COMMENT

THE LIMITATIONS OF TRADITION: HOW MODERN CHOICE OF LAW DOCTRINE CAN HELP COURTS RESOLVE CONFLICTS WITHIN THE NEW YORK CONVENTION AND THE FEDERAL ARBITRATION ACT

ALEXANDER SEVAN BEDROSYAN†

† Executive Editor, Volume 164, *University of Pennsylvania Law Review*. Oralist, Jessup International Law Moot Court Competition Team of University of Pennsylvania Law School. J.D. Candidate, 2016, University of Pennsylvania Law School; B.A. *summa cum laude*, 2012, Columbia University. I am indebted to my colleagues Sara Arrow, Andrew Cherry, Do-Hee Jeong, Michael Keblesh, Rebecca Kopplin, Andrew Schlossberg, Jacob Singer, and William Stewart. I would also like to thank Professors Kermit Roosevelt III and William Burke-White for their unparalleled instruction on the legal subject areas discussed in this Comment. Most importantly, I am grateful for the professional and personal guidance, respectively, of John Townsend and James H. Boykin III, and of Lina, Daron, Raffi, and Joy.

INTRODUCTION

Imagine that you manage an Australian pharmaceutical company. Because your patent permitting the sale of diabetes medication in Australia will expire in one year, you look to sell your product in Japan. Unfamiliar with the Japanese market, you enter into a co-promotion agreement with Beta, a Belgian pharmaceutical company with extensive experience in Japan. Wary of litigating in a foreign, civil law jurisdiction, your counsel recommends that you include an arbitration clause in your co-promotion agreement, which you adopt.

Six months after the conclusion of the agreement, you suspect that Beta has not lived up to its promotional obligations, as Japanese doctors are not prescribing your medication. Pursuant to the agreement, you commence arbitration in London. Fortunately, the arbitration produces an award requiring Beta to pay you hundreds of millions of dollars. Seeking the money you are due under the award, you bring an action to enforce the award before a Belgian court. To your surprise, the Belgian court, rather than summarily enforcing the award, agrees to hear a counterclaim that Beta raises against you. This counterclaim protracts the litigation, and by the time you defeat the counterclaim and prevail in the action, Beta has transferred its assets out of Belgium.

After an exhaustive search, you find enough of Beta's assets in the United States to satisfy the award against Beta. Moreover, your counsel indicates that American courts will refuse to hear any counterclaims that Beta might raise in any enforcement proceedings. You therefore bring an enforcement action in U.S. federal court. To your dismay, the court dismisses your claim as time-barred by the Federal Arbitration Act's three-year statute of limitations. Your foray into international commerce decisively stymied, you resign yourself to developing a new drug to distribute in Australia.

The difficulties faced by the fictional Australian pharmaceutical company above mirror the obstacles that real parties encounter when trying to enforce rights secured through international arbitration. These difficulties stem from the fact that countries have enacted different barriers to the enforcement of international arbitral awards.[1] These cross-national

1 *See* Teresa Cheng, *Celebrating the Fiftieth Anniversary of the New York Convention* (noting that attempts to enforce the same award in different jurisdictions have produced inconsistent

differences in barriers persist today, despite the fact that the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ("New York Convention" or "Convention") attempted to eliminate such differences.[2] Through the New York Convention, the international community sought to limit and standardize the grounds on which countries could refuse to enforce arbitral awards.[3]

The lack of international uniformity does not arise because countries that have ratified the New York Convention are intentionally violating the treaty; rather, the problem lies within the treaty itself—the New York Convention contains a choice of law problem. It establishes that two sets of laws will govern actions to enforce international arbitration awards: its own provisions and the national laws of state-parties.[4] National courts have adopted traditional choice of law methods in order to choose whether they will use their own national laws or the treaty provisions to decide a particular issue. However, this divergence has brought to enforcement actions the same two problems it has brought to other more conventional civil litigations—absurd and nonuniform outcomes. The lack of uniformity is particularly vexing, as the New York Convention's very purpose was to ensure the uniform treatment of a given arbitration award across countries.

This Comment proposes that just as courts have abandoned the traditional choice of law approach in conventional litigation, they should also abandon it in arbitral enforcement litigation. Courts should instead use modern choice of law doctrine. Employing modern choice of law doctrine to enforcement actions would produce sensible results and bring uniformity to the enforcement of international arbitral awards. This Comment focuses on the United States and the Federal Arbitration Act as a case study.[5] It suggests that applying modern American choice of law doctrine to the Federal Arbitration Act, mainly by limiting the application of the statute of limitations contained in section 207 of the Act, would help the United States better implement the New York Convention.

Part I of this Comment sets out the background, purpose, and provisions of the New York Convention. Part II uncovers the choice of law problem embedded in the treaty, and in the Federal Arbitration Act that implements

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outcomes), *in* 50 YEARS OF THE NEW YORK CONVENTION 679, 683 (Albert Jan van den Berg ed., 2009).

2 June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38; *see also* Cheng, *supra* note 1, at 679 ("It is trite and well recognized that the grounds upon which parties can rely to resist enforcement have been exhaustively listed in Art. V [of the New York Convention].").

3 *See* New York Convention, *supra* note 2, art. V.

4 *Id.*, art. III.

5 9 U.S.C. §§ 201–208 (2012) (implementing the New York Convention).

the treaty in the United States. Part III describes the traditional choice of law approach and demonstrates that the adoption of this approach in implementing the New York Convention has brought about absurd and nonuniform consequences. Part IV suggests moving to a modern choice of law approach. Focusing on the United States and the Federal Arbitration Act, it offers three variants of modern American choice of law doctrine: interest analysis, *Erie* analysis, and Reverse-*Erie* analysis. These variants all call for either restricting the scope of the statute of limitations found in the Federal Arbitration Act, or subordinating it in favor of the statute of limitations found in the New York Convention itself. The use of a modern choice of law approach would allow the United States in particular, and state-parties in general, to effectuate the purpose of the Convention, and restore uniformity to the enforcement of international arbitral awards worldwide.

I. BACKGROUND, PURPOSE, AND PROVISIONS OF THE NEW YORK CONVENTION

A successor to the Geneva Convention on the Execution of Foreign Arbitral Awards,[6] the New York Convention has been described as "the most effective instance of international legislation in the entire history of commercial law."[7] The treaty's success is further substantiated by the representative worldwide participation in it: 149 nations have ratified it,[8] including "all parts of the world [with] many different levels of commerce and development[, and a]lmost all the major international trading nations."[9] This near-universal participation is made all the more remarkable when one considers that the Convention undertakes the controversial endeavor of limiting countries' judicial sovereignty. For example, no treaty regarding the enforcement of foreign court judgments has achieved comparable

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6 Sept. 26, 1927, 92 L.N.T.S. 302. For a discussion of the problems in this predecessor treaty, see Robert Briner and Virginia Hamilton, *The History and General Purpose of the Convention: The Creation of an International Standard to Ensure the Effectiveness of Arbitration Agreements and Foreign Arbitral Awards*, *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 3, 6-11 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

7 Michael John Mustill, *Arbitration: History and Background*, 6 J. INT'L ARB. 43, 49 (1989).

8 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetails. aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&lang=en [http://perma.cc/YUQ2-94YG] (last updated Oct. 6, 2015) (listing the countries that have signed or ratified the New York Convention).

9 Joseph T. McLaughlin & Laurie Genevro, *Enforcement of Arbitral Awards Under the New York Convention—Practice in U.S. Courts*, 3 BERKELEY J. INT'L L. 249, 251 (1986).

participation.[10] Yet, the vast majority of states have decided to sacrifice some degree of judicial sovereignty in the enforcement of foreign arbitral awards.

States sacrifice such sovereignty in return for the economic and reputational benefits conferred by accession to the New York Convention. A state that joins the treaty signals to the international business community that it is a hospitable forum where businesses may resolve their disputes,[11] particularly since the Convention allows state-parties to limit their enforcement of awards only to those awards made in the territory of other state-parties.[12] Even putative states accede to the Convention,[13] suggesting that membership in the treaty legitimizes a state's claim to a place not just in the international business community, but also in the community of states more broadly.

The Convention's purpose is to bring uniformity and efficiency to the enforcement of international arbitration awards.[14] For example, the U.S.

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10 *See* Hague Convention on Choice of Court Agreements, June 30, 2005, 44 I.L.M. 1294 (mandating that state parties enforce in their courts judgments given by courts of other state parties in cases arising out of contracts with an exclusive choice of court agreement). This treaty has been ratified only by Mexico and members of the European Union (except for Denmark), and signed by the United States and Singapore. *Status Table: Convention of 30 June 2005 on Choice of Court Agreements*, HAGUE CONFERENCE ON PRIV. INT'L L., http://www.hcch.net/index_en.php?act=conventions.status2&cid=98 [http://perma.cc/BZ4A-PA6Z] (last updated June 19, 2015) (listing the countries that have signed or ratified the Hague Convention).

11 *See* New York Convention, *supra* note 2, art. III (mandating that state-parties enforce arbitral awards brought before their courts); Gerold Herrmann, *The 1958 New York Convention: Its Objectives and Its Future* (stating that the availability of dispute resolution has proven to be "the single most convincing reason for adherence" to the Convention in the author's conversations with representatives of non-signatory states), *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 15, 18 (Albert Jan van den Berg ed., 1999). The influence of the Convention does not stop with accession, as states that have acceded typically modify the rest of their national arbitration legislation to conform to the pro-arbitration framework established by the Convention. Briner & Hamilton, *supra* note 6, at 20.

12 New York Convention, *supra* note 2, art. I. Nearly two-thirds of state-parties have availed themselves of this right, known as the "reciprocity reservation." GARY B. BORN, INTERNATIONAL ARBITRATION: LAW AND PRACTICE § 2.02[G] (2012).

13 *See, e.g.*, Alison Ross, *Palestine Accedes to the New York Convention*, GLOBAL ARB. REV. (Jan. 7, 2015), http://globalarbitrationreview.com/news/article/33283/palestine-accedes-new-york-convention/ [http://perma.cc/ANZ4-EXKJ] (noting that Palestine, which is "not universally recognised as a sovereign state," acceded to the New York Convention).

14 *See* Rory Brady, *Comments on a New York Convention for the Next Fifty Years* (assuming that the New York Convention's "twin goals of efficiency and uniformity in the enforcement of international arbitration awards are probably shared by everybody"), *in* 50 YEARS OF THE NEW YORK CONVENTION, *supra* note 1, at 708, 708; *see also* Albert Jan van den Berg, *Striving for Uniform Interpretation* (noting that at the time the Convention was concluded, delegates believed that the text and structure ensured uniformity), *in* ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION: EXPERIENCE AND PROSPECTS 41, 41 (United Nations 1999).

Supreme Court has stated that the Convention seeks 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."[15] The Convention looks to national courts to achieve its purpose. It "mobilises national courts as enforcement agencies while simultaneously restricting their scope of national judicial supervision over international arbitration awards."[16]

There are three key provisions that collectively achieve this simultaneous "mobilization and restriction," or in other words, that simultaneously create and limit the authority of national courts to enforce awards.

First, Article III mobilizes (creates authority for) national courts to enforce international arbitration awards by requiring them to enforce such awards: "Each Contracting State *shall recognize* arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."[17] The next two articles then restrict national courts' scope of "supervision over international arbitration awards" by respectively limiting the evidence and substantive defenses national courts may consider in enforcement proceedings.[18] Article IV sets out the evidentiary requirements of enforcement proceedings. The requirements are minimal: a party seeking enforcement need only provide (a) the authenticated original or certified copy of the award, and (b) the original arbitration agreement pursuant to which the award was made.[19]

Article V then lays out the seven exhaustive defenses that permit, but do not require, a court to refuse to enforce an award:

> 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 arbitration agreement was invalid due to incapacity of the parties or otherwise under the law governing the arbitration agreement]; or
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> (b) [The award debtor lacked notice or an opportunity to be heard]; or

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15 Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1973).

16 Michael Reisman, *Preface* to ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 6, at 1, 1. This combination has been described as the "genius" of the Convention. *Id.*

17 New York Convention, *supra* note 2, art. III (emphasis added).

18 Reisman, *supra* note 16, at 1.

19 *See* New York Convention, *supra* note 2, art. IV.

> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration . . . ; or
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> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties [or of 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.
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> 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:
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> (a) The subject matter of the difference is [non-arbitrable]; or
>
> (b) The recognition or enforcement of the award would be contrary to the public policy of that country.[20]

These provisions achieve efficiency by limiting the evidence and issues that courts may consider, thereby turning enforcement actions into summary proceedings.[21] They achieve uniformity by standardizing the grounds on which national courts may refuse to recognize awards. Indeed, the international community standardized the grounds for nonenforcement in Article V because it thought that standardized international rules are preferable to the various grounds for refusal that were found in signatories' domestic laws prior to the creation of the Convention, since "mechanical application of domestic arbitral law to foreign awards . . . would seriously undermine finality and regularly produce conflicting judgments."[22]

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20 *Id.* art. V (emphasis added).

21 *See* Zeiler v. Deitsch, 500 F.3d 157, 169 (2d Cir. 2007) ("Confirmation under the [New York] Convention is a summary proceeding in nature, which is not intended to involve complex factual determinations, other than a determination of the limited statutory conditions for confirmation or grounds for refusal to confirm."); Diapulse Corp. of Am. v. Carba, Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980) ("The purpose of arbitration is to permit a relatively quick and inexpensive resolution of contractual disputes by avoiding the expense and delay of extended court proceedings. Accordingly, it is a well-settled proposition that judicial review of an arbitration award should be, and is, very narrowly limited." (internal citations omitted)); Evergreen Sys., Inc. v. Geotech Lizenz AG, 697 F. Supp. 1254, 1257 (E.D.N.Y. 1988) ("[T]he [New York] Convention envisions a summary disposition of the issues where the relief sought is to be denied only if the party resisting enforcement shows that one of the specific grounds stated in the Convention for non-enforcement exists.").

22 Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 n.2 (2d Cir. 1999).

II. THE NEW YORK CONVENTION AND THE FEDERAL ARBITRATION ACT EACH CONTAIN WITHIN THEM A CHOICE OF LAW PROBLEM

Choice of law problems arise when different laws attach different consequences to the same set of facts.[23] The different laws need not come from different sovereigns, as a choice of law involves just that—a clash of legal rules, not legal systems.[24] A court confronting a choice of law problem has a two-step process for resolving it.[25] First, the court must decide whether all of the different laws do in fact attach consequences—that is, establish rights or obligations—to the facts. Second, if more than one law attaches consequences, the court must decide which should prevail.

The New York Convention presents such a choice of law problem. Article III provides that "[e]ach Contracting State shall recognize arbitral awards as binding and enforce them *in accordance with the rules of procedure of the territory* where the award is relied upon, *under the conditions laid down in the following articles*."[26]

Thus, this provision establishes that two sets of laws will govern actions in national courts to enforce arbitral awards: (1) the rules of procedure of the national courts, and (2) the "conditions laid down in the following articles," referring to Articles IV and V of the Convention itself, respectively establishing evidentiary requirements and grounds for refusal.[27]

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23 *See* Kermit Roosevelt III, *The Myth of Choice of Law: Rethinking Conflicts*, 97 MICH. L. REV. 2448, 2465 (1999) (defining a conflict of laws as a situation involving "rights created by different laws," such as when the plaintiff asserts a right derived from one law, and the defendant counters with a right (or privilege against liability) derived from another).

24 Larry Kramer, *More Notes on Methods and Objectives in the Conflict of Laws*, 24 CORNELL INT'L. L.J. 245, 252 (1991); *see also id.* at 250-52 (presenting a hypothetical conflict between two "vehicular collision" statutes from the same jurisdiction as potentially applicable to a passenger struck by a vehicle on an on-ramp); Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 283 (1990) ("[T]he assumption that choice of law problems arise only in multistate cases is erroneous.").

25 *See* KERMIT ROOSEVELT, III, CONFLICT OF LAWS 1 (2d ed. 2010) (describing the two steps as, first, establishing the scope of the various applicable laws, and, second, devising a rule of priority to choose one law over the others); Kramer, *Rethinking Choice of Law*, *supra* note 24, at 285 (noting that "[c]hoosing between [two] laws requires a two-step process," first, interpreting each law in isolation, and then choosing between them in the event that both give the plaintiff a right to recover); Larry Kramer, *Return of the Renvoi*, 66 N.Y.U. L. REV. 979, 982 (1991) ("This approach [to resolving choice of law disputes] consists of two steps: a first step to determine whether there is a conflict, and a second step to resolve conflicts on the basis of 'policy-selecting rules.'").

26 New York Convention, *supra* note 2, art. III (emphasis added).

27 Albert Jan van den Berg, *The New York Convention of 1958: An Overview* ("[A] clear distinction is made between the conditions for enforcement in respect of which the Convention alone is controlling and the procedure for enforcement in respect of which the procedural law of the forum governs."), *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 6, at 39, 54; Emilia Onyema, *Formalities of the*

These two sets of laws may conflict. In other words, they may attach different consequences to the same enforcement action. More specifically, a national procedural rule may require a court to dismiss a claim for enforcement, while Article V, which calls for enforcement in the absence of any enumerated ground for refusal, may require the award to be enforced. This situation commonly arises with national statutes of limitations that bar enforcement actions. For example, the Federal Arbitration Act is the implementing legislation[28] for the Convention in the United States.[29] Section 207 of the Act provides a statute of limitations of three years for enforcement actions.[30] However, Article V of the Convention omits any limitations period from its exhaustive list of grounds for refusal of enforcement; this omission may be recast as establishing an indefinite time period in which enforcement may be sought.[31] Thus, if a claim to enforce an award comes before an American court more than three years after the award was made, the court must choose between the three-year limitations period in section 207, and the indefinite limit in Article V of the Convention.

How a court should solve this problem, in other words which law it should apply to the issue of time limits for seeking enforcement, has attracted "surprisingly little debate" among arbitration practitioners and

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Enforcement Procedure (Article III and IV) (highlighting the "distinction between the *conditions* for recognition and enforcement of a final award controlled by its Article IV and the *procedure* for [doing so], controlled by the procedural law of the relevant Contracting State [per Article III]"), *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 6, at 597, 597.

28 The New York Convention is not self-executing in the United States. It becomes part of American domestic law only if it is expressly incorporated therein through a statute, known as "implementing legislation." *See* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(3) (AM. LAW INST. 1987) ("Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a 'non-self-executing' agreement will not be given effect as law in the absence of necessary implementation.").

29 *See* 9 U.S.C. § 201 (2012) ("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.").

30 *See* 9 U.S.C. § 207 (2012) ("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.").

31 *See* New York Convention, *supra* note 2, art. V (detailing an exhaustive list of grounds for refusal of enforcement that does not include a limitations period); *see also* GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION § 26.07 (2d ed. 2014) ("An argument can be made that the application of national statutes of limitations to Convention awards violates the Convention, by imposing a ground for non-recognition that is not permitted by Article V of the Convention. Nonetheless, the few national courts to consider this argument have rejected it . . . ."). The reasoning of such national court decisions is described and critiqued *infra*, Section III.B.

scholars.[32] This Comment proposes that American courts use choice of law doctrine to resolve this choice of law problem.

The existing choice of law rule for federal laws, however, does not resolve this problem. International law is considered part of domestic federal law,[33] and, in a conflict between two federal laws, the subsequently enacted rule prevails.[34] The typical conflict arises between a treaty and a separate, subsequently enacted statute. For example, in *Breard v. Greene*, a federal statute enacted in 1996,[35] which provided that a habeas petitioner waived her right to contact her consulate if she failed to assert this right in state court, prevailed over Article 36 of the Vienna Convention on Consular Relations of 1971,[36] which provided that a detainee retains the right to contact her consulate.[37] The Court's holding rested on the fact that the statute was the subsequently enacted rule, and therefore controlled.[38]

The conflict of laws in arbitral enforcement actions before American courts differs from the typical conflict of laws situation involving international law, in that the conflict in enforcement actions is not between a treaty and a separate, subsequently enacted statute. Instead, because the New York Convention contains an internal conflict, this conflict carries over to national statutes that implement the Convention. Thus, the federal conflict discussed in this Comment is embedded *within* the Federal Arbitration Act. Section 207 of the Act provides that

> *[w]ithin 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*

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32 Ank A. Santens, *Difficulties Enforcing New York Convention Awards in the U.S. Against Non-U.S. Defendants: Is the Culprit Jurisprudence on Jurisdiction, the Three-Year Time Bar in the Federal Arbitration Act, or Both?*, KLUWER ARB. BLOG (Dec. 23, 2009), http://kluwerarbitrationblog.com/blog/2009/12/23/difficulties-enforcing-new-york-convention-awards-in-the-us-against-non-us-defendants-is-the-culprit-jurisprudence-on-jurisdiction-the-three-year-time-bar-in-the-federal-arbitration-act-or-bot/ [http://perma.cc/WLB2-HTD4].

33 The Paquete Habana, 175 U.S. 677, 700 (1900) ("International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction . . . ."); Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1555 (1984) (recognizing that while international law became part of "our law" with U.S. independence in 1776, the fact "[t]hat it is part of federal, not state, law has been recognized only recently").

34 Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) ("[A treaty] can be deemed . . . only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.").

35 28 U.S.C. § 2254 (2012).

36 Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

37 523 U.S. 371, 376 (1998).

38 *Id.*

> *finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention*.[39]

The two emphasized portions conflict with each other. The first three words of the provision establish a three-year statute of limitations. Yet, the second portion expressly incorporates Article V of the Convention, including the implied indefinite statute of limitations in the article.

There are two possible explanations for the origins of this conflict. First, Congress may have explicitly intended to pass a statute inconsistent with the Convention, and have intended that the explicit three-year limitations period in the statute would prevail over the implicit indefinite limit in the Convention. If this were the case, then the present analysis would end.

However, the legislative history behind the Federal Arbitration Act suggests that a second explanation is more likely: Congress did *not* intend to violate the Convention, but rather did so unwittingly by misinterpreting it. Three parts of the legislative history reinforce this notion. First, "[f]or the effective implementation of the Convention,"[40] Congress exempted enforcement actions from the jurisdictional and venue requirements of other civil actions: section 203 of the Federal Arbitration Act was amended to explicitly state that federal courts would have jurisdiction over enforcement actions "regardless of the amount in controversy;"[41] likewise, section 204 was amended to allow the district that includes the parties' designated "place of arbitration," if such place is within the United States, to serve as the venue for the enforcement action,[42] even though the place of arbitration would not fall within any of the venue provisions for other civil actions.[43] Second, Congress similarly modified already existing grounds for refusal in order to comply with the treaty: the Federal Arbitration Act that predated the Convention originally did not include "incapacity of the parties" as a ground for refusal, while New York Convention Article V(1)(a) did.[44] Congress decided that "[t]o avoid any possible conflict section 207 [would] provide that the refusal and deferral clauses of the Convention are

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39 9 U.S.C. § 207 (2012) (emphases added).

40 S. REP. NO. 91-702, at 7 (1970).

41 9 U.S.C. § 203 (2012).

42 9 U.S.C. § 204 (2012).

43 *See* 28 U.S.C. § 1391 (2012) (establishing as possible venues for civil actions the place of the defendant's residence, the place where a substantial part of the events giving rise to the claim occurred, or any place where the defendant is subject to personal jurisdiction).

44 Before the United States ratified the New York Convention, its domestic arbitration law, 9 U.S.C. §§ 1–14, governed enforcement of awards made through both domestic and international arbitration. Section 10, which laid out the grounds on which the district court could refuse to enforce an award, did not explicitly include "incapacity of the parties." 9 U.S.C. § 10 (1952).

controlling."[45] And third, Congress felt that the Convention did not prohibit it from adding a statute of limitations for enforcement actions; it interpreted the Convention as being "silent" on the topic.[46] This Comment rests on the premise that Congress's interpretation of the New York Convention was erroneous, as it overlooks the "only if" language in Article V that makes clear that the list of grounds on which a court would decline to enforce an award is exhaustive.

Congress's addition of a statute of limitations inconsistent with Article V of the Convention was not, therefore, an intentional attempt to violate the Convention. Where Congress has intended for its implementing legislation to be inconsistent with a treaty, it has been explicit, as seen in the implementing legislation for the Berne Convention for the Protection of Literary and Artistic Works.[47] By contrast, Congress attempted to do what it thought was permitted by the New York Convention. But in doing so, it unwittingly created a conflict with the Convention.

Because the conflict is *within* a *single* statute, the later-in-time conflict of laws rule for federal laws does not solve the conflict in this case. Therefore this Comment will analyze the New York Convention and Federal Arbitration Act through conflict of law approaches used to decide conflicts among states, and among states and the federal government: the traditional approach of substance–procedure characterization, and the modern approaches of interest analysis, *Erie* analysis, and reverse-*Erie* analysis. While the traditional approach is the most widely used by courts around the world, its use has created foreseeable problems of absurd results, unpredictability, and nonuniformity. The latter problem is particularly vexing in the context of arbitral awards, since the New York Convention was

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45 S. REP. NO. 91-702, at 8 (1970).

46 *Id.* ("The [New York] Convention does not contain any specific provision on this point.").

47 Article 6 of the Berne Convention provided that an author of a work would retain all moral rights to object to distortions of her work, even if the author had already ceded all economic rights to the work. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9 1886, S. TREATY DOC. No. 99-27, 828 U.N.T.S. 221. Congress's implementing legislation, the Berne Convention Implementation Act, contains no protection of moral rights; it explicitly precludes parties from relying on the moral rights protections found in the treaty before American courts. *See* 17 U.S.C. § 101 (2012) ("[The Berne Convention is] not self-executing."); *see also* Berne Convention Implementation Act of 1988, Pub. L. No. 100-568, § 3(b), 102 Stat. 2853, 2853 ("The provisions of the Berne Convention, the adherence of the United States thereto, and satisfaction of United States obligations thereunder, do not expand or reduce any right of an author . . . to object to any distortion . . . [of] the work."). Indeed, Congress was reluctant to embrace the concept of "moral rights," and as such intended to take a "minimalist approach to compliance" with the treaty on this issue. MARGRETH BARRETT, INTELLECTUAL PROPERTY 196 (2d ed. 2008); ROBERTA ROSENTHAL KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES 30 (2010).

enacted to bring uniformity to the enforcement of awards. The modern approaches by contrast would avoid these problems and would be more faithful to congressional intent to ensure maximum compliance with the Convention, because the modern approaches would limit the scope of the three-year limitations period in favor of the indefinite limitations period contained in the Convention.

III. TRADITIONAL APPROACH

A. *Summary of Approach*

The traditional choice of law approach established rigid rules that determined which laws governed particular types of issues. The goals of the rules-based system were to ensure uniformity and predictability in the type of law to be applied.[48] It achieved this goal by first *characterizing* the issue, and then *localizing* the law that would govern the issue. Most pertinently, the approach stipulated that the forum court would determine whether the issue was one of substance or procedure[49] (*characterization*). If the issue was one of procedure, the forum law would apply; if it was one of substance, foreign law would apply[50] (*localization*). Essentially, these rules chose the jurisdiction whose law would apply, not the particular law that would actually apply.[51]

However, the traditional approach was criticized on two fronts: (1) its rigidity led to absurd results, and (2) the judicial use of "escape devices" undermined the predictability and uniformity sought by the approach.

Turning first to absurd results, the rigidity of the rules resulted in the parties' rights being determined by the laws of a jurisdiction with only a "fortuitous" connection to the dispute. In the case of the substance–procedure rule, the law to be applied was determined by the "fortuitous circumstance" of the choice of forum by the plaintiff.[52] The traditional approach characterized the competing laws without taking into account

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48 William F. Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 2-4 (1963) (defining predictability as the ability of parties to know in advance what law will govern their conduct, and uniformity as the outcome that the same law would be applied regardless of the forum of litigation).

49 RESTATEMENT OF CONFLICT OF LAWS § 584 (AM. LAW INST. 1934).

50 *Id.* § 585.

51 Aaron D. Twerski & Renee G. Mayer, *Toward a Pragmatic Solution of Choice of law Problems—At the Interface of Substance and Procedure*, 74 NW. U. L. REV. 781, 784-85 n.16 (1979) (describing the traditional approach as being composed of "jurisdiction-selecting rules").

52 Baxter, *supra* note 48, at 19.

their purposes and the context in which they were being applied.[53] In the case of the substance–procedure rule, a law could be procedural in one context but substantive in another; denying this relativity of language with a blanket characterization for all contexts has, in the words of one author, "all the tenacity of original sin."[54] For example, a statute of limitations may be characterized as "procedural" because it is seen to affect the remedy rather than the right;[55] however, applying the forum's statute of limitations in a specific context could lead to a party being left without a remedy, which is the equivalent of not having a right at all.[56] Even the rules-based European approach noted that "characterization" must be made "according to the particular nature of the relationship in question"—therefore, a claim would be characterized differently *for choice of law purposes* than it would be characterized in codes.[57] Realizing the absurd results stemming from rigid methods of characterization, scholars[58] and judges[59] proposed methods of characterization that took into account the purpose and context of the competing laws.

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53 *See* David F. Cavers, *A Critique of the Choice-of-law Problem*, 47 HARV. L. REV. 173, 173-76 (1933) (arguing that the traditional method wrongly ignored the content of competing rules of law); Joseph William Singer, *Facing Real Conflicts*, 24 CORNELL INT'L L.J. 197, 201 (1991) ("Territorial rules are arbitrary because they do not require analysis of . . . policies.").

54 Walter Wheeler Cook, "*Substance" and "Procedure" in the Conflict of Laws*, 42 YALE L.J. 333, 337 (1933). Cook also emphasized that the basis for classification between substance and procedure must depend on some purpose, as opposed to "mechanistic jurisprudence." *Id.* at 339, 356 ("[N]o intelligent conclusion can be reached in any particular case until the fundamental *purpose* for which the classification is being made is taken into consideration." (emphasis added)).

55 H. L. McClintock, *Distinguishing Substance and Procedure in the Conflict of Laws*, 78 U. PA. L. REV. 933, 934 (1930).

56 *See* E. G. L., Comment, *The Statute of Limitations and the Conflict of Laws*, 28 YALE L.J. 492, 496 (1919) ("A right which can be enforced no longer by an action at law is shorn of its most valuable attribute.").

57 Bernard Audit, *A Continental Lawyer Looks at Contemporary American Choice-of-law Principles*, 27 AM. J. COMP. L. 589, 591 (1979); *see also* Celia Wasserstein Fassberg, *Realism and Revolution in Conflict of Laws*, 163 U. PA. L. REV. 1919, 1933 (2015) (noting that European systems "re-form[ed]" the traditional model in order to "adapt local choice rules to local values and changing circumstances," among them the increasingly technological and interconnected world).

58 *See, e.g.*, RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS 62-63 (6th ed. 2010) (proposing a characterization method that balances "difficulty to the forum in finding and applying the foreign rule against the likelihood that the rule will affect the outcome in a manner that will invite forum shopping").

59 *See* Bournias v. Atlantic Mar. Co., 220 F.2d 152, 156 (2d Cir. 1955) (proposing a specificity test, by which a statute of limitations would be characterized as substantive if it were specifically aimed at a newly created right, and procedural if it applied generally to all rights). In this case, then-Judge Harlan found that the statute of limitations, which applied to the entire Panamanian labor code, was not specifically aimed at claims for unpaid wages and was thus procedural. *See id.* at 156-57.

The second criticism of the traditional approach was that it enabled courts to use escape devices, which undermined the uniformity and predictability goals of the traditional approach.[60] Critics argued that courts would employ results-oriented decisionmaking; in other words, they would characterize an issue as "procedural" if they wanted to apply their own law to it, but "substantive" if they wanted to apply foreign law. Frequent use of such escape devices rendered the term "procedural" devoid of any independent meaning: indeed, one casebook suggests that describing an issue as "procedural" is merely "shorthand" for noting that forum law will be applied to it;[61] another treatise calls the substance–procedure classification a "gimmick" used to determine which law will apply.[62] These criticisms could apply with equal force to the application of the traditional approach to the enforcement of international arbitral awards.

B. *Application of the Traditional Approach to the New York Convention and the Federal Arbitration Act*

The New York Convention most obviously enshrines the traditional choice of law approach. The forum (a national court) supplies procedural rules, while the Convention supplies the "substantive" conditions for enforcement in Articles IV and V.[63] Courts have unwaveringly adopted this approach: in deciding the question of whether the forum's statute of limitations or the Convention's indefinite limitations period applies, they have characterized statute of limitations as "procedural" and applied the forum's (i.e., their own) statute of limitations.[64] In so characterizing limitations periods, courts rely on statements by arbitration scholars that

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60 *See* Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 DUKE L.J. 171, 175 (describing the traditional method as "loaded with escape devices," the use of which "introduce[s] a very serious element of uncertainty and unpredictability"); Nicholas deBelleville Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1106 (1956) (decrying the abuse by courts of escape devices, especially the "public policy" escape device).

61 WILLIAM M. RICHMAN, WILLIAM L. REYNOLDS & CHRISTOPER A. WHYTOCK, UNDERSTANDING CONFLICT OF LAWS § 58 (4th ed. 2013).

62 PETER HAY, PATRICK J. BORCHERS & SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 3.5 (5th ed. 2010).

63 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION para. 1669 (Emmanuel Gaillard & John Savage eds., 1999).

64 *See* Ank A. Santens, *supra* note 32 ("It is often assumed without discussion that limitation periods are among the local 'rules of procedure' contemplated in Article III of the New York Convention.").

time limits could fit within the Article III "rules of procedure";[65] some courts have also engaged in treaty interpretation of Article III themselves.[66]

However, adherence to the traditional distinction has caused the same problems of absurd results and nonuniformity in enforcement actions as the traditional approach did in other choice of law contexts.[67]

Recall that the term "absurd results" refers to an outcome where the parties' rights are determined by the law of a jurisdiction with only a "fortuitous" connection to their dispute. In enforcement actions, the "fortuitous" connection is the presence of the award debtor's assets in the enforcing jurisdiction, given that the location of the award debtor's assets almost always determines where the plaintiff seeks enforcement.[68] Moreover, just as the use of a blanket "right–remedy" distinction to characterize between substance and procedure inappropriately ignores the reality that a right without a remedy ceases to be a right—a reality that has been recognized by at least one international trade tribunal[69]—the

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65 ALFRED JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 240 (1981) (labeling time limits as aspects "incidental to the enforcement" and therefore procedural, along with discovery, set-off, and estoppel).

66 Yugraneft Corp. v. Rexx Mgmt. Corp., [2010] S.C.R. 649, 661-63 (Can.) (analyzing explicitly the issue of whether Article III, as interpreted by the Vienna Convention on the Law of Treaties, can encompass statute of limitations).

67 The leading treatise in arbitration summarizes why simple substance–procedure characterization is complicated and inappropriate in the context of the Convention:

> Article III's reference to "rules of procedure" is not easily interpreted, in the context of a global convention, as a reference to statutes of limitations. Consistent with most conflict of laws characterizations, time limitations on the right to enforce an award are more easily interpreted as "substantive" and not a "rule" of "procedure."
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> Nevertheless, it is difficult to accept the notion that the Convention meant to prohibit all national time limitations on the recognition of awards, without substituting any international standard [explicitly in the text].

BORN, *supra* note 31, § 26.07.

68 *See, e.g.*, BORN, *supra* note 12, § 17.06 ("For the award-holder, the most important factor in enforcing an award will usually be the location of identifiable, unencumbered assets of the adverse party . . . ."); JULIAN D. M. LEW, LOUKAS A. MISTELIS & STEFAN MICHAEL KRÖLL, COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION para. 26-57 (2003) ("Enforcement proceedings are possible more or less everywhere assets are located."); William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 260 (2006) ("Enforcement would normally be sought by the winning claimant, looking to attach the respondent's assets.").

69 In 1989, a GATT dispute settlement panel ruled on whether section 337 of the United States Tariff Act was inconsistent with the United States' obligations under the General Agreement on Tariffs and Trade. Panel Report, *United States—Section 337 of the Tariff Act of 1930*, L/6439 (Jan. 16, 1989), GATT BISD (36th Supp.), at 345 (1989). Section 337 provided that imported goods alleged to infringe United States patents could be challenged before the United States International Trade Commission (ITC). *See* 19 U.S.C. § 1337 (2012). Since domestically

distinction in the arbitration context similarly ignores the truism that an arbitration award that cannot be enforced in the only jurisdiction containing the award debtor's assets is nothing more than a "piece of paper."[70] In other words, the application of a local statute of limitations may deprive the award creditor not only of a remedy (enforcement before national courts), but also of a right (the contents of the award).

These absurd results are borne out empirically.[71] In over half of the enforcement actions that were brought before American courts and were dismissed as time-barred, the only connection the parties had with the United States was the enforcement litigation. For example, *Seetransport Wiking Trader Schiffahrtsgesellschaft MbH & Co., Kommanditgesellschaft v. Navimpex Centrala Navala* involved a dispute between German and Romanian corporations whose arbitration had been conducted in Paris subject to French law,[72] while *AO Techsnabexport v. Globe Nuclear Services and Supply* involved a dispute between a Russian entity and a company headquartered in Russia (but nominally incorporated in America), whose

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produced goods alleged to infringe United States patents could not be challenged before the ITC, but only before federal district courts, a question arose as to whether section 337 was inconsistent with the United States' obligations to accord to imported goods "treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements . . . ." General Agreement on Tariffs and Trade, art. III(4), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194. In finding section 337 inconsistent with Article III(4), the panel dismissed the United States' arguments that the phrase "laws" in the Article referred only to substantive laws:

> In the Panel's view, enforcement procedures *cannot be separated from the substantive provisions they serve to enforce*. If the procedural provisions of internal law were not covered by Article III:4, contracting parties could escape the national treatment standard by enforcing substantive law, itself meeting the national treatment standard, through procedures less favourable to imported products than to like products of national origin. The interpretation suggested by the United States would therefore defeat the purpose of Article III . . . .

Panel Report, *United States—Section 337 of the Tariff Act of 1930*, ¶ 5.10, L/6439 (Jan. 16, 1989), GATT BISD (36th Supp.), at 345, 383 (1989) (emphasis added).

70 *See* ALAN REDFERN ET AL., REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION ¶ 9.84 (5th ed. 2009) ("If an award cannot be enforced, it is worth no more than a bargaining chip."); Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of Enforcement of Arbitral Awards in the PRC*, 49 AM. J. COMP. L. 249, 249 (2001) ("Parties want money, not a piece of paper.").

71 For a collection of enforcement case law, see *Topic List of Court Decisions on the New York Convention*, N.Y. ARB. CONVENTION, http://www.newyorkconvention.org/court-decisions/list-of-topics-decisions-per-topic [http://perma.cc/EUD3-TX47] (last visited Sept. 19, 2015). While the number of cases is low, this number does not account for the number of award creditors who were deterred from bringing actions in American courts because of the statute of limitations. Note also that empirical studies reveal that the overwhelming majority of international arbitration awards are complied with voluntarily. BORN, *supra* note31, § 22.01[A] n.18 (citing a 90% compliance rate based on a collection of empirical studies by major arbitral institutions).

72 29 F.3d 79 (2d Cir. 1994).

arbitration had been conducted in Sweden.[73] Similar situations occur in other jurisdictions: *Northern Sales Co. v. Compania Maritima Villa Nova S.A.* was a dispute between an American company and a Spanish company arbitrated in London but decided by the Canadian statute of limitations because Canada was the forum.[74] In these cases, the law of a jurisdiction with which an award creditor has no connection effectively deprived the award creditor of rights secured through international arbitration.

The traditional choice of law approach has also undermined the uniformity and predictability that the New York Convention sought to bring to enforcement actions.[75] Regarding uniformity, limitations periods for enforcement of international arbitral awards vary widely across countries, ranging from six months in China,[76] to six years in England,[77] to thirty years in Austria.[78] Because national courts characterize limitations periods as "procedural" and therefore apply these local limitations periods, attempts to enforce the exact same award will lead to different outcomes in different countries, contrary to the uniform outcome sought by the Convention. As to predictability, an award creditor will have difficultly predicting whether the timeliness of its enforcement action will be governed by national law or by the provisions of the Convention: fifty-three countries treat statutes of limitations as procedural and therefore governed by local law, while the remaining state-parties treat it as substantive and therefore governed by the Convention.[79] Compounding the confusion, even

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73 656 F. Supp. 2d 550 (D. Md. 2009).

74 (1989), 29 F.T.R. 136 (Can. Man. Fed. Ct.), *aff'd*, [1992] F.C. 550 (Can. Man. C.A.).

75 *See supra* notes 14–22 and accompanying text.

76 Zhōngguó de zhòngcái fǎ (中华人民共和国仲裁法) [Arbitration Law of China] (promulgated by Order No. 31 of the President of the People's Republic of China, Aug. 31, 1994, effective Sept. 1, 1995) 1994 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 134, Article 59.

77 This limitations period has to be constructed from multiple sources. English arbitration legislation defers to the limitations period that applies to all civil actions. Arbitration Act 1996, c. 23, § 13 (Eng.). The Limitations Act, in turn, establishes a six-year limitations period for breaches of contract claims. Limitation Act 1980, c. 58, § 5 (Eng.). Finally, case law clarifies that an enforcement action is actually a breach of contract claim, in which the award creditor asserts that the award debtor breached an implied term in the arbitration agreement to comply with any awards resulting from an arbitration pursuant to the agreement. Therefore, the six-year limitations period that applies to all breach of contract claims applies to the enforcement of arbitral awards. Agromet Motorimport Ltd. v. Maulden Eng'g Co. (Beds) [1985] WLR. 762 (QB) 763 (Eng.).

78 ALLGEMEINES BÜRGERLICHES GESETZBUCH [ABGB] [CIVIL CODE] JUSTIZGESETZSAMMLUNG [JGS] No. 946/1816, as amended, § 1478 (Austria).

79 United Nations Comm'n Int'l Trade Law, Rep. on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards on Its Forty-First Session, U.N. Doc. A/CN.9/656/Add.1, at 11-24 (2008).

jurisdictions that characterize time limits as "substantive" in a conflict of laws context have treated them as "procedural" in enforcement actions.[80]

This unpredictability is apparent even within the United States. While courts have all followed the three-year limitations period in the Federal Arbitration Act, they have differed on the distinction between "substantive" and "procedural" on another issue that could fit into either category: whether an award debtor can raise a counterclaim in an enforcement proceeding, or in other words, set-off its debt with a claim it has against the creditor.[81] Federal procedural law generally allows a party to raise counterclaims unrelated to the main claim in the action,[82] while the Convention does not contain counterclaims (or the presence of debts owed by the award creditor to the debtor) in its exclusive list of grounds for refusal of enforcement.[83] As a result, some courts have followed the federal rules and agreed to hear counterclaims by award debtors,[84] while others have applied the Convention and refused to hear counterclaims.[85]

The foregoing survey of case law reveals that state-parties' adherence to the traditional choice of law approach has led to absurd results, as well as a lack of uniformity and of predictability in determining which law governs certain issues in enforcement actions. Arbitration practitioners and scholars foresaw these problems: during the drafting of the Convention, some delegates proposed including uniform procedural rules within the

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[80] Canada is an example of such a jurisdiction. *See* Yugraneft Corp. v. Rexx Mgmt. Corp., [2010] S.C.R. 649, 663-664 (Can.) ("The only material question is whether or not the competent legislature intended to subject recognition and enforcement proceedings to a limitation period. If it did, the limitation period in question will be construed as a 'rule of procedure' as that term is understood under the Convention. How domestic law might choose to characterize such a time limit, either in the abstract *or in a conflict of laws context*, is immaterial." (emphasis added)).

[81] *See* Maxi Scherer, *The Award and the Courts, Set-off in International Arbitration* (explaining that a substantive concept of "set-off" would define the rights—the amount of money due—between the parties, while a procedural concept of set-off would only specify how the award debtor could enforce its right to money owed to it by the claimant—by adjudicating it in pending proceedings rather than arbitrating or litigating the claim separately), *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 451, 454-55 (Gerold Zeiler et al. eds., 2015)

[82] *See* FED. R. CIV. P. 13(A)-(B) (permitting a party to state as a counterclaim against an opposing party any claim that does not arise out of the same transaction or occurrence as the main claim in the action).

[83] *See* New York Convention, *supra* note 2, art. V (detailing an exhaustive list of grounds for refusal of enforcement that does not include counterclaims).

[84] *See, e.g.*, Fertilizer Corp. of India v. IDI Mgmt., 517 F. Supp. 948, 963 (S.D. Ohio 1981); Jugometal v. Samincorp, Inc., 78 F.R.D. 504, 507 (S.D.N.Y. 1978).

[85] *See, e.g.*, Wartsila Fin. OY v. Duke Capital LLC, 518 F.3d 287, 292-94 (5th Cir. 2008); Compagnie Noga D'importation et D'exportation S.A. v. Russian Federation, 361 F.3d 676, 683 (2d Cir. 2004); Evergreen Sys., Inc. v. Geotech Lizenz AG, 697 F. Supp. 1254, 1257 (E.D.N.Y. 1988); Audi NSU Auto Union Aktiengesellschaft v. Overseas Motors, Inc., 418 F. Supp. 982 (E.D. Mich. 1976).

Convention that would be binding on all states—a solution ultimately rejected as impractical.[86] Others today call for harmonization in state-parties' judicial interpretation of Article III, even if it means that state-parties disregard provisions of their local procedural laws.[87]

Accordingly, a more sustainable solution is to move away from the traditional choice of law approach altogether, and eschew its rigid focus on characterization of issues as "substantive" and "procedural." Issues will always lie in the middle of these amorphous fields and applying modern choice of law doctrine would avoid the problem of distinguishing between them. The following Part explores how American courts could apply three different modern choice of law doctrines—interest analysis, *Erie* analysis, and reverse-*Erie* analysis—to the choice of law problem contained within the Federal Arbitration Act.

IV. MODERN APPROACHES

A. *Interest Analysis*

1. Summary of Approach

Developed by Brainerd Currie,[88] interest analysis moves away from jurisdiction-selecting rules and instead examines the *content* of the competing laws in a choice of law problem.[89] It involves two steps. A court

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[86] *See* U.N. Secretary-General, *Recognition and Enforcement of Foreign Arbitral Awards*, ¶ 7, U.N. Doc E/2840, at 4 (Mar. 22, 1956) (studying "the possibility of drawing up a uniform law on arbitration procedure"); Andreas Börner, *Article III* ("The most far-reaching proposal to solve this potential problem [of different enforcement procedures] was to incorporate basic procedural rules into the Convention. . . . The drafters [did not] pursue[] th[is] idea."), *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 115, 117 (Herbert Kronke et al. eds., 2010); *see also* JAN VAN DEN BERG, *supra* note 65, at 235 ("[The proposal for uniform procedural rules] led to a Babel-like confusion at the [drafting] Conference.").

[87] *See* Emilia Onyema, *Formalities of the Enforcement Procedure (Articles III and IV)* ("[H]armonising effort cannot no longer be regarded as 'too far reaching' but a necessity in upholding the value of Convention awards in the resolution international commercial disputes."), *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, *supra* note 6, at 597, 612; *cf*. Carolyn Lamm, *Comments on the Proposal to Amend the New York Convention* (recalling that uniform internal laws in each country and a treaty "incapable of divergent interpretations" were the main goals pursued during the negotiations of the treaty), *in* ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS, *supra* note 6, at 689, 698.

[88] *See generally* Brainerd Currie, *Married Women's Contracts: A Study in Conflict-of-laws Method*, 25 U. CHI. L. REV. 227 (1958).

[89] Cavers, *supra* note 53, at 197.

must first ascertain the *purpose* or *policy* behind each of the competing laws.[90] In constructing the policy, the court may assume that a jurisdiction enacts laws primarily to benefit those who are domiciled within the jurisdiction.[91] Second, the court must determine whether applying a given law to the case would advance the policy behind the law.[92] It must then apply that law whose policy can be served without frustrating the policies of any of the other competing laws.[93] While interest analysis was envisioned to choose between the laws of different sovereigns, it can also be applied to individual laws within a single jurisdiction.[94] Indeed, Currie himself highlighted the parallels between the first step in interest analysis and statutory interpretation of laws that do not involve multijurisdictional elements.[95]

Interest analysis therefore rejects the "unprincipled" characterization of an issue as substantive or procedural, which creates the "thorniest choice of law problems."[96] In abolishing the substance–procedure characterization,[97] the Second Restatement of Conflict of Laws maintained that

> These characterizations, while harmless in themselves, have led some courts into unthinking adherence to precedents that have classified a given issue as "procedural" or "substantive" regardless of what purposes were involved in the earlier classifications. . . . To avoid encouraging error of that sort, the rules stated in this Chapter do not attempt to classify issues as "procedural" or "substantive". Instead they face directly the question of whether the forum's rule should be applied.[98]

Thus, rather than assuming that the forum will automatically apply its rule of procedure just because it is a rule of procedure, interest analysis calls

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90 *See* 2 HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1111-14 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994) (discussing the purposive approach to statutory interpretation).

91 This assumption is known as the "selfish state" assumption. Currie, *supra* note 88, at 237, 254.

92 *Id*. at 233.

93 *Id*. at 253.

94 *See* Kramer, *Rethinking Choice of Law, supra* note 24, at 283 ("[T]he assumption that choice of law problems arise only in multistate cases is erroneous.").

95 *See* Currie, *supra* note 60, at 178 ("This process is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose."); *see also* Lea Brilmayer, *The Other State's Interests*, 24 CORNELL INT'L L.J. 233, 239 (1991) ("[C]hoice of law is a means to the end of furthering substantive values. Choice of law concerns the appropriate scope to give a legal rule in the multistate context. This decision about scope is not qualitatively different from other, domestic, issues of scope.").

96 Twerski & Mayer, *supra* note 51, at 784.

97 *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1969).

98 *Id*. § 122 cmt. b.

for an inquiry into whether any interest of the forum would be advanced by applying its procedural rule. Professors Twerski and Mayer explain:

> A true interest analysis approach would examine each procedural rule to determine whether a given state has an interest in having the rule applied. In making the decision, a court would take into account the impact of such a ruling on the operation of its own judicial machinery. . . . The recent trend toward true interest analysis which focuses directly on whether a state has an interest in having its so-called 'procedural' rule applied has *much to recommend it*.[99]

Interest analysis immediately and steadily picked up steam among courts across the country, displacing the traditional rules.[100] Two features of this new method are relevant to the present inquiry. First, courts have begun using interest analysis, though implicitly, in determining whether American law applies to events abroad. In *Boumediene v. Bush*, for instance, the Supreme Court found that the purpose of the Suspension Clause—to restrain the legislative and executive branches of government—would be served by applying it to the detention of peoples in areas of de facto but not de jure American sovereignty.[101]

The second notable development is that courts have employed the two-step model of interest analysis in order to choose between statutes of limitations. First, they have ascertained the purpose behind statutes of limitations, generally identifying two rationales: (1) assuring judicial efficiency by allocating scarce judicial resources to claims that are based on fresh rather than stale evidence, and (2) giving defendants peace of mind.[102] Under Currie's selfish-state assumption, statutes of limitations presumably aim to

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99 Twerksi & Mayer, *supra* note 51, at 784 nn.15 & 16 (emphasis added).

100 *See* SYMEON C. SYMEONIDES, THE AMERICAN CHOICE-OF-LAW REVOLUTION: PAST, PRESENT AND FUTURE 44-45 (2009) (depicting through bar graphs states' chronological shift away from *lex loci contractus* and *lex loci delicti* rules of the traditional approach).

101 553 U.S. 723, 765-66 (2008) ("The test for determining the scope of [the Suspension Clause] must not be subject to manipulation by those whose power it is *designed to* restrain." (emphasis added)).

102 *See* Kermit Roosevelt III, *Choice of Law in Federal Courts: From* Erie *and* Klaxon *to CAFA and* Shady Grove, 106 NW. U. L. REV. 1, 14 (2012) ("A limitations period does have a procedural purpose, which is to allocate judicial resources to the litigation of fresh rather than stale claims. And were that its only purpose, it might reasonably be classed as procedural and its assertion limited to a particular forum. But it is also intended to give defendants peace of mind after a prescribed period, and that is clearly a right intended to be conveyed regardless of forum—that is, a substantive right.").

give only local defendants such peace of mind.[103] A longer statute of limitations can, "by negative implication," also serve the purpose of protecting (local) plaintiffs.[104] Having ascertained the purposes behind the statute of limitations, courts then examine whether its purpose will be served by applying it in a particular case. Applying a shorter statute of limitations advances its policy of repose only when the defendant is among the class of people intended to be given repose—that is, a domicile of the state with the short statute of limitations.[105]

Courts that have applied this two-step model have declined to apply the forum's statute of limitations in cases where both parties are foreign and the acts giving rise to the dispute occurred abroad. In *Heavner v. Uniroyal, Inc.*, for instance, a North Carolina plaintiff was injured in North Carolina by an exploding tire manufactured by a defendant corporation incorporated in New Jersey but with its principal place of business abroad and business spread throughout the country.[106] The New Jersey Supreme Court declared that it had "no substantial interest in the matter" and barred the action by applying North Carolina's statute of limitations.[107] Similarly, in *Farrier v. May Department Stores Co.*, a Virginia plaintiff slipped and fell in the Virginia branch of a corporation that did business in both Virginia and the District of Columbia.[108] The District of Columbia court applied Virginia's shorter statute of limitations, because doing so would serve the purpose behind the statute of protecting Virginia's defendants from stale claims.[109] By contrast, applying the District of Columbia's longer limitations period to permit the suit to move forward would not further the plaintiff-protective purposes behind that statute, because the plaintiff in this case was not from the District of Columbia. The same court similarly declined to apply the local limitations period in *Cornwell v. C.I.T. Corp. of New York*, in which a Virginia plaintiff sued an airline's owner and operator, from New York and Tennessee, respectively, for a plane crash that occurred in Alaska.[110] Declining to apply the forum's limitation period, the District of Columbia District court found that the forum "ha[d] no relationship to the instant

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103 Allen Mass, Note, *An Interest-Analysis Approach to the Selection of Statutes of Limitation*, 49 N.Y.U. L. REV. 299, 307 (1974) ("[T]he statutes of limitation in the controlling jurisdictions are presumably designed to protect only local defendants.").

104 Gary L. Milhollin, *Interest Analysis and Conflicts Between Statutes of Limitation*, 27 HASTINGS L.J. 1, 11 (1975).

105 *Id.* at 10.

106 305 A.2d 412, 413-14 (N.J. 1973).

107 *Id.* at 418.

108 357 F. Supp. 190, 191 (D.D.C. 1973).

109 *Id.*

110 373 F. Supp. 661, 662 (D.D.C. 1974).

dispute aside from the fact that [the defendant owner] has an agent here and, therefore, is subject to service of process."[111] The pattern is clear: a forum has no interest in applying its statute of limitations to a case involving foreign (out-of-state) parties arising out of events that occurred abroad (in a different state).

Courts have thus applied interest analysis to both international events and statutes of limitations. The next step, then, is to combine these two trends and apply interest analysis to a case that involves *both* international events and statutes of limitations: the enforcement of international arbitral awards.

2. Application of Interest Analysis to the New York Convention and the Federal Arbitration Act

Engaging in the two-step process of interest analysis calls for limiting the scope of the three-year limitations period in the Federal Arbitration Act. As a first step, the purpose behind the limitations period must be ascertained. As discussed above, the two purposes inherent in any limitations period are (1) conserving judicial resources by refusing to consider cases based on stale evidence, and (2) giving defendants repose.[112]

A key question when applying statutes of limitations is which defendants are intended to be given repose, or in other words, whether the selfish-state assumption should be made for enforcement actions. This assumption would presume that the limitations period is designed to give repose primarily to American award debtors. However, there is an argument against this assumption: given the international subject matter of the statute, perhaps Congress sought restrictive enforcement law in order to induce foreign respondents to move their assets into the United States. However, such a broad construction of state interests in this argument cuts against Currie's admonition that the purpose behind statutes should be construed in a limited manner;[113] it would be equally tenuous to propose

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111 *Id.* at 665. Notably, the court was asked to decide between the forum's statute of limitations and the shorter one found in the 1929 Convention for the Unification of Certain Rules Relating to International Carriage by Air. It thus faced a similar conflict, between local and treaty law, as the conflict analyzed in this Comment. The court ultimately declined to reach the issue of whether to apply the treaty's period, however, instead asking the parties for supplemental briefing. *Id.* The case then settled.

112 *See supra* note 101 and accompanying text.

113 *See* Brainerd Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 757 (1963) ("[T]o assert a conflict between the interests of the forum and the foreign state is a serious matter; the mere fact that a suggested broad conception of a local interest will create conflict with that of a foreign state is a sound reason why the conception should be re-examined, with a view to a more moderate and restrained interpretation both of the policy and of the circumstances in which it must be applied to effectuate the forum's legitimate purpose.").

that a state enacted a long statute of limitations in order to better promote accountability from foreign corporations in their interactions with the state's citizens.[114] The selfish-state assumption is also bolstered by the legislative history behind the limitations period in the Federal Arbitration Act. The period was actually increased from one to three years, in recognition of the fact that

> [i]n many cases enforcement would normally be sought outside the United States as a first step. An action would be filed [in the United States] only after efforts to obtain enforcement in a foreign country had failed. It was, therefore, essential to allow time for these initial enforcement efforts outside the United States and the consensus was that 3 years is a reasonable period in these circumstances.[115]

If anything, the limitations period is meant to protect foreign plaintiffs, not foreign defendants. It may therefore be presumed that the statute of limitations in the Federal Arbitration Act is designed to give repose primarily to American award debtors.

The purpose behind the New York Convention's indefinite limitations period is comparably simple: it aims to protect award creditors[116] by allowing for the maximal enforcement of international arbitral awards.

The purposes behind the competing limitations periods are so constructed such that the applicability of each period must be analyzed in a given case. This Comment considers the paradigmatic case, involving wholly foreign parties who arbitrated outside of the United States. These characteristics describe over half of the enforcement actions that were dismissed by American courts as time-barred.[117] In such cases, applying the three-year statute of limitations found in the Federal Arbitration Act would serve none of the policies behind that statute, while applying the indefinite limitations period of Article V of the Convention would serve the policy behind that period.

First, applying the limitations period found in the Federal Arbitration Act would not protect American courts from claims based on stale evidence, because enforcement actions do not involve evidence that goes stale. As

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114 *See* Mass, *supra* note 103, at 314 (warning that "[i]f courts are permitted to ferret out state interests beyond the limited purposes underlying the statute of limitations, the result can only be the kind of judicial free-for-all which conflicts of law doctrine is designed to avoid").

115 S. REP. NO. 91-702, at 8 (1970).

116 *See* Milhollin, *supra* note 104, at 11 (stating that a longer statute of limitations contains an implied policy of protecting plaintiffs).

117 *See supra* notes 71–74 (providing a survey of case law in which the limitations period was dispositive).

discussed, Article IV of the Convention limits the evidence that may be considered by an enforcing court: the award creditor need supply only an authenticated copy of the arbitration agreement and the arbitration award.[118] The reliability of such evidence is unaffected by the passage of time.

Admittedly, the award debtor may raise one of the seven defenses provided for in Article V and present supporting evidence.[119] However, none of these defenses in enforcement proceedings requires—or even permits—the enforcing court to decide afresh the merits of the case: only the arbitrators have the final say on the merits of the dispute.[120] Rather, the Article V defenses concern issues that are distinctly "ancillary," relating mostly to the procedural fairness of the arbitration.[121] Consideration of such ancillary issues would impose only a minimal burden on the judiciary.[122]

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118 New York Convention, *supra* note 2, art. IV.

119 Note, however, that the defendants did not do so in the enforcement actions surveyed *supra* notes 70–73. The only issue in those actions was whether or not the actions were time-barred.

120 *See* BORN, *supra* note 12, at § 17.04[E] ("It is an almost sacrosanct principle of international arbitration that courts will not review the substance of arbitrators' decisions contained in foreign awards in recognition proceedings. Virtually nobody suggests that this principle does not exist or should be abandoned . . . . The Convention does not contain any exception permitting non-enforcement of an award simply because the arbitrators got their decision wrong . . . ."). This fundamental difference between enforcement and conventional litigation has prompted inquiries into whether other requirements in conventional litigation should apply in enforcement litigation. *See* Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 J. INT'L DISP. SETTLEMENT 587, 606-07 (2013) (arguing that because enforcement actions do not involve a review of the merits of the dispute, they should not have internationally preclusive effect); *see also* James E. Berger & Charlene Sun, *Personal Jurisdiction and the New York Convention*, 28 INT'L LITIG. Summer 2012, at 3 (suggesting that the need for an American court to have personal jurisdiction over a defendant is lessened where the court will not determine the defendant's rights but rather give effect to a prior determination of the defendant's rights by a competent tribunal); John Fellas, *Enforcing Foreign Arbitral Awards: Should Jurisdictional Defenses Apply?*, 253 N.Y. L.J. Feb. 6, 2015, at 1 (noting that the fairness concerns of the personal jurisdiction requirement are not as applicable where the defendant's liability is already fixed, and where the defendant could have avoided enforcement litigation altogether by complying voluntarily with the arbitral award).

121 Scherer, *supra* note 120, at 606. *See also* Sovereign Participations Int'l S.A. v. Chadmore Devs. Ltd., 24 Y.B. Com. Arb. 714, 718 (CA Lux. Jan. 28, 1999) ("The control by the [enforcement] court essentially concerns the question whether the award has been rendered in proceedings which respected due process . . . .").

122 Indeed, a primary motivation behind the prohibition on substantive judicial review of arbitral awards is to conserve scarce judicial resources. *See* Peter Bowman Rutledge, *On the Importance of Institutions: Review of Arbitral Awards for Legal Errors*, 19 J. INT'L ARB. 81, 97 (2002) ("Requiring a court to decide whether substantial evidence supports the arbitrator's factual findings or whether the arbitrator has committed legal error may require a much more time-consuming and exhaustive review of the arbitration."); Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 150 (1997) ("The extent to which a court may review a decision made by an adjudicatory body is a function of a judgment as to the extent to which public judicial resources should be made available for this purpose."); Karen

Therefore, applying the Federal Arbitration Act's three-year limitations period would not, or would only minimally, serve the goal of the limitations period of conserving American judicial resources for claims based on fresh evidence.

Second, applying the three-year limit would not serve the policy of giving repose to American defendants because the paradigmatic case does not involve American defendants. By contrast, applying the indefinite period of the Convention would obviously serve the creditor-protective policies behind the indefinite period by allowing for maximal enforcement of international arbitration awards.

Therefore, in the paradigmatic enforcement action involving foreign parties and a foreign arbitration, interest analysis calls for applying the indefinite limitations period of the Convention rather than the three-year period of the Federal Arbitration Act. The purposes behind the Federal Arbitration Act's three-year period would not be served by the period's application; at best, its efficiency goals would be served only slightly. By contrast, the pro-enforcement purposes behind the Convention's indefinite limitations period would be completely vindicated through application of the treaty.

B. Erie *Analysis*

In determining how to resolve the conflict of laws present in enforcement actions, American federal courts may additionally look to the *Erie* doctrine. There are many parallels between the *Erie* doctrine and the Convention. Both the Convention and the *Erie* doctrine respond to conflicts of laws by adopting the traditional approach. Moreover, they both seek to avoid the same problems created by the application of federal law in both conflicts: (1) the use of federal courts for purposes for which they were not intended by the statutes that granted them jurisdiction, and (2) forum shopping by defendants. Federal courts have developed the *Erie* doctrine to move beyond the traditional substance–procedure characterization. Given the parallels between *Erie* and the Convention, they should therefore do the same for the latter.

A. Lorang, Comment, *Mitigating Arbitration's Externalities: A Call for Tailored Judicial Review* 59 UCLA L. REV. 218, 221 (2011) ("Resistance to substantive judicial review arises in part because it drains judicial resources and makes arbitration slower and more expensive for the parties involved."). Calls for the elimination of substantive judicial review of arbitral awards in jurisdictions that do not fully embrace the Convention similarly rest on considerations of judicial efficiency. *See* Cliff Manjiao Chi, *Domestic Arbitration in China: A Comparative Perspective* ("[S]ubstantive review of domestic awards not only seriously harms the efficiency of arbitration but also wastes limited judicial resources, since such review constitutes a *de facto* 'appeal' or 'retrial' of the case."), *in* DISPUTE RESOLUTION IN CHINA 45, 79 (Michael J. Moser ed., 2012).

Both the Convention and the *Erie* doctrine responded to conflict of law situations by adopting the traditional approach. Under the *Erie* doctrine, the conflict is between state law and federal common law.[123] The doctrine initially solved this problem by requiring a federal court sitting in diversity to apply state law to substantive issues and federal law to procedural issues.[124] The Convention addresses conflicts between international law and federal law using a similarly traditional approach, requiring a federal court hearing an enforcement action to apply international (treaty) law to substantive issues and national (federal) law to procedural issues.[125]

Thus, both the doctrine and the treaty adopted the traditional approach in order to limit the application of federal law and the problems the application of federal law would cause. Applying federal law would, first, undermine the purpose underlying the grant of federal (national court) jurisdiction, thereby using federal courts for purposes for which they were not intended to be used. Second, it would encourage forum shopping by defendants.

Applying federal law over state and treaty law would undermine the purpose of diversity and enforcement jurisdiction respectively. The grant of diversity jurisdiction[126] was meant to give litigants access to federal courts, not to federal law.[127] It was not meant to alter state law as the decisional rule. Similarly, the Convention sought to "mobilise[] national courts,"[128] not national law.[129] In countries where the treaty is not self-executing, domestic statutes that grant national courts enforcement jurisdiction[130] pursuant to

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123 Where the federal law is a statute or a rule promulgated pursuant to a statute, it prevails over the state law in accordance with the Supremacy Clause of the U.S. Constitution. *See* U.S. CONST. art. VI, cl. 2; Hanna v. Plumer, 380 U.S. 460, 471 (1965) (holding that state law cannot displace a valid and pertinent Federal Rule of Civil Procedure).

124 Erie R.R. Co. v. Tompkins, 304 U.S. 64, 79-80 (1938); *see also Hanna*, 380 U.S. at 465.

125 FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 63, para. 1671.

126 *See* 28 U.S.C. § 1332 (2012) (granting federal courts jurisdiction over cases involving citizens of two different states).

127 *See* Guar. Trust Co. v. York, 326 U.S. 99, 112 (1945) ("Congress afforded out-of-State litigants another tribunal, not another body of law."); Robert Allen Sedler, *The* Erie *Outcome Test as a Guide to Substance and Procedure in the Conflict of Laws*, 37 N.Y.U. L. REV. 813, 819 (1962) ("The *Erie* doctrine can be understood only in light of the reasoning upon which diversity jurisdiction is based. Diversity jurisdiction is intended to prevent local bias against an out-of-state litigant by insuring control of the trial by a federal judge who enjoys life tenure and is free from local pressures."). *But see* Baxter, *supra* note 48, at 36-41 (analyzing legislative history of the diversity grant of jurisdiction, and concluding that it was indeed meant to guard against biased local law).

128 Reisman, *supra* note 16, at 1.

129 *See supra* notes 16, 22, 86, 87 and accompanying text.

130 *See, e.g.*, 9 U.S.C. § 201 (2012) ("[The New York Convention] shall be enforced *in United States courts* . . . ." (emphasis added)).

the treaty were likewise meant to give arbitrating parties access to national courts, not to national law. Neither the treaty nor implementing legislation sought to supplant treaty law as the rule of decision.[131] Thus, applying federal law in both contexts results in federal courts being used for purposes for which they were not intended.

Moreover, applying federal law over state and treaty law would encourage forum shopping by defendants. In the *Erie* context, it would incentivize defendants to remove cases to federal court in order to avail themselves of more favorable federal general common law.[132] In the enforcement context, it would incentivize defendants to move assets[133] to the United States in order to avail themselves of favorable federal enforcement law.[134] Thus, both the *Erie* doctrine and the Convention sought to respond to the same problems by limiting the application of federal (national) law through the adoption of a traditional choice of law method.

The *Erie* doctrine, however, eventually departed from this traditional method. The Supreme Court stopped characterizing competing state and federal common laws as "substantive" or "procedural."[135] Instead, it began analyzing whether application of the federal rule would frustrate the

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131 For a discussion of the legislative history of the Federal Arbitration Act, see discussion *supra* pp. 217-18.

132 *See* Erie R.R. Co. v. Tompkins, 304 U.S. 64, 74-75 (1938) (noting the "grave discrimination" that results when non-citizen defendants remove cases to federal court and thus prevent citizens from enjoying state-created rights); Roosevelt, *supra* note 102, at 6 ("[F]orum shopping is law shopping . . . ."); *see also* Edward A. Purcell, Jr., *Brandeis,* Erie*, and the New Deal "Constitutional Revolution*,*"* 26 J. SUP. CT. HIST. 258, 272-73 (2001) ("Since the late nineteenth century, corporations operating in interstate commerce had regularly . . . exploited diversity removal jurisdiction to impose heavy legal and extra-legal burdens on individuals who sued them. . . . Abolishing the general federal common law would eliminate a major incentive for intra-state forum shopping and reduce the utility of a variety of popular manipulative tactics." (footnotes omitted)).

133 *See supra* note 68 (recounting that enforcement will be sought primarily where the award debtor's assets are located); *see also* Martin L. Roth, Note, *Recognition by Circumvention: Enforcing Foreign Arbitral Awards as Judgments Under the Parallel Entitlements Approach*, 92 CORNELL L. REV. 573, 587-88 (2007) ("In the context of foreign arbitral awards, the statute of limitations defines a time lapse after which the [award debtor] may feel secure that its assets lie outside the reach of the award holder. Such a provision allows [award debtors] subject to arbitral awards to make rational decisions about the disposition of their assets.").

134 It is worth noting that the Convention seeks to eliminate forum shopping by defendants/award debtors in other contexts, such as the annulment of awards. Article V(1)(e) states that an award debtor may seek to annul an award only in "the country in which, or under the law of which, that award was made." New York Convention, *supra* note 2, art. V(1)(e); *cf.* BORN, *supra* note 12, § 16.02[A][2][ii]-[B] (confirming that most courts and arbitration specialists interpret this language as an explicit limit on the forum in which annulment may be sought by the award debtor).

135 Guar. Trust Co. v. York, 326 U.S. 99, 109 (1945) ("And so the question is not whether a statute of limitations is deemed a matter of 'procedure' in some sense.").

"policies underlying the *Erie* rule"[136]—namely, whether application of the federal rule would encourage forum shopping by defendants. In doing so, the Court developed a uniformity test or "outcome-determination" test: a federal common law rule would not be applied if it "significantly affect[ed] the result of a litigation" such that it would encourage ex ante forum shopping by the defendant.[137] In *Guaranty Trust*, the Court refused to apply a federal limitations period pursuant to this test, and instead applied the state law limitations period.[138]

Courts should do the same in the enforcement context. That is, where application of a federal (national) law would significantly affect the result of the enforcement action, such as to encourage ex ante forum shopping by award debtors, enforcing courts should decline to apply the federal (national) law and instead apply the rule in the Convention. Applying this test would require applying the Convention's indefinite limitations period, rather than the three-year period in the Federal Arbitration Act.

At first blush, *Erie* and the New York Convention admittedly bear little resemblance to one another: the former deals with specific American constitutional law issues while the latter concerns international ones. However, there is nothing in the *Erie* doctrine that confines its application to the narrow realm of federal–state conflicts.[139] Indeed, given the fact that the doctrine and Convention seek to avoid identical problems attendant to the application of federal law in federal courts, it is only logical that the New York Convention should evolve just as the *Erie* doctrine has, from a

136 Hanna v. Plumer, 380 U.S. 460, 467 (1965).

137 *Guar. Trust*, 326 U.S. at 109.

138 *Id.* at 110. Professor Roosevelt has suggested that rather than expanding the scope of the state law statute of limitations, the Court in *Guaranty Trust* was actually making federal common law that incorporated the state law statute of limitations. Roosevelt, *supra* note 102, at 15. This is analogous to the preclusion context, in which a federal court sitting in diversity applies federal common law that incorporates the law of the state in which the rendering court sits. *See* Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506, 508-09 (2001) (holding that a federal court sitting in diversity determines the preclusive effect of a federal court judgment using federal common law, but for the purposes of intra-state uniformity, the federal common law should incorporate the law of the state in which the rendering court sat); *see also* Stephen B. Burbank, Semtek*, Forum Shopping, and Federal Common Law*, 77 NOTRE DAME L. REV. 1027, 1027-28, 1038 (2002) ("applaud[ing]" the *Semtek* Court for accepting the "most controversial" but ultimately correct solution).

139 Sedler, for example, argues that the outcome-determination test should apply to horizontal conflict of law situations (i.e., those between states). He reasons that when a forum decides to refer to an external law and incorporate that law as a model, it has decided that it is a forum of convenience and has no interest in the outcome of the litigation. Therefore, it should incorporate by reference "as much of the law of the locus as is likely to bear materially on the ultimate outcome irrespective of whether the matter is analytically characterized as one of substance or procedure." Sedler, *supra* note 127, at 821, 824.

traditional conflict of law method to a more discerning outcome-determination test. This would ensure the uniformity that motivated the very creation of the Convention.

C. *Reverse-*Erie *Analysis*

The preceding two approaches both entail restricting the scope of the statute of limitations found in the Federal Arbitration Act so that it does not apply to certain enforcement proceedings. Interest analysis achieves this restriction by interpreting the statute of limitations according to its purpose, while the *Erie* doctrine achieves this restriction by interpreting the limitations period according to the outcome-determination test. Both approaches avoid a direct clash between the federal limitations period and the one in the Convention because the latter emerges as the only limitations period whose scope covers the facts of an enforcement action. In the words of Currie, the preceding two methods produce (or reveal) a "false" conflict.[140]

This need not be the case. Rather than interpreting away the scope of either of the limitations periods, federal courts can merely accept that both limitations periods cover the facts of an enforcement action and that they conflict. To resolve this true conflict, courts can look for a rule of priority to decide among the conflicting limitations periods.[141]

The conflict between a federal statute of limitations and one found in a treaty is analogous to the little-discussed reverse-*Erie* problem.[142] This problem arises when a state court is hearing a federal cause of action and confronts a situation in which a state law and the federal law conflict—in other words, a conflict between the law of the court of the hierarchically lower jurisdiction (state law) and the law of the hierarchically higher jurisdiction on which the claim before the court is based (federal law).[143] The parallel in the enforcement context is that national courts are the courts of the hierarchically lower jurisdiction; they are hearing a claim—for enforcement—arising out of the law of a hierarchically higher jurisdiction—

140 *See* Brainerd Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 10 (1958) (describing a false conflict as one where the policies of only one law are implicated by a factual situation).

141 Roosevelt, *supra* note 102, at 11.

142 *See* Kevin M. Clermont, *Reverse-*Erie, 82 NOTRE DAME L. REV. 1, 2 (2006) (noting that the topic is "strangely ignored by most scholars").

143 Omar K. Madhany, Comment, *Towards a Unified Theory of "Reverse-*Erie," 162 U. PA. L. REV. 1261, 1262 (2014).

international law as embodied by the New York Convention.[144] The table below captures the parallels between the two situations:

Table 1: The Reverse-*Erie* Problem

	Ordinary Context	**Arbitral Enforcement Context**
Court	State Court	Federal Court
Claim Arises out of	Federal Law	International Law
Conflicting Law	State Law	Federal Law

State courts considering reverse-*Erie* cases have dealt with them in myriad ways.[145] Intermittent guidance has been provided by the jurisprudence of the Supreme Court, which is the only federal court that can consider a reverse-*Erie* problem on a writ of certiorari from a state court of last resort.[146] The Supreme Court has heard four such cases. In three out of the four cases, it has chosen federal law over the conflicting state law.[147] In doing so, it has looked to the federal statutes and the U.S. Constitution

144 In terms of its place in American domestic law, international law is theoretically on the same footing as other statutes. *See* Chae Chan Ping v. United States, 130 U.S. 581, 600 (1889) (holding that treaties are of no higher dignity than acts of Congress). In practice, however, the Supreme Court has treated international law similarly to the Constitution in terms of its superior relationship to federal statutes. Just as the Court has instructed lower courts to interpret statutes in a way that implicates the Constitution only as a last resort, *see* Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) ("[I]f a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter."), it has also instructed lower courts to interpret statutes inconsistently with international law only as a last resort, *see* Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("It has also been observed that an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."). Therefore, this Comment treats international law analogously to the Constitution, as a source of law hierarchically superior to federal statutes.

145 *See* Madhany, *supra* note 143, at 1305 (surveying three trends in state court treatment of the problem and relevant cases on the issue).

146 28 U.S.C. § 1257(a) (2012) ("Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari . . . .").

147 *See* Felder v. Casey, 487 U.S. 131, 153 (1988) (prioritizing section 1983 over a Wisconsin notice of claim requirement); Dice v. Akron, Canton & Youngstown R.R. Co., 342 U.S. 359, 360-61 (1952) (prioritizing the Federal Employers' Liability Act over an Ohio law that permitted issues of fraud in the procuring of a liability release to be determined by a judge rather than a jury); Brown v. W. Ry. of Ala., 338 U.S. 294, 298-99 (1949) (prioritizing the Federal Employers' Liability Act over a state court rule that would construe pleadings in favor of the defendant). *But see* Johnson v. Fankell, 520 U.S. 911, 922-23 (1997) (prioritizing an Idaho rule prohibiting interlocutory appeals over section 1983).

as rules of priority. The conventional wisdom[148] is that the rule of priority that the Court employed is the Supremacy Clause in the Constitution.[149] Certainly the Court's explicit or implicit references to preemption would support this view.[150] Others, however, argue that the Court was not simply applying federal statutes as written, but rather was making federal common law to fill gaps in these statutes in order to effectuate federal policies.[151] Under this view, it was this judge-made common law that displaced state law as the rule of decision, and the authority for the Court to create such displacing federal common law came from the Rules of Decision Act.[152]

Regardless of whether the Court (and state court judges applying the Court's holdings on remand) followed the Supremacy Clause or the Rules of Decision Act, the bottom line is that it looked to a rule of priority to

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148 *See* Clermont, *supra* note 142, at 5 ("[A]nalysts most often start from preemption." (emphasis omitted)); *cf.* ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 3.5, at 214 (4th ed. 2003) ("[S]tate courts generally need not follow federal procedures when hearing federal law claims. However, state courts must do so if Congress specifies the procedure for a particular matter."); Louise Weinberg, *The Federal-State Conflict of Laws: "Actual" Conflicts*, 70 TEX. L. REV. 1743, 1785-86 (1992) (referencing *Felder* in discussing the distinction between reverse-*Erie* cases and the rest of the supremacy and conflict preemption cases).

149 U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.").

150 *See Johnson*, 520 U.S. at 918 ("[O]ur normal presumption against pre-emption is buttressed by the fact that the [state rule is] neutral . . . ."); *Felder*, 487 U.S. at 138 ("The question before us today, therefore, is essentially one of pre-emption: . . . does the [state notice-of-claim] requirement . . . 'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress?'" (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))); *Dice*, 342 U.S. at 363 (holding that the right to trial by jury was "too substantial a part of the rights" afforded by the federal cause of action to be classified as a "local rule of procedure"); *Brown*, 338 U.S. at 296 ("[It is] our duty . . . to determine whether petitioner has been denied a right of trial granted him by Congress. This federal right *cannot be defeated* by the forms of local practice." (emphasis added)).

151 Clermont, *supra* note 142, at 11 ("The federal court is not determining whether preexisting federal law *already* covers the question . . . . Instead, the court must look at federalism policies somehow to decide if federal law *should* govern. If so, . . . the court then must . . . . extend federal law by creating specialized federal common law . . . ."); Madhany, *supra* note 143, at 1282-83 (noting that the Supremacy Clause directs judges to prioritize federal law that already exists, but not to create it).

152 28 U.S.C. § 1652 (2012) ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress *otherwise require* or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." (emphasis added)). Madhany argues that the federal statutes that are in conflict with state law in reverse-*Erie* cases "require" courts to create and supply federal common law as rules of decision, in order to effectuate vital federal policies contained in the federal statutes. Madhany, *supra* note 143, at 1282.

solve these conflicts between federal and state law.[153] And, both the above rules of priority were designed to effectuate the policies of the hierarchically higher—federal—law.

In the enforcement context, federal courts—the hierarchically lower jurisdiction—should likewise look to a rule of priority that strives to effectuate the policies behind the hierarchically higher law—the international law embodied in the New York Convention. This rule of priority may be found in Article 27 of the Vienna Convention on the Law of Treaties, which states that treaty law prevails over domestic law.[154] Given that Congress only unwittingly violated the New York Convention,[155] it would behoove federal courts to choose a rule of priority[156] that would allow maximal fulfillment of both international law and congressional intent.

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153 Clermont mounts a realist critique of this view, arguing that the Supreme Court's references to preemption were "wooden" and conclusory, and masked a complicated choice of law methodology actually being employed by the Court. As a result, the reverse-*Erie* problem has "morphed from classic preemption into a choice of law that requires an *Erie*-like judicial methodology." Clermont, *supra* note 142, at 33. Notably, faced with conflicting statutes of limitations, "the state courts come out the same way on reverse-*Erie* that federal courts do in the *Erie* setting, with each deferring to the other sovereign." *Id.* at 30 (footnotes omitted). Such parallelism would be appropriate in the enforcement context as well; it would result in application of the statute of limitations of the treaty (or of the "international sovereign"). *See supra* Section IV.B.

154 *See* Jan. 27, 1980, 1155 U.N.T.S. 331 ("A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."). While the United States is not party to the Vienna Convention, it considers many of its provisions to be codifications of binding customary international law. *Vienna Convention on the Law of Treaties*, U.S. DEP'T OF STATE, http://www.state.gov/s/l/treaty/faqs/70139.htm [http://perma.cc/R4C5-HA9S] (last visited Sept. 19, 2015) ("The United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties."); *see also* Mora v. New York, 524 F.3d 183, 196 n.19 (2d Cir. 2008) ("The Department of State considers the Vienna Convention on the Law of Treaties an authoritative guide to current treaty law and practice."). At least some members of the Court consider Article 27 to constitute customary international law, as evidenced by their citation to the Article in a dissent. *See, e.g.*, Sanchez-Llamas v. Oregon, 548 U.S. 331, 390-91 (2006) (Breyer, J., joined by Stevens and Souter, JJ., dissenting) ("[*Breard v. Greene*'s] statement of a presumption that only a treaty provision with a clear and express statement can trump the procedural rules of the forum State, is in tension with more fundamental interpretive rules in this area. . . . [S]ee also Vienna Convention on the Law of Treaties, opened for signature May 23, 1969, Art. 27 . . . .").

155 *See supra* Part II.

156 Kramer has suggested that a rule prioritizing substance over procedure should apply even in conflicts between laws from hierarchically equal jurisdictions. *See* Kramer, *Rethinking Choice of Law*, *supra* note 24, at 328 ("[W]hen conflicts arise in domestic cases between substantive and procedural laws, the usual solution is to favor the substantive rule."). While this Comment urges courts to reject the outdated substance–procedure characterization, such a rule of priority would have the same effect as that of the Vienna Convention: it would prioritize the substantive provisions of the New York Convention over the procedural rules of the enforcing state-parties.

Table 2: The Reverse-*Erie* Problem Solved

	Ordinary Context	Arbitral Enforcement Context
Court	State Court	Federal Court
Claim Arises out of	Federal Law	International Law
Conflicting Law	State Law	Federal Law
Rule of Priority to decide conflict	Supremacy Clause or Rules of Decision Act	Vienna Convention on the Law of Treaties Article 27
Law that takes priority	Federal Law	International Law

* * *

Thus, all three of the modern choice of law approaches analyzed above—interest analysis, *Erie* analysis, and reverse-*Erie* analysis—would result in the same practical outcome. They would each apply the indefinite limitations period contained in Article V of the New York Convention, rather than the three-year limitations period in the Federal Arbitration Act, to enforcement actions involving foreign parties and a foreign arbitration. As shown above, this outcome contains many benefits. It effects maximum fulfillment of the purposes behind each limitations period; it ensures that national courts are not used for purposes for which they were not intended; it removes the incentives for award debtors to engage in forum shopping by removing their assets to countries with restrictive enforcement legislation; and finally it effectuates the policies of the hierarchically higher jurisdiction.

Despite the fact that each approach leads to the same practical outcome, two considerations should drive American judges to employ interest analysis over the other approaches. First, unlike *Erie* and reverse-*Erie* analyses, which are uniquely American doctrines, interest analysis—the idea that when choosing between laws, a court should apply the law whose policies can be served without frustrating the policies of any other potentially applicable laws—is generalizable across jurisdictions internationally. Therefore, if American courts would like to set an example for their foreign colleagues in adopting a choice of law approach that restores uniformity and predictability to the enforcement of arbitral awards, interest analysis would be the ideal approach. Second, interest analysis is the least controversial domestically. The *Erie* doctrine is subject to constant reinterpretation, and the explicit subordination of national to international law entailed by reverse-*Erie* analysis may not be palatable to some litigants before American courts.

CONCLUSION

The New York Convention was enacted to bring international uniformity and predictability to the enforcement of foreign arbitral awards. Its ability to achieve its purpose is threatened by the choice of law problem contained within its provisions, and the use by national courts of the traditional choice of law method to resolve this problem. Not only has the use of the traditional method undermined the uniformity and predictability sought by the Convention, but it has also led to absurd results in which an award creditor is effectively deprived of her rights by the law of a country with which neither she nor the arbitration that produced the rights she is trying to enforce has any connection. To fulfill the Convention's purpose and avoid these absurd results, courts should adopt modern choice of law approaches to solve the choice of law problem within the New York Convention and national implementing legislation, such as the Federal Arbitration Act in the United States. For American judges, interest analysis, *Erie* analysis, and reverse-*Erie* analysis are possible modern approaches. All would result in the application of the indefinite limitations period contained in Article V of the Convention, rather than the three-year period in the Federal Arbitration Act, to enforcement actions between foreign parties involving a foreign arbitral award.

A compelling area for further inquiry would be other issues that lie on the border between "substance" and "procedure," and for which applying traditional choice of law approaches is similarly ill-suited. One such issue would be the admissibility of counterclaims in an enforcement proceeding.[157] As international transactions become more multifaceted and long-term, parties increasingly develop reciprocal claims against one another. Ascertaining a predictable and sensible method by which to choose between a national law, which permits them to bring counterclaims, and Article V of the Convention, which does not, is the next, necessary step in preserving the integrity of what truly may be the most effective piece of international commercial legislation ever enacted.[158]

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157 *See supra* notes 81–85 and accompanying text.

158 *See* Mustill, *supra* note 7, at 49.