Fortress U.S.A.: Two Troublesome Defenses against the Recognition and Enforcement of Foreign Arbitral Awards in the United States

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The international arbitral process depends for its ultimate success upon the support of national courts. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”) obligates the courts of more than 140 signatory nations to refer parties to arbitration and to recognize and enforce awards entered in the territory of any other signatory to the Convention. When presented with an application for recognition and enforcement of a foreign arbitral award governed by the New York Convention, courts of signatory nations may refuse recognition and enforcement on only the grounds specified in Article V of the Convention, which are limited to challenges to the procedural regularity and fairness of the arbitration proceeding, the scope of the agreement or award, the vacatur of the award at the seat of arbitration, or a violation of public policy.

Chapter 2 of the Federal Arbitration Act, enacted to implement the New York Convention following the United States’ ratification of the Convention in 1970, restricts the authority of United States courts to refuse recognition or enforcement to the narrow grounds specified in the Convention. “The court shall confirm the award unless it finds one of the grounds for refusal of recognition or enforcement specified in the said Convention.” 9 U.S.C. § 207.

Notwithstanding this treaty and statutory framework, courts in the United States repeatedly have refused to confirm foreign arbitral awards under the Convention absent an independent basis for personal jurisdiction over the arbitral debtor that satisfies the Due Process Clause of the United States Constitution. In addition, one court dismissed an action to recognize

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2 New York Convention, Art. II.
3 New York Convention, Art. III.
4 See New York Convention, Art. V.
and enforce a foreign award under the doctrine of forum non conveniens.\(^5\) These courts have invoked the provisions of Article III\(^6\) of the Convention, which specifies that the parties to the Convention “shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon…” (Emphasis added). Under these decisions, the language of Article III addresses not only the procedural formalities of how a foreign arbitral award is to be confirmed, but also informs the court’s determination of whether to entertain an action to confirm the award in the first instance.

This article will begin with an analysis of the competing arguments for and against the requirement of an independent basis for jurisdiction,\(^7\) present several hypothetical cases to illustrate the current state of the law, discuss an alternative two-step approach (confirmation with deferred enforcement), and suggest a consent to jurisdiction clause that contracting parties may wish to include in their arbitration agreements in an effort to circumvent the current barriers to recognition and enforcement of foreign awards in United States courts.

\(^5\) See In re Arbitration between Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr., infra, 311 F.3d 488 (2d Cir. 2002) (finding that award confirmation proceedings under the Convention are subject to the doctrine of forum non conveniens and affirming district court’s dismissal on such grounds).

\(^6\) New York Convention, Art. III full text reads: “Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.”