60 Years of the New York Convention

Key Issues and Future Challenges

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CHAPTER 12

Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations

Clifford J. Hendel & María Antonia Pérez Nogales

SUMMARY

The New York Convention on Recognition and Enforcement of International Arbitral Awards was born in 1958 due to the increase of international trade and the need to establish rules to govern the recognition and enforcement of international awards in every signatory jurisdiction. Highly commented by practitioners, scholars and all sorts of legal experts, it is considered as one of the most successful international treaties as its provisions have been incorporated in full into the legal systems of its signatories States. This chapter analyzes the issue of enforcement of international arbitral awards vacated at the seat and the heated debate among courts, scholars and practitioners from different jurisdictions on the interpretation of Article V(1)(e) of the New York (NY) Convention and the discretionary power granted to courts under it. It provides a summary of the most relevant cases that have dealt with the issue to date and refers to the legal analysis followed by the courts in the most relevant jurisdictions.

§12.01 INTRODUCTION

Every relevant international contract today contemplates arbitration. Parties opting for international arbitration seek to limit or avoid the interference of courts in the proceeding, including in respect of the enforcement of the arbitral award.

The finality of an arbitral award is one of the distinctive features of arbitration that makes it attractive to parties seeking efficient, effective and timely resolution of

disputes.[1] Contrarily to decisions of ordinary courts, the merits of an arbitral award cannot be challenged (or at least, not properly challenged) before a higher court. This absence of challenge or "second instance" together with confidentiality (and neutrality) are probably the key drivers encouraging corporations seeking to opt for international arbitration in their contracts.

Internationally speaking, awards are usually voluntarily complied with by the losing party. And where this is not the case, recognition and enforcement proceedings under the Convention on Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (hereinafter, "*NY Convention*") tend to be effective and predictable.

One area of uncertainty though involves the question of whether and in what circumstances an award annulled at the seat is capable of being recognized and enforced by a secondary court (i.e., a court where the enforcement of the annulled award is sought by the losing party). May a party seek the recognition and enforcement of an arbitral award that has been set aside by the courts of the seat? Or has the annulment at the seat put an end to the validity of the award for all purposes, including recognition and enforcement? This issue is far from settled in the international context today.

French jurisprudence and doctrine, for example, hold that the fact that an award has been set aside in the country of origin is entirely irrelevant to the possible recognition and enforcement of such award in France. Conversely, if a party tries to enforce an annulled award before, for example, a Spanish court, there is a high chance that its recognition and enforcement will be refused on the grounds that the award has simply ceased to exist.

Why these differences? How is it that the NY Convention permits this dichotomy of views on what seems to be such a fundamental issue? In a legal world where international arbitration aspires to be the "go-to" alternative to ordinary jurisdiction, does the split of views on the issue of the impact of annulment at the seat on recognition and enforcement elsewhere cast a cloud over the attractiveness of arbitration or reflect significant discrepancies as to its very nature?

This chapter analyzes the issue of recognition of vacated arbitral awards (i) starting from the grounds for denying enforcement under the NY Convention, then (ii) summarizing the positions taken by some European and American courts before and (iii) advancing some concluding remarks.

§12.02 RECOGNITION AND ENFORCEMENT OF ANNULLED AWARDS UNDER THE NY CONVENTION: THE HEATED DEBATE ON THE INTERPRETATION OF ARTICLE V(1)(E)

The recognition and enforcement of international awards transcends national law as it is governed by international treaties, principally the NY Convention, universally

1. Brunda Karanam, *Finality v. International Comity-Enforcement of awards annulled in the Primary Jurisdiction*, Kluwer Arbitration Blog, http://arbitrationblog.kluwerarbitration.com/2017/09/27/finality-v-international-comity-enforcement-awards-annulled-primary-jurisdiction/(accessed March 6, 2018).

recognized as the principal instrument for the maintenance of international arbitration's integrity.

Under Article V(1) of the NY Convention, the refusal of the recognition and enforcement of an international award is limited to five circumstances; the annulment of the award by the court of the seat is one of the five. According to the drafters[2] of the NY Convention, the ground for refusing enforcement and recognition of an award that *[…] 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 (Article V(1)(e))* was expressly included to secure the finality of arbitration awards.

Nevertheless, Article V(1) does not mandate state courts to refuse enforcement of foreign awards but instead provides for their potential rejection when it states that "*[…]* (the) *recognition and enforcement of the award **may** be refused, at the request of the party against whom it is invoked […]* (emphasis supplied)." Relying on the word *may*, some state courts (acting as enforcement courts) have recognized and enforced foreign arbitral awards already annulled by the court of the seat.

The legal debate on this issue revolves around two opposing views: (i) the supporters of the literalism of the word "may" who understand that the NY Convention leaves enough room to national courts to determine their own annulment grounds acknowledging the viability of enforcing an annulled arbitral award and (ii) those that insist on the impossibility of recognizing and enforcing awards annulled by the court of the seat on the basis of the principle "*ex nihilo nilhil fit*" (nothing comes from nothing); that is, once an arbitral award is annulled at the seat, there is simply nothing to be recognized and enforced anywhere.

[A] The Preclusive Effect of the Decision Rendered by the Court of the Seat

According to Pieter Sanders,[3] when the NY Convention was drafted, it was clear that an award annulled by the court of the seat could not be enforced in another country as, once vacated, it no longer exists and its enforcement would be against the public policy of the country of the seat.

The two ideas the supporters of the preclusive effect of the decision taken by the court of the seat consider relevant therefore are the empowerment of the court of the seat by the NY Convention and the erga omnes effect of such decision.[4]

Supporters of this position assert that by including the prior annulment of an arbitral award by the court of the seat as a ground for rejecting its recognition and enforcement, the NY Convention sets the boundaries for recognition and enforcement of arbitral awards by state courts in order to, first, forbid the foreign court to act

2. Scholars as Albert Jan Van den Berg and Paul Jansen.
3. Fernando Cantuarias Salaverry, *Reconocimiento y ejecución de laudos arbitrales anulados en el lugar del arbitraje*, 56 Derecho PUCP 583, 602 (2003).
4. This is the line of argumentation followed by several scholars as Pieter Sanders, Albert Jan Van den Berg or William Park.

contrarily to the court of the seat and, second, ensure coherence in the international legal system.

In a commonsensical approach to the issue, Van den Berg[5] maintains that an arbitral award "belongs to" and is a product of a particular legal system, i.e., the provisions of its national law and the decisions of its national courts. As a result, the court of the seat is not only the most suitable court but also the *only* court able to render a decision on the correct conduct of the arbitration proceeding which took place within its territory.

Under this traditional and majority view, Article V(1) of the NY Convention acts as a mandatory rule providing a standard for every court to apply when deciding on the recognition and enforcement of an arbitral award. Contracting States can stiffen this standard but never soften it. As a result, the grounds included under Article V(1) shall always be incorporated in national procedural laws.[6] The opposite would lead to legal uncertainty and would definitely run against the aim for finality in international commercial arbitration.[7]

As discussed below, opposing scholars point out the difficulty of supporting this statement, particularly since the combination of the permissive nature of Article V(1)(e), and the favorable treatment under Article VII grants courts the opportunity to provide their own interpretations as to enforcement.[8]

Another argument raised is the potential breach of procedural fairness that enforcement of a vacated arbitral award may entail, since the party that obtains the annulment of the award before the court of the seat will be obliged to litigate in every jurisdiction that claimant deems appropriate.

This entails the following unavoidable consequences: (i) it is cost-time consuming: as long as the party that obtained the favorable award pursues enforcement in every jurisdiction where the other party has assets, the costs associated will be significant;[9] (ii) uncertainty: the party that obtained the annulment will never be certain as to when the dispute will finally end; finality and closure will never be reached; and (iii) ultimately, the party having lost in the award but having managed to have it annulled at the seat could feel forced to reach a settlement in order to avoid the former two consequences. If that happens, the arbitration and the enforcement proceedings would have served little or no useful purpose.

According to advocates of the traditional seat-centered view, ignoring decisions rendered by the courts of the country where the arbitration takes place could discourage international companies from resorting to international commercial arbitration in the future. Thus, there is no optionality in Article (V)(1), as it was drafted to

5. Albert Jan Van den Berg, *Enforcement of Annulled Awards,* 9 ICC D. R. Bull. 15 (2), 15 (1998).
6. This has nevertheless not been the case in every country, since, as discussed below, there are contracting parties to the NY Convention that have not incorporated in full to their procedural laws the grounds included in Article (V)(1).
7. Pippa Read, *Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium,* 10 Am Rev Int'l Arb 177, 186-187 (1999).
8. Günther J. Horvath, *What Weight Should Be Given to the Annulment of an Award under the Lex Arbitry?*, 26(2) J Int'l Arb; Kluwer International Law 249, 253 (2009).
9. Read, *supra* n. 7, at 187.

guarantee the finality of arbitration awards and avoid contradictory decisions. Further, allowing the recognition and enforcement of vacated awards would contradict the prima facie presumption that a foreign arbitral award is final and binding as intended by the NY Convention (Article III and Article IV) and it would impede a fast and efficient enforcement of arbitral awards.

[B] The Optionality Behind Article V(1) and the Mandatory Character of Article VII

Departing from the idea that the NY Convention was born from the need of establishing a simple and definitive regime for determining the international validity and effect of arbitral awards, the supporters of the opposing, more novel or "radical" view, posit that annulment of an award does not mean that there is nothing remaining to enforce; that is, they understand that international arbitral awards, once issued and irrespective of eventual subsequent annulment at the seat, are part of a "free-floating" autonomous legal order.[10] Therefore, their existence does not cease once annulled by the court of the seat of the arbitration.[11] As a result, only such awards rendered in purely internal matters, in a particular state and within a proceeding where both parties were domiciled in that state, lose their existence once annulled by the court of the seat as only such awards –and not international awards—"belong to" and are a product of the legal system of that particular state.[12]

Their argumentation is based on (i) the use of the word *may* in Article (V)(1), as it suggests discretion granted to the courts where recognition and enforcement of a nullified award is sought, to establish their own limits for rejecting recognition and enforcement and (ii) the most favorable treatment rule included in Article VII.

[1] The Use of the Word "May" in Article (V)(1)

Supporters of the "free-floating" argument stress the idea of the NY Convention as an "open" instrument, where Article (V)(1) acts as a status of *minimums* for the enforcement of awards.[13] As a result, Article (V)(1)(e) should not be interpreted by courts as a mandate but as a suggestion or recommendation. In any case, the understanding is that the second court is not bound to accept the local's court decision.

On the basis that the purpose of the NY Convention was to simplify the enforcement of arbitral awards, J. Paulsson maintains that "*the annulment of an award by the courts in the country where it was rendered should not be a bar to enforcement*

10. William W. Park, *What Is to Be Done with Annulled Awards?,* Ch. II-C-1, 352-353 (2d ed., Oxford 2012) with reference to Emmanuel Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Martinus Nijhoff 2008).
11. Teramura Nobumichi, *Recognisability and Enforceability of Annulled Foreign Arbitral Awards: Practical Perspectives of Enforcing Countries,* 1214 The Doshisha L Assn 75, 87 (2014).
12. Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin,* 14(1) ICSID Rev For Inv L J 16, 31 (1999).
13. Francisco González de Cossío, *Enforcement of Annulled Awards: Towards a Better Analytical Approach*, 32(1) Arb Int'l 17, 21-22 (2016).

unless the grounds of that annulment were ones that are internationally recognized."[14] Accordingly, giving the court of the seat the power to determine the future of the arbitration proceeding would be against the ultimate purpose of the NY Convention,[15] which is to enhance the recognition and enforcement of international awards by (in words of J. Paulsson) "*establishing a minimum standard for obligating enforcement, not to establish a comprehensive and unitary regime.*"[16]

In this regard, as sustained by some authors, preventing enforcement courts from enforcing annulled arbitral awards would run against the sovereign power of this court to rule on the efficacy of the arbitral award. The fact that the parties have chosen a country as seat of arbitration and the award is annulled in such particular country is not sufficient to assert that the legal existence of the award is exclusively and necessary linked to the law of the seat.

Also argued is the issue of "double control" of the award (by both the courts of the seat and by the courts of enforcement) which, according to supporters of this view, the NY Convention aimed to abolish.[17]

However, there is no evidence in the preparatory works of the NY Convention that supports this view. In fact, there was no discussion on the use of the word "may" instead of "shall."

[2] The Most Favorable Treatment Rule Included in Article VII

Turning to the second argument, since the NY Convention does not provide any guidance on the relation between Article V(1) and Article VII, some authors have interpreted that Article VII includes a mandatory rule requiring courts to guarantee that the application provisions of the NY Convention do 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 law […] of the country where such award is sought to be relied upon."

Article VII was drafted to guarantee the enforcement of valid arbitration awards annulled on the basis of what J. Paulsson defines as Local Standards of Annulment (or LSA).[18] An LSA is considered as a ground for setting aside an award that is not an International Standard of Annulment rule (ISA), i.e., a ground set out in Article V(1)(a)-(d) of the NY Convention, such as incapacity of a party, invalidity of the arbitration agreement or violation of due process, the arbitral tribunal having exceeded

14. Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard of Annulment*, 9(1) ICC INT'L CT. Arb Bull 14, 16 (1998).
15. Philippe Fouchard, *La porté international de l'annulation de la sentence arbitrale dans son pays d'origine,* 3 Rev Arb 329, 345-346 (1997).
16. Paulsson, *supra* n. 14, at 15 et *seq*.
17. Diego Mongrell González, *La ejecución de laudos anulados en el arbitraje comercial internacional*, 93 Leccion. Ens 149, 158 (2014). This author goes even further by suggesting that the control exercised by the court of the seat shall be gradually phased out. Nevertheless, he recognizes that it is far from being achieved.
18. Paulsson, *supra* n. 14, at 16.

its scope or jurisdiction or where the composition of the tribunal or conduct of the process was irregular.[19]

On this basis, it is argued that Article VII acts as a secondary tool that courts may use to apply their own procedural law or other treaties if they are more favorable to enforcement and prevails over Article (V) or the decision of the court of the seat vacating the award.

However, as pointed out by Cantuarias,[20] this argument lacks universal application. It could only be effective in those States that have more favorable grounds for enforcement within their own procedural law. It could not be applicable in those States that have directly transposed Article (V) to their own procedural law. As a result, Article VII has a very reduced applicability and cannot be considered as a useful tool to resolve the problem created by Article V(1)(e).

Consequently, if the party against which the enforcement is sought has assets in countries not contemplating among the grounds for denying enforcement the prior annulment of the award by the court of the seat, there is a chance that the award will be granted enforcement. These countries appear to include the Netherlands, France and (to a certain extent) the United States (US).

In other words, these authors do not consider Article V(1) as a bar for the enforcement of annulled awards but rather understand that the court of enforcement shall exercise an independent control on the enforceability of the award on the basis of its own national law disregarding the decision rendered under the *lex arbitri* and, if the court of enforcement deems appropriate under its own national law, it could enforce a vacated award on the basis of Article VII. For J. Paulsson, the application of Article VII does show respect for the decision of the other country.[21]

In this view, this would never entail a violation of the public order of the seat but instead ensures the enforcement of "enforceable" arbitral awards.

§12.03 WHAT HAS BEEN DONE BY COURTS? INCONSISTENT INTERPRETATIONS AMONG JURISDICTIONS

National court decisions in France, Belgium and Austria, have understood that an award annulled by arbitral seat may, in some circumstances, be enforced.[22] Other courts have reached the opposite conclusion. There has even been the case where a European court acting as court of the seat has annulled the award and another European court, as court of enforcement, has recognized and enforced such award.[23]

While, for example, U.S. courts have mostly shown deference to the decisions rendered by the court of the seat, French courts have gone further and, in some cases,

19. Andrew Tweeddale & Keren Tweeddale, *Cutting the Gordian Knot: Enforcing Awards Where an Application Has Been Made to Set Aside the Award at the Seat of the Arbitration,* 81(2) CIArb's Academic J Arb 137, 141 (2015).
20. Cantuarias, *supra* n. 3, at 609-610.
21. Paulsson, *supra* n. 14, at 28.
22. Gary B. Born, *International Commercial Arbitration* Vol. 3, CH 26, 362-363 (2nd ed, Kluwer International Law 2014).
23. *Polish Ocean Line v. Jolasry XIX Y.B Com. Arb.*,1994, 662-663 (Cour de Cassation) (1993).

have ignored the decision of the seat, enforcing the award exclusively on the basis of their own national law.

Other countries, such as Spain, have very limited jurisprudence on the matter. When it comes to northern European countries, as the Netherlands or the United Kingdom, judges in these countries, although having shown deference for the French approach, are still reluctant to enforce vacated arbitral awards in any circumstance.

Since no universal consensus has been reached in this regard, practitioners keep seeking to enforce annulled awards in those countries where they believe there is a chance for enforcement to be granted, sometimes winning, sometimes not.

As of the date of this article, a relevant number of cases have discussed the possibility of enforcing arbitral awards vacated by the court of the seat. According to González Cossío,[24] the cases where enforcement was granted can be classified in three different categories: (i) those enforcing the award by relying on domestic law, (ii) those ignoring the annulment decision rendered by the foreign court and (iii) those which analyze the annulment decision to determine whether it deserves deference.

This section summarizes the approaches taken by different European and American courts to conclude with the argumentation of the sole Spanish case known as of this date.

[A] The French View: Arbitral Awards and Its Lack of Nationality

In contrast to other countries and consistent with its "arbitration friendly" tradition, France has a strong and clear position when arguing the viability of enforcing annulled awards. For more than 25 years, the *Cour de Cassation* has maintained that the annulment of an award by the court of the seat is simply not relevant—and much less determinative—to the question of its enforceability in France; that is, enforcement courts are as empowered as primary jurisdictions to render a decision on the enforceability of an award.

Contrarily to other jurisdictions, it could be said that the enforcement of annulled arbitral awards in France has become an established practice.[25]

For French courts and some scholars, an international award is a private act that is not integrated into the legal order of any state and therefore, its existence continues even after being annulled in one particular country.[26] Accordingly, and to view the issue from the opposite perspective, an international award annulled in France no longer exists for internal, French legal purposes, but it could nevertheless still be enforced in another country. The *Cour de Cassation* has determined that arbitral awards are decisions of international justice not tied to any national legal system[27] and it is such particular feature—their "delocalized," "anational" character—which makes possible their enforcement even after being nullified in the seat.

24. González de Cossío, *supra* n. 13, 17-18.
25. Vesna Lazić-Smoljanić, *Enforcing Annulled Arbitral Awards: A Comparison of Approaches in the United States and in the Netherlands,* 39 Zb Prav Fak Sveuc Rij 215, 217 (2018).
26. Gaillard, *supra* n. 10, at 30.
27. Van den Berg, *supra* n. 5, at 195.

This standard created by the *Cour de Cassation* can be summarized by three landmark decisions:

[1] Norsolor

The dispute concerned the termination of an agency agreement entered into between Norsolor and Pabalk: the seat of the arbitration was Vienna, and an award was rendered on October 26, 1979, in favor of Palbak.[28] Reasoning that French courts may allow the enforcement of annulled awards by means of Article VII of the NY Convention, the *Cour de Cassation* decided to enforce the award annulled by Austrian courts.

[2] Hilmarton v. OTV

The discussion in this case refers to the fee due by OTV to Hilmarton under an agency agreement involving Hilmarton's securing of a contract in Algeria.[29] The consultancy agreement provided for International Chamber of Commerce (ICC) arbitration in case of dispute. Hilmarton started arbitral proceedings in Geneva and claimed the payment of the agreed fee. The arbitral tribunal based in Geneva rejected the claim.

While Hilmarton was seeking the annulment of the award before the Geneva Court of Appeal, OTV requested the Paris Court of First Instance to enforce the award. Enforcement was granted by the Paris Court of First Instance and confirmed by the Paris Court of Appeal. The Geneva Court of Appeal court vacated the award upon Hilmarton's request, and the Swiss Supreme Court affirmed the decision.

In this case, the Cour de Cassation confirmed its view regarding the enforcement of annulled awards when it expressly stated: "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 award."

[3] Putrabali v. Rena Holding

This case involved the termination of an agreement for the sale of pepper.[30] The contract provided for London as seat for the arbitration under the regulations of the International General Produce Association (IGPA). The dispute arose when a cargo of pepper was lost during transportation and Rena Holding did not pay the price agreed under the contract.

A first award confirming the right of Rena Holding to refuse the payment of the contract price was rendered by the arbitral tribunal. Putrabali sought the annulment of

28. *Société Pablak Ticaret Limited Sirketi v. Norsolor S.A.* 83-11.355, French Cass (1984).
29. *Société Hilmarton Ltd v. Société Omnium de traitement et de valorisation (OTV)*, 92-15.137, French Cass (1994).
30. *Putrabali Adyamulia (Indonesia) v. Rena Holding, et al.*, 05-18.053, French Cass (2007).

the award before the High Court in London that partially annulled it arguing that there was a breach of contract as Rena Holding did not pay the contract price.

The arbitration tribunal issued a second award ruling in favor of Putrabali and requiring Rena Holding to pay the contract price. However, by invoking the more favorable right provision in Article VII(1), Rena Holding obtained the enforcement of the first (but already annulled) award in France.

The Paris Court of First Instance reasoned that since arbitral awards are independent of any national legal order, their enforceability shall be ascertained pursuant to the law of the state in which enforcement is sought. *Putrabali* then sought enforcement of the second award in France, but it did not succeed.[31]

The rationale behind the three above French cases therefore revolves around two main ideas: (i) the power granted to courts under Article VII(1) of the NY Convention to enforce annulled awards if the ground for opposing the enforcement are not included in the procedural law of that particular country and (ii) when there are domestic rules more favorable to enforcement, Article VII takes precedence over Article V(1).

Norsolor and *Hilmarton* demonstrate that French courts do not really link the enforcement of an annulled award to the country where the award was rendered or the rules that governed the arbitral proceeding in such country. Even if the award was vacated by a European and reliable court, French courts may enforce it.

It must be noted that France is one of the countries where Article V(1) of the NY Convention has not been incorporated in full to the procedural law. Therefore, when relying on their own law, French courts do not find any provision precluding the enforcement of an annulled award. Article 1520 (former 1502) of the French Code of Civil Procedure does not include among the grounds for refusal the fact that the award has been previously annulled by another court.

When it comes to enforcement, the parties may request it from the state court on the basis of Article V(1) of the NY Convention (the most common ground) or, in exceptional cases, by relying on the provision included in Article VII. In this regard, if a party requests the enforcement of the arbitral award by invoking Article VII of the NY Convention, it is claiming the application of a more favorable treatment rule.

Therefore, in those States where, as in France, the prior annulment of the award is not considered as ground for refusal, vacated awards may be enforceable.[32] French courts will determine the recognition of an award as part of the French legal system solely on the basis of the French Law requirements for enforceability, i.e., on the basis of French procedural law.[33]

However, as pointed out by Van den Berg, this does not mean that the enforcement of annulled awards was possible under the NY Convention. For Van den Berg, French courts are recognizing and enforcing awards at the seat on the basis of their

31. Richard W. Hulbert, *When the Theory Doesn't Fit the Facts: A Further Comment on Putrabali*, 25(2) Arb Int'l 157, 161-163 (2009).
32. González de Cossío; *supra* n. 24, at 19.
33. Gaillard, *supra* n. 10, at 30.

own domestic law, i.e., outside of the NY Convention. To support otherwise will be mistaken.[34]

Additionally, although Van den Berg understands that the French theory creates "inconsistent and bizarre results," he does not forbid the application of the more favorable right rule but insist that those applicants that claim the application of the national regime (invoke Article VII(1) of the NY Convention) must assume that this regime applies entirely.[35]

[B] The "Practical" View of English Courts

The enforcement of annulled awards in the United Kingdom has not been such a controversial issue. English Courts seem to have implemented a much more practical view as they have rejected absolutist theories on enforcement of vacated arbitral awards.[36]

In *Dowans v. Tanzania*,[37] Burton J. held that automatic refusal under Article V(1) of the NY Convention is inappropriate since "*even if an award has been set aside in the home jurisdiction upon one or other of the grounds set out in the subsections, the English courts still retain a discretion to enforce the award, though that jurisdiction will be exercised sparingly.*"

Regarding how English Courts have to use this discretionary power as enforcing courts, the following guidelines were given:[38] (1) the enforcing court is allowed to consider the circumstances in which the original arbitration award was made and how and why it was later annulled by the court of the seat and (2) the enforcing court would not be prevented from forming its own view on the satisfaction by the foreign entities of the appropriate legal rules.

Therefore, English law accepts that an award may survive and be enforced if, and only if, it determines that the annulment at the seat is contrary to the principles of honesty, natural justice and domestic concepts of public policy. The party seeking enforcement of a vacated award before an English bears a "heavy" burden of proof of a bias in the annulment proceedings, but enforcement is not impossible.

English Courts thus do not directly disregard the decision of the court of the seat on the basis of their discretionary power but instead avail themselves of such discretionary power only if a bias in the annulment proceeding at the seat is proven or

34. Albert Jan Van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J Int'l Arb 178, 193 (2009).
35. *Ibid*. at 194.
36. Andrew Tweeddale, *The Problem with Enforcing Arbitration Awards That Have Been Annulled,* https://corbett.co.uk/the-problem-with-enforcing-arbitration-that-have-been-annulled/ (accessed June 15, 2018).
37. *Dowans Holdings SA and Anr v. Tanzania Electric Supply Co Ltd*, 1539, UKHC (2011).
38. Lord Mance's opinion in *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*, UKSC, 33 paras. 67-68 (2010).

the circumstances in which the award was annulled are deemed contrary to English Common Law.[39]

[C] The Dutch Case

One can say that Dutch Courts have gone even further than French courts have. The Netherlands, known as one of the most pro-arbitration countries in Europe, faced the issue of enforcing annulled awards for the first time in one of the renowned *Yukos*[40] cases.

Starting from the fact that Article V(1) of the NY Convention does not mandate Member States to refuse enforcement of annulled awards, the Amsterdam Court of Appeal ruled against the decision of the Amsterdam Court denying the recognition and enforcement of an arbitral award annulled in Russia. In a second stage, the Amsterdam Court of Appeal understood that the enforceability of an annulled arbitral award depends on whether or not the judgment deciding its annulment can be enforced under Dutch Private international law.

Finally, when the case was brought before the Dutch Supreme Court, it applied the Vienna Convention on the Law of the Treaties in order to interpret Article V(1)(e) of the NY Convention, but it found no useful response as state practice differs. It then considered that enforcement of arbitral awards and, particularly, reducing barriers to such enforcement, was the ultimate objective of the NY Convention. The Dutch Supreme Court understood that this objective was consistent with the limited number of grounds for refusing recognition under the NY Convention.

Taking both facts into account, the Dutch Supreme Court, therefore, found that Article V(1) provides a (limited) discretionary power for the enforcement judge to enforce an award even if one or more grounds for refusal apply. From the analysis of the Dutch Supreme Court, the following two conclusions could be provided: (i) Dutch Courts have discretionary power to decide on the enforcement of an annulled award on the basis of Article V(1) of the NY Convention and (ii) An annulled award may be recognized and enforced in the Netherlands if (i) the annulment decision is based on grounds other than those provided for in Article V(1)(a)-(d), i.e., if the annulment decision is based on an ISA and (ii) the recognition and enforcement of the annulment decision is not possible under Dutch Private International Law.[41]

39. Allen & Overy, *Enforcing Awards That Have Been Set Aside at the Seat: The English and Dutch Courts Remind Parties of the High Hurdle That Must Be Overcome,* http://www.allenovery.com/publications/en-gb/Pages/Enforcing-awards-that-have-been-set-aside-at-the-seat-the-English-and-Dutch-courts-remind-parties-of-the-high-hurdle-that-m.aspx (accessed June 22, 2018).
40. *Yukos Capital SARL v. OJSC Rosneft Oil Company*, 1288, EWHC (2014).
41. Joep Wolfhagen & Jorian Hamster, *Arbitral Award May Be Enforced after Annulment at Seat*, Lexology, https://www.lexology.com/library/detail.aspx?g=386df825-7372-4898-b78d-df5dc2e747a7.

[D] The Approach of U.S. Courts

While French courts have mostly agreed on the viability of enforcing annulled awards in France, U.S. courts have not been entirely consistent, although a general consensus appears to be developing.

Contrarily to French courts, U.S. judges do not consider that they have the absolute authority to recognize and annull award without giving deference to the decision of the court of the seat annulling the award.[42] On the basis of the principle of judicial comity or reciprocity, i.e., the mutual show of respect toward decisions rendered by the court of another state, U.S. courts have understood that there must be an adequate reason to not give deference to the decision of the foreign court vacating the award.

Federal courts in the US have upheld the viability of enforcing a vacated award when it is proven that the nullification proceeding in the foreign country violated U.S. public policy. In this regard, the approach followed by U.S. Court when recognizing annulled arbitral awards can be summarized as follows:

(i) In *Chromalloy*[43] the U.S. District Court recognized the award annulled by an Egyptian Court on the basis of the discretionary standard of Article V(1) NY Convention along with Article VII. However, it is relevant to point out that the court in this case did not deeply analyze the application of Article VII, but it rather considered it as a case of "first impression" by stating that the enforcement of the award will be contrary to U.S. public policy.[44] Contrarily to the general understanding, the court in Chromalloy ruled against the preclusive effect of the principle of comity upon U.S. Law.[45]

However, it is worthy of mention that the decision rendered by the court in Chromalloy has been controversial since the court relied on Chapter 1 rule 10 of the Federal Arbitration Act that refers to the grounds under which an award may be vacated, not the ones for its enforcement.[46] Most commentators (even the pro-enforcement ones) understand that the interpretation of the court was erroneous and its validity doubtful, being this decision completely irreconcilable with the interpretation made by other U.S. courts on the issue.[47]

42. Steven Finizio & Santiago Bejarano, *Annulled Commisa v. Pemex arbitration award enforced*, Lexis PSL Arbitration, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/Publications/Documents/2016-10-10-LexisPSL-annulled-Commisa-v-Pemex-arbitration-award.pdf (accessed April 14, 2018).
43. *Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp v. Arab Republic of Egypt, D.C.W* (1996).
44. Karanam, *supra* n. 1, at 1.
45. G. H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards—Chromalloy Revisited*, 14 J Int 141, 145 (1997).
46. E. A. Schwartz, *A Comment on Chromally: Hilmarton, al'americaine*, 14(2) J Int'l Arb 125, 125-146 (1997).
47. Jan Paulsson, *Rediscovering the NY Convention: Further Reflections on Chromalloy*, 12(5) Mealey's Int'l Arb Rep 20, 34-35 (1997).

(ii) *Spier*:[48] Contrarily to Chromalloy, in the *Spier* case, the Court denied the request to enforce the annulled award since the grounds for enforcement of arbitral awards were limited to those included in Article V(1) of the NY Convention.

(iii) *Commisa v.Pemex*:[49] In this case, particularly relevant for the extraordinary circumstances that are surrounding the annulment decision, the Southern District Court of New York ordered the enforcement in the US of an award vacated by a Mexican Court, which was later confirmed by the Court of Appeals for the Second Circuit.[50]

Commisa was a Mexican subsidiary of the U.S. corporation that started an arbitration proceeding against a subsidiary of the state-owned oil corporation, Pemex. The dispute was arbitrable since Pemex did agree to arbitrate and was authorized to arbitrate as well as actively participated in the arbitral proceeding. By retroactively (and rather egregiously) applying a relevant Mexican Law the dispute became "nonarbitrable," Pemex lost its capacity to arbitrate, and the award was annulled.

When the annulment decision of the Mexican Court was reviewed by the Southern District Court of New York, it found enough grounds to act contrarily to comity and permit the enforcement of the arbitral award in the US[51] since a retroactive application of the statute of limitations will render any claim inadmissible in any forum.

The issue on enforcement of annulled award has reached the docket of the principal commercial appellate court in the U.S. Federal system. In addition to the *Pemex* case decided by the Second Circuit Court of Appeals, the following cases can be cited:

(iv) In *Baker Marine*,[52] the Second Circuit did not provide for the enforcement of the award by relying on the potential breach of the procedural fairness arguing that "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."

(v) In *Termo Rio*,[53] the Circuit Court for the District Columbia, although acknowledging that it could enforce an annulled arbitral award if there is enough evidence that the nullification proceedings were "repugnant to fundamental notions of it what is decent and just in the United States,"

48. *Martin Spier v. Calzaturificio Technica, S.p.A.* 86 Civ.3347 [CSH], S.D.N.Y. (1999).
49. *Corporacion Mexicana de Matenimiento Integral, S De RL De CV v. Pemex-Exploracion y Produccion*, No 13-4022 (United States Court of Appeals, Second Circuit, 2016). It is worthy mention that this case the governing treaty was the 1975 Panama Convention and not the NY Convention but for the issue at hand, both conventions are absolutely identical.
50. V. Lazić-Smoljanić p. 223.
51. Finizio & Bejarano, *supra* n. 42, at 2.
52. *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 2d Cir. (1999).
53. *TermoRio S.A.E.S.P. and LeaseCo Group, LLC v. Electranta S.P. Electrificadora Atántico, S.A.E.S.P.*, DCCC (2007).

observed that it should not "*routinely second-guess*" the decision of a former court.

(vi) Finally in *Thai-Lao Lignite,*[54] the petitioner started enforcement proceedings in the U.S., United Kingdom and France, once the limitation period for challenging the award in Malaysia expired. The award was set aside by the Malaysian court. In 2011, the U.S. District Court for the Southern District of New York enforced the award. Afterwards, the respondent and losing party filed a motion asking the Malaysian court to grant an extension for challenging the award, which was upheld. Finally, the award was annulled by the Malaysian High court and enforced by a U.S. court. As the award was annulled by a higher court, the Southern District of New York vacated its decision to enforce the award. The Second Circuit rejected the petitioners request by applying Rule 60(b) of the Federal Rules of Civil Procedure (therefore, its own procedural law) as it considered that Article (III) NY Convention allows courts to do so.

Summarizing, under the comity-based U.S. approach—in which a certain deference, or presumption of regularity, is accorded to the annulment decision of the courts of the seat—U.S. courts are more cautious than the more "radical" approach followed by French courts when the enforcement of an annulled award is on the table.

[E] Enforcement of Annulled Arbitral Awards in Spain

Spain, as most countries in Europe, has incorporated in full Article V(1) of the NY Convention to its Arbitration Act.[55] Additionally, Spain has been one of the most traditional countries when it comes to arbitration. Its courts occasionally show limited recognition of the institution of arbitration. Under these circumstances, it is no surprise that the application of the French doctrine by Spanish courts is, indeed, very limited.[56]

Although the case law is scant, the Court of Rubí[57] heard a case in 2006, involving an action for enforcement in Spain of a French arbitral award subject of ongoing challenge proceedings in Paris. The judge understood that the NY Convention allowed a simultaneous Spanish recognition and enforcement proceeding and French annulment proceeding so long as the petitioner not obtain a compensation higher than the one granted by the arbitration award.

In its decision, the court questioned the doctrine followed by the Supreme Court of Spain citing the discretionality behind Article V(1) of the NY Convention to conclude

54. *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 2d Cir (2017).
55. Spanish Act in Arbitration 60/2003 (December 23, 2003).
56. Francisco J. Garcimatín Alférez, Sara Sánchez Fernández, *Sobre el reconocimiento en España de laudos arbitrales extranjeros anulados o suspendidos en el estado de origen*, 8 (1) Cuadernos de Derecho Transnacional 111, 120-121 (2016).
57. Challenge number 584/2006, Court of First Instance of Rubí, CENDOJ 08184410032007200001 (2006).

that the enforcement of the award would not be in violation of not violated the public policy in Spain.

It is true that the facts surrounding this case were very peculiar since (i) the award was not yet annulled and (ii) the court appeared to consider that the grounds alleged by the party requesting the enforcement (and the annulment in Paris) were insufficient for the annulment of the award.

However, the rationale followed by the Court of Rubí as to the discretion granted to national courts by Article V(1) was a breath of fresh air and maybe the beginning of a new pro-enforcement doctrine in Spain.

[F] Other Jurisdictions

Other European jurisdictions, such as Germany, although disregarding the enforcement of annulled arbitral awards on the basis of Article V(1)(e), have maintained the validity of Article VII(1) NY Convention when a most favorable right provision is founded applicable to that particular case.[58] These courts are therefore implicitly accepting that Article V(1) does not act as a mandatory rule but it is, indeed, as contended by French courts discretionary.

§12.04 CONCLUSIONS

The NY Convention does not provide definitive guidance to resolve the issue as to the international effect of an annulment decision in the jurisdiction of the seat. In fact, under the NY Convention, there is no hierarchy between jurisdictions, and therefore the court of the seat does not have precedence over the court of enforcement. Since both courts (seat and enforcement) are at the same level, and at first glance, equally empowered by the NY Convention, which one shall determine the enforceability of an award?

This chapter has discussed and analyzed the different views taken by scholars and courts from different jurisdictions with regard to the role played by both courts. Although the authors do agree with the optionality granted to courts by Article V(1) NY Convention when deciding enforcement of arbitral awards, they do not share the view of French courts so as to completely disregard grounds of the decision rendered by the court of the seat. Instead, the authors understand—consistent with the English, Dutch and most U.S. jurisprudence on the issue—that this discretionary power should be used carefully by enforcing courts. Giving international recognition and enforcement to an arbitral award annulled at the seat is "a big stick;" as such, it should be used very sparingly.

The cases discussed show that most of the courts that, acting as secondary jurisdictions, have enforced vacated arbitral awards when it was proven that the

58. Klaus Sachs, "The Enforcement of Awards Nullified in the Country of Origin: The German Perspective," in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series 9, 552 (Kluwer, 1999).

annulment decision by the court of the seat was in clear violation of the basic notions of justice, i.e. where the annulment decision was not deserving of deference. It is in such cases where state courts have availed themselves of the discretionary power granted by the NY Convention and enforced "enforceable" vacated awards. Therefore, most courts agree on the existence of such discretionary power, but this does not mean that such power may be exercised in any case.

The view of the enforcing court is as important as the view of the court of the seat. Both courts play a relevant role as both control the validity of the award for its enforcement within their boundaries. The fact that according to the law of a particular state an award is potentially annullable could not predetermine the future of that award out of the borders of such country.

However, it is a fact that nowadays, the recognition and enforcement of annulled awards may only be possible in two cases: (i) in a state where the national law does not include among the grounds for denying recognition the fact that the award has been already annulled by the court of the seat or (ii) when the annulment decision was based on an LSA which recognition and enforcement will be against the public policy of such particular country.

This only provides another reason why parties must be cautious when choosing their seat of arbitration.