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Current Issues in the Enforcement of International Arbitration Awards

Joseph E. Neuhaus*

INTRODUCTION

A trio of recent United States court decisions has caused a flutter in the arbitration community, in that these decisions are inconsistent with accepted views of how enforcement of international arbitral awards is supposed to work.¹

Two of the decisions run counter to a central claim of international arbitration, which is that enforcement of arbitral awards—even those originating in other countries or legal systems—is summary, simple, and more readily obtainable than enforcement of foreign court judgments.² These two decisions permitted the respondents to avoid enforcement actions based on purely procedural objections.

In the first decision, *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* the United States Court of Appeals for the Fourth Circuit ruled that, contrary to common impression, a claimant could not necessarily bring an enforcement action wherever assets of the debtor were found.³ The court dismissed an enforcement action for lack of personal jurisdiction over the debtor, holding that the presence within the court's jurisdiction of property of the debtor unrelated to the dispute was not sufficient grounds for personal jurisdiction.⁴ In the second decision, *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine,* the United States Court of Appeals for the Second Circuit affirmed the dismissal of an action to confirm and enforce an arbitration award on grounds of *forum non conveniens*, holding the

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1. The three cases are: 1) *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208 (4th Cir. 2002); *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine,* 311 F.3d 488 (2d Cir. 2002); *Chromalloy Aeroservices v. Arab Republic of Egypt,* 939 F. Supp. 907 (D.C. Cir. 1996).

2. *Base Metal Trading, Ltd.,* 283 F.3d 208; *Monegasque de Reassurances S.A.M.,* 311 F.3d 488.

3. *Base Metal Trading, Ltd.,* 283 F.3d at 211.

4. *Id.* at 214-15

Ukraine to be a more appropriate forum for the enforcement proceeding.⁵

The third decision, while it was pro-enforcement, possibly troubled international arbitration circles the most. Here the tenet seemingly under attack was that the country in which an award is issued has primary jurisdiction to review the award and set it aside. In *Chromalloy Aeroservices v. Arab Republic of Egypt*, decided in 1996, the United States District Court for the District of Columbia enforced an award that had been set aside in the country in which it was issued.⁶ The court's decision was so unexpected and unwelcomed by the international bar that it was ominously dubbed the "Chromalloy Problem."⁷ This article seeks not so much to address the wisdom of the decision—about which much has been written—but rather to examine how it has fared in the eight years since the decision was handed down.

This article examines these three cases and concludes that, while they should reasonably cause a double-take, they do not spell the end of international arbitration as we know it. *Base Metal Trading, Ltd.* is simply a mistake, apparently prompted by inadequate briefing. *Monegasque de Reassurances S.A.M.*, however, was correctly decided on unusual facts. *Chromalloy Aeroservices* appears to have been an anomaly that has been largely confined to its facts.

JUDICIAL ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

In order to understand these three decisions, a brief overview of the legal regime for the enforcement of foreign arbitral awards is necessary. The foundation for enforcement of international arbitral awards is the Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention" or "Convention").⁸ Now ratified by 134 countries, the Convention is the most successful multi-lateral international legal instrument that man has devised.⁹ The Convention requires a ratifying state to enforce awards issued in another ratifying state unless one of

5. *Monegasque de Reassurances S.A.M.*, 311 F.3d 488.

6. *Chromalloy Aeroservices*, 939 F. Supp. 907.

7. Thomas E. Carbonneau, *The Exercise of Contract Freedom in the Making of Arbitration Agreements*, 36 VAND. J. TRANSNAT'L L. 1189, 1224 (2003).

8. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38.

9. As of April, 16, 2004, 134 countries were parties to the New York Convention. Status of Conventions and Model Laws, available at <http://www.uncitral.org/en-index.htm> (last visited Oct. 28, 2004).

seven grounds is met.¹⁰

These grounds are essentially, but not entirely, procedural. For the most part, they provide for review to ensure that the arbitral procedures used were fair, rather than providing for review of the merits of the decision. Specifically, the grounds for refusing enforcement under the New York Convention are found in Article V, Section 1:

- a) The parties to the [arbitration] agreement . . . 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.¹¹

In addition, Article V, Section 2 states that recognition and enforcement may also be refused where:

10. New York Convention, *supra* note 8, art. V, § 1-2.

11. New York Convention, *supra* note 8, art. V, § 1(a)-(e) (1959). The New York Convention is implemented in the United States by the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 201-208 (2003). Essentially the same grounds are provided in the Inter-American Convention on International Commercial Arbitration ("Panama Convention"), which has also been implemented through the FAA, 9 U.S.C. §§ 301-307 (2003).

- a) The subject matter of the difference is not capable of settlement by arbitration under the law of [the] country [in which enforcement is sought]; or
- b) The recognition or enforcement of the award would be contrary to the public policy of that country.¹²

Alongside the regime for enforcement of foreign arbitral awards, a separate regime exists for the enforcement of domestic arbitral awards. One fairly widely accepted distinction between the two regimes is that under the domestic regime, courts are generally freer to examine the merits of the tribunal's decision.¹³

This clear-cut bifurcation into two realms, domestic and foreign arbitral awards, is subject to two exceptions. First, the New York Convention applies in certain respects not only to foreign arbitral awards, but also to awards issued in the United States if the arbitration involved a non-United States party, non-United States law, performance abroad, or property located abroad.¹⁴ Second, under Article VII of the New York Convention, a foreign arbitral award can be enforced under any more favorable regime that may exist under domestic law of the country where recognition and enforcement is sought.¹⁵

12. New York Convention, *supra* note 8, art. V, § 2(a)-(b).

13. Enforcement of domestic awards can be refused:

- (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 misbehavior 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.

FAA, 9 U.S.C. § 10(a)(1)-(4) (2003). Courts also have implied non-statutory grounds to review the merits of domestic awards, either under an "arbitrary and capricious" standard, *see, e.g., Indus. Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1446 n.16 (11th Cir. 1998) (discussing the "arbitrary and capricious" standard but refusing to apply it because it is relevant only to domestic, not foreign, awards), or because the decision was "manifestly in disregard" of the applicable law, *see, e.g., I/S Stavborg v. Nat'l Metal Converters, Inc.*, 500 F.2d 424, 430-31 (2d Cir. 1974) (determining that an award would only fail the "manifest disregard" test if it was irrational, not merely erroneous).

14. 9 U.S.C. § 202 (2003). *See, e.g., Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc.*, 126 F.3d 15, 19 (2d Cir. 1997) (holding an arbitral award was non-domestic because the dispute concerned two foreign companies principally involved in contract performance in the Middle East).

15. New York Convention, *supra* note 8, art. VII (stating, in pertinent part: "The

A key feature of the New York Convention for present purposes is that it does not prescribe the procedure to be used by national courts in considering whether to recognize or enforce an arbitral award.¹⁶ Rather, the Convention requires only that States enforce arbitral awards “in accordance with the rules of procedure of the territory where the award is relied upon.”¹⁷ This practical instruction is combined with a safeguard against discrimination, specifically that a national court may not impose “substantially more onerous conditions [on enforcement of awards under the Convention] than are imposed on the recognition or enforcement of domestic arbitral awards.”¹⁸

PERSONAL JURISDICTION AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Suppose that you are a widget maker in Xanadu with a contract to sell a quantity of widgets to Coleridge Corporation in Alph. A dispute arises, Coleridge refuses to pay, and you resort to arbitration in London, which is successful. You have an award for the full amount owed plus interest, but Coleridge still refuses to pay. While Alph and Xanadu are extraordinarily beautiful places, they are somewhat benighted from an arbitration perspective, for neither is a party to the New York Convention. But not to worry, you know the Convention has been widely adopted, so you have every confidence of a quick and easy enforcement once you find assets of Coleridge outside of Alph. This is not difficult, as you know that Coleridge has paid other widget makers from a bank account in Baltimore, Maryland.

You direct your United States lawyers to commence an action to enforce the award in a Maryland federal court and issue restraining notices on the United States bank where the account was located. “Happy to do it,” the lawyers say, “but you should be aware of *Base Metal Trading Ltd. v. OJSC “Novokuznetsky Aluminium Factory,”* a decision issued a couple of years ago by the United States Court of Appeals for the Fourth Circuit, which happens to include Baltimore.”¹⁹

provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award . . . by the law . . . of the country where such award is sought to be relied upon.”)

16. See, e.g., New York Convention, *supra* note 8, art. III.

17. *Id.*

18. *Id.*

19. *Base Metal Trading, Ltd.*, 283 F.3d 208.

In that case, you are told, the Fourth Circuit affirmed the dismissal, for lack of personal jurisdiction, of a case seeking to enforce a foreign arbitral award.²⁰ The court held that, “when the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff’s cause of action, the presence of property alone will not support jurisdiction.”²¹ Since the aluminum that had been attached in the Port of Baltimore was not related to the dispute that led to the arbitration award, the attachment was vacated.²²

Any widget maker in Xanadu would be forgiven for thinking that something’s not right if you can only enforce an arbitral award where the respondent is located or against property that is related to the dispute. This is hardly the quick and easy enforcement that the text of the New York Convention seems to promise, and it limits the efficacy of an award in a way that most laymen would find surprising. Once you have gone to the trouble and expense of obtaining an arbitral award, and once the respondent has failed to fulfill its obligation to pay the award, shouldn’t you be able to take the award anywhere you can find assets and seize them?

If the answer for now is “no” in the Fourth Circuit, the position elsewhere is far from clear, for the question of whether property unrelated to the dispute can serve as a sufficient basis for personal jurisdiction has bedeviled appellate courts across the country in the last few years. Three weeks after the Fourth Circuit’s decision in *Base Metal Trading, Ltd.*, the Ninth Circuit stated, in dictum, that personal jurisdiction to enforce an award can be based on property in the forum unrelated to the underlying controversy.²³ Surveying the field a year later, the Second Circuit found the question “a difficult one,” and dodged it.²⁴ In *Dardana Ltd. v. A.O. Yuganskneftegaz*, the Second Circuit noted the conflicting Fourth and Ninth Circuit decisions, and remanded the

20. *Id.* at 213.

21. *Id.*

22. *Id.* at 214-15.

23. *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1127 (9th Cir. 2002) (affirming dismissal of the action due to the fact that the plaintiff had identified no property in the forum owned by the defendant). A New York state appellate court has gone further, holding that no jurisdictional basis, not even property in the jurisdiction, is required to confirm a foreign-country judgment. See *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285, 291 (N.Y. App. Div. 2001) (stating that, “although defendants assert that they currently have no assets in New York, that assertion has no relation to their jurisdictional objection”).

24. *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 206 (2d Cir. 2003).

case to the district court to consider whether the presence of property alone can supply the jurisdictional basis for an action to enforce a foreign arbitral award.²⁵

That the appellate courts have found the question so difficult is bewildering. More than twenty-five years ago, the United States Supreme Court seemed to resolve the question, albeit in dictum and in a case involving interstate judgments, not foreign arbitral awards.²⁶ In *Shaffer v. Heitner*, a case cited by each of the federal appellate courts referred to above, the Supreme Court held that, in general, the presence of property unrelated to the cause of action was not sufficient to support the exercise of personal jurisdiction needed to adjudicate the merits of the dispute.²⁷ But in a footnote, the Court carved out an exception for actions to enforce a properly obtained judgment:

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.²⁸

After *Shaffer*, state courts throughout the country have regularly applied “quasi in rem” jurisdiction in cases seeking to enforce foreign-state judgments, without imposing any requirement that the property be related to the subject matter of the dispute.²⁹

Add to this mix the anti-discrimination provision of Article III of the New York Convention, which bars contracting states from imposing “substantially more onerous conditions” on the recognition or enforcement of foreign arbitral awards than those imposed

25. *Id.*

26. *Shaffer v. Heitner*, 433 U.S. 186, 209 (1977).

27. The exercise of jurisdiction to determine the rights of particular parties to particular property is called “quasi in rem” jurisdiction. *Id.* at 199 n.17.

28. *Id.* at 210 n.36.

29. *See, e.g.*, *Huggins v. Deinhard*, 654 P.2d 32, 37 (Ariz. Ct. App. 1982) (holding that “quasi in rem” jurisdiction can be the basis of an action to enforce California judgment); *Bank of Babylon v. Quirk*, 472 A.2d 21, 22-23 (Conn. 1984) (holding that “in rem” jurisdiction, involving property unrelated to the claim, can be the basis of an action to enforce a New York judgment); *Tabet v. Tabet*, 644 So. 2d 557, 559 (Fla. Ct. App. 1994) (ruling that if no property is found in the state, then the court will have no jurisdiction to enforce a California judgment); *Williamson v. Williamson*, 275 S.E.2d 42, 43-46 (Ga. 1981) (holding that an Arizona judgment can be enforced if property is found in the state); *First v. Montana Dep’t of Soc. & Rehab. Servs.*, 808 P.2d 467, 474-75 (Mont. 1991) (ruling that “quasi in rem” jurisdiction can be the basis of an action to enforce a South Dakota child support judgment).

on the recognition or enforcement of domestic arbitral awards,³⁰ and a potent argument forms that the Fourth Circuit was simply wrong in *Base Metal Trading, Ltd.*

A clue to what happened is provided by a related decision by the Third Circuit. In *Base Metal Trading Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* the same plaintiff sought to enforce the same award by pursuing aluminum that had been shipped to New Jersey.³¹ In affirming the dismissal of the complaint for lack of personal jurisdiction, the Third Circuit refused to consider an argument that the presence of property in the jurisdiction was sufficient to establish "quasi in rem" jurisdiction because the plaintiff failed to raise the argument in the district court.³² The court commented that the plaintiff also had failed to raise the argument before the Fourth Circuit.³³ Thus, it appears that the Fourth Circuit was led into error by an oversight on the part of the plaintiff's counsel.³⁴

While the Fourth Circuit's decision is cause for concern, and the Second Circuit's perpetuation of the error is even more troublesome, in the end, these decisions appear to be traceable to inadequate briefing. Nothing in the constitutional limits on personal jurisdiction provides a reason not to enforce a foreign arbitral award in any jurisdiction in which property of the respondent can be found, up to the limits of the property found.³⁵

FORUM NON CONVENIENS AND THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

The second of our trio of decisions stands on a different footing, for while the result is surprising, it is probably not wrong. It

30. New York Convention, *supra* note 8, at art. III.

31. *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 47 Fed. Appx. 73 (3d Cir. 2002).

32. *Id.* at 77.

33. *Id.*

34. An earlier assertion of "quasi in rem" jurisdiction might not have succeeded in any event. The Fourth Circuit said, "[I]t is not clear that the aluminum in question belonged to [the respondent]," *Base Metal Trading, Ltd.*, 283 F.3d at 214. In addition, the Third Circuit reported that a court in Louisiana had found that a shipment of aluminum attached by the plaintiff there in fact belonged to another company. *Base Metal Trading, Ltd.*, 47 Fed. Appx. at 75 n.2.

35. It must be borne in mind that "quasi in rem" jurisdiction provides jurisdiction only to the extent of the property on which jurisdiction is founded. For a particularly stark example of this limitation in action, see *CME Media Enters. B.V. v. Zelezny*, No. 01 Civ. 1733, 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001), in which the court confirmed a twenty-three million dollar award, but only to the extent of a five-cent balance in a New York bank account.

is an exceptional decision, but not because legal principles were misapplied; the circumstances were simply very unusual.

In *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, the Second Circuit dismissed an action to confirm and enforce a New York Convention arbitration award on the ground of *forum non conveniens*.³⁶ Informed of this decision, our Xanadu widget maker will wonder whether all of the money spent on the arbitration was ill-spent. And indeed, the first reaction of most practitioners is shock and horror, or at least a sad shake of the head, combined with, for those from outside the United States, a warm feeling of superiority. Here, again, is a decision that runs counter to two basic tenets of enforcement. First, that a claimant should be able to “follow the money,” and, second, that when the claimant finds some money, the enforcement procedure should be quick and easy, rather than presenting needless opportunities for procedural objections.

In fact, however, in *Monegasque de Reassurances S.A.M.*, there was no money to be followed. The claimant evidently had brought the proceeding in hopes of finding something to attach. Insofar as the record before the appellate court revealed, however, the claimant had not succeeded.³⁷ Further, the proceeding was not going to be quick and easy, because the claimant was seeking to enforce an award against both the respondent and a purported alter ego. Additionally, to make things even more interesting, the alter ego was a sovereign.

The facts were as follows: A state-owned Ukrainian pipeline company entered into a contract to transport natural gas for a Russian gas company. The Ukrainians were entitled to take a percentage of the gas to pay for carrying the gas, and the Russians claimed that the Ukrainians had skimmed a bit too much off the top.³⁸ An insurer in Monaco, *Monegasque de Reassurances S.A.M.* (“*Monde Re*”), had paid the extra costs and then initiated arbitration proceedings in Moscow against the Ukrainian company.³⁹ The Moscow arbitration panel awarded \$88 million to the Russians, and the award was upheld by the Russian courts.⁴⁰

In seeking to enforce the award in New York, *Monde Re* for the first time, as far as the court opinions reveal, sought to join

36. *Monegasque de Reassurances S.A.M.*, 311 F.3d at 499.

37. *Id.* Or perhaps the claimant hoped to “export” a decision confirming the award to a jurisdiction in which assets were found.

38. *Id.* at 491.

39. *Id.*

40. *Id.* at 491-92.

the Ukraine to the proceeding, arguing that the country was liable for the award as the alter ego of the pipeline company.⁴¹ The trial court and the Second Circuit were thus confronted with deciding whether the Ukraine was the alter ego of the pipeline company, presumably a question of Ukrainian law, and an issue that would likely require extensive evidence of the relationship between the state and the pipeline company. This issue arose in a case in which there were, as of yet, no assets to enforce against. As the *Monegasque* Court stated, “[T]his case does not lend itself to summary disposition.”⁴²

Both courts declined to go down that path, deciding instead that the doctrine of *forum non conveniens* could be applied in proceedings to enforce a foreign arbitral award under the New York Convention and that the doctrine applied to the case before them. The rule of *forum non conveniens* is a principle of discretion by which a court may decline, “for reasons of convenience, judicial economy and justice,” to exercise jurisdiction conferred on it by statute.⁴³ The Second Circuit concluded that the rule was a procedural rule of the forum that also applied to enforcement of domestic arbitral awards.⁴⁴ As such, the court held that the rule could be applied to enforcement of foreign arbitral awards under the New York Convention.⁴⁵

The Second Circuit then affirmed the district court’s conclusion that the doctrine applied to the dispute between Monde Re, Nak Naftogaz of Ukraine, and the State of Ukraine. The court held that little deference was due to Monde Re’s choice of forum, because there was little “bona fide connection” between New York

41. *Id.* at 492.

42. *Id.* at 500.

43. *Id.* at 497. See also *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). The trial court declined to decide whether it in fact had jurisdiction, and the Second Circuit affirmed on the same basis. The Second Circuit explained that it is proper to decline to exercise jurisdiction without finding whether jurisdiction existed because the abstention “is as merits-free as a finding of no jurisdiction.” *Monegasque de Reassurances S.A.M.*, 311 F.3d at 498 (quoting *In re Minister Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998) (footnote omitted)).

44. The *Monegasque* court cited *Maria Victoria Naviera, S.A. v. Cementus Del Valle, S.A.*, 759 F.2d 1027 (2d Cir. 1985), to support the proposition that *forum non conveniens* applied to domestic arbitration cases. *Monegasque de Reassurances S.A.M.*, 311 F.3d at 496. That case was likely one to which the New York Convention applied, however, because it involved non-U.S. parties who had agreed to arbitration in New York. It was thus a “non-domestic” case for New York Convention purposes. See New York Convention, *supra* note 8, art. I (“[The Convention] shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”). See also 9 U.S.C. § 202 (1970).

45. *Monegasque de Reassurances S.A.M.*, 311 F.3d at 495-97.

and either *Monde Re* or the lawsuit.⁴⁶ The Second Circuit also determined that an adequate alternative forum existed in the Ukraine, finding the evidence submitted of “general corruption in the body politic of that nation” to be insufficient.⁴⁷ Indeed, the court stated that, in voluntarily conducting business with a Ukrainian company, “Gazprom, the Russian company . . . must have anticipated the possibility of litigation in Ukraine.”⁴⁸ The court then balanced so-called “private interest factors”⁴⁹ and “public interest factors”⁵⁰ to conclude that the enforcement action should proceed in the Ukraine.

The Second Circuit’s conclusion that the doctrine of *forum non conveniens* applies to actions under the New York Convention was correct, although its reasoning in places is open to question. The court, for example, rejected *Monde Re*’s argument that application of the doctrine of *forum non conveniens* “flouts the intent of the Convention and runs the risk of invalidating its purpose.”⁵¹ Quoting the district court, the Second Circuit reasoned that enforcing awards in jurisdictions with no connection to the parties, the underlying events or the award “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.”⁵²

The Court’s conclusion is correct, but its reasoning is puzzling. The premise of the New York Convention is that international trade will be furthered by making duly obtained arbitral awards enforceable as widely as possible, even if the respondent is required to litigate the enforceability of the dispute in numerous forums. But the proposition offered by *Monde Re*—that applying

46. *Id.* at 498 (quoting *Iragorri v. U.S. Techs. Corp.*, 274 F.3d 65, 72 (2nd Cir. 2001) (en banc)).

47. *Id.* at 499.

48. *Id.*

49. The “private interest factors” are “the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive.” *Id.* at 500 (internal quotations omitted).

50. The “public interest factors” include “the administrative difficulties associated with court congestion; the imposition of jury duty upon those whose community bears no relationship to the litigation; the local interest in resolving local disputes; and the problems implicated in the application of foreign law.” *Id.* at 500 (internal quotations omitted).

51. *Id.* at 496.

52. *Id.* at 497 (quoting *In re Arbitration Between Monegasque de Reassurance, S.A.M. v. Nak Naftogaz of Ukraine*, 158 F. Supp. 2d 377, 383 (S.D.N.Y. 2001)).

neutral procedures in such a way that enforcement is thwarted would undermine the New York Convention—was properly rejected.⁵³ The Convention does not instruct courts to apply only “enforcement-enhancing” procedures. That the doctrine of *forum non conveniens* results in denial of enforcement is no more a violation of the Convention than application of statutes of limitation or rules that require a petitioner to proceed only with a properly appointed lawyer or in a court with the correct jurisdictional limits.⁵⁴

It might be argued that the doctrine of *forum non conveniens* is not a facially neutral procedural rule, but in fact applies more severely to foreign arbitral awards because it always will be substantially more onerous to be forced to litigate in another country than in another state of the United States. By definition, however, the doctrine applies when the connections with the forum are far less than with one or more alternative forums.⁵⁵ The premise of the “private interest factors” to be considered in applying *forum non conveniens* is that the litigation will be more readily conducted elsewhere than in the United States.

Applying *forum non conveniens* to foreign arbitral awards is thereby not a misstep, as the Fourth Circuit decision in *Base Metal Trading, Ltd.* was, but it is critical that the doctrine continue to be applied with care. While I do not propose to offer any conclusion as to whether the trial court and the Second Circuit were right or wrong in applying the doctrine on the record before them, I make three observations:

First, the Second Circuit was surely wrong in saying that Gazprom “must have anticipated the possibility of litigation in Ukraine.”⁵⁶ In signing a contract calling for arbitration in Moscow, Gazprom did everything it could to *avoid* litigation in the Ukraine. Using a business deal with a Ukrainian company as an endorsement of the Ukrainian court system was wrong.

Second, there is more than a hint of forum-shopping here. Courts in the United States will undoubtedly be more receptive to

53. *Monegasque de Reassurances S.A.M.*, 311 F.3d at 499.

54. Indeed, the United States Supreme Court had said that the doctrine of *forum non conveniens* is “nothing more or less than a supervening venue provision.” *Am. Dredging v. Miller*, 510 U.S. 443, 453 (1994).

55. *See, e.g., Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (ruling that because “plaintiff’s choice of forum should rarely be disturbed,” *forum non conveniens* should only be applied when the balance of the private interest factors is “strongly in favor” of the defendant’s claim of inconvenience).

56. *Monegasque de Reassurances S.A.M.*, 311 F.3d at 499.

an alter ego argument than courts in almost any other country. This was a factor that evidently and properly weighed heavily in the conclusion in *Monegasque de Reassurances S.A.M.*

Third, while *Monegasque* produced good law, it was nonetheless a hard case.⁵⁷ Courts should apply the doctrine of *forum non conveniens* sparingly and take note of the highly unusual facts in the *Monegasque* case, principally the apparent absence of assets in the forum and the complexity occasioned by the introduction of the alter ego issue at the enforcement stage. The presence in the forum of attachable assets likely owned by the defendant should almost always, if not always, be a sufficient connection to the forum to justify the exercise of jurisdiction, even in an alter ego case. Additionally, if an action to enforce is nonetheless dismissed on grounds of *forum non conveniens*, the court should usually condition dismissal on posting of security substantially equal to any assets properly attached.⁵⁸

THE CHROMALLOY PROBLEM

Thus far, I have presented ways in which United States courts have chosen not to enforce arbitral awards. The "*Chromalloy* Problem" refers to the opposite concern: expanding the power of plaintiffs to what some considered an alarming degree.⁵⁹

In *Chromalloy*, the D.C. Circuit enforced an award that had been set aside in the country that issued it. The case involved an award rendered in Egypt against the Egyptian Air Force and in favor of an American company.⁶⁰ The arbitration clause provided that the award would not be subject to any appeal or other recourse, but the Egyptian Air Force nonetheless sought to have the award set aside by the Egyptian courts.⁶¹ The Egyptian judiciary obliged, setting aside the award on the ground that the arbitrators had misapplied Egyptian law.⁶²

Undaunted, the American company sought to confirm the

57. *Cf.* Northern Secs. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (noting that, "Great cases like hard cases make bad law.").

58. *E.g.*, Iberian Tankers Co. v. Terminales Maracaibo, C.A., 322 F. Supp. 73, 75 n.7 (S.D.N.Y. 1971) (dismissing suit to compel arbitration on *forum non conveniens* grounds on condition that defendant post security in the amount of funds attached).

59. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.C. Cir. 1996).

60. *Id.* at 908.

61. *Id.*

62. *Id.* A speaker at an earlier arbitration symposium at the University of Miami has suggested that the Egyptian court's evaluation of the arbitrators' interpretation of law was "strained" and that the protection of national interests might have been at

award in the United States. Under Article V of the New York Convention, the District of Columbia District Court could have refused to enforce the award because one of the grounds for denying enforcement is that the award has been set aside in the country in which it was issued.⁶³ The United States court, however, confirmed the award, holding that the fact that the Egyptian court set aside the award only meant that a court was not *required* to enforce the award under Article V of the New York Convention, not that foreign enforcement was prohibited.⁶⁴ Moreover, since Article VII of the Convention required a court to enforce a foreign award if it would be enforced under domestic law, the D.C. District Court ruled that, under Article VII of the Convention, it was authorized to enforce the award because Chapter 1 of the Federal Arbitration Act required confirmation under the circumstances.⁶⁵

The concern with *Chromalloy* is that it departs from the principle that the courts, at the place of arbitration, have primary jurisdiction over awards issued within their jurisdiction. If an award can be revived after its judicial nullification, a claimant with an annulled award tucked under its arm could go from country to country, like the ghouls in *Night of the Living Dead*,⁶⁶ until it found a court willing to enforce the award.⁶⁷ Moreover, the court's interpretation of Article V of the New York Convention was said to provide the enforcing court with effectively unlimited discretion to enforce faulty arbitration awards as long as its ruling also applied to the enforcement of domestic awards.⁶⁸

As it turns out, none of this appears to have come to pass, at least in United States courts. In the eight years since the *Chromalloy* case was decided, there have been three published decisions in the United States that have expressly considered whether to follow *Chromalloy* in applying Chapter 1 of the Federal Arbitration Act to confirm an award governed by the New York Conven-

the forefront of the Egyptian court's mind. See Thomas M. Carbonneau, *The Ballad of Transborder Arbitration*, 56 U. MIAMI L. REV. 773, 792 (2002).

63. New York Convention, *supra* note 8, art. V(1)(e).

64. *Chromalloy*, 939 F. Supp. 2d at 909.

65. See New York Convention, *supra* note, 8 art. VII.

66. NIGHT OF THE LIVING DEAD (Continental/Image Ten Productions 1968).

67. See, e.g., Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 462 (2000) (explaining that in a system where a vacated award cannot be enforced in another jurisdiction, "a party cannot shop around the world in order to find a flexible court somewhere which is willing to enforce such [a questionable] award") (quoting Albert Jan van den Berg, *Enforcement of Annulled Awards?*, 9 I.C.C. INT'L CT. ARB. BULL. 15 (Nov. 1998)).

68. Carbonneau, *supra* note 7, at 1225.

tion. None of the courts found grounds for applying the *Chromalloy* reasoning.

The Second Circuit refused to apply *Chromalloy* in *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, where Nigerian courts had set aside a Nigerian arbitration ruling in favor of Baker Marine against Chevron Corp. and another company in disputes relating to an agreement for provision of barge services to Chevron.⁶⁹ The New York court broadly rejected the policy basis of *Chromalloy*. The Second Circuit stated that “as a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments.”⁷⁰ The court ultimately distinguished *Chromalloy* on narrower grounds, however, noting that Baker Marine was not a United States “citizen” and that the case did not involve a breach of a promise not to appeal the arbitral award.⁷¹

The United States District Court for the Southern District of New York likewise refused to follow *Chromalloy* in *Spier v. Calzaturificio Tecnica, S.p.A.*⁷² That case involved an arbitral award rendered in Italy in favor of an American citizen against an Italian company. The United States court initially stayed the proceeding to confirm or enforce the award pending set-aside proceedings in Italy.⁷³ The Italian courts, both trial and appellate, set aside the award, holding, in essence, that the arbitrators had misused their power to issue an award “pro bono et aequo,” in awarding a sum entirely outside the bounds of the contract.⁷⁴ The claimant renewed his United States court petition to confirm or enforce the award, but the American court rejected the petition, relying on *Baker Marine*.⁷⁵ While the plaintiff in *Spier* was a U.S. citizen, unlike the plaintiff in *Baker Marine*, the New York court held that the “decisive circumstance” prompting the ruling in *Baker Marine* was “Egypt’s repudiation of its contractual promise not to appeal an arbitral award.”⁷⁶

69. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).

70. *Id.* at 197 n.2 (quoting Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 355 (1981)).

71. *Baker Marine*, 191 F.3d at 197 n.3.

72. *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999).

73. *Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871, 875-76 (S.D.N.Y. 1987). Article VI of the New York Convention provides for a stay pending completion of a set-aside proceeding in the country in which the award was issued.

74. *Spier*, 71 F. Supp. 2d at 281-82.

75. *Id.* at 288.

76. *Id.* at 287.

Finally, the United States District Court for the Southern District of Florida rejected *Chromalloy's* view that the domestic grounds for enforcement in Chapter 1 of the Federal Arbitration Act can apply to arbitral awards to which the New York Convention applies. In *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, the Florida court was asked to confirm an award made in the United States and not a foreign award.⁷⁷ Because the award was based on foreign law and was issued in a dispute between foreign parties, however, the court concluded that the award was “not considered . . . domestic” and was thereby governed by the New York Convention, as implemented in Chapter 2 of the Federal Arbitration Act.⁷⁸ The Florida court read *Chromalloy* as calling for application of the domestic enforcement grounds in Chapter 1 to determine whether to confirm such an award and rejected that conclusion. The court ruled that, notwithstanding the language of Article VII of the New York Convention, the Federal Arbitration Act does not contemplate “the wholesale exclusion of Chapter 2 of the FAA in favor of Chapter 1.”⁷⁹ The Florida court reasoned:

[D]espite the *Chromalloy* court's conclusion that no conflict exists between Chapter 1 and the Convention, . . . its holding implies that article VII of the Convention allows the wholesale exclusion of Chapter 2 of the FAA in favor of Chapter 1. Even if this was the intent of the Convention, 9 U.S.C. § 208 limits the ability to make this type of substitution. Nothing in *Individual Risk Insurers [v. M.A.N. Gutehoffnungshutte]*, 141 F.3d 1434 (11th Cir. 1998), an earlier appellate decision,] or 9 U.S.C. § 208 indicates that Chapter 1 is capable of serving as the primary framework for confirming an award “not considered as domestic” under the Convention, as *Chromalloy* suggests.⁸⁰

The issue in *Four Seasons*—the standards to apply in confirming an award issued in the United States—is quite different from the question presented in *Chromalloy*, *Baker Marine* and *Spier*. In the latter three cases, the issue was whether to enforce an award issued elsewhere after it had been set aside in its coun-

77. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 267 F. Supp. 2d 1335, 1341-42 (S.D. Fla. 2003).

78. *Id.* at 1342.

79. *Id.*

80. *Id.* at 1341-42. 9 U.S.C. § 208, to which the court referred, states, “Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the [New York] Convention as ratified by the United States.” 9 U.S.C. § 208 (2003).

try of origin. Indeed, the Second Circuit, the court that refused to follow *Chromalloy* in the *Baker Marine* case, reached a different conclusion and applied the domestic grounds in deciding whether to set aside a “non-domestic” award issued in the United States.⁸¹ The sweeping rejection, however, of the fundamental premises of *Chromalloy* in *Four Seasons* and *Baker Marine* is telling. The U.S. courts that have addressed *Chromalloy* have not embraced the case and appear to be concerned about the implications that many in the arbitration world feared: both the lack of finality and the risk of conflicting judgments.

The question that arises is whether a court confronted with a breach of a promise not to appeal an arbitral award, as the *Chromalloy* court was, will follow that case. I suggest that it will not. The fundamental proposition that appears to animate each of these post-*Chromalloy* decisions is that the state in which an award was issued, which was generally chosen by the parties, has primary jurisdiction to consider whether to set aside the award. If those courts do not hold a party to its promise not to appeal an award, then it is unlikely that another United States court will enforce that undertaking.

CONCLUSION

The three recent enforcement decisions I have considered are each surprising, but they are not causes for despair. *Monegasque de Reassurances S.A.M.*, which applied *forum non conveniens* to dismiss an enforcement proceeding, was doctrinally correct, but involved extreme circumstances unlikely to be often repeated, namely the absence of assets in the forum. *Base Metal Trading, Ltd.*, which dismissed an enforcement proceeding for lack of personal jurisdiction notwithstanding the apparent presence of the debtor's property in the jurisdiction, was wrongly decided. The result in that case was apparently the product of poor briefing. Finally, *Chromalloy*, which enforced an award that had been set aside in the country of origin, seems to be increasingly confined to its facts. The machinery of enforcement of arbitral awards in the United States is not broken. It is just, as the common law always has been, a bit creaky.

81. *Yusef Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15 (2d Cir. 1997). “We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case [Chapter 1 of] the FAA, to a motion to set aside or vacate that arbitral award.” *Id.* at 21.