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THE RECOGNITION AND ENFORCEMENT OF
FOREIGN ARBITRAL AWARDS AS FOREIGN JUDGMENTS
IN THE UNITED STATES

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I. INTRODUCTION

The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹ (the “New York Convention” or “Convention”) governs the recognition and enforcement in the United States of foreign arbitral awards made in other treaty-signatory states. The New York Convention, implemented by Chapter 2 of the Federal Arbitration Act, has the force and effect of federal law.² By its terms, the New York Convention broadly favors the enforceability of foreign arbitral awards, subject to limited enumerated defenses to enforcement concerned with arbitral jurisdiction, the procedural fairness of the arbitral proceedings that resulted in the award, and public policy considerations.³

The recognition and enforcement of foreign money judgments in the United States is governed by the law of the individual states. Thirty of the 50 states, the District of Columbia and the U.S. Virgin Islands, have adopted the Uniform Foreign Money-Judgments Recognition Act (the “Uniform Recognition Act” or

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¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature*, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, T.I.A.S. No. 6997 [hereinafter New York Convention].

² *See* *Industrial Risk Insurers v. M.A.N. Gutehoffnungshütte GmbH*, 141 F.3d 1434, 1440 (11th Cir. 1998) (“The New York Convention is incorporated into federal law by the FAA, which governs the enforcement of arbitration agreements, and of arbitral awards made pursuant to such agreements, in federal and state courts”).

³ The New York Convention articulates seven defenses to recognition and enforcement of a foreign arbitral award: (i) that the parties to the arbitration agreement were under some incapacity or the agreement was not valid under the law to which the parties subjected it or otherwise the law of the country where the award was made; (ii) that the party against whom the award was rendered lacked notice of the arbitration proceedings or was not afforded due process; (iii) that the award deals with differences or decides matters outside the scope of what was submitted to arbitration; (iv) that the composition of the arbitral tribunal or arbitral procedure did not adhere to the agreement of the parties or otherwise the law of the place of arbitration; (v) that the award is not yet binding or has been set aside in the country in which, or under the law of which, the award was made; (vi) that the subject matter of the arbitration is not capable of settlement by arbitration under the law of the country where it is sought to be recognized and enforced; and (vii) that recognition and enforcement would be contrary to the public policy of the country where recognition and enforcement is sought. *See* New York Convention, Art. V(1), (2).

“Act”).⁴ Like the New York Convention’s treatment of foreign arbitral awards, the Uniform Recognition Act generally favors recognition and enforcement of foreign money judgments, subject to limited enumerated defenses concerning the jurisdiction of the foreign court, the procedural fairness of the foreign court proceedings that resulted in the judgment, and public policy.⁵

The question arises how courts should review foreign judgments confirming foreign arbitral awards, and more specifically, whether a foreign award that would *not* be considered enforceable in the United States under the New York Convention, could nevertheless be recognized and enforced under state law if first converted to a foreign judgment in the courts of a foreign country.

New York is one of the leading jurisdictions for the recognition and enforcement of both foreign arbitral awards and foreign money judgments.⁶ The federal courts in New York have long held that the state-law enforceability of a foreign money judgment, including when it is based on a foreign arbitral award, is independent of the enforceability of the underlying award under the New York Convention.⁷ It has been said that the New York Convention defenses to

⁴ See N.Y. C.P.L.R., Art. 53 (McKinney 1997 and Supp. 2012) (listing jurisdictions). The Uniform Recognition Act, first promulgated in 1962, was modestly amended by the Uniform Law Commission in 2005 with the introduction of the Uniform Foreign-Country Money Judgments Recognition Act. The amended Act has currently been adopted in 18 states and the District of Columbia, but not, as of yet, in New York. It clarifies certain procedural considerations such as burdens of proof and introduces a statute of limitations. In all substantive respects, the amended Act remains virtually the same.

⁵ See Uniform Recognition Act, §§ 3, 4, 13(II) U.L.A. 49, 58-59 (West 2002); *e.g.*, N.Y. C.P.L.R. §§ 5303, 5304. Specifically, the Act provides that a foreign judgment is *not* conclusive if the foreign court did not provide an impartial forum, due process, or exercise personal and subject matter jurisdiction in the dispute. See Uniform Recognition Act, § 4(a). A foreign judgment *need not* be recognized if the defendant did not receive adequate notice, the judgment was obtained by fraud, the claim on which the judgment is based is repugnant to the public policy of the state in which enforcement is sought, the judgment conflicts with another final and conclusive judgment, the proceeding in the foreign court was contrary to an agreement calling for the dispute in question to be settled elsewhere, or the foreign court was an inconvenient forum. See *id.* § 4(b).

⁶ New York is a “clearinghouse of international transactions” and, accordingly, a leading jurisdiction for proceedings that seek to recognize and enforce foreign arbitral awards as well as foreign money judgments. See, *e.g.*, *Banco Nacional de México, S.A. v. Société Générale*, 820 N.Y.S.2d 588, 592 (1st Dept. 2006); see also Martin L. Roth, Note, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 CORNELL L. REV. 573, 584 (2007) (observing that “the vast majority of arbitration enforcement actions are filed in New York”).

⁷ See *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 29 F.3d 79, 82 (2d Cir. 1994); *Victrix S.S. Co. v. Salen Dry Cargo A.B.*, 825 F.2d 709, 713 n.2 (2d Cir. 1987); *Waterside Ocean Navigation Co. v. Int’l Navigation Ltd.*, 737 F.2d 150, 154 (2d Cir. 1984); *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1321-23 & n.8 (2d Cir. 1973); *Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*, 157 F. Supp.

recognition and enforcement of a foreign arbitral award “simply do not apply to a[] . . . proceeding seeking recognition and enforcement of a foreign judgment, even if that judgment was based on a foreign arbitral award.”⁸

Few commentators have explored the implications of this dual-enforceability principle.⁹ Courts in other signatory states to the New York Convention have squarely rejected it.¹⁰ Those commentators that have considered the subject suggest it may permit an otherwise unenforceable foreign arbitral award to be recognized “by circumvention” of the New York Convention unless either existing court of appeal precedent is overturned or new legislation is introduced to correct it.¹¹

This article extends the discussion, first by removing it from the realm of academic debate and situating it in real-world circumstances with significance to the practice of international arbitration. Second, the article revisits the existing case law in this area, bearing in mind that corrective legislation, new treaty making, or otherwise a U.S. Supreme Court decision that overturns nearly three decades of Second Circuit precedent may be unlikely and, accordingly, offers an unsatisfying answer to the issue. Although the case law is certainly developing in the wrong direction, there may still be opportunity to advocate around it, and avoid enforcement “by circumvention” of an otherwise unenforceable award. For reasons explored below, if a foreign arbitral award is not enforceable in the United States pursuant to the defenses applicable to foreign awards under the New York Convention, then it need not be enforceable under state law in the guise of a foreign money judgment.

2d 245, 249-52 (S.D.N.Y. 2001); *Oriental Commercial & Shipping Co (U.K.), Ltd. v. Rosseel, N.V.*, 769 F. Supp. 514, 516-17 (S.D.N.Y. 1991).

⁸ See, e.g., *Ocean Warehousing B.V.*, 157 F. Supp. 2d at 249 (citing *Island Territory of Curacao*, 489 F.2d at 1318).

⁹ Roth, *supra* note 6, at 577 (noting a “paucity of literature and case law” on the treatment of foreign judgments based on foreign arbitral awards).

¹⁰ The German Federal Court of Justice held in 2009 that a foreign judgment based on a foreign arbitral award will no longer be recognized and enforced in Germany in the form of a judgment. Rather the New York Convention or other applicable conventions governing the recognition and enforcement of foreign arbitral awards provide the exclusive basis for recognizing and enforcing a foreign arbitral award in Germany. See Markus Burianski, *German Federal Court of Justice No Longer Permits the Recognition and Enforcement of Foreign Judgments Entered upon Arbitral Awards*, 24(10) INT’L ARB. REP. 10 (Oct. 2009).

¹¹ See Roth, *supra* note 6, at 573, 588-89, 596-97 (suggesting federal or state legislative amendments or otherwise reversal of Second Circuit precedent); see also Comment, *Foreign Judgments Based on Foreign Arbitral Awards: The Applicability of Res Judicata*, 124 U. PA. L. REV. 223, 247 (1975) (advocating a “non-merger” doctrine that would allow parties opposing recognition of a foreign judgment to continue to assert New York Convention defenses on public policy grounds).

II. AN ISSUE OF PRACTICAL AND TACTICAL SIGNIFICANCE

As a threshold matter, one can fairly question whether state-law recognition of a foreign judgment that confirms an otherwise unenforceable foreign arbitral award is sufficiently academic and improbable that it need not raise interest or concern among practitioners. The frequency with which foreign arbitral awards are found *not* enforceable in the United States under the New York Convention is rare, because the defenses to recognition and enforcement are narrow. In order for the exceptional award that runs afoul of the New York Convention's defenses to be enforced "by circumvention," first it would have to be confirmed by the courts of another country – despite its presumably basic jurisdictional and/or procedural flaws under a widely accepted multilateral treaty. Then the judgment of that foreign court based on that foreign award would have to pass muster under state-law exceptions to the recognition and enforcement of foreign judgments. What kind of case could wriggle its way through this needle's eye?

On closer inspection, the needle's eye may be large enough to invite undesirable tactical behavior, forum shopping, and duplicative litigation. Further, while unenforceable awards may be the exception to the rule of broad enforceability under the New York Convention, such rarity only highlights the importance of those cases when they do occur. International arbitration's legitimacy arguably depends as much on the exceptions to the rule favoring enforceability as on the rule itself.¹²

One illustrative example that arises with some frequency in practice is the treatment of non-signatories. The law applicable to determine whether a non-signatory should be bound by an arbitration agreement is anything but simple, or universal. Yet the question of whether a non-signatory is bound to arbitrate is fundamental, and jurisdictional. In the United States, it is a defense to recognition and enforcement of a foreign arbitral award under the New York Convention that the party against whom the award is to be enforced did not agree to arbitrate the dispute that resulted in the award.¹³ Notably, the Convention, by its terms,

¹² Cf. *Hoelt v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003), *overruled on other grounds by* *Hall St. Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) ("Arbitration agreements are private contracts, but at the end of the process the successful party may obtain a judgment affording resort to the potent public legal remedies available to judgment creditors Congress impressed limited, but critical, safeguards onto this process, ones that respected the importance and flexibility of private dispute resolution mechanisms, but at the same time barred federal courts from confirming awards tainted by partiality, a lack of elementary procedural fairness, corruption, or similar misconduct. This balance would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of these reasons, must nevertheless be blessed by federal courts."). *Hoelt* concerned the Federal Arbitration Act's defenses to enforcement under Chapter 1 (domestic awards), but its reasoning is no less true of Chapter 2 defenses applicable to arbitral awards governed by the New York Convention.

¹³ See, e.g., *Telenor Mobile Commc'ns AS v. Storm LLC*, 584 F.3d 396, 405-07 (2d Cir. 2009) (recognizing the defense of lack of arbitrability under the New York

prescribes defenses to recognition and enforcement of foreign awards only in contracting states other than the one in which the award was made, the latter courts retaining primary jurisdiction to confirm, vacate, modify or set aside awards made in their jurisdiction, pursuant to national arbitration law and rules.¹⁴ The application of domestic arbitration law at the seat of arbitration may differ from that of other jurisdictions asked to enforce the award against a non-signatory under the New York Convention. Implicit in the New York Convention's defenses to recognition and enforcement in contracting states other than where the award is made is that enforcing jurisdictions may exercise review of the award regardless of what is done with it at the arbitral seat.

As between the arbitral tribunal, the courts of the seat of arbitration, and the courts of any particular enforcing jurisdiction, the question of whether a non-signatory was bound to arbitrate may turn on the applicable choice of law applied – a subject on which courts and tribunals take varying approaches.¹⁵ Different jurisdictions have different substantive legal theories for binding non-signatories. For example, in some jurisdictions a “group of companies” theory may be used to bind a parent company to its subsidiary's arbitration agreement, while other jurisdictions do not accept this theory.¹⁶ In addition to variation in the applicable choice of law rules and substantive law governing whether a non-signatory is bound to arbitrate, there is also the question of who has competence to decide that question, as between arbitrators and courts, and, to the extent arbitrators have

Convention); *Sarhank Group v. Oracle Corp.*, 404 F.3d 657, 661-62 (2d Cir. 2005) (same, finding that the parent non-signatory of a subsidiary's arbitration agreement did not submit to arbitration and therefore was not bound by a foreign arbitral award rendered in Egypt, notwithstanding that the courts of Egypt had concluded that the parent non-signatory was bound to arbitrate under a “group of companies” theory). The *Sarhank* decision has been criticized for applying the substantive law of the United States, as the enforcing jurisdiction, to the question of whether the non-signatory was bound to arbitrate in Egypt under a contract governed by Egyptian law, rather than, for example, the choice of law provided by the parties' agreement or the law otherwise applicable to the arbitration agreement. See, e.g., 1 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 497, 1216 (2009). While *Sarhank* is perhaps unhelpfully nationalistic in tone, it is not clear why the law of the arbitration agreement should apply to determine whether a non-signatory is bound by the agreement. This seems like bootstrapping, inasmuch as the objection of the non-signatory is precisely that it had nothing to do with the arbitration agreement or therefore, by extension, whatever law may be applicable to it. One could credibly argue that the law of the non-signatory's domicile or where the award is sought to be enforced and satisfied by the non-signatory's assets has a more significant relationship to the determination of whether the non-signatory is bound to arbitrate than the law applicable to the arbitration agreement that the non-signatory did not sign.

¹⁴ See New York Convention, Art. I(1); Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT'L ARB. 47, 49, 55-59 (2010).

¹⁵ See generally BORN, *supra* note 13, at 1211-20.

¹⁶ See generally *id.* at 1214-17.

jurisdiction to decide the matter, the standard of review that a court applies when asked to review the arbitrators' determination.¹⁷

The choice of law, substantive law, and standards of review applied to determine whether a non-signatory is bound can vary from one jurisdiction to the next, and the outcome may vary accordingly. So what of a foreign judgment entered against a non-signatory, based on an arbitral award considered enforceable against the non-signatory in a foreign court but not in the jurisdiction asked to enforce it against the non-signatory? Can it survive the defenses to enforcement that would apply to a foreign judgment in the United States under state law?

The grounds for non-recognition of a foreign money judgment under the Uniform Recognition Act, strictly speaking, look to the jurisdictional foundation, procedural fairness, and public policy implications of the court proceedings that resulted in the foreign judgment. The underlying foreign arbitration proceedings and award, by contrast, will have constituted the merits of the foreign court proceedings and judgment and should not be subject to reconsideration as such by a court asked to recognize and enforce only the foreign judgment. This distinction becomes clearer upon considering how each of the afforded grounds for non-recognition of a foreign judgment under the Uniform Recognition Act would apply to an award challenged by a non-signatory. The Act provides that "a foreign judgment is not conclusive" if:

- (1) *The judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law.* This objection should not have any application to the non-signatory. The foreign court presumably will have provided the non-signatory with an impartial tribunal, neutral procedures and due process of law in determining that the foreign arbitral award should be recognized and reduced to judgment, consistent with the arbitration law and rules applicable in that foreign court's jurisdiction. The point is that these may substantively differ from one jurisdiction to the next, and as between the courts at the place of arbitration and those in a foreign jurisdiction later asked to enforce a foreign judgment that recognizes the foreign award.
- (2) *The foreign court did not have personal jurisdiction over the defendant or subject-matter jurisdiction over the dispute.*¹⁸ This defense is concerned

¹⁷ See generally *id.* at 1220-23. There could also be outcome-determinative procedural differences among different jurisdictions. Consider, for example, that an arbitral tribunal's jurisdictional ruling is frequently issued in a partial award. Suppose that the partial award was not timely challenged in the domestic courts of the seat of arbitration; it could be that the jurisdictional challenge would be waived under that jurisdiction's arbitration law upon review and confirmation of the final award. But this may not constitute waiver under the arbitration law and procedural rules of a foreign court asked to recognize and enforce the final award under the New York Convention. The party opposing enforcement on jurisdictional grounds will not have had a chance to raise the jurisdictional issue before the courts of the enforcing jurisdiction prior to the prevailing party seeking recognition of the final award in that jurisdiction.

with the jurisdiction of the foreign court, not that of the underlying arbitrators. A foreign court will have had jurisdiction, including as the seat of arbitration, to consider an application to confirm, set aside, modify or vacate the arbitral award and reduce it to judgment. Indeed, the non-signatory may be the first to avail itself of that court to challenge the arbitrators' jurisdiction, it being the court with primary jurisdiction to address that very question.

The Uniform Recognition Act provides that a foreign judgment “need not be recognized if”:

- (3) *The defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend.* No issue here; the foreign court ordinarily will have provided the non-signatory sufficient notice, even if no notice or due process were afforded in the underlying arbitration.
- (4) *The judgment was obtained by fraud.* One can assume it was not for present purposes.
- (5) *The cause of action or claim for relief on which the judgment is based is repugnant to the public policy of the state.* This defense has been interpreted very narrowly by New York's highest state court and does not permit state law to supplant foreign law, even when directly in conflict, particularly not in cases concerned simply with the allocation of risk under a contract – as tends to be the subject matter at stake in a contract dispute submitted to international arbitration.¹⁹
- (6) *The judgment conflicts with another final and conclusive judgment.* This defense has no application to our non-signatory, at least not where the prevailing party in the foreign arbitration first reduces its award to a

¹⁸ The Uniform Recognition Act explains, in Section 5, that personal jurisdiction is satisfied for purposes of the Act, among other reasons, if the defendant was personally served in the foreign state, had a business office there and the proceedings in the foreign court involved a claim arising out of business done by the defendant through that office, the defendant was domiciled in the foreign state, had its principal place of business there, or otherwise acquired corporate status there when the foreign court proceedings were instituted, or the defendant voluntarily appeared in the proceedings or submitted to the jurisdiction of the foreign court. Any of these criteria may be satisfied independently of whether the non-signatory submitted to arbitration as necessary for the underlying arbitral tribunal to have had jurisdiction over the non-signatory.

¹⁹ See, e.g., *Welsbach Elec. Corp v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 501 (N.Y. 2006) (direct conflict between the substantive law of New York and that of Florida concerning the right to enforce a lien in relation to a construction contract did not violate any “fundamental principle of justice,” “prevalent conception of good morals” or “deep-rooted tradition of the common weal,” defining such occasions by example to contemplate violations of civil and human rights) (quoting *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.)).

foreign judgment and then seeks recognition of the judgment rather than the award.

But suppose the prevailing party were to first attempt recognition in the United States of the award, resulting in a U.S. decision (and final judgment, accordingly) refusing to recognize that award under the New York Convention. If the prevailing party then tried to enforce a foreign judgment confirming that same award, arguably this would trigger the defense against conflicting judgments.²⁰ This tends to highlight the awkwardness of treating the enforceability of a foreign judgment as strictly separate from the enforceability of the foreign award that it confirms. It seems to reduce the question of enforceability to an arbitrary or tactical choice between which of the foreign award or foreign judgment a prevailing party chooses to present for recognition first in the United States.

- (7) *The proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court.* A non-signatory's problem is not the existence of an agreement providing for alternative dispute resolution but rather the absence of any such agreement. In any event, a foreign court proceeding to review an arbitral award that it has jurisdiction to review will not be contrary to the absence of an agreement to arbitrate. Only the underlying arbitral proceedings and award will have been so.
- (8) *In the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.* This provision, too, would have no applicability. A foreign court with jurisdiction to consider the enforceability of an arbitral award rendered in its jurisdiction is not an inconvenient forum. It is the court with primary jurisdiction to consider the issue.

Recognizing that the enforceability of a foreign judgment confirming an unenforceable foreign arbitral award is not merely academic, and further that it may turn on tactical choices by the prevailing party, it is worth considering to what extent existing U.S. case law confers such enforceability.

²⁰ It may be an open question whether the two judgments, one confirming the award under foreign law and the other declining to recognize it under the New York Convention, would "conflict" within the meaning of the statute. *But cf.* *CBS Corp. v. WAK Orient Power & Light Ltd.*, 168 F. Supp. 2d 403, 415-17 (E.D. Pa. 2001) (confirming a foreign arbitral award which had absolved certain parties of any liability and entering an injunction to prevent the losing party in the arbitration from seeking without leave of the court to recognize in the United States any Pakistani judgment in its favor relating to the same subject matter as the award).

III. THE SOURCE OF THE ISSUE: *ISLAND TERRITORY OF CURACAO*

The seminal case addressing the intersection of the New York Convention and the Uniform Recognition Act – as adopted by Article 53 of the New York Civil Practice Law and Rules – is a 1973 decision by the U.S. Court of Appeals for the Second Circuit in *Island Territory of Curacao v. Solitron Devices, Inc.*²¹ In *Curacao*, a New York manufacturer of semiconductors, Solitron, contracted with the Island Territory of Curacao to manufacture semiconductors in Curacao, in facilities that were to be constructed by the government and leased to Solitron for that purpose.²² After the buildings were constructed, Curacao experienced social unrest and a change in government, including a new minimum wage law that deprived Solitron of the economic advantage it had sought to obtain by agreeing to manufacture its product in Curacao.²³ Solitron thereafter refused to proceed with the parties' agreement.²⁴

The agreement contained an arbitration clause providing for arbitration in Curacao under the laws of the Netherlands Antilles.²⁵ The agreement further provided that Solitron designated Curacao as its domicile for all purposes under the agreement and a resident agent for service of notice and process in Curacao.²⁶ When Curacao commenced arbitration and provided notice thereof to Solitron, Solitron purported to revoke the authority of its resident agent and thereafter refused to appear or participate in the arbitration proceedings, although it was fully informed about them.²⁷

The arbitral tribunal rendered an award in favor of Curacao.²⁸ Curacao then obtained a "writ of execution" from the courts of Curacao confirming the award, pursuant to local law and procedure.²⁹ Solitron had the right to bring an action to annul the award in the courts of Curacao, but did not do so.³⁰ Curacao then commenced proceedings in federal court in New York to enforce both the foreign arbitral award and the foreign judgment, in parallel, in the same proceeding.³¹

The federal district court held "[b]oth under the federal law and the law of New York the award and judgment must be enforced."³² It specifically addressed and rejected on the merits several arguments by Solitron attacking the underlying arbitral proceedings, including on the ground that one of the arbitrators was

²¹ 489 F.2d 1313 (2d Cir. 1973).

²² 356 F. Supp. 1, 4-5 (S.D.N.Y. 1973), *aff'd*, 489 F.2d 1313.

²³ *Id.* at 6.

²⁴ *Id.*

²⁵ *Id.* at 5.

²⁶ *Id.*

²⁷ *Id.* at 6-7.

²⁸ *Id.* at 8-10.

²⁹ *Id.* at 10.

³⁰ *Id.*

³¹ *Id.* at 3.

³² *Id.* at 14.

partial, that the award was indefinite and not final, and that the tribunal lacked jurisdiction as a result of Solitron's withdrawal of its resident agent.³³ The district court's reasoning is unclear as to whether it applied the New York Convention or New York's Article 53, or both, to these various arguments. For the most part, the court just considered Solitron's contentions as they came and rejected them on the merits without bothering to parse whether they concerned the award or the judgment, or, accordingly, the New York Convention or New York state law.

On appeal, the Second Circuit affirmed the district court's decision. The appellate court first addressed Solitron's argument, unaddressed by the district court for reasons unclear, that the New York Convention preempts New York State law on the recognition of foreign judgments based on foreign arbitral awards.³⁴ Rejecting this argument, the court reasoned:

[S]ince the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York state law is not preempted to the extent that it permits, regulates and establishes a procedure for the enforcement of the foreign money judgment [T]he policy of New York State to recognize foreign judgments prevails in the absence of interference with the federal regulatory scheme.³⁵

On this basis, the court stated that it only had to decide whether the award at issue "qua judgment" was enforceable under New York State law and that it did not have to address "the alternative ground advanced by the district court that the arbitration award was independently enforceable under the Convention."³⁶

In practice, however, the court's decision was not so disciplined or narrow. In addressing Solitron's several arguments, like the district court, the appellate court delved into various attacks on the underlying arbitration proceedings and award, rather than reviewing only the procedural adequacy of the Curacao court proceedings that had already resulted in a judgment confirming the arbitral award. For example, in response to Solitron's argument that the award was made "without jurisdiction" – on a theory that the contract terminated by reason of impossibility prior to the award – the court addressed whether the *arbitrators* had jurisdiction to decide this argument in the first instance, and whether they had correctly done so. Concluding in both respects, yes, the court stated that "an arbitration clause survives the frustration of a contract for the purposes of settling, among other things, whether the contract has in fact been frustrated" and went on to find that "[t]here is nothing in the contract to indicate that Solitron's obligations were predicated on the continued existence of any particular wage rate" such that a change in wage rate

³³ *Id.* at 10-12.

³⁴ 489 F.2d. at 1318-19.

³⁵ *Id.* at 1319 (internal quotations and citation omitted).

³⁶ *Id.* at 1318, 1320-23.

had frustrated the contract.³⁷ These arguments attacked the arbitration and award, not the Curacao court proceedings confirming the arbitral award.

Similarly, Solitron sought to characterize other complaints about the underlying arbitration as ostensible state-law attacks on the judgment. For example, Solitron argued on appeal that various damages-related issues were not properly decided by the arbitral tribunal and that because this rendered the arbitral award unenforceable under New York law, a judgment based upon that unenforceable award should not be enforceable under New York law.³⁸ Solitron also argued that Curacao had benefitted from its own wrongdoing by raising wage rates that frustrated the contract. Here too, Solitron's arguments went to the validity of the underlying arbitral award. In rejecting these arguments, the Second Circuit considered the evidence presented to the arbitral tribunal, affirmed the rationale for the arbitrators' calculation of damages, and relied on the terms of the underlying contract, none of which should have been necessary if only the foreign judgment were under review.³⁹

In sum, three observations may be made about the district court and Second Circuit decisions in *Curacao*: First, Solitron sought enforcement of both the foreign award and the foreign judgment in the same U.S. proceeding. This resulted, perhaps among other reasons, in blurred distinctions and no clear guidance as to where a U.S. court's review ends as to one, and begins as to the other. In fact, the court did not actually abide by the distinction it drew between the enforceability of the foreign award and that of the foreign judgment, inasmuch as it entertained various arguments challenging the underlying arbitration.⁴⁰

³⁷ *Id.* at 1320.

³⁸ *See id.* at 1320-21.

³⁹ *See id.* at 1320-23. *See, e.g., id.* at 1322 (“The finding of the arbitrators certainly seems sound on the basis of our independent review of the documents and affidavits submitted to the court below, as it did to the district court itself. It is absurd to think that, if the maintenance of the wage rate were a condition or term of the agreement, it would not have been incorporated into the agreement by way of warranty, covenant or otherwise in light of the fact that Solitron was in a perfectly strong bargaining position, well represented by skilled and learned counsel, with presumably sophisticated and worldly business management at the helm. We see nothing to justify the claim that Curacao was ‘deriving an advantage from its own wrong.’”).

⁴⁰ *See also* *V. Corp. Ltd. v. Redi Corp. (USA)*, No. 04 Civ. 1683 (MBM), 2004 WL 2290491 (S.D.N.Y. Oct. 9, 2004) (upholding the enforceability of an English court judgment based on a foreign arbitral award, but as to which the defendant did not advance any defenses to enforcement under the New York Convention); *Attorney Gen. of Barb. v. Fitzpatrick Constr. Ltd.*, No. 87 Civ. 4714 (JMW), 1988 WL 18871 (S.D.N.Y. Feb. 22, 1988) (recognizing a Barbados judgment based on a foreign arbitral award and implicitly considering under the rubric of Article 53's defenses to recognition of foreign judgments several arguments attacking the underlying arbitral proceedings, including that the arbitration agreement was unenforceable, that it provided for only permissive, not mandatory arbitration, and challenging the impartiality of the arbitrator). *Cf.* *Belmont Partners, LLC v. Mina Mar Group, Inc.*, 741 F. Supp. 2d 743, 751-54 (W.D.Va. 2010) (holding that a challenge to a foreign arbitral award which had been confirmed by a

Second, Solitron's arguments for challenging the foreign arbitral award were clearly without merit. Bad arguments can make for bad law. Solitron did not have any genuine ground upon which to challenge the enforceability of the arbitral award under the New York Convention – notably, Solitron had not challenged the award in the Curacao court proceedings that confirmed it. Third, and relatedly, the U.S. court therefore had no real occasion to consider whether an unenforceable arbitral award under the New York Convention is independently enforceable under state law if confirmed by a foreign court as a foreign money judgment. Perhaps the clearest indication of this comes from the court's disposition of Solitron's preemption argument. The court found no "conflict" between federal law governing the recognition of the arbitral award and state law governing recognition of the foreign judgment, one can fairly infer, because there wasn't one.

IV. CURACAO'S PROGENY

Curacao's dual-enforceability principle has been echoed by subsequent case law in the more than two decades since *Curacao* was decided. If one accepts, for the reasons suggested above, that *Curacao* left for another day whether an unenforceable foreign award may be enforced "by circumvention" of the New York Convention as a foreign judgment under state law, then the question remains whether *Curacao's* progeny do so, too. For reasons explored below, subsequent case law appears to express some concern with *Curacao's* dual-enforceability principle, yet continues to move largely in the wrong direction. Still, opportunity may remain to successfully "circumvent" the existing case law, so as to prevent "circumvention" of the New York Convention.

A. *Fotochrome and Seetransport*

In *Fotochrome, Inc. v. Copal Company, Ltd.*,⁴¹ the Second Circuit considered the enforceability, in bankruptcy, of a foreign arbitral award made in Japan that had been filed with the Tokyo district court. Under Japanese rules of civil procedure, the award was deemed to have the same effect as a judgment in the Japanese court where it was filed. The Second Circuit concluded, however, that the self-executing nature of the award in Japan could not be treated as a "judgment" under U.S. law that would have enforceability in its own right under *Curacao*. Rather, the claimant first had to seek a judgment based on the foreign arbitral award in a district court of the United States, under the New York Convention.⁴² This was because the New York Convention contemplates that each contracting state:

Canadian judgment was barred by claim preclusion but proceeding to consider and reject the arguments concerning the award on their merits).

⁴¹ 517 F.2d 512, 515-19 (2d Cir. 1975).

⁴² *Id.* at 518-19.

[S]hall enforce arbitral awards in accordance with the rules of procedure of the territory where the award is relied upon. Since under our procedure the losing party may object to confirmation on limited grounds that are specified in the Convention, we cannot treat the Japanese arbitral award as equivalent to a final judgment barring such recourse by the losing party when enforcement is sought Fotochrome must [therefore] be given the right to assert the non-enforceability of the award under conditions specified in Article V of the Convention.⁴³

The court went on to expressly observe that “the enforcement of the award is a matter not before us on this appeal.”⁴⁴

Fotochrome comes very close to disagreeing with *Curacao* – albeit without saying so.⁴⁵ *Fotochrome* acknowledges (correctly) that the New York Convention specifically provides for the courts of the enforcing jurisdiction to apply the Convention’s defenses to a foreign award it is asked to recognize. *Fotochrome* characterizes as U.S. procedure the right to raise the New York Convention’s defenses to an award, absent which, a foreign award confirmed by a foreign court cannot be deemed an enforceable “judgment” in the United States. Yet *Curacao*’s dual-enforceability principle necessarily contemplates that *if* the foreign award has been confirmed as a foreign judgment by a foreign court, a U.S. court will enforce the foreign judgment as a matter of state law, without applying the New York Convention’s defenses. It seems then that the only way to reconcile *Fotochrome* with *Curacao* is if *Fotochrome* is understood to mean that so long as the *foreign court* that confirms a foreign award affords an objecting party the opportunity to raise New York Convention defenses to the award in that foreign court, then the foreign award will be enforceable *qua* foreign judgment in the United States. But this is an unsatisfying interpretation of *Fotochrome* insofar as the court reasoned that the New York Convention’s defenses apply as “the rules of procedure of the territory where the award is relied upon.” It is also an unpersuasive reading of *Curacao*, which did not purport to qualify the dual-enforceability principle it espoused by whether the objecting party had an opportunity to raise New York Convention defenses in the judgment-rendering foreign court.

Nevertheless, in *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*,⁴⁶ the Second Circuit later characterized and distinguished *Fotochrome* on precisely this basis. In *Seetransport*, the court considered the enforceability in the United States of a French court decree conferring *exequatur* on an international arbitral award made in France. The statute of limitations applicable in U.S. courts to recognize and enforce the arbitral award had expired. The court therefore considered whether the French *exequatur* could be enforced independently of the award, as a foreign

⁴³ *Id.* at 519.

⁴⁴ *Id.*

⁴⁵ One panel of the Second Circuit cannot reverse the holding of another; only the court sitting *en banc*, or the U.S. Supreme Court may do so.

⁴⁶ 29 F.3d 79 (2d Cir. 1994).

judgment, for which the limitations period had not yet run.⁴⁷ In concluding that it could,⁴⁸ the court distinguished *Fotochrome* on the ground that the Japanese arbitral award there at issue was self-executing as a judgment in Japan and therefore “could not be deemed a Japanese judgment because there had been no opportunity to challenge the award under the few grounds set forth in the [New York] Convention” in Japan.⁴⁹ “By contrast,” explained the court, “the process of obtaining *exequatur* in France allows the losing party in an arbitration to challenge the award on the bases enumerated in the Convention” in France.⁵⁰

Under *Fotochrome* and *Seetransport*, one could argue that *Curacao*’s dual-enforceability principle has been qualified: A foreign judgment based on a foreign arbitral award is enforceable in the United States as a foreign judgment only if the losing party was afforded an opportunity to assert the New York Convention’s defenses in the foreign court that entered judgment on the award. The problems with this approach, however, are significant.

A foreign judgment confirming an arbitral award made at the seat of arbitration may not have occasion to apply the New York Convention’s defenses because those defenses apply, by definition, to the recognition of foreign awards sought in contracting states other than where the arbitral award was made.⁵¹ Thus, the question for a U.S. court in many cases may become whether the national arbitration law at the seat of arbitration provides defenses sufficiently *like* those in

⁴⁷ See *id.* at 80 (“*Seetransport II*”); see also *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala*, 989 F.2d 572, 581 (2d Cir. 1993) (“*Seetransport I*”).

⁴⁸ *Seetransport II*, 29 F.3d at 81. But see *Commissions Import Export S.A. v. Republic of Congo*, Civil No. 12-743 (RCL), 2013 WL 76270 (D.D.C. Jan. 8, 2013) (distinguishing *Seetransport II* and otherwise declining to follow it; holding that a foreign judgment based on a foreign arbitral award could not be enforced under the District of Columbia version of the Uniform Recognition Act where the statute of limitations applicable under Chapter 2 of the FAA to the underlying award had expired). Arguably, by permitting the claimant to avoid the statute of limitations defense to enforcement of the award and enforce the French *exequatur* instead, *Seetransport* permitted enforcement of an award “by circumvention.” But the statute of limitations defense is a procedural one, concerned with timing rather than substance. It does not speak to whether a foreign award runs afoul of the New York Convention’s defenses to recognition and enforcement, only to when a petition may be filed, to which those defenses could then be raised. This is conceptually different and arguably less troubling than holding that the New York Convention’s Article V defenses do not apply to an award that otherwise runs afoul of them if first converted to a foreign judgment – a question *Seetransport* did not decide.

⁴⁹ *Id.* at 82.

⁵⁰ *Id.* The arbitral award at issue in *Seetransport*, although it was made in France, was between two non-French parties and therefore was deemed a foreign or non-domestic award under French law, to which the New York Convention applied in French court. See *Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*, 157 F. Supp. 2d 245, 251 (S.D.N.Y. 2001) (explaining why the New York Convention and *exequatur* procedure applied to the French award at issue in *Seetransport*).

⁵¹ See New York Convention, Art. I(1).

the New York Convention to qualify a foreign judgment confirming a foreign arbitral award as a “judgment” enforceable in the United States. But to suggest that *Fotochrome* and *Seetransport* really contemplated such a comparative-law exercise is probably too charitable a stretch. And if they did, they misunderstand how the New York Convention applies.

The New York Convention defenses apply in a court that is asked to recognize a foreign award regardless of what the courts at the seat of arbitration may do with the award. In particular, the New York Convention permits (but does not require) a court in an enforcing jurisdiction to defer to a decision by a court at the arbitral seat setting aside or vacating the arbitral award.⁵² But the Convention does not purport to require an enforcing jurisdiction to defer to a court at the arbitral seat on whether to *enforce* that arbitral award.

Further, in terms of the New York Convention’s goals of promoting the enforceability of foreign arbitral awards and reducing duplicative litigation, it seems preferable that a U.S. court would simply apply the New York Convention defenses rather than entertain a comparative-law inquiry into whether they would have been available in a foreign court, or otherwise something sufficiently similar, under foreign arbitration law.

B. *Ocean Warehousing*

Contributing further complexity to the meaning of *Curacao*, *Fotochrome* and *Seetransport* is a subsequent district court decision in *Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc.*⁵³ *Ocean Warehousing* addressed cross-motions to confirm or vacate an *ex parte* attachment order entered in support of an application to recognize a Dutch arbitral award and/or a Dutch judgment confirming the award.⁵⁴ Defendants argued that the Dutch award and judgment

⁵² One of the New York Convention’s defenses to recognition and enforcement is that the award has been set aside or suspended by the courts of the country where it was made. But courts retain discretion under the Convention to enforce an award even if it has been vacated at the seat of arbitration. Further, the Convention articulates six other defenses applicable in the enforcing jurisdiction, apart from the disposition of the award at the place of arbitration. *See* New York Convention, Art. V(1)(e); *see generally id.* at Art. V. And courts in an enforcing jurisdiction may entertain recognition and enforcement of an award even before the courts at the seat of arbitration have done so, as is implicit in Article VI of the New York Convention, which contemplates that courts in an enforcing jurisdiction may (but need not) choose to adjourn decision on whether to recognize an award when an application has been made to set aside the award before the courts of the country in which, or under the law of which, the award was made. *See* New York Convention, Art. VI; *Continental Transfert Technique Ltd. v. Federal Gov’t of Nig.*, 697 F. Supp. 2d 46, 59-62 (D.D.C. 2010) (declining to adjourn proceedings to recognize and enforce a foreign arbitral award pending the outcome of proceedings in the courts of Nigeria under the law of which the award was made).

⁵³ 157 F. Supp. 2d 245 (S.D.N.Y. 2001).

⁵⁴ *Id.* at 247. On a motion to confirm an attachment order, like an application for injunctive relief, a court does not decide the merits of the dispute but rather applies a

were not enforceable because defendants had not had the opportunity to present a New York Convention defense to the award before the Dutch court entered judgment on the award. Specifically, defendants argued that the Dutch award was not enforceable under the New York Convention because the parties' alleged arbitration agreement was not in writing pursuant to Article II of the Convention. Yet, under Dutch law, defendants asserted, an arbitration agreement does not need to be in writing to be enforceable. Relying on *Fotochrome* and *Seetransport*, defendants argued that because they had no opportunity to assert their New York Convention defense in the Dutch court proceedings that confirmed the award, the Dutch judgment should not be enforced in the United States.⁵⁵

In rejecting this argument, the district court observed that the New York Convention did not apply in the Dutch court proceedings because the Dutch arbitral award was treated as a "domestic" award under Dutch law, made in the Netherlands. It would make no sense, the court reasoned, to hold that a foreign judgment is unenforceable in the United States unless the defendants were able to raise defenses in the foreign court that did not apply in that foreign court.⁵⁶ The court then proceeded to distinguish *Fotochrome* on the ground that the Japanese award there at issue was self-executing as a judgment in Japan, whereas

[D]efendants here were permitted to contest the arbitral award prior to its confirmation as a judgment in the Netherlands, but they chose not to appear. Further, defendants will have the opportunity to raise the Convention defenses when this Court determines whether to recognize the foreign arbitral award as a United States judgment. However, at this stage of the proceedings, where the attachment must either be confirmed or vacated, the Convention defenses are irrelevant.⁵⁷

In a footnote, the court then immediately cast doubt on its own reasoning, citing *Curacao* and observing that the court may never reach the merits of defendants' Convention defenses because the Dutch judgment would be enforceable as a matter of state law independently of the award.⁵⁸ The court then proceeded to distinguish *Seetransport* on the ground that it stands

only for the limited proposition that the Convention defenses may be raised in an enforcement proceeding in New York when there was no opportunity to raise Convention defenses in a foreign proceeding confirming a "non-domestic"

"likelihood of success" standard to determine preliminarily whether to attach assets of the defendant, pending adjudication of the merits. *See id.* at 247-48. Applying that preliminary standard, the district court considered the "likely" enforceability of the Dutch award and judgment.

⁵⁵ *See id.* at 250.

⁵⁶ *See id.* at 249.

⁵⁷ *Id.* at 250.

⁵⁸ *Id.* at 250 n.8.

arbitral award – a proposition that is not relevant here because the Dutch judgment confirmed a Dutch arbitral award.⁵⁹

A number of things can be said about *Ocean Warehousing*. First, the court's effort to distinguish *Fotochrome* seems unpersuasive. *Fotochrome* held that because the Japanese court did not provide an opportunity to raise New York Convention defenses when confirming the award, when U.S. "procedure" would have done so, the Japanese judgment could not be enforced as such in a U.S. court without affording an opportunity to raise Convention defenses in a U.S. court.⁶⁰ That the defendants in *Ocean Warehousing* were able to contest confirmation of the award in a Dutch court, under Dutch law, stops short of addressing *Fotochrome*'s concern because it does not answer the question whether a U.S. court, by recognizing and enforcing the Dutch judgment, would thereby deprive the defendants of a defense they otherwise would have been entitled to raise under U.S. "procedure" (i.e., the New York Convention). Needless to say, the court's reliance on the preliminary stage of the attachment proceedings and defendants' opportunity to raise Convention defenses at a subsequent, merits stage, only distinguishes *Fotochrome* to the extent it is true. It is unclear what became of the case after the district court's decision to confirm the attachment order, as no further written decisions were issued by any court in the case.

Second, *Ocean Warehousing* purports to limit *Seetransport*'s concern that a defendant should have the opportunity to raise New York Convention defenses to an award to those awards that are treated as "non-domestic" awards in the foreign court where they are confirmed.⁶¹ But *Seetransport* was simply an application of the court's prior holding in *Fotochrome*. In *Fotochrome*, the Japanese award at issue was self-executing as a judgment in Japan. While the court's decision in *Fotochrome* does not explicitly identify whether the award was "domestic" or "non-domestic" for purposes of Japanese law, it stands to reason it was a "domestic" award to which the New York Convention did not apply in Japan, because Japan is a signatory to the New York Convention and so it would have applied the Convention to the award if it had been applicable. Thus, *Fotochrome* is not distinguishable from *Ocean Warehousing* on the grounds upon which *Ocean Warehousing* purported to distinguish *Seetransport*.

Third, regardless of whether an award is considered "domestic" or "non-domestic" in the foreign courts at the place where it was made, in either case it is a foreign award to which the New York Convention applies when it is presented for recognition in a U.S. court. Accordingly, if, as it would seem, the concern in *Fotochrome* was that recognizing a foreign judgment confirming a foreign award may deprive the defendant of an opportunity to raise New York Convention defenses to the underlying award that otherwise would apply in U.S. court under

⁵⁹ *Id.* at 251.

⁶⁰ See *Fotochrome*, 517 F.2d at 519.

⁶¹ See 157 F. Supp. 2d at 251.

U.S. procedure, the “domestic” characterization of the award in the foreign court is no answer to that concern.

Finally, *Ocean Warehousing* is a district court decision and therefore is not binding on any court, including in the Southern District of New York.

C. *Victrix Steamship*

*Victrix Steamship Co., S.A. v. Salen Dry Cargo A.B.*⁶² is another post-*Curacao* decision from the Second Circuit. There the court considered whether to enforce an English arbitration award and English judgment in relation to assets attached in New York of a respondent that had filed for bankruptcy in Sweden. Stating that “[n]either the award nor the judgment may be viewed in isolation” the court applied principles of comity to conclude that it should defer to the Swedish bankruptcy court “to determine what benefit, if any, *Victrix* should enjoy from having obtained the London arbitration award and the British judgment.”⁶³ In this connection, and perhaps as a nod to *Fotochrome* and *Seetransport*, the court noted that “[t]he Swedish court can be expected to accord *Victrix* whatever rights it is entitled to under the [New York] Convention, since Sweden is a signatory of the Convention.”⁶⁴

In extending comity to the Swedish court, the Second Circuit observed by way of a footnote, citing *Curacao*, that “[f]ederal law pertinent to the [New York] Convention is inapplicable because the Convention does not apply to the enforcement of judgments that confirm foreign arbitration awards.”⁶⁵ It is unclear why the court placed this reliance on *Curacao* or whether it was necessary to do so. Perhaps the court was concerned that it not be constrained by the Convention to recognize and enforce the underlying arbitral award when it had concluded that the better course was to defer its recognition and enforcement to the Swedish court. Notably, deference to the Swedish court promoted the orderly disposition of the assets at issue in a single bankruptcy proceeding with other creditors having an interest in the same assets.

But the court might have accomplished the same result without suggesting that the New York Convention did not apply to the judgment confirming the award. For instance, the court could have declined to recognize the award, as it retains discretion to do under the Convention, even when it does apply. Or the court could have declined to exercise its discretion to *enforce* the New York attachment order.⁶⁶ In any event, the case did not require the court to address the

⁶² 825 F.2d 709 (2d Cir. 1987).

⁶³ *Id.* at 714-15.

⁶⁴ *Id.* at 715.

⁶⁵ *Id.* at 713 n.2.

⁶⁶ The exercise of attachment and other judgment enforcement powers are within the discretion of a court. Just because a court recognizes a foreign award or judgment does not dictate what it must do when enforcing it against a respondent’s assets. *See, e.g.*, *TAGC Mgmt., LLC v. Lehman*, 842 F. Supp. 2d 575, 586 (S.D.N.Y. 2012) (“Under New

enforceability of a foreign money judgment based on an otherwise unenforceable foreign award. The court simply deferred consideration of both the judgment and award to the Swedish court.

D. *Waterside Ocean Navigation*

*Waterside Ocean Navigation Co. v. International Navigation Ltd.*⁶⁷ also had no occasion to address an unenforceable award. There the Second Circuit considered the availability of post-award pre-judgment interest in U.S. court proceedings to enforce a foreign award under the New York Convention. Militating in favor of its availability, reasoned the court, was the fact that such interest would have been available if the successful claimant had first reduced its several awards to judgment in England, where the awards were made. Interest then would have applied to the English judgments if they were presented for recognition and enforcement in the United States. Thus, if post-award, pre-judgment interest was *not* available from a U.S. court in relation to the foreign award, claimants would be constrained to obtain a foreign judgment to collect any interest. As the court explained, this would undermine the New York Convention's objectives:

[T]he drafters of the Convention sought to avoid duplicative litigation of this type. In this circuit in particular, such litigation would seriously erode the Convention's overriding goal of promoting the enforcement of awards because we have held that the Convention applies only "to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards." *Island Territory of Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313, 1319 (2d Cir. 1973), *cert denied*, 416 U.S. 986 (1974). Thus, if *Waterside* had attempted to enforce an English judgment confirming the awards, it could not have availed itself of the enforcement procedures of the Convention.⁶⁸

The court's reasoning is interesting in that it recognizes the objective of the New York Convention to avoid duplicative litigation – by obviating the need for a prevailing party first to convert a foreign arbitral award to judgment to have it recognized and enforced by other contracting states. But then the court suggests this objective is eroded insofar as *Curacao* would prevent the prevailing party in arbitration from availing itself of the New York Convention if it had to obtain a foreign judgment to collect interest. In fact, *Curacao* recognizes the ability of a

York law, satisfaction of the statutory criteria for issuing an order of attachment is not a guarantee that the court will issue such a relief. Such relief is discretionary, and since attachment is a harsh remedy, the court must exercise care in its application." (internal quotations and citation omitted)); *Servaas Inc. v. Republic of Iraq*, 686 F. Supp. 2d 346, 361 (S.D.N.Y. 2010), *aff'd*, No. 10-828-cv, 2011 WL 454501 (2d Cir. Feb. 16, 2011) (recognition and enforcement are two distinct procedural steps).

⁶⁷ 737 F.2d 150, 153-54 (2d Cir. 1984).

⁶⁸ *Id.* at 154.

successful claimant to obtain and enforce both a foreign award *and* a foreign judgment, each independently of the other, including in the same proceeding.⁶⁹ Thus, *Curacao* does indeed erode the goals of the New York Convention to reduce duplicative litigation, but not by foreclosing the New York Convention if a foreign judgment is first obtained, but rather by affording two bites at the same enforcement apple – potentially even when the Convention’s defenses would deem the award unenforceable.

In sum, *Curacao*’s progeny paints a messy picture, one at odds with the structure and policy objectives of the New York Convention. But no court to date, perhaps apart from the district court decision in *Ocean Warehousing*, has purported to enforce a foreign judgment based on a foreign arbitral award where the result would be to deny a defendant in U.S. court a meritorious New York Convention defense to the underlying award.

E. *Commissions Import Export*

In fact, a recent district court decision in the District of Columbia has taken a decidedly different approach from the courts of the Second Circuit. *Commissions Import Export S.A. v. Republic of Congo*⁷⁰ raised essentially the same question that the Second Circuit addressed in *Seetransport*: Whether a foreign judgment may be enforced *qua* judgment under the Uniform Recognition Act when it is based on a foreign arbitral award for which the statute of limitations applicable under Chapter 2 of the FAA has expired. Whereas *Seetransport* held that it can, *Commissions Import Export* held that it cannot.

The claimant obtained an ICC arbitration award in Paris against the Republic of Congo and, nine years later, a judgment enforcing the award in the courts of England. Claimant then sought recognition of the English court judgment in federal court in Washington, D.C. pursuant to the District of Columbia’s Uniform Foreign-Country Money Judgments Recognition Act.⁷¹ The three-year statute of limitations applicable to recognition of the ICC arbitral award in the United States, under § 207 of the FAA, had long since expired. The district court characterized claimant’s application to enforce the foreign judgment in place of “an otherwise stale foreign arbitral award” as a “procedural loophole” and held that it was preempted as a matter of federal law.⁷²

⁶⁹ See, e.g., *Oriental Commercial & Shipping Co. (U.K.), Ltd. v. Rosseel, N.V.*, 769 F. Supp. 514, 517 (S.D.N.Y. 1991) (citing *Curacao* and its progeny for the proposition that “even after an award had been confirmed in the foreign jurisdiction – making it enforceable as a foreign judgment – it was still enforceable as a foreign award under the Convention; the foreign confirmation had simply increased the options available to the enforcing party”); see also Roth, *supra* note 6, at 585 (observing that *Curacao* adopted a “parallel entitlements approach” that allows a claimant to enforce either the foreign award, a foreign judgment based on the foreign award, or both).

⁷⁰ 2013 WL 76270 (D.D.C. Jan. 8, 2013).

⁷¹ See *id.* at *1-2.

⁷² *Id.* at *1-3.

As the district court explained, “‘State laws are preempted when they conflict with federal law’” pursuant to the Supremacy Clause of the U.S. Constitution.⁷³ “Such a conflict arises, *inter alia*, where the state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress’” – a determination that requires “‘Judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects. . . . [T]hat which . . . must be implied’” in this regard “‘is of no less force than that which is expressed.’”⁷⁴

The district court concluded that claimant’s attempted end-run of the federal-law limitations period applicable to recognition of the underlying arbitral award, by resort to the Uniform Recognition Act, conflicted with Congress’s purposes and objectives under the FAA. First, the court concluded that the three-year limitations period made applicable to the New York Convention reflected a Congressional objective of “uniform federal procedures to govern the statute of limitations period, rather than allowing each state to determine individually the extent to which it would recognize foreign arbitral awards.”⁷⁵ The court reasoned that claimant’s procedural maneuver, were it permissible, would obstruct “this interest in uniformity by outsourcing the determination of timeliness to states and foreign parties.”⁷⁶ Second, Congress’s selection of a three-year limitations period for the recognition of foreign arbitral awards “evinces a purpose of protecting potential defendants’ interest in finality.”⁷⁷ This objective, too, the court concluded, would be obstructed by claimant’s application “by enabling foreign-award holders to circumvent Congress’s time-limit.”⁷⁸

Recognizing that the Second Circuit’s decision in *Seetransport* “presented facts very similar to those of the present matter,” the court distinguished *Seetransport* on the ground that it “failed to address preemption.”⁷⁹ While this is true insofar as it goes, *Seetransport*, in turn, cited and relied upon *Island Territory of Curacao*, which did consider and reject an argument that the New York Convention preempts recognition of foreign judgments based on foreign arbitral awards under the Uniform Recognition Act.⁸⁰ *Seetransport* did not address preemption, perhaps, because an earlier controlling decision by the same court already did. However, the district court in *Commissions Import Export*, also declined to follow *Island Territory of Curacao* on the ground that the court’s preemption analysis there “did not implicate” the FAA’s statute of limitations provision specifically.⁸¹

⁷³ *Id.* at *3-4 (quoting *Arizona v. United States*, 132 S. Ct. 2492, 2501 (2012)).

⁷⁴ *Id.* at *4 (internal citations and alterations omitted) (quoting *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 373 (2000)).

⁷⁵ *Id.* at *6.

⁷⁶ *Id.*

⁷⁷ *Id.* at *7.

⁷⁸ *Id.*

⁷⁹ *Id.* at *8.

⁸⁰ See *Seetransport II*, 29 F.3d at 82; *Island Territory of Curacao*, 489 F.2d at 1318.

⁸¹ 2013 WL 76270, at *8.

In applying preemption analysis, the district court dispensed with two arguments of interest advanced by the claimant. As claimant argued, the “principal” purpose of Congress’s enactment of the New York Convention in Chapter 2 of the FAA was to *promote* the recognition and enforcement of arbitration agreements. By seeking enforcement of a foreign judgment recognizing a foreign arbitral award, claimant argued that its application sought to *further* this objective. The district court disagreed, reasoning that if “Congress had been solely concerned with maximizing the enforceability of foreign arbitral awards, it would not have imposed a time-limit as it did.”⁸² Secondly, the claimant observed that Chapter 2 of the FAA is concerned with foreign arbitral awards, and says nothing whatever about foreign *judgments*.⁸³ This in sum is why the Second Circuit in *Island Territory of Curacao* found no preemption.⁸⁴ Here too, the district court disagreed, finding that the legal standard of preemption is broader than this would imply: “[T]he inquiry here” reasoned the court, “is to decipher Congress’s ‘purposes and objectives’ in order to determine whether these would be frustrated . . . and this requires interpreting the full scheme Congress chose to enforce the New York Convention not merely reading each word of the statute in isolation.”⁸⁵

While the preemption analysis in *Commissions Import Export* is carefully confined to the limitations period found in § 207 of the FAA – which is precisely how the court distinguished the Second Circuit’s preemption analysis in *Island Territory of Curacao* – it need not be so confined, for reasons explored below.

V. CONTAINING *CURACAO*

If *Curacao* and its progeny leave open to argument the fate of a foreign judgment based on a foreign arbitral award that is unenforceable under the New York Convention’s Article V defenses, there are at least two legal avenues a U.S. court could pursue to decline recognition of such a judgment. The first would be to revisit the doctrine of preemption under the Supremacy Clause of the U.S. Constitution, as reasoned in *Commissions Import Export*, in a case where the application of state law *would* render enforceable a foreign arbitral award that is otherwise *unenforceable* under the New York Convention’s Article V defenses. The second would be to apply the New York Convention’s Article V defenses in connection with the Uniform Recognition Act.

A. *Preemption*

As the U.S. Supreme Court has explained, the Federal Arbitration Act:

contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration. But even when Congress has not

⁸² *Id.* at *7.

⁸³ *See id.*

⁸⁴ *See* 489 F.2d at 1318-19.

⁸⁵ 2013 WL 76270, at *7 (citing *Crosby*, 530 U.S. at 373).

completely displaced state regulation in an area, state law may nonetheless be pre-empted to the extent that it actually conflicts with federal law – that is, to the extent that it “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”⁸⁶

In *Curacao*, the Second Circuit avoided any preemption issue on the ground that the New York Convention goes “only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards.”⁸⁷ The court therefore concluded that New York’s establishment of a procedure for the enforcement of foreign money judgments is not preempted by the Convention “in the absence of interference with the federal regulatory scheme.”⁸⁸ But the court did not take the further step of considering whether the case before it presented any “interference” – apparently because it was not asked by the appellant to do so. Rather, the argument appears to have been framed as preemption of the entire field of foreign judgments based on foreign arbitral awards, rather than any “actual conflict with federal law” in the circumstances of the particular case.⁸⁹ *Curacao* is best understood not to have addressed a case of “actual conflict.” The district court in *Commissions Import Export* might have distinguished *Curacao* this way, more broadly, rather than by confining its own analysis strictly to the statute of limitations provision.

Notably, U.S. state and federal courts have had numerous occasions to consider the extent to which state law “actually conflicts” with the pro-arbitration policy of the FAA, of which the New York Convention is a part.⁹⁰ In particular, courts have held that where state law would prescribe a different standard of judicial review to determine the enforceability of an arbitration agreement or award, the FAA preempts state law.⁹¹

Arguably, this is what state law would do if it permitted the recognition and enforcement of a foreign arbitral award *qua* judgment that federal law defenses

⁸⁶ Volt Info. Scis., Inc. v. Bd. of Trs., 489 U.S. 468, 477 (1989) (citation omitted).

⁸⁷ 489 F.2d at 1319 (citation omitted).

⁸⁸ *Id.*

⁸⁹ *See id.*

⁹⁰ *See generally* William G. Phelps, *Pre-emption by Federal Arbitration Act* (9 U.S.C.A. §§ 1 et seq.) of State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements, 108 A.L.R. FED. 179 (1992) as supplemented (2012).

⁹¹ *See Apex Fountain Sales, Inc. v. Kleinfeld*, 818 F.2d 1089, 1094 & n.4 (3d Cir. 1987) (suggesting that if the scope of review of an arbitrator’s decision differed as between state law and federal law, then federal law would pre-empt state law under the FAA, but finding it unnecessary to reach the question because Pennsylvania’s standards of review of arbitrator decisions did not materially differ from those applicable under federal law); *Coenen v. R.W. Pressprich & Co.*, 453 F.2d 1209, 1211 (2d Cir. 1972) (“Once a dispute is covered by the [FAA], federal law applies to all questions of interpretation, construction, validity, revocability, and enforceability”); *Allen & Co. v. Shearson Loeb Rhoades, Inc.*, 489 N.Y.S.2d 500, 502 (N.Y. App. Div. 1985), *aff’d*, 490 N.E.2d 850 (N.Y. 1986) (federal law affords the exclusive grounds upon which to vacate an arbitral award that falls within the scope of the FAA).

under Article V of the New York Convention otherwise deemed unenforceable. To be sure, state law in this event would offer *greater* enforceability than federal law, and one might ask how does that interfere with a federal-law policy favoring arbitration? But federal law promotes arbitration not by blindly enforcing its results whatever they may be, but also by providing limits that give shape and boundary to the policy favoring enforceability. In *First Options of Chicago, Inc. v. Kaplan*,⁹² for example, the U.S. Supreme Court characterized the federal pro-arbitration policy in terms of party autonomy – the right to choose arbitration – and found that policy “favor[ed]” Kaplan under the circumstances of the particular case, as the party *resisting* arbitration, rather than First Options as the party seeking to enforce it:

[T]here is no strong arbitration-related policy favoring First Options in respect to its particular arguments here. After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties’ wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms. That policy favors the Kaplans, not First Options.⁹³

In essence, the Court recognized that the pro-arbitration policy favoring the freedom to choose arbitration equally includes the freedom not to choose it. A similar logic may be applied to standards of enforceability. The limitations on enforceability may be as important to the federal policy favoring arbitration as the standards broadly favoring enforceability. As the district court recognized in *Commissions Import Export*, preemption analysis must be “‘informed by examining the federal statute as a whole and identifying its purpose and intended effects.’”⁹⁴ If “maximizing the enforceability of foreign arbitral awards” were the singular objective of the New York Convention “it would not have imposed” Article V defenses or made them applicable in the courts of any jurisdiction where recognition of a foreign arbitral award is sought, regardless of whether the award is enforceable anywhere else, including at the place of arbitration.⁹⁵

One challenge that arises in applying principles of preemption, unaddressed in *Commissions Import Export*, is the applicability of the merger doctrine. Specifically, does a foreign award merge into a foreign judgment for purposes of U.S. law such that, in essence, whatever defenses may have pertained to the award before it was recognized by a foreign court, no longer exist? As noted above, by recognizing the dual-enforceability of either the award or the foreign judgment, New York courts appear to have rejected the applicability of the merger doctrine, even if they have done so only implicitly.⁹⁶ Although no court appears to have

⁹² 514 U.S. 938, 947 (1995).

⁹³ *Id.*

⁹⁴ *Id.* at *4 (quoting *Crosby*, 530 U.S. at 373).

⁹⁵ *Id.* at *7; *see also* New York Convention, Art. V.

⁹⁶ *See Seetransport I*, 989 F.2d at 581-83 (finding foreign award unenforceable under applicable statute of limitations but remanding for consideration of whether a decision by the Court of Appeals of Paris should be enforced separately from the award); *Waterside*,

squarely addressed this question, the New York Convention makes a foreign arbitral award recognizable and enforceable in the United States regardless of whether it has been recognized and enforced by any foreign jurisdiction. The Convention therefore gives rise to a federal-law cause of action to recognize and enforce a foreign award that cannot be said to merge or extinguish as a result of a foreign judgment entered on the award. For example, if a foreign arbitral award is vacated by a foreign court, and judgment entered to that effect, the party in whose favor the award was entered may still seek recognition and enforcement of the award under the New York Convention.⁹⁷ If a foreign award does not merge into a foreign judgment that vacates it for purposes of the New York Convention, then it should no sooner merge into a foreign judgment that confirms it. And if the New York Convention embraces such a non-merger principle in respect of foreign awards as a matter of federal law, then no different result should obtain in state court under state law as that would run afoul of the Supremacy Clause.

A harder question, perhaps, is what to make of Article VII of the New York Convention in this context. It provides that “[t]he provisions of the 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.” Effectively, this provision is a most-favorable-treatment clause that allows enforcing jurisdictions to choose to make foreign arbitral awards even more enforceable under their domestic arbitration law than would the New York Convention⁹⁸ – even to the point of “render[ing] the Convention limits on

737 F.2d at 154 (entertaining the enforceability of awards, and availability of interest thereon, notwithstanding that certain of those awards had already been converted to judgment in England); *Victrix*, 825 F.2d at 714 n.3 (recognizing that *Waterside* appears to foreclose any issue about merger); *Continental Transfert Technique Ltd. v. Federal Gov’t of Nig.*, 800 F. Supp. 2d 161, 164-65 (D.D.C. 2011) (awarding summary judgment recognizing both a foreign arbitral award and a foreign judgment based on that award in the same proceeding); Roth, *supra* note 6, at 586 (arguing that the Second Circuit has adopted a dual-enforcement approach to foreign arbitral awards and foreign judgments); Comment, *supra* note 11, at 239-49 (advocating a non-merger approach to foreign judgments based on foreign arbitral awards).

⁹⁷ See, e.g., Rau, *supra* note 14, at 83 (“One of the most fraught questions in the literature is posed when the courts of the ‘seat’ have exercised their undoubted power to set aside an award made there. What is the fate of the award in states of ‘secondary jurisdiction’? Of course Article V(1)(e) of the Convention makes local annulment a permissible ground for non-enforcement in other states; nevertheless at the same time the syntax – and indeed the whole *raison d’être* – of the Convention, cohere in conveying the message that contracting states remain perfectly free to *ignore* vacatur by the courts of the seat. That is, while Article V provides states of secondary jurisdiction with certain carefully delimited ‘outs’ justifying non-enforcement, nothing prevents them from going further – nothing prevents them from giving enhanced currency to any award at all should they wish to do so.”)

⁹⁸ Just not less favorable treatment, as is prevented by Article III of the Convention. See New York Convention, Art. III (“There shall not be imposed substantially more

recognition irrelevant.”⁹⁹ The question therefore becomes whether this provision, as part of the Convention and part of federal law, avoids any preemption issue if state law affords broader enforceability than the New York Convention.

Properly construed, Article VII seems only to beg the question. A most-favorable-treatment clause that says, in effect, if more favorable treatment is available in an enforcing jurisdiction then the New York Convention shall not take it away, should not of itself be determinative of whether that more favorable treatment exists – lest it result “in a perpetual, self-referential loop, ending only in madness.”¹⁰⁰ Article VII allows contracting states to choose to provide more favorable enforcement terms than the New York Convention. It does not purport to determine what they are.

Further, state law statutes governing the enforcement of foreign judgments do not purport to confer more favorable treatment on foreign arbitral awards than the New York Convention, as they are concerned with judgments, not with arbitral awards. More favorable treatment results by happenstance, not by deliberative legislative choice.

Nor can Article VII fairly be read to have intended as a matter of U.S. law to subordinate Article V’s defenses – which plainly apply as federal law – to state-law provisions applicable to foreign judgments in state courts. It would defy settled rules of statutory interpretation to construe Article VII to take away what Article V of the same statute provides.¹⁰¹

One final challenge in relation to preemption is that the New York Convention’s Article V defenses are discretionary, not mandatory. A court does not have to decline recognition of an award that runs afoul of the New York Convention’s defenses. Because the enforceability of a foreign arbitral award is discretionary under federal law, does state law really create any “actual conflict” with federal law if it permits enforcement *qua* judgment of a foreign award that is only *permissibly* unenforceable under federal law?

To this observation, it can be said that discretion only goes so far. Courts may not abuse their discretion, which is therefore bounded. As a practical matter, the New York Convention’s defenses to enforcement are sufficiently limited and fundamental to begin with that a foreign arbitral award that runs afoul of them is unlikely to be enforced – and perhaps equally unlikely to be enforceable within a court’s bounded discretion. But above all, the conflict between federal and state law arises not so much from how a U.S. court chooses to exercise whatever

onerous conditions . . . 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”).

⁹⁹ Rau, *supra* note 14, at 103.

¹⁰⁰ *Id.* at 105.

¹⁰¹ *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259, 1268 (2011) (“[S]tatutes should be read to avoid making any provision ‘superfluous, void, or insignificant’”) (citation omitted); *Peck v. Jenness*, 48 U.S. 612, 623 (1849) (“One portion of a statute should not be construed to annul or destroy what has been clearly granted by another”).

discretion it may have in a particular case. Rather, conflict comes from state law displacing any discretionary federal-court review of the award under the New York Convention, altogether. A defective foreign award ends up being enforceable only because it is subject to no federal-law review.

Fotochrome and *Seetransport* do not offer a compelling solution to this conflict. They effectively cede to a foreign court the application of New York Convention defenses – or something similar – for purposes of enforcing a foreign judgment confirming a foreign arbitral award. This arguably runs counter to the New York Convention – adopted as federal law policy – to make arbitral awards easier and faster to enforce. It invites a prevailing party to pursue duplicative litigation and to forum shop for a foreign jurisdiction willing to confirm a flawed award as a judgment, which can then be enforced as a judgment, to the preclusion of any New York Convention review of the underlying award. U.S. courts become embroiled in comparative law arguments rather than simply applying the New York Convention defenses as the New York Convention contemplates they do notwithstanding what a foreign court may do with the award.

B. *Application of New York Convention Defenses Under the Uniform Recognition Act*

Another way to temper *Curacao*'s dual-enforceability principle in a case of an unenforceable award could be to apply the New York Convention's Article V defenses under the Uniform Recognition Act. The New York Convention – as federal law – also applies as the law of each of the fifty states.¹⁰² There may be two avenues for applying Convention defenses as part of the Uniform Recognition Act.

First, under the Uniform Recognition Act, a foreign judgment need not be recognized if the cause of action or claim for relief on which the judgment is based is “repugnant to the public policy of the state.” The question then is whether a foreign judgment based on a claim for recognition of an unenforceable arbitral award can be characterized as “repugnant” to state “public policy.”

As noted above, the public policy defense is narrow. New York's highest court has explained that it cannot be triggered merely by a conflict between New York law and that of another jurisdiction, or by mere issues of risk allocation under a contract. Rather, it is confined to vindicating “fundamental principle[s] of justice,” a “prevalent conception of good morals” or a “deep-rooted tradition of the common weal.”¹⁰³ It may be difficult to say that the imposition of a contractual liability on a particular non-signatory, for example, or the fact that a foreign court has different arbitration laws and rules from those of the United

¹⁰² See *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990) (“Federal legislation applies in all States”); *Pitrone v. Mercadante*, 572 F.2d 98, 101 (3d Cir. 1978) (“By virtue of the [S]upremacy [C]lause . . . federal law is state law”).

¹⁰³ See, e.g., *Welsbach Elec. Corp v. MasTec N. Am., Inc.*, 859 N.E.2d 498, 501 (N.Y. 2006); *Loucks v. Standard Oil Co.*, 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.).

States, resulting in a different outcome, rises to the level of repugnancy to public policy. Further, the public policy implications may vary from one case to the next, and be stronger or weaker depending on the particular reasons why an underlying arbitral award would be considered unenforceable under the New York Convention. A complete denial of due process on the part of the arbitrators may come closer to “repugnancy” than a case where the arbitrators held a non-signatory liable on legal grounds recognized at the seat of arbitration but not in the United States. And yet, for the applicability of the New York Convention defenses to vary depending on the particular circumstances of the case seems an unwieldy and unsatisfying way to review foreign judgments based on foreign arbitral awards.

The case for applying the New York Convention’s defenses as the public policy of the state may be stronger when viewed as a matter of federalism. If unenforceable foreign arbitral awards can bypass the New York Convention as foreign money judgments in state courts – whatever the reason may be for the unenforceability of the award – arguably this subverts federal – and state – policy to promote arbitration, for the reasons discussed previously.¹⁰⁴ As the Second Circuit has recognized, the “balance” between the broad enforceability of arbitral awards and its limitations “would be eviscerated, and the integrity of the arbitration process could be compromised, if parties could require that awards, flawed for any of the[] reasons [recognized by those limitations], must nevertheless be blessed” by the courts.¹⁰⁵ In short, the same considerations animating a potential preemption issue may also be cast in public policy terms.

A second way to potentially apply Convention defenses under the Uniform Recognition Act would be in respect of the defense to enforcement of a judgment that conflicts with another final and conclusive judgment. The New York Court of Appeals held in 2008 that *res judicata* principles governing the recognition of conflicting judgments depending on when in time they are entered have no application to foreign judgments under New York’s version of the Uniform Recognition Act.¹⁰⁶ The court explained that New York courts are free to decide under the Act, in their discretion, whether to recognize an earlier judgment, a later judgment, or neither, when they conflict.¹⁰⁷

To be sure, when a foreign judgment based on a foreign arbitral award is presented for recognition in a U.S. court, presumably there is no other final and conclusive judgment in conflict with it – at that point in time. But insofar as the foreign award is not merged in the foreign judgment, federal and state courts

¹⁰⁴ *Cf. First Options*, 514 U.S. at 947.

¹⁰⁵ *Hoefl v. MVL Group, Inc.*, 343 F.3d 57, 64 (2d Cir. 2003), *overruled on other grounds by Hall St. Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008). *See also* Comment, *supra* note 11, at 245 (“[A]n award invalid under federal law is, by virtue of the supremacy clause, repugnant to the policy of all states”).

¹⁰⁶ *See Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*, 885 N.E.2d 191, 194 (N.Y. 2008).

¹⁰⁷ *See id.* at 193.

would have jurisdiction under the Convention to enter a U.S. judgment either recognizing the foreign award or declining to do so – but for a tactical choice by the plaintiff not to present the award for recognition.¹⁰⁸ The Uniform Recognition Act might be construed to capture a conflict in substance, if not in form, where a foreign judgment is based on an unenforceable award that is subject to a U.S. judgment to that effect. A court may be seized of jurisdiction under this provision, in its discretion, to consider New York Convention defenses of a party opposing recognition of the foreign judgment to the underlying award on which it is based. A judgment of a U.S. court that the underlying award is not enforceable would, arguably and in view of the statute’s purpose, “conflict” with a foreign judgment finding that the award is enforceable.

VI. CONCLUSION

The Second Circuit has paved a difficult path to follow when recognizing and enforcing foreign judgments based on foreign arbitral awards. The case law is hard to reconcile and continues to develop in a direction that arguably undermines important federal policy objectives. Those objectives include balancing the broad enforceability of arbitral awards with defenses that equally protect the integrity and legitimacy of the arbitral process, and discouraging duplicative litigation and undesirable tactical behavior in relation to the international enforcement of arbitral awards. Still, opportunities may exist to navigate the existing case law to prevent enforcement “by circumvention.”

¹⁰⁸ *Cf.* *ICC Chem. Corp. v. TCL Indus. (Malay.) SDN, No. 06-1393-cv*, 2006 WL 3406836, at *2 (2d Cir. Nov. 21, 2006) (assuming, without deciding, that the New York Convention conferred jurisdiction on a U.S. court to collaterally review a Singapore court’s arbitrability determination that parties to an agreement had not agreed to arbitration in New York, for purposes of a claim for declaratory relief that any judgment entered by the Singapore court would not be enforceable in New York).

