

RECOGNITION JURISDICTION AND THE HAGUE CHOICE OF COURT CONVENTION

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This chapter considers the question of personal jurisdiction in U.S. courts at the stage of submission of a foreign judgment for recognition. Existing cases dealing with both recognition of foreign judgments and with the recognition of foreign arbitral awards under the New York Convention fail to provide a clear position on (1) whether either personal jurisdiction, or quasi in rem jurisdiction through the presence of the judgment/award debtor's assets, is required, and (2) if quasi in rem jurisdiction is relied upon, just what allegation or proof of the presence of the judgment/award debtor's assets within the jurisdiction is necessary. The analysis here ends with the conclusion that due process for purposes of recognition jurisdiction may be satisfied based on concepts of consent that are fundamental to the operation of both the New York Convention and the 2005 Hague Convention on Choice of Court Agreements. Such a result would place the United States in a position consistent with its future treaty partners under the Hague Convention on the matter of recognition jurisdiction.

Key words: jurisdiction, recognition jurisdiction, foreign judgment recognition, foreign judgments, Hague Choice of Court Convention

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I. INTRODUCTION

While the United States and the European Union have both signed the 2005 Hague Convention on Choice of Court Agreements (Hague Convention),¹ thus indicating their intentions to move toward ratification, each has special issues and concerns that must be addressed in order for those ratifications to occur.² In the United States, one of these concerns lies in the special way in which judicial jurisdiction in every case originally brought in a U.S. court is a Constitutional matter.³ The fact that U.S. jurisprudence separates judicial jurisdiction into separate components of subject matter and personal jurisdiction, and that, for purposes of personal jurisdiction, the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution require a determination in each case that the court has proper jurisdiction “over” the defendant (*i.e.*, that the defendant’s due process rights to life, liberty, and property have been respected in the procedures by which he or she is subjected to the court’s power and authority), separates the United States from all other nations when considering basic issues of judicial jurisdiction.⁴

¹ Hague Conference on Private International Law, Convention of 30 June 2005 on Choice of Court Agreements (“Hague Convention”), available at http://www.hcch.net/index_en.php?act=conventions.text&cid=98. The United States signed the Convention on Jan. 1, 2009, and the European Union signed on April 1, 2009. Information on the status of the Convention can be found at http://www.hcch.net/index_en.php?act=conventions.status&cid=98.

² The U.S. State Department Office of the Legal Adviser, Office of Private International Law has established a Study Group on the Hague Convention in order to discuss such issues. See 74 Fed. Reg. 30,660 (June 26, 2009). In the European Union, the discussion of ratification of the Hague Convention overlaps with review of the Brussels I Regulation. See, e.g., Letter of 13 July 2009 from Hans van Loon, Secretary General of the Hague Conference on Private International Law, to European Union Directorate-General Justice, Freedom, and Security, available at http://ec.europa.eu/justice_home/news/consulting_public/0002/contributions/civil_society_ngo_academics_others/hague_conference_on_private_international_law_en.pdf.

³ For a discussion of the Constitutional nature of jurisdiction in U.S. courts, originally prepared as a background document for the negotiations that led to the Hague Convention, see Ronald A. Brand, *Due Process, Jurisdiction and a Hague Judgments Convention*, 60 U. PITT. L. REV. 661 (1999)

⁴ See *id.*

This aberration in U.S. procedure has special implications at two stages of the process of recognition and enforcement of foreign judgments. First, U.S. law on the recognition and enforcement of foreign judgments generally requires that the judgment for which recognition is being sought was obtained in the foreign forum upon conditions that satisfy the U.S. jurisdictional due process requirements (and not just the jurisdictional rules of the originating foreign forum).⁵ Second, the U.S. court (whether state or federal), before which recognition and enforcement is sought, must address the question of whether personal jurisdiction exists in the recognition action itself in order to grant recognition of the foreign judgment (the recognition jurisdiction question). Recent cases involving actions for the recognition of both foreign judgments and foreign arbitral awards have raised important questions about this second stage of jurisdictional analysis.⁶ The result is a lack of clarity regarding whether, and what type of, a separate jurisdictional analysis is required at the recognition and enforcement stage.

In the U.S. ratification and implementation of the Hague Convention, it will be important both to establish a clear rule on the recognition jurisdiction issue and to coordinate that rule with the parallel requirements for recognition jurisdiction in the recognition and enforcement of foreign arbitral awards under the New York Convention⁷ and the Federal Arbitration Act.⁸ The Hague Convention, if properly implemented in the United States, should bring about a more level playing field between arbitration agreements/awards and choice of

⁵ See, e.g., Uniform Foreign Money-Judgments Recognition Act § 4(a)(2) ("1962 Recognition Act"), available at http://www.law.upenn.edu/bll/archives/ulc/fnact99/1920_69/ufmjra62.htm; Uniform Foreign-Country Money Judgments Recognition Act § 4(b)(2) ("2005 Recognition Act"), available at <http://www.law.upenn.edu/bll/archives/ulc/ufmjra/2005final.htm>; and RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 482(1)(b) (1986).

⁶ A defense to personal jurisdiction may be waived, making consent always an acceptable basis of personal jurisdiction, both for purposes of an original action in any court in the United States and for purposes of considering whether a foreign originating court had personal jurisdiction for purposes of recognition and enforcement of the resulting judgment in a court in the United States.

⁷ United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention"), done at New York, June 10, 1958, entered into force for the United States on June 7, 1959, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, available at http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html.

⁸ 9 U.S.C. § 1 et. seq.

court agreements/judgments.⁹ This can only occur if there is a rational parallel approach to the question of recognition jurisdiction under each of the two regimes. Whether this approach focuses most heavily on the defendant's due process rights or on consistency with practice in other nations (or attempts some combination of the two), will be important for parties to private contracts and transnational arbitration and litigation for the foreseeable future.

In this chapter I will first review briefly the concerns that make personal jurisdiction in U.S. courts a Constitutional matter, thus separating it from the process of determining initial judicial competence to hear a case in other legal systems. I will then review the approach U.S. courts have taken in applying this personal jurisdiction analysis when faced with the question of recognition and enforcement of foreign judgments and arbitral awards. Finally, I will comment on the implications of this jurisprudence for the process of implementation of the Hague Convention in the United States.

II. PERSONAL JURISDICTION AS A CONSTITUTIONAL ISSUE IN THE UNITED STATES

The Fifth Amendment to the United States Constitution provides that the federal government shall not deprive any person of life, liberty, or property, without due process of law.¹⁰ The Fourteenth Amendment extends the same limitation to state governments. The application of these two clauses to jurisdictional decisions in cases involving foreign defendants in U.S. courts requires an understanding of certain elements of the federal system. First, concepts of vertical federalism (*i.e.*, federal-state relations) mean that, unless the matter before a court is based on a federal statute, the relevant Due Process Clause usually is that in the Fourteenth Amendment, which is applicable to the states.¹¹ Second, concepts of horizontal federalism (state-state relations)

⁹ For a discussion of the Hague Convention and its likely impact, see RONALD A. BRAND & PAUL M. HERRUP, *THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS* (Cambridge University Press 2008).

¹⁰ The Fifth Amendment was ratified with the first ten Amendments (the Bill of Rights) effective December 15, 1791, and includes the provision that, “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.” U.S. CONST. amend. V.

¹¹ The Fourteenth Amendment, which was ratified on July 9, 1868, provides in Section 1, that no State shall “deprive any person of life, liberty, or property, without due process

are implicated in that the vast majority of cases that raise the question of jurisdictional due process given to “foreign” defendants deal with defendants from other U.S. states, not defendants from other nations, and thus apply the Fourteenth Amendment. This all means that the due process rules applicable to non-U.S. defendants have been developed largely in cases involving parties from different U.S. states, applying the clause as a limitation on judicial reach of the U.S. state involved.

a) Due Process in Interstate Cases

In the 1877 case of *Pennoyer v. Neff*,¹² the U.S. Supreme Court set the stage for all subsequent jurisdictional cases applying the Fourteenth Amendment Due Process Clause (and the Fifth Amendment Clause as well) by focusing on a territorial approach to jurisdiction over the defendant.¹³ The decision enunciated “two well-established principles of public law respecting the jurisdiction of an independent State over persons and property”:

*One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. . . . The other principle . . . is, that no State can exercise direct jurisdiction and authority over persons or property without its territory.*¹⁴

The Court held that an Oregon court was without personal jurisdiction over a California defendant when service had been only by publication.¹⁵

of law.” U.S. CONST. amend. XIV. There are exceptions to the general statement in the text, in particular when jurisdiction in a non-federal question case is based on national contacts. See, e.g., Federal Rules of Civil Procedure, Rule 4(k)(1)(b) and 4(k)(2).

¹² 95 U.S. 714 (1877). “Rightly or wrongly, *Pennoyer v. Neff*, linked American jurisdictional law with the Fourteenth Amendment’s Due Process Clause, and however questionable that linkage may be, it has become part of American conventional wisdom.” Friedrich K. Juenger, *Constitutionalizing German Jurisdictional Law*, 44 AM. J. COMP. L. 521 (1996) (book review).

¹³ “The authority of every tribunal is necessarily restricted by the territorial limits of the State in which it is established. Any attempt to exercise authority beyond those limits would be deemed in every other forum, as has been said by this court, in illegitimate assumption of power, and be resisted as mere abuse.” 95 U.S. at 720.

¹⁴ *Id.* at 722.

¹⁵ *Id.* at 734. “Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement

In *Milliken v. Meyer*,¹⁶ the Supreme Court held that domicile in the forum state “is alone sufficient to bring an absent defendant within the reach of the state’s jurisdiction for purposes of a personal judgment by means of appropriate substituted service.”¹⁷ This aspect of the due process analysis creates clear parallels with the general jurisdiction provision found in Article 2 of the Brussels I Regulation,¹⁸ which also provides for jurisdiction over a defendant in the courts of the state of the defendant’s domicile.

In *International Shoe Co. v. Washington*,¹⁹ the Court moved beyond a strict territorial analysis, recognizing the need for to deal with legal persons that can operate in many states simultaneously. The decision established the breadth of jurisdictional reach under the due process analysis, noting that,

*due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’*²⁰

The *International Shoe* Court further noted two variables in determining the constitutionality of jurisdiction over non-resident defendants. The first is the extent and intensity of the defendant’s activities in the forum state, and the second is the connection between those activities and the cause of action.²¹ “Continuous and systematic” activity supports general jurisdiction over a defendant, allowing general jurisdiction over a defendant regardless of his place of domicile and whether or not the cause of action arises out of those activities.²²

in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do not constitute due process of law.” *Id.* at 733.

¹⁶ 311 U.S. 457 (1940).

¹⁷ *Id.* at 462.

¹⁸ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 22(5), O.J.E.U. L 12/1 (Jan. 16, 2001) (“Brussels I Regulation”).

¹⁹ 326 U.S. 310 (1945).

²⁰ *Id.* at 313 (quoting from *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)).

²¹ *Id.* at 316-320.

²² *Id.* at 317: “Presence” in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to

This clearly extends the general jurisdiction rule beyond a rigid defendant's domicile rule like that found in the Brussels I Regulation.²³ A "single isolated" contact, on the other hand, will (at most) support only specific jurisdiction, and the cause of action then must arise out of that contact.²⁴

In *McGee v. International Life Ins. Co.*,²⁵ the Court acknowledged a "continuing process of evolution [of due process concepts, in which the] Court accepted and then abandoned 'consent,' 'doing business,' and 'presence' as the standard for measuring the extent of state judicial power over [foreign] corporations."²⁶ The Court concluded that the limitations of *Pennoyer* had given way to constitutional acceptance of expanded jurisdiction, giving the reasons for this acceptance as follows:

*Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other nonresidents. In part this is attributable to the fundamental transformation of our national economy over the years. Today many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted by mail across state lines. At the same time modern transportation and communication have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.*²⁷

The Court held that the Due Process Clause did not prevent jurisdiction in a California Court over a defendant insurance company that had dealt with California residents only by mail, and that "[i]t is sufficient for purposes of due

an agent to accept service of process has been given. *St. Clair v. Cox*, 106 U.S. 350, 355, 1 S. Ct. 354, 359, 27 L. Ed. 222; Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there.

²³ Brussels I Regulation, *supra* note 18, art. 2.

²⁴ The distinction between general and specific jurisdiction was first suggested in Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1144-1164 (1966).

²⁵ 355 U.S. 220 (1957).

²⁶ *Id.* at 221.

²⁷ *Id.* at 222-223.

process that the suit was based on a contract which had substantial connection with that State.”²⁸

In *Hanson v. Denckla*,²⁹ the Court noted the evolution from the “rigid rule” of *Pennoyer v. Neff* to the more “flexible standard” of *International Shoe*,³⁰ but refused to acknowledge “the eventual demise of all restrictions on the personal jurisdiction of state courts.”³¹ Instead, the Court returned to the territorial concepts of *Pennoyer*, finding the Due Process Clause to be “more than a guarantee of immunity from inconvenient or distant litigation.”³² In reverting to a territorial orientation, the decision also reiterated the need for a nexus between the conduct of the defendant and the forum state: “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”³³

In *World-Wide Volkswagen v. Woodson*,³⁴ the Court stressed both the rights of defendants and the resulting limitations on state jurisdiction:

²⁸ 355 U.S. at 223. The Court further elaborated as follows: “The contract was delivered in California, the premiums were mailed from there and the insured was a resident of that State when he died. It cannot be denied that California has a manifest interest in providing effective means of redress for its residents when their insurers refuse to pay claims. These residents would be at a severe disadvantage if they were forced to follow the insurance company to a distant State in order to hold it legally accountable. When claims were small or moderate individual claimants frequently could not afford the cost of bringing an action in a foreign forum—thus in effect making the company judgment proof. Often the crucial witnesses—as here on the company’s defense of suicide—will be found in the insured’s locality. Of course there may be inconvenience to the insurer if it is held amenable to suit in California where it had this contract but certainly nothing which amounts to a denial of due process.” *Id.* at 223-224.

²⁹ 357 U.S. 235 (1958).

³⁰ *Id.* at 251.

³¹ *Id.*

³² *Id.* at 251: “Those restrictions . . . are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the ‘minimal contacts’ with that State that are a prerequisite to its exercise of power over him.”

³³ *Id.* at 253.

³⁴ 444 U.S. 286 (1980).

*As has long been settled, and as we reaffirm today, a state court may exercise personal jurisdiction over a nonresident defendant only so long as there exist “minimum contacts” between the defendant and the forum State. . . . The concept of minimum contacts, in turn, can be seen to perform two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.*³⁵

In *World-Wide Volkswagen*, the Court found a New York automobile dealer and a New York automobile distributor to have insufficient contacts with the forum state of Oklahoma to satisfy due process for a suit resulting out of an automobile accident in Oklahoma. The defendants in question had no real contacts with Oklahoma, other than the fact that an automobile they had sold had made its way into Oklahoma without any direction or intention on the part of the defendants.

The *World-Wide Volkswagen* Court made clear that the concept of minimum contacts is only the first element of the required analysis. The second element is the concept of reasonableness and fairness:

*The protection against inconvenient litigation is typically described in terms of “reasonableness” or “fairness.” We have said that the defendant’s contacts with the forum State must be such that maintenance of the suit “does not offend “traditional notions of fair play and substantial justice.” . . . The relationship between the defendant and the forum must be such that it is “reasonable . . . to require the corporation to defend the particular suit which is brought there.”*³⁶

This focus on reasonableness led the Court to a balancing test of relevant interests:

Implicit in this emphasis on reasonableness is the understanding that the burden on the defendant, while always a primary concern, will in an appropriate case be considered in light of other relevant factors, including the forum State’s interest in adjudicating the dispute; the plaintiff’s interest in obtaining convenient and effective relief, at least when that interest is not adequately protected by the plaintiff’s power to choose the forum; the interstate judicial system’s interest in obtaining the most efficient resolution

³⁵ 444 U.S. at 291-292.

³⁶ *Id.* at 292 (quoting from *International Shoe*, 326 U.S. at 317).

*of controversies; and the shared interest of the several States in furthering fundamental substantive social policies.*³⁷

Minimum contacts and reasonableness were found not to be controlled by, but rather tempered by, the concept of foreseeability: “[F]oreseeability’ alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause.”³⁸ However,

*[t]his is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.*³⁹

This level of foreseeability may result from the defendant’s conduct in placing goods into a “stream of commerce”:

*When a corporation “purposefully avails itself of the privilege of conducting activities within the forum State,” . . . , it has clear notice that it is subject to suit there, and can act to alleviate the risk of burdensome litigation by procuring insurance, passing the expected costs on to customers, or, if the risks are too great, severing its connection with the State. . . . The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.*⁴⁰

b) Due Process in Transnational Cases

The analysis applied in interstate cases has been extended to cases crossing national borders. In *Helicopteros Nacionales de Colombia, S.A. v. Hall*,⁴¹ a wrongful death action was brought in Texas state court against a Colombian corporation (Helicol) as the result of a helicopter crash in Peru, causing death to four U.S. citizens and others. The Supreme Court held that a combination of “purchases

³⁷ *Id.* at 292 (citations omitted).

³⁸ *Id.* at 295.

³⁹ *Id.* at 297.

⁴⁰ *Id.* at 297-298.

⁴¹ 466 U.S. 408 (1984).

and related trips, standing alone, are not a sufficient basis for a State's assertion of jurisdiction."⁴²

Helicopteros has become best known for its delineation of specific and general "doing business" jurisdiction.⁴³ "When a controversy is related to or "arises out of" a defendant's contacts with the forum, the Court has said that a "relationship among the defendant, the forum, and the litigation" is the essential foundation of in personam jurisdiction."⁴⁴ Thus, specific jurisdiction requires that the cause of action in litigation "arise out of," and thus be directly related to, the activities of the defendant within the forum state.⁴⁵

General jurisdiction may be founded on the defendant's contacts with the forum state alone, regardless of where the cause of action arises. "Even when the cause of action does not arise out of or relate to the foreign corporation's activities in the forum State, due process is not offended by a State's subjecting the corporation to its in personam jurisdiction when there are sufficient contacts between the State and the foreign corporation."⁴⁶ So long as the contacts are "continuous and systematic," they may support jurisdiction even though the cause of action does not "arise out of" those contacts.⁴⁷ The *Helicopteros* Court found the cause of action at issue not to have arisen out of the contacts with Texas, thereby avoiding a discussion of specific jurisdiction. It then ruled that general jurisdiction did not exist under the Due Process Clause.⁴⁸

In *Asahi Metal Industry Co., Ltd. v. Superior Court of Calif.*,⁴⁹ two opinions - each joined by four Justices - take divergent positions on the "stream of commerce" language of *World-Wide Volkswagen*. Justice O'Connor adopted a "stream of commerce plus" approach, according to which the mere insertion of a product into the stream of commerce, absent some purposeful act availing the defendant of the benefits of the forum state, should not support constitutional jurisdiction:

⁴² *Id.*

⁴³ For the origins of this distinction, see von Mehren & Trautman, *supra* note 23, at 1144-64.

⁴⁴ 466 U.S. at 414.

⁴⁵ *Id.* at 415.

⁴⁶ *Id.* at 414.

⁴⁷ *Id.* at 414-415 (discussing *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437 (1952), and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779-780 (1984)).

⁴⁸ *Id.* at 418-419.

⁴⁹ 480 U.S. 102 (1987).

*The “substantial connection,” . . . between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State. . . . The placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State. . . . But a defendant’s awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream into an act purposefully directed toward the forum State.*⁵⁰

Justice Brennan’s dissenting opinion, on the other hand, would have accepted a simple stream of commerce test.⁵¹ Neither position was necessary to the holding in the case, with all nine Justices agreeing that it was unreasonable to assert jurisdiction over the Japanese defendant simply for purposes of deciding what had become a dispute only with a Taiwanese party.⁵²

III. RECOGNITION JURISDICTION FOR FOREIGN JUDGMENTS

a) The Supreme Court Footnote

In *Shaffer v. Heitner*,⁵³ the Supreme Court addressed the difficult question of extending jurisdiction over a defendant when that defendant does not have the necessary contacts with the forum state to support personal jurisdiction, but property of the defendant is located in that state.⁵⁴ In a footnote, the Court stated:

⁵⁰ 480 U.S. at 112.

⁵¹ “The stream of commerce refers not to unpredictable currents or eddies, but to the regular and anticipated flow of products from manufacture to distribution to retail sale. As long as a participant in this process is aware that the final product is being marketed in the forum State, the possibility of a lawsuit there cannot come as a surprise.” *Id.* at 117 (Brennan, J., dissenting).

⁵² “Considering the international context, the heavy burden on the alien defendant, and the slight interests of the plaintiff and the forum State, the exercise of personal jurisdiction by a California court over Asahi in this instance would be unreasonable and unfair.” *Id.* at 116.

⁵³ 433 U.S. 186 (1977).

⁵⁴ For a complete discussion of *Shaffer v. Heitner*, see, Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33 (1978).

*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.*⁵⁵

This language has been at the core of all subsequent cases addressing the question of recognition jurisdiction, whether in the context of foreign judgments recognition or of recognition of foreign arbitral awards.

b) The Three Basic Alternatives

While *Shaffer v. Heitner* was not an action for recognition of a foreign nation judgment, its footnote 36 has become the starting point for the debate over just what the due process requirements are for recognition jurisdiction. Decisions indicate three possible approaches.

One end of the spectrum is represented in the language of the New York Appellate Division decision in *Lenchyslyn v. Pelko Electric, Inc.*⁵⁶ There the court 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.*⁵⁷

This approach, carried to the extreme, allows a recognition action to be brought whether or not the defendant has contacts with the forum state, and whether or not the defendant has assets within the state against which the judgment could be enforced. In *Lenchyslyn*, the New York court went so far as to state that

even if defendants do not presently have assets in New York, plaintiffs nevertheless should be granted recognition of the foreign country money judgment pursuant to [the Uniform Foreign Money-Judgments Recognition Act], and thereby should have the

⁵⁵ 433 U.S. at 210 n.36.

⁵⁶ 281 A.D.2d 42, 723 N.Y.S.2d 285 (2001).

⁵⁷ *Id.* at 43, 723 N.Y.S.2d at 286.

*opportunity to pursue all such enforcement steps in futuro, whenever it might appear that defendants are maintaining assets in New York.*⁵⁸

The other end of the spectrum is represented by a case from the Fourth Circuit U.S. Court of Appeals which addressed recognition jurisdiction for purposes of recognizing and enforcing a foreign arbitral award. In *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminim Factory"*,⁵⁹ the court held that even quasi in rem jurisdiction through the attachment of assets of the judgment debtor within the state is not sufficient, and that personal jurisdiction over the judgment debtor is always required in a judgments recognition action.

In the middle are cases that find jurisdiction to be proper when either (1) the defendant has sufficient personal contacts to satisfy standard minimum contacts analysis, or (2) there are assets of the defendant in the forum state, even if those assets are unrelated to the claim in the underlying judgment.⁶⁰ This appears to be the position followed in both the *Restatement (Third) Foreign Relations Law*⁶¹ and the American Law Institute's 2005 *Recognition and Enforcement of Foreign Judgments: Analysis and Proposed Federal Statute ALI Proposed Federal Statute*.⁶² The *Restatement* states that, while

*a state has jurisdiction to adjudicate a claim on the basis of presence of property in the forum only where the property is reasonably connected with the claim, an action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property, or between the defendant and the forum.*⁶³

⁵⁸ 281 A.D.2d at 50, 723 N.Y.S.2d at 291.

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

⁶⁰ *See, e.g.*, *Pure Fishing, Inc. v. Silver Star Co. Ltd.*, 202 F. Supp.2d 905, 910 (N.D. Ia. 2002) ("the minimum contacts requirement of the Due Process Clause does not prevent a state from enforcing another state's valid judgment against a judgment-debtor's property located in that state, regardless of the lack of other minimum contacts by the judgment-debtor"); *Electrolines v. Prudential Assurance Co. Inc.*, 260 Mich.App. 144, 163, 677 N.W.2d 874, 885 (2003) ("in an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor's property").

⁶¹ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 cmt. h (1986).

⁶² ALI, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE § 9 (2005).

⁶³ RESTATEMENT (THIRD) FOREIGN RELATIONS LAW § 481 cmt. h (1986).

The ALI Proposed Federal Statute similarly provides in section 9:

(b) *An action to recognize or enforce a judgment under this Act may be brought in the appropriate state or federal court*

(i) *where the judgment debtor is subject to personal jurisdiction; or*

(ii) *where assets belonging to the judgment debtor are situated.*

Each of these documents thus allows an action for recognition and enforcement to proceed if there exists *either* personal jurisdiction over the judgment debtor *or* quasi in rem jurisdiction resulting from the presence of property of the judgment debtor within the forum state. By allowing for quasi in rem jurisdiction, they avoid a strict requirement that personal jurisdiction exist in all cases.⁶⁴

c) Statutory and Case Law Developments

In 2005, the National Conference of Commissioners on Uniform State Laws (NCCUSL) completed its Uniform Foreign-Country Money Judgments Recognition Act (2005 Recognition Act).⁶⁵ This Act was largely an updated version of the 1962 Uniform Foreign-Money Judgments Recognition Act (1962 Recognition Act).⁶⁶ One of the changes made by the 2005 Act, as compared to the 1962 Act, is described by NCCUSL as follows:

*The 2005 Act addresses the specific procedure for seeking enforcement. If recognition is sought as an original matter, the party seeking recognition must file an action in the court to obtain recognition. If recognition is sought in a pending action, it may be filed as a counter-claim, cross-claim or affirmative defense in the pending action. The 1962 Act does not address the procedure to obtain recognition at all, leaving that to other state law.*⁶⁷

⁶⁴ The question not clearly answered in either case is whether the type of in rem jurisdiction addressed here will allow recognition and enforcement of a foreign judgment only up to the value of the local assets which are the bases of jurisdiction (even though not effective against the world as in normal in rem actions), or recognition *against* the defendant in the same manner as would be the case with personal jurisdiction.

⁶⁵ 2005 Recognition Act, *supra* note 5

⁶⁶ 1962 Recognition Act, *supra* note 5.

⁶⁷ Uniform Law Commissioners, Summary, Uniform Foreign-Country Money Judgments Recognition Act, *available at* http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ufcmjra.asp.

This change is accomplished in Section 6 of the new Act, which reads as follows:

SECTION 6. Procedure for Recognition of Foreign-Country Judgment.

(a) 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.

(b) 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.⁶⁸

Raising the issue of recognition defensively in a pending action will not invoke problems of personal jurisdiction, because the party against whom the issue is raised (likely the plaintiff) will already have consented to jurisdiction by bringing the action. Thus, it is paragraph (a) which is important to the personal jurisdiction issue. A requirement that the issue of recognition be raised “by filing an action seeking recognition of the foreign-country judgment,”⁶⁹ suggests that personal jurisdiction must exist for that action. Nonetheless, the comments to the 2005 Act specifically avoid taking a position on recognition jurisdiction.⁷⁰

While the Uniform Law Commissioners could side-step the question of personal jurisdiction requirements and just what footnote 36 in *Shaffer v. Heitner* means to the recognition and enforcement of foreign country judgments, courts have not always been able to do so. Still, the number of cases in which the question has been raised has been significantly limited. This is mostly because few judgment recognition actions seem to have been brought in a court

⁶⁸ 2005 Recognition Act, *supra* note 5, § 6.

⁶⁹ *Id.*

⁷⁰ *Id.*, comment 4: “While this Section sets out the ways in which the issue of recognition of a foreign-country judgment may be raised, it is not intended to create any new procedure not currently existing in the state or to otherwise effect existing state procedural requirements. The parties to an action in which recognition of a foreign-country judgment is sought under Section 6 must comply with all state procedural rules with regard to that type of action. Nor does this Act address the question of what constitutes a sufficient basis for jurisdiction to adjudicate with regard to an action under Section 6. Courts have split over the issue of whether the presence of assets of the debtor in a state is a sufficient basis for jurisdiction in light of footnote 36 of the U.S. Supreme Court decision in *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977). This Act takes no position on that issue.”

in which there is neither personal jurisdiction over the judgment debtor nor assets of the judgment debtor in the forum state against which the judgment may be enforced.

Beyond the *Shaffer* footnote, the *Lenchyshyn* case has become the established starting point for judicial discussion of the personal jurisdiction question.⁷¹ Later decisions have focused primarily on the New York Appellate Division's conclusion in *Lenchyshyn* that a party "need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts."⁷²

In *Pure Fishing, Inc. v. Silver Star Co., Ltd.*,⁷³ the Federal District Court for the Northern District of Iowa found the *Lenchyshyn* analysis to be persuasive, stating that

[t]he Iowa [Foreign Money-Judgments Recognition Act] itself contains no requirement of personal jurisdiction over the judgment debtor. The court notes that in the context of the recognition and enforcement of other state judgments, the minimum contacts requirement of the Due Process Clause does not prevent a state from enforcing another state's valid judgment against a judgment-debtor's property located in that state, regardless of the lack of other minimum contacts by the judgment-debtor.

It appears from the facts of the *Pure Fishing* case that the defendant did have property within the state of Iowa. Thus, this statement can be argued as going beyond the facts of the case, with the holding being that personal jurisdiction is not required when quasi in rem jurisdiction is available. *Lenchyshyn* itself is a bit more difficult in this regard. There the plaintiff alleged that the defendant had assets within the forum state, but that fact was not specifically established. Accepting jurisdiction in *Pure Fishing*, when the defendant had property within the forum state, is something different from accepting jurisdiction on the mere allegation of property within the jurisdiction without requiring proof of that property's existence. At any rate, to the extent the language of either of these two cases suggests that *neither* personal *nor* quasi in rem jurisdiction is required, the facts require closer scrutiny.

The Michigan Court of Appeals focused on concern with the facts of *Lenchyshyn* and *Pure Fishing* in *Electrolines, Inc. v. Prudential Assurance Company, Ltd.*,⁷⁴

⁷¹ See *supra* notes 56-58 and accompanying text.

⁷² *Lenchyshyn*, 723 N.Y.S.2d at 285.

⁷³ 202 F.Supp.2d 905 (N.D.Iowa 2002).

⁷⁴ 260 Mich.App. 144, 677 N.W.2d 874 (Mich.App. 2003).

when it rejected the *Lenchyshyn* court's language, instead stating that "in an action brought to enforce a judgment, the trial court must possess jurisdiction over the judgment debtor or the judgment debtor's property."⁷⁵ The *Electrolines* court may have gone a bit too far in challenging the *Lenchyshyn* analysis, however, when it stated that "the holding of *Lenchyshyn* is helpful only where a party demonstrates that property of the judgment debtor is located within the jurisdiction of the court."⁷⁶ The facts of *Lenchyshyn* did not demonstrate the existence of such property, but only the allegation of its existence.

A pair of recent cases from Texas rejects the *Electrolines* limitations on the *Lenchyshyn* analysis, holding that neither personal jurisdiction nor in rem jurisdiction is necessary to support an action for recognition of a foreign judgment. In *Haaksman v. Diamond Offshore (Bermuda), Ltd.*,⁷⁷ the Texas Court of Appeal held that "the United States Constitution does not require in personam jurisdiction over the judgment debtor in the state in which a foreign judgment is filed."⁷⁸ Specifically rejecting the analysis in the *Electrolines* case,⁷⁹ the Texas court took the *Lenchyshyn* dicta as applicable even when no property of the judgment debtor was found within the forum state, concluding that "even if a judgment debtor does not currently have property in Texas, a judgment creditor should be allowed the opportunity to obtain recognition of his foreign-money judgment and later pursue enforcement if or when the judgment debtor appears to be maintaining assets in Texas."⁸⁰ Beyond finding that this result was consistent with the United States Constitution, the court found it also to be consistent with the Uniform Foreign Money-Judgments Recognition Act as enacted in Texas:

*[T]he plain language of the Uniform Act does not require the judgment debtor to maintain property in the state in order for that state to recognize a foreign-money judgment. [The Act] provides a list of specific reasons why the trial court may refuse recognition of the foreign-country judgment; however, lack of property in the state is not a ground for nonrecognition.*⁸¹

⁷⁵ *Electrolines*, at 260 Mich.App. 163, 677 N.W.2d 885.

⁷⁶ *Id.* at 260 Mich.App. 162, 677 N.W.2d 885.

⁷⁷ 260 S.W.3d 476 (Tex.App. 2008).

⁷⁸ *Id.* at 480 (determining that the language in *Shaffer v. Heitner* regarding full faith and credit to sister state judgments applies equally to the recognition of foreign judgments).

⁷⁹ *Id.*

⁸⁰ *Id.* at 481.

⁸¹ *Id.*

Thus, the court concluded that “a trial court does not have to possess jurisdiction over the judgment debtor or the judgment debtor’s property in order to rule on a motion for nonrecognition under the Uniform Act.”⁸²

In 2009, the *Haaksman* case was followed by the Texas Court of Appeal in *Beluga Chartering B.V. v. Timber S.A.*,⁸³ where the court stated:

*Under the [Uniform Foreign Money-Judgments Recognition Act’s] express language, the trial court “may not, under any circumstances, review the foreign country judgment in relation to any matter not specified in Section 36.005.” Section 36.005 provides that the trial court may refuse recognition if the foreign country court did not have personal jurisdiction over the judgment debtor in connection with the underlying action giving rise to the foreign country judgment for which enforcement is sought. The trial court does not entertain claims against the judgment debtor in the enforcement proceeding, and does not exercise personal jurisdiction over the judgment debtor. Therefore, lack of personal jurisdiction over the judgment debtor is not an available basis for resisting the subsequent UFCMJRA proceeding in Texas.*⁸⁴

d) Recognition Jurisdiction for Arbitral Awards

Litigation is not the only area in which there is need for the recognition and enforcement of dispute settlement decisions. One of the values of the 2005 Hague Convention is that it goes a good distance in leveling the playing field for choice of court and choice of arbitration. The New York Convention has done much to make arbitration the preferred choice for dispute settlement in international contracts.⁸⁵ It is thus worth looking at how the recognition jurisdiction

⁸² *Id.*

⁸³ 294 S.W.3d 300 (Tex.App. 2009).

⁸⁴ *Id.* at 305.

⁸⁵ See, e.g., Roger P. Alford, *The American Influence on International Arbitration*, 19 OHIO ST. J. ON DISP. RESOL. 69, 71 (2003) (“The singular event of the past fifty years in international commercial arbitration undoubtedly was the signing of the New York Convention in 1958.”); Alan Redfern, *Having Confidence in International Arbitration*, 57 DISP. RESOL. J. 60, 60-61 (2003) (the New York Convention “has been described as the single most important pillar on which the edifice of international arbitration rests” and “perhaps could lay claim to be the most effective instance of international legislation in the entire history of commercial law.”).

issue is dealt with in the arbitration realm, both in order to make a comparison to the litigation approach and to consider the approach to implementation of the Hague Convention that will provide appropriate parallels to the law applicable in the recognition and enforcement of arbitration awards.

The recent Second Circuit Court of Appeals decision in *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan*,⁸⁶ provides useful analysis and review of prior cases on the question of recognition jurisdiction for foreign arbitral awards. The court held that there must be either personal jurisdiction over the award debtor or presence of the award debtor's assets in the forum state in order to confirm a foreign arbitral award.⁸⁷

The *Frontera Resources* court noted that the Third, Fourth, and Ninth Circuits had all concluded that either personal or quasi in rem jurisdiction is required in a recognition action.⁸⁸ It then rejected the award creditor's argument that the only limitations on recognition and enforcement of a foreign arbitral award were those found in Article V of the New York Convention, and that U.S. treaty obligations thus prevented requiring personal or in rem jurisdiction as a hurdle to a recognition action. The court explained its analysis as follows:

The validity of an order of a federal court depends upon that court's having jurisdiction over both the subject matter and the parties." While the requirement of subject matter jurisdiction "functions as a restriction on federal power," the need for personal jurisdiction is fundamental to "the court's power to exercise control over the parties," "Some basis must be shown, whether arising from the respondent's residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power.

Because of the primacy of jurisdiction, "jurisdictional questions ordinarily must precede merits determinations in dispositional order." "[T]he items listed in Article V as the exclusive defenses ... pertain to *substantive* matters rather than to procedure." Article V's exclusivity limits the ways in which one can challenge a request for confirmation, but it does nothing to alter the funda-

⁸⁶ 582 F.3d 393 (2d Cir. 2009).

⁸⁷ *Id.* at 398.

⁸⁸ *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178-79 (3d Cir.2006); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120-22 (9th Cir.2002); *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 212-13 (4th Cir.2002). *See also* *Transatl. Bulk Shipping Ltd. v. Saudi Chartering S.A.*, 622 F.Supp. 25, 27 (S.D.N.Y.1985).

mental requirement of jurisdiction over the party against whom enforcement is being sought.⁸⁹

Frontera Resources and the other Federal Circuit Court decisions resulting in similar holdings provide a contrast to the approach taken by the New York Appellate Division in *Lenchyshyn*, particularly as that case has been applied by Texas courts in the *Haaksman* and *Beluga Chartering* cases dealing with the recognition of foreign judgments. In both of the Texas cases, the court accepted the argument that the Uniform Foreign Money-Judgment Recognition Act bases for non-recognition are exclusive and therefore do not allow denial of recognition based on lack of jurisdiction over the party or the party's assets. The Texas courts did not address the substance/procedure distinction held to be determinative in *Frontera Resources*.

In noting that other Circuit Courts of Appeal had required either personal or quasi in rem jurisdiction,⁹⁰ the *Frontera Resources* court implicitly glossed over possible differences in those decisions. The Ninth Circuit, in *Glencore Grain Rotterdam B.V. v. Shiyath Rai Harnarain Co.*,⁹¹ suggested that recognition jurisdiction could exist in the absence of personal jurisdiction, so long as there is property of the defendant within the forum state "even if that property has no relationship to the underlying controversy between the parties."⁹² Even so, the court held jurisdiction not to exist because "the best [plaintiff] can say is that it believes in good faith that [defendant] has or will have assets located in the forum."⁹³ Thus, while *Glencore Grain* has been cited as holding that jurisdiction may be established when property of the defendant is in the forum state, even if there is no relationship between that property and the underlying controversy between the parties,⁹⁴ the facts of the case were deficient in meeting even this test and the court held that no jurisdiction existed.

In *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminim Factory"*,⁹⁵ the Fourth Circuit Court of Appeals stated that the trial court had determined

⁸⁹ *Id.* at 397 (citations omitted).

⁹⁰ *Supra* note 88 and accompanying text.

⁹¹ 284 F.3d 1114 (9th Cir. 2002).

⁹² *Id.* at 1127.

⁹³ *Id.* at 1128.

⁹⁴ International Commercial Disputes Committee of the Association of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407, 417 (2004) ("ABCNY Committee Report").

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

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,”⁹⁶ and then affirmed that decision. The opinion, however, discusses only personal jurisdiction, and never directly addresses the possibility of quasi in rem jurisdiction, leaving it of limited value on the issue.

In sum, the cases on recognition jurisdiction in arbitration have been consistent in holding that either personal jurisdiction or quasi in rem jurisdiction is necessary in order to recognize and enforce a foreign arbitral award under the New York Convention and the Federal Arbitration Act in U.S. courts.⁹⁷ When personal jurisdiction does not exist, the nuances of quasi in rem jurisdiction necessary to support a recognition action are not entirely clear. While the language of some cases suggests such jurisdiction is possible even when the local property is unrelated to the underlying controversy, language in other cases suggests that even if local property has been seized by attachment, that will not suffice. This leads to the question of how the implementation of the Hague Convention should deal with such issues.

⁹⁶ *Id.* at 211.

⁹⁷ The overwhelming weight of commentary is consistent with the case law. The draft ALI Restatement on International Commercial Arbitration,¹ the International Commercial Disputes Committee of the Association of the Bar of the City of New York,² and the leading commentary on international commercial arbitration,³ all find it necessary to have either personal jurisdiction over the award debtor or quasi in rem jurisdiction over assets of the award debtor for purposes of an action for enforcement of a foreign arbitral award. For the ALI position, see, ALI, RESTATEMENT OF THE LAW (THIRD) U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 5-19 and Reporters’ Notes (Tentative Draft No. 1, March 29, 2010) (stating a requirement of either statutory personal jurisdiction and compliance with “general constitutional due-process requirements under the Fifth and Fourteenth Amendments,” or quasi in rem jurisdiction, but also noting that “a court remains free to predicate jurisdiction on consent where the parties entering into an agreement selecting that court as a forum for the enforcement of an award,” citing *D.J. Blair & Co. V. Gottdiener*, 462 F.3d 95, 104 (3d Cir. 2006)). For the New York City Bar position, see, ABCNY Committee Report, *supra* note 94. For the principal commentary, see, GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2399-2400 (2009). Born takes the position that “customary jurisdictional limitations on the judicial powers of Contracting States” are sufficient grounds to deny recognition and enforcement of an arbitral award under the New York Convention, but that the application of the doctrine of *forum non conveniens* to avoid recognition and enforcement (being, in his analysis, substantive and not procedural) is not reconcilable with Articles III and V of the New York Convention. *Id.* at 2400 and 2402.

IV. RECOGNITION JURISDICTION UNDER THE HAGUE CONVENTION

a) Threshold Questions Regarding Recognition Jurisdiction

The above analysis suggests a series of questions in addressing the implementation of the Hague Convention in the United States. Two threshold questions deal with whether separate recognition jurisdiction is or should be required in order to bring an action for recognition of a foreign judgment under the Convention. The first question requires analysis of U.S. law and the second requires analysis of the Convention:

- 1) Can a recognition action under Article 8 of the Hague Convention be brought in a U.S. court absent either personal jurisdiction over the defendant or the presence in the forum state of property belonging to the defendant?
- 2) Does the Hague Convention prohibit a requirement that a court in which a recognition action is brought under Article 8 have either personal or quasi in rem jurisdiction?

It is safe to assume that the answer to each of these questions is “no.” The following discussion will address each of these questions.

- i) Can a recognition action under Article 8 of the Hague Convention be brought in a U.S. court absent either personal jurisdiction over the defendant or the presence in the forum state of property belonging to the defendant?*

The Second Circuit’s analysis in *Frontera Resources* necessarily assumes (1) that U.S. jurisdictional jurisprudence requires either personal or in rem jurisdiction for an action to be brought for the confirmation of an arbitral award, and (2) that the New York Convention does not obligate the United States to recognize foreign arbitral awards when there is neither personal jurisdiction over the award debtor nor assets of the award debtor within the forum state at the time the action for recognition is brought. This does not prevent the award creditor from (1) collecting on the award when the award debtor has assets within the forum state, (2) gaining recognition of an award against an award debtor subject to personal jurisdiction in order to be ready to attach assets of the award debtor that may come into the forum state in the future, or (3) using the award for preclusive effect in defense of claims brought that are

inconsistent with the award. It does, however, limit an award creditor in any attempt to obtain recognition of the award against an award debtor not subject to personal jurisdiction in order to be ready to attach assets of the award debtor should they come into the forum state in the future.

Cases dealing with both judgment recognition and the recognition of foreign arbitral awards have been generally consistent in requiring that either personal jurisdiction or quasi in rem jurisdiction exist before a court may entertain an action for recognition. While two Texas cases provide an aberration,⁹⁸ and the language of the *Lenchyshyn* case from New York suggests the possibility of a different result,⁹⁹ those decisions engage in only limited analysis, not clearly addressing the substance/procedure dichotomy and the accompanying Constitutional concerns that have led other courts to a contrary conclusion. Thus, in implementing the Hague Convention, it is safe to assume that courts would find a Constitutional requirement of personal or quasi in rem jurisdiction to apply to recognition actions under Article 8 of the Convention.

ii) *Does the Hague Convention prohibit a requirement that a court in which a recognition action is brought under Article 8 have either personal or quasi in rem jurisdiction?*

The language of Article V of the New York Convention, on which the *Frontera Resources* court based its analysis, provides that “[r]ecognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof” of one of the listed grounds for non-recognition.¹⁰⁰ This is very similar to the language of Article 8(1) of the 2005 Hague Convention (“[r]ecognition or enforcement may be refused only on the grounds specified in this Convention”).¹⁰¹ The logic of the *Frontera Resources* decision assumes that the exclusivity language of Article V of the New York Convention applies only to substantive legal rules regarding recognition and enforcement of the arbitral award, and not to procedural matters, and that the question of jurisdiction for recognition purposes is a procedural matter.

⁹⁸ See *supra* notes 77-84 and accompanying text.

⁹⁹ See *supra* notes 56-58 and accompanying text.

¹⁰⁰ New York Convention, *supra* note 6, art. V(1).

¹⁰¹ Hague Convention, *supra* note 1, art 8(1).

These are attractive assumptions for a lawyer trained in the U.S. legal system in which the due process clauses of the Constitution pervade just about all aspects of the law, and especially judicial jurisdiction. Whether they are equally attractive to our treaty partners, most of whom are populated with lawyers trained in civil law traditions, is not so clear. In the civil law world in which judicial jurisdiction is more likely to be addressed as a matter of whether the court is competent to decide a case, and not so much as a question of power over the parties,¹⁰² it could be easy to read the New York Convention provisions on recognition of arbitral awards to require that the courts of a contracting state consider themselves competent to recognize foreign arbitral awards.

On a practical level, it can be argued that, unless enforcement is possible, there is little benefit to naked offensive recognition of a foreign judgment. The standard situation where recognition without enforcement would be of value is when defensive recognition is used to prevent a second action on the same claim that is already the subject of the first judgment. The Convention does countenance such recognition without enforcement.¹⁰³ In such circumstances, however, personal jurisdiction in a U.S. court is not likely to raise significant problems. It will normally be the defendant asserting recognition for such purposes, and the plaintiff will have consented to jurisdiction in bringing the action. If a plaintiff is seeking recognition for purposes of preclusive effect in an action not specifically seeking enforcement, it is logical to assume there will be other claims and other bases on which personal jurisdiction over the defendant will exist as well.

The Brussels I Regulation of the European Union provides some insight into the civil law approach to the recognition jurisdiction question, but does not permit a definitive understanding of the intentions of even our European treaty partners in regard to these issues for both arbitration and litigation purposes. Article 22(5) of the Brussels I Regulation provides for exclusive jurisdiction “in proceedings concerned with the enforcement of judgments, [in] the courts of the Member State in which the judgment has been or is to be enforced.”¹⁰⁴

¹⁰² See, e.g., UGO A. MATTEI, TEEMU RUSKOLA & ANTONIO GIDI, *SCHLESINGER'S COMPARATIVE LAW* 718 (7th ed. 2009)

¹⁰³ Convention of 30 June 2005 on Choice of Court Agreements, Explanatory Report by Trevor Hartley & Masato Dogauchi, ¶ 170, available at <http://www.hcch.net/upload/expl37e.pdf> (“Explanatory Report”).

¹⁰⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, art. 22(5), O.J.E.U. L 12/1 (Jan. 16, 2001) (“Brussels I Regulation”).

Because the Regulation's jurisdictional rules are not subject to any overlay of due process analysis similar to that in the United States, the question of "personal jurisdiction" as a U.S. lawyer knows it does not arise. This exclusive jurisdiction provision is focused on enforcement and includes no language regarding recognition, and could thus be considered to be the equivalent of a U.S. court having jurisdiction to enforce a judgment when assets of the judgment debtor are present in the forum state. After all, one cannot obtain enforcement without assets, and Article 22(5) applies in the state "in which the judgment has been or is to be *enforced*."¹⁰⁵ Thus, it is difficult to conclude that a European civil law perspective of either of the New York or Hague Conventions necessarily could require that the courts of a contracting state assume jurisdiction for purposes of recognition when the jurisdictional rules of that state (*i.e.*, its procedural rules) would otherwise prohibit it from doing so. At the same time, however, it is difficult to assume conclusively that a provision like Article 22(5) of the Brussels I Regulation could not be used for recognition purposes, with contemplation of prospective enforcement.

While the Hague Convention, like both the New York Convention and the two Uniform Recognition Acts, provides an exclusive list of grounds justifying non-recognition of a foreign decision, it also recognizes the separation between procedural rules and the Convention's own substantive rules of judgments recognition. Article 8(1) of the convention does make clear that "[r]ecognition or enforcement may be refused only on the grounds specified in [the] Convention,"¹⁰⁶ but Article 14 provides as well a clear substance/procedure distinction like that relied upon in *Frontera Resources*, stating that:

*The procedure for recognition, declaration of enforceability or registration for enforcement, and the enforcement of the judgment, are governed by the law of the requested State unless this Convention provides otherwise. The court addressed shall act expeditiously.*¹⁰⁷

The jurisdictional rules found in Chapter II of the Hague Convention (dealing with enforcement of a choice of a court agreement in the originating court) require a chosen court to take jurisdiction and a non-chosen court to decline to exercise jurisdiction.¹⁰⁸ There are no explicit jurisdictional rules found in

¹⁰⁵ *Id.* art. 22(5) (emphasis added).

¹⁰⁶ Hague Convention, *supra* note 1, art. 8(1).

¹⁰⁷ *Id.* art. 14.

¹⁰⁸ *Id.* arts. 5 & 6. There are limited exceptions in each case to these jurisdictional requirements.

the recognition and enforcement rules contained in Chapter III. Article 8 does require that contracting states recognize and enforce qualified judgments under the Convention, subject to the exceptions contained in Article 9. In each of these articles, however, the title (“Recognition and enforcement” and “Refusal of recognition and enforcement”) and the rules are addressed to the combination of recognition and enforcement. A U.S. court having neither personal jurisdiction over the judgment debtor nor property of the judgment debtor located within the forum state will have no ability to engage in enforcement of the judgment. Once either type of jurisdiction does exist, then recognition and enforcement is both required and possible.

This review of the language of the New York and Hague Conventions provides neither explicit nor implicit indication that the United States has a treaty obligation compelling its courts to assume jurisdiction where internal procedural rules (the Due Process Clauses as applied to judicial jurisdiction) would prevent those courts from doing so. Thus, a requirement in the U.S. implementing legislation that either personal or quasi in rem jurisdiction exist for purposes of bringing a recognition action under Article 8 of the Hague Convention is not prevented by the Convention.¹⁰⁹ The more difficult question (considered below) is whether the United States should conform to other potential Convention contracting states and adopt jurisdictional rules that would allow recognition actions in the absence of quasi in rem jurisdiction.

b) Secondary Questions Regarding Quasi In Rem Jurisdiction

If a requirement is established that either personal jurisdiction or quasi in rem jurisdiction is necessary under U.S. law for purposes of bringing a judgment recognition action under Article 8 of the Hague Convention, a secondary set of questions arises when personal jurisdiction does not exist, and the action is brought on the basis of the existence of property of the judgment debtor within the forum state. This section addresses these questions.

¹⁰⁹ This same conclusion was reached by the International Disputes Committee of the Association of the Bar of the City of New York in regard to arbitration award recognition actions under the New York Convention. See ABCNY Report, *supra* note 94, at 411-16.

- i) *Will the mere allegation of the presence of property of the judgment debtor within the forum state be enough to support recognition jurisdiction?*

A requirement that either personal or quasi in rem jurisdiction exist before an action for recognition of a judgment can be brought raises the question of just what evidence of quasi in rem jurisdiction is necessary when personal jurisdiction does not exist. While the language and facts of the *Lenchyshyn* case suggest that the mere allegation that the judgment debtor has assets in the forum state is sufficient to establish jurisdiction for a recognition action,¹¹⁰ the jurisprudence of quasi in rem jurisdiction generally requires something more.¹¹¹ Thus, a judgment creditor should be entitled to jurisdictional discovery under the court's ordinary rules,¹¹² and such discovery may be necessary in order to establish the actual presence of assets within the state sufficient to provide the foundation for quasi in rem jurisdiction.

- ii) *Will the presence of property of the judgment debtor within the forum state satisfy quasi in rem jurisdiction requirements if it has no connection to the underlying claim?*

As noted in the discussion above, this question is not clearly answered in the existing cases on either judgments or arbitral award recognition.¹¹³ The International Disputes Committee of the Association of the Bar of the City of New York has taken the position that, in regard to the New York Convention, the "presence of the debtor's property within the state, regardless of whether it has any connection to the underlying claim, should be sufficient to establish quasi-in-rem jurisdiction for enforcement of a foreign arbitral award."¹¹⁴ Here, both U.S. jurisprudence on quasi in rem jurisdiction and respect for the purposes of the Hague Convention support that result for the Hague Convention as well. In *Shaffer v. Heitner*, the Supreme Court stated:

¹¹⁰ See *supra* notes 56-58 and accompanying text.

¹¹¹ JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 3.8 (4th ed. 2005).

¹¹² See the discussion of this issue in regard to arbitration by the International Disputes Committee of the Association of the Bar of the City of New York. ABCNY Report, *supra* note 94, at 410.

¹¹³ See *supra* notes 85-96 and accompanying text.

¹¹⁴ ABCNY Report, *supra* note 94, at 416.

The primary rationale for treating the presence of property as a sufficient basis for jurisdiction to adjudicate claims over which the State would not have jurisdiction if International Shoe applied is that a wrongdoer “should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.” Restatement § 66, Comment a.

This justification, however, does not explain why jurisdiction should be recognized without regard to whether the property is present in the State because of an effort to avoid the owner’s obligations. Nor does it support jurisdiction to adjudicate the underlying claim. At most, it suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with *International Shoe*.¹¹⁵

This is also consistent with the purpose the Hague Convention to increase opportunities to recognize and enforce judgments on a global basis.¹¹⁶ Thus, the implementing process for the Hague Convention in the United States should not require that the judgment debtor’s property in the forum state, upon which quasi in rem jurisdiction is founded, have a specific connection to the underlying claim in the original action in the foreign state.

iii) If recognition jurisdiction is based on the presence of the judgment debtor’s property in the forum state, must there be an attachment of that property to support quasi in rem jurisdiction?

This question was also considered by the International Disputes Committee of the Association of the Bar of the City of New York in its Report on the New York Convention. That Committee determined that “due process does not require attachment of the debtor’s property for enforcement of a foreign arbitral award.”¹¹⁷ While that Committee acknowledged that some “state statutes may require seizure of assets as a basis for quasi-in-rem jurisdiction,”¹¹⁸

¹¹⁵ 433 U.S. at 210 (footnotes and citations omitted).

¹¹⁶ Explanatory Report, *supra* note 102, at p. 21, ¶ 5 (“The value of a choice of court agreement will be greater if the resulting judgment is recognised and enforced in as many other States as possible.”).

¹¹⁷ ABCNY Report, *supra* note 94, at 418.

¹¹⁸ *Id.*

and that “practical considerations may well lead creditors to obtain attachment of the assets upon which they base jurisdiction,”¹¹⁹ it concluded that there is no Constitutional requirement of attachment prior to confirming recognition jurisdiction.¹²⁰ The same analysis holds for the establishment of recognition jurisdiction in judgments cases.

iv) If recognition jurisdiction is based on the presence of the judgment debtor’s property within the forum state, is enforcement of the judgment limited to the value of those assets?

This question was answered in the affirmative by the ABCNY Committee both in regard to the recognition of arbitral awards¹²¹ and in regard to the recognition of foreign judgments.¹²² The Committee focused its analysis on *CME Media Enterprises B.V. v. Zelezny*,¹²³ an unreported decision of the Federal District Court for the Southern District of New York. In *Zelezny*, confirmation of a \$23.35 million Dutch arbitration award against a Czech defendant was sought. The plaintiff conceded that personal jurisdiction did not exist, but based its allegation of quasi in rem jurisdiction on the presence in New York of the award debtor’s bank account with Citibank. That account had a balance of \$69.65 when the action was filed in New York, and had been reduced to \$0.05 at the time of hearing because of fees assessed by Citibank. The court found quasi in rem jurisdiction to exist, and thereby confirmed the award for enforcement, but only to the extent of the \$0.05 of defendant’s assets within the forum state. Because the court had no personal jurisdiction over the award debtor, “any judgment will have no effect beyond the property that forms the basis of quasi in rem jurisdiction.”¹²⁴ Ultimately, the court’s decision was summed up in the following language:

[Q]uasi in rem jurisdiction cannot be based on speculation about the possible existence of other property. Because it is the existence of property that provides the basis for jurisdiction, and in the absence of minimum contacts, the Court cannot exercise ju-

¹¹⁹ *Id.* at 419.

¹²⁰ *Id.* at 418.

¹²¹ *Id.* at 421.

¹²² *Id.* at 426.

¹²³ 2001 WL 1035138 (SDNY 2001).

¹²⁴ *Id.* at *4.

*risdiction beyond the known assets based on petitioner's speculation that other assets might exist. [The award debtor] is not before the Court; only the limited assets in the Account- $\$0.05$ -are before the Court. For these reasons, petitioner's request for discovery to locate other assets in this jurisdiction is denied.*¹²⁵

This restriction of recognition of a judgment to the value of the assets which form the basis for quasi in rem recognition jurisdiction clearly limits the effect of the recognition action itself.

c) A Third Possible Threshold Question: Can recognition jurisdiction under the Hague Convention satisfy due process requirements absent the presence in the forum state of property belonging to the defendant?

At this point, one must ask if all the possible alternatives for analysis have been exhausted. The one further analytical option lies with the concept of consent as a basis of jurisdiction when no other basis of personal jurisdiction, and no quasi in rem jurisdiction, exists. The New York Convention and the Hague Convention are both based entirely upon the concept of party consent to jurisdiction. But does this concept for jurisdictional purposes extend only to the initial action in the chosen forum for resolving a dispute? Does it not extend as well to consent to jurisdiction wherever it may be necessary (or at least valuable in the eyes of the award or judgment creditor) to seek recognition and enforcement of the award?

As noted above, in the vast majority of cases, recognition will not be sought in a jurisdiction in which there is neither personal jurisdiction over the judgment debtor nor the presence of assets of the judgment debtor against which enforcement may be accomplished. But there may be cases in which the judgment creditor finds it valuable to obtain recognition of the judgment for purposes of possible future enforcement.

The absence of a due process gloss to jurisdictional analysis in other countries that will become parties to the Hague Convention means that such jurisdiction normally will be available for purposes of recognition in their courts.¹²⁶ The

¹²⁵ *Id.* at *5.

¹²⁶ *See, e.g.*, Brussels Regulation, *supra* note 18, art 22(5).

logic of uniformity argues for applying the rules of the Convention in a similar manner in the United States. The existence of the Hague Convention itself provides notice that choice of court agreements falling within its scope will be honored, and that resulting judgments will be recognized and enforced. Thus, consent to a choice of court agreement may easily be seen as consent both to dispute resolution in the chosen court and to recognition and enforcement of the resulting judgment in any Convention contracting state.

Consent is always a legitimate basis of jurisdiction, and it clearly satisfies due process requirements. Thus, the Convention presents a clear argument for implied (if not express) consent to recognition jurisdiction. While implied consent has not been the source of specific jurisdictional decisions in recent cases, it does have a long history of application in U.S. courts. In 1855, the Supreme Court held that a judgment from one U.S. state was required to be recognized in other states where jurisdiction was based on the implicit consent to jurisdiction by corporations doing business in the forum state.¹²⁷ While the language of implicit consent has been replaced by a focus on the defendant's activities in and contacts with the forum state, that analytical evolution has not removed the legitimacy of consent as a basis of jurisdiction, whether express or implied. The Supreme Court has held that a form farm equipment lease containing a New York choice of court clause was sufficient to require Michigan lessees to defend against suit in New York,¹²⁸ and that Washington state consumers of cruise ship services "consent" to sue only in Florida even where such consent is evidenced only by a small type clause on the back of a cruise ship ticket that is received after payment.¹²⁹ If the parties in those cases can be so bound by their consent to jurisdiction, there seems little problem with binding parties to a choice of court agreement within the scope of the Hague Convention to recognition jurisdiction in a court in the United States for purposes of carrying out a foreign judgment from the chosen court.

Such an analysis would be consistent with the *Lenchyslyn* case in New York, and the two Texas decisions that have followed it, and would avoid the need

¹²⁷ *Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 408 (1855) (Ohio statute providing for service of process on foreign corporation provided "presumed assent of the corporation" sufficient to found jurisdiction over Indiana corporation, making Ohio judgment subject to full faith and credit recognition in Indiana).

¹²⁸ *National Equipment Rental v. Szukhent*, 375 U.S. 311 (1964).

¹²⁹ *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593 (1991).

for any type of quasi in rem jurisdictional analysis. While this approach may appear to be inconsistent with the majority of U.S. cases in both the arbitration and judgments recognition context, U.S. implementing legislation could make clear this aspect of the Hague Convention, acknowledging that consent to jurisdiction results from a choice of court agreement both for the original litigation and for any resulting recognition action. This would provide an analysis that would be consistent with both U.S. due process principles and the jurisdictional rules found in the legal systems of our treaty partners. If a U.S. judgment may be recognized abroad under the Hague Convention even in the absence of property in the state of recognition, the result would then be a level playing field in which the judgments of our treaty partners would be recognized in the United States even in the absence of property in our recognizing jurisdiction.

V. CONCLUSION

Neither the New York Convention nor the 2005 Hague Convention on Choice of Court Agreements provides an easy answer for U.S. courts to the question of recognition jurisdiction when a foreign arbitral award or foreign judgment is brought before a U.S. court for recognition and enforcement. The majority of cases to date that have addressed the issue of recognition jurisdiction in both contexts hold that an action for recognition requires that the court have jurisdiction over either the judgment/award debtor or that assets of that debtor be present within the forum state. On a practical level, this will likely create problems only in those cases in which recognition is sought for purposes of prospective enforcement against a judgment/award debtor who has no significant contacts with the forum state and at the time of the action has no assets within the forum state on which execution of the judgment/award may be obtained. Nonetheless, there exists a strong argument based on the consent nature of private party access to the Hague Convention to allow recognition jurisdiction even in the absence of property of the judgment debtor in the recognizing jurisdiction.

Sažetak

Ronald A. Brand*

NADLEŽNOST ZA PRIZNANJE I HAŠKA KONVENCIJA
O SPORAZUMU O IZBORU NADLEŽNOG SUDA

Sud koji primi zahtjev za priznanje i ovrhu strane odluke mora najprije riješiti pitanje nadležnosti. U većini država to nije problematično, no u Sjedinjenim Državama ustavna klauzula o ispravnom postupku ograničava nadležnost za strane tuženike na osobe koje imaju neku vezu s državom foruma. U ovome radu razmatra se pitanje nadležnosti ratione personae pri sudovima u SAD-u u stadiju podnošenja zahtjeva za priznanje strane odluke. Zanimljivi slučajevi koji se odnose na priznanje stranih odluka i pravorijeka prema Newyorškoj konvenciji ne pružaju jasno stajalište o tome (1) je li potrebna nadležnost ratione personae ili nadležnost quasi in rem putem prisutnosti dužnikove imovine i (2) ako se oslanja na nadležnost quasi in rem, kakav je navod ili dokaz o prisutnosti imovine dužnika unutar područja nadležnosti potreban. Analiza ovdje prestaje sa zaključkom da pravičnost postupka za potrebe priznanja odluka može biti zadovoljena na temelju koncepta pristanka koji su osnova za djelovanje Newyorške konvencije i Haaške konvencije o sporazumu o izboru nadležnog suda iz 2005. godine. Takav ishod smjestio bi Sjedinjene Države na položaj usklađen s pozicijom njezinih budućih partnera pod okriljem Haaške konvencije o nadležnosti u postupcima priznanja.

Ključne riječi: nadležnost, nadležnost za priznanje, priznanje stranih odluka, strane odluke, Haaška konvencija o sporazumu o izboru nadležnog suda

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