

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS AND AWARDS: WHAT HATH *DAIMLER* WROUGHT?

LINDA J. SILBERMAN[†] & AARON D. SIMOWITZ[‡]

In Daimler AG v. Bauman, the Supreme Court confirmed what it had only hinted at previously—that general jurisdiction over a corporation is limited only to a state which can be regarded as its “home.” In doing so, the Court brought the United States closer to the rest of the world in its approach to general jurisdiction. What may have been overlooked, however, is the impact of Daimler on actions brought to recognize and enforce foreign country judgments and foreign arbitral awards if the Daimler standard is applied in that context. Some courts have already done so. Professors Silberman and Simowitz offer an overview of the present jurisdictional regimes for recognition and enforcement actions with respect to both foreign judgments and arbitral awards. Their own analysis concludes that a jurisdictional nexus should be required for recognition and enforcement but that the context of recognition and enforcement presents unique differences from a plenary action. Thus, they argue that Daimler needs to be tailored to fit such actions. Professors Silberman and Simowitz also examine various alternative bases of jurisdiction—property-based jurisdiction, specific jurisdiction, and consent—that may be pressed into service if Daimler is extended to recognition and enforcement actions, and find both promise as well as limits in those alternatives.

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[†] Martin Lipton Professor of Law, Co-Director, Center for Transnational Litigation, Arbitration, and Commercial Law, New York University School of Law.

[‡] Research Fellow, Center for Transnational Litigation, Arbitration, and Commercial Law, Fellow, Classical Liberal Institute, Adjunct Professor, New York University School of Law, Lecturer in Law, Columbia Law School. The authors wish to thank Steve Burbank, Trey Childress, Bill Dodge, Peter Trooboff, and participants in the Pepperdine Works in Progress Transnational Litigation Conference, the Pepperdine Arbitration & Courts Conference, and the Templeton Foundation/Federalist Society Conference on International Economic Law for their valuable suggestions on prior drafts. The authors also wish to thank Kevin Benish and Nathan Yaffe for their valuable research assistance. The authors also thank the editors on the New York University Law Review for their contributions. The authors are grateful for the recognition of the John Templeton Foundation. Professor Silberman expresses her appreciation to the Filomen D’Agostino and Max E. Greenberg Research Fund for its financial support of this research. Copyright © 2016 by Linda J. Silberman & Aaron D. Simowitz.

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INTRODUCTION: THE STORY IN BRIEF

Two different and contradictory lines of cases now complicate attempts to recognize and enforce foreign judgments and arbitral awards. Historically, the approach in the United States—but not necessarily elsewhere—was that an independent action must be brought in order to recognize or enforce a foreign country judgment or arbitral award.¹ Such an action for recognition or enforcement traditionally required a “jurisdictional nexus” between the defendant and the forum—either the assets of the defendant must be found in the forum, or the defendant must be subject to personal jurisdiction. Until recently, that requirement did not pose a serious impediment. For the most part, recognition and enforcement are usually sought in the forum where assets are located. And although the Supreme Court in *Shaffer v. Heitner*² rejected the presence of assets as a basis of jurisdiction for asserting an initial claim against a defendant, it was clear that assets continued to suffice as a basis of jurisdiction for enforcing foreign judgments and awards.³ In those cases where no assets could

¹ See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. g (AM. LAW INST. 1987) (noting that a foreign judgment creditor must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property); *id.* § 487 cmt. c (“As in respect to judgments . . . an action to enforce a foreign arbitral award requires jurisdiction over the award debtor or his property.”). The Draft Restatement of the Law (Third) on the U.S. Law of International Commercial Arbitration also takes the position that jurisdiction over the defendant is required to enforce a foreign arbitral award. See RESTATEMENT (THIRD) OF U.S. LAW OF INT’L COMMERCIAL ARBITRATION § 4-27 (AM. LAW INST., Tentative Draft No. 3, 2013). Notwithstanding the reference to “personal jurisdiction” in the title, the Draft makes clear that the “plaintiff may invoke whatever statutory bases of jurisdiction the chosen forum allows (be it in personam, in rem, or quasi-in-rem), provided their use under the circumstances also comports with due process standards.” *Id.* § 4-27, Reporter’s Note (a); see, e.g., *First Inv. Corp. of the Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 747–49 (5th Cir. 2012) (explaining that the New York Convention’s omission of personal jurisdiction as an express ground pursuant to which member states may deny confirmation of awards did not remove the requirement that courts obtain personal jurisdiction over defendant debtors, including foreign entities, as a predicate to enforcing awards); see also Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT’L ARB. 439, 439 (2012) (noting that almost all courts in the United States require personal jurisdiction over the debtor or quasi-in-rem jurisdiction over the debtor’s property in order to enforce an arbitral award).

² 433 U.S. 186 (1977).

³ See *id.* at 212 n.36 (1977) (“Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no

be found, judgment and award creditors could nonetheless assert personal jurisdiction—usually broad all-purpose general jurisdiction, rather than specific jurisdiction⁴—over the judgment or award debtor. Indeed, even when assets are present, creditors might prefer to obtain personal jurisdiction for recognition and enforcement in order to gain access to important remedies, such as turnover orders and asset discovery. Award creditors in particular may seek recognition⁵ of arbitral awards in the absence of assets in order to obtain a judgment within the three-year time period imposed by Chapter 2 of the Federal Arbitration Act.

Given the transformation of the rules on general jurisdiction in plenary actions with the Supreme Court decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁶ and *Daimler AG v.*

unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.”).

⁴ See *infra* Part V.

⁵ The Federal Arbitration Act and the international conventions use differing terminology with respect to the recognition and enforcement of foreign arbitral awards. Article III of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards requires that contracting states “recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon” Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. III, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 3 [hereinafter New York Convention] (emphasis added). Articles IV and V of the Convention also refer to “recognition and enforcement.” *Id.* (emphasis added). Chapter II of the Federal Arbitration Act, which implements the New York Convention, refers to an application for “an order confirming the award.” 9 U.S.C. § 207 (2012) (emphasis added). It also provides that a court “shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.” *Id.* (emphasis added). The Inter-American Convention on International Commercial Arbitration provides that “execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts” Inter-American Convention on International Commercial Arbitration, art. 4, Jan. 30, 1975, S. TREATY DOC. NO. 97-12, 1438 U.N.T.S. 249 [hereinafter Panama Convention] (emphasis added) (entered into force on June 16, 1976). Articles 5.1 and 5.2 refer to grounds on which “recognition and execution” of the decision may be refused. *Id.* at arts. 5.1, 5.2 (emphasis added). We use “confirmation” in some instances to refer to U.S. proceedings seeking recognition of a Convention award.

⁶ 131 S. Ct. 2846 (2011). In *Goodyear*, estates of North Carolina minors who were killed in a bus accident attempted to assert general jurisdiction over foreign manufacturers who sold various types of tires in the United States, including in North Carolina. The case should have been an easy one since mere sales activity into the forum state had never been sufficient for general all-purpose jurisdiction. However, the North Carolina intermediate state court had upheld jurisdiction, and thus the Supreme Court had good reason to take the case to reaffirm well-accepted constitutional limits on general jurisdiction. But instead of emphasizing the traditional general jurisdiction standard of substantial, systematic, and continuous activities, the Supreme Court went much further to state that such jurisdiction required that a corporation’s affiliations with a forum be “so ‘continuous and systematic’ as to render it essentially at home in the forum state.” *Id.* at 2851 (emphasis added). The

Bauman,⁷ the question arises whether this new standard—that in the absence of extraordinary circumstances, a foreign corporation must be sued “at home,” i.e. at its place of incorporation or principal place of business—also applies to the recognition and enforcement of judgments and awards. Both *Goodyear* and *Daimler* involved the question of the constitutional standard for asserting general jurisdiction over foreign country defendants for claims that arose abroad in the context of a plenary action. Those cases said nothing about jurisdiction in the very different context of recognition and enforcement. Nonetheless, with no consideration of the differences between adjudication of a plenary action and an action for recognition and enforcement of a prior judgment or award, several courts in the United States have extended the due process limits of *Goodyear* and *Daimler* to actions for recognition and enforcement of foreign arbitral awards and judgments.

As an illustration, the Court of Appeals for the Second Circuit, in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*,⁸ dismissed an action for recognition of a \$932 million arbitral award because the debtor did not have sufficient jurisdictional connections with New York to meet the newly-minted general jurisdiction standard addressed to plenary actions. This export of jurisdictional rules from the realm of traditional adjudication to the very different landscape of recognition poses serious dangers to the routine recognition of foreign judgments and awards and highlights the need for rethinking the jurisdictional

Court identified the paradigm situations of “at home” as the place of incorporation and principal place of business of the corporation, *id.* at 2853–54, but appeared to leave open the question whether other indications of substantial corporate activity in a state might also establish general jurisdiction.

⁷ 134 S. Ct. 746 (2014). *Daimler* involved the question of whether a U.S. court could exercise judicial jurisdiction over a foreign country defendant to hear claims for human rights violations brought by foreign plaintiffs based on activity that took place abroad. Jurisdiction over the foreign defendant was based on the activities of its indirect subsidiary in the forum state, which were clearly substantial and continuous under the traditional standard for general jurisdiction. Once the Court rejected the attribution of the subsidiary’s activities to the parent, it need not have gone further to decide the case. Nonetheless, the Court proceeded to confirm what it had only hinted at in *Goodyear*: that continuous and systematic business activity alone was not sufficient for establishing general jurisdiction; rather a corporation’s affiliations must be so substantial and of such a nature as to render it “essentially at home” in that state—meaning the corporation’s place of incorporation or principal place of business, with a limited exception for “extraordinary circumstances.” *Id.* at 760–61. Although *Goodyear* presaged this dramatic change to the standard for general jurisdiction, it was *Daimler* that firmly effectuated it—and therefore the new “at home” standard is referred to herein as the *Daimler* standard.

⁸ 750 F.3d 221, 223 (2d Cir. 2014), *cert. denied*, *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 134 S. Ct. 2888 (2014) (citing *Daimler* in dismissing an action for recognition and enforcement of a foreign arbitral award for lack of personal jurisdiction).

prerequisites for courts to grant recognition and enforcement to foreign awards and judgments.

Not all courts—in the United States or elsewhere—have followed *Sonera* in imposing this strict jurisdictional requirement in the recognition and enforcement context. Indeed, even prior to *Daimler*, several recent lower New York state courts dispensed with any jurisdictional requirement with respect to an action to enforce a foreign *judgment*.⁹ These cases were a marked departure from the generally accepted approach that some jurisdictional basis was necessary to enforce not only a foreign judgment but also a foreign arbitral award. Thus the New York cases created an inexplicable disparity between the jurisdictional requirements for treatment of foreign awards and foreign judgments, in a situation where the differences would logically lead to a more liberal standard for awards and not the other way around.

In Canada, the recent decision by the Canadian Supreme Court in *Chevron Corp. v. Yaiguaje*,¹⁰ took an approach very different from *Sonera* in addressing the issue of jurisdiction to recognize and enforce a foreign *judgment*, going in precisely the opposite direction. In yet another iteration of the epic Chevron/Lago Agrio dispute,¹¹ the Supreme Court of Canada held that an action by the Lago Agrio plaintiffs for recognition and enforcement of their Ecuadorian judgment could be brought in Ontario even when the judgment debtor (Chevron) had no property in Ontario and lacked any nexus with Ontario. Indeed, the Court referenced the idiosyncratic lower court New York state cases. In support of its decision, the Canadian Supreme Court also pointed to Ontario's approach to recognition and enforcement of foreign arbitral awards, which does not require a jurisdictional nexus. But the Court overlooked a fundamental difference between awards and judgments at the recognition/enforcement stage. In the international arbitration context, parties consent to resolution of their disputes, and when they agree to arbitrate in a country that is party to the New York or Panama Convention, it can be argued that their agreement to arbitrate is also consent to recognition or enforce-

⁹ See *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Fin. Servs. Co.*, 986 N.Y.S.2d 454 (App. Div. 2014); *Lenchyshyn v. Pelko Electric, Inc.*, 723 N.Y.S.2d 285 (App. Div. 2001).

¹⁰ See *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69 (Can.). Although this Article represents solely the views of the authors, we do note that Professor Silberman has had a consulting relationship with Jones Day and Professor Simowitz practiced at Gibson, Dunn & Crutcher until 2011. In those capacities, they were involved in earlier phases of the *Chevron* dispute.

¹¹ The facts of the dispute are recounted in exhaustive detail in *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 383–544 (S.D.N.Y. 2014).

ment of the award in another Convention state. In justifying its conclusion that no nexus is required for judgment recognition, the Canadian Supreme Court failed to consider the substantial burden that might be imposed upon debtors as a result. The Court explained that debtors hold the keys to their own salvation, but as prior attacks on the Chevron judgment itself illustrate,¹² debtors often have significant defenses to recognition and enforcement. The Canadian approach requires debtors from anywhere in the world to come to the forum where recognition is sought—even where they have no connection or presence—to assert defenses or lose them. Nor can the debtor afford to simply ignore the recognition action, as the resulting judgment will have consequences both in the forum, if the debtor's assets later enter the state, and possibly outside the forum, should such a recognition judgment be given effect elsewhere.¹³

While *Chevron* seems to err in one direction, *Sonera* errs in the other. In *Sonera*, the Court of Appeals for the Second Circuit extended the *Daimler* standard to hold that a New York federal court lacked general jurisdiction over a Turkish award debtor in an action against it by the award creditor to confirm a New York Convention award rendered in Switzerland.¹⁴ The Second Circuit thereby required the same nexus with the forum for both plenary adjudication and recognition/enforcement, and it overlooked another of the fundamental differences between adjudication and recognition/enforcement. In a plenary action, a claimant is seeking to obtain a proper forum for adjudication of the merits of a dispute. In a recognition/enforcement proceeding, a presumptively competent tribunal has already rendered a decision against the debtor, which has only limited defenses, primarily relating to process. The creditor is seeking a forum where, for example, assets can eventually be found, seized, sold, and applied to the outstanding judgment or award. In practical terms, the standard imposed by *Sonera* will prevent recognition and enforcement of

¹² In the U.S. proceeding alone, the Ecuadorian judgment at the heart of the dispute was attacked as being contaminated by “racketeering, extortion under both federal and state law, mail fraud, wire fraud, money laundering, obstruction of justice, witness tampering, conspiracy to violate racketeering laws, tortious interference with contract, unjust enrichment, civil conspiracy, and trespass to chattels.” *Chevron Corp. v. Naranjo*, 667 F.3d 232, 237–38 (2d Cir. 2012). Specifically, the district court granted an injunction (later vacated by the Court of Appeals) restraining worldwide enforcement of the Ecuadorian judgment because it found that the Ecuadorian courts were corrupt and afflicted with political interference, and that the specific proceedings were infected with fraud. *See id.* at 238.

¹³ *See infra* text accompanying notes 45–52.

¹⁴ *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 223 (2d Cir.), *cert. denied*, 134 S. Ct. 2888 (2014). The Court of Appeals did not even address the question of whether *Daimler* applies in the recognition context.

awards and judgments that would have been previously recognized in the United States, potentially undermining the effectiveness of cross-border recognition and enforcement on which transnational businesses, among others, rely.

An intermediate path is clearly needed. Although a jurisdictional nexus should be required to recognize and enforce foreign arbitral awards and foreign country judgments,¹⁵ the distinction between a plenary action and an action for recognition and enforcement justifies a more relaxed jurisdictional nexus in the recognition and enforcement context.¹⁶ The justification for permitting the existence of the debtor's property located in the forum state to satisfy the jurisdictional requirement for purposes of recognition and enforcement supports the argument that the pre-*Daimler* "doing business"/"systematic and continuous contacts" standard should be sufficient to satisfy such requirements as well.¹⁷

With one exception (now largely discredited),¹⁸ every court that has imposed a jurisdictional nexus requirement for recognition and enforcement of arbitral awards has held that this nexus can be satisfied by the presence of the debtor's property.¹⁹ Indeed, such a rule flows naturally from *Shaffer v. Heitner*,²⁰ in which the U.S. Supreme Court rejected the presence of assets as a basis of jurisdiction for asserting an initial claim against a defendant, but preserved property

¹⁵ See Silberman, *supra* note 1, at 441 ("[T]he award debtor who has a legitimate challenge to the award may be forced at the confirmation stage to raise Convention defenses to the award in a far-off forum with which neither he nor his assets have any connection.").

¹⁶ See *infra* Part II.

¹⁷ There are potential lesser jurisdictional standards other than the traditional "doing business"/"systematic and continuous contacts" test. A "fixed place of business" test—similar to that used for plenary jurisdiction under English law—would provide ascertainability and predictability that was lacking in the earlier pre-*Daimler* era. See Linda J. Silberman, *The End of Another Era: Reflections on Daimler and Its Implications for Judicial Jurisdiction in the United States*, 19 LEWIS & CLARK L. REV. 675, 681 (2015). One of *Daimler*'s difficulties, however, is that the Court failed to appreciate the extent to which other areas of law had developed in reliance on broad general jurisdiction—such as arbitral award and judgment recognition and enforcement. Preservation of the traditional "doing business"/"systematic and continuous contacts" standard for recognition and enforcement is likely to minimize disruption.

¹⁸ See *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208, 213 (4th Cir.) (requiring that any property that serves as a jurisdictional basis for a recognition and enforcement action have some connection to the underlying claim), *cert. denied*, 537 U.S. 822 (2002).

¹⁹ See, e.g., *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 398 (2d Cir. 2009) (stating that jurisdiction over the debtor or the debtor's property is a prerequisite to a petition to recognize and enforce a foreign arbitral award).

²⁰ 433 U.S. 186 (1977).

as a basis for jurisdiction in post-judgment proceedings.²¹ But assets are not always present, and even when property-based jurisdiction is available, it has certain limits. Thus, difficulties remain if the *Daimler* “at home” standard extends to recognition and enforcement. When there are no assets, creditors face the three-year time bar for recognition of foreign arbitral awards—allowing debtors to evade enforcement by keeping their assets out of the United States for a relatively short time. The mere presence of property as a jurisdictional basis may also limit the amount of recovery available to creditors and may not justify or permit many of the additional remedies available to creditors when they can obtain personal jurisdiction over a debtor.²²

The limitations of both general and property-based jurisdiction may lead judgment and award creditors to think about *specific* jurisdiction in the recognition and enforcement context. Justice Ginsburg’s decision in *Daimler* presumed that specific jurisdiction—the power to decide claims arising out of or related to the defendant’s contacts in the forum—would substitute for the dramatic diminution of general jurisdiction.²³ But specific jurisdiction is a very strange fit for recognition and enforcement. To establish specific jurisdiction, a plaintiff must usually demonstrate that the defendant’s contacts have a “nexus” with the plaintiff’s claims.²⁴ In a recognition and enforcement proceeding, another tribunal has already decided the claim—only the resulting judgment or award remains unsatisfied. Thus, specific jurisdiction is difficult to adapt to this context.

Daimler’s application to recognition and enforcement has not been limited to actions against debtors; it has also been applied to enforcement proceedings against third parties. Judgments and awards against noncompliant debtors are often satisfied by taking enforcement proceedings against third parties, either those with information about the whereabouts of the debtor’s assets or in possession of the debtor’s assets, often called garnishees. The *Daimler* rule of general jurisdiction may also limit a court’s power over these third parties in enforcement proceedings, even when enforcement is sought in the judgment-rendering court itself.

²¹ See *id.* at 212 n.36 (“Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.”).

²² See, e.g., *infra* notes 195–204 and accompanying text.

²³ *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014).

²⁴ See *id.* at 754 (describing the “arising from” and “relating to” standards for establishing specific jurisdiction).

The extension of *Daimler* to recognition and enforcement is unworkable. *Daimler* is a case about plenary jurisdiction to adjudicate claims. In that context, it was a much-needed corrective to an overbroad and unpredictable standard for general jurisdiction.²⁵ Several courts—in particular, the Second Circuit in *Sonera*—that extend *Daimler* to the very different question of whether a judgment or award can be recognized and enforced have failed to consider the differences and policies between those contexts. If this trend continues, the recognition and enforcement of judgments and awards will likely be hampered. Although alternatives to general jurisdiction may exist, some of these alternatives—such as property-based jurisdiction—address only a portion of the problem.²⁶ Other alternatives, such as consent-based or specific jurisdiction in the context of recognition and enforcement, require further analysis.²⁷

I

THE NEED FOR A JURISDICTIONAL NEXUS

The issue of whether any jurisdictional nexus is required for an action to enforce a foreign judgment or award has not yet reached the U.S. Supreme Court. Numerous federal courts of appeal have held that either property or personal jurisdiction is necessary to support an action to confirm a foreign arbitral award.²⁸ Most courts in the United States also impose a similar requirement for recognition and enforcement of a foreign judgment.²⁹

²⁵ See Silberman, *supra* note 17, at 680; Linda J. Silberman, *Goodyear and Nicastro: Observations from a Transnational and Comparative Perspective*, 63 S.C. L. REV. 591, 613–14 (2012) (criticizing pre-*Goodyear* “doing business” jurisdiction as indeterminate and expansive).

²⁶ *Infra* Part VI.

²⁷ *Infra* Parts III–V.

²⁸ See *First Inv. Corp. of the Marsh. Is. v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 749 (5th Cir. 2012) (“Even though the New York Convention does not list personal jurisdiction as a ground for denying enforcement, the Due Process Clause requires that a court dismiss an action, on motion, over which it has no personal jurisdiction.”); *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 397–98 (2d Cir. 2009) (stating that the district court correctly required jurisdiction over the debtor or the debtor’s property in order to recognize and enforce a foreign arbitral award); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1121 (9th Cir. 2002) (“We hold that neither the Convention nor its implementing legislation removed the district courts’ obligation to find jurisdiction over the defendant in suits to confirm arbitration awards.”); see also Silberman, *supra* note 1, at 439.

²⁹ See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. g (AM. LAW INST. 1987); e.g., *Electrolines, Inc. v. Prudential Assurance Co.*, 677 N.W.2d 874, 880 (Mich. Ct. App. 2003) (holding that in an action to enforce a foreign country judgment, the court must possess jurisdiction over the judgment debtor or the judgment debtor’s property); see also Silberman, *supra* note 1, at 444.

Two lower court New York state decisions have dispensed with any jurisdictional requirement for an action to enforce a foreign judgment.³⁰ In *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Financial Services Co.*, the New York Appellate Division, First Department, held that “a party seeking recognition in New York of a foreign money judgment (whether of a sister state or a foreign country) need not establish a basis for the exercise of personal jurisdiction over the judgment debtor by the New York courts,” since neither the C.P.L.R. nor the Constitution’s Due Process Clause require it, “[n]or does the [C.P.L.R.] require the judgment debtor to maintain property in New York for New York to recognize a foreign money judgment.”³¹ In short, the New York appellate court in *Abu Dhabi* held that a judgment creditor can bring a suit to recognize or enforce a foreign country judgment against a debtor who has no connection of any kind with the forum state. The court referenced the defenses to recognition listed in C.P.L.R. 5304, but overlooked the requirement of C.P.L.R. 5303, which provides that foreign country judgments are “enforceable by an *action on the judgment*,” indicating that institution of an action is required for recognition and enforcement of a foreign country judgment.³² Institution of an action traditionally *does* require personal jurisdiction or attachment of the debtor’s property.³³ The New York court decisions that hold neither property nor personal jurisdiction is required for recognition of a judgment stand as an aberration.³⁴

Maintaining a recognition and enforcement action in the United States has traditionally required personal jurisdiction over the debtor or the attachment of the debtor’s property. The Due Process Clause serves here, as it does in plenary actions, to protect a defendant from

³⁰ See *Abu Dhabi Commercial Bank PJSC v. Saad Trading, Contracting and Fin. Servs. Co.*, 986 N.Y.S.2d 454 (App. Div. 2014); *Lenchyshyn v. Pelko Elec., Inc.*, 723 N.Y.S.2d 285 (App. Div. 2001); see also *Haaksman v. Diamond Offshore (Berm.) Ltd.*, 260 S.W.3d 476, 480–81 (Tex. App. 2008) (stating that due process does not require personal jurisdiction over a debtor after *Shaffer* and that “a judgment creditor should be allowed the opportunity to obtain recognition of his foreign-money judgment and later pursue enforcement if or when the judgment debtor appears to be maintaining assets” in that forum).

³¹ *Abu Dhabi Commercial Bank PJSC*, 986 N.Y.S.2d at 458.

³² N.Y. C.P.L.R. 5303 (CONSOL. 2014) (emphasis added).

³³ *Id.* (“Such a foreign judgment is enforceable by an action on the judgment . . .”).

³⁴ Other courts in New York had previously required some jurisdictional nexus. See *Biel v. Boehm*, 406 N.Y.S.2d 231, 233 (Sup. Ct. 1978) (“[I]t seems clear that a plaintiff armed with a foreign country judgment must establish some basis of jurisdiction over the defendant before enforcing the judgment.”); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. g (AM. LAW INST. 1987) (noting that a foreign judgment creditor must establish a basis for the exercise of jurisdiction by the enforcing court over the judgment debtor or his property).

the burdens of litigating in a forum where it has a limited connection. Although the costs and litigation burdens on a debtor in a recognition/enforcement action are less than in a full plenary action, a debtor nonetheless can assert defenses to recognition and enforcement of a foreign award or judgment.³⁵

Under the New York and Panama Conventions, an award debtor can challenge the validity of the arbitration agreement, raise other procedural objections to the proceedings, and object to recognition/enforcement on grounds of non-arbitrability and public policy.³⁶ Even more extensive defenses are available to a defendant resisting recognition and enforcement of a foreign country judgment.³⁷ The standards and criteria for recognition and enforcement of a foreign judgment in the United States are generally a matter of state law.³⁸ A judgment debtor has a number of defenses available to challenge the original judgment and should not be forced to raise those defenses in any forum in which the judgment creditor might choose to bring a recognition/enforcement action. The debtor should only be required to respond to an action for recognition or enforcement in a court where the debtor's property has some connection to the forum and it is fair to require him to respond there. In overlooking such concerns, the New York state court decisions in *Lenchyshyn* and *Abu Dhabi* failed to appreciate the potential unfairness to a judgment debtor in holding

³⁵ Moreover, in the United States, each side in a recognition and enforcement action generally bears its own costs and attorneys' fees, thus increasing the cost burdens on a judgment debtor with no contacts with the enforcement forum. See *Sheet Metal Workers' International Association Local Union No. 359 v. Madison Indus., Inc., of Ariz.*, 84 F.3d 1186, 1192 (9th Cir. 1996) ("Ordinarily, the prevailing party in a lawsuit does not collect attorney's fees absent contractual or statutory authorization.").

³⁶ See New York Convention art. V, *supra* note 5, 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42; Panama Convention art. 5, *supra* note 5, 1438 U.N.T.S. at 250.

³⁷ A majority of states have adopted one of two Uniform Acts on recognition and enforcement of foreign country judgments—the 1962 Uniform Foreign-Money Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act. See Linda J. Silberman, *The Need for a Federal Statutory Approach to the Recognition and Enforcement of Foreign Country Judgments*, in *FOREIGN COURT JUDGMENTS AND THE UNITED STATES LEGAL SYSTEM* 101, 103–04 (Paul B. Stephan ed., 2014). Even in states without a Uniform Act, the defenses to recognition and enforcement of a foreign country judgment are similar. They include a lack of impartial tribunals or procedures, a lack of personal or subject matter jurisdiction in the foreign court, failure of notice, fraud, conflict with another judgment, contravention of a forum-selection clause, public policy, and in some states a failure of reciprocity of treatment to U.S. judgments. See, e.g., Barb Dawson et al., *Global Impact on Arizona Soil: Recognition and Enforcement of Foreign Judgments in Arizona*, ARIZ. ATT'Y, Feb. 2007, at 24–30, https://www.myazbar.org/AZAttorney/PDF_Articles/0207foreignjudgm.pdf (outlining the framework for recognition and enforcement of foreign judgments under Arizona common law).

³⁸ See Silberman, *supra* note 37, at 102–04 (describing the historical progression by which state common law and later, in many states, state statutory law came to govern recognition and enforcement of foreign judgments).

that no jurisdictional nexus is required in order to bring a recognition action.³⁹

In its recent *Chevron Corp. v. Yaiguaje* decision, the Supreme Court of Canada, citing the lower New York court cases, also dismissed the argument that burdens on judgment debtors should be a factor in requiring a jurisdictional nexus for recognition and enforcement of foreign judgments.⁴⁰ In rejecting the requirement that any nexus with the enforcing court, including the presence of assets, is necessary, the Supreme Court of Canada noted that Rule 17.02(m) of the Ontario Rules provides for the existence of a foreign judgment as a basis for “service out” or service *ex juris* on the judgment debtor.⁴¹ Although the Court conceded that the Rules do not “confer jurisdiction,” the Court found that, in the absence of specific jurisdictional legislation, the Rules should govern, and actions for recognition and enforcement should be permitted without additional restrictions.⁴²

The Court offered several justifications for disregarding the interests of judgment debtors. The Court reasoned that a judgment debtor holds the keys to its own salvation: “In essence, through their own behaviour and legal noncompliance, the debtors have made themselves the subject of outstanding obligations. It is for this reason that they may be called upon to answer for their debts in various jurisdictions.”⁴³ But as the *Chevron* situation illustrates better than most,⁴⁴ judgment debtors often have valid defenses to the judgment that must be asserted in the enforcing court or they are waived.

It is hardly accurate to say that “no unfairness” could result from demanding that a judgment debtor with no connection of any kind to Ontario be haled from across the world into a court there and forced to assert its defenses there—or lose its ability to contest the conversion of a foreign judgment into a Canadian judgment. That the judgment debtor has no connection to the enforcing forum does not mean that the debtor has no reason to be troubled by the existence of an outstanding judgment rendered in that forum. If the judgment debtor chooses not to defend a recognition action where it has no assets, the

³⁹ Cf. Int’l Commercial Disputes Comm. of the Ass’n of the Bar of N.Y.C., *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT’L ARB. 407, 424–25 (2004).

⁴⁰ *Chevron Corp. v. Yaiguaje*, [2015] S.C.R. 69, para. 27 (Can.).

⁴¹ See *id.* at para. 70.

⁴² See *id.* at paras. 70, 74.

⁴³ See *id.* at para. 55 (“[N]o unfairness results to judgment debtors from having to defend against recognition and enforcement proceedings.”).

⁴⁴ A full recitation of the intricacies of the *Chevron-Lago Agrio* dispute is well beyond this paper’s scope. For one account, see *Chevron Corp. v. Donziger*, 974 F. Supp. 2d 362, 383–544 (S.D.N.Y. 2014).

existence of an outstanding judgment may have reverberations during the life of the judgment.

The effect of a rule that permits recognition without a jurisdictional nexus is likely to encourage creditors to shop for the forum that offers the most lax standards for judgment recognition. The problem is compounded if other nations will grant recognition to such a judgment,⁴⁵ or if other states within a federal system view the judgment as itself entitled to enforcement without defenses, as under the Full Faith and Credit Clause of the U.S. Constitution.⁴⁶

Courts in the United States are divided as to whether a recognition judgment mandates further recognition within the United States under the Full Faith and Credit Clause. An appellate court in the District of Columbia⁴⁷ and an appellate court in Pennsylvania⁴⁸ differed about how to treat a New York judgment that recognized a Bahranian judgment where the New York court rendered its recognition judgment without personal jurisdiction over the judgment debtor. The Pennsylvania court held that the New York judgment was entitled to full faith and credit; and the fact that the New York judgment was a mere recognition judgment was “of no moment.”⁴⁹ However, the District of Columbia Court of Appeals took a different view, noting that although the judgment was enforceable in New York, it was not entitled to full faith and credit.⁵⁰ As the D.C. court explained, “when a state does nothing more than recognize a foreign country judgment, it lacks the type of interest that drives full faith and credit jurisprudence.”⁵¹ As a matter of policy, the court found it troubling that “litigants may obtain recognition of foreign country judgments in *any* U.S. jurisdiction and then enforce those judgments throughout the

⁴⁵ See Maxi Scherer, *Effect of Foreign Judgments Relating to Arbitral Awards: Is the 'Judgment Route' the Wrong Road?*, 4 J. INT'L DISP. SETTLEMENT 587, 587–628 (2013); Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, in FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT 313, 322 (Franco Ferrari ed., 2013).

⁴⁶ U.S. CONST. art. IV, § 1. As for Canada, the Canadian Supreme Court indicated that the Ontario judgment could be subject to registration in other provinces. See *Chevron Corp. v. Yaiguaje*, [2015] S.C.R. 69, para. 49.

⁴⁷ *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998, 1006–08 (D.C. 2014).

⁴⁸ *Standard Chartered Bank v. Ahmad Hamad Al Gosaibi & Bros.*, 2014 PA Super 179, *appeal dismissed without opinion*, 108 A.3d 36 (Pa. 2015).

⁴⁹ *Id.* at 14.

⁵⁰ See *Ahmad Hamad Al Gosaibi & Bros. Co.*, 98 A.3d at 1006. The D.C. court was interpreting the Uniform Enforcement of Foreign Judgments Act (UEFJA) which provides for registration of “any judgment . . . that is entitled to full faith and credit.” *Id.* at 1001 (quoting D.C. Code §§ 15-351 to -357).

⁵¹ *Id.*

country.”⁵² The court also indicated that a recognition judgment was a “fundamentally different kind of judgment” than those usually given full faith and credit.⁵³ The court held that full faith and credit did not apply to the New York judgment, but indicated that the Bahranian judgment could potentially be presented for recognition under the D.C. Money Judgment Recognition Act. The concerns identified by the D.C. court do not necessarily require that the jurisdictional criteria in the award and judgment context be exactly the same as for plenary actions. As the Supreme Court recognized in *Shaffer*, the balance of interests between creditors and debtors in an already adjudicated award or judgment is different than the ordinary balance of interests between plaintiffs and defendants in a plenary action.⁵⁴

Even without the constitutional backdrop that exists in the United States, many countries do require (as a matter of domestic law) that a judgment or award debtor have a nexus with the forum—either be resident, domiciled, or have assets in the state—in order to recognize and enforce a judgment or award.⁵⁵ With respect to arbitral

⁵² *Id.*

⁵³ *Id.* at 1007. The D.C. court noted the limited and conflicting authority that exists regarding the conferral of full faith and credit on the recognition judgments of other states, although only the D.C. and Pennsylvania appellate courts have addressed the particular question of whether to recognize a judgment domesticated without a jurisdictional nexus. *See* Silberman, *supra* note 37, at 113–15 (noting that the lack of uniformity and lack of guidance created by such conflicts among state judgment recognition systems argues for a federal statute); *see also* RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW: JURISDICTION § 401 cmt. g (AM. LAW INST., Tentative Draft No. 1, 2014) (“The Full Faith and Credit Clause does not apply to judgments of foreign courts. Nor does it require a U.S. court automatically to regard as conclusive the decision of another U.S. court to recognize, or not to recognize, a foreign judgment.”). *Compare* Reading & Bates Constr. Co. v. Baker Energy Res. Corp., 976 S.W.2d 702, 714–15 (Tex. App. 1998) (indicating it was not required to give full faith and credit to a Louisiana judgment recognizing a foreign country judgment since it would undermine the reciprocity requirement that Texas imposed and Louisiana did not), *with* Jaffe v. Accredited Sur. & Cas. Co., 294 F.3d 584, 591–92 (4th Cir. 2002) (holding a prior judgment that refused to enforce a Canadian judgment on grounds of Florida public policy was entitled to preclusive effect in Virginia, even if the Canadian judgment would not have violated Virginia public policy). Most recently, a Delaware state court held that it was obligated to recognize an Arizona judgment recognizing a Canadian judgment, even though the underlying Canadian judgment would have been unenforceable in Delaware both because it was a “fine or penalty” and it was outside the Delaware statute of limitations. *Alberta Sec. Comm’n v. Ryckman*, No. N13J-02847, 2015 WL 2265473, at *7–8 (Del. Super. Ct. May 5, 2015), *aff’d mem.*, 2015 WL 6848141 (Del. Nov. 5, 2015). The Delaware court held that Delaware’s interest in vindicating its own public policy did not outweigh the interests embodied by the Full Faith and Credit Clause. *Id.* at *8.

⁵⁴ *See* *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977).

⁵⁵ Germany provides an example in the context of judgments. *See* Wolfgang Wurmnest, *Recognition and Enforcement of U.S. Money Judgments in Germany*, 23 BERKELEY J. INT’L L. 175, 198–99 (2005) (“The action for a declaration of enforceability is an adversarial proceeding and the general rules of jurisdiction apply. The proper venue to file

awards, some countries vest jurisdiction in a single designated court if the debtor is not resident or domiciled in the jurisdiction, rather than permitting recognition and enforcement where the assets are found.⁵⁶ On the other hand, a minority of countries permit recognition or enforcement of a foreign arbitral award—and occasionally even a foreign judgment—without requiring any jurisdictional nexus.⁵⁷ For arbitral awards, the explanation is that there has been consent to recognition and enforcement by the award debtor when recognition and enforcement of a Convention award is sought in a New York or Panama Convention State and the debtor had agreed to arbitrate in a Convention State.⁵⁸ In the *Chevron* case, the Canadian Supreme Court pointed to the Ontario approach to recognition and enforcement of *arbitral awards* which does not require a jurisdictional nexus in support of its conclusion that no nexus is required for the recognition and enforcement of a *foreign judgment*. However, the Supreme Court failed to acknowledge that Ontario's position on arbitral awards was a minority one, and even more importantly, the Supreme Court never considered the significant differences between judgments and arbitral awards.

As indicated above, the United States would actually be in step with many other signatories to the New York Convention in requiring that the debtor be “at home” or have assets in the forum before recognizing and enforcing a foreign *arbitral* award. However, this jurisdictional requirement works particular hardship because of the three-

the motion is determined primarily by the defendant's domicile or the location of the assets that are to be seized.”). For awards, see for example Austria, Argentina, Brazil, China, the Czech Republic, France, Germany, Hungary, Italy, Japan, Norway, Paraguay, Peru, Portugal, Switzerland, Turkey, and Venezuela. See George A. Bermann, Recognition and Enforcement of Foreign Arbitral Awards: The Application of the New York Convention by National Courts 76–78, 77 n.260 (July 2, 2014) (unpublished manuscript) (on file with the *New York University Law Review*) (describing those countries as comprising “[t]he prevailing view among the States surveyed . . . that, in order for personal jurisdiction to be established, the award debtor must either be resident or domiciled in the State or have assets situated therein”).

⁵⁶ See Bermann, *supra* note 55, at 77 & n.261 (noting that Italy, Greece, and Indonesia vest jurisdiction to recognize foreign arbitral awards in a single designated court if the debtor is not a resident or domiciled in the jurisdiction).

⁵⁷ For judgments, see for example England. 1 DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS, 678–79 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012). For awards, see Australia, Canada, Croatia, India, Indonesia, Israel, Peru, Slovenia, and Uruguay. Bermann, *supra* note 55, at 78 & n.267; see also Int'l Commercial Disputes Comm. of the Ass'n of the Bar of N.Y.C., *supra* note 39, at 414 n.26 (noting that notwithstanding provisions requiring a jurisdictional nexus, laws in France, Germany, Italy, and Sweden appear to leave open a route for enforcement absent such a nexus).

⁵⁸ *E.g.*, DICEY, *supra* note 57, at 678–79 (noting the English rule). For more on the role of consent, see *infra* Part III.

year statute of limitations applied to confirmation of awards under Chapter 2 of the Federal Arbitration Act.

II

TAILORING *DAIMLER* FOR RECOGNITION AND ENFORCEMENT OF AWARDS AND JUDGMENTS

The requirement that jurisdiction is necessary to confirm an arbitral award or to recognize and enforce a foreign judgment did not, until recently, appear to have caused unnecessary hardship to the award or judgment creditor. Recognition and enforcement was most often based on the presence of the debtor's property, which is also the most effective means for enforcement.⁵⁹ Alternatively, a creditor attempting to recognize and enforce a judgment or award could sue the debtor in a state in the United States, when the defendant had sufficient contacts for general jurisdiction.⁶⁰ Thus, in an action to recognize and enforce a judgment or an award, a corporate defendant with "systematic and continuous contacts" in the forum—often termed "doing business"—was traditionally subject to jurisdiction there.⁶¹

However, with the Supreme Court decisions in *Goodyear Dunlop Tires Operations, S.A. v. Brown*⁶² and *Daimler*,⁶³ the traditional "doing business" ground for general jurisdiction has been rejected, at least in a plenary action. In *Daimler*, the Supreme Court reinforced what it said earlier in *Goodyear*:⁶⁴ for general or "all-purpose" jurisdiction, a corporation's affiliations with the State must be so continuous and systematic as to render it essentially "at home" in the forum State, pointing to the paradigm situations of place of incorporation and principal place of business.⁶⁵ As a result, "continuous and system-

⁵⁹ See Aaron D. Simowitz, *Siting Intangibles*, 48 N.Y.U. J. INT'L L. & POL. 259, 318 (2015) (noting that when courts assert property-based jurisdiction, "enforcement is 'built-in'—the same court that determines the merits action can then order enforcement against the asset").

⁶⁰ See, e.g., *STX Pan Ocean Shipping Co. v. Progress Bulk Carriers Ltd.*, No. 12 CIV. 5388 RJS, 2013 WL 1385017, at *3 (S.D.N.Y. Mar. 14, 2013) (confirming a foreign arbitral award when the debtor had "continuous and systematic" contacts with New York sufficient to support general jurisdiction).

⁶¹ For classic examples of pre-*Daimler* "doing business" jurisdiction in plenary actions, see for example, *Bryant v. Finnish National Airline*, 208 N.E.2d 439, 441–42 (N.Y. 1965) (finding a basis for jurisdiction where a foreign corporation maintained a lease, employed several people, and had a bank account in the forum) and *Tauza v. Susquehanna Coal Co.*, 115 N.E. 915, 916–17 (N.Y. 1917) (Cardozo, J.) (upholding general jurisdiction due to the presence of a local office conducting regular business).

⁶² 131 S. Ct. 2846 (2011).

⁶³ *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014).

⁶⁴ See *Goodyear*, 131 S. Ct. at 2853–54.

⁶⁵ *Daimler*, 134 S. Ct. at 760–61.

atic activities” are not sufficient to establish jurisdiction over claims unrelated to those activities. In a footnote, the Court did note the possibility of an exceptional case where a corporation’s operation in a state other than its formal place of incorporation or principal place of business may be so substantial and of such a nature as to render it essentially at home in that state.⁶⁶

The open question is whether the Court’s rejection of “doing business” or “systematic and continuous activities” as an appropriate basis for jurisdiction should extend to the recognition and enforcement context. The recent decision by a panel of the Second Circuit in *Sonera Holding B.V. v. Çukurova Holding A.Ş.*⁶⁷ suggests that it does, although the Second Circuit failed to even acknowledge the possibility that the context of the case—recognition and enforcement of a New York Convention award—might provide an exception to the *Goodyear/Daimler* rule.⁶⁸ In *Sonera*, a Dutch corporation brought suit in federal court in New York to confirm an arbitral award rendered in Switzerland against a Turkish company, Çukurova.⁶⁹ Çukurova was a Turkish holding company that claimed to have no direct operations in New York and no property in New York or anywhere in the United States.⁷⁰ In the district court, Çukurova’s motion to dismiss the action for lack of personal jurisdiction and for *forum non conveniens* was denied, and the award was then confirmed.⁷¹ In an opinion rendered prior to *Daimler*, the district court found that Çukurova was engaged in a continuous course of doing business and was subject to general personal jurisdiction in New York based on its own contacts with New York as well as on the activities of various affiliates.⁷² These activities included: (1) failed negotiations by

⁶⁶ *Id.* at 761 n.19.

⁶⁷ 750 F.3d 221 (2d Cir.), *cert. denied*, 134 S. Ct. 2888 (2014).

⁶⁸ There is also no indication that the point was ever raised by the parties before the Court of Appeals. Nor was the issue pressed by the award creditor Sonera in its petition for certiorari, which was denied. Sonera asked the Supreme Court to revisit the agency theory of general personal jurisdiction in two questions: “(1) Whether a foreign parent corporation is ‘at home’ in a state for purposes of general personal jurisdiction when it controls and dominates a subsidiary or affiliate domiciled in the subject forum”; and “(2) Whether the existence of general personal jurisdiction over a subsidiary or affiliate that is controlled and dominated by a foreign parent corporation creates jurisdiction over the parent, regardless of the subsidiary’s or affiliate’s domicile.” Petition for Writ of Certiorari, *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 134 S. Ct. 2888 (2014) (No. 13-1386), 2014 WL 2120862, at *i.

⁶⁹ 750 F.3d at 223.

⁷⁰ *Id.*

⁷¹ *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 895 F. Supp. 2d 513, 519–20, 526 (S.D.N.Y. 2012), *rev’d*, 750 F.3d 221 (2d Cir. 2014).

⁷² *See id.* at 520 (“[T]he undisputed evidence is clear that Çukurova and its affiliates are engaged in business activity in New York that is sufficiently continuous and systematic as

Çukurova or one of its affiliates to sell an interest in a Turkish television broadcaster to two New York-based private equity funds; (2) Çukurova's sale of shares in a Turkish joint stock company to an underwriter in London, with the shares subsequently offered for sale on the New York Stock Exchange; (3) an affiliate's agreement to provide digital television content to a U.S.-based company; and (4) use of a New York office by two Turkish companies affiliated with Çukurova, one of which described itself as having been founded in New York City as Çukurova's "gateway to the Americas."⁷³ On appeal, the Court of Appeals for the Second Circuit reversed.⁷⁴ Without deciding whether Çukurova had met New York's "doing business" test for corporate "presence" or New York's agency theory of jurisdiction,⁷⁵ the Court of Appeals held that "[w]hatever the purported scope of N.Y. C.P.L.R. 301 and the agency-based theory of jurisdiction . . . *Daimler* confirmed that subjecting Çukurova to general jurisdiction in New York would be incompatible with due process."⁷⁶

Curiously, the Second Circuit did not consider whether the fact that the plaintiff was seeking "confirmation" of a foreign arbitral award affected the jurisdictional standard. Even accepting the consistent position taken by the federal courts of appeals that a jurisdictional nexus is required to confirm an arbitral award,⁷⁷ it does not follow that the standard adopted for jurisdiction in a plenary action must be precisely the same for an action seeking recognition or enforcement of an award (or judgment). Indeed, the lesson of *Shaffer* is that although property of the defendant is insufficient to justify an action with respect to a claim unrelated to it, property still supports an action to enforce a previously rendered judgment or award.⁷⁸ This

to give rise to general jurisdiction under the state's long arm statute and the Due Process Clause.").

⁷³ *Sonera*, 750 F.3d at 223–24.

⁷⁴ *Id.* at 223.

⁷⁵ In a footnote, the Second Circuit opined that there is "some tension between *Daimler*'s 'at home' requirement and New York's 'doing business' test for corporate 'presence,' which subjects a corporation to general jurisdiction if it does business there 'not occasionally or casually, but with a fair measure of permanence and continuity.'" *Id.* at 224 n.2 (quoting *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 267 (1917) (Cardozo, J.)). It concluded that "*Daimler*'s gloss on due process may lead New York courts to revisit Judge Cardozo's well-known and oft-repeated jurisdictional incantation." *Id.*

⁷⁶ *Id.* at 224–25.

⁷⁷ See *supra* note 28 (describing federal appellate decisions requiring a jurisdictional nexus for recognition and enforcement of a foreign arbitral award).

⁷⁸ See *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977) ("Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to

dichotomy suggests that restrictions on general jurisdiction set forth in *Goodyear* and *Daimler* should not necessarily apply in the recognition and enforcement context.

Interestingly, the Canadian Supreme Court in *Chevron* insisted that the jurisdictional standard for a suit to adjudicate a tort claim need not (and probably should not) be the same as the jurisdictional standard to recognize and enforce a foreign judgment or arbitral award. *Chevron* had argued that the Supreme Court's recent reaffirmation of the "real and substantial connection test" in a tort action should inform the Court's approach to a recognition action.⁷⁹ But the Court would have none of it: "The connecting factors . . . identified for tort claims did not purport to be an inventory covering all claims known to law, and the appropriate connecting factors can reasonably be expected to vary depending on the cause of action at issue."⁸⁰ However, as explained earlier, the Court's ultimate holding—that no jurisdictional nexus at all is required—erred in going too far in the other direction.⁸¹

The justification for different standards is evident. As the Supreme Court explained in *Shaffer*:

Once it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff, there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.⁸²

It is true that the *Shaffer* analogy is not perfect, since the very object of the enforcement action of either the judgment or the award—the property itself—is the basis of the jurisdiction. But from a due process perspective, *Shaffer* can be understood more generally to justify a separate jurisdictional standard for recognition and enforcement.⁸³ The Canadian Court in *Chevron* adopted similar reasoning:

determine the existence of the debt as an original matter."); see also Silberman, *supra* note 17, at 690–91 (discussing *Shaffer* in the context of recognition and enforcement and suggesting that "a less restrictive standard for general jurisdiction" may apply in that context).

⁷⁹ See *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, paras. 24, 79 (Can.).

⁸⁰ See *id.* at para. 91 ("[I]t should be remembered that the specific connecting factors that [the court] established in *Van Breda* were designed for and should be confined to the assumption of jurisdiction in tort actions.").

⁸¹ See *infra* Part I.

⁸² *Shaffer*, 433 U.S. at 210 n.36.

⁸³ See *infra* notes 165–68 and accompanying text (describing *Shaffer* as supportive of the proposition that jurisdiction may lie in an enforcement action even where it would have been absent in the original suit).

[T]he crucial difference between an action at first instance and an action for recognition and enforcement is that, in the latter case, the only purpose of the action is to allow a pre-existing obligation to be fulfilled. . . . [T]he court does not create a new substantive obligation, but instead assists with the fulfillment of an existing one.⁸⁴

In the United States, the constitutional function of due process in recent jurisdictional jurisprudence has been directed at protecting a defendant from the burdens of litigating an inchoate claim in a forum unconnected to either the defendant or the claim. A plenary merits action is likely to involve elaborate pleadings and discovery, as well as a subsequent, full trial, possibly with a jury. The *Daimler* rule applied in the context of a merits dispute reflects an attempt to limit widespread forum-shopping for a place only tangentially connected to the parties or the transaction.⁸⁵

A proceeding to recognize or enforce an arbitral award or judgment is quite different. Such a proceeding is summary in nature and involves a limited number of defenses. It is designed to effectuate enforcement and avoid long and expensive litigation. This objective is particularly important with respect to the New York and Panama Conventions, which are designed to ensure the portability of arbitral awards and enforcement in any Convention country.

Given those policies, the award creditor should not be forced to bring a recognition action only at the “home” of the award debtor. It is typical in international arbitrations that one or more of the parties will not be “at home” in the United States, and the New York and Panama Conventions were enacted specifically to facilitate enforcement of awards worldwide.⁸⁶ The *Daimler* concept that a defendant should be sued “at home” is at odds with the recognition and enforcement regimes in the Conventions. Indeed, because an enforcing court is permitted to refuse recognition on public policy grounds, recognition only at the “home” of the award debtor raises concerns about parochial policies that protect local debtors, particularly when the

⁸⁴ See *Chevron*, [2015] 3 S.C.R. at paras. 42–44. That insight, however, does not justify eliminating the requirement of *some* jurisdictional nexus.

⁸⁵ See *Daimler AG v. Bauman*, 134 S. Ct. 746, 762 (2014) (noting that the suit involved “claims by foreign plaintiffs having nothing to do with anything that occurred or had its principal impact in California”).

⁸⁶ See *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 318 (2d Cir. 1998) (noting that “the primary goal of the Convention is to facilitate the recognition and enforcement of arbitral awards”).

debtor is a sovereign.⁸⁷ For example, in some countries the assets of state entities may be immune from execution in the home forum.⁸⁸

If the *Daimler* “at home” standard is extended without modification to recognition and enforcement proceedings for judgment and awards, alternative bases for jurisdiction—each with their own promise as well as limitations—will inevitably need to be considered. Some of these approaches may play out differently for awards, as opposed to judgments.

III

CONSENT AS A BASIS OF JURISDICTION FOR RECOGNITION OF ARBITRAL AWARDS

With respect to arbitral awards, an argument can be made that an agreement to arbitrate subject to the New York or Panama Convention constitutes consent to jurisdiction in an action for recognition in any state party to those conventions.⁸⁹ That argument has had some force in the context of sovereign immunity, where section 1605(a)(6) of the Foreign Sovereign Immunities Act (FSIA) expressly provides that a foreign state agreeing to arbitrate pursuant to a treaty in force in the United States is not immune in an action to enforce a subsequent arbitral award in the United States.⁹⁰ Indeed, even under the more general “implied waiver” provision in section 1605(a)(1) of the FSIA,⁹¹ the Court of Appeals for the Second Circuit in *Seetransport v. Navimpex* ruled that by agreeing to arbitrate in Paris the defendant

⁸⁷ See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT’L ARB. 297, 304 (2007) (arguing that a vacatur judgment at the arbitral seat should not be entitled to deference by other courts when the seat is also the “home” of one of the parties to the arbitration agreement); see also Silberman & Scherer, *Forum-Shopping and Post-Award Judgments*, *supra* note 45, at 322 (describing multiple approaches to recognizing arbitral awards set aside at the seat of the arbitration).

⁸⁸ See, e.g., Brief for Appellee-Petitioner at 30–31, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-04022 (2d Cir. Apr. 11, 2014), 2014 WL 1509492.

⁸⁹ See GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2983–84 (2d ed. 2014) (noting the possibility that agreement to arbitrate in a New York Convention signatory state could be construed as consent to recognition and enforcement of the award in other signatory states).

⁹⁰ 28 U.S.C. § 1605(a)(6) (2012).

⁹¹ Prior to the addition of section 1605(a)(6) to the FSIA in 1988, some courts dealt with the immunity defense by treating an agreement to arbitrate pursuant to a treaty as an implicit waiver of immunity and jurisdiction under FSIA § 1605(a)(1). See, e.g., *Iptrade Int’l, SA v. Federal Republic of Nigeria*, 465 F. Supp. 824, 826 (D.D.C. 1978) (agreement to arbitrate in Switzerland sufficient for jurisdiction to confirm Swiss award in the United States). See generally JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 245–48 (2d ed. 2003).

waived its immunity in an action to enforce the French award in the United States.⁹² With respect to the constitutional challenge to personal jurisdiction, however, the court of appeals did not rest on “consent” or “waiver,” but on the extensive sales activity that the defendant had engaged in “with a fair measure of permanence.”⁹³

In *Creighton Ltd. v. Qatar*,⁹⁴ the Court of Appeals for the D.C. Circuit held that by agreeing to arbitrate in France, Qatar did not “impliedly waive” immunity in an action brought to confirm the award in the United States.⁹⁵ Moreover, the court of appeals also held that the defendant foreign state did not waive its constitutional objection to personal jurisdiction even under the express provision in section 1605(a)(6) of the FSIA, which provides that a foreign state that agrees to arbitrate pursuant to a treaty in force in the United States is not immune in an action to enforce the agreement or to confirm the award in the United States.⁹⁶ Implicit in that holding was that this kind of “consent” alone did not satisfy due process. If it did, Qatar’s agreement to arbitrate in a New York Convention contracting state with full awareness of section 1605(a)(6) would certainly seem to manifest the necessary consent to enforcement in the United States.

Notwithstanding this limited case law, it is possible that the due process jurisdictional prerequisite might be satisfied if consent to arbitrate in a Convention State can be understood to include consent to recognition or enforcement in another Convention State. After all, in

⁹² 989 F.2d 572 (2d Cir. 1993). Indeed, although the action to confirm the award was time-barred, the court of appeals permitted the action to proceed to determine whether the confirmation *judgment* at the arbitral seat could be enforced pursuant to state law. The court of appeals held that the waiver of immunity extended to the claim for enforcement of the judgment “because the cause of action is so closely related to the claim for enforcement of the arbitral award.” *Id.* at 583.

⁹³ *Id.* at 580.

⁹⁴ 181 F.3d 118 (D.C. Cir. 1999).

⁹⁵ *Id.* at 125. Qatar, however, was not a signatory to the New York Convention, and the D.C. Circuit held that Qatar’s agreement to arbitrate in a signatory country did not demonstrate the requisite intent to waive its sovereign immunity in the United States. *Id.* at 123–24. The D.C. Circuit distinguished *Seetransport* on this basis, noting that “the Second Circuit reasoned, correctly we think, that ‘when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states.’” *Id.* at 123 (quoting *Seetransport*, 989 F.2d at 578). However, the New York Convention comes into force when an award creditor seeks recognition and enforcement of an award “made in the territory of another Contracting State” in the courts of another Contracting State—it is irrelevant whether the signatories to the arbitration agreement are citizens of a Contracting State. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. I(3). Qatar was not the seat of the arbitration. It was merely a party to the agreement. Therefore it is not at all clear why the fact that Qatar is not a signatory state to the New York Convention should bear on the analysis.

⁹⁶ 28 U.S.C. § 1605(a)(6) (2012).

J. McIntyre Machinery, Ltd. v. Nicastro,⁹⁷ the Supreme Court plurality opinion rests due process on concepts of sovereignty and consent rather than “fairness.”⁹⁸ Thus, jurisdiction for an action to recognize or enforce an arbitral award from a Convention State may be found to satisfy due process because the award debtor’s consent to arbitrate in a State that is party to the New York or Panama Conventions is also consent to the recognition action in the United States.⁹⁹

The *Sonera* panel devoted no attention to the possibility that *Daimler* could apply differently to recognition/enforcement or that consent to arbitrate in a New York Convention country could be construed to manifest consent to recognition and enforcement in any contracting state.¹⁰⁰ Likewise, the Canadian Supreme Court in *Chevron* failed to appreciate the role of consent in the context of the recognition and enforcement of *arbitral awards* when it used the arbitration analogy as support for dispensing with a nexus requirement for the recognition and enforcement of *foreign judgments*.¹⁰¹

The panel in *Sonera* did consider the possibility that language in the arbitration agreement could indicate an intent to consent to personal jurisdiction wherever enforcement was sought, and thus looked to the specific wording of the clause itself. The arbitration agreement at issue contained a standard form entry-of-judgment clause, providing that “[a]ny award of the arbitral tribunal may be enforced by judgment or otherwise in any court having jurisdiction over the award or over the person or the assets of the owing Party or Parties.”¹⁰² As the court correctly observed, this clause has a purpose unrelated to recognition and enforcement of foreign arbitral awards—it provides federal subject matter jurisdiction to enter judgment on an action to recognize and enforce a domestic arbitral award.¹⁰³ It was not a sepa-

⁹⁷ 131 S. Ct. 2780 (2011).

⁹⁸ *Id.* at 2787.

⁹⁹ Even if the argument based on “consent” satisfies due process for purposes of an action to confirm a foreign Convention award without the need for an independent basis of jurisdiction, the “consent” rationale does not extend to recognition and enforcement of a foreign judgment. There is no international convention dealing with recognition and enforcement of foreign judgments from which consent can be construed.

¹⁰⁰ *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221, 226–27 (2d Cir.), *cert. denied*, 134 S. Ct. 2888 (2014).

¹⁰¹ See *Chevron Corp. v. Yaiguaje*, [2015] 3 S.C.R. 69, para. 71 (Can.). The Court also failed to make this distinction when invoking a decision by the High Court of Ireland on recognition and enforcement of arbitral awards. See *id.* at 60.

¹⁰² *Sonera*, 750 F.3d at 226.

¹⁰³ *Id.* at 227 n.3. The court noted that “[a]lthough a jurisdictional stipulation to entry of judgment in international arbitration contracts is technically unnecessary given 9 U.S.C. § 203’s conferral on U.S. district courts of original subject matter jurisdiction over Convention awards, consent to entry of judgment is required, under 9 U.S.C. § 9, for enforcement of domestic arbitration awards.” *Id.* Such clauses are generally included

rate affirmative consent to personal jurisdiction wherever recognition and enforcement was sought.

The inquiry in *Sonera* highlights possible ways for award creditors to avoid the potential hardship flowing from *Daimler*. Parties can always include a clause affirmatively consenting to future enforcement of any award in the arbitral agreement, stating that “both parties consent to the personal jurisdiction of any court where award recognition may be sought.”¹⁰⁴ And if the parties choose not to include such a clause, then perhaps the courts should not impose one at the recognition/enforcement stage.

Daimler's expansion into recognition and enforcement for awards and judgments puts pressure on another theory of consent jurisdiction specific to foreign corporations: consent by compliance with state or federal registration statutes.¹⁰⁵ Every state in the United States has enacted some version of a registration statute—laws requiring that foreign corporations doing business in the state register with an in-state agent for service, often the secretary of state.¹⁰⁶ Some of these statutes are relevant only to service, some confer only specific jurisdiction, while a few, such as New York's, have been interpreted to provide for general jurisdiction over any foreign corporation registering to do business in the state.¹⁰⁷ After *Daimler*, the constitutional validity of the statutes that impose general jurisdiction on foreign corporations has come under attack.¹⁰⁸ But none of the criticisms levied

“even in international agreements out of an abundance of caution.” *Id.* (citing R. Doak Bishop, *Drafting the ICC Arbitral Clause*, in *TRANSNATIONAL LITIGATION* § 41:8 (J. Fellas ed., Westlaw 2014)).

¹⁰⁴ William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 *HASTINGS L.J.* 251, 284 (2006); see also Silberman, *supra* note 1, at 442.

¹⁰⁵ See generally Kevin D. Benish, Note, *Pennoyer's Ghost: Consent, Registration Statutes, and General Jurisdiction after Daimler AG v. Bauman*, 90 *N.Y.U. L. REV.* 1609 (2015).

¹⁰⁶ See *id.* app. (compiling state registration statutes). If a corporation fails to register, the statute subjects it to various penalties, usually including closing the state court doors and imposing fines. See *id.*

¹⁰⁷ *Id.*; see also, e.g., *STX Panocean (UK) Co. v. Glory Wealth Shipping Pte Ltd.*, 560 F.3d 127, 131 (2d Cir. 2009); *Rockefeller Univ. v. Ligand Pharm. Inc.*, 581 F. Supp. 2d 461, 466–67 (S.D.N.Y. 2008). The New York legislature has considered (and is again considering) a bill to clarify the New York registration statute. See A. 6714, 2015-16 State Assemb., Reg. Sess. (N.Y. 2015), http://assembly.state.ny.us/leg/?default_fldbn=A06714&term=2015&Summary=Y&Memo=Y&Text=Y. At present, the New York statute does not specify whether it confers general jurisdiction, specific jurisdiction, or merely establishes an agent for service. See *N.Y. BUS. CORP. LAW* §§ 304, 305, 1301 (McKinney 2003). New York courts have long held that the statute requires that a foreign corporation submit to general jurisdiction in New York. See Benish, *supra* note 105, at 1656.

¹⁰⁸ According to some commentators, consent to general jurisdiction by registration undermines *Daimler*, imposes unconstitutional conditions on the privilege of doing

against consent to plenary actions by registration necessarily applies to actions for recognition and enforcement of judgments and awards.¹⁰⁹

business in a state, places burdens on interstate commerce, and makes for bad policy. *See* Benish, *supra* note 105 (failure to satisfy minimum contacts and unconstitutional conditions); Tanya J. Monestier, *Registration Statutes, General Jurisdiction, and the Fallacy of Consent*, 36 CARDOZO L. REV. 1343, 1387–98 (2015) (coerced consent as an unconstitutional condition); *see also* New York City Bar, *Report on Legislation*, at 4 (bad policy). For these reasons, *Daimler* may lead courts to narrowly construe registration statutes to avoid constitutional concerns. *See* *Brown v. Lockheed Martin Corp.*, No. 14-4083, 2016 WL 641392, at *15 (2d Cir. Feb. 18, 2016) (“[T]he analysis that now governs general jurisdiction over foreign corporations . . . suggests that federal due process rights likely constrain an interpretation that transforms a run-of-the-mill registration and appointment statute into a corporate ‘consent’—perhaps unwitting—to the exercise of general jurisdiction by state courts . . .”). *But see* *Acorda Therapeutics Inc. v. Mylan Pharm. Inc.*, No. 2015-1456, 2016 WL 1077048, at *11 (Fed. Cir. Mar. 18, 2016) (noting that “*International Shoe* and *Daimler* did not overrule th[e] historic and oft-affirmed line of binding precedent” that “the appointment of an agent by a foreign corporation for service of process could subject it to general personal jurisdiction”) (O’Malley, J., concurring).

¹⁰⁹ Recognition and enforcement, by its nature, contemplates multiple concurrent actions in different forums. *See, e.g.,* *Figueiredo Ferraz e Engenharia de Projeto Ltda. v. Republic of Peru*, 665 F.3d 384, 402 (2d Cir. 2011) (“The Convention seeks to open the doors of foreign courts to efforts to enforce arbitration awards wherever assets are available.”) (Lynch, J., dissenting). It is difficult to envision how consent to jurisdiction for recognition and enforcement purposes could constitute an unconstitutional condition. And the policies underlying recognition and enforcement jurisdiction are markedly different from those underlying jurisdiction to adjudicate claims. Moreover, even those who criticize the use of registration statutes to ground general jurisdiction allow that registration statutes might be used to obtain specific jurisdiction—although specific jurisdiction may be an awkward fit for recognition and enforcement. It is worth noting that, in New York, registration by foreign banks to do business is governed by a separate statute that, even if interpreted to confer jurisdiction, is limited by its terms to specific personal jurisdiction. *See* N.Y. Banking Law § 200(3) (McKinney 2013) (requiring that a foreign bank appointing the Superintendent “its true and lawful attorney, upon whom all process in any action or proceeding against it on a cause of action arising out of a transaction with its New York agency or agencies or branch or branches, may be served with the same force and effect,” as if it were a domestic bank); *see also* Marc J. Gottridge & Lisa J. Fried, *Does New York Banking Law § 200(3) Undo ‘Daimler’?*, N.Y.L.J. (Mar. 17, 2016), <http://www.newyorklawjournal.com/id=1202752329093/Does-New-York-Banking-Law-1672003-Undo-Daimler?slreturn=20160231143704> (noting that “if the statute did provide for consent to jurisdiction, it would be limited by its terms to a subset of *specific* personal jurisdiction”). However, in the context of third-party subpoenas, two courts have held that section 200(3) imposes some form of general jurisdiction. *See* *Vera v. Republic of Cuba*, 91 F. Supp. 3d 561, 570 (S.D.N.Y. 2015) (holding that § 200(3) subjected a foreign bank to jurisdiction to answer information subpoenas because “*Daimler* and *Gucci* should not be read so broadly as to eliminate the necessary regulatory oversight into foreign entities that operate within the boundaries of the United States”) *appeal dismissed*, 802 F.3d 242 (2d Cir. 2015); *see also* *B&M Kingstone, LLC v. Mega Int’l Commercial Bank Co.*, 131 A.D.3d 259, 264–65 (N.Y. App. Div. 2015), *leave to appeal dismissed*, 26 N.Y.3d 995 (2015).

IV CONSENT AND THE SPECIAL PROBLEM OF SOVEREIGNS

Enforcement of an arbitral award or a foreign judgment against a sovereign adds the additional complication of state immunity. In the United States, an action to confirm a foreign arbitral award or judgment against a foreign state or instrumentality implicates the FSIA.¹¹⁰ In order to bring an action to recognize a foreign judgment or a foreign arbitral award against a foreign sovereign, the creditor must establish federal subject matter jurisdiction over the action as well as personal jurisdiction over the defendant sovereign.¹¹¹

To some extent, the FSIA muddles the traditional ways one thinks about subject matter jurisdiction, personal jurisdiction, and immunity.¹¹² Under FSIA section 1330(a), district courts have original jurisdiction as to any claim to which the foreign state is not entitled to immunity.¹¹³ Section 1330(b) provides that personal jurisdiction exists in any case over which the district courts have original jurisdiction (pursuant to section 1330(a)), where service is properly made under the service provisions of the FSIA.¹¹⁴ In effect, subject matter jurisdiction is equivalent to personal jurisdiction, so long as service of process is properly made and the exceptions to immunity include connections usually associated with the requirements of personal jurisdiction. Interestingly, attachment of property of a sovereign is not permitted prior to judgment,¹¹⁵ and thus attachment of property is not a basis for jurisdiction for either an initial action or an action for recognition/enforcement of a foreign judgment or award against a sovereign debtor¹¹⁶—unlike the situation with respect to an ordinary judgment debtor. In order to bring an action to obtain a U.S. judgment to confirm a foreign arbitral award or recognize a foreign judgment against a

¹¹⁰ 28 U.S.C. §§ 1330, 1602–11 (2012).

¹¹¹ See, e.g., *GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805 (D.C. Cir. 2012) (noting that, even when the FSIA provides for statutory personal jurisdiction over a foreign sovereign instrumentality, “the Constitution impose[s] additional, non-statutory personal jurisdiction requirements”).

¹¹² See *DELLAPENNA*, *supra* note 91, at 32 n.252 (2d ed. 2003) (highlighting confusion and criticism surrounding the FSIA).

¹¹³ 28 U.S.C. § 1330(a). Exceptions to immunity are listed in section 1605 of the Act. 28 U.S.C. § 1605(a).

¹¹⁴ 28 U.S.C. § 1608.

¹¹⁵ Per 28 U.S.C. §§ 1609 and 1610, attachment is only available in aid of execution. As to execution against assets, the FSIA has special immunity rules, see 28 U.S.C. § 1610 and exemptions for certain classes of property. See *id.* § 1611.

¹¹⁶ Although the property of the sovereign cannot be attached, courts appear to rely on the existence of property held by the sovereign in the forum to satisfy due process. See, e.g., *Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 397–98 (2d Cir. 2009).

foreign sovereign or instrumentality, the relevant provisions of the FSIA must be satisfied.

The most likely ground in the FSIA under which to obtain subject matter and therefore personal jurisdiction with respect to recognition of a foreign arbitral award is FSIA section 1605(a)(6).¹¹⁷ Under the relevant section of that provision, foreign states are *not* immune from the jurisdiction of U.S. courts in any case where an action to confirm an arbitral award is brought pursuant to an arbitration agreement and either “the arbitration takes place or is intended to take place in the United States;”¹¹⁸ or “the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral award;”¹¹⁹ or “the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court.”¹²⁰ To the extent that a foreign state or instrumentality has constitutional due process protections from assertions of personal jurisdiction,¹²¹ it may nonetheless argue, invoking *Creighton*, that an agreement to arbitrate does not manifest consent to recognition and enforcement within the meaning of due process.

The issue of whether the *Daimler* standard applies in the recognition and enforcement context—along with the related importance of FSIA section 1605(a)(6) and consent—has resurfaced in the ongoing appeal before the Court of Appeals for the Second Circuit in an action to confirm an award against a foreign instrumentality, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. (COMMISA) v. Pemex-Exploración y Producción (PEP)*.¹²² COMMISA obtained a Panama Convention award against PEP, a subsidiary of Mexico’s state oil company. A Mexican appellate court nullified the award, and COMMISA sought to confirm the award in

¹¹⁷ There is no analog in the FSIA for the recognition of foreign judgments.

¹¹⁸ 28 U.S.C. § 1605(a)(6)(A).

¹¹⁹ *Id.* § 1605(a)(6)(B).

¹²⁰ *Id.* § 1605(a)(6)(C).

¹²¹ It is still unclear whether foreign states are protected by the Due Process Clause. See *Republic of Arg. v. Weltover, Inc.*, 504 U.S. 607, 619 (1992) (“assuming, without deciding,” that foreign states receive the protections of the Due Process Clause of the Fifth Amendment). In *Price v. Socialist People’s Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002), the defendant Libya challenged the lack of a jurisdictional nexus with the forum under the terrorism exception to the FSIA. The D.C. Circuit ruled that foreign states are not “persons” protected by the Due Process Clause of the Fifth Amendment. *Id.* at 96. In *Frontera*, 582 F.3d at 399, 401, the Second Circuit endorsed that view with respect to a foreign state and its agents, but left open the question of whether a state instrumentality that was not operating as an agent was entitled to due process protection.

¹²² No. 13-04022 (2d Cir. argued Nov. 20, 2014).

federal court in New York notwithstanding the set aside.¹²³ The district court exercised subject matter and personal jurisdiction over PEP pursuant to section 1605(a)(6) and confirmed the award.¹²⁴ The district court determined that the exercise of personal jurisdiction over PEP was consistent with due process based on PEP's activities in the forum state.¹²⁵

On appeal, and in addition to its argument that the district court should not confirm an arbitration award nullified at the seat, PEP claimed that it did not have sufficient activities to satisfy general jurisdiction as a matter of due process.¹²⁶ Relying on *Daimler* and *Sonera*, PEP emphasized that as a Mexican corporation formed to develop petrochemical resources it could not be "fairly regarded as at home" in New York.¹²⁷ In its responsive Appellate Brief, COMMISA argued, without reference to *Daimler*, that the nature of confirmation proceedings "colors [the] analysis" of personal jurisdiction.¹²⁸ The Brief called attention to the strong interests in enforcement of arbitral awards, the summary nature of confirmation proceedings, and the relatively minor burden on the award debtor.¹²⁹ There is just a hint of the "consent" argument in COMMISA's brief, which noted that PEP is a Mexican corporation that agreed to arbitrate in Mexico, a signatory to the Panama Convention, and that the Convention contemplates recognition and enforcement of arbitral awards, including in the United States.¹³⁰

Following argument, the panel requested the views of the Solicitor General's office. In its amicus brief, the United States addressed both jurisdictional theories. First, the United States endorsed, albeit not *in haec verba*, the consent theory of jurisdiction

¹²³ See Transcript of August 25, 2010 at 19–20, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, 962 F. Supp. 2d 642, 661 (S.D.N.Y. 2013) (confirming the award).

¹²⁴ See *id.*

¹²⁵ *Id.* at 24–28.

¹²⁶ Brief for Appellant-Respondent at 24–26, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-04022 (2d Cir. Jan. 28, 2014), 2014 WL 487235.

¹²⁷ *Id.* at 25. PEP also relied on pre-*Daimler* cases in support of its position that its activities in New York fell far short of what has traditionally been required for general jurisdiction. See *id.* at 26. See also Reply Brief for Appellant-Respondent at 6–9, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-04022 (2d Cir. May 9, 2014), 2014 WL 2004554 (citing *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 895 F. Supp. 2d 513, 524 (S.D.N.Y. 2012), *rev'd*, 750 F.3d 221 (2d Cir. 2014)).

¹²⁸ Brief for Appellee-Petitioner, *supra* note 88, at 29 (quoting *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 178 (3d Cir. 2006)).

¹²⁹ *Id.* at 30–31.

¹³⁰ *Id.* at 31.

against sovereigns, arising from 1605(a)(6).¹³¹ The United States noted the application of 1605(a)(6), then observed that “PEP entered into contracts with COMMISA (a subsidiary of a U.S. corporation), which provided for arbitration of any dispute,”¹³² and that “PEP, an instrumentality of Mexico, knew or should have known when it entered into the contracts that both Mexico and the United States are parties to the Panama Convention and that, as a result, any Mexican arbitral award could be enforced in U.S. courts.”¹³³ The United States argued that because the FSIA’s provision of statutory personal jurisdiction is presumptively consistent with the requirements of the Due Process Clause, the court should reject any approach that would render 1605(a)(6) an empty grant of statutory personal jurisdiction. The United States did not explicitly characterize its argument as a consent-based approach, but a “consent” theory seems to be the only way to understand the United States’ position.¹³⁴

Second, the United States endorsed the need for a different jurisdictional standard in the context of recognition and enforcement. Relying on *Shaffer*, the United States argued that fewer contacts could constitute the requisite “minimum contacts” in the context of an enforcement proceeding, stating that “the nature of a proceeding to confirm and enforce a foreign arbitral award would also typically support the conclusion that the exercise of jurisdiction is constitutional”¹³⁵ Nonetheless, the United States strongly argued that mere “involvement in U.S. financial markets is not itself a sufficient basis for a U.S. court to exercise personal jurisdiction over a dispute that is unrelated to such financing activities,” regardless of whether the action was for recognition of a foreign award.¹³⁶ The United States conceded that some of PEP’s contacts in New York arose from financial activity, but that “the record refers to other contacts between PEP and the United States that more directly relate to the parties’ dealings, which illustrate that the exercise of personal jurisdiction under the FSIA should satisfy constitutional standards.”¹³⁷

¹³¹ Letter Brief for the United States as Amicus Curiae at 7, *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 13-04022 (2d Cir. Feb. 6, 2015), 2015 WL 1021311.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ In this context, Pemex’s consent would be limited to a claim for recognition and enforcement of the arbitral award and is therefore a variation on specific, rather than general, jurisdiction.

¹³⁵ Letter Brief for the United States as Amicus Curiae, *supra* note 131, at 7.

¹³⁶ *Id.* at 8.

¹³⁷ *Id.* at 9. The United States also supported the proposition that quasi-in-rem jurisdiction is sufficient for a recognition and enforcement action, even without attachment of the property in the forum. *See id.*; *see also* *Frontera Res. Azer. Corp. v. State Oil Co. of*

Unfortunately, *COMMISA* is not the perfect case to resist the impact of *Daimler* in recognition and enforcement proceedings. Because the Mexican court set the award aside, the case presents a reverse forum-shopping problem on the part of *COMMISA*, who might be viewed as seeking a pro-enforcement forum in a situation where the award has been set aside elsewhere and there are no assets in the United States. Indeed, the main issue in the *COMMISA* case is likely to be under what circumstances a court in the United States will confirm an award that has been set aside at the arbitral seat.¹³⁸

Judgments against foreign sovereigns are different. There is no provision corresponding to section 1605(a)(6) for recognition of foreign judgments. Creditors have serious obstacles to overcome in order to recognize a foreign judgment against a foreign sovereign in the United States. In two cases, the Court of Appeals for the Second Circuit framed the question as whether the *facts* of the underlying action that gave rise to the foreign judgment would satisfy one of the exceptions to foreign sovereign immunity under FSIA section 1605.¹³⁹ Such an inquiry may appear odd, but the Court of Appeals explained that a focus on the facts relating to the foreign judgment itself would be unlikely to bring the recognition proceeding within one of the exceptions to section 1605.¹⁴⁰ Thus, an action to recognize a foreign country judgment against a sovereign would likely be barred on

the Azer. Republic, 582 F.3d 393, 397–98. The United States did not address the validity of *COMMISA*'s particular argument for quasi-in-rem jurisdiction—that the appeal bond posted by PEP in this case could support property-based jurisdiction. Brief for Appellee-Petitioner, *supra* note 88, at 32–33.

¹³⁸ See Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 32–36 (2009); Silberman & Scherer, *Forum Shopping and Post-Award Judgments*, *supra* note 45, at 313. In seeking a U.S. forum, *COMMISA* pointed to the facts that PEP knew that *COMMISA* was a subsidiary of a U.S. corporation, that PEP agreed to arbitration, that “because PEP is a Mexican state entity, its assets are immune from attachment in Mexico,” that “Mexico is a signatory to the Panama Convention, which provides for confirmation of arbitral awards—including in the United States,” and that PEP had assets in the United States “that could be used to satisfy the Final Award.” Brief for Appellee-Petitioner, *supra* note 88, at 30–31 (“PEP also would have clearly foreseen that confirmation proceedings would occur in the United States.”).

¹³⁹ The two cases are *Transatlantic Schiffahrtskontor GMBH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384 (2d Cir. 2000), and *Int'l Housing Ltd. v. Rafidain Bank Iraq*, 893 F.2d 8 (2d Cir. 1989). *Shanghai Foreign Trade Corp.* involved the commercial activity exception of FSIA, 28 U.S.C. § 1605(a)(2). In that context, the Second Circuit noted that, “even assuming that foreign judgments, or the assignment of them, can ever satisfy the ‘based upon’ requirement” of the commercial activity exception, actions to enforce foreign judgments against foreign governments in the United States would fail for a lack of subject matter jurisdiction unless “the acts upon which the assigned judgments are themselves grounded” were “taken in connection with a commercial activity that caused a direct effect in the United States.” *Shanghai Foreign Trade Corp.*, 204 F.3d at 390.

¹⁴⁰ *Shanghai Foreign Trade Corp.*, 204 F.3d at 390.

immunity grounds.¹⁴¹ To avoid that result, the Court of Appeals chose to look back to the events surrounding the underlying claim that gave rise to the judgment.

But even the Second Circuit's essentially pro-enforcement reasoning leaves little hope for creditors more generally—it would be a mere happy coincidence if the facts giving rise to the underlying claim also supported an action against the sovereign in the United States.¹⁴² One district court was willing to entertain arguments that either the facts giving rise to the underlying action or the recognition action satisfied one of the section 1605 exceptions—but found that neither did.¹⁴³

V

THE LIMITED PROMISE OF SPECIFIC JURISDICTION

One of the central premises underlying the Court's decision in *Daimler* is that “specific jurisdiction has become the centerpiece of

¹⁴¹ It is, of course, possible that an explicit or implicit waiver of immunity, per section 1605(a)(1), will be construed as consent to jurisdiction to enforce a foreign judgment against a foreign state. But such waivers are construed narrowly. *See Strategic Techs. PTE, Ltd. v. Republic of China (Taiwan)*, No. 05-2311 (RMC), 2007 WL 1378492, at *2–4 (D.D.C. May 10, 2007) (denying attempt to enforce Singapore judgment against the Republic of China in the United States on the basis of sovereign immunity; agreement to arbitrate in Singapore in accordance with Singapore law does not constitute a waiver under §1605(a)(1) of the FSIA).

¹⁴² And once a creditor demonstrated that there was an exception to sovereign immunity, it would still have to demonstrate that the judgment was subject to enforcement under the relevant state foreign money judgment recognition law. On occasion, a creditor will be able to satisfy both requirements. *See SerVaas, Inc. v. Republic of Iraq*, 686 F. Supp. 2d 346, 360–61 (S.D.N.Y. 2010), *aff'd*, No. 10-828-CV, 2011 WL 454501 (2d Cir. Feb. 10, 2011). A defendant would still be able to raise constitutional due process objections to personal jurisdiction—although foreign sovereigns may not have such due process rights. *Compare Frontera Res. Azer. Corp. v. State Oil Co. of the Azer. Republic*, 582 F.3d 393, 398 (2d Cir. 2009) (holding that foreign sovereigns do not enjoy due process personal jurisdiction protections), *and Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002) (same), *with Theo H. Davies & Co. v. Republic of the Marsh. Is.*, 174 F.3d 969, 974 (9th Cir. 1998) (requiring minimum contacts for assertion of personal jurisdiction over a foreign sovereign). In addition, execution on assets must satisfy the independent requirements of FSIA section 1610.

¹⁴³ *See Strategic Techs. PTE, Ltd. v. Republic of China (Taiwan)*, No. 05-2311(RMC), 2007 WL 1378492, at *4–6 (D.D.C. May 10, 2007). These judgment cases again illustrate another awkward interaction between rules designed for plenary actions—the FSIA—and the very different context of recognition and enforcement. It is also worth noting that there is no provision similar to section 1605(a)(6) that governs recognition of foreign judgments against foreign sovereigns. It is possible that a special provision should be added to the FSIA to cover foreign judgments against sovereigns. Such a provision could provide that the presence of the sovereign debtor's assets in the United States would constitute a statutory exception to jurisdictional immunity (while preserving execution immunity of FSIA § 1610)—essentially bringing sovereign debtors on par with private debtors, at least at the jurisdictional stage.

modern jurisdiction theory, while general jurisdiction [has played] a reduced role.”¹⁴⁴ Thus, the Court’s assessment of what is “fair” in the context of allocations between general and specific jurisdiction in an ordinary merits dispute may make good sense. However, the role for specific jurisdiction in recognition and enforcement of either awards or judgments is quite unclear. If specific jurisdiction cannot fill the gap created by *Daimler*, the extension of the *Daimler* standard to recognition and enforcement will actually undermine the interest in comity that itself concerned Justice Ginsburg.¹⁴⁵

In *Sonera*, the creditors did not even attempt to assert specific jurisdiction. The Court of Appeals did not consider whether specific jurisdiction could apply (or bother to remand in order for the parties to brief the question). In any event, specific jurisdiction is a very strange fit for recognition and enforcement proceedings.¹⁴⁶ Specific jurisdiction focuses on whether there is “an ‘affiliatio[n] between the forum and the underlying controversy’” and “issues deriving from, or connected with, the very controversy that establishes jurisdiction.”¹⁴⁷ In recognition and enforcement proceedings, the underlying controversy has been decided, either by another court or an arbitral tribunal.¹⁴⁸

In a recognition and enforcement action, the creditor is not seeking to bring an action to adjudicate the initial underlying controversy—it is seeking assets to *satisfy* the resulting judgment or award. The relevant controversy in such an action is the outstanding judgment or award and disposition of the debtors’ assets. Unfortunately, the Tentative Draft of the *Restatement (Fourth) of the Foreign Relations Law of the United States* purports to impose the jurisdictional rule for plenary actions on actions for recognition of a foreign judgment, addressing enforcement in a separate section.¹⁴⁹ Although

¹⁴⁴ *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014) (citing *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S. Ct. 2846, 2854 (2011)). But recent trends in specific jurisdiction undermine that claim. See Silberman, *supra* note 17, at 682–83.

¹⁴⁵ See *Daimler*, 134 S. Ct. at 763 (“The Ninth Circuit, moreover, paid little heed to the risks to international comity its expansive view of general jurisdiction posed. Other nations do not share the uninhibited approach to personal jurisdiction advanced by the Court of Appeals in this case.”).

¹⁴⁶ At least two courts have considered the application of specific jurisdiction to enforcement proceedings after *Daimler*—albeit in the context of determining the power of the judgment-rendering court over absent third parties. See *infra* Section VII. The question of how specific jurisdiction applies to a debtor in a recognition and enforcement action remains unexamined by the courts.

¹⁴⁷ *Goodyear*, 131 S. Ct. at 2851 (quoting Arthur T. von Mehren & Donald T. Trautman, *Jurisdiction to Adjudicate: A Suggested Analysis*, 79 HARV. L. REV. 1121, 1136 (1966)).

¹⁴⁸ Cf. *supra* notes 82–88 and accompanying text.

¹⁴⁹ The two sections in the Tentative Draft are § 402, Procedure to Obtain Recognition, and § 406, Enforcement of Foreign Judgments.

the Draft acknowledges that, per *Shaffer*, the presence of assets will sustain a proceeding that simultaneously recognizes and enforces a foreign money judgment,¹⁵⁰ with respect to an action for recognition when there are no assets, the Draft adopts the same jurisdictional standard required for a plenary action, either general or specific.¹⁵¹

If the debtor is not domiciled or “at home,” per the *Daimler* standard, the Tentative Draft Restatement would require a jurisdictional nexus between the debtor’s activities in the state and the underlying claim that gave rise to the judgment. As the action giving rise to the judgment was decided abroad, it would be mere coincidence (and an unlikely one at that) if the underlying facts would also have given rise to plenary jurisdiction in the United States. The requirement of a nexus between the underlying action and the forum for recognition and enforcement would require scrutiny of the underlying action that is unusual in the context of an action for recognition and enforcement.¹⁵² It would also ignore the Supreme Court’s acknowledgement

¹⁵⁰ See RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION § 402, cmt. b (AM. LAW INST., Tentative Draft No. 1, 2014); *id.* § 402, reporters’ note n.3.

¹⁵¹ The current Tentative Draft Restatement provides: “§ 402. Procedure to Obtain Recognition. A person seeking recognition of a foreign judgment must either initiate a civil proceeding for that purpose in a U.S. court of competent jurisdiction or properly raise the issue in an existing proceeding.” The Draft then suggests that in an action for recognition where there are no assets, a nexus would be required between the debtor’s activities in the forum and the facts giving rise to the underlying claim. In explaining the nexus requirement, the Draft states: “A court entertaining a separate action to obtain recognition of a foreign judgment must obtain jurisdiction over every person on whom its decision will have conclusive effect. . . . [S]pecific jurisdiction will exist under the Due Process Clause if the person whom the recognition decision will bind engaged in sufficient local conduct related to the claim to establish minimum contacts with and purposeful availment of the forum. . . . [G]eneral jurisdiction normally will exist only if that person has consented to jurisdiction or has such continuous and systematic contacts as to render it essentially at home in the forum State.” *Id.* (internal citations omitted). (In a written comment to the Reporters, Professor Silberman criticized this section for drawing a distinction between recognition and enforcement and then requiring that a recognition action be based on a nexus with the facts giving rise to the underlying claim.) The Restatement (Fourth) approach may have been influenced by law on recognition and enforcement of foreign judgments against foreign sovereigns. See *supra* text accompanying notes 139–42. Such reliance is misplaced. Courts considering whether actions to recognize a foreign judgment against a foreign sovereign have indeed looked to whether the underlying action satisfied the requirements of the FSIA—including the requirement of a “nexus” with the United States. See, e.g., *Transatlantic Schifffahrtskontor GMBH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 388–89 (2d Cir. 2000). The rule with respect to foreign sovereigns is in part a function of exceptions to immunity under the FSIA and does not necessarily dictate a similar approach for constitutional due process in the recognition and enforcement of foreign judgments generally.

¹⁵² See *Alta. Sec. Comm’n v. Ryckman*, No. N13J-02847, 2015 WL 2265473, at *8 (Del. Super. Ct. May 5, 2015) (“Such an examination of a valid judgment would involve potentially needless, expensive, and time-consuming litigation.”).

in *Shaffer* that jurisdictional standards can—and probably should—be different before and after a judgment is rendered.¹⁵³

In the recognition and enforcement context, the more appropriate nexus for specific jurisdiction would appear to be between the debtor's activities and satisfaction of the judgment or award. It is not clear, however, exactly how such an inquiry would proceed. Such an approach presupposes that the presence of assets is not a necessary element to establish a jurisdictional nexus between the forum and satisfaction of the judgment or award.¹⁵⁴ But conceivably, the relevant connection could be where the debtor has moved assets in the past, would likely move assets in the future, or had taken other actions in connection with disposition of its assets (such as, for example, taking steps in the United States to establish an offshore asset protection trust).¹⁵⁵ This nexus may be looser than the level of "relatedness" required in the specific jurisdiction inquiry for plenary actions—but, if so, it is justified for much the same reasons that a lesser standard for general jurisdiction is also justified: There has already been an adjudication of claims against the debtor. In the ensuing recognition and enforcement proceedings, the debtor has defenses it may assert, but the burden on a debtor in a recognition and enforcement proceeding

¹⁵³ *Shaffer v. Heitner*, 433 U.S. 186, 210 n.36 (1977).

¹⁵⁴ And there would be good reasons to make such an assumption. See *infra* text accompanying notes 178–94.

¹⁵⁵ One possible analogy, albeit in a very different context, can be found in discovery in aid of enforcement. In the Federal Rules of Civil Procedure, Rule 69 governs discovery in aid of enforcement and, where discovery proceeds under federal law, incorporates the relevancy requirements for pre-trial discovery in Rule 26. Fed. R. Civ. P. 26, 69. Nevertheless, courts have interpreted this requirement quite differently in the enforcement context. In enforcement proceedings, there is "no longer an action pending which may be utilized by reference to its subject matter." *Caisson Corp. v. Cty. W. Bldg. Corp.*, 62 F.R.D. 331, 333 (E.D. Pa. 1974). Therefore, the "concept of relevancy," when applied to enforcement proceedings, "must be somewhat different." *Id.* (applying this distinction to discovery in aid of execution of judgment). The creditor can get any discovery that could lead to "assets by which to satisfy its judgment," and, as such, "is entitled to a very thorough examination of the judgment debtor." *Id.* at 335. New York law permits discovery of any "matter relevant to the satisfaction of the judgment," a "generous standard [that] permits the creditor a broad range of inquiry through either the judgment debtor or any third person with light to shed on the debtor's property, present or potential." N.Y. C.P.L.R. 5223 cmt. C5223:2 (McKinney 2014) (author Richard C. Reilly, compiling David D. Siegel's commentary) ("Relevancy is the central theme."). The modification of the "relevancy" requirement in the context of enforcement discovery is a useful analogy to the modification of the "nexus" requirement for specific jurisdiction as applied to recognition and enforcement proceedings. See generally Aaron D. Simowitz, *Transnational Enforcement Discovery*, 83 *FORDHAM L. REV.* 3923 (2015) (providing an overview of the different tests U.S. courts have applied in pre-trial discovery and post-judgment enforcement discovery).

is a more minimal one than in a plenary action.¹⁵⁶

In *Daimler*, Justice Ginsburg relied on the development of specific jurisdiction to justify the dramatic pruning of general jurisdiction.¹⁵⁷ If specific jurisdiction cannot fit post-judgment and post-award actions, the basis for extending *Daimler*'s general jurisdiction revolution to such proceedings is significantly weakened.¹⁵⁸

VI

THE LIMITATIONS OF PROPERTY-BASED JURISDICTION

To the extent a jurisdictional nexus is required for recognition and enforcement actions, it has long been accepted that the presence of a defendant's assets is a sufficient basis for jurisdiction. If specific jurisdiction cannot be effectively translated to recognition and enforcement, the application of *Daimler* to recognition and enforcement will limit creditors to two fora: where the debtor is "at home" and where it has assets. As a result, creditors are likely to face significant obstacles to the satisfaction of awards and judgments.

In *Shaffer v. Heitner*,¹⁵⁹ the Supreme Court held the "minimum contacts" requirement demanded by the Due Process Clause of the Constitution since *International Shoe*¹⁶⁰ applied to actions in rem, as well as in personam.¹⁶¹ Thus, per *Shaffer*, attachment of property for a claim unrelated to that property no longer suffices as a basis for jurisdiction over a defendant unless there are additional ties to the forum state that make assertion of jurisdiction fair and reasonable.¹⁶² How-

¹⁵⁶ For discussion, see *supra* Part I, II. Some commentators have called for relaxation of the "relatedness" inquiry for third parties after *Daimler* in enforcement actions. See Cassandra Burke Robertson & Charles W. "Rocky" Rhodes, *A Shifting Equilibrium: Personal Jurisdiction, Transnational Litigation, and the Problem of Nonparties*, 19 LEWIS & CLARK L. REV. 643, 660 (2015) ("In transnational cases involving nonparty foreign financial institutions with branch businesses in the forum, then, the financial institution often should be amenable to specific jurisdiction to provide an effective remedy against its customers sued in the state, even if the provided financial services were performed elsewhere.").

¹⁵⁷ *Daimler AG v. Bauman*, 134 S. Ct. 746, 755 (2014); see also Silberman, *supra* note 17, at 682 (highlighting that Justice Ginsburg "overlooks the impact of the Court's recent decisions on specific jurisdiction").

¹⁵⁸ Although the court in *Sonera* did not consider whether specific jurisdiction could be obtained over the debtor, at least two courts have speculated about the use of specific jurisdiction over third parties in enforcement proceedings. For further discussion, see *infra* Section VII.

¹⁵⁹ 433 U.S. 186 (1977).

¹⁶⁰ See *Int'l Shoe Co. v. Washington*, 326 U.S. 310 (1945).

¹⁶¹ *Shaffer*, 433 U.S. at 211–12.

¹⁶² *Id.* at 209 ("[A]lthough the presence of the defendant's property in a State might suggest the existence of other ties among the defendant, the State, and the litigation, the presence of the property alone would not support the State's jurisdiction.").

ever, the Supreme Court in *Shaffer* also acknowledged that a wrongdoer “should not be able to avoid payment of his obligations by the expedient of removing his assets to a place where he is not subject to an in personam suit.”¹⁶³ The Supreme Court cited the practical justification set out in the *Restatement (Second) of Conflict of Laws*. The *Restatement* observes that, without post-judgment asset jurisdiction, a debtor could easily render itself judgment-proof simply by removing its assets to a place where it was not subject to personal jurisdiction.¹⁶⁴

Untangling jurisdiction from enforcement, the Court in *Shaffer* indicated that although the existence of property in a state might not support jurisdiction over the cause of action itself, such property could suffice as a basis to assert jurisdiction to enforce a judgment.¹⁶⁵ According to *Shaffer*, once a court has determined that the defendant is a debtor of the plaintiff, “there would seem to be no unfairness in allowing an action to realize on that debt in a State where the defendant has property, whether or not that State would have jurisdiction to determine the existence of the debt as an original matter.”¹⁶⁶

Post-*Shaffer*, conventional wisdom has accepted the distinction between a plenary action and an action to recognize and enforce a judgment. The *Restatement (Third) of Foreign Relations Law*, in its comment *h* to section 481, acknowledges that an action to enforce a judgment may be brought wherever a defendant’s property is found, without any connection between the underlying action and the property or between the defendant and the forum.¹⁶⁷ The comment goes on to explain: “The rationale behind wider jurisdiction in enforcement of judgments is that once a judgment has been rendered in a forum having jurisdiction, the prevailing party is entitled to have it satisfied out of the judgment debtor’s assets wherever they may be located.”¹⁶⁸

¹⁶³ *Id.* at 210 (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (AM. LAW INST. 1971) (setting forth the rationale for attachment of property as a proper basis for jurisdiction over a defendant)).

¹⁶⁴ RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 66 cmt. a (AM. LAW INST. 1971).

¹⁶⁵ See Linda J. Silberman, *Shaffer v. Heitner: The End of an Era*, 53 N.Y.U. L. REV. 33, 63–64 (1978).

¹⁶⁶ *Shaffer*, 433 U.S. at 210 n.36.

¹⁶⁷ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. h (AM. LAW INST. 1987).

¹⁶⁸ *Id.* The present draft of the RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES: JURISDICTION retains this distinction with respect to enforcement of a foreign judgment. See § 406 reporters’ note n.3 (AM. LAW INST., Tentative Draft No. 1, 2014); see also *supra* notes 149–51 and accompanying text, but appears to take a different position with respect to recognition of a foreign judgment. Comment b to section 402 states that with regard to personal or in rem jurisdiction, “jurisdiction will exist only if the persons whom the judgment will bind have sufficient contacts with the forum to satisfy due process as well as the forum’s jurisdictional rules” and that “[i]n the case of an *in rem* proceeding to enforce a foreign judgment . . . the presence of assets belonging to

For similar reasons, the presence of property supports an action to enforce a foreign arbitral award. The one federal appellate court decision that found the presence and attachment of property jurisdictionally insufficient for confirmation of a foreign arbitral award has been rejected by other circuits and criticized by numerous commentators.¹⁶⁹ Most federal courts, including the leading appellate case, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*,¹⁷⁰ accept that adjudicatory jurisdiction over the defendant is necessary in order to bring an action to recognize or enforce a foreign arbitral award, but observe that the award can be enforced against the defendant's property in the forum even if that property has no relationship to the underlying controversy between the parties.¹⁷¹ In *Glencore Grain*, however, the plaintiff failed to identify any property owned by the debtor against which the award could be enforced. The assertion that the plaintiff believed "in good faith" that the defendant "has or will have assets located in the forum" was "simply not enough."¹⁷²

Other federal appellate courts have also examined the question of whether jurisdiction over a defendant is necessary for confirmation of an arbitral award and if so, whether property of the defendant is sufficient to support jurisdiction. In *Frontera Resources Azerbaijan Corp. v. State Oil Co. of the Azerbaijan Republic*,¹⁷³ the Court of Appeals for the Second Circuit concluded that although Article V of the New York Convention "limits the ways in which one can challenge a request for confirmation," "it does nothing to alter the fundamental requirement of jurisdiction over the party against whom enforcement is being sought."¹⁷⁴ That said, the Second Circuit held the district court was correct in requiring jurisdiction over the defendant or the defendant's property as a prerequisite to the petition to confirm the award.¹⁷⁵ In the latest decision, the Fifth Circuit Court of Appeals

any person against whom enforcement is sought will satisfy due process." We remain highly skeptical of this distinction between in personam recognition and in rem enforcement and have addressed comments to the reporters on that point.

¹⁶⁹ *Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory"*, 283 F.3d 208 (4th Cir. 2002), *cert. denied*, 537 U.S. 822 (2002). For a comparison with other circuits, see *infra* notes 170–77 and accompanying text.

¹⁷⁰ 284 F.3d 1114 (9th Cir. 2002).

¹⁷¹ *Id.* at 1127. The court added a footnote stating that "[t]ormented souls of first-year civil procedure will recognize this strain of jurisdiction as *quasi in rem* type II, 'where the plaintiff seeks to apply what he concedes to be the property of the defendant to the satisfaction of a claim against him.'" *Id.* at 1127 n.8 (quoting *Hanson v. Denckla*, 357 U.S. 239, 246 n.12 (1958)).

¹⁷² *Id.* at 1128.

¹⁷³ 582 F.3d 393 (2d Cir. 2009).

¹⁷⁴ *Id.* at 397.

¹⁷⁵ *Id.* at 398.

agreed. In *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*,¹⁷⁶ that court stated that, “[e]ven though the New York Convention does not list personal jurisdiction as a ground for denying enforcement, the Due Process Clause requires that a court dismiss an action, on motion, over which it has no personal jurisdiction” when the creditor has not alleged the presence of the debtor’s property.¹⁷⁷

The imposition of *Daimler*’s general jurisdiction test on recognition and enforcement of arbitral awards presents significant practical problems. Chapter 2 of the Federal Arbitration Act imposes a three-year statute of limitations on the confirmation of a foreign arbitral award in the United States.¹⁷⁸ Debtors attempting to avoid the consequences of an arbitral award in the United States need only to keep their assets out of the United States for three years—once the three-year statute of limitations has run, they can get back to business as usual.¹⁷⁹

This sort of evasion generated a controversy about arbitral award enforcement in one recent federal case. In *Commissions Import Export S.A. v. Republic of the Congo*, the plaintiffs obtained a \$31 million award in France against the Republic of the Congo.¹⁸⁰ According to the plaintiff, the Republic of the Congo then engaged in a “decade-long award evasion” campaign that involved keeping assets out of countries where the award could be enforced.¹⁸¹ The plaintiff obtained recognition and enforcement of the award in England.¹⁸² Unable to secure recognition of the award in the United States due to the absence of property and now outside the three-year statute of limitations, the award creditor attempted to enforce the English judgment recognizing the award,¹⁸³ taking advantage of the longer statute

¹⁷⁶ 703 F.3d 742 (5th Cir. 2012).

¹⁷⁷ *Id.* at 749–50.

¹⁷⁸ 9 U.S.C. § 207 (2012).

¹⁷⁹ In rare instances, equitable tolling may extend the three-year limitations period, but those circumstances are usually extreme. See *BCB Holdings Ltd. v. Government of Belize*, 110 F. Supp. 3d 233, 245 (D.D.C. 2015) (finding the criteria for equitable tolling satisfied where mandatory criminal penalties in effect subjected the award creditors and their attorneys to the risk of imprisonment and a substantial fine if they attempted to enforce the award).

¹⁸⁰ See *Comm’ns Imp. Exp. S.A. v. Republic of the Congo*, 916 F. Supp. 2d 48, 49 (D.D.C. 2013), *rev’d*, 757 F.3d 321 (D.C. Cir. 2014).

¹⁸¹ Brief for Appellant at 48, *Comm’ns Imp. Exp. S.A. v. Republic of the Congo*, 757 F.3d 321 (2014) (No. 13-7004), 2013 WL 3147972.

¹⁸² *Comm’ns Imp. Exp. S.A.*, 757 F.3d at 325. Judicial recognition of the French award was also obtained in Belgium and Sweden. Also, in response to a challenge, the French award was upheld by the Paris Court of Appeals.

¹⁸³ *Commissions Import Export S.A. (Commisimpex)* initially applied for recognition and enforcement of the judgment in the Southern District of New York. *Commisimpex*

of limitations for recognition and enforcement of a foreign country money judgment.¹⁸⁴ The district court dismissed the action for recognition of the foreign judgment, reasoning that the plaintiff's "maneuver would obstruct" the Congressional objectives of "promoting arbitration, on the one hand, and protecting potential defendants' interest in finality," and therefore "violates the Supremacy Clause and is preempted."¹⁸⁵ The Court of Appeals for the D.C. Circuit reversed, holding that "Congress did not intend to speak beyond the recognition and enforcement of arbitral awards," and that "[p]ermitting the Company to have recourse to the D.C. Recognition Act to enforce the English judgment, then, would appear to be consistent with Federal Arbitration Act Chapter 2's objectives and to pose no obstacle to the accomplishment of its purpose."¹⁸⁶

On remand, Congo argued that the creditor was "laundering" the award by seeking recognition of an English judgment that itself recognized a French arbitration award. Congo relied on the earlier D.C. Court of Appeals case, *Ahmad Hamad Al Gosaibi*,¹⁸⁷ where the court concluded that a New York judgment recognizing a foreign country judgment could not be enforced in D.C. Rejecting Congo's argument, the district court observed that the *Ahmad* case involved interpretation of a different statute¹⁸⁸ and that federal public policy favored enforcement of an arbitral award. The district court, finding no valid

alleged that Congo maintained accounts in New York and that such accounts would satisfy the venue requirements of the FSIA, 28 U.S.C. § 1391(f). See *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, No. 11 Civ. 6176(JFK), 2012 WL 1468486, at *2 (S.D.N.Y. Apr. 27, 2012). The district court expressed doubt that the mere presence of a state debtor's assets could constitute events giving rising to the claim for property that is the subject of the action—even in an action for recognition and enforcement of a foreign money judgment—but ultimately held that Commisimpex had failed to establish the existence of Congo's property in the district and transferred the action to the District Court for the District of Columbia. *Id.* at *2, *5.

¹⁸⁴ This tactic of "parallel entitlement" raises its own set of issues. These concerns are explored in Silberman & Scherer, *Forum Shopping and Post-Award Judgments*, *supra* note 45, at 330–37.

¹⁸⁵ *Comm'ns Imp. Exp. S.A.*, 916 F. Supp. 2d at 55; see also *id.* at 57 ("Commisimpex's Complaint amounts to an attempt to circumvent the procedures Congress established for the confirmation of New York Convention awards in the Federal Arbitration Act.").

¹⁸⁶ *Comm'ns Imp. Exp. S.A.*, 757 F.3d at 329.

¹⁸⁷ *Ahmad Hamad Al Gosaibi & Bros. Co. v. Standard Chartered Bank*, 98 A.3d 998, 1006–08 (D.C. 2014); see *supra* notes 47–53 and accompanying text.

¹⁸⁸ The district court pointed out that in *Ahmad* the proceeding for recognition was brought pursuant to the Uniform Enforcement of Foreign Judgments Act, which provides for registration of "any judgment . . . that is entitled to full faith and credit." *Ahmad*, 98 A.3d at 1003. The UEFJA did not apply because the New York judgment was not entitled to full faith and credit. In the present case, recognition of the English judgment was sought under the D.C. Recognition Act, and did not involve any issue of full faith and credit.

defenses, then recognized and enforced the English recognition judgment.¹⁸⁹

Award creditors may have reasons beyond the three-year time bar to seek recognition of their awards where there are not yet but may soon be assets. Satisfaction of awards is increasingly achieved by enforcement against intangible assets that may enter and exit a jurisdiction too quickly for the traditional recognition and enforcement apparatus to catch.¹⁹⁰ Accordingly, creditors may want to seize the debtor's assets the moment they enter the state. Property-based jurisdiction relies on the contemporaneous presence of the debtor's assets but will not support jurisdiction even if assets will imminently enter the state. However, if an award creditor can assert personal jurisdiction over the debtor to obtain recognition of the award, the creditor can then use state judgment enforcement mechanisms to restrain any of the debtor's assets when they enter the state.¹⁹¹ Unlike pre-judgment restraints, these post-judgment remedies operate on a continuing basis to reach any after-acquired assets.¹⁹²

It was precisely these kinds of concerns that motivated the Canadian Supreme Court in *Chevron* to reject the presence of assets as being necessary for recognition or enforcement of a judgment. The Court observed that such a requirement would "ultimately prove to only benefit those debtors whose goal is to escape rather than answer for their liabilities, while risking depriving creditors of access to funds that might eventually enter the jurisdiction."¹⁹³ The Court noted that "[i]n today's globalized world and electronic age," to require that a creditor "wait until the foreign debtor is present or has assets in the province before a court can find that it has jurisdiction in recognition

¹⁸⁹ *Comm'ns Imp. Exp. S.A. v. Republic of the Congo*, 118 F. Supp. 3d 220, 227–30 (D.D.C. 2015).

¹⁹⁰ See Simowitz, *Siting Intangibles*, *supra* note 59, at 259 (chronicling the emergence of enforcement against intangible assets).

¹⁹¹ See *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 303 (D.C. Cir. 2005) (noting that "having a judgment in hand," as opposed to merely an arbitral award, "will expedite the process of attachment").

¹⁹² See, e.g., N.Y. C.P.L.R. 5224 cmt. C5224:5 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel's commentary) (noting that, if the garnishee has property of the debtor at the moment of service, "the restraint becomes operative not only on that property or debt, but also upon any other property of the judgment debtor which may afterwards come into [the garnishee]'s possession, and any further debts, owed by [the garnishee] to the judgment debtor, coming due afterwards"). Typical targets for this sort of prospective enforcement include financial institutions and parties contracting with the debtor that might generate payables that would then be owed to the award creditor.

¹⁹³ See *Chevron Corp. v. Yaiguaje*, [2015] S.C.R. 69, para. 3 (Can.) ("Nor is it necessary, in order for the action to proceed, that the foreign debtor contemporaneously possess assets in the enforcing forum.").

and enforcement proceedings would be to turn a blind eye to current economic reality.”¹⁹⁴

Property-based jurisdiction has its own limitations. When a creditor invokes the court’s jurisdiction based on the mere presence of property, it may only be entitled to a recognition judgment in the amount of that property. Under the traditional pre-*Shaffer* regime, quasi-in-rem jurisdiction was available for plenary actions,¹⁹⁵ but was limited in that a plaintiff could only obtain a judgment for the value of the asset in the forum state and could not seek to recognize the judgment in other states as a matter of full faith and credit.¹⁹⁶ This principle may extend to recognition and enforcement actions, where quasi-in-rem jurisdiction lives on after *Shaffer*. A New York federal district court held that an arbitral award could be confirmed based on the mere presence of the debtor’s property, “but only to the extent there exist assets in this jurisdiction, because the effect of a judgment in a quasi in rem case is limited to the property that supports jurisdiction.”¹⁹⁷ The district court did not consider whether this limitation should be relaxed post-judgment or post-award. Accordingly, the court limited the amount of the judgment to \$0.05, the amount uncovered in the debtor’s New York bank account.¹⁹⁸ The court added that a quasi-in-rem judgment was not entitled to recognition or preclusive effect outside the forum state.¹⁹⁹ In a later case, the Court of Appeals for the Ninth Circuit agreed with the New York district court’s conclusion that property could support jurisdiction, but did not address the limitation on the amount of the judgment.²⁰⁰

Quasi-in-rem jurisdiction also traditionally limited remedies against the defendant—unless the defendant opted to enter a general appearance.²⁰¹ In the absence of a general appearance, the court had no power to make in personam orders, but was limited to orders

¹⁹⁴ *Id.* at para. 56–57.

¹⁹⁵ *See Shaffer v. Heitner*, 433 U.S. 186, 198–99 (1977) (discussing the lasting effects of *Pennoyer* on jurisdiction).

¹⁹⁶ *Id.* at 201 n.18.

¹⁹⁷ *CME Media Enters. B.V. v. Zelezny*, No. 01 CIV. 1733(DC), 2001 WL 1035138, at *4 (S.D.N.Y. Sept. 10, 2001).

¹⁹⁸ *Id.* at *5.

¹⁹⁹ *Id.*

²⁰⁰ *See, e.g., Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1122 n.5 (9th Cir. 2002) (noting that the *Zelezny* court “could only confirm [the] award up to the value of Zelezny’s bank account—the basis of the court’s jurisdiction,” but that “[t]his part of the court’s holding has no bearing on the case before us, and we offer no opinion as to the correctness of this determination”).

²⁰¹ *Developments in the Law: Injunctions*, 78 HARV. L. REV. 944, 1033 (1965) (noting that “little justification would exist for using attachment of the property as a basis for issuance of an injunction”).

appropriate for an in rem action against the property itself.²⁰² The Canadian Supreme Court seemed to assume that recognition and enforcement of judgments in Canada would follow a similar course, reasoning that, because recognition and enforcement actions are fundamentally territorial, remedies could only be had against property within its territory.²⁰³ Therefore, no other nation could be offended.²⁰⁴

However, creditors enforcing judgments or awards in the United States typically seek two particular remedies—discovery of the debtor’s assets within and without the state and turnover of the debtor’s assets held by third parties. These remedies are powerful tools and classic in personam remedies that may extend beyond the territorial borders of the United States. But these remedies are not necessarily available in an action based on the mere presence of property.

Sonera is a good example of why creditors may seek to obtain personal jurisdiction in an action for recognition and enforcement (even if assets may be available). *Sonera* sought recognition and enforcement of its award in New York to get access to specific remedies and never alleged or identified any Çukurova assets in New York.²⁰⁵ *Sonera* sought and obtained recognition and enforcement of the award based purely on personal jurisdiction over Çukurova, then obtained discovery of Çukurova’s assets outside the United States,²⁰⁶

²⁰² See *id.* (“Enforcement would, however, be limited to the sequestration of the attached property. Any attempt to use further coercion—criminal contempt, for example—would exceed the jurisdiction of the court.”).

²⁰³ See *Chevron Corp. v. Yaiguaje*, [2015] S.C.R. 69, para. 49–50 (Can.) (outlining the Court’s concern for “territorial overreach”). The Court’s belief that recognition and enforcement in Canada is fundamentally territorial played a significant role in its conclusion that “comity” weighs in favor of granting recognition and enforcement of judgments that have no connection to Canada. *Id.* at para. 53.

²⁰⁴ See *id.* at para. 50 (“[T]here can be no concern about jurisdictional overreach if no jurisdiction can reach further into the matter than any other.”). The Court seems to assume an extraterritorial asset freezing order would not be appropriate in this situation.

²⁰⁵ See *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 895 F. Supp. 2d 513, 524 (S.D.N.Y. 2012), *rev’d*, 750 F.3d 221 (2d Cir. 2014). The district court noted Çukurova’s argument that “*Sonera* has identified no assets in the United States against which it might seek to enforce the Final Award,” and that, “in seeking confirmation here, *Sonera* hopes to gain access to the broad discovery rights generally available in American courts.” *Id.* The court rejected this argument, stating that “the fact that it has not identified U.S. assets belonging to Çukurova does not establish that *Sonera* lacks a good-faith basis for seeking enforcement here.” *Id.*

²⁰⁶ See *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, No. 11 CIV. 8909 DLC, 2012 WL 6644636, at *1 (S.D.N.Y. Dec. 21, 2012), *vacated*, 750 F.3d 221 (2d Cir. 2014) (describing discovery requests); see also *In re Sonera Holding B.V.*, No. 11CV08909 DLC FM, 2013 WL 4405382, at *1 (S.D.N.Y. Apr. 18, 2013) (listing assets of Çukurova uncovered in discovery), *vacated sub nom.* *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888 (2014).

a freezing injunction against disposition of Çukurova's assets, and an antisuit injunction against a proceeding in the British Virgin Islands that concerned use of Çukurova funds and property.²⁰⁷ Sonera was well on its way to obtaining turnover orders directing Çukurova to bring its assets into New York when the court stayed issuance of the injunction conditioned on Çukurova posting a bond to secure the recognition judgment.²⁰⁸ Sonera apparently believed that it could not obtain such remedies if jurisdiction was premised on the mere presence of property—it did not allege the presence of assets even after it became clear that *Daimler* would impose a severe obstacle to recognition and enforcement of the award.²⁰⁹

²⁰⁷ See *In re Sonera Holding*, 2013 WL 4405382, at *1 (providing order for freezing injunction and order for anti-suit injunction).

²⁰⁸ *Sonera Holding B.V. v. Çukurova Holding A.Ş.*, No. 11 CIV. 8909(DLC), 2013 WL 1935325, at *4 (S.D.N.Y. May 10, 2013), *vacated*, 750 F.3d 221 (2d Cir. 2014), *cert. denied*, 134 S. Ct. 2888, 189 L. Ed. 2d 837 (2014). In fact, the above description understates the complexity of the case. Sonera and Çukurova entered into a letter agreement, including an arbitration clause, to negotiate in good faith a purchase agreement for shares that conferred majority control of Turkcell, Turkey's largest cellular company. See *Sonera*, 895 F. Supp. 2d at 517. When negotiations faltered, Sonera commenced the arbitration, demanding delivery of the shares for the proposed purchase price. See *id.* Sonera prevailed and sought recognition and enforcement of the award in New York. See *id.* at 525. Çukurova alleged that, during the arbitral proceedings, Sonera had agreed to accept payments of over \$100 million from third parties, Altimo Holding and Investments Limited and Alfa Telecom Turkey Limited (Alfa). See Respondent's Amended Memorandum of Law in Opposition to the Petition to Confirm Foreign Arbitral Award, *In re Sonera Holding*, No. 11 CIV 8909 (DLC), 2012 WL 8900221, at *4 (S.D.N.Y. May 21, 2012). Alfa had lent money to Çukurova with the Turkcell shares as security. In a play to gain control of Turkcell itself, Alfa paid Sonera to drop any claim to delivery of the shares and ask only for damages, which it did before the final award in its favor was issued. See *id.* Sonera did not dispute these allegations in its pleadings. Çukurova brought suit in the British Virgin Islands (BVI) to establish a right to redeem the shares from Alfa—in January 2013, the Privy Council ruled that Çukurova had such a right. See *Sonera Holding*, 2013 WL 1935325, at *1. Sonera sought and obtained an anti-suit injunction of the BVI action on the basis that Çukurova was attempting to use assets that could satisfy the Sonera award to secure new financing to obtain funds to redeem the shares pledged to Alfa—but it is reasonable to assume that the anti-suit injunction was sought in part to benefit Alfa. See *In re Sonera Holding*, 2013 WL 4405382, at *5. Çukurova eventually obtained a stay of the injunction by offering to post a bond to secure the recognition judgment—effectively giving Sonera all the relief it was entitled to, while frustrating Alfa's attempts to use the Sonera award to effect control of the Turkcell shares. See *Sonera Holding*, 2013 WL 1935325, at *3–4. In this tangled history, Sonera sought recognition and enforcement of the award for a variety of reasons—to obtain payments from Alfa by throwing obstacles into the share redemption process and perhaps to locate Çukurova assets outside the United States. Finding and seizing assets in the United States—the traditional reason for seeking recognition and enforcement in the United States—seems to have played little role.

²⁰⁹ Even if the pre-*Daimler* standard of “continuous and systematic” activities were adopted for recognition and enforcement actions, a district court would still retain discretion as to whether to order such broad relief. Courts have broad discretion to craft enforcement remedies to suit the particular circumstances before them. See, e.g., N.Y. C.P.L.R. 5240 (McKinney 2015) (“The court may at any time, on its own initiative or the

VII THE QUESTION OF ENFORCEMENT AGAINST THIRD PARTIES

Enforcement proceedings are not only brought against debtors. Enforcement proceedings can also be commenced against third parties to compel them to turn over information or, in the case of garnishees, to turn over the assets—indeed, these actions are often termed “turnover proceedings” (the typical garnishee is the debtor’s bank).²¹⁰ Such turnover proceedings can only be commenced against a garnishee where it is subject to personal jurisdiction.²¹¹ Assets alone will not suffice.²¹² Some courts have already extended the more restrictive *Daimler* standard to third parties in enforcement proceedings, again with little or no consideration of the differences between a plenary action and a special proceeding in aid of enforcement. This application of *Daimler* will constrain judgment and award enforcement even where the enforcement is sought from the same court that rendered the judgment or from the court at the arbitral seat.

For example, in *Gliklad v. Bank Hapoalim B.M.*, plaintiff Gliklad obtained a \$505 million New York judgment against defendant Cherney.²¹³ Gliklad served a restraining notice and subpoena on the New York branch of the Israeli Bank Hapoalim, which has three physical branches in New York and, thus, likely would have been subject to general jurisdiction pre-*Daimler*.²¹⁴ The bank resisted turning over funds that the defendant debtor had transferred to the bank’s central

motion of any interested person, and upon such notice as it may require, make an order denying, limiting, conditioning, regulating, extending or modifying the use of any enforcement procedure.”). Indeed, a district court might well be reluctant to order broad extraterritorial relief when the debtor’s only connections to the forum are “continuous and systematic” unrelated activities—but might be more willing to grant such remedies when the debtor is “at home” in the forum or has consented to jurisdiction there. *Cf.* Republic of Arg. v. NML Capital, Ltd., 134 S. Ct. 2250, 2258 (2014) (permitting discovery of Argentina’s “worldwide assets generally”).

²¹⁰ See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 67 (AM. LAW INST. 1971).

²¹¹ See, e.g., DAVID D. SIEGEL, NEW YORK PRACTICE § 510, at 895 (5th ed. 2011) (citing *Koehler v. Bank of Berm. Ltd.*, 911 N.E.2d 825 (N.Y. 2009)); see also N.Y. C.P.L.R. 5225 cmt. C5225:5 (McKinney 2014) (author Richard C. Reilly, recompiling David D. Siegel’s commentary) (noting that a turnover action under C.P.L.R. 5225(b) requires that jurisdiction be “obtained over the third person”).

²¹² Even where no jurisdictional nexus is required to recognize and enforce a judgment—as in New York—the requirement of personal jurisdiction over third parties remains.

²¹³ See *Gliklad v. Bank Hapoalim B.M.*, No. 155195/2014, 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014). See generally Aaron Simowitz, *Case of the Day: Gliklad v. Bank Hapoalim B.M.*, LETTERS BLOGATORY (Sept. 3, 2014), <https://lettersblogatory.com/2014/09/03/case-day-gliklad-v-bank-hapoalim-b-m/>.

²¹⁴ *Gliklad*, 2014 WL 3899209, at *1, *3–4.

branch in Tel Aviv on the ground that it was not subject to general jurisdiction in New York.²¹⁵ The New York trial court agreed, holding that *Daimler* applied to enforcement proceedings against a third party, and accordingly Bank Hapoalim, an Israeli bank, was not “at home” in New York.²¹⁶

The Court of Appeals for the Second Circuit panel took a similar position in *Gucci v. Li*, a proceeding by Gucci to impose sanctions on the Bank of China for failure to comply with a document subpoena and an asset freeze injunction in a trademark infringement litigation involving counterfeit goods.²¹⁷ Gucci brought claims in New York under the Lanham Act against Chinese luxury goods counterfeiters. Gucci commenced an equitable action for an accounting against, among others, the Bank of China to determine the amount of the profits derived from the illegal activity and to freeze the counterfeiters’ accounts.²¹⁸ The Bank of China maintained a physical branch in New York City,²¹⁹ and the district court had held (in a ruling prior to *Daimler*) that the bank’s New York activity was clearly sufficient to support general jurisdiction.²²⁰ The district court issued an asset freeze injunction, barring the bank from disposing of any of the counterfeiters’ assets, and ordered the bank to produce information relating to the accounts.²²¹ The bank stated that it would not comply with the injunction or the production order on the basis of Chinese bank

²¹⁵ The bank also relied on the separate entity rule. *See id.* at *3; *see also* *Motorola Credit Corp. v. Standard Chartered Bank*, 21 N.E.3d 223, 227 (N.Y. 2014) (citing *Gliklad*). The separate entity rule provides that, for attachment and garnishment proceedings only, each branch of a non-party bank shall be treated as a corporate separate entity. *See Motorola Credit*, 21 N.E.3d at 158 (“The separate entity rule . . . provides that even when a bank garnishee with a New York branch is subject to personal jurisdiction, its other branches are to be treated as separate entities for certain purposes, particularly . . . post judgment restraining notices and turnover orders.”). The separate entity rule does not apply to debtors, *see Crescendo Mar. Co. v. Bank of Commc’ns Co.*, No. 15 CIV. 4481 (JFK), 2016 WL 750351, at *6 (S.D.N.Y. Feb. 22, 2016), or to discovery. *See CE Int’l Res. Holdings, LLC v. S.A. Minerals Ltd. P’ship*, No. 12-CV-08087 CM SN, 2013 WL 2661037, at *17 (S.D.N.Y. June 12, 2013) (“Application of the separate entity rule in the discovery context would be inconsistent with the underlying policy justifications for the rule, which are to avoid confusion and prevent competing claims over assets held in a foreign branch.”).

²¹⁶ *Gliklad*, 2014 WL 3899209, at *2 (“While Bank Hapoalim’s New York branch may in fact be the center of its operations in the United States, this says nothing with respect to an elevated level of continuous and systematic activity.”).

²¹⁷ *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 129 (2d Cir. 2014) (“We conclude that in light of *Daimler AG v. Bauman*, 134 S. Ct. at 746, decided only this year, the district court erred in finding that [Bank of China] is properly subject to general jurisdiction.”).

²¹⁸ *Id.* at 126–27.

²¹⁹ *Id.* at 126.

²²⁰ *See id.* at 136.

²²¹ *See Gucci Am., Inc. v. Weixing Li*, No. 10 CIV. 4974 RJS, 2011 WL 6156936, at *13 (S.D.N.Y. Aug. 23, 2011), *rev’d*, 768 F.3d 122 (2d Cir. 2014).

secrecy law that, it alleged, prohibited it from doing so.²²² The district court held the bank in contempt.²²³ While the case was on appeal, the Supreme Court decided *Daimler*. The Second Circuit then interpreted *Daimler* to dictate that the bank was not subject to general jurisdiction in New York. The court did not address either the nature of the action—an accounting in aid of enforcement—or the nature of the party—a third-party witness.²²⁴

In both *Gucci* and *Gliklad*, the courts failed to address whether a lesser jurisdictional standard than *Daimler*'s “at home” test is appropriate to exercise general jurisdiction over third parties in enforcement proceedings. The *Shaffer* rationale does not necessarily implicate a lesser standard for third parties as it does for debtors. The Court in *Shaffer* emphasized a creditor's need to bring an action wherever the debtor's property is present because “it has been determined by a court of competent jurisdiction that the defendant is a debtor of the plaintiff.”²²⁵ Third parties have no outstanding judgment or award against them. A lesser general jurisdiction standard cannot be justified

²²² See *Gucci Am., Inc. v. Weixing Li*, No. 10 CIV. 4974 RJS, 2012 WL 1883352, at *4 (S.D.N.Y. May 18, 2012), *vacated*, 768 F.3d 122 (2d Cir. 2014), *rev'd*, 768 F.3d 122 (2d Cir. 2014) (considering and denying this claim).

²²³ See *Gucci Am., Inc. v. Weixing Li*, No. 10 CIV. 4974 RJS, 2012 WL 5992142, at *7 (S.D.N.Y. Nov. 15, 2012), *rev'd*, 768 F.3d 122 (2d Cir. 2014) (finding Bank of China in contempt “[b]ecause Plaintiffs have demonstrated that (1) BOC failed to comply with the Court's clear and unambiguous August 23 [production] Order, (2) the proof of non-compliance is clear and convincing, and (3) BOC has not diligently attempted to comply in a reasonable manner”).

²²⁴ See *Gucci*, 768 F.3d at 135 (“We conclude that applying the Court's recent decision in *Daimler*, the district court may not properly exercise general personal jurisdiction over the Bank. Just like the defendant in *Daimler*, the nonparty Bank here has branch offices in the forum, but is incorporated and headquartered elsewhere.”). A similar problem is likely to arise in the context of criminal and civil subpoenas issued by the government. Traditionally, subpoenaed witnesses—generally banks—needed only to be doing business in the United States, through branches or otherwise. *Daimler* has the potential to eliminate this whole line of cases as well. See, e.g., *In re Grand Jury Proceedings the Bank of Nova Scotia*, 740 F.2d 817, 828 (11th Cir. 1984) (“The nationality of the Bank is Canadian, but its presence is pervasive in the United States. The Bank has voluntarily elected to do business in numerous foreign host countries and has accepted the incidental risk of occasional inconsistent governmental actions.”) (footnote omitted). *Daimler*'s impact is as yet unclear in another type of discovery—applications for discovery in aid of proceedings before foreign tribunals under 28 U.S.C. § 1782. Section 1782 provides that “[t]he district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal . . .” 28 U.S.C. § 1782. Prior to *Daimler*, a corporation's “systematic and continuous” contacts with a district were sufficient to subject it to § 1782 discovery there, even if its place of incorporation and principal place of business were elsewhere. See *In re Inversiones y Gasolinera Petroleos Valenzuela, S. de R.L.*, No. 08-20378, 2011 WL 181311, at *8 (S.D. Fla. Jan. 19, 2011).

²²⁵ *Shaffer v. Heitner*, 433 U.S. 186, 210–11 n.36 (1977).

on the basis that their due process interest has been satisfied or diminished by a prior adjudication.

On the other hand, third parties are merely called upon to offer up documents or assets, rather than to litigate a plenary claim.²²⁶ Moreover, third parties are presumed to have “no dog in [the] fight.”²²⁷ A garnishee, for example, is not a defendant resisting a potential liability judgment—a garnishee is just the person unlucky enough to be in possession of the judgment debtor’s assets. However, every garnishment action or subpoena carries with it the possibility of a contempt judgment (which was, in fact, levied against the Bank of China). A liability judgment and a contempt judgment are quite different. But it is unclear which way that should cut, especially when a non-party is subject to foreign compulsion that arguably forces it to violate one’s sovereign’s laws in order to comply with the demands of another.

Practical considerations lay behind the preservation of quasi-in-rem jurisdiction for recognition and enforcement actions—debtors could easily frustrate satisfaction of judgments and awards if they could shield assets simply by placing them where they were not subject to personal jurisdiction.²²⁸ Similar practical considerations may inform the question of whether a lesser general jurisdiction standard is appropriate for third parties in enforcement proceedings—a debtor will also be able to easily frustrate enforcement proceedings if it can place its assets in the hands of garnishees that are beyond the power of the judgment-rendering court or courts likely to recognize and

²²⁶ *First Am. Corp. v. Price Waterhouse LLP*, 154 F.3d 16, 20 (2d Cir. 1998). The Court of Appeals for the Second Circuit observed that “a person who is subjected to liability by service of process far from home may have better cause to complain of an outrage to fair play than one similarly situated who is merely called upon to supply documents or testimony.” *Id.* (emphasis omitted). One district court remarked, in the context of a garnishment action, that “it is well recognized that merely making a submission to the court imposes a far less significant burden on that party than bringing the party into a lawsuit.” *Licea v. Curacao Drydock Co.*, C.A. No. 4:13-MC-00874, slip op. at 7 (S.D. Tex. Sept. 9, 2014). A subpoena in aid of enforcement proceedings “imposes an even lighter burden than a typical subpoena, which may delve into aspects of a company’s business that are sensitive, and which may require extensive legal analysis as well as internal resources in crafting objections and providing responses.” *Id.* at 8. A third party, by contrast, needs to only tell the creditor what information it has about the debtor’s assets. “It is a question that can be answered in an instant.” *Id.* Domestic non-party witnesses arguably enjoy lesser constitutional jurisdictional protections because the burdens on them “rarely should result in ‘meaningful inconvenience’ rising to a constitutional level.” Rhonda Wasserman, *The Subpoena Power: Pennoyer’s Last Vestige*, 74 MINN. L. REV. 37, 97 (1989). Domestic witnesses, however, are unlikely to face the problem of foreign compulsion.

²²⁷ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 717 (1st Cir. 1998).

²²⁸ See RESTATEMENT (SECOND) CONFLICT OF LAWS § 66 cmt. a (1971) (noting that debtors “should not be able to avoid payment . . . by removing [their] assets to a place where [they are] not subject to an in personam suit”).

enforce the judgment.²²⁹ And as with debtors, it is not clear that specific jurisdiction can fill the gap left by *Daimler*—a key premise of Justice Ginsburg’s opinion.²³⁰

Notably, in both the *Gliklad* and *Gucci* cases, the courts speculated about the possibility of exercising specific jurisdiction over the banks. In *Gucci*, the Second Circuit remanded the case with an order for the district court to consider whether U.S. courts could exercise jurisdiction over the Bank of China on another basis.²³¹ In *Gliklad*, the state court judge seemed to suggest that the bank might be subject to specific jurisdiction if a nexus existed between the claim for recognition and enforcement of the judgment and the activities of the garnishee in the forum—specifically, the court inquired whether the debtor had initiated the transfers with the intent to avoid the judgment.²³² But it is not clear how the actions of the debtor can justify specific jurisdiction over the bank or give rise to the “purposeful availment” on the part of the bank that is necessary to meet the due process standard for specific jurisdiction. In order to meet this standard, a garnishee would have to have taken purposeful actions that led to the institution of the recognition and enforcement action in the forum state, such as purposeful assistance of the debtor in dissipation or concealment of assets.²³³

²²⁹ Indeed, a common tactic to avoid judgment enforcement is to place assets in an “asset protection trust” not subject to the power of a U.S. court (and which will not release the funds to the debtor under compulsion, thereby shielding the debtor from civil contempt sanctions, as it lacks the power to produce the assets). See Stewart E. Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom?*, 85 CORNELL L. REV. 1035, 1098–100 (2000) (noting jurisdictional and enforcement difficulties in the context of trust assets under the UCC).

²³⁰ See *supra* notes 144–58 and accompanying text. See Robertson & Rhodes, *supra* note 156, at 650–51 (“This jurisdictional challenge is made even more difficult by a lack of clarity regarding personal jurisdiction over nonparties, whether domestic or foreign. As the circuit court pointed out in *Gucci*, the Supreme Court has never addressed the scope of specific jurisdiction over nonparties.”).

²³¹ See *Gucci Am., Inc. v. Weixing Li*, 768 F.3d 122, 138 (2d Cir. 2014) (“In light of that pre-*Daimler* case law, the district court had no need to consider specific jurisdiction or to develop a record sufficient for that purpose. On remand, the district court must give the issue due consideration.”).

²³² See *Gliklad v. Bank Hapoalim B.M.*, 2014 N.Y. Slip Op. 32117[U], 2014 WL 3899209, at *1 (N.Y. Sup. Ct. Aug. 4, 2014) (“Without any suggestion that [the debtor] initiated these transfers for the specific intent of depriving Mr. Gliklad of the opportunity to receive payment on the promissory note, there is no basis for establishing specific jurisdiction over Bank Hapoalim.”).

²³³ The Supreme Court’s recent decision in *Walden v. Fiore* may make such a showing even more difficult. In *Walden*, the Court rejected the argument that a defendant’s mere knowledge that his actions would affect persons domiciled in another forum could subject the defendant to specific jurisdiction there. See 134 S. Ct. 1115, 1125 (2014) (“Petitioner’s actions in Georgia did not create sufficient contacts with Nevada simply because he allegedly directed his conduct at plaintiffs whom he knew had Nevada connections.”). A

Following the remand, the district court in *Gucci* did find specific jurisdiction, reasoning that the bank's repeated processing of transfers from a New York correspondent bank account constituted the requisite purposeful conduct.²³⁴ The district court relied on the earlier decision of the Court of Appeals for the Second Circuit, in *Licci v. Lebanese Canadian Bank*,²³⁵ which found specific jurisdiction in a plenary proceeding over a foreign bank that maintained a correspondent bank account with a New York bank to process U.S.-dollar-denominated wire transfers, where those transfers were "used as an instrument to achieve the very wrong alleged."²³⁶ In *Licci*, the Court of Appeals for the Second Circuit specifically noted that repeatedly processing "U.S.-dollar-denominated wire transfers" in New York constitutes "purposeful avilment of New York's dependable and transparent banking system, the dollar as a stable and fungible currency, and the predictable jurisdictional and commercial law of New York and the United States."²³⁷ Like the state court in *Gliklad*, the district court in *Gucci* focused on the nexus between the accounting action and the bank's in-state activities—rather than any nexus between the bank's actions and the underlying infringement action. The district court focused on the production order and noted that "Gucci's Subpoenas are premised on the fact that Defendants' proceeds from the sale of counterfeit goods were transferred through [Bank of China]'s correspondent account in New York," and that, "[a]s such, there is a substantial nexus" between the action and the bank's New York contacts.²³⁸

Another aspect of the Canadian Supreme Court's *Chevron* decision considered jurisdiction over a third-party garnishee in a recognition and enforcement action.²³⁹ The Court held that it could exercise jurisdiction over Chevron Canada, which is incorporated in British

third-party bank could plausibly argue that *Walden*, if extended to the recognition and enforcement context, indicates that the bank's mere knowledge that its actions could frustrate satisfaction of an award or judgment in another forum is insufficient to subject it to specific jurisdiction there.

²³⁴ See *Gucci Am., Inc. v. Weixing Li*, No. 10 CIV. 4974 RJS, 2015 WL 5707135, at *5 (S.D.N.Y. Sept. 29, 2015) ("Here, there can be no real dispute that BOC frequently and deliberately used its New York correspondent account with Chase to effectuate wire transfers for its U.S. clients, including, critically, Defendants in this action." (emphasis omitted)).

²³⁵ 732 F.3d 161 (2d Cir. 2013).

²³⁶ *Id.* at 171–72 ("It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of [proceedings] in that forum for [information] related to, and arising from, that use.").

²³⁷ *Id.* at 171 (internal quotation marks omitted) (internal citation omitted).

²³⁸ *Gucci*, 2015 WL 5707135, at *9.

²³⁹ *Chevron Corp. v. Yaiguaje*, [2015] S.C.R. 69, at para. 92.

Columbia and has its principal place of business in Vancouver, because it was “carrying on business” in Ontario. Although the Court had expressed some concern about the breadth of “carrying on business” jurisdiction in a tort action, the *Chevron* Court held that “[i]n the recognition and enforcement context, it would hardly make sense to require that the carrying on of business in the province relate to the subject matter of the dispute.”²⁴⁰ The Court reasoned that “one aspect of the plaintiffs’ claim in this case is for enforcement of Chevron’s obligation to pay the foreign judgment using the shares and assets of Chevron Canada to satisfy its parent corporation’s debt obligation,” and that, “[i]n this respect, the subject matter of the claim is not the Ecuadorian events that led to the foreign judgment . . . [but] the collection of a debt using shares and assets that are alleged to be available for enforcement purposes.”²⁴¹

CONCLUSION

In the context of traditional plenary actions, the Supreme Court’s decision in *Daimler* transformed the law on general jurisdiction in the United States, effectively bringing the United States into line with the approach to general jurisdiction in most other countries. As the *Daimler* case itself illustrates, global forum-shopping opportunities for plaintiffs in plenary actions that have little or nothing to do with the United States have been eliminated post-*Daimler*. However, the impact of *Daimler* in the context of recognition and enforcement has received little attention. Cases, such as *Sonera*, have reflexively imposed the *Daimler* “at home” standard on actions to recognize an arbitral award, without considering the significant differences between traditional plenary actions and recognition and enforcement proceedings. Although the presence of the debtor’s assets in the forum remains a viable basis for recognition and enforcement of an award or judgment, assets are not always available and even when they are, personal jurisdiction over the debtor may nonetheless be desirable in order to obtain broader and more effective remedies. However, in personam proceedings to recognize and enforce foreign award and judgments that were prevalent in the pre-*Daimler* era can no longer be brought, potentially undermining cross-border cooperation on which transnational business relies. As we have shown, the burdens on a foreign debtor are substantially different when an action is brought to recognize and enforce a foreign judgment or arbitral award, thus suggesting that the *Daimler* rule may not be appropriate in this con-

²⁴⁰ *Id.*

²⁴¹ *Id.* at para. 93.

text. Moreover, a specific jurisdiction alternative to general jurisdiction does not quite fit the recognition and enforcement context.

At the same time, some courts—both here and abroad—have permitted recognition and enforcement of foreign judgments and awards without the requirement of any jurisdictional nexus with the forum. Such an approach errs in the other direction, overlooking the very real concerns of judgment and award debtors, who may have substantial defenses to the judgment or award, but are forced to respond in a jurisdiction with which they have no connection. Lack of a jurisdictional nexus of any kind promotes forum-shopping for the most lax standards of judgment or award recognition, which is compounded if other fora are willing to give respect or complete deference to such a judgment.

In this Article, we have offered an intermediate path and propose a jurisdictional standard designed with particular reference to recognition and enforcement of judgments and awards. We believe the pre-*Daimler* standard of “systematic and continuous activities” strikes the proper balance of creditor and debtor interests in this context. We also acknowledge the possibility of different treatment for the recognition of foreign awards pursuant to the New York and Panama Conventions on the theory that a party consenting to arbitration governed by an international treaty can be deemed to consent to recognition and enforcement in a Convention country, but we do not necessarily embrace it. We are also uncertain as to whether the basic *Daimler* jurisdictional rule or a tailored jurisdictional recognition rule (such as the pre-*Daimler* general jurisdiction standard) should apply to enforcement proceedings against third parties. On the one hand, a third party has no award or judgment against it and can appropriately argue for the same due process entitlement demanded in a plenary suit. On the other hand, a third party is not faced with the burden of defending a plenary action and does not face a potential liability judgment. To that extent, the third party arguably is not in need of the jurisdictional protection offered by the *Daimler* rule. However, a third party may be subject to sanctions for non-compliance, particularly in cases of foreign compulsion where it could be faced with violating the laws of one sovereign to comply with the demands of another, and therefore may require significant due process protections. If an alternative rule for specific jurisdiction in the context of enforcement against third parties can be constructed to fit the third-party situation, such as the one accepted in the *Gucci* case, *Daimler* protection given to third parties in this situation would not pose a serious obstacle to a creditor’s enforcement proceedings.

As we have emphasized in this Article, the role of jurisdiction in recognition and enforcement proceedings is significant and should not be overlooked. And now is certainly the time to seriously consider: “What Hath *Daimler* Wrought?”