Defending Actions for the Enforcement of Foreign Money Judgments in New York: Developments and Strategic Considerations

May 3, 2018

Davis Polk

Davis Polk & Wardwell LLP

Presented by

Frances E. Bivens

Antonio J. Perez-Marques

Topics

Overview of Article 53

Article 53 of the CPLR governs recognition and enforcement of foreign country money judgments in New York.

Overview of Article 53

Hypothetical

- Brazilian corporation works on project in sub-Saharan Africa with a local partner.
- Project falls apart, and local partner sues in the local court.
- Local court issues money judgment against Brazilian corporation for hundreds of millions of dollars.
- Brazilian corporation does not have any assets in the jurisdiction.
- Local partner seeks to enforce judgment against Brazilian corporation in New York in Article 53 action.

Overview of Article 53

> New York has traditionally been a generous forum in which to enforce judgments for money damages rendered by foreign courts. Article 53 was designed to codify and clarify existing case law on the subject and, more importantly, to promote the efficient enforcement of New York judgments abroad by assuring foreign jurisdictions that their judgments would receive streamlined enforcement here.

CIBC Mellon Tr. Co. v. Mora Hotel Corp. N.V., 100 N.Y.2d 215, 221 (2003) (citations omitted).

Defenses to Enforcement: Mandatory Bars

To be recognized, the judgment must be

- "of a foreign state," not for "taxes," "a fine or other penalty," or "support in matrimonial or family matters";
- "final, conclusive, and enforceable where rendered"; and
- for a sum certain.

Court must deny recognition if

- "the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law"; or
- "the foreign court did not have personal jurisdiction over the defendant."

See CPLR 5301(b) and CPLR 5304(a)(2).

Defenses to Enforcement: Impartiality of Tribunals

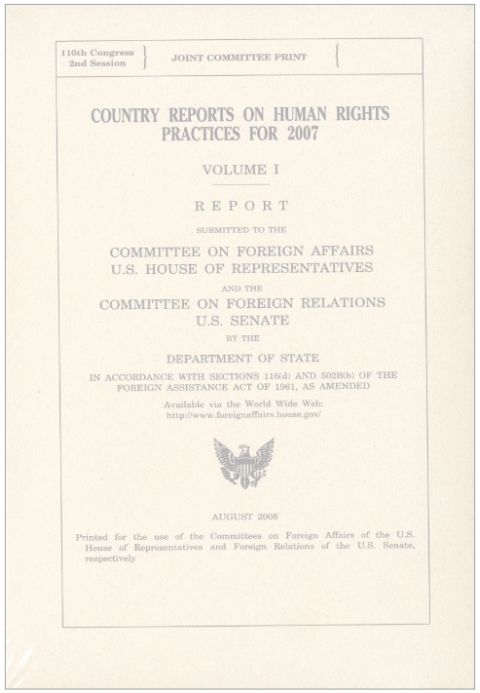
Defense has been recognized in prior cases:

- *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362 (S.D.N.Y. 2014) – Ecuador
- *Bridgeway Corp. v. Citibank*, 45 F. Supp. 2d 276 (S.D.N.Y. 1999) – Liberia
- *Osorio v. Dole Food Co.*, 665 F. Supp. 2d 1307 (S.D. Fla. 2009) – Nicaragua
- *In re Perry H. Koplik & Sons, Inc.*, 357 B.R. 231 (Bankr. S.D.N.Y. 2006) – Indonesia

Potential supporting evidence:

- Country condition reports issued by the U.S. Department of State
- Reports from international/non-governmental organizations
- Experts speaking to country conditions and the state
  of the country's legal system

Key legal point is that the impartiality of the system is most important.


110th Congress 2nd Session | JOINT COMMITTEE PRINT

COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2007

VOLUME I

REPORT

SUBMITTED TO THE

COMMITTEE ON FOREIGN AFFAIRS
U.S. HOUSE OF REPRESENTATIVES

AND THE

COMMITTEE ON FOREIGN RELATIONS
U.S. SENATE

BY THE

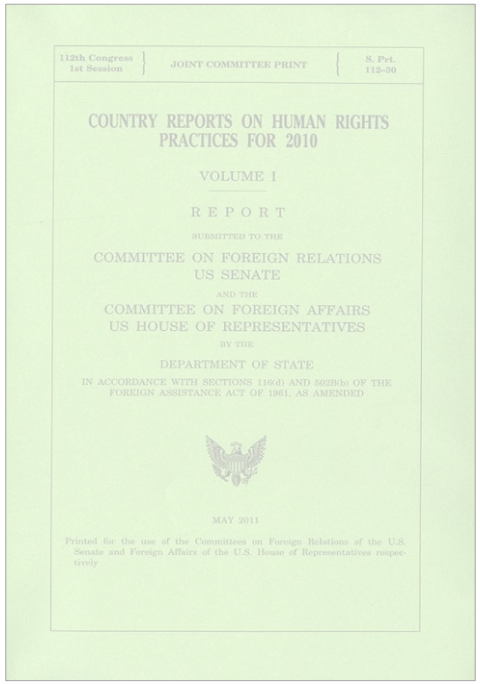
DEPARTMENT OF STATE

IN ACCORDANCE WITH SECTIONS 116(d) AND 502B(b) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED

Available via the World Wide Web: http://www.foreignaffairs.house.gov/

AUGUST 2008

Printed for the use of the Committees on Foreign Affairs of the U.S. House of Representatives and Foreign Relations of the U.S. Senate, respectively


112th Congress 1st Session | JOINT COMMITTEE PRINT | S. Prt. 112-30

COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 2010

VOLUME I

REPORT

SUBMITTED TO THE

COMMITTEE ON FOREIGN RELATIONS
US SENATE

AND THE

COMMITTEE ON FOREIGN AFFAIRS
US HOUSE OF REPRESENTATIVES

BY THE

DEPARTMENT OF STATE

IN ACCORDANCE WITH SECTIONS 116(d) AND 502B(b) OF THE FOREIGN ASSISTANCE ACT OF 1961, AS AMENDED

MAY 2011

Printed for the use of the Committees on Foreign Relations of the U.S. Senate and Foreign Affairs of the U.S. House of Representatives respectively

Defenses to Enforcement: Discretionary Bars

Courts may deny recognition of a foreign judgement if any of the following applies:

- **Lack of subject matter jurisdiction:** "[T]he foreign court did not have jurisdiction over the subject matter."
- **Lack of notice:** Defendant in the foreign proceeding "did not receive notice of the proceeding in sufficient time to enable him to defend."
- **Fraud:** "[T]he judgment was obtained by fraud."
- **Public policy:** The judgment is based on a cause of action "repugnant to the public policy of this state."
- **Conflicting judgment:** "The judgment conflicts with another final and conclusive judgment."
- **Contrary to prior agreement:** The foreign proceeding was "contrary to an agreement between the parties" with respect to how/where to settle the dispute in question.
- **Inconvenient forum:** "[T]he foreign court was a seriously inconvenient forum for the trial of the action," if the foreign court's jurisdiction in the case was "based only on personal service."
- **Defamation action:** The judgment arose from a defamation action, unless the foreign jurisdiction "provided at least as much protection for freedom of speech and press in that case as would be provided by both the United States and New York constitutions."

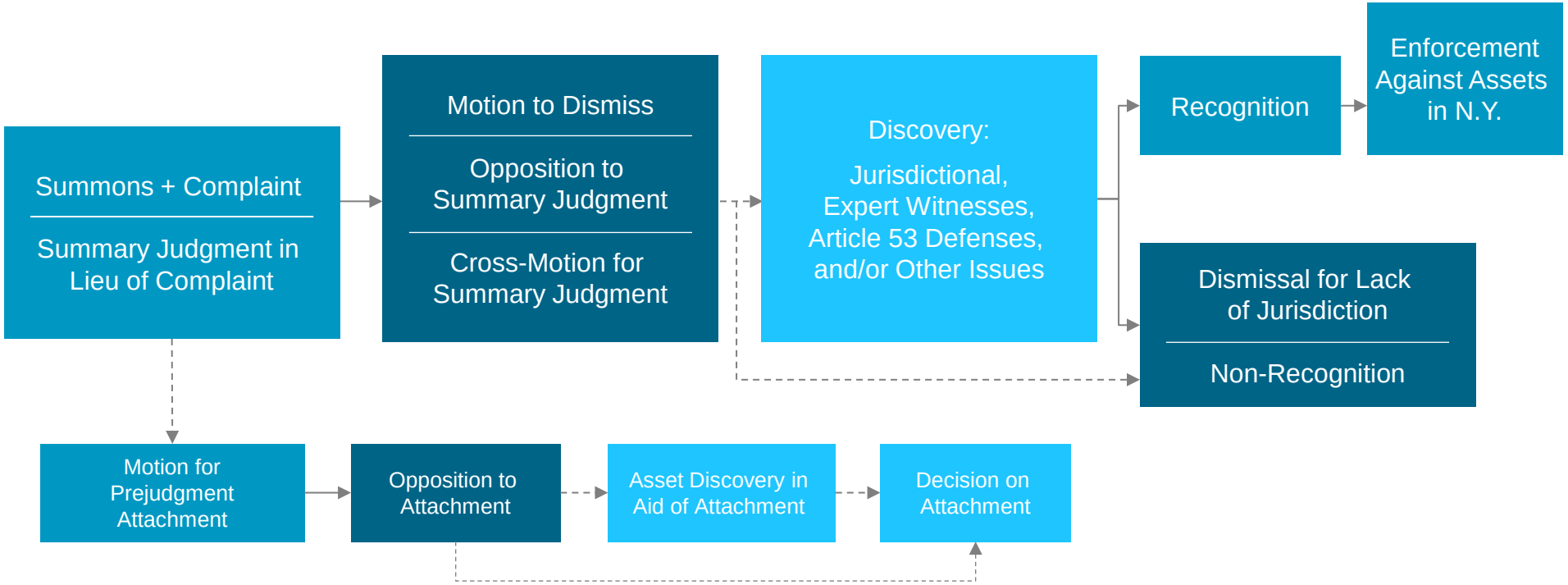
See CPLR 5304(b).

Litigating an Article 53 Action

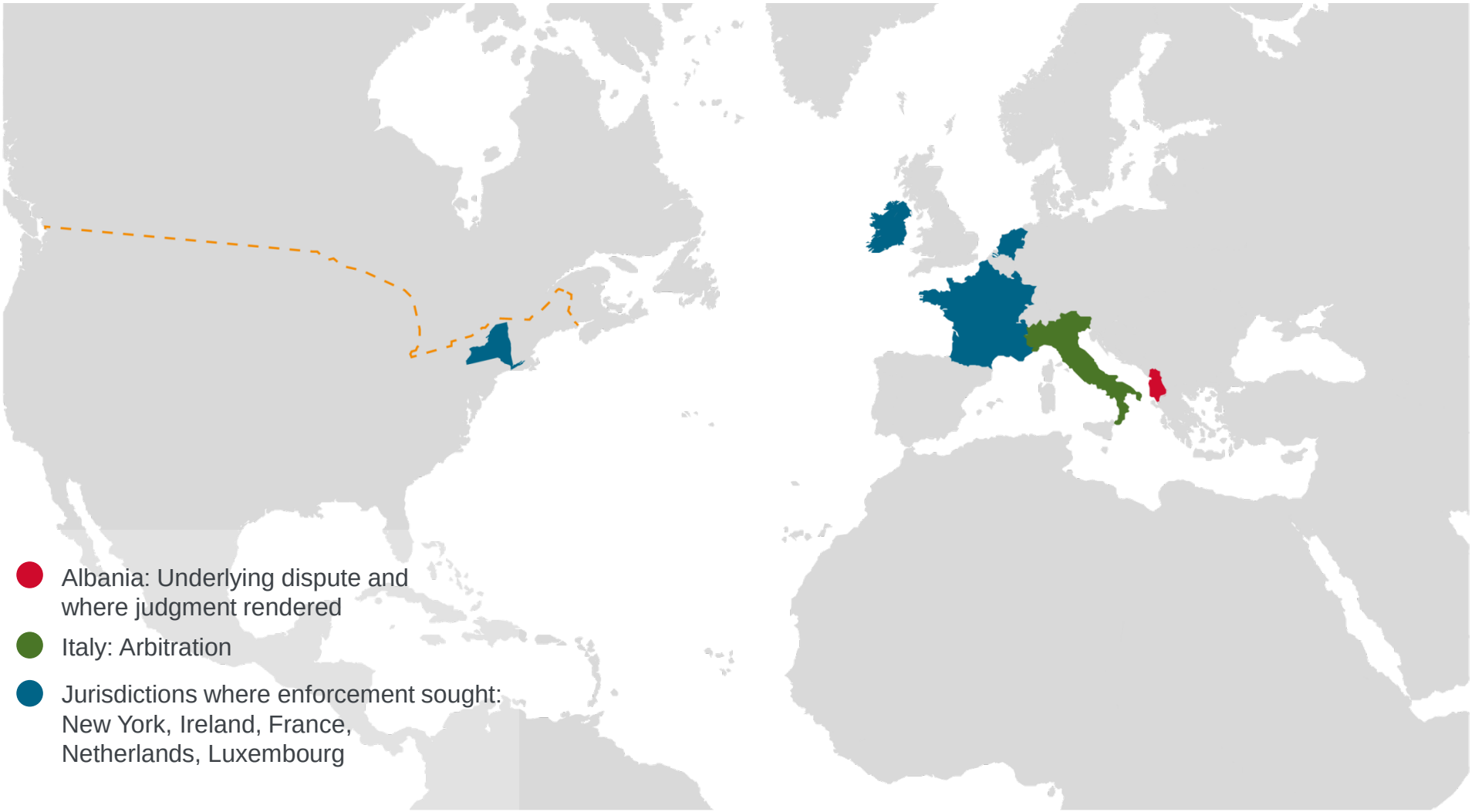
Be ready for the judgment debtor to start quickly with a multi-pronged initial filing:

- File for summary judgment in lieu of complaint, rather than complaint and summons
  - A summary judgment motion in theory allows for an accelerated timeline, though in practice that is not always the case.
- Request interim relief:
  - Motion for attachment
  - Motion for a temporary restraining order pending a decision on the attachment motion
  - Motion for expedited asset discovery
- Pursue parallel enforcement proceedings in various jurisdictions around the world

Litigating an Article 53 Action



The *Enel* Case: Background



The *Enel* Case: Personal Jurisdiction

***Albaniabeg Ambient Sh.p.k. v. Enel S.p.A.*, 160 A.D.3d 93 (1st Dep't 2018)**

Pre-*Enel* N.Y. Law: In cases where merits of enforcement action were not contested, New York courts had held that jurisdiction over defendant or defendant's property was not necessary to maintain an Article 53 action.

Circumstances of *Enel*:

- Enel is an Italian company
- No alleged conduct in New York
- No alleged property in New York
- Enel raised multiple defenses on the merits against recognition and enforcement of foreign judgment

Outcome in *Enel*: First Department ruled that, in a contested Article 53 action, court cannot proceed without jurisdiction over defendant or defendant's property.

The *Enel* Case: Subject Matter Jurisdiction

Section 1314(b) of Business Corporation Law

- Unless otherwise authorized by law, an action between two foreign parties may "only" be maintained under the circumstances specifically enumerated in Section 1314(b).
- The enumerated circumstances include:
  - (1) Where it is brought to recover damages for the breach of a contract made or to be performed within this state, or relating to property situated within this state at the time of the making of the contract;
  - (2) Where the subject matter of the litigation is situated within this state;
  - (3) Where the cause of action arose within this state, except where the object of the action or special proceeding is to affect the title of real property situated outside this state;
  - (4) Where, in any case not included in the preceding subparagraphs, a non-domiciliary would be subject to the personal jurisdiction of the courts of this state under Section 302 of the civil practice law and rules;
  - (5) Where the defendant is a foreign corporation doing business or authorized to do business in this state.
- Serious argument as to whether Section 1314(b) satisfied in an Article 53 action between foreign parties.
- The First Department did not reach this issue.

Forum of the Dispute

New York versus other states

- Each state has its own rules governing enforcement of foreign country judgments.
- However, substantive rules tend to be similar and are largely based on the Model Rules promulgated by the Uniform Law Commission.
- Some divergence in jurisdictional requirement.

State court versus federal court

- Federal diversity jurisdiction lacking in actions between foreign corporations.
- 9 U.S.C. § 205 as a possible basis for removal to federal court?

Enforcing Foreign Arbitral Awards

- In the Second Circuit, personal or quasi in rem jurisdiction is required to enforce a foreign arbitral award. *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 398 (2d Cir. 2009).

- The process for enforcing foreign arbitral awards in the United States is governed by Chapter 2 of the Federal Arbitration Act, which implements a treaty called the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, or the New York Convention.

Enforcing Foreign Arbitral Awards

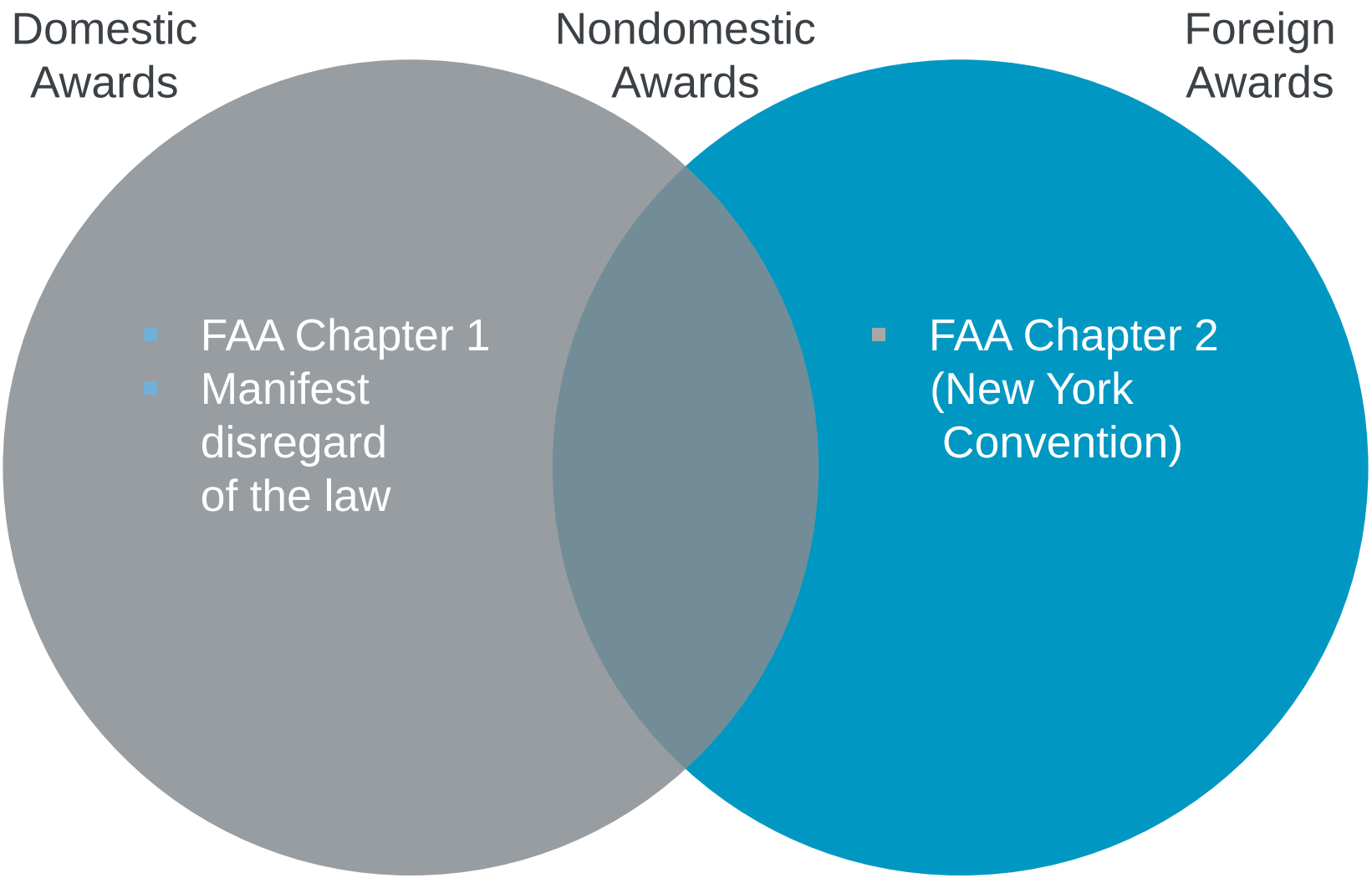
The grounds on which a court can refuse to enforce a foreign arbitral award are:

Article V of the New York Convention	Article 53 Parallel
The parties were under some incapacity, or the agreement is not valid under the applicable law.	"[T]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court." CPLR 5304(b)(6).
The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.	Defendant in the foreign proceedings "did not receive notice of the proceedings in sufficient time to enable him to defend." CPLR 5304(b)(2).
The award deals with a difference not contemplated by the arbitration agreement or it contains decisions on matters beyond the scope of the arbitration.	"[T]he proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court." CPLR 5304(b)(6).
The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement or the law of the country where the arbitration occurred.	The judgment must be "enforceable" where rendered. CPLR 5302.
The award is not yet binding, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.	The judgment must be "final" and "conclusive" where rendered. CPLR 5302.
The subject matter of the difference is not capable of settlement by arbitration under the law of that country.	"[T]he foreign court did not have jurisdiction over the subject matter." CPLR 5304(b)(1).
The recognition or enforcement of the award would be contrary to the public policy of that country.	The judgment is based on a cause of action that is "repugnant to the public policy of this state." CPLR 5304(b)(4).

Enforcing Domestic Arbitral Awards

- For a domestic arbitral award, which is governed by Chapter 1 of the Federal Arbitration Act, the grounds to challenge the award are:
  - "the award was procured by corruption, fraud, or undue means";
  - "there was evident partiality or corruption in the arbitrators";
  - "the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced"; or
  - "the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. §§ 10, 12.
- An objector may also challenge an award on the basis of manifest disregard of the law.
- Manifest disregard of the law allows a court to vacate an arbitral award where:
  - (1) "the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether"; and
  - (2) "the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004).

Enforcing Nondomestic Arbitral Awards



Enforcing Nondomestic Arbitral Awards: Manifest Disregard of the Law

- *In Daesang Corp. v. NutraSweet Co*., 2017 WL 2126684 (Sup. Ct. N.Y. Cty. May 15, 2017), Daesang moved to confirm and NutraSweet moved to vacate a final award entered by the ICC.
- Justice Ramos vacated the arbitral award on the ground that the arbitration panel manifestly disregarded controlling New York law.
- The court held that the tribunal manifestly disregarded New York law:
  - (1) "in dismissing NutraSweet's claim for fraudulent inducement" by ignoring the well-established principle that "a fraud claim can be based on a breach of contractual warranties where the misrepresentations are of present facts (in contrast to future performance) and cause the actual losses claimed"; and
  - (2) in "failing to consider the merits of NutraSweet's breach of contract counterclaim" by holding that it was waived during closing argument.
- The First Department heard oral argument on February 20, 2018 and its decision is pending.

Practical Considerations

There are important practical and strategic considerations companies should keep in mind with respect to defending against the recognition and enforcement of foreign judgments:

1. Defend yourself!
2. Pay attention to forum selection clauses
3. Think ahead to enforcement
4. Coordinate across jurisdictions
5. Think about corporate structure

Questions

Thank you!

For more information, please visit our International Arbitration webpage:
https://www.davispolk.com/practices/litigation/international-arbitration

Appendix

Presenters

Frances E. Bivens

Frances Bivens is a partner in Davis Polk's Litigation Department and regularly acts as lead counsel in a broad range of high-stakes commercial litigation matters in federal and state courts around the country and arbitrations around the globe. She has handled many cross-border matters, including an international arbitration for Sete Brasil arising from deepwater drilling rig contracts, arbitration and litigation work on behalf of a global chemical company in connection with the sale of a $1 billion business, and a commercial dispute and potential arbitration for a European aerospace company. She is recognized as a leading lawyer by the foremost legal directories, including Chambers USA, Benchmark Litigation, The American Lawyer, and Best Lawyers in America.

Antonio J. Perez-Marques

Antonio Perez-Marques is a partner in Davis Polk's Litigation Department. His practice focuses on complex commercial disputes, including securities and M&A-related litigation, as well as securities enforcement and white collar matters. As part of his Latin American litigation practice, he is currently representing Eletrobras in United States class action litigation arising from the Lavo Jato investigation, and previously represented a multinational in connection with the expropriation of a multibillion-dollar South American subsidiary. He also has extensive experience advising Spanish, Latin American and other foreign clients concerning U.S. litigation matters and investigations, as well as domestic clients concerning overseas and cross-border disputes.