The More Favorable Regime for Confirming International Arbitral Awards Made in the U.S.: A Choice Within the ‘Overlapping Coverage’ of FAA Chapters One and Two

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Abstract:

According to U.S. courts, Chapters One and Two of the Federal Arbitration Act provide “overlapping coverage” over arbitral awards that were made in the U.S. and also fall under the New York Convention. The meaning of “overlapping coverage” under U.S. arbitral law remains unclear, but affects the defeated party’s ability to challenge the conversion of these awards to court judgments and, consequently, the parties’ decision to seat an arbitration in the U.S. According to every Circuit that has addressed the question, when a U.S.-rendered award is domestic, it is subject to summary, challenge-free confirmation under Chapter One if it is not vacated within 90 days of its rendering. If instead the U.S.-rendered award is non-domestic and falls under the Convention, the question is whether Chapter Two of the FAA, which implements the Convention, deprives the prevailing party this potential challenge-free confirmation. By one reading, it does not.

According to the Convention’s little-explored Article VII(1), the so-called “more-favorable regime” provision, the Convention does not deprive an interested party of any right to confirmation she may have under the law of the country in which enforcement is sought (here, the U.S.). This gives rise to an interpretation of “overlapping coverage” whereby the prevailing party to a non-domestic award made in the U.S. may have the regimes of Chapters One and Two available as parallel entitlements. The choice by the prevailing party among the available regimes, including challenge-free confirmation under Chapter One, depends on the regime that is most advantageous. And under this interpretation, alluded to by courts and commentators and developed herein, the prevailing party would enjoy summary, challenge-free confirmation of an award made in the U.S. for which vacatur is not timely sought even if that award falls under the Convention. The implications for the U.S. law of international commercial arbitration are manifold.
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As recently as 2011, a U.S. federal court reiterated that Chapters One and Two of the Federal Arbitration Act (“FAA”)¹ provide “overlapping coverage” over non-domestic arbitral awards rendered in the United States, to the extent the two chapters do not conflict.² Some courts interpreting this “overlapping coverage” have taken it to mean that Chapter One is a gap-filler for Chapter Two, providing procedural or technical provisions for residual application.³ But a different interpretation of “overlapping coverage” is that the two chapters of the FAA create two separate regimes for the confirmation of non-domestic arbitral awards rendered in the U.S., and that between these two regimes, the prevailing party to the arbitral award “may [choose] the most advantageous.”⁴ This view, introduced by the Second Circuit’s seminal case, Bergesen v. Muller,⁵ and further elaborated by the Second and Seventh Circuits,⁶ calls for “overlapping coverage” beyond simply using 9 U.S.C. § 208 to fill in gaps in Chapter Two by drawing from Chapter One. Instead, this interpretation takes the two regimes as parallel entitlements.

An extension of this interpretation may be seen in light of the Seventh Circuit’s reference, in the context of citing Bergesen’s holding on “overlapping coverage,” to Article VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention” or “Convention”).⁷ Article VII(1) of the New York Convention provides that the Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon.”⁸

The logical question is whether there is such a more-favorable regime within U.S. law. This article’s thesis is that there is. Article VII(1) of the Convention, then, provides for an enticing possibility: a more favorable, more pro-enforcement confirmation regime, when available to a party that prevails in

⁴ Bergesen v. Muller, 710 F.2d 928, 934 (2d Cir. 1983).
⁵ 710 F.2d 928 (2d Cir. 1983); see also Albert Jan van den Berg, When is an Arbitral Award Nondomestic Under the New York Convention of 1958?, 6 PAC L. REV. 25, 25–27 (1985).
⁶ Lander Co. v. MMP Investments, 107 F.3d 476 (7th Cir. 1997); Alghanim v. Toys ’R’ Us, Inc., 126 F.3d 15 (2d Cir. 1997).
⁸ New York Convention, art. VII(1).
arbitration, is not taken away by application of the Convention. Courts interpreting the provisions of Chapter One governing confirmation and vacatur have created a rule with regard to confirmation: if the defeated party in arbitration does not move to vacate the award within the statute of limitations, the defeated party is deemed to have accepted the award as final and binding. The prevailing party may then confirm the award without challenge. There are policy reasons motivating this rule—arbitration is meant to be a speedy form of dispute resolution, and if the defeated party does not timely object to an award, the prevailing party should not be delayed from obtaining monetary satisfaction.

What happens to this rule under the Convention as implemented by FAA Chapter Two, that is, when an award made in the U.S. falls under the Convention? Does the rule disappear, possibly subjecting the prevailing party to undue delay in obtaining satisfaction of the award? Or is the rule preserved under Article VII(1) of the Convention as part of a “more favorable regime” for enforcement?

In his evaluation of the Second Circuit’s holding in Bergesen, Prof. Albert Jan van den Berg argues that the court may have taken an “expansive interpretation” of awards falling under the New York Convention. According to Prof. van den Berg, the court’s interpretation may make enforcement of an award rendered in the U.S., but falling under the Convention, more onerous than confirmation of an award rendered in the U.S. that is domestic. He states: “Enforcement of an award falling under Chapter One of the Federal Arbitration Act is almost automatic. Objections to an award must be raised through an action for setting aside an award.” The more onerous enforcement process elucidated by Prof. van den Berg is that the award may be subject to a vacatur action based on grounds in 9 U.S.C. § 10 and also be opposed based on grounds in Article V. He posits that this may be prevented simply by the party that prevails in arbitration arguing collateral estoppel. But the more elegant solution he then proffers is for

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11 Id.
12 Jan van den Berg, supra note 5, at 46–54.
13 Id. at 54.
14 Id. at 54–55.
15 Id. at 55.
16 Id. at 55–56.
the prevailing party to be entitled to confirm a Bergesen award under Chapter One as a more-favorable regime, pursuant to Article VII(1) of the Convention.17

This Article examines two interpretations of “overlapping coverage” in light of Article VII(1) of the New York Convention. Under the first interpretation, both regimes apply simultaneously until the prevailing party files her complaint and chooses the confirmation regime pursuant to which she wishes to confirm her award. In particular, if the prevailing party invokes Article VII(1) and chooses to confirm under Chapter One, taking pains to avoid invoking the Convention, the Convention is excluded in toto. By this interpretation, a prevailing party may choose one confirmation regime over the other because the chosen regime is more advantageous. The defenses available to the defeated party are then determined by the confirmation regime chosen by the prevailing party.

Under the second interpretation, both regimes apply simultaneously in a proceeding to confirm a non-domestic award rendered in the U.S. (for convenience, a Bergesen award). Thus, regardless of the provision pursuant to which the prevailing party moved to confirm the award, that is, the cause of action invoked by the prevailing party, the defeated party has the defenses from both Chapter One and the New York Convention available when not precluded by statute of limitations. Broadly speaking, the two interpretations may be reconciled as follows. The first interpretation requires the premise that Convention’s application is directed by the character of the prevailing party’s chosen cause of action, while the second interpretation requires the premise that the Convention is mandatory in its application based on the non-domestic character of an award.

This article will proceed in three parts. Part I discusses the confirmation regimes under FAA Chapter One and Chapter Two, and presents consequences of viewing the two regimes as “overlapping.” Part II develops the two interpretations of “overlapping coverage” as introduced above, as well as the reconciliation of these positions based on either the character of the prevailing party’s complaint, or the character of the arbitral award, as the trigger for the Convention’s application. Part III presents an assessment of the two interpretations and their reconciliations.

17 Id. at 55–57.
I. THE CONFIRMATION REGIMES UNDER FAA CHAPTERS ONE AND TWO

Article VII(1) of the Convention gives the prevailing party the choice as to the more favorable regime for the confirmation of the award. For an award made in the U.S. that falls under the Convention, this choice is principally between Chapters One and Two of the FAA. The regime typically chosen for confirming an award falling under the Convention is FAA Chapter Two, even if the award was made in the U.S. But this overlooks the potential use of Article VII(1) to provide access to Chapter One as a confirmation regime, including its strategic importance because of the possibility of challenge-free confirmation. This use of Article VII(1) is only possible by interpreting the “overlapping coverage” of Chapters One and Two as providing parallel entitlements. To provide the building blocks for this evaluation, this article will describe the confirmation regimes of Chapter One and Two and the relevant aspects of their “overlapping coverage.”

A. Introduction to the “Overlapping Coverage” of FAA Chapters One and Two

There are two introductory points regarding “overlapping coverage.” First, the now well-cited proposition from Bergesen that FAA Chapters One and Two provide “overlapping coverage,”18 and the notion that “[s]ince the statutes overlap,”19 the prevailing party “may chose [sic] the most advantageous” available remedy,20 applies only to arbitral awards that are (i) rendered in the U.S. and (ii) non-domestic pursuant to 9 U.S.C. § 202.21 Second, a common interpretation of “overlapping coverage” is the limited view that the parts of Chapter One not conflicting with Chapter Two apply in a proceeding under Chapter Two through the “residual application” provision, 9 U.S.C. § 208.22 While overlapping coverage in the sense of residual application is part of the picture, this article speaks of overlapping coverage also in the

18 Bergesen, 710 F.2d 928, 934 (2d Cir. 1983).
19 Id.
20 Id.
21 Jan van den Berg, supra note 5, 30–32, 47–50.
sense of parallel entitlements. Under this view, overlapping coverage provides that the prevailing party “has more than one remedy available and may [choose] the most advantageous.”

1. The concept of a non-domestic award rendered in the U.S. (a “Bergesen” award)

The concept of a non-domestic, U.S.-rendered award under U.S. *lex arbitri* draws largely from Article I of the New York Convention and Section 202 of the Federal Arbitration Act’s Chapter Two. The New York Convention was meant to apply not only to the recognition and enforcement of awards in a contracting state which awards were rendered in a different state, but also to awards rendered in the contracting state where recognition and enforcement is sought that are considered in that state to be non-domestic. In the U.S., awards are determined to be non-domestic in accordance with Section 202 of the Federal Arbitration Act (“FAA”), which provides in relevant part:

An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Courts have applied Section 202 to hold that agreements or awards involving at least one non-U.S. citizen are also non-domestic and fall under the Convention. In short, an award rendered in the U.S. is non-domestic, when (i) at least one party is not a U.S. citizen or (ii) if both parties are U.S. citizens, when the

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23 *Bergesen*, 710 F.2d at 934.
26 New York Convention art. I(1); Alan Scott Rau, *The New York Convention in American Courts*, 7 AM. REV. INT’L ARB. 213, 221 (1996). Some states parties to the New York Convention, including the United States, have made the reservation that they will only apply the New York Convention to awards made in the territory of another contracting state. New York Convention art. I(3); Rau, supra, at 225–28. This reservation by the U.S. has not been interpreted by U.S. courts to preclude the application of the New York Convention to awards rendered in the U.S. that are considered non-domestic. *Id.* at 227–28; *Bergesen*, 710 F.2d at 932.
award involves some foreign contact (i.e., involves property abroad or envisages performance or enforcement abroad). In such cases, the New York Convention applies to the award.

The Second Circuit’s opinion in Bergesen is recognized by many as the leading case on what qualifies as a non-domestic award under U.S. lex arbitri. But the court did not hold that the Convention was the sole and only regime through which a non-domestic award can be enforced. Rather, it acknowledged that the award at issue in that case “might also have been enforced under the Federal Arbitration Act [Chapter One].” Thus, Chapters One and Two overlap in the sense that they both applied to the award in question—Chapter One because the award was rendered in the U.S., and Chapter Two because the award fell under the Convention.

Courts that have cited to Bergesen’s concept of “overlapping coverage,” however, have often done so in conjunction with 9 U.S.C. § 208 (Chapter 1; residual application). According to this article, this view of overlapping coverage, which yields a regime that draws from Chapter Two and Chapter One only insofar as incorporated into Chapter Two by residual application, differs from the view of “overlapping coverage” in Bergesen whereby the prevailing party “has more than one remedy available and may chose [sic] the most advantageous.” In order to distinguish the views of overlapping coverage that is limited to residual application from the view of overlapping coverage as parallel entitlements, this article briefly reviews the operation of the residual application provision of Chapter Two.

2. Residual application of Chapter One in Chapter Two through 9 U.S.C. § 208

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32 See, e.g., Lander Co., 107 F.3d at 482.
33 New York Convention art. I(1); 9 U.S.C. § 202; Contini, supra note 27, at 292–94.
34 Rau, supra note 26, at 221 n.31; Jan van den Berg, supra note 5, at 26.
35 See Bergesen, 710 F.2d at 934.
36 Id.
38 See Pinkston, supra note 22, at 642 n.10.
39 Id.
40 See Lander Co., 107 F.3d at 481.
Under 9 U.S.C. § 208, Chapter One “applies to actions and proceedings brought under [Chapter Two] to the extent that chapter is not in conflict with [Chapter Two] or the [New York Convention].”

Courts have interpreted this gap-filling provision to bring procedural aspects of Chapter One into Chapter Two, such as the power to stay a proceeding referable to arbitration pursuant to Section 3, or the power to compel arbitration pursuant to Section 4 when no situs has been designated by the parties. On more substantive issues, such as the power of a U.S. court to vacate a non-domestic award pursuant to Section 10, some courts allowing for such vacatur have substantiated the position by stating that Section 10 is not in conflict with Chapter Two and thus incorporate by Section 208.

The interpretation of “overlapping coverage” as being limited to residual application provides that “either [Chapter One] or [Chapter Two] applies, but not both at the same time, with the ‘overlap’ taking place once [Chapter Two] incorporates a non-conflicting provision of [Chapter One].” By contrast, the formulation of “overlapping coverage” in Bergesen can be read as one in which both Chapters One and Two are confirmation regimes available to the prevailing party. While this latter formulation is not one of simultaneous application of Chapters One and Two throughout a confirmation proceeding, this article interprets it as prescribing simultaneous availability at the outset of a confirmation proceeding: Either regime, and in particular, “the more advantageous,” may be elected by the prevailing party, but upon such election, the other is excluded in toto. The choice of a prevailing party to seek confirmation of a non-domestic, U.S.-rendered award (for convenience, a Bergesen award) under Chapter One to the exclusion of Chapter Two has at times been respected, and at times overridden, by courts faced with the

43 Energy Transport, 348 F. Supp. 2d at 201; Pinkston, supra note, at 680–81.
44 Jain v. de Mere, 51 F.3d 686, 688–92 (7th Cir. 1995); Pinkston, supra note 22, at 682.
45 Ario v. The Underwriting Members of Syndicate 53 at Lloyds, 2010 WL 3239474, at *8 (3d Cir. 2010). The question of vacatur pursuant to 9 U.S.C. § 10 of a non-domestic, U.S.-rendered award is the subject of a Circuit split and discussed further infra at Section I.D.1.
46 Pinkston, supra note 22, at 642 n.10.
48 Bergesen, 710 F.2d at 934; Lander Co., 107 F.3d at 482; New York Convention art. VII(1).
49 See JAN VAN DEN BERG, supra note 47, at 85 (“If a party seeking enforcement choses [sic] to rely on the domestic law concerning enforcement of foreign awards or on another treaty by virtue of the mfr-provision of Article VII(1) of the New York Convention, he must rely on that basis in tota, to the exclusion of the New York Convention.”).
motion to confirm.\textsuperscript{50} Before discussing the tradeoffs faced by the prevailing party in choosing between Chapters One and Two as parallel entitlements, this article presents the basics of these two regimes.

\textbf{B. The First Confirmation Regime for Non-Domestic Awards Rendered in the U.S.: The New York Convention and FAA Chapter Two}

The regime commonly chosen by prevailing parties to confirm *Bergesen* awards is the one set out by the New York Convention, as implemented by Chapter Two of the FAA.\textsuperscript{51} As long as a *Bergesen* award is considered as “commercial,” the award falls under Chapter Two and the prevailing party may seek enforcement of the award pursuant to 9 U.S.C. § 207.\textsuperscript{52} The regime explicitly provides for (1) a private right of action to enforce an award falling under the Convention; (2) venue for the enforcement action and subject matter jurisdiction of the court faced with such an action; and (3) grounds by which the defeated party in arbitration can oppose enforcement of the award.

\textbf{1. The private right of action}

Section 207 creates a private right of action pursuant to which the prevailing party can move to confirm her award\textsuperscript{53} and convert the award into a court judgment.\textsuperscript{54} This section provides:

\begin{quote}
Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under [Chapter Two] for an order confirming the award as against any other party to the arbitration.\textsuperscript{55}
\end{quote}


\textsuperscript{51} See, e.g., Lander Co., 107 F.3d at 478–79 (Lander “claims that the suit arises under the Convention, and specifically 9 U.S.C. § 207” though the award was rendered in New York); ESCO Corp. v. Bradken Resources Pty Ltd., 2011 U.S. Dist. LEXIS 46460, Civ. No.10-788-AC, at **18–19 (N.D. Ill Jan. 31, 2011) (award was rendered in the U.S. but ESCO sought confirmation pursuant to § 207).


Faced with such an application, “[t]he 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 [NY Convention].”

In an action to confirm an award under Chapter Two, the petition to confirm will typically be a motion explicitly pursuant to 9 U.S.C. § 207.

2. Subject-matter jurisdiction

Section 203 provides federal courts with “original jurisdiction over [an action or proceeding falling under the Convention], regardless of the amount in controversy.” Courts routinely cite 9 U.S.C. § 203 as their basis for subject-matter jurisdiction over actions to confirm arbitral awards falling under the Convention, including Bergesen awards, in 9 U.S.C. § 203.

3. Venue

In perhaps one of the clearest indications that Congress intended Chapter Two and the Convention to apply to certain awards rendered in the United States, Section 204 provides that any “action or proceeding over which the district courts have jurisdiction pursuant to [9 U.S.C. § 203]” may be brought in, among other courts, the “court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.” Additionally, venue is proper in any district court “in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought.”

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56 Id.
61 Id.; Bergesen, 710 F.2d at 933; S. Rep. No. 91-702 at 7.
application of Section 203, courts’ use of Section 204 as the basis for venue to confirm Convention awards, including Bergesen awards, is well-settled.63

4. The grounds for vacatur of, or refusal to recognize and enforce, a Bergesen award

The grounds by which a Bergesen award may be vacated, or based on which its recognition and enforcement may be refused, is the subject of a well-known circuit split.64 Those subscribing to the view that the grounds for refusal to enforce an award enumerated in Article V of the Convention are exclusive, in respect of all awards falling under the Convention, find that only these grounds may be invoked by the defeated party to a Bergesen award.65 Those subscribing to the view that the “domestic vacatur” provisions under FAA Chapter One (i.e., those in 9 U.S.C. § 10) apply to Bergesen awards find that the grounds for refusal to enforce enumerated in Article V of the Convention are not exclusive, and that (i) enforcement of such an award may be refused based on a ground in Article V and (ii) such an award may be vacated pursuant to Section 10.66 The grounds for vacatur under Section 10 are discussed in Section I.C.3, infra, and the grounds for refusal to recognize and enforce an award are discussed next.

Article V of the Convention lists seven grounds based on which the defeated party may argue against the recognition and enforcement of an award sought to be confirmed pursuant to Section 207.67 Article V, paragraph 1, lists five grounds that may be raised by only “the party against whom [the award] is invoked,”68 i.e., the defeated party in the arbitration.69 Article V, paragraph 2, list two grounds for refusal to recognize and enforce that may be found sua sponte by “the competent authority in the country

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64 Compare Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc., 126 F.3d 15 (2d Cir. 1997) with Industrial Risk Insurers v. M.A.N. Gutehoffnungshute GmbH, 141 F.3d 1434 (11th Cir. 1998). For scholarly and practitioner commentary on this circuit split and the resulting debate in the field, see Rau, supra note, at 234–42; Richard W. Hulbert, The Case for a Coherent Application of Chapter 2 of the Federal Arbitration Act, 22 AM. REV. INT’L ARB. 45, 75–84 (2011); Pinkston, supra note 22, at 672–75, 694–97. The impact of this split on this article’s discussion of “overlapping coverage” is described in Section I.D.1, infra.
65 Industrial Risk, 141 F.3d at 1446; Hulbert, supra note, at 72.
66 Toys “R” Us, 126 F.3d at 21, 23; Rau, supra note, at 234–40.
67 Five of the seven grounds are listed in Article V(1). The remaining two grounds are listed in Article V(2).
68 New York Convention art. V(1).
69 JAN VAN DEN BERG, supra note 47, at 264.
where recognition and enforcement is sought," i.e., the court faced with the action pursuant to Section 207.

A detailed discussion of each Article V ground is beyond the scope of this article, but this article’s discussion requires specific mention of one ground. Article V(1)(e) provides that recognition and enforcement of an award may be refused if the award “has been set aside or suspended by a competent authority of the country in which, or under the laws of which, that award was made.” To demonstrate this ground, the party opposing recognition and enforcement must show that the award has been set aside by a court in the country in which the arbitration took place, or by a court of a nation whose procedural law applied to the arbitration. Under U.S. *lex arbitri*, set-aside of an award is termed *vacatur*. Only a court in the seat of arbitration has the authority to set aside (vacate) an award. Thus, for *Bergesen* awards, the seat of which is in the U.S., vacatur can only be done by a U.S. court.

Further in the context of “overlapping coverage,” it is additionally relevant that the grounds for refusal to recognize and enforce an award under Article V are not grounds for vacatur. The few courts to have analyzed the issue have held that Chapter Two does not contain a statutory cause of action whereby the defeated party may vacate a Convention award; the defeated party may only oppose recognition and enforcement.

This basic overview of recognition and enforcement under Chapter Two aims to describe the generally-used framework for converting awards falling under the Convention, including *Bergesen*

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**Footnotes:**

70 New York Convention art. V(2); see *RAKTA* 508 F.2d at 973 (court’s review under Article V(2)(b) may be initiated by the defendant or by the court sua sponte); *id.* at 974 (court’s review under Article V(2)(a) may be initiated by the defendant or by the court sua sponte).
71 *RAKTA*, 508 F.2d at 973.
72 New York Convention art. V(1)(e); see generally *JAN VAN DEN BERG*, *supra* note 47, at 349–52.
74 *JAN VAN DEN BERG*, *supra* note 47, at 350.
75 Rau, *supra* note 26, at 239.
76 *RAKTA*, 508 F.2d at 973.
77 New York Convention art. V(1)(e); see generally *JAN VAN DEN BERG*, *supra* note 47, at 349–52.
78 See *Zeiler v. Deitsch*, 500 F.3d 157, 165 n.6 (2d Cir. 2007).
awards, into court judgments. But prevailing parties to Bergesen awards have at times sought confirmation of their awards pursuant to 9 U.S.C. 9. To set the stage for evaluating the overlap between these two regimes, this article will describe Chapter One as an avenue for confirming a non-domestic award made in the U.S.

C. The Second Confirmation Regime for Non-Domestic Awards Made in the U.S.: FAA Chapter One

The road less traveled by is for the prevailing party to seek confirmation of a Bergesen award pursuant to Chapter One of the FAA. Indeed, this author was only able to locate two cases in which such an action was successful (discussed infra). In these cases, only the facts reveal that the awards were Bergesen awards; neither the parties nor the court identified them as such. But the desirability of confirmation under Chapter One of any award rendered in the U.S. is plain in light of the rule in a number of Circuits, including the Second, Fourth, and Eighth: an award may not be challenged pursuant to the grounds in Section 10 if such grounds are not raised within the first three months after the award was rendered; rather, at that point the award may be confirmed without challenge. Such challenge-free confirmation is attractive, as it allows for speedy monetary satisfaction of an award. In light of this more favorable right to confirmation available pursuant to 9 U.S.C. § 9, this article briefly sets out the confirmation regime under Chapter One of the FAA.

1. The private right of action

Like Section 207, Section 9 creates a private right of action whereby the prevailing party can move to confirm her award and have it converted into a court judgment. Section 9 provides:

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80 See, e.g., Jamaica Commodity, 1991 U.S. Dist. LEXIS 8976, at *1; see also Jan van den Berg, supra note 5, at 56–57; Karamanian, supra note 47, at 93
85 See supra Part I.B.1.
At any time within one year after the award is made any party to the arbitration may apply to [a court specified in the parties’ agreement or the United States court in the district within which such award was made] for an order confirming the award...  

Faced with such an application, “the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of [Chapter One].” Said differently, confirmation is mandatory upon application in respect of awards not vacated or modified—Section 9 “unequivocally tells courts to grant confirmation in all cases, except when one of the ‘prescribed’ exceptions applies.” In an action to recognize and enforce an award under Chapter One, the petition to confirm will typically be a motion explicitly pursuant to 9 U.S.C. § 9.

One additional requirement exists in 9 U.S.C. § 9 that is not part of recognition and enforcement under the Convention: the parties to the arbitration must consent to the confirmation of the award as a court judgment. The Circuits are divided over the exact language that satisfies this consent-to-confirmation requirement. Some courts hold that language in the agreement stating that the award will be “final and binding” is sufficient to indicate the parties’ consent to the confirmation of the award, while others hold that such language is insufficient. Additionally, some courts have held that “if a district court compels arbitration . . . it may confirm the award despite the absence of an agreement as to confirmation.” Most courts have found that Section 9’s consent-to-confirmation requirement is

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89 Id.; Karamanian, supra note 47, at 26–27.
90 Hall St., 128 S.Ct. at 1405.
92 9 U.S.C. § 9 (2011) (“[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration . . . .”); Phoenix, 391 F.3d at 435–37; accord McDermott Int’l, Inc. v. Lloyds Underwriters of London, 120 F.3d 583, 588–89 & n.12 (5th Cir. 1997); see also Van Ausdall, supra note 87, at 43–44 (describing the consent to judgment requirement).
93 Van Ausdall, supra note 87, at 43–44 (describing the Circuit split).
94 See, e.g., IUS Stavborg v. Nat’l Metal Converters, Inc., 500 F.2d 424, 426 (2d Cir. 1974); see also Van Ausdall, supra note 87, at 43–44.
95 See, e.g., PVI, Inc. v. ratiopharm GmbH, 135 F.3d 1252, 1254 (8th Cir. 1998); see also Van Ausdall, supra note, at 43–44.
inconsistent with the Convention, and thus not part of Chapter Two by virtue of 9 U.S.C. § 208, and it is questionable whether any court maintains a contrary position.

2. Subject-matter jurisdiction

It is settled law that FAA Chapter One does not provide an independent ground for subject-matter jurisdiction in federal courts. Such jurisdiction must instead be grounded in diversity or federal question. As with federal question jurisdiction more generally, the plaintiff’s well-pleaded complaint must allege a cause of action “arising under federal law” and cannot be based on an actual or anticipated defense. However, there is some authority for the proposition that federal question jurisdiction in a motion to vacate exists when the ground for vacatur asserted by the defeated party is manifest disregard of federal law. According to this article, this points to a more general notion that vacatur under Chapter One is an independent cause of action from confirmation, and is unlike opposition to recognition and enforcement under Chapter Two; the latter, by its very nature, cannot be raised independently of an action to recognize and enforce.

3. Venue

By statute, venue for an action to confirm an award pursuant to Section 9 is proper in a court specified in the parties’ arbitral agreement or, if no such court is specified, the district court embracing the

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98 Daihatsu Motor Co., Inc. v. Terrain Vehicles, Inc., No. 92 C 1589, 1992 U.S. Dist. LEXIS 7804, at **6–8 (N.D. Ill. June 1, 1992); but see Daihatsu Motor Co., Ltd. v. Terrain Vehicles, Inc., 13 F.3d 196, 199 (7th Cir. 1993) (The Circuit Court affirmed the district court’s opinion on the grounds that the arbitral agreement contained language that satisfied the consent-to-confirmation requirement, but stated: “We believe it is unnecessary to decide whether § 9 applies to the Convention. Because we agree with the district court’s conclusion that the arbitration clause in the Agreement between the two parties constitutes a § 9 consent-to-confirmation clause, determining whether § 9 applies to the Convention would not alter the disposition of the case. Thus, we reserve the question of whether the convention conflicts with § 9 until a time when it must be answered.”).
101 Vaden, 129 S.Ct. at 1272.
102 Cf. id.
104 Compare 9 U.S.C. § 9 (“any party to the arbitration may apply to the court so specified for an order confirming the award”) with id. § 10 (“the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration”).
arbitral seat. For an action to vacate an award pursuant to Section 10, the statute provides that venue is proper in the district court embracing the arbitral seat. According to the Supreme Court, these venue provisions (together with the venue provision of 9 U.S.C. § 11 in respect of actions to correct or modify an award) are permissive only. Thus, actions to confirm or vacate pursuant to Chapter One may be brought in the courts specified in the relevant statutory provisions, and may also be brought in any district court having jurisdiction over the parties.

4. The grounds for vacatur
   a. In general

   When an action to vacate an award is brought under FAA Chapter One, the award may only be vacated pursuant to the grounds enumerated in 9 U.S.C. § 10, or, in courts subscribing to the view, grounds providing a judicial gloss thereto. An action to vacate an award rendered in the U.S. may be brought pursuant to Section 10 as an action by the party seeking vacatur on its own initiative, or alternatively, in opposition to a motion to confirm brought by the prevailing party. Section 10 explicitly enumerates four grounds for vacatur. Separately, an award may always be vacated if it violates public policy.

The debate continues as to whether a court may vacate an award that is in manifest disregard of the law. Since the Supreme Court held in Hall St. that §§ 10 and 11 respectively provide the FAA’s exclusive grounds for expedited vacatur and modification, and “manifest disregard” is not enumerated in Section 10, it is not clear that “manifest disregard” remains an available ground for vacatur under the

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107 Id. § 10.
110 Hall St., 552 U.S. at 585.
112 See, e.g., Hall St., 552 U.S. at 577; Cortez Byrd, 529 U.S. at 196 (the defeated party’s action to vacate was brought in one court while the prevailing party’s action to confirm was brought in another district).
117 Hall St., 128 S.Ct at 1403.
When applied, the standard has been described as “requiring a showing that the arbitrators ‘knew of the relevant [legal] principle, appreciated that this principle controlled the outcome of the disputed issue, and nonetheless willfully flouted the governing law by refusing to apply it;’”¹¹⁹ the Ninth Circuit, before vacating a partial award for manifest disregard,¹²⁰ stated that “for an arbitrator’s award to be in manifest disregard of the law, ‘[i]t must be clear from the record that the arbitrator[] recognized the applicable law and then ignored it.’”¹²¹ Some Circuits find that the doctrine survives the Supreme Court’s decision in *Hall St.*,¹²² while others find that *Hall St.* renders “manifest disregard of the law” no longer an available ground.¹²³ The Supreme Court declined to decide “whether ‘manifest disregard’ survives [its] decision in [Hall St.] as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth at 9 U.S.C. §10.”¹²⁴

Finally, according to 9 U.S.C. § 12, an action to vacate pursuant to Section 10 must be raised within the first three months after the award was rendered.¹²⁵ In other words, courts have interpreted Section 12 as providing a statute of limitations within which an action to vacate under Section 10 must be raised.¹²⁶ Once these three months have elapsed, the award may not be vacated.¹²⁷

b. Unavailability once the 90-day period for vacatur has expired—The *Florasynth* rule

The Circuit are, to date, in agreement that not only must a vacatur action be brought within three months of the award’s rendering, but also that beyond these three months, the grounds in Section 10 may not be raised as defenses against an action to confirm.¹²⁸ The Second Circuit in *Florasynth Inc. v.*

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¹¹⁹ *Stolt-Nielsen*, 559 U.S. at [] n.3 (citing Brief for Respondent at 25).
¹²⁰ *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1293 (9th Cir. 2009).
¹²² *Comedy Club, Inc. v. Improv West Assoc.*, 553 F.3d 1277, 1290 (9th Cir. 2009).
¹²³ *Citigroup Global Mkts., Inc. v. Bacon*, 562 F.3d 349, 355 (5th Cir. 2009); see also LeRoy, supra note 118, at 180.
¹²⁴ *Stolt-Nielsen*, 559 U.S. at [] n.3.
¹²⁶ *Florasynth*, 750 F. 2d at 177.
¹²⁷ Id.
¹²⁸ See infra notes 129–34 and accompanying text.
Pickholz examined the rationale behind this position in detail. This rule has been adopted by the Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits.

To this author’s knowledge, only one court declined to apply the rule in Florasynth, and did so in light of specific facts of the case. According to the district court for the Southern District of New York in Gauthier v. Mardi Capital Corp., the rule in Florasynth assumes from the “inaction or silence on the part of the losing party in arbitration that ‘the successful party has a right to assume the award is valid,’ even in the eyes of the loser.” But in Gauthier, “counsel for respondents made known to counsel for petitioner within days of the publication of the award respondent’s intention to contest it.” In the subsequent months, there was some procedural confusion as to whether the defeated party must file its motion to vacate in state or federal court. Judge Haight went on to state:

Given this procedural history and the contemporaneous communications between counsel . . . which petitioner nowhere contradicts, I conclude that petitioner has waived the right to contend that the cross-petition [to vacate] should have been served within three months of the date of publication of the award. If the three month limitation in § 12 is jurisdictional and immune from waiver and estoppel, then the case is at an end and petitioner is entitled to summary confirmation under the rule in Florasynth. But I am aware of no appellate court that addressed comparable circumstances, and so I will consider the merits of the petition and cross-petition.

129 See Florasynth, 750 F.2d at 175-77.
131 Kopper-Glo, 819 F.2d at 642.
135 Gauthier v. Mardi Capital Corp. et al., No. 90 Civ. 4313 (CSH), 1990 U.S. Dist. LEXIS 14428, at **3–4 (S.D.N.Y. Oct. 31, 1990). The district court for the Northern District of Indiana in Chauffeurs, Teamsters, Warehousemen & Helpers Local Union No. 364 v. Ruan Transport Corp., 473 F. Supp. 298 (N.D. Ind. 1979), held that the grounds in 9 U.S.C. § 10 may be raised as defenses to a motion to confirm even after the three-month statute of limitations had expired. However, this case is no longer good law in light of Jefferson Trucking, 628 F.2d at 1027. Additionally, the district court for the Southern District of New York in District Council 1707 et al. v. Hope Day Nursery, 05 Civ. 3642 (RMB), 2006 U.S. Dist. LEXIS 107, at **9–12 (S.D.N.Y. Jan. 3, 2006) held that grounds for vacatur under FAA Chapter One could not be raised as defenses to a confirmation action and were time barred but entertained an argument for manifest disregard of the law, ultimately finding it unavailing. The court also declined to vacate the award on the ground that it violated public policy. Id. at **11–12.
137 Id. at *3.
138 Id.
139 Id. at **3–4.
On the merits, the court denied vacatur and confirmed the award.\textsuperscript{140}

In sum, the general rule is that the grounds under Chapter One may only be raised within the first three months after an award has been rendered as affirmative grounds for vacatur, and may not be raised as defenses to confirmation after those three months have elapsed.\textsuperscript{141} However, two potential caveats may exist. First, a court may find that the prevailing party was not entitled to assume that the award was acceptable to the defeated party based on the defeated party’s silence and/or inaction, as was found in \textit{Gauthier}. Second, an award is always subject to vacatur on the ground that the award violates public policy, as demonstrated by the Sixth Circuit even after it adopted the \textit{Florasynth} rule.\textsuperscript{142}

This article next proceeds to discuss confirmation and vacatur under Chapter One, and recognition and enforcement and refusal thereof under Chapter Two, in the context of the “overlapping coverage” of these two Chapters as to \textit{Bergesen} awards. For an award rendered in the U.S., the prevailing party may in good faith seek confirmation pursuant to 9 U.S.C. § 9, which entails the possibility of associated counterclaims for vacatur pursuant to 9 U.S.C. § 10 and limitations thereto. For an award falling under the Convention, the prevailing party may similarly in good faith seek recognition and enforcement pursuant to 9 U.S.C. § 207, which entails the possibility of associated defenses pursuant to Article V. For an award that fits into both of these categories, the \textit{Bergesen} court held that the regimes provided “overlapping coverage.” The interaction between Chapters One and Two reveals the nature of this “overlapping coverage.”

D. \textit{The “Overlapping Coverage” of the FAA’s Confirmation Regimes}

1. “Overlapping Coverage”: Vacatur of a non-domestic award rendered in the U.S.

While a detailed treatment of the renewed debate on Article V’s exclusivity as to \textit{Bergesen} awards\textsuperscript{143} is beyond the scope of this article, a brief synopsis of the debate and its impact upon the issue of

\textsuperscript{140} \textit{Id.} at **15–16.

\textsuperscript{141} See supra notes 128–40 and accompanying text.

\textsuperscript{142} Kopper-Glo, 819 F.2d at 643–44.

\textsuperscript{143} See, e.g., Hulbert, supra note 64; Alan Scott Rau, \textit{Understanding (and Misunderstanding) “Primary Jurisdiction”}, 21 AM. REV. INT’L ARB. 47 (2010).
the “overlapping coverage” is warranted. The position adopted by the Second, Third, Fifth, and Sixth (hereinafter, the “majority position on exclusivity”) is that the grounds for refusal to recognize or enforce an award are not the exclusive grounds by which a Bergesen award may be challenged; rather, such awards may be vacated pursuant to 9 U.S.C. § 10. The position adopted by the Eleventh Circuit (hereinafter, the “minority position on exclusivity”) is that the grounds in Article V are exclusive as to all awards falling under the Convention, irrespective of the arbitral situs.

According to the majority position on exclusivity, a non-domestic award rendered in the U.S. may be vacated pursuant to Section 10 of the FAA, and this vacatur is not inconsistent with the Convention. By contrast, vacatur pursuant to domestic law, interpreted by courts to mean Chapter One of the FAA, is expressly contemplated by the Convention. “[T]he Convention ‘mandates very different regimes for the review of arbitral awards (1) in the countries in which, or under the law of which, the award was made, and (2) in other countries where recognition and enforcement are sought.’” The former have been termed states of primary jurisdiction while the latter have been termed states of secondary jurisdiction. The Convention was not meant to displace the specific domestic regimes of contracting states; rather, it contains no provision for set-aside, and leaves untouched the “full panoply of express and implied grounds for relief.” Courts of a state of secondary jurisdiction may refuse to recognize and enforce an award only based on the grounds in Article V. But since Article V(1)(e) of the Convention specifically contemplates set-aside by courts embracing the seat of arbitration, courts of a state of primary jurisdiction may set aside an award in accordance with that state’s domestic bases.

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144 Toys “R” Us, 126 F.3d at 23.
145 Ario, 2010 WL 3239474.
148 Industrial Risk, 141 F.3d at 1407.
149 Gulf Petro, 512 F.3d at 746.
150 Id.
151 Toys “R” Us, 126 F.3d at 23; VED P. NANDA & DAVID K. PANSIUS, 3 LITIGATION OF INTERNATIONAL DISPUTES IN U.S. COURTS § 19:14 (March 2010).
152 Tesoro, 798 F. Supp. at 405.
153 Toys “R” Us, 126 F.3d at 23.
154 Gulf Petro, 512 F.3d at 747.
In the case of arbitrations seated in the U.S., the majority position thus finds that U.S. courts may vacate Bergesen awards pursuant to the express or implied grounds in Section 10. In addition, such vacatur is also consistent with 9 U.S.C. § 208, also part of the Convention’s implementing statute, in which Congress expressly provided for the application of the domestic FAA to the extent that it did not conflict with the Convention. . . . When both the arbitration and the enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(c) of the Convention incorporates the domestic FAA and allows awards to be “set aside or suspended by a competent authority of the country in which . . . that award was made.”

By this line of reasoning, vacatur pursuant to Section 10 is an included part of the regime under Chapter Two and the Convention, rather than a defeated party’s right to derogate from the Convention.

According to the minority position on exclusivity, Bergesen awards, like other awards falling under the Convention, may only be set aside pursuant to the grounds in Article V of the Convention. In the Eleventh Circuit’s case, the leading case of the minority position on exclusivity, the defeated party sought to vacate the award in question pursuant to a judicially created ground, namely, that the award was “arbitrary and capricious.” Significantly, the defeated party was not seeking vacatur pursuant to 9 U.S.C § 10, the domestic federal statutory provision for vacatur. Still, the ruling in Industrial Risk was that any grounds other than those in Article V are impermissible as to Bergesen awards. Jurists and commentators have expanded upon Industrial Risk’s holding to say that vacatur pursuant to any grounds not enumerated in the Convention is inconsistent with the Convention, and thus is not incorporated into Chapter Two through Section 208. A district court in the Eleventh Circuit interpreted Industrial Risk as prohibiting vacatur of Bergesen awards pursuant to Section 10.

2. “Overlapping Coverage”: The statutes of limitations in FAA Chapters One and Two

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155 Toys “R” Us, 126 F.3d at 21.
156 Id.
158 Industrial Risk, 141 F.3d at 1445–46.
159 Hulbert, supra note 64, at 75–76.
Reconciling the substantive provisions of Chapters One and Two necessarily depends on the three statutes of limitations within these two Chapters. This article will thus present the three statutes of limitations and the framework it creates for the “overlapping coverage” of Chapters One and Two.

The first statute of limitations is from Section 12, which provides that an action to vacate an award pursuant to Section 10 must be brought within 90 days of the award’s rendering. Courts have consistently interpreted this provision, as part of the law of Chapter One, to mean that (1) a motion to vacate must be brought within these 90 days and (2) Section 10’s grounds may not afterwards be raised as defenses against confirmation.¹⁶¹

The second statute of limitations is from Section 9, which provides that an action to confirm an award pursuant to that Section may be brought within one year of the award’s rendering. As to whether this provision constitutes a statute of limitations, whereby the prevailing party must file for confirmation under Section 9 within one year, there is a Circuit split.¹⁶² The Fourth and Eighth Circuits have held that the provision in Section 9 is permissive only, and that an action to confirm pursuant to Section 9 may be brought after one year following the award’s rendering.¹⁶⁵ The Second Circuit has expressly held that “section 9 of the FAA imposes a one-year statute of limitations on the filing of a motion to confirm an arbitration award under the FAA,”¹⁶⁶ while the Seventh and D.C. Circuits have so stated in passing.¹⁶⁷ For purposes of the present discussion on “overlapping coverage,” this article adopts the view that Section 9 contains a one-year statute of limitations within which a motion to confirm must be brought.

The third statute of limitations is from Section 207, which provides that an action to confirm an award pursuant to that Section may be brought within three years of the award’s rendering. The Second Circuit has likewise interpreted this provision to set a three-year statute of limitations for motions to

¹⁶¹ Florasynth, 750 F.2d at 176–77.
¹⁶³ Sverdrup Constr. Corp. v. WHC Constructors, Inc., 989 F.2d 148, 156 (4th Cir. 1993).
¹⁶⁵ Sverdrup, 989 F.2d at 155–56; Rubins, supra note 31, at 42–43.
¹⁶⁶ Photopaint Technologies, LLC v. Smartlens Corp., 335 F.3d 152, 158 (2d Cir. 2003).
¹⁶⁷ Lander Co., 107 F.3d at 480; Communications Workers of America v. American Telephone & Telegraph Co., 10 F.3d 887 (D.C. Cir. 1993); see also Rubins, supra note 31, at 43.
recognize and enforce an award falling under the Convention.\textsuperscript{168} For purposes of its discussion, this article takes this as controlling law in light of no disagreement on this point, to this author’s knowledge.

The overlapping coverage of Chapters One and Two over \textit{Bergesen} awards thus give rise to three different time windows:

1. Within the first 90 days following the award’s rendering, the award is subject to vacatur actions pursuant to Section 10;

2. For the roughly nine months after the vacatur window but before the date that is one year after the award’s rendering, a proceeding to confirm an award under Chapter One\textsuperscript{169} is a summary proceeding immune from challenge (the “\textit{Florasynth} window”);

3. For the remaining two years after the \textit{Florasynth} window but before the date that is three years after the award’s rendering, the prevailing party may not seek confirmation under Chapter One, but may seek confirmation under Chapter Two (the “\textit{Lander Co.} window”).\textsuperscript{170}

It is clear that during the first time window, the award is subject to vacatur. And, it is evident that during the \textit{Lander Co.} window, confirmation is possible under Chapter Two (due to its longer statute of limitations for seeking confirmation),\textsuperscript{171} but the award is subject to challenge based on grounds in the Convention. For a domestic award made in the U.S., confirmation is challenge free during the \textit{Florasynth} window. The question is whether this possibility survives if the award made in the U.S. is non-domestic.

3. “Overlapping Coverage:” Challenging a non-domestic award rendered in the U.S. when the plaintiff moves for confirmation under FAA Chapter One

Two consequences of the overlapping coverage of the statutes of limitations discussed above are probably not controversial, while a third, the subject of this article, may raise some eyebrows. First, the

\textsuperscript{168} Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centralla Navala, 989 F.2d 572, 580–81 (2d Cir. 1993); \textit{see also} Karamanian, \textit{supra} note 47, at 95–96.
\textsuperscript{169} For a discussion on whether it is the proceeding or the award that must be governed by Chapter One, which in turn determines whether the \textit{Florasynth} rule applies to \textit{Bergesen} awards, see Part II.C, \textit{infra}.
\textsuperscript{170} \textit{See Lander Co.}, 107 F.3d at 478–79.
rule in *Florasynth* provides that when a motion to confirm is sought pursuant to 9 U.S.C. § 9, a cross-motion to vacate may be brought within the first 90 days after the award’s rendering. But in the remaining nine months of the year within which the confirmation motion may be brought, movant is entitled to challenge-free confirmation. Second, tracing through the majority position on exclusivity, a motion to vacate may be brought within the first 90 days after the award was rendered. However, in the remaining roughly two years and nine months within which a motion to confirm pursuant to Section 207 may be brought, unless the *Florasynth* rule applies to a non-domestic award made in the U.S., the confirmation motion remains subject to challenge pursuant to Article V.

But suppose confirmation under Section 9 and confirmation under Section 207 are viewed as parallel entitlements, where the prevailing party “has more than one remedy available and may [choose] the one most advantageous.”172 Under both regimes, the *Bergesen* award is subject to vacatur within the first 90 days after it was rendered. But under one regime, the prevailing party is entitled to challenge-free confirmation during the “*Florasynth* window,” while in the other regime, the prevailing party may still face challenge pursuant to Article V during that window. Solely by the non-domestic nature of the award, does the Convention deprive the prevailing party of this right to challenge-free confirmation in the nine-month window, or does Article VII(1) of the Convention preserve this right?

4. **“Overlapping Coverage”: Challenge-free confirmation of a *Bergesen* award**

Judge Posner, in *Lander Co.*, referred in dictum to Article VII(1) of the New York Convention, which provides in relevant part that the Convention shall not deprive a prevailing party “of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”173 Commentators have stated that Article VII may lead to confirmation of a *Bergesen* award pursuant to Chapter One.174 Based on the interpretation of the *Florasynth* court and its progeny, an award rendered in the U.S. that is not vacated

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172 See *Bergesen*, 710 F.2d at 934.
173 *Lander Co.*, 107 F.3d at 481 (citing New York Convention art. VII(1)).
within 90 days of its rendering may be confirmed without challenge.\textsuperscript{175} Moreover, prevailing parties to awards rendered in the U.S. have deliberately sought summary, challenge-free confirmation of awards not timely vacated.\textsuperscript{176} The main question examined by this article is whether this doctrine applies to awards rendered in the U.S. that also fall under the Convention. The doctrine may be in conflict with Chapter Two and the Convention, or may be preserved by Article VII.

Jurists, scholars, practitioners and clients alike may appreciate the advantage of challenge-free confirmation in relation to \textit{Bergesen} awards: it enhances the efficiency of arbitration and provides a highly-expedited path to the award’s monetary satisfaction. But the availability of challenge-free confirmation has been criticized as a “trap for the unwary,”\textsuperscript{177} and in weighing the policy arguments for and against challenge-free confirmation of an award deemed acceptable,\textsuperscript{178} courts and participants in the arbitration field may be asked to decide whether to apply this doctrine to \textit{Bergesen} awards. This application of the doctrine is possible if \textit{Bergesen} awards may be confirmed pursuant to 9 U.S.C. § 9 as a parallel entitlement. To that end, this article lays out two interpretations of “overlapping coverage” that center on one decision point: whether the prevailing party to a \textit{Bergesen} award must confirm under Chapter Two, or may confirm under Chapter One.

\section*{II. \textsc{TWO INTERPRETATIONS OF “OVERLAPPING COVERAGE”}}

\subsection*{A. Interpretation 1: In a Proceeding to Confirm a Bergesen Award Brought Under FAA Chapter One, Chapter Two is Excluded Altogether}

1. Article VII(1) of the New York Convention: A framework for interpreting the right to a more favorable regime

\textsuperscript{175} See supra Part I.C.4.b.
\textsuperscript{176} See, e.g., Prasad, 82 F. Supp. 2d at 367.
\textsuperscript{177} Rau, supra note 143 [2010], at 179 n.334.
\textsuperscript{178} Compare Florasynth, 750 F.2d at 175–77 with id.
Article VII of the New York Convention, often termed the “more-favorable right” or provision, provides that the Convention shall not . . . deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law . . . of the country where such award is sought to be relied upon.

While the terms of this provision speak of “any interested party,” this may be taken to refer to the party seeking recognition and enforcement of the award. By virtue of this provision, a party seeking enforcement of an award may do so pursuant to the Convention, or the domestic law of the place where enforcement is sought, depending on which is more advantageous.

Courts, however, have interpreted this provision to allow enforcement within their jurisdiction of an award that has been set aside by a competent authority in the situs. In the much-criticized decision in Chromalloy, the district court for the District of Columbia enforced an award that had been vacated in the seat of arbitration (Egypt), despite agreement by the parties that their award would not be subject to “any appeal or other recourse.” The court based its holding on the conclusion that none of the grounds for vacatur under 9 U.S.C. § 10 could be demonstrated to oppose confirmation.

The Second Circuit departed from this approach, and in Baker Marine, the Circuit declined to enforce an award pursuant to Article VII of the Convention where the award had been vacated by a court

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180 New York Convention art. VII, para. 1. Article VII(1) also provides that where “treaties of the country where [an] award is sought to be relied upon” provide a right for a party to avail himself of an award, such treaty rights will also not be displaced by the New York Convention. Id.; see also JAN VAN DEN BERG, supra note 47, at 82–83.
181 JAN VAN DEN BERG, supra note 47, at 84.
182 Id. at 385.
185 See Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd., 191 F.3d 194, 197 n.3 (2d Cir. 1999).
Judge Leval distinguished the case from *Chromalloy* on the grounds that petitioner was not a U.S. citizen, and did not initially seek confirmation of the award in the U.S., set-aside by a Nigerian court did not violate any aspect of the parties’ agreement, and recognition of the Nigerian court’s set-aside judgment did not violate any U.S. public policy. A clearer departure from *Chromalloy*’s reasoning comes in the third case of the trilogy, *Spier v. Calzaturificio Tecnica, S.p.A.*, in which the Southern District of New York declined to invoke Article VII(1) to enforce an award that had been vacated by the highest court in the situs (Italy). The court distinguished *Chromalloy*, as did the Second Circuit in *Baker Marine*, on the ground that the annulment in the situs was not in contravention of the parties’ agreement, but further grounded its decision with the principle that “domestic arbitral law may be applied only by ‘a court under whose law the arbitration was conducted.’” The *Spier* court recognized that it was not the court embracing the seat of arbitration and was not willing to second-guess the annulment decision of the court embracing the seat.

This trilogy has given rise to the interpretation that Article VII may serve as avenue to enforcing an award in the U.S. even after the award has been set aside in the situs. Notably, however, this canon of interpretation applies to awards from arbitrations seated outside of the U.S. This interpretation would not have meaningful application to awards from arbitrations seated in the U.S., as vacatur by a U.S. court renders an award unenforceable elsewhere in the U.S.

In this regard, Interpretation 1 is not an extension of the holding in *Chromalloy*, and because the arbitration in *Chromalloy* was seated outside the U.S., would not have been available to the prevailing party in that case. The award in *Chromalloy* was rendered in Egypt, and thus, was not a non-domestic...
award rendered in the U.S.¹⁹⁶ This article’s contribution is different. Interpretation 1 concerns a case in which the prevailing party to a non-domestic award rendered in the U.S. seeks to take advantage of challenge-free confirmation *precisely because* the award was rendered in the U.S., thereby bringing it within the ambit of Chapter One in parallel with Chapter Two.

For non-domestic awards made in the U.S., this article proposes the following two-step approach to applying Article VII(1) in light of scholarship on this provision of the New York Convention. First, to determine whether Article VII(1) preserves a right to enforcement of an award, one views the award in the absence of the Convention.¹⁹⁷ If there were no New York Convention, what rights to enforcement would a party to the award enjoy? Second, one adds the Convention and observes whether an interpretation of the Convention would deprive a party to the award of any of these rights from the first step.¹⁹⁸ If applying the Convention a particular way results in enforcement being more challenging, or removes a right to enforcement, this application is precluded by Article VII(1). The prevailing party may invoke Article VII(1) to return to the regime that would exist in the absence of the Convention, and confirm the award pursuant to that regime.¹⁹⁹ In light of this proposed framework, this article next examines how Article VII(1) applies procedurally under the FAA.

2. A plaintiff is entitled to the cause of action pleaded, to the exclusion of other available causes of action

If a prevailing party to an award determines that there is a more favorable regime that she wishes to utilize, she would need the certainty that the court faced with her confirmation action would respect the cause of action she pleads in her papers. In particular, she would need the certainty that the court will not displace her chosen regime with another, less favorable regime.

a. In general

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¹⁹⁶ *Chromalloy*, 939 F. Supp. at 912.
¹⁹⁷ *See* Jan van den Berg, *supra* note 5, at 56–57; *cf. Jan van den Berg, supra* note 47, at 119 (“The Convention does not supersede the domestic law on the enforcement of foreign arbitration agreements and arbitral awards in the sense that it is allowed to rely thereon in actions outside the Convention . . . .”); Ostrowski & Shany, *supra* note 9, at 1658–59.
¹⁹⁹ *See* JAN VAN DEN BERG, *supra* note 47, at 385.
Judge Posner, in *Lander Co.*, commented that “[a] plaintiff typically makes a selection on tactical grounds from a menu of possible grounds for asserting liability, and the district judge is in no position to guess which omitted [substantive] grounds were omitted by sheer oversight and out to be restored later.”\(^{200}\) Moreover, “whether the Convention is applicable may make a difference even though jurisdiction is secure under [Chapter One of] the Federal Arbitration Act.”\(^{201}\) This was in the context of the plaintiff’s argued basis for the court’s subject-matter jurisdiction,\(^{202}\) rather than grounds in opposition to confirmation, but the comment is still instructive.

As discussed above, there are notable difference between the cause of action provided by Section 207 and that provided by Section 9. The differences lie not only in terms of statutes of limitations, but also in terms of applicable grounds for opposing confirmation\(^ {203}\) and, as is the subject of this article, whether there is a time period during which an award subject to Chapter One may be confirmed without challenge. Interpretation 1 views the two causes of action as parallel entitlements from which the prevailing party may choose,\(^ {204}\) one to the exclusion of the other.\(^ {205}\)

The position is as follows: Where the prevailing party has invoked Section 9 as her cause of action pursuant to which she seeks confirmation, and complies with the requirements of confirmation under Chapter One, the court should not bring the action under Chapter Two against the plaintiff’s wish.\(^ {206}\) And, to the extent that proceeding under Chapter Two poses advantages or avoids limitations

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\(^{200}\) *Lander Co.*, 107 F.3d at 480.

\(^{201}\) *Id.*

\(^{202}\) *Id.* at 480–81.

\(^{203}\) See *id*.

\(^{204}\) See *id.* at 481; *Bergesen*, 710 F.2d at 934.

\(^{205}\) See JAN VAN DEN BERG, * supra* note 47, at 85; see also infra Part I.A.2.c.

\(^{206}\) For examples of where a proceeding to confirm a *Bergesen* award under Chapter One was not brought under Chapter Two by the court, see *Flour*, supra note, at *12; Graphic Security Systems Corp. v. Datitalia Sistemi s.r.l., No. 89 Civ. 2995 (MJL), 1989 U.S. Dist. LEXIS 6709, at **1–2, **94–6 (S.D.N.Y. June 15, 1989) (in an action to confirm a non-domestic award rendered in New York, the court applies the *Florasynth* rule in the face of no opposition by respondent). For an example of a proceeding to confirm a *Bergesen* award under Chapter One that was brought under Chapter Two against the prevailing party’s wish, see *Jamaica Commodity*, * supra* note, at **3–7. For an example of a proceeding to confirm a *Bergesen* award under Chapter One that was brought under Chapter Two by agreement of the parties, see Skandia America Reins. Corp. v. Caja Nacional de Ahorro y Seguro, 96 Civ. 2301 (KMW), 1997 U.S. Dist. LEXIS 7221, at **3–4 (S.D.N.Y. May 23, 1997).
imposed by Chapter One,\textsuperscript{207} the court should not impose limitations from Chapter One that are not part of
Chapter Two when the prevailing party has invoked Section 207 as her cause of action.

In practice, it is well known that one set of facts can give rise to multiple causes of action,\textsuperscript{208} and
that a desired goal can be reached by any of several available legal avenues. A plaintiff is entitled, and
confined, to the cause of action chosen.\textsuperscript{209} To illustrate with a mundane example, a common nucleus of
facts could give rise to causes of action under contract (sale of goods) or tort (strict product liability). But
in addressing an action in contract (e.g., breach of implied warranty of merchantability) the court will not
apply a defense under tort law (e.g., defendant did not produce a defective product).\textsuperscript{210} A more developed
example of this principle in federal law—the plaintiff gets what the plaintiff pleads—arises in actions to
redress race or sex discrimination in the workplace.

b. Analogizing from employment discrimination

In the context of employment discrimination, it is well-settled that 42 U.S.C. §§ 1981 and
1983,\textsuperscript{211} on the one hand, and Title VII of the Civil Rights Act of 1964 ("Title VII"),\textsuperscript{212} on the other,
constitute "parallel causes of action."\textsuperscript{213} Title VII was not intended by Congress to be the exclusive
remedy to redress workplace discrimination by state employers that amounts to a violation of the
employee-plaintiff’s constitutional right;\textsuperscript{214} indeed, "§ 1983 stands ‘as an independent avenue of
relief.'"\textsuperscript{215} The rich jurisprudence of employment discrimination claims reveals that proceedings under

\begin{itemize}
  \item \textsuperscript{207}See Lander Co., 107 F.3d at 481 (Chapter Two affords a longer statute of limitations than Chapter One); Bergesen, 710 F.2d
  at 932–34 (same).
  nucleus of facts gave rise to claims sounding in tort, breach of express warranty, and breach of implied warranty of merchantability.).
  \item \textsuperscript{209}Jay Tidmarsh, Procedure, Substance, and Erie, 64 VAND. L. REV. 877, 915 (2011).
  \item \textsuperscript{210}Archstone, 2011 NY Slip Op. 30166U.
  \item \textsuperscript{211}42 U.S.C. § 1983 (2011). In various actions, plaintiffs have sought relief pursuant to 42 U.S.C. § § 1981, 1982, 1983, and
  article will refer to such actions collectively as brought under §§ 1981/1983.
  \item \textsuperscript{212}42 U.S.C. §§ 2000e et seq. (2011).
  \item \textsuperscript{213}Lauderdale v. Texas Dep’t of Criminal Justice, Institutional Div., 512 F.3d 157, 166 (5th Cir. 2007); Johnson v. City of Fort
  Lauderdale, 148 F.3d 1228, 1230–31 (11th Cir. 1998).
  \item \textsuperscript{214}Annis v. County of Westchester, New York, 36 F.3d 251, 255 (2d Cir. 1994).
  \item \textsuperscript{215}Webb, 471 U.S. at 241 (citing Smith v. Robinson, 468 U.S. 992, 1011 n.14 (1984)).
\end{itemize}
§§ 1981/1983 and Title VII carry with them noticeable differences, and thus, the parallel causes of action entail tradeoffs.\textsuperscript{216}

For instance, there are certain defenses that may apply in actions pled under §§ 1981/1983,\textsuperscript{217} but simply do not apply in actions invoking Title VII.\textsuperscript{218} In the former actions, defendants may raise the defense that they are entitled to “qualified immunity,” but this does not apply if the action is filed under Title VII.\textsuperscript{219} The “mixed-motive” defense is available against a retaliation claim brought under § 1981 but is not available in Title VII actions.\textsuperscript{220} And the Seventh Circuit has held that discriminatory intent is a required element to prove a § 1983 claim, but not for a Title VII claim.\textsuperscript{221}

By contrast, the Seventh Circuit held in the same case that actions brought under Title VII are subject to the “Ellerth-Faragher” defense, a defense simply not available in §§ 1981/1983 actions.\textsuperscript{222} The Supreme Court cases setting forth this defense were decided in actions brought under Title VII,\textsuperscript{223} but the defense has not been extended to a case brought under §§ 1981/1983. At the same time, the requirement to exhaust administrative remedies applies in Title VII cases but not in actions under § 1981.\textsuperscript{224}

Faced with tradeoffs as described above, plaintiffs have experienced the benefits and drawbacks of each regime. Plaintiffs have elected to litigate pursuant to §§ 1981/1983 and avoided, for instance, the procedural requirements of Title VII.\textsuperscript{225} Likewise, plaintiffs making claims under Title VII avoid, for

\textsuperscript{216} This article does not advance the cases to be discussed in the subsequent two paragraphs as setting forth general rules of federal common law beyond the circuits in which they set forth controlling law.
\textsuperscript{219} Rioux v. City of Atlanta, Georgia, 520 F.3d 1269, 1285 (11th Cir. 2008). The court elaborates: “[Q]ualified immunity protects government officials performing discretionary functions from the burdens of civil trials and from liability,” and if after “plaintiff has shown that the challenged conduct violates a statutory or constitutional right,” the court will relieve defendant of liability if “defendant’s conduct was nonetheless objectively reasonable in light of that . . . right.” \textit{Id.} at 1282–83. \textit{See also} Duckworth v. St. Louis Metropolitan Police Dep’t, 491 F.3d 401, 405 n.1, 408 (8th Cir. 2007) (The court holds that the “qualified immunity” defense does not apply in Title VII cases but grants it in relation to a § 1983 claim.).
\textsuperscript{220} Metoyer v. Chassman, 504 F.3d 919, 934 (9th Cir. 2007) (citing Price Waterhouse v. Hopkins, 490 U.S. 228, 242 (1989)). The “mixed motive” defense absolves an employer of liability if the employer “can prove that, even if it had not taken [race and] gender into account, it would have come to the same decision regarding a particular person.” \textit{Id.} at 931.
\textsuperscript{221} Huff v. Sheahan, 493 F.3d 893, 902–03 (7th Cir. 2007).
\textsuperscript{222} \textit{Id.} at 900, 904–05. The “Ellerth-Faragher” defense provides that, when no tangible employment action is taken, the employer is relieved of vicarious liability to an employee based on a supervisor’s actions if “(a) [the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) [] the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.” Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998); Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).
\textsuperscript{223} \textit{Ellerth}, 524 U.S. at 746–47; \textit{Faragher}, 524 U.S. at 780.
\textsuperscript{224} Webb, 471 U.S. at 240–41.
\textsuperscript{225} Thigpen v. Bibb County, Georgia, 223 F.3d 1231, 1238–39 & 1238 n.5 (11th Cir. 2000).
instance, the potential defense of “qualified immunity.” The comparison between the two remedies is clear: In absolving defendants of liability under § 1983 claims, the Eleventh Circuit remarked:

If [plaintiff] had presented his claims under the provisions of Title VII, he would be entitled to have his claims of discrimination heard by a jury. The result we reach here is compelled by the remedy [plaintiff] chose, that is, section 1983 claims against individual decisionmakers rather than his employer, for which the law recognizes the right to qualified immunity.

In other words, courts have adhered to plaintiffs’ choice among the available remedies and have afforded plaintiffs the advantages and drawbacks brought by the chosen cause of action.

c. Application to international arbitration and Bergesen awards

Can the same principle be applied in the confirmation of Bergesen awards, i.e., if plaintiff moves under Chapter One, should the court still apply defenses from Chapter Two?

Case law on this issue is notably sparse. In Fluor and Datitalia, non-domestic awards rendered in the U.S. were confirmed pursuant to Section 9, but the applicability of the Convention to these proceedings or the subject awards was not litigated. The award in Datitalia was rendered in New York City and was between a Delaware corporation with principal place of business in New York and an Italian corporation. The prevailing party moved under Section 9, and the defeated party raised neither a vacatur action pursuant to Section 10 nor challenges pursuant to Article V. The court confirmed the award.

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226 Duckworth, 491 F.3d 405 n.1.
227 Rioux, 520 F.3d at 1285.
228 In Jamaica Commodity, discussed at Part II.B, infra, respondent raised defenses under Article V after claimant sought to invoke the Florasynth rule, and the court entertained the defenses. But the issue litigated was not whether Article VII(1) preserved claimant’s right to challenge-free confirmation as a more favorable regime; claimant did not try this argument. Rather, the litigated issue was whether Section 12’s statute of limitations on vacatur actions was incorporated into Chapter Two by way of Section 208, and restricted Article V’s defenses to the first 90 days after the award’s rendering. The court ruled against this argument, but this is not an argument within Interpretation 1: Article V’s defenses would apply in the Lander Co. window and, in the first year following the award’s rendering, if the prevailing party seeks confirmation pursuant to Section 207. Article V’s defenses would only not apply in the Florasynth window if the prevailing party seeks confirmation pursuant to Section 9.
231 Id. at *1.
232 Id. at **3–4.
233 Id. at **4–6.
234 Id. at *6.
The award in Fluor similarly was rendered in New York City,235 was between American and Saudi companies on both petitioner and respondent sides,236 and “related to the construction of a power plant in Rabigh, Saudi Arabia.”237 Petitioners sought confirmation pursuant to Section 9 and argued that they had to seek confirmation over a partial award before the one-year statute of limitations expired.238 Respondents countered that they had agreed to toll the statute of limitations and that thus, petitioners were not required to file for confirmation of the partial award within one year of its rendering.239 Judge Lynch disagreed. Finding that “[r]egardless of whether [petitioner] is required to file a motion for confirmation within one year, however, it is certainly not barred from doing so,”240 the court confirmed the partial award to the extent that it finally resolved issues.241 Curiously, respondent in Fluor did not argue that the award could have been confirmed pursuant to Section 207 within three years of its rendering.242 Thus, the court did not have an opportunity to decide whether confirmation could be achieved pursuant to Section 9 despite the availability of Section 207 or whether confirmation under Section 9 was not mandatory because Section 207 remained available for roughly another two years at the time the action was filed.

The setting in which courts have found Chapters One and Two to afford parallel entitlements is in actions to compel arbitration. In Energy Transport, Ltd. v. M.V. San Sebastian,243 plaintiffs sought to compel arbitration in New York exclusively pursuant to 9 U.S.C. § 4,244 and argued that they need not seek to compel arbitration pursuant to either the New York Convention or the Panama Convention.245

235 Fluor Petition to Confirm, supra note, ¶¶ 15–17, at 4–5.
236 Id. ¶¶ 3–9, at 2–3.
238 Id. at *1; Memorandum of Law in Support of Petition to Confirm Partial Arbitration Award of Arbitrators at 12; In the Matter of the Arbitration Between Fluor Daniel Intercontinental, Inc. et al., 2007 U.S. Dist. LEXIS 17588, 06 Civ. 3294 (GEL) (S.D.N.Y. Mar. 13, 2007).
241 Id. at 12.
242 See generally Fluor Respondent Brief, supra note.
244 9 U.S.C. § 4 (2011) (“A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. . . .”).
245 Energy Transport, 348 F. Supp. 2d at 199–200. While defendants moved to compel arbitration pursuant to 9 U.S.C. § 206 and 9 U.S.C. § 303, the court found that because of the nationality of the parties, defendant’s action was properly governed not by the
The court agreed and, holding that “plaintiffs may bring their cross-motion pursuant to Chapter 1” and need not bring their action pursuant to either Convention, compelled arbitration.

Interpretation 1 requires viewing actions to confirm awards under Sections 9 and 207 as parallel entitlements similar to the way Judge Leisure viewed actions to compel under Sections 4 and 206. But with this interpretation of overlapping coverage must also be the view that Florasynth rule is a right that can be preserved when the award to be confirmed is a Bergesen award.

3. Challenge-free confirmation is a right of the prevailing party preserved by Article VII(1) of the New York Convention

Commentators have indicated that applying Article VII’s right to a more-favorable regime to Bergesen awards “would mean that the enforcement can be based on Chapter One of the Federal Arbitration Act.” For purely domestic awards brought for confirmation under Chapter One, the prevailing party “is entitled . . . to confirmation of the arbitration award” if a timely motion to vacate is not brought, with such confirmation granted without challenge. For such awards, prevailing parties have availed themselves of this right, successfully arguing that they are entitled to challenge-free confirmation of awards not timely vacated. In the case of an award rendered in the U.S. that is non-domestic in nature, the otherwise-applicable regime for confirmation would have been Chapter One in the absence of the Convention. And according to the framework for applying Article VII(1) set forth in this article, adding the Convention to the mix should not deprive the prevailing party of a more-favorable right to enforcement that she otherwise would have been entitled to under domestic law.

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246 Id. at 200.
247 Id. at 208.
248 Jan van den Berg, supra note 5, at 57; accord Karamanian, supra note 47, at 93.
249 Sanders-Midwest, 857 F.2d at 1238.
250 Id.; Florasynth, 750 F.2d at 176–77.
4. Chapter Two is excluded in toto when the plaintiff exercises this right under Article VII(1)

In the most classical interpretation of Article VII, it operates as an on-off switch as to the applicability of the Convention: If the prevailing party exercises her right to a confirmation regime that is more favorable than the Convention, the Convention is excluded in toto. By this view, the prevailing party would not be able to cherry-pick favorable provisions of the Convention and Chapter One (for instance, the more liberal requirement as to what constitutes an agreement “in writing”). Rather, the prevailing party is confined to the advantages and drawbacks of the chosen regime. In the context of this article’s discussion, it would mean that the prevailing party could not take advantage of the longer statute of limitations under Chapter Two while still arguing that confirmation must be granted free of challenge at any time after the vacatur window (i.e., the window of 90 days following the award’s rendering). By choosing confirmation under Chapter One, a motion to confirm pursuant to 9 U.S.C. § 9 must be brought within one year of the award’s rendering, and thus, the window of time for challenge-free confirmation, the *Florasynth* window, similarly closes on the date that is one year following the award’s rendering.

B. Interpretation 2: In a Proceeding to Confirm a Bergesen Award Brought Under FAA Chapter One, Chapter Two Still Applies

According to Interpretation 2, even if the prevailing party moves to confirm only by invoking 9 U.S.C. § 9, the court will apply any relevant provisions of Chapter Two—most particularly, grounds for refusal to recognize and enforce under Article V. To this author’s knowledge, the sole case that illustrates this interpretation is *Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc.* In *Jamaica Commodity*, the award at issue was between a company owned by the Government of Jamaica and a New Jersey corporation, with the arbitration seated in New York City. The court

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253 JAN VAN DEN BERG, supra note 47, at 85; but see Tepes, supra note 179, at 146–51 (questioning Prof. van den Berg’s classical interpretation).
256 *Id.*
257 *Id.* at *1.
acknowledged the award as an award made in the U.S. and falling under the Convention. As a result, the court asserted jurisdiction pursuant to Chapter Two. Petitioner had moved expressly pursuant to 9 U.S.C. § 9 in a filing roughly one month after the award was rendered. Respondent’s answer, which came about a month later, requested that the proceedings “be held in abeyance pending the parties’ receipt of the arbitrators’ Reasons,” and further requested that it “be granted two weeks from the receipt of the Reasons either to satisfy the Award, or to move for an order vacating the same on one or more grounds applicable under the Federal Arbitration Act, 9 U.S.C. §§ 1 et seq.”

Almost five months after the award’s issuance, defendant filed for vacatur. In its supporting memorandum, defendant argued that the Convention governed its action. Defendant further argued that “Section 207 extends the confirmation period for Convention awards to three years,” that Section 207 “by its plain language sanctions refusal of recognition or enforcement for any ground applicable under the Convention,” and that “[t]here is no limitation period applicable to the right granted under the Convention to oppose confirmation.” It was undisputed that a motion by respondent pursuant to 9 U.S.C. § 10 would have been untimely.

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258 Jamaica Commodity Motion to Confirm, supra note, Exhibit A. The award was dated June 26, 1990. Id.
260 Id.
261 Id. Jamaica Commodity Motion to Confirm, supra note, at 1–2.
263 Id. In its supporting memorandum, respondent argued that the confirmation action was premature, that the award was not subject to confirmation until the arbitrators provided their reasons for their award, and that “[i]t was with these procedural protections [of 9 U.S.C. § 10, the ground of manifest disregard of the law, and the challenge to an award on the ground that it is ‘irrational, capricious, or without any factual support’] that [respondent] informed the arbitrators it preferred a reasoned award.” Memorandum in Opposition to Petition of JCTC for Order Confirming Award at 2, 4–5, Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc., 1991 U.S. Dist. LEXIS 8976, No. 87 Civ. 6369 (JMC) (S.D.N.Y. July 3, 1991). Petitioner replied by asserting that respondent only generally argued against confirmation without demonstrating a proper ground for vacatur. Reply Memorandum of Law in Support of Motion to Confirm Arbitration Award at 1, 3–4, Jamaica Commodity Trading Co. Ltd. v. Connell Rice & Sugar Co., Inc., 1991 U.S. Dist. LEXIS 8976, No. 87 Civ. 6369 (JMC) (S.D.N.Y. July 3, 1991).
266 Id. at 5.
Plaintiff then argued that the award was governed by the Convention and Chapter One, \(^{268}\) but sought summary confirmation by arguing that defenses under the Convention are time-barred by operation of 9 U.S.C. § 12 just like vacatur actions are time-barred by this provision. \(^{269}\) In particular, plaintiff sought to incorporate Section 12’s statute of limitations into Chapter Two through the residual application provision, 9 U.S.C. § 208. \(^{270}\) Defendant counter-argued that Section 12 was in conflict with Chapter Two and could not be incorporated pursuant to Section 208. \(^{271}\)

The court agreed with the defendant, \(^{272}\) and entertained respondent’s Article V(2)(b) argument. \(^{273}\) At least in terms of the case’s outcome, *Jamaica Commodity* is a case in which despite plaintiff having moved pursuant to Section 9, the court entertained defenses to confirmation that, according to this article, properly apply to a motion pursuant to Section 207. The court’s basis was that the award was governed by the Convention, \(^{274}\) and that “[s]ince [defendant’s] motion to vacate is made within three years of the award in opposition to [petitioner’s] motion to confirm, it is permissible under the Convention.” \(^{275}\) More generally as to Interpretation 2, as long as the award is governed by the Convention, exclusively or in conjunction with Chapter One, the upshot of *Jamaica Commodity* is that there is no time period in which confirmation may be obtained without challenge—the defeated party in arbitration may always raise grounds under Article V in opposition to a motion to confirm. \(^{276}\)

This article disagrees with the outcome in *Jamaica Commodity* and submits that that case was wrongly decided for three reasons. First, the plaintiff expressly sought confirmation pursuant to FAA Chapter One. There is a notable difference between the litigation strategy, so to speak, underlying

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\(^{269}\) Id. at 12; see also id. at 4–11.

\(^{270}\) Id. at 5–6.


\(^{273}\) Id. at **8–17.

\(^{274}\) Id. at **5–7; accord Filanto, S.p.A. v. Chilewich Int’l Corp., 789 F. Supp. 1229, 1234 (S.D.N.Y. 1992); see also *Four Seasons I*, 267 F. Supp. 2d at 1339–42 (holding that for awards falling under the Convention, confirmation actions may not be brought pursuant to 9 U.S.C. § 9).


\(^{276}\) Pinkston, *supra* note 22, at 696.
Interpretation 1 (wait 90 days and only then file for confirmation deliberately to avail oneself of challenge-free confirmation) and what was done in *Jamaica Commodity* (move for confirmation at a time when challenge-free confirmation is not assured by rule). In *Jamaica Commodity*, the plaintiff filed within one month of the award’s making, and only sought to invoke § 12’s statute of limitation as, essentially, a counterargument. 277 This article submits that the provisions of the chosen regime, here, Chapter One, should have governed, and Chapter Two should not be imposed if not invoked. Second, this article submits that New York Convention Article VII(1) preserves challenge-free confirmation as long as the award in question was rendered in the U.S. To be sure, this argument was not tried in *Jamaica Commodity*. It is unclear whether the court would have allowed challenge-free confirmation in the manner set forth in Interpretation 1. The case was not appealed, perhaps because the court confirmed the award. 278

C. Reconciling the Interpretations: The Character of the Award or the Character of the Complaint?

The choice between the two interpretations discussed above depends on which of the following is given primacy: the non-domestic nature of an award falling under the Convention, or the specific cause of action pled by the party seeking confirmation. According to Interpretation 1, the Convention and Chapter Two govern the proceeding only if 9 U.S.C. § 207 is the cause of action chosen by the party seeking confirmation. If a party petitions for confirmation of a Bergesen award expressly pursuant to 9 U.S.C. § 9, even if the Convention and Chapter Two apply to the arbitral agreement and the award thereunder, the Convention and Chapter Two do not apply to the confirmation proceeding and only Chapter One applies. Thus, the cause of action chosen by the prevailing party as the more advantageous controls the law applicable to the confirmation proceeding. According to Interpretation 2, the Convention and Chapter Two govern a motion to confirm a Bergesen award even if the motion to confirm is brought under 9 U.S.C. § 9. The non-domestic character of the arbitral agreement and the award thereunder controls, and

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277 See supra note 268 and accompanying text.
a motion to confirm will always be treated by the court as being brought pursuant to 9 U.S.C. § 207 so that the proceeding is one under Chapter Two with residual application of Chapter One.

This leads to the following three possible reconciliations of the two interpretations discussed above. Under one reconciliation, if the chosen cause of action controls despite the non-domestic character of the award, Interpretation 1 prevails. Under a second reconciliation, if the non-domestic character of the award trumps despite the cause of action chosen by the prevailing party, Interpretation 2 prevails. And under a third, hybrid reconciliation, the non-domestic character of an award may trump and force Chapter Two upon a proceeding brought under Chapter One, but within Chapter Two, Section 208 and Article VII(1) together preserve the plaintiff’s right to challenge-free confirmation pursuant to the *Florasynth* rule.

1. Reconciliation 1: The court will adhere to a plaintiff’s choice of Chapter One and will not force Chapter Two upon the proceeding

The invocation of Section 9 over, and to the exclusion of, Section 207 is an untested approach that would follow the use of Article VII articulated by Prof. van den Berg and echoed by Judge Posner. Courts have applied Chapter One to the exclusion of Chapter Two in the context of compelling arbitration. Courts have granted confirmation of *Bergesen* awards pursuant to Section 9, but without application of Article VII(1). Rather than arguing that Section 12 is incorporated into Chapter Two,

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279 Jan van den Berg, *supra* note 5, at 56–57.
280 See *Lander Co.*, 107 F.3d at 481 (“It could also be argued that the New York Convention was intended to be exclusive within its domain. We would then have to consider its applicability to this case because if it were applicable there would be no jurisdiction under the Federal Arbitration Act. Nothing in the Convention or its history, or in the implementing legislation or its history, suggests exclusivity, and it would be particularly perverse in a case such as this involving a dispute squarely within the scope of the Federal Arbitration Act between two U.S. firms. In fact, Article VII of the Convention provides that the Convention shall not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.” We agree with the Second Circuit that there is ‘no reason to assume that Congress did not intend to provide overlapping coverage between he Convention and the Federal Arbitration Act.’”).
281 *Energy Transport*, 348 F. Supp. 2d at 199–200, 208 (“Plaintiffs seek to compel defendant to arbitrate both sets of claims before a single panel pursuant to Chapter 1 only and did not invoke either Convention. . . . The Court finds that the Conventions do not supersede Chapter 1 in this instance, and thus, plaintiffs may bring their cross-motion pursuant to Chapter 1. . . . [P]laintiffs’ cross-motion to compel defendant to arbitrate before a single arbitration panel is GRANTED.”).
282 In *Datitalia*, the court granted confirmation free of challenge since the award had not been vacated, but the defeated party raised no opposition pursuant to Article V. *Datitalia*, 1989 U.S. Dist. LEXIS 6709, at *3–5*. In *Fluor* the applicability of the Convention was not an issue litigated. *Fluor*, 2007 U.S. Dist. LEXIS 17588, at *1*. The court’s holding in *Jamaica Commodity* may foreclose this possibility altogether except that the prevailing party did not seek to invoke the more-favorable right provision of Article VII(1); rather, the prevailing party sought to argue that challenges to recognition and enforcement pursuant to Article V
this reconciliation would be that Chapter Two simply does not apply once the prevailing party moves under Section 9, invoking the right to a more-favorable regime protected by Article VII(1). The analogous outcome has been successfully achieved in employment discrimination cases. In these cases, the law applicable to the proceeding was dictated by the cause of action chosen by the plaintiff.\footnote{For instance, if the action was pled under Title VII, the “qualified immunity” defense would not be applied, Wu v. Thomas, 996 F.2d 271, 273 (11th Cir. 1993) (“Qualified immunity is no defense to a Title VII action.”), while if the action was pled under § 1983, the plaintiff would not be required to exhaust administrative remedies, \textit{Webb}, 471 U.S. at 240–41.}

Applied in the context of \textit{Bergesen} awards, it would mean that the application of Chapter Two as a confirmation regime depends solely on whether plaintiff invokes the cause of action in 9 U.S.C. § 207. For those that find that the cause of action chosen by the party seeking confirmation controls the law applicable to the proceeding, irrespective of the non-domestic nature of the award, Interpretation 1 would prevail over Interpretation 2.

2. Reconciliation 2: The \textit{Florasynth} rule does not apply to awards falling under the Convention

Some courts and commentators expressly or implicitly find that the non-domestic nature of the arbitral agreement and the award thereunder controls, and means that the Convention and Chapter Two must be the law applicable to a proceeding to confirm such an award.\footnote{See, e.g., \textit{ESCO}, 2011 U.S. Dist. LEXIS 46460, at *19 (“It is clear that because the award falls under the Convention, the court’s review of the award is governed by Chapter II of the FAA.”); \textit{Hulbert}, supra note 64, at 63.} This holding comes from courts on both sides of the debate on whether a \textit{Bergesen} award may be vacated pursuant to 9 U.S.C. § 10.\footnote{Compare \textit{A. Halcoussis Shipping Ltd. v. Golden Eagle Liberia Ltd.}, 1989 U.S. Dist. LEXIS 11401, at **1–3 (S.D.N.Y. Sept. 28, 1989) (Petition to confirm a \textit{Bergesen} award brought pursuant to Section 9, but the court entertains grounds for vacatur pursuant to Article V and Section 10) and \textit{Ario}, 2010 WL 3239474 at **5–6 (The party seeking confirmation sought to exempt the award and confirmation proceeding from the FAA entirely. The court held that the parties “cannot ‘opt out’ of FAA coverage in its entirety,” and further, that “[t]hough this award falls under the Convention, which ordinarily provides extremely limited grounds for vacatur, the FAA provides the applicable (and slightly broader) vacatur standards for this award.”) with \textit{Bautista v. Star Cruises}, 396 F.2d 1289, 1297 (“Rather than put the Convention Act and the Inter-American Act on equal footing with the FAA in the field of foreign arbitration, Congress gave the treaty-implementing statutes primacy in their fields, with FAA provisions applying only where they did not conflict.”) and \textit{Four Seasons I}, 267 F. Supp. 2d at 1340, 1342 (“Contrary to Four Seasons’ argument, Chapter 1 of the FAA is unavailable to confirm the award independently. Based on the Eleventh Circuit’s opinion in \textit{Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte}, 141 F.3d 1434 (11th Cir. 1998), the award can only be confirmed under the Convention and not Chapter 1 of the FAA. . . . Nothing in \textit{Industrial Risk Insurers} or 9 U.S.C. § 208 indicates that Chapter 1 is capable of serving as the primary framework for confirming an award “not considered as domestic” under the Convention . . . . Rather, Chapter 1 of the FAA merely augments the Convention to the extent no conflict exists between the two instruments.”).} By this line of reasoning, once an arbitral agreement (or award issued pursuant to such agreement) is non-

\textit{were time barred because Section 12’s statute of limitations was incorporated into Chapter Two by Section 208. See supra notes 268–71 and accompanying text.}
domestic in nature, as set forth in 9 U.S.C. § 202, the Convention and Chapter Two necessarily apply to any motion to confirm such an award. Chapter One cannot be used as the exclusive regime for confirmation of an award, and only would apply to the extent not in conflict with Chapter Two.

In line with this view, Chapter Two mandatorily applies to any proceeding to confirm an award falling under the Convention. No proceeding, and no right, under Chapter One’s confirmation regime may be invoked as to Bergesen awards. Chapter Two applies with primacy, (i) precluding the Florasynth rule from ever applying to Bergesen awards and (ii) preserving the defeated party’s right to invoke Article V’s grounds to oppose confirmation at any time when a motion to confirm such an award is brought.

For those that find that the non-domestic character of the award governs the law applicable to a proceeding to confirm such an award irrespective of the cause of action invoked by the party seeking confirmation, Interpretation 2 would prevail over Interpretation 1.

3. Reconciliation 3: The Florasynth rule is incorporated into Chapter Two through 9 U.S.C. § 208 and Article VII(1)

In this hybrid reconciliation, the Convention and Chapter Two apply to any proceeding to confirm a Bergesen award, but Section 208 incorporates any right or provision from Chapter One that can be reconciled with a provision of the Convention. For example, even if Chapter Two applies to a proceeding to confirm a non-domestic award rendered in the U.S., access to vacatur pursuant to Section 10 is preserved in Chapter Two because it is contemplated by, and consistent with, Article V(1)(e) of the Convention.

Courts following the Second Circuit’s application of Section 10 to awards made in the U.S. and falling under the Convention have done so explicitly holding that Section 10 is not in conflict with the Convention, and thus incorporated into Chapter Two through Section 208. Similarly, this

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286 Hulbert, supra note 64, at 63–64.
288 Toys “R” Us, 126 F.3d at 21 (“We read Article V(1)(e) of the Convention to allow a court in the country under whose laws the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award.”).
289 Ario, 2010 WL 3239474, at *8 (“This reasoning is also consistent with 9 U.S.C. § 208, also part of the Convention’s implementing statute, in which Congress explicitly provided for the application of the domestic FAA to the extent that it did not conflict with the Convention. When both the arbitration and the enforcement of an award falling under the Convention occur in the United States, there is no conflict between the Convention and the domestic FAA because Article V(1)(e) of the Convention...”)
reconciliation finds that access to challenge-free confirmation pursuant to the *Florasynth* rule is preserved in Chapter Two because it is contemplated by, and consistent with, Article VII.

By its terms, Section 208 incorporates provisions of Chapter One “not in conflict with [Chapter Two] or the Convention as ratified by the United States” (emphasis added).290 Thus, this article submits that in interpreting whether provisions of Chapter One or the jurisprudence thereunder is in conflict with Chapter Two, one may look not only to the statutory language of Chapter Two, but also to the terms of the New York Convention,291 given their ordinary meaning, “in their context and in light of [the Convention’s] object and purpose.”292

In the absence of the Convention, an award rendered in the U.S. that was not vacated within 90 days is presumed agreeable to the defeated party, and thus, subject to challenge-free confirmation upon the motion of the prevailing party. Challenge-free confirmation is more pro-enforcement than allowing challenges provided in Article V, and the Convention by its plain language does not “deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law … of the country where such award is to be relied upon.”293 According to Reconciliation 3, the Convention and Chapter Two apply to a *Bergesen* award, and whatever rights are provided by the Convention remain available to the prevailing party.294 Since the prevailing party may

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291 Id.
293 New York Convention art. VII, para. 1.
294 This construction avoids the circularity that Ostrowski & Shany discuss in their critique of the *Chromalloy* decision. See Ostrowski & Shany, supra note 9, at 1677–79. The circularity therein described firstly differs because it questions the incorporation of Section 10 into Chapter Two by way of Article VII. Section 10, however, is not a means by which an interested party “avail[s] himself of an arbitral award;” rather, it is a means of annulling the award. Thus, a right to vacatur would not seem to be the more-favorable right to enforcement that Article VII contemplates.

But the “strained legal interpretation” in using Article VII that Ostrowsky & Shany point to is still appreciated. In the context of Reconciliation 3, it may be argued that the reconciliation is guilty of bootstrapping—its uses Article VII to create the very right that Article VII then protects. Said differently, Article VII preserves access to domestic law, but domestic law includes Section 208. Section 208 screens out of Chapter Two any provision that is in conflict, so if the *Florasynth* rule is in conflict with Chapter Two, there would be no *Florasynth* rule in domestic law for Article VII to preserve.

To avoid this circularity, the approach to applying Article VII set forth in Part II.A.1, supra, becomes relevant. Chapter Two and the Convention are of equal footing in terms of their status under the Supremacy Clause, with Chapter Two simply implementing the Convention. To discern whether a right that exists under the law of Chapter One is in conflict with Chapter Two, the right in question must be reconciled through Section 208 as “gatekeeper.” One asks whether the right in question can be squared with a provision of the Convention or Chapter Two. If the answer is yes to either, in other words, if the right in
seek challenge-free confirmation in accordance with the *Florasynth* rule by way of Article VII(1), the *Florasynth* rule is incorporated into Chapter Two pursuant to Section 208. For those that find that the non-domestic character of the award governs the law applicable to a proceeding to confirm such an award irrespective of the cause of action invoked by the party seeking confirmation, access to challenge-free confirmation may still be available as a more-favorable right that is not in conflict with Chapter Two, and thus, part and parcel of the law applicable to the confirmation proceeding.

III. AN ASSESSMENT

The possibility of challenge-free confirmation surely brings one advantage: the prevailing party can quickly obtain monetary satisfaction of her award. Whether such a possibility is consistent with U.S. *lex arbitri* depends on whether courts allow confirmation pursuant to Section 9 to the exclusion of Section 207, or alternatively, hold that challenge-free confirmation is preserved under Chapter Two. Each of the interpretations presents inconsistencies, and the choice between them turns on tradeoffs among implications both domestically and abroad.

A. Inconsistencies Raised by the Two Interpretations: A Tension Between Promoting Enforcement and Uniformity?

As stated by the Supreme Court, “[t]he goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.”

These twin goals of the Convention and Chapter Two, promoting recognition and enforcement, and

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question can be squared with a provision of Chapter Two or a provision of the Convention, the right in question is not in conflict with Chapter Two. See S. Rep. at 8 (Mr. Kearney from the Department of State testifies as to Section 208 that it is “a residual clause under which the original Arbitration Act applies to all matters arising under the legislation implementing the convention except when the convention or the implementing legislation have conflicting provisions.”) (emphasis added). Reconciliation 3 sets forth that the *Florasynth* rule can be squared with Article VII, and thus, is incorporated into Chapter Two as a non-conflicting provision from Chapter One.

uniformity of enforcement standards, are sometimes in tension, as is revealed by assessing the two interpretations discussed above.

The main inconsistency raised by Interpretation 1 is that thwarts uniform application of the Convention.\textsuperscript{296} It may be the reality that the Convention was written and adopted partly contemplating the preservation of domestic regimes of the contracting states. But allowing the vagaries of the many domestic regimes of states parties to the Convention to infiltrate the global mosaic of arbitral regimes necessarily allows for fragmentation rather than integration.\textsuperscript{297}

The main inconsistency raised by Interpretation 2 is that it prioritizes the defeated party’s right to oppose confirmation over the prevailing party’s right to obtain confirmation. This does not comport generally with the object and purpose of the Convention to promote enforcement of arbitral awards.\textsuperscript{298} If made to choose between the right of a defeated party and that of a prevailing party in arbitration, the more pro-enforcement choice is that the latter’s right should take priority.

In weighing the above inconsistencies, this article supports Interpretation 1 as allowing for more enforceability of awards even though it impairs uniformity. The Convention contemplates this potential for non-uniform, more-favorable regimes by its inclusion of Article VII.\textsuperscript{299} The continued viability of Article VII in recent international debate,\textsuperscript{300} points to the primacy of enforceability over uniformity when the choice must be made between the two.

B. \textit{Which Interpretation is More Consistent with U.S. Pro-Enforcement, Pro-Arbitration Policy, and the Attractiveness of the U.S. as a Situs?}

\textsuperscript{296} JAN VAN DEN BERG, supra note 47, at 386; see also Ostrowski & Shany, supra note 9, at 1664–66; Hulbert, supra note 64, at 51.

\textsuperscript{297} JAN VAN DEN BERG, supra note 47, at 386.

\textsuperscript{298} See Scherk, 417 U.S. at 520 n.15; Jan van den Berg, supra note 5, at 54–57.

\textsuperscript{299} Ostrowski & Shany, supra note 9, at 1660–61.

It is generally agreed that a policy underlying the three chapters of the FAA is to promote the enforcement of awards.\textsuperscript{301} Alongside this policy is the goal of promoting arbitration as a form of dispute resolution.\textsuperscript{302} However, as with favoring enforcement versus promoting uniformity, favoring enforcement and promoting arbitration exist in partial tension. The possibility of challenge-free confirmation is attractive to the prevailing party as a speedy form of resolution, widely regarded as one of the goals of arbitration.\textsuperscript{303} But the possibility of challenge-free confirmation may be unsettling to the defeated party, and the prospect of being in such a position as a defeated party may put arbitration in disfavor. A position that allows for challenge-free confirmation, under certain circumstances, is more pro-enforcement but could be less pro-arbitration.

C. \textit{Is Application of FAA Chapter Two Mandatory or Permissive?}

The question as to whether the character of the award or the character of the proceeding should dictate the law applicable to the confirmation proceeding, as reviewed in the reconciliations above,\textsuperscript{304} relates to a deeper question: whether the Convention as implemented in Chapter Two was meant to be mandatory or permissive as to its application to non-domestic awards made in the U.S. Said differently, once an award falls under the Convention, irrespective of the arbitral seat, \textit{must} the Convention govern its enforcement, or \textit{may} the Convention govern its enforcement?

At a meeting of the American Law Institute I had the opportunity to pose this question to Prof. Andreas Lowenfeld as the last surviving drafter of Chapter Two.\textsuperscript{305} His instinctive response was “I would think it should be mandatory—that’s why we have the Convention.” Mr. Hulbert expresses the same view, reasoning that the use of the phrase “[t]he Convention . . . shall be enforced in United States courts in accordance with [Chapter Two]” means that application of the Convention is mandatory once an award

\textsuperscript{301} Scherk, 417 U.S. at 520 n.15; Phoenix, 391 F.3d at 435; Prasad, 82 F. Supp. 2d at 369–70; see also Karamanian, supra note 47, at 61 (“[T]he Convention has a ‘pro-enforcement’ bias.”); Thomas Carbonneau, Debating the Proper Role of National Law under the New York Arbitration Convention, 6 Tul. J. Int’l & Comp. L. 277, 284 (1998).


\textsuperscript{303} Encyclopaedia Universalis, 403 F.3d at 90 (describing “settling disputes efficiently and avoiding long and expensive litigation” as “the twin goals of arbitration.”).

\textsuperscript{304} See supra Part II.C.

\textsuperscript{305} I was privileged to attend this meeting as a guest, and am not a member of the American Law Institute.
falls under the Convention. Ostrowski & Shany reason that Chapter Two “could be considered to constitute lex specialis (i.e., the specific rule governing the general) and as a result could be viewed as superseding the more general provisions of Chapter One, particularly given that chapter’s principally domestic focus.” Courts have agreed, particularly those in the Eleventh Circuit following the holding of Industrial Risk.

The idea that the Convention is permissive in its application, that it is an available remedy but is one of two in federal law from which a party may choose, derives largely from case law. Judge Posner expressly stated that “[n]othing in the Convention or its history, or in the implementing legislation or its history, suggests exclusivity.” Prof. van den Berg raises a criticism of the Bergesen court’s holding as potentially making enforcement of non-domestic awards rendered in the U.S. more cumbersome since “[e]nforcement of an award falling under Chapter One of the Federal Arbitration Act is almost automatic.” But this problem can be solved, he says, by allowing enforcement of Bergesen awards under Chapter One, in light of the more-favorable right provision. Moreover, the inclusion of Article VII in the Convention can be viewed as evidence that the Convention was not meant to be mandatory in its application. This article recalls that, in contrast to the New York Convention, the Panama Convention does not include a comparable more-favorable right provision.

Even if the Convention, as drafted, was meant to be permissive in its application, it may well be that in the American implementation of it through Chapter Two, Congress intended for its application to be mandatory. The Convention can be drafted in a way that is least restrictive to the national sovereignty of states parties so as to promote adoption. But the U.S. as a party acceding to the Convention can do so with the intention of displacing Chapter One as an available regime as to awards falling under the

306 Hulbert, supra note 64, at 63–64.
307 Ostrowski & Shany, supra note 9, at 1677.
308 See Bautista, 396 F.3d at 1297; Four Seasons I, 267 F. Supp. 2d at 1340, 1342.
309 See Bergesen, 710 F.2d at 934; Lander Co., 107 F.3d at 481.
310 Lander Co., 107 F.3d at 481.
311 Jan van den Berg, supra note 5, at 54–55.
312 Id. at 56–57.
313 Bowman, supra note 179, at 64–68 (“As such, Article VII expresses the strong pro-enforcement policy of the New York Convention.”).
Convention. Section 202 leaves purely domestic awards between U.S. parties “within the jurisdiction of the 50 States of the Union,” but some element of internationality, for instance, as to one of the parties or the contract’s performance, brings the award within the ambit of Section 202.

Chapter Two’s legislative history is peppered with references to the goal of promoting foreign commerce as an intention of Chapter Two, but as to whether Chapter Two was intended to be an available regime or the exclusive regime, the legislative history is largely inconclusive. The only somewhat indicative statement bearing on the mandatory/permisssive question that this author was able to locate is contained in House Report 91-1181, in which Asst. Sec. Torbert addressing the Speaker described the work of a small group formed at the initiative of the Secretary of State’s Advisory Committee on Private International Law consisting of “representatives of the American Arbitration Association, members of the arbitration bar, and law school professors” on the Convention’s implementation. Asst. Sec. Torbert states:

The consensus of the group, with which the Department of Justice concurs, was that rather than amending a series of sections of the Federal Arbitration Act, it would be preferable to enact a new chapter dealing exclusively with recognition and enforcement of awards falling under the Convention. This approach would leave unchanged the largely settled interpretation of the Federal Arbitration Act. Moreover, it would avoid complicated interlineations which, while facilitating implementation of the Convention, might also mislead or confuse persons dealing with cases falling under the Federal Arbitration Act but not under the Convention.

Thus, if the award falls under Chapter One, but not under the Convention, the Congressional intent may have been that there should be no confusion that the Convention may apply to the award. And, Chapter Two deals only with the recognition and enforcement of awards falling under the Convention. But if the award falls under Chapter Two, was the intention to bring these awards under Chapter Two and out of Chapter One, or for Chapter Two to be an available remedy that exists alongside Chapter One? This article’s interpretation of the statement above is that Congress chose a clear

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315 Id.
316 See id. at 6; H. Rep. 91-1181 at 2.
317 H. Rep. 91-1181, at 3.
318 Id.
separation of regimes, Chapter One only for purely domestic awards and Chapter Two for all Convention awards, rather than “complicated interlineations” under a common regime. Convention awards fall exclusively under Chapter Two, with provisions and “settled interpretation[s] of [Chapter One]” applying only residually through Section 208.319 In relation to the reconciliations presented above,320 this tends to favor Reconciliation 2 or 3.

CONCLUSION

Prof. van den Berg remarks that “[t]he more-favourable-right-provision of Article VII(1) appears to be somewhat neglected in practice.”321 The sole case to apply Article VII in U.S. lex arbitri is Chromalloy, but this was at best a strained interpretation. In light of the “overlapping coverage” of FAA Chapters One and Two, this article sought to develop a different application of Article VII(1) in U.S. lex arbitri that is hopefully more conceptually palatable: whatever a prevailing party would have had access to in the absence of the Convention should not be denied by application of the Convention. The outcome of this application of Article VII(1), that a non-domestic award rendered in the U.S. can be confirmed without challenge within a specific window of time, may be startling even if enticing to the prevailing party. But especially if an award not timely vacated is seen as one whose binding force is recognized by both the parties, affording summary confirmation to such an award does not appear to offend notions of fairness. And the advantages are manifold.

319 See S. Rep. at 8 (“Finally, in section 208, we have a residual clause under which the original Arbitration Act applies to all matters arising under the legislation implementing the convention except when the convention or the implementing legislation have conflicting provisions.”).
320 See supra Part II.C.
321 JAN VAN DEN BERG, supra note 47, at 386.