AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 12-13, 2013

RESOLUTION

RESOLVED, That the American Bar Association affirms that the U.S. common law doctrine of *forum non conveniens* is not an appropriate basis for refusing to confirm or enforce arbitral awards that are subject to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration and that refusal on that basis is not consistent with U.S. treaty obligations under these Conventions and U.S. implementing legislation.

REPORT

I. Introduction.

This Report is proposed to set forth the American Bar Association's ("ABA") view concerning the application of the U.S. common law doctrine of *forum non conveniens* ("FNC") as a basis for denying the enforcement of international arbitration awards in U.S. courts pursuant to multilateral conventions, and, particularly, the Convention on Enforcement of Foreign Arbitral Awards (1958) ("the New York Convention") and the Inter-American Convention on International Commercial Arbitration (the "Panama Convention").

The ABA recognizes that these Conventions were intended to establish uniform enforcement of international arbitration awards in the courts of the contracting parties. Article V of these Conventions sets forth the exclusive grounds for denying enforcement. Article III provides that contracting parties shall enforce international arbitration awards in accordance with their "rules of procedure." Incorporating the discretionary common law doctrine of FNC into these "rules of procedure" defeats the exclusivity of Article V and prohibits uniform enforcement under the Conventions. Recent decisions refusing enforcement of international arbitration awards on FNC grounds also raise the specter of unintended negative consequences. Savvy award debtors can rely on these decisions to complicate and delay enforcement. Further, these decisions may prompt courts in other nations to adopt similar rationales based on local discretionary or idiosyncratic procedures, which could undermine the presumption of enforcement established by the present treaty regime.

The Council of the American Law Institute ("ALI") recently rejected incorporating FNC into these international arbitration enforcement procedures when it approved Section 4-29(a) of the Restatement (Third) of the U.S. Law of International Commercial Arbitration (Council Draft No. 3, approved Dec, 23, 2011). The language of the Restatement is clear: "An action to confirm a U.S. Convention award or enforce a foreign Convention award is not subject to a stay or dismissal in favor of a foreign court on *forum non conveniens* grounds." The ALI's commentary provides that "[s]tay or dismissal of an action to confirm or enforce a Convention award based on *forum non conveniens* would run afoul of the Conventions' requirement that, absent a specific Convention defense to enforcement, Contracting States confirm and enforce such award." In the Reporters' Notes, the ALI elaborates:

> Convention awards are entitled to confirmation under the Conventions and the FAA chapters that implement them, unless one of the grounds enumerated in the Conventions for denying confirmation is established. Inconvenience is not among those grounds. More important, it would not be consistent with U.S. treaty obligations under the Conventions and the U.S. implementing legislation, for a

> court to refuse to entertain an action to confirm on a fundamentally discretionary ground such as *forum non conveniens*.

The ALI's approach comports with the history of the Convention, and should be approved by the ABA.

II. Background.

A. The ABA's Historical Recognition of the Importance of Enforcement of International Arbitral Awards.

The ABA has a rich history supporting international arbitration, and has long recognized that international commercial transactions rely on international arbitration as a preferred dispute resolution mechanism. In February 1978, the ABA House of Delegates approved a resolution recommending as follows:

> [T]he Inter-American Convention of International Commercial Arbitration (1975) ("IACAC") should be signed and ratified by the United States; provided that implementing legislation, or an appropriate resolution of advice and consent, or both, are prepared which are designed: (a) to avoid conflicts with the New York Convention and (b) to provide appropriate safeguards with respect to future amendments in the IACAC Arbitration Rules.

In August 1989, the House of Delegates approved a policy (Report 114) supporting continued use of and experimentation with alternative dispute resolution techniques, both before and after suit is filed, "as necessary and welcome components of the justice system in the United States ... so long as every disputant's constitutional and other legal rights and remedies are protected." That same month, the House of Delegates also approved a resolution (Report 104C) favoring the recognition of freedom of parties to international commercial arbitration proceedings to choose as their representatives in those proceedings lawyers who need not be admitted to practice law in the jurisdiction where the arbitration proceedings take place. During the 1990 Midyear Meeting, the House of Delegates approved a resolution urging "the government of the United States to start negotiations with other governments in order to implement the principles contained in the Draft General Treaty on the Peaceful Settlement of International Disputes to accept arbitration for the resolution of international disputes."

During the 2009 Annual Meeting in Chicago, the ABA House of Delegates adopted a resolution (Report 114) supporting (1) the use of commercial arbitration to resolve disputes involving international business transactions; and (2) federal, state and territorial legislation or regulations that recognize and aid in the enforcement of international commercial arbitration agreements and awards. The resolution also opposed legislation or regulations that would (1) reduce or discourage the use of

international commercial arbitration or that would be inconsistent with established international commercial arbitration standards and practice; (2) invalidate pre-dispute agreements to arbitrate international commercial disputes; (3) alter the current law as to the allocation of authority between the court and arbitrators to determine the jurisdiction of arbitrators in international commercial disputes or regarding the timing of these determinations; or (4) protect discrete classes as an amendment to the Federal Arbitration Act (the "FAA").

The ABA's progress tracks the growing importance of international arbitration as a mechanism to provide greater legal certainty in an increasingly global business climate. Between 1993 and 2003, the number of international arbitrations overseen by the leading arbitral institutions nearly doubled, and, as of 2005, it was estimated that nearly ninety percent of transnational commercial contracts contained an arbitration provision. Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 233 & n.1 (2006)

B. The New York Convention.

The party's ability to collect an international arbitration award is a key reason for the growth and use of arbitration. As one commentator has noted, "[i]t would be antithetical to arbitration, which has as its essence the parties' election to *avoid* the local court systems of their own countries (or any other), for the winning party to have to litigate a second time on the merits, this time in enforcement proceedings on the losing party's home turf." Matthew H. Adler, Figueiredo v. Peru: *A Step Backward for Arbitration Enforcement*, 32 NW. J. INT'L L. & BUS. 38A, at 39A (Jan. 26, 2012).

Instead, the New York Convention provides that an arbitration award rendered in the territory of one party is enforceable in the territory of another. New York Convention, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38. One hundred forty-eight countries are signatories to the New York Convention. U.S. Department of State, TREATIES IN FORCE: A LIST OF TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES IN FORCE ON JANUARY 1, 2011 (2011), *available at* http://www.state.gov/documents/organization/169274.pdf (accessed Oct. 29, 2012), at 317-18. The exclusions to enforcement are limited to those provided for by the Convention. Under Article V, an award may be denied enforcement only where there is a failure of due process or a failure by the arbitrators to act in accordance with their mandate (by, for example, proceeding in a manner, or deciding an issue, other than as prescribed by the contract's arbitration clause), where the subject matter of the dispute cannot be settled by arbitration under the law of the enforcing country, or where enforcement of the award would be contrary to the public policy of the enforcing country. New York Convention at art. V(1)-(2). Re-litigation of the merits of the dispute is not one of the specified and limited exceptions to enforcement. *See id.*

Broadly speaking, the New York Convention and its acceptance by member states have led to jurisprudence in member state courts that is pro-arbitration and pro-

enforcement. "Most developed international arbitration regimes impose a presumptive obligation to recognize international arbitral awards. …. Most developed national arbitration statutes also treat foreign arbitral awards as presumptively valid." Gary B. Born, INTERNATIONAL COMMERCIAL ARBITRATION (2d ed. 2001) at 779-80. That said, the New York Convention does not eliminate the need for *any* enforcement proceedings, and does not eliminate protections for parties against whom enforcement is sought. In the United States, a prevailing party must confirm the award pursuant to the Federal Arbitration Act to reduce the award to a formal judgment, and then must execute the judgment upon the assets of the losing party. 9 U.S.C. §§ 1, *et seq*. (2006). Chapter 2 of the Federal Arbitration Act incorporates the New York Convention, thus providing the limited statutory bases for denying confirmation of an arbitration award. *Id*. These bases were agreed to by the member states and were the *exclusive* bases envisioned by those states. *See* 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards – the "New York" Convention*, art. V at 50 *available at* http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf (accessed Oct. 29, 2012) (recognizing the "only" reasons of which a party may present "proof" so as to avoid recognition and enforcement of an award); Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the New York Convention on the Recognition and Enforcement of Arbital Awards*, 37 TEX. INT'L L.J. 43, 61 (citing U.N. Doc. E/AC.42/4/Rev. 1, at 9) (tracing legislative history and concluding that "the listed grounds" in Article V were intended to be "exclusive"). FNC is not one of those exclusive bases.

C. Traditional and Historic Application of FNC.

FNC analyzes the convenience of holding a trial on the underlying merits, not the "convenience" of locating and executing upon assets post-judgment. Consequently, the doctrine considers the convenience of *parties and witnesses*, for example. In this light, FNC should have little, if any, relevance to enforcement actions which are concerned with identifying assets in the jurisdiction of a contracting party and applying those assets in satisfaction of an award. *See* Matthew H. Adler, *Figueiredo v. Peru: A Step Backward for Arbitration Enforcement*, 32 NW. J. INT'L L. & BUS. 38A (Jan. 26, 2012).

In the United States, the doctrine of FNC originated in the context of domestic litigation, and served to prevent plaintiffs from filing suit in states that had little connection to the underlying dispute when an alternative forum was available. *See Gulf Oil Co. v. Gilbert,* 330 U.S. 501 (1947). However, ever since the federal venue transfer statute was adopted, the "federal doctrine of *forum non conveniens* has [had] continuing application only in cases where the alternative forum is abroad." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 449 n.2 (1994).

> [W]hen an alternative forum has jurisdiction to hear the case, and *when **trial** in the chosen forum* would "establish …. oppressiveness and vexation to a defendant … out of all proportion to plaintiff's convenience," or when the "chosen forum [is] inappropriate because of considerations affecting

> the court's own administrative and legal problems," the court may, in the exercise of its sound discretion, dismiss the case.

Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (alterations in original) (emphasis added) (quoting *Koster v. Am. Lumbermans Mut. Cas. Co.*, 330 U.S. 518, 524 (1947)). In the Second Circuit, evaluation of the deference that is due to the plaintiff's choice of forum is the first step in the FNC analysis. *Norex Petroleum, Ltd. v. Access Indus., Inc.*, 416 F.3d 146, 153 (2d Cir. 2005) (describing the three-step FNC analysis as the determination of (1) the appropriate deference due to the plaintiff's choice of forum; (2) whether an alternative forum exists; and (3) the public and private interests implicated by the choice of forum). The public and private interest factors assess the litigants' ability to fairly and reasonably present their claims and defenses, and the court's ability to evaluate those claims and defenses.

Traditional private interest factors include ease of access to relevant evidence, the identity and location of witnesses, whether such witnesses can be compelled to attend hearings, and the relative expense to the parties. Ronald A. Brand, *Comparative Forum Non Conveniens and the Hague Convention on Jurisdiction and Judgments*, 37 TEX. INT'L L.J. 467, 476 (2002). Public interest factors include an assessment, for example, of the court's administrative capability to adjudicate the case. *Id*. at 477 (explaining that since the Supreme Court's decision in *Gilbert*, the public interest factors have included the congestion of the docket, the burden of jury duty on a community that has no relation to the underlying dispute, and conflict of laws problems). Relevant factors in the assessment of the court's capacity for adjudication could include, and have included, the court's ability to apply foreign law. *See, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 260; *Sonera Holding B.V. v. Cukurova Holding A.S.*, 11 Civ. 8909, 2012 U.S. Dist. LEXIS 128602, *26 (S.D.N.Y. Sept. 10, 2012); *Graf von Spee v. Graf von Spee*, 514 F. Supp. 2d 302, 312 (D. Conn. 2007) (quoting *Bybee v. Oper der Standt Bonn*, 899 F. Supp. 1217, 1223 (S.D.N.Y. 1995)). The factors are assessed in the context of whether it would be convenient to hold a trial on the merits of the parties' claims in the United States. *See, e.g.*, *Piper Aircraft Co.*, 454 U.S. at 257-61; *Auxer v. Alcoa, Inc.*, 406 Fed. Appx. 600, 603-05 (3d Cir. 2011); *Jiali Tang v. Synutra Int'l, Inc.*, 656 F.3d 242, 249-53 (4th Cir. 2011); *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1234 (9th Cir. 2011); *McLane v. Los Suenos Marriott Ocean & Golf Resort*, Civ. No. 11-11860, 2012 U.S. App. LEXIS 8218, *4-9 (11th Cir. Apr. 24, 2012); *Saqui v. Pride Cent. Am. LLC*, 595 F.3d 206, 213-14 (5th Cir. 2010).

III. Impact of the Application of Forum Non Conveniens to Enforcement of International Arbitration Awards.

In 2002, the Second Circuit affirmed a district court decision dismissing an international arbitration enforcement case on FNC grounds. *Monegasque de Reassurances S.A.M. v. NAKNafto-Gaz of Ukraine (Monde Re)*, 311 F.3d 488 (2d Cir. 2002). In *Monde Re*, the petitioner had won an arbitration award of $88 million against a Ukrainian company and sought enforcement against that company and the Ukrainian government. *Id*. at 491-92. The U.S. District Court for the Southern District of New

York had granted Ukraine's motion to dismiss on the basis of FNC. *Id*. at 492. The U.S. Court of Appeals for the Second Circuit affirmed. In upholding the district court's decision, the Court of Appeals addressed the argument "that the doctrine of forum non conveniens cannot be applied to a proceeding to confirm an arbitral award pursuant to the provisions of the Convention," but rejected that argument on the basis that "the proceedings for enforcement of foreign arbitral awards are subject to the rules of procedure that are applied in the courts where enforcement is sought". *Id*. at 495.

The Court of Appeals in *Monde Re* based its reasoning on Article III of the New York Convention, which provides that "[e]ach Contracting [i.e., member] State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles." New York Convention, art. III; *Monde Re,* 311 F.3d at 496.

The Court of Appeals did not provide a clear basis for reconciling, on the one hand, its interpretation of FNC as a "procedural" ground for refusing enforcement with, on the other hand, the New York Convention's plain language providing that "[r]ecognition and enforcement of the award may be refused …. *only if*" the party opposing enforcement establishes one of the Article V conditions. New York Convention, art. V (emphasis added); *Monde Re,* 311 F.3d at 496. Nevertheless, at least in the Second Circuit, *Monde Re* made the enforcing forum's "rules of procedure" an independent basis for denying enforcement when it dismissed the enforcement action. Matthew H. Adler, 32 NW. J. INT'L L. & BUS. 38A, 43A (citing *Monde Re*, 311 F.3d at 496; *Thai-Lao Lignite (Thailand) Co. v. Gov't of the Lao People's Democratic Republic*, No. 10 Civ. 5256, 2011 U.S. Dist. LEXIS 87844, *23-34 (S.D.N.Y. Aug. 3, 2011); *Constellation Energy Commodities Grp. Inc., v. Transfield ER Cape Ltd.*, No. 10 Civ. 4434, 2011 U.S. Dist. LEXIS 83589, at *5-16 (S.D.N.Y. July 29, 2011)). *Monde Re's* interpretation of Article III opens the door to member states to create discretionary defenses to enforcement of awards under the guise of creating "rules of procedure." . *See Monde Re*, 311 F.3d at 495-96. In characterizing FNC as a procedural rule for purposes of Article III, the Second Circuit looked to *American Dredging Co. v. Miller*, 510 U.S. 443 (1994), a Supreme Court case that treated the doctrine as procedural, not substantive, for *Erie* (*Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938)) choice-of-law purposes. *Id*. at 453. However, *American Dredging* did not concern an arbitral award, the FAA, or the New York Convention. *See id.*

No doubt FNC is a procedural doctrine in American jurisprudence. However, that discretionary common law procedure should not be incorporated into the "rules of procedure" in Article III, if the result is to do violence to Article V and the fundamental purpose of the Convention. All American procedural rules do not apply to international arbitration awards.

The Second Circuit revisited the intersection of FNC and the enforcement of international arbitration awards in 2011. *Figueiredo Ferraz e Engenharia de Projeto Ltda v. Republic of Peru*, 665 F.3d 384 (2d Cir. N.Y. 2011) *See also Melton v. Oy Nautor AB*, 161 F.3d 13 (9th Cir. 1998)(affirming district court's dismissal of action to enforce

international arbitration award on *forum non conveniens* grounds while holding that plaintiff waived the argument that NY Convention prohibits application of FNC).

Like *Monde Re, Figueiredo* concerned an attempt to enforce an award, which had been rendered in a country outside the United States, against a government entity – in this case, the government of Peru. *Figueiredo*, 2011 U.S. App. LEXIS 24748, at *1-2. Petitioner Figueiredo, a Brazilian company, contracted through its Peruvian subsidiary to provide consulting services to the Peruvian state agency that was responsible for water supply and sanitation. The arbitration was held in Peru and Figueiredo was awarded $21 million. Figueiredo sought to seize $21 million in proceeds from the Peruvian government's sale of bonds, which was held on account in New York City. *Id*. The enforcement effort implicated a Peruvian statute that limited the annual amount that any state agency could pay on a judgment to three percent of that agency's annual budget. *Id*. at *4, 19-20. As a result of that statute, at the time the case was heard by the Court of Appeals for the Second Circuit, the agency had paid Figueiredo only $1.4 million of the $ 21 million award. *Id*. at *7.

The agency disclosed the existence of the three percent statute to the district court and argued the case should be dismissed on FNC grounds. *Figueiredo Ferraz Consultoria E Engenharia de Projecto Ltda. v. Republic of Peru,* 655 F. Supp. 2d 361, 366, 374-77 (S.D.N.Y. 2009). The district court denied the motion. *Id*. at 378. In doing so, the district court noted that a Peruvian court was not an adequate forum because only a U.S. court could enforce the award against Peru's U.S. assets. *Id.* at 376.

The Court of Appeals for the Second Circuit rejected the district court's rationale:

> It is no doubt true that only a United States court may attach a defendant's particular assets located here, but that circumstance cannot render a foreign forum inadequate. If it could, every suit having the ultimate objective of executing upon assets located in this country could never be dismissed because of FNC.

Figueiredo, 2011 U.S. App. LEXIS 24748, at *13. The Court of Appeals decided that the Peruvian statute capping recovery was "a highly significant public factor warranting FNC dismissal." *Id*. at *19. Assessing the public and private factors in the FNC analysis, the Court of Appeals found Peru's statutory cap capable of trumping the United States' public policy in favor of arbitration and arbitration enforcement: "Although enforcement of such awards is normally a favored policy of the United States and is specifically contemplated by the Panama Convention, *that general policy must give way to the significant public factor of Peru's cap statute*." *Id*. at *21 (emphasis added). The Court did not consider how Peru's public policy was affected by Peru's agreement to the Panama Convention.

Since *Figueiredo* was decided, only one court, the U.S. District Court for the Southern District of New York, has applied the new FNC standard in an enforcement

case. In *Skanga Energy & Marine, Ltd. v. Arevenca S.A.*, a Nigerian importer of petroleum sued an energy company operated by the Venezuelan government, as well as the energy company's agent, for failure to deliver petroleum to Nigeria. 2012 U.S. Dist. LEXIS 86549, 11 Civ. 4296, *2-6 (S.D.N.Y. 2012). Plaintiff filed in state court. Defendant removed the case to the district court and moved to dismiss based on FNC and other grounds. *Id.* at * 6-7. In ruling on the FNC argument, the court considered three factors: (1) the degree of deference properly accorded the plaintiff's choice of forum; (2) whether the alternative forum proposed by the defendants was adequate to adjudicate the parties' dispute; and (3) a balance of the private and public interests implicated in the choice of forum. *Id.* at 19 (citing *Norex Petroleum Limited v. Access Indus., Inc.,* 416 F.3d 146, 153 (2nd Cir. 2005), *reh'g den'd en banc* (Nov. 23, 2005), *cert. den'd*, 126 S. Ct. 2320 (2006)). The court quoted *Figueiredo* in weighing the private and public interests, stating that "the Second Circuit [] recently noted that public interest factors weigh in favor of dismissal where the litigation is intimately involved with sovereign prerogative,' for example, where 'it is important to ascertain the meaning of another jurisdiction's statute from the only tribunal empowered to speak definitively.'" *Skanga Energy & Marine, Ltd.*, 2012 U.S. Dist. LEXIS 86549at * 25 (quoting *Figueiredo*, 665 F.3d at 392). The *Skanga Energy* court denied the defendant's motion to dismiss on FNC grounds, reasoning that although the private interests were balanced between New York and Venezuela, the public interest weighed in favor of keeping the case in New York. *Skanga Energy & Marine, Ltd.*, 2012 U.S. Dist. LEXIS 86549, at *25-29. The decision has not been appealed.

IV. Implications of Applying Principles of FNC To Enforcement of International Arbitration Awards.

A. A Discretionary "Procedural" Doctrine Undermines the Convention's Purpose.

Dismissing an action to enforce a foreign arbitral award on FNC grounds permits U.S. litigants to convert a "procedural" U.S. doctrine into an enforcement bar even though it is not one of the exclusive bases in Article V of the New York Convention. This approach undermines the uniformity sought by member states to multilateral arbitration conventions, including the New York Convention, and could invite other member states to adopt similar doctrines restricting arbitration enforcement, so long as those restrictions are characterized as "procedural." Further, this approach does not have a sound basis in the canons of treaty interpretation, nor in U.S. statutory or case law.

Article III of the New York Convention provides that arbitral awards shall be recognized as binding and shall be enforced "in accordance with the rules of procedure of the territory where the award is relied upon." New York Convention, art. III. Construing this language to import FNC as a defense to bar enforcement ignores international norms inherent in the drafting of the Convention in general and Article III in particular. The authority to dismiss on FNC grounds is not based in statute, treaty, or constitution, but rather in the court's inherent power to regulate its own jurisdiction. *See Figueiredo*, 665 F.3d at 400 (citing *Monde Re*, 311 F. 3d at 497) (J. Lynch, dissenting). This construction

empowered the court to use FNC to dismiss a New York Convention case without deciding whether any Article V ground for refusal of recognition was present. This use of FNC conflicts with the express language of the New York Convention and with Chapter Two of the FAA, which mandates Convention enforcement. 9 U.S.C. §§ 201-208.

Application of FNC in this manner in the international award context also conflicts with the U.S. Supreme Court's directive that where two or more interpretations of relevant international treaty language are possible, that which gives the more liberal effect to the core objectives of the treaty is preferred. *Stuart v. United States*, 498 U.S. 353 (1989) ("[A] treaty should generally be construed …. liberally to give effect to the purpose which animates it, and even where a provision of a treaty fairly admits two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.") (quoting *Bacardi Corp. of America v. Domenech*, 311 U.S. 150, 163 (1940)). Whether there are even two different interpretations of the New York Convention's "procedural" exception is open to debate, particularly when read with the "exclusive" grounds for non-enforcement provided in Article V of that treaty. However, if so, interpreting the New York Convention as allowing for a FNC defense runs counter to the U.S. Supreme Court's directive to choose the "more liberal interpretation."

Further, just as with a normal question of statutory interpretation, abiding by the plain language of the treaty is a preferred method of interpretation. It is also a method supported by the understanding of the member states. *Medellin v. Texas*, 552 U.S. 491 (2008) (citations omitted) ("The interpretation of a treaty, like the interpretation of a statute, begins with its text. … Because a treaty ratified by the United States is 'an agreement among sovereign powers,' we have also considered as 'aids to its interpretation' the negotiation and drafting history of the treaty as well as 'the post ratification understanding' of signatory nations.").

Historically, there are no grounds to rewrite or reinterpret the "rule of procedure" language to somehow introduce substantive grounds opposing enforcement that would otherwise be exclusively contained in Article V. The "rule of procedure" language of the New York Convention has its origins in the Geneva Convention of 1927; that language emerged from the 1958 United Nations Working Group debates on the New York Convention. W.W. Park, *Respecting the New York Convention*, 18 ICC INTERNATIONAL COURT OF ARBITRATION BULL. 2 at 1 (2007). Thus, even had the United States (or any other member state) proposed a means to adopt a discretionary measure such as FNC as an additional defense to enforcement, beyond those included in Article V, the language of the Convention emerged without such an addition.[1]

[1] The United Kingdom proposed language providing that awards should be recognized and enforced "under rules of procedure not more complicated than those used for the enforcement of any other award …. ." U.N. Economic and Social Council Doc.E/Conf.26/L.11 (May 25, 1958), *available at* www.uncitral.org (accessed Oct. 29, 2012). The Israeli delegation proposed that enforcement be "in accordance with rules of procedure substantially similar to those applying to domestic arbitral awards … ." U.N. Economic and Social Council Doc. No. E/Conf.26/L.21 (May 27, 1958), *available at* www.uncitral.org (accessed Oct. 29, 2012). The U.S. delegate, in his remarks on procedural rules governing enforcement, specifically commented on schedules of costs and fees. Summary Record of the Tenth Meeting of the U.N. Conference

This understanding of the New York Convention comports with the treaty's "object and purpose" – namely, "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 signatory countries." *Scherk v. Alberto-Culver*, 417 U.S 506, 520 n. 15 (1974); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614 (U.S. 1985) (quoting *Scherk*, 417 U.S. at 520 n. 15) *Ministry of Def. & Support v. Cubic Def. Sys.*, 665 F.3d 1091, 1098 (9th Cir. 2011) (citation omitted); *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257, 1262 (11th Cir. 2011) (citation omitted); *Certain Underwriters at Lloyd's London v. Argonaut Ins. Co.*, 500 F.3d 571, 579 (7th Cir. 2007) (citation omitted); *Termorio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007), *cert. den'd*, 2007 U.S. LEXIS 12557 (Nov. 26, 2007) (citation omitted); *Intergen N.V. v. Grina*, 344 F.3d 134, 143 (1st Cir. 2003) (citation omitted). This understanding is also consistent with the plain language of the Convention.

It also must be considered that civil law countries, including members of enforcement conventions, neither recognize nor apply FNC. Civil law countries make up the majority of the member states to the New York Convention. This fact makes it all the more unlikely that those member states could, by use of the term "rules of procedure," have meant to import – indirectly – a U.S. doctrine to which they do not subscribe in the first place. As the Court of Appeals for the Ninth Circuit stated, one "cannot assume that the drafters [of the New York Convention] would have understood the doctrine of forum non conveniens to be a 'question of procedure.'" *Hosaka v. United Airlines, Inc.*, 305 F.3d 989, 999 n.13 (9th Cir. 2002). Conversely, expanding the definition of "rule of procedure" as the Court of Appeals for the Second Circuit has done would permit any member state to interpret as procedural any number of anti-arbitration measures in an attempt to escape its obligations under the New York Convention. This creates great potential differences in *actual* enforcement, "antithetical" to the uniform approach sought by the parties to the New York Convention.

To the contrary, an interpretation of "rules of procedure" to include time limits for filing (such as those included in the FAA), service of process, and filing fees may involve differences between member states, but such rules are objective and verifiable by parties. These are conditions that can be fulfilled by an applicant for enforcement, and whose fulfillment can be objectively determined. For example, the FAA requires a copy of the arbitration agreement to accompany a petition. Such an understanding accords with the desire to encourage international arbitration as a dispute resolution procedure by making enforcement a defined process, and also accords with the history of the Convention.

B. Importing FNC into the New York Convention Analysis is Antithetical to the Overriding Purpose of the Convention.

In addition to contravening the plain language and history of the New York Convention, the import of the FNC doctrine as a procedural ground for refusing

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on International Commercial Arbitration, May 27, 1958, U.N. Economic and Social Council Doc. No.E/Conf.26/SR.10 (Sept. 12, 1978), *available at* www.uncitral.org (accessed Oct. 29, 2012), at 7.

enforcement contravenes the plainly intended purpose of the Convention – that of uniform enforcement. Each of the member states must have anticipated that, by becoming a party, it would be required to recognize and enforce awards that were rendered outside of, and that did not involve, that member state. The enforcement procedure was designed, at least in part, to allow the pursuit of assets in those member states. It could not have come as a surprise to member states that Article V – the explicit grounds for refusing enforcement of an award – might require a court to interpret and address foreign law. U.S. courts, in fact, have considered the applicability of foreign law in this context. *See, e.g.*, Case No. 06 C 5724, *Championsworld, LLC v. United States Soccer Fedn., Inc.*, 2012 U.S. Dist. LEXIS 116380, *36-37 (N.D. Ill. Aug. 17, 2012) (Swiss law); *Pactrans Air & Sea, Inc. v. China Nat'l Chartering Corp.*, No. 3:06-cv-369, 2010 U.S. Dist. LEXIS 42773, *4-5 (N.D. Fla. Mar. 29, 2010) (Chinese law); *Steel Corp. v. Int'l Steel Servs.*, 2006 U.S. Dist. LEXIS 52464 (W.D. Pa. July 31, 2006) (Philippine law).

V. Conclusion

In order to reaffirm its support for international arbitration, the ABA should adopt a policy that rejects the use of *forum non conveniens* as a defense to enforcement actions under the New York and Panama Conventions.

Respectfully Submitted,

Barton Legum
Chair, ABA Section of International Law

August 2013

107C

GENERAL INFORMATION FORM

Submitting Entity: Section of International Law

Submitted By: Barton Legum, Chair, Section of International Law

1. Summary of Resolution(s).

This resolution opposes the application of the U.S. common law doctrine of *forum non conveniens* as a means of inhibiting the enforcement under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards or the Inter-American Convention on International Commercial Arbitration. It states that refusal on that ground is not consistent with U.S. treaty obligations under these Conventions and U.S. implementing legislation.

2. Approval by Submitting Entity.

Approved by Council of the Section of International Law on April 27, 2013

3. Has this or a similar resolution been submitted to the House or Board previously?

No

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

Existing ABA policy supporting the use of commercial arbitration to resolve international commercial disputes, including Resolutions 114 adopted by the House of Delegates in 2009 and 104(C) adopted by the House of Delegates in 1989, are relevant to this resolution, as this resolution further supports the use of commercial arbitration to resolve international commercial disputes by preserving the general principles of enforceability of such international arbitration awards.

5. What urgency exists which requires action at this meeting of the House?

This resolution seeks to avoid the possibility of parties inappropriately avoiding or unnecessarily delaying the enforcement of international arbitral awards. Delay in adoption increases the likelihood that such actions would take place.

6. Status of Legislation. (If applicable)

None applicable.

7. Brief explanation regarding plans for implementation of the policy, if adopted by the House of Delegates.

GAO will send letters to the Departments of Justice and State notifying them of the resolution. If appropriate, and in accordance with ABA approval procedures, this resolution could become the basis for an ABA amicus brief.

8. Cost to the Association. (Both direct and indirect costs)

None

9. Disclosure of Interest. (If applicable)

None applicable.

10. Referrals.

This resolution is being provided to ABA sections and divisions for co-sponsorship and/or support.

11. Contact Name and Address Information. (Prior to the meeting)

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12. Contact Name and Address Information. (Who will present the report to the House?)

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EXECUTIVE SUMMARY

1. Summary of the Resolution

The American Bar Association should support the enforcement of international arbitration awards pursuant to multilateral conventions, and oppose the application of the U.S. common law doctrine of *forum non conveniens* as a means of inhibiting such enforcement. Multilateral treaties are designed to secure uniform and global portability for the recognition and enforcement of arbitral awards made in the territories of member states. Multilateral treaties identify the exclusive grounds for barring enforcement of an arbitration award. *Forum non conveniens* is not one of those grounds. The doctrine of *forum non conveniens* is a discretionary, local, judge made rule. It concerns the convenience of holding a trial on the underlying merits, rather than the "convenience" of locating and executing upon assets post-judgment. Accordingly, the doctrine should not stand as a bar to enforcement.

2. Summary of the Issue that the Resolution Addresses

International arbitration is a preferred dispute resolution mechanism in international business transactions. The choice of international arbitration as a means of resolving disputes between international parties is due at least in part to the ability to recognize and enforce awards made in the territories of the parties to multilateral conventions. It is possible that such a State has little, if any, connection to the dispute apart from the location of assets of the award debtor. The lack of *other* connections between the State and the dispute should have no bearing on the recognition and enforcement of that award. Parties to a multilateral treaty expect uniform enforcement of treaty awards subject to an exclusive list of defenses.

3. Please Explain How the Proposed Policy Position will address the issue

The proposed Resolution would enable the American Bar Association to urge U.S. courts to resist application or adoption of the *forum non conveniens* defense in international arbitration enforcement cases. It would also provide litigants seeking enforcement of international arbitral awards with persuasive supporting authority for the position that a potential lack of ties between the U.S. and the underlying dispute should not serve as a defense to enforcement of such awards.

4. Summary of Minority Views

No minority views have been identified in opposition.