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Enforcement of Awards Set Aside in the Country of Origin: The French Experience

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I. INTRODUCTION

The main sources of international arbitration law, in particular the UNCITRAL Model Law, the principal international arbitration rules (which in recent years have become more and more alike) and national legislation competing to be as attractive as possible, have had the combined effect of producing a vast, worldwide harmonization of the law of international commercial arbitration in recent years. Given the striking similarities among arbitration rules and among national laws, one might wonder at first glance what, if anything, continues to differentiate international arbitrations taking place in Paris, London or Mexico City. The only remaining differences, one might think, would involve relatively minor details or questions of style stemming primarily from the legal background of the arbitrators. However, certain important differences have survived despite this apparent consensus. These differences are all the more difficult to comprehend since they cannot be readily perceived simply by reading the applicable rules; they are concealed by the facade of uniformity. For example, the generally accepted principles that allow arbitrators, in the absence of agreement by the parties, to decide on procedural issues or choose the substantive rules applicable to the merits can conceal practices which remain quite diverse because of this broad discretion granted to arbitral tribunals. The same goes for the often bitterly contested question of the scope and validity of the arbitration agreement itself. The fact that all the laws and arbitration rules require that arbitrators' decisions must be based on a valid arbitration agreement does not eradicate fundamental differences that exist regarding the interpretation of that requirement. In fact, on each of these questions, the reasoning – and often the end result – ultimately depend on the response to a much more basic and controversial question, that of the role of the seat of the arbitration.

According to one view, which has long been dominant and still remains strong in England, the seat of arbitration is the equivalent of a municipal jurisdiction's *forum*. Under this view, the law of the seat necessarily governs the arbitration agreement, either directly or by designating the applicable law. Similarly, the law of the seat governs the formation and composition of the arbitral tribunal as well as the procedure and form of the award. The courts at the seat of the arbitration oversee the proper functioning of the procedural aspects of the arbitration and, at the end of the process, confirm or set aside

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the award. In other words, under this approach, the seat anchors the arbitration to the legal order of the State in which it takes place.

This philosophy of arbitration was put forward in a famous article by F.A. Mann: "*Lex Facit Arbitrum*".[1] Several consequences flow from it. Even when applying arbitral rules that grant them broad discretion over the matter, arbitrators who follow this approach will have a tendency to submit the procedure of the arbitration to the law of the seat as the *lex fori*. They will also be tempted to determine the law applicable to the merits by referring to the choice of law rules of the seat of the arbitration. According to some commentators, in doing so, arbitrators could also apply the mandatory rules of a jurisdiction other than the one chosen by the parties to govern their dispute, in the same way that judges from numerous European States have discretion to do by virtue of the first paragraph of Art. 7 of the Rome Convention of 27 June 1980 on the Law Applicable to Contractual Obligations[2] or Art. 19 of the Swiss Law on Private International Law. Even if the law of the seat of the arbitration only requires arbitrators to ascertain the existence of "a valid arbitration agreement" in order to assert jurisdiction over the matter, they will have a similar tendency to use the choice of law rules of the seat of the arbitration, seen as the *forum*, in selecting the law to govern the arbitration agreement.

In a second conception of arbitration, dominant in France and other countries with civil law traditions and systematized by Berthold Goldman and Pierre Lalive, the seat of arbitration is chosen for little more than the sake of convenience. Arbitral tribunals need not operate like the national courts of a particular State simply because they have their seat there. Arbitrators do not derive their powers from the State in which they have their seat but rather from the sum of all the legal orders that recognize, under certain conditions, the validity of the arbitration agreement and the award. This is why it is often said that arbitrators have no *forum*.

A number of practical consequences flow directly from this view. Arbitrators are not bound to apply the procedural rules in force in the State of the seat of the arbitration. Having no *forum*, arbitrators do not have to follow the choice of law rules of a *forum*. They also have much broader discretion in determining the substantive law rules applicable to the dispute. If they choose to give effect to the mandatory rules of jurisdictions other than those of the *lex contractus*, as some authors have advocated, this is not because the law of the *forum* confers that power on its own courts to further international cooperation in the defense of vital public policies. Finally, if the scope or validity of the arbitration agreement is at issue, the disagreement will not be resolved by means of a national law determined by a classic choice of law mechanism.

Even if these important differences between the two approaches have become blurred or reduced to the level of differences of opinion by the adoption of general rules that grant arbitrators broad discretion over most of these important questions, the unresolved disagreement over the role of the seat of the arbitration becomes critical when examining

1. P. SANDERS, ed., *International Arbitration: Liber Amicorum for Martin Domke* (1967) p. 157.
2. The States in question are those that have ratified the Rome Convention of 19 June 1980, without making the reservation regarding Art. 7(1) like Germany, Luxembourg and the United Kingdom.

the issue of the enforcement of awards set aside in the country in which the arbitration took place.

Could an award be enforced even if it has been set aside by the national courts of the seat of the arbitration? If the award derives its binding force from the legal order of the State of the seat of the arbitration, as would a ruling by a lower court set aside by a higher court of that jurisdiction, such a proposition would be out of the question. Indeed, a foreign jurisdiction would never recognize a decision by the English High Court that had been overturned by the House of Lords.

However, if the place in which the arbitration is held is not the sole link between the arbitration and national legal orders, it would be perfectly proper to recognize an award in one State that had been set aside in another, the law of the seat of the arbitration having no precedence over the law of the place of enforcement. The answer to this question, which remains very much in dispute, will thus depend on the conceptual approach to arbitration that one holds.

It is not surprising that French law, which in a highly coherent manner has always favored the universalist conception of arbitration and has tended to reduce as much as possible the role of local idiosyncrasies, even those of French law itself, opted very early to recognize all awards meeting the conditions of French law, even when they had been set aside by the courts of their country of origin.

This approach has been followed consistently in France. An overview of the approach will first be provided (II) and then its merits discussed (III).

II. OVERVIEW OF THE FRENCH LAW APPROACH

On several occasions beginning in 1984, French case law has confirmed that an arbitral award that has been set aside in its State of origin may nonetheless be recognized by French courts. The rule is firmly established and its scope today is perfectly clear.

1. French Case Law Upholding Enforcement

The possibility under French law to recognize and enforce awards which have been set aside in their State of origin results from a clear line of case law illustrated by three separate decisions.

a. The Norsolor case

The arbitrators in *Norsolor* created a great stir by exclusively applying *lex mercatoria* – more widely referred to today as transnational rules[3] – to the merits of the dispute in the absence of a choice of law by the parties. However, this case also provided the French *Cour de cassation* with the opportunity to address the interplay between two provisions of the New York Convention. Art. V(1)(*e*) of the New York Convention States in

3. See E. GAILLARD, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", ICSID Rev. (1995) p. 208.

relevant part that the "recognition and enforcement of the award may be refused ... only if ... the award ... has been set aside or suspended by a competent authority of the country in which ... the award was made."[4] Art. VII(1) provides that the Convention shall not "deprive any party of any right he may have to avail himself of an arbitral award in this manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied on."[5]

The dispute arose from the termination of a commercial agency contract between the French company Ugilor (which later became Norsolor) and Pabalk, a Turkish corporation. An arbitral tribunal established under the auspices of the ICC with its seat in Vienna ordered Ugilor to pay various sums on the basis of transnational rules, rather than the law of a particular State.[6]

The award was initially recognized in Austria[7] and France.[8] It was subsequently partially set aside by the Vienna Court of Appeal[9] on the grounds that the award was based on transnational rules. In turn, the decision of the *Tribunal de grande instance* of Paris granting recognition of the award was reversed by the Paris *Cour d'appel*, which based its refusal to recognize the nullified decision on Art. V(1)(*e*) of the New York Convention.[10]

In its decision of 9 October 1984,[11] the *Cour de cassation* overturned the judgment of the Paris Court of Appeal, citing Art. VII of the New York Convention and Art. 12 of the French New Code of Civil Procedure (NCCP). The Court held that Art. VII of the New York Convention authorized the recognition of the award based on French law and that Art. 12 NCCP required the Court of Appeal to determine to what extent French law would oppose the enforcement of the award.

As one commentator has aptly pointed out,[12] this decision did not give the Court the opportunity to rule on the conditions under which an award might be recognized under French law notwithstanding its having been set aside in its country of origin. This question, which would have been resubmitted to a lower court, never arose because the Austrian Supreme Court reversed the decision of the Vienna Court of Appeal.[13]

However, the decision did effectively establish the principle that Art. VII of the New York Convention takes precedence in situations that also implicate Art. V. In so doing,

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4. Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention), 330 U.N.T.S. 38 (1959), Art. V(1)(*e*).
5. Art. VII(1) New York Convention.
6. ICC Award No. 3131, Rev. arb. (1993) p. 525.
7. Decision of the Vienna Commercial Tribunal of 29 June 1981, Rev. arb. (1983) p. 514.
8. Decision of the Paris *Tribunal de grande instance* of 4 March 1981 rejecting the appeal of the enforcement decision of 4 February 1980, Rev. arb. (1983) p. 466.
9. Decision of 29 January 1982, Rev. arb. (1983) p. 516.
10. Decision of 19 November 1982, Rev. arb. (1983) p. 472.
11. Note, B. GOLDMAN, Rev. arb. (1985) p. 430; Note, Ph. KHAN, JDI (1985) p. 679; Note, B. DUTOIT, Rev. Crit. DIP (1985) p. 551; Note, J. ROBERT and D. THOMPSON, J. Int. Arb. (1985) p. 67.
12. GOLDMAN, *op. cit.*, fn. 11.
13. Decision of the Austrian Supreme Court of 18 November 1982, Rev. arb. (1983) p. 519.

the ruling opened the door by applying the "more favorable right" principle[14] to the recognition in France of an award set aside in the country of origin.

b. The Hilmarton case

The *Hilmarton* case is also well-known among international arbitration specialists. The dispute concerned the payment of a commission by OTV, a French corporation, to Hilmarton, an English corporation, for obtaining a contract in Algeria. In an award of 19 April 1988,[15] the sole arbitrator held that the commission was not due on the grounds that Algerian law, which was not the *lex contractus*, absolutely prohibited payments to intermediaries in such circumstances.

At the initiative of OTV, the first award was recognized and enforced in France in a decision rendered by the *Tribunal de grande instance* of Paris on 27 February 1990. Simultaneously, Hilmarton had instituted proceedings in Switzerland to have the award set aside. In a decision of 17 November 1989,[16] the Court of Justice of the Canton of Geneva set aside the award. The Swiss Federal Tribunal affirmed this decision in a ruling issued on 17 April 1990,[17] exactly two months after the Paris *Tribunal de grande instance* enforced the award in France. When an appeal of the enforcement decision was brought before it, the Paris Court of Appeal was directly confronted with the question of whether to recognize in France an award which had been set aside in its country of origin.

In its decision of 19 December 1991,[18] the Paris Court of Appeal first noted that in applying Art. VII of the New York Convention, "the judge may not refuse to enforce unless the national law so authorizes", thereby effectively neutralizing the argument founded in Art. V(1)(*e*) of the Convention. The court then observed that Art. 1502 NCCP[19] does not include as one of the grounds for refusal to enforce an award, the fact that it has been set aside in its country of origin. Finally and most significantly, the court added that the recognition of an award in France that had been set aside in its country of origin was not contrary to the French conception of international public policy.

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14. A.J. van den BERG, *The New York Arbitration Convention of 1958* (1981) p. 89.
15. ICC Award No. 5622, Rev. arb. (1993) p. 327; A.J. van den BERG, ed., ICCA *Yearbook Commercial Arbitration* XIX (1994) p. 105 (hereinafter *Yearbook*).
16. Rev. arb. (1993) p. 315.
17. Rev. arb. (1993) p. 322.
18. Rev. arb. (1993) p. 300.
19. Art. 1502 NCCP states:

> "Appeal of a decision granting recognition or enforcement is available only in the following cases:
> 1. If the arbitrator has ruled without the authority of an arbitration agreement or based on an arbitration agreement which is void or which has expired;
> 2. if the arbitral tribunal was improperly constituted or if the sole arbitrator was improperly designated;
> 3. if the arbitrator has exceeded the terms of his brief;
> 4. if the principle of contradiction has not been respected;
> 5. if recognition or enforcement of the award are contrary to international public policy."

The *Cour de cassation* confirmed this approach in a decision of 23 March 1994,[20] ruling that the award in question was "an international award which was not integrated into the Swiss ... legal order, such that its existence continued in spite of its being set aside and that its recognition in France was not contrary to international public policy."

This reasoning left several uncertainties unresolved concerning the precise conditions for recognition under French law of awards set aside in their country of origin. In particular, the question of whether recognition is possible in every case where an award can be characterized as an international award under French law remained unanswered.[21] However, the decision did confirm *Norsolor* by accepting the recognition in France of an award set aside at the seat of arbitration.

Subsequent arbitral proceedings in Switzerland provided the French courts with the opportunity to further define the scope of its case law in this area.

A second award, which granted Hilmarton the right to collect its commission, was rendered in Switzerland on 10 April 1992. At Hilmarton's initiative, the *Tribunal de grande instance* of Nanterre issued a ruling enforcing this second award on 25 February 1993. At the same time, Hilmarton obtained from the same court an order recognizing the decision of the Swiss Federal Tribunal of 17 April 1990 which had set aside the first arbitral award.

Following these two decisions by the Nanterre Court, by virtue of the various intervening enforcement decisions, two conflicting awards concerning the same dispute between the same parties as well as a judgment setting aside the first award, coexisted within the French legal order. It goes without saying that this situation was unsustainable.

Nevertheless, in two decisions of 29 June 1995,[22] the Versailles Court of Appeal upheld the decisions of the Nanterre Court. Invoking various French procedural rules, the Versailles Court of Appeal reasoned that the enforcement of the first award did not "crystallize the dispute in the French legal order" and held that consequently the recognition of the first award was in no way a bar to the recognition of the second, conflicting award.

In its ruling of 10 June 1997,[23] the *Cour de cassation* reversed the two decisions of the Versailles Court of Appeal, on the basis of Art. 1351 of the French Civil Code concerning *res judicata*, thereby putting an end to the uncertainty. Thus, after this decision, only the first decision ordering enforcement of the first *Hilmarton* award survived in the French legal order and was definitively recognized in France despite having been set aside in Switzerland. This ruling removed any remaining contradiction in French case law on the recognition of awards set aside in the country of origin.

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20. Note, E. GAILLARD, JDI (1994) p. 701; Note, Ch. JARROSSON, Rev. arb. (1994) p. 377; Note, B. OPPETIT, RTD Com. (1994) p. 702; *Yearbook* XVIII (1993) p. 663.
21. See below Section II.*2.c*.
22. Note, E. GAILLARD, JDI (1996) p. 120; Note, Ch. JARROSSON, Rev. arb. (1995) p. 638.
23. Note, E. GAILLARD, JDI (1997) p. 1033; Note, Ph. FOUCHARD, Rev. arb. (1997) p. 376; Ph. FOUCHARD, "La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine", Rev. arb. (1997) p. 329.

The principle according to which an award set aside in its country of origin may be recognized in France was to find a new application in the *Chromalloy* case.

c. The Chromalloy case

Since the *Chromalloy* case is well-known for its developments in the United States and has already been examined in a particularly detailed study by David Rivkin,[24] it is not necessary to review the circumstances of the case at length here. One need only recall that the matter concerned an award rendered in Egypt on 24 August 1994[25] ordering the Egyptian government to pay various sums to Chromalloy, an American corporation. The award was recognized in the United States on 31 July 1996 despite its being set aside by an Egyptian court on 5 December 1995.[26] This same award was also the subject of an enforcement proceeding in France. Enforcement was obtained by order of 4 May 1996. Egypt immediately appealed.

In a decision issued on 14 January 1997, the Paris Court of Appeal approved the recognition of the award in France despite its having been set aside in Egypt, following the tradition of *Hilmarton*. The ruling clearly established that none of the conditions set forth in Art. 1502 NCCP, which permit courts to refuse to enforce an award, had been satisfied. The court's reasoning provides a perfect summary of the position of French law on the question of recognition and enforcement of an award set aside in the country of origin:

> "Considering that the French judge may not refuse enforcement except in those limited cases enumerated in Art. 1502 of the New Code of Civil Procedure that constitute national law on the matter and on which Chromalloy has relied;
>
> And considering that this Art. 1502 of the New Code of Civil Procedure does not include among the grounds for refusal to recognize and enforce the grounds outlined in Art. V of the [New York] Convention, the application of which must be barred;
>
> Considering finally that the award rendered in Egypt was an international award which by definition was not integrated into the legal order of that country such that its existence continues despite its nullification and that its recognition in France is not contrary to international public policy."

This last paragraph contains a welcome clarification concerning the fate of an international award rendered in a foreign State which, from the French point of view, is, "*by definition*", not integrated in the legal order of the State in which it was rendered.[27]

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24. See David W. RIVKIN, "The Enforcement of Awards Nullified in the Country of Origin: The American Experience", pp. 528-543.
25. 11 Mealey's Int. Arb. Rep. (August 1996) p. C-1.
26. 11 Mealey's Int. Arb. Rep. (August 1996) p. C-4; Rev. arb. (1997) p. 439; concerning *Chromalloy* in the United States, see RIVKIN, *op. cit.*, fn. 24. On the setting aside by the Egyptian court, see Rev. arb. (1994) p. 665.
27. On this question, see below Section II.*2.c.*

The position of French law on the issue of recognition of awards set aside in their country of origin is thus firmly established. The setting aside of an award in the country in which it was rendered does not in itself constitute grounds for refusal of enforcement of the award in France. The review of the award is conducted pursuant to the applicable criteria of French law, which are identical whether the jurisdiction of French courts is sought by way of a request for annulment of the award (which is admissible if the award was rendered in France) or by way of a request for enforcement if the award was rendered in a foreign country.

2. *Scope of the Rule*

The scope of the rule established by French case law requires three clarifications. The first relates to the effect of a second award rendered at the seat of the arbitration following the setting aside of the first award (*a*). The second concerns the grounds for the nullification of the first award (*b*) and the third the type of award that may benefit from this line of case law (*c*).

a. The effect of a second award rendered at the seat of the arbitration

Following the setting aside of an award by the courts of the seat of the arbitration, the arbitral proceedings may sometimes continue in the State of the seat. A second award may result. The issue did not arise in *Norsolor*, as the Austrian Supreme Court reversed the decision setting aside the award by the Vienna Court of Appeal.[28] Nor did it arise in *Chromalloy*, as the decisions concerning the enforcement of the first award in the United States and France led to an amicable settlement of the dispute. Because a number of States allow the enforcement of an award set aside at the seat of the arbitration, litigants will now tend to concentrate their efforts on attempting to enforce the award in one of these States rather than recommencing arbitral proceedings at the seat. This outcome is even more likely if the award appears to be well-founded and the grounds for nullification do not appear to be in accordance with generally accepted principles in comparative law. It is thus reasonable to conclude that only rarely will a situation occur in which a second award is rendered at the seat of the arbitration.

Nevertheless, such a situation may occur. Indeed, this is precisely what happened in *Hilmarton*.[29] Following the setting aside by the Court of Justice of the Canton of Geneva of the award of 19 August 1984, a second conflicting award was rendered on 12 April 1992. There were thus three decisions at issue: the two awards and the ruling setting aside the first award by the court of the State of origin. In such a situation, it is clear that recognition of the first award by French courts despite its having been set aside at the seat would bar any later recognition of either the decision setting the first award aside or a second conflicting award in the same case.

It is therefore quite surprising that the Versailles Court of Appeal enforced the second award, reasoning that it would ultimately fall to the *Cour de cassation* to resolve this

28. See above Section II.*1.a.*
29. See above Section II.*1.b.*

conflict of judgments under the applicable rules of the New Code of Civil Procedure intended to govern conflicting decisions of French courts.[30] The action of the Versailles Court in fact amounted to thinly veiled resistance to the principle of recognizing awards set aside at the seat of arbitration. The chaos that would have resulted had this decision been permitted to stand would have served as the most effective proof of its impracticability.

In reversing the decision of the Versailles Court of Appeal, the *Cour de cassation* put an end to this absurd situation, which had been unanimously criticized by commentators.[31] The holding is unambiguous: "the existence of a final French decision concerning the same object and between the same parties bars the recognition in France of any judicial decision or arbitral award rendered abroad which is incompatible with it."[32] The scope of the *Norsolor-Hilmarton* case law concerning a second award rendered at the seat in the same case is now clear: this award may not be recognized in France if the first award has already been recognized.

b. Irrelevance of the reasons for the setting aside of the first award

French case law makes clear that when applying the *Norsolor-Hilmarton* holding, the reason why the award was set aside at the seat should not be taken into consideration. The fact that conflicting positions exist, with respect to the recognition of an award, between the legal order of the State of enforcement and the legal order of the State of origin stems from several different situations.

The first situation is when the State of origin has a list of grounds for setting aside or refusing to enforce which is more extensive than that of the State of enforcement. In contrast to French law, which since 1981 has radically limited the grounds for setting aside or refusing to enforce awards rendered in international matters,[33] this was the case in Switzerland before the 1987 Law on Private International Law entered into force.[34] It is still the case in England, as the 1996 Arbitration Act contains many more possible grounds for setting aside an award than French, Swiss or Dutch law, for example. Although one may hope that the English courts will have limited recourse to these, the list of grounds appears extremely wide and imprecise to a continental practitioner. It includes such grounds as "serious irregularities which have caused or will cause injustice

30. Art. 16, NCCP. See also Note, Ch. JARROSSON, Rev. arb. (1995) p. 639 (concerning the applicability of that provision to this situation).
31. See JARROSSON, *op. cit.*, fn. 30; see also FOUCHARD, Rev. arb. (1997) p. 329; B. LEURENT and N. MEYER FABRE, Bulletin ASA (1995) p. 118.
32. GAILLARD, *op. cit.*, fn. 23; Note, Ph. FOUCHARD, Rev. arb. (1997) p. 376.
33. See above Section II.*1.b.*
34. In effect, under the rules of the Concordat, which are no longer applicable to international matters unless the parties so choose, an award may be set aside for being "arbitrary".

to the applicant", "ambiguity as to the effect of the award", and "irregularities in the conduct of the proceedings or in the award...".[35]

Differences concerning the grounds that are recognized for setting aside or refusing to enforce any award may have been at the root of the *Norsolor-Hilmarton* case law. This was the case in *Hilmarton*, given that the Swiss Concordat included the grounds that the award was "arbitrary". *Chromalloy* provides an illustration of a similar situation. Although inspired by the UNCITRAL Model Law, the Egyptian arbitration law of 1994 added to the Model Law's list of grounds for nullification a provision allowing an award to be set aside if it "did not apply to the merits of the dispute the law chosen by the parties".[36] This language, interpreted broadly by the Cairo Court of Appeal, served as the basis for that court's decision of 5 December 1995 to set aside the award rendered on 24 August 1994 on the grounds that the award improperly applied Egyptian civil law rather than Egyptian administrative law, grounds which would not have been sufficient to justify nullification under French law.[37]

The second situation in which the recognition in another State of an award set aside at the seat might arise is when differing interpretations are given to the same grounds to

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35. Sect. 68 of the English Arbitration Act 1996 states under the caption "Challenging the award: serious irregularities":

"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
(2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant: (a) failure by the tribunal to comply with section 33 (general duty of tribunal); (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67); (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties; (d) failure by the tribunal to deal with all the issues that were put to it; (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers; (f) uncertainty or ambiguity as to the effect of the award; (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy; (h) failure to comply with the requirements as to the form of the award; or (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
(3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may: (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.
(4) The leave of the court is required for any appeal from a decision of the court under this section."

36. Art. 53(1)(e) of the Law of 21 April 1994, Rev. arb. (1994) p. 763.
37. See decision of 14 January 1997 rendered by the Paris Court of Appeal. As one of the arbitrators that rendered the *Chromalloy* award, the author expresses no view on the merits of the Cairo Court's decision.

set aside or refuse to enforce awards. Such was the case in *Norsolor*. In Austrian law, as in French law, an award may be set aside if the arbitrators exceed their mission. While French courts have never held that a tribunal's decision to apply transnational rules in the absence of a choice of law by the parties constitutes a case of acting beyond their mission,[38] the Vienna Court of Appeal reached the opposite conclusion.[39] Although that decision was later reversed by the Austrian Supreme Court, it demonstrates how the same grounds for nullification may be interpreted differently in two different States, a phenomenon which may appear with increasing frequency in the future.

The adoption of the UNCITRAL Model Law by numerous States should have the effect of harmonizing the various grounds for nullification despite the fact that it has, in a very conservative manner, merely transcribed the list of grounds contained in the New York Convention. The possibility remains, however, that these grounds, or in any case some of them, may give rise to very different interpretations in different States. In particular, conflicting conceptions of international public policy could produce widely diverging standards of interpretation.

French case law makes no distinction between these two situations regarding the conditions for recognizing awards rendered in foreign States. Whether the nullification results from a different legislative approach to the grounds for nullification or a diverging judicial interpretation of the same grounds, the approach of French law is the same: the recognition of the award as part of the French legal order will be determined solely on the basis of the French law conditions for enforceability of what is basically a private act, the arbitral award.

c. Type of awards that may benefit from the Norsolor-Hilmarton case law

It is worth considering whether all awards rendered abroad and set aside at the seat of arbitration may benefit from the *Norsolor-Hilmarton* case law and thus presumably receive recognition in France provided they satisfy the requirements of Arts. 1502 and 1504 NCCP.

This debate arose from the wording used by the *Cour de cassation* in its *Hilmarton* decision of 23 March 1994 which states that "the award rendered in Switzerland was an international award that was not integrated into the legal order of that State, such that its existence continued despite its nullification."[40] This wording was ambiguous. Did it mean that only awards that are "not integrated into the legal order" of the State of the seat of arbitration may be enforced in France? If so, what types of award come within this designation? In truth, the holding appears to constitute less an exception to the rule than the theoretical justification of the court's approach.

This justification is directly borrowed from Berthold Goldman, who observed in the wake of the *Norsolor* decision that the proposition that an award ceases to exist after being set aside at the seat "cannot be accepted if the nullification applies to an

38. See Ph. FOUCHARD, E. GAILLARD, B. GOLDMAN, *Traité de l'Arbitrage Commercial International* (1996) no. 1443.

39. See above Section II.*1.a*.

40. See above Section II.*1.b*.

international award, since an international award is not integrated into the legal order of the country of the seat simply by virtue of the geographic location" of the seat of arbitration. This can only mean that all international awards should benefit from the legacy of *Norsolor-Hilmarton.*

The Paris Court of Appeal provided a helpful clarification of the rule in its *Chromalloy* decision of 14 January 1997. As noted above, the court held that "the award rendered in Egypt was an international award, which, by definition, was not integrated into the legal order of that State such that its existence continued despite its nullification." In observing that "*by definition*" an international award is "*not integrated*" into the judicial system of the State of the seat, this decision dispels any doubt that all awards rendered in matters of an international nature may be recognized in France notwithstanding their having been set aside in the State of origin.

Only awards rendered in purely internal matters in any given State, between parties domiciled in that State, concerning subjects that affect commerce exclusively within that State, may be held to have lost their legal existence by virtue of their "*integration*" into the judicial system of that State.

III. MERITS OF THE FRENCH LAW APPROACH

The French approach to the recognition and enforcement of awards set aside at the seat of arbitration, which has also appeared in the United States and in Belgium,[41] has produced sharply contrasting reactions in France[42] and throughout the world.[43] Three

41. Decision of the Brussels Tribunal of First Instance of 6 December 1988, *Yearbook* XV (1990) p. 370; J. Trib. (1993) p. 685; Bulletin ASA (1989) p. 213.

42. For a criticism of this approach, see B. OPPETIT, Note following *Hilmarton*, Rev. Crit. DIP (1995) p. 356; B. LEURENT, "Réflexions sur l'efficacité internationale des sentences arbitrales", *Trav. co. fr. DIP, 1994-95* (Pédone 1996) p. 181; see, in favor of this approach, FOUCHARD, GAILLARD, GOLDMAN, *op. cit.*, fn. 38, no. 1595; B. GOLDMAN, "Une bataille judiciaire autour de la lex mercatoria: l'affaire Norsolor", Rev. arb. (1983) p. 379; Ph. FOUCHARD, "La portée internationale de l'annulation de la sentence arbitrale dans le pays d'origine", Rev. arb. (1997) p. 329; D. HASCHER, Note following *Polish Ocean Line*, Rev. arb. (1993) p. 255; Ph. KAHN, Note following *Polish Ocean Line*, JDI (1993) p. 360; GAILLARD, *op. cit.*, fn. 20; Ch. JARROSSON, Note following Civ. 1re, 23 March 1994, *Hilmarton*, Rev. arb. (1994) p. 327; Note, J.-C. DUBARRY and E. LOQUIN, RTD Com. (1994) p. 702.

43. For a criticism of this approach, see J.-F. POUDRET, "Quelle solution pour en finir avec l'affaire Hilmarton? Réponse à Philippe Fouchard", Rev. arb. (1998) p. 7; H. GHARAVI, "Chromalloy: another view", 12 Mealey's Int. Arb. Rep. (January 1997) p. 21; H. GHARAVI, "The Legal Inconsistencies of Chromalloy", 12 Mealey's Int. Arb. Rep. (May 1997) p. 21; E. SCHWARTZ, "A Comment on Chromalloy. Hilmarton, à l'américaine", 14 J. Int. Arb. (June 1997) p. 125; see, in favor of this approach, J. PAULSSON, "Rediscovering the N.Y. Convention: Further Reflections on Chromalloy", 12 Int. Arb. Rep. (April 1997) p. 20 and "Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment", 1 ICC Bull. (1998) p. 14; G. SAMPLINER, "Enforcement of Foreign Arbitral Awards After Annulment in their Country of Origin", 11 Mealey's Int. Arb. Rep. (September 1996) p. 22; E. GAILLARD, "Enforcement of a Nullified Foreign Award", NYLJ (2 October 1997); G. DELAUME, "Enforcement Against a Foreign State of an Award Annulled in the Foreign State",

areas of debate have emerged. The first concerns jurisdictional issues arising from the principal international arbitration conventions (i). The second concerns arbitration policy (ii). The third focuses on the more fundamental question of the respective entitlements of the various States involved to have their views on the conditions under which an arbitral award may benefit from State approval prevail (iii).

1. Arguments Based on International Conventions

The debate has focused on the 1958 New York Convention (*a*) thus minimizing the significance of the 1961 Geneva Convention (*b*).

a. The 1958 New York Convention

The arguments based upon the New York Convention are of two types. One is a textual argument and the other is derived from the supposed intention of the drafters of the Convention to organize the allocation of jurisdictional powers of the various affected States.

i. The textual argument

The argument drawn from the text of the Convention is unsatisfying.

This criticism of the *Norsolor-Hilmarton* approach is based on the French version of Art. V(1) which reads "the recognition and enforcement of the award *will be* refused ..." only if one of the following grounds is found. One such ground, set out in paragraph (*e*) is the case in which "the award ... has been set aside" in the State of origin. Thus, the French version of Art. V(1) seems to indicate an obligation to refuse to recognize such awards. This would render the permissive "may be refused only" of the English version inoperative.[44]

However hard it may be for a French speaker to turn down an argument based on the preeminence of the French language, the argument is not terribly convincing. For a French reader, it is not impossible to view Art. V(1) as permissive, the "only if " serving to limit the possible grounds for refusing recognition. Indeed, Art. VII confirms this interpretation and leaves no doubt that the drafters of the Convention intended to establish only the minimum conditions for the recognition of awards, leaving to each State the freedom to act less restrictively.[45]

ii. The allocation of jurisdictional roles resulting implicitly from the Convention

The second argument against the *Norsolor-Hilmarton* case law, also based on the New York Convention, rests on the idea that in adopting Art. V(1)(*e*), the drafters of the Convention sought to draw jurisdictional boundaries between the judge of the State of

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RDI (1997) p. 253; RIVKIN, *op. cit.*, fn. 24.

44. See, e.g., SCHWARTZ, *op. cit.*, fn. 43.

45. See J. PAULSSON, "*May* or *Must* Under the New York Convention: An Exercise in Syntax and Linguistics", 2 Arb. Int'l (1998) p. 227; contra FOUCHARD, *op. cit.*, fn. 42 at p. 344. For a discussion of the treatment of this issue in the Geneva Convention of 1961, see below Section III.*1.b.*

origin and the judge of the State of enforcement, imposing on the latter the obligation to recognize the decisions of the former. This theory is based on the premise that limiting challenges of the award to the seat of the arbitration would ensure a minimum level of coherence in the international legal system.

Aside from the fact that this theory is difficult to reconcile with the language of Art. VII, the inability of the drafters of the Convention to ensure a minimal level of coordination stems from at least three considerations.

First, it is difficult to reconcile such a philosophy with another provision in the Convention pursuant to which it is optional, rather than obligatory, for courts in the State of enforcement to stay a proceeding pending the outcome of a matter before a court in the State of origin.[46] If the decision of a court in the State of origin will necessarily be binding, then a stay would be necessary. Otherwise, any enforcement prior to a final decision in the State of the seat would be liable to create an inextricable situation in which one State would have to go back upon an enforcement decision which it considered justified in order to conform to a conflicting decision rendered in a foreign country.[47] However, if the stay were mandatory, the mechanism would not be far removed from the "dual" enforcement system in place under the Geneva Convention of 1927, a system from which the drafters of the New York Convention sought to move away.

A second consideration shows even more clearly that the drafters of the Convention did not intend that court decisions in the seat of the arbitration should dictate the outcome of proceedings in the State of enforcement. If they had, then why is the rule not the same for decisions in which courts decline to set aside an award?[48] This argument was put forward in a particularly convincing manner by Philippe Fouchard. If the courts of the seat offer the optimal *forum* for reviewing the award, and if it is indeed the stated objective of the Convention to avoid "dual" enforcement, why not require courts in the enforcing State to adhere to the decision of the courts in the State of origin whether or not they accept the validity of the award?

Clearly, however, the New York Convention did not endorse such a solution. On the contrary, the Convention insists upon the right of courts in the State of enforcement to review awards while limiting the right not to recognize them to certain cases. Critics of the *Norsolor-Hilmarton* case law are in fact implying that the drafters of the Convention intended to give an absolute international effect to the judge's ruling in the State of the seat when hostile to the award, but would disregard completely a similar ruling in support of the award. This result, which would systematically disfavor the enforcement of arbitral awards, would be paradoxical to say the least, as the product of an instrument designed to enhance the recognition and enforcement of awards.

The third indication confirming that there was no intention to centralize the control of the award in the courts of the State of the seat is the rejection of the idea that an award for which there is no recourse in the seat may not benefit from the New York Con-

46. See PAULSSON, *op. cit.*, fn. 43.

47. For an example of mechanisms designed to remedy this phenomenon, see K. SACHS, "The Enforcement of Awards Nullified in the Country of Origin: The German Perspective", pp. 552-556.

48. See FOUCHARD, *op. cit.*, fn. 42 at pp. 345-346.

vention.[49] No one would defend such a proposition today. However, if it is true that an award set aside in the State of origin loses its legal existence and that, as a result, it cannot be enforced in another State, it should also be true that awards which cannot be validated by the courts of the seat would be contrary to the philosophy underlying the New York Convention. This would be the case for awards rendered in Belgium and in Switzerland, when the subject matter has no connection with these countries and when the parties have made that choice.[50] The fact that this position, although logical, has now been abandoned[51] indicates, at least implicitly, that the New York Convention may not be used to support the idea that the validity of an award may only stem from the law of the seat of the arbitration.

If at the end of the day, the New York Convention is perfectly neutral on the fate of awards set aside in the State of origin, since it neither requires their recognition (Art. V(1)(*e*)) nor bars such recognition (Art. VII), it is equally clear that the drafters of the Geneva Convention of 1961 chose to impose on the State of enforcement an explicit obligation to recognize such awards in certain circumstances.

b. The 1961 Geneva Convention

The European Convention on International Commercial Arbitration of 21 April 1961 has now been ratified by 27 States. This Convention adopted the same philosophy that led to the conclusion in *Norsolor* in France some 23 years later.[52]

The first paragraph of Art. IX of the Convention reads as follows:

> "(1) The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:
> (*a*) the parties to the arbitration agreement were, under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or
> (*b*) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> (*c*) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters

49. On this issue, see A. SAMUEL, *Jurisdictional Problems in International Commercial Arbitration: A Study of Belgian, Dutch, English, French, Swedish, Swiss, US and West German Law* (1989) p. 293.
50. See Art. 1717(4) of the Belgian Judicial Code as amended by Law of 19 May 1998, published in the Official Gazette on 7 August 1998 and Art. 192 of the Swiss Private International Law Act.
51. See FOUCHARD, GAILLARD, GOLDMAN, *op. cit.*, fn. 38, no. 1689.
52. See above Section II.*1.a.*

> submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;
> (*d*) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Art. IV of this Convention."

This list of grounds for refusal is a slightly better drafted version of the first four cases included in Art. V(1) of the New York Convention.[53] The Geneva Convention leaves no ambiguity, even in the French version, regarding the fact that its purpose is only to draw up the possible grounds for "refusal of recognition or enforcement" that may be relied upon, which signifies that even in these situations, States are not required to refuse the recognition of awards set aside on these grounds. It is true that this observation is not conclusive regarding the interpretation of the wording "may be refused/*ne seront refusées*" of the New York Convention. Some might see in the "cleaned-up" text the clarification of its optional nature, whereas others may draw an *a contrario* argument. The most important contribution of the Geneva Convention in this context lies in the fact that the setting aside of an award in the State of origin may only serve as grounds for refusing recognition or enforcement if it is based on one of the following four grounds: incapacity or, more generally, the invalidity of the arbitration agreement; violation of the right to due process; overstepping the terms of the arbitration agreement by the arbitrators; or constitution of the tribunal or conduct of the proceedings contrary to the will of the parties or the law of the State of the seat of arbitration.

Rather than imposing a list of grounds on Contracting States for the nullification of awards, the Convention limits the international impact of all other grounds for the setting aside of awards. In fact, the Convention not only restricts the international impact of all grounds for setting aside other than those of the New York Convention, but furthermore excludes certain grounds listed in the New York Convention, namely those included in Art. V(2) concerning the non-arbitrability of the dispute and breach of international public policy. The Geneva Convention is quite explicit on this issue. It specifies in the second paragraph of its Art. IX the impact of paragraph 1 on the application of the New York Convention:

> "(2) In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V(1)(*e*) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

In practice, this means that, for the 27 States which have ratified the Geneva Convention, when the Convention is applicable, grounds for setting aside such as those in Art. 68 of the English Arbitration Act, as the "*arbitraire*" of the Swiss Concordat, or the "non-

53. See above Section III.*1.a* under i

application of the law agreed by the parties to the merits of the dispute" of Art. 53(1) of the Egyptian Arbitration Law of 1994[54] should have no international effect. Even if such grounds led to the setting aside of an award in the State of the seat, when the Convention applies, none of these States may recognize the setting aside without infringing Art. IX. As far as France is concerned, the Geneva Convention did not apply in *Norsolor* and *Hilmarton*, given the parties' respective domiciles.[55] However, it would be paradoxical to recognize grounds for setting aside that are inconsistent with the Geneva Convention in cases in which the Convention does not apply and not to recognize them when the Convention applies as a result of the parties' residence or domicile. Thus, by analogy, the Geneva Convention provides an additional reason not to give effect to the setting aside on grounds of "*arbitraire*" of the *Hilmarton* award in Switzerland or of the *Chromalloy* award in Egypt for grounds not included in the list of four grounds of Art. IX of the Geneva Convention.[56]

It is therefore inaccurate to suggest that an award set aside at the seat of the arbitration may only be recognized in France and, perhaps now, in the United States. Depending on the domicile of the parties, the award may be recognized in all States that have ratified the Geneva Convention plus the United States, that is, 28 States altogether. One cannot then say, as has Albert Jan van den Berg somewhat derisively, that "if an award is set aside in the country of origin, a party can still try its luck in France."[57] In fact, a party may "try its luck" not only in France and the United States but, depending on whether the Geneva Convention applies, also in Austria, Belgium, Denmark, Germany, Italy, Luxembourg and Spain, as well as in Belarus, Bosnia-Herzegovenia, Bulgaria, Burkina Faso, Croatia, Cuba, the Czech Republic, Hungary, Kazakhstan, the Republic of Macedonia, Moldavia, Poland, Romania, the Russian Federation, Slovakia, Slovenia, Turkey, the Ukraine and the former Yugoslavia.[58]

In all, given the neutrality of the New York Convention and the unmistakable position of the Geneva Convention, arguments derived from these international conventions militate in favor of the *Norsolor-Hilmarton* case law rather than against.

2. *Arguments Based on Policy Considerations*

Critics of the *Norsolor-Hilmarton* case law have advanced three arguments in this respect.

a. Encouragement of States that have recently embraced arbitration

The first of these arguments is rooted in the fear that the *Norsolor-Hilmarton* decisions will be viewed as acts of defiance against the judicial decisions setting them aside, and that they may undermine endeavors to restore confidence in international arbitration in

54. See above Section II.*2.b*.
55. See Art. I(1) of the Geneva Convention.
56. See above Sections ii.*1.b* and *c*.
57. *Yearbook* XIX (1994) p. 592, cited in SCHWARTZ, *op. cit.*, fn. 43.
58. The Convention has also been signed, but not ratified, by Finland.

States that have been hostile to it until only recently. When these States or their nationals succeed in obtaining the seat of an arbitration in their territory, the failure to obtain international recognition of decisions rendered by their courts could have the effect of discouraging them from resorting to international arbitration in the future.[59]

The desire not to discourage States that are striving to modernize their arbitration laws is laudable. In essence, however, this argument rests on a questionable premise, which is that the New York Convention grants States the right to regulate, in respect of the entire world, all arbitrations held on their territory.[60] Only in this case would the act of not recognizing a decision by a court in the State of the seat to set aside an award rise to the level of a challenge to the authority of that State.

In fact, the State's sovereignty over its territory[61] is not in question. The only issue in dispute concerns the international effect of decisions concerning arbitration rendered in a State's territory. It is perfectly in accordance with principles of private international law that, in the absence of an international treaty on the subject, this question should be resolved in accordance with the views of the place of enforcement. As the New York Convention covers only the recognition of awards, and not court decisions concerning arbitration matters,[62] States may exercise their individual sovereignty only within the confines of their own legal order.

Moreover, as is often the case, an argument based on the legitimate expectations of the parties concerned can easily be challenged. The legitimate expectations at issue are not only those of the State of origin of the award, but also, and perhaps more importantly, those of the two parties to the arbitration, whether or not the State of the seat of the arbitration happens to be one of them. These expectations will rarely be satisfied by the international recognition of highly particular national rules or court interpretations.

The adoption of modern legislation in a number of States that do not have a long judicial tradition favorable to arbitration has led to a more geographically diverse choice of seats of arbitration. The amplification, caused by international recognition, of the effects of decisions from jurisdictions serving as arbitral seats when these jurisdictions are not truly favorable to arbitration despite the enactment of modern legislation, is hardly a sign of respect for the confidence that international commercial players have placed in these recent laws.

Nonetheless, it is worth noting that unlike the implications of certain of the reasons cited by the American judge in the *Chromalloy* decision, the effect in France of awards set aside at the seat does not depend on the French court's evaluation of the legitimacy of the grounds for the foreign court's decisions to set aside the award. This approach is based on a very general principle and totally dispenses the French judge from weighing

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59. See above SCHWARTZ, *op. cit.*, fn. 43 at p. 135.
60. *Ibid.*, p. 134 (*Chromalloy* does not serve "the cause of international arbitration particularly for the courts of one country to disregard the legitimate right of another country to determine the rules governing arbitrations conducted on its territory – a right, moreover, that is recognized by the New York Convention").
61. Or over arbitrations governed by its law. See Art. V(1)(*e*) New York Convention.
62. See Art. I(1) New York Convention.

the merits of the foreign decision, the scope of which is deemed not to extend beyond the confines of the legal order in question. In this respect, the French law approach may be perceived as less antagonistic to the State whose judgment is not recognized by the French legal order.

b. The fight against "floating awards"

Another policy-based criticism frequently leveled at the *Norsolor-Hilmarton* case law is that it promotes the creation of "floating awards". These are awards that can never be set aside once and for all, whatever their defects may be, obliging the unjustly condemned party to wait for enforcement measures in different countries to occur without having any power to respond by challenging the recognition of the award in each jurisdiction.[63] The same criticism has been made of Art. 1717(4) of the Belgian Judicial Code and of Art. 192 of the Swiss Law on Private International Law, both of which permit certain awards to escape any nullification actions at the place of the seat.[64] In other words, this approach encourages questionable *forum shopping* on the part of claimants attempting to act on the basis of an award set aside at the seat. In practice, however, such a phenomenon is unlikely to be widespread since the choice of States of enforcement is more frequently driven by the location of seizable assets than by the characteristics of the arbitration law of the State of enforcement.

On a theoretical level, rather than "floating awards",[65] one should really refer to them as "limping awards". Just as a marriage which is recognized in one State but not in another is a "limping marriage", or a divorce recognized in one State but not in another is a "limping divorce", an award which may be enforced in one State but not in another should be called a "limping award". International law is replete with examples of this type of situation. To take just one example, in international business law, the situation is no different when the beneficiary of an award against a State is barred from enforcing the award by immunity from enforcement in one State but benefits from a commercial exception in another. Moreover, the discord reflected in the *Norsolor-Hilmarton* case law is no more shocking than the reverse situation in which an award would be confirmed at the seat but nonetheless refused enforcement elsewhere.[66] The award is just as lame, but in the other leg. In reality, it is the division of the world into sovereign States that gives rise to these situations, and as long as there is no supra-national jurisdiction for review of arbitral awards,[67] the realization of this diversity must not permit the seat of the arbitration to be considered to have precedence in a conflict with the place of enforcement. Before directly addressing this conflict between the seat and the place of enforcement,

63. See OPPETIT, *op. cit.*, fn. 42; see also GHARAVI, *op. cit.*, fn. 43.
64. See above Section III.*1.a*.ii.
65. Once again, the award is only "floating" if one assumes that the State of the seat has the natural link to the arbitration.
66. See below Section III.*3.b*.
67. On this idea, see H. HOLTZMANN, "A Task for the 21st Century: Creating a New International Court for Resolving Disputes on the Enforceability of Awards", M. HUNTER, A. MARRIOTT, and V.V. VEEDER, eds., *The Internationalisation of International Arbitration* (1995).

which lies at the heart of the *Norsolor-Hilmarton* case law,[68] a third policy-based argument by critics of this approach remains to be examined.

c. The search for neutrality

It has been suggested that the result reached in *Norsolor-Hilmarton* will amount to no more than an expedient device designed to favor entities in the State of enforcement over foreign interests. Consequently, this result would lack neutrality, thus contravening one of the ideals of traditional private international law.[69]

Case law does not support such a conclusion. In *Norsolor*, the French corporation was condemned to make payments to the Turkish corporation in the award set aside by the Vienna Court of Appeals.[70] The enforcement of the award, despite its being set aside thus harmed the French corporation. In *Hilmarton*, by contrast, the French corporation benefitted from the award, which was recognized notwithstanding a nullification decision, as the award refused to condemn the French company for reasons which, although questionable, belonged to the merits of the case and did not warrant a refusal to enforce.[71] In *Chromalloy*, recognition of the award set aside in Egypt benefitted an American corporation to the detriment of the Egyptian government, affecting no French interests. Thus, the record to date has been quite balanced from this standpoint.

If reasoning in these terms reveals anything, it would be that the *Norsolor-Hilmarton* case law statistically can only be disfavorable to French parties. Indeed, it is reasonable to think that French parties will have more seizeable assets in France than in any other country. As a result, enforcement of an award against a French party is likely to first be sought in French territory. Consequently, any case law favorable to the enforcement of an award despite challenges at the seat of arbitration would in all likelihood disfavor the French party. It is therefore rather implausible that this approach could be grounded in nationalist sentiment. In truth, if the *Norsolor-Hilmarton* case law is biased, it is in favor of the validity of arbitral awards and the extremely limited nature of grounds for refusal to recognize them.

The merits of the *Norsolor-Hilmarton* case law can therefore best be assessed on a more fundamental level, that of the respective entitlements of the State of the seat of arbitration and the State of enforcement in reviewing arbitral awards.

3. Arguments Based on the Legitimacy of the Review

An arbitration agreement is a private act. An arbitral award rendered on the basis of this private act is also a private act. It is unanimously agreed that States may not endorse the award before it has been reviewed by State courts, even though States may have diverging views on the scope and practical implementation of the appropriate review.

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68. See above Section III.*2.a.*
69. See POUDRET, *op. cit.*, fn. 43.
70. See above Section II.*1.a.*
71. See above Section II.*1.b.*

Is the legitimacy of the review conducted at the seat of the arbitration so strong that the courts of the place of enforcement must defer to the result of the review conducted at the seat, at least when the decision is unfavorable to the award? This is, in principal, how one might frame the question which gave rise to the *Norsolor-Hilmarton* case.

The answer may be articulated in terms of the presumed intent of the parties, or in terms of the respective strengths of the connecting factors that are the place of the seat and the place of enforcement.

a. The presumed intent of the parties

An easy objection to the *Norsolor-Hilmarton* case law is that the courts would have honored the intent of the parties by giving effect to the decisions of the courts of the seat setting aside the award. In choosing the seat of the arbitration, either directly or by delegation of this power to an arbitration institution or to the arbitrators themselves, the parties would have sought to place themselves under the protection of the courts of that place. The refusal to recognize a nullification decision rendered in that place would thus disregard the parties' will.[72]

As attractive as it may seem, this argument is ultimately not persuasive. First of all, even if the parties themselves chose the place of arbitration, they may have had many different reasons for doing so, including neutrality and geographic proximity and it appears artificial to suggest that, more often than not, parties would choose the location of the arbitration based on a particular type of challenge available against awards and the case law history of its application. Even if the arbitration clause is negotiated by lawyers, which is not always the case, we are all aware of the approximations and compromises influencing its drafting.

The frequency with which parties forget expressly to submit disputes concerning the validity of the contract to the arbitrators and simply agree that "all differences concerning the interpretation and enforcement of the present contract" will be submitted to arbitration says much about the limits of the argument based on the presumed intent of the parties. The argument rests on the questionable premise that the parties' intent would cover not only the normal arbitration process, but also subsequent litigation regarding the validity of the award. It seems more reasonable to assume that, at the time the contract is signed, the parties are always concerned about the performance of their contract; occasionally concerned about litigation arising out of their contract (the arbitration); but only rarely concerned about litigation regarding the way the litigation arising out of their contract will been conducted (challenges of the arbitral award).

Moreover, it is not obvious that the parties' intent should be of any relevance at all to questions concerning judicial review of arbitral awards or, more precisely, the question of the recognition in one State of a court decision of another. Barring particular legislation on the matter, the rules governing the review of arbitral awards are generally considered to be of a public policy nature, as they affect not only the interests of the parties but also those of the States. It must therefore be the States that determine the conditions under which the arbitral award, a private act, takes on the attributes of a court

72. See SCHWARTZ, *op. cit.*, fn. 43, and POUDRET, *op. cit.*, fn. 43.

decision. Thus, it is not the intent of the parties, real or presumed, that can serve as a guide for deciding the question of legitimacy of the review conducted at the place of the seat or at the place of enforcement of the award.

b. The intensity of the respective connecting factors

The French conception of the State review of awards rests on the idea that the State of the place of enforcement is as well positioned as the State of the seat to assess whether an award should be recognized and enforced.

In fact, the assessment of the strength of the connecting factors between the dispute and each of the States involved, which is a typical private international law approach, tends to support this position. This is clear in a situation where the place of the seat is not a potential place of execution. The State of the seat hosts the material operations of the arbitration on its territory. Although it receives an economic benefit in exchange, as long as the award is not being enforced in its territory, it has only a relatively theoretical interest in reviewing the award, that of not backing a result which is inconsistent with its conceptions of justice. It is this consideration that Belgian and Swiss legislation pushed to its limits by refusing to consider to set aside actions when no national or resident party is involved, no enforcement is sought on its territory and the parties have so agreed.

The State of the enforcement of the award, by contrast, has a very real interest in ensuring that the award meets the standards of what it considers to be a decision worthy of public support. On a very basic level, between the State of the seat which provides hotel rooms and conference centers for an arbitration, and the State of enforcement which permits the seizure and sale of assets in its territory, there can be little doubt but that the latter has the stronger interest in reviewing the award. This view is perfectly consistent with the New York Convention, which permits the State of enforcement to apply its own conception of public policy and its own standards concerning the arbitrability of the dispute in all cases.[73] The fact that the State of the seat may also be the place or one of the places of enforcement of the award does not alter this analysis.

IV. CONCLUSION

In conclusion, it is worth emphasizing that this approach does not entail that arbitral awards should be considered to be "delocalized" or "floating", in the sense that they would draw their legal authority solely from the will of the parties or from their *de facto* existence. Contrary to what an excessive interpretation of the internationalist view of arbitration might lead one to believe, it is indeed in legal orders of States that the arbitration agreement, and subsequently the award, acquire their binding nature. The source is not exclusively the legal order of the seat of arbitration but rather the sum of all of the legal orders which, on certain conditions which they set, are willing to recognize the arbitral award, a private act. It remains true that "*lex facit arbitrum*", but this law is the law of a community of States rather than the law of just one State, be it

73. See Art. V(2) New York Convention.

the State of the seat or the State of enforcement. While, to avoid provocation, one might not go so far as to say that "*lex mercatoria facit arbitrum*", it is certainly the law of different States, if not transnational rules, that lend the arbitral award its legal authority.

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"Enforcement of Awards Set Aside in the Country of Origin: The French Experience", *in* ICCA Congress Series n° 9, *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, 1999, p. 505