Enforcement of Annulled Arbitration Awards: How the dead is resurrected in France and the United States?

AmrAbdelhamied Elattar [1]

"We raise in degrees whom We will, but over every possessor of knowledge is one [more] knowing." [Holy Qur'an 12:76]

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I. Introduction

International arbitration provides an "efficient and effective" mean for resolving different sorts of disputes including commercial disputes and state-to-state disputes.[3] Such popularity is based on the fact that arbitration provides both the courts and the arbitrating parties with valuable benefits.[4] By submitting their disputes to arbitration, parties are able to take their

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3 *Gary Born, INTERNATIONAL ARBITRATION: LAW AND PARCTICE, 2nd* edition, at p.1, Wolters Kluwer, 2016.

4 *Jessica Rodriguez, Enforcement of Annulled Arbitral Awards in the United States: Is a Return to Chromalloy Warranted? 34 Rev. Litig. 379, at 380 (2015)*

disputes before a forum other than the traditional litigation one and avoid the delay of different motions found in court proceedings such as depositions, summary judgements and motion to appeal.[5] This reduces the number of cases before the domestic courts which allow them to better deal with the cases before them.[6]

On the other hand, arbitration provides the parties with valuable benefits, most important is the freedom of the parties to agree to any provisions, within the arbitration agreement, to satisfy their needs in less formal and less adversarial settings.[7] It can be, in some cases, faster than litigation before courts.[8] Moreover, and based on the fact that arbitration is a "creature of contract", the parties enjoy the freedom to choose the applicable law, whether procedural or substantive, and to select their arbitrators, as they can choose individuals who are disconnected from both the subject matter of the dispute and their respective home state courts.[9] Further, parties can choose arbitrators with expertise both in international transaction and areas of the law relevant to the dispute.[10]

Another benefit of international arbitration is to provide the parties with the possibility of confidential, or at least private, dispute resolution mechanism as most national court proceedings are not

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5 *Id.*

6 *Id.*

7 *Edna Sussman, Why Arbitration? The Benefits and Savings, N.Y. St. B. J. Oct. 2009, at 20.*

8 *Id, at 22.*

9 *Rodriguez, supra note 3, at 380.*

10 *Sussman, supra note 6, at 21.*

confidential.[11] Among these benefits, enforceability of the arbitration agreements and awards is the most essential benefit for the parties. One of the most important objectives of legal regimes for international arbitration is to provide for enforceability of arbitration agreements and arbitral awards.[12] The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 "known as the New York Convention" states an obligation upon its contracting parties to recognize and enforce both arbitration agreements and arbitral awards.[13] The New York Convention also provides for the grounds under which the court of the enforcing state "may" refuse to recognize and enforce the said award.[14]

In fact, the benefits discussed, in addition to others, are very encouraging and promising for the parties to settle their disputes by arbitration, however, enforcement of an arbitral award in a foreign country is the most important benefit the parties seek. No doubt that the success of an arbitration process is based on the ability of the parties to enforce the arbitral award.

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11 *Born, supra note 2, at 13.*

12 *Gary Born, INTERNATIONAL COMMERCIAL ARBITRATION, 2n Ed. Vol. I, at p. 77, Walters Kluwer (2014).*

13 *The New York Convention Art. II stipulates that "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them....". Art. III states that "Each contracting state shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedures of the territory where the award is relied upon..."*

14 *The New York Convention, Art V.*

Once an arbitral award is rendered, the parties may have that award enforced or annulled by a domestic court, either in the same jurisdiction where arbitration took place or in a different jurisdiction.[15]The losing party may proceed to annul the arbitral award before the domestic courts of the country where the arbitration take place (seat of arbitration) where he/she may prevail and then the arbitral award shall be null. In that case, the annulled arbitral award may not be granted recognition and enforcement in the enforcing state.[16] Nonetheless, domestic courts in different jurisdictions have adopted a new approach contrary to what is provided under the New York Convention. In both France and the United States, domestic courts granted recognition and enforcement to arbitral awards which had been set aside by courts of the seat of arbitration.Both jurisdictions tried to establish an acceptable theory in order to justify the possibility to enforce an annulled arbitral award that has been set aside at the seat of arbitration.

The author would like to point out thatthis issue, subject discussion, is governed by two important Articles under the New York Convention:

First: Article V (1) (e) which provides that "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 recognition and enforcement is sough,

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[15] *Rodriguez, supra note 3, at 382.*

[16] *The New York Convention, Art. V (1) (e) provides that "recognition "may be refused" if the award has "set aside" by a competent authority of the country in which, or under the law of which, the award was made."*

proof that: 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."[17]

Second: Article VII (1) **of the same Convention states that "the provisions of the present Convention shall not affect the validity of multilateral or bilateral agreement concerning the recognition and enforcement of arbitral awards entered into by the Contracting nor deprive any interested party of any right he may 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."[18]**

According to one commentator, these two provisions have given arise to two different approaches when it comes to the recognition and enforcement of arbitral award annulled at their home jurisdiction; first is the classic approach which can be called "New York Convention enforcement standard" while the second approach, which based on Article VII of the Convention known as the more favored rule, shall be called "local enforcement standard."[19]

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17 *The New York Convention, Art. V (1)(e).*

18 *Id, Art VII (1).*

19 *Christopher Koch, The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience, 26(2) J. Int'l Arb. 267, 268 (2009). Christopher Koch borrowed the term "local enforcement standard" from Jan Paulsson who 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 standard.*

This paper examines the different approaches in both France and the United States discussing the justification behind granting annulled arbitral award recognition and enforcement in the light of recent case law in both jurisdictions. It also will help, humbly, to set some criteria for a proper treatment for annulled awards in other jurisdictions.

II. The French Approach

French courts have held, for a very long time, that an award which has been annulled at the seat of arbitration could be recognized in France.[20] Although France is a signatory state to the New York Convention, French courts have gone beyond the terms of the Convention by stating that annulment of an arbitral award in the rendering state does not constitute a ground for refusing enforcement of the said award in France.[21]France does not apply the Convention, when it comes to recognizing and enforcing arbitral awards, but it applies its local standard for enforcement, which it considers more favorable and advantageous to the enforcement of arbitral awards than the Convention.[22]

Under Article 1502 (Article 1520 of the New French Code of Civil and Commercial Procedures (NFCCP), the order enforcing a foreign award may appealed only in the following five cases:

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20 *Born, supra note 11, Vol. 3, at 3625.*

21 *Hamid G. Gharavi, Enforcement Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention, 6 J. Transnat'l L. & Pol'y 93, at 96 (1996).*

22 *Koch, supra note 18, at 269.*

(1) If the arbitrator decided in the absence of an arbitration agreement, or on the basis of a void or expired agreement;[23]

(2) If the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;[24]

(3) If the arbitrator decided in a manner incompatible with the mission conferred upon him;[25]

(4) If due process has not been respected;[26]

(5) If recognition or enforcement is contrary to international public policy.[27]

The FCCP does not provide annulment or suspension of an arbitral award in its place of origin as aground for appealing an enforcement order, therefore, such ground is not a reason to refuse enforcement of foreign arbitral awards in France.[28] By combining Article 1502 of FCCP with Article VII(1) of the New York Convention, the French courts can legally refuse to apply Article V(1)(e) of the Convention and can, instead, enforce an arbitral award annulled in the country in which, or under the law of which, it was

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23 *NOUVEAU C. PR. CIV. Art 1502 (1).*
24 *Id, art. 1502 (2).*
25 *Id, art. 1502 (3).*
26 *Id, art. 1502(4).*
27 *Id, art 1502(5).*
28 *Koch, supra note 18, at 270.*

made.[29] The French approach was the fruit of an evolution of cases which started in 1984.[30]

A. Societe Pabalk Trcaret v. Societe Norsolor

This case is considered the starting point for France's movement away from the New York Convention toward a local enforcement standard.[31] In *Norsolor, Societe Pabalk,* a Turkish company, entered into an agency agreement with *Societe Norsolor,* a French company, under which *Pabalk* was to receive commission for delivering certain products to a third party.[32] *Norsolor* terminated the agreement, and, claiming the unpaid commission and damages, *Pabalk* submitted the dispute to ICC Court of Arbitration.[33] In 1978, the arbitral tribunal issued an award against *Norsolor* applying "*Lex mercatoria*"[34] instead of the municipal law of either of the parties to the merits of the case, finding that *Norsolor* had breached its obligation of good faith.[35] However, since allocating damages for each head of claim was too difficult, the tribunal "evaluated in equity by way of global lump

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29 *Gharavi, supra note 20, at 97.*

30 *Koch, supra note 18, at 270.*

31 *Id.*

32 *Gharavi, supra note 3, at 97-98.*

33 *Id, at 98.*

34 *Lex mercatoria (merchant law) is a system of principles governing merchants in Europe during medieval times. Rodriguez, supra note 3, at footnote 78 (citing Michael Douglas, The Lex Mercatoria and the Culture of Transnational Industry, 13 U. Miami Int'l & Comp. L. Rev. 367, 369 (2006).*

35 *Koch, supra note 18, at 270.*

sum, the amount of the damages due to *Pabalk* ... the sum of 800,000 French francs."[36]

The arbitral award was set aside by the Vienna Court of Appealbased on that the arbitral 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."[37] The court also found that the tribunal had exceeded its mandate by awarding damages "in equity," thereby, assuming powers of amiable composition which the arbitration agreement did not give it.[38] On the other hand, *Pabalk* applied was granted a request for the enforcement of the award by the French lower court, however, *Norsolor* appealed the enforcement decision after the award was set aside by the Vienna Court of Appeal. [39] The Paris Court of Appeal *(cour d'appel de Paris)* refused to confirm the enforcement order in accordance with Article V(1)(e) of the New York Convention.[40] However, the French Court of Cassation reversed the decision of the Court of Appeal and held that the award was enforceable against *Norsolor.*[41]The French Court of Cassation based its decision on the ground that nothing in the French law authorizes refusal of recognition and enforcement of a foreign award that has been set aside.[42] The Court held that by simply refusing enforcement of the award under Article V(1)(e) of the Convention without examining whether under Article VII of the Convention that award could be enforced in

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[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Gharavi, supra note 3, at 98.*

France pursuant to French Arbitration law, the Paris Court of Appeal had violated Article VII of the Convention.[43]

In fact, this decision had increased the French "liberalism" in enforcing annulled arbitral awards; as the court held that French judges "have the duty, and not just the right, to apply the more-favorable-right provision of Article VII in enforcing arbitral awards, even where enforcement would be otherwise refused under Article V(1)(e) of the Convention.[44]

B. Societe Polish Ocean Line v Societe Jolasry

In 1993 the French Court of Cassation rendered another decision confirming its earlier approach and elaborated in the rational for recognition and enforcement of annulled arbitral awards,[45] applying the French approach in enforcing arbitral awards set aside at their place of origin.

In *SocietePolish Ocean Line v Societe Jolasry,*[46] a French company, *Jolasry*, obtained an award against *Polish Ocean Line.*[47] *Polish* appealed the award and the award was stayed pending annulment proceedings before the Polish courts.[48] The French company sought enforcement in France and the enforcement order was granted and confirmed by the Paris Court of

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43 *Koch, supra note 18, at 271.*
44 *Gharavi, supra note 3, at 97.*
45 *Born, supra note 11, at p. 3625.*
46 *Koch, supra note 18, at 271.*
47 *Id.*
48 *Id.*

Appeal.[49] ***Polish Ocean Line*** **appealed the order before the French Court of Cassation arguing that the award should not be enforced in France as long as it was suspended in Poland.[50] The court held that:**

"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 which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art V(1)(e) ... are not among grounds specified in French domestic arbitration law."[51]

In that case, the French court did not address the preclusive effect of the Polish decision, which set aside the arbitral award, instead, treating the recognition provision of Article 1502 of the FCCP as the sole relevant criteria to the decision.[52] Moreover, the French court in *Polish* took the rational of *Norsolor* case and expanded it one step further, as *in the Norsolor* decision, the French Court of Cassation acknowledged that Article V(1)(e) alone was not sufficient to deny the enforcement of an arbitral award.[53] In *Polish,* the court held that not only was Article V (1)(e) independently insufficient for denial of enforcement, but also that the "more favorable law" clause, Article VII (1), prevailed over Article V(1)(e). [54] Thus, the French domestic law applied.[55]

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49 *Id.*

50 *Id.*

51 *Id.*

52 *Born, supra note 11, at 3626.*

53 *Rodriguez, supra note 3, at 392 citing Koch, supra note 18, at 271.*

54 *Id.*

55 *Id.*

C. Societe Hilmarton v Societe OTV

In *Societe Hilmarton v. Societe OTV*[56], a contract made on December 12, 1980, between Hilmarton Ltd. ("Hilmarton"), an English consulting company, which agreed to assist Omnimum de Traitment et de Valorisation ("OTV"), a French company, in obtaining a public work contract in Algeria.[57] Swiss law governed the agreement between Hilmarton and OTV and the place of arbitration was Geneva.[58] The Swiss sole arbitrator rejected Hilmarton's claim based on that the contract between the parties violated a mandatory principles of Algerian law which prohibited the use and payment of intermediaries in the procurement of public works contracts.[59] However, in 1989, the Geneva Court of Appeal set aside the award, finding that the arbitrator's decision was arbitrary and could thus be set aside in accordance with Article 36(f) of the Swiss Concordat on Arbitration.[60]On the other hand, succeeded to have the award enforced in France and obtained an exequatur of the award from the Paris Court of First Instance on February 27, 1990,[61] Hilmarton appealed the said exequatur before the Paris Court of Appeal based on the annulment of the arbitral

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56 *Gharavi, supra note 3, at 100 citing Judgment of Nov. 17, 1989 (Societe Hilmarton v. Societe OTV), Cour de Justice de Geneve, 1993 REV. ARB. 315, 316, translated in XIX Y.B. COM. ARB. 214 (1994).*

57 *Id.*

58 *Koch, supra note 18, at 272.*

59 *Id.*

60 *Id.*

61 *Id.*

award by the Swiss courts.[62] The Paris Court of Appeal, on December 19, 1991 decided that:

"the provision of Art V (1)(e) of the Convention- according to which an 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 case, 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 of FCCP."[63]

The French Court of Appeal, resting upon *Norsolor* and *Polish Ocean Line,* determined that henceforth the enforcement of foreign awards in France would be no longer be governed by Article V(1)(e) of the New York Convention, but solely by the more "lenient" provision of the French domestic law as they result from Article 1502 of the FCCP.[64] This decision was confirmed by the French Court of Cassation on its decision on March 23, 1994, which added "a new twist to the debate" by providing that:

"lastly, the award rendered in Switzerland is an "international award" which is not "integrated" in the legal system of that State, so it remains "in existence" even if set aside and its recognition in France is not contrary to international public policy"[65]

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62 *Id.*

63 *Id, (citing judgment of Cour d'appeal (court of appeal), Paris, December 19, 1991, 19 y.B Com. Arb. 655-57 (1994).*

64 *Id.*

65 *Id*

The French Court of Cassation, by stating that the award in Switzerland was an international award which is not integrated into the legal order of Switzerland, took a resolute, if not adamant "internationalist" standard. [66] By other words, despite the fact that the parties had agreed that the place of arbitration is Switzerland and the Swiss law shall be applied, the French Court of Cassation considered this award as totally independent from the Swiss legal system. This award, once is rendered by the arbitrator, has no attachment to any legal order even to the legal order of the place where it was rendered.[67]

A second arbitration took place also in this case in which the tribunal rendered an award in favor of *Hilmarton*, but the French Court of Cassation held that the award of the second arbitration could not be enforced in France because of *res judicata.*[68]

D. Bechtel v Department of Civil Aviation of Dubai (DAC)

On February 20, 2002, a sole arbitrator rendered an award in favor *International Bechtel Co. ("Bechtel")*, a company registered in Panama, in a dispute against *the Directortate General of Civil Aviation of the Emirate of Dubai ("DAC").*[69] *Bechtel* requested enforcement of

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66 *Id.*

67 *Id.*

68 *Rodriguez, supra note 3, at 393.*

69 *Koch, supra note 18, at 274 (citing 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/=

the award in France. In October 2003, the Paris Court of First Instance issued an enforcement order.[70] In 2004, the UAE Court of Cassation in Dubai, annulled the arbitral award on the basis that the arbitrator had violated a mandatory procedural rule of the UAE by failing to swear in witnesses before they were heard.[71] *DAC* filed an appeal in the Paris Court of Appeal against the enforcement order issued by the Paris Court of First Instance.[72] It asked the Court of Appeal to recognize the decision rendered by the Dubai Court of Cassation which set aside the arbitral award rendered in favor of *Bechtel.*[73] During that time, UAE was not yet a member to the New York Convention, therefore, *DAC* based its case in 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.[74] Article 13 (1)(c) of the mutual enforcement treaty provides that a judicial decision can be recognized in France only once it can no longer be appealed in the UAE and is accordingly capable of enforcement in its country of origin.[75] Moreover, *DAC* argued that enforcement of the said arbitral award

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=153d6bd2-17f4-48a0-94b2-af4265abf8fc/article_Annulled_awards_v3.pdf>. (citing *Direction General de l'AviationCivile de l'Emirat de Dubai v Societe International Bechtel, case available at:<http://newyorkconvention1958.org/index.php?lvl=notice_display&id=169>)*

70 *Id.*

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

would constitute a violation to international public policy, a ground for refusal to grant recognition and enforcement of an international arbitral award under Article 1502 of the French Code of Civil Procedure.[76]

The Paris Court of Appeal rejected the submitted arguments because an award was not a judicial decision with the meaning of the said treaty.[77] Therefore, there was no need to exhaust all local instance in the UAE, mentioned under Article 13 (1)(c), before seeking enforcement in France.[78] Resting upon the same rational of *Hilmarton,* the Court of Appeal emphasized the fact the judicial effect of the annulment decision, issued by the Dubai Court of Cassation, did not have to be recognized or given any weight by the French Court of Appeal.[79]

E. Putrabali v Rena Holding

The position of the French Court of Cassation, in emphasizing that an international annulled arbitral award could be executed in France, has been reconfirmed by its decision in *Putrabali* case. In that case, an Indonesian company, *Putrabali,* had sold a shipment of pepper to a French company, *Rena Holding,* the latter refused to payment because the goods were lost at the sea.[80] *Putrabali* initiated arbitration proceedings in London under International General Produce Association rules (IGPA). [81] The arbitral tribunal issued a first award in favor of

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76 *Polkinhorne, supra note 68.*
77 *Koch, supra note 18, at 274.*
78 *Id.*
79 *Polkinhorne, supra note 68.*
80 *Koch, supra note 18, at 274.*
81 *Id.*

Putrabali, however, according to the IGPA rules, it is possible to appeal the award to a Board of Appeal which, on April 10, 2001 ruled that *Rena Holding* was excused from paying the price of the pepper.[82] This "First Award" was appealed to the English High Court on "points of law".[83]

On May19, 2003, the English High Court partially set aside the award under the English Arbitration Act of 1996, causing the IGPA Board of Appeal to render a second award "The Second Award" in favor of *Putrabali.*[84] In the meanwhile, *Rena Holding* presented the IGPA Board of Appeal's award dated April 10, 2001, absolving it of any obligations for recognition and enforcement in France.[85] On September 13, 2003, *Rena Holding* was granted an exequatur for enforcement from the Paris Court of First Instance.[86] The said exequatur was appealed, based on the annulment award issued by the London Court, before the Paris Court of Appeal which rejected the appeal on basis of Article 1502.[87] The French Court of Cassation affirmed the decision of the Court of Appeal stating that:

"an international arbitration 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

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82 *Id, at 275.*
83 *Id.*
84 *Id.*
85 *Id.*
86 *Id.*
87 *Id.*

country where its recognition and enforcement is sought"[88]

In other words, by this decision, the French Court of Cassation held that an international arbitral award has no connection to any domestic legal system; as such an award is considered a decision of "international" justice whose validity should be assessed in accordance with the applicable rules in the country where its recognition and enforcement is sought.[89] The Court of Cassation may have recognized the existence of an international arbitral legal order which exists "independently" of the national arbitral system under which the arbitral award was rendered.[90]Similar to previous decisions, the French Court of Cassation does not recognize judicial decisions which set aside the arbitral award; since such decisions have only local effects within the jurisdiction where it was rendered.

III. The American Approach

Although some the US courts welcomed the principle of the possibility to enforce annulled arbitral awards, however, these courts developed an analysis which less expansive than the French approach.[91] On the other hand, some case law in the United States appear to have "reject or limited" the possibility of enforcing an award that has been set aside in the seat of arbitration.[92] This section discusses the evolution of the

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88 *Id (citing Cass., June 20, 2007, 24 Arb, Int'L 295 (No. 2, 2008).*

89 *Polkinhorne, supra note 68.*

90 *Koch, supra note 18, at 275.*

91 *Born, supra note 11, at 3629.*

92 *Id.*

American case law in considering whether to recognize annulled awards.

A. Chromalloy v Arab Republic of Egypt

On July 31, 1996, the U.S. District Court for the District of Columbia issued its decision in *Chromalloy Aeroservices ("CAS") v The Arab Republic of Egypt ("Egypt")*[93] by which the US courts started to join the French courts in their approach to enforce annulled arbitral award.[94] *Chromalloy* was the first case before the US court to examine the possibility of enforcing an arbitral award which has been annulled in its place of origin.[95]

On June 16, 1988, Egypt and CAS entered into a contract under which CAS agreed to provide parts, maintenance, and repair foe helicopters belonging to the Egyptian Air Force.[96] Due to several delays in the work, on December 2, 1991, Egypt terminated the contract by notifying CAS representatives in Egypt.[97] On December 4, 1991, Egypt notified CAS headquarter in Texas of the termination.[98] On December 15, 1991, CAS notified Egypt by its rejection to the cancelation of the contract "and commenced arbitration proceedings on the basis of the arbitration clause contained in Article XII and Appendix E of the contract.[99] Both parties agreed to submit their disputes to arbitration in

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93 *939 F. Supp. 907 (D.D.C) 1996.*
94 *Koch, supra note 18, at 276.*
95 *Chromalloy, 939 F. Supp. 907, 911.*
96 *Id, at 908.*
97 *Id.*
98 *Id.*
99 *Id*

Cairo, Egypt, according to the Egyptian law.[100] The arbitration agreement stating that "*any disputes or differences arising from the contract would be referred to arbitration, the decision therefore being "final and binding" and not subject to "any appeal or other recourse."*[101]

On August 24, 1994, the arbitral tribunal ordered Egypt to pay to CAS over than $ 18 million and ordered CAS to pay to Egypt the sum of 606,920 sterling.[102] After the award was render, on October 28, 1994, CAS sought recognition and enforcement of the award before the U.S. District Court for the District of Columbia, however, On March 1, 1995, Egypt filed an appeal before the Egyptian Court of Appeal seeking nullification of the award.[103] On December 5, 1995, the Cairo Court of Appeal issued an order nullifying the arbitral award due to the fact that the arbitral tribunal wrongfully applied the Egyptian private law rather than the administrative law.[104] On July 31, 1996, the U.S. District Court for the District of Columbia granted CAS an order to enforce the arbitral award which had been annulled in Egypt.

In its decision, the District Court, applying the French approach, addressed, ***firstly***, the application of Article V(1)(e) of the New York Convention to the case emphasizing the permissive nature of the said Article. It provided:

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100 *Id, at 912.*

101 *Stephen T. Ostrowski& Yuval Shany, CHROMALLOY: United States and International Arbitration at the Crossroads, 73 N.Y.U.L Rev. 1650, at 1666-1667 (1998)*

102 *Chromalloy, 939 F. Supp. 908*

103 *Id.*

104 *Id.*

"in the present case, the award was made in Egypt, under the laws of Egypt, and has been nullified by the court designated by Egypt to review arbitral awards. Thus, the court "may, at its discretion, decline to enforce the award."

The court then moved to discuss the mandatory nature of Article VII of the New York Convention, known as the "more favorable right's provision", which states that "*the provisions of the present Convention shall not ... deprive any interested party of any right he may 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.*"[105] The court found itself obliged by Article VII of the Convention rather than Article V(1)(e) which the court found not mandatory. The court relied upon Article VII which enable parties to utilize provisions of national law that are more favorable than those in the New York Convention.[106]

Secondly, the court turned to U.S. law, specifically Section 10 in Chapter 1 of the Federal Arbitration Act[107] ("FAA") which lists the grounds for setting aside an arbitral award. The court found that these grounds are limited and none of them applied, therefore, enforcement of the arbitral award was

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105 *Id, at 909.*

106 *Robert C. Bird, Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of A "New" New York Conventon, 37 N.C. J. Int'l L. & Com. Reg. 1013, at 1031 (2012).*

107 *9 U.S.C, Sec. 10*

"proper" according to the U.S. law.[108] Section 10 of Chapter 1 of the FAA states that an arbitration awards are presumed to be binding, and may only be vacated by a court under very limited circumstances:

(a) If the award was procured by corruption, fraud, or undue means.

(b) Where the was evident partially or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) If the award was made in "manifest disregard of the law."

The grounds under Section 10, Chapter 1 of the FAA provide "an enforcement standard" that did not consider annulment of an award under the law of the seat of arbitration as a ground for nullifying the award.[109] Since the Cairo Court of Appeal based its

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[108] *Johnthan I. Blackman & Ellen London, Respecting Awards Annulled at the Seat of Arbitration: The Road From Chromalloy to Termorio, 63-OCT Dis. Resol. J. 70, at 73.*

[109] *Koch, supra note 18, at 277.*

annulment decision on the fact that the arbitrators had misapplied the law to the subject matter of the dispute, since they had applied the Egyptian private law and not the administrative law, the District Court examined this fact under the "manifest disregard of law" under the FAA. Manifest disregard of law may be found if "the arbitrator(s) understood and correctly stated the law, but proceeded to ignore it.[110]The court found that the application of the private law rather than the administrative law is considered, at most, a mistake of law, and not a manifest disregard of the law.[111] The court added:

> *"the arbitrator in the present case made a procedural decision that allegedly led to a misapplication of substantive law. After considering Egypt's argument that Egyptian administrative law should govern the contract, the majority of the arbitral panel held that it did not matter which substantive law they applied –civil or administrative. At worst, this decision constitutes a mistake of law, and thus is not subject to review by this court"*[112]

Thirdly, the court addressed whether it was required to recognize the decision issued by the Cairo Court of Appeal, as a valid foreign judgement. In fact, the court did not recognize that decision as a valid foreign judgement. It based its decision on the assumption that the Egyptian court illegally assumed

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110 *Chromalloy, 939 F. Supp. 907, 910, citing Kanuth v. Prescott, Ball, &Turben Inc., 949 F.2d 1175, 1179 (D.C.Cir.1991).*

111 *Id, at 910-911, citing Al-Harbi v. Citibank, 85 F.3d, 680, 683 (D.C.Cir. 1996).*

112 *Id, at 911.*

jurisdiction over the award since both parties agreed not subject the award to appeal or any other recourse.[113] However, since the decision had been issued by the Cairo Court of Appeal, the court had to examine the possibilities for recognizing this decision as a valid foreign judgement.[114] The requirement for enforcement of a foreign judgment are that there be (i) proper service of process, and (ii) the original claim did not violate public policy.[115] The court found that the annulment decision, issued by the Egyptian court, violate the U.S. public policy.[116] In determining the meaning of U.S. public policy, the court mentioned that "*judges have no license to impose their own brand of justice in determining applicable public policy.*"[117]The court, citing *Mitsubishi v. Chrysler*[118],heldthat there is an "emphatic federal policy in favor of arbitral dispute resolution."[119] Moreover, there is a strong public policy behind judicial enforcement of binding arbitration clauses.[120] Therefore, recognizing the decision rendered by the Egyptian court, which is considered by the U.S. court a violation to the arbitration agreement between both parties, would violate the clear U.S. public policy.[121]

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113 *Koch, supra note 18, at 277.*

114 *Id.*

115 *Chromalloy, 939 F. Supp. 907, 913 citing Tahan v. Hodgson, 662 F.2d 862, 864 (D.C.Cir. 1981)*

116 *Id.*

117 *Id, citing Northwest Airlines Inc., v. Air Line Pilots Association, Int'l, 808 F.2d 76, 78 (D.C.Cir.1987).*

118 *Mitsubishi v. Solar Chrysler-Plymouth, 473 U.S. 614, 631.*

119 *Chromalloy, 939 F. Supp. 907, 911.*

120 *Id.*

121 *Id.*

B. Yusuf Ahmed Algahnim & Sons v. Toys "R" Us

A year after *Chromalloy*, the US courts faced a very important issued regarding the "interplay" between the New York Convention and the provisions of the FAA. This issue was examined in a decision rendered by the U.S. Court of Appeal for the Second Circuit on September 10, 1997, in the case of *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us.*[122]

This case concerned a dispute between a Kuwaiti company, Yusuf Ahmed Alghanim & Sons *("Algahnim")* and a U.S Company, *Toys "R" Us Inc., ("Toys "R" Us)*. On November 1982, the two parties concluded a License and Technical Assistance Agreement (the "agreement").[123] According to this agreement, *Toys "R" Us"* granted *Alghanim* a limited right to open Toys "R" Us stores in several countries in the Middle East using its trademarks.[124]From 1982 to December 1993, *Alghanim* only opened four stores all in Kuwait.[125]Due to disagreement between the parties, on July 20, 1992, *Toys "R" Us* terminated the agreement sending *Alghanim* notice of non-renewal statin that the agreement would terminate on January 31, 1993. *Alghanim*refused the termination of the agreement and considered it a breach of the contract between the parties.[126] On December 20, 1993, *Toy "R" Us* initiated arbitration proceedings, under the auspices of the American Arbitration Association (AAA) seeking a declaration that the agreement was terminated on

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[122] *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc., 125 F.3d 15 (2nd Cir. 1997).*

[123] *Id, at 17.*

[124] *Id.*

[125] *Id.*

[126] *Id, at 18.*

December 31, 1993. *Alghanim* counterclaimed the breach of the contract by *Toys "R" Us.*[127] An arbitration was held in New York and the arbitral tribunal issued an award in favor of Alghanimof $ 46.44 million plus interest. *Alghanim* sought recognition and enforcement of the award, under the New York Convention, before the district court, while *Toys "R" Us* cross-moved to vacate the award under Section 10 of the FAA, arguing that the award was clearly irrational, in manifest disregard of the law and in manifest disregard of the agreement.[128] In its decision, the district court concluded that "the Convention and the FAA afford overlapping coverage, and the fact that a petition to confirm is brought under the Convention does not foreclose a cross-motion to vacate under the FAA, and the Court will consider *Toys "R" Us* cross-motion under the standards of the FAA."[129]Moreover, the Court of Appeal, in its decision, discussed the role of the domestic courts in both the state of the seat of arbitration and the enforcing state as follow;

"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 state where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award was 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

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[127] *Id.*
[128] *Id.*
[129] *Id.*

equally clear that when an action of 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."[130]

The words of this decisions provide that Article V(1)(e) of the Convention is "positive directive" to courts at the seat of arbitration to apply domestic arbitration law grounds for annulment of foreign arbitral awards governed by this Convention.[131] After this award,U.S. courts have accepted that the Convention itself obligates the United States to apply its domestic arbitration law standards of annulment when there is a motion to vacate a Convention award that was issued by a tribunal sitting in the United States.[132] Although the court decision in *Toys "R" Us*, did not directly address the issue of the possibility to enforce annulled arbitral awards in the United States, however, the court addressed the issue of whether the FAA had a role to play defining the standards for enforcement under the New York Convention.[133] The court's

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130 *Id, at 23.*

131 *Marc J. Goldstein, Annulled awards in the U.S. Courts: How Primary is "Primary Jurisdiction?", 25 Am Rev. Int'l Arb. 19, 22 (2014).*

132 *Id, at 23. Citing Gulf Petro Trading Co. v. Nigerian Int'l Petroleum Copr., 512 F. 3d 742, 746 (5th Cir. 2008); TermoRio S.A.E.S.P. v. Electranta S.P., 487 F.3d. 928, 935 (D.C. Cir. 2007); KarahaBodas Co., LLC v. Perusahaan PertambanganMinyak Dan Gas Bumi Negara, 346 F.3d. 274, 287 (5th Cir. 2004); China Minmetals Materials Import & Exports Co. v. Chi Mei Corp., 334 F.3d 274, 285 (3d Cir. 2003); Thai-Lao Thailand (Thailand) Co. v. Government of The Lao People's Democratic Republic, 2014 WL 476239 at * 3 (S.D.N.Y Feb, 2014).*

133 *Koch, supra note 18, at 280.*

decision provided that the Convention states the exclusive grounds for not enforcing foreign awards, thus, excluding the application of any implicit grounds under Section 10 of FAA.[134] In this regard, *Toys "R" Us* decision can be considered in contrary to *Chromalloy* decision which attempted to introduce FAA as more favorable local standard for enforcement.[135]

C. Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd.

After *Toys "R" Us* decision, The U.S. Court of Appeal, the Second Circuit, discussed the issue between hands and rendered a decision, in *Baker Marine* case, contrary to what *Chromalloy* had concluded before. Inthis case, Baker*Marine, Chevron & Danos,*[136]are corporations involved in Nigeria's oil industry.In September 1992, Baker Marine and Danos entered into a contract to bid to provide barge services for Chevron.[137] Baker Marine agreed that it would provide local support, while Danos agreed it would provide management and technical equipment. The bid by Baker Marine and Danos was successful, and in October 1992, the two companies entered a contract with Chevron to provide barge services.[138] Later, Baker Marine alleged that Chevron and Danos violated the contracts.[139] The dispute was submitted by parties to arbitration before panels of arbitrators in Lagos,

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134 *Alghanim v. Toys "R" Us, supra note 121, at 20,21.*

135 *Koch, supra note 18, at 280.*

136 *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, 195 (2nd Cir. 1999).*

137 *Id, 195.*

138 *Id.*

139 *Id.*

Nigeria. In 1996, two arbitral awards were rendered in favor of Baker Marine against both Chevron and Danos, one of award of $ 2.23 million in damages against Danos, the second award was about $ 750,000 in damages against Chevron.[140]

Baker Marine sought recognition and enforcement of both award in the Nigerian Federal High Court, while the Chevron and Danos appealed to the same court to vacate the arbitral awards.[141]The Nigerian court had annulled both awardsconcluding that Danson's award was unsupported by the evidence, while it found that the arbitrators in Chevron's award had improperly awarded punitive damages, gone beyond the scope of submissions and incorrectly admitted parole evidence.[142] In August 1997, Baker Marine sought enforcement and recognition of both awards, before the District Court of the Norther District of New York, under the United States law implementing the Convention (Chapter 2 of the FAA, Sections 201-209). The court denied Baker Marine's petition concluding that under the Convention and the 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."[143]Baker Marine appealed the decision of the district court before the U.S. Court of Appeal, Second Circuit, relying upon two basic arguments; (1) the district court decision failed to give effect to Article VII of the Convention; and (2) Baker Marine had the right to have the awards recognized under the more

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140 *Id, 196.*
141 *Id.*
142 *Id.*
143 *Id.*

favorable provisions under FAA (Baker Marine was invoking application of the local standard for enforcement). In rejecting the first argument, the U.S. Court of Appeal stated that the parties had contracted in Nigeria and their disputes shall be settled in accordance with Nigerian laws.[144] Moreover, the governing agreements "make no reference" to the United States law and nothing suggests that the parties intended to apply the United States domestic arbitral law to their disputes.[145] Citing Albert Jan van den Verg[146], in footnote 2, the court added that:

"as a practical matter, mechanical application of the domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regular produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the award under the domestic law 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 enforcement."[147]

The *Baker Marine* court rejected the Article VII approach adopted by *Chromalloy* decision.[148] Since the parties agreed to arbitrate their disputes in Nigeria, and

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144 *Id, at 197*

145 *Id.*

146 *Albert Jan van den Berg, the New York Arbitration Convention 1958: Towards a Uniform Judicial interpretation 355 (1981).*

147 *Baker Marine, 191 F. 3d 194, at 197.*

148 *Koch, supra note 18, at 281.*

in accordance with the Nigerian law, there was no reason to apply the FAA provisions to this context.[149]

Baker Marine's second argument was based on the permissive language of Article V(1)(e) of the New York Convention, arguing that this use of the permissive "may" rather than mandatory term, implies that the court might have enforced the awards, notwithstanding the Nigerian judgments vacating them.[150] The court's answer was short and simple, as it stated that "*Baker Marine has shown no adequate reason for refusing to recognize the judgments of the Nigerian courts.*"[151] To continue its rational behind its decision in, in footnote 3, the court discussed the difference between Baker Marine, where recognition and enforcement were denied, and *Chromalloy* case, where enforcement was granted and on which Baker Marine was relying.According to the U.S. Court of Appeal, there are two basic differences:

(1) The *Chromalloy* case involved a U.S. company while *Baker Marine* did not.

(2) In *Chromalloy,* since the parties had agreed not to subject the arbitration award to "any appeal or other recourse",the Egyptian government violated its obligation by submitting the arbitral award to the Cairo Court of Appeal, which is not the case in *Baker Marine,* as Chevron and Danos did not violate any promise in appealing the arbitration award within Nigeria, therefore, recognition of the Nigerian judgements in this

149 *Id.*
150 *Baker Marine, 191 F. 3d 194, at 197*
151 *Id.*

case does not violate the United States public policy.[152]

The court in *Baker Marine* specified that the decision in *Chromalloy* applies only 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."[153]

D. Martine I. Spier v. CALAZATURIFICIO TECNICA S. p. A.

On October 22, 1999, two months after *Baker Marine,* the U.S. District Court for the Southern District of New York issued a decision, discussing the question of whether it should enforce an award that had been set aside by the Italian courts, in *Spier v. CALAZATURIFICIO TECNICA S. p. A.*[154] In this case, Martin I Spier, an American citizen, entered into a consulting agreement with an Italian company, *CALAZATURIFICIO TECNICA ("Tecnica"),* regarding the manufacture of plastic footwear and ski boots.[155] Later, a dispute arose between both parties after Spier alleged that the Italian company created a new footwear production system based on Spier's expertise.[156] The dispute was submitted to arbitration, according to the agreement between the parties, in which the tribunal awarded *Spier* one billion lire, plus interest.[157] *Tecnica*

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[152] *Id. See also Koch, supra note 18, at 281; Blackman & London, supra note 107, at 74.*

[153] *Rodriguez, supra note 3, at 400.*

[154] *Martin I. Spier v. CALAZATURIFICIO TECNICA S. p. A, 71 F. Supp. 2d 279 (S.D.N.Y 86 Civ. 3447 (CSH) 1999).*

[155] *Id, at 280.*

[156] *Id, at 281*

[157] *Id.*

move to annul the award before the Italian courts. The three courts deciding the issue have held that the arbitral award could not stand.[158]On the other hand, *Spier* brought an action before U.S. courts to recognize and enforce the arbitral award, while *Tecnica* defended against *Spier's*petition, through denying enforcement under the Convention.[159] The U.S. District Court of New York denied *Spier's* petition for enforcement. In fact, the district court decision in *Spier's*was echoing previous cases rationale,*Alghanim* and *Baker Marine.*In its decision, the court concluded that the FAA did not apply to *Spier's*claim, finding itself "constrained" by Article V (1)(e).[160]The court stated that, unlike *Alghanim,* the court was requested to enforce an award which was rendered in Italy, therefore, the arbitral award, in this case, is considered a foreign award not an American "non-domestic" award.[161] Thus, FAA does not apply since recognition and enforcement of foreign arbitral award are governed by Article V of the Convention.[162]

In addition, *Spier* attempted to apply *Chromalloy* rationale and have the Italian arbitral award recognized by application of the "most favorable" standard of the FAA, however, the reject that argument holding that:

"*Spier seek to apply United States arbitral law in order to escape the Italian courts' nullification of an Italian award. The effort cannot survive the court of appeals' observations in Yusuf that under the*

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158 *Id.*
159 *Id, at 282-83.*
160 *Id, at 285.*
161 *Koch, supra note 18, at 282.*
162 *Id.*

Convention "the state in which, or under the law of which, the ward 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."[163]

The court also stated the differences between *Spier* and *Chromalloy* on which *Spier* was relying to have his arbitral award enforced within the United States. Although the court stated that in this case *Spier* is an American citizen who seeking enforcement of an arbitral award in the United States, however, the court highlighted the differences between both cases. In *Chromalloy,* the action of the Egyptian government, in seeking appeal of the arbitral award, considered a violation to the agreement between the parties.[164] This circumstance "is singled out as violating the American public policy articulated in FAA, thereby justifying the district court's enforcement of the Egyptian award."[165]

E. TermoRio v. Electrana

Although the court decision in this case did not follow the rationale of *Chromalloy,* however, this decision did reshape *Chromalloy's* analysis in supporting enforcement of annulled arbitral award. This decision was rendered by the U.S. Court of Appeals for the District of Columbia Circuit on May 25, 2997, in the case of *TermoRio& leaseCo Group v. Electrana S.P. et al.*[166] In this case *TermoRio,* which was a wholly owned subsidiary of LeaseCo Group, an

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[163] *Spier, supra note 153, at 288.*

[164] *Id, at 287*

[165] *Id.*

[166] *TermoRio S.A. E.S.P. & LeaseCo Group, LLC v. Electrana S.P., et al., 487 F.3d 928 (D.C. Cir 2007).*

Oregon corporation, and *Electrana* entered into an agreement by virtue of which *TermoRio* had an obligation to generate energy, and *Electrana* had an obligation to buy it.[167] *Electrana* failed to buy power from *TermoRio* and breached the agreement.[168] Consequently, the parties submitted their dispute to arbitration, under the ICC rules, according to the arbitration agreement between them.[169] The arbitral tribunal, which seated in Barranquilla, Colombia, determined that *Electrana* had breached the contract and ordered *Electrana* to pay *TermoRio* an award of $ 60.3 million.[170] *Electrana* sought to have the award vacated before the Columbian Council of State which set aside the award. the Colombian Council of the State reasoned that the arbitration had to be conducted in accordance with Colombian law, and Colombian law in effect as the date of the agreement did not expressly permit the use of ICC procedural rules in arbitration.[171] However, *TermoRio* sought enforcement of award before the U.S District Court for the District of Columbia. The district court denied enforcement and the Court of Appeals affirmed that decision.[172] In its decision the Court of Appeals rejected the *Chromalloy* approach which *TermoRio* had argued stating that:

"The Convention does not endorse a regime in which a secondary States routinely second-guess the judgement 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

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[167] *Id, at 930.*
[168] *Id, at 931.*
[169] *Id.*
[170] *Id.*
[171] *Id.*
[172] *Id, at 932.*

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 jurisdiction State vacating an arbitration award. It takes much more than a mere assertion that the judgement of the primary State. "offends the public policy" of the secondary State to overcome a defense raised under Article v (1)(e)"[173]

The Court of Appeals in its decision noted that the Colombian court was "indisputably" a "competent authority' in Colombia, which was the primary jurisdiction (the courts of the state of seat of arbitration).[174]Moreover, it stated that nothing is the record indicated to the court that Colombian's court proceedings were "tainted" or that its judgement was "other than authentic."[175] Moreover, citing *Baker Marine case,* the court provided that *TermoRio* had no cause of action to enforce the award in a secondary jurisdiction based on the FAA or the New York Convention.[176]

The court, significantly, established a test according to a judgement for of annulment is "unenforceable as against public policy to the extent that is "repugnant to fundamental notions of what is decent and just in the state where enforcement is sought."[177] The court concluded, applying this test, that there is no basis for ignoring the Colombian court's

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[173] *Id, at 937.*

[174] *Id, at 935.*

[175] *Id. See alsoBlackman & London, supra note 107, at74.*

[176] *Id.*

[177] *Id, at 938 citing Tahan v. Hodgson, 662 F. 2d. 862, 864 (D.C. Cir. 1981).*

judgement annulling the award.[178] Moreover, as the other courts had discussed, the D.C. Circuit discussed the differences between *Chromalloy* and *TermoRio,* stating that the *Chromalloy* effect is only limited to the case in which there is a violation of express contractual language prohibiting an appeal of awards.[179] This decision seems to have "swung" from local enforcement standard under *Chromalloy* to a strict application of Article V (1)(e) of the New York Convention.[180]

F. COMMISA v PEMEX

Once again, the U.S courts were faced by the question whether the they should enforce an arbitral award that had been annulled by the courts of the primary jurisdiction. In fact, this decision was different from what was applied before the domestic courts in the United States. Significantly, the U.S. courts decided to grant recognition and enforcement for an award which had been set aside in a primary jurisdiction. Although the effect of that decision was similar to *Chromalloy,* however, the court in that case developed a new rationale which is different from *Chromalloy.*

This case was between a State-owned Petroleos Mexcanos ("PEMEX"), based in Mexico City, and COMMISA, a Mexican corporation a subsidiary of KBR, Inc., a company incorporated in Delaware and headquartered in Huston, Texas.[181] The two parties

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[178] *Blackman & London, supra note 107, at 75.*

[179] *TermoRio, supra note 165, at 937-38.*

[180] *Koch, supra note 18, at 287.*

[181] *CORPORACION MEXICANA DE MANTENIMIENTO INTEGRAL, S. DE R.L. DE C.V., v. PEMEX-EXPLORACION Y PROCDUCCION, 962 F.Supp. 2d 642, 644 (S.D.N.Y 2013).*

concluded an agreement, in October 1997, for COMMISA to build and install two offshore natural gas platforms in the Gulf of Mexico.[182] This agreement includes, not only but also, several terms such as (i) a clause providing that the contract is governed by the Mexican law; (ii) a clause providing for any dispute to be settled by arbitration conducted in Mexico City in accordance with the Conciliation and Arbitration regulations of the International Chamber of Commerce (ICC); and (iii) a clause allowing PEMEX to rescind the contract if COMMISA failed to comply with certain obligations under the contract.[183] At the time the contract was concluded between the parties and at the time controversies arose, the PEMEX enabling statute authorized PEMEX to enter into arbitration agreements with private contractors.[184] After failure to reach an agreement through conciliation, COMMISA filed a demand for arbitration with the ICC.[185] On December 16, 2004, PEMEX notified COMMISA that it was proceeding by administrative rescission.[186] In response, on December 23, 2004, COMMISA filed a petition for an indirect *amparo* (a judicial challenge to the validity of the constitutionality of acts of a government authority)[187] before the Mexican courts alleging that PEMEX administrative rescission was untimely and that the statutes on which it was based were unconstitutional and inapplicable to the parties'

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[182] *Id.*

[183] *Id.*

[184] *Id, at 645.*

[185] *Id.*

[186] *Id.*

[187] *Id, footnote 5, the court citing Michael Taylor, Why Do Rule of Law in Mexico? Explaining the Weakness of the Mexican Judicial Branch, 27 N.M. L, Rev. 151, 151 (1997)*

dispute.[188] After trials before several courts, on February 23, 3007, the court held that PEMEX had properly followed the administrative rescission statutes and that the rescission was timely.[189] While the *amparo* proceedings unfolded, the ICC tribunal was formed according to COMMISA' demand.[190] After initiation of the arbitration proceedings between both parties, there were changes and modification to the Mexican law. Under a new law took effect on December 2007, the litigation relating to the issue of compliance with the requirements of public contracts was to be litigated in special administrative court which means that lawsuits regarding administrative rescission would be litigated before domestic administrative court.[191] A second statutory change took effect on May 28, 2009, addressed the arbitrability of administrative rescission, according to which, all cases that challenged administrative rescission, that occurred after May 28, 2009, could not be arbitrated.[192]

On December 16, 2009, the ICC tribunal rendered an award in favor of COMMISA of more than $ 280 million.[193] Consequently, COMMISA filed a petition to confirm the award which was granted on November 2, 2010.[194] With the litigation initiated by COMMISA to confirm the award, PEMEX sought nullification of the ICC award before the Mexican courts.[195] On September 21, 2011, a Mexican court

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[188] *Id, at 645-46.*
[189] *Id.*
[190] *Id.*
[191] *Id, at 647.*
[192] *Id, at 648.*
[193] *Id.*
[194] *Id, at 649.*
[195] *Id.*

issued an order nullifying the ICC arbitral award due to the lack of jurisdiction of the ICC tribunal. The court based its decision on the new law issued on May 2009, prohibited arbitrating disputes regarding administrative rescission.[196] The issue was brought before the U.S. Court for the Southern District of New York and on August 27, 2013 the district court hold that the ICC award could be enforced despite the Mexican annulment.[197]As mentioned before, although the result of PEMEX case decision led to the same results as *Chromalloy* which is enforcement of annulled arbitral award, however, the *PEMEX* decision had a different rationale than *Chromalloy*. In its decision, the court was resting upon *TermoRio* case. It stated that "*under the standard announced in TermoRio, the decision violated "basic notion of justice."*[198] The violation of "basic notion of justice" occurred when the Mexican court applied a law that came into effect after the parties entered into their contract and initiation of the arbitration proceedings.[199]The circuit court, affirmed by the district court, stated that there may be circumstances where an arbitral award should be confirmed despite a judgment of nullification in the primary jurisdiction.[200] Such circumstance, according to the court citing *TermoRio*, exist only when such judgement is "repugnant to fundamental notions of what is decent and just in the United States."[201] The decision adopted what is called "public policy gloss" on Article V(1)(2) of the New York Convention in order to

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[196] *Id, at 650.*
[197] *Id, at 661.*
[198] *Id, at 657 citing TermoRio, 487 F. 3d at 939.*
[199] *Id, at 659-60.*
[200] *Id, at 656.*
[201] *Id. Citing TermoRio, 847 F. 3d, at 937*

leave the door open to enforce annulled arbitral award in case nullification judgement violates "basic notion of justice".

G. Thai-Lao Lignite v Government of Lao

This case is the most recent case which examined the issue of enforcement of annulled arbitral awards. The court in that case applied *Pemex's* "basic notion of justice" standard. In this case, a foreign mining companies (*"Thai-Lao Lignite &Hangsa Lignite (Laopdr)"*) requested recognition and enforcement of Malaysian arbitral award against the government of Laos which was granted by the District Court and then affirmed by the U.S. Second Circuit Court of Appeals.[202]However, the arbitral award in question was annulled by the competent court in Kuala Lumpur.[203]In its decision, the court stated that the courts in a secondary jurisdiction should not enforce an arbitral award vacated by a court with a primary jurisdiction over the award, however, still there are certain circumstances in which enforcement of the annulled award may be appropriate, meaning in case of violation of notion of justice.[204] The court went to examine whether if there was a violation to "basic notion of justice" during annulment of the award. The court hold that "the alleged errors Petitioners point out in the proceedings before the Malaysian courts and in the

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202 *Thai-Lao Lignite (Thailand) Co., Ltd. V. Government of the Lao People's Democratic Republic, 2014 WL476239 (S.D.N.Y Feb. 6, 2014).*

203 *Goldstein, supra note 130, at 28.*

204 *Id, at 29.*

judgement of those court do not rise to the level of violating basic notion of justice ..."[205]

IV. The French or the American Approach?

Both, the French and American approaches, grant recognition and enforcement of arbitral awards set aside at their place of origin. However, there are some differences between both jurisdiction regarding the rationale behind granting enforcement is such cases. While the French courts seem to have a "numerous appetite" to enforce annulled arbitral awards, the American courts do not seem to have such approach, as they developed, through deciding multiple cases, a unique standard for enforcing annulled arbitral awards.

First, **the French courts' approach basically based on several principles, one of them is Article VII of the New York Convention, known as "more favorable right"provision, which states that the New York Convention 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 treaties of the country where such award is sought to be relied upon." Meaning that the Convention does not affect the validity of other treaties or domestic laws which will facilitate recognition and enforcement of foreign arbitral award and make them easier.[206]**

The domestic French law concerning arbitration is the New French Code of Civil Procedures, basically Article 1520, does not provide that annulment of an

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[205] *Id.*

[206] *Albert Jan van den Berg, Y.B. Com. Arb., Vol. XXVIII, p. 671-74 (Kluwer Law; Kluwer Law International 2003).*

arbitral award at the seat of arbitration could be a ground for refusing enforcement of the said award. Therefore, the French courts can legally refuse to apply Article V(1) (e) of the New York Convention, according to which an annulled arbitration award may not be enforced, and instead applying its own domestic law to allow enforcement. As mentioned earlier, such mechanism is called enforcement according to "Local Enforcement Standard"[207]In *Norsolor*[208]case, the French Court of Cassation applied that standard stating that the French judges have, not only the right, but the duty to apply Article VII(1) in enforcing a foreign arbitral award, even where enforcement would otherwisebe refused under Article V(1)(e) of the Convention.[209]The French courts' approach was supported by several commentators. Professor Emmanuel Gillard stated that "as per its Article VII, the Convention sets only a minimum standard (for recognition and enforcement). States can always be more liberal ... The number of cases referring to the New York Convention in French law is scarce precisely because the ordinary rules governing the enforcement in France are more liberal than those of the Convention and are routinely applied without any need to refer to the Convention."[210]

This is the basic philosophy for the French approach which encourages the application of the domestic law, which is more favorable, rather than the

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[207] *Supra note 18.*

[208] *Supra note 30.*

[209] *Gharavi, supra note 3, at 97.*

[210] *Emmanuel Gaillard, The Urgency of Not Revising the New York Convention, in 50 YEARS OF THE NEW YORK CONVENTION, ICC CONGRESS SERIES NO. 14, AT 689, 691 (Albert Jan van den Berg ed., 2009).*

provisions of the Convention, under which an annulled arbitral award could be refused. However, this approach should not be adopted as a model since it leads to some negative consequences.[211] In his commentary, Albert Jan ven den Berg pointed out:

"A losing party must be offered the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant could obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States."[212]

<u>Second:</u> In trying to avoid the res *judicata* effect of judgments which set a side arbitral awards, in the country in which, or under the law of which the award was made, the French courts went to state the arbitral award issued in the seat of arbitration (primary jurisdiction) is not "integrated" in the legal system of the country of the seat of arbitration and remains in existence even if such award was nullified in the seat of arbitration.[213] Stating that, the French courts consider the arbitral award as "international" which has no connection or roots to the seat of arbitration. Since the arbitral award is issued in international arbitration proceedings, it will be "delocalized" when it is rendered

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[211] *Gharavi, supra note 3, at 100.*

[212] *Baker Marine, 191 F. 3d 194, at 197. Citing Albert Jan van den berg, the New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 355 (1981).*

[213] *Koch, supra note 18, at 272.*

by the arbitral tribunal."[214] Therefore, to the French courts, the fact that the parties agree to arbitrate in certain country has no importance in the courts' consideration.[215] As for domestic judgments setting aside arbitral awards, the French courts consider such judgments "cannot be made the object of recognition in France" since they do not have "international effects because they apply only to certain territorial sovereignty."[216] On the other hand, some scholars argue that courts of the enforcing state should refuse to grant recognition and enforcement to arbitral awards annulled at the seat of arbitration simply because annulled arbitral awards no longer exist.[217] Thus, enforcing an arbitral award which does not exist would be against public policy in the enforcing state.[218]

On the other hand, the American courts, under certain circumstances, grant enforcement and recognition to arbitral awards, which were annulled in the country in which, or under the law of which, the award was made. However, it should be noted that American approach is more developed than the French approach. While French courts enforce annulled arbitral awards in a very liberal way, the American court, after *Chromalloy*, started to justify more clear and effective standard. The *Chromalloy* decision was an American decision rendered in a French "flavor". This decision was subject to a broad discussion and different

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[214] *Id, at 273.*
[215] *Id.*
[216] *BECHTEL case, Koch, supra note 18, at 274.*
[217] *Gharavi, supra note 3, at 104, citingP. Sanders, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 6 NETHERLAND Int'l L. Rev. 43, 55 (1959).*
[218] *Id.*

commentators criticized it specially in applying Section 10 of the FAA to recognition of a foreign arbitral award. The court's decision in *Chromalloy* adopted the French view in applying the domestic law through Article VII, which does not prevent enforcement of annulled arbitral awards, rather than applying Article V (1)(e) of the Convention. In *Chromalloy,* the situation was different, as the New York Convention is the "exclusive source in the domestic law on the question of recognition and enforcement of foreign awards.[219] Moreover, the district court did not put into consideration the Congress' decision in adopting the New York Convention within Chapter Two of the FAA, which was to make Chapter Two is the exclusive regime for U.S. recognition and enforcement of arbitral awards subject to the Convention.[220] FAA chapter Two is, in fact, the U.S. domestic law applicable to foreign law, and Chapter Two expressly reduces the role of Chapter One, so that "it applies only to the extent that chapter is not in conflict with this chapter or the Convention..."[221] The *Chromalloy* rationale regarding the application of Article VII of the Convention, as a basis for recognition and enforcement of annulled award, has not been adopted in any other U.S. case till after.[222] However, and despite all the controversy that *Chromalloy* created, the author believe that this decision was the first to turn on a little light to guide other courts, not to apply, but to develop a certain standard for enforcement of annulled awards and to reach a certain level of consistency. One of the arguments that *Chromalloy* relied upon, that the

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[219] *Blackman & London, supra note 107, at 73. See also Ostrowski&Shany, supra note 100, at 1677.*

[220] *Goldstein, supra note 130, at 20.*

[221] *Id, at 21*

[222] *Id, at 20.*

Egyptian government did not honor its contractual obligation by submitting the arbitral award to the Cairo Court of Appeal, while the parties had agreed that arbitral award "could not be subject to any appeal or other recourse."[223]

The district court examined the Egyptian action and considered it as a violation to the "sacred" arbitration agreement between the parties, and therefore, a violation to the American public policy which favoring arbitration agreement.[224] Such analysis launched the first sparkle for American courts to evaluate the circumstances under which the annulment judgment was rendered. After *Chromalloy,* American courts started to be more careful and strict in enforcing annulled arbitral awards. In later cases, the U.S. courts rejected applying domestic law (FAA) through applying the most-favorable- law" under Article VII holding that since the parties to the arbitration agreement did not agree to apply the American law, FAA would not applicable.[225] Moreover, unlike the French courts' approach, the American courts gave weight to the judgments that nullified arbitral awards in the country in which, or under the law of which, the award was made as long as these judgments rendered by a "competent authority" and do not contradict with the U.S. public policy.[226] Finally, in *TermoRio* case, the American courts created one more condition to recognize a judgment, annulling the arbitral award, which is not violating "basic notion of justice".[227] Briefly, in order to recognize a foreign judgement,

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[223] *Chromalloy, 939 F. Supp. 907, at 912.*
[224] *Id, at 912-13.*
[225] *See Baker Marine, 191 F. 3d 194, at 197.*
[226] *Id.*
[227] *TermoRio, 487 F.3d 928, 938 (D.C. Cir 2007).*

which set aside an arbitral award, such judgment must be (i) rendered by the competent authority in the country in which, or under the law of which, the arbitral award was made; and (ii) such judgment does not violate "basic notion of justice" in the United States.

V. Conclusion

Recognition and enforcement of annulled arbitral awards has become a very critical issue in the field of international arbitration. The French approach in doing so seems that it should be subject to many consideration, one of them is the issue of the *res judicata* effect of the judgment which set aside arbitral awards at the seat of arbitration. It is very important to examine case by case and the circumstances under which the award was set aside. In some cases, annulment could be considered a violation of "basic notion of justice" as in *PEMEX* case, where the courts of the seat of arbitration, in setting aside the arbitral award, applied a law which was not in effect when the parties conclude their agreement. While in some cases, annulment should be considered a valid ground under the New York Convention to refuse enforcement of annulled arbitral awards.