

ENFORCING INTERNATIONAL ARBITRAL AWARDS IN U.S. COURTS
AND PERSONAL JURISDICTION: PROCEDURE, PROBLEMS, AND
STRATEGIES

PAULINA COHEN*

I. INTRODUCTION

Arbitration can be a beneficial tool because it allows parties to settle disputes with fewer costs and formalities and can be more efficient than litigation.¹ However, simply getting an arbitral award in one's favor does not mean that redress is necessarily achieved. Upon a finding that the award-debtor's assets are held in the United States, the awarded party will need to have the award recognized and executed in a U.S. court. This process involves a complex statutory framework and complex procedural rules. Due to the hollow nature awards can have if they are unrecognized or unenforced, parties are advised to plan a strategy for enforcing the award in advance of seeking recognition and enforcement in a U.S. court.

This annotation asserts that unanswered questions relating to personal jurisdiction demonstrate a significant hurdle, one that should be mitigated, in the recognition and enforcement of arbitral awards in the United States. Part I will provide a brief overview of the applicable legal regime and procedure for the enforcement for arbitral awards in U.S. courts. Part II will present problems specifically related to personal jurisdiction that can arise in award enforcement proceedings in U.S. courts, and explore recent developments in the field. Finally, Part III will propose certain strategies that parties can implement to ensure more successful enforcement following arbitration.

II. PROCEDURE

The legal framework for the recognition and enforcement of international arbitral awards in U.S. courts is based on two multilateral treaties: the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), and the 1975 Inter-American Convention on International Commercial Arbitration (Panama Convention).² The Federal Arbitration Act (FAA) implements

* This online annotation was written in the course of the author's tenure as a Staff Editor on the *N.Y.U. Journal of International Law & Politics*.

¹ See *Ultracashmere House, Ltd. v. Meyer*, 664 F.2d 1176, 1179–80 (11th Cir. 1981) (“The purpose of the Federal Arbitration Act was to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation.” (citing *Wilko v. Swan*, 346 U.S. 427 (1953)).

² Inter-American Convention on International Commercial Arbitration, *opened for signature* Jan. 30, 1975, 104 Stat. 448, 1438 U.N.T.S. 245 [hereinafter *Panama Convention*]; Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter *New York Convention*]. The Panama Convention lays out essentially the same procedures and

these two conventions in the United States, thereby giving U.S. courts subject-matter jurisdiction over award recognition and enforcement.³ The New York Convention requires member states to recognize and enforce awards issued in other ratifying states, with refusal being allowed only on a narrowly defined set of “essentially . . . procedural” grounds.⁴

The New York Convention does not present a procedure for a state’s courts to follow, but instead defers to the “rules of procedure of the territory where the award is relied upon.”⁵ This highly deferential instruction on procedure is coupled with a safeguard condition that instructs national courts not to impose “substantially more onerous conditions or higher fees or charges [on the enforcement of awards under the Convention] than are imposed on the recognition or enforcement of domestic arbitral awards.”⁶ Given the minimal requirements for, and prescription of, the procedure to be used in the enforcement of arbitral awards, member states’ courts are given some latitude when considering whether or not to enforce said awards. When asking if a U.S. court will enforce the award in question, it is not so much a matter of looking at the requirements set out in the New York or Panama Conventions; rather, it is essential to examine the relevant precedent outlining domestic procedures in place for the enforcement and recognition of international arbitral awards.

III. PROBLEMS

Well within the bounds of the discretion that the New York Convention bestows upon them, U.S. courts have identified certain procedural problems that can lead them to choose not to enforce arbitral awards, apart from the grounds for refusal outlined in Article V of the New York Convention. One such roadblock to enforcement is lack of personal jurisdiction, best exemplified through the Fourth Circuit’s refusal to recognize an award in *Base Metal Trading, Ltd. v. OJSC “Novokuznetsy Aluminum Factory.”*⁷ The Fourth Circuit, moreover, is not alone. The First, Second, Third, Fourth, Fifth, Seventh, Ninth, Eleventh and D.C. circuits have all held that establishing personal jurisdiction over the

grounds as the New York Convention, so this annotation will primarily focus on the New York Convention.

³ 9 U.S.C. §§ 201–208 (2012); 9 U.S.C. §§ 301–307 (2012).

⁴ Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. MIAMI INTER-AM. L. REV. 23, 25 (2004); see also New York Convention, *supra* note 2, art. V (outlining the circumstances in which member states may refuse the recognition and enforcement of an award).

⁵ New York Convention, *supra* note 2, art. III.

⁶ *Id.*

⁷ *Base Metal Trading, Ltd. v. OJSC “Novokuznetsy Aluminum Factory,”* 283 F.3d 208, 211 (4th Cir. 2002) (affirming a refusal to confirm a foreign arbitration award because of lack of personal jurisdiction due to the fact 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 action”). This annotation will explore this case and its effect on the enforcement of arbitral awards in further detail below.

defendant is a necessity in the seeking of enforcement of awards under the New York Convention.⁸ If a plaintiff can establish that the defendant's contacts with the forum state are sufficient, or if the corporate defendant's affiliations with the forum state are "so 'continuous and systematic' as to render them essentially at home in the forum state," then there will be no issue establishing personal jurisdiction and a court will be able to preside over the enforcement without issue (at least on the personal jurisdiction prong).⁹

However, because the enforcement of arbitral awards typically has less to do with a defendant's activity within a forum state and more to do with a claimant "follow[ing] the money," the issues of jurisdiction based on power over property and the attachment of a defendant's assets become highly relevant.¹⁰ A typical scenario may involve a claimant trying to secure a defendant's assets located in the forum state, using the presence of said assets in the forum state as the basis for the establishment of personal jurisdiction. Because the ability to successfully attach a defendant's property is crucial to the achievement of the New York Convention's goals and to the maintenance of the legitimacy of international arbitration more broadly, the question of whether or not courts will embrace attaching a defendant's property in the forum state is a highly pertinent one.

Base Metal presents a relevant case study. The court explained that while the New York Convention gives courts of the United States the proper subject-matter jurisdiction to preside over matters brought pursuant to the Convention, it does not wholly confer personal jurisdiction and it is the plaintiff's burden to show that constitutional personal jurisdiction requirements are met.¹¹ Although the traditional tests for conferring personal jurisdiction were not satisfied, the claimant (*Base Metal*) argued that the presence of the respondent's (NKAZ) property in Maryland "[conferred] jurisdiction over NKAZ for the purpose of confirming and enforcing the foreign arbitration award."¹² While the Supreme Court held

⁸ *First Inv. Corp. of Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748 (5th Cir. 2012); *GSS Grp. Ltd. v. Nat'l Port Auth.*, 774 F. Supp. 2d 134, 136 (D.C. Cir. 2011); *Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393, 397–98 (2d Cir. 2009)); *Telecordia Tech, Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 181 (3d Cir. 2006); *InterGen N.V. v. Grina*, 344 F.3d 134, 142 (1st Cir. 2003); *Base Metal*, 283 F.3d at 212; *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121–22 (9th Cir. 2002); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1305 (11th Cir. 2000); *Emp'rs Ins. of Wausau v. Banco de Seguros del Estado*, 199 F.3d 937, 941–42 (7th Cir. 1999).

⁹ *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 919 (2011) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 317 (1945)).

¹⁰ Neuhaus, *supra* note 4, at 31.

¹¹ *Base Metal*, 283 F.3d at 212 (citing *Transatlantic Bulk Shipping, Ltd. v. Saudi Chartering S.A.*, 622 F. Supp. 25, 27 (S.D.N.Y. 1985)); *see also Generica Ltd. v. Pharm. Basics, Inc.*, 125 F.3d 1123, 1129 (7th Cir. 1997) ("[F]ederal courts have [subject-matter] jurisdiction under [U.S.C.] chapter 2 Title 9 to enforce awards made under the New York Convention" (citing 9 U.S.C. § 203 (1994))).

¹² *Base Metal*, 283 F.3d at 212.

in *Shaffer v. Heitner* that property alone, without the other requirements for personal jurisdiction (such as minimum contacts, significant ties to the state, or an overwhelming state interest), is generally insufficient support for the exercise of the requisite personal jurisdiction, it did specify an exception for actions to enforce a properly obtained judgment.¹³ By ignoring the well-established exception to *Shaffer*'s holding, the decision in *Base Metal* seems to go against the New York Convention's goal of providing a mechanism for arbitral awards to be recognized and enforced in order to maintain the legitimacy of the international arbitration system at large.¹⁴ A subsidiary question to the discussion, and one to which parties should be attentive, is this: In the absence of personal jurisdiction over the defendant's person (or corporation), will courts be willing to exercise *quasi in rem* jurisdiction over the defendant's property located in the forum state?

Despite the perhaps troubling and confusing decision in *Base Metal*, courts afterwards have been cautious to follow the Fourth Circuit's ruling, and have instead distinguished its holding or have even avoided the question completely.¹⁵ There is even a theory that the decision in *Base Metal* "appear[s] to be traceable to inadequate briefing" and that the Fourth Circuit "was simply wrong."¹⁶ Coupled with the fact that the requirements for *quasi in rem* jurisdiction theoretically should not constitutionally limit a court's ability to enforce an award fully in the jurisdiction where the relevant property can be found, the caselaw following *Base Metal*, along with the academic criticism, may provide concerned observers with a sensation of relief. However, given that *Base Metal* has yet to be overruled or distinguished to the effect that it is functionally overruled, its holding should not be ignored, even in circuits adhering to the aforementioned exception to the rule outlined in *Shaffer*. While the circuits may be aligned regarding the necessity for establishing personal jurisdiction in

¹³ See *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) ("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.").

¹⁴ See Neuhaus, *supra* note 4, at 28 ("[The decision in *Base Metal*] 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?").

¹⁵ See, e.g., *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1127 (9th Cir. 2002) (stating that for the purposes of award enforcement, personal jurisdiction can be based on property located in the forum state even if the property does not necessarily relate to the underlying activity); see also *Dardana Ltd. v. A.O. Yuganskneftegaz*, 317 F.3d 202, 206, 208 (2d Cir. 2003) (noting that the question of whether or not a respondent's property located in the forum state can stand as a basis for establishing personal jurisdiction is "a difficult one" before remanding the case back to the district court).

¹⁶ Neuhaus, *supra* note 4, at 30.

enforcement actions, there is uncertainty with regard to the efficacy of attachment, which should put claimants on notice that the mere presence and existence of assets in a forum state may not be enough to guarantee full award enforcement. *Base Metal* makes one thing abundantly clear: Just because a respondent's property can be found in a particular jurisdiction, it does not guarantee a successful finding of personal jurisdiction so as to render the award fully recognized and enforced.

IV. STRATEGIES

Although it may be frustrating that U.S. courts may refuse to enforce an arbitral award based on procedural grounds, it also means that the grounds upon which refusal may rest are relatively narrow, and thus can be easily identified and anticipated. One way in which parties can be sure that personal jurisdiction issues will not serve as a roadblock in the enforcement stage is to conclude an *ex ante* agreement to forfeit any jurisdictional defenses. It is well-established that consent is a legitimate basis of jurisdiction, and parties may, by their contract, agree to forfeit jurisdictional defense.¹⁷ Because "arbitration is a matter of contract," traditional elements of contract law should apply, and parties are encouraged to stipulate to a forum selection clause relating to the enforcement piece of the arbitration.¹⁸

Exploring avenues for enforcement through U.S. state courts may also be a fruitful option. In a New York court, for example, a claimant may be able to successfully establish that a sufficient basis for personal jurisdiction exists over the respondent's property (in the form of assets), based on the decision in *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Financial Services Co.*, where personal jurisdiction requirements over the respondent were satisfied based solely on the existence of the respondent's assets in the state.¹⁹ In order for enforcement to be successful in a manner mirroring the outcome in *Abu Dhabi Commercial Bank*, a state must have parallel legislation that explicitly allows for this, but the mere fact that such precedent does indeed exist (and in a state where many assets are bound to be located) should be a promising sign.²⁰

¹⁷ See, e.g., *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 596–97 (1991) (finding that a forum-selection clause limiting the forum to the State of Florida was enforceable); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) (stating that "the personal jurisdiction requirement is a waivable right").

¹⁸ *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960). This idea also extends to treaties. See, e.g., *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014) ("As a general matter, a treaty is a contract, though between nations. Its interpretation normally is, like a contract's interpretation, a matter of determining the parties' intent.").

¹⁹ *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting & Fin. Servs. Co.*, 986 N.Y.S.2d 454, 459 (N.Y. App. Div. 2014).

²⁰ See, e.g., *Lenchyshyn v. Pelco Elec., Inc.*, 723 N.Y.S.2d 285, 289 (N.Y. App. Div. 2001) ("[A] party seeking recognition in New York of a foreign money judgment (whether

V. CONCLUSION

The ability to enforce an international arbitral award in the United States can be a crucial element of the arbitration process at large.²¹ Without recognition and enforcement, an award is worth just as much as the paper it is printed on. This not only renders the effects of the award hollow, but can also work to erode the legitimacy of the arbitration process. While the FAA gives U.S. courts the proper subject-matter jurisdiction to recognize and enforce arbitral awards, indecision amongst the circuits makes it clear that the New York Convention and the FAA do not automatically confer personal jurisdiction over respondents and their assets, and that claimants, in order to recover in a U.S. court, will still need to meet the burden of proving that the requisite elements of personal jurisdiction are satisfied. Claimants may be able to use certain strategies such as bargaining for a forum selection clause *ex ante* or seeking enforcement in state courts with favorable legislation *ex post*. The efficacy of these efforts has yet to be fully determined.

of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts. No such requirement can be found in the CPLR, and none inheres in the Due Process Clause of the United States Constitution . . .”).

²¹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 487 cmt. b (AM. LAW INST. 1987) (“[T]he *critical* element is the place of the award . . .”) (emphasis added).