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Personal Jurisdiction as a Defense to the Enforcement of Foreign Arbitral Awards

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Personal Jurisdiction as a Defense to the Enforcement of Foreign Arbitral Awards

Ronald R. Darbee*

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* J.D. Candidate, University of the Pacific, McGeorge School of Law, 2010; B.A., Economics, University of California, San Diego, 2004. I would like to thank Professor Thomas O. Main for his advice and encouragement. I would also like to thank my family; without the love and support of my wife and my father, I would not be where I am today.
I. INTRODUCTION

When arbitration is chosen over international litigation, the decision is frequently made in order to increase certainty in the outcome.1 The United States has not acceded to any international agreement for the recognition and enforcement of foreign judgments,2 but it has acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a major multinational treaty obligating the enforcement of foreign arbitral awards.3 Ironically, U.S. requirements for personal jurisdiction have reversed this certainty in some cases. While courts have usually enforced foreign judgments without personal jurisdiction,4 courts have refused to enforce factually similar foreign arbitral awards for lack of personal jurisdiction.5

This Comment examines the cases, statutes, and treaties that have created this anomaly in American law and presents a simple solution to resolve it: bar personal jurisdiction as a defense during a proceeding to recognize or enforce a foreign arbitral award.

Part II of this Comment outlines the practices of most states in the enforcement of foreign judgments as they relate to personal jurisdiction. Part III presents the contrasting approach taken to personal jurisdiction as it applies in the enforcement of a foreign arbitral award. Part IV explores the practical differences between the two approaches and argues that arbitral award debtors should not be able to assert personal jurisdiction as a defense to the enforcement of an otherwise valid arbitral award, just as it is not an available defense during proceedings to enforce a foreign judgment. Part IV further argues that there are sufficient protections in place to assure due process in enforcement of foreign arbitral awards and that the imposition of personal jurisdiction as a procedural barrier to enforcement is contrary to the international obligations of the United States.


2. ROBERT E. LUTZ, A LAWYER’S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 1-2 (2007). While states often refer to judgments from other states as “foreign judgments,” this Comment uses “foreign judgments” to refer to foreign-country judgments unless otherwise indicated.


5. See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harinarain Co. (Glencore Grain), 284 F.3d 1114 (9th Cir. 2002) (affirming a district court’s dismissal of a complaint to enforce a London arbitration award for lack of personal jurisdiction); Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory” (Base Metal Trading I), 283 F.3d 208 (4th Cir. 2002) (affirming a district court’s dismissal of a complaint to enforce an arbitration award against a Russian corporation for lack of personal jurisdiction).
II. THE RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

In general, every state is required to recognize and enforce judgments granted by the other states of the Union under the Full Faith and Credit Clause. However, there is no constitutional mandate for states to recognize foreign judgments in the same way, nor do treaty obligations require the United States to recognize foreign judgments. Instead, decisions regarding the recognition and enforcement of foreign judgments are left up to the individual states, though concerns about judicial economy and comity have led most states to adopt a uniform approach.

A. The Uniform Acts

Two uniform acts have largely dictated state practice on the recognition and enforcement of foreign judgments: the Uniform Enforcement of Foreign Judgments Act (Enforcement Act) and the Uniform Foreign Money-Judgments Recognition Act (Recognition Act).

Forty-six states and Washington, D.C., have adopted the Enforcement Act. Ultimately, the Act is procedural, setting out a uniform framework for states to follow in enforcing the judgments of sister states. That same framework is used in enforcing foreign-country judgments in states that have also adopted the Recognition Act. The Enforcement Act does not specify criteria for defining which foreign judgments a state enforces.

Thirty-one states, Washington, D.C., and the Virgin Islands have adopted versions of the Recognition Act. The Recognition Act enumerates criteria that foreign judgments must meet to qualify for recognition in the United States.

7. LUTZ, supra note 2, at 1-2.
8. See infra Part II.B (discussing the typical state approach to recognition and enforcement of foreign judgments).
12. See id. § 2-8 (governing filing, notice, stays, fees, and uniformity of interpretation and preserving a creditor's right to seek enforcement outside of the Act).
13. See id. § 1.
16. See 13-II U.L.A. 25 (Supp. 2009) (showing that twenty-six states, the Virgin Islands, and Washington, D.C., have adopted this version of the Act). A newer version of the Recognition Act was introduced in 2005, but has failed to gain significant traction. While five states have adopted this version of the Act, the differences between the two versions are irrelevant to this Comment and further references to the Recognition Act apply to the older, widely adopted version. UNIF. FOREIGN MONEY JUDGMENTS RECOGNITION ACT, 13-II U.L.A. 7 (Supp. 2009).
Essentially, the Act requires that the foreign court complied with basic due process when it adjudicated the original case; the requirements include an impartial tribunal,\textsuperscript{18} sufficient notice to the defendant,\textsuperscript{19} and personal jurisdiction.\textsuperscript{20} The Act devotes an additional section to qualify the requirement of personal jurisdiction.\textsuperscript{21} However, despite the attention given to the subject, every reference to personal jurisdiction in the Recognition Act concerns only the personal jurisdiction of the original (foreign) court, not the personal jurisdiction of the local court charged with enforcement.\textsuperscript{22}

**B. Typical State Practice: Lenchyshyn**

In *Lenchyshyn v. Pelko Electric, Inc.*,\textsuperscript{23} a New York appellate court held that it is unnecessary for a domestic court to establish personal jurisdiction over a defendant in an action to recognize a foreign judgment.\textsuperscript{24} The court further held that the defendant need not have any assets in the forum for the judgment to be recognized; the plaintiff's anticipation that the defendant might someday have assets in the forum is sufficient for the recognition of the judgment.\textsuperscript{25}

The action in New York arose from Michael Lenchyshyn's attempts to enforce a Canadian judgment.\textsuperscript{26} Lenchyshyn, a Canadian citizen and resident, along with another Canadian, were sued by Pelko Electric, Inc. (Pelko Electric), an Ontario corporation, and Pelko Electric's president, director, and sole shareholder, Kosta Pelonis, a Canadian citizen and resident of Taiwan.\textsuperscript{27} Lenchyshyn successfully countersued Pelko Electric and Pelonis, who, after exhausting their appeals in Canada, owed Lenchyshyn a judgment of approximately $4,700,000.\textsuperscript{28} Less than three months after exhausting his appeals in Canada, Lenchyshyn filed in the New York Supreme (trial) Court in Erie County to confirm and enforce the Canadian judgment.\textsuperscript{29} Lenchyshyn alleged that

\begin{itemize}
  \item 18. *Id.* § 4(a)(1).
  \item 19. *Id.* § 4(b)(1).
  \item 20. *Id.* § 4(a)(2).
  \item 21. *Id.* § 5 (establishing criteria for recognizing foreign judgments absent a finding of personal jurisdiction).
  \item 22. *Id.* § 4(a)(2) (stating that there may not be grounds for recognition of a foreign judgment if "the foreign court did not have personal jurisdiction over the defendant" (emphasis added)); *id.* § 5 (providing criteria that satisfy a foreign court's personal jurisdiction over a defendant for purposes of recognizing the foreign judgment in the U.S.).
  \item 24. *Id.* at 292 ("[I]t is immaterial to recognition and enforcement of a foreign country money judgment whether there is any basis for the exercise of personal jurisdiction over the judgment debtor in New York.").
  \item 25. *Id.* at 290-92.
  \item 26. *Id.* at 286-87.
  \item 27. *Id.* at 286.
  \item 28. *Id.* at 286-87. All money values in this Comment represent United States dollars and generally represent currency conversion calculations performed by the relevant courts at the time of the decision.
  \item 29. *Lenchyshyn*, 723 N.Y.2d at 287.
\end{itemize}
Pelko Electric and Pelonis had moved money from Canada into accounts in Buffalo, New York, to avoid execution on the funds. He further alleged that the defendants had other assets in the state of New York. The defendants lost their challenges to jurisdiction and service at the trial court, which then granted summary judgment to Lenchyshyn. This action reached the appellate court on procedural appeals; specifically, the defendants claimed that the court did not have personal jurisdiction over them. Most of the appellate court’s holding was based on Article 53 of the New York Civil Practice Law and Rules (CPLR), New York’s version of the Recognition Act, and Article 54, New York’s version of the Enforcement Act. While Article 54 deals primarily with procedural and administrative steps for confirming a foreign judgment, Article 53 “sets forth substantive requirements that must be met before a foreign country money judgment will be recognized in New York.” Of particular note is the requirement that “the foreign country’s court had personal jurisdiction over the judgment debtor and subject matter jurisdiction over the case.” If that requirement is met, along with a few other requirements regarding notice and fairness, the judgment “is ‘conclusive’ and entitled to recognition.”

The defendants in this case did not challenge the jurisdiction of the Ontario court, where they originally began as plaintiffs. Instead, they claimed that the court lacked personal jurisdiction over them in the enforcement action. The appellate court held that no requirement for personal jurisdiction exists during an action to enforce a foreign judgment. To reach this conclusion, the court relied on an analysis of the CPLR, the Due Process Clause of the United States Constitution, and the Supreme Court case, Shaffer v. Heitner. The court then concluded that the defendants’ due process rights were protected adequately in

30. Id.
31. Id. at 288.
32. Id.
34. Although the Lenchyshyn court referred to the “Uniform Foreign Country-Money Judgments Recognition Act,” the newer version of the Recognition Act, this newer version had not been promulgated at the time of the decision. See Lenchyshyn, 723 N.Y.2d at 287-88. New York was using the older version of the Recognition Act at the time of the decision and continues to use the older version of the Act at the publication of this Comment.
35. N.Y. C.P.L.R. § 5408.
36. Lenchyshyn, 723 N.Y.2d at 288 (“CPLR article 53 is New York’s version of the ‘Uniform Foreign Country-Money Judgments Recognition Act.’ It codifies common-law principles appli-cable [sic] to recognition of foreign country judgments . . . and is a companion to CPLR article 54, which is New York’s version of the ‘Uniform Enforcement of Foreign Judgments Act’ . . . .” (citations omitted)).
37. Id. (citing N.Y. C.P.L.R. §§ 5303-5305).
38. Id. (citing N.Y. C.P.L.R. §§ 5304 (a)(2) & (b)(1), 5305).
40. Id. at 286-89.
41. Id. at 289.
42. Lenchyshyn, 723 N.Y.2d at 289-90 (citing Shaffer v. Heitner, 433 U.S. 186, 210 n.36 (1977)).
Canada, and there was no need to require personal jurisdiction again at the enforcement stage. The court provided a list of citations from courts in many states, and it found that only one Utah case did not support a similar outcome. Ultimately, the court defined the confirmation of a foreign money judgment as a "ministerial function" of the court.

The defendants also argued that confirmation of the judgment is inappropriate, because the plaintiff had not demonstrated that the defendants actually had any assets in New York. The court held that this "assertion has no relation to their jurisdictional objection" and commented that the defendants would not be "so adamantly opposed" to the recognition of the judgment if they did not or would not soon have assets in New York. Finally, the court concluded that it would be unreasonable to deny the plaintiff the possibility of collecting on this judgment in the future, regardless of the defendants' current distribution of assets. Though Lenchyshyn is a state case about foreign money judgments, the constitutional principles and reasoning employed may be paralleled in some of the federal cases dealing with foreign arbitral awards.

C. A Brief Examination of Shaffer v. Heitner

A brief examination of Shaffer v. Heitner will be useful in examining the holding of Lenchyshyn and the cases that follow. In Shaffer, the Supreme Court changed the requirements for a court to assert personal jurisdiction over a defendant. The Court ruled that the mere presence of the defendant's property in a state was insufficient as a basis for jurisdiction. Specifically, this ruling did away with the quasi in rem basis for jurisdiction.

43. Id.
44. Id. at 288-89 ("Those courts that have cited the Shaffer footnote have held that no jurisdictional basis for proceeding against the judgment debtor need be shown before a foreign judgment will be recognized or enforced in a given state. Only one case . . . holds to the contrary, and does so without referring to the Shaffer principle." (citing Mori v. Mori, 896 P.2d 1237 (Utah Ct. App. 1995) (holding personal jurisdiction to be necessary) (citations omitted))). Utah has not adopted either version of the Recognition Act.
45. Id. at 291.
46. Id.
47. Id.
49. See infra Part III.B (discussing federal cases on the recognition and enforcement of foreign arbitral awards).
51. See infra Part III (discussing current approaches to the recognition and enforcement of foreign arbitral awards).
52. Shaffer, 433 U.S. at 212.
53. Id. at 208-09.

For the type of quasi in rem action typified by Harris v. Balk [198 U.S. 215 (1905)] and the present case, however, accepting the proposed analysis would result in significant change. These are cases where the property which now serves as the basis for state-court jurisdiction is completely unrelated to the plaintiff's cause of action. Thus, although the presence of the defendant's property in a State
The Court noted that the "primary rationale" for quasi in rem jurisdiction was to prevent debtors from moving their assets to jurisdictions where other forms of personal jurisdiction over the debtor did not exist. The Court found that this was not a reasonable justification in general, but acknowledged one situation where it was appropriate—the enforcement of judgments:

At most, [the justification] suggests that a State in which property is located should have jurisdiction to attach that property, by use of proper procedures, as security for a judgment being sought in a forum where the litigation can be maintained consistently with International Shoe. Moreover, we know of nothing to justify the assumption that a debtor can avoid paying his obligations 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 all other States.

Finally, the Court noted that "there would seem to be no unfairness in allowing" a judgment creditor to collect on that judgment in a state where personal jurisdiction could not be established, so long as the original court had proper personal jurisdiction over the defendant. Though the Court’s reasoning in Shaffer was directed only towards judgments, this reasoning is equally relevant in discussing arbitral awards.

D. Analysis of the Lenchyshyn Style Reasoning in Light of Shaffer

The Lenchyshyn court treated its decision as logical and unexceptional. At its heart, the argument is simple: the Recognition Act (and the foreign court where the judgment originated) is already protecting the defendant’s due process rights, including personal jurisdiction, so the court charged with enforcement should not be required to grant further protections during a ministerial enforcement action.

This approach balances the defendant’s due process rights with the rights of the judgment creditor in accordance with the Shaffer decision. In Shaffer, the U.S. Supreme Court expressed concern that personal jurisdiction might be used

might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State’s jurisdiction. If those other ties did not exist, cases over which the State is now thought to have jurisdiction could not be brought in that forum.

Id.

54. Id. at 210.
55. Id. (citations and footnotes omitted).
56. Id. at 210 n.36.
57. Id.
as a shield to protect assets from execution under a valid judgment.\textsuperscript{60} The Lenchyshyn court's approach squarely addresses that possibility:

At bottom, defendants take the illogical and inequitable position that a judgment debtor's New York assets should be immune from execution or restraint so long as the judgment debtor absents himself from New York, no difficult trick in this day of telecommuting and banking and investing by telephone or wire or over the Internet. Requiring that the judgment debtor have a "presence" in some or other jurisdictional nexus to the state of enforcement would unduly protect a judgment debtor and enable him to easily escape his just obligations under a foreign country money judgment.\textsuperscript{61}

The Lenchyshyn court's reasoning also addresses a more subtle question: How is the defendant unjustly harmed by the recognition of a judgment against him if he has no assets in the forum state? The court concluded that the defendant will only be affected if he currently has assets in the forum or intends to bring assets into the forum.\textsuperscript{62} The court expressed extreme skepticism that a defendant who had no assets in the forum and no plans to bring assets into the forum would contest the recognition of the judgment on these grounds.\textsuperscript{63} The defendant only loses anything if he actually has or will have assets in the forum, in which case those assets should rightfully be attached and seized to satisfy the judgment.\textsuperscript{64}

State courts have largely proceeded in this manner with the belief that the Supreme Court blessed this course of action in Shaffer.\textsuperscript{65} "Those courts that have cited the Shaffer footnote have held uniformly that no jurisdictional basis for proceeding against the judgment debtor need be shown before a foreign judgment will be recognized or enforced in a given state."\textsuperscript{66} Ultimately, this seems to be the most logical approach to assuring that judgment creditors are able to collect against assets in the United States.

III. THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Unlike the recognition of judgments from foreign courts, which has generally been a matter left primarily to state law, the recognition of foreign arbitral awards

\textsuperscript{60} Id. at 210 ("[A] wrongdoer 'should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.'" (quoting \textit{RESTATEMENT OF JUDGMENTS} § 66 cmt. a (1963))).

\textsuperscript{61} \textit{Lenchyshyn}, 723 N.Y.2d at 291-92.

\textsuperscript{62} See id. (noting that the presence of assets in the forum state is all that is required to enforce a foreign judgment).

\textsuperscript{63} Id.

\textsuperscript{64} Id. at 290-91.

\textsuperscript{65} Id. at 289-90 (providing a listing of courts that support the Shaffer analysis).

\textsuperscript{66} Id. at 289.
is an area of exclusive federal subject matter jurisdiction. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) and Chapter 2 of the Federal Arbitration Act (FAA) govern the recognition and enforcement of foreign arbitral awards in the United States. Chapter 2 of the FAA is simply the implementing legislation for the New York Convention.

A. The New York Convention

The New York Convention is a multinational treaty establishing a set of procedures for the recognition and enforcement of foreign arbitral awards in more than 130 countries. Congress ratified the Convention in 1970. It is said to have a "pro-enforcement bias," which is implemented by the FAA and recognized by the United States Supreme Court.

The Convention gives a short and conclusive list of available defenses to the enforcement of a foreign arbitral award: "invalid arbitration agreement, lack of opportunity to present one's case, arbitrator in excess of jurisdiction, . . . irregular composition of the arbitral tribunal[,]" award is not yet final or is set aside, the subject matter of the award is not capable of settlement by arbitration, or the award is in violation of the public policy of the forum. Courts must confirm the award unless one of these defenses applies. In keeping with the pro-enforcement bias, these defenses are given a narrow scope by courts in the United States and abroad.

There are two additional procedural issues related to recognition and enforcement of an arbitral award under the Convention. First, the FAA established that the award must be presented for recognition or enforcement within three years, which essentially imposes a statute of limitations. Second, the Convention specifies that the forum state "shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the

67. 9 U.S.C. §§ 202-203 (2006). See Glencore Grain, 284 F.3d 1114, 1121 (9th Cir. 2006) (referring to the aforementioned code sections collectively by their common name, the Federal Arbitration Act (FAA)).
68. New York Convention, supra note 3.
70. Id. § 201.
72. Glencore Grain, 284 F.3d at 1119-20.
73. Id. at 1120.
74. PARK, supra note 71, at 307 (citing New York Convention, supra note 3, at art. V(1)).
75. New York Convention, supra note 3, art. V(1)(e).
76. Id. art. V(2); PARK, supra note 71, at 307.
78. PARK, supra note 71, at 307.
79. 9 U.S.C. § 207.
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territory where the award is relied upon." This language is not intended to erect procedural barriers to enforcement but to specify that local rules of procedure are to be followed. The following cases illustrate the complications caused when arbitral award debtors assert lack of personal jurisdiction as a defense, though this is not a defense explicitly allowed by the New York Convention or the FAA.

B. Current Approaches: Federal Case Law

1. Glencore Grain

In *Glencore Grain*, the Ninth Circuit held that it was necessary to establish personal jurisdiction during proceedings to confirm a foreign arbitral award. Though the court recognized that the New York Convention offers only a limited number of defenses to enforcement of an award, it insisted that the Convention does not abrogate the requirement of personal jurisdiction.

The action began with Glencore Grain Rotterdam B.V. (Glencore Grain), a Netherlands corporation, filing to confirm an arbitral award against Shivnath Rai Harnarain Company (Shivnath Rai), an Indian corporation, in the Northern District of California. Glencore Grain had entered into a series of contracts with Shivnath Rai regarding the sale and delivery of rice. Though the contract in question was to be executed entirely within India, it included clauses mandating that the London Rice Brokers’ Association (LRBA) arbitrate disputes under English law.

A dispute regarding delivery arose, which the parties arbitrated in England, presumably in accordance with the agreement. The LRBA awarded Glencore Grain more than seven million dollars. Glencore Grain first filed to confirm the award in India and then filed in the United States while the Indian proceedings were underway. Glencore Grain allowed almost three full years to expire, the maximum period allowed by the FAA, before filing in the United States. The

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80. New York Convention, supra note 3, art. III.
81. See Park & Yanos, supra note 3, at 256 (“This language relates to how recognition will be granted, not whether recognition will be granted at all.”).
82. 284 F.3d 1114 (9th Cir. 2002).
83. Id. at 1121.
84. Id. at 1120-21.
85. Id. at 1118.
86. Id.
87. Id.
88. Glencore Grain, 284 F.3d at 118 (stating that Shivnath Rai challenged the arbitral procedures directly in an action in India).
89. Id.
90. Id. at 1118-19.
92. Glencore Grain, 284 F.3d at 1118-19 (noting that the LRBA issued its decision in July 1997, while Glencore Grain initiated its action in the United States in July 2000).
Indian proceedings were still pending in the High Court of Delhi when the Ninth Circuit filed its opinion, approximately four years after the Indian action was initiated. The court also noted that the award was final and enforceable in England, though the opinion makes no mention of any enforcement proceedings there, possibly due to Shivnath Rai having no assets in England.

The Ninth Circuit's primary reasoning for upholding the personal jurisdiction requirement was that a "statute cannot grant personal jurisdiction where the Constitution forbids it," which it described as a "bedrock principle of civil procedure and constitutional law." The court acknowledged that, while the FAA expanded the subject matter jurisdiction of the federal courts, it could not expand the personal jurisdiction of the courts to "all persons throughout the world who have entered into an arbitration agreement covered by the [New York] Convention." The court insisted that some basis, such as residence, conduct, consent, or location of property, must exist to confer personal jurisdiction.

The court then engaged in an analysis of Shivnath Rai's contacts with the forum, a la International Shoe and its progeny. Glencore Grain alleged only scant contacts between Shivnath Rai and the State of California: "an independently employed sales agent who imports and distributes Shivnath Rai's rice, a 1987 rice shipment into Los Angeles, and . . . fifteen San Francisco shipments from March 1999 to March 2000." When the court later expanded its review to Shivnath Rai's contacts with the entire nation, it added only seven additional shipments from 1993 to 1995. The court concluded that, "while it is clear that Shivnath Rai has stepped through the door, there is no indication that it has sat down and made itself at home." The court also found that "the exercise of personal jurisdiction over Shivnath Rai would be unreasonable." Finally, the

93. Id.
94. Id. at 1118.
95. Id. at 1121 (quoting Gilson v. Republic of Ir., 682 F.2d 1022, 1028 (D.C. Cir. 1982)).
96. Id.
97. Id. at 1122 (quoting Transatlantic Bulk Shipping Ltd. v. Saudi Chartering S.A., 622 F. Supp. 25, 27 (S.D.N.Y. 1985)).
98. Glencore Grain, 284 F.3d at 1122.
99. Id. at 1123-28.
101. See generally Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985) (holding that a defendant must have intentionally created contacts with the forum in order for jurisdiction to be proper and that the exercise of personal jurisdiction must be reasonable); Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (holding that general jurisdiction may be applicable in circumstances where the suit did not arise out of contacts with the forum); Shaffer v. Heitner, 433 U.S. 186 (1977) (holding that an analysis of contacts would be necessary to establish jurisdiction over defendant's property); Hanson v. Denckla, 357 U.S. 235 (1958) (holding that the cause of action must arise out of defendant's contacts with the forum for specific jurisdiction to apply).
102. Glencore Grain, 284 F.3d at 1124.
103. Id. at 1127.
104. Id. at 1125.
105. Id. at 1126.
court concluded that, because Glencore Grain failed to identify any assets of Shivnath Rai in the United States, it could not base jurisdiction on assets, though in dicta it discussed *CME Media Enterprises B.V. v. Zelezny* on this point, and it declined to comment on whether the limitations on recovery in *Zelezny* were appropriate.

In reaching its holding, the court ignored the intent behind the New York Convention and its implementing legislation: “The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” The court acknowledged that the New York Convention and the FAA have a pro-enforcement bias; a bias recognized by the U.S. Supreme Court. The intent is that the courts should have “little discretion” when enforcing arbitral awards and that “[e]ach Contracting State shall recognize arbitral awards as binding without creating conditions or procedures more onerous than those applied to domestic arbitration awards.”

Despite the clear intent expressed in the New York Convention and the FAA—and the support of that intent by the Supreme Court—the Ninth Circuit refused to enforce a foreign arbitral award for lack of personal jurisdiction.

2. Base Metal Trading

In *Base Metal Trading I*, the Fourth Circuit considered a case similar to, though perhaps less sympathetic than, *Glencore Grain* and reached a similar result. The court focused most of its analysis on why it had no personal jurisdiction over the debtor, “OJSC ‘Novokuznetsky Aluminum Factory’”

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106. *Id.* at 1127-28.
107. *CME Media Enter. B.V. v. Zelezny*, No. 01 CIV. 1733 (DC), 2001 WL 1035138, at *4-5 (S.D.N.Y. Sept. 10, 2001) (on file with the McGeorge Law Review) (holding that *quasi in rem* jurisdiction based on property alone was appropriate, but only up to the value of the property); see infra Part III.B.3.
108. *Glencore Grain*, 284 F.3d at 1122 n.5.
109. *Id.* at 1120 (quoting 9 U.S.C. § 207 (2006)).
110. *Id.*
111. The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).
112. *Glencore Grain*, 284 F.3d at 1120 (quoting Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc., 969 F.2d 764, 770 (9th Cir. 1992)).
113. *Id.* at 1120-21 (quoting New York Convention, *supra* note 3, art. III) (emphasis added by 9th Cir.).
114. *Id.* at 1119-21.
115. *Id.* at 1120.
116. 283 F.3d 208 (4th Cir. 2002).
117. *Id.* at 216.
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NKAZ), while its discussion of why it needed personal jurisdiction was quite brief.118

The action began with Base Metal Trading (Base Metal), a Guernsey, Channel Island corporation, filing to confirm an arbitral award against NKAZ, a Russian corporation, in the District of Maryland.119 Base Metal, a raw materials trader, and NKAZ, an aluminum manufacturer, had a business dispute and agreed to arbitrate in the Commercial Arbitration Court of the Moscow Chamber of Commerce and Industry.120 In December 1999, the Commercial Arbitration Court issued a $12 million award to Base Metal, which it was unable to collect.121 Base Metal filed to confirm the arbitral award in the United States in June 2000 and also moved to attach a shipment of aluminum in the Baltimore Harbor allegedly belonging to NKAZ.122 The resulting attachment order was eventually vacated due to conflicting claims of ownership, but Base Metal won a default judgment against NKAZ.123 In April 2001, the default judgment was vacated, and the case was dismissed for lack of personal jurisdiction.124

On appeal, the Fourth Circuit briefly examined the sections of the FAA dealing with jurisdiction over the confirmation of arbitral awards under the New York Convention.125 The court, without any real analysis, concluded that the Convention grants subject matter jurisdiction to the federal courts, but it does not grant personal jurisdiction if it is not already present.126

The court conducted a typical personal jurisdiction analysis and concluded that personal jurisdiction could not be established, because NKAZ did not have minimum contacts with the state of Maryland,127 did not “purposefully avail itself of the privilege of conducting activities within” Maryland,128 and did not have “continuous and systematic” contacts with the state of Maryland.129 Additionally, the court noted that “the presence of property alone [did] not support jurisdiction”130 in Maryland. The court then dismissed Base Metal's alternative argument that, even if minimum contacts could not be established in the state of Maryland, jurisdiction would be proper, because NKAZ had sufficient contacts

118.  Id. at 212-16.
119.  Id. at 211.
120.  Id.
121.  Id.
122.  Base Metal Trading I, 283 F.3d at 211.
123.  Id. at 211-12.
124.  Id. at 212.
125.  Id. (discussing 9 U.S.C. §§ 203, 207 (2006)).
126.  Id. at 212 (“While the Convention confers subject matter jurisdiction over actions brought pursuant to the Convention, it does not confer personal jurisdiction when it would not otherwise exist.”). 
127.  Id. at 213-14 (citing Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).
128.  Base Metal Trading I, 283 F.3d at 208 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)).
129.  Id. at 213 (quoting Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 416 (1984)).
130.  Id. (citing Shaffer v. Heitner, 433 U.S. 186, 209 (1977)).
with the United States as a whole, if not with any one state.\textsuperscript{131} Though the court found several flaws with this argument, the largest barrier was the fact that Base Metal had a nearly identical action pending against NKAZ in the Third Circuit, where it was arguing that personal jurisdiction could be established in New Jersey. As such, the Fourth Circuit refused to consider whether personal jurisdiction could be established in any other individual state because that would decide the question before the Third Circuit.\textsuperscript{132}

After losing in the Fourth Circuit, Base Metal advanced a new theory in its action in the Third Circuit. It claimed that personal jurisdiction should not be necessary to confirm a foreign arbitral award and seize assets, “because a proceeding to confirm and enforce a foreign arbitration award in a jurisdiction where the award debtor has property is the same as a proceeding to execute on an in personam judgment in a jurisdiction where the judgment debtor has property.”\textsuperscript{133} To support this theory, Base Metal relied on a footnote from \textit{Shaffer}\textsuperscript{134} suggesting that personal jurisdiction might not be a requirement in an action to collect a debt as long as competent jurisdiction was established when the debt was adjudicated.\textsuperscript{135} However, the court declined to consider this theory, because it was not advanced at the trial court level.\textsuperscript{136}

Much like in \textit{Glencore Grain}, the courts in both \textit{Base Metal} cases required personal jurisdiction despite the intent of the New York Convention. However, by not considering the merits of Base Metal’s final argument regarding personal jurisdiction, the Third Circuit did not foreclose the possibility that this argument could find success in another case.\textsuperscript{137}

3. Zelezny

In \textit{CME Media Enterprises B.V. v. Zelezny},\textsuperscript{138} the District Court for the Southern District of New York ruled in favor of a plaintiff who argued that a foreign arbitral award could be confirmed despite the court’s lack of personal jurisdiction over the defendant.\textsuperscript{139} Though this case was probably something of a pyrrhic victory for CME Media Enterprises B.V. (CME Media), the court’s

\textsuperscript{131} \textit{Id.} at 215-16 (referencing Fed. R. Civ. P. 4(k)(2)).
\textsuperscript{132} \textit{Id.} at 215 (referencing the action ultimately decided in Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory,” 47 F. App’x 73 (3d Cir. 2002)).
\textsuperscript{133} Base Metal Trading, Ltd. v. OJSC “Novokuznetsky Aluminum Factory” (\textit{Base Metal Trading II}), 47 F. App’x 73, 77 (3d Cir. 2002).
\textsuperscript{134} 433 U.S. 186, 210 n.36 (1977); see supra Part II.C (providing a brief examination of \textit{Shaffer}).
\textsuperscript{135} \textit{Base Metal Trading II}, 47 F. App’x at 77 (“In support of this theory, Base Metal relies upon footnote dicta in \textit{Shaffer}.” (citation omitted)).
\textsuperscript{136} \textit{Id.} at 78 (citing Union Pac. R.R. Co. v. Greentree Transp. Trucking Co., 293 F.3d 120, 126 (3d Cir. 2002)).
\textsuperscript{137} \textit{Id.} at 77-78.
\textsuperscript{138} No. 01 CIV. 1733(DC), 2001 WL 1035138 (S.D.N.Y. Sept. 10, 2001).
\textsuperscript{139} \textit{Id.} at *5.
analysis of the personal jurisdiction requirement was more accommodating to the New York Convention than the analyses in *Glencore Grain* and *Base Metal*.\(^{140}\)

CME Media, a Netherlands corporation, filed to confirm an arbitral award against Dr. Vladimir Zelezny, a businessman who was both a resident and citizen of the Czech Republic.\(^{141}\) CME Media had purchased a number of shares in a consulting firm from Zelezny, subject to an agreement containing non-compete provisions.\(^{142}\) In 1999, CME Media initiated arbitration against Zelezny in Amsterdam, alleging that he violated the abovementioned non-compete provisions.\(^{143}\) In February 2001, the arbitral panel gave CME Media a $23,350,000 award, which it sought to confirm in the Southern District of New York later that month.\(^{144}\) CME Media did not contend that the court had personal jurisdiction over Zelezny. Rather, it argued that the court could confirm and enforce the arbitral award based solely on Zelezny’s assets in New York, which consisted of a bank account.\(^{145}\)

Ultimately, the court asserted *quasi in rem* jurisdiction over Zelezny’s bank account but refused to confirm the award beyond the value of the account.\(^{146}\) At the time the action was filed, the bank account held only $69.65, which was reduced by bank fees to $0.05 by the time of the decision.\(^{147}\) Despite the comically low recovery, CME Media convinced the court that the confirmation of a foreign arbitral award was more like the recognition of a foreign judgment than a new, independent action.\(^{148}\)

In reaching its verdict, the *Zelezny* court relied heavily on *Shaffer*.\(^{149}\) Though *Shaffer* established that minimum contacts would generally be required to establish personal jurisdiction in cases proceeding *in rem* or *quasi in rem*,\(^{150}\) it left an exception for circumstances “where *quasi 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.”\(^{151}\) The Supreme Court ensured that judgment debtors could not protect their assets from seizure simply by moving them to a jurisdiction where they lacked minimum contacts.\(^{152}\)

\(^{140}\) *Id.* at *3-4.*  
\(^{141}\) *Id.* at *1.*  
\(^{142}\) *Id.*  
\(^{143}\) *Id.*  
\(^{144}\) *Zelezny*, 2001 WL 1035138, at *1.*  
\(^{145}\) *Id.* at *1-2.*  
\(^{146}\) *See id.* at *4* (stating that the award was confirmed, “but only to the extent there exist assets in this jurisdiction, because the effect of the judgment in a quasi in rem case is limited to the property that supports jurisdiction.” (citing *Shaffer v. Heitner*, 433 U.S. 186, 199 & n.17 (1977))).  
\(^{147}\) *Id.* at *2.*  
\(^{148}\) *See id.* at *3-4* (explaining why minimum contacts were not required for CME Media to collect an award based on a previously adjudicated claim).  
\(^{149}\) *See supra* note 146 and accompanying text.  
\(^{151}\) *Zelezny*, 2001 WL 1035138, at *3* (citing *Shaffer*, 433 U.S. at 210 n.36).  
\(^{152}\) *Id.* (citing *Shaffer*, 433 U.S. at 210).
The court in Zelezny found that the arbitral panel in Amsterdam had personal jurisdiction over Zelezny, had adjudicated CME Media’s claim against him, and had determined that Zelezny was a debtor to CME Media by issuing an award.\textsuperscript{153} It was not necessary for Zelezny to have minimum contacts with the state of New York in order for the court to proceed, because this was not a case adjudicating a claim; it was a case to collect a debt that had already been duly adjudicated.\textsuperscript{154} The court concluded that, “even though the Court lacks personal jurisdiction over [Zelezny], the Court has quasi in rem jurisdiction to hear this case.”\textsuperscript{155}

After establishing quasi in rem jurisdiction, the court continued by exploring the ramifications of its holding.\textsuperscript{156} It noted that it could not confirm the entire arbitral award and could only confirm the award to the extent that Zelezny had assets in the jurisdiction.\textsuperscript{157} The court also noted that its judgment quasi in rem could not have preclusive effects in other forums, because quasi in rem judgments cannot be enforced under the Full Faith and Credit Clause\textsuperscript{158} of the Constitution.\textsuperscript{159} Finally, it noted that, because Zelezny was not before the court, the court could not require Zelezny to participate in discovery, which CME Media had hoped to use to find other assets Zelezny might possess in New York or elsewhere.\textsuperscript{160}

In the opinion, the court also briefly examined the New York Convention, particularly the reasons for which it might choose not to enforce the arbitral award.\textsuperscript{161} The court recognized that its role was limited to denying enforcement based only on grounds enumerated in the Convention.\textsuperscript{162} Substantial case law supports the assertion that district courts may not find other procedural reasons to deny enforcement,\textsuperscript{163} and “the Convention clearly manifests a ‘general pro-enforcement bias.”\textsuperscript{164} Since Zelezny did not cite any of the Convention’s seven grounds for non-enforcement as reasons why the award should not be enforced, the court was bound by the Convention and precedent to enforce the award.\textsuperscript{165}

\begin{itemize}
  \item[153.\textit{ Id.}]
  \item[154.\textit{ Id. at *4.}]
  \item[155.\textit{ Id.}]
  \item[156.\textit{ See id. at *4-5 (discussing the extent of the court’s jurisdiction over Zelezny).}]
  \item[157.\textit{ See supra note 146 and accompanying text.}]
  \item[158.\textit{ U.S. CONST. art. IV, § 1.}]
  \item[159.\textit{ Zelezny, 2001 WL 1035138, at *4.}]
  \item[160.\textit{ Id. at *5 (“Because it is the existence of property that provides the basis for jurisdiction, and in the absence of minimum contacts, the Court cannot exercise jurisdiction beyond the known assets based on petitioner’s speculation that other assets might exist . . . . For these reasons, petitioner’s request for discovery to locate other assets in this jurisdiction is denied.”).}]
  \item[161.\textit{ Id. at *4-5.}]
  \item[162.\textit{ Id. at *5 (citing Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15, 19 (2d Cir. 1997)).}]
  \item[163.\textit{ Id. (quoting Yusuf Ahmed Alghanim & Sons, 126 F.3d at 20 (citations omitted)).}]
  \item[164.\textit{ Id. (quoting Parsons & Whittemore Overseas Co. v. Societe Generale de L’Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974)).}]
  \item[165.\textit{ Zelezny, 2001 WL 1035138, at *5.}]
\end{itemize}
4. Synthesis of Cases on the Enforcement of Foreign Arbitral Awards

Ultimately, the Zelezny court approached the issue of personal jurisdiction as a defense to the enforcement of a foreign arbitral award differently than the Glencore Grain and Base Metal courts. The Zelezny court treated the restrictions of the New York Convention with respect and considered existing precedents. This approach was in sharp contrast to the approaches taken in Glencore Grain and Base Metal. The Glencore Grain court seemed to assume that the restrictions on procedural barriers to enforcement did not apply to personal jurisdiction. Similarly, the Base Metal courts ignored the Convention’s restrictions entirely. Additionally, while the Glencore Grain and Base Metal courts were unwilling to expand their approaches to personal jurisdiction, the Zelezny examined and applied the doctrine of personal jurisdiction in a way that honored the intent of the New York Convention and assured that defendants continued to receive adequate procedural protection.

These cases suggest a strong hesitancy to question the requirement of personal jurisdiction among the federal judiciary. That hesitancy is natural given the line of cases leading up to Shaffer, which ensconced the importance of the personal jurisdiction requirement. In Shaffer, the Supreme Court presented a warning about sacrificing personal jurisdiction in order to achieve judicial economy: “When the existence of jurisdiction in a particular forum under International Shoe is unclear, the cost of simplifying the litigation by avoiding the jurisdictional question may be the sacrifice of ‘fair play and substantial justice.’ That cost is too high.” However, Justice Marshall’s footnote, at issue throughout this line of cases, significantly softened the absolute nature of that warning:

166. See id. at *3-4 (discussing jurisdiction over Zelezny).
167. See id. at *3-5 (analyzing how different courts applied the restrictions of the New York Convention).
168. See Glencore Grain, 284 F.3d 1114, 1121-22 (9th Cir. 2002) (discussing the relationship between personal jurisdiction and due process).
169. See Base Metal Trading I, 283 F.3d 208, 212 (4th Cir. 2002); Base Metal Trading II, 47 F. App’x 73, 78 (3d Cir. 2002).
170. See Glencore Grain, 284 F.3d at 1123-28; Base Metal Trading I, 283 F.3d at 212-16; Base Metal Trading II, 47 F. App’x at 74-77.
172. Glencore Grain, 284 F.3d at 1121 (“It is a bedrock principle of civil procedure and constitutional law . . . .”); Base Metal Trading I, 283 F.3d at 212 (“The personal jurisdiction inquiry is a well established one.”); Zelezny, 2001 WL 1035138, at *3 (“[T]his Court cannot confirm a $23.35 million arbitration award and enter a judgment to that effect when jurisdiction is limited to quasi in rem jurisdiction based solely on assets of $0.05.”).
173. See supra note 101 and accompanying text; see also Int’l Shoe Co. v. Washington, 326 U.S. 310 (1945) (establishing the modern personal jurisdiction doctrine of minimum contacts).
Once it has been determined by a court of competent jurisdiction that
the defendant is a debtor of the plaintiff, there would seem to be no
unfairness in allowing an action to realize on that debt in a State where
the defendant has property, whether or not that State would have
jurisdiction to determine the existence of the debt as an original matter. 175

This footnote suggests, and the Zelezny court recognized, that the traditional
personal jurisdiction analysis need not apply to cases already adjudicated. 176 In
addition, the Zelezny court never examined the difference between an arbitral
award and a judgment. The court moved fluidly between the two concepts and
seemed to treat them synonymously. 177 The court stated that “an arbitration panel
with personal jurisdiction over Zelezny has already adjudicated [the] claims
against Zelezny and determined that he is a debtor.” 178 The court conducted its
analysis without considering whether Zelezny was an arbitral award debtor or a
judgment debtor, and made no suggestion that such a distinction would have a
bearing on its analysis. 179 This treatment probably came from the court’s
examination and understanding of the New York Convention—a document the
Glencore Grain and Base Metal courts gave far less credence. 180

The Zelezny court also noted that holding otherwise could allow arbitral
award debtors to move their assets to the United States to avoid collection on
those assets. 182 Neither the Glencore Grain nor Base Metal courts suggested a
solution to this problem, though the Zelezny court had little trouble applying the
solution from Shaffer to arbitral awards. 183

IV. PROPOSAL TO DISPENSE WITH THE PERSONAL JURISDICTION REQUIREMENT
AS APPLIED TO THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Personal jurisdiction is not a defense to the enforcement of a foreign
judgment, but the current judicial trend is toward allowing it as a defense to the
enforcement of foreign arbitral awards. 184 This Comment suggests a simple and
straightforward solution to the disparity: arbitral award debtors should not be

175. Id. at 210 n.36.
177. See id. at *3 (applying authority relating to claims adjudicated by courts to claims resolved by
arbitrators with no discussion or examination of the differences between courts and arbitrators).
178. Id.
179. Id.
180. Id. at *4-5.
181. Glencore Grain, 284 F.3d 1114, 1121 (9th Cir. 2002) (“[N]either the Convention nor its
implementing legislation removed the district courts’ obligation to find jurisdiction over the defendant in suits
to confirm arbitration awards.”); Base Metal Trading I, 283 F.3d 208, 212 (4th Cir. 2002) (“[T]he
Convention . . . does not confer personal jurisdiction when it would not otherwise exist.”). 
183. See id. (applying the reasoning in Shaffer to the facts in Zelezny).
184. See supra Part III.B.
allowed to assert personal jurisdiction as a defense to the enforcement of a foreign arbitral award. Allowing debtors to use this procedural defense is unfair to plaintiffs, unnecessary to ensure due process, and harmful to the institution of international arbitration as a whole. Additionally, this proposed solution would allow the United States to remain faithful to its treaty obligations under the New York Convention.

A. Fairness to Plaintiffs

Parties might choose arbitration over litigation for many reasons: choice of venue, law, or factfinder; decreased cost; increased efficiency; privacy and confidentiality; or any other reason. The decision may also be driven by enforcement obligations under the New York Convention. Whatever the motive for choosing arbitration, procedural defenses to enforcement create additional litigation for plaintiffs with arbitral awards. This is a frustrating proposition for arbitrating parties who make a calculated decision to avoid litigation.

Additionally, the only discernible effect of allowing personal jurisdiction as a defense at the enforcement stage is to protect the assets of the arbitral award debtor. In effect, it allows an arbitral award debtor to shield assets from those legally entitled to collect from those assets. In the very similar situation of a judgment debtor, courts like the Lenchyshyn court have long since determined that "considerations of logic, fairness, and practicality dictate that a judgment creditor be permitted to obtain recognition and enforcement of a foreign country money judgment without any showing that the judgment debtor is subject to personal jurisdiction in [the forum state]." Those same considerations of logic, fairness, and practicality equally favor an arbitral award creditor. It seems grossly incongruous that arbitral award debtors might be allowed to move assets to an unrelated forum to shield them from attachment when the predominant jurisprudence suggests that it is inequitable and illogical to allow judgment debtors to shield assets in this fashion.

185. See infra Part IV.A.
186. See infra Part IV.B.
187. See infra Part IV.C.
188. See infra Part IV.D.
190. See id. (noting that arbitration awards are "much more likely" to be enforced, in part because of the New York Convention); William W. Park, Text and Context in International Dispute Resolution, 15 B.U. INT'L L.J. 191, 197 (1997) ("Just as significantly, the New York Arbitration Convention ... binds most of the world to enforce an arbitration clause and the resulting award.").
193. See id. at 291-92 ("[D]efendants take the illogical and inequitable position that a judgment debtor's New York assets should be immune from execution or restraint so long as the judgment debtor absents himself...")
Finally, foreign arbitral award creditors gain benefits from recognition of their awards beyond the simple ability to collect debts owed to them. Once an award is recognized in the United States, *res judicata* will enshrine the results of the arbitration.\(^{194}\) If the award is not recognized, it is possible that the party who lost at the arbitral tribunal might file a conflicting lawsuit against the previous victor, hoping to reach the opposite outcome.\(^{195}\)

**B. Due Process Protections**

The Recognition Act and the New York Convention both contain provisions ensuring that the United States will only enforce a foreign judgment or arbitral award when it was granted in compliance with certain procedural protections.\(^{196}\) The Recognition Act essentially requires that the foreign court granting the judgment complies with basic due process, including personal jurisdiction.\(^{197}\) The New York Convention’s procedural protections are less specific. The provisions require that the award was valid under the laws of the arbitral situs,\(^{198}\) that the arbitral award debtor was given proper notice of the proceedings and an opportunity to defend,\(^{199}\) and that all parties consented to arbitration in writing.\(^{200}\) While the New York Convention does not explicitly state that the arbitral situs needs to have personal jurisdiction over the parties, the written consent of the parties to arbitrate at that situs establishes jurisdiction.\(^{201}\)

The due process protections created by the Recognition Act and the New York Convention are otherwise quite similar. It is hard to imagine a situation where these protections would deny enforcement of a foreign judgment but allow enforcement of a foreign arbitral award with similar circumstances. In fact, because of the written consent requirement, the protections assured to a foreign arbitral award debtor seem to be greater than those assured to a foreign judgment debtor. Why then should the foreign arbitral award debtor receive additional benefits from New York....")

\(^{194}\) See Ivanova, *supra* note 1, at 902 ("After such an award is recognized, it would be easy to attach any funds the defendant may have in that jurisdiction in the future. Recognition will also eliminate the possibility of conflicting lawsuits.").

\(^{195}\) See id. at 902-03 ("If an award is vacated in a particular jurisdiction, the plaintiff will encounter difficulties in combating the *res judicata* effect of the decision when making the argument for enforcement in a jurisdiction where the defendant does have assets.").


\(^{198}\) New York Convention, *supra* note 3, art. V(1)(a).

\(^{199}\) *Id.* art. V(1)(b).

\(^{200}\) *Id.* art. II.

\(^{201}\) See *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 n.14 (1985) (generally allowing that personal jurisdiction may be waived and acknowledging the validity of forum-selection provisions).
procedural protections from enforcement, above and beyond those granted to a foreign judgment debtor?

C. Effects on International Arbitration

American courts have long recognized that the New York Convention strictly limits defenses to enforcement. Just four years after the United States acceded to the Convention, the Court of Appeals for the Second Circuit recognized that the "Convention clearly shifted the burden of proof to the party defending against enforcement and limited his defenses to seven set forth in Article V." By allowing arbitral award debtors additional procedural defenses against enforcement, the courts erode the international community's faith in the finality of arbitral awards and the United States' commitment to its treaty obligations under the Convention.

It has been suggested that the current trend of judicial rulings could lead to "the demise of international business arbitration." While that view might be extreme, an erosion of the certainty and finality of international arbitral awards in the United States has negative effects on the institution of international arbitration. "The New York Convention was enacted to . . . codify the obligation to recognize and enforce an arbitral award. This obligation is necessary to make international arbitration a reliable alternative to litigation." As such, if international arbitration becomes less reliable, that can only lead to an increase in costly international litigation—an unwanted burden on the parties and the courts of the nations involved.

Additionally, there is already a situational dislike for arbitration among members of the legal community. Creating additional loopholes and complications in arbitration law, especially in ways that complicate the enforcement of arbitral awards relative to judgments, surely cannot increase the confidence of the legal community in international arbitration.

References


203. Id.

204. See Ivanova, supra note 1, at 900 ("Recent federal courts decisions have undermined the New York Convention's cherished finality and reliability.").

205. Id. at 920.

206. Id. at 904.

207. See, e.g., Park, supra note 190, at 197 ("Arbitration is very much like . . . [a] proverbial cow: useful in some contexts, but in other situations quite out of place—no more welcome than a half-ton farm animal trampling through a flower bed.").
D. Treaty Obligations Under the New York Convention

Allowing procedural barriers to the recognition of foreign arbitral awards beyond those outlined in the New York Convention places the United States in breach of its treaty obligations.\(^{208}\)

In the United States, recognition of arbitral awards increasingly implicates a tension between respect for the international obligations, embodied in the New York Arbitration Convention, and application of procedural rules that under domestic law share an equal status with treaty commitments. The Constitution creates few bright lines to determine when treaty obligations trump established principles of domestic law.\(^{209}\)

However, domestic law favors interpreting statutes so as not to violate international law.\(^{210}\) This principle suggests that courts should avoid imposing a requirement for personal jurisdiction when it is inconsistent with obligations under the New York Convention, especially given that the *Shaffer* footnote\(^{211}\) provides an avenue to reconcile the issue without conflict.

E. Reexamining the Case Law

It is hard to imagine that the defendants in the *Glencore Grain* or *Base Metal Trading* cases would have suffered injustice had the arbitral awards been enforced. If the reasoning from the *Lenchyshyn* case is applied to these cases, it seems clear that the outcome would be equitable.

The *Glencore Grain* court noted that “the best Glencore Grain can say is that it believes in good faith that Shivnath Rai has or will have assets located in the forum,” which the court found to be fatal to the plaintiff’s claim.\(^{212}\) The *Lenchyshyn* court addressed a very similar question and held that, “although defendants assert that they currently have no assets in [the forum state], that assertion has no relation to their jurisdictional objection.”\(^{213}\) Even if the award had been recognized, Glencore Grain needed to find and attach Shivnath Rai’s property before it could claim anything. Thus, the recognition of the award only assures that the plaintiff could attach such property.

*Base Metal* had actually identified assets it believed were owned by the defendant when it attempted to confirm its arbitral award.\(^{214}\) Though there was

\[208.\] Park & Yanos, *supra* note 3, at 296-98.

\[209.\] *Id.* at 296-97.

\[210.\] *Id.* at 253.


\[212.\] *Glencore Grain*, 284 F.3d 1114, 1128 (9th Cir. 2002).

\[213.\] *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.2d 285, 291 (App. Div. 2001). The court added “that [if the] assertion were true, it would be difficult to understand why defendants have so adamantly opposed the recognition of the Ontario judgment in New York.” *Id.*

\[214.\] *See Base Metal Trading I*, 283 F.3d 208, 211 (4th Cir. 2002) (stating that *Base Metal Trading*
some dispute regarding the actual ownership of the assets, the court simply
discussed whether the assets could form a basis for jurisdiction. The
Lenchyshyn court sidestepped this question based on the belief that an
enforcement action would not lead to an assertion of *in personam* jurisdiction
over the defendants.

Moreover, it is not inevitable or even likely that any enforcement device
... will 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 or *in personam* against third
parties, such as banks, investment firms, employers, or other third-party
garnishees, obligors, or debtors of the judgment debtor.

Had the *Base Metal Trading* courts taken the *Lenchyshyn* approach, they
would not have subjected NKAZ to *in personam* jurisdiction before a court in the
United States. Rather, they would only have allowed a court to exercise *in rem*
jurisdiction over the contested load of aluminum, along with any other assets
*Base Metal* might later identify.

In *Glencore Grain* and *Base Metal Trading*, recognition of the award would
have served another purpose: it would have stopped the clock on the three-year
time limit for enforcement of foreign arbitral awards established by the FAA.
In both cases, the litigation on the personal jurisdiction question took so long that
the statutory period for recognition expired. In essence, the arbitral award
creditors were precluded from attempting to confirm their awards in other forums
or based on other legal theories. It seems inequitable that the procedural
roadblocks allowed by the courts consumed the time allowed to enforce an
otherwise valid foreign arbitral award. By allowing the award to be recognized
without establishing personal jurisdiction, the courts make it easier for foreign
arbitral award creditors to confirm their awards within the three-year statutory
period.

The *Zelezny* court certainly came closer than the *Glencore Grain* or *Base
Metal Trading* courts to achieving a result like that in *Lenchyshyn*, but simply
confirming the entire award would not have created injustice. The *Zelezny* court
denied CME Media’s requests for discovery; CME Media hoped to search for
additional assets in the forum, but it was not allowed, because *Zelezny* was not

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sought attachment of a separate aluminum shipment allegedly owned by defendant).

215. *Id.* at 213. "Base Metal contends that Maryland has jurisdiction to confirm the foreign arbitral
award in large part because 2,563 tons of aluminum, alleged to be the property of NKAZ, arrived in Baltimore
Harbor." *Id.* at 214.


217. *Id.*

foreign arbitral award falling under the New York Convention).

219. *Glencore Grain*, 284 F.3d 1114, 1118-19 (9th Cir. 2002); *Base Metal Trading I*, 283 F.3d at 211.
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properly before the court. While it is reasonable not to subject Zelezny to discovery proceedings when he is not before the court, confirming the entire award would allow CME Media to attach any other assets later found through other channels without having to resort to another lengthy judicial proceeding. This is another area where Lenchyshyn applies. If the defendant truly has no other resources in the forum, they cannot be harmed by the recognition of the award in that forum. The logic of the Shaffer footnote applies here as well. It is fair to allow a creditor to collect on his debt in a forum, even when the courts of that forum cannot establish personal jurisdiction over the debtor. Ultimately, none of the factual situations presented in these cases requires personal jurisdiction to be established to protect foreign arbitral award debtors from injustice. Their rights were already protected by the New York Convention and the FAA. Thus, they should not be entitled to protections above and beyond those given to foreign judgment creditors. If anything, the consent to arbitration and the treaty obligations of the United States suggest that the courts should allow fewer protections. Finally, these defendants are protected by the practical reality that if they truly have no presence in the forum and no assets in the forum, they cannot be unjustly harmed by the recognition of foreign arbitral awards against them.

V. CONCLUSION

After examining the cases involving enforcement of foreign judgments and arbitral awards, it should be clear that using personal jurisdiction to distinguish the two is arbitrary and almost certainly unjust. This Comment explored the factual and procedural similarities between the two types of enforcement actions while highlighting the opposing outcomes that occur.

The importance of personal jurisdiction is established during the first year of law school, but it is not necessary in actions to recognize and enforce foreign arbitral awards. There are other due process protections in place during these proceedings. Justice Marshall wrote that "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," and there is no reason that his

221. See Lenchyshyn, 723 N.Y.2d at 291 (claiming that parties without assets in a forum have no reason to object to jurisdiction in that forum).
223. See discussion supra Parts IV.B & E.
224. Shaffer, 433 U.S. at 210 n.36.
words should not apply equally to judgments and arbitral awards. They are procedurally similar, and the arbitral awards are protected by treaty.\textsuperscript{225}

This Comment demonstrates that similar treatment would not have resulted in injustice in any of the three arbitral award cases discussed.\textsuperscript{226} This proposal is really nothing that should be surprising or remarkable. It is simply the logical connection of the \textit{Shaffer} decision and the New York Convention.

\textsuperscript{225} See supra Part IV.

\textsuperscript{226} See supra Part IV.E.