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# *Shaffer's* Footnote 36

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# *SHAFFER'S* FOOTNOTE 36

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## I. INTRODUCTION

A scholar once said that "[a]rbitration proceeds in the shadow of government power at several stages."[1] Lately, this has become an understatement. Today, when referring to the enforcement of foreign arbitral awards in the United States under the New York Convention,[2] it would be fairer to say that arbitration proceeds not in the shadow of governmental power, but rather at the mercy of judicial parochialism.

In a recent opinion, *Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory*,[3] the U.S. Court of Appeals for the Fourth Circuit held that, in order to enforce a foreign arbitral award against assets present in its jurisdic-

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1 William W. Park, *Amending the Federal Arbitration Act*, 13 AM. REV. INT'L ARB. 75, 98 (2002).

2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

3 283 F.3d 208 (4th Cir. 2002).

tion, the subject property must be related to the underlying cause of action.[4] Soon thereafter, the U.S. Court of Appeals for the Ninth Circuit in *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*[5] reasoned the opposite: relatedness to the cause of action is not necessary for a court to enforce an award against assets present in the forum.[6] Other courts, including the U.S. Court of Appeals for the Second Circuit, have followed the rationale behind the latter holding and rejected that of the former.[7] The split can be summarized as a division on the question of whether the assets targeted in an enforcement action must be the subject of (or related to) the underlying cause of action.[8]

Adding to the controversy, those U.S. state courts that have addressed the issue have held that foreign judgments may be enforced within their jurisdiction based on the presence of assets alone.[9] These state courts, unlike the Fourth

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[4] *Id.* at 211 ("[T]he mere presence of seized property in Maryland provides no basis for asserting jurisdiction when there is no relationship between the property and the action . . . ."). A few months after the Fourth Circuit decided *Base Metal*, the Court of Appeals for the Third Circuit dodged this issue. In an unpublished opinion, the Third Circuit declined to address whether the presence of assets in a jurisdiction is enough to enforce a foreign arbitral award because the moving party had not advanced this theory in the lower court. Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory, No. 01-3348, 2002 WL 31002609, at *4 (3d Cir. Sept. 5, 2002).

[5] 284 F.3d 1114 (9th Cir. 2002).

[6] *Id.* at 1127 ("Considerable authority supports [the] position that [a foreign arbitral award] can [be] enforce[d] [against an award debtor's] property in the forum even if that property has no relationship to the underlying controversy between the parties.").

[7] *See, e.g.*, Dardana Ltd. v. Yuganskneftegaz, 317 F.3d 202, 206-08 (2d Cir. 2003); CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733(DC), 2001 WL 1035138, at *3-4 (S.D.N.Y. Sept. 10, 2001).

[8] A sub-issue that lurks in the background is whether the presence of assets in the enforcing jurisdiction is even necessary before a court may confirm an award. The U.S. Court of Appeals for the District of Columbia raised this issue when it noted in *Creighton Ltd. v. Government of Qatar* that:

> It is implausible that a defendant in Connecticut who had agreed to arbitrate all disputes in New York, and thereby implicitly waived any objection to personal jurisdiction in a suit brought in New York to enforce the resulting arbitral award, also waived its objection to personal jurisdiction in such an action brought in California merely because the full faith and credit clause would make a valid New York judgment enforceable in the courts of California.

181 F.3d 118, 126 (D.C. Cir. 1999). For a more in-depth discussion of this issue see *infra* Part VI.

[9] *See* Joseph E. Neuhaus, *Current Issues in the Enforcement of International Arbitration Awards*, 36 U. MIAMI INTER-AM. L. REV. 23, 29 & n.29 (2004) (citing Huggins v. Deinhard, 654 P.2d 32, 37 (Ariz. Ct. App. 1982)); Bank of Babylon v. Quirk, 472 A.2d 21, 22-23 (Conn. 1984); Tabet v. Tabet, 644 So. 2d 557, 559 (Fla. Dist. Ct. App. 1994); Williamson v. Williamson, 275 S.E.2d 42, 44-45 (Ga. 1981)).

Although federal district courts have original jurisdiction over all proceedings under the New York Convention regardless of the amount in controversy, *see* 9 U.S.C. § 203 (2000), state law governs recognition and enforcement of foreign judgments. *See also id.* § 205 (providing for removal of "an action or proceeding pending in a State court" that "relates to an arbitration agreement or award falling under the [New York] Convention").

Circuit, have not required the assets to be related to the cause of action. Of course, in the context of arbitral awards, these opinions raise a more basic question: should a foreign judgment receive more favorable treatment in U.S. state courts than foreign arbitral awards in U.S. federal courts?

As it is, the aforementioned circuit court opinions have also unearthed a major question posed by many commentators and academics in the years since the Supreme Court's landmark decision *Shaffer v. Heitner*.[10] In *Shaffer*, the Court held that all assertions of jurisdiction must comply with the minimum contacts test "set forth in *International Shoe* [*Co. v. Washington*][11] and its progeny."[12] Yet, as a well-known scholar observed merely a year after the *Shaffer* opinion:

> The crucial question . . . is whether [the] limited exposure [of quasi in rem subtype II], as contrasted with the general exposure achieved by in personam rules, makes the exercise of in rem jurisdiction reasonable in circumstances in which assertion of in personam jurisdiction would go too far. Only the answer to this question can resolve whether in rem rules have a continuing utility.[13]

That is, the *Shaffer* Court did not explicitly state whether the minimum contacts test was at all influenced by the nature and procedural posture of a proceeding.

In light of these issues, this article will address two basic points. First, it will propose that foreign arbitral awards should be treated no differently than foreign judgments. A contrary approach could undermine the theory behind the New York Convention:[14] that it "makes it far easier to enforce arbitral awards

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This "split" between state and federal courts accentuates the awkwardness of not having a unified federal standard to deal with the recognition and enforcement of foreign judgments and arbitral awards. *See* 18B CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4473 (2d ed. 2002) ("It is intrinsically awkward to confront foreign judgments with the potentially divergent law of fifty states and federal courts, and recognition of foreign judgments at least touches concerns of foreign relations in which the national government has paramount interests.").

10 433 U.S. 186 (1977).

11 326 U.S. 310 (1945).

12 *Shaffer*, 433 U.S. at 212.

13 Hans Smit, *The Enduring Utility of In Rem Rules: A Lasting Legacy of* Pennoyer v. Neff, 43 BROOK. L. REV. 600, 614 (1977); *see also* Linda J. Silberman, Shaffer v. Heitner*: The End of an Era*, 53 N.Y.U. L. REV. 33, 77 (1978) (noting that *Shaffer*'s "majority opinion implied that the Court would still permit attachment for post-judgment enforcement purposes").

14 Albert Jan van den Berg, *Recent Enforcement Problems under the New York and ICSID Conventions*, 5 ARB. INT'L 2, 2 (1989) ("The effectiveness of international arbitration depends ultimately on . . . whether the arbitral award can be enforced against the losing party.").

than it is to enforce [foreign] judgments."[15] Second, this Article will posit that the presence of assets alone, however unrelated to the underlying cause of action they may be, should be enough to meet the minimum contacts test during a post-award proceeding.[16] As such, the Article will argue that "[p]roceedings to enforce a foreign arbitration award *against [any] assets located in [the enforcing forum's] jurisdiction* should not require the same showing of personal jurisdiction to satisfy due process as would a complaint seeking determination of the merits of the controversy, because the merits have already been determined."[17]

In the course of doing so, Section II of this piece gives an overall picture of the New York Convention and its goals. Of special importance to this section is the discussion of "floating" awards and how this conceptualization of arbitral awards as hovering over the losing party's assets furthers the goals of the New York Convention. Section III then discusses the limits that U.S. constitutional doctrine and jurisprudence place on the enforcement of arbitral awards subject to the New York Convention.

Section IV discusses the difference between personal and quasi in rem jurisdiction while also highlighting the difference between pre- and post- judgment proceedings. It is in this context that the piece addresses the Supreme Court's holding in *Shaffer*, with *Shaffer*'s footnote 36 taking center stage. Section IV also notes that the Supreme Court understood the minimum contacts test to be a flexible standard—different types of proceedings call for different application of the test. Section V then argues that this flexible approach should apply with equal force to arbitral awards as it does to domestic and foreign court judgments.

Section VI explains why a more flexible approach to the minimum contacts test during post-judgment proceedings is adequate to protect a party's due process rights. In so doing, it concludes that relatedness to the cause of action is a requirement that is appropriate in pre-judgment proceedings but that need not be bootstrapped onto post-judgment proceedings.

## II. THE NEW YORK CONVENTION AND "FLOATING" AWARDS

Most arbitral awards are never subject to the state or judicial action of any given jurisdiction. Having agreed to arbitrate their claims (and, consequently, to respect the decision of the arbitral tribunal), most losing parties voluntarily comply with the terms and conditions of an arbitral award.[18] Moreover, even if the winning party is faced with a recalcitrant loser and judicial action is

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[15] Robert B. von Mehren, *Enforcement of Foreign Arbitral Awards in the United States*, 18 INT'L ARB. L. REV. 198, 198 (1998).

[16] The phrase "post-judgment/award proceeding(s)" is used in this article to refer to actions to enforce domestic judgments, foreign judgments, or foreign arbitral awards.

[17] Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1127 (9th Cir. 2002).

[18] GEORGE GOLDBERG, A LAWYER'S GUIDE TO COMMERCIAL ARBITRATION 59 (2d ed. 1983).

required, the winning party may not have to travel far to seek redress. An award may be confirmed and enforced in the jurisdiction where it was rendered in much the same manner as a local judgment would be.[19]

Matters could be a bit more difficult when a losing party refuses to pay, and none of the losing party's assets are located in the jurisdiction where the award was rendered. In that case, the winning party may have no other option but to go search for those assets in whatever other jurisdictions they might be found.[20] The New York Convention is one of the mechanisms available to a winning party, which the party may use to enforce a valid arbitral award in jurisdictions other than the one where it was rendered. Described as the most significant international commercial arbitration agreement currently in place,[21] the success of the New York Convention lies primarily in its practicality and its convenience.

The relevance of the New York Convention, however, is better understood when discussed in its historical context. Under the Geneva Convention,[22] the predecessor to the New York Convention, the winning party in an arbitration that wished to enforce the award outside of the situs of the arbitration had to pursue two separate judicial proceedings: the first in the forum country, to confirm the award, and the second in the foreign jurisdiction, to enforce the award.[23] Double *exequatur*, as this procedural requirement is known, "was an unnecessary time-consuming hurdle . . . and greatly limited [the Geneva Convention's] utility."[24]

The New York Convention eliminated the requirement of double *exequatur*. Under the New York Convention, there is no need to have the award confirmed in the court of the forum in which it was rendered. Indeed, the New York Convention simplified the process by making arbitral awards enforceable

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19 *Compare* footnotes 84-86 and accompanying text *infra* (describing how a domestic judgment is enforced), *with* footnote 31 *infra* (numbering the challenges that may be raised in a proceeding brought to enforce a foreign arbitral award subject to the New York Convention).

20 Marc J. Goldstein & Andrea K. Bjorklund, *International Commercial Dispute Resolution*, 36 INT'L LAW. 401, 406-407 (2002) ("Enforcement of an award in the domiciliary state of the award debtor may be difficult for many reasons, and so the award creditor may be inclined to seek enforcement in a pro-enforcement jurisdiction where . . . the award debtor may . . . have assets subject to attachment . . . .").

21 *See, e.g.*, ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1 (1981) (describing the New York Convention as the "most important convention of modern times in the field of international commercial arbitration").

22 Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 301.

23 VAN DEN BERG, *supra* note 21, at 7.

24 Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997) (citations omitted); *see also* Jan Paulson, *The Role of Swedish Courts in Transnational Commercial Arbitration*, 21 VA. J. INT'L L. 211, 212 (1981) (noting that having to seek enforcement of an award first in the forum where it was rendered was unduly cumbersome).

immediately in all countries that are signatories to the Convention.[25] As one of the leading experts in the field explained:

> [O]ne of the most important features of an award in an international commercial arbitration is that it should be readily transportable. It must be capable of being taken from the state in which it was made, under one system of law, to other states in which it is able to qualify for recognition and enforcement, under different systems of law. To render an award effective, means must be available internationally and not simply in the country in which the award is made.[26]

That is precisely what the New York Convention accomplished. Quite simply, it "liberalized procedures for enforcing foreign arbitral awards."[27] Under the New York Convention, an arbitral award is a "floating" award, ready to strike like lighting in any jurisdiction where the losing party has assets.[28]

This simple process provides certainty to parties when they are negotiating an international commercial agreement. The arbitration clause, as a practical matter, serves as a choice of forum clause which avoids the problem of not knowing where a suit could be brought by one contracting party against the other. In so doing, the process facilitates international business transactions.[29] Even the Supreme Court noted, in *Scherk v. Alberto-Culver Co.*, that "'much uncertainty and possibly great inconvenience to both parties could arise . . . if jurisdiction were left to any place (where personal or *in rem* jurisdiction might

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[25] Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (explaining that the New York Convention was designed "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which . . . arbitral awards are enforced . . . .").

[26] ALAN REDFERN & MARTIN HUNTER, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 438-439 (2004).

[27] *Yusuf*, 126 F.3d at 22 (quoting Jane L. Volz & Roger S. Haydock, *Foreign Arbitral Awards: Enforcing the Awards against the Recalcitrant Loser*, 21 WM. MITCHELL L. REV. 867, 878 (1996)).

[28] There is a caveat to this statement. Article I(3) of the New York Convention allows states to limit their commitment to recognize and enforce foreign arbitral awards to those rendered in the territory of another contracting state. *See* New York Convention, *supra* note 2, at art. I(3). The United States requires that the award be made in the territory of a contracting state. 9 U.S.C. § 201 (2000).

[29] Indeed, in ratifying the New York Convention, Congress was fully aware that it would facilitate international commercial dispute-resolution and, consequently, aid U.S. companies' expansion into global markets. *See* S. Rep. No. 91-702, at 3 (1970) ("[The bill] will serve the best interests of Americans doing business abroad by encouraging them to submit their commercial disputes to impartial arbitration for awards which can be enforced in both U.S. and foreign courts.").

be established).'"[30] By that same token, after a full and fair proceeding in the forum of their own choosing, the corresponding certainty of being able to hunt down a debtor's assets wherever in the world they might be found is a winning party's ideal scenario.

To be sure, the New York Convention does not give carte blanche to the winning party to enforce an arbitral award without restrictions. Under the New York Convention, a court may refuse to recognize a foreign arbitral award if the losing party was "not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present [its] case."[31] Furthermore, and perhaps not surprisingly, arbitral rules often have a provision addressing the parties' due process concerns. For example, Article 15(2) of the International Chamber of Commerce provides that "[i]n all cases, the Arbitral Tribunal shall act fairly and impartially and ensure that each party has a reasonable opportunity to present its case."[32] Moreover, as the next section discusses, there are other due process concerns that may limit the possibility of enforcing a foreign arbitral award in the United States and, consequently, give new meaning to the cliché "so close, yet so far away."

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[30] 417 U.S. at 518 (quoting The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1971)). The Court also noted that "[t]he elimination of all such uncertainties by agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting." *Id.* (quotation omitted); *see also Bremen*, 407 U.S. at 11-12 ("Not surprisingly, foreign businessmen prefer . . . to have disputes resolved in their own courts, but if that choice is not available, then in a neutral forum with expertise in the subject matter."). For a discussion of the advantages, real or perceived, of international arbitration in cross-border transactions, see Park, *supra* note 1, at 89-94.

[31] New York Convention, *supra* note 2, at art. V(1)(b). This ground for dismissal guarantees that the parties' due process rights will not be violated. Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L.J. 1049, 1067 (1961) (stating that Article V.1(b) incorporates basic principles of due process).

Other grounds for dismissal are: (1) the parties to the arbitration agreement lacked capacity or the agreement was not legally valid; (2) the award deals with a matter not submitted to arbitration or beyond the scope of submission; (3) the arbitral authority or procedure was not agreed to by the parties; or (4) the award was not yet binding or had been set aside or suspended in the enforcement forum. New York Convention, *supra* note 2, at art. V(1). Enforcement may also be refused if "[t]he subject matter of the difference is not capable of settlement by arbitration" or if "recognition or enforcement of the award would be contrary to the public policy of [the signatory nation where enforcement is sought]." *Id.* at art. V(2). These specified grounds for denial of enforcement are exclusive. *See, e.g., Yusuf*, 126 F.3d at 23 (noting that judicial review of arbitral awards under the New York Convention is "very limited . . . in order to avoid undermining the twin goals of arbitration, namely, settling disputes efficiently and avoiding long and expensive litigation") (quoting Folkways Music Publishers, Inc. v. Weiss, 989 F.2d 108, 111 (2d Cir. 1993)).

[32] Art. 15(2) of the International Chamber of Commerce Rules on International Commercial Arbitration, *available at* http://www.iccwbo.org/ court/english/arbitration /pdf_documents/ rules /rules_arb_english.pdf.

## III. ANCHORING THE FLOATING AWARD TO THE UNITED STATES

Although the New York Convention provides a liberal framework for the recognition and enforcement of foreign arbitral awards, it does not do so in a vacuum. To the contrary, when the rubber meets the road, an arbitral award is subject to the enforcing forum's procedures.[33] The New York Convention explicitly requires "[e]ach Contracting State [to] recognize arbitral awards as binding and [to] enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in [various provisions of the Convention]."[34]

In the United States, the recognition and enforcement of a foreign arbitral award is subject to the constitutional requirements of procedural due process.[35] This limitation is embedded in the Due Process Clause of the U.S. Constitution, which provides that a "state [cannot] deprive any person of life, liberty, or property, without due process of law . . . ."[36] This constitutional mandate makes it clear that U.S. courts must exercise some restraint before enforcing a foreign arbitral award. This section briefly discusses how the Due Process Clause and a corresponding set of jurisdictional requirements may stand in the way of an award's enforcement by requiring that it be anchored to "something" or "someone" in the United States.[37]

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[33] *See* New York Convention, *supra* note 2, at art. III.

[34] *Id.*

[35] Procedural due process refers to the set of procedures that a state or federal government must follow before it can deprive a person of her life, liberty, or property. Common examples of procedural due process issues are what kind of notice and what kind of hearing a person is entitled to before the government can take a particular action. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW PRINCIPLES AND POLICIES 523-24 (2d ed. 2002).

[36] U.S. CONST. amends. V & XI; *see also* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985) ("[T]he Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures."); Ins. Corp. of Ir., Ltd. v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 (1982) ("The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause.").

The Fourteenth Amendment binds the states, and the Fifth Amendment binds the federal government. As a general matter, the constitutional analysis that follows is one and the same for proceedings brought in state or federal courts because the Federal Rules of Civil Procedure adopt state law as the federal law of territorial jurisdiction. *See* Fed. R. Civ. P. 4(k)(1) ("Service of summons . . . is effective to establish jurisdiction over the person of a defendant . . . who could be subjected to the jurisdiction of a court of general jurisdiction in the state in which the district court is located . . . ."). Moreover, given that many states' jurisdictional statutes expand the exercise of jurisdiction to the constitutional limits, the minimum contacts inquiry boils down to whether the exercise of jurisdiction is consistent with due process. *See, e.g.*, Base Metal Trading, Ltd. v. OJSC Novokuznetsky Aluminum Factory, 283 F.3d 208, 212-13 (4th Cir. 2002).

[37] Although the Federal Arbitration Act ("FAA") grants federal courts the subject matter jurisdiction to hear actions to enforce arbitral awards, it does so only to the extent that is constitutionally permissible. *See* 9 U.S.C. § 207 (2000) (allowing for confirmation of a foreign arbitral award by application to any court "having jurisdiction"); Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1122 (9th Cir. 2002) ("Interpreting the FAA to dispense with the

The operative words in the constitutional hurdle that litigants have to leap to get closer to the enforcement of a foreign arbitral award are "minimum contacts." This term is the constitutional formulation of a "test"[38] that finds its basis in the two complementary and sometimes competing goals of the Due Process Clause. As the Supreme Court itself noted:

> The concept of minimum contacts . . . perform[s] two related, but distinguishable, functions. It protects the defendant against the burdens of litigating in a distant or inconvenient forum. And it acts to ensure that the States through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system.[39]

Put simply, the minimum contacts test requires that the defendant "have certain . . . contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"[40]

The minimum contacts test thus serves as a constitutional umbrella encompassing two tests: the "power" test and the "fairness," or "reasonableness," test.[41] On the one hand, the power test looks at the pre-litigation contacts with the state and asks whether these contacts are the result of the defendant's purposeful actions.[42] On the other hand, the fairness test aims at determining whether the "relationship between the defendant and the forum" makes it reasonable to require the defendant to defend a particular suit brought in the fo-

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jurisdictional requirements of Due Process in actions to confirm arbitral awards would raise clear questions concerning the constitutionality of the statutes."); *cf. Ins. Corp. of Ir.*, 456 U.S. at 702 ("The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty."); Gilson v. Ireland, 682 F.2d 1022, 1028 (D.C. Cir. 1982) ("[A] statute cannot grant personal jurisdiction where the Constitution forbids it . . . .").

[38] This piece refers to "minimum contacts" not as a preliminary step in the constitutional analysis, but as the conclusion of that analysis. However, the Supreme Court's jurisprudence has suggested that the term "minimum contacts" means a "quantum of contacts." *See* ROBERT C. CASAD & WILLIAM M. RICHMAN, JURISDICTION IN CIVIL ACTIONS 147-48 (3d ed. 1998). Regardless of what is the "correct" interpretation or definition of the phrase, the analysis and overarching principles described in this section remain the same.

[39] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291-92 (1980).

[40] Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)).

[41] Hanson v. Denckla, 357 U.S. 235, 253 (1958).

[42] *Id.* at 253 ("[T]here [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protection of its laws."); *World-Wide Volkswagen*, 444 U.S. at 294-295 (noting that "[e]ven if the defendant would suffer minimal or no inconvenience . . .; even if the forum State has a strong interest in applying its law to the controversy; even if the forum State is the most convenient location for the litigation[,]" there can be no jurisdiction without purposefully established contacts).

rum.[43] These two sub-tests are cumulative; that is, "power must exist and its exercise must not be unreasonable."[44]

Another layer of constitutional analysis that affects the understanding and application of the minimum contacts test is the distinction between general and specific jurisdiction. General jurisdiction allows a court to adjudicate any claim, including those claims that are not intimately related to the defendant's contacts with the state, upon a showing that the defendant's contacts are of a "continuous and systematic" nature.[45] Specific jurisdiction allows a court to adjudicate only those claims that are "related to" the defendant's contacts with the state. As such, the court's power can be fairly exercised only to the extent that it is used to address a cause of action that arises out of the defendant's contacts with the forum, and those contacts cannot be random, fortuitous, or attenuated.[46] In short, the defendant's contacts with the forum must be "such that [it] should reasonably anticipate being haled into court there."[47]

Perhaps the only clear pronouncement by the Supreme Court regarding the minimum contacts test is its admission that the test "is not susceptible of mechanical application."[48] If anything, it is more like a sliding scale, with general and specific jurisdiction being the two opposite ends.[49] In other words, the more contacts a defendant purposefully establishes with a given forum, the more reasonable it is for a court in that forum to exert its power over that defendant. (This is true even if the cause of action is not directly related to a defendant's contacts with the state.) Similarly, the fewer contacts a defendant purposefully establishes with a given forum, the less reasonable it is for a court in that forum to exert its power over that defendant. In those circumstances, the minimum contacts requirement dictates that a court may exercise only specific jurisdiction over the defendant and adjudicate actions that arise out of those limited contacts with the forum.

Determining what is a fair and reasonable exercise of judicial power in light of a party's contacts with a state or the United States is no easy feat.[50] Yet,

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43 *World-Wide Volkswagen* , 444 U.S. at 292 (quoting *Int'l Shoe*, 326 U.S. at 317).

44 KEVIN M. CLERMONT, CIVIL PROCEDURE: TERRITORIAL JURISDICTION AND VENUE 20 (1999); CASAD & RICHMAN, *supra* note 38, at 138.

45 *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416-17 (1984).

46 Burger King Corp. v. Rudzewicz, 471 U.S. 462, 473 (1985).

47 *World-Wide Volkswagen*, 444 U.S. at 297. In *World-Wide Volkswagen*, the Court found that "the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." *Id.*

48 Kulko v. Superior Court, 436 U.S. 84, 92 (1978); *see also Burger King Corp.*, 471 U.S. at 477 ("These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required.").

49 CASAD & RICHMAN, *supra* note 38, at 163.

50 "[A]ny inquiry into 'fair play and substantial justice' necessarily requires determinations 'in which few answers will be written in 'black and white. The greys are dominant and even among

there are some factors that may guide litigants and courts in determining whether a court may subject a party to its jurisdiction. These are: (a) the burden on the defendant in litigating in the forum; (b) the forum state's interest in adjudicating the dispute; (c) the plaintiff's interest in obtaining convenient and effective relief; (d) the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and (e) the several states' shared interest in furthering fundamental substantive social policies.[51] "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of . . . contacts than would otherwise be required."[52]

Another factor that should serve as a framework to an analysis of these considerations is the nature and procedural posture of an action. For example, the minimum contacts test should take into account the difference between an action brought to resolve a breach of contract dispute and an action to enforce a judgment against assets located in the jurisdiction. Again, the idea of a sliding scale comes to mind, with pre-judgment actions in one extreme and post-judgment actions in the other. The sections that follow address why a more flexible approach is warranted at the back-end of the process in an enforcement proceeding.

## IV. A FLEXIBLE AND REASONABLE APPROACH TO A MINIMUM CONTACTS ANALYSIS

The past section showed that the minimum contacts test, although ambiguous, is also flexible. To be sure, a court's jurisdictional power over a party must always comply with the constitutional requirements set forth in the minimum contacts test.[53] This section, however, argues that the Court in *Shaffer* understood that the difference between pre-judgment and post-judgment proceedings calls for different applications of this test. To do so, this section briefly discusses the difference between in personam and quasi in rem actions. A discussion of *Shaffer* and its footnote 36 serves as a backdrop to this discussion.

At the root of the minimum contacts test's flexibility is its all-inclusiveness; the minimum contacts test applies to all categories of jurisdiction.[54] There are three categories of jurisdiction: one directed towards persons – in personam (or personal) jurisdiction – and two directed towards things – in

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them the shades are innumerable.'" *Burger King*, 471 U.S. at 486 n.29 (quoting *Kulko*, 436 U.S. at 92).

51 *Id.* at 477 (citing *World-Wide Volkswagen*, 444 U.S. at 292).

52 *Id.*

53 Shaffer v. Heitner, 433 U.S. 186, 207 (1977).

54 *Id.* at 211. *But see* Burnham v. Superior Court, 495 U.S. 604, 620-21 (1990) (noting that *Shaffer* did not hold that "all bases of assertion of *in personam* jurisdiction . . . must be treated alike and subjected to the 'minimum contacts' analysis of *International Shoe*").

rem and quasi in rem jurisdiction.[55] The practical difference between the three categories of jurisdiction is that they describe diverging ways in which a court may affect the interests or rights of a defendant. Whereas a court that has in personam jurisdiction over a defendant may render a judgment imposing personal liability on that defendant, a court that has in rem or quasi in rem jurisdiction can only bind the property before it.[56] Logically, then, a defendant's exposure to liability and a plaintiff's possibility of recovery are greater if a court has personal jurisdiction over the defendant.[57]

Another key feature of in personam jurisdiction is that the resulting judgment offers the winning party the possibility of interstate enforcement. A valid in personam judgment rendered in any state of the United States is entitled to full faith and credit in the courts of every sister state.[58] The Supreme Court said it best when it explained that "a debtor can[not] avoid paying his obligation by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him. The Full Faith and Credit Clause, after all, makes the valid *in personam* judgment of one State enforceable in other sister States."[59]

In practice, what gives personal jurisdiction such a broad reach and virtually unlimited enforcement possibilities is quasi in rem jurisdiction subtype II or, as it is more commonly known, attachment jurisdiction. This category allows a court to exert jurisdiction over a designated property and to render a judgment that affects only the interests of particular individuals in such property.[60] Attachment jurisdiction is therefore commonly used to either secure a

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[55] Categorization of an action is a vestige of a time in which the power test was king. *See* Pennoyer v. Neff, 95 U.S. 714 (1877); Silberman, *supra* note 13, at 44-45 (explaining that the theory behind the categories of jurisdiction was the "'power' theory of jurisdiction" which, in turn, was based on two principles: "that 'every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory'" and "that 'no tribunal established by [a state] can extend process beyond [its] territory so as to subject either persons or property to its decisions'") (quotation omitted).

[56] CASAD & RICHMAN, *supra* note 38, at 179-80; CLERMONT, *supra* note 44, at 7-8.

[57] Greater exposure to liability, however, does not mean that there are no limits as to what can be adjudicated in an in personam action. The principles of general and specific jurisdiction, of course, apply to in personam jurisdiction and help define – and narrow, as the case may be – the cause of actions to which a defendant may be liable.

[58] According to Article IV, § 1 of the U.S. Constitution, "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof." Although some commentators argue that Congress has done little under its authority to implement the clause, *see, e.g.*, ROBERT LEFLAR, AMERICAN CONFLICTS LAW 215-16 (1986), it has nonetheless enacted a statute to that effect. *See* 28 U.S.C. § 1738 (2000).

[59] *Shaffer*, 433 U.S. at 210; Michael B. Mushlin, *The New Quasi in Rem Jurisdiction: New York's Revival of a Doctrine Whose Time Has Passed*, 55 BROOK. L. REV. 1059, 1110 (1989-90) ("[T]he full faith and credit clause means that a judgment obtained in one jurisdiction where there are no assets to satisfy the claim must be enforced by other jurisdictions where assets exist.") (footnote omitted).

[60] *Shaffer*, 433 U.S. at 199 & n.17.

pre-existing claim over the subject property or, more importantly for our purposes, to collect a debt based on a judgment rendered against the owner of the property in a forum where that owner was subject to personal jurisdiction.[61] To summarize, "[t]he effect of a judgment in [an attachment jurisdiction] case is limited to the property that supports jurisdiction; [it] does not impose a personal liability on the property owner, since he is not before the court."[62]

Attachment jurisdiction has a more troubling history than merely serving as a practical complement to in personam judgments. For a long time, quasi in rem jurisdiction served as a substitute for in personam jurisdiction. This practice can be traced back to U.S. colonial times.[63] Back then, attachment jurisdiction allowed creditors to adjudicate claims against fleeing debtors by attaching the property that the debtor had left behind.[64] In so doing, attachment jurisdiction provided creditors with a forum in which to adjudicate their claims against a debtor and a means, albeit limited to the value of the attached property, with which to satisfy any resulting judgment.[65] Otherwise, given that "huge sections of the continent were underdeveloped, and transportation and communication among its far flung parts remained primitive," a creditor would have been unable to collect on an absent debtor's debt.[66]

That practice changed after *Shaffer*. In that case, the Supreme Court held that for a pre-judgment in rem action to be consistent with constitutional limitations on state power, the attached property must be the subject of, or related to, the litigation.[67] Mr. Heitner, a shareholder of the Greyhound Corporation, had brought suit in Delaware against Mr. Shaffer, along with other members of the board of directors, alleging that they had violated their duties to Greyhound. According to Mr. Heitner, the board of directors caused the corpo-

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[61] *Id.*; CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733(DC), 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001) ("[Q]uasi in rem jurisdiction is used to attach property to collect a debt based on a claim already adjudicated in a forum where there was personal jurisdiction over the defendant.").

[62] *Shaffer*, 433 U.S. at 199. Furthermore, unlike an in personam judgment, "a quasi in rem judgment cannot be enforced by other jurisdictions under the Full Faith and Credit Clause of the Constitution." *CME Media*, 2001 WL 1035138, at *4.

[63] Mushlin, *supra* note 59, at 1066.

[64] *Id.*

[65] *Id.*

[66] *Id.* at 1067.

[67] The court ruled that, when "the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action," the mere presence of property within a particular state would not be enough, by itself, to support jurisdiction. *Shaffer*, 433 U.S. at 209. Despite this clear pronouncement, there is still disagreement as to whether in a *pre-judgment* proceeding the attached property must be strictly related to the cause of action. *Compare* Unitech USA, Inc. v. Ponsoldt, 457 N.Y.S.2d 526 (N.Y. App. Div. 1983) (holding that property must be related to the cause of action), *and* Cameron-Brown Co. v. Daves, 350 S.E.2d 111 (N.C. App. 1986) (same), *with* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (holding that property may be unrelated to the cause of action), *and* Estate of Portnoy v. Cessna Aircraft Co., 603 F. Supp. 286 (S.D. Miss. 1985) (same).

ration to engage in actions that resulted in it being liable in an antitrust suit. The alleged violations, however, took place in Oregon, and none of the board of directors resided in Delaware. In fact, the directors had been "haled" into Delaware courts based on their ownership of stock and stock options which, according to local law were deemed to be "present" in Delaware. But, as the Court noted, the "property [was] not the subject . . . of th[e] litigation, nor [was] the underlying cause of action related to the property."[68] Indeed, the property was "completely unrelated to [the] cause of action . . . . [T]he only role played by the property [was] to provide the basis for bringing the defendant into court."[69]

One of the primary concerns of the *Shaffer* Court was closing a gap in the law: "if a direct assertion of personal jurisdiction over [a] defendant would violate the Constitution, . . . an indirect assertion of that jurisdiction should be equally impermissible."[70] As the Court understood it, Mr. Heitner could not have sued Mr. Shaffer in Delaware for breach of fiduciary duties because Delaware courts did not have personal jurisdiction over him. Clearly, Mr. Heitner should not have been able to circumvent that constitutional limitation by claiming jurisdiction over Mr. Shaffer's property. In practical terms, the result would have been the same: Mr. Shaffer would have been forced to litigate in a jurisdiction that otherwise did not have personal jurisdiction over him, and that consequently would not have been able to entertain Mr. Heitner's claim in the first place. The Court agreed that "[t]he phrase, 'judicial jurisdiction over a thing', is a[n] . . . elliptical way of referring to jurisdiction over the interest of persons in a thing."[71]

Thus, at a pre-judgment stage, it matters little that the potential liability of a defendant who has been haled into court in an in rem action would be limited to the value of the property.[72] According to the *Shaffer* Court, "[t]he fairness of subjecting a defendant to [the jurisdiction of a court] does not depend on the size of the claim being litigated."[73] Instead, it depends on "fair play and substantial justice." And, in this context, fairness depends on the relationship between the property and the cause of action. If, for example, the property is related to the cause of action, as in an action where a party challenges a defendant's ownership rights, then the exercise of jurisdiction would be proper because "the defendant's claim to [the] property located in the State would . . . indicate that he expected to benefit from the State's protection of his interest."[74]

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68 *Shaffer*, 433 U.S. at 213.

69 *Id.* at 209 (footnotes omitted).

70 *Id.*

71 *Id.* at 207 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 56, Introductory Note (1971)).

72 *Id.* at 207 n.23.

73 *Id.* (citations omitted).

74 *Id.* at 207-08 (footnotes omitted).

The Supreme Court, however, had a very different view of what is "fair" in post-judgment attachment actions and "greatly relaxed" the minimum contacts requirement in such actions.[75] At the endgame of litigation, once a judgment has been rendered, the *Shaffer* Court considered it fair to allow a party to satisfy the resulting debt by permitting attachment of any of the losing party's property, regardless of its relationship to the underlying cause of action.[76] That is, in a post-judgment action, the Court embraced a "rear view mirror" approach to the question of personal jurisdiction: Did the rendering court have personal jurisdiction over the defendant? If so, then all that is needed in the enforcing state is the presence of defendant's assets.[77]

*Shaffer's* footnote 36 is the Supreme Court's imprimatur of this practical relationship between in personam and attachment jurisdiction in post-judgment actions. According to the Court,

> [o]nce it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.[78]

Thus, a state may enforce a sister state judgment even if the enforcing state does not have personal jurisdiction over the debtor.[79] As Professor Leflar said, "per-

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[75] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 309 n.14 (1980) (Brennan, J., dissenting) (citing *Shaffer*, 433 U.S. at 210-11 nn. 36-37).

[76] *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). This is because "the formality and procedural requisites for [a] hearing can vary, depending upon the importance of the interests involved . . . ." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 545 (1985) (quoting Boddie v. Connecticut, 401 U.S. 371, 378 (1971)). Indeed, Due Process "is not a technical conception with a fixed content unrelated to time, place and circumstances . . . . [It] is flexible and calls for such procedural protections as the particular situation demands." Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citations omitted).

[77] *See* Cameco Indus., Inc. v. Mayatrac, S.A., 789 F. Supp. 200, 203 (D. Md. 1992) ("I do not, however, read *Shaffer* as requiring the same minimum contacts for the exercise of quasi in rem jurisdiction as are required for the assertion of in personam jurisdiction."); *cf.* Feder v. Turkish Airlines, 441 F. Supp. 1273 (S.D.N.Y. 1977) (finding jurisdiction in a pre-judgment action even though the attached property was unrelated to the cause of action because a defendant that places property in the state "knowingly assume[s] some risk that the state will exercise its power over [his] property or [his] person while there.").

[78] *Shaffer*, 433 U.S. at 210-11 n.36.

[79] *See* Kulko v. Superior Court, 436 U.S. 84, 95-97 (1978) (holding that California's assertion of personal jurisdiction over a New York resident defendant was unreasonable but noting that "a New York court would clearly have personal jurisdiction over [the defendant] and, if a judgment were entered by a New York court . . . it could properly be enforced against him in both New York and California"); *see also* Neuhaus, *supra* note 9, at 29; Lawrence W. Newman, *Jurisdiction to Enforce Foreign Judgments*, 225 N.Y. L.J. 3 col.1 (April 30, 2001) (noting that *Shaffer*'s foot-

sonal jurisdiction is not required in every state that has anything to do with the enforcement of a judgment."[80]

Even if in personam and attachment jurisdiction work hand-in-hand to ensure that a party's victory is not empty, that should not give the impression that anything goes. As suggested above, a major limitation to the Full Faith and Credit Clause is that a judgment must be recognized and enforced in another forum only if the court that rendered the judgment had personal jurisdiction over the parties.[81] In other words, an in personam judgment that is rendered without jurisdiction over the losing party is not entitled to another state's faith or credit.[82] Such a judgment is subject to collateral attack on the ground of lack of jurisdiction.[83]

In short, a valid in personam judgment rendered by a U.S. court is subject only to the enforcing state's *bona fide* procedural rules.[84] In this context though, a winning party's concerns should be limited to properly complying with purely administrative requirements that the enforcing state imposes.[85]

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note 36 suggests that the standards and theoretical bases for jurisdiction to enforce a judgment may be different than those at stake during a pre-judgment proceeding).

[80] LEFLAR, *supra* note 58, at 235-36. Or, as the Supreme Court noted in *Shaffer*, "a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with [the minimum contacts requirements]." *Shaffer*, 433 U.S. at 210 (footnote omitted).

[81] *See* Barkat Gems, Inc. v. Feldman, No. 84 Civ. 0659 (WCC), 1989 WL 34065, at *2 (S.D.N.Y. Jan. 21, 1989).

[82] *See* Hanson v. Denckla, 357 U.S. 235 (1958). *Compare* New York Convention, *supra* note 2, at art. V(1)(b) (stating that enforcement of an award may be refused if "[t]he party against whom the award is invoked was . . . unable to present his case"), *with* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985) (noting that the "root requirement" of the Due Process Clause is that an individual be given an opportunity for a hearing before being deprived of any significant property interest).

[83] *See* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980) ("A judgment rendered in violation of due process is void in the rendering State and is not entitled to full faith and credit elsewhere.") (citing Pennoyer v. Neff, 95 U.S. 714, 732-33 (1877)); RESTATEMENT OF THE LAW (SECOND) OF JUDGMENTS § 81 (1982).

[84] Under the Uniform Enforcement of Foreign Judgment Act ("Sister State Act"), the clerk of the court in the enforcing state treats the sister state judgment in the same manner as a judgment rendered by a court of the enforcing state. *See* UNIF. ENFORCEMENT OF FOREIGN JUDGMENTS ACT, § 1 et. seq, 13 U.L.A. 154 (1986); *see also* LEFLAR, *supra* note 58, at 217 ("A state is not bound to set up, for suits on foreign judgments, judicial machinery which it does not provide for its own causes of action.") (citing Anglo-Am. Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903)).

[85] For example in New Jersey, under its Uniform Enforcement of Foreign Judgments Act, N.J. STAT. ANN. §§ 2A:49A-25 to -33 (2000), the judgment of a sister state court "has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating, or staying as a judgment of a Superior Court of this State and may be enforced in the same manner." Enron (Thrace) Exploration & Prod. BV & ECT v. Clapp, 874 A.2d 561 (N.J. Super. Ct. App. Div. 2005); *see also* Redondo Constr. Corp. v. United States, 157 F.3d 1060, 1065 (6th Cir. 1998) (concluding that, upon filing pursuant to Kentucky's Uniform Enforcement of Foreign Judgments Act, a judgment entered by the United States District Court for Puerto Rico was the equivalent of

Even so, a defendant's procedural due process rights are safeguarded: first, by being able to defend the claim asserted in the rendering court, and later by being able to challenge the validity of the judgment or by seeing that the enforcing state follows the appropriate procedures when satisfying the winning party's claim.[86]

This simple process complies with the "root requirement" of the Due Process Clause: "that an individual be given an opportunity for a hearing *before* . . . [being] deprived of any significant property interest."[87] The veracity and currency of that statement is the lasting legacy of *Shaffer*'s footnote 36. The section that follows describes how this legacy should embrace foreign arbitral awards as it does foreign judgments.

## V. STRETCHING THE FLEXIBLE STANDARD TO INCLUDE FOREIGN ARBITRAL AWARDS

The Full Faith and Credit Clause does not state that it applies to foreign judgments, and the Supreme Court has not construed it otherwise. In fact, it has affirmatively stated that "[n]o such right, privilege, or immunity . . . is conferred by the Constitution or by any statute of the United States in respect to the judgments of foreign states or nations . . . ."[88] Accordingly, while U.S. courts must give full faith and credit to any judgment of a sister state empowered to enter the judgment,[89] they need only recognize the judgment of a foreign court to the extent that this recognition comports with principles of judicial comity.[90] This section discusses how foreign monetary judgments are enforced in the United States and argues that foreign arbitral awards should not be treated differently.

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a Kentucky judgment, and there is no requirement that a "Kentucky court rubberstamp the foreign judgment before Kentucky will recognize it as equivalent to a domestic judgment").

86 Newman, *supra* note 79, at 3. For example, in Gedeon v. Gedeon, 630 P.2d 579 (Colo. 1981), the court rejected a due process challenge to the procedures under Colorado's sister-state judgment act, which allows the entry in Colorado of a sister-state's judgment, without formal notice or an opportunity to be heard. The court held that the filing of the judgment did not violate principles of due process because the "basic requirements of notice and hearing" were met by the state, which issued the original judgment. *Gedeon*, 630 P.2d at 583.

87 *Cleveland Bd. of Educ.*, 470 U.S. at 542 (citing Boddie v. Connecticut, 401 U.S. 371, 379 (1971)).

88 Aetna Life Ins. Co. v. Tremblay, 223 U.S. 185, 190 (1912); *see also* Allstate Ins. Co. v. Hague, 449 U.S. 302, 321 n.4 (1981) (Stevens, J., concurring ) ("The Full Faith and Credit Clause, of course, was inapplicable . . . because the law of a foreign nation, rather than of a sister State, was at issue . . . ."). Likewise, 28 U.S.C. § 1738 does not apply to the recognition and enforcement of foreign country judgments.

89 Bakerby Thomas v. Gen. Motors Corp., 522 U.S. 222, 233 (1998).

90 *See* Hilton v. Guyot, 159 U.S. 113, 203 (1895). The Supreme Court has defined comity as "[t]he extent to which the law of one nation . . . shall be allowed to operate within the dominion of another nation." *Id.* at 163.

### A. *Foreign Judgments in the United States*

Despite the absence of a constitutional blessing, "American courts [have recognized] . . . foreign judgments on a regular basis . . . ."[91] This has been possible because "at a minimum [the Due Process Clause] require[s] that deprivation of life, liberty, or property by adjudication be proceeded by notice and opportunity for hearing appropriate to the nature of the case,"[92] and, not surprisingly, the United States is not the only country that values these same principles. The Supreme Court so recognized more than a century ago when it noted that:

> [once] there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, . . . or any other special reason why the comity of this nation should not allow it full effect . . . the merits of the case should not . . . be tried afresh.[93]

Therefore, U.S. courts are fully aware that they are not the only judicial entities guided by the principles of justice and fairness to the parties.[94]

Informed and constrained by this constitutional benchmark, the recognition and enforcement of foreign-country judgments is governed by state law. About half of the states in the United States have adopted the Uniform Foreign Money-Judgments Recognition Act ("Money-Judgments Act"),[95] which is limited to foreign money judgments and provides that these judgments should be

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91 *In re* Fotochrome Inc., 377 F. Supp. 26, 33 (E.D.N.Y. 1974).

92 Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (discussing notice as a requirement of due process); *see also* Richards v. Jefferson County, Ala., 517 U.S. 793 (1996) (noting that the opportunity to be heard is essential to due process).

93 *Hilton*, 159 U.S. at 158.

94 As Judge Cardozo said, "We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home." Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918); *see also Hilton*, 159 U.S. at 205 ("[W]e are not prepared to hold that the fact that the [foreign] procedure . . . differed from that of our own courts is, of itself, a sufficient ground for impeaching the foreign judgment."); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 482 cmt. b (1986) [hereinafter RESTATEMENT OF FOREIGN RELATIONS] ("A court asked to recognize or enforce the judgment of a foreign court must satisfy itself of the essential fairness of the judicial system under which the judgment was rendered.").

95 13 (pt. 2) U.L.A. 43 (2002). For a discussion of the Money-Judgments Act see John A. Spanogle, *The Enforcement of Foreign Judgments in the U.S. – A Matter of State Law In Federal Courts*, 13 U.S.-MEX. L. J. 85 (2005).

treated similarly to sister-state judgments.[96] Just as with judgments issued by sister states, a defendant may challenge such judgments in the enforcing jurisdiction on the ground that the foreign court that issued the judgment lacked personal jurisdiction over the defendant.[97]

More importantly, the Money-Judgments Act provides that "the foreign judgment is enforceable in the same manner as the judgment of a sister state which is entitled to full faith and credit."[98] In the enforcement context this means that the enforcement of foreign judgments in the United States complies with the constitutional requirements of due process in the same way that their domestic counterparts do: pre-judgment in personam jurisdiction over a defendant, and post-judgment attachment jurisdiction over the defendant's assets.[99] As a New York state court recently reasoned while applying New York's version of the Money-Judgments Act:

> In a proceeding under [New York's version of the Money-Judgments Act], the judgment creditor does not seek any new relief against the judgment debtor, but instead merely asks the court to perform its ministerial function of recognizing the foreign country money judgment and converting it into a New York judgment. Moreover, it is . . . likely that any enforcement

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[96] MONEY-JUDGMENTS ACT, §§ 2-3, 13 (pt. 2) U.L.A. 45-57; *see also* Soc'y of Lloyd's v. Ashenden, 233 F.3d 473, 481-82 (7th Cir. 2000) (holding that Illinois Uniform Foreign Money-Judgments Recognition Act does not require the judgment creditor to bring an action to recognize the judgment and another proceeding to enforce it); Don Docksteader Motors, Ltd. v. Patal Enter., Ltd., 794 S.W.2d 760 (Tex. 1990) (holding that under Texas Uniform Foreign Country Money-Judgments Recognition Act, the judgment of a foreign country was enforceable either by filing a common law action to enforce the judgment or by the "short cut" filing procedure in the Uniform Enforcement of Foreign Judgment Act). *But see* Overseas Dev. Bank v. Northmann, 496 N.Y.S.2d 534 (N.Y. App. Div. 1984), *rev'd on other grounds*, 477 N.E.2d 1086 (N.Y. 1985) (holding that under New York's version of the Money-Judgments Act, the holder of the foreign country judgment may not file the judgment directly but must first file a complaint or motion and obtain a domestic judgment).

[97] MONEY-JUDGMENTS ACT, § 4(a), 13 (pt. 2) U.L.A. at 58-59.

[98] MONEY-JUDGMENTS ACT, § 3, 13 (pt. 2) U.L.A. at 49. *See, e.g.*, N.J. STAT. ANN. § 2A:49A-27 (stating that a copy of any properly authenticated "foreign judgment" may be filed with the Clerk and the Clerk is required to "treat the foreign judgment in the same manner as a judgment of the Superior Court of this State"); *see also* Enron (Thrace) Exploration & Prod. BV & ECT, 874 A.2d 561, 566 (N.J. Super. Ct. App. Div. 2005) (noting that "[b]ecause [in New Jersey] judgments entitled to full faith and credit may be enforced . . . without a prior determination [by the court of first instance] recognizing those judgments, the same procedure is available for judgments of foreign countries").

[99] This would seem to be especially true if a U.S. court requires that a judgment meet the personal jurisdiction requirements of U.S. law, not the law of the rendering foreign country. *See, e.g.*, Ackerman v. Levine, 788 F.2d 830, 838 (2d Cir. 1986) (applying U.S. minimum contacts inquiry to a judgment rendered abroad and holding that a judgment debtor had sufficient contacts with West Germany such that the exercise of personal jurisdiction by a German court did not offend the U.S. "notions of fair play and substantial justice").

> device ultimately employed by the judgment creditor will [not] operate against the judgment debtor in personam. Most devices for the enforcement of money judgments operate in rem against the real or personal property of the judgment debtor . . . .[100]

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[100] Lenchyshyn v. Pelko Elec., Inc., 723 N.Y.S.2d 285, 291 (N.Y. App. Div. 2001) (citations omitted). *Accord* Pure Fishing, Inc. v. Silver Star Co., 202 F. Supp. 2d 905 (N.D. Iowa 2002) (holding that a court may recognize and enforce a foreign judgment against a judgment-debtor's property located in the state in the same manner that it would a judgment of a sister state).

The court in *Lenchyshyn* went even further by holding that presence of assets or property was not necessary for a court to confirm a foreign arbitral award.

> [E]ven if defendants do not presently have assets in New York, [a creditor] nevertheless should be granted recognition of the foreign country money judgment ... and thereby, should have the opportunity to pursue all such enforcement steps *in futuro*, whenever it might appear that defendants are maintaining assets in New York . . . .

*Lenchyshyn*, 723 N.Y.S.2d at 291. Although the court held that the "judgment debtor need not be subject to personal jurisdiction in New York," it also held that the Due Process Clause of the U. S. Constitution does not require "that the New York court have *a jurisdictional basis* for proceeding against [the] judgment debtor." *Id.* at 286 (emphasis added).

The constitutionality of this approach is suspect. As this piece has argued, the minimum contacts test is more flexible at the post-judgment stage. That does not mean that a constitutional analysis is not required before a court may domesticate a foreign judgment or recognize a foreign arbitral award. It simply means that when a debtor is not subject to general or specific personal jurisdiction in an enforcing state but happens to have assets in the United States, those assets alone are enough to satisfy the constitutional inquiry—they provide a court with attachment jurisdiction and allow it to enforce the judgment/award up to the value of the attached assets. *See* Park, *supra* note 1, at 100 & n.99 ("The presence of property would seem relevant in light of the decision in *Shaffer* making a distinction between jurisdiction on the merits of a dispute and jurisdiction to enforce [a] judgment.").

It is hard to see how confirming a foreign judgment (despite the absence of personal or attachment jurisdiction) so as to allow a party to enforce it *in futuro* does not run afoul of constitutional due process. When a U.S. court confirms a foreign judgment, the court enters a judgment in terms identical to those of the foreign judgment. This judgment has the same force and effect as a validly-rendered judgment of any U.S. court. It may be enforced in any other court in the United States under the Full Faith and Credit Clause. Therefore, although the party has yet to enforce the judgment against the assets of the debtor, confirming a foreign judgment is tantamount to depriving the debtor of property. The judgment holder has a legally recognized right over the debtor's property. As such, the constitutional tenet that a person shall not be deprived of "life, liberty, or property, without due process of law" should counsel against a state's confirmation of a foreign judgment in the absence, at the very least, of assets within its jurisdiction.

In short, the same concerns that counsel against allowing a party to enforce an award in the absence of any nexus to the state should also counsel against confirming an award in a similar context. It is thus not surprising that this rationale has already been rejected by other courts. *See, e.g.*, Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1127 (9th Cir. 2002) (noting that mere allegations that a party may or will have assets in the forum "is simply not enough" to confirm an award); Electrolines, Inc. v. Prudential Assurance Co., 677 N.W.2d 874 (Mich. App. 2003) (holding that in a confirmation and enforcement proceeding, the court must have jurisdiction over the judgment debtor or his property); *cf.* Jain v. de Mere, 51 F.3d 686, 692 (7th Cir. 1995) ("One foreign party can compel another foreign party to arbitrate in the United

Thus, at least in New York, a creditor may enforce a foreign judgment by levying against whatever assets the defendant may have in New York.[101] "Any other rule would encourage defendants to transfer property into the state while keeping themselves cautiously beyond personal jurisdiction."[102]

### B. *Foreign Arbitral Awards in the United States*

In light of this discussion, one should ask: what makes judgments, foreign or domestic, different from foreign arbitral awards? If the enforcement of foreign judgments in the United States can comply with the constitutional requirement of due process by having a fair proceeding in the rendering state and, at the very least, in rem jurisdiction in the enforcing state, why should U.S. courts impose a higher threshold on foreign arbitral awards?[103]

Certainly, there are significant differences between the judgment of a sister or foreign state and a foreign arbitral award. These differences are not without legal significance; arbitral awards are not subject to the Full Faith and Credit Clause and its implementing statute because the latter apply only to "judicial proceedings."[104] Given that "[a]rbitration is not a 'judicial proceeding' . . . § 1783 does not apply to arbitration awards."[105] Consequently, perhaps the most important difference between the two forms of dispute resolution is the most obvious: arbitrators are not judges in the common law sense of the word. The Supreme Court has so determined when it noted that:

> [A]rbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases . . . . [W]e should . . . be even more scrupulous to safeguard the impartiality of arbitrators than judges,

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States only where the second party has expressly consented to a United States forum or has contacts with that forum sufficient to meet the requirements of personal jurisdiction."). *But see* Goldstein & Bjorklund, *supra* note 20, at 406-07 ("[T]he award creditor may be inclined to seek enforcement in a pro-enforcement jurisdiction where, it has reason to believe, the award debtor may *at some point* have assets subject to attachment (if only . . . because funds in transit might flow through a bank account 'situated' in that jurisdiction).") (emphasis added).

101 *See, e.g., Lenchyshyn*, 723 N.Y.S.2d at 291; Biel v. Boehm, 406 N.Y.S.2d 231 (N.Y. Sup. Ct. 1978). New York is not alone. After *Shaffer*, state courts throughout the country have regularly applied "quasi in rem" jurisdiction in cases seeking to enforce foreign-state judgments, without requiring that the property be related to the underlying cause of action. *See* Neuhaus, *supra* note 9, at 29 & n.29; *see also* Levi Strauss & Co. v. Crocket Motor Sales, Inc., 293 Ark. 502, 507 (1987).

102 David D. Siegel, 132 SIEGEL'S PRAC. REV. 3 (2003).

103 *See* Dardana Ltd. v. Yuganskneftegaz, 317 F.3d 202, 208 n.13 (2d Cir. 2003).

104 *See* McDonald v. City of West Branch, Mich., 466 U.S. 284, 287 (1984) (quotation omitted) ("[A]rbitration decisions . . . are not subject to the mandate of § 1738.").

105 *Id.* at 288.

> since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review.[106]

More simply, unlike judges, arbitrators are not instruments of the state; they are members and participants of the marketplace.

Like judges, however, arbitrators decide disputes between parties.[107] Indeed, "[i]t is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function."[108] More importantly, arbitral tribunals can provide litigants with as fair a procedure as any other court of a foreign country. For example,

> [s]hort of authorizing trial by battle or ordeal or, more doubtfully, by panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes; parties are as free to specify idiosyncratic terms of arbitration as they are to specify any other terms in their contract.[109]

In other words, in arbitration, contractual liberty is the name of the game.[110] If the parties agreed to the terms of the arbitral clause, then the arbitral award that results from a proceeding under those terms and conditions must necessarily be fair.

Consequently, arbitral proceedings and the resulting arbitral awards are, at least in theory, just as "fair" as the domestic and foreign judgments rendered by judges.[111] Based on this same rationale, the Second Circuit has hinted that foreign arbitral awards may be enforced as if they were foreign judgments subject to the enforcing state's Money-Judgments Act. According to the Second Circuit:

> The [New York Money-Judgments Act] does not expressly require that the judgment be shown to be that of a court, although courts are referred to elsewhere in the article. There is room to include such equivalent tribunals as an arbitral panel and an

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106 Commonwealth Coatings Corp. v. Cont'l Cas. Co., 393 U.S. 145, 148-49 (1968).

107 Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 626 (1985) ("By agreeing to arbitrate a . . . claim . . . a party does not forgo . . . [its] substantive rights...; it only submits to their resolution in an arbitral, rather than judicial, forum.") (citation omitted).

108 *Commonwealth Coatings*, 393 U.S. at 150 (White, J., concurring).

109 Baravati v. Josephthal, Lyons & Ross, Inc., 28 F.3d 703, 709 (7th Cir. 1994).

110 Park, *supra* note 1, at 107 (noting that "business managers generally assume the risk that arbitrators may 'get it wrong' on the substance of the dispute but do not bargain for denial of fundamental due process").

111 Although some may disagree with this general statement, the truth is that no adjudicative system is perfect. *See* Park, *supra* note 1, at 129 & nn.217-18 (admitting that, in some instances, "arbitration can become the instrument of injustice").

> administrative type agency, if their determinations otherwise satisfy the criteria set forth in [the Money-Judgments Act]. It may be that the determination emerges from such a foreign tribunal with the same status there as a judicial judgment has, and without having to be converted into such a judgment. If that is so, it should not be indispensable that such a conversion occur before New York recognizes the determination.[112]

That being the case, the spirit, if not the language, of both *Hilton* and *Shaffer*'s footnote 36 should apply with equal force to foreign arbitral awards.[113] The presence of property alone, however unrelated to the cause of action it may be, can and should supply the jurisdictional basis in an action to enforce arbitral awards under the New York Convention.[114]

To rule otherwise would mean that foreign judgments are to be enforced more liberally than foreign arbitral awards. That result could lead to a de facto resurgence of the double *exequatur* problem that the New York Convention tried to eliminate.[115] In fact, at least one commentator has already asked whether "successful parties in foreign arbitrations [should] think about turning their awards into foreign judgments abroad, before trying to enforce them in the United States as awards . . . ."[116] Under the current state of affairs, the answer,

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[112] Dardana Ltd. v. Yuganskneftegaz, 317 F.3d 202, 208 n.13 (2d Cir. 2003) (quoting David D. Siegel, N.Y. C.P.L.R. 5301 at 541 (McKinney 1997)).

[113] Karen Halverson, *Is a Foreign State a "Person"? Does it Matter?: Personal Jurisdiction, Due Process, and the Foreign Sovereign Immunities Act*, 34 N.Y.U. J. INT'L L. & POL. 115, 179 (2001) ("The issue in such a case is not whether the defendant possesses 'minimum contacts' within the jurisdiction of the enforcing court, but rather whether the defendant had such contacts within the jurisdiction of the court that issued the judgment."). *But see* S.I. Strong, *Invisible Barriers to the Enforcement of Foreign Arbitral Awards in the United States*, 21 J. INT'L ARB. 479, 489 (2004) (discrediting the validity of footnote 36 because footnotes "are not the most persuasive location in a judicial opinion" and arguing that "actions to enforce foreign arbitral awards are not necessarily analogous to actions to enforce . . . judgments of sister states").

[114] *Dardana*, 317 F.3d at 208. *But see* S.I. Strong, *supra* note 113, at 489 (arguing that attachment based solely on the presence of property in the state is unconstitutional).

[115] Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B., 825 F.2d 709, 713 n.2 (2d Cir. 1987) ("[T]he [New York] Convention does not apply to the enforcement of judgments that confirm foreign arbitral awards."); Island Territory of Curacao v. Solitron Devices Inc., 489 F.2d 1313, 1318 (2d Cir. 1973) ("The Convention . . . in no way . . . prevent[s] states from enforcing foreign money judgments, whether those judgments are rendered in the enforcement of an arbitration award or otherwise."); Ocean Warehousing B.V. v. Baron Metals & Alloys, Inc., 157 F. Supp. 2d 245, 249 (S.D.N.Y. 2001) ("The [New York] Convention defenses 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.").

[116] Lawrence W. Newman & David Zaslowsky, *Jurisdiction to Enforce Arbitral Awards*, 229 N.Y.L.J. 3 col.1 (April 30, 2003); *see Ocean Warehousing*, 157 F. Supp. 2d 245 (enforcing a Dutch judgment based on a foreign arbitral award under the Money-Judgments Act even though the judgment debtor claimed that the court could not enforce the underlying arbitration award under the New York Convention because the agreement to arbitrate was not in writing); *cf.* A.

unfortunately, appears to be yes. But should it? The answer to this question, in turn, must be no. As discussed above, such practical obstacles could hinder the convenience of international arbitration by undermining the essence of the floating awards concept. And, as the next section discusses, the presence of assets alone should be enough to enforce even a foreign arbitral award.

## VI. A FLEXIBLE, REASONABLE, AND CONSTITUTIONAL APPROACH TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Of course, saying that foreign arbitral awards must be treated the same as foreign or domestic judgments during post-judgment proceedings begs a critical question: is the practice of enforcing these judgments based on the presence of assets alone even constitutional? Could not it be argued that courts should require that the subject assets be related to the underlying cause of action before enforcing a sister state or foreign judgment? In short, what exactly did the *Shaffer* Court say in footnote 36, and did the Court mean what it said?

Besides dropping footnote 36, the *Shaffer* Court did not really provide that much guidance as to whether the attached property or assets in an enforcement proceeding need to be related to the underlying cause of action. Two recent Court of Appeals opinions have not helped clarify the matter. Although the Ninth Circuit in *Glencore Grain* referred to *Shaffer*'s footnote 36 when it reasoned that relatedness is not a prerequisite to enforcement,[117] the Fourth Circuit in *Base Metal* relied on different parts of the Supreme Court opinion in *Shaffer* when it held the exact opposite.[118] Neither court explained with clarity why the

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von Mehren & Trautman, *Recognitions of Foreign Adjudications: A Survey and Suggested Approach*, 81 HARV. L. REV. 1601, 1695-96 (1968) (arguing that in order to avoid lack of uniformity among states, the standards for recognizing and enforcing foreign country judgments need to be federalized).

Moreover, any distinction between foreign and domestic judgments may violate Article III of the New York Convention. Article 3 requires adhering countries not to impose "substantially more onerous conditions . . . on the recognition or enforcement of [foreign] arbitral awards . . . than are imposed on the recognition or enforcement of domestic arbitral awards." New York Convention, *supra* note 2, at art. III. As a practitioner noted more than twenty years ago, if a domestic arbitral award may be made into a domestic judgment and, consequently, be entitled to full faith and credit, while a judgment based on a foreign award is entitled only to comity, "[i]t would seem that this distinction might have a significantly discriminating effect upon foreign awards." Hans Harnik, *Recognition and Enforcement of Foreign Arbitral Awards*, 31 AM. J. COMP. L. 703, 711 (1983).

[117] *See* Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1127 (9th Cir. 2002).

[118] Base Metal Trading, Ltd. v. Novokuznetsky Aluminum Factory, 283 F.3d 208, 213 (4th Cir. 2002). The court held that:

> [W]hen the property which serves as the basis for jurisdiction is completely unrelated to the plaintiff's cause of action, the presence of property alone will not support jurisdiction. While "the presence of defendant's property in a State might suggest the existence of other ties among the defendant, the State,

presence of unrelated assets in the forum state is, or is not, sufficient to give fair warning to the award debtor such that he could reasonably anticipate being haled into court in the United States to defend against an enforcement proceeding.[119]

The discussion that follows picks-up where these two most recent opinions left off. It explains why relatedness to the cause of action, or a sort of "specific-jurisdiction" analysis, need not be applied in a proceeding to enforce a foreign arbitral award. The main point that this section makes is that relatedness is a not a good proxy for fair warning. Instead, courts should consider purposefulness of the presence of the assets within their jurisdiction when deciding whether an enforcement action may be pursued in its jurisdiction.[120]

### *A. Assets in the United States*

As a preliminary matter, there can be no doubt that, before a court can enforce a foreign arbitral award, there must be "something" within its jurisdiction with which to satisfy that award.[121] That is to say, to be constitutionally fair, a floating award must be anchored in the United States. Federal law, after all, "does not provide federal courts with power over all persons throughout the world who have entered into an arbitration agreement covered by the [New York] Convention."[122] Or, stated otherwise, "neither the [New York] Conven-

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> and the litigation" when those "other ties" do not exist, jurisdiction is not reasonable.

*Id.* (internal citations omitted).

[119] Similarly, commentators have brushed aside the issue without discussing whether relatedness to the cause of action should be taken into consideration at the time of enforcement of an award. *See, e.g., supra* notes 102, 113.

[120] Burger King Corp. v. Rudzewicz, 471 U.S. 462, 477 (1985) (noting that the "fair warning" requirement in pre-judgment actions is satisfied if there is a finding of both purposefulness of defendant's activities in the forum and relatedness of those activities to the cause of action).

[121] *See* Rush v. Savchuk, 444 U.S. 320, 332-33 (1980) ("[T]he Due Process Clause 'does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contact, ties, or relations.'") (quoting Int'l Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)). *But see* Pelagia Ivanova, Note, *Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention*, 83 B.U.L. REV. 899, 916 (2003) (arguing that "[i]t would be more reasonable to abide by the jurisdictional finding of the arbitral situs: as long as a court finds jurisdiction over the defendant at such situs, the forum asked to affirm the award should not be concerned with a separate finding of jurisdiction," but admitting that "such a rule will inevitably face much opposition on constitutional grounds").

Of course, this "something" does not have to be assets. A court can enforce the award if it has personal jurisdiction over the defendant.

[122] Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A., 622 F. Supp. 25, 27 (S.D.N.Y. 1985). The Southern District of New York said it best when it noted that the FAA:

> does not . . . give the court power over all persons throughout the world who have entered into an arbitration agreement covered by the [New York] Con-

tion nor its implementing legislation removed the district courts' obligation to find jurisdiction over the defendant [or his property] in suits to confirm [and enforce] arbitral awards."[123]

The practical implication that an award has to be enforced against "something" has a constitutional undertone: fair warning.[124] The Second Circuit summarized these fair warning concerns by way of an example when it dismissed an action to enforce a foreign arbitral award on *forum non conveniens* grounds:[125]

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> vention. Some basis must be shown, whether arising from the [award debtor's] residence, his conduct, his consent, the location of his property or otherwise, to justify his being subject to the court's power.

*Id.*

[123] Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1121 (9th Cir. 2002).

[124] "The Due Process Clause requires that individuals have 'fair warning that a particular activity may subject [them] to the jurisdiction of a foreign sovereign.'" *Burger King*, 471 U.S. at 472 (citation omitted).

[125] Quite inexplicably, the Second Circuit never reached the question of whether it had jurisdiction over the defendant. *See* Monegasque De Reassurances S.A.M. (Monde Re) v. Nak Noftogaz of Ukr., 311 F.3d 488, 497 (2d Cir. 2002) (noting that the district court failed to address the jurisdictional issue raised by the defendants, but stating that "it was acceptable for the district court to do so").

Courts of Appeals are split on whether courts must decide jurisdictional issues, such as personal jurisdiction, before ruling on *forum non conveniens*. *Compare Monde Re*, 311 F.3d at 497-98 (holding that courts may decide a *forum non conveniens* issue before deciding the question of personal jurisdiction), and *In re* Papandreu, 139 F.3d 247, 255-56 (D.C. Cir. 1998), *with* Malaysia Int'l Shipping Corp. v. Sinochem Int'l Co., 436 F.3d 349 (3d Cir. 2006) (holding that a court must first address the question of personal jurisdiction before dismissing on *forum non conveniens* grounds). *See also* Dominguez-Cota v. Cooper Tire & Rubber Co., 396 F.3d 650, 654 (5th Cir. 2005) (per curiam); Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001), *aff'd in part, cert. dismissed in part*, 538 U.S. 468 (2003); Kamel v. Hill-Rom Co., 108 F.3d 799 (7th Cir. 1997).

The very goal of *forum non conveniens* suggests that a court cannot by-pass a jurisdictional inquiry by dismissing on *forum non conveniens* grounds. As the Court of Appeals for the Third Circuit noted,

> *Forum non coveniens* allows a court (with jurisdiction and proper venue) to decline the exercise of its jurisdiction in favor of letting another court (also with jurisdiction and venue) hear the case. In this way, jurisdiction – both subject matter and personal jurisdiction – is a *sine qua non* for *forum non coveniens*.

*Malaysia Int'l Shipping*, 436 F.3d at 361 (citations omitted). Moreover, given the nature of enforcement proceedings and the idea of floating awards embraced by the New York Convention, there is a good argument to be made that *Monde Re* was wrongly decided, not only because it bypassed the jurisdictional inquiry, but also because it applied the doctrine of *forum non conveniens* in the context of enforcement of foreign arbitral awards. The discussion so far would suggest that there is absolutely no room for that doctrine in that context. *See* Melton v. Oy Nautor Ab, No. CV-96-00492-DLJ, 1998 WL 613798, at *2 (9th Cir. Sept. 4, 1998) (Tashima, J., dissenting) (arguing that *forum non conveniens* does not apply to proceedings to enforce arbitral awards). If a court has personal jurisdiction over a defendant, or even attachment jurisdiction, the court must

> Forcing the recognition and enforcement in Mexico . . . in a case of an arbitral award made in Indonesia, where the parties, the underlying events and the award have no connection to Mexico, may be highly inconvenient overall and might chill international trade if the parties had no recourse but to litigate, at any cost, enforcement of arbitral awards in a petitioner's chosen forum. The Convention was intended to promote the enforcement of international arbitration so that businesses would not be wary of entering into international contracts. It would be counterproductive if such an application of the Convention gave businesses a new cause for concern.[126]

A key feature of the Second Circuit's fact pattern is that the parties had no connection to the enforcing state. This would essentially deprive them of any notice that they could ever be brought to that jurisdiction in a post-award proceeding. According to the views set forth in this piece, the Second Circuit's concerns are entirely unobjectionable.

### *B. Relatedness as Proxy for Fair Warning*

Nevertheless, relatedness to the cause of action is an inadequate proxy for fair warning in post-judgment attachment actions because it does not further the legitimate expectations of the parties. At the time of collecting on a debt, a creditor does not expect to have to distinguish between assets that are related to the cause of action and those that are not. By the same token, an award debtor would be hard-pressed to claim that he expects related assets to be more vulnerable to attachment jurisdiction than unrelated assets during an enforcement proceeding. [127] To both parties, the importance of these assets is not defined in terms of relatedness; it is defined in terms of value. Not surprisingly, that is also the only thing that matters to a winning party who, through an enforcement proceeding, is going after those assets. This, in turn, should be the only thing that matters to a court. Once a court or tribunal has determined that one party owes

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enforce the award. And, assuming that the doctrine of *forum non conveniens* does apply, the court must find that the forum is convenient.

Be that as it may, it seems that the holding of the district court in *Monde Re* would not have been the same if the defendant had assets in the United States. *See* Monagasque De Reassurances S.A.M. (Monde Re) v. Nak Naftogaz of Ukr., 158 F. Supp. 2d 377, 386-87 (S.D.N.Y. 2001) (discussing in passing that "it is not clear that [the defendant] has any assets in the United States from which Monde Re could recover"); *see also Monde Re*, 311 F.3d at 499 (claiming that "the motivation of Monde Re for bringing its enforcement proceeding in the United States is not apparent").

126 *Monde Re*, 311 F.3d at 496-97 (citation omitted).

127 *Cf.* RESTATEMENT OF THE LAW (SECOND) OF JUDGMENTS § 8 (1982) ("A court may exercise jurisdiction to seize property whose situs is in the state . . . in an action concerning a claim against the owner of the property if: . . . [t]he action is to enforce a judgment against the owner of the property.").

money to another party, there is no logical reason to require that the debt be paid with moneys that had been earmarked for that purpose.

A relatedness requirement also introduces unnecessary uncertainty and fosters perverse incentives that hinder the goals of the Due Process Clause. As the Supreme Court has noted:

> [T]he Due Process Clause, by ensuring the "orderly administration of laws" . . . gives a degree of predictability to the legal system that allows potential defendants to structure their . . . conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.[128]

Despite this admonition, the relatedness requirement embraced by the Fourth Circuit in *Base Metal* would allow courts to look the other way and allow an award debtor to structure his conduct so as to avoid the enforcement of the award. That is, to the extent that a relatedness requirement leads to a predictable result, it would likely be in the context of a recalcitrant debtor attempting to place his assets out of the reach of the award creditor. This form of forum shopping protects the expectations of these debtors; however, allowing parties to hide their unrelated assets in the United States ignores the legitimate expectations of international players who see the United States as a fair forum and expect their debts to be paid. A better rule would be to put parties on notice that any and all assets present in the United States are subject to attachment jurisdiction in an enforcement action, regardless of whether the assets are related to the underlying cause of action.[129]

By making the United States a safe haven for unrelated assets, the relatedness requirement also forces the parties to answer two equally difficult questions that are prone to dilatory litigation tactics. First, what is the cause of action about? Second, are the assets related to the cause of action? One can easily imagine parties trying to define the underlying dispute in such a way as to make it appear "related" or "unrelated" to the assets at stake.[130] This, in turn, highlights the difficulty behind requiring that the assets be related to the cause of action: assets are fungible. Very often, it can be nearly impossible to establish the relationship between the assets present in the United States and the underlying cause of action that resulted in the award.

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[128] World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980) (internal citations omitted).

[129] RESTATEMENT OF FOREIGN RELATIONS, *supra* note 94, § 481 cmt. h ("An action to enforce a judgment may usually be brought wherever property of the defendant is found, without any necessary connection between the underlying action and the property . . . .").

[130] *Cf.* Cameron-Brown Co. v. Daves, 350 S.E.2d 111, 116 (N.C. Ct. App. 1986) (noting, in a pre-judgment proceeding, that although one party claimed that the assets were "intimately related" to the cause of action, "the record [did] not disclose any such relationship").

Admittedly, establishing relatedness between the cause of action and the assets within the United States would be easier in the case of tangible property. Despite this minor advantage, courts should not draw the line between tangibles and intangibles.[131] Imagine a case in which the cause of action is a breach of contract for the sales of goods and that the goods are in a U.S. territory. In such a case, the goods are, no doubt, related to the cause of action and the relatedness inquiry appears utterly workable. Nevertheless, any distinction between tangibles and intangibles could provide an incentive to the award debtors to turn tangible property into intangible assets and avoid an easy relatedness inquiry.[132]

### C. *Purposefulness as Proxy for Fair Warning*

The bottom line is that a better proxy for fair warning in enforcement proceedings lies in a determination of the purposefulness of the presence of assets within the United States. As Justice Stevens said in his concurrence in *Shaffer*,

> The requirement of fair notice . . . includes fair warning that a particular activity may subject a person to the jurisdiction of a foreign state. If I . . . acquire real estate or open a bank account in it, I knowingly assume some risk that the State will exercise its power over my property . . . . As a matter of international law, that suggestion might be acceptable because a foreign investment is sufficiently unusual to make it appropriate to require the investor to study the ramifications of his decision.[133]

In other words, once the party places assets in the United States, he knowingly assumes the risk that those assets may be subject to attachment in an enforcement proceeding.

This is especially true in the context of international arbitration where a party that agrees to arbitrate a dispute is on notice that if he loses, the winning

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[131] *But see* Shaffer v. Heitner, 433 U.S. 186, 218 (1977) (Powell, J., concurring) (advising that the Court should draw a line between tangible and intangible property because "[i]n the case of real property" or "other forms of property whose situs is indisputably and permanently located . . . preservation of the common-law concept of *quasi in rem* jurisdiction . . . would avoid the uncertainty of the general *International Shoe* standard without significant cost to traditional notions of fair play and substantial justice") (internal quotation and citations omitted).

[132] The Supreme Court often takes into account the adverse effect that a jurisdictional finding may have on what would otherwise be desirable behavior. For example, in *Kulko* the Court noted that a finding of personal jurisdiction over a non-resident defendant based on a divorce agreement that allowed the children to visit their mother in the state "would discourage parents from entering into reasonable visitation agreements." Kulko v. Superior Court, 436 U.S. 84, 93 (1978). Therefore, although not strictly part of a jurisdictional inquiry, U.S. courts should take into consideration the effects that a jurisdictional distinction between tangible and intangible assets may have on the actions of the parties to litigation.

[133] *Shaffer*, 433 U.S. at 218 (Stevens, J., concurring).

party will try to satisfy the award with his assets wherever they are found.[134] A debtor knows that he must pay and that, to the extent that he resists, he should expect that he will be forced to pay. In an enforcement proceeding, the power of the state is based on the well-established principle of fairness that the Supreme Court in *Shaffer* embraced without hesitation: "a debtor [should not be able to avoid] paying his obligations by removing his property to a State in which his creditor cannot obtain personal jurisdiction over him."[135]

Here the most difficult question will arise when dealing with intangible assets and attempting to determine where they are "located."[136] One of the factors that a court could consider when determining purposefulness is the duration of the assets' presence within the jurisdiction. For example, if the assets have been in the jurisdiction for many years, it would be hard for the award debtor to show that he had not purposefully placed them there or that she did not know that the law of the state considered them as being located within the jurisdiction of the state.[137]

Allowing for the enforcement of foreign arbitral awards against unrelated assets will not flood the dockets of U.S. courts with international disputes.[138] The same basic constitutional tenets that protect an award debtor from being haled into a forum in which he does not have assets, or any other kind of connection, would also serve judicial economy by allowing courts to quickly

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[134] A similar argument is made in the context of sovereign states. The weight of authority holds that a foreign state's agreement to arbitrate in one New York Convention signatory state is an implied waiver of immunity from actions to confirm and enforce a resulting arbitral award in other Convention signatories. *See, e.g.*, Creighton Ltd. v. Gov't of Qatar, 181 F.3d 118, 123 (D.C. Cir. 1999); Seetransport Wiking Trader Schiffarhtsgesellschaft MBH v. Navimpex Centrala Navala, 989 F.2d 572, 577-78 (2d Cir. 1993); M.B.L. Int'l Contrs., Inc. v. Republic of Trinidad & Tobago, 725 F. Supp. 52 (D.D.C. 1989); Liberian Easter Timber Corp. v. Gov't of Republic of Liberia, 650 F. Supp. 73, 76 (E.D.N.Y. 1986), *aff'd.*, 854 F.2d 1314 (2d Cir. 1987); Verlinden B.V. v. Cent. Bank of Nigeria, 488 F. Supp. 1284, 1300 (S.D.N.Y. 1980), *aff'd on other grounds*, 647 F.2d 320 (2d Cir. 1981), *rev'd*, 461 U.S. 480 (1983).

[135] *Shaffer*, 433 U.S. at 210. *Accord* David H. Vernon, *State-Court Jurisdiction: A Preliminary Inquiry into the Impact of* Shaffer v. Heitner, 63 IOWA L. REV. 997, 1008 (1977-78) (arguing that a flexible understanding of the minimum contacts test when applied to enforcement proceeding is "pragmatically necessary if judgment debtors are to be prevented from shielding their assets from judgment creditors by shipping the assets to a state with which the underlying litigation had no prior connection").

[136] Hanson v. Denckla, 357 U.S. 235, 246-47 (1958) ("The basis of [in rem] jurisdiction is the presence of the subject property within the . . . State. Tangible property poses no problem for the application of this rule, but the situs of intangibles is often a matter of controversy.").

[137] *Cf.* Cameco Indus., Inc. v. Mayatrac, S.A., 789 F. Supp. 200, 203 (D. Md. 1992) ("It is one thing to say that merely maintaining a bank account in the forum should not subject a defendant to a personal judgment of a potentially limitless amount; it is quite another to say that the maintenance of that account should never by itself subject the defendant to a judgment . . . limited to the monies that he has purposefully deposited in the forum.").

[138] *Cf.* Base Metal Trading, Ltd. v. OJSC Navokuznetsky Aluminum Factory, 283 F.3d 208, 216 (4th Cir. 2002) ("It is not clear why the limited resources of the federal courts should be spent resolving disputes between two foreign corporations with little or no connection to our country.").

dismiss actions to enforce foreign arbitral awards where such connections do not already exist. As one Court of Appeals noted in a somewhat related matter, "[t]here will be no vast migration of foreign arbitration disputes to the United States . . . unless the defendant is already in some way connected to this country."[139]

Although the suggested approach relies heavily on the power test,[140] it does not do so at the expense of the reasonableness test. As discussed above, the minimum contacts test is not divorced from the constantly-evolving economic realities that may reduce or increase the burden on a defendant. In fact, "[t]he limits imposed on state jurisdiction by the Due Process Clause, in its role as guarantor against inconvenient litigation, have been substantially relaxed over the years."[141] And, if the past is any indication of the future, this trend is bound to continue. More than two decades ago, the Supreme Court so heralded when it stated that:

> [t]oday many commercial transactions touch two or more States and may involve parties separated by the full continent. With this increasing nationalization of commerce has come a great increase in the amount of business conducted . . . across state lines. At the same time modern transportation and communication has made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity.[142]

The same, of course, holds true today in an age that is defined not so much by the nationalization of commerce but by its globalization. Modern systems of transportation and communication have lessened the burden on litigants who may need to litigate in a foreign forum.

Modern litigants have also changed. Parties whose awards are subject to the New York Convention are generally not mom-and-pop companies. They are by definition "international," and their deals have some international component to them. To these parties, often multinational companies, the litigation expense that may result from being "haled into U.S. courts" is not really a burden, it is part of doing business.[143] The idea of a foreign party being "haled into

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139 Jain v. de Mere, 51 F.3d 686, 692 (7th Cir. 1995).

140 Pennoyer v. Neff, 95 U.S. 714, 722 (1877) ("[E]very state possesses exclusive jurisdiction and sovereignty over persons and property within its territory."); *see also* discussion *supra* Part III.

141 World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980).

142 McGee v. Int'l Life Ins. Co., 355 U.S. 220, 222-23 (1957).

143 *Cf.* Park, *supra* note 1, at 83 (advocating for a reform of the FAA that clearly distinguishes between international and domestic arbitration and noting that "[d]iverse cases call for different levels of judicial review, with the least interventionist role assumed in arbitration between sophisticated business entities from different countries").

court" and unfairly burdened with having to defend himself against an enforcement proceeding has a hollow ring to it in the international arbitration context.[144]

What is more, this burden on the award-debtor must be considered in light of other relevant factors such as the nature of the action.[145] At the enforcement stage, the court is dealing with parties that were presumably able to litigate the basis of their claim; they already had their day in court.[146] All that remains to be done is "cashing" the award and satisfying a debt.[147] The process, as explained above, is relatively simple. To the extent that the losing party claims that the award should not be enforced, his defenses are limited to the seven grounds set forth in the New York Convention.[148] Limited defenses, in turn, translate into limited expenses. And, if jurisdiction is based on assets located in the jurisdiction, this will also translate into limited exposure to liability.

The fact that there may be other jurisdictions where the award creditor may attempt to enforce the award should not provide U.S. courts with an escape hatch to dismiss enforcement actions in the name of judicial economy.[149] If

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144 *Cf.* Neuhaus, *supra* note 9, at 28 ("Once you have gone to the trouble and expense of obtaining an arbitral award, and once the respondent has failed to fulfill its obligation to pay the award, shouldn't you be able to take the award anywhere you can find assets and seize them?"); David D. Siegel, *For Suit on Foreign Country Arbitral Award, Need There be Personal Jurisdiction in New York, or Does Property Suffice?*, 132 SIEGELL'S PRAC. REV. 3 (2003) (same). *But see* Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 114 (1986) (noting that the "unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders").

145 *World-Wide Volkswagen*, 444 U.S. at 292 ("[T]he burden on the defendant . . . will in an appropriate case be considered in light of other relevant factors . . . .").

146 Richard B. Cappalli, *Locke as the Key: A Unifying and Coherent Theory of In Personam Jurisdiction*, 43 CASE W. RES. L. REV. 97, 115 (1992) (noting that the court at a post-judgment proceeding "is not assessing liability and measuring compensation but merely making property available to satisfy the claim [because] the assessing and measuring is done by a judgment-issuing court with" in personam jurisdiction).

147 CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733 (DC), 2001 WL 1035138, at * 3 (S.D.N.Y. Sept. 10, 2001) ("Minimum contacts are not required because an arbitration panel with personal jurisdiction over the defendant has already adjudicated claims and determined that defendant is a debtor of the plaintiff; the purpose of the proceeding is merely to collect on that debt.") (citing *Shaffer*'s footnote 36); *accord* Am. Constr. Mach. & Equip. Corp. v. Mechanized Constr. of Pakistan Ltd., No. 85 Civ. 3765, 1986 WL 2973 at *5 (S.D.N.Y. March 5, 1986) ("As a preliminary matter, it is not clear that 'contacts' between the United States and the defendant are required where the judgment sought is simply the enforcement of an award rendered in a foreign jurisdiction where the defendant had the opportunity to appear and contest the entry of judgment . . . .").

148 *See* Halverson, *supra* note 113, at 178-79 ("What should matter in the enforcement context is whether the award is valid under the criteria set forth in the Convention and whether there are assets of the foreign state in the United States against which to enforce the award.").

149 *Id.* at 176-77 ("Since the arbitration exception involves actions to *enforce* arbitral awards rendered elsewhere rather than an action to litigate the underlying dispute, the plaintiff in such a suit should be able to enforce the award wherever the foreign state's assets may be found.").

anything, this should counsel in favor of enforcement of the arbitral award. As the Supreme Court noted in a case dealing with a foreign defendant,

> [c]ourts [must] take into consideration the interests of the "several States," in addition to the forum State, in the efficient judicial resolution of the dispute and the advancement of substantive policies . . . . [T]his advice calls for a court to consider the . . . policies of other *nations* whose interests are affected by the assertion of jurisdiction by [a U.S.] court.[150]

Thus, U.S. courts must take into account the interests of other nations when confronted with an action to enforce a foreign arbitral award. A key factor guiding their decision must be the undisputed fact that what makes international arbitration practical is that there may be multiple enforcement proceedings in multiple jurisdictions against the recalcitrant debtor. The New York Convention envisioned that there would be more than one forum where the award could be enforced. As such, it left the determination as to where such proceedings should be brought to the best judgment of the winning party, not to the courts. Simply put, judicial economy should not trump the right of the award creditor to enforce the award.

At the end of the day, it is in the United States' best interest to enforce arbitral awards based on the presence of assets alone (however unrelated to the underlying cause of action they may be). As explained above, the New York Convention promotes the enforcement of international awards because the certainty of knowing that a valid award floats and can be enforced against the assets of a recalcitrant debtor actually reduces the concerns of entering into international contracts. International firms may think twice before entering into international transactions if they think that assets present in the United States may be off limits. This doomsday scenario has already been described by those who claim that "[w]ithout the assurance of enforcement by a national court in whose territory an award debtor's property is located, international commercial arbitration simply will not work."[151]

## VII. FINAL THOUGHTS AND CONSIDERATIONS

*Shaffer's* footnote 36 should have settled the matter of whether, during a post-judgment proceeding to enforce an arbitral award, there needs to be a nexus between the party's assets and the underlying cause of action. The courts that so far have managed not to follow the spirit and letter of footnote 36 have done so to the detriment of the international system established by the New York Convention.

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[150] Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102, 115 (1987).

[151] W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL COMMERCIAL ARBITRATION 107 (1992).

*Shaffer*'s footnote 36 is certainly not the final word on the jurisdictional issues that a party may have to confront during an enforcement proceeding in the United States. The field is ripe with additional questions and problems. For example, assuming that the Supreme Court or another jurisdiction adopts the reasoning of the Ninth Circuit in *Glencore Grain*, the question would still remain whether an award could only be enforced up to the value of the assets that served as the basis of the court's jurisdiction. Although, at first blush, it would appear that a court's power to enforce an award should be limited to the value of the assets present within its jurisdiction for the reasons discussed above, the Ninth Circuit questioned the validity of this assumption and expressly declined to rule on it.[152]

Similarly, the D.C. Circuit has recently questioned whether foreign companies are entitled to the protection of the Fifth Amendment.[153] According to the court, "although courts often assume the minimum contacts test applies to suits against foreign 'persons,' that assumption appears never to have been challenged."[154] This is not the first time that the D.C. Circuit has intimated that it would be willing to entertain an argument challenging this assumption. Although it is hard to tell how the court will rule when this issue arises, based on the context in which the statement was made, it appears that the D.C. Circuit is ready to take the next step and hold that foreign companies are not "persons" for due process purposes.

Finally, another question that needs to be resolved is whether the presence of assets is even necessary to *confirm* a foreign arbitral award. In other words, can a court properly confirm an award so that a party may try to enforce it *in futuro*? Although the D.C. Circuit has noted that this would be possible in the case of foreign states (who are not subject to the requirements and protection of the Due Process Clause), other circuits in the United States have not addressed the issue. Similarly, many commentators have assumed, without discussion, that this would be a constitutionally permissible course of action.[155]

Ultimately, it could be said that all cases are alike and all cases are distinguishable. Yet, in whatever form and under whichever fact pattern they arise, the truth is that all of these issues require more attention from the judiciary, practitioners, and commentators alike. Perhaps a clear principle of law will evolve from such a concerted exercise.

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[152] Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1122 n.5 (9th Cir. 2002).

[153] TMR Energy Ltd. v. State Prop. of Ukr., 411 F.3d 296, 302 (D.C. Cir. 2005).

[154] *Id.* at 302 n.* (raising the question of whether the minimum contacts test applies to foreign "persons").

[155] *See, e.g.*, Goldstein & Bjorklund, *supra* note 20, at 406-07 (noting that an "award creditor may . . . seek enforcement in a pro-enforcement jurisdiction where . . . the award debtor may at some point have assets subject to attachment").