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ENFORCEMENT OF INTERNATIONAL ARBITRAL AWARDS:
SHOULD A PARTY BE ALLOWED MULTIPLE
BITES AT THE APPLE?

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I. INTRODUCTION

The issuance of a “final” arbitral award may only mark the midway point in an international commercial dispute. The losing party (the award-debtor) can bring proceedings to set aside the award before the courts in the country where the arbitration was seated, while the winning party (the award-creditor) may have to apply to enforce the award before the courts in one or more other countries if the award-debtor fails to pay. In many cases, the same legal and factual issues relating to the validity and enforceability of the award will arise in each of these post-award proceedings.¹

Courts in the U.S. and England regularly give effect to the judgments of foreign courts, applying well-developed rules on the recognition of foreign judgments and claim or issue preclusion. These rules are intended (among other things) to promote harmony and consistency in judicial outcomes, to conserve judicial resources, and to achieve finality by preventing a party from relitigating the same issues that it has already litigated and lost before another court – i.e., from taking multiple bites at the apple.

In the context of post-award proceedings, however, the granting of effect to a foreign court’s judgment may arguably encourage forum shopping, violate a state’s obligations under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly known as the New York Convention), and undermine the parties’ intent to have their dispute decided in a neutral forum of their choosing. This article surveys the current approach in the U.S. and England with respect to the effect of foreign post-award judgments. It then analyzes the principal criticisms of this approach and suggests a possible adjustment.

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¹ It is also possible that, long before the arbitral tribunal issued the award, a foreign court rendered a judgment on an issue relating to a jurisdictional, procedural, or other ground on which the availability of post-award relief depends. For example, a French court may have referred the parties to arbitration in Switzerland after concluding that their arbitration agreement was valid; notwithstanding this decision, the award-debtor may later resist enforcement of the award in the U.S. on the ground that the arbitration agreement is invalid. While it is generally appropriate, subject to the safeguards discussed in Part III.C below, for U.S. and English courts to give issue-preclusive effect to a foreign *pre-award* judgment in these circumstances, this article only addresses the effect of a foreign *post-award* judgment in subsequent post-award proceedings in the U.S. and England.

II. CURRENT APPROACH IN THE U.S. AND ENGLAND

Courts in the U.S. and England generally give effect to foreign judgments enforcing, refusing to enforce, confirming or setting aside an international arbitral award. However, the scope of the effect that they give to such judgments differs depending on whether the particular judgment in question was rendered by a court at the seat of the arbitration (a “primary jurisdiction” court) or by a court in any other country (a “secondary jurisdiction” court). By contrast with the approach in the U.S. and England, courts in France do not give any effect to foreign post-award judgments, regardless of which court rendered the judgment.²

A. *Judgments of Secondary Jurisdiction Courts*

Where the foreign judgment was rendered by a secondary jurisdiction court, U.S. and English courts grant issue-preclusive effect to the foreign judgment under the forum’s generally applicable rules on the recognition of foreign judgments and issue preclusion (also known as collateral estoppel or issue estoppel). These rules require a two-step analysis. The first step is to determine whether the foreign judgment is entitled to recognition in the forum. Generally speaking, recognition is granted unless it would violate the forum’s public policy or the foreign court lacked jurisdiction. If the foreign judgment is entitled to recognition, the second step is to determine whether any of the factual findings or legal conclusions contained in the judgment are entitled to issue-preclusive effect. While the U.S. and English requirements for issue preclusion differ in some respects, they both include that the issue determined by the foreign court must be identical to the issue arising in the forum and that the foreign court’s determination of that issue must have been necessary for its decision.³

The Reporters of the Draft Restatement on the U.S. Law of International Commercial Arbitration have endorsed this approach. Section 4-8 of the Draft Restatement provides that in post-award proceedings, a U.S. court should give preclusive effect to a foreign judgment in accordance with “the forum’s applicable principles governing . . . claim and issue preclusion, and recognition of foreign

² See, e.g., *Omnium de Traitement et de Valorisation v. Hilmarton*, Judgment of June 10, 1997, XXII Y.B. COM. ARB. 696 (1997) (French Supreme Court).

³ English courts and the majority of U.S. courts apply the *forum*’s preclusion rules in the second step of the analysis. See, e.g., *Diag Human Se v. Czech Republic*, [2014] EWHC 1639 (Comm), at ¶¶ 51-59; *Alfadda v. Fenn*, 966 F. Supp. 1317, 1329 (S.D.N.Y. 1997). However, some U.S. courts have suggested that the preclusive effect of a foreign judgment should be determined under the law of the foreign jurisdiction that rendered the judgment. See, e.g., *United States v. Kashamu*, 656 F.3d 679, 683 (7th Cir. 2011). The question of which jurisdiction’s law applies in the second step may be outcome-determinative, because civil-law jurisdictions generally only grant preclusive effect to the operative part (*dispositif*) of a judgment, not to all of the factual findings and legal conclusions contained in the judgment. See International Law Association, *Berlin Conference (2004) Interim Report: “Res judicata” and Arbitration*, at 13-14.

judgments.”⁴ As explained in the Reporters’ Notes, “the Restatement does not adopt the position that the question of the existence of a ground for post-award relief has such cardinal importance as to warrant do novo review, regardless of whether a court has previously ruled on [it].”⁵

Applying the forum’s generally applicable rules on the recognition of foreign judgments and issue preclusion, U.S. and English courts have granted issue-preclusive effect to the judgments of secondary jurisdiction courts in a variety of circumstances. In *Thai-Lao Lignite v. Laos*, for example, an English court enforced an award rendered in Malaysia on the ground, among others, that the award-debtor was precluded from relitigating its three defenses to enforcement, which it had already litigated and lost in enforcement proceedings in New York.⁶ In particular, by the time that the English Commercial Court was called upon to decide the claimants’ enforcement application, Judge Wood of the District Court for the Southern District of New York had already rejected Laos’s contention that the tribunal had exceeded its jurisdiction by allegedly (1) deciding claims under two contracts that provided for a different method of dispute resolution, (2) deciding claims of a claimant that was not a party to the contract founding the tribunal’s jurisdiction, and (3) awarding damages for harms suffered not by the claimants but by their affiliates.⁷ Because Laos raised the identical three objections to the tribunal’s jurisdiction in the English enforcement proceedings, the English court granted issue-preclusive effect to Judge Wood’s decision on each of the objections.

Conversely, in *Diag Human v. Czech Republic*, an English court refused to enforce an award rendered in the Czech Republic because, in prior enforcement proceedings in Austria, the award-creditor had litigated and lost the issue whether the award was “binding” on the parties within the meaning of Article V(1)(e) of the New York Convention.⁸ The Austrian Supreme Court had determined that the award was not “binding” because the Czech Republic had validly commenced an arbitral review process that was specifically provided for in the parties’ arbitration agreement. That process, which was still ongoing at the time of the English Commercial Court’s decision, consisted of a review of the tribunal’s award by a second set of arbitrators. Unlike in *Thai-Lao*, where the English court’s granting of issue-preclusive effect to Judge Wood’s enforcement decision availed the

⁴ American Law Institute, RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION, TENTATIVE DRAFT NO. 2 (April 16, 2012), § 4-8, at 107.

⁵ *Id.* § 4-8, Reporters’ Notes, note b, at 113.

⁶ *Thai-Lao Lignite (Thailand) Co. Ltd. v. Laos*, [2012] EWHC 3381 (Comm), at ¶ 24. The author is a member of the legal team representing the award-creditors in the *Thai-Lao* case in both the U.S. and English enforcement proceedings.

⁷ *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People’s Democratic Republic*, No. 10 Civ. 5256, 2011 U.S. Dist. LEXIS 87844 (S.D.N.Y. Aug. 3, 2011), *aff’d*, 2012 U.S. App. LEXIS 14340 (2d Cir. July 13, 2012), and *vacated by* 997 F. Supp. 2d 214 (S.D.N.Y. 2014).

⁸ *Diag Human Se v. Czech Republic*, [2014] EWHC 1639 (Comm), at ¶¶ 51-63.

award-creditors, in *Diag Human* it was the award-debtor who successfully invoked the English doctrine of issue estoppel.

Even where the U.S. or English courts have primary jurisdiction over an award, with the exclusive authority to set it aside because the arbitration was seated in the forum, they have granted preclusive effect to the judgments of secondary jurisdiction courts enforcing the award. In *Belmont Partners v. Mina Mar Group*, for example, a federal district court in West Virginia denied the award-debtor's application to set aside the award, which had been rendered by a tribunal seated in West Virginia, on the ground that the award-debtor had already litigated and lost the issue whether the award was procured by fraud in enforcement proceedings brought by the award-creditor in Ontario.⁹ Similarly, in *Chantiers de l'Atlantique v. Gaztransport & Technigaz*, an English court gave preclusive effect to a French judgment enforcing an award that had been rendered in England.¹⁰ In particular, the Paris Court of Appeal (like the Ontario court in *Belmont Partners*) had already considered and rejected the award-debtor's contention that the award was unenforceable because the award-creditor had procured it by perpetrating a fraud on the arbitral tribunal. The English Commercial Court specifically noted that it was irrelevant whether the French courts would have given any effect to its decision had the sequence of the proceedings been the reverse.

Only one decision of a U.S. or English court is at odds with the approach of granting issue-preclusive effect to a foreign judgment enforcing or refusing to enforce an award. In *Karaha Bodas v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, the U.S. Court of Appeals for the Fifth Circuit overturned the district court's anti-suit injunction prohibiting the award-debtor from pursuing set-aside proceedings in its home jurisdiction of Indonesia, which was not the seat of the arbitration.¹¹ The Fifth Circuit held that the anti-suit injunction was unnecessary because the Indonesian court's judgment purporting to set aside the award would not be entitled to any effect outside of Indonesia. It reasoned that "the 'relitigation' of issues is characteristic of the [New York] Convention's confirmation and enforcement scheme" and that a secondary jurisdiction court's judgment "is not truly a decision on the merits; rather, it is an order to enforce an award elsewhere, which is not necessarily given *res judicata* effect in foreign jurisdictions."¹²

The result reached by the Fifth Circuit was correct, but its reasoning is unconvincing. The Indonesian court's set-aside judgment would not have been entitled to any effect outside of Indonesia because the New York Convention contemplates that the award-debtor can bring set-aside proceedings only at the

⁹ *Belmont Partners, LLC v. Mina Mar Group, Inc.*, 741 F. Supp. 2d 743, 750-53 (W.D. Va. 2010).

¹⁰ *Chantiers de l'Atlantique S.A. v. Gaztransport & Technigaz S.A.S.*, [2011] EWHC 3383 (Comm), at ¶¶ 313-317.

¹¹ *Karaha Bodas Company v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003).

¹² *Id.* at 372; *see also id.* at 366-68.

seat of the arbitration (which in this case was Switzerland, not Indonesia), not because it contemplates relitigation of the same issues in multiple jurisdictions. While the Convention allows an award-creditor to bring proceedings to enforce the award in more than one jurisdiction, it does not logically follow that either party should be allowed to take multiple bites at the apple by relitigating the same issues that it has already litigated and lost in enforcement proceedings before another court. Moreover, a foreign court's judgment enforcing or refusing to enforce an award constitutes a final decision on the merits of the defenses to enforcement raised by the award-debtor in the proceedings before that court. As such, the foreign court's rulings on the award-debtor's defenses to enforcement are in principle entitled to issue-preclusive effect under U.S. and English law.

B. Judgments of Primary Jurisdiction Courts

U.S. and English courts give even greater effect to foreign judgments rendered by primary jurisdiction courts, which have the power to set aside an award under the New York Convention's enforcement scheme.

Where a primary jurisdiction court has set aside an award, U.S. and English courts generally refuse to recognize or enforce the award under Article V(1)(e) of the New York Convention, which provides that recognition or enforcement of an award "may" be refused if the award "has been set aside . . . by a competent authority of the country in which . . . the award was made." The courts' analysis in such cases involves only one step, which is to determine whether the foreign set-aside judgment is entitled to recognition under the forum's generally applicable rules on the recognition of foreign judgments. If the set-aside judgment is entitled to recognition under these rules, then the U.S. or English court refuses to recognize or enforce the award, without regard for the specific factual findings or legal conclusions contained in the judgment.¹³

Conversely, where a primary jurisdiction court has confirmed the validity of an award, courts in the U.S. have allowed the award-creditor to enforce the foreign confirmation judgment in addition to, or instead of, enforcing the award.¹⁴ As in the case of a foreign set-aside judgment, the courts' analysis involves only one step, which is to determine whether the foreign confirmation judgment is enforceable under the forum's generally applicable rules on the enforcement of foreign judgments. The author is not aware of any English case law addressing this scenario. At a minimum, an English court would presumably grant issue-preclusive effect to a foreign confirmation judgment.

¹³ See, e.g., *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933-36 (D.C. Cir. 2007); *Yukos Capital Sarl v. OJSC Rosneft Oil Co (No 2)*, [2012] EWCA Civ 855, at ¶ 151.

¹⁴ See, e.g., *Curacao v. Solitron Devices, Inc.*, 489 F.2d 1313 (2d Cir. 1973).

III. ANALYSIS OF THE PRINCIPAL CRITICISMS OF THE CURRENT APPROACH

Some commentators have criticized the U.S. and English courts' granting of effect to foreign judgments relating to the validity or enforceability of an international arbitral award. This section examines three of the principal criticisms of the courts' approach.

A. *Incentive for Forum Shopping*

Professor Maxi Scherer has warned that the granting of issue-preclusive effect to a foreign secondary jurisdiction court's judgment enforcing or refusing to enforce an award "poses a serious risk of forum shopping and the multiplication of parallel and possibly conflicting post-award proceedings."¹⁵ In support of this claim, Professor Scherer asserts:

The award creditor, on the one hand, will likely race to have the award recognized or enforced in a country that is reputed for its liberal, arbitration-friendly approach – counting on the preclusive effect of this judgment. The award debtor, on the other hand, may try to obtain a declaration of non-enforceability in a country which has a more conservative or even arbitration-hostile attitude and rely on the preclusive effect of that judgment.¹⁶

As a practical matter, however, the risk of forum shopping during post-award proceedings is limited. First, an award-debtor has no real ability to forum shop. Under the New York Convention's enforcement scheme, it can only bring set-aside proceedings before the courts at the seat of the arbitration. If it brings set-aside proceedings before the courts of a secondary jurisdiction, and those courts render a judgment in its favor, that judgment should not be entitled to any effect in the U.S. or England because of its inconsistency with the Convention. Moreover, few countries allow an award-debtor to bring an action for a "negative declaration" that the award is unenforceable, and those that do allow such an action generally require the award-debtor to show a legitimate interest in obtaining the declaration.¹⁷ In the absence of such an interest, a secondary jurisdiction court's negative declaration would be no different in substance from an impermissible set-aside judgment and therefore should not be granted any effect.

Second, while the granting of issue-preclusive effect to a foreign enforcement judgment may incentivize an award-creditor to bring enforcement proceedings in the jurisdiction where it is most likely to obtain a favorable decision (so that it can rely on that decision in subsequent proceedings in another country), this type of

¹⁵ Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4(3) J. INT'L DISPUTE RESOLUTION 587, 622-23 (2013).

¹⁶ *Id.* at 623.

¹⁷ See HERBERT KRONKE ET AL., RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY 133-35 (2010).

forum shopping is a normal feature of international litigation and generally furthers the Convention's pro-enforcement goals.

B. *Violation of the Forum's Obligations Under the New York Convention*

Several commentators claim that granting issue-preclusive effect to a foreign secondary jurisdiction court's judgment enforcing or refusing to enforce an award violates the forum's obligations under the New York Convention. This claim has several variants.

First, Professor Gary Born has argued broadly that Article V of the Convention obligates each Contracting State "independently to consider whether recognition [of an award] is required under the Convention, without according preclusive effect to prior recognition decisions."¹⁸ Any such obligation would have to be implied from the terms of Article V. However, issue preclusion is generally considered a procedural doctrine, and Article III of the Convention specifically provides that Contracting States shall recognize and enforce awards "in accordance with the rules of procedure of the territory where the award is relied upon." Accordingly, the implication of an obligation not to accord issue-preclusive effect to a prior decision would be inconsistent with Article III. Moreover, issue preclusion is also an equitable doctrine which, after all, is intended (among other things) to protect a party from the vexation and expense of having to relitigate the same issues more than once. Absent clear language in the Convention to the contrary, the courts should be deemed to retain their equitable power to preclude the relitigation of issues already decided by another court.¹⁹

Second, Professor Albert Jan van den Berg has argued that the granting of issue-preclusive effect to a foreign secondary jurisdiction court's judgment refusing to enforce an award violates the Convention because it would have as a consequence that "the decision of one foreign court denying enforcement operates as a setting aside of that award, which is exclusively reserved for the courts in the country of origin."²⁰ As explained below, however, a U.S. or English court retains discretion not to grant issue-preclusive effect to a foreign secondary jurisdiction court's judgment refusing to enforce an award. As a result, such a judgment does not necessarily have the same effect on subsequent enforcement proceedings as a foreign set-aside judgment. Moreover, even if the two judgments have the same effect in certain circumstances, they do not "operate" in the same way. Whereas an award-debtor can bring set-aside proceedings only at the seat of the arbitration and generally only within a short time period after the award is rendered, it is the award-creditor who chooses where, when, and in what sequence to bring enforcement proceedings.

¹⁸ GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 3790 (2d ed. 2014).

¹⁹ See *Karaha Bodas*, 335 F.3d at 365 (holding that federal courts retain their equitable power to issue injunctions in enforcement proceedings under the New York Convention).

²⁰ Sebastian Perry & Richard Woolley, *Issue estoppel halts enforcement in London*, *GLOBAL ARB. REV.* (May 29, 2014) (quoting Prof. van den Berg).

Third, Professor Scherer has argued that the granting of issue-preclusive effect to a foreign judgment refusing to enforce an award on the ground that the parties' arbitration agreement was invalid "would violate the forum's obligations under [Article II of] the New York Convention to recognize and give effect to valid arbitration agreements."²¹ However, the effect of a foreign judgment refusing to enforce an award generally only arises in subsequent proceedings to recognize or enforce the *award* (not the arbitration agreement).²² Accordingly, Article V(1)(a) of the Convention, not Article II, applies to the forum's determination of the validity of the arbitration agreement. As explained above, in proceedings to recognize or enforce an award under Article V, the courts should be deemed to retain their equitable power to preclude the relitigation of issues already decided by another court.

C. *Undermining of the Parties' Intent to Have Their Dispute Decided in a Neutral Forum of Their Choosing*

The most serious and legitimate criticism of the U.S. and English approach of granting effect to foreign judgments relating to the validity or enforceability of an award is that it risks undermining the parties' intent to have their dispute decided in a neutral forum of their choosing.²³ In short, if such judgments are granted effect in other countries, a politically biased or just plain erroneous judgment setting aside or refusing to enforce a valid award can have devastating consequences, making it impossible for the award-creditor to enforce the award and rendering the whole arbitration a colossal waste of time and money.

While the risk of undermining the parties' intent to have their dispute decided in a neutral forum of their choosing is real, the law in both the U.S. and England already contains certain safeguards. Nonetheless, to further protect against this risk, an adjustment relating to the effect of a foreign set-aside judgment is called for.

1. *U.S. and English Courts Retain Discretion Under Existing Law Not to Grant Issue-Preclusive Effect to a Foreign Judgment Refusing to Enforce an Award*

Because issue preclusion is an equitable doctrine, the courts in the U.S. and England retain discretion under existing law to grant or deny issue-preclusive effect to a foreign secondary jurisdiction court's judgment refusing to enforce an award. As explained by the English Court of Appeal, "The application of the

²¹ Scherer, *supra* note 15, at 622. See also BORN, *supra* note 18, at 3782-83.

²² By contrast, the effect of a foreign *pre-award* judgment refusing to recognize the parties' arbitration agreement may arise either (1) in parallel, pre-award proceedings to recognize the agreement or (2) in post-award proceedings to recognize or enforce an award. An argument can be made that in case (1), Article II of the Convention obligates a Contracting State independently to consider the validity of the agreement, without according preclusive effect to the foreign judgment. See BORN, *supra* note 18, at 3782-83.

²³ See BORN, *supra* note 18, at 3642-43.

principles of issue estoppel is subject to the overriding consideration that it must work justice and not injustice.”²⁴ The courts should exercise this discretion so as to ensure that a foreign judgment that is politically biased or clearly erroneous does not undermine the parties’ intent to have their dispute decided in a neutral forum of their choosing. More specifically, U.S. and English courts should not grant issue-preclusive effect to a foreign judgment refusing to enforce an award if the judgment was rendered by a court system whose independence and impartiality are open to question (e.g., because the award-debtor is a state-owned company), or if the foreign court’s determination of the particular issue in question was clearly erroneous.

The District Court for the Southern District of New York’s recent decision in *Yukos Capital v. Samaraneftgaz* highlights the importance of the courts’ discretion not to grant issue-preclusive effect to a foreign judgment refusing to enforce an award.²⁵ In that case, Yukos Capital, a subsidiary of Yukos, the bankrupt Russian oil and gas company whose assets had been seized by the Russian government, sought to enforce an award rendered in New York against Samaraneftgaz, a subsidiary of Rosneft, the Russian state-owned oil and gas company. Samaraneftgaz had not participated in the arbitration, and it asked Judge Crotty to grant issue-preclusive effect to a Russian judgment refusing to enforce the award on the ground that Samaraneftgaz had not received notice of each stage of the arbitral proceedings.

Judge Crotty exercised his discretion not to grant issue-preclusive effect to the Russian court’s determination with respect to the notice issue, relying on several factors, including (1) admissions by Samaraneftgaz in the New York enforcement proceedings that it had received certain notices during the arbitration, (2) the lack of clarity of what the Russian court had actually decided, and (3) the fact that granting issue-preclusive effect to the Russian judgment would not have promoted judicial economy, “as this Court can readily determine the [notice] issue for itself from the record.”²⁶ While Judge Crotty did not expressly impugn the independence and impartiality of the Russian court system, the facts of the case (including a subsequent Russian judgment invalidating the contract between Yukos Capital and Samaraneftgaz) raised obvious alarm bells regarding the *bona fides* of the Russian judgment refusing to enforce the award. It was thus clearly appropriate, under all of the circumstances, for Judge Crotty to exercise his discretion not to grant issue-preclusive effect to the judgment.

²⁴ Good Challenger Navegante SA v. MetalExportImport SA, [2003] EWCA Civ. 1668, at ¶ 54.

²⁵ Yukos Capital S.A.R.L. v. OAO Samaraneftgaz, 963 F. Supp. 2d 289 (S.D.N.Y. 2013).

²⁶ *Id.* at 294-96.

2. *U.S. and English Courts Should Have Discretion Not to Recognize a Foreign Set-Aside Judgment in Extraordinary Circumstances Beyond the Forum's Standard Grounds for Non-Recognition of Foreign Judgments*

As explained above, where a foreign primary jurisdiction court has set aside an award, the sole question that a U.S. or English court asks is whether the set-aside judgment is entitled to recognition under the forum's rules on the recognition of foreign judgments. These rules generally provide that recognition shall be granted unless it would violate the forum's public policy or the foreign court lacked jurisdiction.

The public policy standard for non-recognition of a foreign judgment constitutes a high bar. The New York Court of Appeals recently held that a foreign judgment does not run afoul of New York public policy unless it is "inherently vicious, wicked or immoral, and shocking to the prevailing moral sense."²⁷ Likewise, the New York federal courts, which apply federal common law on the recognition of foreign judgments in New York Convention cases, have held that recognition violates public policy only if the foreign judgment is "repugnant to fundamental notions of what is decent and just in the State where [recognition] is sought."²⁸ Under English law, the public policy standard requires "cogent evidence" that the courts of the country that issued the judgment are "partial and dependent."²⁹

Because of the high bar for non-recognition of a foreign judgment under U.S. and English law, the courts in both countries almost invariably recognize a foreign set-aside judgment and, as a result, refuse to enforce the award that was set aside by the judgment in question. This is true even in cases where the foreign set-aside judgment was rendered in favor of a state-owned company and/or is clearly erroneous.

To protect against the risk that a foreign set-aside judgment may undermine the parties' intent to have their dispute decided in a neutral forum of their choosing, U.S. and English courts should have discretion not to recognize such judgments in extraordinary circumstances beyond the forum's standard grounds for non-recognition of foreign judgments. In particular, just as the courts in both countries already have discretion not to grant issue-preclusive effect to a secondary jurisdiction court's judgment refusing to enforce an award if the judgment was rendered by a court system whose independence and impartiality are open to question or if the judgment was clearly erroneous, they should also have discretion not to recognize a primary jurisdiction court's set-aside judgment in these circumstances. Such discretion is justified because recognition of a set-aside judgment potentially conflicts with the New York Convention's strong policy in favor of the enforcement of international arbitral awards.

²⁷ *Sung Hwan Co. v. Rite Aid Corp.*, 817 N.Y.S.2d 600, 603 (2006).

²⁸ *Ackermann v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986).

²⁹ *Yukos Capital Sarl v. OJSC Rosneft Oil Co.* (No 2), [2012] EWCA Civ 855, at ¶ 151.

While adoption of the “extraordinary circumstances” standard would constitute an adjustment to the current approach to set-aside judgments in the U.S. and England, it has been endorsed by the Reporters of the Draft Restatement. Section 4-16 of this treatise on the U.S. law of international commercial arbitration provides that a U.S. court may recognize or enforce an award that has been set aside by a court at the seat of the arbitration if the set-aside judgment “is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, *or in other extraordinary circumstances*.”³⁰ The official comments to Section 4-16 explain that under the “extraordinary circumstances” standard, a U.S. court may disregard a foreign set-aside judgment if, for example, “the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction” or “other facts give rise to substantial doubts about the integrity or independence of the foreign court with respect to the judgment in question.”³¹

* * *

Commentators have vigorously criticized the U.S. and English approach of liberally granting effect to foreign judgments relating to the validity or enforceability of an international arbitral award. However, two of the three criticisms leveled against this approach – namely, that it encourages forum shopping and that it violates the forum’s obligations under the New York Convention – lack any merit. The third criticism, that the U.S. and English approach risks undermining the parties’ intent to have their dispute decided in a neutral forum of their choosing, is the most serious and legitimate. It warrants an adjustment to the current approach to set-aside judgments in both countries, in particular the adoption of an “extraordinary circumstances” standard for the non-recognition of such judgments.

³⁰ DRAFT RESTATEMENT, *supra* note 4, § 4-16 (emphasis added).

³¹ *Id.* § 4-16, Comment d, at 225.

