 32 states have adopted either the 1962 Recognition Act or its 2005 revision, 18 states have chosen to continue to apply common law precedents to foreign judgment recognition. The Restatement, formulated in 1986 by the American Law Institute, provides a summary of common law issues and solutions, and is used by state courts where the Recognition acts have not been adopted, as well as the federal courts in those states. The mandatory grounds for nonrecognition of foreign judgments are listed in section 482(1), and the discretionary ones are in section 482(2).

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[17] Uniformlawsorg, *'Uniform Foreign Money Judgment Recognition Act of 2005'* (*Uniformlawsorg*, 2005)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf> accessed 22 May 2017

[18] Id. at section 6.

[19] Revised Uniform Enforcement of Foreign Judgments Act of 1964

[20] Id. at Section 1

3.5 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, widely referred to as the New York Convention[21], went into force in 1959. It was ratified by the US in 1970, and the UK in 1975. Upon ratification by the United States Senate, the New York Convention was incorporated into Chapter 2 of the Federal Arbitration Act (“FAA”), thus pre-empting any conflicting state laws[22]. The supremacy of US Senate-ratified treaties over conflicting state laws has been confirmed in a number of cases by the US Supreme Court, and reaffirmed more recently in the *Sanchez-Llamas* decision;[23] there, the court opined on the supremacy of treaties (in that case, the Vienna Convention) over state laws:

> Under our Constitution, "[t] he judicial Power of the United States is vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." That "judicial Power . . . extend[s] to . . .Treaties." And, as Chief Justice Marshall famously explained, that judicial power includes the duty "to say what the law is." If treaties are to be given effect as federal law under our legal system, determining their meaning as a matter of federal law "is emphatically the province and duty of the judicial department," headed by the "one supreme Court" established by the Constitution. It is against this background that the United States ratified, and the Senate gave its advice and consent to, the various agreements that govern referral of Vienna Convention disputes to the ICJ[24].

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[21] Uncitral, *'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards'* (*Newyorkconventionorg*, 10 June 1958)<http://www.newyorkconvention.org/english> accessed 30 May 2017

[22] See S Koh, *'Respectful Consideration after Sanchez-Llamas v Oregon: Why the Supreme Court Owes More to the International Court of Justice'* [2007] 93(1) Cornell Law Review, at 247

[23] *Sanchez-Llamas v Oregon*, [2006] 548 US 331

[24] For the full decision and comments, see Sally Cummins, *Consular and Judicial Assistance. in S Cummins (ed), Digest of United States Practice in International Law 2006 (*Oxford University Press 2006) 71

3.6 Table 1.

Grounds for Nonrecognition

Of Foreign Money Judgments

(Money judgments, other than for taxes, fines or penalties[25])

Restatement (Third) of Foreign Relations Law	1962 Uniform Foreign Money Judgments Recognition Act	2005 Foreign-Country Money Judgment Recognition Act
§ 482(1): (Mandatory) 1. Lack of due process and impartial tribunals in country of origin. **§ 482(2): (Discretionary)** 1. No subject matter jurisdiction. 2. Violations in notifying the defendant. 3. Fraud 4. Contrary to public policy of state or the United States. 5. Conflicts with another judgment. 6. Conflicts with party agreement on forum.	**§ 4(a): (Mandatory)** 1. Lack of due process and impartial tribunals in country of origin. 2. No personal jurisdiction, using US standards. 3. No subject matter jurisdiction. **§ 4(b): (Discretionary)** 1. Violations in notifying the defendant. 2. Fraud 3. Contrary to public policy of state. 4. Conflicts with another judgment. 5. Conflicts with party agreement on forum. 6. Inconvenient forum with jurisdiction based on personal service only.	**§ 4(b): (Mandatory)** 1. Lack of due process and impartial tribunals in country of origin. 2. No personal jurisdiction, using US standards. 3. No subject matter jurisdiction. **§ 4(c): (Discretionary)** 1. Violations in Notifying the defendants. 2. Fraud 3. Contrary to public policy of state or the United States. 4. Conflicts with another judgment. 5. Conflicts with party agreement on forum. 6. Inconvenient forum with jurisdiction based on personal service only. 7. The integrity of the court in country of origin is in doubt. 8. The foreign judgment is not compatible with the requirements of due process.

[25] See § 483 of the Restatement (Third) of Foreign Relations Law, which states that "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states."

2 Analysis: Recognition of Foreign Money Judgments in the United States

The US Supreme Court has made it abundantly clear that Constitutional protections do not cease to exist when a foreign judgment is presented for recognition, as they do not cease to exist for judgments made by state courts. In the *Matsushita* case[26] the Supreme Court explained that unless the state court judgment meets the Due Process provisions of the Fourteenth Amendment to the Constitution, it fails and is not entitled to full faith and credit recognition by other states or jurisdictions. That same admonition applies to foreign judgments, if and when the judgment is recognized by a state court in contravention of the US Constitution. This was further amplified in the *Martens v Martens* case[27]which said that foreign judgments differ from sister-state judgments which constitutionally deserve full faith and credit. Foreign judgments cannot contravene the state's public policy, and they must prove that the foreign court and personal and subject matter jurisdictions. All of these issues – public policy, due process, and personal and subject matter jurisdiction – must be addressed in the court proceeding that is asked to recognize the judgment.[28]

As the United States has not ratified any treaties governing the recognition and enforcement of foreign judgments, judgment creditors face an array of different procedures in the various states. Some states have subscribed to the 1962 Uniform Foreign Money-Judgments Recognition Act[29] with others opting for the revised 2005 Uniform Foreign-Country Money Judgments Recognition Act[30]. Many have adopted the 1964 Revised Uniform Enforcement of Foreign Judgments Act, but in states which rely on common law, federal and state courts refer to sections 481 and 482 of

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[26] *Matsushita Electric Ind v Epstein*, 516 US 367,386 [1996]
[27] *Martens v Martens* (284 NY 363, 365-366)
[28] Id.
[29] Uniformlawsorg, *'Uniform Foreign Money Judgment Recognition Act 1962'* (*Uniformlawsorg*, 1962)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_62.pdf> accessed 22 May 2017

[30] Uniformlawsorg, *'Uniform Foreign Money Judgment Recognition Act 2005'* (*Uniformlawsorg*, 2005)<http://www.uniformlaws.org/shared/docs/foreign%20country%20money%20judgments%20recognition/ufcmjra_final_05.pdf> accessed 22 May 2017

the Restatement (Third) of Foreign Relations Law,[31] which provide a summary of the common law on the recognition and enforcement of foreign judgments. In one area of agreement, the two Acts and the Restatement agree on a prerequisite for any foreign judgment: It must grant or deny money, and it must be final, conclusive and enforceable in the country of issue.

The 2005 Recognition Act revises the 1962 Act in some important areas. Unlike the earlier act, it requires the judgment creditor to file a court action to have the foreign judgment recognized in the state; likewise, a judgment debtor must do the same to obtain a preclusive determination. It also adds a statute of limitations to the foreign judgment: it expires at the earliest of (a) its expiration in the country of origin, or (b) 15 years from the time it became effective in the country of origin.[32]

Of the 32 states to adopt the 1962 Recognition Act, 22 have so far embraced the 2005 revision.[33] Table 1 in the Rules section compares the grounds for nonrecognition of foreign money judgments by the Restatement (Third) of Foreign Relations Law, used by 18 common law states, and the 1962 and 2005 Recognition Acts. As the table indicates, some of the determinants for nonrecognition are mandatory, while others are discretionary.

4.1 Federal versus State courts: Many foreign judgment creditors would prefer to have the judgment recognized and enforced by a federal court, rather than a state court, but for the requirement that there be both personal and subject matter jurisdiction for the federal court to recognize the judgment.[34]Although that requirement can also be found in both the 1962 and the 2005 Recognition Acts (see Table 1), it is not so in common law states. If personal jurisdiction cannot be ascertained, the judgment creditor who wants to gain recognition in a common law state would be better served by filing for recognition in a state court, rather than federal one. But be it as it may, in the absence of any ratified treaties or federal laws to guide them, federal courts, following what has become known as the Erie Doctrine, rely on state statutes or Uniform Acts in deciding foreign judgment issues[35].

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[31] Restatement (Third) of Foreign Relations Law §§ 481, 482 (1987).
[32] 2005 Recognition Act § 9.
[33] http://www.uniformlaws.org
[34] CA Wright and AR Miller, *Federal Practice and Procedure* (3rd edn, Thomson Reuters 2012) §§ 1063, 3522
[35] *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)

4.2 Public policy - State and Federal: The difference between section 4(b)(3) of the 1962 Act and section 4(c)(3) of the 2005 Act is of interest. Where the 1962 Act may deny recognition to a foreign judgment which is contrary to the state's public policy, the 2005 Act denies it if the foreign judgment is contrary to the public policy of the state OR the public policy of the United States. Consider, for example, a hypothetical attempt to enforce a foreign money judgment in Indiana, where the defendant in the foreign judgment asks the Indiana court for preclusive determination, claiming discrimination in the country of origin due to his homosexuality. Such discrimination is not contrary to Indiana's public policy, and if the 1962 Act were the guideline, the request for preclusive determination would be denied; however, Indiana has now adopted the 2005 Act, which adds the United states public policy as a determinant, and says that recognition may be denied if contrary to the public policy of either the state (Indiana) *or* the United States. Based on a 2015 decision of the United States Supreme Court, which clarified the public policy concerning that issue[36]via a decision on same-sex marriage, an assumption could be made that the public policy of the United States, and not Indiana's, would be used in either issuing a preclusive determination or denying recognition.

In *De Brimont v Penniman*[37] the French plaintiff had married the American daughter of the defendants, and lived with her in France, where they had a child. Following the death of Mrs. De Brimont, her husband obtained a child-support judgment from a French court, obligating the American parents of the deceased to make child support payments to Mr. De Brimont. While French anti-paupery public policy would require well-to-do in-laws to contribute to the child's welfare, that is not the case in the US and indeed, in denying De Brimont's request to recognize the French judgment, the New York court held that *"[C]omity does not require, but rather forbids it, when such a recognition works a direct violation of the policy of our laws, and does violence to what we deem the rights of our own citizens."*[38] (But see the Reporter's note to the Restatement [Third] of Foreign Relations Law s. 482[39])

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[36] For a Supreme Court case which changed public policy, see *Obergefell v. Hodges* : 576 US ___ (2015)
[37] *De Brimont v Penniman*, 7 F Cas 309 (CCSDNY 1873)
[38] Id.
[39] [R]EPORTERS NOTES: "1. Public policy and enforcement of foreign judgments. Since specific grounds for resisting recognition of a foreign judgment, such as lack of procedural fairness, are separately enumerated in this section, few judgments fall in the category of judgments that need not be recognized because they violate the public policy of the forum. That a judgment was rendered on a cause of action not known to or rejected by the forum in which recognition is sought is not sufficient to defeat recognition."

43 First Amendment protection. Prior to 1964, US courts treated libel as a common law tort, in which the burden was on the defendant to prove that the plaintiff had not been libelled. The US Supreme Court changed that with the *New York Times v Sullivan*[40] decision, which shifted the burden of proving libel to the plaintiff, requiring the plaintiff to show that the defendant acted with malice. In this, the court cited the First Amendment to the US Constitution, which guarantees the freedom of speech by saying that "*Congress shall make no law… abridging the freedom of speech, or the press.*[41]"

The *Bachchan v. India Abroad Publications Inc*[42] is an example of an English libel judgment which was refused recognition by the New York Supreme Court on First Amendment grounds. The defendant was a publisher serving the Indian diaspora in the UK and US, as well as providing diaspora news to media in India. In 1990 it reprinted a story which first appeared in a leading Swedish newspaper, and which reported a Swiss investigation into alleged kickbacks received by Bachchan (an Indian national) from Swedish arms dealers. Sometime later, the Swedish newspaper retracted the story, apologised and reached a confidential settlement with Bachchan. The defendant, *India Abroad,* published the retraction, but was sued nevertheless in England, with Bachchan obtaining a High Court judgment of GBP 40,000 plus attorney's fees. In denying the request by Bachchan to have the New York court recognise the English judgment, Judge Fingerhood wrote that *"Entry of the judgment is opposed on the ground that it was imposed without the safeguards for freedom of speech and the press required by the First Amendment to the United States Constitution and Article I, Section 8 of the Constitution of the State of New York. Defendant asks this court to reject the judgment as repugnant to public policy, a ground for nonrecognition of foreign judgments under CPLR 5304(b)(4).*[43]" Judge Fingerhood's decision points out that although the two countries share a legal tradition, the UK does not have a written constitution nor does it have free speech guarantees, which, in the post-*Sullivan* age, have upended libel laws in the US.

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[40] 376 U.S. 254 (1964)
[41] First amendment to the US Constitution
[42] *Bachchan v. India Abroad Publications Inc.,* 585 N.Y.S.2d 661 (Sup. Ct. 1992).
[43] Id.

4.4 Lack of Due Process: In the Lloyd's v Ashenden case[44], Ashenden, an American investor in one of Lloyd' syndicates, protested a demand for additional contributions made by Lloyd's, claiming that when Lloyd's solicited his participation in the syndicate, it failed to disclose the syndicate's current liabilities, which were mostly asbestos claims. Such disclosures are mandatory in the US, but not in the UK. Lloyd's obtained a judgment in London which it then filed for enforcement in Illinois. Ashenden resisted, claiming that the English courts had not afforded him due process. Ashenden's claim was rejected by a US District Court; on appeal to the 7th Circuit Court of Appeals, the 'lack of due process' in England was given short shrift by the court's Chief Justice Posner.

> *[T]he judgments about which they complain were rendered by the Queen's Bench Division of England's High Court, which corresponds to our federal district courts; they were affirmed by the Court of Appeal, which corresponds to the federal courts of appeals; and the Appellate Committee of the House of Lords, which corresponds to the U.S. Supreme Court, denied the defendants' petition for review. Any suggestion that this system of courts "does not provide impartial tribunals or procedures compatible with the requirements of due process of law" borders on the risible. "[T]he courts of England are fair and neutral forums*."[45]

But in *Osorio v Dole Food Co.*[46] the results were different. In that case, hundreds of Nicaraguan farm workers brought suit against a plantation owner for exposing them to a chemical, dibromochloropropane ("DBCP"), used as soil fumigant. After discovering that concentrated exposure to DBCP could cause sterilization in male workers, further usage was banned in 1979 by the US Government. In 2001 Nicaragua passed Special Law 364 (also known as "the DBCP law" or alternately as the "Anti Dole Foods Law") that established a high minimum compensatory damage to any plaintiff harmed by DBCP. A Nicaraguan court then issued a judgment of $97 million against Dole Foods, which plaintiffs tried to enforce in a US district court in Miami. In denying recognition, the US court noted that "case did not arise out of proceedings that comported with the international concept of due process," casting doubt on the

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[44] *Soc'y of Lloyd's v. Ashenden*, 233 F.3d 473, 477 (7th Cir. 2000)

[45] *Id. at s6*

[46] *Osorio v. Dole Food Co.,* 665 F. Supp. 2d 1307 See also Stategov, '2012 Investment Climate: Nicaragua' (*US Department of State*, 2012) <https://www.state.gov/e/eb/rls/othr/ics/2012/191209.htm> accessed 11 June 2017

genesis of Special Law 364, and the tribunal convened to use it against Dole Food Co. The *Osorio* quest for recognition was also denied due to lack of subject matter jurisdiction, discussed further below.

Another example concerning the fairness of the foreign court in issuing a judgment is *Bank Melli Iran v Pahlavi,*[47] In which two Iranian banks filed - in Iran - an action against the sister of the former Shah. The only form of service was the publication of summons in an Iranian legal publication. After obtaining a $32 million default judgment against the princess, the bank filed for recognition of the judgment in California, only to be denied by the 9th Circuit Court of Appeals.[48]

Pahlavi explained to the court that in her circumstances the service was improper, that she was precluded from defending herself in Tehran, where she is the subject of an arrest warrant, nor could she expect prospective witnesses in Iran to testify on her behalf. The 9th Circuit agreed that the Iranian court action did not meet US standards of due process in denying the claim.

What if the foreign country has a constitution modelled after the US Constitution, has an independent judiciary and American-style system of checks and balances? That was the claim a Liberian judgment creditor made in *Bridgeway Corp. v. Citibank.*[49] But the court agreed with Citicorp that during the Liberian Civil War the Liberian judiciary was rife with corruption and incompetence, and that the crumbling system of governance no longer resembled the American model. The court denied Bridgeway's request to recognize the judgment.

In this case the court, in commenting on the state of the judiciary in Liberia during the civil war, relied primarily on the monthly reports provided by US consular officials in Monrovia to the State Department. The consular officials had frequent contacts with Liberian courts, and thus could observe first-hand the deterioration of the Liberian judicial system during the war.

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[47] *Bank Melli Iran v. Pahlavi,* 58 F.3d 1406, 1408, 1413 (9th Cir. 1995),

[48] Id.

[49] *Bridgeway Corp v Citibank* , 201 F.3d at 137

4.5 Lack of Personal Jurisdiction: Personal jurisdiction allows the court to determine the rights and liabilities of litigants. When one of the litigants resides in another jurisdiction, the court can still assert personal jurisdiction by these means:

Contract or agreement which specifies which law it is subject to. However, the 6th Circuit Court of Appeals has determined that such consent could be invalidated if challenged on grounds of fraud, inconvenience, overreaching or contravention of public policy.[50]

Minimum contacts. If the plaintiff can document that in negotiating and executing the commercial transaction the defendant visited the jurisdiction, it can mitigate the fact that the court had the use the long-arm statute to serve the defendant.[51]

Transient jurisdiction. The court obtains jurisdiction over an out-of-jurisdiction litigant if the process was served while he was visiting the jurisdiction[52].

John Kough, having been sued by the Bank of Montreal[53], raised the issue of lack of personal jurisdiction when he challenged the bank's filing for judgment recognition in California. Kough, a California resident, was a director of a British Columbia company, and in that capacity signed a personal guaranty for a loan the company obtained from the Bank of Montreal. When the loan defaulted, the bank obtained a British Columbia court judgment against Kough and then proceeded to enforce it in California.

The bank claimed that the standard clause in the loan guaranty, which subjected it to the laws of British Columbia, gave the Canadian court which issued the money judgment personal jurisdiction over John Kough. Kough disagreed, saying that the Canadian court should not have imputed a personal jurisdiction from a pre-printed clause in the loan guaranty agreement; the Northern California US District Court agreed. However, the bank succeeded in disputing the personal jurisdiction challenge by showing the court that other factors surrounding the loan guaranty, such as minimum contacts, were sufficient to establish personal jurisdiction by the British Columbia court.

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[50] *Shell v. R.W. Sturge, Ltd.,* 55 F.3d 1227 (6th Cir. 1995)
[51] *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945).
[52] *Burnham v. Superior Court,* 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990)
[53] *Bank of Montreal v Kough*, 430 F Supp 1243, 1246 (DCCal 1977)

Although John Kough was not successful in his challenge to the Canadian judgment, his case points out that in similar situations, Americans can either choose to appear in the (possibly hostile) foreign court, where they believe the odds are stacked against them, or, like Kough, refuse to attend the foreign trial, and use 'lack of personal jurisdiction' in challenging attempts to file the foreign judgment for recognition in the US.

Personal jurisdiction was claimed – and denied – in another Canadian / American litigated case. In *Falcon v Ames,*[54] the defendant, a New York merchant, ordered a supply of nails from a Canadian company, Falcon Manufacturing. Upon receipt of the nails, Ames refused payment, claiming that the nails were mislabelled and of the wrong size. Falcon sued Ames in Ontario, Canada, and that court, utilising Ontario's long-arm statute,[55]claimed personal jurisdiction over Ames and issued a default judgment. Falcon then asked a New York court to recognize the judgment. In denying the request, Allen Myers J wrote that he had to answer these questions:

> "(1) Does the default judgment against defendant based upon jurisdiction conferred pursuant to the Ontario "long-arm" statute contravene our public policy or the due process clause of the Fourteenth Amendment to the United States Constitution?
>
> "(2) If it does not contravene our public policy or the Fourteenth Amendment, did the defendant in fact commit a breach of contract *in Ontario* which would authorize personal service of the writ of summons upon him in New York pursuant to the Ontario statute so as to give jurisdiction to the Ontario court?[56]

The judge found that there was nothing in the commercial transaction between the litigants that gave rise to a claim of personal jurisdiction by the Ontario court. His suggested remedy for Falcon was to file a claim against Ames in New York.

4.6 Lack of Subject Matter Jurisdiction: A court must have jurisdiction over the subject matter before it. It stands to reason that a court of equity cannot try criminal cases, nor can a bankruptcy court decide on child-custody issues. One of the reasons used by the US District

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[54] *Falcon Mfg v Ames,* 53 Misc.2d 332 (1967)
[55] The statute allows a state court to assume personal jurisdiction over an out-of-state litigant based on certain contacts with the locality.
[56] Falcon *supra.*

Court in Florida for denying recognition for the *Osorio v Dole Food Co*[57]Nicaraguan judgment of $97 million, discussed earlier, was lack of subject matter jurisdiction. Both the US and Nicaragua are signatories of CAFTA, the Central American Free Trade Agreement[58], and that treaty allows for a dispute resolution mechanism different from the one taken by the Nicaraguan court[59]. As with most international trade agreements, CAFTA requires arbitration, rather than national courts, to handle trade disputes among members.

4.7 Improper or No Service*:* The Uniform Foreign-Country Money Judgments Recognition Act (2005)[60] specifies that no request for recognizing a foreign judgment will be made unless it can be shown that the defendant in a foreign court action received the proper and timely notice that would allow him to prepare his defence in court. In general, there are two ways for an American court to determine that the foreign service was improper: (a) It did not meet the requirements for proper service in the foreign jurisdiction[61], or (b) it did not meet constitutional requirements[62]. In the *Somportex* case,[63] third party defendants were removed by the 3rd Circuit Court of Appeals upon finding that they were never served with summons by the plaintiff.

4.8 Extrinsic Fraud*:* When the defendant uses fraud in requesting nonrecognition of the foreign judgment, the court will have to determine whether the claimed fraud was extrinsic or intrinsic to the case. The court will reject claims of fraud if they are intrinsic to the case, as when the veracity of documents presented to the court by the plaintiff in the country of origin could not be established.[64] However, the court will deny recognition of the foreign judgment if extrinsic fraud can be shown, as when the plaintiff did not provide the court with documents favourable to the defendant.[65]

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[57] *Osorio v. Dole Food Co*., 665 F. Supp. 2d 1307

[58] https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text

[59] Id. At Chapter 20

[60] Uniform Foreign-Country Money Judgments Recognition Act (2005) § 4(c)

[61] See *Tahan v. Hodgson*, 662 F.2d 862 (D.C. Cir. 1981).

[62] Id.

[63] *Somportex Limited v Philadelphia Chewing Gum Corp*, 453 F 2d 435, 443 (3rd Cir 1971)

[64] *MacKay v. McAlexander,* 268 F.2d 35, 39 (9th Cir. 1959)

[65] *De La Mata v. Am. Life. Ins. Co*., 771 F. Supp. 1375, 1377–90 (D. Del. 1991).

4.9 No Finality: The *Chimexim* judgment[66] was obtained in Romania against an American company, Velco enterprises. The money judgment issued by a Romanian trial court was confirmed by an appellate court and then appealed again to the Romanian Supreme Court. At the time Chimexim filed for recognition of the judgment in New York, a Supreme Court appeal was still pending.

Velco used that fact in asking the New York court to deny recognition of the judgment, asserting that until the Romanian Supreme Court issued a ruling, there was no finality ascribed to the judgment. The US district court for the Southern District of New York disagreed, as neither Romanian court – trial and appellate - had stayed the judgment pending the appeal to the Romanian Supreme Court.

3 Analysis of Obstacles to Foreign Arbitral Awards

5.0.1 Recognition of foreign arbitral awards: Generally, the procedure for recognising foreign arbitral awards follows simple FAA guidelines. The party seeking to enforce the award can file a motion to confirm it with the appropriate court, and attach certified copies (and if need be, translations) of the award and the arbitration agreement[67]. Once recognized as a judgment by the court, it is as enforceable as any domestic judgment.

US arbitrations designated as 'nondomestic' (i.e. where the property in dispute is in a foreign country or subject to foreign law) are governed by the Convention.[68] The New York Convention is quite vague in defining a nondomestic arbitration[69], allowing for a variety of interpretations. However, 9 U.S.C. § 202, one of the provisions incorporating the New York Convention, explains that:

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[66] *SC Chimexim SA v Velco Enterprises Ltd* 36 F. Supp. 2d 206 (S.D.N.Y. 1999)

[67] *Article IV, UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (New York Convention); see also Geotech Lizenz AG v Evergreen Systems,* Inc, 697 F. Supp. 1248, 1252 (E.D.N.Y. 1988)):

[68] EM Senger-weiss, *Enforcing Foreign Awards*. in TE Carbonneau and JA Jaggi (eds), *Handbook on International Arbitration and ADR* (American Arbitration Association 2006) 164

[69] RW Hulbert, *'The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act'* [2011] 22(1) American Review of International Arbitration 45,52

> [a]n agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

In the US, a domestic arbitration is subject to Chapter 1 of the Federal Arbitration Act, which requires enforcement of the award within one year of issuance. But as discussed earlier, if the arbitration is deemed 'nondomestic', it is governed by Chapter 2 of the same Act, which allows three years to enforce the award.[70]

5.1 The Panama Convention*:* This treaty was ratified by the US in 1990, and incorporated into Chapter 3 of the Federal Arbitration Act[71]. Generally, it applies the terms of the New York Convention to several Central and South American countries who had not ratified the New York Convention.

5.2 Exclusions to the New York Convention: Chapter 1 of the FAA makes it very difficult to challenge a domestic arbitral award[72]. Challenges are limited to

> '(1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehaviour by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made[73].'

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[70] AJ Van der berg, *'When is an Arbitral Award Nondomestic Under the New York Convention of 1958?'* [1985] 6(1) Pace Law Review 25-26
[71] FAA, 9 U.S.C. §§ 202 and 302.
[72] Cornelledu, *'Federal Arbitration Act, Chapter 1, Section 10'* (*LII / Legal Information Institute*, 2002) <https://www.law.cornell.edu/uscode/text/9/10> accessed 5 June 2017
[73] Id.

Can the above exclusions apply to nondomestic awards? Some US appellate courts answer in the affirmative, while others have decided that only Chapter 2 of the FAA may be applied to nondomestic awards. This issue is further discussed in par.5.4.

While the New York Convention provides a competent framework for the enforcement of foreign arbitral awards, it provides a preclusive effect to certain classes of arbitral awards, albeit not as severely as Chapter 1 of the FAA, as outlined by Article V of the Convention:

1. Recognition and enforcement of an award may be denied if the party it is issued against can prove to a competent court or governing authority that:

(a) Either of the parties lacked capacity, or the agreement was not valid under the laws of the country of origin, or

(b) The non-prevailing party was not given proper notice and was unable to present its case, or

(c) The award deals in matters which are beyond the scope of the arbitration, or

(d) The tribunal was not formed in adherence to the laws of the country where the arbitration took place, or

(e) The award is either not binding, or else has been set aside[74] or suspended by a court in the country where the award was made.

2. In addition, the award enforcement may be refused

(a) If the award conflicts with the public policy, or

(b) If the issue is deemed non-arbitrable by the country in which recognition and enforcement of the award is sought[75].

Notice the difference between the two standards: Chapter 1 sets a very high bar for challenging an arbitral award, making such challenge extremely difficult to sustain as the requirements are mandatory. Conversely, Article V of the Convention provides additional grounds for a challenge, but its very first statement makes Article V optional, rather than mandatory. In a court challenge

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[74] "*Set aside*" is the phrase used in the New York Convention to denote nullification. The corresponding phrase in US law is "vacate". See also 9 U.S.C. § 10 (2012)

[75] Uncitral, *'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards'* (*Newyorkconventionorg*, 10 June 1958)<http://www.newyorkconvention.org/english> accessed 30 May 2017

to a nondomestic or foreign award, that ambiguity would allow the court to possibly not use it as a guideline, as we will see in some of the cases discussed below.

5.3 Choice of remedies:

In international arbitration, the non-prevailing party has two separate courses of action if it chooses to contest the award, one active and one passive, as proposed in the UNCITRAL Model Law on International Commercial Arbitration[76]. The active course of action takes place at the seat of arbitration, where it can raise objections to the enforcement of the award, while the passive course of action takes place in courts elsewhere, where the non-prevailing party attempts to prevent the enforcement of the award.

This is best illustrated in the well-known *Astro v Lippo*[77] case, in which *Astro,* a Malaysian company, commenced arbitration against Lippo, an Indonesian company, in Singapore. Acting on a motion by Astro, the arbitrators allowed a joinder whereas five Astro subsidiaries, who were not parties to the arbitration agreement, were joined as claimants. The tribunal then ruled in favor of the claimants. *Astro* proceeded to enforce the award in the UK, as well as a number of east Asian countries.

The award was challenged in a Singapore court, which found that the tribunal erred, due to lack of jurisdiction, in allowing the joinder[78]. As the majority of the arbitral award had been in favour of the joinder companies, this amounted to a set-aside of most of the award. Further, the Singapore Court of Appeal affirmed the recognition, by Singapore, of the UNCITRAL Model Law.

Lippo had never objected, in the time allowed, to the enforcement of the award in Hong Kong, thinking that it had no assets in the former Crown colony. When it discovered it had assets in Hong Kong it tried, belatedly, to prevent enforcement of the award on jurisdictional grounds. The Hong Kong Court of First Instance (HKCFI) denied its motion, ruling that aside from the

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[76] Uncitralorg, *'UNCITRAL Model Law on International Commercial Arbitration'* (*Uncitralorg*, 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 5 June 2017

[77] *Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others and AcrossAsia Limited,* HCCT 45/2010 [*Astro*]

[78] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* (2013) SGCA 57

late filing, Lippo should have raised the jurisdictional challenge before the arbitration tribunal[79]. If left to stand, the HKCFI decision would have meant that while Singapore law - and the UNCITRAL Model Law - allows both active and passive courses of action to the non-prevailing party in an arbitration, Hong Kong allows only the former.

The Hong Kong Court of Appeals disagreed with the HKCFI interpretation, but nevertheless rejected *Lippo's* motion due to its late filing.

This case serves as a reminder that both active and passive remedies may be available to the non-prevailing party in arbitration proceedings, as long as objections are filed within the prescribed timeframe.

5.4 Conflicting decisions by appellate courts on nondomestic arbitral awards:

While domestic arbitral awards may be set aside if the appeal meets the requirements of Chapter 1 of the FAA, that may not be the case with nondomestic awards. One US appellate court, the 2nd Circuit Court of Appeals, has determined in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*[80] that both Chapter 1 and Chapter 2 may be reviewed by the court when considering a set-aside request for a nondomestic arbitral awards. That position is followed by the 5th Circuit[81] and 6th Circuit[82] appellate courts, while the 11th Circuit Court of Appeals is looking for guidance from Chapter 2 only, thus ignoring Chapter 1.

In the *Alghanim* case, a New York arbitrator found in favour of the Claimant, a Kuwaiti franchisee of Toys 'R' Us. The Respondent requested the court to set aside the award, and in denying the request, the lower court relied on both Chapter 1 and Chapter 2 of the FAA. That decision was confirmed by the 2nd Circuit Court of Appeal, which contended that the high bar set by Chapter 1 for set-asides was not met by the Respondent.

Although the 2nd Circuit's decision to use both chapters of the FAA in reviewing set-aside requests has been followed by some other Circuits, the 11th Circuit Court of Appeals took a

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[79] Astro v First Media CACV 272/2015

[80] *Yusuf Ahmed Alghanim & Sons, WLL. v Toys "R" Us, Inc* [1997] 126 F 3d 15, 21, 23 (2nd Circuit)

[81] *Bridas S A P I C v Gov't of Turkmenistan*,[2003] 345 F 3d 347, 365 (5th Cir)

[82] Although overturned, the court in *Jacada (Eur), Ltd v Int'l Mktg Strategies, Inc*, [2005] 401 F 3d 701, 709 (6thCir) followed the 2nd Circuit in reviewing both Chapter 1 and Chapter 2 of the FAA.

different approach in *Four Seasons v. Consorcio Barr*[83]. In that case, the disputants were a Barbados company (Four Seasons) and a Venezuelan company. The arbitration took place in Miami, Florida. In reviewing the lower court decision, the 11th Circuit Court of Appeals set a precedent in deciding that nondomestic arbitral awards were subject to Chapter 2, but not to Chapter 1 of the FAA. Since Chapter 2 and/or Article V of the New York Convention does not deal at all with set-asides, we now have a serious conflict in vacating nondomestic arbitral awards between the 11th Circuit and the group of circuits which uses the 2nd Circuit and *Alghanim* as a guide. The 11th Circuit, by ignoring Chapter 1 of the FAA, is not allowing any set-asides of such awards - only non-recognition, while the group following the 2nd Circuit allows set-asides if they meet the high-bar requirements of Chapter 1. With this in mind, we expect attorneys to evaluate the set-aside rules when deciding on a venue for a nondomestic arbitration.

The 9th Circuit, in reviewing the *LaPine* case,[84]commented on the fact that the underlying arbitration agreement specified that both Chapter 1 and Chapter 2 of the FAA should be available for any court action subsequent to an award. A lower court had precluded the use of Chapter 1 as this was a nondomestic arbitral award, but the 9th Circuit Court of Appeals determined that while usually, only chapter 2 would be applicable, the very specific language of the arbitration agreement required that both chapters be used in reviewing the arbitral award.

5.5 Recognition of set-aside judgments issued at the seat of arbitration

Article V (e) of the Convention presents an interesting question: When a competent court in the country that served as the seat of the arbitration nullifies or sets aside the award, can the award still be recognized and enforced elsewhere? Since Article V says that the award 'may', rather than 'shall' be set aside, courts have taken inconsistent views of the meaning. In the *CPConstruction Pioneers Baugesellschaft Anstalt v Gov't of the Republic of Ghana,*[85] in which a construction company sued the Government of Ghana for reneging on payments for highway construction, an ICC tribunal in Accra, Ghana, issued two interim awards in favour of the

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[83] *Four Seasons Hotels and Resorts, BV v Consorcio Barr, SA*, [2003] 320 F 3d 1205 (11th Cir)

[84] *LaPine v Kyocera Corp* [2008] US Dist LEXIS 41172 at *15-16 (N D Calif)

[85] *CPConstruction Pioneers Baugesellschaft Anstalt v Gov't of the Republic of Ghana* [2008] 578 F Supp2d 50, 54 50 (DDC) (Oberdorfer)

claimant. The respondent sued in local court to vacate the award, claiming that 'fraud' as a cause of action is not arbitrable as per the Ghana Arbitration Act 1961[86]. As that suit wound its way through the Ghana courts, claimant tried to have the interim awards recognized and enforced in Washington, DC, only to be rebuffed in the Federal District Court. Oberdorfer J took the position that the request for recognition would be stayed until a final disposition by the Ghana court.[87]The same court reached a similar conclusion in staying an award issued against the Government of Guyana[88]which had been set aside by a Guyanese court and then appealed.

Private international law: Generally, the court that is being asked to confirm or deny a foreign award already set aside by a court at the seat of the arbitration will apply the principles of private international law in reaching a decision. The foreign court's decision will be given full weight if it is determined that the foreign court was competent and fair, and that its methodology and decision-making did not violate public policy.[89]

There are situations where the decision of a seat-of-arbitration foreign court to set aside an arbitral award is rejected by foreign courts. Here, the *Yukos Capital S.a.r.l. v.OAO Rosneft*[90] case is often cited when a set-aside is considered to be unfair or politically-influenced. Yukos had won four arbitral awards in Russia in a dispute with Rosneft, a Russian government-owned oil company. Although the awards had been set aside by a Russian court, Yukos asked an Amsterdam court to enforce them in the Netherlands. The Dutch court found in favour of Yukos, having concluded that the Russian court had been politically motivated[91]and thus unfair to Yukos.

Although the Dutch decision allowed Yukos to receive the monetary award from Rosneft, it had to file another action against it in a British court, in order to collect post-judgment interest. The High Court agreed that this was an issue estoppel case, and that there was no need to re-litigate

[86] Jtighanaorg, 'Ghana Arbitration Act 1961' (*Jtighanaorg*, 1961) <http://www.jtighana.org/new/actdetails.php?id=21> accessed 1 June 2017

[87] *CPConstruction Pioneers Baugesellschaft Anstalt v Gov't of the Republic of Ghana* [2008] 578 F Supp2d 50, 54 50 (DDC) (Oberdorfer)

[88] *Arbitration of Certain Controversies Between Getma Int'l v. Republic Guinea*, [2015] 142 F Supp 3d 110, 113 (DDC)

[89] L Silberman and M Scherer, *'Forum Shopping and Post-Award Judgments'* [2014] 2(1) PKU Transnational Law Review (China) 115-123

[90] *Yukos Cap, 34 YB Comm Arb* at 703

[91] Id. at 712, where the Dutch court says that it is "likely that the Russian civil court decisions annulling the arbitral awards [were] the outcome of a judicial process that must be deemed partial and dependent."

whether the Russian court had exhibited bias in setting aside the Russian arbitral awards. On appeal, The Court of Appeal disagreed, pointing out that

> [T]he standards by which any particular country resolves the question whether courts of another country are 'partial and dependent' may vary considerably [. . .]. It is our own [English] public order which defines the framework for any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court[92] .

While there hasn't been any US case law motivated by *Yukos,* the American Law Institute draft Restatement on International Commercial Arbitration[93] takes a similar approach, suggesting that any foreign seat-of-arbitration court judgments should be evaluated for fairness and for adherence to public policy. A UK court was asked to pass judgment on the fairness of an Egyptian court decision in the *Malicorp* case[94], where the claimant had asked to enforce in the UK an Egyptian arbitral award, even though an Egyptian court had set it aside. The arguments used by Malicorp were similar to the ones used by Yukos before the Dutch court - Malicorp, much like Yukos, claimed bias by the Egyptian court in favour of the Egyptian government, in addition to a claim that the Egyptian court had misapplied the law used to set aside the arbitral award. The British High Court decision - refusing to challenge the Egyptian court's set-aside - suggests that perhaps some political considerations, such as possible adverse effects on trade relations with Egypt, had coloured the High Court decision, or that perhaps the Egyptian justice system is viewed more favourably than the Russian one.

A recent 2nd Circuit case, *Commisa v. PEMEX[95],* Sheds light on how one appellate court interprets Article 5 1(e) of the New York Convention, which precludes award recognition where the award has been set aside by a court at the seat of the arbitration. Commisa is the Mexican division of KBR, an American company located in Texas. PEMEX is the national oil company

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[92] [2012] EWCA Civ 855 [151].

[93] Restatement (Third) of the U.S. Law OF International Commercial Arbitration § 4-16(b) (American Law Institute, Tentative Draft No. 2, 2012)

[94] *Malicorp Ltd v Government of the Arab Republic of Egypt* [2015] EWHC (Comm) 361

[95] *Corporacion Mexicana de Matenimiento Integral, S De RL De CV v Pemex-Exploracion y Produccion*, No 13-4022 (2d Cir Aug 2, 2016)

of Mexico, and a commercial dispute between the two was arbitrated in Mexico, where the arbitration tribunal awarded Commisa $350 million. The award was then set aside by a Mexican court, which ruled that due to the fact that PEMEX is a state-owned entity, the dispute is non-arbitrable.

Commisa proceeded to get a New York court to enforce the award. On appeal, the 2nd Circuit confirmed the award, saying that Art. V 1(e) of the Convention is not mandatory, as the Mexican court was clearly biased in favour of a state-owned disputant.

Although the cases discussed above demonstrate that US, UK and Dutch courts are not inclined to rubber-stamp set-asides issued by courts at the seat of the arbitration, particularly when there is even a hint of bias, we see that even a shared judicial tradition is sometimes coloured by political considerations.

4 Conclusion

As we have seen earlier, American courts are determined to apply constitutional protection whenever foreign judgments are presented for recognition, often at the expense of the doctrine of comity[96]. They require evidence that the foreign tribunal was impartial, and that procedural due process was applied. While US state court judgments are given full faith and credit by sister states[97] (unless challenged on constitutional grounds), foreign money judgments creditors cannot simply file them in the US and expect automatic recognition. Rather, they must file a court action for the judgment to be recognized, thus opening the door to the various challenges described in Section 4 of this paper. Due to the various legal doctrines concerning foreign money judgments, as represented by the 1962 and 2005 Uniform Recognition Acts, as well as the Restatement [Third] used by common law states, the judgment creditor needs to evaluate where to file for judgment recognition, and must be cognizant of the fact that due to potential constitutional challenges they may have to re-litigate their case in American court.

Foreign arbitral awards, on the other hand, enjoy the protection of the New York Convention, and while Article V allows challenges to the award, it is not mandatory, as noted by the court in the *Commisa* case.[98]

As discussed earlier, US appellate courts have struggled with the issue of whether to apply domestic challenges to arbitral awards (as codified in Chapter 1 of the FAA) in addition to the ones promulgated by the New York Convention (Chapter 2 of the FAA). We noted that the 12 US appellate courts follow two different schools of thought on this issue.

We have also reviewed arbitral awards set aside by a court at the seat of arbitration, and whether US courts were bound by the foreign court's decision. All that leads us to the research question: The working hypothesis was that all foreign money judgments and arbitral awards face similar hurdles in asserting their claims in the United States, and the research question we set out to

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[96] P. Nanda & DK Pansius, Litigation of International Disputes in US Courts (2nd edn. 2004)
[97] U.S. Constitution, Article IV, Section 1
[98] *Corporacion Mexicana de Matenimiento Integral, S De RL De CV v Pemex-Exploracion y Produccion*, No 13-4022 (2d Cir Aug 2, 2016)

answer was whether that was, indeed, the case, and if not, why is one category of foreign judgments treated differently from the other.

It follows that by ratifying the New York Convention, the United States has adopted a streamlined approach to recognizing and enforcing foreign arbitral awards in the US. The same cannot be said for the recognition and enforcement of foreign money judgments, as the US is not a signatory to any international treaty concerning such judgments. The resulting different doctrines adopted by the states have created a unique dilemma for the judgment creditor, who must evaluate his options carefully in determining where to file the judgment.

We conclude, then, that foreign arbitral awards follow a simpler, more streamlined procedure for recognition and enforcement in the US than foreign money judgments, due to international treaties that apply to the former, but not the latter. Therefore, foreign arbitral awards comprise a distinct class of claims, which is quite different procedurally from foreign money judgments.

7. Bibliography

Acts, Model Laws and Statutes

Federal Arbitration Act, 9 U.S.C. §§ 202 and 302 (USA)

Ghana Arbitration Act 1961 (Ghana)

Restatement (Third) of Foreign Relations Law §§ 481, 482 (1987) (USA)

Restatement (Third) of the U.S. Law OF International Commercial Arbitration § 4-16(b) (American Law Institute, Tentative Draft No. 2, 2012) (USA)

Revised Enforcement of Foreign Judgments Act of 1964 (USA)

State Immunity Act 1978 (UK)

UNCITRAL Model Law on International Commercial Arbitration 2006 (UN)

Uniform Foreign Money Judgment Recognition Act of 1962 (USA)

Uniform Foreign-Country Money Judgment Recognition Act of 2005 (USA)

United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UN)

U.S. Constitution

Books and Journal Articles

RA Brand, 'Recognition and Enforcement of Foreign Judgments' [2013] 74(Spring) Univ Pittsburgh Law Review

S Cummins (ed), *Digest of United States Practice in International Law 2006* (Oxford University Press 2006) 71

Burton Dewitt, 'A Judgment without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards' [2015] 50(2-3) Texas International Law Journal 495-518

RW Hulbert, 'The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act' [2011] 22(1) American Review of International Arbitration 45,52

S Koh, 'Respectful Consideration after Sanchez-Llamas v Oregon: Why the Supreme Court Owes More to the International Court of Justice' [2007] 93(1) Cornell Law Review

P. Nanda & DK Pansius, Litigation of International Disputes in US Courts (2nd edn. 2004)

EM Senger-weiss, Enforcing Foreign Awards. in TE Carbonneau and JA Jaggi (eds), *Handbook on International Arbitration and ADR* (American Arbitration Association 2006) 164

M Scherer, 'Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?' [2013] 4(3) Journal of International Dispute Settlement, Vol 4, No 3 (2013), pp 587–628 587-628

L Silberman and M Scherer, 'Forum Shopping and Post-Award Judgments' [2014] 2(1) PKU Transnational Law Review (China) 115-123

AJ Sorkowitz, 'Enforcing Judgments under the Uniform Foreign Money-Judgments Recognition Act ' [1991] 37(5) Practical Lawyer 57-68

T Vaisanen, 'Incompetent Drafting and Complex Laws: Automatically Waiving Set-Aside of Foreign Arbitration Awards in the United States' [2013] 45(1) Cornell Int'l Law Journal 723

AJ Van der berg, 'When is an Arbitral Award Nondomestic Under the New York Convention of 1958?' [1985] 6(1) Pace Law Review 25-26

CA Wright and AR Miller, *Federal Practice and Procedure* (3rd edn, Thomson Reuters 2012) §§ 1063, 3522

Cases

Ackermann v. Levine, 788 F.2d 830, 842 n. 12 (2d Cir.1986)
Yusuf Ahmed Alghanim & Sons, WLL. v Toys "R" Us, Inc [1997] 126 F 3d 15, 21, 23 (2nd Circuit)
Arbitration of Certain Controversies Between Getma Int'l v. Republic Guinea, [2015] 142 F Supp 3d 110, 113 (DDC)
Astro v First Media CACV 272/2015
Astro Nusantara International BV and others v PT Ayunda Prima Mitra and others and AcrossAsia Limited, HCCT 45/2010 [*Astro*]
Bachchan v. India Abroad Publications Inc., 585 N.Y.S.2d 661 (Sup. Ct. 1992)
Bank Melli Iran v. Pahlavi, 58 F.3d 1406, 1408, 1413 (9th Cir. 1995)
Bank of Montreal v Kough, 430 F Supp 1243, 1246 (DCCal 1977)
Bridas S A P I C v Gov't of Turkmenistan,[2003] 345 F 3d 347, 365 (5th Cir)
Burnham v. Superior Court, 495 U.S. 604, 110 S.Ct. 2105, 109 L.Ed.2d 631 (1990)
Corporacion Mexicana de Matenimiento Integral, S De RL De CV v Pemex-Exploracion y Produccion, No 13-4022 (2d Cir Aug 2, 2016)
CPConstruction Pioneers Baugesellschaft Anstalt v Gov't of the Republic of Ghana [2008] 578 F Supp2d 50, 54 50 (DDC) (Oberdorfer)
De Brimont v Penniman, 7 F Cas 309 (CCSDNY 1873)
De La Mata v. Am. Life. Ins. Co., 771 F. Supp. 1375, 1377–90 (D. Del. 1991).
Erie R. Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938)
Falcon Mfg v Ames, 53 Misc.2d 332 (1967)
Four Seasons Hotels and Resorts, BV v Consorcio Barr, SA, [2003] 320 F 3d 1205 (11th Cir)
Geotech Lizenz AG v Evergreen Systems, Inc, 697 F. Supp. 1248, 1252 (E.D.N.Y. 1988)
Hilton v Guyot, 159 [1895] US 113
International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed.2d 95 (1945).
Jacada (Eur), Ltd v Int'l Mktg Strategies, Inc, [2005] 401 F 3d 701, 709 (6thCir)
LaPine v Kyocera Corp [2008] US Dist LEXIS 41172 at *15-16 (N D Calif)
MacKay v. McAlexander, 268 F.2d 35, 39 (9th Cir. 1959)
Malicorp Ltd v Government of the Arab Republic of Egypt [2015] EWHC (Comm) 361
NML Capital Limited (Appellant) v Republic of Argentina (Respondent) [2011] UKSC 31
Obergefell v. Hodges :: 576 US ___ (2015)
Osorio v. Dole Food Co., 665 F. Supp. 2d 1307
PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal (2013) SGCA 57
Sanchez-Llamas v Oregon, [2006] 548 US 331
SC Chimexim SA v Velco Enterprises Ltd 36 F. Supp. 2d 206 (S.D.N.Y. 1999)
Shell v. R.W. Sturge, Ltd., 55 F.3d 1227 (6th Cir. 1995)
Soc'y of Lloyds v. Ashenden, 233 F.3d 473, 477 (7th Cir. 2000)
Somportex Limited v Philadelphia Chewing Gum Corp, 453 F 2d 435, 443 (3rd Cir 1971)
Tahan v. Hodgson, 662 F.2d 862 (D.C. Cir. 1981)

Yukos Cap, *34 YB Comm Arb* at 703 and [2012] EWCA Civ 855 [151]

Websites

CAFTA: https://ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta/final-text

Cornelledu, 'Federal Arbitration Act, Chapter 1, Section 10' (*LII / Legal Information Institute*, 2002) <https://www.law.cornell.edu/uscode/text/9/10> accessed 5 June 2017

Uncitralorg, 'UNCITRAL Model Law on International Commercial Arbitration' (*Uncitralorg*, 2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> accessed 5 June 2017

W Thomson, 'Confronting the New Breed of Transnational Litigation: Abusive Foreign Judgments' (Instituteforlegalreformcom, 2011)<http://www.instituteforlegalreform.com/research/confronting-the-new-breed-of-transnational-litigation-abusive-foreign-judgments> accessed 7 June 2017

RA Brand, 'Recognition and Enforcement of Foreign Judgments' (Fjcgov, April 2012) <https://www.fjc.gov/sites/default/files/2012/BrandEnforce.pdf> accessed 7 June 2017

Stategov, '2012 Investment Climate: Nicaragua' (*US Department of State*, 2012) <https://www.state.gov/e/eb/rls/othr/ics/2012/191209.htm> accessed 11 June 2017

Legislaturecagov, 'Recognition of foreign money judgments in California' (*Legislaturecagov*, 2007) <https://leginfo.legislature.ca.gov/faces/codes_displayText.xhtml?lawCode=CCP&division=&title=11.&part=3.&chapter=2.&article=> accessed 22 May 2017

J Wilson, 'Arbitration in New York' (*Cmslegalcom*, 2012) <https://eguides.cmslegal.com/pdf/arbitration_volume_I/CMS%20GtA_Vol%20I_NEW%20YORK.pdf> accessed 30 May 2017

Uncitral, 'United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (*Newyorkconventionorg*, 10 June 1958)<http://www.newyorkconvention.org/english> accessed 30 May 2017

LW Thomas, 'Enforcement of International Arbitration Awards in the United States' (International Law - Europe, April) <http://www.laweurope-international.com/articles_pdf/Usa/Enforcement_International_Arbitration_awards_USA.pdf> accessed 31 May 2017

https://tollefsenlaw.com/wp-content/uploads/2014/08/2011-US-Chamber-AbusiveForeignJudgments.pdf