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All correspondence should be addressed to:

Dr. Michael J. Moser

Journal of International Arbitration

c/o Hong Kong International Arbitration Centre

38th Floor, Two Exchange Square, 8 Connaught Place, Hong Kong S.A.R., China

Tel: +852 3512 2398, Fax: +852 2877 0884, Email: editorjoia@kluwerlaw.com

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The Enforcement of Awards Annulled in their Place of Origin

The French and U.S. Experience

Christopher KOCH*

This article examines to what extent awards which have been annulled in their country of origin can be enforced in France and the United States. In the 1990s the Hilmarton case in France and the Chromalloy decision in the United States seemed to indicate that French and U.S. case law was moving in a similar direction. In both cases the courts enforced awards that had been set aside in their place of origin, not pursuant to the New York Convention, but on the basis of the more favourable provisions of domestic arbitration law. However, since then, the French and U.S. courts have taken diametrically opposed views. While the French courts continue to ignore foreign annulment decisions altogether, and will enforce an international arbitration award regardless of what the home jurisdiction finds as to its validity, U.S. courts have increasingly refused to enforce awards which were set aside at the place of arbitration. U.S. courts will disregard a foreign annulment decision only if it fundamentally violates U.S. public policy. This article argues in favour of a middle approach. By giving the word “may” in the phrase “Recognition and enforcement of the award may be refused” in Article V of the New York Convention greater weight, enforcement courts can examine the validity of a foreign annulment decision in the light of internationally recognized annulment reasons and not from the perspective of domestic rules pertaining to the recognition of foreign judicial decisions. This should strengthen the international efficacy of commercial arbitral awards within the framework of the New York Convention and not on the basis of domestic arbitration law.

I. INTRODUCTION

The question whether an award that has been vacated, annulled, or set aside at its place of origin can still be enforced in another jurisdiction was a topic that greatly preoccupied the arbitration world in the wake of the *Hilmarton* decisions in France and the *Chromalloy* ruling in the United States in the late 1990s. Both French and U.S. case law seemed to be heading in the same direction, namely, that the setting aside of an award in the place of origin would not automatically render that award unenforceable in the United States or in France. In two of the world’s most important arbitration jurisdictions there seemed to emerge a new understanding of how to apply the New York Convention or, rather, how to apply the more lenient local enforcement standards to the recognition and enforcement of awards that had been set aside in their country of origin.

However, French and U.S. case law which seemed to start from similar premises in 1998, have grown steadily apart in the ensuing ten years. Indeed, the judicial approach to enforcing or not enforcing annulled awards seems to have taken on an increasingly

* Partner in Georgana & Koch, 43 rue du Rhône, 1204 Geneva and Merlin Street 8, 106 71 Athens Greece; <christopher@gklaw.gr>. This article is a revised and somewhat expanded version of a paper presented at the Fifth Biennial Symposium on Arbitration and Alternative Dispute Resolution of the Center for International Legal Studies (CILS), in Salzburg in June 2008.

dogmatic tone on either side of the Atlantic. This article intends not only to show the divergent paths taken by French and U.S. courts but also attempts to offer an alternative frame of analysis on whether an annulled award is to be granted any legal effect in another jurisdiction.

The starting point for any discussion about the enforcement of foreign arbitral awards must be the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (“New York Convention”). While there are other regional instruments such as the 1961 European Convention on International Commercial Arbitration or the Inter-American Convention on International Commercial Arbitration of 1975, none has the importance and weight of the New York Convention, which has been adopted by 148 countries.

Whether or not an award that has not become binding, has been set aside, or has been suspended in the place of arbitration can be enforced in another jurisdiction is in principle governed by Article V(1)(e) of the New York Convention, which provides:

Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: ...

- (e) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

However, Article VII(1) of the New York Convention states:

The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.

These two rules have given rise to two different schools of thought when it comes to the enforcement of arbitration awards which have been set aside in their home jurisdictions.

The first is the classic approach based on Article V(1)(e), which I will call the “New York Convention enforcement standard,” while the second is based on Article VII of the Convention, also known as the more favoured rule clause, which I will call, borrowing from Jan Paulsson, “local enforcement standard.”¹

While the New York Convention was a marked improvement over the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, since it did away with the double *exequatur* requirement, and limited the reasons for which a court could refuse the enforcement of a foreign award, it did not in any way regulate how the courts of the arbitral venue dealt with awards issued in their jurisdictions.

¹ Jan Paulsson coined the term “local standard annulment” (LSA) in opposition to “international standard annulment” (ISA) to determine whether an annulment of an award met internationally recognized standards.

The system set up by the New York Convention allows the enforcement court not to enforce an award which has been invalidated in its country of origin. Indeed, by allowing the enforcement court to refuse enforcement of such an award, Article V(1)(e) creates a presumption that annulled awards are not enforceable foreign awards. However, the presumption is rebuttable because: "Recognition and enforcement of the award *may* be refused" (emphasis added). The New York Convention thus opens the possibility to a party that wishes to have an award enforced, despite the fact that the award was set aside at the place of arbitration, to do so by showing that the decision annulling the award should not be given effect by the court at the place where enforcement is sought.

The school advocating local standard enforcement considers that Article V of the New York Convention does not go far enough in protecting international commerce in general and the sanctity of international arbitration in particular. Indeed, Article V is seen as an obstacle to the creation of truly international awards.² Those pleading in favour of recognizing truly international awards regret that the New York Convention did not protect parties from unjustified annulments by defining the grounds upon which an award may be set aside in the home jurisdiction.³ However, an award may yet be protected by the more favourable provision of the enforcement forum by the application of Article VII(1). This provision therefore not only preserves any more favourable rights of enforcing foreign awards which might exist in the enforcement forum but also opens the door for national jurisdictions to create domestic rules for enforcing international awards which may be more favourable than those of the Convention.

II. THE FRENCH APPROACH

Although a signatory of the New York Convention, France does not apply the Convention, when it comes to recognizing and enforcing foreign arbitral awards, but its local standard for enforcement, which it considers more advantageous to the enforcement of awards than the Convention.

According to Article 1502 of the New Code of Civil Procedure (NCCP), the order enforcing a foreign award may be appealed only in the following cases:

² Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC BULL. 14, 19 (No. 1, 1998) (quoting Yves Derains, *Foreword*, in *HOMAGE À FRÉDÉRIC EISEMANN (LIBER AMICORUM)* 5, 13 (1978)).

³ The European Convention on International Commercial Arbitration of 1961 (applicable in 31 European states) goes further in this respect. It gives international effect to an annulment only if the award was set aside pursuant to the grounds set out in art. V(1) of the New York Convention. Art. IX of the European Convention states: "1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons: [the grounds set out are those of art. V(1)(a) to (d) of the New York Convention]. 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

- (1) if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
- (2) if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
- (3) if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;
- (4) if due process has not been respected;
- (5) if recognition or enforcement is contrary to international public policy.⁴

Since the annulment or suspension of an award in its place of origin is not listed among the grounds for appealing an enforcement order it is not a reason to refuse enforcement of a foreign award which otherwise passes muster under Article 1502 NCCP. The evolution of this state of affairs did not come overnight with the implementation of Article 1502 NCCP in 1981, but was the fruit of an evolution of cases that started in 1984.

A. NORSOLOR

The first case that started France's movement away from the New York Convention and to the systematic enforcement of annulled awards under local standards was the *Norsolor* case which came to the French Supreme Court in 1984. The arbitration had opposed a French company, Norsolor, to a Turkish one, Pabalk Ticaret Ltd., which claimed damages for the wrongful termination of an agency agreement. In 1978, the arbitral tribunal rendered its award applying the law of merchants ("*lex mercatoria*") rather than the municipal law of either of the parties to the merits of the case. Finding that Norsolor had breached its obligation of good faith, one of the basic tenants of the *lex mercatoria*, the arbitrators held the French company liable for damages. However, since allocating damages for each head of claim was too difficult, the tribunal "evaluated in equity by way of a global lump sum, the amount of the damages due to Pabalk ... the sum of 800,000 French francs."⁵

The Vienna Court of Appeal partially set aside the award on the grounds that the tribunal had exceeded its mission in applying *lex mercatoria* rather than a national law as Article 13 of the then current ICC Rules of Arbitration required. It had also overstepped its mandate by awarding damages "in equity," thereby assuming powers of amiable composition which the arbitration agreement did not give it.

In France, Pabalk's request for the enforcement of the award was initially granted by the lower court. However, Norsolor appealed the enforcement decision after the award was set aside in Austria. The Paris Court of Appeal refused to confirm the enforcement

⁴ Translation from INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION (J. Paulsson ed., 1998).

⁵ ICC Case No. 3131, Award, October 26, 2006, 9Y.B. COM. ARB. 109-10 (2006).

order pursuant to Article V(1)(e) of the New York Convention. However, on October 3, 1984 the French Supreme Court held:

Having considered together Article VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, signed in New York on June 10, 1958, and Article 12 of the New Code of Civil Procedure;

...

It held that points III and IV of the award had been set aside by a decision dated January 29, 1982 of the Vienna Court of Appeal on the grounds that the arbitral tribunal, contrary to Article 13 of the Rules of the Court of Arbitration of the ICC, had not determined the national law applicable and had been content to refer to the international *lex mercatoria*, "a world law of uncertain validity"; that in so deciding, when it should have determined, if necessary *ex officio*, whether French law did not permit Pabalk to avail itself of the award invoked, the Court of Appeal has violated the abovementioned texts; for these reasons we set aside the decision of the Court of Appeal of November 19, 1982 and remit the case to the Court of Appeal of Amiens.⁶

In other words, by simply refusing enforcement of the award under Article V(1)(e) without examining whether under Article VII of the Convention that award could be enforced in France pursuant to French arbitration law, the Paris Court of Appeal had violated Article VII of the Convention.

Norsolor was followed by *Polish Ocean Line* (POL) in 1993. In arbitral proceedings conducted in Poland, a French company, Jolasry, obtained an award against POL. POL appealed the award and obtained a stay of enforcement pending the annulment proceedings from the Polish courts. The French company sought enforcement of the award in France. The enforcement order was granted and confirmed by the Paris Court of Appeal. POL then appealed to the Cour de cassation arguing that the award should not be enforced in France as long as it was suspended in Poland. The Cour de cassation, however, decided:

Art. VII of the 1958 New York Convention, to which both France and Poland are parties, does not deprive any interested party of any right it may have to avail itself 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. As a result, a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art. V(1)(e) of the 1958 New York Convention, are not among the grounds specified in Art. 1502 NCCP.⁷

While in *Norsolor* the French Supreme Court had only stated that Article V(1)(e) of the New York Convention was not in itself a sufficient grounds to deny the enforcement of an annulled foreign award, it now clearly held that the more favourable law provision of Article VII, and thus application of Article 1502 NCCP, prevailed over Article V(1)(e) of the Convention.

⁶ Cass. 1e civ., October 3, 1984, 2 J. INT'L ARB. 67-76 (No. 2, 1985) (emphasis added).

⁷ Cass., March 10 1993, 19 Y.B. COM. ARB. 662-63 (1994).

B. HILMARTON

The famous *Hilmarton* case concerned a dispute between a French company, Omnium de Traitement et de Valorisation (OTV), and Hilmarton, an English company. The latter claimed payment of commissions allegedly due for helping OTV obtain a public works contract in Algeria. Swiss law governed the agreement between OTV and Hilmarton and the place of arbitration was Geneva. The Swiss sole arbitrator rejected Hilmarton's claim on the ground that the contract between the parties violated mandatory principles of Algerian law which prohibited the use and payment of intermediaries in the procurement of public works contracts. The arbitrator thus found the contract between OTV and Hilmarton illegal.⁸ However, in 1989, the Geneva Court of Appeal set aside the award,⁹ finding that the arbitrator's decision was arbitrary and could thus be set aside pursuant to Article 36(f) of the Swiss Concordat on Arbitration.¹⁰ The Swiss Federal Tribunal confirmed the cantonal decision on April 17, 1990.¹¹

In the meantime, OTV sought to have the award recognized in France. It obtained the exequatur of the award from the Paris Court of First Instance on February 27, 1990. However, since the award had been annulled in Switzerland, Hilmarton appealed the exequatur decision before the Paris Court of Appeal, which on December 19, 1991 decided that:

The provision of Art. V(1)(e) of the Convention—according to which exequatur must be denied to an award which has been set aside in the country in which it was made—does not apply when the law of the country where enforcement is sought permits enforcement of such an award. In casu, recognition and enforcement is sought in France of an arbitral award rendered in Geneva; the award having been set aside by the Swiss courts is not a ground for denying exequatur under Art. 1502 NCCP.¹²

Building on the blueprint supplied in the *Norsolor* and *Polish Ocean Line* cases, the Paris Court of Appeal determined that henceforth the enforcement of foreign awards in France would no longer be governed by Article V(1)(e), but solely by the more lenient provisions of French domestic law as they result from Article 1502 NCCP. The decision was confirmed by the French Supreme Court on March 23, 1994, which added a new twist to the debate by stating:

Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.

⁸ ICC Case No. 5622, August 19, 1988, 1993 REV. ARB. 327–42.

⁹ Cour de Justice du canton de Genève, November 17, 1989, 1993 REV. ARB. 327.

¹⁰ The Swiss Concordat on Arbitration governed international arbitrations in Switzerland before 1989. The grounds for annulment were set out in art. 36 and included subpara. (f) which stated: "An action for annulment of the arbitral award may be brought before the judicial authority provided for in Article 3, where it is alleged: ... (f) that the award is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing on the file, or in that it constitutes a clear violation of law or equity."

¹¹ Tribunal Fédéral (Supreme Court), April 17, 1990, 1993 REV. ARB. 322.

¹² Cour d'appel (court of appeal), Paris, December 19, 1991, 19 Y.B. COM. ARB 655–57 (1994).

By decreeing that the award rendered in Switzerland was an international award which was not integrated into the legal order of Switzerland, the French Court of Cassation took a resolute, if not adamant “internationalist” stand.¹³ In this conception, the award issued in international arbitration proceedings is delocalized when it is rendered by the arbitrators. It has no particular attachment to any legal order, especially not to the legal order of the place where it was produced. The fact that the parties stipulated in their arbitration clause that “the arbitration will take place in Geneva under the law of the Canton of Geneva” was of absolutely no importance to the court’s determination. This view was reconfirmed by the Cour de cassation in the 2007 *Putrabali* case, which is discussed in more detail below.

After the annulment of the first award in Switzerland, a second arbitrator rendered a new award in 1992. The second award granted Hilmarton’s claim against OTV. Hilmarton then requested and obtained the exequatur of that award from the Nanterre Court of First Instance.¹⁴ OTV appealed the exequatur decision to the Versailles Court of Appeal, on the grounds that, since the decision enforcing the first award was *res judicata* in France, the second award was no longer open to enforcement and that it was incompatible with French public policy to have two court decisions enforcing contradictory awards in France.

The Versailles Court of Appeal, which visibly had little sympathy for the enforcement policies adopted by the French Supreme Court, had no problem in confirming the lower court’s decision to execute the second award. While it acknowledged that the more favourable provisions of French domestic enforcement law govern the enforcement of an award annulled at its place of origin, the Versailles judges could not accept that this would in effect “freeze” the dispute to the point of rendering the new award unenforceable in France:

Contrary to OTV’s thesis, French international public policy does not oppose the recognition of a foreign arbitral award rendered after a previous award, which has been declared enforceable in France, even though it has been set aside in the country of rendition.

To reach a different conclusion would mean to allow the systematical prevalence of the award which has been first recognized or enforced in France, whatever its value in the foreign legal system. It would also mean to accord to enforcement an effect which by far exceeds its object: it is certainly not the purpose of the enforcement to maintain awards in France which have been set aside in the State of rendition.¹⁵

The judges of the Cour de cassation wasted little time in clarifying the situation. In a decision dated June 10, 1997, they held that by confirming the enforcement of the

¹³ Eric Schwatz, *A Comment on Chromalloy Hilmarton, à l’américaine*, 14 J. INT’L ARB. 125, 130 (No. 3, 1997), commented on that passage as follows: “Although consistent with a conception of international arbitration that has a noble and prestigious heritage in France, [reference omitted] this pronouncement, I might timidly venture to ask, is nevertheless just a little bit presumptuous, is it not? For on what authority can a French court decide what does or does not form part of the Swiss legal order? I would have thought that this is a matter for Swiss legislators and courts, and not the French Court of Cassation to decide.”

¹⁴ Tribunal de grande instance (court of first instance), Nanterre, September 22, 1993, 20 Y.B. COM. ARB. 194–97 (1995).

¹⁵ 21 Y.B. COM. ARB. 524–31 (1996).

second award the Versailles Court of Appeal had violated the *res judicata* rule of Article 1351 of the French Civil Code, because:

the existence of a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it.

C. BECHTEL AND PUTRABALI

In February 2002, a sole arbitrator sitting in Dubai rendered an award in arbitral proceedings between the engineering group Bechtel and the Department of Civil Aviation of Dubai (DAC).¹⁶ Bechtel requested enforcement of the award in France. The Paris Court of First Instance issued the enforcement order in October 2003. In 2004, the UAE's highest civil court, the Court of Cassation in Dubai, annulled the award, on the basis that the arbitrator had violated mandatory procedural rules of the UAE by failing to swear in witnesses before they were heard.

DAC then appealed the enforcement order before the Paris Court of Appeal. The novelty of the situation was that, since the UAE had not adhered to the New York Convention, DAC based its case on the 1991 bilateral judicial enforcement treaty between the UAE and France, arguing that, under the treaty, the award could not have been enforced in France as it was still subject to judicial review in UAE when the execution order was issued in 2003. The Paris Court of Appeal rejected the argument because an award was not a judicial decision within the meaning of the treaty. There was thus no need to exhaust all local instances in the UAE before seeking enforcement in France. Moreover, echoing the first *Hilmarton* decision of the Cour de cassation, the Paris Court of Appeal found that the Dubai judgment was by its nature incapable of being recognized internationally.

The annulment decision of the Court of Cassation of Dubai cannot be made the object of recognition in France; judgments delivered pursuant to annulment proceeding, like execution orders, do not have international effects because they apply only to a defined territorial sovereignty, and no consideration can be given to these judgments by a foreign judge pursuant to indirect proceeding.¹⁷

The French Cour de cassation has reconfirmed its position as recently as June 29, 2007, in the *Putrabali* case. Here, an Indonesian company, PT Putrabali Adyamulia (Putrabali), had sold to a French company, Est Epices, later Rena Holding (Rena), a shipment of pepper. The latter refused payment because the goods were lost at sea. Putrabali initiated arbitration in London under the International General Produce Association (IGPA) rules. An award was issued by an umpire in favour of Putrabali. However, pursuant to the IGPA Rules it is possible to appeal an award to a Board of Appeal which, on

¹⁶ Michael Polkinhorne, *Enforcement of Annulled Awards in France: The Sting in the Tail* (January 2008), available at <www.whitecase.com/files/Publication/9519e3f5-1c7b-4531-8a62-a6ac59dc87de/Presentation/PublicationAttachment/153d6bd2-17f4-48a0-94b2-af4265abf8fc/article_Annulled_awards_v3.pdf>

¹⁷ *Id.* at note 17 (emphasis added).

April 10, 2001, ruled that Rena was excused from paying the price of the pepper. However, this award was then appealed to the English High Court on points of law. On May 19, 2003, the High Court partially set aside the award under the English Arbitration Act, causing the IGPA Board of Appeals to render, on August 19, 2003, a second award of EUR 163,086 in favour of Putrabali.

In the meanwhile, Rena presented the IGPA Board of Appeal's award dated April 10, 2001, absolving it of any obligations for recognition and enforcement (*exequatur*) in France. On September 13, 2003, three weeks after the second award had been issued, Rena obtained an enforcement order for the *initial* award from the Paris Court of First Instance. The enforcement decision was appealed to the Paris Court of Appeal. That appeal was rejected, on March 31, 2005, on the basis of Article 1502 NCCP.¹⁸ The Cour de cassation affirmed the lower court finding and stated:

an international arbitral award—which is not anchored to any national legal order—is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.¹⁹

Some see here a landmark decision, as important as the 1963 *Gosset* case by which the Cour de cassation accepted that the arbitration agreement was separable from the main contract.²⁰ In my view this might be a bit of an overstatement. By affirming that an international arbitration award was an international judicial decision, the Cour de cassation may have recognized the existence of an international arbitral legal order which exists independently of the national arbitral systems within which international arbitral awards are produced. However, the consequences of this finding do not seem to go much further than the 1994 holding in *Hilmarton*, that an international arbitration award does not belong to the legal order of the state where it was rendered.²¹

For readers steeped in the notion that legal orders emanate from the legislative process of a given nation-state, this affirmation might come as a surprise. But French commercial law doctrine has for a long time accepted the notion that there is an independent body of law created by the usages and rules of the actors engaged in international commerce known as the law of merchants or "*lex mercatoria*." As such, it is not the creation of any national legislature but an amorphous collection of transnational rules which regulate the activities and behaviour of those engaged in international commerce.²² By extension, arbitration, which has become the foremost means of dealing with international commercial disputes, is itself an integral part of that transnational legal system and, therefore,

¹⁸ 2006 REV. ARB. 665 (author's translation) and note E. Gaillard at 666–72.

¹⁹ Cass., June 29, 2007, 24 ARB. INT'L 295 (No. 2, 2008).

²⁰ See Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24 ARB. INT'L 277 (2008).

²¹ Alexis Mourre, *A Propos des Articles V et VII de la Convention de New York et de la Reconnaissance des Sentences Annulées dans leurs pays d'origine: Où va-t-on après les arrêts Termo Rio et Putrabali?*, 2008 REV. ARB. 263, 281.

²² FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 800 et seq. (E. Gaillard & J. Savage eds., 1999).

not “anchored” in the legal system where the award has been produced.²³ What is new in *Putrabali*, however, is the suggestion that there exists a transnational arbitral order that, independently of the parties’ agreement on the place of arbitration, will produce “international judicial decisions” which, by definition, are not grounded in any national legal order. This goes beyond “local standard enforcement” as it denies the courts of the place of arbitration any role in establishing the international validity of the arbitral award.

III. THE AMERICAN EXPERIENCE

A. CHROMALLOY

On July 31, 1996, when the U.S. District Court for the District of Columbia issued its decision in *Chromalloy v. Arab Republic of Egypt*, it looked as if the United States would be joining the French approach in enforcing awards on the basis of local standards rather than under Article V of the New York Convention.²⁴

The case concerned the enforcement of an award rendered on August 24, 1994, in Cairo in an arbitration that involved the U.S. company Chromalloy Aeroservices Inc. against the Republic of Egypt. The tribunal awarded Chromalloy over \$18 million, applying Egyptian law as stipulated in the contract. On October 28, 1994, Chromalloy sought enforcement of the award in the United States. Two weeks later, on November 13, 1994, the Republic of Egypt appealed the award before the Cairo Court of Appeal. The Court of Appeal annulled the award in December 1995 because the arbitrators had wrongfully applied Egyptian private rather than administrative law.²⁵ Seven months later, the District of Columbia District Court granted Chromalloy’s petition to enforce the award notwithstanding the annulment of the award in Egypt.

The District Court found that, while under Article V, recognition and enforcement of an award *may* be refused if it has been set aside under the *lex arbitri*, Article VII of the New York Convention stated that “no party *shall* be deprived of the rights it would have to avail itself 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.” Thus, the court concluded, Article V created a permissive standard leaving non-enforcement of an annulled award within the discretion of the judge, while Article VII was a mandatory provision,

²³ While this is not the place to discuss the merits of whether or not a *lex mercatoria* exists and what its contents might be, the debate surrounding these questions has been a passionate one ever since the mid-1960s. While Fouchard, Gaillard, and Goldman strongly affirm the existence of such a transnational legal order, ALAN REDFERN & MARTIN HUNTER *in* THE LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 117 (2d ed. 2004) are more skeptical. The essentials of the decades-old controversy are well summarized by JEAN FRANCOIS POUURET & SEBASTIAN BESSON, COMPARATIVE LAW OF INTERNATIONAL ARBITRATION para. 854 (2007); see paras. 690–704.

²⁴ 939 F. Supp. 907 (D.D.C. 1996), 22 Y.B. COM. ARB. 1001–12 (1997).

²⁵ Cairo Court of Appeal, December 5, 1995, 24 Y.B. COM. ARB. 265–68 (1999).

enshrining the parties' right to invoke the more favourable enforcement provisions of national law where enforcement was sought. The District Court stated:

While Art. V provides a discretionary standard, Art. VII of the Convention requires that, "The provisions of the present 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 count[r]y where such award is sought to be relied upon." 9 U.S.C. Sect. 201 note (emphasis added). In other words, under the Convention, *Chromalloy* maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention. Accordingly, the Court finds that, if the Convention did not exist, the Federal Arbitration Act would provide *Chromalloy* with a legitimate claim to enforcement of this arbitral award.

However, while France had domestic rules for enforcing foreign arbitral awards which were more permissive than the New York Convention, there are no such rules in the United States. The *Chromalloy* court thus referred to the Federal Arbitration Act (FAA) to provide an enforcement standard that did not consider the annulment of an award under the *lex arbitri* as ground for vacating an award and proceeded to examine whether the award rendered in Egypt was sufficiently flawed to be vacated pursuant to section 10 of the FAA. Finding that the application of Egyptian private law rather than administrative law amounted at most to a mistake of law, and not to a "manifest disregard of the law," which would be a ground for setting aside the award under section 10 of the FAA, the court concluded that "as a matter of U.S. law, the award is proper."

The *Chromalloy* court then dealt with the Egyptian judgment annulling the award. It seemed to suggest that the Egyptian courts had wrongfully assumed jurisdiction over the award since the parties had waived any recourse to the courts by providing in the arbitration agreement: "The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse." Nevertheless, since the Egyptian courts had issued a judgment, the enforcement court had to examine whether to give it effect in the United States or not. Citing *Tahan v. Hodgson*,²⁶ the *Chromalloy* court found that the requirements for enforcing foreign judgments in the United States were (a) that there had been proper service and (b) that the initial claim did not violate U.S. public policy.

Determining that "[t]he U.S. public policy in favour of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law," the District Court examined whether "comity" and the act of state doctrine obliged it to give the Egyptian judgment *res judicata* effect:

No nation is under an unremitting obligation to enforce foreign interests which are fundamentally prejudicial to those of the domestic forum. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (D.C. Cir. 1984) ... [C]omity never obligates a national forum to ignore "the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* at 942 (emphasis added) (quoting *Hilton v. Guyot*, 159 U.S. 113, 164, 16 S.Ct. 139, 143-144, 40 L.Ed. 95 (1895)).

²⁶ *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) (citing *Hilton v. Guyot*, 159 U.S. 113, 202, 16 S.Ct. 139, 158, 40 L.Ed. 95 (1895)).

The court thus decided that it was under no obligation to enforce the Egyptian judgment which had been issued in proceedings that contradicted the parties' agreement to waive all judicial recourse against the award and thus violated the emphatic U.S. public policy in favour of arbitration. The *Chromalloy* decision is built on the following assumptions:

- (1) Article VII of the Convention gives a party the right to obtain enforcement of a foreign award under the more favourable rule of domestic arbitration law.
- (2) The enforcement of the foreign award must therefore be examined under the FAA rather than Article V(1)(e) of the Convention. Only if the foreign award is so defective that it can be vacated under section 10 of the FAA will the foreign court's annulment decision be recognized in the United States.
- (3) Since the validity of a foreign award is to be examined *de novo* under section 10 of the FAA, there is no preponderant role of the jurisdiction of the seat in determining the validity of an award.
- (4) The "public policy in favour of arbitration" is sufficiently strong to override considerations of "comity" when deciding not to grant *res judicata* effect to the foreign annulment decision.

The *Chromalloy* decision heartened those favouring delocalized international awards. At the 1998 ICCA Conference in Paris, one got the feeling that the recognition of the transnational nature of awards and the emergence of international annulment standards was as inescapable as the rise of international commercial arbitration. A number of commentators did not view this evolution with great enthusiasm, pointing out the various shortcomings of the *Chromalloy* decision²⁷ and the possible negative consequences for foreign investment in the Third World.²⁸

Would the *Chromalloy* decision usher in a new era of enforcement in the United States? Twelve years later we can say that little or nothing is left of this precedent. As the following cases will show, the central assumptions of the *Chromalloy* decision have all been discarded by other U.S. courts.

B. ALGHANIM

The interplay between the New York Convention and the FAA was the focus of a decision issued by the U.S. Court of Appeals for the Second Circuit on September 10, 1997, in the matter of *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us & TRU (HK) Ltd.*²⁹

The case concerned a dispute between an Iraqi company on the one hand and a U.S. and Hong Kong company on the other. Alghanim claimed that the respondents had wrongfully terminated the contracts which had allowed it to market the Toys "R" Us brand and merchandize in a number of countries of the Middle East. Pursuant to the

²⁷ Schwartz, *supra* note 13.

²⁸ Hamid G. Gharavi, *Chromalloy: Another View*, 12 MEALEY'S INT'L ARB. REP. (No. 1, 1997).

²⁹ *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. & Tru (HK) Ltd.*, 126 F.3d 15 (2d Cir. 1997), reprinted in 23 Y.B. COM. ARB. 1058-67 (1998).

arbitration clause, an arbitration was held in New York under the auspices of the AAA and the tribunal issued an award of \$46.44 million plus interest in Alghanim's favour. While Alghanim sought to have the award enforced under the New York Convention, Toys "R" Us cross-moved to have the award vacated under section 10 of the FAA. The District Court found that in a case where an award rendered in the United States was not considered a "domestic" award it was possible to have "overlapping coverage" of provisions of the Convention and those of the FAA. Thus, Alghanim could seek enforcement under the Convention, while the respondent could cross-move to vacate under the FAA.³⁰

The Court of Appeals essentially confirmed the lower court's ruling, but did clarify some points which would have a bearing on our topic.

First, the court dealt with the question whether it was possible to raise implied grounds for refusal that are available under section 10 of the FAA within enforcement proceedings governed by the New York Convention. In other words, could one read the implied grounds of the FAA into Article V of the Convention? Looking at the legislative history of Article V and U.S. implementation, the court found "strong authority for treating as exclusive the bases set forth in the Convention for vacating an award." It therefore concluded that the implied grounds for vacatur could not be raised as a defense against enforcement of a non-domestic award under the Convention.

The second question was whether a "non-domestic award rendered in the United States" could only be set aside under Article V of the New York Convention or if it could be vacated under section 10 of the FAA. Under the New York Convention, the competent authority of the country where the award was made applies its own domestic arbitration law to determine whether or not that award should be set aside. In the case of a "non-domestic award rendered in the United States" the *lex arbitri* is the FAA, so that U.S. courts can apply that statute in determining the validity of an award. In its analysis, the *Alghanim* court carefully examined the role of the courts in the enforcement state and that of the rendering state (which were the same in this case):

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention Art. V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Art. V of the Convention.³¹

³⁰ There was no debate that the New York Convention applied to the enforcement of the award, even though it had been issued in New York. According to U.S. case law, arbitral proceedings which involve interests situated outside of the United States either because the parties are foreign or because the contract is to be performed outside the United States would not be considered a "domestic" arbitration. The resulting award would be a "non-domestic award rendered in the United States" the enforcement of which is governed by the Convention in virtue of the last sentence of art. 1(1), which foresees that the Convention also applies to awards *which are not considered domestic awards in the state where their recognition and enforcement is sought*.

³¹ 23 Y.B. COM. ARB. 1066 (1998).

Although the *Alghanim* court did not directly address the question of whether an annulled award could be enforced in the United States, it did address the issue of whether the FAA had a role to play in defining the standards for enforcing awards under the New York Convention. The court's clear verdict, according to which the Convention provided the exclusive grounds for not enforcing foreign awards, thus excluding the application of any implicit grounds available under section 10 of the FAA, clearly ran contrary to the *Chromalloy* decision's attempt to introduce the FAA as more favourable local standard for enforcement.

C. BAKER MARINE

The *Baker Marine* case, decided by the U.S. Court of Appeals of the Second Circuit on August 12, 1999, was more directly to the point.³² Baker Marine (Nig.) Ltd. had contracted with Danos and Curole Marine Contractors, Inc. (Danos) and Chevron (Nig.) Ltd. and Chevron Corp., Inc. (Chevron) to supply barge services for those companies' oil exploration activities in Nigeria. A dispute arose and Baker Marine obtained awards against Danos for \$2.23 million and against Chevron for \$750,000. The arbitral proceedings had taken place in Nigeria and it was there that Baker Marine initially sought enforcement. However, the Nigerian courts set aside both awards, determining, in the case of Danos, that the tribunal's findings were not supported by the evidence and, in the case of Chevron, that the tribunal had improperly awarded punitive damages, gone beyond the scope of the parties' submissions, incorrectly admitted parole evidence, as well as having made inconsistent awards.

Nevertheless, Baker Marine sought confirmation of both awards in the United States under the New York Convention. The District Court of the Northern District of New York denied Baker Marine's petitions reasoning that, under the New York Convention and principles of comity, "it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts."

In its appeal, Baker Marine argued that the District Court had failed to give effect to Article VII of the Convention and that Baker Marine had the right to have the awards recognized under the more favourable provisions of the FAA. Since the FAA contained none of the grounds for setting aside the awards that the Nigerian courts had applied, both awards should be enforced in the United States. The Court of Appeals had little sympathy for the argument. It held:

We reject Baker Marine's argument. It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria. The governing agreements make no reference whatever to United States law. Nothing suggests that the parties intended United States domestic arbitral law to govern their disputes. The primary purpose of the FAA is ensuring that private agreements to arbitrate are enforced according to their terms. (references omitted) Furthermore Baker Marine has made no contention that the Nigerian courts acted contrary to Nigerian law.³³

³² Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. & Chevron Corp., Inc.; Baker Marine (Nig.) Ltd. v. Danos and Curole Marine Contractors, Inc., 191 F.3d 194 (2d Cir. 1999), reprinted in 24a Y.B. COM. ARB. 909-14 (1999).

³³ *Id.* at 911 (emphasis added).

In a footnote (no. 2) to the emphasized passage the court decisively dealt with the issue of applying the FAA when enforcing awards under the Convention:

Furthermore, as a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary “with enforcement actions from country to country until a court is found, if any, which grants the enforcement.” Albert Jan van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (1981) p. 355.³⁴

We see the *Baker Marine* court roundly rejecting the Article VII approach taken in the *Chromalloy* decision. Having contracted to arbitrate their dispute in Nigeria, the parties never agreed to have an award governed by the FAA and there was no reason to apply U.S. domestic arbitration law in this context.

While the *Baker Marine* court did not overrule *Chromalloy*, by distinguishing the cases, it relegated the *Chromalloy* decision’s Article VII approach to the case where the foreign vacatur has been obtained in proceedings that violated an express waiver of any recourse against the award before the courts of the place of arbitration:

[Footnote no. 3] This case is unlike *In re Chromalloy* [reference omitted], on which *Baker Marine* relies. In that case, the government of Egypt had entered a contract with an American company agreeing that disputes would be submitted to arbitration and that the decision of the arbitrator could not “be made subject to any appeal or other recourse” ... After the arbitrator entered an award in favor of the American company, the American company applied to the United States courts for confirmation of the award, and the Egyptian government appealed to its own courts, which set aside the award. The district court concluded that Egypt was seeking “to repudiate its solemn promise to abide by the results of the arbitration,” and that recognizing the Egyptian judgment would be contrary to the United States policy favoring arbitration ... Unlike the petitioner in *Chromalloy*, *Baker Marine* is not a United States citizen, and it did not initially seek confirmation of the award in the United States. Furthermore, *Chevron* and *Danos* did not violate any promise in appealing the arbitration award within Nigeria. Recognition of the Nigerian judgment in this case does not conflict with United States public policy.

D. M. SPIER

Two months after the *Baker Marine* decision, the U.S. District Court for the Southern District of New York was faced with the question whether it should enforce an award that had been issued fourteen years earlier and that had been set aside by the Italian courts. The case of Martin Spier’s judicial saga against the Italian ski boot manufacturer *Calzaturificio Technica, S.p.A.* (*Technica*) is a testimony to the enduring nature of hope. In 1969, Mr. Spier entered into a consulting contract with *Technica* concerning the manufacture of plastic footwear and ski boots. A dispute arose and led to an award of 1 billion Italian lire (\$672,000) in favour of Mr. Spier. In 1987, the New York District Court

³⁴ *Id.* at 914.

adjourned enforcement of the award under Article VI of the Convention because Technica had commenced setting aside procedures in Italy.³⁵ In time the award was annulled by the Italian courts and that annulment was ultimately confirmed by the Italian Supreme Court. Mr. Spier reactivated enforcement proceedings in 1999. The *Chromalloy* decision might have blown a new spark of life into what had seemed to be a dead claim.

In its opinion dated October 22, 1999, the District Court firmly based its opinion on the reasoning of the *Alghanim* and *Baker Marine* cases.³⁶ Unlike in *Alghanim*, the court was requested to enforce an award which was rendered in Italy. This made it “an award made in the territory of a state other than the territory of the state where enforcement is sought,” that is, a truly foreign award not an American “non-domestic” award. As a consequence of this finding there was no room to apply the FAA in determining the validity of the award. As a foreign award the recognition and enforcement was completely governed by Article V(1)(e) of the Convention:

However, where (as in the case at bar) an arbitral award is made in one State adhering to the Convention and sought to be enforced in another adhering State, the grounds for resisting the award are limited to those found in Art. V of the Convention.³⁷

Thus the court roundly defeated Spier’s attempt to apply the *Chromalloy* rationale and have the Italian award recognized by application of the “more favourable” standards of the FAA:

Spier seeks to apply domestic United States arbitral law in order to escape the Italian courts’ nullification of an Italian award. That effort cannot survive the court of appeals’ observation in Yusuf that under the Convention “the state in which, or under the laws of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief.”³⁸

The court goes even further in marginalizing the *Chromalloy* decision, without, however, repudiating it altogether. Distinguishing the cases the court states:

In some respects *Chromalloy* bears a superficial resemblance to the case at bar, since Spier is a United States citizen and seeks confirmation of the award in the United States. But I read this footnote in *Baker Marine* to identify as the decisive circumstance Egypt’s repudiation of its contractual promise not to appeal an arbitral award. Only that circumstance is singled out as violating American public policy articulated in the FAA, thereby justifying the district court’s enforcement of the Egyptian award.³⁹

³⁵ Art. VI of the New York Convention allows a court where enforcement is sought to adjourn a decision to enforce an award if the award is being challenged in its home jurisdiction. *Martin Spier v. Calzaturificio Tecnica S.p.A.*, 663 F. Supp. 871 (S.D.N.Y., No. 86 Civ. 3447 (CSH) 1987), *reprinted in* 25 Y.B. COM. ARB. 641, 663 (2000).

³⁶ *Martin Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 86 Civ. 3447 (CSH) 1999), *reprinted in* 25 Y.B. COM. ARB. 1048 (2000).

³⁷ *Id.* at 1048.

³⁸ 126 F.3d at 23.

³⁹ *Id.* (emphasis added).

E. PERTAMINA

Two cases decided by the Court of Appeals of the Fifth Circuit in New Orleans in 2003 and 2004, which concerned the same dispute, are interesting because the first seems to supply new grist to the mills of the “internationalist” camp favouring the *Chromalloy* approach, while the second confirms the traditional view of how to apply Article V(1)(e) of the New York Convention.

On November 28, 1994, Karaha Bodas Co., L.L.C. (KBC) and Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina), the Indonesian state oil company, agreed to jointly develop the 400 MW Karaha Bodas Geothermal Project in West Java, Indonesia. Indonesian law was applicable to the contracts and any disputes were to be arbitrated in Geneva, Switzerland, under the UNCITRAL Rules. During the 1997 East Asian financial crisis, the Indonesian government first suspended and then abandoned the project. KBC initiated arbitration against the Indonesian parties in Switzerland and on December 18, 2000, the arbitral tribunal issued a Final Award of \$261 million in favour of KBC. Pertamina unsuccessfully sought to have the award set aside in Switzerland. The Federal Tribunal dismissed the request on August 2001.

On March 14, 2002, Pertamina commenced setting aside proceedings in Indonesia. It also sought to obtain from the Central Jakarta District Court a restraining order forbidding KBC to enforce the award anywhere in the world. Once KBC was on notice of the impending restraining order, it applied and obtained from the U.S. District Court for the Southern District of Texas an antisuit injunction directing Pertamina to withdraw its request for injunctive relief in Indonesia. Pertamina appealed the antisuit injunction issued by the Texas District Court. The Court of Appeals thus had to decide whether the Texas court had been justified in issuing the injunction. This is the setting of the first *Pertamina* decision of the Fifth Circuit Court of Appeals of June 18, 2003 (*Pertamina I*).⁴⁰ *Pertamina I* did not deal with an enforcement issue but with defining the proper limits of the injunctive powers of federal courts in the context of the New York Convention.

In determining whether an antisuit injunction is justified, a court must balance domestic judicial interests against international courtesy of the mutual recognition of judgments. More specifically, it must weigh the need to prevent “vexatious or oppressive litigation” against the principles of international comity. Foreign litigation is “vexatious or oppressive” if the foreign suit (1) imposes “inequitable hardship” on a party, (2) has the ability to “frustrate the speedy and efficient determination of the cause,” and (3) causes a substantial duplication of the U.S. litigation. The Fifth Circuit Court of Appeals found that the litigation concerning the Indonesian anti-enforcement injunction did not meet any of these criteria:

[92] When the Convention was drafted, one of its main purposes was to facilitate the enforcement of arbitration awards by enabling parties to enforce them in third countries without first having to

⁴⁰ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al. & Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003), *reprinted in* 28 Y.B. COM. ARB. 908–64 (2003).

obtain either confirmation of such awards or leave to enforce them from a court in the country of the arbitral situs. [reference omitted] Under the Convention, a court maintains the discretion to enforce an arbitral award even when nullification proceedings are occurring in the country where the award was rendered. [Footnote no. 72] Furthermore, an American court and courts of other countries have enforced awards, or permitted their enforcement, despite prior annulment in courts of primary jurisdiction [reference omitted] ...

[93] By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award. For instance, Art. (V)(1)(d) enables a losing party to challenge enforcement on the grounds that the arbitral panel did not obey the law of the arbitral situs, i.e., the *lex arbitri*, even though such a claim would undoubtedly be raised in annulment proceedings in the rendering State itself. In addition, this case illustrates that enforcement proceedings in multiple secondary-jurisdiction states can address the same substantive issues.

[Footnote no. 72] See *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F.Supp. 907, 909–913 (D.D.C. 1996) [reported in XXII YEARBOOK 1001–12 (1997) (US no. 230)] (enforcing an arbitral award made in Egypt despite annulment of the award by Egyptian courts, in part because Art. V only makes refusal to enforce discretionary, and in part because Art. VII enables a secondary jurisdiction to enforce an award if allowed by its domestic law). See also Domenico Di Pietro and Martin Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958*, at 169–170 (2001) (discussing a court’s discretion to enforce an award despite annulment elsewhere and listing several examples of the exercise of such discretion in other national courts).

Advocates of local standard enforcement have cited this Court of Appeals decision as endorsement of the *Hilmarton* and *Chromalloy* line of reasoning.⁴¹ In my view, this would be taking it out of its context. As already mentioned, the *Pertamina I* court was not concerned with enforcing an award. It was examining whether the act of commencing injunctive proceedings in Jakarta was so burdensome for KBC that the Texas court was justified in issuing the antisuit injunction against Pertamina. The court’s listing of the various types of proceedings pertaining to the same arbitral award that can be going on under the New York Convention simultaneously at any given moment was not intended to endorse any of these proceedings, it was merely used to illustrate that parallel proceedings were within the nature of the New York Convention and that they may occur in different jurisdictions concerning the same award. Thus, Pertamina’s request for injunctive relief from the Indonesian courts could not be overly burdensome on KBC, and, therefore, the Texas District Court’s antisuit injunction was not warranted on that ground.

The Fifth Circuit Court of Appeal’s second decision of March 24, 2004, was closer to our subject. Here, the court was faced with the question of whether the annulment of the *Pertamina* award by the Indonesian courts, notwithstanding that the award had been rendered in Geneva, barred enforcement of that award in the United States (*Pertamina II*).⁴²

Pertamina argued that Indonesia had “primary” jurisdiction over the award pursuant to the “under the law of which” clause of Article V(1)(e) of the New York Convention.

⁴¹ E. Gaillard, *Il est interdit d’interdire: réflexions sur l’utilisation des anti-suit injunctions dans l’arbitrage commercial international*, REVUE DE L’ARBITRAGE 47–62 (No. 1, 2004); Gaillard, *infra* note 52, at 1111.

⁴² *Karah Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al. & Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274 (5th Cir. 2004).

It maintained that, since Indonesian law applied to the contract, the parties had also intended Indonesian procedural law to apply to the arbitration, even though the place of arbitration was in Geneva. Indonesian courts could therefore assert “primary” jurisdiction over the award, meaning that annulment of the award in Indonesia barred its enforcement in the United States.

The central question for the Court of Appeals was not whether an annulled award could be enforced in the United States, but which court had the power under the Convention to annul awards. Here the court made the following analysis:

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award. [Footnote no. 11. *Karaha Bodas Co.*, 335 F.3d at 364; see *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys “R” Us, Inc.*, 126 F.3d 15, 23 (2d Cir.1997).] Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country. [Footnote no. 12. *Karaha Bodas Co.*, 335 F.3d at 364.] The 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.” [Footnote no. 13. *Alghanim*, 126 F.3d at 23 (quoted in *Karaha Bodas Co.*, 335 F.3d at 364).] Under the Convention, “the country in which, or under the [arbitration] law of which, [an] award was made” is said to have primary jurisdiction over the arbitration award. [Footnote no. 14. *Karaha Bodas Co.*, 335 F.3d at 364.] All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award. [Footnote no. 15. *Karaha Bodas Co.*, 335 F.3d at 364.] It is clear that the district court had secondary jurisdiction and considered only whether to enforce the Award in the United States.⁴³

By deferring the power of deciding matters of annulment to the “primary” jurisdiction at the place of arbitration, the *Pertamina II* court acknowledged that jurisdiction at the seat of arbitration played a leading role when it came to determining the validity of an award. In doing so, the *Pertamina* court hammered yet another nail in the coffin of the *Chromalloy* legacy.⁴⁴

F. TERMORIO

The most recent decision concerning the enforcement of an annulled award in the United States was issued by the U.S. Court of Appeals for the District of Columbia Circuit on May 25, 2007 in the matter of *Termorio & LeaseCo Group v. Electranta S.P. et al.*⁴⁵

⁴³ 364 F.3d 274 at para. 27.

⁴⁴ The distinction between “primary” and “secondary” jurisdictions within the context of the New York Convention was apparently made for the first time by PROF. MICHAEL REISMAN in *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* (1992). The concept was roundly criticized by Jan Paulsson in *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC BULL. 14 (No. 1, 1998), where these categories are considered by Mr. Paulsson as “pure products of his own reflection” (at 26). “The Convention itself does not define the categories ‘primary’ and ‘secondary,’ as conceived by Mr. Reisman, and I find them unwarranted. If anything, the primary jurisdiction should be the one where the economic or other consequences of an award are sought” (at 27).

⁴⁵ *Termorio S.A.E.S.P. & Leaseco Group, L.L.C. v. Electranta S.P. et al.*, 487 F.3d 928 (D.C. Cir. 2007).

The case concerned the enforcement of a Colombian award issued in December 2000 in favour of Termorio for about \$60.3 million against a Colombian state-owned electrical utility, Electranta. The arbitration had taken place in Barranquilla, Colombia, and, formally at least, all parties to the arbitration were Colombian. However, Termorio was a wholly owned subsidiary of the LeaseCo Group, an Oregon corporation. Electranta sought to have the award vacated in Colombia and the Colombian Council of State set aside the award on the grounds that the ICC arbitration clause was not valid because at the time it was entered into it violated Colombian law.

When Termorio sought to have the award enforced in the United States, the District Court for the District of Columbia denied enforcement in its decision of March 16, 2006.⁴⁶ The Court of Appeals affirmed that decision. In doing so, it very clearly rejected the *Chromalloy* approach which appellants had argued:

The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to “competent authority” to “set aside” an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State “offends the public policy” of the secondary State to overcome a defense raised under Article V(1)(e). (emphasis added)

This goes a long way in eviscerating anything that might have been left of *Chromalloy*. The Court of Appeals finds that the United States’ emphatic policy in favour of arbitration is not, in itself, a public policy objective enough to justify ignoring a foreign judgment. Taking a direct shot at the *Chromalloy* rationale, the District of Columbia Court of Appeals found:

The test of public policy cannot be simply whether the courts of a secondary State would set aside an arbitration award if the award had been made and enforcement had been sought within [their] jurisdiction.

For a U.S. court to be able to ignore a foreign annulment decision, the party seeking enforcement would have to demonstrate that the foreign decision violated U.S. “public policy.” This would be the case if the foreign judgment was “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.” If the foreign decision “tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property”⁴⁷ then one might find that it violated U.S. public policy.

⁴⁶ Termorio S.A.E.S.P. v. Electranta S.P. et al., 241 F. Supp. 2d 87 (D.D.C. 2006) reprinted in 31 Y.B. COM. ARB. 1457–73 (2006), published in a French version and commented on by Jan Paulsson, 2006 REV. ARB. 786–804.

⁴⁷ Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986).

The *Termorio* court did not override *Chromalloy* but distinguished it without giving an opinion as to its continued validity.⁴⁸ The standard applied by the District of Columbia Court of Appeals is a high one indeed, making it very difficult, if not impossible, to obtain the enforcement in the United States of an award annulled at its place of origin. Thus, the pendulum seems to have swung from local enforcement standard under *Chromalloy* to a strict application of Article V(1)(e) of the New York Convention. The decision has been severely criticized by those who favour local enforcement standards.⁴⁹

IV. LOCAL STANDARD ENFORCEMENT OR NEW YORK CONVENTION ENFORCEMENT?

A. PROBLEM WITH THE FRENCH APPROACH

The French approach is logically coherent and conforms to the letter of the New York Convention. By enforcing foreign awards in accordance with its local standard and not the Convention, there is no need to deal with the foreign annulment decision; the French courts can simply ignore it since it has no international effectiveness.⁵⁰ This was also the approach of the *Chromalloy* court which could ignore the Egyptian decision, while acknowledging that it might have been issued in accordance with Egyptian law.⁵¹ The focus of the enforcement court remains on the award, sparing it the task of dealing with considerations of comity and reciprocity.⁵²

Nevertheless, for all its intellectual coherence, the local standard enforcement approach under Article VII of the New York Convention does not correspond to the spirit of the Convention. Creating a national set of enforcement standards for foreign awards that, in effect, bypasses the Convention is diametrically opposed to one of the central concerns of the New York Convention, namely, the international harmonization of the rules pertaining to the enforcement of arbitral awards. What would the world of international award enforcement look like, if every one of the over 140 countries that have adhered to the Convention, defined its own, ostensibly more favourable, standards to evaluate the validity of a foreign award? Enforcement would not become simpler but more complex because the international coordination effect created by a uniform set of rules would be lost. Moreover, by eliminating the steering effect of a “primary” jurisdiction to which the New York Convention gives the power to determine the international validity of an award, the French approach has led to the *Hilmarton* and *Putrabali* nightmares. (It

⁴⁸ The Court of Appeals found (487 F.3d 928 para. 53): “We need not decide whether the holding in *Chromalloy* is correct, because, as appellees point out, ‘the present case is plainly distinguishable from *Chromalloy* where an express contract provision was violated by pursuing an appeal to vacate the award.’”

⁴⁹ Fernando Mantilla Serrano, *Case Note Termorio S.A. ESP et al. v. Electranca S.P. et al.*, 25 J. INT’L ARB. 397–405 (2008).

⁵⁰ Paulsson, *supra* note 2, at 28, has argued that the art. VII approach is preferable since it does not engage the enforcement court in the thorny issue of having to evaluate the merits or demerits of a foreign sovereign act.

⁵¹ *Chromalloy*, 939 F. Supp. 907, at note 9, states: “Indeed, the Court assumes that the decision of the Court of Appeal at Cairo is proper under applicable Egyptian law.”

⁵² Emmanuel Gaillard, *Anti-suit injunctions et reconnaissance des sentences annulées au siège, une évolution remarquable de la jurisprudence américaine*, 130 J. DROIT INT’L (Clunet) 1005, 1112 (2003).

will come as no surprise that, while the second *Hilmarton* award was not enforceable in France, it was enforced in England.)⁵³

What would have happened if Putrabali had been the first to present the award in its favour to the French courts for enforcement? Logically, the French court would have had to enforce the second award and deny enforcement of the first, simply because of the priority in time. However, I wonder if enforcement on a “first come first served” basis is a sound way of defining whether to enforce a foreign award or not? Should the validity of a foreign award really be determined by the speed with which enforcement is sought?⁵⁴ Denying the courts at the place of arbitration any “primary” role in defining the international validity of awards issued in their jurisdiction will obviously create uncertainty as to which of the successive awards is enforceable.⁵⁵

Local standard enforcement also runs against party autonomy. When parties directly or indirectly choose a seat of arbitration, this choice implies an agreement to submit the arbitration to the *lex arbitri* and the supervisory powers of the judicial system at the seat. Local standard enforcement ignores this choice, making it completely unpredictable where an award may be seen to be valid or not.⁵⁶ This is obviously not to the advantage of anyone, not even necessarily to the party benefiting from the enforcement of an annulled award.

Finally, the systematic refusal to recognize annulment judgments issued by courts at the seat also runs diametrically contrary to the very nature of the principles of international private law that have been elaborated to ensure that foreign decisions are given the greatest possible international recognition. The French Cour de cassation has elaborated standards according to which French courts must recognize foreign decisions. These standards were laid down in the *Munzer* and *Simitch* and *Cornelissen* cases. Thus, the French courts should recognize a foreign judgment if:

- (a) the foreign court was competent;
- (b) the procedure before the court respected due process;
- (c) the judgment is not contrary to French international public order;
- (d) there was no “fraude à la loi” or evasion of law in obtaining the foreign decision.⁵⁷

The French Cour de cassation has not articulated any valid reasons for treating a foreign annulment decision differently from any other foreign judgment.⁵⁸ Thus, there remains an inherent contradiction in postulating rules for the recognition of foreign decisions,

⁵³ High Court of Justice (QB) (Commercial Court), May 24, 1999, 24a Y.B. COM. ARB. 777–85 (1999).

⁵⁴ Polkinhorne, *supra* note 16, believes that allowing the enforcement of an annulled award may create a “chase for exequatur” as parties seek to have a favourable award declared enforceable in France if they fear that it may be set aside elsewhere.

⁵⁵ Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT’L 19 (2001).

⁵⁶ POUURET & BESSON, *supra* note 23, para. 854.

⁵⁷ Mourre, *supra* note 21, at n.40.

⁵⁸ In the *Bechtel* case the Cour de cassation found that an annulment decision, like an enforcement decision, has no international effect. However, by assimilating the annulment decision to an exequatur decision the Cour de cassation ignored the fact that determining the validity of an award under the *lex arbitri* is different from deciding whether or not to enforce a foreign award. The first case concerns the validity of the award, whereas an exequatur decision concerns the territorial scope of the award’s effect. This explains the rule that the decision to enforce in one jurisdiction cannot be the basis for a decision to enforce in a second. (Mourre, *supra* note 21, at 287).

but ignoring them when it comes to recognizing the effect of a foreign decision vacating an award.

B. PROBLEM WITH TOO MUCH COMITY

On the other hand, it can hardly be in the interest of international trade or international commercial arbitration if awards in favour of a foreign party that are obtained in expensive arbitral proceedings are rendered meaningless by the annulment of the award by a local court seeking to protect local interests. I wonder whether the very strict standard applied by the District of Columbia Court of Appeals in the *Termorio* case was not too doctrinaire in its approach. While the New York Convention may not contemplate that secondary jurisdictions “routinely second-guess the judgment of a court in a primary State” it does allow secondary jurisdictions a measure of latitude in evaluating whether the setting aside of an award in its place of origin was compatible with the overall international preoccupation of enforcing international arbitration awards.

Termorio seems to be typically one of those cases where a large arbitral award against the government, or one of its instrumentalities, issued in arbitral proceedings conducted in that state, is set aside by the courts of the seat on grounds which appear contrived. The Consejo de Estado (Council of State), the highest Colombian administrative court, vacated the award because, at the time that the ICC arbitration clause was entered into, Colombian law did not allow for the use of institutional arbitration. However, the parties signed the Terms of Reference without reservations at a time when Colombian law had been changed to allow for institutional arbitration. Under most circumstances, signing the Terms of Reference without reservations as to the validity of the arbitration agreement would remedy any initial defect in the agreement to arbitrate.⁵⁹ Moreover, neither of the parties had raised this argument before the Colombian courts.⁶⁰ It would thus seem that the Council of State was looking very hard for a reason to set aside the award. It therefore looks like the award was not judged on its merits but rather with a view to protect the interests of the state.⁶¹

Article V(I)(e) foresees that “recognition and enforcement *may* be refused.”⁶² However, if the bar for disregarding a foreign vacatur decision is placed too high by an

⁵⁹ POUURET & BESSON, *supra* note 23, para. 576.

⁶⁰ Mantilla Serrano, *supra* note 49, at 398.

⁶¹ One must, however, bear in mind that the *Termorio* award was annulled on the basis of an international annulment standard, that is, invalidity of the arbitration agreement (art.V(a) of the New York Convention). Thus, the presumption would have to be in favour of the Colombian annulment decision. However, *Termorio* might have been able to rebut the presumption by showing that the decision was clearly biased in favour of the local party. As it was, *Termorio* had to show that the Colombian court was “corrupt” which it was not able to do. (See 31 Y.B. COM. ARB. 1469 (2006)).

⁶² A prohibition on enforcing an annulled award might be inferred from the French version of the Convention, which states: “la reconnaissance et l’exécution de la sentence ne seront refusées ... que si” (“recognition and enforcement of the award shall not be refused ... unless”). One could thus argue *a contrario* that if it has been set aside, enforcement must be refused. However, Jan Paulsson examined all five official versions of the Convention and found that four of the five versions clearly used permissive rather than mandatory language, and thus came to the conclusion that the drafters wished to give the enforcement judge discretion on whether or not to enforce an annulled award. Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT’L 227–30 (1998). On the other hand, the French reading of the Convention as requiring non-enforcement of annulled awards may have conditioned the French approach to find a way out of that straight-jacket.

enforcement court, it will effectively mean that the permissive “may” is, in fact, interpreted as *must*.⁶³ Thus, as in the case of the *Termorio* court, if the foreign annulment decision will only be disregarded if it is shown to be “repugnant to fundamental notions of what is decent and just in the State where enforcement is sought,” that enforcement court largely deprives itself of the discretion it has under the Convention. Article V thus interpreted ends up meaning: “recognition and enforcement *must* be refused.”

A more enforcement friendly approach would be to measure the foreign annulment decision not against the lofty standard of international public order but, as Jan Paulson suggested over ten years ago, in terms of international annulment principles as they have emerged in international commercial arbitration through the New York Convention and the UNCITRAL Model Law on Arbitration. Thus, the fairness of an annulment would be evaluated by comparison to these norms. As stated at the outset of this article, the annulment of an award at its place of origin creates a presumption that the award has no legal effect. To reverse the presumption, the party wishing to enforce the award will normally have the burden to prove that the annulment decision should not be given effect in the enforcement jurisdiction.⁶⁴ However, if the award was annulled pursuant to local standards, one could shift the burden to the party wishing to resist enforcement of the award. In this case, there would be a presumption that the annulment was not justified and the party pleading nullity would have the burden to prove that the annulment was not abusive or in violation of international enforcement standards.

It cannot be avoided that when a court is asked to enforce an award that has been vacated at the place of arbitration the focus shifts from the award to the judgment vacating it. While the local enforcement standard approach of Article VII may allow the enforcement court to ignore the annulment decision, an Article V approach will necessarily require the enforcement court to pass judgment on the foreign *vacatur* decision, something that courts for reasons of comity and reciprocity do not like to do. The enforcement court’s reflex will be to look to the domestic rules for recognizing foreign court decisions. There is, however, a difference between a foreign decision on the merits of an issue and one that passes judgment on an award issued by an arbitral tribunal. While a foreign decision on the merits is issued by state courts in proceedings which are entirely governed by the procedural law of the country of origin, the arbitral award emanates from private proceedings that, while they may be conducted within the general framework of the *lex arbitri*, are purely contractual in nature.⁶⁵ The decision of a state court, having often gone through two or perhaps three degrees of jurisdiction, has the full weight of that state’s judicial sovereignty behind it. It is therefore understandable that the enforcement court will defer to the foreign judgment as a matter of comity by placing the bar for non-recognition as high as possible. When it comes to arbitral awards emanating

⁶³ Goode, *supra* note 55, at 22 n.9, makes the point that it does not matter whether it is “shall” or “may” since, read in the context of the sentence, the wording still allows for a permissive standard. If the drafters had wanted to make refusal of annulled foreign awards mandatory they would have used a phrase such as “shall be refused if and only if.”

⁶⁴ Paulsson, *supra* note 2, at 30.

⁶⁵ Mourre, *supra* note 21, at 293.

from private proceedings in which the courts at the seat had only limited involvement, it is less understandable why the foreign decision vacating the award is given the same degree of deference. The permissive language in Article V(1)(e) clearly allows the enforcement court to apply the pro-enforcement bias of the New York Convention rather than the internal rules for recognizing foreign judgments. This does not mean that the enforcement court is second-guessing the “primary court’s” decision, but rather that it can examine the fairness of the foreign court’s decision in the light of annulment standards which are internationally accepted.

In October 2008, the English Court of Appeal came to the same conclusion by allowing the enforcement of an award in England even though proceedings to set it aside were pending in Nigeria. In the decision Tucker, L.J. stated:

The purpose behind the Convention is reflected in the language of the 1996 Act. Enforcement “shall not be refused” except in the limited circumstances listed in section 103(2) where the court is not required to refuse but “may” do so. Under subsection (5) the court may adjourn but only if it considers it “proper” to do so. The enforcing court’s role is not therefore entirely passive or mechanistic. The mere fact that a challenge has been made to the validity of an award in the home court does not prevent the enforcing court from enforcing the award if it considers the award to be manifestly valid (see *Soleh Boneh v. Uganda Government* [1993] 2 Lloyds Rep. 208, 212).⁶⁶

V. CONCLUSION

In both France and the United States, an award which is annulled does not cease to exist simply because it was set aside by the courts of its place of origin. What differs dramatically between the two systems is the weight given to annulment decisions in either jurisdiction. In applying Article VII of the New York Convention, the French courts have developed a more favourable local standard to enforce foreign awards under Article 1502 NCCP, so that the foreign annulment decision is given no weight. Except for one notable exception in the *Chromalloy* case, the U.S. courts have refused to enforce awards that have been set aside in the country of origin. Applying Article V(1)(e) of the Convention, they have examined whether the annulment decision was compatible with U.S. public policy. Neither approach is entirely satisfactory. The French solution of applying a local enforcement standard and considering the award delocalized, which allows French courts to ignore the foreign annulment decision, is a municipal response to a global problem. On the other hand, the U.S. solution, which expresses excessive deference to foreign annulment decisions by the enforcement court, is not in the interest of international trade either.

As always, the proper way lies somewhere in the middle. I would see it as an approach that fully recognizes the permissive “may” in Article V of the Convention by examining both the annulment decision and the award and determines whether the annulment decision is to be given preference over the award, in the light of the objectives of the New York Convention and, in the United States, the public policy in favour of

⁶⁶ *IpcO (Nigeria) Ltd. v. Nigerian National Petroleum Corp.*, [2008] EWCA (Civ) 1157 (emphasis added).

arbitration. If there is to be progress, it would be useful if the courts in enforcement jurisdictions would lead the way in determining in their decisions what standards pertaining to the annulment of awards are internationally acceptable and what are not. By squarely examining the fairness of a foreign annulment decision that is based on a local annulment standard, or a particularly jarring application of an international annulment standard, enforcement courts would be able to universalize the principles of the New York Convention. Building up such a body of international case law would not only enhance the efficacy of international awards. In any given case where a respected enforcement court finds that an award has been unjustifiably annulled at the seat, its decision is likely to have probative value in other potential enforcement jurisdictions, thus helping a party overcome an unfair annulment.⁶⁷ This can obviously not happen if the decision to enforce an annulled award is based on local standards of enforcement, and simply ignores the annulment decision rendered by the courts at the place of arbitration.

Even though the issue of enforcing annulled awards may not have arbitration congresses abuzz any longer, this “Tale of Two Cities” shows that there are issues which national courts should tackle not in “splendid isolation” but with a view to the objectives of the New York Convention and the needs of foreseeability and fairness in international commercial arbitration.

⁶⁷ The educative and internationally salutary effect of a reasoned decision squarely explaining why a foreign annulment decision should not be given weight in the enforcement jurisdiction can be seen by the fact that the only annulled award that has ever been enforced in Germany was an award which had also been upheld in Austria, in the *Radenska* case, which is more fully described in Dr. Horvath’s article in this same issue. Briefly stated, the Austrian Supreme Court declared enforceable an award issued in Yugoslavia that had been set aside by the Slovenian Supreme Court as contrary to Slovene public order. Applying art. IX of the European Convention, the Austrian Supreme Court found that the violation of the public order at the place of origin was not a reason justifying non-enforcement of an award. The Slovene annulment decision was thus not given any effect in Austria and the award was enforced (OGH October 20, 1993, 3Ob117/93). Faced with the same award, the Bavarian courts applied the same reasoning (OLG Munich February 13, 1995).

Guide to Authors

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