CHAPTER 3
THE RELATIONSHIP OF THE NEW YORK CONVENTION WITH OTHER TREATIES AND WITH DOMESTIC LAW

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While the New York Convention is undoubtedly the most significant international instrument as regards the recognition and enforcement of arbitral awards, it does not operate in isolation from other instruments. In certain circumstances, other treaties or the domestic law of the country in which enforcement is sought will also apply to the question of whether or not an arbitral award may be enforced. Article VII of the New York Convention provides an innovative solution to potential conflicts between the Convention and other applicable treaties and laws by allowing a party seeking to enforce an award to take advantage of whichever provisions are most favourable to enforcement. Professor Philippe Fouchard described this provision as 'the treasure, the ingenious idea' of the Convention that ensured its durability while permitting States and judges to improve upon it.[1]

The application of Article VII, however, has not been free from controversy. The divergence of views is sharpest with respect to the question of whether an award that has been set aside by a court in the country where it was rendered may be enforced in other countries. For those who believe that an arbitral award draws its legal effect from the legal system of the seat of the arbitration, once an award is set aside in the seat it ceases to exist and there is nothing left to enforce. For others, however, an international arbitral award is autonomous from the legal system of the seat but rather draws its legal force from the common accord among all States willing to give effect to such awards. Under this view, a decision by a court of the seat of the arbitration to set aside an award has no effect beyond that country's borders; as a result, an award set aside in the country where it was rendered may potentially be enforced elsewhere.

The following sections analyse the meaning of Article VII(1); the effect of Article VII on conflicts between the New York Convention and other international conventions (II); and the effect of Article VII on conflicts

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[1] Philippe Fouchard, 'Suggestions pour accroître l'efficacité internationale des sentences arbitrales', 1998(4) *Rev. arb.* 653, 663.

between the New York Convention and domestic law (III). The chapter concludes that the better view—the view most consistent with the aims and purpose of the New York Convention as well as contemporary practice—is that international arbitral awards are not anchored in the legal system of the seat and may therefore be enforced irrespective of setting aside proceedings in the country where they were rendered (IV).

1. The 'More-Favourable-Right' Provision of Article VII

The relationship of the New York Convention with other treaties and with domestic law is governed by Article VII, paragraph 1, which reads:

> The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.[2]

The first part of Article VII(1) confirms that the New York Convention does not affect the validity of other treaties as regards the recognition and enforcement of arbitral awards. This has been referred to by one commentator as the 'compatibility-provision'.[3] The second part of the paragraph allows a party to enforce an award on the basis of the domestic law or treaties of the particular country where such award is to be enforced, and not pursuant to the New York Convention. This has been referred to as the 'more-favourable-right-provision'.[4]

While it may be useful for certain analytical purposes to bisect the paragraph into these two parts, in fact, read as a whole, the entire paragraph enshrines the notion of 'more favourable right'. The first part is simply a precursor to the second part of the paragraph, confirming that the validity of other treaties is not affected by the New York Convention, such that they can be relied upon by any interested party if that is more favourable than the New York Convention, as can the law of the country where the award is sought to be enforced. Thus, this provision ensures that whenever the New York Convention proves to be less favourable to a party seeking 'to avail himself of an arbitral award' than the provisions of another treaty or law of the country where

[2] This rule is also contained in Article 5 of the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.
[3] Albert Jan van den Berg, *The New York Convention of 1958: Towards a Uniform Judicial Interpretation* 81, Kluwer (1981).
[4] ibid.

enforcement is sought, the more favourable treatment shall prevail over the rules of the New York Convention.

2. Resolution of Conflicts Between International Conventions

The New York Convention's more-favourable-right provision derogates from the rules that ordinarily govern conflicting provisions of treaties. Under Article VII, paragraph 1, the instrument which prevails – presumably, between the parties – is neither the most recent, nor the most specific, but instead that which is most favourable to the enforcement of the award. Thus, the traditional conflict principles, namely *lex posterior derogat legi priori* and *lex specialis derogat generali*, are replaced with the concept of the 'maximum effectiveness' of each treaty – if an award is unenforceable under one applicable treaty, but enforceable under another, then the award may be enforced under the latter, regardless of whether or not it is more recent or more specific.

In addition, Article 30(2) of the Vienna Convention on the Law of Treaties of 23 May 1969 states, in relation to successive treaties relating to the same subject matter: 'When a treaty specifies that it is subject to, or that *it is not to be considered as incompatible with, an earlier or later treaty*, the provisions of that other treaty prevail' (emphasis added). In other words, under the Vienna Convention a typical compatibility clause operates to relegate the treaty containing the clause to a subservient position vis-à-vis the designated treaties by requiring that it be interpreted in a way so as not to conflict with such treaties. However, Article VII of the New York Convention does not establish a hierarchy with other treaties; instead, its purpose is to preserve rights available under other treaties so that they may be relied upon if they are more favourable with regard to enforcement of an award. This is in keeping with the broader objective of the New York Convention, which is to provide for enforcement of arbitral awards whenever possible, either on the basis of its own provisions or another instrument. Thus, what has been called the 'compatibility-provision' in Article VII[5] is not a standard compatibility provision but a provision crafted to achieve the Convention's specific aim of maximising the enforceability of arbitral awards.

2.1 Interaction with Specific International Agreements

2.1.1 The European Convention of 1961

The European Convention on International Commercial Arbitration of 1961 applies to 'arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or

[5] See van den Berg, supra note 3, at 91–92.

legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States'.[6] This is slightly different from the scope of application of the New York Convention as set out in its Article I, in two respects. First, the European Convention only applies to disputes arising from *international trade*. This requirement is not found in the New York Convention, but it is of limited practical significance given that the bulk of cases brought under the New York Convention are of an inherently international nature. Second, the European Convention requires that the parties come from *different Contracting States*. This is not a requirement of the New York Convention. Thus, the scope of application of the New York Convention is broader than that of the European Convention.

There are also some substantive differences in the enforcement provisions of the two conventions. First, with respect to the enforcement of the arbitration agreement itself, Article VI(3) of the European Convention requires courts to abstain from ruling on a dispute over the validity of the agreement until after the arbitrators have done so, but only if arbitration proceedings are instituted prior to the onset of judicial proceedings. The New York Convention, on the other hand, obliges courts to refer cases to arbitration irrespective of where papers are first filed, so long as the arbitration agreement is not 'null and void, inoperative or incapable of being performed'.[7]

Second, under Article V(1)(e) of the New York Convention, the fact that an award was set aside by a competent authority of the country in which or under the law of which it was made constitutes a ground for refusing to enforce it under the Convention, regardless of the reason why it was set aside. Article IX of the European Convention, by contrast, limits a court's discretion to refuse to enforce an award to those cases where the award has been set aside for one of the reasons enumerated therein (invalidity of the arbitration agreement, failure to give proper notice, award beyond the scope of authority, or improper constitution of the tribunal). Thus an award that has been set aside for public policy reasons or because of a manifest disregard of the law may be enforced under the European Convention,[8] but not under the New York Convention.

[6] Article I(1)(a).
[7] For a more detailed discussion of these issues, see Chapter 8.
[8] In a 1998 case, the Austrian Supreme Court held that an award that had been set aside for public policy reasons in Slovenia could nonetheless be enforced in Austria under Article IX of the European Convention (Oberster Gerichtshof, 23 February 1998, *Radenska v. Kajo*, 1999(2) *Rev. arb.* 385).

2.1.2 The Panama Convention of 1975

The Inter-American Convention on International Commercial Arbitration of 1975 (the 'Panama Convention') contains provisions concerning the enforcement of awards which are similar, but not identical to those found in the New York Convention. Article 4 of the Panama Convention provides that:

> An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

The text of Article 4 thus implies enhanced enforceability for arbitral awards by equating final arbitral awards with final judicial judgments, but it mitigates this equality of treatment by stating that an arbitral award's recognition or execution 'may be ordered', in contrast with the imperative form of the word 'shall' in the New York Convention. Nevertheless, in specific cases, the Panama Convention may offer enhanced enforcement options compared with those of the New York Convention, and under the more-favourable-right provision, a party seeking to enforce an award falling under both Conventions could take advantage of these options.[9]

In the *TermoRio* case, discussed below, the party seeking enforcement sought to rely on both the Panama Convention and the New York Convention. The Court, however, limited its consideration to the New York Convention on the grounds that 'codification of the Panama Convention incorporates by reference the relevant provisions of the New York Convention (see 9 U.S.C. § 302), making discussion of the Panama Convention unnecessary'.[10] This statement overlooks the fact that the two conventions are not identical and there would otherwise be no reason, from a US court's perspective, for the existence of 9 U.S.C. § 305

[9] In other cases, however, it may be more advantageous to a party to have an arbitral award treated as a domestic award rather than a judicial judgment, since the scope of review of such an award may be more limited. For example, in the United States, a federal court of appeals may reverse a final decision of a lower court for a mere error of law, but may not vacate an arbitral award unless the tribunal acted in manifest disregard of the law. See *Wilko v. Swan*, 346 U.S. 427, 436–37 (1953) ('the interpretations of the law by the arbitrators in contrast to manifest disregard are not subject, in the federal courts, to judicial review for error in interpretation').

[10] *TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P.*, 421 F. Supp. 2d 87, 91 n.4 (D.D.C. 2006).

which governs the determination by a US court of which instrument is to apply. In practice, however, US courts have applied the conventions as if they were identical[11] and they have not considered the effect of Article VII in cases where both conventions apply.

2.2 Examples from Case Law

Conflicts between the New York Convention and other international conventions on the recognition and enforcement of arbitral awards are infrequent. However, where courts have been faced with such conflicts, they have typically resolved them in accordance with Article VII's more-favourable-right provision.

The Swiss Federal Tribunal has recognised the principle of 'maximum effectiveness' by refusing to follow the provisions of the Franco-Swiss Convention of 1869 in favour of the New York Convention, which in the circumstances was more favourable to the enforcement of the arbitral award.[12] Referring to Article VII, the Court stated:

> This solution corresponds to the so-called rule of maximum effectiveness, as was correctly referred to by the lower court. According to this rule, in case of discrepancies between provisions in international conventions regarding the recognition and enforcement of arbitral awards, preference will be given to the provision allowing or making easier such recognition and enforcement, either because of more liberal substantive conditions or because of a simpler procedure. This rule is in conformity with the aim of bilateral or multilateral conventions in this matter, which is to facilitate, as far as possible, recognition and enforcement of arbitral awards.[13]

In contrast, the more-favourable-right provision of Article VII does not operate to allow the respondent to an enforcement action to assert the more stringent provisions of another treaty. Where an Italian party sought enforcement of an award against a Swiss party in Switzerland

[11] Thus, in *Productos Mercantiles y Industriales, S.A. v. Faberge USA, Inc.*, the Second Circuit quoted and followed a Congressional report stating that:

> The New York Convention and the Inter-American Convention are intended to achieve the same results, and their key provisions adopt the same standards, phrased in the legal style appropriate for each organization. It is the Committee's expectation, in view of the fact that the parallel legislation under the Federal Arbitration Act that would be applied to the Conventions, that courts in the United States would achieve a general uniformity of results under the two conventions.

23 F.3d 41, 45 (2d Cir. 1994) (quoting H.R. Rep. No. 501, 101st Cong., 2d Sess. 4 (1990), reprinted in 1990 USCCAN 675, 678).

[12] Swiss Fed. Trib., 14 March 1984, *Denysiana S.A. v. Jassica S.A.*, BGE/ATF 110 Ib 191, 1984(4) *ASA Bull.* 206, 1985(3) *Rev. crit. DIP* 551, 1st decision, XI *Y.B. Com. Arb.* 536 (1986).

[13] ibid. XI *Y.B. Com. Arb.* at 538, ¶ 6.

and the Swiss party sought to defend such action by arguing that Article VII of the New York Convention entitled it to rely upon the more stringent Switzerland/Italy bilateral treaty on the Recognition and Enforcement of Judgments of 1933, the Zurich Court of First Instance rejected the Swiss party's argument, saying:

> The defendant argues that, according to Art. VII(1) Convention, the Convention does not affect the validity of bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States.... The defendant seeks here to rely on the [Bilateral Treaty] and its partly more stringent provisions....
> We must note that Art. VII(1) Convention only provides for the so-called more-favourable-right principle, which means that, irrespective of the Convention, the parties may rely on other treaties which contain provisions that are more favourable to recognition and enforcement. The more-favourable-right principle does not provide the party opposing enforcement with further grounds for refusal that are not listed in the Convention....[14]

The Court of Appeal of Zurich affirmed the lower court's decision, agreeing that the Convention only provides for the alternative application of laws or treaties that are more favourable to enforcement of an arbitral award. The Court then examined whether, in derogation from the more-favourable-right provision, the Bilateral Treaty could take precedence over the New York Convention. The Court answered this question in the negative:

> Although such a derogation is in principle possible, the mere existence of an older bilateral treaty does not suffice. It does not appear that there was the intention to give the Bilateral Treaty precedence with respect to the entry into force of the New York Convention for Italy and Switzerland, nor can the appellant indicate concrete grounds for such an intention.[15]

It is not clear why the Court left open the possibility of derogating from the more-favourable-right provision of Article VII. The sole criterion in choosing between the New York Convention and other treaties in relation to the enforcement of an arbitral award should be which instrument provides 'maximum effectiveness' and is therefore more favourable.

[14] Bezirksgericht Zurich, 14 February 2003, *Italian party v. Swiss company*, XXIX *Y.B. Com. Arb.* 819, ¶¶ 8–9, at 823 (2004).
[15] Obergericht Zurich, 17 July 2003, *Swiss company v. Italian party*, *XXIX Y.B. Com. Arb.* 819, ¶ 45, at 830 (2004).

The same outcome was reached by a Japanese court in 1997.[16] In that case, the Okayama District Court applied the more favourable provisions of the 1974 Japan-China Trade Agreement, reasoning as follows:

> As mentioned above, the Japan-China Trade Agreement and the New York Convention are applicable to the recognition and enforcement of the present arbitration award (except that, under Art. VII(1) of the said Convention with regard to those portions to which the Japan-China Trade Agreement is understood to be applicable preferentially, the latter shall be applied preferentially over the said Convention)....

These cases show that, in the event of a conflict between the New York Convention and another international convention, courts have not had difficulty giving effect to the more-favourable-right provision of Article VII.

3. Resolution of Conflicts Between the New York Convention and Domestic Law on the Enforcement of Arbitral Awards

As seen above, the 'more-favourable-right' provision in Article VII of the New York Convention resolves conflicts between international instruments by allowing the party seeking enforcement simply to avail itself of whatever provisions are most favourable to enforcement. The same principle applies to the resolution of conflicts between the New York Convention and the law of the Contracting State in which enforcement is sought. However, courts have been inconsistent in giving effect to Article VII in such cases.

3.1 The Relationship Between Articles V(1)(e) and VII

Article V of the New York Convention provides that recognition and enforcement of an award 'may' be refused in a number of listed circumstances. It has been argued that, through its use of the discretionary 'may' in the English version (although the use of the mandatory 'seront' in the French version does not convey the same meaning), the New York Convention leaves the matter of recognition and enforcement to the discretion of the court of the Contracting State in which such recognition and enforcement are sought.[17] In exercising

[16] Dist. Ct. Okayama, 14 July 1993, *Zhe-jiang Provincial Light Industrial Products Import & Export Corp. v. Takeyari K.K.*, XXII *Y.B. Com. Arb.* 744, ¶ 8, at 746 (1997).

[17] This is in contrast to the predecessor to Article V of the New York Convention. The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 had provided that recognition and enforcement 'shall' be refused where the award had been annulled in the country in which it had been made. Article VII(2) of the New York Convention provides that the Geneva Convention shall cease to have effect between Contracting States on their becoming bound by the New York Convention. The use of the discretionary *(continued...)*

this discretion, however, the court must pay heed to the 'more-favourable-right' provision of Article VII in conjunction with the applicable domestic law. In a number of cases, discussed below, courts have exercised their discretion under Article V by recognising and enforcing a foreign award on the basis that the provisions of domestic law are more favourable to the party seeking enforcement than the provisions of the New York Convention.

3.2 Examples from French Case Law

A series of decisions by the French Cour de Cassation has firmly established that awards set aside in the Contracting State in which they were rendered may be enforced in another Contracting State. In the first of these cases, *Norsolor*, the Paris Court of Appeal, relying on Article V(1)(e) of the New York Convention, refused to grant enforcement in France of an arbitral award made in Austria on the basis that the award had been set aside by the Vienna Court of Appeal. The Cour de Cassation reversed the decision, relying instead on Article VII of the Convention and Article 12 of the French New Code of Civil Procedure.[18] The mere fact that an award has been set aside in another country is not a ground under French law for refusing to recognise and enforce it in France. Accordingly, the Cour de Cassation ordered enforcement of the award, holding that:

> The judge cannot refuse enforcement when his own national legal system permits it, and, by virtue of Article 12 of the New Code of Civil Procedure, he should, even *sua sponte*, research the matter if such is the case.[19]

Thus, the 'more-favourable-right' provision in Article VII operates to open to an interested party the right to seek the application of national law if that is more favourable than the provisions of the New York Convention, in this case Article V. A party seeking to recognise and enforce a foreign award may therefore rely directly on the more limited grounds for refusal under national law—in the case of French law, as set out in Article 1502 of the New Code of Civil Procedure.[20] The court

'may' in Article V of the New York Convention also contrasts with the mandatory 'shall' used in Article III of the same Convention.

[18] CA Paris, 19 November 1982, *Norsolor v. Pabalk Ticaret Sirketi*, 1983(4) *Rev. arb.* 465, 472, with commentary by B. Goldman at 379, XI *Y.B. Com. Arb.* 484 (1986); Cass. 1e civ., 9 October 1984, *Pabalk Ticaret Sirketi v. Norsolor*, 1985(3) *Rev. arb.* 431, 24 *I.L.M.* 363 (1985), with an introductory note by E. Gaillard at 360, with note by B. Goldman, XI *Y.B. Com. Arb.* 484 (1986).

[19] Cass. 1e civ., 9 October 1984, supra note 18, 24 *I.L.M.* at 363.

[20] Article 1502 provides an exhaustive list of the five grounds upon which recognition and enforcement may be refused in France:

1° Where the arbitrator ruled in the absence of an arbitration agreement or on the basis of an agreement that was void or had expired;

2° Where the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed; *(continued...)*

must verify for itself, on its own initiative if necessary, whether the objection allowed by the foreign court as a ground for setting aside the award would also be accepted by French courts applying French law. The *Norsolor* award had been set aside by the Vienna Court of Appeal due to its reference to *lex mercatoria*, whereas such reference was held not to be a valid basis to refuse enforcement of the award under French law. In effect, this decision shows that, by taking precedence in situations involving Article V, the more-favourable-right principle contained in Article VII is at the heart of the entire New York Convention system.[21]

The decision in *Norsolor* was followed in two subsequent Cour de Cassation cases. In the first case, *Polish Ocean Line*, an award was rendered in Poland and the Polish court (the Economic Court of Gdansk) then suspended enforcement of the award pending its decision whether to annul the award. However, the Cour de Cassation upheld the enforcement of the award in France, holding:

> Art. VII of the 1958 New York Convention, to which both France and Poland are parties, does not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. As a result, a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art. V(1)(e) of the 1958 New York Convention, are not among the grounds specified in Art. 1502 NCCP....
>
> The Court of Appeal was therefore correct in deciding that the setting aside action in Poland and the Polish court's decision to suspend enforcement cannot justify a refusal of enforcement of the award in France.[22]

In *Hilmarton*, the Cour de Cassation recognised an award rendered in Switzerland rejecting a contract claim, despite it having been set aside by the Swiss Federal Tribunal and a new arbitral tribunal having been constituted. The Cour de Cassation confirmed its approach taken in *Norsolor* and *Polish Ocean Line*, stating:

3° Where the arbitrator ruled without complying with the mission conferred upon him or her;

4° When due process has not been respected;

5° Where the recognition or enforcement is contrary to international public policy'.

[21] The Austrian Supreme Court subsequently reversed the decision to set aside the award. See Oberster Gerichsthof, 18 November 1982, *Norsolor S.A. v. Pabalk Ticaret Ltd.*, 1983(4) *Rev. arb.* 519, IX *Y.B. Com. Arb.* 159 (1984).

[22] Cass. 1e civ., 10 March 1993, *Polish Ocean Line v. Jolasry*, 1993(2) *Rev. arb.* 255, 2d decision, with note by D. Hascher, 120(2) *J.D.I.* 360 (1993), 1st decision, XIX *Y.B. Com. Arb.* 662, ¶¶ 1–2, at 663 (1994).

> [A]pplying Art. VII of the [1958 New York Convention], OTV could rely upon the French law on international arbitration concerning the recognition and enforcement of international arbitration awards rendered abroad, and especially upon Art. 1502 NCCP, which does not list the ground provided for in Art. V of the 1958 Convention among the grounds for refusal of recognition and enforcement.[23]

The Court went on to explain the conceptual basis for its finding:

> [T]he award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy.[24]

In several more recent cases, the Paris Court of Appeal has consistently followed the approach set out by the Cour de Cassation in the *Norsolor* line of cases. In the 2004 *Bargues Agro* case, the Court refused to grant a stay of enforcement of an award issued in Belgium pending the conclusion of setting aside proceedings in Belgium. In upholding the decision of the lower court, the Paris Court of Appeal summarised the position under French law:

> Art. 1502 NCCP – which, unlike Art. V(1)(e) of the [1958 New York Convention], does not list a foreign award's annulment by the court of the seat of the arbitration among the grounds for refusing that award's recognition and enforcement – applies here pursuant to Art. VII [of the New York] Convention....
> The annulment proceeding initiated in Belgium, where the arbitration was held, is irrelevant to the enforcement in France of the award rendered on 28 June 2002 in Antwerp, since that award was rendered in an international arbitration implicating international commerce interests ... and is not integrated in the Belgian legal system. Hence, its possible annulment by the court of the seat does not affect its existence and prevent is recognition and enforcement in other national legal systems.[25]

[23] Cass. 1e civ., 23 March 1994, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation – OTV*, 121(3) *J.D.I.* 701 (1994), with note by E. Gaillard, 1994(2) *Rev. arb.* 327, with note by C. Jarrosson, 9(5) *Int'l Arb. Rep.* E-1 (1994), XX *Y.B. Com. Arb.* 663, ¶ 4, at 665 (1995).
[24] ibid. XX *Y.B. Com. Arb.* at 665, ¶ 5. The new tribunal ordered to be constituted by the Swiss Federal Tribunal then entered a conflicting second award ordering the respondent to pay a consulting fee under the contract at issue. The French Cour de Cassation rejected a lower court ruling recognising the second award and held that only the first award was recognised in France, ruling that the recognition in France of the first award, set aside outside France, necessarily prevented the recognition or enforcement in France of the second award. See Cass. 1e civ., 10 June 1997, *OTV v. Hilmarton*, 1997(3) *Rev. arb.* 376, with note by P. Fouchard, XXII *Y.B. Com. Arb.* 696 (1997), 12(7) *Int'l Arb. Rep.* 11 (1997).
[25] CA Paris, 10 June 2004, *Bargues Agro Industrie SA v. Young Pecan Co.*, XXX *Y.B. Com. Arb.* 499, 501 (2005).

Likewise, in *Putrabali*, a French lower court ordered the enforcement of an arbitral award that had been set aside by the English High Court. The losing party appealed on the basis that a second award had been issued in the case, but this appeal was rejected by the Paris Court of Appeal, which reiterated that the setting aside of an award in the country of the seat was not a ground for refusing enforcement of the award in France.[26] The Cour de cassation, in a ground-breaking decision, reconfirmed the policy underlying the refusal to take into account the setting aside of the award in the country where it was rendered and recognised the full autonomy of arbitral awards from national legal orders:

> An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Under Art. VII of the [1958 New York Convention], Rena Holding ... could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country.[27]

Finally, in *Bechtel*, the Court reached the same conclusion in a case which did not involve the New York Convention but rather a bilateral treaty between France and the United Arab Emirates on the enforcement of court decisions and arbitral awards. The result, therefore, did not depend on Article VII, but rather on the Court's understanding that 'decisions made in setting aside actions, just as those made in enforcement actions, do not have any international effects, because they only concern the given sovereignty and the territory on which that sovereignty is exercised'.[28]

3.3 Examples from United States Case Law

The position of US courts is considerably more ambiguous. In 1996, two years after the French decision rendered in *Hilmarton*, the United States District Court for the District of Columbia reached a similar decision in the *Chromalloy* case.[29] The Court considered an application to enforce in

[26] CA Paris, 31 March 2005, *PT Putrabali Adyamulia v. SA Rena Holding*, 2006(3) *Rev. arb.* 665, with note by E. Gaillard.
[27] Cass. 1e civ., 29 June 2007, *PT Putrabali Adyamulia v. Rena Holding*, XXXII *Y.B. Com. Arb.* 299, ¶¶ 2–3, at 302 (2007), 2007(3) *Rev. arb.* 507, 514–15, with note by E. Gaillard.
[28] CA Paris, 29 September 2005, *Direction Générale de l'Aviation Civile de l'Emirat de Dubai v. International Bechtel Co., LLP*, 2005(3) *Stockholm Int'l Arb. Rev.* 151, 156–57, with note by P. Pinsolle, 2006(3) *Rev. arb.* 695.
[29] *In re Arbitration of Certain Controversies Between Chromalloy Aeroservices and the Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996), 35 *I.L.M.* 1359 (1996), XXII *Y.B. Com. Arb.* 1001 (1997), 1997(3) *Rev. arb.* 439.

the US an award that had been rendered in Egypt and subsequently annulled by an Egyptian Court of Appeal. This was the first time a US court was faced with this issue. Relying upon the more-favourable-right provision of Article VII of the New York Convention, the Court found the award to be valid under US law and granted enforcement. Of the relationship between Articles V and VII of the New York Convention, the Court stated, in line with the approach of the French Cour de Cassation:

> Article V provides a permissive standard, under which this Court may refuse to enforce an award. Article VII, on the other hand, mandates that this Court must consider [Chromalloy's] claims under applicable U.S. law.[30]

The Court explained that the seat of arbitration ought to be considered as independent of the country in which enforcement is sought:

> Egypt argues that by choosing Egyptian law, and by choosing Cairo as the sight [sic] of the arbitration, [Chromalloy] has for all time signed away its rights under the Convention and U.S. law. This argument is specious. When [Chromalloy] agreed to the choice of law and choice of forum provisions, it waived its right to sue Egypt for breach of contract in the courts of the United States in favor of final and binding arbitration of such a dispute under the Convention. Having prevailed in the chosen forum, under the chosen law, [Chromalloy] comes to this Court seeking recognition and enforcement of the award. The Convention was created for just this purpose. It is untenable to argue that by choosing arbitration under the Convention, [Chromalloy] has waived rights specifically guaranteed by that same Convention.[31]

Chromalloy was also successful in seeking enforcement of the same award in France. The Paris Court of Appeal determined that none of the conditions in Article 1502 of the New Code of Civil Procedure had been satisfied:

> The award made in Egypt is an international award which, by definition, is not integrated in the legal order of that State so that its existence remains established despite its being annulled and its recognition in France is not in violation of international public policy.[32]

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[30] ibid. 939 F. Supp. at 914, XXII *Y.B. Com. Arb.* at 1012.

[31] ibid. 939 F. Supp. at 914, XXII *Y.B. Com. Arb.* at 1011.

[32] CA Paris, 14 January 1997, *République arabe d'Egypte v. Chromalloy Aero Services*, 1997(3) *Rev. arb.* 395, with note by P. Fouchard, 125(3) *J.D.I.* 750 (1998), with note by E. Gaillard, 12(4) *Int'l Arb. Rep.* B-1 (1997), XXII *Y.B. Com. Arb.* 691, ¶ 2, at 693 (1997).

However, three subsequent US cases distinguished *Chromalloy* and refused to enforce foreign awards that had been set aside without considering whether the grounds upon which the awards had been set aside would constitute valid reasons to deny enforcement under US law. In the first case, *Baker Marine*,[33] the US Court of Appeals for the Second Circuit refused to enforce two awards rendered in Nigeria and set aside by the Nigerian courts. Baker Marine argued that Article VII of the New York Convention entitled it to invoke US national arbitration law to enforce the awards in the US, notwithstanding the decisions of the Nigerian court, because the awards were set aside for reasons that would not be recognised under US law as valid grounds for vacating an award. The Court rejected this argument cursorily:

> We reject Baker Marine's argument. It is sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the laws of Nigeria. The governing agreements make no reference whatever to United States law. Nothing suggests that the parties intended United States domestic arbitral law to govern their disputes.[34]

The Court distinguished *Chromalloy* on the basis of the nationality of the claimant and of a provision of the arbitration clause stating that the decision of the arbitrator could not 'be made subject to any appeal or other recourse'. The Court understood these factors to have been crucial to the *Chromalloy* decision:

> The district court concluded that Egypt was seeking 'to repudiate its solemn promise to abide by the results of the arbitration,' and that recognizing the Egyptian judgment would be contrary to the United States policy favoring arbitration.... Unlike the petitioner in *Chromalloy*, Baker Marine is not a United States citizen, and it did not initially seek confirmation of the award in the United States. Furthermore, Chevron and Danos did not violate any promise in appealing the arbitration award within Nigeria. Recognition of the Nigerian judgment in this case does not conflict with United States public policy.[35]

The Court was also concerned about the practical consequences of applying Article VII's more-favourable-right provision to allow the enforcement of awards set aside elsewhere:

> [M]echanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality

[33] *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999), 14(8) *Int'l Arb. Rep.* D-1 (1999).
[34] ibid. 191 F.3d at 197.
[35] ibid. 191 F.3d at 197 n.3 (internal citations omitted).

> and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary 'with enforcement actions from country to country until a court is found, if any, which grants the enforcement'.[36]

The Court in *Baker Marine* did not explain why it believed these policy concerns over the application of more favourable provisions of domestic law justified it in ignoring the plain language of Article VII. Moreover, the Court's approach was to protect the finality of State court judgments in setting aside actions at the expense of the finality of arbitral awards. This approach is difficult to square with the overarching purpose of the New York Convention.

In the second case, *Spier*,[37] the US District Court for the Southern District of New York was called upon to enforce an award rendered in Italy and set aside by the Italian courts. Following *Baker Marine*, the Court denied the application, relying on the provision of the arbitration clause prohibiting appeals from arbitral awards in order to distinguish the case from *Chromalloy*:

> [T]he *Chromalloy* district court's reliance upon the FAA to disregard an Egyptian court's decision nullifying an Egyptian award was prompted by a particular circumstance not present in the case at bar: Egypt's blatant disregard of its contractual promise not to appeal an award. Spier points to no comparable provision in his contract with Tecnica....[38]

As for Article VII of the New York Convention, the Court stated:

> Nor may Spier introduce domestic United States law, statutory or decisional, into the case at bar through the vehicle of Article VII of the Convention. *Baker Marine* precludes that effort. There is no basis for applying American law to the rights and obligations of the parties, including dispute resolution by arbitration. Just as did the parties in *Baker Marine*, Spier and Tecnica contracted in a foreign state that their disputes would be arbitrated in that foreign state; the governing agreements make no reference to United States law; and nothing suggests that the parties intended United States domestic arbitral law to govern their disputes.[39]

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[36] ibid. 191 F.3d at 197 n.2 (quoting van den Berg, supra note 3, at 355).
[37] *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999), 14(8) *Int'l Arb. Rep.* D-1 (1999).
[38] ibid. 71 F. Supp. 2d at 288.
[39] ibid.

The Court's approach here is puzzling in that *Spier* was an easy case. As the Court noted, all three Italian courts which had considered the award agreed that 'these particular arbitrators' award to Spier exceeded their powers'.[40] Under the Federal Arbitration Act, as codified at 9 U.S.C. §10(a)(4), a court may deny recognition to an arbitral award, 'where the arbitrators exceeded their powers'. Article V(1)(c) of the New York Convention similarly allows courts to refuse enforcement where the award exceeds the scope of the agreement to arbitrate. The US Courts could therefore have reached a similar decision on the basis of the requirements of US law. Rather than placing its decision on this firm grounding, the Court noted it only in passing, as an alternative basis for its decision.[41]

This issue came before the US courts again in early 2006. In *TermoRio*,[42] the claimant sought to enforce an award rendered in Colombia and set aside by the Colombian courts. The Court refused to enforce the award, stating that '[t]he court's decision in *Chromalloy* is both questionable on the merits and distinguishable on the facts'.[43] The Court then identified four bases upon which the decision could be distinguished:

> First, there is no longer a U.S. party involved in this case, as there was in *Chromalloy*. The lack of a U.S. party diminishes the U.S. interest in applying U.S. law; indeed the presence of a U.S. party in *Chromalloy* arguably was decisive. Second, there is no jurisdiction under the commercial activities exception of the Foreign Sovereign Immunities Act in this case, as there was in *Chromalloy*. As a result, even assuming that one could set aside the New York Convention and look to the Federal Arbitration Act, this Court would lack jurisdiction to consider the matter. Third, the *Chromalloy* court seemed to rely heavily on the fact that Egypt sought 'to repudiate its solemn promise to abide by the results of the arbitration' in breach of the contractual agreement that the arbitration decision 'shall be final and binding and cannot be made subject to any appeal or other recourse.' Here, in contrast, the agreement did call for the arbitration to be 'binding,' but it did not expressly preclude judicial review, or say it was final.
>
> Fourth and finally, although it is not mentioned by the *Chromalloy* court, the petitioners first filed suit in the United States, before Egypt filed suit in its own country. There is a strong policy preference for favoring the first-filed suit, including in the international context.[44]

[40] ibid. 71 F. Supp. 2d at 281.
[41] ibid. 71 F. Supp. 2d at 287.
[42] *TermoRio*, supra note 10.
[43] ibid. 421 F. Supp. 2d at 98.
[44] ibid. 421 F. Supp. 2d at 99 (internal footnotes and citations omitted).

Reviewing *Baker Marine* (which was considered 'more on point') and *Spier*, the Court concluded that:

> This case involves a dispute involving Colombian parties over a contract to perform services in Colombia which led to a Colombian arbitration decision and Colombian litigation. In consideration of these facts and the foregoing three cases, plaintiffs cannot seek to enforce their arbitral award here unless the Colombian courts' decisions violated U.S. public policy.[45]

The Court did not provide any support for its view that *only* a violation of US public policy by the Colombian courts would enable it to enforce the award, thus focusing on the *foreign judgment* relating to the enforcement of the award in a third country as opposed to the *award* itself, and ignoring both Article V and Article VII.

The later courts' efforts to distinguish *Chromalloy* on the basis of Egypt's 'solemn promise to abide by the results of the arbitration'[46] are also somewhat misplaced in that there is nothing unusual about parties agreeing to abide by the results of an arbitration.[47]

The decision of the Court in the *TermoRio* case was affirmed by the US Court of Appeals for the District of Columbia, in less nuanced terms, on 25 May 2007.[48] In doing so, the Court of Appeals squarely focused the inquiry on the validity of the decision of the Colombian courts vacating the award rather than forming its own view on the enforceability of the award, effectively ceding control to the courts of the seat, contrary to the spirit of the New York Convention.

The upshot of these cases is that, whereas the French courts have clearly and consistently given full effect to Article VII, the position in the US is considerably more restrictive. The *Chromalloy* decision has been criticised and distinguished by later courts, and US courts appear increasingly reluctant to enforce arbitral awards that have been set aside in the country where they were rendered.[49] These subsequent cases, however, fail to give effect to the more-favourable-right provision of Article VII by

[45] ibid. 421 F. Supp. 2d at 101.
[46] *Chromalloy*, 939 F. Supp. at 912, cited in *Baker Marine*, 191 F.3d at 197 n.3, *Spier*, 71 F. Supp. 2d at 288, *TermoRio*, 421 F. Supp. 2d at 98.
[47] For example, Article 28(6) of the ICC Rules of Arbitration provides: 'Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made'.
[48] *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007), 2007(3) *Rev. arb.* 553, with note by Jan Paulsson.
[49] See Dana Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards – The Aftermath of the Chromalloy Case', 17(2) *J. Int'l Arb.* 1 (2000).

confusing it with a choice of law question (*Spier*, *TermoRio*) or conflating the task of interpreting Article VII with the task of interpreting the parties' contract (*Baker Marine*, *Spier*).

The reluctance of US courts to give effect to Article VII by enforcing awards set aside by the courts of the seat of the arbitration is due in large part to the mistaken perception that they are being asked to grant recognition to a foreign decision relating to an arbitral award as opposed to granting recognition to the arbitral award itself. If the question is viewed in this manner, institutional affinities and notions of judicial comity will inevitably lead them to privilege the decisions of sister courts over those of arbitral tribunals. Nevertheless, the dilemma is more apparent than real once the international nature of the arbitral award—and the minimal importance of the choice of seat—is recognised.

The question in *Baker Marine* was not whether to apply Nigerian or US law to the merits of the dispute, nor was the question in *Chromalloy*—as the District Court in *TermoRio* erroneously stated—'whether to enforce a foreign court's judgment'[50] as opposed to an arbitral award. Instead, the question presented in these cases is the extent to which a decision by a court of the seat to set aside an international arbitral award under that country's law is binding on a US court called upon to determine whether that same award may be enforced in the United States.[51] The concerns raised by some commentators to the effect that enforcing an award notwithstanding a set aside decision is to deny *res judicata* effect to a foreign court's judgment are overwrought,[52] and they ignore the reality that the New York Convention does not require a court to deny enforcement on the basis that enforcement has been denied by a court in a third State. Viewed properly, therefore, a foreign court's decision setting aside an award cannot provide a definitive answer to the question of whether that same award may be enforced under the applicable domestic law or treaties of a different country.

[50] *TermoRio*, supra note 42, 421 F. Supp. 2d at 98.
[51] See, eg, Jan Paulsson, 'The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention', 7(2) *Am. Rev. Int'l Arb.* 99, 101, 103 (1996). The author has pointed out that the Court in *Chromalloy* declined to criticise the decision of the Egyptian court, because such criticism was unnecessary. Even assuming, as the Court did, that the Egyptian Court's decision was 'proper under applicable Egyptian law', the Court could nevertheless 'enforce the award on the footing that U.S. law does not recognise the alleged infirmity which impressed her Egyptian colleagues'.
[52] See, eg, Andrew Rogers, 'The Enforcement of Arbitral Awards Nullified in the Country of Origin', in *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series No. 9, at 548, Kluwer (1999).

4. Conclusion

The contrast between the approach taken by the French courts and the *Chromalloy* Court on the one hand, and the later US cases on the other hand, reflects the divergence of opinion as to the relationship of an arbitral award to the legal system of the seat of the arbitration.

To place these divergent opinions in the proper context, one must recall that one of the principal achievements of the New York Convention was to eliminate the old requirement of 'double exequatur' according to which an arbitral award could not be enforced in a State other than that of the seat unless it was first granted recognition by the courts of the seat. Under the New York Convention, however, an arbitral award can be enforced directly in the courts of any country, and the courts of the seat no longer sit in judgment over arbitral awards rendered there. To require courts in other States to defer to the courts of the seat with respect to the enforceability of an arbitral award would represent a great leap backward in international arbitration law and would once again make arbitral awards hostage to the idiosyncrasies of local courts.

Such deference, moreover, is impossible to reconcile with the intentions of the parties in referring their disputes to international arbitration in the first place. The main reason why parties choose to enter into arbitration agreements is precisely to remove their dispute from the jurisdiction of local courts. Further, the choice of the seat is frequently made by the arbitral institution or the arbitrators rather than by the parties. When chosen by the parties themselves, the seat is usually selected for reasons of convenience[53] rather than based on an intention to confer upon the courts of the seat a veto power over the arbitral award. The arbitrators having no forum, the parties' aim to remove their dispute from the jurisdiction of local courts would be defeated if the courts of one particular legal system were to have the final word on the settlement of the dispute despite the existence of the arbitration agreement.[54]

[53] See, eg, Yves Derains, 'Le choix du lieu d'arbitrage/The Choice of the Place of Arbitration', 1986 *Rev. dr. aff. int. / Int'l Bus. L.J.* 109.

[54] See E. Gaillard and J. Savage (eds.), *Fouchard Gaillard Goldman on International Commercial Arbitration* 1181 and n.28, Kluwer (1999).