LACK OF JURISDICTION AND FORUM NON CONVENIENS AS DEFENSES TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The International Commercial Disputes Committee
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Federal and state courts have generally been highly receptive to the enforcement of both foreign arbitral awards and foreign judgments. However, there is recent case law, including court decisions in New York, which has created some uncertainty in this area, particularly as regards foreign arbitral awards. The uncertainty concerns the availability of lack of jurisdiction of the enforcing court over the debtor or his property and the doctrine of *forum non conveniens* as grounds for refusing recognition and enforcement.

The central purpose of the New York Convention[1] is to liberalize procedures for enforcing foreign arbitral awards.[2] The Convention does so principally by limiting the grounds on which an arbitral award may be denied recognition or enforcement.[3] The Convention itself expressly states: "The court shall confirm the award unless it finds one of the grounds for refusal

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[1] Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T. 53 [hereinafter the New York Convention or the Convention], *implemented by and reprinted in* the Federal Arbitration Act [hereinafter FAA], 9 U.S.C. §§ 201-208.

[2] *See generally* Scherk v. Alberto Culver, 417 U.S. 506, 519-20 & n.15; ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARD A UNIFORM JUDICIAL INTERPRETATION 6-10 (1981).

[3] Article V(1) of the Convention provides that recognition and enforcement of an award may be refused only upon proof that:

> (a) The parties to the agreement referred to in Article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
> (e) The award has not yet become binding on the parties or 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.

Under Article V(2), recognition and enforcement may also be refused by the courts of a country if:

> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Note 1, supra, Article V (1)-(2).

or deferral of recognition of the enforcement of the award specified in the Convention."[4] Accordingly, the specified grounds, set forth in the Convention's Article V, have been held to be exclusive.[5] The specified grounds do not include lack of jurisdiction of the enforcing court or *forum non conveniens*. Nevertheless, courts have declined to enforce Convention awards on both these grounds.

With regard to jurisdiction, courts that have addressed the issue, including the Fourth and Ninth Circuits, have held that, under the Due Process Clause of the Constitution, the enforcing court must have either personal jurisdiction over the award debtor or *quasi-in-rem* jurisdiction over his property for an arbitral award to be enforced.[6] However, the Fourth and Ninth Circuits have expressed conflicting views about the showing required for a finding of *quasi-in-rem* jurisdiction based upon the defendant's property – the Fourth Circuit holding that the property must be related to the underlying claim[7] and the Ninth Circuit holding that no such connection is required.[8] The Second Circuit has left open the question whether a party must establish the jurisdiction of the enforcing court over the award debtor or its property in order to enforce an arbitral award under the Convention.[9]

With regard to *forum non conveniens*, the Second and Ninth Circuits have each used it as a basis for denying enforcement of a Convention award, notwithstanding its absence from the list of grounds specified in Article V.[10]

The Committee believes that both actions for the recognition and enforcement of foreign arbitral awards under the Convention and actions for the recognition and enforcement of foreign judgments under the Uniform Foreign Money-Judgments Recognition Act[11] require a basis for

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[4] Note 1, *supra*, Article III.

[5] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, 126 F.3d 15, 19 (2d Cir. 1997).

[6] Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain Co., 284 F.3d 1114 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208 (4th Cir.), *cert. denied*, 537 U.S. 822 (2002); Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 47 Fed.Appx. 73, 2002 WL 31002609 (3rd Cir. 2002); Italtrade International, USA, L.L.C. v. Sri Lanka Cement Corp., 2002 WL 59399 (E.D.La. Jan 15, 2002) (NO. CIV.A.00-2458); Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A., 622 F. Supp. 25, 27 (S.D.N.Y.1985); CME Media Enterprises B.V. v. Zelezny, 2001 WL 1035138, 2001 U.S. Dist. LEXIS 13888 (S.D.N.Y.2001).

[7] Base Metal Trading, 283 F.3d at 213

[8] Glencore Grain, 284 F.3d at 1126.

[9] Dardana Ltd. v. Yuganskneftegaz, 317 F.2d 202 (2d Cir. 2003). The Court of Appeals remanded the case to the District Court to consider "whether a party seeking to enforce an arbitral award under the Convention must establish a basis for exercising personal jurisdiction over the other party or the property of that party, against whom enforcement is sought;" and whether "the presence of property alone can supply the jurisdictional basis in an action to enforce arbitral awards under the Convention or under state law...." *Id.* at 208. However, the case was thereafter settled. *See* Dardana Limited v. A.O. Yuganskneftegaz, No. 00 CIV. 4633 (DAB), Stipulation and Order of Dismissal entered May 19, 2003.

[10] Monegasque de Reassurances SAM v. Nak Naftogaz de Ukraine, 311 F.3d 488 (2d Cir. 2002); Melton v. Oy Nautor AB, 161 F.3d 13 (9th Cir. 1998).

[11] Uniform Foreign Country Money-Judgments Recognition Act (1962) (the "Recognition Act"). In the United States, recognition of foreign country judgments is a matter of state law. In 29 states and the District of Columbia,

the exercise of jurisdiction. Jurisdiction is mandated by the Due Process clause of the U.S. Constitution, which trumps any contrary statute or treaty. Therefore, a basis for jurisdiction will be required even though neither the Convention nor the Recognition Act provides for – and indeed may be read to preclude – lack of jurisdiction as a ground for refusal of recognition or enforcement.[12]

In the Committee's view, the presence of the debtor's property within the state, regardless of whether that property is connected with the underlying claim, is sufficient to establish *quasi-in-rem* jurisdiction. The Committee believes that, while state statutes may require attachment of assets as the basis for *quasi in rem* jurisdiction, attachment is not required by the Due Process Clause of the Constitution. Still, where the sole basis of jurisdiction is the defendant's property within the state, the judgment should be limited in its effect to property within the state at the time the action was commenced. 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.[13]

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the applicable law with respect to money judgments is the Recognition Act. In New York, the Recognition Act is codified in Article 53 of the CPLR. Section 4 of the Recognition Act contains a list of grounds for refusal of recognition similar to those listed in Article V of the Convention:

§ 5304. Grounds for non-recognition

(a) No recognition. A foreign country judgment is not conclusive if:

1. the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

2. The foreign court did not have personal jurisdiction over the defendant.

(b) Other grounds for non-recognition. A foreign country judgment need not be recognized if:

1. the foreign court did not have jurisdiction over the subject matter;

2. the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

3. the judgment was obtained by fraud;

4. the cause of action on which the judgment is based is repugnant to the public policy of this state;

5. the judgment conflicts with another final and conclusive judgment;

6. the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or

7. in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.

[12] The Committee disagrees with the holding of a New York state appellate court that, under the Recognition Act, an action for recognition may not be dismissed based on the lack of jurisdiction of the court where recognition is sought. Lenchyshyn v. Pelko Electric, Inc., 281 A.D.2d 42, 723 N.Y.S.2d 285 (4th Dep't 2001).

[13] In the Second Circuit, a plaintiff seeking to obtain jurisdictional discovery may do so by "pleading in good faith ... legally sufficient allegations of jurisdiction" – *i.e.*, by making a "*prima facie* showing" of jurisdiction...." Jazini v. Nissan Motor Co., Ltd., 148 F.3d 181, 184, 186. (2d Cir. 1998). *Cf.* Peterson v. Spartan Industries, Inc., 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974) (to be entitled to jurisdictional discovery, a plaintiff faced with a motion to dismiss for lack of jurisdiction need only demonstrate that facts "may exist" that would enable him to defeat the motion).

The Committee believes that *forum non conveniens* should not be a ground for dismissing an action to confirm or enforce an arbitral award governed by the New York Convention or for recognition of a foreign judgment under the Recognition Act.[14] Unlike jurisdiction, a convenient forum is not as such a requirement of Constitutional due process. That defense should, however, be available for enforcement of an arbitral award against a person not a party to the arbitration that resulted in the award.

Until the issues are judicially or legislatively resolved, practitioners may wish to seek contractual solutions. For example, an arbitration clause can 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*. Such a waiver could also be limited to specified named jurisdictions, or to any jurisdiction in which the award debtor has property, and only to the extent of such property.

The following pages contain a more detailed discussion of the authorities and the reasons for the Committee's conclusions.

[14] In Watary Services, Ltd. v. Law Kin Wah, 247 A.D.2d 281, 668 N.Y.S.2d 458 (1st Dep't 1998), the court held that, under the Recognition Act, *forum non conveniens* was not available as a ground for non-recognition of a foreign judgment and that the grounds listed in CPLR § 5304 were the only defenses that could be interposed in a proceeding under the Recognition Act. *Contra* Turksoy v. Acar, 772 N.Y.S.2d 831 (2nd Dep't 2004) (summarily affirming dismissal on *forum non conveniens* grounds of an action to enforce a foreign money judgment).

I. REQUIREMENT OF JURISDICTION OVER PERSON OR PROPERTY FOR THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS AND FOREIGN JUDGMENTS

A. *Jurisdiction of the Enforcing Court Over the Award Debtor or His Property Is Required for Enforcement of Foreign Arbitral Awards in U.S. Courts*

Although lack of jurisdiction of the enforcing court is not among the New York Convention's "exclusive" defenses, all of the U.S. courts that have thus far addressed the issue have held that under the Due Process Clause the enforcing court must have either personal jurisdiction over the award debtor or *quasi-in-rem* jurisdiction over his property in order to enforce a foreign arbitral award.[15]

In *Glencore Grain Rotterdam BV* v. *Shivnath Rai Harnarain Co.*, Glencore, a Netherlands corporation, sought enforcement in California federal court of a London arbitration award against an Indian rice exporter for breach of contracts for delivery of rice in India. The district court dismissed for lack of personal jurisdiction. On appeal, Glencore argued that the New York Convention dispensed with any requirement of personal jurisdiction over the defendant. The Ninth Circuit acknowledged that "(1) neither the Convention nor its implementing legislation expressly requires personal jurisdiction . . . and (2) lack of personal jurisdiction over the defendant in the state where enforcement is sought is not among the Convention's seven defenses to recognition and enforcement of" a foreign arbitration award. Nevertheless, the court found no significance in what the Convention and the FAA do *not* say.[16] Rather, the court held that the requirement of jurisdiction flows from the Due Process Clause of the Constitution, and that the Convention did not "abrogate the Due Process requirement that jurisdiction exist over the defendant's person or property."[17] The court in *Glencore* stated its holding as follows:

> [W]e hold that in suits to confirm a foreign arbitral award under the Convention, due process requires that the district court have jurisdiction over the defendant against whom enforcement is sought or his property.[18]

The Committee believes that the holding in *Glencore* is both correct and consistent with prior authority.[19] It is also in accord with the prevailing view as regards jurisdiction to enforce foreign

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[15] *See* cases cited in note 6, *supra*. The question remains open in the Second Circuit. In *Dardana*, cited in note 9, *supra*, the Second Circuit remanded for consideration by the district court of the question "whether a party seeking to enforce a foreign arbitral award under the Convention must establish a basis for exercising personal jurisdiction over the other party, or the property of that party, against whom enforcement is sought." 317 F.2d at 208. The Court of Appeals stated that "[T]he question is a difficult one, and has been the subject of recent decisions in two circuit courts." *Id.*

[16] Glencore Grain, 284 F.3d at 1121.

[17] *Id.* at 1120.

[18] *Id.* at 1122 (emphasis added).

[19] The court in *Glencore* correctly noted that "The little authority that exists unequivocally endorses our position." *Id.* at 1121.

judgments.[20] Jurisdiction is mandated by the Due Process Clause of the U.S. Constitution, which requirement must apply despite any contrary statute or treaty. Therefore, a basis for jurisdiction will be required even though neither the Convention nor the Recognition Act provide for – and indeed may be read to preclude – lack of jurisdiction as a ground for refusal of recognition or enforcement.[21]

As the court in *Glencore* observed, it would anomalous to dispense, in actions for the enforcement of foreign arbitral awards, with basic jurisdictional requirements, grounded in notions of fundamental fairness, that are constitutionally mandated for every other kind of action and that limit the ability of courts to assert power over foreign persons and property. As then District Judge (now Circuit Court Judge) Leval held, the Convention

> ...does not give the court power over all persons throughout the world who have entered into an arbitration agreement governed by the Convention. Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power.[22]

B. *A Number of Foreign Countries Require a Nexus Between the Award Debtor or His Property and the Place of Enforcement as a Basis for Jurisdiction*

Jurisdictional requirements for enforcement of foreign arbitral awards vary in other countries. However, a number of nations' laws require a connection between the award debtor or his property and the place of enforcement. For example, in China,[23] Japan,[24] and Switzerland,[25] jurisdictional provisions for the enforcement of foreign awards contain such

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[20] *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. c (1987): "An arbitral award is ordinarily enforced by confirmation in a judgment.... As in respect to judgments ... an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property."

[21] *See* Pelagia Ivanova, *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, 914-15 (2003) ("In cases of conflicts between an international law and the U.S. Constitution, American courts traditionally abide by the Constitution even if such decisions amount to a violation of international law").

[22] Transatlantic Bulk Shipping v. Saudi Chartering, 622 F. Supp. 25 (S.D.N.Y. 1985) (Leval, J.).

[23] "In light of the Notice on the New York Convention and Article 269 of the PRC Civil Procedural Law 1991, as well as Regulation 5/2002, the Intermediate People's Courts which have jurisdiction over recognition and enforcement of foreign arbitral awards should be those in the capital cities of the provinces, autonomous regions or municipalities directly under the Central Government, or those in the special economic zones or cities directly under state planning, where the party against whom enforcement is sought either has his legal domicile or property." Li Hu, *Enforcement of Foreign Arbitral Awards and Court Intervention in the People's Republic of China*, 20 ARB. INT'L. 167 (2004).

[24] Articles 5 and 46 of the Japan Arbitration Law provide for jurisdiction of enforcement actions in the district court at the place of arbitration, the general forum of the counterparty, location of the object of the claim or location of the debtor's seizable assets.

[25] "The Federal Act on Debt Enforcement and Bankruptcy ... [hereafter FADEB] will apply if the award involves a sum of money. According to this law, the party who seeks execution of an award sends through a state organ an order to pay (*Zahlungsbefehl, commandement de payer*) to the debtor domiciled in Switzerland. In certain cases it may also obtain an attachment of assets of the debtor located in Switzerland. The debtor can then either pay or raise

requirements.[26] England permits service out of the jurisdiction with leave of the court when "a claim is made to enforce any foreign judgment or arbitral award[27] and, while there is no express requirement of any connection between the award debtor or his property and England, "[t]he court will not give permission unless satisfied that England and Wales is the proper place in which to bring the claim."[28] The determination whether such is "the proper place", takes into account such factors as the defendant's contacts with England and the presence of his property there.[29]

In light of the jurisdictional requirements imposed by a number of other countries in connection with the enforcement of foreign arbitral awards, it would not be unusual or aberrant

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opposition (*Rechtsvorschlag, opposition*). The state judge decides on this opposition." Robert Briner, *Switzerland*, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Supp. 27 (Jan Paulsson ed., December/1998). Articles 46 through 55 of FADEB concern the proper forum for debt enforcement proceedings. The "for ordinaire" is the domicile of the debtor (Article 46) or the place where he may be found, if he has no fixed domicile (Article 47). The debt enforcement proceeding may also take place at the location of property pledged or mortgaged to secure the debt (Article 51) or seized by the creditor (Article 52). Article 50 provides for a forum for enforcement of debts against foreign domiciled debtors who either once possessed an establishment in Switzerland or who chose Switzerland as the place for performance of a debt.

[26] The laws of France, Germany and Italy contain seemingly similar provisions, but also, along with the law of Sweden, appear to provide a forum for enforcement even when there is no connection between the debtor or his property and a particular place within the country. In France, "[f]or awards rendered abroad, it is the *T[ribunal de] G[rande] I[nstance]* of the place where the party or the assets against which enforcement is sought are domiciled or located. However, also the *TGI* of Paris may be considered to have jurisdiction." Yves Derains and Rosabel E. Everard-Goodman, *France*, INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, *supra* note 25 at Supp. 26 (February/1998). Section 1062 (3) of German Arbitration Law 1998 provides that competence for the enforcement of a foreign award "lies with the Higher Regional Court [*Oberlandesgericht*] where the party opposing the application has his place of business or place of habitual residence, or where assets of that party or the property in dispute or affected by the measure is located, failing which the Berlin Higher Regional Court [*Kammergericht*] shall be competent." In Italy, Code of Civil Procedure, Book Four, Title VIII, Section 839, provides: "The party wishing to enforce a foreign award in the Republic shall file a petition with the president of the court of appeal of the district in which the other party has its domicile; if that party has no domicile in Italy, the court of appeal of Rome shall have jurisdiction." INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, *supra* note 25 at Supp. 31 (September/2000). Sweden's relevant statute contains no reference to the location of the award debtor or his property. ("Under Sect. 56 application is made to the *Svea* Court of Appeal in Stockholm, which has been given exclusive first instance jurisdiction as regards the summary procedure for enforcement.") INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, *supra* note 25 at Supp. 32 (December/2000). However, it is unclear whether these countries would, in fact, enforce an award in the absence of any connection whatsoever between the award debtor or his property and the country or whether these are mere venue provisions.

[27] CPR 6.20(9). The White Book commentary on this provision of the CPR states that the promulgation of the rule changed English law by permitting courts to assert jurisdiction in enforcement cases based on property alone. "The presence of assets within the jurisdiction does not in itself give the English courts jurisdiction over a person outside the jurisdiction. Accordingly, previously, a foreign judgment could not be enforced against English assets in cases not falling within the provisions for the reciprocal enforcement of judgments legislation unless the debtor could be served in England or was 'domiciled or ordinarily resident within the jurisdiction.' Now the foreign judgment or award is itself a sufficient ground for a grant of permission." SWEET & MAXWELL'S CIVIL PROCEDURE § 6.21.41, at 211 (2004).

[28] CPR 6.21.

[29] Lewis v. King, [2004] EWCA Civ1329. As Lord Goff said in *The Spiliada*, [1987] 1 Lloyd's Rep: "We have to consider where the case may be tried 'suitably for the interests of all the parties and for the ends of justice.'"

for U.S. courts to impose similar requirements. Nor should such requirements be considered as inherently inconsistent with the goal of the New York Convention which, as stated in *Scherk*, was to "unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."[30]

C. *Agreement to Arbitrate in a Signatory Country has not Been Accepted by U.S. Courts as Equivalent to Consent to Jurisdiction in the Courts of All Other Signatory Countries*

Based on the principle that the requirement of personal jurisdiction may be waived[31] and that personal jurisdiction based on consent is sufficient to satisfy due process,[32] it has been argued that agreement to arbitrate in a country that is a signatory to the Convention is tantamount to consent to *in personam* jurisdiction for enforcement of the award in the courts of any other signatory country. That argument was rejected by the District of Columbia Circuit in *Creighton Ltd.* v. *Gov't of the State of Qatar*,[33] holding that by agreeing to arbitrate in France, Qatar did not waive its objection to personal jurisdiction in the United States.[34] While *Creighton* appears to be the only case to expressly address the issue, its conclusion is sound, and is, at least, implicitly supported by *Glencore Grain* and the other cases discussed in Section A above, dismissing for lack of jurisdiction actions to enforce awards against award debtors who had agreed to arbitration in signatory countries.

In *Dardana Ltd.* v. *Yuganskneftegaz*,[35] the Second Circuit likewise appears not to have accepted the notion that merely entering into an agreement to arbitrate in a Convention country constitutes consent to the jurisdiction of any other signatory country. This seems to be implicit in the Second Circuit's direction to the district court to consider whether consent or waiver could be founded upon the language of the arbitration clause in the contract at issue in that case, which provided, in relevant part, as follows:

> Judgment on an award may [*sic*] entered in any court having appropriate jurisdiction, or application may be made to that court for a judicial acceptance of the award and an order of enforcement, as the Party seeking to enforce that award may elect. *The Parties waive any defense of sovereign immunity or similar defense....* In the event that a dispute arises, this Contract shall be governed by the laws of Sweden. (emphasis added)[36]

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[30] 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 41 L.Ed. 2d 270 (1974).

[31] National Equipment Rental, Ltd. v. Szukhent, 375 U.S. 311, 316 (1964).

[32] *See, e.g.,* Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471-72, n.14 (1985).

[33] 181 F.3d 118 (D.C. Cir. 1999).

[34] In *Creighton*, the court proceeded upon the assumption that a foreign state was a "person" for the purpose of the Due Process clause of the Fifth Amendment. In a case decided a few years later, the D.C. Circuit held that "foreign states are not 'persons' protected by the Fifth Amendment[.]" Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).

[35] *Supra* note 9.

[36] 317 F.3d at 207.

As noted, because *Dardana* was settled before a judicial resolution, the issue of implied consent or waiver based upon such language – "boilerplate" language that is frequently used in arbitration clauses – remains open in the Second Circuit. It may be advisable that arbitration clauses contain express language specifically consenting to jurisdiction in the desired fora for enforcement of any award and specifically waiving any defense based upon those fora's lack of jurisdiction.

D. *Presence of the Debtor's Property Within the State, Regardless of Whether it has Any Connection to the Underlying Claim, Should be Sufficient to Establish Quasi In Rem Jurisdiction for Enforcement of a Foreign Arbitral Award.*

As noted above, courts that have addressed the question of jurisdiction to enforce foreign arbitral awards have consistently held that either *in personam* jurisdiction of the enforcing court over the award debtor or *quasi-in-rem* jurisdiction over his property is required for the enforcement of a foreign arbitral award. While the courts have also been consistent as to the showing necessary to establish *in personam* jurisdiction over the award debtor, the Ninth and Fourth Circuits have taken different positions on the showing required for a finding of *quasi-in-rem* jurisdiction based upon the defendant's *property*.

In *Glencore*, the Ninth Circuit held that enforcement of an award against property in the forum state is permissible even if the property bears no relationship to the underlying controversy between the parties.[37] The court also stated that the presence of property alone was sufficient to establish *quasi-in-rem* jurisdiction.[38] By contrast, in *Base Metal Trading, Ltd.* v. *OJSC "Novokuznetsky Aluminum Factory,"*[39] the Fourth Circuit affirmed dismissal, holding that the "mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the underlying action."[40]

The Committee regards the Ninth Circuit decision as better reasoned and more consistent with the Supreme Court's decision in *Shaffer* v. *Heitner*.[41] *Shaffer* held that, in an action on the merits, *quasi-in-rem* jurisdiction over a non-resident defendant could not be based upon the mere presence in the state of property that was unrelated to the plaintiff's cause of action. In a footnote, however, the Court indicated that there is an exception to this rule in enforcement actions – actions in which a plaintiff seeks to apply the property of the defendant to the

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[37] 284 F.3d at 1126.

[38] *Id.*.

[39] 283 F.3d 208 (4th Cir.), *cert. denied*, 537 U.S. 822 (2002).

[40] *Id.* at 211. A subsequent unpublished decision of the Third Circuit in another *Base Metal* case suggests a possible way of reconciling the divergent views of the Fourth Circuit and the Ninth Circuit. According to the Third Circuit, the plaintiff in *Base Metal* did not ask the Fourth Circuit to assert *quasi-in-rem* jurisdiction over property of the defendant but, instead, argued only that the presence of the defendant's property in the jurisdiction was sufficient to establish "general" *in personam* jurisdiction over the defendant. Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 47 Fed. Appx. 73, 2002 WL 31002609, n.5 (3rd Cir. 2002).

[41] 433 U.S. 186 (1977).

satisfaction of a judgment obtained against him.[42] The *Shaffer* Court stated:

> 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.[43]

Although the footnote in *Shaffer* concerned the enforcement of sister state judgments under the Full Faith and Credit Clause of the Constitution, the rationale should apply with equal force to foreign country awards and judgments:

> The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the [court] would not have jurisdiction if *International Shoe* applied is that a wrongdoer "should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an *in personam* suit."[44]

A corollary of the foregoing rule is that, in the absence either of *in personam* jurisdiction over the award debtor or of any property – even unrelated – belonging to the award debtor, there would be no jurisdiction to enforce a foreign arbitral award.

E. *Due Process Does not Require Attachment of the Debtor's Property for Enforcement of a Foreign Arbitral Award*

State statutes may require seizure of assets as a basis for quasi-in-rem jurisdiction.[45] *CME Media Enterprises B.V.* v. *Zelezny,*[46] a case in the Southern District of New York,

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[42] *See* Glencore Grain, 284 F.3d at 1127. The court in *Glencore* made clear that it was referring to the type of jurisdiction that "[t]ormented souls of first-year civil procedure" would recognize as "*quasi in rem* type II, where "the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him." *Id.*, n.8.

[43] 433 U.S. at 210 n.36.

[44] *Id.* (quoting Restatement § 66, comment a). *See also Dardana.* By remanding in *Dardana*, the Second Circuit appeared to be accepting, tacitly at least, that the presence of property of the debtor in the jurisdiction, without more, could be a sufficient jurisdictional basis for enforcement of a foreign arbitral award against the debtor. The Second Circuit directed the district court to consider on remand the argument that property alone can supply the jurisdictional basis for an action to enforce a foreign award, and permitted discovery concerning the presence of the defendant's assets in the jurisdiction.

[45] For example, in New York, CPLR 314(3) permits service of process on a defendant after seizure of the defendant's property in New York. "In deference to the lingering requirement of *Pennoyer v. Neff*, it requires that the attachment be secured and levied before the summons is served." SIEGEL, NEW YORK PRACTICE 178 (3d ed. 1999). *See* Nemetsky v. Banque De Developpement De La Republique Du Niger, 48 N.Y.2d 962, 425 N.Y.S.2d 277, 401 N.E.2d 388 (1979). However, in Lenchyshyn v. Pelko Electric, Inc., 281 A.D.2d 42, 723 N.Y.S.2d 285 (4th Dep't 2001) (discussed *infra*) the Fourth Department recognized a foreign judgment in an action where there was no personal jurisdiction and no seizure of the defendants' property.

[46] 2001 WL 1035138, 2001 U.S. Dist. LEXIS 13888 (S.D.N.Y.2001) (Chin, J.).

illustrates the use of attachment in proceedings to enforce a foreign arbitral award or judgment.[47] A temporary restraining order attaching the defendant's New York bank account assets was issued at the inception of the action. At the time, however, the account contained only five cents. Relying on the above-mentioned footnote in *Shaffer*, the *Zelezny* court held that it had *quasi-in-rem* jurisdiction to confirm and enforce the award. "Under [*Shaffer*'s reasoning], minimal contacts [of the property with the dispute] are not required for a court to exercise jurisdiction over the assets, so as to permit a party to collect on an arbitration award."[48] After determining that none of the Convention's grounds for refusal of enforcement applied, the court confirmed the award – but only to the extent of the assets before the court – *i.e.*, the five cents in the account. The court observed that its *quasi-in-rem* judgment "cannot be enforced by other jurisdictions under the Full Faith and Credit Clause of the Constitution."[49] For both foreign arbitral awards and foreign judgments, this "can represent a significant barrier to enforcement."[50]

Although practical considerations may well lead creditors to obtain attachment of the assets upon which they base jurisdiction for the enforcement of arbitral awards, logic and fairness argue that attachment of such assets should not be *required* in order to obtain

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[47] The *Zelezny* court appears to have assumed that attachment to enforce a foreign arbitral award was permitted under New York state law, which it was bound to apply under Fed R Civ P. 4(n)(2). In New York, Article 62 of the CPLR is the statute that governs attachments. CPLR 6201(5) expressly permits attachment in an action in which "the cause of action is based ... on a judgment which qualifies for recognition under Article 53." However, CPLR 6201(5) makes no provision for attachment based upon a foreign arbitral award. It has been argued that attachment under Article 62 is not available for foreign arbitral awards. *See* V. Corp Ltd v. Redi Corp., 2004 WL 2290491 (S.D.N.Y, October 9, 2004) In *V. Corp*, the court held that the order that was the basis for the attachment was, in fact, a final foreign judgment qualifying for recognition under Article 53. However, the court stated in *dictum* that "Absent this finality in the English Courts, plaintiff would not have been able to obtain an order of attachment from this court." 2004 WL 2290491. In the view of the Committee, attachment under Article 62 is available in an action to enforce a foreign arbitral award. CPLR 6201 provides that an order of attachment may be granted in any action ... where the plaintiff has demanded and would be entitled, in whole or in part, or in the alternative, to a money judgment against one or more defendants....". If the arbitral award involves the payment of money, then a proceeding to confirm the award is such an action. Although there is no specific provision governing attachments to enforce foreign arbitral awards, CPLR 6201 contains other grounds for attachment which should normally be available in proceedings to enforce foreign arbitral awards – e.g. CPLR 6201(1)l, which permits attachment when "the defendant is a nondomiciliary residing without the state, or is a foreign corporation not qualified to do business within the state." It may also be argued that such relief is available under CPLR 7502(c). However, that statue appears to apply only when an arbitration is pending or has not yet been commenced – not when an award has already been rendered.

[48] CME Media Enterprises B.V. v. Zelezny, 2001 WL 1035138 at * 4, 2001 U.S. Dist. LEXIS 13888 at * 10 (S.D.N.Y.2001) (Chin, J.).

[49] *Id.* at * 4, * 11.

[50] LAWRENCE NEWMAN & MICHAEL BURROWS, THE PRACTICE OF INTERNATIONAL LITIGATION 331 (1992): "As a practical matter, a plaintiff will probably have to seek a prejudgment attachment, particularly if he is expecting to levy on moveable property such as bank accounts. Following this procedure will require that he satisfy the requirements of Article 62 of the C.P.L.R. with respect to grounds for attachment, undertaking, confirmation proceedings and service of summons in the underlying lawsuit within 60 days. These procedures, containing safeguards for the protection of a defendant's property being attached before judgment has been obtained in a proceeding on the merits, are obviously more cumbersome and costly than they should be for the enforcement of a judgment already rendered on the merits. Under the present state of the law, nonetheless, it would be imprudent for a plaintiff seeking to enforce a foreign judgment in New York not to proceed by means of an order of attachment when the defendant's property is likely to be removed from the state."

jurisdiction. The Due Process Clause of the Constitution does not require the seizure of the defendant's assets at the commencement of *quasi-in-rem*-based enforcement proceedings. The view that the Due Process requires attachment dates from the 1878 case, *Pennoyer* v. *Neff*,[51] but that holding has been sharply criticized, and it is questionable whether this aspect of the case remains good law. "[S]erious doubt has arisen as to whether prejudgment seizure, as a prerequisite to jurisdiction, can survive serious analysis in the light of modern concepts."[52] Commentators have observed that (a) existing precedents at the time *Pennoyer* was decided did not require seizure at the commencement of the action; (b) any such requirement would be inconsistent with the *Pennoyer* court's theory of the territorial basis of judicial power, under which the mere presence of the property within the state should have been sufficient to confer jurisdiction; (c) the states should have the sovereign power to devise procedural mechanisms for obtaining *quasi-in-rem* jurisdiction; (d) while attachment of the property at the commencement of an action might ensure its availability for enforcement of the resulting judgment, such availability should have no effect on the court's jurisdiction or the validity of its judgment if property was within the state at the commencement of the action; and (e) the need to notify the defendant of the commencement of the action does not justify a requirement of seizure of property.[53]

Under *Shaffer*,[54] there appears to be "no unfairness" in allowing a *quasi-in-rem* action for enforcement of a foreign judgment or arbitral award in a state where the defendant has property at the time the enforcement action was commenced, even if the property has *not* been seized.[55] Nor would there appear to be any unfairness in allowing such an action to proceed even if the defendant's property within the state has not been specifically identified at the time the action was commenced. Indeed, not allowing recognition or enforcement with respect to such property would seem to reward the defendant for concealing it or removing it from the state – a result inconsistent with the views expressed in *Shaffer*. In order to avoid potential abuse, the Committee believes that fundamental fairness requires maintaining the existing rule limiting the resulting judgment to the assets that form the basis for *quasi-in-rem* jurisdiction—*i.e.*, assets can be shown to have been in the jurisdiction at the time that the action was commenced.[56]

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[51] 95 U.S. 714 (1878).

[52] Griffin v. Zinn, 318 So. 2d 151 (Fla. 2d Dist. 1975).

[53] *See*, Linda Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 45-47 (1978); George B. Fraser, *Actions In Rem*, 34 CORNELL L.Q. 29, 38-40 (1948); Note, *The Requirement of Seizure in the Exercise of Quasi In Rem Jurisdiction: Pennoyer v. Neff Reexamined*, 63 HARV. L. REV. 657 (1950).

[54] 433 U.S. at 210, n.36.

[55] In *Glencore*, the court left open the possibility of a *quasi in rem* judgment having effect beyond specific assets attached by the award creditor, but held that plaintiff's good faith assertion that the defendant had property in the forum was "simply not enough" to permit enforcement of the award. 284 F.3d at 1122, 1127

[56] Any other rule could permit a plaintiff to commence an enforcement proceeding in a remote state where the award debtor has few assets or finds it burdensome to defend and then register the resulting judgment as an *in personam* judgment in a sister state. *See* Harold L. Korn, *The Development Of Judicial Jurisdiction In The United States: Part I*, 65 BROOK. L. REV. 935 (1999): "Typical of the abuses [*quasi in rem* jurisdiction] had been turned to here at the time *Pennoyer* came up for decision were cases in which plaintiffs obtained *quasi in rem* default judgments through the alleged attachment of some trivial item of local property-a bedstead, perhaps, even a handkerchief-and then sought their enforcement as personal judgments in the defendants' home states under the Full Faith and Credit Clause and its Implementing Act."

F. *Upon a Proper Showing, a Party Seeking to Enforce a Foreign Arbitral Award or a Foreign Judgment Should be Entitled to Jurisdictional Discovery of Assets Within the Jurisdiction*

In the *Zelezny* case, the court also declined to permit the petitioner to conduct discovery as to other assets of the defendant in the jurisdiction. The court reasoned as follows:

> Petitioner argues that respondent may have other assets in New York. But *quasi-in-rem* jurisdiction cannot be based on speculation about the possible existence of property. Because it is the existence of property that provides the basis for jurisdiction, and in the absence of minimum contacts, the Court cannot exercise jurisdiction beyond the known assets based on petitioner's speculation that other assets might exist. [The debtor] is not before the Court; only the limited assets in the Account--$0.05--are before the Court. For these reasons, petitioner's request for discovery to locate other assets in the jurisdiction is denied.[57]

In the *Zelezny* court's view, such a conclusion was the logical result of requiring attachment of property as the basis for *quasi-in-rem* jurisdiction: the party seeking enforcement must identify and attach the debtor's property in order to obtain jurisdiction. However, any "discovery" must be limited to those assets that are subject to the jurisdiction of the court—the assets already identified and attached. If such limits are imposed, parties seeking to enforce foreign judgments and arbitral awards are denied the kind of "jurisdictional discovery" that is available, upon a proper showing, to plaintiffs in other kinds of actions.

This Committee believes that, upon a proper showing, jurisdictional discovery regarding the award debtor's assets in the jurisdiction should be available in *quasi-in-rem* actions to enforce foreign arbitral awards and judgments.[58] The showing required to obtain such discovery should be no more rigorous than the showing required in actions on the merits. In the Second Circuit, a plaintiff seeking to obtain jurisdictional discovery may do so by "'pleading in good faith ... legally sufficient allegations of jurisdiction,' *i.e.*, by making a '*prima facie* showing' of jurisdiction."[59] The allegations must be "factually specific" and not merely conclusory.[60]

New York's state courts tend to apply a more liberal standard: to be entitled to jurisdictional discovery, a plaintiff faced with a motion to dismiss for lack of jurisdiction need only demonstrate that facts "may exist" that would enable him to defeat the motion.[61] Other circuits have also adopted a more liberal standard. For example, the D.C. Circuit requires only a

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[57] 2001 WL 1035138 at *5; 2001 U.S. Dist. LEXIS 13888 at * 15.

[58] Indeed, such discovery was allowed by the Second Circuit in *Dardana*, where the court said: "We also remand for discovery on respondent's assets in the jurisdiction. The district court should consider the merits of Dardana's claim that the presence of property alone can supply the jurisdictional basis in an action to enforce arbitral awards under the Convention." 317 F.3d at 208.

[59] Jazini v. Nissan Motor Co., Ltd. 148 F.3d 181, 184, 186. (2d Cir.1998).

[60] *Id.*

[61] Peterson v. Spartan Industries, Inc., 33 N.Y.2d 463, 310 N.E.2d 513, 354 N.Y.S.2d 905 (1974).

"good faith belief" on the plaintiff's part that the requested discovery will show a basis for jurisdiction.[62]

G. *Jurisdiction for Recognition of Foreign Judgments under New York's Version of the Uniform Foreign Money-Judgments Recognition Act*

As shown above, a number of courts have held that jurisdiction in actions for the enforcement of foreign arbitral awards and foreign judgments can be based on the presence of property alone. However, in New York, the Fourth Department appears to have dispensed even with this requirement in a case involving the recognition or enforcement of a foreign money judgment. In *Lenchyshyn* v. *Pelko Electric, Inc.*,[63] an action for recognition of a Canadian money judgment, the Fourth Department held that neither personal jurisdiction over the judgment debtor nor the presence of his property was required for jurisdictional purposes:

> There is no mention in CPLR article 53 of any requirement of personal jurisdiction over the judgment debtor in New York, a telling omission in our view. The sole reference to personal jurisdiction within CPLR article 53 relates to whether the foreign country's court had personal jurisdiction over the judgment debtor (*see,* CPLR 5304[a][2]; [b][2]; 5305[a], [b]). Thus, the statutory scheme does not explicitly contemplate a challenge to the New York court's exercise of personal jurisdiction over the judgment debtor in the recognition proceeding itself.[64]

Noting that Article 53 imposes more "formal and complex" requirements for the recognition of foreign country judgments than Article 54, which permits registration of sister state judgments, the court held that this difference "should not be viewed as allowing the judgment debtor to raise non-statutory obstacles to recognition of the foreign country money judgment...."[65]

With respect to the presence of property, the court observed that "plaintiffs sufficiently allege that defendants have assets in New York"[66] and expressed skepticism about the defendants' denial. Significantly, the court stated that, even if it were true that defendants had no assets in New York, "that assertion has no relation to their jurisdictional objection." The court concluded:

> [E]ven if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money

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[62] *See* Diamond Chemical Co., Inc. v. Atofina Chemicals, Inc., 268 F.Supp.2d 1 (D.D.C 2003); GTE New Media Services Inc. v. BellSouth Corp., 199 F.3d 1343, 1347 (D.C.Cir. 2000).

[63] 281 A.D.2d 42, 723 N.Y.S.2d 285 (4th Dep't 2001).

[64] *Id.* at 48-49, 290.

[65] *Id.*

[66] *Id.* at 50, 291. "In particular, it is alleged that defendants maintain bank accounts in Buffalo and that Pelonis is a principal in a New York corporation (one formed apparently to carry out what formerly had been the business of Pelko Electric)."

> judgment pursuant to CPLR article 53, and thereby should have the opportunity to pursue all such enforcement steps *in futuro,* whenever it might appear that defendants are maintaining assets in New York, including at any time during the initial life of the domesticated Ontario money judgment or any subsequent renewal period (*see generally,* CPLR 211[a]; 5014).[67]

Lenchyshyn's suggestion that a court may recognize a foreign judgment regardless of whether the defendant has property in the state represents a departure from prior New York authority. In New York, only two cases prior to *Lenchynshyn* dealt with the question,[68] and both held that, in the absence of personal jurisdiction over the judgment debtor, *quasi-in-rem* jurisdiction over his property was required for recognition of a foreign judgment under the Act.

New York, it should be noted, requires the institution of an action for the enforcement of a foreign country judgment. More specifically, in enacting its Recognition Act, the New York Legislature altered the text of the uniform act.[69] Section 3 in the original version, and as currently in force in 24 of 30 jurisdictions enacting the legislation, provides: "The foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit." [70] The New York legislature rejected this language and, in CPLR 5303, opted to continue, as under prior law, to require that a specific action be brought for the

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[67] *Id.*

[68] *See* Biel v. Boehm, 94 Misc.2d 946, 948-949, 406 N.Y.S.2d 231 (Sup.Ct. Suffolk Co. 1978); Parada Jimenez v. Mobil Oil Co. de Venezuela, S.A., No. 90 Civ. 5938 (SWK), 1991 WL 64186 (S.D.N.Y. April 18, 1991).

[69] NEWMAN & BURROWS, *supra* note 54 at 325; Marvin J. Pickholz & James Bernard, *Civil Disclosure and Freezing Orders: Recovering Property From Overseas*, 13 DICK J. INT'L L 479. Newman and Burrows suggest that, if New York had adopted a registration regime for foreign country judgments, the requirement of personal or *quasi-in-rem* jurisdiction would be bypassed. NEWMAN & BURROWS, *supra*, at 328. In the registration states, filing can result in recognition of a foreign country judgment without the involvement of a court, effectively "bypassing" jurisdictional questions. *See, e.g.,* V. T. C. A., CIVIL PRACTICE & REMEDIES CODE § 36.0041-45. *But see*, ALI International Jurisdiction and Judgments Project, PROPOSED FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT, Tentative Draft No. 2 (April 13, 2004) §10(c) (requiring affidavit setting forth factual basis for belief that defendant has property within the state as a jurisdictional basis for registration of a foreign judgment under a proposed federal statute).

[70] At least one court has interpreted this language to mean that the registration procedure for the enforcement of sister state judgments under the Uniform Enforcement of Foreign Judgments Act (the "Enforcement Act") can also be used for the recognition and enforcement of a foreign country judgment under the Recognition Act. In Society of Lloyd's v. Ashenden, 233 F.3d 473 (7th Cir 2000), Judge Posner, applying Illinois law, held that proceedings to enforce a foreign country judgment could be commenced by registration of the judgment under the Enforcement Act and that no separate recognition proceeding was required unless the defendant invoked "'procedures, defenses and proceedings for reopening, vacating or staying' the judgment." 233 F.3d at 481. However, a subsequent state case undermines that decision; it indicates that under Illinois law recognition of a foreign judgment by a court is required before it can be enforced. Bianchi v. Savino Del Bene International Freight Forwarders, Inc., 329 Ill.App.3d 908, 770 N.E.2d 684 (2003). *Accord*, Matusevitch v. Telnikoff, 877 F. Supp. 1 (D.D.C. 1995); Marks v. United States, 15 Cl.Ct. 609, 612 (1988). *See* K. Patchel, Study Report on Possible Amendment of the Uniform Foreign Money-Judgments Act 17-21 (June 25, 2003); ALI International Jurisdiction and Judgments Project, PROPOSED FOREIGN JUDGMENTS RECOGNITION AND ENFORCEMENT ACT, Tentative Draft No. 2 (Apr. 13, 2004).

recognition of foreign country judgments.[71] This statutory requirement of an action was the basis for the holding by the court in *Biel* v. *Boehm* that a party seeking to enforce a foreign country judgment can do so only "after securing some jurisdictional basis over the defendant in this State." Under the CPLR, jurisdiction over person or property is normally required for an action and lack of jurisdiction is ground for dismissal.[72] It is unlikely that, in enacting the Recognition Act, the Legislature intended to create an exception to this requirement. It would also be contrary to the view expressed in the Restatement (Third) of Foreign Relations Law § 481 (1987), comment h, that an action to enforce a judgment may be brought "wherever the property *of* the defendant is found..." [73]

Some courts and commentators have attempted to reconcile *Lenchynshyn* with the prior cases which had required at least *quasi-in-rem* jurisdiction for the recognition of foreign judgments.[74] According to this view, *Lenchynshyn* is indeed a *quasi-in-rem* case, and merely dispenses with any requirement of physical attachment in connection with the assertion of *quasi-in-rem* jurisdiction.[75] As noted above, this Committee agrees that such attachment is not constitutionally required, and that there would be no unfairness in allowing an action for recognition of a foreign judgment to proceed even if the defendant's property within the state had not been specifically identified at the time the action was commenced. However, *Lenchynshyn* appears to have required only an allegation, albeit supported by affidavits and

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[71] CPLR 5303 provides, in relevant part: "Such a foreign judgment is enforceable by an action on the judgment, a motion for summary judgment in lieu of complaint, or, in a pending action by counterclaim, cross-claim or affirmative defense."

[72] *See* Gager v. White, 53 N.Y.2d 475, 442 N.Y.S.2d 463, *cert. denied*, 454 U.S. 1086 (1981) (It is a "basic principle that '[a] court must have jurisdiction in rem or in personam in order to enter a valid judgment of any kind....'").

[73] Comment h provides: "*h. Jurisdiction in action to enforce foreign judgment.* The rules of jurisdiction to adjudicate in respect of civil actions generally, §421, are applicable to actions or proceedings to enforce foreign judgments. However, whereas under §421(k) (and under prevailing United States law) a state has jurisdiction to adjudicate a claim on the basis of presence of property in the forum only where the property is reasonably connected with the claim, an action to enforce a 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."

[74] Electrolines, Inc. v. Prudential Assurance Co., Inc., 260 Mich. App. 144, 159, 677 N.W.2d 874 (2003). It is difficult to square this view of *Lenchyshyn* (that *Lenchyshyn* requires *quasi-in-rem* jurisdiction) with the statement of the Fourth Department that "...even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to CPLR article 53...." Professor Siegel has summarized *Lenchnshyn* as follows: "Some courts, incidentally, indicate that the state may entertain a foreign enforcement suit even where it is not even shown that the defendant has property in the state. *See, e.g., Lenchyshyn* [citation omitted], suggesting that a creditor with a foreign country judgment against the defendant is entitled to have it converted into a New York judgment on the mere possibility that the defendant will one day have some property in New York. *For Suit On Foreign Country Arbitral Award, Need There Be Personal Jurisdiction In New York, Or Does Property Suffice?*, 132 SIEGEL'S PRAC. REV. 3 (2003)

[75] As noted above, New York courts have required seizure of the defendant's property prior to service of process as the basis for *quasi-in-rem* jurisdiction. *See* Nemetsky v. Banque de Développement de La République du Niger, 48 N.Y.2d 962, 401 N.E.2d 388, 425 N.Y.S.2d 277 (1979). *See also* SIEGEL, NEW YORK PRACTICE (3rd ed. 1999), 178. CPLR 6201(5) specifically provides for attachment of assets in actions for recognition of foreign judgments under CPLR Article 53. However, in *Lenchyshyn*, there was no attachment of assets. Service of process was made on the defendants pursuant to CPLR 308(5) which provides that "Personal service upon a natural person may be made...in such manner as the court, upon motion without notice, directs, if service is impracticable under paragraphs one, two, and four of this section."

exhibits (even if denied by the defendants), that the defendants had property in New York. In the Committee's view, a mere allegation that property of the defendant is present in New York is not sufficient to establish *quasi-in-rem* jurisdiction in an action for the recognition of a foreign judgment. It may, however, be sufficient to entitle the plaintiff to jurisdictional discovery. *Lenchynshyn* also suggests that the recognized judgment could apply to property that is not in the state at the time of recognition but comes into the state "*in futuro*." As noted above, the Committee believes that, to avoid potential unfairness, the effect of the recognized judgment should be limited to property in the state at the time the action for recognition was commenced.

One consequence of *Lenchynshyn* is that it has, at least potentially, created an inconsistency between the treatment of foreign judgments and foreign arbitral awards. If, as the court held in *Lenchyshyn*, lack of jurisdiction is unavailable as a basis for refusing recognition of foreign judgments, but available as a basis for refusing enforcement of foreign arbitral awards, parties prevailing in foreign arbitrations may be tempted to convert their awards into foreign judgments before seeking enforcement in New York. For example, in *Dardana Ltd.* v. *Yuganskneftegaz*,[76] the petitioner sought to overcome the enforcing court's alleged lack of personal jurisdiction over one of the defendants by seeking instead to enforce a foreign *judgment* confirming the award against that defendant. The petitioner in *Dardana* relied upon *Lenchynshyn* which, as described by the Second Circuit, held that "a foreign country money judgment can be enforced without any showing that the judgment debtor is subject to personal jurisdiction in New York" under Article 53.[77] Encouraging resort to such a strategy to avoid jurisdictional defenses is contrary to the Convention's purpose of facilitating direct passage from award to judgment of enforcement. Since due process is no less implicated in an action to recognize or enforce foreign judgments than in an action to recognize or enforce foreign arbitral awards, jurisdiction should be required for both kinds of actions.

II. *FORUM NON CONVENIENS* AS A DEFENSE TO RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRATION AWARDS

Like lack of jurisdiction of the enforcing court, *forum non conveniens* is not among the exclusive grounds enumerated in the New York Convention for non-recognition or non-enforcement of foreign arbitral awards. However, unlike jurisdiction, a convenient forum is not as such a requirement of Constitutional due process.[78] Therefore, even if it is appropriate for an enforcing court to inquire into the adequacy of its jurisdiction to recognize or enforce a foreign

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[76] *Supra* note 9.

[77] *Id.*, 317 F.3d at 208. The petitioner in *Dardana* also argued that, even without a foreign judgment confirming an award, the award itself could be enforced as a judgment under the Recognition Act rather than as an award under the Convention. This was urged as an alternative basis for enforcement of the awards in *Dardana*, based on a reference in *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH v. Navimpex Central Novala (Seetransport II)*, 29 F.3d 79, 92, n.4 (2d Cir. 1994). *See* Siegel, N.Y. C.P.L.R. 5301 at 541 (McKinney 1997) (practice commentary) (suggesting that foreign arbitral awards can be enforced as foreign judgments under Article 53).

[78] As the Ninth Circuit reasoned in *Glencore*, the Convention cannot abrogate the due process requirement that jurisdiction exist because the Constitution trumps any contrary statute or treaty. 284 F.3d at 1120-21; Convenience of the forum may be, in some instances, be a factor in determining whether the assertion of jurisdiction comports with Due Process. *See, e.g.* Asahi Metal Industry Co. v. Superior Court, 480 U.S. 102 (1987).

arbitral award, it does not follow that the enforcing court should entertain a *forum non conveniens* motion to dismiss such an action. On the contrary, application of the *forum non conveniens* doctrine to awards governed by the New York Convention should be foreclosed by the exclusivity of the grounds for non-enforcement set forth in Article V of the Convention.[79] However, the Second Circuit, ruling in the case of *Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*,[80] affirmed the dismissal on *forum non conveniens* grounds of an action to confirm a foreign arbitral award.

A. *The Second Circuit Wrongly Construed Article III of the New York Convention to Permit Forum Non Conveniens as a Defense to Enforcement of an Award*

In *Monegasque de Reassurances S.A.M.* v. *Nak Naftogaz of Ukraine*,[81] the claimant petitioned to confirm an $88 million Moscow arbitration award against a Ukrainian company. Claimant sought confirmation and enforcement of the award not only against the award debtor, but also against Ukraine, which was not a party to the underlying arbitration agreement or proceeding, on the theory that the Ukrainian company had acted as agent, instrumentality or alter ego of Ukraine. The Ukrainian company moved to dismiss for lack of personal jurisdiction, maintaining that it had no contacts with New York specifically or the United States generally. Ukraine separately moved to dismiss for lack of personal jurisdiction based upon its claimed immunity from suit under the Foreign Sovereign Immunities Act (FSIA) and also on *forum non conveniens* grounds.

Without addressing the jurisdictional issues, the district court granted Ukraine's *forum non conveniens* motion and ordered the removal of the Ukrainian company's motion from the docket as moot.[82] The Second Circuit affirmed, noting that subjecting Ukraine to liability could require extensive discovery and possibly trial of the factual issues bearing upon the liability of a non-signatory to an arbitration agreement. In light of the location of the relevant evidence in Ukraine, the applicability of Ukrainian law to determine Ukraine's liability, and the absence of any U.S. parties or nexus, the court found that the relevant private and public interest factors weighed in favor of dismissal of the enforcement action as against Ukraine. The court also took the unusual step of dismissing the action against the award debtor.

The petitioner's principal contention on appeal in *Monegasque* was that *forum non conveniens* did not apply as a matter of law because it did not figure among the exclusive defenses to enforcement enumerated in the New York Convention.[83] The Second Circuit rejected this argument, relying upon Article III of the Convention, which provides:

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[79] While the main concern of this report is Convention awards, the Committee believes *forum non conveniens* analysis should rarely, if ever, result in dismissal of an action to enforce even a non-Convention award where the award debtor has assets in the jurisdiction in which enforcement is sought.

[80] *Supra* note 10.

[81] *Id.*

[82] 158 F. Supp. 2d 377, 387-88 (S.D.N.Y. 2001).

[83] 311 F.3d at 495.

> Each 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. There 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.[84]

The Second Circuit found that Article III accommodated the application of *forum non conveniens* because the "Supreme Court has classified the doctrine of *forum non conveniens* as 'procedural rather than substantive,' and it cannot be disputed that the doctrine is applied in the United States Courts in the enforcement of domestic arbitral awards."[85]

This analysis is flawed in several respects. First, it is questionable whether *forum non conveniens* is in fact properly characterized as "procedural" within the meaning of Article III, which contemplates application of national procedures only to "recognize arbitral awards as binding and enforce them," not to *deny* recognition and enforcement of arbitral awards.[86] The language on which the Second Circuit relied was intended to deal only with the issue of *how* awards are to be enforced under the treaty, not *whether* such awards are to be enforced.

Second, even if *forum non conveniens* can properly qualify as "procedural" in this context, the "conditions laid down" in Article III should be read as limiting application of national procedural law. To the extent the forum's procedural rules, such as the availability of *forum non conveniens* as a defense, are inconsistent with the exclusive "conditions laid down" in the Convention's Article V, they may not be applied. The Second Circuit summarily rejected that argument, stating without explanation that "the items listed in Article V as the exclusive defenses . . . pertain to substantive matters rather than to procedure."[87]

Third, Article III precludes application of national procedures to the enforcement of foreign arbitral awards that are "substantially more onerous" than those imposed on the enforcement of *domestic* awards. The Second Circuit reasoned that since *forum non conveniens* is applied in domestic arbitration cases brought under the FAA, it may likewise be applied under

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[84] New York Convention, supra note 1, art. III.

[85] *Id.* at 495 (citation omitted).

[86] In finding *forum non conveniens* to be procedural, the Second Circuit (like the district court below) relied principally on the Supreme Court's decision in *American Dredging Co.* v. *Miller*, 510 U.S. 443 (1994), an admiralty case which held that application of the federal *forum non conveniens doctrine* in such a case is predominantly procedural in nature. It is far from clear, however, whether *forum non conveniens* should also be deemed to be procedural in the context of a treaty whose very purpose is essentially procedural – *i.e.*, to provide a mechanism for the summary recognition and enforcement of arbitral awards – and whose principal objective is to *enhance* the recognition and enforcement of such awards.

[87] 311 F.3d at 496.

the Convention. Yet the only domestic case cited by the Court concerned the authority of a court to dismiss a petition to compel arbitration – not a petition to enforce an award.[88]

Finally, other international treaties have been held *not* to permit application of the *forum non conveniens* doctrine. In *Hosaka* v. *United Airlines, Inc.*, for instance, the Ninth Circuit held that Article 28(1) of the Warsaw Convention "overrides the discretionary power of the federal courts to dismiss an action for *forum non conveniens.*" [89] Article 28(1) of that Convention prescribes four potential fora in which an action arising under the treaty may be brought[90] and, like Article III of the New York Convention, states: "Questions of procedure shall be governed by the law of the court to which the case is submitted." Reasoning that the Warsaw Convention sought to create uniform rules both of jurisdiction and liability, the Ninth Circuit declined to "infer from the treaty's incorporation of local procedural law that the drafters acquiesced in the application of *forum non conveniens*, a concept that was (and is) both alien to and unwelcome by the majority of the contracting parties." [91] The court expressed concern about subjecting a treaty intended to limit the contracting states' exercise of discretion to "a doctrine that is itself vague and discretionary."[92] The court pointed to the U.K. courts' similar construction of the Warsaw Convention, as well as the history of other international treaties, as further support for its conclusion that "the Warsaw Convention's silence on *forum non conveniens* does not permit that doctrine's application."[93] The same analysis should apply to Articles III and V of the New York Convention.

B. *Applying the Doctrine of Forum Non Conveniens to Dismiss Actions to Enforce Foreign Arbitral Awards is Contrary to the Purpose of the New York Convention*

Most important, application of the *forum non conveniens* doctrine to deny enforcement of a Convention award is fundamentally inconsistent with the Convention's essential purpose, namely to enhance the worldwide enforcement of international arbitration agreements and awards. As the Supreme Court noted in *Scherk* v. *Alberto-Culver Co.,*

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[88] Even if an action to enforce a domestic award were subject to *forum non conveniens* dismissal, application of the same doctrine to deny enforcement of a foreign arbitral award could be "substantially more onerous" for the award creditor, who would be relegated by such dismissal to a foreign and potentially hostile alternative forum. In any event, Contracting states are certainly not required to impose all the onerous conditions to enforcement of foreign awards that they may apply in domestic cases.

[89] 305 F.3d 989, 993 (9th Cir. 2002).

[90] Article III of the New York Convention, by contrast, does not identify any particular forum in which an action to recognize or enforce an award may be brought, but rather provides that "*Each* Contracting State shall recognize arbitral awards as binding and enforce them . . . " (italics supplied).

[91] *Id.* at 999. The Ninth Circuit noted the existence of some contrary authority, which it declined to follow. 305 F.3d at 995, discussing In re Air Crash Off Long Island New York, on July 17, 1996, 65 F. Supp. 2d 207, 214 (S.D.N.Y. 1999) (holding that "*[f]orum non conveniens* is a procedural tool available to U.S. courts and thus squarely falls within the literal language of Article 28(2)."). *Accord,* In re Air Crash Disaster Near New Orleans, Louisiana on July 9, 1982, 821 F.2d 1147, 1161 (5th Cir. 1987) (*en banc*) (holding that the Warsaw Convention permits application of *forum non conveniens* because the plaintiff's choice under Article 28(1) is "subject to the procedural requirements and devices that are part of that forum's internal laws").

[92] 305 F.3d at 997 (citations omitted).

[93] *Id.* at 1001

> [t]he goal of the 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.[94]

A primary means of achieving this purpose is to allow parties to enforce international arbitration awards in any signatory jurisdiction. *Forum non conveniens* dismissals of actions to enforce awards curtail that right and threaten the international currency of the awards the Convention was designed to enhance. Moreover, because *forum non conveniens* is a uniquely common-law doctrine, unknown in civil-law jurisdictions,[95] its application as an additional ground for non-enforcement of awards would hardly "unify the standards by which . . . arbitral awards are enforced in the signatory countries."[96]

The Second Circuit in *Monegasque* disagreed:

> Forcing the recognition and enforcement in Mexico, for example, in a case of an arbitral award 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.[97]

This concern about a potential chilling effect on international trade is overstated. It is difficult to imagine that international business people will be deterred from agreeing to arbitration by their knowledge that any resulting award, in their favor or against them, could be enforced anywhere in the world where the award debtor has assets. This is one of the main benefits of arbitration under the Convention. Indeed, there should be nothing unusual or unexpected about a petition to enforce in Mexico an arbitral award made in Indonesia, even though the parties, the underlying events and the award have no connection to Mexico, since both countries are signatories to the New York Convention. If awards could be enforced only in "convenient" fora, parties expecting to lose arbitrations would be encouraged to identify countries with no contacts with the judgment or the underlying transaction and hide their assets there in order to avoid execution of awards.

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[94] 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 41 L.Ed. 2d 270 (1974).

[95] *See generally* Ronald Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 468 (2002) ("The doctrine of *forum non conveniens* generally is unknown in legal systems following the continental civil law model."); James L. Baudino, Comment, *Venue Issues Against Negligent Carriers – International and Domestic Travel: The Plaintiff's Choice?*, 62 J. AIR L. & COM. 163, 192-95 (1996) (surveying civil and common-law countries' current practices regarding discretionary jurisdiction).

[96] 417 U.S. at 520 n.15.

[97] 311 F.3d at 497 (*quoting* 158 F. Supp. 2d at 383).

The New York Convention has regularly been lauded for providing an efficient mechanism for the enforcement of arbitral awards, and for encouraging business people to elect to have their contractual disputes heard in arbitration rather than in the courts of one of the party's country. These vaunted attributes of the Convention would be undermined if successful claimants in arbitration have the additional burden of establishing, to the satisfaction of each court in which enforcement of the award might be sought, that enforcement proceedings in that court are convenient for parties, witnesses and/or the court itself.

While it is conceivable that foreclosing *forum non conveniens* as a defense to enforcement opens the door to forum shopping by award creditors for the purpose of harassing an award debtor or obtaining, without opposition, a judgment for use against the award debtor elsewhere, this type of maneuvering is likely to be rare, as award creditors ordinarily bring (and incur the expense of) enforcement proceedings in jurisdictions where they believe the award debtors have assets against which the award can be enforced.[98] In any event, any slight risk of forum shopping is a tolerable consequence of furthering the Convention's fundamental purpose of promoting the international enforceability of arbitral awards.

Precluding *forum non conveniens* as a defense in actions to enforce Convention awards would also appear to align the treatment of *forum non conveniens* in the enforcement of foreign arbitral with its treatment in the enforcement of foreign money judgments. In *Watary Services, Limited* v. *Law Kin Wah*,[99] the First Department held that *forum non conveniens* was not available as a ground for non-recognition of a foreign judgment:

> The Hong Kong judgment is conclusive (CPLR 5302, 5303), and must be enforced absent a showing of one of the grounds for non-recognition specified in CPLR 5304 (*see Matter of Fickling v. Fickling,* 210 A.D.2d 223, 619 N.Y.S.2d 749). The grounds urged by defendant --that New York is an inconvenient forum and that necessary parties have not been joined in the New York action--do not fall within any of the grounds specified.[100]

C. *Forum Non Conveniens Should be Available as a Defense in an Action to Enforce a Foreign Arbitral Award Against a Non-Party to the Arbitration*

In *Monegasque*, the Second Circuit appears to have reached the right result in dismissing on *forum non conveniens* grounds the enforcement action against Ukraine. *Forum non*

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[98] It is arguable that *Monagasque* was, itself, an example of this kind of tactical forum shopping, as there appeared to be absolutely no contacts with or assets in the U.S. to warrant enforcement there. For this reason, the court in *Monagasque* may, in fact, have reached the correct result even as against the award debtor, but *forum non conveniens* was not an appropriate basis for reaching that result. Because of its breadth and discretionary nature, allowing *forum non conveniens* as a defense simply opens too large a hole in the enforcement fabric that the Convention was designed to create. Other doctrines to police this kind of forum shopping may be available.

[99] 247 A.D.2d 281, 668 N.Y.S.2d 458 (1st Dep't 1998).

[100] *Id.* Recently, in *Turksoy v. Acar*, 772 N.Y.S.2d 831 (2nd Dep't 2004), the Second Department, reached the opposite result, summarily affirming dismissal on *forum non conveniens* grounds of an action to enforce a foreign money judgment without discussion of the exclusivity of the grounds for refusal of enforcement set forth in the Recognition Act. The Committee believes that the decision of the First Department in *Watary* was correct.

conveniens should be available as a defense in an action to enforce an award against a non-party to the arbitration because the issue of the non-party's liability for the award is separate and distinct from the issue of the award's enforceability under the New York Convention.[101] Non-parties to the arbitration agreement and arbitral proceedings cannot be deemed to have consented to the worldwide enforcement of the award. Moreover, the issue of the non-party's liability for the award may entail a plenary examination on the factual and legal merits of the alleged grounds for holding the non-party liable for the award, whereas the ordinary enforcement action against the award debtor under the Convention consists of a summary proceeding to verify the non-existence of any of the Article V grounds for non-enforcement of the award, without any review of the merits of any party's rights or liabilities.

Finally, the petitioner could have named Ukraine as a respondent party in the underlying arbitration, but refrained from doing so, preferring instead to litigate Ukraine's liability in a U.S. court in the context of enforcement proceedings. As the Second Circuit noted, the petitioner's motivation for bringing its enforcement action in the United States was far from clear.[102] The *forum non conveniens* doctrine is an appropriate vehicle for policing against such forum shopping to adjudicate the liabilities of non-parties to the arbitration agreement.

Unfortunately, the *Monagasque* court did not limit its dismissal to the enforcement action against Ukraine. [103] Rather, it confirmed dismissal of the enforcement proceeding in its entirety, including the claim against the award debtor.[104]

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[101] *See* Orion Shipping & Trading Co. v. Eastern States Petroleum Corp. of Panama, S.A., 312 F.2d 299, 301 (2d Cir. 1963) ("an action for confirmation is not the proper time for a District Court to 'pierce the corporate veil.' ... It would unduly complicate and protract the proceeding were the court to be confronted with a potentially voluminous record setting out details of the corporate relationship between a party bound by an arbitration award and its purported 'alter ego.'"); Promotora de Navegacion, S.A. v. Sea Containers, Ltd., No. 00 Civ. 3374 (GEL), 2000 WL 1721128, at *9 (S.D.N.Y. Nov. 16, 2000) ("[a] motion to confirm an arbitral award is generally an inappropriate occasion for a district court to consider an alter ego theory of liability"); Chios Charm Shipping Co. v. Rionda, No. 93 Civ. 6313 (SS), 1994 WL 132141, at *4 (S.D.N.Y. Apr. 12, 1994) ("Although Chios may have a claim against C-R Co. and Trading under an alter ego theory, a motion to confirm an arbitration award is not the proper procedural stage to raise such a claim."); Hidrocarburos y Derivados, C.A. v. Ulemos, 453 F. Supp. 160, 177 (S.D.N.Y. 1977) (holding that Second Circuit law "requires that the alter ego theory, and any other theory determinative of the identity of parties to an arbitration agreement, be tested by an action to compel arbitration under [9 U.S.C.] § 4, prior to the arbitration hearings.")

[102] 311 F.3d at 499.

[103] Courts have the authority to sever claims and then dismiss them on *forum non conveniens* grounds. *See, e.g,.* ACLI Int'l Commodity Servs. v. Banque Populaire Suisse, 652 F. Supp. 1289 (S.D.N.Y. 1987) (plaintiff permitted to sever one claim, permitting that claim to survive the dismissal of the remaining claims under *forum non conveniens*); Banco Latino v. Gomez Lopez, 17 F. Supp. 2d 1327 (S.D. Fla. 1998) (U.S. plaintiff permitted to severe its claims from claims brought by foreign plaintiffs which are dismissed under *forum non conveniens*).

[104] As explained above, *forum non conveniens* should have no application against award debtors such as the Ukrainian company in *Monegasque*. In any event, it was inappropriate to dismiss the action against that defendant upon that ground. As the Court in *Monegasque* recognized, "the private interest factors may not ordinarily weigh in favor of *forum non conveniens* dismissal in a summary proceeding to confirm an arbitration award." 311 F.3d at 500. *See* Melton v. Oy Nautor AB, 161 F.3d 13, 1998 WL 613798, at *2 (9th Cir. 1998) (Tashima, J., dissenting) (observing that the *forum non conveniens* private interest factors relating to proof and logistics considerations attendant to trial are not relevant to a summary proceeding to enforce an arbitration award). Moreover, even where the parties, dispute and arbitration have little or no nexus with the United States, the United States can still be said to

CONCLUSION

Both actions for the recognition and enforcement of foreign arbitral awards and actions for the recognition and enforcement of foreign judgments require a basis for the exercise of jurisdiction. As for judicial jurisdiction to enforce, the presence of the award debtor's property within the forum state, regardless of whether it has any connection with the underlying claim, is sufficient to establish *quasi-in-rem* jurisdiction. When the sole basis of jurisdiction is property of the defendant within the state, however, the judgment should, in keeping with well-established *quasi-in-rem* case law, be limited in its effect to property in the state at the time the action for recognition and enforcement was commenced. In the Committee's view, while state statutes may require attachment of assets as the basis for quasi-in-rem jurisdiction, the Due Process Clause of the Constitution imposes no such requirement in order for such jurisdiction to be properly asserted. In any event, a party seeking enforcement of a foreign arbitral award or judgment should be entitled to reasonable jurisdictional discovery on the same showing that is required in other types of actions.

The doctrine of *forum non conveniens* should not be accepted as a ground for dismissing an otherwise proper action against the award debtor for confirmation or enforcement of an arbitral award under the New York Convention. Accepting it as a valid ground for dismissal is contrary to the Convention's exclusive enumeration of grounds for non-enforcement and, unlike jurisdiction of the enforcing court, is not a requisite of Constitutional due process. Nor can resort to *forum non conveniens* in this context be justified on the basis of Article III of the Convention, which entitles signatory countries to recognize and enforce Convention awards in accordance with their local rules of procedure. On the other hand, *forum non conveniens* should be available as a defense to enforcement of an arbitral award against a defendant who was not a party to the proceeding that resulted in the award.

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have a public interest in adhering to its international treaty duty to recognize and enforce arbitral awards governed by the Convention.

ANNEX

The International Commercial Disputes Committee

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