RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND ARBITRATION AWARDS IN THE UNITED STATES: A PRACTICAL PERSPECTIVE

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I. Recognition and Enforcement of Foreign Civil Judgments

A. Standards for Recognition and Enforcement

- The U.S. is not party to any international conventions or treaties requiring the recognition of foreign judgments. Further, there is no constitutional basis requiring recognition, nor is there any governing federal legislation. That said, the U.S. is receptive to foreign judgment recognition and enforcement. *See* Statement of Professor Linda J. Silberman (Martin Lipton Professor of Law, NYU School of Law)Before the Subcommittee on Courts, Commercial and Administrative Law of the U.S. House of Representatives, Committee on the Judiciary (Nov. 15, 2011), *available at* http://judiciary.house.gov/hearings/pdf/Silberman%2011152011.pdf.

- Recognition and enforcement of judgments is governed by two main bodies of law:
  - The common law standard stemming from a 1895 Supreme Court Case, *Hilton v. Guyot*, 159 U.S. 113 (1895); and
  - Variations of the Uniform Foreign Money Judgments Recognition Act ("UFMJRA," "Uniform Act" or "Act"), as adopted by individual states.

1. Common Law Jurisdictions

- Note: "Common law" will apply –
  - in federal question cases brought in federal court;
  - in diversity actions brought in federal court applying the state law of a state that has not adopted the Uniform Act; and
  - in state court of a state that has not adopted the Uniform Act.

- ***Hilton v. Guyot*:**
  - In *Hilton v. Guyot*, the Supreme Court found that judgments of foreign courts should be recognized as a matter of international comity:

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> "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

Hilton, 159 U.S. at 163-64.

- Under the *Hilton* standard, foreign judgments are recognized – and thus enforceable – where there has been:
  - opportunity for a full and fair trial;
  - competent jurisdiction;
  - adequate notice to or voluntary appearance of the defendant(s);
  - proceedings under a system likely to secure an impartial administration of justice with respect to other countries;
  - no evidence of prejudice in the court or in the system of laws;
  - no evidence of fraud in procuring judgment; and
  - no other reason why comity should not be granted.

  Id. at 202-03; *see also Koster v. Automark Ind., Inc.*, 640 F.2d 77 (7th Cir. 1981); *Mata v. American Life Ins. Co.,* 771 F. Supp. 1375 (D. Del. 1991).

- Burden of Proof:
  - Under a plain reading of *Hilton*, it appears that the party seeking to enforce the judgment has the burden of showing that the foreign court's judgment satisfies the listed criteria. *See Hilton*, 159 U.S. at 203.
  - However, "courts generally find foreign judgments to be presumptively enforceable." Cedric C. Chao &Christin S. Neuhoff, Enforcement and Recognition of Foreign Judgments in United States Courts: A Practical Perspective, 29 Pepp. L. Rev. 147, 149 (2001). "Thus, unless the party seeking to *avoid* enforcement shows that the foreign court's judgment (or the system under which it was rendered) was fundamentally unfair, the judgment should be given conclusive effect in the United States." *Id.*

- Reciprocity:
  - In addition to the criteria listed above, the *Hilton* Court required reciprocity as a prerequisite to enforcement of a foreign judgment.
    - The Court found that the judgment at issue met all of the listed criteria, yet the Court declined to enforce the judgment on the grounds that a French court would not recognize a judgment from a United States Court. *Hilton*, 159 U.S. at 228.

        - Most jurisdictions appear to have abandoned the reciprocity requirement. They will enforce a foreign judgment regardless of whether the foreign court would recognize a U.S. judgment. Chao &Neuhoff, *supra* at 150.

- **The Restatement (Third) of Foreign Relations Law (1986)**
    - In 1986, the American Law Institute adopted the Restatement (Third) of Foreign Relations Law ("Restatement"). The Restatement builds on the comity analysis of *Hilton v. Guyot*. While the Restatement provides for recognition of foreign money judgments (in Section 481), however, such recognition is subject to certain mandatory grounds for non-recognition (in section 482(1)) and certain discretionary grounds (in section 482(2)).
    - Section 481: Recognition and Enforcement of Foreign Judgments
      (1) Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.
      (2) A judgment entitled to recognition under Subsection (1) may be enforced by any party or its successor or assigns against any other party, its successors or assigns, in accordance with the procedure for enforcement of judgments applicable where enforcement is sought.
    - Section 482(a): Mandatory Grounds for Nonrecognition
        - the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law; or
        - the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state.
    - Section 482(b): Discretionary Grounds for Nonrecognition
        - the court that rendered the judgment did not have jurisdiction of the subject matter of the action;
        - the defendant did not receive notice of the proceedings in sufficient time to enable him to defend;
        - the judgment was obtained by fraud;
        - the cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States or of the State where recognition is sought;
        - the judgment conflicts with another final judgment that is entitled to recognition; or
        - the proceeding in the foreign court was contrary to an agreement between the parties to submit the controversy on which the judgment is based to another forum.

  See Ronald A. Brand (for the Federal Judicial Center), Recognition and Enforcement of Foreign Judgments, Int'l Litigation Guide, at 6-7 (Apr. 2012), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/brandenforce.pdf/$file/brandenforce.pdf

- Most states that have retained a common law approach to foreign judgments recognition follow *Hilton* and the Restatement. *Id.* at 7.

2. **Statutory Jurisdictions**

- The common law as set forth in *Hilton* and the Restatement has largely been adopted in the **Uniform Foreign Money Judgments Recognition Act**, initially approved in 1962 and subsequently amended in 2005. *See* http://uniformlaws.org/Act.aspx?title=Foreign Money Judgments Recognition Act (original); https://www.law.upenn.edu/library/archives/ulc/ufmjra/2005final.htm (amended).
- Over half of U.S. states – including California and New York – have adopted some form of the Act.
- The Uniform Act applies to money judgments only. It does not apply to judgments for taxes, fines or other penalties, or for support in matrimonial or family matters. UFMJRA § 3.
- Under the Act, foreign money judgments are presumptively recognized *unless* a reason for non-enforcement is found. UFMJRA § 4(a). Further, much like the Restatement, the Act provides a list of mandatory as well as discretionary grounds for non-recognition.
    - Mandatory Grounds: A court will not recognize a foreign judgment if –
        - The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with due process;
        - The rendering court lacked personal jurisdiction over the defendant; or
        - The rendering court lacked subject matter jurisdiction.

      UFMJRA § 4(b).
        - Note: Unlike the Restatement, the Act includes lack of subject matter jurisdiction in the originating court as a mandatory ground for non-recognition.
    - Discretionary Grounds: A court need not recognize a foreign judgment if -
        - Notice to the defendant was inadequate;
        - The judgment was obtained by fraud;
        - The cause of action on which the judgment was based is repugnant to the public policy of the state in which enforcement is sought;
        - The judgment conflicts with another final and conclusive judgment;
        - The parties had entered into a forum selection clause in which they chose a forum other than the one in which the judgment was rendered; or
        - Jurisdiction was based solely on personal service and the rendering court was a seriously inconvenient forum.

      UFMJRA § 4(c).

- Burden: "A party resisting recognition of a foreign-judgment has the burden of establishing that a ground for nonrecognition … exists." UFMJRA § 4(d).
- Note on Personal Jurisdiction: Though the Uniform Act specifies that courts will not enforce the judgment of a foreign court if that court lacked personal jurisdiction, it also identified certain caveats. UFMJRA § 5. Enforcement will not be denied for lack of personal jurisdiction under the following circumstances:
    - The defendant was personally served in a foreign country;
    - The defendant voluntarily appeared in the proceedings for reasons other than contesting jurisdiction or protecting property seized or threatened with seizure;
    - The defendant had previously agreed to submit to the jurisdiction of the foreign court with respect to the subject matter at issue;
    - The defendant was domiciled in the foreign state when proceedings began;
    - The defendant (if a corporation) was incorporated or had its principal place of business in the foreign state;
    - The defendant (if a corporation) had a business office in the foreign state *and* the cause of action arose out of business done in that office; or
    - The defendant operated a motor vehicle or airplane in the foreign state, and the cause of action arose out of such operation.

  Id.
- Procedure:
    - Original Matter: "If recognition of a foreign-country judgment is sought as an original matter, the issue of recognition shall be raised by filing an action seeking recognition of the foreign-country judgment." UFMJRA § 6(a).
        - Statute of Limitations: An action to recognize a foreign-country judgment must be commenced within the earlier of:
            - The time during which the foreign-country judgment is effective in the foreign country; or
            - 15 years from the date that the foreign-country judgment became effective in the foreign country.
    - Pending Action: "If recognition of a foreign-country judgment is sought in a pending action, the issue of recognition may be raised by counterclaim, cross-claim, or affirmative defense." UFMJRA § 6(b).
    - Enforcement: If the court finds that the foreign-country judgment is entitled to recognition under the Act, then – to the extent that the foreign-country judgment grants or denies recover of a sum of money – the foreign country judgment is:
        - "conclusive between the parties to the same extent as the judgment of a sister state entitled to full faith and credit in this state would be conclusive," UFMJRA § 7(1); and
        - "enforceable in the same manner and to the same extent as a judgment rendered in this state," UFMJRA § 7(2).

- Variations:
    - One purpose of the Uniform Act was to provide some *uniformity* among the states in the area of enforcement of foreign judgments. However, some states have enacted the Uniform Act with their own alterations/variations.
    - Example – Reciprocity: The Uniform Act does *not* include a reciprocity requirement, but several states have included a reciprocity requirement in their versions of the Uniform Act (e.g., Florida, Georgia, Idaho, Massachusetts, Ohio, and Texas).

B. **Practical Considerations**

1. **Initial Issues in a Recognition Case**

a. **Jurisdiction to Hear a Recognition Action**

- Courts are split over the parameters of the due process requirements for jurisdiction in a recognition/enforcement action in the U.S. *See* Brand, *supra* at 10.
- Spectrum:
    - One end: Allows a recognition action to be brought whether or not the defendant had contacts within the forum state or had assets within the state against which the judgment could be enforced.
        - *Lenchyshyn v. Pelko Electric, Inc.*, 281 A.D.2d 42, 43 (N.Y.S. 2001): Held that "the judgment debtor need not be subject to personal jurisdiction in New York before the judgment creditor may obtain recognition and enforcement of the foreign country money judgment, as neither the Due Process Clause of the United States Constitution nor New York law requires that the New York court have a jurisdictional basis for proceeding against a judgment debtor."
    - Middle: Jurisdiction is proper when "either the defendant has sufficient personal contacts to satisfy the standard minimum contacts analysis or there are assets of the defendant in the forum state, even if those assets are unrelated to the claim in the underlying judgment." Brand, *supra* at 11.
        - Note: This is the position followed by the Restatement and the ALI Proposed Federal Statute, discussed *infra*.
    - Other end: Courts have "held that attachment of assets of the judgment debtor within the state is not sufficient to provide jurisdiction, and that personal jurisdiction over the judgment debtor is necessary." Brand, *supra* at 10-11.

b. **Finality**

- In both common law jurisdictions and those using a form of the Uniform Act, foreign judgments will only be recognized and enforced if they are final and conclusive *where rendered*.

- However, "a judgment will be considered final even though it is subject to appeal or an appeal is pending." Chao &Neuhoff, *supra* at 152 (citing UFMJRA § 2).
    - "At least one United States Court has refused to reconsider recognition of a foreign judgment even though that judgment was later vacated in the foreign court." *Id.* (citing *DSQ Prop. Co. v. DeLorean*, 745 F. Supp. 1234 (E.D. Mich. 1990), wherein US court refused to reconsider its recognition of an English judgment despite fact that English court later vacated that judgment).
- If you are opposing enforcement of a foreign judgment that is on appeal, or for which the time to appeal has not yet passed, you should seek a stay of the US action pending appeal in the foreign court.
    - "[T]he court may stay the proceedings until the appeal has been determined or until the expiration of a period of time sufficient to enable the defendant to prosecute the appeal." *Id.* at 153.

c. **Enforcement of Default Judgments**

- Courts in the United States will recognize default judgments as well as judgments on the merits. *Id.* at 153, n. 36-38(collecting cases).
- A party "may not simply argue that he or she should have won on the merits of the action. As with judgments on the merits, if the criteria for recognition or enforcement are met, 'the merits of the case should not be tried afresh ….'" *Id.* (quoting *Hilton*, 159 U.S. at 203).

2. **Grounds for Non-Recognition**

a. **Improper Notice**

- If the defendant did not voluntarily appear before the foreign court, a US court may examine whether the method of service of process provided the defendant with adequate notice of the action. As noted above, inadequate notice may constitute grounds for non-recognition of a foreign judgment.
- As a practitioner, one of the first steps should be to determine whether or not there has been compliance with local service requirements
    - Check applicable conventions (e.g., Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters)
    - Consult with local counsel regarding whether service of process complied with the rules of the foreign jurisdiction
        - But Note: "if the foreign forum's law is not reasonable calculated to provide actual notice to the defendant, compliance with foreign law will not be sufficient to support enforcement of the judgment in the United States." Chao &Neuhoff, *supra* at 155.

b. **Lack of Personal Jurisdiction**

- Must ensure the foreign court issuing the judgment had personal jurisdiction over the party.
- When may lack of personal jurisdiction be raised as a ground for non-recognition?
    - "A defendant may resist enforcement or recognition on the basis of lack of personal jurisdiction if that defendant neither appeared in the foreign court to contest jurisdiction, nor waived jurisdiction." *Id*.
    - Note: Personal jurisdiction *may* not be subject to dispute in the US if the issue was litigated and decided before the foreign court. *See id.*
        - Court may find that a defendant waived any challenge to personal jurisdiction if, after losing an initial challenge, he or she participated in the action on the merits, taking no further action to litigate/challenge personal jurisdiction. *Id.* at 156 (citing *Carolina Nat'l Bank v. Westpac banking Corp.*, 678 F. Supp. 596, 599 (D.S.C. 1987)).
        - But Note: "At least one court has suggested that a defendant may have preserved the right to challenge personal jurisdiction on a later enforcement action if he had brought an interlocutory appeal in the foreign court or reasserted the objection during the trial on the merits and any subsequent appeals." *Id.*
- How will a U.S. court assess whether there was jurisdiction?
    - US courts generally look at whether the foreign court's exercise of personal jurisdiction conformed to standards of due process as recognized in the United States (i.e., apply the minimum contacts test).
    - As previously noted, the Uniform Act provides a list of circumstances under which enforcement or recognition may *not* be denied on the basis of lack of personal jurisdiction. *See supra* p.4.

c. **Lack of Subject Matter Jurisdiction**

- Lack of subject matter jurisdiction is a mandatory ground for non-recognition under the Uniform Act, and a discretionary ground under the Restatement.
- "In contrast to the test for personal jurisdiction, where U.S. courts apply U.S. legal concepts to foreign court determinations, when ruling on the question of subject matter jurisdiction, U.S. courts apply the jurisdictional rules of the foreign court." Brand, *supra* at 20.

d. **Choice of Court Clauses: Judgments Contrary to Party Agreement**

- The Supreme Court has stated clear support for the enforcement of forum-selection clauses in international contracts.
    - *See Bremen v. Zapata Offshore Co.*, 407 U.S. 1 (1972):
        - Facts: Petitioner Unterweser made an agreement to tow respondent's drilling rig from Louisiana to Italy. The contract

contained a forum-selection clause providing for the litigation of any dispute in the High Court of Justice in London. When the rig under tow was damaged in a storm, respondent instructed Unterweser to tow the rig to Tampa, the nearest port of refuge.

- Procedural History: In Florida, Respondent brought suit in admiralty against petitioners. Unterweser invoked the forum clause in moving for dismissal for want of jurisdiction and brought suit in the English court, which ruled that it had jurisdiction under the contractual forum provision. The District Court, relying on *Carbon Black Export, Inc. v. The Monrosa,* 254 F. 2d 297, held the forum-selection clause unenforceable, and refused to decline jurisdiction on the basis of *forum non conveniens.* The Court of Appeals affirmed.
- *Held:* The forum-selection clause, which was a vital part of the towing contract, is binding on the parties unless respondent can meet the heavy burden of showing that its enforcement would be unreasonable, unfair, or unjust.

- The Uniform Act provides for discretionary non-recognition of a judgment when "the proceedings in the foreign court was contrary to an agreement between the parties under which the dispute in question was determined otherwise than by proceedings in that foreign court." UFMJRA § 4(c).
- Thus, under both common law and the state statutory schemes, it is unlikely that foreign judgments obtained in an effort to evade jurisdiction in the forum originally agreed to by the parties will be enforced by U.S. courts. *See* Brand, *supra* at 23.
- The law on recognition of foreign judgments and choice of court agreements will change significantly if the United States proceeds to ratify the 2005 Hague Convention on Choice of Court Agreements. *See infra* p. ___. The Convention will create a treaty obligation to enforce exclusive choice of court agreements and to recognize judgments resulting from jurisdiction bsed on those agreements. This would make U.S. court's non-recognition of a judgment obtained in violation of an exclusive choice of court agreement mandatory.

e. **Fraud**

- Fraud is a defense to the recognition of a foreign judgment. "Generally, a foreign judgment can be impeached only for extrinsic fraud, which deprives the aggrieved party of an adequate opportunity to present its case to the court." *Id.*
  - Pending Action: *Chevron Corp. v. Donzinger*, No. 11-cv-691 (S.D.N.Y.)
    - In February 2011, a court in Ecuador ordered Chevron to pay as much as $18 billion in compensatory and punitive damages for its subsidiary Texaco Inc.'s alleged dumping of toxic drilling wastes in the Ecuadorian jungle from 1964 to about 1992.
    - Chevron sued an attorney and others associated with the plaintiffs in New York under RICO, calling the Ecuadorian action a "sham." Specifically, Chevron alleges:

        - that parts of the judgment from the Appellate Division of Ecuador's Provincial Court of Justice in Sucumbios were ghost-written by the plaintiffs rather than written by the judge; and
        - plaintiffs selected and wrote most of the report of the court-appointed independent global expert on environmental harm.
    - The defendants asserted an affirmative defense of collateral estoppel.
    - Chevron moved for partial summary judgment dismissing the affirmative defense, arguing that the foreign judgment is not entitled to recognition or enforcement – and thus would not be entitled to preclusive effect – because of the fraud involved in the proceedings.
    - In a recent opinion, the District Court for the Southern District of New York agreed that the plaintiffs' lawyers engaged in activities that "unquestionably were tainted." It also found that there were "serious questions concerning the judgment itself." However, it was still too soon to determine whether the judgment could be enforced: there is an issue as to whether any conduct by plaintiffs "corrupted the judicial process" to such a degree that the judgment cannot be recognized and enforced.
- "In most cases, a judgment cannot be impeached for intrinsic fraud, which involves matters passed upon by the original court, such as the veracity of testimony and the authenticity of documents." Brand, *supra* at 21.

C. **<u>Recent Developments That May Impact Future Law</u>**

The law governing the recognition and enforcement of foreign judgments:

> continues to evolve at the state, federal, and international levels. Reform efforts include the 2005 Hague Convention on Choice of Court Agreements, the 2005 ALI Proposed Federal Statute, and an ongoing project of NCCUSL to create a Uniform Choice of Court Agreement Act that would serve as state-by-state implementing legislation for the 2005 Hague Convention.

Brand, *supra* at 27.

1. **The 2005 Hague Convention on Choice of Court Agreements**

- Background
    - The Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters came into effect on February 1, 1971. However, only Cyprus, The Netherlands, Portugal and Kuwait became parties, and none of them ever deposited the bilateral agreements

that were, according to the convention, necessary to make the treaty operable.In June 1994, the Special Commission of the Hague Conference met and determined that it would be advantageous to draw up a convention on jurisdiction, recognition and enforcement of foreign judgments in civil and commercial matters. In June of 1995 a similar recommendation was made by the Special Commission on General Affairs and Policy of the Conference.

- At its Eighteenth Session, which was held from September 30 to October 19, 1996, the Hague Conference followed these suggestions. As part of the Final Act of the Eighteenth Session, the represented nations voted to include in the Agenda of the Nineteenth Session the question of "jurisdiction, and recognition, and enforcement of foreign judgments in civil and commercial matters."
- A Draft Convention was prepared in 1999 but faced much criticism and, thus, there were various efforts made to create new drafts and several formal and informal meetings, negotiation sessions, and working groups convened between in 2000 and 2004.
- Through these meetings and drafting sessions, the project morphed into one focused exclusively on making choice of court agreements as effective as possible in the context of international business.

See Woestehoff, Knut, "The Drafting Process for a Hague Convention on Jurisdiction and Judgments with Special Consideration of Intellectual Property and E-commerce" (2005). *LLM Theses and Essays.* Paper 54. *Available at* http://digitalcommons.law.uga.edu/stu_llm/54.

- The 2005 Hague Convention on Choice of Court Agreements is the ultimate product.
- At present, Mexico is the only party to the Convention, but both the United States and the European Community have signed, indicating their intent to ratify or accede to the Convention in the future. *See*http://www.hcch.net/index_en.php?act=conventions.status&cid=98.
- If the U.S. ratifies the Hague Convention, it will be the first U.S. treaty with the recognition and enforcement of foreign judgments as a principal focus.
- There are three basic rules dealt with by the Convention:
  - "the court chosen by the parties in an exclusive choice of court agreement has jurisdiction";
  - "if an exclusive choice of court agreement exists, a court not chosen by the parties does not have jurisdiction, and shall decline to hear the case"; and
  - "a judgment resulting from jurisdiction exercised in accordance with an exclusive choice of court agreement *shall* be recognized and enforced in the court of other Contracting States."

  Brand, *supra* at 27-28 (emphasis added).
- Article 9 of the Hague Convention contains a list of grounds for non-recognition similar to those found in the Restatement and the Uniform Act, including:

- Invalidity of the choice of court agreement
- Lack of party capacity
- Lack of property notice or service of process
- Fraud
- Manifest incompatibility with public policy of the recognizing state
- Inconsistency with a recognizing state judgment
- Inconsistency with a foreign judgment

- Next steps for the U.S.—
  - The National Conference of Commissioners on Uniform State Laws has drafted a Uniform Choice of Court Agreement Act designed to provide state law applicable within the Convention framework

- Next steps for the Convention—
  - In 2011, the Council of General Affairs of the Hague Conference decided that a small group of experts should be set up to explore the original judgments project and assess the merits of resuming that project. *See* http://www.hcch.net/upload/wop/genaff_concl2011e.pdf.
  - In 2012, the expert group concluded that there should be "[a] future instrument [that] should make provision for the recognition and enforcement of judgments." *At* http://www.hcch.net/upload/gaf2012wd2e.pdf.
  - It should be noted that the main attention of the Convention is on implementation of the Choice of Courts Agreement. However, it seems likely that major discussions or decisions regarding a broader doctrine on the recognition and enforcement of foreign judgments will take place in the future – but it may not be the near future.

2. The 2005 ALI Proposed Federal Statute on the Recognition and Enforcement of Judgments

- The ALI federal statute proposes to preempt state law, creating a uniform body of law for federal and state courts to apply in this area.
- The project proffered two bases for the preemption of state law:
  - "the federal government has the authority 'as inherent in the sovereignty of the nation, or as derived from the national power over foreign relations shared by Congress and the Executive, or as derived from the power to regulate commerce with foreign nations,' to govern the recognition and enforcement of foreign judgments";
  - "'a coherent federal statute is the best solution' for addressing ' a national problem with a national solution.'"

Brand, *supra* at 29 (quoting Foreign Judgments recognition and Enforcement Act 3 (Proposed Federal Statute); *see also* Robert L. MacFarland, "Federalism, Finality, and Foreign Judgments: Examining the ALI Judgments Project's Proposed Federal Foreign Judgments Statute," *available at*http://www.nesl.edu/userfiles/file/lawreview/vol45/1/McFarland_final-pg63-100PROOFED.pdf.

- While much of the law is similar to those used in the states, there would be some changes, including on the stance on reciprocity. While most states do not require reciprocity, this statute, if passed, would include such a requirement.
- The principal sources of authority in the United States for the recognition and enforcement of foreign arbitration awards are the 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention

II. Enforcement of Arbitration Awards

- The principal sources of authority in the United States for the recognition and enforcement of foreign arbitration awards are the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), the 1975 Inter-American Convention on International Commercial Arbitration (the "Panama Convention"), and the U.S. Federal Arbitration Act (the "FAA").

A. The New York Convention

- The U.S. Supreme Court has said:

  > the goal of the [New York] Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

  Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974)
- Indeed, under the New York Convention, a U.S. court must enforce an arbitral award from a tribunal of a foreign nation that has ratified the Convention if the award is final, international, and commercial (i.e., involving a commercial dispute). *See* New York Convention at Article I (3).
- For a court to refuse to enforce an aware, it must find one of the following seven grounds:
  (1) the contracting parties suffered under some incapacity or the arbitration agreement was invalid;
  (2) the party against whom the award is invoked did not receive proper notice of the arbitration proceedings or was unable to present its case;
  (3) the award decided matters not within the scope of the arbitration agreement;
  (4) the composition of the arbitral tribunal or the procedure used did not accord with the parties' agreement or applicable law;
  (5) the award has not yet become binding or has been set aside or suspended by a competent authority of the country where the award was rendered;
  (6) the subject matter was not appropriate for arbitration; or

(7) the recognition or enforcement of the award would be contrary to public policy.

Id. at Article V.

- Under the New York Convention, "[t]he party seeking to prevent enforcement bears the burden of producing competent authority that one of the enumerated grounds exists." Richerd N. Sheirlis and Chad A. Wingate, "Enforcement of International Arbitration Awards," For the Defense, at 7 (Sept. 2010).

B. **The Panama Convention**

- The Panama Convention has been ratified by sixteen nations, including the United States (Sept. 1990).
- Under the Panama Convention, a final (non-appealable) arbitral award is given the same force as a final judicial judgment. *See* Panama Convention at Art. 4, *available at* http://www.sice.oas.org/dispute/comarb/iacac/iacac2e.asp.
- However, the Convention only applies when the arbitration arises from a commercial relationship between citizens of signatory nations. *See* Sheirlius and Wingate, *supra* at 75.
- Article V of the Panama Convention "nearly mirrors Article V of the New York Convention regarding the bases for refusing to enforce arbitration awards." *Id.* (citing*International Ins. Co. v. CajaNactional de Ahorro y Seguro,* No. 00C6703, 2001 WL 322005 (N.D. Ill. Apr. 2, 2001)).
- Though the conventions do differ, U.S. legislative history "shows that Congress intended for the same results to be reached whether the New York Convention or the Panama Convention applied." *Id.*

C. **The FAA**

- When enacted in 1925, the FAA legitimized arbitration as "a legal, binding alternative to litigation." Sheirlis and Wingate, *supra*, at 74;*see id.* ("[M]ost courts [have] interpreted Congress' move as establishing a national policy favoring arbitration.").
- The New York Convention has been incorporated into Part II of the Federal Arbitration Act.
- The Panama Convention has been incorporated into Part III of the FAA.
- When both the New York Convention and the Panama Conventions can apply, courts determine which convention to use as follows:
  (1) If a majority of the parties to the arbitration agreement are citizens of a state or states that have ratified the Panama Convention and are member states of the Organization of American States, the Panama Convention will apply.
  (2) In all other cases, the New York Convention will apply.

Id.

D. A Note on Venue and Applicable Law

- If an action is brought in federal court to enforce an arbitral award, it will be considered a "federal question" case – not a diversity case – because it is being decided under both treaty law and a federal statute. State law will not be applied.
- An action may be brought in state court, in which case there may be a state statute on point. *See* John A. Spanogle, The Enforcement of Foreign Arbitral Awards in the U.S. – A Matter of Federal Law, 13 U.S.-Mex. L.J. 97, 98 n.7 (2005) (collecting statutes).

E. Discussion of Certain Grounds for Non-Recognition / Enforcement

1. Due Process Violations

- As previously noted, Article V(1)(b) provides for refusal of recognition or enforcement of an award if 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."
- This defense "essentially sanctions the application of the forum state's standard of due process." *Parsons & Whitmore Overseas Co. v. SocieteGenerale de L'Industrie du Papier*, 508 F.2d 969, 975 (2d Cir. 1974).
- It "has not often been successful. Instead, U.S. courts have narrowly construed Article V(1)(b), considering the overall arbitration result and determining whether a defendant received a fair hearing." Sheirlis and Wingate, *supra*, at 76;*see id.* ("a court probably will not refuse to enforce an arbitration award based on an allegation of improper evidence or an allegation that proper evidence was missing").
- *But see Iran Aircraft Industries v. Auco Corp.*, 980 F.2d 141 (2d Cir. 1992): An American company was unaware that a replacement tribunal judge had changed the evidentiary requirements, which prevented it from fully presenting its case. The Second Circuit therefore refused to enforce the arbitration award.

2. Improper Arbitration Procedure or Panel Composition

- "The composition of the tribunal itself can be the subject of valid defenses, as can its procedures." Spanogle, *supra*, 13 U.S.-Mex. L.J. at 101; *see* New York Convention Article V(1)(d) (a court will not enforce a foreign arbitration award when "[t]he composition of the arbitral authority or the arbitral procedure was not in accordance with the law of the country where the arbitration took place").
- "If the parties stipulate its composition in their written agreement, any deviation from that composition will allow a court to refuse recognition and enforcement of the award. Thus, where an agreement provides for a three-member tribunal, an award by a single-member tribunal would be unenforceable." Spanogle, *supra*, 13 U.S.-Mex. L.J. at 191. "If the composition of the tribunal is not stipulated by the arbitral agreement, it is to be determined by the law of the location of the tribunal." *Id.*

- "The same rules apply to the arbitral procedures. Thus, if the written arbitral agreement stipulates the use of UNCITRAL procedures, and the tribunal employs some other set of procedural rules, that will furnish a defense to enforcement of the arbitral award under the New York Convention." *Id.*

3. **Public Policy**

- Article V(2)(b) of the New York Convention states that if recognizing or enforcing an award would conflict with the public policy of the country where a party seeks enforcement, a court can refuse to enforce the award.
- "As with other grounds against enforcing arbitration awards, courts narrowly construe this ground, applying it only when effectuating an award would violate the most basic notions of morality and justice of the foreign state." Sheirlis and Wingate, *supra*, at 77. *See, e.g., Fitzroy v. Flame*, 1994 U.S. District LEXIS 17781 (N.D. Ill. Dec. 2, 1994) (finding defendant failed to meet his burden where he claimed that his counsel for the foreign arbitration failed to reveal a conflict of interest).
- "A typical case where this defense was raised successfullyinvolved an award of a post-judgment interest rate of five percent over the maximum allowed by Georgia law. The federal district court held that such an interest to the civil law concept of penalty damage awards, and found that it was inconsistent with common law concepts of compensatory damages." Spanogle, *supra,* 13 U.S.-Mex. L.J. at 102 (discussing *Laminoirs-Trefileries-Cableries de Lens, S.A. v. Southwire Co.*, 484 F. Supp. 1063, 1068-69 (N.D. Ga. 1980)).