

Table of Contents

CHAPTER 15	587
Private International Law	587
A. COMMERCIAL LAW/UNCITRAL	587
1. General.....	587
2. UNCITRAL	593
3. UNCITRAL Treaty Transmittals	594
4. Hague Securities Convention.....	598
B. FAMILY LAW	602
Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance	602
C. INTERNATIONAL CIVIL LITIGATION	603
1. <i>COMMISA v. PEP</i>	603
2. <i>DA Terra Siderurgica LTDA v. American Metals International</i>	605
3. <i>Belize v. Belize Social Development Ltd.</i>	613
Cross References	620

CHAPTER 15

Private International Law

A. COMMERCIAL LAW/UNCITRAL

1. General

On September 22, 2016, State Department Legal Adviser Brian J. Egan delivered remarks to the International Bar Association on the subject of private international law. His remarks are excerpted below and available at <https://2009-2017.state.gov/s/l/releases/remarks/262459.htm>.

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At the State Department, we define “private international law” as the legal rules that apply to cross-border relations between private actors. Our goal is to establish international frameworks to help private parties figure out which law or set of rules applies to cross-border transactions. We aim to develop these global rules in a way that promotes U.S. interests and, whenever possible, is consistent with existing U.S. practices. Private international law covers a vast array of subject matter areas, from family law to international commercial law, property law, and laws on succession.

In an era of government logjam and, in some quarters, skepticism of international law in our country, I submit that U.S. practice in private international law reflects an oft-overlooked success story. It is an area of international law in which the Executive Branch, Congress, U.S. states, and private parties—including, historically, some of the key U.S. bar associations—have worked together on a non-partisan basis to develop and implement meaningful and useful legal instruments that make a positive difference in business relationships and human relationships that cross national boundaries.

I. Background on Private International Law

First, I'll ask that you bear with me for a little bit of history of private international law.

Many legal professionals in the United States—including those working in the field of international law—would scratch their heads if asked to explain what is covered by “private international law.” It is rare to find U.S. law school courses on “private international law.” In the United States, private international law traditionally has been associated with the study of “conflict of laws.” U.S. practice under the conflict of laws rubric, however, historically has developed in a U.S. state-to-state context, rather than in an international context, with the development of most conflict of laws principles through common law.

Indeed, the United States is a relative newcomer to private international law initiatives that have been underway in Europe for well over a century. This is in part due to the historical development of nation states, and national laws, in Europe.

The modern-day Hague Conference on Private International Law began in 1893 with a meeting of European legal experts. Although the United States participated as an observer in a number of Hague conferences in the first part of the 20th century, we did not become a member of this organization until 1964. Our cautious approach to joining this organization reflected our desire to ensure that U.S. participation could be undertaken consistent with the constitutional division of powers between our federal and state governments. It was the American Bar Association and members of the private sector that successfully persuaded the Executive branch to take a more active role in the Hague Conference and other private international law initiatives. These efforts culminated in the U.S. Congress passing legislation in 1963 that allowed the United States to join the Hague Conference as well as the International Institute for the Unification of Private Law—or UNIDROIT—which is based in Rome and was originally established in 1926.

Today, most major initiatives in the area of private international law take place under the auspices of the Hague Conference, UNIDROIT, and a third entity—the UN Commission on International Trade Law, or UNCITRAL, which is an organ of the UN General Assembly and was established in 1966. The United States is now an active and leading player in these bodies, and many of the more recent legal instruments developed by these organizations were proposed or supported by the United States.

While the origins of private international law generally are rooted in European continental law, we recognize that the continued vitality of private international law depends on engagement throughout the world. To take just one example, we are increasingly promoting the consideration of existing private international law instruments—as well as suggesting new projects—in Asia and Latin America, at the Asia-Pacific Economic Cooperation forum and the Organization of American States.

II. Recent U.S. practice in private international law

In the Office of the Legal Adviser, our work on private international law is the primary responsibility of the Office of the Assistant Legal Adviser for Private International Law. (It's a very creative title.) One of the unique and defining features of this office is in its outreach to other private international law stakeholders. The office works closely with a variety of other government agencies, foreign counterparts, academics, and a wide range of stakeholders in the private sector, including business-related organizations and organizations interested in family law. The goal of this outreach is threefold: First, to identify areas where new private law instruments would be helpful. Second, to appropriately calibrate our work in the process of developing and negotiating private international law instruments, whether they be multilateral

conventions, model laws, or other soft law instruments, such as guides to help legislatures as they consider law-making on particular topics. Third, to help ensure implementation of these instruments domestically and in concert with other nations.

Simply put, this complex work cannot be done by the State Department alone, or even the Executive Branch alone. Engagement with the private sector helps ensure that our work is timely and addresses the needs of private entities operating in the real world. Engagement with U.S. states and state-law experts helps ensure that we develop and implement conventions consistent with U.S. law. Consultations with Congress help ensure that, once we negotiate a legal instrument, the Senate will provide its advice and consent or the Congress will pass implementing legislation, if either is needed. And even after U.S. adoption of a convention, we work with other countries on best practices in implementing the convention so that the rules established in the convention remain current and relevant.

I would like to say a few words about each of these aspects of our work. U.S. efforts in this area are not just an achievement of the Office of the Legal Adviser and the State Department, but an achievement of the whole of government as well as the private sector in the United States.

A. Private sector outreach

...[W]e tend to focus our efforts on areas that have been identified for further work by the U.S. private sector. The Secretary of State's Advisory Committee on Private International Law, which holds periodic meetings to which all members of the public are invited, is one key vehicle that we use to solicit input from interested members of the public. Established in 1972, the Advisory Committee has 40 members, including legal practitioners, academics, and representatives of trade associations in various fields. We also send out e-mail notices to others who have expressed an interest, and we solicit input from the general public. We additionally have a number of legal experts who assist us on specific projects.

I'd like to give you an example of how the private sector helps prioritize our work. One area of focus in recent years has been to promote responsible and reliable dispute resolution, which of course is essential to the conduct of cross-border business. Following consultations with private sector and academic experts, we heard significant support for a convention on the recognition and enforcement of foreign judgments. The wider circulation of judgments would assist U.S. citizens and businesses by enhancing legal certainty and reducing costs associated with the resolution of cross-border disputes. U.S. courts are already among the most receptive in the world to the recognition and enforcement of judgments from foreign countries. Other countries are not always so ready to recognize and enforce foreign judgments (including judgments from U.S. courts), and many countries will only recognize and enforce foreign judgments if a certain treaty is in place between the countries.

The development of a broad convention on matters of jurisdiction and foreign judgments, sometimes called the Hague Judgments Project, was originally proposed by the United States decades ago. After years of effort, the plans for such a broad convention were dropped and a narrower convention regarding choice of court agreements emerged in 2005. More recently, in 2014, the United States formally agreed to support a relaunching of the Judgments Project, but only if the work was focused narrowly on a convention on the recognition and enforcement of foreign judgments. Negotiation of this convention is now underway at the Hague Conference, with the first meeting held in June 2016, and the next meeting scheduled for February 2017. Initial reports suggest that there is substantial support for such a treaty among Hague Conference member states.

Another important project in the area of dispute resolution is a proposal at UNCITRAL for an instrument on the recognition and enforcement of conciliated, or mediated, settlement agreements. This is a U.S. initiative. My office held a series of public meetings on this topic, including an initial meeting to solicit ideas for useful projects for UNCITRAL, and then sought input on this initiative through subsequent meetings with academics, private sector mediators, mediation groups, and trade associations. Based on these consultations, the United States proposed this project two years ago in the hope that such a legal framework would provide a boost for the use of mediation internationally—just as the New York Convention provided a boost for international arbitration over the past few decades. In many legal cultures, mediation is not a dispute resolution option that is as widely accepted as it is in the United States. We hope that an international framework will help make businesses in those jurisdictions more willing to engage in mediation.

In the area of family law, our agenda is driven in large part by the interests or concerns of families and family law practitioners in the United States and abroad. A wide range of family law topics have been addressed, or are being addressed, through private international law—from the enrichment of families through international adoption, to the return of children who have been abducted to other countries, to the recognition and enforcement of foreign child support orders and child custody determinations. Again, the Department has utilized our Advisory Committee on Private International Law when we are preparing for meetings on these and related topics at the Hague Conference. We fully recognize the importance of hearing from private citizens, practitioners, academics, and other government officials as we develop frameworks in this area.

B. Coordination with U.S. state law

Of course, it does no one any good if we negotiate private international law conventions that cannot be properly implemented in the United States. So our office considers issues of domestic implementation before, during, and after the negotiation of treaties. We often consult with stakeholders, including representatives of U.S. state law interests, throughout this process to obtain views as to how a treaty might best be incorporated into law in the United States. This is particularly important because many private international law instruments set forth rules in areas traditionally governed by U.S. state law.

It is no surprise then that we work so closely with the Uniform Law Commission, or ULC. The ULC is a non-profit and state-supported organization, based in Chicago, which helps develop uniform state laws, perhaps most prominently the Uniform Commercial Code. The development of relevant uniform state laws under the ULC's leadership is often a critical component of our ability to become party to private international law treaties. We have been able to forge a constructive and supportive relationship with the ULC, with whom we meet regularly. Its input is important both on the “front end”—as new instruments are conceived and negotiated—and on the “back end”—after an instrument is negotiated, but before it is approved and implemented.

One area in which our work with state law interests is ongoing is the Convention on Choice of Court Agreements (also known as COCA). This Convention was concluded in 2005 at the Hague Conference and aimed at ensuring the effectiveness of choice of court agreements (also known as “forum selection clauses”) between parties to international commercial transactions. The Convention provides greater certainty to businesses engaging in cross-border activities and therefore creates a legal environment more amenable to international trade and investment. The COCA entered into force in October 2015 for the EU and Mexico, and

Singapore ratified it in June of this year. The United States has signed the treaty but it has not yet been transmitted to the Senate for advice and consent to ratification.

As with many other private international law treaties, “federalism”—the balance of federal and state interests—presents the primary challenge in figuring out how best to implement the COCA domestically. For example, there are many who believe that the COCA should be implemented in the United States through federal legislation only. There are others who believe that, in view of the longstanding role of U.S. state law in the recognition and enforcement of judgments, the COCA should be implemented through a combination of federal and uniform state legislation. We are continuing to work on a way forward that will allow us to submit the COCA to the Senate.

Issues of federalism are also very important in the area of family law. Several family law conventions have been negotiated at the Hague Conference. The United States is party to the 1980 Convention on the Civil Aspects of International Child Abduction, as well as the Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption.

Our work on the Child Support Convention—or the Convention on International Recovery of Child Support and Other Forms of Family Maintenance—is another example of how we have worked through U.S. state law issues in a manner that enables us to promote private international law. The Child Support Convention contains groundbreaking provisions that, for the first time, on a worldwide scale, will establish uniform, simple, and inexpensive procedures for the processing of international child support cases.

The United States signed the Convention in 2007. As the Convention was negotiated, we worked closely with the ULC to ensure that the international instrument would hew as closely as possible to the applicable U.S. state law—the Uniform Interstate Family Support Act. Subsequent to the negotiation of the Convention, the ULC drafted amendments to this uniform state law so that, among other things, state child support agencies would be able to act in a manner consistent with the Convention.

In 2010, the Senate approved ratification of the treaty subject to the passage of appropriate federal and state implementing legislation. In 2014, Congress enacted implementing legislation. Over the past 18 months, all U.S. states have enacted the amended version of the Uniform Interstate Family Support Act. And the ULC has worked with U.S. state legislatures to assist them as they have enacted the revised uniform act. Just a few weeks ago, the President signed the instrument of ratification of the Child Support Convention. The instrument has been deposited with the depositary in the Netherlands, and the treaty will enter into force for the United States in January.

I cite this Convention as an example of how federalism issues can be addressed when governmental bodies at all levels—the national government that negotiated the Convention, the U.S. Congress that passed implementing legislation, the ULC as a coordinating body, and the legislatures of all 50 states, as well as the District of Columbia, Guam, Puerto Rico and the U.S. Virgin Islands—work in concert to address an important family law issue for the benefit of children and families around the world.

C. Working with Congress

I will now turn to the importance of our work with the U.S. Congress on issues of private international law. Some who follow the field of private international law have commented critically on the fact that the United States has become a party to only a small handful of the international instruments that have been negotiated at the Hague Conference, UNIDROIT, and UNCITRAL.

There is some truth to these comments, and that is why our office launched an effort three years ago to dedicate greater resources and efforts to facilitating the domestic implementation and approval of private international law treaties. Becoming a party to more of these treaties will enhance our credibility and leadership at the three private international law organizations. Our recent work with the Senate on issues of private international law has been constructive and productive, and I expect that we will continue to find ways to work with Congress to advance U.S. interests in private international law.

I'd like to highlight some of our recent work with the Senate on private international treaties. Currently, four private international law treaties are pending with the Senate for advice and consent to ratification:

- * The Hague Convention on the Law Applicable to Securities Held by an Intermediary, or Hague Securities Convention;
- * The UN Convention on the Use of Electronic Communications in International Contracts;
- * The UN Convention on the Assignment of Receivables in International Trade; and
- * The UN Convention on Independent Guarantees and Stand-by Letters of Credit.

The Senate recently has demonstrated an interest in moving forward with private international law treaties, and we hope to continue working with the Senate in this respect. On May 29, the Senate Foreign Relations Committee held a hearing on the Hague Securities Convention, a private international law treaty that was transmitted to the Senate in 2012. The treaty would clarify the choice of law rules for securities transactions to which the law of several countries could apply, thereby strengthening the integrity of, and reducing the risks associated with, global financial markets. One of our lawyers was the only U.S. government witness who testified on the Hague Securities Convention before the Committee at the hearing. The Committee recommended ratification of the treaty in June, and we are hoping for action by the full Senate shortly.

Also, while it took some time, our work on the Child Support Convention further demonstrates that cooperation is possible between the Administration, Congress, and the states in implementing private international law treaties.

D. International implementation

Finally, it is essential that private international law conventions, once concluded, remain relevant and address the issues that led to their adoption. In the context of the Hague Conference, this implementation work is undertaken through periodic expert-level meetings of contracting states, also known as Special Commissions.

For example, the Hague Evidence Convention allows transmission of letters rogatory—without recourse to consular and diplomatic channels—from the contracting state where the evidence is sought to a contracting state where the evidence is located. But this Convention dates from the late 1960s and early 1970s, long before the advent of the internet.

So the Special Commission on the Hague Evidence Convention recently discussed application of the Convention to video, Skype, and other, more recent methods of undertaking discovery. These methods of discovery are increasing in use due to their lower costs and greater flexibility, but they were, of course, not contemplated by the original treaty. In an effort to keep the Convention up-to-date, the Hague Conference established an Experts Group to consider this matter, which could lead to a protocol to amend the Convention or a guide to good practice under the Convention that discusses ways to address these new means of discovery.

Implementation of the Hague Evidence Convention also illustrates how different countries may interpret a private international law treaty differently. The United States takes the view that the Convention provides one avenue for obtaining evidence internationally, but not the only avenue. This position was adopted by the U.S. Supreme Court in its *Aerospatiale* decision. Other contracting states, however, assert that the Convention is the exclusive means for obtaining evidence across national borders. This highlights another role played by our office: U.S. federal courts often seek the views of the U.S. government as they consider whether to rely on their rules of procedure or instead utilize the procedures established by the Hague Evidence Convention. Similarly, we are sometimes contacted by foreign governments when U.S. courts choose their own rules rather than the Convention rules.

Conclusion

In closing, I recognize that the work of the International Bar Association includes many committees that focus on issues related to private international law, and I commend you for your work on these initiatives. As I hope that my comments here today have demonstrated, our office has a strong interest in promoting the development of private international law, and we expect to continue our efforts to develop and implement international instruments in this area. We welcome your participation in that process, by engaging with your home countries as they work with us in international bodies, or by consulting with us through our Advisory Committee process. I firmly believe that this is an area where countries can work together to our mutual benefit to bring stability and predictability to cross-border relationships between business entities and private individuals. Thank you.

* * * *

2. UNCITRAL

Emily Pierce, Counselor for the U.S. Mission to the United Nations, delivered remarks on October 11, 2016 at the 71st Session of the UN General Assembly Sixth Committee on the report of the United Nations Commission on International Trade Law (“UNCITRAL”) on the work of its 49th session. Ms. Pierce’s comments are excerpted below and available at <https://2009-2017-usun.state.gov/remarks/7486>.

* * * *

The United States welcomes the Report of the 49th session of the United Nations Commission on International Trade Law and commends the efforts of UNCITRAL’s member states, observers, and Secretariat in continuing to promote the development and harmonization of international commercial law.

First, we are pleased that, after years of work, UNCITRAL adopted a Model Law on Secured Transactions. Lack of access to credit is the main obstacle to growth for micro, small and medium enterprises. In our view, secured transaction reform is one of the most crucial steps that governments can take to help small businesses prosper.

Second, we welcome the adoption of the Technical Notes on Online Dispute Resolution. We are pleased that this longstanding project also came to a successful conclusion this year. On

line dispute resolution, or ODR, is essential to enhancing access to justice and promoting cross-border commerce. ODR could be particularly helpful to small businesses that do not have access to cost-effective dispute resolution remedies.

Third, with respect to its ongoing efforts related to the recognition and enforcement of conciliated settlement agreements, we hope that UNCITRAL's consideration of this topic will soon result in a convention that could help to promote the use of conciliation internationally in the same way that the New York Convention has helped to promote the use of arbitration in recent decades.

Fourth, we are pleased that UNCITRAL is completing work on the model law enabling the use of electronic transferable records. Also, in the area of electronic commerce, UNCITRAL is considering work on identity management and cloud computing. These are all timely and important topics in international commerce.

On other topics, UNCITRAL is continuing its efforts to develop legal instruments that will help states encourage the growth of micro, small, and medium enterprises, MSMEs, starting with the issue of simplified registration and incorporation. As the UNCITRAL Secretariat has pointed out, 90% of MSMEs in developing countries operate in the informal sector, despite the need for a formal legal status to operate and enter into contracts, as well as obtain broader access to credit. UNCITRAL is also continuing its work on enterprise group insolvency issues and a model law on the recognition and enforcement of insolvency-related judgments.

The United States believes that all of these projects have the potential to result in instruments that significantly advance the development of international commercial law. However, for these efforts to have their greatest effect, UNCITRAL needs broad participation in all of its working groups, so that the resulting instruments will meet the needs of countries from all regions and legal cultures. We encourage states to participate in as many of the working group sessions as possible, and we look forward to continued collaboration on all of these projects.

Finally, we are pleased to inform this body that the United States has taken steps toward becoming party to three conventions negotiated at UNCITRAL. In February, the President transmitted to the Senate for its approval the following conventions: the United Nations Convention on the Assignment of Receivables in International Trade, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and the United Nations Convention on the Use of Electronic Communications in International Contracts.

* * * *

3. UNCITRAL Treaty Transmittals

As Mr. Egan and Ms. Pierce mentioned in their remarks *supra*, the Executive Branch transmitted to the Senate several private international law conventions in 2016. On February 10, 2016, President Obama delivered a message to the Senate, transmitting the UN Convention on the Use of Electronic Communications in International Contracts. The President's message is excerpted below and available at <https://www.congress.gov/114/cdoc/tdoc5/CDOC-114tdoc5.pdf>.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, subject to certain declarations and understandings, I transmit herewith the United Nations Convention on the Use of Electronic Communications in International Contracts (Convention), done at New York on November 23, 2005, and entered into force on March 1, 2013. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention sets forth modern rules validating and facilitating the use of electronic communications in international business transactions. The Convention will promote legal uniformity and predictability, and thereby lower costs, for U.S. businesses engaged in electronic commerce.

The Convention's provisions are substantively similar to State law enactments in the United States of the 1999 Uniform Electronic Transactions Act (UETA), and to the governing Federal law, the Electronic Signatures in Global and National Commerce Act, Public Law 106-229 (June 30, 2000). Consistent with the Federal law, all States have enacted laws containing the same basic rules on electronic commerce, whether based on UETA or on functionally equivalent provisions. The Federal statute allows States that enact UETA, or equivalent standards, to be subject to their State law, and not the corresponding provisions of the Federal law.

The United States proposed and actively participated in the negotiation of the Convention at the United Nations Commission on International Trade Law. Accession by the United States can be expected to encourage other countries to become parties to the Convention, and having a greater number of parties to the Convention should facilitate electronic commerce across borders.

The Convention would be implemented through Federal legislation to be proposed separately to the Congress by my Administration.

The Convention has been endorsed by leading associations and organizations in this area, including the American Bar Association and the United States Council on International Business. The United States Government worked closely with the Uniform Law Commission regarding the negotiation and domestic implementation of the Convention.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification, subject to certain understandings and declarations.

* * * *

Also on February 10, 2016, President Obama delivered a message to the Senate, transmitting the UN Convention on Independent Guarantees and Stand-by Letters of Credit. The President's message is excerpted below and available at <https://www.congress.gov/114/cdoc/tdoc9/CDOC-114tdoc9.pdf>.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, subject to certain understandings set forth in the enclosed report, I transmit herewith the United Nations Convention on Independent Guarantees and Stand-By Letters of Credit (Convention), done at New York on December 11, 1995, and signed by the United States on December 11, 1997. The report of the Secretary of State, which includes an overview of the proposed Convention, is enclosed for the information of the Senate.

As a leader in transactional finance, the United States participated in the negotiation of this Convention at the United Nations Commission on International Trade Law with the support of U.S. commercial and financial interests. The Convention establishes common rules on stand-by letters of credit and other independent guarantees, instruments that are essential to international commerce, and thereby reduces the uncertainty and risk that may be associated with cross-border transactions. With two minor exceptions, the Convention's provisions are substantively similar to the uniform State law provisions in the Uniform Commercial Code Article 5 (Letters of Credit), which all States and the District of Columbia, Puerto Rico, and the Virgin Islands have enacted.

Ratification by the United States of this Convention can be expected to encourage other countries to become parties to the Convention. While eight countries currently are parties to the Convention, having a greater number of parties to the Convention would promote the stability and efficiency of international commerce.

The Convention has been endorsed by leading banking and business associations in the United States.

The Convention would be implemented through Federal legislation to be separately transmitted by my Administration to the Congress.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to its ratification, subject to certain understandings set forth in the enclosed report.

* * * *

And, the third UNCITRAL convention submitted on February 10, 2016 was the UN Convention on the Assignment of Receivables in International Trade. The President's transmittal message is excerpted below and available at <https://www.congress.gov/114/cdoc/tdoc7/CDOC-114tdoc7.pdf>.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, subject to certain declarations and understandings set forth in the enclosed report, I transmit herewith the United Nations Convention on the Assignment of Receivables in International Trade, done at New York on December 12, 2001, and signed by the United States on December 30, 2003. The report of the Secretary of State, which includes an overview of the proposed Convention, is enclosed for the information of the Senate.

The Convention sets forth modern uniform rules governing the assignment of receivables for use in international financing transactions. In particular, the Convention facilitates the use of cross-border receivables financing by: (a) recognizing the legal effectiveness of a wide variety of

modern receivables financing practices; (b) overriding certain contractual obstacles to receivables financing; and (c) providing clear, uniform conflict-of-laws rules to determine which country's domestic law governs priority as between the assignee of a receivable and competing claimants.

As a global leader in receivables financing, the United States actively participated in the negotiation of this Convention at the United Nations Commission on International Trade Law with the support of U.S. business interests. Drawing on laws and best practices prevalent in the United States and other countries where receivables financing flourishes, the Convention would promote the availability of capital and credit at more affordable rates and thus facilitate the development of international commerce. Widespread ratification of the Convention would help U.S. companies, especially small- and medium-sized enterprises, obtain much-needed working capital financing from U.S. banks and other lenders to export goods, and thereby help create more jobs in the United States.

The rules set forth in the Convention do not differ in any significant respect from those contained in existing U.S. law. In particular, in virtually all cases application of the Convention will produce the same results as those under the Uniform Commercial Code Article 9, which all States and the District of Columbia, Puerto Rico, and the Virgin Islands have enacted.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification, subject to certain declarations and undertakings set forth in the enclosed report.

* * * *

On December 9, 2016, the President transmitted the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), Done at New York on December 10, 2014. The President's transmittal letter follows. Daily Comp. Pres. Docs. 2016 DCPD No. 00841.

* * * *

With a view to receiving the advice and consent of the Senate to ratification, subject to certain reservations, I transmit herewith the United Nations Convention on Transparency in Treaty-Based Investor-State Arbitration (Convention), done at New York on December 10, 2014. The report of the Secretary of State, which includes an overview of the Convention, is enclosed for the information of the Senate.

The Convention requires the application of the modern transparency measures contained in the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules to certain investor-state arbitrations occurring under international investment agreements concluded before April 2014, including under the investment chapters of U.S. free trade agreements and U.S. bilateral investment treaties. These transparency measures include publication of various key documents from the arbitration proceeding, opening of hearings to the public, and permitting non-disputing parties and other interested third persons to make submissions to the tribunal. As the UNCITRAL Transparency Rules by their terms automatically apply to arbitrations commenced under international investment agreements concluded on or after April 1, 2014, and that use the UNCITRAL Arbitration Rules (unless the parties to such

agreements agree otherwise), there is no need for the Convention to apply to international investment agreements concluded after that date.

Transparency in investor-state arbitration is vital, given that governmental measures of interest to the broader public can be the subject matter of the proceedings. The United States has long been a leader in promoting transparency in investor-state arbitration, and the 11 most recently concluded U.S. international investment agreements that contain investor-state arbitration already provide for modern transparency measures similar to those made applicable by the Convention. However, 41 older U.S. international investment agreements lack all or some of the transparency measures. Should the United States become a party, the Convention would require the transparency measures to apply to arbitrations under U.S. international investment agreements concluded before April 2014, to the extent that other parties to those agreements also join the Convention and to the extent the United States and such other parties do not take reservations regarding such arbitrations. The Convention would also require the transparency measures to apply in investor-state arbitrations under those agreements when the United States is the respondent and the claimants consent to their application, even if the claimants are not from a party to the Convention.

The United States was a central participant in the negotiation of the Convention in the UNCITRAL. Ratification by the United States can be expected to encourage other countries to become parties to the Convention. The Convention would not require any implementing legislation.

I recommend, therefore, that the Senate give early and favorable consideration to the Convention and give its advice and consent to ratification by the United States, subject to certain reservations.

* * * *

4. Hague Securities Convention

On May 19, 2016, Assistant Legal Adviser John Kim testified at a hearing before the Senate Foreign Relations Committee in support of the Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary (“the Convention”). Mr. Kim’s testimony is excerpted below and available at http://www.foreign.senate.gov/imo/media/doc/051916_Kim_Testimony.pdf. On September 28, 2016, the Senate gave its advice and consent to ratification. 162 Cong. Rec. S6195 (Sep. 28, 2016). The Senate’s consent to ratification is subject to one declaration: that the Convention is self-executing. And on November 30, 2016, President Obama signed the instrument of ratification. On December 15, 2016, the United States deposited its instrument of ratification of the Convention, an action which triggers the Convention’s entry into force, on April 1, 2017. The United States, Switzerland, and Mauritius will then be bound by the Convention.

* * * *

The Convention was adopted by the Hague Conference on Private International Law on July 5, 2006, and it was signed by the United States and Switzerland that same day. The Convention will enter into force after the deposit of the third instrument of ratification. Switzerland and Mauritius have ratified the Convention. Many countries are looking to the United States, upon whose law the Convention largely was based, to become a party before they take action.

In brief, the rules in the Convention provide a narrow, technical fix to a serious problem in cross-border securities markets that has already been fixed domestically through adoption by all U.S. states of Articles 8 and 9 of the Uniform Commercial Code (UCC). The Convention, if widely adopted, would basically extend current U.S. law and practice to the global financial markets.

In particular, the rules in the Convention solve the current quandary of determining which country's law applies to certain aspects of a cross-border transaction in which the investor or owner, the issuer, the clearing corporation, and the owner's bank or broker may be located in different countries. As a result, the Convention (1) reduces the legal and systemic risks in cross-border investment securities transactions; (2) reduces costs; and (3) facilitates capital flows.

My statement will consist of three parts. First, I will provide some background on the Convention explaining the nature of the problem that the Convention was designed to address. Second, I will explain how the Convention addresses the problem and briefly run through its basic provisions. Third, I will indicate the Convention's relation to domestic law and its importance to U.S. banks, brokers and others.

I. Background—the Nature of the Problem

Historically, owners of securities had a direct relationship with the issuer. Investors or owners would either have physical possession of the securities certificates, or be recorded on the issuer's share registry. The location of the certificate or registry was readily identifiable.

Over time, however, financial markets have expanded and moved to a system of securities clearance, settlement, and ownership where the ownership information is held electronically and indirectly as a book entry. This so-called "indirect system" consists of one or more tiers of intermediaries between the issuer and the owner. These so-called "intermediated" securities are maintained through clearing corporations (or central securities depositories) for the accounts of banks, brokers, and other financial institutions, which in turn maintain accounts for their customers (the beneficial owners of the securities). The owners do not appear on any registry maintained by the issuer, nor do they have actual possession of certificates.

In the movement towards book-entry systems, it has become increasingly difficult for financial market participants to determine which country's law would apply to transactions involving securities held through these systems that involve different countries. (For example, suppose that a New York broker holds stock issued by Japanese and Singapore companies for a South American customer.) Also, these cross-border transactions take place very quickly and in huge volumes.

Many countries' legal systems have not kept up with the book-entry system, and their rules remain different than those in the United States. This problem affects U.S. financial institutions every day, and increases legal uncertainty and raises costs associated with the often-complicated determination of which country's law may apply.

That is why the Uniform Law Commission (ULC) and the American Law Institute in 1994 addressed this problem domestically in revising the UCC. The rules in the Convention reflect the modern finance law of the United States in Articles 8 and 9 of the UCC, adopted by

all U.S. states and the District of Columbia. The Convention would bring this modern approach to the global markets.

II. The Proposed Solution

I turn now to the solution to this problem that is provided by the Convention.

The Convention's focus is important but narrow. It deals with intermediated securities but not securities directly held by the investor from the issuer. The Convention does not prescribe substantive law for securities intermediaries, and it has no effect on regulatory law. The Convention simply selects a governing law for certain issues related to an intermediated securities transaction, thereby providing legal certainty on the law applicable to those issues, and avoiding the need to comply with the laws of multiple jurisdictions for the same transaction.

The issues covered by the Convention include the legal rights and obligations of the intermediary; the legal nature and effect of a disposition of the investor's interest in the securities by the investor's bank or broker, to a buyer or a secured lender; and how priority conflicts among the buyer, the secured party and a judgment lien creditor are resolved if there are conflicting claims to the securities.

The primary rule of the Convention for determining the applicable law is to look to the law of the jurisdiction whose law governs the account agreement between the customer and the intermediary. Virtually all book-entry systems are covered by an account agreement, and the very large majority of those agreements specify a governing law.

Under the Convention, some minimal nexus must be established for the choice of that law, such as an office (a place of business) of the intermediary that performs certain functions in the chosen jurisdiction dealing with securities, even if those functions are unrelated to any particular securities account. This is generally not an issue for U.S. banks or brokers. They would normally require that the governing law of the account agreement be that of a jurisdiction in which they maintain an office.

If the applicable law cannot be determined pursuant to an agreement between the customer and the intermediary, certain fallback provisions in the Convention would ultimately apply the law of the jurisdiction in which the intermediary is organized.

III. Relation to U.S. Domestic Law

Turning now to the third part of my presentation, the Convention is consistent with, and was largely based on, U.S. law.

The Convention generally follows the approach to choice of law for the indirect holding system contained in Article 8 of the UCC. Article 8 was specifically revised in 1994 to reflect the increasing use of securities accounts without physically identifiable securities or issuer share registries. In particular, UCC Article 8 permits the intermediary and the customer to determine the law that governs the transaction by express agreement.

As previously noted, the Convention has no effect on regulatory law or the jurisdictional scope or mandate of any banking, securities, or other regulators. Federal law does not cover these types of commercial transactional matters, so there is no federal law that would be displaced. In addition, the Convention would not affect any other legal rules or contractual provisions that are not specified in the Convention.

UCC Articles 8 and 9 will continue to cover any issues not covered by the Convention and issues related to securities held directly by the investor or owner.

There are some minor differences between the Convention and UCC Articles 8 and 9...

None of these differences are significant, and none of the interested U.S. industry associations or the ULC has indicated any difficulty with these differences. These minor differences are not expected to create any difficulties for U.S. practices under UCC Articles 8 and 9.

The Administration has proposed that the Convention be self-executing. No federal or state legislation would be required to implement the Convention. This method of domestic implementation was supported by the ULC. There is no need to craft federal legislation that would intersect with Articles 8 and 9 of the UCC since the terms of the Convention itself would do that adequately.

Finally, the Convention does not permit reservations, and the Administration has not proposed any understandings or declarations.

IV. Benefits of U.S. Ratification

My last and perhaps most important point is that I hope the Senate will appreciate the many benefits of U.S. ratification of the Convention.

The Convention would contribute to the practical need in the large and growing global financial markets for greater legal certainty as to the laws applicable to interests in securities held through indirect holding systems, and would reduce the costs of cross-border securities transactions for securities investors, market actors, and custodians. As a result, the Convention would facilitate the flow of capital to both developed and emerging markets.

In addition to the aforementioned benefits to the United States, U.S. banks and brokers would benefit in particular because the Convention sets forth modern rules with which U.S. intermediaries already are familiar and are generally applying. Further, U.S. investors would benefit. For example, many Americans have pension funds or 401(k) accounts, and these pension funds have large holdings in securities that are managed under the book-entry systems I have described. Widespread adoption of the Convention would enhance harmonization and lower the costs of cross-border transactions involving these funds.

It is therefore not surprising that industry trade associations such as the International Swaps and Derivatives Association, the Securities Industry and Financial Markets Association, the Association of Global Custodians, and the Trade Association for the Emerging Markets (EMTA) have written to this Committee indicating their support for U.S. ratification. Also, notably, the President of the ULC sent a letter to this Committee supporting U.S. ratification of the Convention.

In view of the successful development of UCC Articles 8 and 9 in the United States, and given this country's significant role in cross-border securities transactions, other countries are looking to U.S. leadership on the Convention.

If the United States becomes a party, we expect that many other countries, including Canada, as well as countries in Asia, South America, and Africa, will be encouraged to join the Convention and adopt the same rules on choice of law for cross-border securities transactions. As other countries proceed to adopt the Convention, legal certainty will continue to increase for all securities transactions, including those carried out by banks, brokers and other market participants in the United States.

* * * *

B. FAMILY LAW**Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance**

The United States signed the Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance in 2007. In 2010, the Senate approved ratification of the treaty subject to the passage of appropriate federal and state implementing legislation. As discussed in *Digest 2015* at 616, the U.S. Congress passed implementing legislation and U.S. states amended their laws to comport with the obligations of the Convention (by adopting an amended version of the Uniform Interstate Family Support Act), paving the way for U.S. ratification.

On August 30, 2016, the President signed the instrument of ratification of the Child Support Convention. On September 7, 2016, the United States deposited its instrument of ratification to the Convention in The Hague. See Secretary Kerry's September 7 press statement, available at <http://2009-2017.state.gov/secretary/remarks/2016/09/261631.htm>. As explained in the press statement:

The Convention will enter into force for the United States on January 1, 2017.

This Convention will help families through numerous groundbreaking provisions that, for the first time on a worldwide scale, will establish uniform, simple, fast, and inexpensive procedures for the processing of international child support cases. The United States already has a comprehensive system to establish, recognize, and enforce domestic and international child support obligations. The Convention requires that all treaty partners have similar systems in place. As a result, more children in the United States and abroad should receive more support, more expeditiously than ever before.

On December 8, 2016, President Obama issued Executive Order 13752, "Relating to the Implementation of the Convention on the International Recovery of Child Support and Other Forms of Family Maintenance." Daily Comp. Pres. Docs. 2017 DCPD No. 00829 (Dec. 8, 2016). The E.O. designates the Department of Health and Human Services as the "Central Authority," in accordance with Article 4 of the Convention, for purposes of discharging certain functions under the Convention. Section 2 of E.O. 13752 provides that the Central Authority may designate State agencies as authorized to perform specific functions under the Convention.

C. INTERNATIONAL CIVIL LITIGATION

1. *COMMISA v. PEP*

As discussed in *Digest 2015* at 616-20, the United States submitted a brief as *amicus curiae* in *Corporación Mexicana de Mantenimiento Intergral, S. de R.L. de C.V. (“COMMISA”) v. Pemex-Exploración y Producción (“PEP”)*, No. 13-4022 (2d. Cir.), asserting that the district court had erred in declining to recognize the nullification of an arbitral award and in increasing the amount of the award. The Court of Appeals issued its decision on August 2, 2016, affirming the district court’s confirmation and enhancement of the arbitral award. Excerpts follow from the decision.

* * * *

The domestic enforcement of foreign arbitral awards is governed by two international Conventions: the Inter-American Convention on International Commercial Arbitration (“Panama Convention”) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”). There is no substantive difference between the two: both evince a “pro-enforcement bias.” ...

Article V of the Panama Convention sets out—and limits—the discretion of courts in enforcing foreign arbitral awards: “The recognition and execution of the decision *may* be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested” one of seven defenses. Panama Convention art. V(1), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245 (emphasis added). “Article V provides the exclusive grounds for refusing confirmation under the Convention, [and] one of those exclusive grounds is where ‘t[he] award . . . has been [annulled] or suspended by a competent authority of the country in which, or under the law of which, that award was made.’” *Yusuf*, 126 F.3d at 20 (quoting Panama Convention art. V(1)(e), Jan. 30, 1975, O.A.S.T.S. No. 42, 1438 U.N.T.S. 245); see also 9 U.S.C. § 207 (“The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.”). In sum, a district court *must* enforce an arbitral award rendered abroad unless a litigant satisfies one of the seven enumerated defenses; if one of the defenses is established, the district court *may* choose to refuse recognition of the award.

At first look, the plain text of the Panama Convention seems to contemplate the unfettered discretion of a district court to enforce an arbitral award annulled in the awarding jurisdiction. However, discretion is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Panama Convention. See *Pravin Banker Assocs., Ltd. v. Banco Popular Del Peru*, 109 F.3d 850, 854 (2d Cir. 1997) (“Although courts in this country have long recognized the principles of international comity and have advocated them in order to promote cooperation and reciprocity with foreign lands, comity remains a rule of ‘practice, convenience, and expediency,’ rather than of law.”(quoting *Somportex Ltd. v. Phila. Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)));

In re Maxwell Comm'n Corp. plc, 93 F.3d 1036, 1047 (2d Cir. 1996) (“When construing a statute, the doctrine of international comity is best understood as a guide where the issues to be resolved are entangled in international relations.”).

Accordingly, “a final judgment obtained through sound procedures in a foreign country is generally conclusive . . . unless . . . enforcement of the judgment would offend the public policy of the state in which enforcement is sought.” *Ackermann v. Levine*, 788 F.2d 830, 837 (2d Cir. 1986) (emphasis in original). “A judgment is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’” *Id.* at 841 (quoting *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981)); see also *Fed. Treasury Enter. Sojuzplodoimport v. Spirits Int’l B.V.*, 809 F.3d 737, 743 (2d Cir. 2016) (“Nevertheless, ‘courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States.’”(quoting *Pravin*, 109 F.3d at 854)).

The public policy exception does not swallow the rule: “[t]he standard is high, and infrequently met”; “a judgment that ‘tends clearly’ to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.” *Ackermann*, 788 F.2d at 841 (quoting *Somportex*, 453 F.2d at 443). The exception accommodates uneasily two competing (and equally important) principles: [i] “the goals of comity and *res judicata* that underlie the doctrine of recognition and enforcement of foreign judgments” and [ii] “fairness to litigants.” *Id.* at 842.

Precedent is sparse; but the few cases that are factually analogous have endorsed this approach. See *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 n.3 (2d Cir. 1999) (“Recognition of the Nigerian [annulment of the arbitral award] in this case does not conflict with United States public policy.”); see also *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007) (“*Baker Marine* is consistent with the view that when a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case. . . . Therefore, it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy. A judgment is unenforceable as against public policy to the extent that it is ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’” (citation omitted) (quoting *Ackermann*, 788 F.2d at 841)).

Consequently, although the Panama Convention affords discretion in enforcing a foreign arbitral award that has been annulled in the awarding jurisdiction, and thereby advances the Convention’s pro-enforcement aim, the exercise of that discretion here is appropriate only to vindicate “fundamental notions of what is decent and just” in the United States. *Id.* (quoting *Ackermann*, 788 F.2d at 841).

IV

Applying this standard, we conclude that the Southern District did not abuse its discretion in confirming the arbitral award notwithstanding invalidation of the award in the Mexican courts. The high hurdle of the public policy exception is surmounted here by four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation.

2. *DA Terra Siderurgica LTDA v. American Metals International*

On September 12, 2016, the United States submitted an *amicus* brief in *DA Terra Siderurgica LTDA v. American Metals International*, No. 15-1133, 15-1146 (2d. Cir.). The appeal was brought after plaintiff's attempts to confirm and enforce an arbitral award were dismissed in district court, based on the reasoning that the award was not "enforceable" against alleged alter egos or successors in interest without first being "confirmed." The Court of Appeals asked for U.S. views on two questions. The U.S. brief answers those by explaining that: (1) an arbitral award-creditor need not "confirm" a foreign arbitral award governed by the New York Convention before seeking to "enforce" that award against an award-debtor in U.S. courts but may pursue a single-step process of reducing an arbitral award to a court judgment; and (2) an award-creditor may seek, in appropriate circumstances, to confirm a foreign arbitral award directly against alleged alter egos or successors. The U.S. brief argues that the Court of Appeals should vacate the judgments of the district court and remand for further proceedings. Excerpts follow (with footnotes omitted) from the brief, which is available in full at <https://www.state.gov/s/l/c8183.htm>.^{*}

* * * *

The United States has a strong interest in ensuring the proper interpretation and implementation of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention" or "Convention"). Because the United States is a party to the Convention and participated in its negotiation, the government's interpretation of the treaty is "entitled to great weight." *Medellín v. Texas*, 552 U.S. 491, 513 (2008) (quotation marks omitted). The United States also has an interest in encouraging the reliable and efficient enforcement of international arbitral awards in aid of international commerce.

* * * *

The New York Convention is a multilateral treaty that establishes a regime for enforcement in Contracting States of international commercial arbitration agreements and awards. *See* The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518. The United States acceded to the Convention on September 30, 1970, and it entered into force in the United States on December 29, 1970.

In the United States, the Convention is implemented through Chapter Two of the Federal Arbitration Act (the "FAA"), 9 U.S.C. §§ 201-208. Chapter Two provides subject matter jurisdiction in federal district courts for any "action or proceeding falling under the Convention .

^{*} Editor's note: On March 2, 2017, the court of appeals amended the opinion it had issued in January in response to a motion for rehearing. The Court held that the district court erred in determining that the Convention and the FAA required confirmation prior to enforcement and erred in dismissing the fraud claims. The appeals court remanded to the district court.

. . .” 9 U.S.C. § 203. The scope of “falling under the Convention” is in turn defined by 9 U.S.C. § 202 to include international commercial arbitral agreements and awards.

Consistent with the Convention, the FAA permits a party that has prevailed in international commercial arbitration to seek recognition and enforcement of that award against an award-debtor. *See* 9 U.S.C. § 207; Convention, arts. III, IV. In actions to recognize and enforce an award, the Convention distinguishes between courts of “primary” and “secondary” jurisdiction. Primary jurisdiction lies in the courts of the country in which, or under the arbitration law of which, an award was made (often referred to as the “seat” of the arbitration); secondary jurisdiction lies in the courts of all other Contracting States. *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111, 115 n.1 (2d Cir. 2007). Courts of primary jurisdiction are “free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief,” while courts of secondary jurisdiction “may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.” *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997).

* * * *

I. Neither the New York Convention nor the FAA Requires an Award-Creditor to First “Confirm” an Award Before Seeking to “Enforce” It

The first of the Court’s post-argument questions asks whether the winner of a foreign arbitration governed by the New York Convention must first “confirm” the award before seeking to “enforce” it in U.S. courts. The answer is no: both the Convention and the FAA envision a single-step process for reducing a foreign arbitral award to a domestic judgment.

A. The terms employed by the Convention and the FAA

The FAA and the Convention use different terms for two distinct legal processes: (1) the process of reducing an arbitral award to judgment, and (2) the process of executing on that judgment in order to obtain an award-debtor’s assets.

Reducing an award to judgment. The term “confirmation” under the FAA and the term “recognition and enforcement” under the Convention both mean the process of applying to a court to enter judgment based on an arbitral award.

In domestic arbitration governed by Chapter 1 of the FAA, the process of reducing an arbitral award to a court judgment is referred to as “confirmation.” *See* 9 U.S.C. § 9 (“If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, . . . any party to the arbitration may apply to the court . . . for an order confirming the award . . .”). Chapter 2 of the FAA also uses the term “confirm,” with the same meaning. *See* 9 U.S.C. § 207 (“[A]ny party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.”). The New York Convention does not employ the term “confirmation.” Instead, it refers to “recognition” and “enforcement” of arbitral awards, almost always as part of the single phrase “recognition and enforcement.” *See* Convention, arts. III, IV, V. Under the Convention, “recognition” of an award means giving it preclusive legal effect, while “enforcement” means reducing that award to a domestic judgment (which entails “recognition” of the award). *See* Restatement (Third) U.S. Law of Int’l Comm. Arb. (Tentative Draft No. 2) § 1-1(z), (l); *id.* cmts. z, l.2

The text of section 207 of the FAA demonstrates that the terms “confirmation” and “recognition and enforcement” are synonymous: “The court shall *confirm* the award unless it finds one of the grounds for refusal or deferral of *recognition or enforcement* of the award specified in the said Convention.” 9 U.S.C. § 207 (emphases added). Thus, by providing a procedure to reduce arbitral awards to judgment, the “confirmation” proceeding under Chapter Two of the FAA fulfills the United States’ obligation under the Convention to provide procedures for “recognition and enforcement” of Convention arbitral awards.

Executing on a judgment. Chapter 2 of the FAA does not specify what further steps may be necessary for an arbitration-creditor to obtain an arbitration-debtor’s assets following the entry of judgment. In the United States, however, this latter process is variously referred to as “enforcement of” or “execution on” a judgment, and trial courts have typically applied state-law procedures under Federal Rule of Civil Procedure 69 to order payment or execution against particular assets. *See, e.g., Daum Glob. Holdings Corp. v. Ybrant Digital Ltd.*, No. 13 Civ. 3135, 2015 WL 5853783, at *2 (S.D.N.Y. Oct. 6, 2015). This latter meaning of “enforcement” is distinct from the meaning of the term “recognition and enforcement” in the Convention.

The New York Convention is silent as to execution on judgments arising out of arbitral awards. However, the Convention does require that each Contracting State must “enforce [awards] in accordance with the rules of procedure of the territory where the award is relied upon,” and forbids the imposition of “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.” Convention, art. III.

B. The New York Convention was designed to avoid a two-step process for confirmation

Thus, the New York Convention does not require an award-creditor to first “confirm” an award before seeking to “enforce” that award through conversion of the award into a court judgment. Rather, “confirmation” and “enforcement” are synonyms in this context. The former is the domestic statutory term, and the latter is the Convention term, but both mean reducing an award to judgment. In addition, regardless of terminology, requiring an award-creditor to proceed through two separate steps before obtaining a judgment would run contrary to one of the purposes of the Convention.

The New York Convention was specifically designed to provide a simple, single-step judicial process for recognizing and enforcing arbitral awards. The New York Convention “succeeded and replaced the Geneva Convention of 1927,” whose “primary defect . . . was that it required an award first to be recognized in the rendering state before it could be enforced abroad.” *Yusuf Ahmed Alghanim*, 126 F.3d at 22. The two-step Geneva Convention procedure, referred to as “double exequatur,” proved cumbersome, and the New York Convention was designed to eliminate it. *See id.* In transmitting the New York Convention to the Senate for advice and consent in 1968, the executive branch specifically noted that the new regime was intended to permit an arbitral award holder “to request recognition and enforcement of his foreign award without having to prove that the award was binding in the country in which it was made.” *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Message from the President of the U.S., Exec. E, 90th Cong., 2nd Sess., at 20 (1968), reproduced 7 I.L.M. 1042, 1058 (1968).

Accordingly, all an award-creditor must generally do prior to initiating execution, under the Convention and section 207 of the FAA, is apply to a court of competent jurisdiction for the single-step process of reducing its award to a judgment.

II. An Award-Creditor May Also Seek to Confirm a Foreign Arbitral Award Against an Award-Debtor's Alleged Alter Ego or Successor in Interest

The Court's second question asks whether, even if in general there is no requirement of "confirmation" that precedes "enforcement" of a Convention award, the situation is different where an award-creditor seeks to enforce directly against an award-debtor's alleged alter ego or successor, rather than against the award-debtor itself. The New York Convention neither prohibits a Contracting State from allowing an award-creditor to seek enforcement of an award directly against an alter ego or successor, nor obliges a Contracting State to permit such an action. In the view of the United States, however, allowing such an action is consistent with judicial decisions on the interpretation and enforcement of both domestic and international arbitration agreements, as well as the text and purpose of the Convention and its implementing legislation, the FAA.

The United States takes no position on whether, and how, alter ego, successorship, or similar doctrines of agency or vicarious liability might apply in this or any other individual case. As an initial matter, even understanding which theories might be available in a specific case would require resolving threshold choice-of-law questions, which might vary depending on the specific theory or the point during the arbitral process at which it is invoked. Even after the applicable substantive law is identified, alter ego and successor theories of liability are different doctrines, which would require consideration of different threshold legal and factual questions. Determining whether an entity could be liable as a successor to an arbitral party, for example, might turn on an interpretation of the parties' agreement and its terms under the law governing the agreement. Determining whether an entity could be liable as an alter ego based on a theory of fraudulent conveyance of assets could require a determination as to whether the applicable law would be the law of the place where the assertedly fraudulent conveyance took place, or the law governing the parties' contract, or some other body of law. The United States also takes no position on whether, and if so under what circumstances, an alleged alter ego or successor would have a valid defense to confirmation of an arbitral award under Article V of the Convention.

A. The courts are empowered to decide who is bound by an arbitral agreement in the single-step confirmation proceeding

A court may decide whether a non-signatory to an arbitral agreement is bound by that agreement during the course of the single-step process for confirming a Convention award, just as it may in other arbitral contexts.

An arbitration agreement is a contract. Thus, the question of whether a specific entity has agreed to arbitrate a claim or is otherwise bound by an arbitration agreement is generally governed by ordinary principles of contract law. *First Options, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995) (FAA Chapter 1 case). Under *First Options* and related cases, questions of arbitrability—including questions about whether a non-signatory to an arbitration agreement is bound by that agreement—are for courts to decide, unless the parties have agreed otherwise. *Id.* at 943; *accord Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 84 (2002).

The question of whether an entity is bound by an arbitration agreement may be raised at various stages in the dispute resolution process.

Prior to arbitration, a party may bring an action to compel arbitration against a party that was not a signatory to the arbitration agreement. *See* 9 U.S.C. § 4 (domestic arbitration); 9 U.S.C. § 206 (New York Convention). In such a case, the district court must decide in the first instance whether the non-signatory will be bound by the agreement, and may need to take evidence and resolve disputed facts in order to reach a conclusion. As this Court has held, non-signatories may be bound by an agreement to arbitrate under “ordinary principles of contract and agency,” including “(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel.” *Smith/Enron Cogeneration Ltd. P’ship, Inc. v. Smith Cogeneration Int’l, Inc.*, 198 F.3d 88, 95-97 (2d Cir. 1999) (quotation marks omitted; citing *Thomson-CSF, S.A. v. American Arbitration Ass’n*, 64 F.3d 773, 776 (2d Cir. 1995)).

A party to an arbitration agreement may also raise the question of alter ego status (or other agency principles) for the first time in arbitral proceedings by asking the arbitral panel to enter an award against a non-signatory to the arbitral agreement. In a subsequent action to confirm an arbitral award against an alter ego, the district court would review de novo the arbitral panel’s decisions as to alter ego status—unless the court first determined that the parties clearly and unmistakably intended that arbitrators should decide that question. *See First Options*, 514 U.S. at 943-46 (holding that a court should decide whether the arbitration contract bound parties who did not sign the agreement); *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 661 (2d Cir. 2005) (applying *First Options/Howsam* rule to arbitral award governed by the New York Convention); *China Minmetals Materials Import and Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 281 (3d Cir. 2003).

To decide whether (and which) non-signatories are bound by an arbitral agreement in the course of confirming an award against the non-signatory, the district court would need to resolve any factual disputes, conducting evidentiary hearings if necessary. *See, e.g., China Minmetals*, 334 F.3d at 281, 284, 289-90; *Local Union No. 38, Sheet Metal Workers’ Int’l Ass’n, AFL-CIO v. Custom Air Sys., Inc.*, 357 F.3d 266, 268 (2d Cir. 2004). Several foreign courts have taken a similar approach, conducting an independent review of an arbitral panel’s rulings on alter ego or other agency theories. *See, e.g., IMC Aviation Solutions Pty Ltd. v. Altain Khuder LLC*, [2011] VSCA 248 (Australia, Sup. Ct. Victoria); *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Sup. Ct. United Kingdom).

Alternatively, an arbitral award-creditor may bring an action to confirm an award against the award-debtor, and then bring a claim (either by a second action, or as a separate claim in the original action) to execute on the resulting judgment against the assets of an alleged alter ego or successor who was not a party to the original arbitration. *See, e.g., JSC Foreign Econ. Ass’n Technostroyexport v. Int’l Dev. & Trade Servs., Inc.*, 295 F. Supp. 2d 366 (S.D.N.Y. 2003) (following confirmation of a foreign arbitral award, subsequent action by judgment-creditor against alleged alter egos of judgment-debtor). In such an action, the district court will rule on the alter ego question even though that issue was not reached or passed upon by the arbitral panel.

In short, a party to an arbitral agreement can assert that an alleged alter ego or successor should be held liable for its damages in each of these circumstances, with initial or de novo review by a district court of the issue. There is no evident reason that that answer should change because the award-debtor can no longer be sued because it has no legal status following the completion of foreign bankruptcy proceedings.

B. The text of the FAA supports the conclusion that a confirmation action directly against an alleged alter ego or successor is permissible

The text of Chapter 2 further suggests that an award-creditor may seek to confirm an award directly against a non-signatory to the arbitration agreement under legal doctrines such as alter ego or successor liability. Whether in an action to confirm an award (under section 207) or to compel arbitration (under section 206), the courts' authority includes the power to determine whether a non-signatory to the arbitral agreement is bound by that agreement—and (under section 207) is bound by the arbitral award—and, if so, to confirm an award against such a non-signatory.

Judicial authority to decide which entities are bound by an arbitration agreement or an arbitral award derives ultimately from sections 202 and 203 of the FAA. Section 203 grants “original jurisdiction” to federal district courts for an “action or proceeding falling under the Convention.” Section 202 states that a matter falls under the Convention when it is “[a]n arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title.” Thus, when a district court is asked to exercise jurisdiction against a non-signatory to an agreement, it must analyze the “legal relationship” between the parties to the suit, “whether contractual or not.”

Federal courts have exercised that jurisdiction under section 206 of the FAA to compel arbitration by non-signatories to the agreement. Section 206 provides that “[a] court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement.” Courts interpret the scope of “the agreement” under section 206 in accordance with the common law principles (such as assumption, alter ego, and estoppel) described in *Thomson-CSF*. See 64 F.3d at 776. Courts therefore compel participation in arbitration by entities that have not signed an arbitration agreement when they are nonetheless bound to the agreement for a valid legal reason. See, e.g., *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38, 47 (1st Cir. 2008); *Deloitte Noraudit A/S v. Deloitte Haskins & Sells, U.S.*, 9 F.3d 1060, 1065 (2d Cir. 1993).

Federal courts should similarly be understood to have authority under section 207 of the FAA to determine in confirmation actions which entities are bound by an arbitral award. Section 207 of the FAA provides that “any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.” Given that the scope of the “legal relationship” under section 202 and the scope of the “agreement” under section 206 are defined in part by reference to common law or comparable principles such as agency and alter ego, it would be anomalous if the analysis of which entities are “party to the arbitration” under section 207 categorically excluded those theories.

Of course, application of such doctrines in an individual case would require a threshold determination as to the substantive body of law that would apply to govern that determination. In addition, a determination that an entity is an alter ego of the arbitral award-debtor would be distinct from, and not necessarily conclusive of, the separate determination of whether that entity had a valid defense to confirmation under Article V of the Convention. An alleged alter ego might argue, for example, that the award should not be confirmed against it because it “was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.” Convention, art. V(1)(b). The United States takes no view on how these or similar questions should be answered in these proceedings.

C. Permitting confirmation directly against non-signatories is consistent with the Convention

The Convention does not address explicitly whether a court may directly confirm an award against an entity not specifically named as the award-debtor. Article III provides that each Contracting State must “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon,” and that 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.” Allowing confirmation against a non-signatory does not subject Convention awards to different or more onerous procedures than would be available for confirmation of domestic awards.

The defendants raise arguments to the effect that no other country would countenance an action to enforce the award at issue here against the defendants. (Appellees’ Br. 84-85, 88-89). Even assuming that is true, it is not inconsistent with the Convention. The Convention places a floor on the situations in which awards may be recognized and enforced; it does not bar Contracting States from permitting more liberal enforcement. *See* Convention, art. VII (“The provisions of the present Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”); *see also* Albert Jan van den Berg, *The New York Convention of 1958: An Overview*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS 39, 66 (Emmanuel Gaillard & Domenico Di Pietro eds., 2008) (the “Convention is aimed at facilitating recognition and enforcement of foreign arbitral awards; if domestic law or other treaties make recognition and enforcement easier, that regime can be relied upon”).

D. This Court’s *Orion* decision does not limit the authority to confirm a Convention award against alter egos

Nor does this Court’s decision in *Orion Shipping & Trading Co. v. E. States Petroleum Corp. of Panama, S.A.*, 312 F.2d 299, 300 (2d Cir. 1963), limit U.S. courts’ authority to entertain an action for confirmation against alleged alter egos or successors. While the district court relied on that decision for its holding to the contrary, *Orion* predates Chapter 2 of the FAA; it has been limited in important ways by subsequent decisions of this Court; and its conception of which parties are bound by an arbitration agreement or arbitral award is more limited than that reflected in more recent decisions of this Court and the Supreme Court.

The *Orion* decision rejected an argument by the award-creditor that the district court, in an action seeking confirmation of a domestic arbitral award, could properly determine that a parent corporation was an “alter ego” of the award-debtor that could also be held liable for the award. The *Orion* court held that “an action for confirmation is not the proper time for a District Court to ‘pierce the corporate veil.’ ” 312 F.2d at 301. The Court reasoned that a confirmation action under 9 U.S.C. § 9 “is one where the judge’s powers are narrowly circumscribed and best exercised with expedition,” and the factually intense veil-piercing analysis would “unduly complicate and protract” that proceeding. *Id.* The Court distinguished cases seeking to compel arbitration, seemingly agreeing that in that context it would be appropriate for a district court to engage in a plenary analysis of veil-piercing under 9 U.S.C. § 4. *Id.* Finally, the Court noted that alternatives—such as a suit against the entity that is claimed to be the guarantor or the alter ego of the award-debtor—remained available to the plaintiffs, but that “an action to confirm the

arbitrator's award cannot be employed as a substitute for either of these two quite distinct causes of action." 312 F.2d at 301.

As an initial matter, *Orion*—decided more than fifty years ago under Chapter 1 of the FAA, before the United States became a party to the New York Convention—should not govern actions under Chapter 2 of the FAA. Indeed, this Court has already suggested, in dicta, that the traditional principles of contract and agency law identified in *Thomson-CSF* might permit an award holder to bring a Convention action to confirm an arbitral award against an alleged alter ego, though it ultimately decided the case on other grounds. See *In re Arbitration Between Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495 (2d Cir. 2002).

Furthermore, *Orion*'s holding has been narrowed in important ways. First, this Court has rejected the proposition that *Orion* categorically bars consideration of all common law or agency theories of liability at the confirmation stage. In *Productos Mercantiles E Industriales, S.A. v. Faberge USA, Inc.*, 23 F.3d 41, 46-47 (2d Cir. 1994), the Court ruled that the district court should consider the question of successorship in interest in a confirmation proceeding because, in that case, successorship was factually straightforward. Second, the Court has already distinguished *Orion* as inapplicable to labor, as opposed to commercial, arbitration, because in labor arbitration, the intent to bind non-signatories is exceptionally clear. See *Gvozdenovic v. United Air Lines, Inc.*, 933 F.2d 1100, 1105 (2d Cir. 1991). In addition, *Orion* did not consider whether its general rule should apply even when the original award-debtor itself can no longer be sued directly, making the two-step process urged by the Court unavailable.

More fundamentally, the basic approach of *Orion*—as well as the distinction drawn in *Productos Mercantiles* between “complex” veil-piercing cases and cases in which the application of common law or similar principles of agency, alter ego, or successorship is more straightforward—is inconsistent with the judicial role described by more recent cases such as *First Options* and *Howsam*. Under *First Options*, unless the parties have contracted otherwise, courts are empowered to decide questions of arbitrability de novo, including which parties are bound to an arbitral agreement. 514 U.S. at 943-45; see *Howsam*, 537 U.S. at 84. By contrast, *Orion*, despite reciting a legal rule similar to *First Options*, went on to hold that a district court's powers in confirmation actions pursuant to 9 U.S.C. § 9 “are narrowly circumscribed and best exercised with expedition.” 312 F.2d at 301. But the *First Options* line of cases does not hold that courts' powers to evaluate who is bound to an agreement are “narrowly circumscribed”—to the contrary, those cases stand for the proposition that these matters lie within the courts' power (unless agreed otherwise by the parties), and nothing in those cases suggests that courts should circumscribe that power or conduct only a narrow inquiry in order to adjudicate those matters. See, e.g., *First Options*, 514 U.S. at 944 (holding that, in a Chapter 1 FAA case, a court should undertake ordinary analysis of state-law contract principles to decide whether parties had agreed to arbitrate); *China Minmetals*, 334 F.3d at 289-90 (in Convention case, remanding for the district court to decide a dispute of fact about whether parties had agreed to arbitrate). Indeed, in *First Options* itself—a post-arbitration confirmation action—the Supreme Court upheld the Third Circuit's lengthy, fact-intensive exploration of whether individuals were bound by an arbitral agreement on the basis of veil-piercing and alter ego theories. See 514 U.S. at 946-47.

For all these reasons, *Orion* should not be read to extinguish an award-creditor's right to pursue confirmation against an alleged alter ego, successor, or agent of the award-debtor when the award-debtor itself is defunct.

E. Permitting direct confirmation against third parties prevents award-debtors from avoiding enforcement

Finally, leaving open the possibility in appropriate circumstances of confirmation directly against entities that are not named as award-debtors furthers the policy goal of preventing award-debtors from avoiding legitimate enforcement and collection. In a case where (as alleged here) an award-debtor is defunct and thus immune from suit, but fraudulently transferred its assets to another entity to avoid liability on the arbitral award, it makes little sense to reward that misconduct by requiring the creditor to engage in additional litigation to first confirm its award against the now-nonexistent award-debtor, and only then proceed to suing the award-debtor's alleged alter egos or successor or its transferees. Indeed, that first step may be impossible, given the award-debtor's unavailability for suit; the requirement to sue it then may frustrate the creditor's legitimate ability to collect. Whether, on the merits, the transferee of the defunct entity's assets would be liable for payment of the arbitral award would of course have to be resolved by the court in such a proceeding. But permitting a confirmation action directly against the transferee—in which the transferee can raise the typical defenses to confirmation of the award and can also challenge its alter ego or successor status—minimizes the chance that the arbitral award will be defeated by the debtor's manipulation or concealment. Although, as noted, the United States takes no position on whether and how any common law or comparable theory of liability may apply in this case, there is no reason to categorically bar an arbitral award-creditor from seeking confirmation of an award against a non-party where applicable law provides for a valid claim and other defenses to enforcement do not apply.

* * * *

3. *Belize v. Belize Social Development Ltd.*

On December 7, 2016, the United States filed an amicus brief in the U.S. Supreme Court, opposing the petition for certiorari in *Government of Belize v. Belize Social Development Ltd.*, No. 15-830. The Government of Belize petitioned for certiorari after the Court of Appeals affirmed the district court's confirmation of an arbitral award against it secured by a telecommunications company that had entered into an agreement to provide services in Belize with its former government (led by Prime Minister Musa). The successor as prime minister (Dean Barrow) refused to honor the agreement, prompting the telecom company to pursue arbitration. The Government of Belize pursued actions in domestic courts to invalidate actions of the former prime minister, including the telecom agreement at issue in this case. In one such action, the Belize Supreme Court enforced an arbitral award; the Belize Court of Appeals reversed; and the Caribbean Court of Justice ("CCJ") affirmed the decision not to enforce the award, concluding that Prime Minister Musa lacked authority to enter into such agreements and that enforcement of the award would violate the public policy of Belize. The petition for certiorari was denied on January 9, 2017. Excerpts follow from the U.S. amicus brief (with footnotes omitted).

* * * *

1. Petitioner first contends (Pet. 16-22) that this Court should grant certiorari to decide whether a court may decline to confirm an arbitral award on *forum non conveniens* grounds when the party petitioning for confirmation seeks to attach the assets of a foreign state that are located in the United States. This case would be a poor vehicle for considering that question for two reasons. First, the *forum non conveniens* argument was not the focus of the briefing below, and the court of appeals addressed it only in summary fashion. Second, resolution of that question would not matter in this case, because there is another reason why there is no adequate alternative forum abroad: in light of the Caribbean Court of Justice’s decision, the arbitral award cannot be enforced in Belize. Further review is therefore unwarranted.

a. A *forum non conveniens* analysis consists of two questions: whether there is an alternative forum abroad, and if so, whether a balancing of private and public interest factors favors dismissal so the case may be heard in the alternative forum. See *Sinochem Int’l Co. v. Malaysia Int’l Shipping Corp.*, 549 U.S. 422, 429 (2007) (*Sinochem*); *American Dredging Co. v. Miller*, 510 U.S. 443, 447-449 & n.2 (1994); see also Pet. App. 26. Where the alternative forum abroad is inadequate, however, the case may not be dismissed on *forum non conveniens* grounds. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254-255 & n.22 (1981). An alternative forum is not inadequate merely because its substantive law would be “less favorable to the plaintiffs than that of the present forum.” *Id.* at 247. Rather, the forum may be considered inadequate when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all.” *Id.* at 254; see *id.* at 254 n.22. The defendant has the burden of establishing that there is another adequate forum to hear the case. See *Sinochem*, 549 U.S. at 430; 14D Charles Alan Wright et al., *Federal Practice and Procedure* § 3828.2 & n.1 (4th ed. 2013 & Supp. 2016) (“Federal courts unanimously conclude that the defendant bears the burden of persuasion on all elements of the *forum non conveniens* analysis.”).

b. In this case, the D.C. Circuit affirmed the district court’s ruling declining to dismiss this case on *forum non conveniens* grounds, which relied on *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296 (2005) (*TMR*). See Pet. App. 14, 26-27. In *TMR*, the D.C. Circuit held that, because the party petitioning to enforce the arbitration award sought to attach assets of a foreign state in the United States, no other adequate forum existed because “only a court of the United States (or of one of them) may attach the commercial property of a foreign nation located in the United States.” 411 F.3d at 303 (citing 28 U.S.C. 1609, 1610).

Petitioner contends (Pet. 17-21) that review is warranted because the Second Circuit disagrees with the D.C. Circuit about whether a court may dismiss a petition to confirm an arbitral award on *forum non conveniens* grounds when the party petitioning for enforcement seeks to attach assets of a foreign state in the United States. Petitioner relies on *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384 (2d Cir. 2011) (*Figueiredo*). In that case, Peru sought dismissal on *forum non conveniens* grounds of an action to enforce an arbitration award against it under the Inter-American Convention on International Commercial Arbitration (Panama Convention), Jan. 30, 1975, 1438 U.N.T.S. 245, arguing that enforcement in U.S. courts could undermine a Peruvian statute that placed an annual cap on payment of adverse judgments. 665 F.3d at 391-392.

Invoking *TMR*, the plaintiffs in *Figueiredo* argued that dismissal on *forum non conveniens* grounds was inappropriate because they sought to attach Peruvian assets in the United States. The Second Circuit rejected that argument, explaining that, in an action to enforce

an arbitral award where the plaintiff seeks “to obtain a judgment and ultimately execution on a defendant’s assets,” “the adequacy of the alternate forum depends on whether there are some assets of the defendant in the alternate forum, not whether the precise asset located here can be executed upon there.” *Figueiredo*, 665 F.3d at 391. The Second Circuit stated that, to the extent that the D.C. Circuit established a categorical rule that “a foreign forum [is] inadequate because the foreign defendant’s precise asset in this country can be attached only here,” it disagreed with that rule. *Ibid.* The Second Circuit then ordered dismissal of the action on *forum non conveniens* grounds.

In its amicus brief in *Figueiredo* (at 21-27), the United States argued that the district court properly declined to dismiss the action on *forum non conveniens* grounds. The United States did not, however, specifically address whether an enforcement proceeding in Peru would furnish an adequate alternative forum. It instead assumed the availability of another adequate forum (*id.* at 23), but argued that the balance of public policy and private interests weighed against dismissal. Specifically, the United States pointed to the policy embodied in the Panama Convention of enforcing arbitral awards and the presence of assets of Peru in the United States as strong reasons not to dismiss (*id.* at 23-25).

c. It is not clear whether the D.C. Circuit in *TMR* intended to establish a categorical rule that a foreign forum is always inadequate when the plaintiff seeks to attach assets in the United States, although the district court in this case read *TMR* to do so, and the court of appeals affirmed for the reasons stated by the district court. Pet. App. 14, 26-27. But the D.C. Circuit in *TMR* and this case was not faced with the sort of public policy factor (such as the state-imposed cap on annual payments of judgments) that the Second Circuit in *Figueiredo* found to weigh in favor of dismissal notwithstanding the presence of assets of Peru in the United States. 665 F.3d at 391-392.

Moreover, because the D.C. Circuit in *TMR* held that there was no adequate forum abroad, it expressly did not consider the further argument, rejected by the Second Circuit in *In re Arbitration Between Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488 (2002), that *forum non conveniens* is altogether unavailable as a basis for dismissal in an action to confirm an arbitral award under the New York Convention. See *TMR*, 411 F.3d at 304 n.*

The district court and the D.C. Circuit in this case likewise did not consider that issue, and the parties refer to it only in footnotes in their filings in this Court, see Br. in Opp. 11 n.8; Reply Br. 6 n.5, focusing instead on the D.C. Circuit’s application of the doctrine in this case. This case therefore presents no occasion to consider the availability of the doctrine of *forum non conveniens* in an action under the New York Convention.

In any event, this case would be a poor vehicle for resolving any conflict between the decisions of the D.C. Circuit and the Second Circuit’s decision in *Figueiredo*. First, the *forum non conveniens* issue was not petitioner’s primary issue on appeal, and the court of appeals addressed it only in passing. Petitioner’s primary argument was that the case must be dismissed on foreign sovereign immunity grounds. ... Accordingly, the court of appeals spent most of its opinion addressing petitioner’s various arguments in favor of sovereign immunity. See Pet. App. 5-14. With respect to petitioner’s *forum non conveniens* argument, the court of appeals simply relied on the district court’s analysis and provided no “further exposition.” *Id.* at 14.

Second, resolution of the first question presented would not matter to the ultimate outcome of this case, because there is a different reason why no adequate alternative forum exists. In both the Second Circuit and D.C. Circuit, an alternative forum must afford the plaintiff

some meaningful possibility of relief to be adequate for purposes of the *forum non conveniens* doctrine. See *Norex Petroleum Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 157-159 (2d Cir. 2005), cert. denied, 547 U.S. 1175 (2006); *Nemariam v. Federal Democratic Republic of Eth.*, 315 F.3d 390, 394 (D.C. Cir.), cert. denied, 540 U.S. 877 (2003); see also *Piper Aircraft Co.*, 454 U.S. at 254 & n.22 (alternative forum is inadequate when “the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all”). Here, petitioner itself has explained that respondent has no meaningful possibility of enforcing the arbitral award in Belize courts in light of the CCJ’s recent decision.

Specifically, as petitioner notes (Pet. 8-12, 24-27, 39), the CCJ has held that enforcement of BCB Holdings’ arbitral award against petitioner would violate the public policy of Belize because the arbitral award enforces an agreement for preferential tax treatment that was not approved by Belize’s Parliament. See Pet. App. 123-124 (CCJ’s analysis). Although that decision concerns a different agreement between different parties, petitioner represents that the CCJ’s holding makes similar contracts conferring preferential tax treatment without Parliament’s consent unenforceable in Belize’s courts. Petitioner has not identified any claim that respondent could present to the Belizean courts that would not be foreclosed by the CCJ decision. Petitioner therefore has not carried its burden of establishing that the courts in Belize provide an adequate alternative forum for this dispute. Accordingly, even if this Court were to grant review on the first question presented and decide the issue favorably to petitioner, it would not ultimately change the result, because the lack of an adequate alternative forum would make *forum non conveniens* dismissal inappropriate.

2. Petitioner also contends (Pet. 23-33) that review is warranted to address the court of appeals’ conclusion that the New York Convention’s public policy exception is inapplicable in this case. The court of appeals’ holding is correct, and it does not conflict with any decision of another court of appeals or of this Court. Rather, petitioner’s argument is simply a disagreement with the application of settled law to the facts of this particular case.

a. Under Article V(2)(b) of the New York Convention, a U.S. court may refuse to recognize or enforce an arbitral award if doing so “would be contrary to the public policy of” the United States. 21 U.S.T. 2520, 330 U.N.T.S. 42. The test is not simply “whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within its jurisdiction”; rather, the party seeking dismissal has a heavy burden to establish that enforcement would “violate the forum state’s most basic notions of morality and justice.” *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir.) (citation omitted), cert. denied, 552 U.S. 1038 (2007); see Pet. App. 46.

In the courts below, petitioner contended that confirmation of the arbitral award would be contrary to U.S. public policy against foreign corruption, because (in its view) the agreement was the product of corruption. See Pet. C.A. Br. 33-36; Pet. C.A. Reply Br. 27- 29. The district court concluded that petitioner failed to demonstrate that the arbitral award would “offend the United States’ most basic notions of morality and justice,” and therefore declined to refuse enforcement under Article V(2)(b). Pet. App. 47 (internal quotation marks omitted). The court of appeals agreed with that reasoning without “further exposition.” *Id.* at 14.

That fact-bound holding does not warrant this Court’s review, and this case would be a poor vehicle for addressing it in any event. As with the *forum non conveniens* issue, the public policy defense was not the focus of the briefing in the court of appeals, and the court addressed it only in summary fashion. Review would involve the application of settled law to the facts of this case, yet the court of appeals did not discuss those facts or assess their legal significance in any

detail. Indeed, although petitioner invokes three public policies before this Court (combatting corruption, international comity, and respecting separation of powers), petitioner focused its Article V(2)(b) argument below on only one of them (combatting corruption).

Further, the court of appeals' decision is correct. The United States has an "emphatic federal policy in favor of arbitral dispute resolution," which "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler- Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (citing the New York Convention and the FAA). Based on the record in this case, petitioner has not met its burden of establishing that a public policy of the United States precludes enforcement of the arbitral award.

Petitioner first contends (Pet. 23, 27-28, 32-33) that the district court erred by failing to give sufficient weight to the U.S. policy against public corruption. The United States does have a substantial interest in combatting foreign corruption. The United States is a party to several treaties aimed at preventing and prosecuting corruption. See Inter-American Convention Against Corruption, Mar. 29, 1996, S. Treaty Doc. No. 105-39 (1998) (to which Belize also is a party); see also United Nations Convention Against Corruption, Oct. 31, 2003, 2349 U.N.T.S. 41; Organization for Economic Cooperation and Development: Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1. Further, the Foreign Corrupt Practices Act of 1977, 15 U.S.C. 78dd-1 *et seq.*, governs certain corrupt practices abroad that have a nexus to the United States. But the well-established U.S. policy against suborning corruption abroad does not render an arbitral award unenforceable based on a bare allegation of corruption.

At the very least, petitioner would have to demonstrate that the agreement was procured by corruption, but it has not done so. Petitioner chose not to present this argument in the arbitration proceeding—where it would have been proper to do so—and the arbitral tribunal concluded that the agreement was neither secret nor corrupt. C.A. J.A. 64-66. The CCJ decision also did not address that issue with respect to the similar BCB Holdings agreement: the court concluded that Prime Minister Musa lacked the authority to approve the BCB Holdings agreement without Parliament's consent, but it did not hold that that agreement was obtained by corruption. See generally Pet. App. 88-125. Petitioner's reliance on a general State Department finding that there were "public indications of government corruption" in Prime Minister Musa's administration, Pet. 28 (citation omitted), is insufficient to conclude that the specific contract at issue here was procured by corruption.

Second, invoking considerations of international comity, petitioner contends (Pet. 23, 28, 31, 33), that the district court should have declined to enforce respondent's arbitral award under the public policy exception because the CCJ declined to enforce the arbitral award that BCB Holdings (not a party here) obtained against petitioner. The CCJ's decision did not require dismissal of this action on public policy grounds. Petitioner was required to demonstrate that enforcement of respondent's arbitral award would violate the United States' "most basic notions of morality and justice," *TermoRio S.A. E.S.P.*, 487 F.3d at 938, and petitioner has not shown that enforcing the arbitral award, which was entered in a valid, agreed-upon foreign tribunal, meets that demanding standard. Indeed, to the extent international comity concerns are relevant here, they favor enforcing the award, because the award was entered by a foreign tribunal and has not been vacated by that tribunal or the courts of the foreign state chosen as the seat of arbitration. See Pet. App. 27-28 & n.11. The courts below found that the arbitration clause was valid, *id.* at 7-8, 37-39, as did the CCJ in its decision regarding the similar agreement with BCB Holdings, *id.* at 121. That arbitration clause memorializes petitioner's consent to arbitrate before

the LCIA. Petitioner could have participated in the arbitration or challenged the tribunal's award in the courts of England, but it did neither. Under these circumstances, it would not further respect for foreign judgments and awards for U.S. courts to refuse enforcement of the arbitral award.

Finally, petitioner contends (Pet. 27-28, 31) that the public policy exception applies because the agreement violates the separation of powers under the Constitution of Belize, in that Prime Minister Musa attempted to exercise powers of the Parliament. Although the United States has a public policy interest in enforcing *its own* constitutional strictures, including the separation of powers among the Branches of the United States Government, there is no comparable public policy of the United States in favor of enforcing the separation of powers in a *foreign state's* government. In particular, the United States does not have an overarching public policy interest in attempting to determine which powers reside in different branches of foreign governments. Moreover, petitioner's argument that the agreement violates the separation of powers under the Constitution of Belize because the Prime Minister attempted to execute the powers of the Parliament is an argument that the agreement was unlawful. As explained above, that is an argument petitioner could have made to the arbitral tribunal if it had participated in those proceedings, and the tribunal in any event concluded that the agreement was valid. See p. 4, *supra*. This consideration, too, counsels against petitioner's public policy argument as a basis for refusing enforcement of the arbitral award.

b. Contrary to petitioner's contention (Pet. 29-31), there is no disagreement in the circuits about the standard for evaluating assertions of the public policy defense under Article V(2)(b) of the New York Convention. The courts of appeals generally agree that the public policy defense should be read narrowly in light of the Convention's general rule requiring enforcement of arbitral awards. See, e.g., *Asignacion v. Rickmers Genoa Schiffahrtsgesellschaft mbH & Cie KG*, 783 F.3d 1010, 1016 (5th Cir. 2015), cert. denied, 136 S. Ct. 795 (2016); *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys., Inc.*, 665 F.3d 1091, 1096-1097 (9th Cir. 2011); *TermoRio S.A. E.S.P.*, 487 F.3d at 938; *Slaney v. International Amateur Athletic Fed'n*, 244 F.3d 580, 593 (7th Cir.), cert. denied, 534 U.S. 828 (2001); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844, 851 n.2 (6th Cir. 1996); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974). That is in accord with this Court's recognition that the Contracting States "should not be permitted to decline enforcement of such agreements on the basis of parochial views of their desirability." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The courts of appeals also generally agree that, to justify dismissal under Article V(2)(b), enforcement of the arbitral award must violate the "most basic notions of morality and justice." *Parsons & Whittemore Overseas Co.*, 508 F.2d at 974; see *Asignacion*, 783 F.3d at 1016; *Cubic Def. Sys.*, 665 F.3d at 1097; *TermoRio*, 487 F.3d at 938; *Slaney*, 244 F.3d at 593; *M & C Corp.*, 87 F.3d at 851 n.2.

Petitioner contends (Pet. 29-31) that courts of appeals disagree on how to assess competing public policies under Article V(2)(b). That is incorrect. In each of the cited cases, the court started with the general rules set out above, then applied those rules to assess the policy or policies asserted in the particular case. Any differences in outcome are attributable to the different circumstances, not a difference in legal rules.

* * * *

There is therefore no conflict among the courts of appeals regarding how to evaluate competing public policies under the New York Convention. And even if there were, adopting petitioner's proposed test— which involves looking for a “dominant public policy” (Pet. 31)— would not change the outcome here, because petitioner has not established that any of the three policies that it invokes is a public policy of the United States that would justify a departure from the Convention's general rule of enforcement. For that reason as well, further review is unwarranted.

* * * *

Cross References

Treaties generally, **Chapter 4.A.1.**

Treaties transmitted to Senate, **Chapter 4.A.2.**

Senate advice and consent to treaties, **Chapter 4.A.3.**

Comity (Cooper v. TEPCO), **Chapter 5.C.5.**

Application of FSIA to ICSID arbitral award, **Chapter 10.B.1.**

Service of process, **Chapter 10.B.5.**