TOWARD A UNIFORM INTERPRETATION OF THE FEDERAL ARBITRATION ACT: THE ROLE OF 9 U.S.C. § 208 IN THE ARBITRAL STATUTORY SCHEME[†]

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† I respectfully acknowledge the similarity of the title to ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), which the Supreme Court cited in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 639 (1985). That book and this Article share the goal of promoting and facilitating international commercial arbitration through a consistent interpretation of the controlling statutory texts. In contrast to Prof. van den Berg's attempt to promote a consistent interpretation of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards across the wide spectrum of signatory countries, this Article seeks to apply the same principle to the relevant U.S. statutory text, which incorporates and codifies the Convention.

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INTRODUCTION

Arbitration, as an independent process and institution, has matured from the unwanted stepchild of the American judiciary to a reliable colleague in the resolution of disputes.[1] They are, however, not equals. For all of arbitration's perceived independence, it still relies upon judicial (sovereign) support and encouragement because arbitration requires an enforcement mechanism lurking in the background to ensure good faith participation in the arbitral process and to give arbitration potency beyond other forms of dispute resolution.[2] With the enactment of the Federal Arbitration Act (FAA) in 1925,[3] arbitration gained the judicial support without which it would never have gained the vitality it now enjoys.[4] In enacting the FAA, Congress removed historical judicial hostility towards the arbitral process[5] and provided arbitration with a statutory legal structure upon which it could rely.

"[A]s a creature of contract,"[6] arbitration possesses a great deal of flexibility to morph itself to fit the needs of contracting parties, but it needs a reliable legal foundation to build upon and to ensure at the end of the day that

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[1] Green Tree Fin. Corp. Ala. v. Randolph, 531 U.S. 79, 89 (2000); Scherk v. Alberto-Culver Co., 417 U.S. 506, 510 n.4 (1974) ("English courts traditionally considered irrevocable arbitration agreements as 'ousting' the courts of jurisdiction, and refused to enforce such agreements for this reason. This view was adopted by American courts as part of the common law up to the time of the adoption of the [Federal] Arbitration Act."); *see* Vicki Zick, *Reshaping the Constitution to Meet the Practical Needs of the Day: The Judicial Preference for Binding Arbitration*, 82 MARQ. L. REV. 247, 247 (1998) (arguing that the judiciary has been remolding 7th Amendment jurisprudence, in the context of employment litigation, to reduce its dockets thereby turning arbitration into a "junior varsity justice system").

[2] ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 5 (1981) ("[I]nternational commercial arbitration cannot function without the assistance of the national courts."); Charles H. Brower, II, Note, *What I Tell You Three Times is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT'L L. 971, 972 (1995) ("[O]ne doubts whether anyone would turn to arbitration in the absence of [its] complementary relationship [with the judiciary].").

[3] 9 U.S.C. §§ 1–16 (2006).

[4] The growth in popularity of arbitration is quite pronounced in the realm of international commercial arbitration. From 1980 to 1988 American parties participated on average in 70.4 International Chamber of Commerce (ICC) arbitrations per year. Christopher R. Drahozal, *New Experiences of International Arbitration in the United States*, 54 AM. J. COMP. L. 233, 244 (Supp. 2006). In comparison, from 2000 to 2004 Americans on average participated in 189.0 ICC arbitrations. *Id.*

[5] *See Scherk*, 417 U.S. at 510–11 (1974) (citing H.R. REP. NO. 68-96, at 1–2 (1924)); *see also* S. REP. NO. 68-536 (1924).

[6] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999); *see also* Volt Info. Scis. v. Bd. of Trs. of Leland Stanford Jr. Univ., 489 U.S. 468 (1989); Scher v. Bear Stearns & Co., 723 F. Supp. 211, 214 (S.D.N.Y. 1989) ("It is fundamental that arbitration agreements are creatures of contract law.").

an arbitration agreement or arbitral award will be enforceable. Therefore, a uniform and consistent (principled) interpretation of the federal statutory texts controlling arbitration is essential to nourish the arbitral process;[7] this is the ultimate goal of this Article. The twin goals of uniformity and consistency became harder to attain when the United States amended the FAA to codify the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) in 1970.[8] The New York Convention threw a potential wrench into the arbitral scheme as two different legal regimes came ostensibly to control international and domestic arbitration.[9] However, the superficial differences between the two legal regimes prove less stark than they appear because "[t]here is no reason to assume that Congress did not intend to provide overlapping coverage between the [New York] Convention and [the FAA]."[10] By and large courts have done an admirable job in melding the two

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[7] *See* Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 579 (7th Cir. 2007). The court said:

> We conclude that the Convention and its implementing federal legislation express a clear federal interest in uniform rules by which agreements to arbitrate will be enforced. . . . The uniformity at issue here is one that implicates the very specific interest of the federal government in ensuring that its treaty obligation to enforce arbitration agreements covered by the Convention finds reliable, consistent interpretation in our nation's courts.

Id.; *see also* Energy Transp., Ltd. v. M.V. San Sebastian, 348 F. Supp. 2d 186, 198 (S.D.N.Y. 2004); THOMAS E. CARBONNEAU, THE LAW AND PRACTICE OF ARBITRATION 73 (2004) ("The [Supreme] Court has an unmistakable ambition in terms of arbitration: To create a substantively uniform and uniformly applied law favoring arbitral agreements and awards.").

[8] Pub. L. No. 91-368 (1970) (codified at 9 U.S.C. §§ 201–08) (implementing the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3).

[9] Despite two different regimes applying to domestic and international arbitration, uniformity remains an important goal of Title 9. *See Scherk*, 417 U.S. at 520 n.15 ("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."). In spite of the general goal of uniformity, distinctions between the two regimes will remain. Murphy Oil USA, Inc. v. S.R. Int'l Bus. Ins. Co. Ltd., No. 07-CV-1071, 2007 WL 2752366, at *4 (W.D. Ark. Sept. 20, 2007) ("[T]he United States Supreme Court has, on at least three occasions, treated international agreements to arbitrate as distinct from domestic agreements, citing principles of international comity.").

[10] Bergesen v. Joseph Muller Corp., 710 F.2d 928, 934 (2d Cir. 1983); *see also* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20 (2d Cir. 1997); *Energy Transp.*, 348 F. Supp. 2d at 200. Some clarification of the term "overlapping" is required. When the New York Convention applies to a case, the FAA only overlaps to the extent it is incorporated into the New York Convention as a non-conflicting provision because "Congress gave the treaty-implementing statutes primacy in their fields." Bautista v. Star Cruises, 396 F.3d 1289, 1297 (11th Cir. 2005). Therefore, either the FAA or the New York Convention applies, but not both at the same time, with the "overlap" taking place once the New York Convention incorporates a non-conflicting provision of the FAA. *Id.*

into a uniform body of law.[11] The ongoing convergence of the FAA and the New York Convention, and subsequent codification, however, lacks a principled, unifying interpretive paradigm.

This Article will set forth the case law addressing the interaction of U.S. domestic and international arbitral law and derive from that case law an interpretive approach to Title 9 (entirety of federal arbitral law) that promotes international arbitration by providing a principled and, therefore, uniform and predictable interpretation of the controlling statutory texts.[12] At the same time, this Article will draw attention to instances where courts have departed from the elicited interpretive paradigm.[13] When courts have done so, either they

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[11] *See* CARBONNEAU, *supra* note 7, at 344. Additionally, "uniformity is best served by trying all [New York Convention] cases in federal court unless the parties unequivocally choose otherwise." Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373, 377 (5th Cir. 2006) (quoting McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1207–08 (5th Cir. 1991)). Section 9 of Title 9 contains "one of the broadest removal provisions" in federal law in order to further the goal of uniformity. *Id.*; *see also* Beiser v. Weyler, 284 F.3d 665, 669 (5th Cir. 2002) ("[W]henever an arbitration agreement falling under the Convention could *conceivably* affect the outcome of the plaintiff's case, the agreement 'relates to' to [sic] the plaintiff's suit" and therefore, falls under 9 U.S.C. § 205.). "So generous is the removal provision that [courts] have emphasized that the general rule of construing removal statutes strictly against removal 'cannot apply to [New York Convention] cases because in these instances, Congress created special removal rights to channel cases into federal court.'" Ancar v. Murphy Oil, U.S.A., Inc., Civ. A. Nos. 06-3246, 06-3247, 06-3248, 06-3249, 06-3250, 06-3251, 06-3252, 06-3253, 06-3254, 06-3255, 06-3256, 06-3257, 06-3258, 06-3259, 06-3260, 06-3261, 06-3262, 2006 WL 2850445, at *4 (E.D. La. Oct. 3, 2006) (quoting *McDermott Int'l*, 944 F.2d at 1213). However, once a trial begins, an action becomes unremovable under 9 U.S.C. § 205. Pan Atlantic Group, Inc. v. Republic Ins. Co., 878 F. Supp. 630, 641 (S.D.N.Y. 1995) (interpreting the term trial broadly to include the "resolution of actively litigated substantive issues"). For other cases addressing removal issues, see *Adams v. Georgia Gulf Corp.*, 237 F.3d 538 (5th Cir. 2001) (insurance contract between defendant and its insurer (also a party) provided adequate grounds to remove case to federal court under the New York Convention); *Ballard v. Ill. Cent. R.R. Co.*, 338 F. Supp. 2d 712 (S.D. Miss. 2004) (remanding a direct action back to state court despite finding that the defendant's third party action against an insurer satisfied the removal requirements of 9 U.S.C. § 205); *Reddam v. KPMG LLP*, No. SACV04-1227GLT(MANX), 2004 WL 3761875, at *1–2 (C.D. Cal. Dec. 14, 2004); *Sheinberg v. Princess Cruise Lines, Ltd.*, 269 F. Supp. 2d 1349, 1352 (S.D. Fla. 2003) (30-day window to obtain unanimity of consent from all defendants to remove to federal court does not apply to New York Convention cases); *Creative Tile Mktg., Inc. v. SICIS Int'l, S.r.L.*, 922 F. Supp. 1534, 1537 (S.D. Fla. 1996) (upon removal a federal court can reconsider State court's denial of motion to compel arbitration); *Xactron Mgmt Ltd. v. Kreepy Krauly U.S.A., Inc.*, 696 F. Supp. 1465, 1466 (S.D. Fla. 1988) (retaining jurisdiction after 9 U.S.C. § 205 removal despite the fact that plaintiff withdrew motion to compel arbitration under the N.Y. Act); *Seafort Shipping Corp. v. W. Eng. Ship Owners Mut. Protection and Indem. Ass'n*, Civ. A. No. 88-4605, 1988 WL 135179, at *2–3 (E.D. La. Dec. 12, 1988); *Dale Metals Corp. v. Kiwa Chem. Industry Co.*, 442 F. Supp. 78 (D.C.N.Y. 1977).

[12] A number of sections of the FAA and Chapter Two of 9 U.S.C. explicitly reference the other chapter or sections of the competing chapter. *See, e.g.*, 9 U.S.C. §§ 16, 202, 205, 208. The issues raised by these explicit references do not fall under this Article's interpretive approach because the specific reference removes any doubt about that particular action's applicability to the competing chapter.

[13] Despite the fairly uniform manner in which courts have interpreted Title 9, statutory interpretation inherently possesses an element of fluidity. As one commentator has stated: "Do not expect anybody's theory

have reached questionable conclusions or unnecessarily distinguished between the foreign and domestic arbitral schemes, thereby resulting in an analytically less uniform arbitral scheme, which ultimately undermines the goal of developing a reliable and predictable legal foundation upon which arbitration may build.

Title 9 of the U.S. Code provides the framework of federal arbitral law and "confers an armamentarium of powers" upon a court to implement the title's directives.[14] Title 9 is divided into "three separate but inter-connected chapters."[15] The first chapter, which includes sections 1 through 16, constitutes the FAA (domestic arbitral law).[16] Chapter Two encompasses sections 201 through 208 and incorporates the New York Convention into Title 9 through section 201.[17] Therefore, in interpreting the interaction of Chapters One and Two of Title 9, the New York Convention is a direct and substantive element of Chapter Two (the New York Convention and Chapter Two shall be referred to collectively as the "N.Y. Act"). The third chapter codifies and incorporates the Inter-American Convention on International Commercial Arbitration,[18] also known as the Panama Convention, in sections 301 through 307.[19] The second and third chapters reference the FAA to form an

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of statutory interpretation . . . to be an accurate statement of what courts actually do with statutes. The hard truth of the matter is that American courts have no intelligible, generally accepted, and consistently applied theory of statutory interpretation." WILLIAM D. POPKIN, A DICTIONARY OF STATUTORY INTERPRETATION 316 (2007) (quoting HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1169 (1994)). The fact that only one statute, Title 9, is at issue, rather than statutory interpretation generally, diminishes the risk of haphazard judicial interpretation. *See id.*

[14] InterGen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003).

[15] *Energy Transp.*, 348 F. Supp. 2d at 197 (S.D.N.Y. 2004).

[16] 9 U.S.C. §§ 1–16 (2006).

[17] *Id.* §§ 201–08. Section 201, titled "Enforcement of Convention," states: "The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter." *Id.* § 201; *see also* McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1208 (5th Cir. 1991) ("To avoid possible interference with the well-settled jurisprudence construing the FAA, Congress enacted new legislation in [Chapter Two] rather than amending the FAA.").

[18] Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 17 U.S.T. 1270, 1438 U.N.T.S. 248.

[19] 9 U.S.C. §§ 301–07. Hereafter, I shall only address the N.Y. Act but not the Panama Convention because of their near identical structures. Section 307 mirrors section 208. Section 307, titled "Chapter 1; residual application," states, "Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States." *Id.* § 307. Moreover, section 302, titled "Incorporation by reference," provides, "Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter 'the Convention' shall mean the Inter-American Convention." *Id.* § 302. Analytically, the N.Y. Act and the Panama Convention are nearly identical, with the main distinction turning

"interrelated, but . . . not a seamless whole."[20] The FAA fills the gaps of the other two chapters and sets out the procedural framework that federal courts apply in implementing those chapters. All three chapters, or federal arbitral law in its entirety, will be referred to collectively as "Title 9," and the three individual chapters will be referred to as "FAA," "N.Y. Act," and "Panama Convention" respectively. In addition, hereinafter individual sections of Title 9 are simply referred to as "section" followed by the specific number.

Section 208 provides the statutory tool for harmonizing domestic and international arbitration:

> §208. Chapter 1; residual application
>
> Chapter 1 applies to actions and proceedings brought under [Chapter Two] to the extent [Chapter One] is not in conflict with [Chapter Two] or the Convention as ratified by the United States.[21]

The hierarchical structure of the FAA as set forth in section 208, with the N.Y. Act taking precedence over the FAA in the international arena, supplies the first step in building a principled interpretive paradigm for Title 9. Section 208 provides the golden rule that when conflicts arise, the N.Y. Act trumps the FAA.[22]

Case law provides that in determining whether a conflict exists, the analysis should turn on three hierarchical considerations. The first and primary consideration is to determine which scheme, the FAA or N.Y. Act, most

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on their respective spheres of applicability. *See* Progressive Cas. Ins. Co. v. C.A. Reaseguradora Nacional de Venez., 802 F. Supp. 1069, 1072–75 (S.D.N.Y. 1992); *Energy Transp.*, 348 F. Supp. 2d at 198 (S.D.N.Y. 2004) (quoting H.R. REP. NO. 101-501, at 4 (1990)). The court in *Energy Transport* stated:

> The New York Convention and the Inter-American Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee's expectation, in view of that fact and the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, that courts in the United States would achieve a general uniformity of results under the two conventions.

Id. In addition, the Panama Convention has generated limited case law and, therefore, does not provide the breadth of jurisprudence needed to discern an overriding approach to statutory interpretation. Although not directly addressed in this article, the interpretative paradigm developed herein will extend to the Panama Convention.

[20] Bautista v. Star Cruises, 396 F.3d 1289, 1296 (11th Cir. 2005).

[21] 9 U.S.C. § 208.

[22] *See id.*

directly addresses a particular issue. This accords with a bedrock of statutory interpretation that a "general statutory rule usually does not govern unless there is no more specific rule."[23] In the context of two competing bodies of law within Title 9, this gives rise to three classes of conflict between the FAA and the N.Y. Act: (1) FAA-Specific vs. N.Y. Act-Specific; (2) FAA-General vs. N.Y. Act-Specific; and (3) FAA-Specific vs. N.Y. Act-General.[24] Under this rubric the N.Y. Act will trump the FAA whenever it specifically addresses an issue. Therefore, the N.Y. Act prevails in the first two classes of conflicts. As no conflict exists in the third class of conflict, the N.Y. Act incorporates the non-conflicting sections of the FAA by operation of section 208.[25]

The term "general" under this paradigm has a dual meaning: either (1) a section does not directly or explicitly address an issue, or (2) in comparison to a competing section in another chapter of Title 9, it only tangentially addresses an issue, while the competing section goes to the heart of the matter. "Specific," on the other hand, means that a particular section leaves little doubt as to its applicability to a particular situation and the result that the section dictates. A concrete example of the application of the specific-general dichotomy is section 9 versus section 207, both regarding the statute of limitations for obtaining judicial confirmation of arbitral awards.[26] Section 207 trumps section 9 in cases falling under the N.Y. Act because it imposes a

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[23] Green v. Bock Laundry Mach. Co., 490 U.S. 504, 524 (1989); *see also In re* Brown, 329 F. Supp. 422, 425 (S.D. Iowa 1971) ("However inclusive may be the general language of the statute, it will not be held to apply or prevail over matters specifically dealt with in another part of the same enactment."); WILLIAM N. ESKRIDGE, JR. ET AL., LEGISLATION AND STATUTORY INTERPRETATION 275 (2000); NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:5 (7th ed. 2007).

[24] Logically, a fourth class of conflict exists: FAA-General vs. N.Y. Act-General. However, a review of the case law under section 208 has not produced a case that I would characterize as falling under this class. Moreover, the very structure of Title 9 leads to the conclusion that such a case will not arise due to the higher level of specificity found in the FAA.

[25] *See* 9 U.S.C. § 208.

[26] *Id.* §§ 9, 207. Section 207 states:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration.

Id. § 207. Section 9 provides:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award . . . .

Id. § 9.

three-year statute of limitations to confirming foreign arbitral awards; this manifestly conflicts with section 9's one-year statute of limitation for domestic awards.[27] This conflict falls under the FAA-Specific vs. N.Y. Act-Specific category of conflicts because both sections 9 and 207 specifically address the issue of the applicable statute of limitations. While the statute of limitations conflict between the FAA and the N.Y. Act is quite clear, many conflicts under Title 9 are not as readily apparent or easy to resolve.

In the FAA-Specific vs. N.Y. Act-Specific class of conflict, an actual conflict exists, and the N.Y. Act prevails.[28] In the FAA-General vs. N.Y. Act-Specific class of conflict, despite an appearance to the contrary, no actual conflict exists because the very structure of the N.Y. Act precludes the FAA from applying to the Act.[29] Stated another way, although various sections of the FAA and the N.Y. Act may address similar elements of the arbitral process, the N.Y. Act does not incorporate some provisions of the FAA because of the inherent differences in the two legal regimes.[30] For example, the FAA simply does not control which cases fall under the N.Y. Act, despite a number of sections addressing jurisdiction generally, such as sections 1, 2, 4, and 9; section 202 governs whether a case falls under the N.Y. Act.[31] Therefore, rather than finding a conflict between the jurisdictional requirements of the FAA and the N.Y. Act, this Article will treat such ostensible conflicts as disparate, and as a result, no true conflict can arise. In effect, by treating such ostensible conflicts as disparate, the FAA is silent as to an issue arising under the N.Y. Act. In the FAA-Specific vs. N.Y. Act-General class of conflict, an element of the FAA may be incorporated into the N.Y. Act without engendering a conflict because of the Act's failure to directly address an issue.[32]

The remainder of this Article is structured along the specific-vs.-general dichotomy with the secondary and tertiary interpretive considerations and anomalous case law analyzed within that structure. Parts I, II, and III of this

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[27] *See* Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 437 n.3 (2d Cir. 2004).

[28] *See infra* Part I.

[29] *See infra* Part II.

[30] To clarify, the FAA defines the term "commerce" that extends throughout Title 9, including the N.Y. Act. However, the FAA's role in defining "commerce" for Title 9 plays no role in distinguishing whether a case falls under the N.Y. Act or the FAA; it is a universal requirement that applies to all cases controlled by Title 9. *See* 9 U.S.C. § 1. Therefore, an analysis of whether a case falls under the N.Y. Act, as opposed to the FAA, begins and ends with the N.Y. Act.

[31] 9 U.S.C. §§ 1, 2, 4, 9, 202; *see infra* Parts II.A, III.A.

[32] *See infra* Part III.

Article analyze the individual conflicts that fall under each class of conflict. Due to the primacy of the specific-vs.-general dichotomy, an analysis of a section 208 conflict will not continue to the secondary and tertiary considerations developed herein when the specific-vs.-general analysis clearly indicates a result.

The secondary consideration of the interpretive paradigm is that courts seek to minimize the number of instances where the FAA and N.Y. Act conflict.[33] In doing so, courts cultivate a more uniform body of arbitral law that allows international arbitral participants to extrapolate from pre-established arbitral law as to how a court should treat novel issues arising under the N.Y. Act. The cross-pollination between the domestic and international arbitral schemes ultimately makes judicial determination and enforcement of issues arising from international arbitration more predictable.[34]

The tertiary element to the proposed interpretative paradigm is the pro-arbitration policy of the United States.[35] The policy has played a significant role explicitly and implicitly in Title 9 jurisprudence.[36] However, the policy plays a greater role in N.Y. Act cases because the "federal [pro-arbitration] policy applies with special force in the field of international commerce."[37] This role of the pro-arbitration policy accords with section 208, giving primacy to the N.Y. Act whenever it specifically addresses an issue, as in the first and second class of conflicts.

The pro-arbitration policy is a malleable concept that does not provide concrete analytical guidance to interpreting the text of Title 9; rather it provides a more general goal, the promotion of arbitration. The pro-arbitration policy only serves a limited, gap-filling role because in interpreting a statute

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[33] *See, e.g.*, *infra* Part I.A.

[34] *See generally* CARBONNEAU, *supra* note 7, at 179, 354–65.

[35] *See* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974); *see also In re* Bousa Inc., No. 92 Civ. 6194 (RPP), 1993 WL 78019, at *5 (S.D.N.Y. Mar. 16, 1993) (rejecting the argument that "the federal policy of arbitration is overridden by the federal policy favoring unitary bankruptcy" (quoting a prior bankruptcy court order)).

[36] Francisco v. Stolt Achievement MT, 293 F.3d 270, 274–75 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030, 1030 (2002) ("Even if we were doubtful of the correctness of our conclusion, doubts as to whether a contract falls under the Convention Act should be resolved in favor of arbitration . . . ."). "Implicit" refers to the way many cases mold or arguably corrupt their analysis to conform to the pro-arbitration policy or at least their understanding of the policy, often at the expense of Title 9 textual considerations, embodied in the primary element of the proposed interpretative paradigm, and other competing bodies of law. *See* Jarred Pinkston, *New York's Unwelcoming Harbor: The New York Convention's Inapplicability to Claims Arising from Seamen's Employment*, 3 BYU INT'L L. & MGMT. REV. 233 (2007).

[37] *Mitsubishi Motors*, 473 U.S. at 631.

such as Title 9, "the first step is to determine whether the statutory language has a plain and unambiguous meaning by referring to 'the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.'"[38] The inquiry ends there "if the language is clear and 'the statutory scheme is coherent and consistent.'"[39] Therefore, at all the times the actual texts of Title 9 and the New York Convention are of paramount importance. Although the specific-vs.-general dichotomy is the primary element of this Article's proposed interpretive approach, the pro-arbitration policy can play a role in borderline conflicts that are difficult to resolve under the specific-vs.-general rubric. More precisely, when the text of Title 9 leads to equally plausible interpretive conclusions about a section's application, the interpretation that most facilitates and promotes arbitration, especially international arbitration, should triumph. This Article will tease out this role of the pro-arbitration policy from case law when germane to the primary specific-vs.-general dichotomy and the secondary goal of avoiding conflicts between the various chapters of Title 9.

I. FAA-SPECIFIC VS. N.Y. ACT-SPECIFIC CLASS OF CONFLICTS

Issues arising from the interaction of the FAA and N.Y. Act constitute the prototypical conflict that section 208 addresses. When the FAA and the N.Y. Act both address a narrow and specific issue in a conflicting manner, the conflict can only be resolved by invoking section 208 to trump a provision of the FAA.[40]

A. *Section 4 vs. Section 206—Extent of District Court Authority to Compel Arbitration*

If one party to an arbitration agreement proves recalcitrant to resolving a dispute arising under that agreement through arbitration, the method of initiating the arbitral process today is to seek a court order compelling arbitration. Specific performance of an arbitration agreement was historically an equitable remedy.[41] "Prior to the enactment of the [FAA], an action at law

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[38] Bautista v. Star Cruises, 396 F.3d 1289, 1295 (11th Cir. 2005) (quoting Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997)).

[39] *Id.* at 1295–96 (quoting *Robinson*, 519 U.S. at 341).

[40] *See* 9 U.S.C. § 208 (2006).

[41] USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 21 n.6 (1st Cir. 1978) ("The interposition of an arbitration agreement has been construed an equitable defense at least since Shanferoke Corp. v. Westchester Corp., 293 U.S. 449, 452 . . . (1935)); *see also* Daniel Tan, *Enforcing International Arbitration Agreements in*

on the [arbitral agreement] was the proper method of enforcing it,"[42] but generally "specific performance of the promise would not be enforced" without a statutory basis.[43] As a result, damages for a breach of contract were the appropriate remedy rather than specific performance.[44] The FAA changed this from an equitable remedy to a statutory remedy, but the FAA and the N.Y. Act explicitly diverge on the extent of a federal court's authority to grant this remedy.[45]

Under section 4 of the FAA, entitled "Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination,"

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court . . . for an order directing that such arbitration proceed in the manner provided for in such agreement . . . . The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an

Federal Courts: Rethinking the Court's Remedial Powers, 47 VA. J. INT'L L. 545, 560 (2007) ("[E]stablished principles of equity dictate that the power to compel specific performance be limited to situations where common law damages would be inadequate to vindicate the breach."); Gregory R. J. Zini, Comment, *The Arbitration Clause Controversy in Oklahoma*, 32 TULSA L.J. 163, 171 (1996).

[42] Kentucky River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953) (citing Red Cross Line v. Atl. Fruit Co., 264 U.S. 109 (1924)), *cited in* Insurdata Mktg. Servs. v. Healthplan Servs., 352 F. Supp. 2d 1252, 1254–55 (M.D. Fla. 2005)). The court in *Kentucky River Mills* was addressing an action to enforce an arbitral award rather than to compel arbitration, but this statement of law should apply to both actions because without a statutory basis granting a right to specific performance, the only remaining viable course of action would be an action at law.

[43] *Red Cross Line*, 264 U.S. at 118 (citing Finucane Co. v. Bd. of Educ., 190 N.Y. 76, 83 (N.Y. 1907)). This was the law on the issue in New York at the time and was indicative of the general nationwide attitude against granting specific performance before the FAA or other state statutes on arbitration preceding the FAA. GARY BORN, 1 INTERNATIONAL COMMERCIAL ARBITRATION 42 (2009); *see, e.g.*, DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 79–81 (1st Cir. 2000) (summarizing Massachusetts's pre-FAA law on arbitration). Of note is that New York enacted a statute on arbitration in 1920, five years before the enactment of the FAA, which greatly influenced it. *See* Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S.Ct. 1396, 1406 n.7 (2008).

[44] *See generally* Tan, *supra* note 41, at 597–607.

[45] It was a long, slow process to work out the federalism issues raised by Title 9. *See generally* CARBONNEAU, *supra* note 7, at 133–53. *See also* Allied-Bruce Terminix Cos., Inc. v. Dobson, 513 U.S. 265, 270–72 (1995) (interpreting the FAA as extending "to the limits of Congress' Commerce Clause power" in overruling a state anti-arbitration statute, despite the fact that the transaction was "primarily local"); Acosta v. Master Maint. & Constr. Inc., 452 F.3d 373, 379 (5th Cir. 2006) ("Congress[] [decided] that the federal courts are best able to establish uniformity in the enforcement of arbitral agreements"); David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 249 (2d Cir. 1991) (holding that the N.Y. Act pre-empts a state requirement that "any agreement to arbitrate must be displayed prominently in the contract or contract confirmation and must be signed by the parties").

> order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, *shall be within the district* in which the petition for an order directing such arbitration is filed.[46]

Section 4 not only conflicts with section 207, as will be discussed below, but it also contains "an internal conflict: it directs both that the court enforce an arbitration agreement in accordance with its terms and that it may direct arbitration only if it is to occur within the court's own district."[47] A concrete example of this internal conflict would be if one party brings an action in the jurisdiction where the defendant is domiciled for breach of contract, there is a subsequent failure to arbitrate as per the terms of the contract, and the defendant then raises as a defense that the situs named in the arbitration clause is outside the district court's jurisdiction. Despite the fact that the arbitration clause is valid in all respects, a federal court would lack authority to compel arbitration outside its "district" under section 4, even if specific performance at the specified situs is the "manner provided for in such agreement" and is the only appropriate remedy under the contract in question.[48] A plaintiff seeking to compel arbitration in a non-N.Y. Act case should take care to file suit in the appropriate jurisdiction to avoid the limitations of section 4.

Section 4's limitations likewise can prove problematic to a defendant seeking to compel arbitration as an affirmative defense. Despite a valid arbitration agreement, a district court cannot compel arbitration outside the district, leaving the defendant with the following options: seek a stay pursuant to section 3 or the courts inherent authority to manage its docket, thereby leaving the plaintiff no remedy other than going forward with arbitration in the appropriate jurisdiction in order to obtain any relief; waive the defense and seek compensatory damages for breach of contract; file an action to compel in the situs district and, hopefully, receive a stay of the initial action; or transfer the action under a *forum non conveniens* rationale.[49] All of the preceding

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[46] 9 U.S.C. § 4 (2006) (emphasis added).

[47] DaPuzzo v. Globalvest Mgmt. Co., L.P., 263 F. Supp. 2d 714, 727 (S.D.N.Y. 2003) (analyzing a motion to compel under the FAA because the contract at issue called for arbitration in the Bahamas, which is not a signatory to the New York Convention, so the case did not fall under the Convention).

[48] *Id.* (citing Jain v. de Méré, 51 F.3d 686, 690 (7th Cir. 1995)).

[49] *See* 9 U.S.C. §§ 3–4; Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496–97 (2d Cir. 2002) (holding that *forum non conveniens* doctrine may apply to cases falling under the N.Y. Act). *But see* Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 809–10 (N.D. Cal. 2004) (holding that a party who had applied for a U.S. patent could foresee litigation in the United States and thus could not invoke the *forum non conveniens* doctrine to dismiss the action).

options are counter to the primary benefits of arbitration because they are time consuming and, therefore, costly.[50]

The N.Y. Act, however, possesses no such shortcoming because of section 206, titled "Order to compel arbitration; appointment of arbitrators," which states:

> A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.[51]

Even a cursory reading reveals the specific-vs.-specific conflict between a federal court's inability to compel arbitration outside its district under section 4 and the court's power to compel "at any place" under section 206.[52] Furthermore, Article II(3) of the New York Convention directs the courts of signatory nations to compel arbitration without making geographical distinctions.[53]

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50 CARBONNEAU, *supra* note 7, at 5–6; 1 JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION § 6:21 (3d ed. 2005); *see also* Murray Oil Products Co. v. Mitsui & Co., 146 F.2d 381, 384 (2d Cir. 1944) ("The most common reason for arbitration is to substitute the speedy decision of specialists in the field for that of juries and judges . . . .").

51 9 U.S.C. § 206 (2006).

52 *See* Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483, 487 (S.D.N.Y. 1985). However, the New York Convention limits the term "any place" to only include signatory nations. *DaPuzzo*, 263 F. Supp. 2d at 726. Additionally, section 4 and section 206 have been collectively interpreted as granting courts "a concomitant power to enjoin arbitration where arbitration is inappropriate." Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P., 49 F. Supp. 2d 331, 342 (S.D.N.Y. 1999) (citing Societe Generale de Surveillance, S.A. v. Raytheon European Mgmt. & Sys. Co., 643 F.2d 863, 868 (1st Cir. 1981)). *Contra* URS Corp. v. Lebanese Co. for Dev. and Reconstruction of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 209–10 (D. Del. 2007). See *infra* Part III.D for additional conflicts between sections 4 and 206.

53 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. II(3), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention]. Article II(3) states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Id.; *see also* Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50, 53 (3d Cir. 1983) ("[W]e conclude that the meaning of Article II section 3 which is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is 'null and void' only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver, or (2) when it contravenes fundamental policies of the forum state." (citation omitted)).

The New York case *Energy Transport, Ltd. v. M.V. San Sebastian* provides a good example of a court avoiding an unnecessary conflict within the FAA and properly invoking American pro-arbitration policy while adhering to the specific-vs.-general dichotomy.[54] In that case, a Panamanian defendant was to transport oil from the United States to Singapore and Thailand, but before the ship reached its destination, a fire broke out, harming a number of crewmembers and forcing plaintiffs to find an alternative and more costly means of transporting their goods.[55] Plaintiffs were two distinct but closely related companies based in the United States.[56] One plaintiff, Energy Transport, Ltd., had entered into a charter agreement with defendants, while the other plaintiff, PT Cabot, was a party to a bill of lading, but only the charter agreement provided for arbitration.[57] Besides the dilatory defense of standing, the real issue was whether the charter agreement incorporated the bill of lading.[58] The answer to that question determined whether one or two arbitral forums were required, because if the charter did not incorporate the bill of lading, then the second plaintiff could not invoke the charter party agreement to compel arbitration of all related claims before the same tribunal within the court's jurisdiction.[59]

In arguing their respective positions, the defendant invoked the N.Y. Act and the Panama Convention Act—but affirmatively argued against the FAA—to compel arbitration with two different tribunals, while plaintiffs simply invoked the FAA to compel arbitration with only one arbitral tribunal within

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54 *See* Energy Transp., Ltd. v. M.V. San Sebastian, 348 F. Supp. 2d 186 (S.D.N.Y. 2004).

55 *Id.* at 190–91.

56 *Id.* at 191.

57 *Id.* at 202–08.

58 *Id.* Although the court reached the correct conclusion that the plaintiffs had standing, the court arguably applied the wrong standing analysis. The court evaluated the merits of the case in determining that the plaintiffs established: "(1) an injury in fact to their interests in the carbon black feedstock; (2) that is sufficiently connected to defendant's alleged negligence in maintaining the vessel; and (3) that this injury could be redressed by a decision favorable to plaintiffs." *Id.* at 196. I would assert that the correct standing analysis in determining whether to compel arbitration under a contractual arbitration agreement is: (1) there exists a binding arbitration agreement; (2) one party alleges the other party breached the agreement; and (3) the arbitration agreement provides a remedy within the scope of an arbitrator's power to grant, i.e. money damages. The preceding proposed standing analysis generally conforms to the standard subject matter jurisdiction analysis applied when determining whether an action falls under the N.Y. Act. *See* Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co. (Pemex), 767 F.2d 1140, 1144–45 (5th Cir. 1985). The third requirement raises a novel issue as to whether arbitral parties can grant arbitrators the power to compel specific performance.

59 *Energy Transp.*, 348 F. Supp. 2d at 192–93.

the court's district.[60] Plaintiffs did not contest the applicability of either the N.Y. Act or the Panama Convention Act but failed to invoke either as grounds for compelling arbitration.[61] Rather than distinguishing which chapter of the FAA should have been invoked to compel arbitration, the court simply held that "in this instance, it is possible for the Court to compel the parties to arbitrate within its district in compliance with § 4, without engendering a conflict with § 206" because of the manner in which it interpreted the bill of lading.[62] Therefore, no reason existed to reach the issue.[63] Stated another way, the court found it unnecessary to address a hypothetical issue and potential conflict when the facts of the case did not dictate that it do so.[64] The ruling had the additional pro-arbitration benefit of consolidating all arbitral proceedings before a single tribunal, thereby increasing the speed of the arbitration and decreasing costs.

B. Section 9 vs. Section 207—Venue and Statute of Limitations

In *Phoenix Aktiengesellschaft,* the court correctly pointed out in dicta a number of clear specific-vs.-specific conflicts between sections 9 and 207:

> The consent provision is only one of several differences between § 9 and § 207. Section 9, for example, requires applications for confirmation to be filed within one year of the arbitration, while § 207 provides the parties with three years to seek confirmation. Section 9, moreover, provides that the application for confirmation should be made "to the United States court in and for the district within which such award was made," unless the parties have specified a different court. Section 207, in contrast, allows parties to the arbitration to apply to any court having jurisdiction under Chapter 2.[65]

Both the venue and statute of limitations issues mentioned in *Phoenix Aktiengesellschaft* fall under the FAA-Specific vs. N.Y.-Act Specific category of conflicts because they both directly and explicitly address narrow issues,

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[60] *Id.* at 199–202. Although not determinative to the court's conclusion, the court held that the Panama Convention Act controlled the action because the parties hailed from the U.S. and Panama, both signatories to the Panama Convention. *Id.* at 199 n.10.

[61] *Id.* at 190.

[62] *Id.* at 201.

[63] *Id.*

[64] *See id.*

[65] Phoenix Aktiengesellschaft v. Ecoplas, Inc, 391 F.3d 433, 437 n.3 (2d Cir. 2004) (quoting 9 U.S.C. § 9 (2000)); *see also* Unionamerica Ins. Co., Ltd. v. Allstate Ins. Co., 302 F. Supp. 2d 865, 867 (N.D. Ill. 2004).

thereby leading to irreconcilable conclusions.[66] Consequently, section 207's venue and statute of limitations provisions clearly trump the same provisions in section 9.[67]

That does not mean, however, that section 9 in its entirety conflicts with section 207 because section 9 deals with a variety of issues that do not explicitly arise under the N.Y. Act. For example, while "[n]either the [New York] Convention nor the related federal statute implementing it addresses service of process,"[68] section 9 provides that "notice of the application [for confirmation of an arbitral award to residents outside a court's jurisdiction] shall be served by the marshal."[69] In contrast, section 207 makes no mention of how to provide notice to parties to arbitration who reside outside the jurisdiction of the court.[70] *Phoenix Aktiengesellschaft* bolsters this distinction by distinguishing the two provisions in its analysis, rather than finding that section 9 conflicts with section 207 *in toto*.[71] Distinguishing between elements of the sections, and not the sections in their entirety, provides a further consideration in interpreting the interaction of the FAA and the N.Y. Act. This Article will further develop this distinction when comparing the respective consent to confirmation requirements in section 9 and section 207,[72] and addressing section 9's service of process requirements.[73]

The foregoing specific-vs.-specific prototypical conflicts are quite narrow and rare.[74] As Parts II and III demonstrate, Title 9 is a fairly cohesive statute when questionable case law is analyzed in the proper context. Any

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[66] An issue unique to N.Y. Act cases is whether the three year of statute of limitations begins to run from when the arbitrator renders the award or the award becomes final under the law governing the arbitration. Seetransport Wiking Trader Schiffarhtsgesellschaft MBH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala, 989 F.2d 572, 580–82 (2d Cir. 1993) (holding that the statute of limitations began to run once the award was rendered by the arbitral tribunal and that two years of litigation in foreign situs court did not toll the statute of limitation requirement of section 207).

[67] *See Phoenix Aktiengesellschaft*, 391 F.3d at 437.

[68] Lucent Techs., Inc. v. Tatung Co., No. 02 Civ. 8107(JSR), 2003 WL 402539, at *1 (S.D.N.Y. Feb. 20, 2003) (finding that service by marshal is "an irrelevancy in a case like this where the respondent, being a foreign entity, cannot necessarily be found in any United States district").

[69] 9 U.S.C. § 9 (2006); *see infra* Part III.L.

[70] 9 U.S.C. § 207.

[71] *Phoenix Aktiengesellschaft*, 391 F.3d at 437 n.3.

[72] *See infra* Part II.B.

[73] *See infra* Part III.L.

[74] *See* McDermott Int'l, Inc. v. Lloyds Underwriters of London, 944 F.2d 1199, 1209 (5th Cir. 1991) ("[T]he [New York] Convention Act only effected 'minor changes' in the FAA . . . ." (quoting S. REP. NO. 91-702, at 5 (1970) (statement of Richard D. Kearney, Chairman of the Secretary of State's Advisory Committee on Private International Law))).

questionable reasoning employed in case law may simply arise from the fact that Title 9 is an "anomaly" in U.S. law in the way that issues of federalism, international law, and the principle of freedom of contract collide.[75] All three of these competing principles will likely influence judges unfamiliar with the N.Y. Act when deciding real cases, not just in their abstract statutory interpretation. This Article, however, is limited to developing a principled method of melding the texts of the FAA and N.Y. Act into a uniform body of arbitral law.

II. FAA-GENERAL VS. N.Y. ACT-SPECIFIC CLASS OF CONFLICTS

Despite appearances, issues arising from the interaction of the FAA and N.Y. Act falling under Part II do not truly conflict. They are grouped together here because of their parallel rather than intersecting relationship. Although various sections of the FAA and the N.Y. Act superficially appear to address the same or similar issues, they actually do not, as revealed by analysis within the greater structure of the domestic and international schemes. The variations between the two schemes do not constitute a conflict because they are so fundamentally different in nature that neither can extend to the other scheme. Nonetheless, despite a clear difference in semantics, to characterize the differences between the FAA and N.Y. Act as conflicting or different in nature does not change the legal or analytical relationship between the competing sections in that the N.Y. Act simply does not incorporate a particular section of the FAA.

A. Section 4 vs. Section 202—Federal Subject Matter Jurisdiction

The FAA "does not create any independent federal-question jurisdiction"[76] in an action to compel arbitration because section 4 only applies when a court has "jurisdiction under title 28, in a civil action or in admiralty."[77] In contrast, the N.Y. Act grants federal courts subject matter jurisdiction in section 203, which states that "[a]n action or proceeding falling under the Convention shall

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[75] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 25 n.32 (1982) (noting that Title 9 creates a body of substantive federal law without establishing independent federal question jurisdiction over suits to compel arbitration).

[76] *Id.*

[77] 9 U.S.C. § 4 (2006). As a result of section 4, federal courts must employ a standard federal subject matter jurisdictional analysis before proceeding to an FAA section 4 analysis of whether to compel arbitration. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 25 n.32.

be deemed to arise under the laws and treaties of the United States."[78] Section 202 defines the cases falling under the N.Y. Act.[79] The N.Y. Act

> provides two causes of action in federal district court for enforcing arbitration agreements falling under the Convention: an action to compel arbitration pursuant to an arbitration agreement falling under the Convention, 9 U.S.C. § 206, and an action to confirm an arbitration award made pursuant to an agreement falling under the Convention, 9 U.S.C. § 207.[80]

Section 202 addresses jurisdiction for both actions.[81] From section 202 arises a four-part test for federal subject matter jurisdiction:[82]

> (1) there is an agreement in writing to arbitrate the dispute;[83]

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[78] 9 U.S.C. § 203 (2006). Section 203 further states: "The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy." *Id.*; *see* Nitron Int'l Corp. v. Golden Panagia Mar., Inc., No. 98 Civ. 8718(DLC), 1999 WL 223155, at *4 (S.D.N.Y. Apr 16, 1999) (confirming a N.Y. Act award in the amount of $3,500).

[79] 9 U.S.C. § 202 (2006). Section 202 provides:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

Id.

[80] Czarina, L.L.C. v. W.F. Poe Syndicate, 358 F.3d 1286, 1290–91 (11th Cir. 2004).

[81] *Id.* at 1291 n.2; URS Corp. v. Lebanese Co. for Dev. and Reconstruction of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 208 (D. Del. 2007) ("[T]he [N.Y. Act] does not authorize an injunction against a foreign arbitral proceeding," and therefore such an action cannot provide a basis for subject matter jurisdiction under the N.Y. Act.).

[82] Standard Bent Glass Corp. v. Glassrobots Oy, 333 F.3d 440, 449 & n.13 (3d Cir. 2003); Smith/Enron Cogeneration Ltd. P'ship, Inc. v. Smith Cogeneration Int'l, Inc., 198 F.3d 88, 92–93 (2d Cir. 1999) (rejecting "a 'center of gravity' test to determine whether [an] arbitration falls under the [New York] Convention" and holding that the situs controls); Sedco, Inc. v. Petroleos Mexicanos Mexican Nat'l Oil Co., (Pemex), 767 F.2d 1140, 1144–45 (5th Cir. 1985); Ledee v. Ceramiche Ragno, 684 F.2d 184, 186–87 (1st Cir. 1982); Invista N. Am. S.à.r.l. v. Rhodia Polyamide Intermediates S.A.S., 503 F. Supp. 2d 195, 201 (D.D.C. 2007); *see also* 2 VED P. NANDA & DAVID K. PANSIUS, LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 19:6 (2d ed. 2005). *But see URS Corp.*, 512 F. Supp. 2d 199 (finding no subject matter jurisdiction under the N.Y. Act without applying the four-part test in an action to enjoin foreign arbitral proceedings because the Act only envisioned two causes of action: compelling arbitration and confirming an award); Polytek Eng'g Co., Ltd. v. Jacobson Cos., 984 F. Supp. 1238, 1240–41 (D. Minn. 1997) (applying the four-part test in "deciding whether to confirm an award" rather than as a jurisdictional pre-requisite).

(2) an agreement provides for arbitration in the territory of a New York Convention signatory;[84]

(3) the agreement to arbitrate arises out of a commercial legal relationship;[85]

(4) an international element to the contracting parties' relationship exists.[86]

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[83] That does not necessarily mean that the contract must be signed by the party opposing arbitration. *See* Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GMBH, 206 F.3d 411, 416 (4th Cir. 2000); A/S Custodia v Lessin Int'l, Inc., 503 F.2d 318, 320 (2d Cir. 1974); Best Concrete Mix Corp. v. Lloyd's of London Underwriters, 413 F. Supp. 2d 182, 187 (E.D.N.Y. 2006). A court is also not bound by an arbitral tribunal's determination that there was an agreement in writing. *Czarina*, 358 F.3d at 1293; *see also* AGP Indus. SA, (Peru) v. JPS Elastromerics Corp., 511 F. Supp. 2d 212, 215 (D. Mass. 2007) ("Preprinted arbitration terms on the back of a form that is not signed by both parties are not 'agreements in writing' enforceable under the Convention."); J.A. Jones, Inc. v. Bank of Tokyo-Mitsubishi, Ltd., No. 5:98-CV-308-BO(3), 1999 WL 1940003, at *3–4 (E.D.N.C. Feb. 11, 1999) (finding that the bank guarantor of a construction project forced one party into bankruptcy, and in doing so, assigned that party's rights under the construction contract; and holding that the other parties then could invoke the arbitration clause of the construction contract to compel the bank to arbitrate its claims under both the construction contract and the separate guaranty contract, which did not contain an arbitration clause); Frydman v. Cosmair, Inc., No. 94 Civ. 3772 (LAP), 1995 WL 404841 (S.D.N.Y. July 6, 1995) (determining that a price appraisal pursuant to French law did not constitute an arbitration agreement and remanding the case for lack of subject matter jurisdiction). *But see* Sarhank Group v. Oracle Corp., 404 F.3d 657, 660 & n.2 (2d Cir. 2005) (holding that the existence of a signed written arbitration agreement is a question of merit, not subject-matter jurisdiction); Sen Mar, Inc. v. Tiger Petroleum Corp., 774 F. Supp. 879, 882–83 (S.D.N.Y. 1991) (holding that a single telex to which defendant objected did not satisfy the "in writing" requirement).

[84] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 934 (D.C. Cir. 2007) ("Under the Convention, 'the critical element is the place of the award: if that place is in the territory of a party to the Convention, all other Convention states are required to recognize and enforce the award, regardless of the citizenship or domicile of the parties to the arbitration.'" (quoting Creighton Ltd. v. Gov't of the State of Qatar, 181 F.3d 118, 121 (D.C. Cir. 1999) (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 487 cmt. b (1987)))); E.A.S.T., Inc. of Stamford, Conn. v. M/V Alaia, 876 F.2d 1168, 1172 (5th Cir. 1989) ("[T]he Convention focuses on the situs of the arbitration, not upon the nationality of the parties.").

[85] Bautista v. Star Cruises, 396 F.3d 1289, 1295–96 (11th Cir. 2005) (holding that a seaman's employment constituted a commercial relationship); Francisco v. Stolt Achievement MT, 293 F.3d 270, 274 (5th Cir. 2002).

[86] The court in *Sedco*, 767 F.2d at 1145, as well as other courts, initially postulated this requirement as: "[I]s a party to the agreement not an American citizen?" However, 9 U.S.C. § 202 states that an agreement "fall[s] under the Convention" if the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states"; therefore, a case could fall under the N.Y. Act even when both parties are American. As a result, the phrase "international element" better conveys this requirement. *See* Jones v. Sea Tow Servs. Freeport N.Y. Inc., 30 F.3d 360, 366 (2d Cir. 1994) (holding that the arbitration agreement standing alone cannot satisfy the international element requirement); Chew v. KPMG, LLP, No. 3:04CV748BN, 2005 WL 5353281, at *4 (S.D. Miss. Jan. 6, 2005) (finding that the N.Y. Act subject matter jurisdiction existed, even though both parties directly bound by the arbitration agreement were American, because action revolved around a tax avoidance scheme that involved buying shares of a foreign corporation).

In light of the N.Y. Act's explicit grant of federal jurisdiction, a federal court initially determining whether it has subject matter jurisdiction to hear a Title 9 case need not employ a general jurisdictional analysis such as diversity or admiralty until it concludes that the action fails the four-part test of section 202.[87] An attempt to do so would engender an unnecessary conflict between the FAA and the N.Y. Act.[88] Streamlining a subject matter jurisdiction analysis by limiting it to the four-part test furthers pro-arbitration policy by reducing the range of potentially litigable issues. Additionally, once jurisdiction has been established, "a court which orders arbitration retains jurisdiction to determine any subsequent application involving the same agreement to arbitrate, including a motion to confirm the arbitration award."[89]

Another issue arising from the FAA and N.Y. Act's differing realms of subject matter jurisdiction includes the narrow exemptions to certain classes of

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[87] Jacada (Eur.), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 704 (6th Cir. 2005) ("Because we have no doubt that the Convention does indeed apply, we need not, and therefore do not, consider the jurisdictional question of whether removal on the basis of diversity jurisdiction would be proper in this case."); Lander Co., Inc. v. MMP Invs., Inc., 107 F.3d 476, 479 (7th Cir. 1997) (holding that the lower court should have considered FAA jurisdiction based on diversity once it determined that it did not have jurisdiction under the N.Y. Act, but overturning the lower court's determination that it did not have jurisdiction under the N.Y. Act); Wilson v. Deutsche Bank AG, No. 05 C 3474, 2005 WL 3299366, at *2 n.6 (N.D. Ill. Nov. 30, 2005). In the following cases, the court noted or evaluated diversity jurisdiction despite the fact that the case fell under the N.Y. Act, and, therefore, jurisdiction existed independent of diversity: *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1036–37 (3d Cir. 1974); *Borsack v. Chalk & Vermilion Fine Arts, Ltd.*, 974 F. Supp. 293, 297–98 (S.D.N.Y. 1997); *Regent Seven Seas Cruises, Inc. v. Rolls Royce, PLC*, Nos. 06-22347-CIV, 06-22539-CIV, 2007 WL 601992, at *5–6 (S.D. Fla. Feb. 21, 2007). *But see* ACE Ltd. v. CIGNA Corp. & CIGNA Holdings, Inc., No. 00 Civ. 9423 WK, 2001 WL 767015, at *2 n.1 (S.D.N.Y. July 6, 2001) (relying on diversity jurisdiction because the N.Y. Act "does not independently confer subject matter jurisdiction").

[88] However, when an action involves a foreign government, a court must apply the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602–1611 (2000), to establish jurisdiction before proceeding to apply the N.Y. Act. *See* Compagnie Noga D'Importation et D'Exportation, S.A. v. Russian Fed'n, 361 F.3d 676, 686–68 (2d Cir. 2004); Concord Reinsurance Co., Ltd. v. Caja Nacional de Ahorro y Seguro, No. 93 Civ. 6606 (JSM), 1994 WL 86401, at *1 (S.D.N.Y. Mar. 16, 1994). Also, additional authority provides that "a Court may not pierce the corporate veil in a confirmation proceeding." Generica Ltd. v. Pharm. Basics, Inc., No. 95 C 5935, 1996 WL 535321, at *8 (N.D. Ill. Sept. 18, 1996) (citing Orion Shipping & Trading Co. v. Eastern States Petroleum Corp., 312 F.2d 299, 301 (2d Cir. 1963)); *see also* Fiat S.p.A. v. Ministry of Fin. and Planning of Republic of Surin., No. 88 Civ. 6639 (SWK), 1989 WL 122891, at *4–5 (S.D.N.Y. Oct. 12, 1989) (rejecting arbitrators' decision to pierce the corporate veil against a non-signatory who did not participate in the arbitration). Nonetheless, "where the complaint specifies both the Federal Arbitration Act and [diversity jurisdiction] as grounds for jurisdiction, the action is not merely one to confirm an arbitration award, but rather 'could thus be construed as a separate action to enforce the arbitration award against nonparties to the arbitration.'" *Generica*, 1996 WL 535321, at *9 (quoting Sea Eagle Mar., Ltd. v. Hanan Int'l Inc., No. 84 C 3210 (PNL), 1985 WL 3828, at *2 (S.D.N.Y. Nov. 14, 1985)). Therefore, in an action to confirm an award, a party who prevailed in the arbitration and who later seeks to enforce the award against a non-directly participating party may need to plead alternative grounds for jurisdiction (such as diversity) as to that party.

[89] Smiga v. Dean Witter Reynolds, Inc., 766 F.2d 698, 705 (2d Cir. 1985).

workers under section 1.[90] Two federal circuit courts have interpreted the FAA and N.Y. Act as conflicting on this issue.[91] If one accepts the reasoning under this line of cases, the conflict should fall under Part II (FAA-General vs. N.Y.-Act Specific). Because I do not accept this reasoning,[92] the conflict between the FAA's narrow exemption to arbitration for claims arising from certain types of employment will be addressed in Part III.

B. Section 9 vs. Section 207—Consent to Confirmation Requirement

Some courts have found a conflict between section 9's explicit consent to confirmation of an arbitral award requirement and section 207's more liberal requirements for confirming a foreign arbitral award.[93] At first glance, this particular conflict would fall under the FAA-Specific vs. N.Y. Act-Specific class of conflicts, but a closer review of the issue places this conflict under the FAA-General vs. N.Y. Act-Specific class of conflicts for the reasons that follow.

A number of irreconcilable specific conflicts exist between section 9 and 207;[94] however, some courts have unnecessarily muddied the waters for a uniform interpretation of the FAA. Moreover, much jurisprudence misconstrues the nature of section 9. The immediately pertinent part of section 9, titled "Award of arbitrators; confirmation; jurisdiction; procedure," states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made.[95]

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[90] 9 U.S.C. § 1 (2006).

[91] Bautista v. Star Cruises, 396 F.3d 1289, 1294–1300 (11th Cir. 2005); Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002).

[92] Pinkston, *supra* note 36, at 234–36.

[93] *See, e.g.*, Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436–37 (2d Cir. 2004); Stone & Webster, Inc. v. Triplefine Int'l Corp., 118 Fed. App'x 546, 549 (2d Cir. 2004); McDermott Int'l, Inc. v. Lloyds Underwriters of London, 120 F.3d 583, 588–89 (5th Cir. 1997).

[94] *See supra* Part II.B.

[95] 9 U.S.C. § 9.

Many courts interpret section 9 as a substantive requirement, rather than simply jurisdictional, but require less than express consent-to-confirmation.[96] Consent to and participation in the arbitral process is sufficient for judicial confirmation[97] because "[t]o agree to binding arbitration is to agree that if your opponent wins the arbitration he can obtain judicial relief if you refuse to comply with the arbitrator's award."[98]

In comparison to section 9, section 207, titled "Award of arbitrators; confirmation; jurisdiction; proceeding," goes on to state:

> Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. 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.[99]

Under the N.Y. Act, "[a] confirmation proceeding . . . is not an original action, it is, rather in the nature of a post-judgment enforcement proceeding."[100] In *Phoenix Aktiengesellschaft v. Ecoplas, Inc.*, the Second Circuit found a conflict between the FAA and N.Y. Act "[b]ecause the plain language of § 207 authorizes confirmation of arbitration awards in cases where § 9's consent requirement expressly forbids such confirmation."[101] The court thus held that

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[96] PVI, Inc. v. Ratiopharm GmbH, 135 F.3d 1252, 1253–54 (8th Cir. 1998); *see also* Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT'L ARB. 213, 217 (1996) ("There is no uniformity of understanding as to whether any other court—one that has neither been named in the parties' agreement, nor is within the district where the arbitration took place—has the power to confirm."). Stated another way, it is not clear if section 9 precludes a court that would have jurisdiction based on other grounds from confirming an arbitral award based simply on contractual principles, rather than on a statutory basis.

[97] *In re* I/S Stavborg (O. H. Meling, Manager) v. Nat'l Metal Converters, 500 F.2d 424, 425–26 (2d Cir. 1974) ("[T]he language of [the contract], coupled with the conduct of appellant[,] was sufficient to confer jurisdiction on the district court to enter judgment on the award pursuant to 9 U.S.C. § 9 . . . ."); *see also* Booth v. Hume Pub., Inc., 902 F.2d 925, 929–30 (11th Cir. 1990); Milwaukee Typographical Union v. Newspapers, Inc., 639 F.2d 386, 389–90 (7th Cir. 1981); Kallen v. District 1199, Nat'l Union of Hosp. and Health Care Employees, 574 F.2d 723, 724–26 & n.1 (2d Cir. 1978); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982, 985 (E.D. Mich. 1976) (declining to determine "whether the provisions of the Convention . . . do away with the consent to judgment requirement [under section 9]" after finding that the defendant had consented to confirmation).

[98] Lander Co., Inc. v. MMP Invs., Inc., 107 F.3d 476, 480 (7th Cir. 1997).

[99] 9 U.S.C. § 207.

[100] Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172, 182 (S.D.N.Y. 1990) (quoting Fertilizer Corp. of India v. IDI Mgmt., Inc., 517 F. Supp. 948, 963 (S.D. Ohio 1981)).

[101] Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436 (2d Cir. 2004).

"§ 207 preempts § 9's consent-to-confirmation requirement in cases under the Convention."[102]

In *Phoenix Aktiengesellschaft*, the German plaintiff successfully arbitrated against the American defendant in Zurich under Swiss law.[103] Because the defendant refused to pay, the plaintiff successfully commenced an action to confirm the award in the Western District of New York.[104] The defendant argued that the "federal district court lacked jurisdiction over [the] action because the arbitration agreement did not reflect the parties' intent to consent to judicial confirmation of the arbitration award, as required by § 9 of the [FAA]."[105] Since sections 9 and 207 conflicted, the court held that the N.Y. Act trumped section 9, and upheld the confirmation of the arbitral award.[106]

Although the court reached the correct result, its analysis was questionable. Section 208 should not have controlled in *Phoenix Aktiengesellschaft* because the court found a false conflict. The issue was whether the federal district court possessed subject matter jurisdiction.[107] Chapter One is not generally understood to "confer federal jurisdiction by its own weight";[108] rather, an alternative basis such as diversity or admiralty must exist.[109] This is because

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[102] *Id.* However, this is not a true statement of the law because "the Federal Arbitration Act contains no provision forbidding resort to enforcement by the mechanism of either a common law action on the award or a claim for breach of the term in the arbitration agreement that requires compliance with the arbitral award." Insurdata Mktg. Servs. v. Healthplan Servs., 352 F. Supp. 2d 1252, 1256 (M.D. Fla. 2005) (action to confirm an arbitral award more than one year after arbitration); *see also* Hall Street Associates, L.L.C. v. Mattel, Inc., 128 S.Ct. 1396, 1406 (2008) ("The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law . . . .").

[103] *Phoenix Aktiengesellschaft*, 391 F.3d at 434.

[104] *Id.*

[105] *Id.*

[106] *Id.* at 436–37.

[107] *Id*. The defendant also challenged the award under New York Convention Article (V)(1)(b). *Id.* at 434–35. However, that issue is not germane to the current section 208 issue within the context of this Article.

[108] Mercurio v. Am. Express Centurion Bank, 363 F. Supp. 2d 936, 938–39 (N.D. Ohio 2005) (citing Ford v. Hamilton Invs., Inc., 29 F.3d 255, 257–59 (6th Cir. 1994)); *see also* Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 140 (2d Cir. 2002).

[109] Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1982) (action to compel arbitration).

the FAA "is something of an anomaly in the field of federal-court jurisdiction. It creates a body of federal substantive law establishing and regulating the duty to honor an *agreement to arbitrate*, yet it does not create any independent federal-question jurisdiction under 28 U.S.C. § 1331 or otherwise."[110] However, this statement refers to compelling arbitration, not confirming an arbitral award.[111] The difference in the two actions is where the confusion arises.

As often happens, "the chameleon-like quality of the term 'jurisdiction'" can lead a jurisdictional analysis down the wrong path.[112] Contractual agreement as a basis for jurisdiction under the FAA is what section 9 provides in the limited context of confirming an arbitral award.[113] Section 9 "takes the principle of contractual freedom into account: The parties may choose the court that will issue the order confirming the award prospectively in their agreement."[114] Section 9 grants a "summary remedy"[115]—or more precisely, an expedited procedure (which "does not [even] envision an original action by complaint")[116]—for confirming an arbitral award in a federal court, even a federal court that may have lacked subject matter jurisdiction to compel

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110 *Id.* (internal citation omitted) (emphasis added).

111 The court in *Moses H. Cone Memorial Hospital* stated, "Section 4 provides for an order compelling arbitration only when the federal district court would have jurisdiction over a suit on the underlying dispute; hence, there must be diversity of citizenship or some other independent basis for federal jurisdiction before the order can issue." *Id.* This implies that the statement characterizing the FAA as an "anomaly in the field of federal-court jurisdiction" referred to compelling arbitration rather than all actions falling under the FAA.

112 DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 78 (1st Cir. 2000).

113 *See* Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 793 (10th Cir. 1991) ("The unambiguous language of § 9 leads us to believe that it creates its own level of subject matter jurisdiction for confirmation under [Chapter One]."). Courts and commentators are both perplexed by the exact role that section 9 plays within Title 9. *See, e.g.*, Erika Van Ausdall, *Confirmation of Arbitral Awards: The Confusion Surrounding Section 9 of the Federal Arbitration Act*, 49 DRAKE L. REV. 41 (2000) (arguing, after reviewing section 9 case law, that less than express consent to confirmation is required under section 9 but failing to consider section 9 as a subject matter jurisdictional requirement to gain access to federal court, in contrast to the alternative of state court).

114 CARBONNEAU, *supra* note 7, at 108; *see also* Lander Co., Inc. v. MMP Invs., Inc., 107 F.3d 476, 480–81 (7th Cir. 1997) ("[S]ection 9 merely creates alternatives to conventional venue . . . . The district in which the defendant resides is a conventional venue for civil cases." (citation omitted)).

115 Kentucky River Mills v. Jackson, 206 F.2d 111, 120 (6th Cir. 1953).

116 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 89 (2d Cir. 2005); *see also* JACK J. COE, JR., INTERNATIONAL COMMERCIAL ARBITRATION: AMERICAN PRINCIPLES AND PRACTICE IN A GLOBAL CONTEXT 296 (1997) (noting that confirmation is a "summary proceeding that merely makes what is already a final arbitration award a judgment of the court" (citing Ottley v. Schwartberg, 819 F.2d 373, 377 (2d Cir. 1987))).

arbitration in the first place.[117] This conclusion is supported by the plain meaning of section 9,[118] without reference to questionable case law.

To state the foregoing in another way, parties *must* have an independent basis of subject matter jurisdiction to compel arbitration under the FAA, but consensual agreement can suffice to grant federal jurisdiction to confirm an award.[119] This distinction is supported by the fact that sections 4 and 9 both contain the term "jurisdiction" in their title.[120] Therefore, the FAA clearly

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[117] *Contra* Perpetual Secs., Inc. v. Tang, 290 F.3d 132, 140 (2d Cir. 2002) (citing Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 26 n.32 (1982)); Loral Corp. v. Swiftships, Inc., 77 F.3d 420, 422 (11th Cir. 1996), *cert. denied*, 519 U.S. 966 (1996) (citing no authority for this holding); Valrose Maui, Inc. v. Maclyn Morris, Inc., 105 F. Supp. 2d 1118, 1121 (D. Haw. 2000). However, none of those courts addressed the fact that *Moses* only addressed jurisdiction to compel arbitration under sections 1, 2, 3, and 4. *Moses* did not mention, much less address, subject matter jurisdiction under section 9. The preceding courts have taken the statement in *Moses* that the FAA "does not create any independent federal-question jurisdiction" out of context. *See Moses H. Cone Mem'l Hosp.*, 460 U.S. at 26 n.32. Moreover, sections 4 and 9 both contain the term "jurisdiction" in the title, further compounding the confusion around FAA jurisdiction. By doing so, Congress evinced an intention to apply distinct jurisdictional requirements for actions on agreements to arbitrate and final arbitration awards. Section 4 clearly states:

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement.

9 U.S.C. § 4 (2006). By section 4's own terms, the jurisdictional requirements contained therein apply to a "written agreement for arbitration" and not the FAA in its entirety or to actions on arbitral awards. *Id.*

[118] Section 9 states:

> If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award.

9 U.S.C. § 9. That sentence, standing alone, would indicate that if the parties have so agreed, a federal court would have jurisdiction to confirm the award. Moreover, no statute negates that conclusion by expressly disavowing federal subject matter jurisdiction in the limited context of confirming an arbitral award. Furthermore, the next sentence clearly contemplates a federal court having jurisdiction to confirm an award when the parties have not expressly agreed on a court to confirm their award. Section 9 states that "[i]f no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made." *Id.* Giving section 9 a plain meaning interpretation leads to the conclusion that actions to confirm an arbitral award can be premised on contractual consent and that the jurisdictional requirements of an action to compel arbitration do not extend to actions to confirm.

[119] Moreover, "[s]ubject matter jurisdiction for cases filed pursuant to § 9 . . . is not dependent upon the location in which the arbitration award was made." *Loral Corp.*, 77 F.3d at 422.

[120] The title of section 4 is "Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination." 9 U.S.C. § 4. The title of section 9 is "Award of arbitrators; confirmation; jurisdiction; procedure." *Id.* § 9.

contemplates different jurisdictional requirements in actions to compel arbitration and actions to confirm an award. Section 9's consent to confirmation provision would be redundant if interpreted differently,[121] and would logically lead to an absurd result: parties to arbitration could divest a court of jurisdiction by simply failing to agree to confirmation of an arbitral award when, but for that failure, the court would have jurisdiction on some other basis, such as diversity.[122]

The N.Y. Act, however, confers federal subject matter jurisdiction "by its own weight" in both actions to compel arbitration and actions to confirm because sections 202 and 203 specifically grant jurisdiction.[123] Section 203, titled "Jurisdiction; amount in controversy," states that "[a]n action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States . . . shall have *original jurisdiction* over such an action or proceeding, regardless of the amount in controversy."[124] Section 202, titled "Agreement or award falling under the Convention," defines the actions that fall under the N.Y. Act:

> An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is

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[121] It is redundant because the converse does not hold true. If a court had jurisdiction based on diversity, it would not be divested of jurisdiction by the failure of the parties to an arbitration to consent to confirmation. Parties cannot contractually expand or decrease a court's jurisdiction. Abbott Labs. v. CVS Pharmacy, Inc., 290 F.3d 854, 857 n.1 (7th Cir. 2002).

[122] Regardless of whether this conclusion is found persuasive, the ultimate conclusion that section 9 simply cannot conflict with the N.Y. Act because of the inherent difference in jurisdictional framework employed by the Act and the FAA will not change because the N.Y. Act still provides an independent grant of jurisdiction. 9 U.S.C. §§ 202–03.

[123] *Cf.* VAN DEN BERG, *supra* note 2, at 242–43 (stating that the United States would have the right under Article III of the New York Convention to impose such a requirement without offering an opinion as to whether the section 9 confirmation requirement extends to the N.Y. Act); Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 581 n.9 (7th Cir. 2007) (stating that the N.Y. Act has "an independent grant of federal subject matter jurisdiction").

[124] 9 U.S.C. § 203 (emphasis added).

> incorporated or has its principal place of business in the United States.[125]

Therefore, alternative grounds for federal subject matter jurisdiction, such as consent or diversity, are irrelevant to cases falling under the N.Y. Act.[126] Section 9 addresses an issue that cannot arise under the N.Y. Act because contractual agreement to confirmation is immaterial to finding federal subject matter jurisdiction under the Act, specifically section 203.[127] As a result, section 207, by its own terms, cannot conflict with section 9 because they deal with two wholly distinct issues.[128]

The court in *Phoenix Aktiengesellschaft* departed from the specific-vs.-general paradigm by failing to focus on the greater structure of Title 9. Section 9 deals with the issue of subject matter jurisdiction in an action to confirm an arbitral award under the FAA (which provides no grant of general subject matter jurisdiction),[129] whereas section 207 deals with issues of venue, statute of limitations (three years), grounds for not confirming an award, and jurisdiction only tangentially in the form of venue rather than subject matter.[130]

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[125] *Id.* § 202.

[126] Such grounds are irrelevant to determining whether the court has statutory authority to hear the action. However, consent is still highly relevant to the facts of an individual case because arbitration is predicated upon enforcing privately negotiated agreements to arbitrate, a situation that can only arise based upon the parties contractually agreeing to arbitration.

[127] A primary purpose of section 9's consent to enforcement requirement is to ensure that the parties "affirmatively agreed to the application of the federal substantive law contemplated by [Chapter One] to the interpretation of the arbitration agreement into which they have entered." *In re* I /S Stavborg (O. H. Meling, Manager) v. Nat'l Metal Converters, Inc., 500 F.2d 424, 426 (2d Cir. 1974).

[128] One possible cause of the confusion could be that sections 9 and 207 share nearly identical titles—"Award of arbitrators; confirmation; jurisdiction; procedure" in section 9, with section 207 simply interchanging the term "proceeding" for "procedure." 9 U.S.C. §§ 9, 207. However, section 203 is entitled "Jurisdiction; amount in controversy" and therefore also addresses jurisdiction. *Id.* § 203. The court in *Phoenix Aktiengesellschaft* gave no treatment to section 203, even though the principal issue on appeal was subject matter jurisdiction. Phoenix Aktiengesellschaft v. Ecoplas, Inc., 391 F.3d 433, 436–37 (2d Cir. 2004). Here, the shared title should be irrelevant because "[w]hile words in the title of a statute or the heading of a section can shed light on the meaning of an ambiguous word or phrase in the text of a statute, they cannot create an ambiguity where none otherwise would exist." Francisco v. Stolt Achievement MT, 293 F.3d 270, 275 (5th Cir. 2002), *cert. denied*, 537 U.S. 1030 (2002) (addressing the conflict between sections 1 and 202 in regard to the exemption for seamen from federal arbitral law). Even though section 207 ostensibly deals with jurisdiction, it addresses jurisdiction in terms of venue rather than subject matter. *See* 9 U.S.C. § 207.

[129] Okla. City Assocs. v. Wal-Mart Stores, Inc., 923 F.2d 791, 794 (10th Cir. 1991) (stating that section 9 "pertains to subject matter jurisdiction").

[130] The N.Y. Act neither addresses nor grants personal jurisdiction. Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1122 (9th Cir. 2002); Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory," 283 F.3d 208, 212 (4th Cir. 2002). But "[i]t is well settled . . . that when a party agrees to arbitrate a dispute [within a U.S. jurisdiction], such agreement is deemed consent to the

By unnecessarily finding a conflict between the FAA and the N.Y. Act and applying two different regimes to domestic and international awards, the court further obfuscated the analytical process. *Phoenix Aktiengesellschaft* exemplifies the fact that "[c]ourts sometimes reach a correct result for an incorrect reason."[131] Flawed reasoning, however, undermines the goal of a uniform and analytically consistent interpretation of Title 9. The analysis of *Phoenix Aktiengesellschaft* provides limited, if any, direct insight on how to address future conflicts because of those shortcomings.[132]

C. Sections 9, 10, and 12 vs. Section 207 and Article V of the New York Convention—Defenses to Confirmation of an Arbitral Award

The N.Y. Act and FAA diverge on the grounds for denying confirmation. Under section 207 of the N.Y. Act, a "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."[133] Section 207's nearest domestic counterpart is section 9, which addresses confirmation under the FAA and references section 10, which enumerates the grounds for vacating an

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jurisdiction of the courts for purposes relating to enforcing the arbitration agreement." Venconsul N.V. v. Tim Int'l N.V., No. 03 Civ. 5387, 2003 WL 21804833 at *3 (S.D.N.Y. Aug. 6, 2003).

[131] InterGen N.V. v. Grina, 344 F.3d 134, 141 (1st Cir. 2003). However, it is better to be right for the wrong reason than to reach the wrong conclusion. *See* Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc., No. 92 C 1589, 1992 WL 133036 at *3 (N.D. Ill. June 1, 1992), *aff'd*, 13 F.3d 196 (7th Cir. 1993). The *Daihatsu Motor* court held that section 207 incorporated section 9's consent to confirmation requirement because otherwise "any party to a nonbinding arbitration clause could seek confirmation of an arbitration decision under such a clause because that party would be 'any party to the arbitration' as required by § 207." *Id.* If a so-called adjudicative procedure is nonbinding, then it is simply a form of mediation, not arbitration, and should not fall under the FAA. While parties to such a mediation can subsequently ratify the conclusions reached by neutral third parties, until both parties do so, it remains merely a form of mediation and therefore, no party can unilaterally confirm a "non-binding" arbitration clause.

[132] *Contra* Jasen Matyas, *Everybody Loves Arbitration: The Second Circuit Sets Pro-Arbitration Precedent in International Commercial Arbitration Cases*, 2005 J. DISP. RESOL. 481, 493. Matyas advocates the strength of *Phoenix Aktiengesellschaft* as an interpretive paradigm for section 208 cases:

> The decision in *Phoenix* could have a far-reaching, positive impact on the recognition of international commercial arbitral awards in the United States. . . .
>
> Furthermore, the *Phoenix* holding can, and should be, applied by courts in the future when confronted with any situation where Chapter 2 is silent on an issue and the Chapter 1 provision on point is not favorable to arbitration.

Id. This conclusion completely disregards section 208 and fails to adhere to the most fundamental principle of statutory interpretation: the text is of paramount importance.

[133] 9 U.S.C. § 207. As previously stated, the New York Convention is a direct and substantive element of Chapter Two through its incorporation in section 201 and therefore, together they constitute an inseparable body of law.

arbitral award.[134] The FAA provides no substantive defenses to the confirmation of an award distinct from the grounds to vacate an award. Therefore, the sole defense to confirmation under section 9 for an action falling under the FAA is to seek to vacate the award based on the grounds enumerated in section 10(a)(1)–(4).[135] A losing party to arbitration has three months to bring a motion to vacate a judgment pursuant to section 12.[136] This "short time period for moving courts to vacate an award is to ensure that any challenge to an award will be promptly made."[137] If the losing party fails to move to vacate within that time, it is barred from raising a section 10(a)(1)–(4) ground for vacatur defense to a motion to confirm pursuant to section 9.[138] Section 12's three-month timeframe to bring a motion to vacate an award serves as a de facto statute of limitations to raising a defense to confirmation pursuant to section 9.[139]

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[134] 9 U.S.C. §§ 9–10.

[135] *Id.* The party contesting confirmation of an award can also delay confirmation by seeking to modify the award pursuant to section 11, also mentioned in section 9. *Id.* §§ 11, 9. Section 11 limits itself to a narrow range of grounds, such as a calculation error, for modifying an award. *Id.* § 11. Even if a losing arbitration participant makes a section 11 motion to modify the award, it will only postpone the inevitable confirmation of that award, as section 11 is administrative in nature rather than substantive. *See* 9 U.S.C. § 11(c) (providing that modification or correction of an award is appropriate where the imperfection is a matter of form that does not affect the merits).

[136] 9 U.S.C. § 12 ("Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered."); *see also* Generica Ltd. v. Pharm. Basics, Inc., No. 95 C 5935, 1996 WL 535321, at *2 (N.D. Ill. Sept. 18, 1996) ("[I]t is a well-settled principle that a party's failure to file a timely motion to vacate bars it from raising a defense to a motion to confirm." (citing Int'l Union of Operating Eng'rs v. Murphy Co., 82 F.3d 185, 188 (7th Cir. 1996))). However, the N.Y. Act specifies a three-year statute of limitations to vacate or remand an arbitration award, and therefore, courts have not applied section 12's three-month statute of limitations to motions to vacate where the N.Y. Act controls. *See* Hartford Fire Ins. Co. v. Lloyd's Syndicate 0056 ASH, No. CIV397CV00009AVC, 1997 WL 33491787, at *3 (D. Conn. July 2, 1997) (extending the three-month statute of limitations period to bring a motion to vacate to three years, thereby bringing it in line with the statute of limitations for confirming an award under the N.Y. Act; but not analyzing section 12); *Generica*, 1996 WL 535321, at *2 (ignoring the three-month statute of limitation to bring a motion to vacate for an action falling under the N.Y. Act); Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc., No. 87 Civ. 6369 (JMC), 1991 WL 123962, at *2–3 (S.D.N.Y. July 3, 1991).

[137] 1 LARRY E. EDMONSON, DOMKE ON COMMERCIAL ARBITRATION § 40:2 (3d ed. 2007).

[138] Lander Co., Inc. v. MMP Investments, Inc., 107 F.3d 476, 478 (7th Cir. 1997) (analysis under N.Y. Act); Florasynth, Inc. v. Pickholz, 598 F. Supp 17, 18 (S.D.N.Y. 1984); Tokura Constr. Co. v. Corporacion Raymond, S. A., 533 F. Supp. 1274, 1277–78 (S.D. Tex. 1982); *see* EDMONSON, *supra* note 137, § 40:3. *Contra* Chauffeurs, Teamsters, Warehousemen and Helpers Local Union No. 364 v. Ruan Transp. Corp., 473 F. Supp 298, 302–03 (N.D. Ind. 1979).

[139] *See* Foster v. Turley, 808 F.2d 38, 41 (10th Cir. 1986). However, other courts have construed section 9's three-month time frame as a jurisdictional requirement and, therefore, not waivable. Ekstrom v. Value Health, Inc., 68 F.3d 1391, 1393 (D.C. Cir. 1995).

This de facto statute of limitations to raising a defense to confirmation, however, does not extend to the N.Y. Act. In an action under the N.Y. Act to confirm an award, the party contesting confirmation of that award may do so at any point within the three-year statute of limitations because section 207 and Article V of the New York Convention explicitly limit the grounds for denying confirmation under the N.Y. Act.[140] Additionally, a "court is strictly limited to

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[140] The New York Convention states:

> 1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:
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> (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (b) 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; or
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
> (e) The award has not yet become binding on the parties, 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.
>
> 2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:
>
> (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

New York Convention, *supra* note 53, art. V; *see* Overseas Cosmos, Inc. v. NR Vessel Corp., No. 97 Civ. 5898, 1997 WL 757041, at *2 (S.D.N.Y. Dec. 8, 1997) (confirming an award after rejecting the argument that an award rendered by default when the party had notice violates Article V(1)(b)); Abbott Labs. v. Baxter Int'l Inc., No. 01 C 4809, 01 C 48392002, 2002 WL 467147, at *7–11 (N.D. Ill. Mar. 27, 2002) (rejecting the argument that confirmation of the arbitral award would lead to a violation of U.S. anti-trust laws and therefore, violate public policy); PPG Indus., Inc. v. Pilkington PLC, 825 F. Supp. 1465, 1478 (D. Ariz. 1993) (declining to determine whether the arbitration agreement itself was an "anticompetitive tool" that violated U.S. antitrust law and left the determination to the arbitral tribunal by compelling arbitration); Whirlpool Corp. v. Philips Electronics, N.V., 848 F. Supp. 474, 480–81 (S.D.N.Y. 1994) (stating that the arbitrator's "decision as to the

the seven defenses under the New York Convention when considering whether to confirm a foreign award."[141] The FAA is silent as to defenses to confirmation per se and merely limits itself to the procedural defense of the de facto statute of limitations to defeat confirmation via a motion to vacate.[142] In light of the FAA's general silence as to defenses to confirmation and the fact that the N.Y. Act's express terms specifically preclude the FAA's de facto statute of limitation defense from extending to the N.Y. Act, no conflict exists between the two bodies of law.[143] Moreover, the grounds for vacating an award pursuant to section 10 should not be conflated with the limited grounds for denying confirmation established by the N.Y. Act.

Confusion exists in the case law due to many courts' failure to clearly distinguish between a petition to confirm and a motion to vacate an arbitral award,[144] and "[i]t is important that one use words with specificity."[145] A clear

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scope of its arbitral authority is entitled to deference"); China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274, 286 (3d Cir. 2003) (holding "that a district court should refuse to enforce an arbitration award under the Convention where the parties did not reach a valid agreement to arbitrate, at least in the absence of a waiver of the objection to arbitration by the party opposing enforcement," and, therefore that the writing requirement of Article II can serve as an additional basis for refusing to confirm an award).

141 Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc., 403 F.3d 85, 92 (2d Cir. 2005); *see also* Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH, 141 F.3d 1434, 1445–46 (11th Cir. 1998); Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1374 (S.D. Fla. 2003) ("Waiver is not one of the enumerated grounds for non-recognition under the New York Convention."); Hewlett-Packard, Inc. v. Berg, 867 F. Supp. 1126, 1132–33 (D. Mass. 1994) ("The Convention only allows for specific and limited attacks on the validity of the claim, and nowhere does the Convention provide that a court sitting over a confirmation proceeding may adjudicate a counterclaim."). *But see* Polytek Eng'g Co., Ltd. v. Jacobson Cos., 984 F. Supp. 1238, 1240–41 (D. Minn. 1997) (conflating the writing requirement of the four-part subject matter jurisdiction test with defenses to confirmation).

142 Additionally, "the New York Convention allows for the posting of prejudgment security" in an action to confirm an award. Skandia Am. Reinsurance Corp. v. Caja Nacional de Ahorro y Segoro, No. 96 Civ. 2301(KMW), 1997 WL 278054, at *5 (S.D.N.Y. May 23, 1997) (holding that applying New York insurance law comports with the New York Convention). However, when a losing arbitral party is an agency or instrumentality of a foreign government, the winning party cannot seek prejudgment attachment because of the Foreign Sovereign Immunities Act. Concord Reinsurance Co., Ltd. v. Caja Nacional de Ahorro y Seguro, No. 93 Civ. 6606 (JSM), 1994 WL 86401, at *2 (S.D.N.Y. Mar. 16, 1994).

143 Defenses pursuant to Article V(1)(a)–(e) are irrelevant to a court when the losing party fails to raise them, but a court "may refuse to recognize an award upon its own finding" of a violation of Article V(2)(a)–(b). Seven Seas Shipping (UK) Ltd. v. Tondo Limitada *ex rel.* Republic of Angola, No. 99 Civ. 1164(DLC), 1999 WL 435149, at *2 (S.D.N.Y. June 25, 1999).

144 Various jurisdictions are split over whether the defenses to confirming an award differ from the grounds for vacating an award. *See* Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A., 267 F. Supp. 2d 1335, 1341 n.5 (S.D. Fla. 2003). *Compare* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 20–21 (2d Cir. 1997) (distinguishing between an action to vacate an award and a petition to confirm one), *with Indus. Risk Insurers*, 141 F.3d at 1441–43 (11th Cir. 1998) (viewing action to vacate an award and an action to confirm equally). The Second Circuit's reasoning proves stronger as it is better grounded in the structure of the N.Y. Act. *See infra* Part III.M; *see also* Mgmt. & Technical Consultants S.A.

understanding of this distinction is necessary to understand why confirmation issues fall under FAA-General vs. N.Y. Act-Specific, as the N.Y. Act does not incorporate the FAA provisions on confirmation. In contrast, vacatur falls under FAA-Specific vs. N.Y. Act-General and is ultimately incorporated into the N.Y. Act as a non-conflicting provision.

Although petitions to confirm and motions to vacate share a fundamental characteristic in that a court will not ultimately enforce an arbitral award, strong distinctions remain between the two actions, which should be maintained by keeping the procedural and analytical schemes consistent.[146] An analogy proves helpful: domesticating a foreign judgment is to confirmation as an appeal is to vacatur. In domesticating a judgment, a court must simply determine whether it will recognize and enforce the foreign judgment.[147] If the court decides not to recognize the foreign judgment, its decision will only have relevance to that jurisdiction and will not affect the validity of the underlying judgment within the jurisdiction that rendered it. Moreover, the jurisdiction denying domestication of the judgment will not have an estoppel effect on a third jurisdiction contemplating domesticating the original judgment.[148] The

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v. Parsons-Jurden Int'l Corp., 820 F.2d 1531, 1533–34 (9th Cir. 1987) (finding that an "arbiter's award can be vacated only on the grounds specified in the Convention" even though the term "vacate" does not appear in the New York Convention); Ministry of Def. and Support for Armed Forces of Islamic Republic of Iran v. Cubic Def. Sys., Inc., 29 F. Supp. 2d 1168, 1171 (S.D. Cal. 1998) (finding that "Section 10 of the FAA and case law addressing domestic arbitration set forth grounds upon which a court may refuse to confirm an arbitration award" despite the fact that the term "confirm" does not appear in section 10); York Hannover Holding A.G. v. Am. Arbitration Ass'n, No. 92 Civ. 1643(CSH), 1993 WL 159961, at *5 n.4 (S.D.N.Y. May 11, 1993).

[145] EDMONSON, *supra* note 137, § 3:1.

[146] Section 16, concerning grounds for appeal, provides a very clear textual example of the fact that actions to vacate and confirm under Title 9 are both academically and substantively distinct. Section 16(a)(1)(d) provides that an order "confirming or denying confirmation of an award or partial award" may be appealed, while section 16(a)(1)(e) allows a party to appeal a court order "modifying, correcting, or vacating an award." 9 U.S.C. § 16 (2006).

[147] If a court declines to recognize a foreign judgment, it may then potentially reach the merits of the dispute ab initio. *See* ROBERT E. LUTZ, A LAWYER'S HANDBOOK FOR ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND ABROAD 28 (2007). In effect, the court ignores the results of the original action and determines the original action has no res judicata or collateral estoppel effect on the current action. *See id.*

[148] Nicor Int'l Corp. v. El Paso Corp., 292 F. Supp. 2d 1357, 1375 (S.D. Fla. 2003) (failing to recognize a Dominican court's setting aside of an award rendered in Texas as a defense to confirmation). Estoppel as a defense to compelling arbitration under Article II has also been rejected. JSC Surgutneftegaz v. President & Fellows of Harvard Coll., No. 04 Civ. 6069(RCC), 2005 WL 1863676, at *4 (S.D.N.Y. Aug. 3, 2005) (rejecting estoppel argument raised by a party seeking a stay of commenced arbitration proceedings based on the fact that a Russian court had ruled on some of the issues to be arbitrated because the party seeking arbitration "was not a party to the litigation before the Russian courts or in privity with those who were parties to the litigation such as to make the Russian courts' decisions binding on" the party seeking arbitration). *But see* Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc., Nos. 3:95CV2362(AWT), 3:96CV2218(AWT), 3:96CV2219(AWT), 2000 WL 435566, at *8 n.8 (D. Conn. Mar. 14, 2000).

court in an action to domesticate or confirm simply does not adjudicate the merits of the case as it would on an appeal.[149] In comparison, if an appellate court subsequently overturns or vacates a judgment, the judgment loses all effect and becomes unenforceable in any jurisdiction; this mirrors arbitration in that once a court of the situs nation vacates an award, the award becomes potentially unenforceable anywhere.[150]

A basic assumption of the original FAA appears to have been that arbitration is a localized process, meaning that a party to an arbitration, seeking to challenge an award, should initially attempt to do so at the court whose jurisdiction encompassed the situs of the arbitration. Section 10 states that "the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration."[151] The local court would have initial jurisdiction to place the stamp of sovereign disapproval on the arbitral award by entertaining a motion to vacate an award.[152] If the losing party fails to bring such a motion, it will effectively waive an opportunity to have a sovereign power intervene on its behalf. Therefore, in the domestic context, regardless of where one party seeks to confirm an award, any imposition of sovereign power on behalf of the losing party would rest with the local court empowered to hear a motion to vacate. In

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[149] Some civil law countries employ the exequatur procedure, which is

> unique in that recognition usually is sought through a special petition to a court that has exclusive jurisdiction over recognition proceedings, usually an appellate court and often the highest court of appeal. . . .
>
> . . . [T]he *exequatur* procedure limits the court to reviewing the judgment only on the basis of those elements for granting or denying recognition.

LUTZ, *supra* note 147, at 427. In contrast, common law courts may consider the merits but only in the context of determining whether to recognize the judgment. *Id.*

[150] A court will not recognize a judgment that is not "final and conclusive" within the original jurisdiction. *Id.* at 17. However, the arbitral scheme differs significantly in that even if a court of the situs jurisdiction vacates an award, another nation could still confirm the award because Article V of the New York Convention is permissive rather than mandatory. Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907, 909 (D.D.C. 1996) (confirming an arbitral award despite the fact the country in which the award was rendered vacated the award). Other signatory nations, such as France, have reached similar conclusions. *See* CARBONNEAU, *supra* note 7, at 523 (citing OTV v. Hilmarton, 1997 REVUE DE L'ARBITRAGE 376 (1997)). *But see* TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 937 (D.C. Cir. 2007) (distinguishing *Chromalloy*); Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279, 287–88 (S.D.N.Y. 1999).

[151] 9 U.S.C. § 10 (2006). Other sections of the FAA further support the view that domestic arbitration was conceived as a localized process. For example, section 4 states that once a court compels arbitration, any "hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed." *Id.* § 4.

[152] *Id.* § 10.

effect, the localized perspective of arbitration under the FAA has led to motions to vacate and motions to confirm intermingling to such an extent that they have become nearly indistinguishable.

International arbitration, on the other hand, greatly differs in that a chosen situs may often have little to no legal or practical connection with the parties or their dispute because the parties likely chose the situs for its perceived neutrality or convenience.[153] As a result, parties may choose to completely avoid the courts of the situs country without seeking to vacate or confirm the award in that country and first seek sovereign involvement by seeking to confirm the award in one of the parties' home countries.[154] The New York Convention recognizes this fundamental difference in a number of ways. First, the "Convention contains no provision for seeking to vacate an award."[155] In the Convention's silence, the discretion to vacate an award devolves to the situs country or the country whose law is applied to the arbitration[156] because "the New York Convention . . . severely restricts a party in choosing a venue in which to file motions *to set aside or suspend* a foreign arbitral award."[157] Second, to maintain a workable legal scheme and avoid a New York Convention signatory nation's abuse of the power to vacate awards rendered domestically to protect its national interest, other signatory nations have the

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[153] Arbitral parties may go so far as to create an "a-national" award which results from "an arbitration which is detached from the ambit of national arbitration law by means of agreement of the parties," including the laws of the situs country. VAN DEN BERG, *supra* note 2, at 28–40 (arguing that the New York Convention does not apply to "a-national" awards but that the burden of refuting the Convention's applicability rests with the losing party).

[154] Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 500 F.3d 571, 576 n.4 (7th Cir. 2007).

[155] Lander Co., Inc. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997).

[156] New York Convention, *supra* note 53, art. V(1)(e). The Second Circuit has noted, "What the Convention did not do . . . was provide any international mechanism to insure the validity of the award where rendered. This was left to the provisions of local law. The Convention provides no restraint whatsoever on the control function of local courts at the seat of arbitration." Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997) (citing W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J. 1, 11 (1995)); *see also* TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 935–36 (D.C. Cir. 2007); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 500 F.3d 111, 115 n.1 (2d Cir. 2007); Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara, 364 F.3d 274, 287 (5th Cir. 2004) ("Only a court in a country with primary jurisdiction over an arbitral award may annul that award.").

[157] M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 849 (6th Cir. 1996) ("[A] motion to vacate may be heard only in the courts of the country where the arbitration occurred or in the courts of any country whose *procedural* law was specifically invoked in the contract calling for arbitration of contractual disputes.").

power to recognize and enforce an award, despite another nation having vacated an award.[158]

The structure of the New York Convention makes a clear distinction between confirmation and vacatur, and leaves issues of vacatur to the "competent authority."[159] Numerous New York Convention signatory nations, including the United States, recognize as "competent authority" the courts of a nation that provide the procedural and not the substantive law to the arbitration, with the procedural law emanating generally from the situs country.[160] Application of the situs country's procedural law arises from Articles V(1)(e) and VI of the New York Convention, which "affirm the well-established principle of current international commercial arbitration that the court of the country of origin is exclusively competent to decide on setting aside of the award."[161] In sum, the New York Convention does not address vacatur and leaves issues of vacatur to the situs country. Under the non-localized nature of international arbitration, motions to vacate and to confirm remain quite distinct.[162] The analytical distinction between the two must be maintained in order to develop a uniform and logically consistent arbitral scheme at the intersection of the FAA and N.Y. Act.

Furthermore, confirmation is a "summary procedure" that seeks through motion practice "to expedite petitions for confirmations of foreign arbitral awards."[163] For example, "[t]he loser in arbitration cannot freeze the

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[158] Chromalloy Aeroservices v. Arab Republic of Egypt, 939 F. Supp. 907, 914 (D.D.C. 1996) (confirming an award despite an Egyptian court having set the award aside). *But see TermoRio S.A. E.S.P.*, 487 F.3d at 935 (D.C. Cir. 2007) (denying confirmation of an award set aside by a Columbian court "because there is nothing in the record here indicating that the proceedings before the [Columbian Court] were tainted or that the judgment of that court is other than authentic," and distinguishing *Chromalloy*).

[159] New York Convention, *supra* note 53, art. V(1)(e); *see infra* Part III.M.

[160] *M & C Corp.*, 87 F.3d at 848–49; Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172, 178 (S.D.N.Y 1990). The United States' refusal to recognize the setting aside of an award by the courts of a nation providing only the substantive law, and not the procedural, accords with the permissive structure of New York Convention Article V. *See* VAN DEN BERG, *supra* note 2, at 265 ("Article V employ[s] permissive rather than mandatory language . . . .").

[161] VAN DEN BERG, *supra* note 2, at 20. Article V(1)(e) does envision that a procedural law, other than the situs country's, may apply by operation of contract. New York Convention, *supra* note 53, art. V(1)(e). Such a situation would run into the same problems of an "a-national" award and may not be recognized by nations that follow the rule that the situs provides the procedural law. *See* Ministry of Def. of Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357, 1364–65 (9th Cir. 1989) (finding jurisdiction under the N.Y. Act based upon an "a-national" or "non-national law" award made under international law, rather than the law of any one nation).

[162] *See* Trans Chemical Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 302, 310 (S.D. Tex. 1997) (analyzing a motion to vacate under the FAA separately from a motion to confirm under the New York Convention).

[163] Imperial Ethiopian Gov't v. Baruch-Foster Corp., 535 F.2d 334, 335 (5th Cir. 1976).

confirmation proceedings in their tracks and indefinitely postpone judgment by merely requesting discovery."[164] Distinguishing between vacatur and confirmation will further streamline the confirmation process by precluding a party from raising vacatur defenses in a number of circumstances, thereby reducing opportunities for advocatory mischief and the likelihood that a court will chase a red herring issue.

In light of the foregoing, the N.Y. Act is silent as to substantive issues touching upon vacatur ("setting aside") and focuses on confirmation, on which the FAA is conversely silent (other than the three-month de facto statute of limitation to filing a motion to vacate).[165] Therefore, the grounds for defeating confirmation listed in Article V are the exclusive means of challenging confirmation under the New York Convention and should not be intermixed with grounds to vacate pursuant to the FAA.[166] The confirmation versus vacatur distinction is further developed in Part III.

The ostensible conflicts falling under Part II have proven occasionally troublesome to courts because despite appearances, no actual conflicts exist once the complete structure of the American arbitral scheme is taken into consideration. This class of conflicts highlights the importance of clearly maintaining the analytical scheme applied to American arbitral law by focusing on the more specific elements of Title 9.

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[164] *Id.* at 337.

[165] An additional issue related to confirmation, arising from the interaction of the New York Convention and domestic law, but not directly arising from the text of the FAA, is whether grounds exist for staying confirmation proceedings other than Article VI. This provision states:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

New York Convention, *supra* note 53, art. VI. As previously discussed, the FAA is generally silent on issues of confirmation, including grounds for staying confirmation proceedings. There is authority to support that a court has the power to stay confirmation proceedings that do not arise from either the text of the N.Y. Act or FAA. Hewlett-Packard Co., Inc. v. Berg, 61 F.3d 101, 105–06 (1st Cir. 1995) (stating that the power to stay a proceeding is incidental to the power inherent in every court to control the disposition of the cases on its docket, and neither the FAA nor the N.Y. Act expressly preempts that power).

[166] M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 851 n.2 (6th Cir. 1996). Article V grounds for refusing confirmation are exclusive, and "'manifest disregard of the law' [cannot] be pigeonholed into the 'violation of public policy' basis for refusal to confirm an award contained in Article V(2)(b) of the New York Convention." *Id.*

III. FAA-SPECIFIC VS. N.Y. ACT-GENERAL CLASS OF CONFLICTS

With the N.Y. Act postdating the FAA by 55 years, the FAA already addressed many facets of the arbitral process. Consequently, the text of Chapter Two, encompassing the N.Y. Act, is considerably more abbreviated than Chapter One, containing the FAA. The majority of FAA sections fall under the class of conflict discussed in Part III because of the N.Y. Act's silence. The volume of case law falling under this class of conflict is greater than the other classes for that reason, a result that conforms to the secondary interpretive element of seeking to avoid conflicts. All of the following sections or subsections can and should be successfully incorporated into the N.Y. Act arbitral regime.

A. Section 1 vs. Section 202—Exclusions to Subject Matter Arbitrability

Section 1 of the FAA explicitly excludes "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce" from the scope of the FAA.[167] Two federal circuit courts have interpreted section 1's narrow and explicit exemption for claims arising from seamen's employment to conflict with section 202's general grant of jurisdiction over international commercial relationships subject to an arbitration agreement.[168] That interpretation is the most blatant divergence from the specific-vs.-general dichotomy employed by the majority of case law addressing the interaction of the FAA and the N.Y. Act. Accepting the current jurisprudence, this conflict would fall under Part I, FAA-Specific vs. N.Y. Act-Specific. However, in applying the interpretive paradigm developed in this Article, it becomes clear that this conflict should fall under Part III. More importantly, a thorough analysis of this issue, taking the totality of federal law into consideration, further supports the conclusion that section 1 of Title 9 excludes claims arising from seamen's employment from the scope of the N.Y. Act.[169]

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[167] 9 U.S.C. § 1 (2006).

[168] Bautista v. Star Cruises, 396 F.3d 1289, 1294 (11th Cir. 2005); Francisco v. Stolt Achievement MT, 293 F.3d 270, 273 (5th Cir. 2002); *see also* Lobo v. Celebrity Cruises, Inc., 488 F.3d 891, 895–96 (11th Cir. 2007) (discussing that *Bautista* led to the conclusion that Seaman's Wage Act claims are also arbitrable); Goshawk Dedicated v. Portsmouth Settlement Co. I, 466 F. Supp. 2d 1293, 1305–06 (N.D. Ga. 2006) (determining that the N.Y. Act superseded the McCarran-Ferguson Act based on the reasoning of *Bautista*).

[169] Pinkston, *supra* note 36, at 272–79. Although the case law and this Article have explicitly addressed only the section 1 exemption for seamen, reasoning by analogy, this conclusion should apply equally to the

The crux of section 1 versus section 202 cases turns on the Fifth and Eleventh Circuits' determination that the N.Y. Act applies to "commercial legal relationships without exception."[170] This determination, although supported by pro-arbitration policy, is grounded neither in the text of the N.Y. Act[171] nor in Supreme Court jurisprudence on subject matter arbitrability.[172] As the Supreme Court has stated, "[d]oubtless, Congress may specify categories of claims it wishes to reserve for decision by our own courts without contravening this Nation's obligations under the Convention."[173] Therefore,

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section 1 exemption for "railroad employees, or any other class of workers engaged in foreign or interstate commerce."

170 *Bautista*, 396 F.3d at 1299. Under U.S. law, subject matter arbitrability is certainly broad. *See, e.g.*, Circuit City Stores, Inc. v. Adams, 532 U.S. 105, 112 (2001) (employment claims of workers not "actually engaged in the movement of goods in interstate commerce" are arbitrable); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628–34 (1985) (anti-trust claims are arbitrable); Invista N. Am., S.à.r.l. v. Rhodia Polyamide Intermediates S.A.S., 503 F. Supp. 2d 195, 204–05 (D.D.C. 2007); Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 807–09 (N.D. Cal. 2004) (patent claims are arbitrable); Meadows Indem. Co. Ltd. v. Baccala & Shoop Ins. Servs., Inc., 760 F. Supp. 1036, 1041–43 (E.D.N.Y. 1991) (RICO claims are arbitrable). However, broad does not mean boundless.

171 Section 202 states: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." 9 U.S.C. § 202 (2006). Section 2 states:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Id. § 2. Section 1 then defines the term "commerce" found in section 2 but excludes claims arising from seamen's employment from that definition. *Id.* § 1. Section 202's reference to section 2 establishes a direct textual link between the N.Y. Act and the FAA in regard to section 1's limited exclusions. Therefore, the conclusion that the N.Y. Act does not incorporate section 1 as a non-conflicting provision is not supported by the text of Title 9 and is at odds with the interpretive approach developed in this Article, as derived from the greater body of N.Y. Act case law. *See* Pinkston, *supra* note 36, at 252–56.

172 *Mitsubishi Motors*, 473 U.S. at 627–28 (holding that the bargain to arbitrate should be enforced "unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue"). The only conclusion from such a proposition is that exemptions to subject matter arbitrability can and do exist.

173 *Id.* at 639 n.21 (citing Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 723 F.2d 155, 164 (1st Cir. 1983)); *see also* Stephens v. Am. Int'l Ins. Co., 66 F.3d 41 (2d Cir. 1995) (holding that the McCarran-Ferguson Act allows states to enact anti-arbitration statutes in regulating insurance and that the N.Y. Act does not preempt such statutes). *Contra* Murphy Oil USA, Inc. v. SR Int'l Bus. Ins. Co., Ltd., No. 07-CV-1071, 2007 WL 2752366 (W.D. Ark. 2007); Goshawk Dedicated v. Portsmouth Settlement Co. I, Inc., 466 F. Supp. 2d 1293 (N.D. Ga. 2006); Cont'l Ins. Co. v. Jantran, Inc., 906 F. Supp. 362, 366 (E.D. La. 1995); W. Eng. Ship Owners Mut. Ins. Ass'n (Luxembourg) v. Am. Marine Corp., No. 91-3645, 1992 WL 37700, at *4–5 (E.D. La. Feb. 18, 1992).

the basic underlying premise of current section 1 versus section 202 jurisprudence proves untenable.

The New York Convention and its subsequent codification in Chapter Two of Title 9 envision specific exceptions to subject matter arbitrability grounded in domestic law despite section 202's general grant of jurisdiction.[174] Section 1, as the only explicit exception to arbitration in Title 9, clearly constitutes such a congressional exception to arbitration and, therefore, should be incorporated into the N.Y. Act pursuant to section 208 as a non-conflicting provision of the FAA.[175] Moreover, to do so would avoid a conflict between the FAA and the N.Y. Act.

The current jurisprudence highlights the danger in relying solely on the pro-arbitration policy to interpret Title 9.[176] By skipping over the primary (specific-vs.-general) and secondary (avoiding textual conflicts) interpretive elements developed in this Article to get to the tertiary element (pro-arbitration), the current jurisprudence has reached a conclusion that should not survive close scrutiny.

B. Section 2 vs. Section 202 and Article II(3) of the New York Convention—Revoking an Agreement to Arbitrate

Under section 2 of the FAA, "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[177] In contrast, Article II(3) of the New York Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.[178]

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174 *See* Pinkston, *supra* note 36, at 263–72.

175 9 U.S.C §§ 1, 208 (2006).

176 *See* Pinkston, *supra* note 36, at 272–79; Terrebonne v. K-Sea Transp. Corp., 477 F.3d 271, 286 (5th Cir. 2007) (following the jurisprudence set out by *Francisco v. Stolt Achievement* and finding that "it is by now beyond cavil that such agreements [to arbitrate personal injury claims] are presumptively enforceable"). A convention that on its face addresses commercial relationships, and the pro-business policy behind such a convention, should not lead courts to determine that personal injury claims are unquestionably arbitrable.

177 9 U.S.C. § 2.

178 New York Convention, *supra* note 53, art. II(3).

This gives rise to a potential conflict as to the grounds for revoking an arbitration agreement.

This potential conflict proves unique for two reasons. First, the N.Y. Act in section 202 explicitly references section 2,[179] and therefore cannot summarily be dismissed as conflicting with the FAA. Second, "such grounds as exist at law or in equity for the revocation of any contract" in section 2 is a reference to an amorphous body of law outside the text of Title 9, a body of law that varies based on the jurisdiction and circumstances of a particular contractual case.[180] Therefore, the grounds for revoking an arbitration agreement cannot be conclusively established by Title 9 itself, and as a result, section 2 may or may not conflict with Article II(3).

The interpretation of Article II(3) that "is most consistent with the overall purposes of the Convention is that an agreement to arbitrate is 'null and void' only . . . when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver."[181] The best approach to addressing this potential conflict is to extend section 2 to the N.Y. Act, with the qualification that the applied body of U.S. contract law (regardless of whether state or federal law applies)[182] solely defines the contours of internationally recognized defenses rather than creates exceptions or defenses to arbitration per se. By extending section 2 to the N.Y. Act in this limited manner, all three interpretive considerations apply. Additionally, due to the doctrine of separability rooted in *Prima Paint Corp. v. Flood & Conklin Manufacturing, Co.*,[183] section 2 and Article II(3) address only an agreement to arbitrate, rather than a contract because, in applying a legal fiction, an arbitration agreement contained within a contract is deemed severable from that contract.[184]

[179] 9 U.S.C. § 202.

[180] *See id.*

[181] Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro, 712 F.2d 50, 53 (3rd Cir. 1983) (recognizing that public policy could also lead to an arbitration agreement being null and void). *See* Rosgoscirc v. Circus Show Corp., Nos. 92 Civ. 8498 (JSM), 93 Civ. 1304 (JSM), 1993 WL 277333, at *4 (S.D.N.Y. July 16, 1993) (holding that in naming an arbitration association that did not exist, the parties made a mutual mistake, thereby rendering the arbitration agreement "null and void," causing the court to revive an earlier agreement to arbitrate).

[182] *See* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1235–36 (S.D.N.Y. 1992) (comparing conflicting authority as to whether state or federal law applied, and ultimately applying federal law).

[183] Prima Paint Corp. v. Flood & Conklin Mfg., Co., 388 U.S. 395 (1967).

[184] *See infra* note 220.

C. Section 3 vs. N.Y. Act's Silence—Stay of Court Proceedings

The N.Y. Act is silent on the issue of a court granting a stay of any proceeding litigation until conclusion of any arbitral proceedings.[185] Standing alone, the N.Y. Act arguably could be interpreted as granting a court the discretion to either dismiss or stay an action until the final resolution of a pending arbitration.[186] However, section 3 of the FAA specifically addresses this issue:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.[187]

Courts have correctly interpreted the N.Y. Act's silence as not conflicting with section 3's explicit directive to grant a stay of the action rather than leaving the determination of whether to stay or dismiss the action at a court's discretion.[188]

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[185] RoadTechs, Inc. v. MJ Highway Tech., Ltd., 79 F. Supp. 2d 637, 639 (E.D. Va. 2000) ("[N]either the Convention itself nor its implementing legislation expressly confers upon district courts the authority to stay an action pending arbitration."); *see also* DaPuzzo v. Globalvest Mgmt. Co., L.P., 263 F. Supp. 2d 714, 725 (S.D.N.Y. 2002); Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236 (S.D. Cal. 2000).

[186] *See* David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245, 253 n.2 (2d Cir. 1991); RoadTechs, Inc. v. MJ Highway Technology, Ltd., 79 F. Supp. 2d 637 (E.D. Va. 2000) (party simultaneously moved to compel arbitration and to dismiss); Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P., 55 F. Supp. 2d 231, 237 n.3 (S.D.N.Y. 1999); Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1241–42 (S.D.N.Y. 1992). The New York Convention does not directly address the issue of whether a court should dismiss an action pending the conclusion of arbitral proceedings or should simply stay the litigation. Article II(3) states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

New York Convention, *supra* note 53, art. II(3). The term "refer" is certainly oblique enough to grant a New York Convention signatory nation the discretion to either dismiss an action pending the final determination of the arbitrator(s) or to simply stay the litigation until the time the winning party seeks to confirm the award.

[187] 9 U.S.C. § 3 (2006).

[188] DiMercurio v. Sphere Drake Ins., PLC, 202 F.3d 71, 77–78 (1st Cir. 2000); McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1037 (3rd Cir. 1974) (holding that pursuant to section 3 and Article II(3), granting a stay is not "discretionary"); Energy Transp., Ltd. v. M.V. San Sebastian, 348 F. Supp. 2d 186, 201

Therefore, once a court determines that it has jurisdiction—both personal and subject matter—and that a binding arbitration exists, it must stay the action.[189] However, a party in default of arbitration proceedings cannot invoke section 3.[190] Additionally, "the mandatory stay provision of the FAA does not apply to those who are not contractually bound by the arbitration agreement," and therefore, whether to stay litigation relating to, but not encompassed within, arbitral proceedings remains at the court's discretion.[191] Extending section 3 to the N.Y. Act also furthers the pro-arbitration policy by allowing either party to quickly petition the court to aid the arbitral tribunal in enforcing any remedial remedies it may grant.[192] Hence, "[f]rom start to finish, courts [should] stand ready to take action in support of arbitration."[193]

(S.D.N.Y. 2004) ("Neither Chapter 2 nor Chapter 3 makes specific reference to the court's power to stay the action while arbitration proceeds. Consequently, the Court discerns no conflict in this area, and § 3 may be fully incorporated into both Chapter 2 and Chapter 3."); Danisco A/S v. Novo Nordisk A/S, No. 01 Civ. 10557, 2003 WL 282391 (S.D.N.Y. Feb. 10, 2003) (staying a patent litigation); Chloe Z Fishing Co., Inc. v. Odyssey Re (London) Ltd., 109 F. Supp. 2d 1236, 1242 (S.D. Cal. 2000). *Contra* Tenn. Imps., Inc. v. Filippi, 745 F. Supp. 1314, 1323–25 (M.D. Tenn. 1990) (finding that a court has the discretion to either stay or dismiss an action falling under the N.Y. Act).

[189] Adams v. Ga. Gulf Corp., 237 F.3d 538, 540 (5th Cir. 2001); Hughes, Hooker & Co. v. Am. S.S. Owners Mut. Protection and Indem. Ass'n, Inc., No. 04 Civ. 1859, 2005 WL 1384055 (S.D.N.Y. June 9, 2005) (extending section 3 stay "to the remaining [non-arbitrating] defendants in the interests of fairness and judicial economy"); Marubeni Corp. v. Mobile Bay Wood Chip Ctr., No. Civ. A. 02-0914-PL, 2003 WL 22466216, at *18 (S.D. Ala. Sept. 19, 2003) (staying state court litigation). *Contra* Colt's Mfg. Co., Inc. v. Devteck Corp., 961 F. Supp. 382, 384–85 (D. Conn. 1997) ("Section 3 does not authorize a stay of a pending state proceeding."); *see* Rhodia Inc. v. Bayer Cropscience Inc., Civ. No. 04-6424, 2007 WL 3349453, at *5 (D.N.J. Nov. 7, 2007) ("If all the claims in an action are arbitrable, a court may dismiss the action instead of staying it.").

[190] *See* Invista N. Am., S.à.r.l. v. Rhodia Polyamide Intermediates S.A.S., 503 F. Supp. 2d 195, 207 (D.D.C. 2007).

[191] *Adams*, 237 F.3d at 540–41 (quoting Zimmerman v. Int'l Companies & Consulting, Inc., 107 F.3d 344, 346 (5th Cir. 1997)) (ruling that once it determined that section 3 did not mandate granting a stay, the court became divested of appellate jurisdiction under section 16 as the issue of granting a stay became discretionary); Nakamura Trading Co. v. Sankyo Corp., No. 05 CV 7205, 2006 WL 1049608 (N.D. Ill. Apr. 19, 2006) (holding that only a party to the arbitration agreement can seek a stay pursuant to section 3, but that the court could still stay the case as to non-arbitrating parties based upon "parallel-proceeding abstention"). *But see* Chew v. KPMG, LLP, 407 F. Supp. 2d 790, 803–04 (S.D. Miss. 2006) (applying principal-agent relationship rationale to staying litigation (pursuant to section 3) between a non-signatory to the arbitration agreement, who had the right to compel arbitration against some but not all of the plaintiffs, and the non-arbitrating plaintiffs).

[192] *See generally* Raymond J. Werbicki, *Arbitral Interim Measures: Fact or Fiction?*, 57 DISP. RESOL. J. 62 (Nov. 2002–Jan. 2003).

[193] Brower, *supra* note 2, at 972; *see* James Assocs. (USA) Ltd. v. Anhui Mach. & Equip. Imp. & Exp. Corp., 171 F. Supp. 2d 1146, 1148–50 (D. Colo. 2001) (retaining jurisdiction and imposing an injunction "in aid of arbitration"); Allen Group, Inc. v. Allen Deutschland GMBH, 877 F. Supp. 395, 399 (W.D. Mich. 1994) (holding that once a court establishes jurisdiction to compel arbitration, it retains jurisdiction over any future arbitration related litigation).

An additional issue arising from the interaction of section 3 and the N.Y. Act is whether a court can, "consistent with the [New York] Convention, validly compel arbitration in a non-contracting state"—when "not empowered" by the N.Y. Act to compel arbitration—"by staying litigation and leaving the party invoking its jurisdiction with no option but to commence arbitration in the non-signatory forum."[194] An order under section 3 "does not concern itself with the place of arbitration."[195] As a result, the Southern District of New York has affirmatively held that it has the power to stay litigation for arbitration at a situs outside its jurisdiction in a non-New York Convention signatory nation, despite having no authority to compel arbitration under either the FAA or the N.Y. Act.[196]

D. Section 4 vs. Section 206—Extent of District Court's Authority to Compel Arbitration when the Arbitration Agreement Fails to Name a Situs

The Seventh Circuit addressed an additional conflict between sections 4 and 206 in *Jain v. de Méré*.[197] The issue in *Jain* was "whether federal courts have power to compel arbitration between two foreign nationals where their arbitration agreement fails to specify a location for the arbitration or a method of choosing arbitrators."[198] In *Jain*, the Indian appellant had entered into a marketing agreement with the French appellee, and a dispute arose over a licensing agreement with a third party that the appellant had facilitated.[199] The N.Y. Act clearly governed the dispute because of the international and commercial nature of the action.[200]

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[194] DaPuzzo v. Globalvest Mgmt. Co., L.P., 263 F. Supp. 2d 714, 737 (S.D.N.Y. 2002).

[195] Tolaram Fibers, Inc. v. Deutsche Eng'g Der Voest-Alpine Industrieanlagenbau GmbH, No. 2:91CV00025, 1991 WL 41772, at *1 (M.D.N.C. Feb. 26, 1991).

[196] *DaPuzzo*, 263 F. Supp. 2d at 741 ("[U]nlike the statutory and contractual grounding that legitimate the power to compel arbitration, a court's authority to stay litigation has its own separate discretionary footing in judicial economy."). *But see* Brier v. Northstar Marine, Inc., Civ. No. 91-597, 1992 WL 350295 (D.N.J. July 1, 1992) (granting no stay where a valid contract contained an arbitration agreement naming England as the situs but where the parties could not establish jurisdiction under section 202 for lack of a foreign element, other than the arbitration agreement).

[197] Jain v. de Méré, 51 F.3d 686, 688–92 (7th Cir. 1995).

[198] *Id.* at 688. Defendant unsuccessfully argued "that specifying a location for arbitration in a state that has adopted the Convention is a prerequisite for compelling arbitration pursuant to chapter 2." *Id.* at 691; *see* Apple & Eve, LLC v. Yantai N. Andre Juice Co. Ltd., 499 F. Supp. 2d 245, 252–53 (E.D.N.Y. 2007) (compelling arbitration in China even though the arbitration agreement failed to name a specific situs within China or an arbitration commission); Svenska Ortmedicinska Institutet v. Desoto, No. Civ. 00-368-P-C 2001 WL 175261, at *5–6 (D. Me. Feb. 22, 2001) (compelling arbitration at the situs named in the most recently executed contract when presented with a series of contracts that named varying arbitration sites).

[199] *Jain*, 51 F.3d at 686.

[200] *Id.* at 689.

The court found that it could not compel arbitration under section 206 of the N.Y. Act because of the parties' failure to explicitly name a venue for the arbitration.[201] Section 206 states:

> A court having jurisdiction under this chapter may direct that arbitration be held *in accordance* with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.[202]

The court, however, continued its analysis based on the reasoning that elements of the FAA could still apply—even if the N.Y. Act did not provide a direct statutory basis to compel arbitration—so long as it did not conflict with the N.Y. Act.[203] The court determined that "[i]n contrast to § 206, [section 4 of the FAA] not only permits but requires a court to compel arbitration in its own district when no other forum is specified" and that this exercise of authority does not conflict with section 206.[204] As one court has noted, "Congress, in drafting the [FAA], was more concerned with promoting arbitration than with making sure that arbitration would go forward in some particular place."[205] Therefore, when contractual parties fail to name a situs in an arbitration agreement falling under the N.Y. Act, the district court must compel arbitration within its jurisdiction under section 4 because to do so does not conflict with section 206.[206] Otherwise stated, section 206 does not provide a grant of

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201 *Id*.

202 9 U.S.C. § 206 (2006) (emphasis added).

203 *Jain*, 51 F.3d at 690. The court acknowledged that section 206 would clearly conflict with section 4 if the parties were to have specified an arbitral venue outside the court's jurisdiction. *Id.*

204 *Id*. The pertinent language of section 4 is:

> The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed.

9 U.S.C. § 4; *see also* Tolaram Fibers, Inc. v. Deutsche Eng'g Der Voest-Alpine Industrieanlagenbau GmbH, No. 2:91CV00025, 1991 WL 41772, at *4 (M.D.N.C. Feb. 26, 1991) (holding that the "provisions of Chapters 1 and 2 of the Federal Arbitration Act require the Court to compel arbitration to be held in this district unless there is a specific place designated in the forum selection clause of the arbitration contract," despite the fact that the arbitration agreement provided that ICC rules apply and that those rules direct the ICC to determine the situs in such a situation).

205 Capitol Converting Co. v. Curioni, No. 87 C 10439, 1989 WL 152832, at *2 (N.D. Ill. Nov. 9, 1989) (reconsideration of original order compelling arbitration).

206 *Jain,* 51 F.3d at 690–91 (citing Bauhinia Corp. v. China Nat'l Mach. & Equip. Imp. & Exp. Corp., 819 F.2d 247, 249–50 (9th Cir. 1987) (compelling arbitration within its district under the rules of the American Arbitration Association, after determining that parties failed to name a situs, in spite of the fact that the

authority to compel arbitration in such a general situation, but at the same time it does not, by its terms, preclude the compelling of arbitration.[207] Therefore, pursuant to section 208, the N.Y. Act specifically incorporates section 4 in this limited context, as a non-conflicting provision.[208]

The court's reasoning is a prime example of this Article's proposed interpretive approach, as it incorporated all three interpretive considerations. Section 4, in the given context, addresses the very narrow and specific issue of compelling arbitration within the jurisdiction of the district court seized of the action—with both concurrent personal and subject matter jurisdiction—when there is a valid arbitration agreement that fails to name a situs for the arbitration.[209] But section 206, granting authority to a district court to compel arbitration anywhere named in the arbitration agreement, addresses compelling arbitration more generally.[210] In *Jain*, the more specific clause once again won the day.[211]

In addition, the *Jain* court avoided a conflict between the FAA and N.Y. Act and properly invoked pro-arbitration considerations in support of its textual interpretation of the FAA, but only after determining the issue within the specific-vs.-general rubric. The court cited three further considerations that fall under the pro-arbitration policy because of the manner in which they will facilitate arbitration in general, especially international arbitration.[212] First, the court stated that the international character of the action trumps the federalism concerns embedded in and embodied by section 4.[213] Second, the text of Article II(3) of the New York Convention supports a textual interpretation of the N.Y. Act.[214] Finally, the court added that a contrary interpretation would lead to an absurd result, that "a federal court would have less power to compel arbitration under an international agreement than a state court."[215] The reasoning of *Jain* mirrors the proposed interpretive paradigm in that it first

contract mentions proceedings at the Foreign Trade Arbitration Commission of the China Council for the Promotion of International Trade in Peking)); Circus Productions, Inc. v. Rosgoscirc, No. 93 Civ. 1304, 1993 WL 403993 (S.D.N.Y. Oct. 5, 1993); Capitol Converting Co. v. Curioni, 87 C 10439, 1989 WL 152832 (N.D. Ill. Nov. 9, 1989); Oil Basins Ltd. v. Broken Hill Proprietary Co., 613 F. Supp. 483 (S.D.N.Y. 1985).

[207] *See Jain*, 51 F.3d. at 690.

[208] *See id.*

[209] 9 U.S.C. § 4.

[210] *Id.* § 206.

[211] *See Jain,* 51 F.3d. at 690–91.

[212] *Id.* at 691.

[213] *Id.*

[214] *Id.*

[215] *Id.*

applied the specific-vs.-general dichotomy, avoided a conflict, and then integrated pro-arbitration concerns.

E. Section 4 vs. N.Y. Act's Silence—Offensive Petition to Compel Arbitration

The N.Y. Act makes no explicit distinction between offensive petitions to compel arbitration and defensive motions to compel, while section 4 includes both.[216] Parties seeking to avoid arbitration have argued that the N.Y. Act only envisions defensive petitions to compel arbitration based on a questionable interpretation of the term "seized of an action" found in Article II(3).[217] As such an interpretation is logically unsound[218] and against the weight of N.Y. Act jurisprudence and commentary, the N.Y. Act is generally silent regarding differentiating between offensive and defensive motions.[219] Therefore, the N.Y. Act incorporates section 4's explicit specific grant of power to offensively compel arbitration.

F. Section 4 vs. N.Y. Act's Silence—Standing Requirement

Section 4 imposes a standing requirement. In order to bring an action to compel arbitration, a moving "party [must be] aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration" before it will have sufficient standing to allow a court to compel arbitration.[220] As such, "[o]n its face, this requirement is not in conflict with [Chapter Two] or the [New York] Convention itself."[221] The N.Y. Act's

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216 *Compare* New York Convention, *supra* note 53, *with* 9 U.S.C. § 4 (2006).

217 *See, e.g.*, Builders Fed. (Hong Kong) Ltd. v. Turner Const., 655 F. Supp. 1400, 1403–04 (S.D.N.Y. 1987).

218 Such an interpretation would allow any breaching party to void an arbitration agreement by simply doing nothing. If the breaching party were ultimately sued, it could avoid arbitration by simply never making a motion to compel arbitration, and the plaintiff would be without recourse other than to proceed with the litigation. In effect, arbitration agreements could never be binding under such an interpretation.

219 *Builders Fed. (Hong Kong) Ltd.*, 655 F. Supp. at 1403–06 (S.D.N.Y. 1987) (citing Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985), for the fact that the Supreme Court has already determined that the N.Y. Act includes offensive petitions to compel arbitration).

220 9 U.S.C. § 5.

221 Hartford Acc. & Indem. Co. v. Equitas Reinsurance Ltd., 200 F. Supp. 2d 102, 108, 109 (D. Conn. 2002) (finding that the defendant still had time to accept the plaintiff's demand to arbitrate and that the plaintiff failed to make "specific factual allegations to support the amended complaint's assertion that 'one or more of the Arbitration Defendants do not intend to arbitrate'"); *see also* Colt's Mfg. Co., Inc. v. Devteck Corp., 961 F. Supp. 382, 384–85 (D. Conn. 1997) (holding that since defendant was not resisting arbitration, the plaintiff was not "aggrieved" and, therefore, could not compel arbitration and was not entitled to a stay pursuant to section 3; and dismissing the non-resisting party); Evans & Sutherland Computer Corp. v. Thomson Training & Simulation Ltd., No. 94 Civ. 6795 (JFK), 1994 WL 593808, at *4–5 (S.D.N.Y. Oct. 28,

silence on standing, therefore, does not conflict with the "aggrieved" requirement of the FAA.[222] In practice, the "aggrieved" requirement should not be more than a technical pleading requirement because there is no practical reason to commence litigation if the opposing party cooperates and proceeds with arbitration. However, a party should take care to ensure that all conditions precedent to demanding arbitration have been met.[223]

G. *Section 4 vs. N.Y. Act's Silence—Right to a Jury Trial on Issue of Existence of a Binding Arbitration Agreement and Breach Thereof*

Under section 4 of the FAA, a party is entitled to a jury trial on two issues: (1) "the making of the arbitration agreement," but generally not the underlying contract,[224] and (2) one party's "failure, neglect, or refusal to perform" the

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1994) (holding that commencement of litigation in another country contrary to the arbitration agreement satisfied the "aggrieved" requirement of section 4). *Contra* Daye Nonferrouse Metals Co. v. Trafigura Beheer B.V., No. 96 Civ. 9740, 1997 WL 375680 (S.D.N.Y. July 7, 1997), *aff'd in part and vacated in part*, 152 F.3d 917 (Table), 1998 WL 385968 (2d Cir. May 26, 1998) (holding that section 4 conflicts with section 206).

[222] *Hartford Acc. & Indem. Co.*, 200 F. Supp. 2d at 108–09; *see also* Andersen Consulting Bus. Unit Member Firms v. Andersen Worldwide Societe Co-op., No. 98 Civ. 1030, 1998 WL 122590 (S.D.N.Y. Mar. 18, 1998) (declining to compel arbitration because there is no evidence that any party has refused to arbitrate).

[223] *See Hartford Acc. & Indem. Co.*, 200 F. Supp. 2d at 108–09.

[224] 9 U.S.C. § 4. This distinction arises from the separability doctrine. The doctrine provides that the agreement to arbitrate is independent of the main contract. Therefore, allegations of contractual invalidity do not necessarily affect the validity of the arbitral clause. The interrelated doctrine of *kompetenz-kompetenz* empowers arbitrators to rule on issues of jurisdiction despite challenges to the validity of the underlying contract. CARBONNEAU, *supra* note 7, at 29–30. The separability doctrine in the United States has its roots in *Prima Paint Corp. v. Flood & Conklin Mfg., Co.*, 388 U.S. 395 (1967). *See* Republic of Nicaragua v. Standard Fruit Co., 937 F.2d 469, 476 (9th Cir. 1991) ("*Prima Paint* demands that arbitration clauses be treated as severable from the documents in which they appear unless there is clear intent to the contrary."). However, "*Prima Paint* has not been consistently applied and . . . some lower court cases permit issues that go to the general enforceability of a contract to be issues for the court in determining whether there is an enforceable contract." Miner Enters., Inc. v. Adidas AG, No. 95 C 1872, 1995 WL 708570, at *2 (N.D. Ill. Nov. 30, 1995); *see* Filanto, S.p.A. v. Chilewich Int'l Corp., 789 F. Supp. 1229, 1238–40 (S.D.N.Y. 1992) (rejecting the Ninth Circuit's application of *Prima Paint)*; Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc., Nos. 3:95CV2362(AWT), 3:96CV2218(AWT), 3:96CV2219(AWT), 2000 WL 435566, at *12 (D. Conn. Mar. 14, 2000). As a result, some courts still draw a distinction between void and voidable contracts and only apply the separability doctrine to voidable contracts. Such courts will hear a challenge to the contract generally when a party asserts that the entire contract, including the arbitration agreement, is void. China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp., 334 F.3d 274 (3rd Cir. 2003) (action to confirm); Sandvik AB v. Advent Int'l Corp., 220 F.3d 99, 100 (3rd Cir. 2000) (addressing the "anomalous situation where a party suing on a contract containing an arbitration clause resists arbitration, and the defendant, who denies the existence of the contract, moves to compel it"); Guang Dong Light Headgear Factory Co., Ltd. v. ACI Int'l, Inc., No. 03-4165-JAR, 2005 WL 1118130 (D. Kan. May 10, 2005). *Contra* Alamria v. Telcor Int'l, Inc., 920 F. Supp. 658, 665–67 (D. Md. 1996); TWI Lite Int'l, Inc. v. Anam Pac. Corp., Nos. C-96-2323, C-96-2664, 1996 WL 637843, at *6 (N.D. Cal. Oct. 24, 1996) ("As we read *Prima Paint,* whatever fraud is alleged had to specifically and unquestionably infect the agreement to arbitrate . . . ."); Seafort Shipping Corp. v. W. Eng.

arbitration agreement.[225] Additionally, "the party putting the agreement to arbitrate in issue must present 'some evidence' in support of its claim before a trial is warranted."[226]

The N.Y. Act does not address the right to a jury trial. Applying this Article's interpretive approach, section 4's right to a jury trial in the two enumerated and narrowly construed situations extends to the N.Y. Act because the Act is silent on the matter, and this interpretation avoids a conflict.[227]

Ship Owners Mut. Protection and Indem. Ass'n, Civ. A. No. 88-4605, 1988 WL 135179, at *5 (E.D. La. Dec. 12, 1988) ("The Fifth Circuit has gone so far as to hold that even when a contract containing an arbitration clause was void from its inception, the arbitration clause would still be enforceable.") (citing Lawrence v. Comprehensive Bus. Servs. Co., 833 F.2d 1159 (5th Cir. 1987)). To apply *Prima Paint* consistently, a party resisting arbitration based on inarbitrability due to lack of contractual agreement must challenge the validity of the arbitration clause rather than the underlying contract in general to invoke section 4's limited right to a jury trial. *See* EDMONSON, *supra* note 137, §§ 11:2, 21:3 (citing Campaniello Imps., Ltd. v. Saporiti Italia S.p.A., 117 F.3d 655 (2d Cir. 1997)).

[225] 9 U.S.C. § 4. Section 4 states:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof . . . . Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose.

Id.; *see also* Thomson Training & Simulation, Ltd. v. Global Venturer, Inc., No. 97 C 2440, 1997 WL 399619, (N.D. Ill. July 14, 1997) (ordering a trial, by judge or jury, for a case falling under the N.Y. Act because "[u]nder Illinois law, the existence of an agency relationship is a question of fact").

[226] Sphere Drake Ins. Ltd. v. Clarendon Nat'l Ins. Co., 263 F.3d 26, 30 (2d Cir. 2001) (holding that the section 4 right to a jury trial extends to N.Y. Act cases when one party produces evidence that the contract is void rather than just voidable); *see* Boston Telecomm. Group, Inc. v. Deloitte Touche Tohmatsu, 278 F. Supp. 2d 1041, 1048 (N.D. Cal. 2003) (ignoring fraud in the inducement claim); Paramedics Electromedicina Comercial Ltda. v. GE Med. Sys. Info. Tech., Inc., No. 02 Civ. 9369, 2003 WL 23641529, at *8 (S.D.N.Y. June 4, 2003) (distinguishing a condition precedent to the creation of the right to commence the arbitration from a condition precedent to the contract generally); Belship Navigation, Inc. v. Sealift, Inc., No. 95 Civ. 2748, 1995 WL 447656, at *4–5 (S.D.N.Y. July 28, 1995). *But see* Phoenix Bulk Carriers Ltd. v. Oldendorff Carriers Gmbh & Co., KG., No. 01 Civ. 11777, 2002 WL 31478198, at *5 (S.D.N.Y. Nov. 6, 2002) (declining to compel arbitration for failure to satisfy a condition precedent to the contract generally).

[227] Marks 3 Zet-Ernst Marks GMBH & Co. KG v. Presstek, Inc., 455 F.3d 7, 8 (1st Cir. 2006) (affirming the lower court's denial of motion to reconsider whether plaintiff was entitled to a hearing or trial under section 4 when plaintiff initially failed to seek relief which the court could grant). This opinion appeared to presuppose that the right to a jury trial would be available for cases falling under the N.Y. Act but did not apply in the current instance due the plaintiff's questionable "strategic choice[s]." *Id.* at 17; *see* U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co., Ltd., 241 F.3d 135, 144–46 (2d Cir. 2001); Cargill Int'l S.A. v. M/T Pavel Dybenko, 991 F.2d 1012, 1019 (2d Cir. 1993); *see also* USM Corp. v. GKN Fasteners, Ltd., 574 F.2d 17, 19–20 (1st Cir. 1978). The issue on appeal in *USM Corporation* was the court's jurisdiction to hear an appeal on staying litigation pursuant to a section 3 motion (no section 4 motion was made). The court determined that a section 3 stay is not a final order and therefore, not appealable for lack of jurisdiction. *Id.* at 19. The court interestingly added that a section 4 motion compelling arbitration or request for a jury trial

Arguably such a determination would undermine the pro-arbitration policy by increasing the burden of litigation in addition to any arbitration proceedings, but as previously stated, the pro-arbitration policy only gains relevance once the primary and secondary considerations prove inconclusive. Moreover, in light of the separability doctrine, the party seeking a trial must attack the arbitration agreement itself and not the underlying contract, which factually proves to be a high hurdle and, therefore, limits the instances in which section 4's right to a jury trial will apply.[228]

H. Section 5 vs. Section 206—District Court's Authority to Name Arbitrators

In *Jain v. de Méré*, after determining that a court seized of a N.Y. Act case could compel arbitration within its district when the contract failed to name a situs, the court employed similar reasoning to determine that section 5 does not conflict with section 206.[229] Under section 206, a court may appoint arbitrators "in accordance with the provisions of the agreement,"[230] whereas section 5 states:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy

would be a final order and that such a right had not been extinguished by its holding because the defendant could bring such a motion after the arbitration. *Id.* The court stated: "Should the prevailing party in the arbitration proceedings need to seek enforcement of the award, appeal to the district court under 9 U.S.C. §§ 4, 201, and 207 is permitted. A jury could then be empanelled to decide if the other party were in default of the decree." *Id.* at 20. This greatly misconstrues the function of section 4, which by its very title addresses a "[f]ailure to arbitrate under agreement [and] petition to United States court having jurisdiction for order to compel arbitration" and therefore has nothing to do with post-arbitration litigation. 9 U.S.C. § 4. A party wishing to invoke section 4's limited right to a jury trial must do so before arbitral proceedings commence or it may be waived for all practical purposes. *See id.*

[228] If a party cannot preliminarily establish grounds for federal subject matter jurisdiction under the N.Y. Act, it cannot invoke section 4's right to a jury trial when no other basis for jurisdiction exists, such as diversity. Severonickel v. Gaston Reymenants, 115 F.3d 265, 269 n.4 (4th Cir. 1997) (finding no jurisdiction where the party seeking to compel arbitration could not produce a "secret arbitration agreement" that would serve as the basis for jurisdiction under the N.Y. Act due to confidentiality concerns).

[229] Jain v. de Méré, 51 F.3d 686, 692 (7th Cir. 1995); *see also* Pemex-Refinacion v. Tbilisi Shipping Co.Ltd., No. 04 Civ. 02705, 2004 WL 1944450 (S.D.N.Y. Aug. 31, 2004) (denying section 5 motion to name a new arbitrator upon the death of an arbitrator in an 11-year-old arbitration and instead, compelling the parties to restart the arbitration by naming new arbitrators themselves).

[230] 9 U.S.C. § 206.

> the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.[231]

The court in *Jain* reasoned that even though section 206 does not grant a court authority to name an arbitrator when the contract is silent as to how the parties intended to name the arbitrator(s), section 206 does not explicitly deny a court the power to do so under section 5, and, therefore, no conflict exists.[232] Without expressly doing so, the *Jain* Court once again employed the specific-vs.-general dichotomy.[233] Section 206 addresses naming arbitrators generally "in accordance with the agreement," and section 5 focuses on the narrower issue of the parties agreeing to arbitrate but failing to provide an exact means of naming an arbitrator(s).[234] *Jain* significantly advances the pro-arbitration policy by not allowing parties to avoid arbitration based on technical shortcomings in an arbitration agreement when it is clear that such an agreement exists.

I. Section 6 vs. N.Y. Act's Silence—Application by Motion

Section 6 of the FAA states that "[a]ny application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."[235] According to one court's opinion:

> One of the clearest examples of the operation of Section 208 is its making motion practice under Section 6 applicable to proceedings under the [New York Convention]. Thus, an arbitration award under the Convention may be enforced by filing a petition or application for an order confirming the award supported by an affidavit. The hearing on such a

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[231] *Id.* § 5.

[232] *Jain*, 51 F.3d at 692; *see also* Creative Tile Mktg., Inc. v. SICIS Int'l, S.r.L., 922 F. Supp. 1534, 1539–40 (S.D. Fla. 1996) (requiring parties to select their arbitrators pursuant to section 5 where the contract was silent). In compelling arbitration with a panel of three arbitrators, the court here failed to take into consideration the rest of section 5, which states that "unless otherwise provided in the agreement the arbitration shall be by a single arbitrator." 9 U.S.C. § 5.

[233] *See supra* Part III.D.

[234] 9 U.S.C. §§ 5, 206.

[235] 9 U.S.C. § 6.

> petition or application will take the form of a summary procedure in the nature of federal motion practice.[236]

J. Section 7 vs. N.Y. Act's Silence—Arbitrator's Power to Compel a Witness to Appear

The FAA grants "arbitrators broad evidence-gathering powers," which even extend "to nonarbitrating parties."[237] However, "arbitration offers much less discovery than that available under the Federal Rules."[238] An arbitrator's power to compel evidence from non-contractually related third parties, over whom the arbitrator does not have jurisdiction by operation of the arbitration agreement, is a distinctive feature of U.S. arbitral law.[239] Section 7 states:

> The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.[240]

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[236] TermoRio S.A. E.S.P. v. Electranta S.P., 487 F.3d 928, 940 (D.C. Cir. 2007) (citing 3 Fed. Proc., L. Ed. § 4:183 (1999)); *see also* Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co., 415 F. Supp. 133, 135 n.4 (D.N.J. 1976).

[237] CARBONNEAU, *supra* note 7, at 107.

[238] Satcom Int'l Group PLC v. Orbcomm Int'l Partners, L.P., 49 F. Supp. 2d 331, 340 (S.D.N.Y. 1999) (holding that by conducting discovery under the Federal Rules of Civil Procedure to an extent greater than that permitted in arbitration, the plaintiff waived its right to compel arbitration).

[239] CARBONNEAU, *supra* note 7, at 107. English arbitral law shares this feature. *Id.*

[240] 9 U.S.C. § 7 (2006). Section 7 also addresses the procedure for compelling a witness to appear before an arbitrator. It states that:

> The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court . . . .

Id. Because the N.Y. Act is silent as to compelling witnesses to appear, these procedural measures also apply to actions falling under the Act. *See id.*

Because the N.Y. Act is silent on the subject, section 7's evidence gathering powers extend to the Act. However, this power is limited, particularly for cases falling under the N.Y. Act, because "federal courts have a duty to enforce arbitrators' summonses only within the federal district in which the arbitrators, or a majority of them, are sitting."[241] Therefore, the arbitral situs must be within the United States before an arbitral party can invoke section 7 because "[i]t is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded its domestic dispute-resolution counterpart."[242] Although this power is available in cases falling under the N.Y. Act, it is curtailed by the geographical limitations imposed by section 7.

K. Section 8 vs. N.Y. Act's Silence—Seizure of Vessel or Property in Cases that Would Also Fall Under Admiralty Jurisdiction

The FAA explicitly grants a court the power to issue a pre-arbitral ruling attachment of property when the underlying action would have arisen in admiralty but for the arbitration agreement.[243] Section 8 provides:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.[244]

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[241] Republic of Kazakhstan v. Biedermann Int'l, 168 F.3d 880, 883 (5th Cir. 1999). The court addressed the issue of whether 28 U.S.C. § 1782, which grants a court power to compel discovery in aid of "foreign and international tribunals," also encompassed international commercial tribunals, and reasoned by analogy to Title 9 that it did not. *Id.*

[242] *Id.*

[243] However, just because a contract containing an arbitration agreement could have fallen under a court's admiralty jurisdiction, this does not automatically entitle a party to proceed by libel and seizure of the vessel. Castelan v. M/V Mercantil Parati, No. Civ. A. No. 91-1351, 1991 WL 83129 (D.N.J. May 8, 1991). The court stated that "Section 8 'does not of itself confer an *in rem* right against a vessel.' To proceed *in rem,* there must exist an independent *in rem* claim based upon a cognizable maritime lien. Plaintiffs cannot proceed *in rem* merely by virtue of the Federal Arbitration Act." *Id.* at *4 (quoting E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA, 673 F. Supp. 796, 800 (E.D. La. 1987)). Therefore, a party must establish a right to the ship independent of Title 9 before invoking section 8. *Contra* Sembawang Shipyard, Ltd. v. Charger, Inc., 955 F.2d 983, 988 n.5 (5th Cir. 1992) (conflicting with *Castelan* over whether section 8, combined with the Supplemental Admiralty and Maritime Claims Rule C, constitutes a basis for arresting a ship).

[244] 9 U.S.C. § 8.

The N.Y. Act does not distinguish between general jurisdiction under section 202 and other grants of jurisdiction, such as admiralty, much less the narrow issue of a pre-arbitral ruling attachment of property in such cases. Courts have expressly held that in light of the N.Y. Act's general silence, section 8's explicit specific grant of authority to freeze assets does not conflict with the N.Y. Act.[245] In addition to avoiding a conflict between the FAA and N.Y. Act, such a determination furthers the pro-arbitration policy by making the same provisional remedy available in arbitration that is common practice in litigation, thereby not forcing a prospective litigant or arbitral participant to choose between the two.[246]

L. Section 9 vs. N.Y. Act's Silence—Service of Process in an Action to Confirm an Award

Section 9 of the FAA states: "If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."[247] Due to the N.Y. Act's silence as to notice, the question arises of how to serve a defendant for an action to confirm an international arbitral award when the defendant does not have an ongoing presence in any district of the United States ("nonresident").[248] The specific-vs.-general dichotomy cannot answer this question because it would lead to situations where a court would ostensibly have jurisdiction but would be unable to exercise it while still adhering to section 9's dictates. The issue can be broken down in terms of general personal jurisdiction vs. specific personal jurisdiction.

Although the New York Convention provides subject matter jurisdiction, a "statute cannot grant personal jurisdiction where the Constitution forbids it."[249]

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[245] E.A.S.T., Inc. of Stamford, Conn. v. M/V ALAIA, 876 F.2d 1168, 1173 (5th Cir. 1989); Atlas Chartering Servs., Inc. v. World Trade Group, Inc., 453 F. Supp. 861, 863 (S.D.N.Y. 1978); Andros Compania Maritima, S.A. v. Andre & Cie, S.A. 430 F. Supp. 88, 91 (S.D.N.Y. 1977).

[246] *Atlas Chartering Servs*, 453 F. Supp. at 863 ("The attachment, we believe, serves only as a security device in aid of the arbitration.").

[247] 9 U.S.C. § 9. If the losing party to an arbitration is a resident of the district, no issue exists as to complying with the requirement that "service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court." *Id.*

[248] Section 9, via its congruity with section 12, "is an anachronism not only because it cannot account for the internationalization of arbitration law subsequent to its enactment, but also because it cannot account for the subsequent abandonment of United States marshals as routine process servers." InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 67 n.3 (S.D.N.Y. 1993).

[249] Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120–21 (9th Cir. 2002) (holding that despite the New York Convention's "pro-enforcement bias," "neither the Convention nor its

If a party has an ongoing presence within a jurisdiction, a court can exercise general personal jurisdiction over the party, and personal service is unproblematic; in that situation section 9 does not conflict with the N.Y. Act and can be incorporated.[250] However, when a plaintiff seeks to establish specific personal jurisdiction, it becomes unfeasible to extend section 9's service requirement to the N.Y. Act.

For specific personal jurisdiction, a plaintiff must establish that

> (1) defendant purposefully availed itself of the privilege of conducting activities in [the district], thereby invoking the benefits and protections of its laws; (2) plaintiff's claims arise out of defendant's [district]-related activities; and (3) the exercise of jurisdiction would be reasonable.[251]

Situations may certainly arise when a defendant does not have an ongoing presence sufficient to establish general personal jurisdiction (nonresident) but meets the three requirements of the specific jurisdiction test. If jurisdiction is specific, it becomes impossible to interpret the text of Title 9 in a manner consistent with the specific-vs.-general dichotomy, and one must move to the secondary and tertiary considerations. No interpretation can avoid a conflict because of the opposing conclusions arising from a specific-vs.-general personal jurisdiction analysis. The pro-arbitration policy then leads to the conclusion that section 9's service by marshal requirement, when jurisdiction is based on specific personal jurisdiction because the defendant resides outside the United States, conflicts with the N.Y. Act.[252] As a result, courts should apply the Federal Rules of Civil Procedure as they would in any other type of case.[253]

Furthermore, issues of personal jurisdiction in the context of enforcing an arbitral agreement or award are wholly distinct from the issue of enforcing a binding arbitral award when the losing party has assets within the United

implementing legislation removed the district courts' obligation to find [personal] jurisdiction over the defendant in suits to confirm arbitration awards").

[250] *Id.* at 1121.

[251] Cargnani v. Pewag Austria G.m.b.H., No. Civ. S-05-0133, 2007 WL 415992, at *4 (E.D. Cal. Feb. 5, 2007) (Parties were Austrian and Italian, and arbitration took place in Italy; petitioner attempted to base personal jurisdiction on the presence of the losing party's subsidiary within the state.).

[252] *See* Lucent Techs., Inc. v. Tatung Co., No. 02 Civ. 8107, 2003 WL 402539, at *1 (S.D.N.Y. Feb. 20, 2003) (ignoring the issue of service by marshal because the case fell under the N.Y. Act).

[253] *See generally* InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64 (S.D.N.Y. 1993).

States. However, "jurisdiction based on property is usually subject to the same minimum contacts test that is applied to in personam cases."[254] A court may find quasi in rem jurisdiction in enforcing an arbitral award up to the amount of the value of the assets found within that court's jurisdiction despite lacking personal jurisdiction.[255]

M. Section 10 vs. Section 207 and Article V of the New York Convention—Motion to Vacate an Award

The N.Y. Act is silent as to the grounds and procedure for vacating an arbitral award, and as a result, incorporates FAA section 10(a)(1)-(4) regarding grounds for vacating an award.[256] Despite some courts conflating motions to confirm and motions to vacate, the two actions are distinct in the international arbitration context and must remain so.[257] Not only does treating the two actions as disparate naturally flow from the text and structure of Title 9, but it also accords with the framework of the New York Convention and principles of international commercial law, which establish that a New York Convention signatory nation has the right to apply domestic law to actions to "set aside" (vacate) an arbitral award when the award was either rendered within that country or "under the law" of that nation.[258]

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[254] CME Media Enters. B.V. v. Zelezny, No. 01 Civ. 1733, 2001 WL 1035138, at *3 (S.D.N.Y. Sept. 10, 2001), *cited in Grain Rotterdam*, 284 F.3d at 1122.

[255] *CME Media Enters.*, No. 01 Civ. 1733, 2001 WL 1035138, at *4; *see also* Dardana Ltd. v. Yuganskneftegaz, 317 F.3d 202, 204 (2d Cir. 2003) (remanding case to allow discovery on issue of personal jurisdiction, which could encompass quasi in rem jurisdiction, waiver, contacts with the forum district, and national contacts pursuant to FED. R. OF CIV. P. 4(k)(2)).

[256] *See* 9 U.S.C. § 10 (2006).

[257] *See supra* Part III.C. Additionally, "a petition to confirm an arbitration award is compulsory in response to a petition to vacate the award." InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 70 (S.D.N.Y. 1993) (holding that a party can raise a jurisdictional defense to an action to vacate an award and simultaneously move to confirm); *see also* White Motor Corp. v. Int'l Union, United Automobile, Aerospace & Agricultural Implement Workers of Am., UAW, Local Union No. 932, 365 F. Supp. 314, 317 (S.D.N.Y.1973), *aff'd*, 491 F.2d 189 (2d Cir. 1974).

[258] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 23 (2d Cir. 1997) (incorporating domestic grounds to vacate an award through Article V(1)(e) of the New York Convention rather than as a non-conflicting provision of the FAA through section 208); Underwriters at Lloyd's London Who Participated in Syndicates v. BCS Ins. Co., 239 F. Supp. 2d 812, 815 (N.D. Ill. 2003); *see also* VAN DEN BERG, *supra* note 2, at 20, 350. I disagree with the Second Circuit's determination that domestic grounds to vacate can only be incorporated via Article V(1)(e) and believe that they can also be incorporated as non-conflicting provisions of the FAA pursuant to section 208. However, the technical difference proves of no importance, and that Circuit's holding and this Article's conclusion that domestic grounds for vacating an award extend to the N.Y. Act as non-conflicting are mutually reinforcing. The Second Circuit's interpretation of Article V(1)(e) does bear great relevance, though, to extending non-statutory grounds for vacating an award considered as non-domestic but rendered within the United States.

The New York Convention envisions distinctions in the treatment of arbitral awards falling under the Convention based on where the award was rendered.[259] Article V(1)(e) of the Convention states that a signatory nation may deny confirmation of an award when "[t]he award has not yet become binding on the parties, 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."[260] At the same time, it is generally understood that an award falls "under the law" of a nation when a nation's procedural law is applied, generally when the arbitration took place within that nation.[261] As a result, "the [New York] Convention contemplates that any petition to vacate an arbitration award will be filed in the country where the award was rendered."[262] As one commentator notes, "[i]t suffices to observe that the Convention is not applicable in the action for setting aside the award."[263]

Title 9 accords with the principle of international commercial law that the situs country has primacy in vacating an arbitral award rendered within its borders:

> [B]ecause the [New York] Convention allows [a] district court to refuse to enforce an award that has been vacated by a competent authority in the country where the award was rendered, [a U.S.] court may apply FAA standards to a motion to vacate a non-domestic award rendered in the United States.[264]

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259 *Yusuf Ahmed Alghanim*, 126 F.3d at 23; Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine, 311 F.3d 488, 496 (2d Cir. 2002).

260 New York Convention, *supra* note 53, art. V(1)(e).

261 *Yusuf Ahmed Alghanim*, 126 F.3d at 23. The New York Convention recognizes that parties may be subject to the procedural law of a nation other than the nation in which the arbitration took place. *See* New York Convention, *supra* note 53, art. V(1)(e). However, this would be a rare event, arising from the arbitral agreement itself, and could run into potential problems as an "a-national" award. *See* VAN DEN BERG, *supra* note 2, at 20, 350. Title 9 does not recognize this distinction and relies on the situs to provide the procedural law and ultimately the grounds to vacate in section 10. *See* 9 U.S.C. § 10 (2006).

262 Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc., Nos. 3:95CV2362(AWT), 3:96CV2218(AWT), 3:96CV2219(AWT), 2000 WL 435566, at *5 (D. Conn. Mar. 14, 2000) (holding that a U.S. court lacked subject matter jurisdiction to hear a motion to vacate an award rendered in China).

263 VAN DEN BERG, *supra* note 2, at 20.

264 *Yusuf Ahmed Alghanim & Sons*, 126 F.3d at 21 (2d Cir. 1997) (citing Spector v. Torenberg, 852 F. Supp. 201, 205–06 & n.4 (S.D.N.Y. 1994)); *see also* Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 709 (6th Cir. 2005); Lander Co., Inc. v. MMP Invs., Inc., 107 F.3d 476, 478 (7th Cir. 1997); *Spector*, 852 F. Supp. at 205–06.

Additionally, it is well established that section 202 defines "non-domestic" under U.S. arbitral law.[265]

Under the FAA, a U.S. court will entertain a motion to vacate when the arbitration took place within its jurisdiction, or as section 10 states, the "United States court in and for the district wherein the award was made may make an order vacating the award."[266] The FAA does not grant courts power to entertain a motion to vacate when the award was not rendered within its jurisdiction, even if the award was made applying substantive U.S. law, because Article V(1)(e) "refers exclusively to procedural and not substantive law, and more precisely, to the regimen or scheme of arbitral procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case."[267]

Once the entire structure of the New York Convention and Title 9 is analyzed, it becomes clear that the FAA is silent as to substantive defenses to confirmation, and the N.Y. Act is silent on vacatur. As the N.Y. Act is generally silent on vacatur, the FAA's well-established, enumerated and limited grounds for vacating an arbitral award can be incorporated into the N.Y. Act as non-conflicting provisions pursuant to section 208, but only when the award was rendered in the United States.[268] As per the terms of the FAA, a party has just three months to bring a motion to vacate; failing to file such a motion waives the right to bring one.[269] However, once that right has been waived, the losing party may still raise the defenses to confirmation enumerated in the New York Convention.[270] Additionally, a "Court has

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[265] *Jacada*, 401 F.3d at 706–09; Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983); *Lander Co.*, 107 F.3d at 478, 481–82 (holding that an arbitration between two American companies taking place in New York City fell under the N.Y. Act because the contract envisioned performance abroad); Trans Chemical Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 293 (S.D. Tex. 1997).

[266] 9 U.S.C. § 10 (2006); *see* Matter of Andros Compania Maritima, S.A., 579 F.2d 691 (2d Cir. 1978) (evaluating a section 10 motion to vacate without determining whether the action fell under the N.Y. Act or the FAA).

[267] M & C Corp. v. Erwin Behr GmbH & Co., KG, 87 F.3d 844, 848 (6th Cir. 1996) ("Resorting to the courts of the nation supplying the substantive law for the dispute does nothing to enhance the underlying principles of international arbitration because, under the terms of the New York Convention itself, judicial review of such an award is extremely limited and extends only to procedural aspects of the determination."); *see also* Olsher Metals Corp. v. Olsher, No. 03-12184, 2004 WL 5394012, at *2–3 (11th Cir. Jan. 26, 2004); Coutinho Caro & Co. U.S.A., Inc. v. Marcus Trading, Inc., Nos. 3:95CV2362(AWT), 3:96CV2218(AWT), 3:96CV2219(AWT), 2000 WL 435566, at *6 n.5 (D. Conn. Mar. 14, 2000); Int'l Standard Elec. Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172, 178 (S.D.N.Y.1990).

[268] *See supra* Part III.C.

[269] 9 U.S.C. § 12.

[270] *See supra* Part III.C.

authority under the FAA to review and vacate an arbitration panel's interim order" based upon the grounds enumerated in section 10.[271]

A brief review of the four statutory grounds for vacating an award under the N.Y. Act and general standards applied to those grounds follows. This Article will not address the non-statutory grounds for vacating an arbitral award developed by the courts, such as manifest disregard of the law or arbitrary and capricious awards, because it seeks to develop a principled interpretation of the text of Title 9.[272] However, the recent Supreme Court case of *Hall Street Associates, L.L.C. v. Mattel, Inc*. has severely called into question the applicability of non-textual defenses to confirming or vacating an arbitral award under Title 9.[273] In *Hall Street Associates*, the Court stated that "[m]aybe the term 'manifest disregard' was meant to name a new ground for review, but maybe it merely referred to the § 10 grounds collectively, rather than adding to them."[274] If judicially-created non-textual grounds for vacating an award remain valid, a court should not be per se barred from applying such grounds to awards falling under the N.Y. Act rendered in the United States because a situs country has primacy in vacating an arbitral award rendered within its borders, in addition to Article V(1)(e) constraints.[275]

1. Section 10(a)(1)—Fraud Generally

Pursuant to section 10(a)(1) a court may vacate an award when "the award was procured by corruption, fraud, or undue means."[276] According to case law:

> Under [Title 9] a party who alleges that an arbitration award was procured through fraud or undue means must demonstrate that the improper behavior was (1) not discoverable by due diligence before or during the arbitration hearing, (2) materially related to an issue in

[271] Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 937 (N.D. Cal. 2003).

[272] It should be noted that these grounds for vacating an award originally arose in the context of labor arbitration and have spilled over to other areas of arbitral law, and therefore, they do not sit well within the international arbitral scheme. *See generally* CARBONNEAU, *supra* note 7, at 110.

[273] Hall Street Assocs., L.L.C v. Mattel, Inc., 128 S.Ct. 1396, 1400, 1403–06 (2008).

[274] *Id.* at 1404.

[275] *See supra* note 256; Essex Cement Co. v. Italmare, S.p.A., 763 F. Supp. 55 (S.D.N.Y. 1991) (applying a manifest disregard analysis to N.Y. Act case without acknowledging it was a N.Y. Act case).

[276] 9 U.S.C. § 10(a)(1) (2006); *see* Biotronik Mess-Und Therapiegeraete GmbH & Co. v. Medford Med. Instrument Co., 415 F. Supp. 133 (D.N.J. 1976) (performing section 10(a)(1) analysis of an arbitration that took place in Switzerland, finding no fraud, and therefore declining to decide whether section 10(a)(1) conflicted with the N.Y. Act). *See generally* CARBONNEAU, *supra* note 7, at 297–335.

> the arbitration, and (3) established by clear and convincing evidence.[277]

2. *Section 10(a)(2)—Arbitrator Corruption*

Pursuant to section 10(a)(2), a court may vacate an award "where there was evident partiality or corruption in the arbitrators, or either of them."[278] However, a court can only apply section 10(a)(2) when vacating an actual award, not when disqualifying an arbitrator during the course of the arbitration.[279]

3. *Section 10(a)(3)—Arbitrator Misconduct*

Pursuant to section 10(a)(3), a court may vacate an award "where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, 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."[280] Section 10(a)(3) has been interpreted "to mean that *except where fundamental fairness is violated,* arbitration determinations will *not* be opened up to evidentiary review."[281]

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[277] Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 304 (S.D. Tex. 1997); *aff'd* 161 F.3d 314 (5th Cir. 1998) (citing Gingiss Int'l, Inc. v. Bormet, 58 F.3d 328, 333 (7th Cir. 1995); A.G. Edwards & Sons, Inc. v. McCollough, 967 F.2d 1401, 1404 (9th Cir. 1992), *cert. denied*, 506 U.S. 1050, 1050 (1993); Dean Foods Co. v. United Steel Workers of Am., 911 F. Supp. 1116, 1124 (N.D. Ind. 1995); Shearson Hayden Stone, Inc. v. Liang, 493 F. Supp. 104, 108 (N.D. Ill. 1980), *aff'd*, 653 F.2d 310 (7th Cir. 1981)). *But see* Dandong Shuguang Axel Corp., Ltd. v. Brilliance Mach. Co., No. C 00-4480, 2001 WL 637446, at *5 (N.D. Cal. June 1, 2001) (entertaining a section 10(a)(1) defense, despite the fact arbitration took place in China, via Article V(2)(b) based on public policy).

[278] 9 U.S.C. § 10(a)(2); *see* AAOT Foreign Econ. Ass'n (VO) Technostroyexport v. Int'l Dev. & Trade Servs., Inc., 139 F.3d 980, 981 (2d Cir. 1998) (holding that if a party has knowledge of partiality or corruption, it must raise the issue before an adverse award is rendered or it will have waived bringing such defense under Article V(2)(b) ("public policy exception")); Lucent Techs., Inc. v. Tatung Co., No. 02 Civ. 8107(JSR), 2003 WL 402539, at *2 (S.D.N.Y. Feb. 20, 2003) (denying discovery on the issue of the arbitrators' alleged conflicts of interest absent "clear evidence of any impropriety" (quoting Lyeth v. Chrysler Corp., 929 F.2d 891, 899 (2d Cir. 1991)).

[279] Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 935–37 (N.D. Cal. 2003); Application of York Hannover Holding A.G. v. Am. Arbitration Ass'n, No. 92 Civ. 1643 (CSH), 1993 WL 159961, at *2–5 (S.D.N.Y. May 11, 1993) (declining to determine whether a court could use its inherent equitable power to remove an arbitrator for bias before the panel rendered a final award because the party failed to establish that the arbitrator was in fact biased). *But see* McKenzie v. Wilson, No. 02 C 4100, 2002 WL 31056688, at *3 (N.D. Ill. Sept. 13, 2002).

[280] 9 U.S.C. § 10(a)(3); *see also* Trans Chemical Ltd. v. China Nat'l Mach. Imp. & Exp. Corp., 978 F. Supp. 266, 306–10 (S.D. Tex. 1997).

[281] Deiulemar Compagnia Di Navigazione, S.p.A. v. Transocean Coal Co., Inc., No. 03 Civ. 2038(RCC), 2004 WL 2721072, at *6 (S.D.N.Y. Nov. 30, 2004) (quoting Tempo Shain Corp. v. Bertek, Inc., 120 F.3d 16,

4. *Section 10(a)(4)—Arbitrators Exceeded Authority*

Pursuant to section 10(a)(4), a court may vacate an award "where 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."[282] A court must "enforce an award 'if the arbitrator's award draws its essence from the . . . agreement, and is not merely his own brand of industrial justice.'"[283] A court will uphold an award if the arbitrator(s) were "even arguably construing or applying the contract."[284]

N. Section 10 vs. N.Y. Act's Silence—Standing to Challenge an Award

The FAA limits who may seek to vacate an arbitral award in section 10, while the N.Y. Act remains silent as to issues of vacatur.[285] A court may vacate an award upon "application of any party to the arbitration."[286] Therefore, a third party beneficiary of a contract containing an arbitration agreement cannot seek to vacate an award arising from that agreement.[287] The Fifth Circuit case of *Psarianos v. Standard Marine, Ltd.* provides an example.[288] In that case, a ship sank in international waters and the surviving crew members and family of deceased crewmembers filed suit against the vessel's owner, ultimately winning a judgment.[289] The vessel owner later

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20 (2d Cir.1997) (emphasis added by court)) (holding that two arbitrators excluding a third from deliberations did not violate section 10(3) so long as the arbitral proceedings were fundamentally fair); *see also* InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 72–73 (S.D.N.Y. 1993) (holding that deciding a contractual issue without hearing live testimony did not violate section 10(a)(3)).

[282] 9 U.S.C. § 10(a)(4).

[283] Jacada (Europe), Ltd. v. Int'l Mktg. Strategies, Inc., 401 F.3d 701, 712 (6th Cir. 2005) (quoting United Paperworkers Int'l Union v. Misco, 484 U.S. 29, 36 (1987)); *see also* Certain Underwriters at Lloyd's London v. Argonaut Ins. Co., 264 F. Supp. 2d 926, 937–45 (N.D. Cal. 2003) (holding that an interim arbitral award requiring a party to pre-pay into an escrow account held by the other party's attorney, rather than posting a bond, drew its essence from the arbitration agreement, but finding that the arbitral tribunal exceeded its power in imposing sanctions of $10,000 per day until the payment was made); Underwriters at Lloyd's London Who Participated in Syndicates v. BCS Ins. Co., 239 F. Supp. 2d 812, 816–18 (N.D. Ill. 2003).

[284] *United Paperworkers Int'l Union*, 484 U.S at 38. Additionally, Article V(1)(c) of the Convention "tracks in more detailed form § 10(d) of the Federal Arbitration Act, 9 U.S.C. § 10(d) [now 9 U.S.C. § 10(a)(4)], which authorizes vacating an award '[w]here the arbitrators exceeded their powers.'" Nat'l Oil Corp. v. Libyan Sun Oil Co., 733 F. Supp. 800, 817 (D. Del. 1990) (quoting Parsons & Whittemore Overseas Co., Inc. v. Societe Generale De L'Industrie Du Papier (RAKTA), 508 F.2d 969, 976 (2d Cir. 1974)).

[285] *See supra* Part III.M.

[286] 9 U.S.C. § 10; Bacashihua v. U.S. Postal Serv., 859 F.2d 402, 405 (6th Cir. 1988).

[287] *See* 9 U.S.C. § 10.

[288] Psarianos v. Standard Marine, Ltd., 12 F.3d 461 (5th Cir. 1994).

[289] *Id.* at 462–63.

arbitrated insurance claims against its insurer and lost.[290] After a convoluted procedural history, the aforementioned plaintiffs sought to vacate the arbitral award in favor of the insurance company and bring a direct action against the insurance company.[291] The court held that plaintiffs did not have standing to vacate the award as they were not parties to the arbitration.[292] Due to the N.Y. Act's general silence on the matter, the Act incorporates section 10's standing requirement for vacating an award as a non-conflicting FAA provision.

O. Section 11 vs. N.Y. Act's Silence—Judicial Modification of an Award

As previously discussed, motions to vacate and actions to confirm an arbitral reward are distinct.[293] The N.Y. Act simply does not address vacatur when an award was rendered within the United States because the New York "Convention provides no restraint whatsoever on the control functions of local courts at the seat of arbitration."[294] As a result, the N.Y. Act incorporates section 11's grant of authority to modify an award as a non-conflicting provision when the award was rendered in the United States.[295]

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[290] *Id.* at 463 (finding that the arbitrators determined that the vessel owner had "not complied with the insurance contract," a condition precedent to the insurance company having to pay out on the policy).

[291] *Id.*

[292] *Id.* at 465.

[293] *See supra* Parts II.C, III.M.

[294] Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc., 126 F.3d 15, 22 (2d Cir. 1997) (quoting W. Laurence Craig, *Some Trends and Developments in the Laws and Practice of International Commercial Arbitration*, 30 TEX. INT'L L.J., 1, 11 (1995)).

[295] Section 11, titled "Same; modification or correction; grounds; order," provides:

> In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—
>
> (a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.
>
> (b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.
>
> (c) Where the award is imperfect in matter of form not affecting the merits of the controversy.
>
> The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

9 U.S.C. § 11 (2006).

P. *Section 12 vs. N.Y. Act's Silence—Procedure to Vacate an Award*

The N.Y. Act incorporates most of section 12 for the same reason it incorporates section 11 (vacatur vs. confirmation distinction).[296] Like section 9, section 12 sets forth a specific procedure for serving a party to an action to vacate: "If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court."[297] As with section 9, the circumstances of a particular case will dictate whether this requirement will conflict with the N.Y. Act; if the non-vacating party is a resident then no conflict exists, but if that party does not have an ongoing presence within the United States then a conflict will arise.[298]

Q. *Section 13 vs. N.Y. Act's Silence—Procedure to Enforce a Confirmed Award*

The N.Y. Act "provides little guidance on the procedure to enforce a confirmed arbitration award" but incorporates section 13 as a non-conflicting provision.[299] Section 13 states:

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[296] *See supra* Part II.C. Section 12, titled "Notice of motions to vacate or modify; service; stay of proceedings," provides:

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. . . . For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

9 U.S.C. § 12.

[297] 9 U.S.C. § 12.

[298] See *supra* Part III.L for the reasoning behind this conclusion. *See also* InterCarbon Berm., Ltd. v. Caltex Trading & Transp. Corp., 146 F.R.D. 64, 67 (S.D.N.Y. 1993). The court in *InterCarbon Bermuda* noted:

> Section 12 does not squarely conflict with sections 201–08 or the Convention, but neither does it give any direction for service on a foreign party. Instead, for a nonresident of the district where an award is made, Section 12 requires service by a marshal in any district where the nonresident is found. The problem is that foreign parties will not necessarily be found in *any* district. Requiring parties to satisfy Section 12 might amount to requiring them to do the impossible.

Id.

[299] Ermenegildo Zegna Corp. v. Lanificio Mario Zegna, S.p.A., No. 02 Civ. 3511, 2003 WL 21709424, at *2 (S.D.N.Y. July 22, 2003) (compelling post-judgment discovery to determine whether the defendant continued to satisfy the terms of a confirmed arbitral award).

> The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.[300]

Therefore, a confirmed award, regardless of where the award was rendered, becomes indistinguishable from a judgment, and a court's full panoply of enforcement procedures become available to the party that prevailed in arbitration and subsequent confirmation proceedings.[301]

R. Section 14 vs. N.Y. Act's Silence—Contracts

Section 14 applies to the N.Y. Act by its own terms, stating, "This title shall not apply to contracts made prior to January 1, 1926."[302] Therefore, it does not implicate section 208.

S. Section 15 vs. N.Y. Act's Silence—Act of State Doctrine

Congress revised the FAA in 1988 to include section 15, which states: "Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine."[303] The Act of State Doctrine is inherently international in character and would intuitively fall under the N.Y. Act,[304] but the N.Y. Act is silent as to the doctrine. In light of the N.Y. Act's general silence, "[n]o reason is apparent why 9 U.S.C. § 15 would be in conflict with either of the Conventions or either of the FAA Chapters that implemented them."[305]

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300 9 U.S.C. § 13.

301 *See id.*

302 *Id.* § 14.

303 *Id.* § 15. The Act of State doctrine says that "acts carried-out as part of a nation's assertion of sovereign powers are not attributable to individuals. This doctrine is followed by municipal courts to avoid ruling on the actions of states." JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 6 (1992). For analysis before the enactment of section 15, see *Letelier v. Republic of Chile*, 748 F.2d. 790, 799 (2d Cir. 1984); *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175, 1179 (D.D.C. 1980).

304 *See generally* CARBONNEAU, *supra* note 7, at 115–18.

305 Republic of Ecuador v. ChevronTexaco Corp., 376 F. Supp. 2d 334, 366 (S.D.N.Y. 2005).

T. Section 16 vs. N.Y. Act's Silence—Appellate Jurisdiction

Section 16 enumerates the grounds upon which a party to an arbitration agreement or award may appeal an order of a district court.[306] Sections 15 and 16 are the only two sections of the FAA enacted after the codification of the New York Convention.[307] Congress clearly took the N.Y. Act into consideration when drafting them, as evidenced by section 16's express reference to section 206.[308] Therefore, section 16 does not implicate any section 208 interpretive issues and should be followed by its terms.

As established above, the vast majority of interpretive issues arising from Title 9 and the New York Convention can be harmonized by focusing on the most specific element of the various texts. By focusing on specificity, a fairly uniform arbitral scheme emerges with the N.Y. Act incorporating most elements of the FAA as non-conflicting provisions pursuant to section 208.

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[306] Section 16, titled "Appeals," provides:

> (a) An appeal may be taken from—
> (1) an order—
> (A) refusing a stay of any action under section 3 of this title,
> (B) denying a petition under section 4 of this title to order arbitration to proceed,
> (C) denying an application under section 206 of this title to compel arbitration,
> (D) confirming or denying confirmation of an award or partial award, or
> (E) modifying, correcting, or vacating an award;
> (2) an interlocutory order granting, continuing, or modifying an injunction against an arbitration that is subject to this title; or
> (3) a final decision with respect to an arbitration that is subject to this title.
> (b) Except as otherwise provided in section 1292(b) of title 28, an appeal may not be taken from an interlocutory order—
> (1) granting a stay of any action under section 3 of this title;
> (2) directing arbitration to proceed under section 4 of this title;
> (3) compelling arbitration under section 206 of this title; or
> (4) refusing to enjoin an arbitration that is subject to this title.

9 U.S.C. § 16; *see* David L. Threlkeld & Co. v. Metallgesellschaft, Ltd., 923 F.2d 245 (2d Cir. 1991) (appealing denial of motion to compel arbitration).

[307] *See* Pub. L. No. 100-669, § 1 (1988) (codified at 9 U.S.C. § 15); Pub. L. No. 101-650, § 325(a)(1) (1990) (codified at 9 U.S.C. § 16). The New York Convention was codified in 1970. Pub. L. No. 91-368, § 4 (1970) (codified at 9 U.S.C. §§ 201–08) ("This Act [enacting this chapter] shall be effective upon the entry into force of the Convention on Recognition and Enforcement of Foreign Arbitral Awards with respect to the United States."). The Convention entered into force for the United States on December 29, 1970. UNCITRAL, Status: 1958—Convention on the Recognition and Enforcement of Foreign Arbitral Awards, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html (last visited Feb. 20, 2009).

[308] *See* 9 U.S.C. § 16(a)(1)(C), (b)(2) (2006).

CONCLUSION

From its inception, arbitration has continually sought independence from the judiciary. The quest for independence can only go so far. Arbitration lacks the muscle that only a sovereign power can provide through the operation of its judiciary. Therefore, arbitration cannot escape its indirect reliance upon sovereign power by operation of the judiciary and statutory law. At the same time, the judiciary has recognized the benefits of cultivating arbitration as a colleague in resolving disputes. The ongoing give and take between arbitration's need for judicial muscle and desire for independence generally characterizes the relationship between the judiciary and arbitration.

The interests of arbitration and the judiciary align on the issue of statutory interpretation. Arbitration requires a reliable statutory base to anchor the process to a firm rock of sovereign power. The judiciary can provide that stable rock by interpreting the federal statutory texts addressing arbitration in a uniform and consistent manner.[309] To interpret the arbitration statutes uniformly and consistently requires a principled method of analysis.

A principled method does exist to interpret the interaction of the domestic and international arbitral statutory texts, although one cannot easily discern it from individual cases. Section 208 of the N.Y. Act injects a special wrinkle into interpreting the arbitration statutes in a principled manner because of the unique way in which it provides a statutory tool for melding two ostensibly different arbitral schemes together. An analysis of the entirety of section 208 jurisprudence uncovers a clear, principled, and interpretive paradigm for reconciling the domestic and international arbitral schemes.

The interpretive paradigm begins with the fundamental question of whether a conflict exists between the texts of the FAA and the N.Y. Act. Section 208 establishes that the N.Y. Act will trump conflicting provisions of the FAA.[310] Case law reveals three hierarchical considerations of descending importance to aid in determining whether a conflict exists. First and foremost, the level of specificity of a particular element of the text of Title 9 carries the most weight in determining whether a conflict exists between the FAA and the N.Y. Act. Section 8 of the FAA, which grants a court the power to issue a pre-arbitral

[309] This analogy to the clash between independence and the need for judicial muscle goes to how large the rock of sovereign involvement should be—an issue outside the scope of this Article—whereas consistent statutory interpretation determines the firmness of the rock.

[310] 9 U.S.C. § 208.

ruling on the attachment of property when the underlying action would have arisen in admiralty, provides a clear example of a very specific section of the FAA extending to the N.Y. Act.[311] The N.Y. Act remains silent on many procedural elements of arbitration, such as section 8. The N.Y. Act's general silence in no way conflicts with section 8's narrow and specific grant of authority to permit a pre-arbitral ruling on the attachment of property.[312]

Second, courts should and do avoid interpretations of Title 9 that lead to conflicts between the FAA and N.Y. Act.[313] By avoiding interpretations of Title 9 that would lead to a conflict, courts cultivate a uniform body of arbitral law that will lend greater predictability to the resolution of disputes arising under the N.Y. Act. As a result, case law shows that very few conflicts exist between the FAA and N.Y. Act. Only on the issues of the "Extent of District Courts Authority to Compel Arbitration" and "Venue and Statute of Limitations" do the schemes truly conflict.[314] Even if one construes the issues falling under the FAA-General vs. N.Y. Act-Specific class of conflict as conflicting rather than differences in kind, that only establishes three further conflicts between the FAA and N.Y. Act: conflict on the issues of "Federal Subject Matter Jurisdiction," "Consent to Confirmation Requirement," and "Defenses to Confirmation of an Arbitral Award."[315]

Third is the pro-arbitration policy of the United States, the most fluid interpretive consideration and a gap-filling consideration. However, the pro-arbitration policy only serves such a role when the text of Title 9 fails to clearly address an issue, because statutory interpretation should begin with and focus on the actual text.[316] The pro-arbitration policy receives a lot of attention from the courts because it provides a simple analytical shortcut around a rigorous analysis of the text of Title 9. Hopefully, this Article has set out an analytical structure for interpreting the interaction of the FAA and N.Y. Act that will prevent courts from relying on the pro-arbitration policy as an analytical shortcut because such a method occasionally leads courts to the incorrect conclusion, with the section 1 exemption for seamen to arbitration providing the clearest example.[317] The policy should play a role, but it should

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[311] *Id.* § 8.
[312] *See supra* Part III.K.
[313] *See, e.g.*, Part I.A.
[314] *See supra* Parts III.D, I.B.
[315] *See supra* Part II.
[316] *See* Bautista v. Star Cruises, 396 F.3d 1289, 1295 (11th Cir. 2005).
[317] *See supra* Part III.A.

play a constrained one at the margins of deciding whether a section of the FAA extends to the N.Y. Act. The U.S. arbitral scheme proves quite cohesive in regard to the convergence of the FAA and N.Y. Act when analyzed under the principled interpretive paradigm set out in this Article.