REASONS AND INCOHERENCIES REGARDING THE ENFORCEMENT OF ANNULLED FOREIGN ARBITRAL AWARDS

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Abstract

On the completion of the 60th anniversary of the New York Convention, it may be of interest to revisit one of the most controversial debates it has sparked since its genesis, by examining how the French courts have interpreted the Convention. This article deals with the extent to which an arbitral award that has been annulled in its country of origin, can be enforced in another State. Throughout the last two decades, the outcome of case law and opinions expressed by arbitration professionals have continued to differ considerably on the question of enforcement of awards set aside in their country of origin. The first part of the article deals with the French position on this matter, where courts have expressed a tendency to enforce annulled awards by noting the limited role of the court at the seat of arbitration and elaborating on the principle of autonomy in arbitration. The second part of the article analyses the legal framework of the awards annulled in their country of origin. The current legal framework, which in our view is flawed, is based on the principle of international comity, according to which a State should comply with decisions issued in other States regarding the validity of an arbitral decision.

I. Introduction

An arbitral award, like any other decision, to be implemented in a foreign country must first be recognized in that State. In most States, the recognition and enforcement of arbitral awards is regulated by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 ["**New York Convention**"].

The New York Convention established a uniform regime for the recognition and enforcement of arbitral awards as it limits itself to defining a maximum level of control, which States can exercise over arbitral awards and arbitration clauses. Article V(1)(e) of the New York Convention, in particular, provides that recognition and enforcement of the award may be refused at the request of the party against whom it is invoked, only if that party furnishes to the competent authority, proof that:[1] "*[t]he award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.*"

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1 Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT'L 227, (1998).

The wording of Article VII of the New York Convention allows for a more favorable approach and therefore must be applied. Starting from these internal and intrinsically opposing positions within the New York Convention, the authors note that there are two antagonistic positions of interpretation in the world: one in accordance with Article V and the other, on the basis of Article VII. The wording of Article VII is as follows: "*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]

However, although Article VII of the same text has adopted a liberal approach, Article V may not be applied even in the event that a national law is more favorable.

Article V grants the possibility to refuse the execution of the arbitral awards that have been set aside in the country of origin, while Article VII allows its execution despite such annulment. The legislative history of the New York Convention does not discuss the relationship between Articles V(1)(e) and VII(1), but with regard to the 'more-favourable-right' provision under Article VII(1), courts in certain contracting States have consistently enforced awards that have been set aside or suspended in their State of origin.

The world of international arbitration is therefore divided in this regard. The authors believe that this is due to the confidence each State has in arbitral proceedings. However, this division is not equal, as France takes a position that differs from countries across the world. Thus, the question is whether a State is in favour of or against the 'French concept' of international arbitration.

This article discusses two aspects of this issue: first, this article will analyse why the French position is correct in the opinion of the authors, and second, the article will dispel the criticisms that have been raised against the French position.

II. The Affirmation of the French Conception

France, applying Article VII of the New York Convention, gives effect to its own local standards for the execution and recognition of arbitration awards which are given more weightage than the provisions of the New York Convention. Article 1520 of the French Code of Civil Procedure does not, in fact, mention the annulment of an award in its state of origin as a ground for setting aside the award.[3] Therefore, the annulment of an award in the courts of the 'seat' cannot be grounds for refusing recognition and enforcement of the arbitral award in France under French domestic law.[4]

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2 Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. VII, ¶ 1, Jun. 10, 1958, 330 U.N.T.S. 38 [*hereinafter* "New York Convention"].

3 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1520 (Fr.) ("An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.").

4 Cour de cassation [Cass.] 1e civ., Jun. 29, 2007, 05-18.053, Bull. civ. I, No. 250 REVUE DE L'ARBITRAGE [REV. ARB.] 2007, 507 (Fr.) [*hereinafter* "Putrabali"].

The French position has evolved over time. However, two decisions - namely the *Société Hilmarton Ltd.* v. *Société Omnium de traitement et de valorisation (OTV)* ["**Hilmarton**"] decision (1994), and the *Société PT Putrabali Adyamulia* v. *Société Rena Holding et Société Moguntia Est Epices* ["**Putrabali**"] decision (2007),[5] were particularly important and have, in a certain sense, crowned its evolution.

The *Hilmarton* case concerned a dispute between a French company, Omnium de Traitement et de Valorisation (OTV), and Hilmarton, an English company. The latter claimed payment of commissions, allegedly due for helping OTV obtain a public works contract in Algeria. Swiss law governed the agreement between OTV and Hilmarton and the place of arbitration was Geneva. The Swiss sole arbitrator rejected Hilmarton's claim on the grounds that the contract between the parties violated mandatory principles of Algerian law prohibiting the use and payment of intermediaries in the procurement of public works contracts. The arbitrator thus, found the contract between OTV and Hilmarton illegal. Two months after the recognition of the award in France, the English company requested and obtained the annulment of the award by the court of the arbitration office.[6]

Hilmarton challenged the ruling of the Paris Court of Appeal, which upheld the enforcement order. It contended that pursuant to Article V(1)(e) of the New York Convention, the recognition and enforcement should have been refused since it had been set aside in its State of origin. It argued further that the Paris Court of Appeal also violated Articles 1498[7] and 1502(5) of the French Code of Civil Procedure,[8] by giving effect to an award which had no legal existence, since it had been vacated. The Supreme Court affirmed the decision of the Paris Court of Appeal and dismissed the action.[9] The Supreme Court found that, pursuant to Article VII of the New York Convention, the Court of Appeal rightly held that OTV could avail itself of French rules on the recognition and enforcement of foreign awards in international arbitration. It held that the French law applicable is Article 1502 of the Code of Civil Procedure, which does not include the same grounds for refusal of recognition and enforcement of awards as set forth in Article V(1)(e) of the New York Convention. The Supreme Court added that the award rendered in Switzerland, which was the place of arbitration, was an international award which was not integrated into the legal order of that State and therefore, continues to exist

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5 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, 92-15.137 REV. ARB. 1994, 327 (Fr.) [*hereinafter* "Hilmarton"]; Putrabali, 1e civ., Jun. 29, 2007, 05-18.053, Bull. civ. I, No. 250 REVUE DE L'ARBITRAGE [REV. ARB.] 2007, 507.

6 Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin The French and U.S. Experience*, 26(2) J. INT'L ARB. 267, 272-273 (2009).

7 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1498 (Fr.) ("Arbitral awards shall be recognized in France if the party relying on them establishes their existence and if this is not manifestly contrary to international public policy. Under the same conditions arbitral awards shall be declared enforceable in France.").

8 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1502 (Fr.) ("Appeal of a court decision granting recognition or enforcement is only available on the following grounds: (5) if recognition or enforcement is contrary to international public policy.").

9 France / 23 March 1994/ Cour de cassation / Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV) / 92-15.137, NEW YORK CONVENTION GUIDE 1958, *English Summary of the decision is available at* http://newyorkconvention1958.org/index.php?lvl=notice_display&id=140, (Source: Bulletin 1994 I No. 104 at 79, Original decision obtained from the registry of the Cour de cassation.).

notwithstanding the notion that it had been set aside. Hence, its recognition in France was not contrary to international public policy.[10]

This ruling represented the first step taken by a French Court towards the recognition and enforcement of awards annulled in the place where the arbitration took place, until the *Putrabali* ruling completed this work of interpretation. In fact, in the *Putrabali* ruling, the French Court of Cassation goes further.[11]

An Indonesian company (Putrabali) sold a cargo of white pepper to a French company (Est Epices, which later became Rena Holding) that was lost in a shipwreck. Putrabali then commenced arbitration proceedings pursuant to the arbitration clause under the Rules of Arbitration and Appeal of the International General Produce Association. The arbitral tribunal however held that Rena Holding's refusal to pay was 'well-founded'. The award was challenged before the High Court of England and Wales under the Arbitration Act, 1996 for England and Wales, which partially set aside the award and based on the merits of the dispute, deferred the decision to the panel. In the second award, the arbitral tribunal ruled in favor of Putrabali and ordered Rena Holding to pay the price stipulated in the contract.[12]

At the same time of these proceedings, Rena Holding favoured the enforcement of the first award of the tribunal. An enforcement order was issued by the President of the First Instance Court of Paris allowing for the recognition and enforcement of the first award in France. This decision was challenged before the Paris Court of Appeal, which dismissed the appeal against the enforcement order. The appeal was dismissed on the grounds that, the setting aside of an arbitral award in a foreign country does not prevent the interested party from seeking enforcement of the award in France and held that the enforcement of the first award would not be contrary to international public policy.[13]

The French Supreme Court affirmed that the decision of the Paris Court of Appeal is an international arbitral award, which is not based on any national law, and is a decision of international justice whose validity must be ascertained with respect to the rules applicable in the country where its recognition and enforcement is sought. Under Article VII of the New York Convention, the interested party can invoke the French rules regarding the same, which state

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10 Hilmarton, 1e civ., Mar. 23, 1994, 92-15.137 REV. ARB. 1994, 327.

11 Putrabali, 1e civ., Jun. 29, 2007, 05-18.053, Bull. civ. I, No. 250 REVUE DE L'ARBITRAGE [REV. ARB.] 2007, 507 at 517, note Emmanuel Gaillard; CLUNET 2007, 1236, note Thomas Clay; GAZETTE DU PALAIS CAHIERS DE L'ARBITRAGE [GAZ. PAL., CAH. ARB.]. 2007, 2, note Ph. Pinsolle; GAZ. PAL., CAH. ARB. 2008 23, note Cl. Debourg; REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ [REV. C. D. INT'L P.] 2008, 109, note S. Bollée; PETITES AFFICHES [P. A.] 2007, 20, note M. de Boisséson; D. 2007.AJ.1969, note X. Delpech; DALLOZ 2008, 1429, obs. L. Degos; JURIS-CLASSEUR PÉRIODIQUE J. C. P. 2006, 7, 216, obs. di Ch. Seraglini; REVUE DE JURISPRUDENCE DE DROIT DES AFFAIRES [REV. J. D. A.] 2007, 883, obs. J.P. Ancel; D. PAN. 2008, 189, obs. Th. Clay; REVUE TRIMESTRIELLE DE DROIT COMMERCIAL [REV. T. D. COM.] 2007, 682, note Eric Loquin; GAZ. PAL., CAH. ARB, 2007, 3, note S. Lazareff; ARB. INT'L 2007, 277, note Ph. Pinsolle's; ASA BULL. 2007, 217, note P.Y. Gunter; AMERICAN REV. INT'L ARB. 2007, 309, note H. Smit; REVISTA BRASILEIRA DE ARBITRAGEM [REV. BRA. ARB.] 2008, No. 18, 114, note L. Weiller.

12 France / 29 June 2007/ France, Cour de cassation / Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices / 05-18.053, NEW YORK CONVENTION GUIDE 1958, *English Summary of the decision is available at* http://newyorkconvention1958.org/index.php?lvl=notice_display&id=176 (Source: Bulletin 2007, I, No. 250, Original decision obtained from the registry of the Cour de cassation.).

13 *Id.*

that the annulment of an award in its country of origin is not a ground for the refusal of recognition and enforcement of an award rendered in a foreign country.

The Supreme Court based its decision on the text of Article 1520 of the French Code of Civil Procedure, which does not list the setting aside of an award in the country of origin as a ground for refusing the recognition and enforcement of that award, and on Article VII of the 1958 New York Convention which contains the rule of 'more-favourable-right' provision.[14]

In another case decided in the same year as the *Putrabali* decision, the Paris Court of Appeal found that the rule according to which the setting aside of an arbitral award in a foreign country does not affect the right to request the enforcement of the award in France, constitutes a "*fundamental principle under French law*", since the arbitrator is not a part of the national legal order of the country where the award was rendered.[15]

The two decisions enumerated above confirm a well-established principle of law in France. It confirms that the arbitration award is a decision of international justice on which the judge at the seat of arbitration has the sole power to allow its execution within his territory. This judge has no power over the other national courts, and hence it cannot be subject to his decision. The court of the place where enforcement is required will be the only one able to decide whether the award complies with its own independent legal system. Those rules reflect the logic and the underlying reason behind the New York Convention, the main objective of which is to circulate arbitral awards in an effective manner.

This conception, introduced by the French, has in fact been followed by other legal systems also. For example, the ruling issued by the United States [the "**US**"] Court of Appeals on August 2, 2016, in *Corporación Mexicana de Mantenimiento Integral* v. *Pemex-Exploración Y Producción* ["**Pemex case**"],[16] could lead one to believe that the US has also adopted a similar approach regarding the autonomy of arbitral awards and the absolute authority to recognize an annulled award. It was on the lines of the French approach as it gave no deference to the decision of the foreign court annulling the award. Indeed, in this case, the US Court of Appeals for the Second Circuit affirmed the district court decision, which recognized an arbitral award that had been set aside by a court in Mexico, the seat of arbitration.[17]

In the *Pemex case* the award was rendered out of an International Chamber of Commerce ["**ICC**"] arbitration, arising out of a contract to build offshore gas platforms in the Gulf of Mexico between Commisa (a company specializing in public infrastructure project) and Pemex-Exploración y Producción, a subsidiary of Pemex (a state-owned oil company).[18] When the

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14 New York Convention, *supra* note 2, art. VII(a) ("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 or 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.").

15 Cour d' appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 18, 2007, 05/10887.

16 Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción, 962 F. Supp. 2d 642 (S.D.N.Y. 2013) [*hereinafter* "Commisa"].

17 *Id.*

18 *Id.*

dispute arose, Commisa initiated an ICC arbitration seated in Mexico City, for breach of contract. It obtained an award against Pemex, which was held liable for the wrongful termination of the contract, and the tribunal ordered Pemex to pay damages to Commisa.

Commisa approached the District Court in New York in order to have the award recognised in the US, which confirmed the award. Simultaneously, Pemex filed a constitutional action in Mexico seeking to vacate the award on constitutional grounds. It failed in the first instance but, on appeal, the Court in Mexico vacated the award. Pemex appealed the District Court's ruling before the Court of Appeals, which confirmed the award despite its annulment in Mexico.[19]

The Court of Appeal based its decision on the Panama Convention (the Inter-American Convention on International Commercial Arbitration, 1975), containing a similar provision in Article V(1)(e) of the New York Convention.[20] Interpreting the language in Article 5(1) of the Panama Convention, the Court held that the use of the word 'may', meant that it had the discretion to recognize and enforce an award even if it had been previously annulled in the seat of arbitration. It also meant that it had the authority to enforce an annulled award unless there existed '*adequate reason*' not to do so.[21] In other words, the court's approach required that the decision, setting aside the award in the seat of arbitration, may not be followed if it were contrary to the public policy of the US. Furthermore, the court acknowledged that this requirement is not expressly mentioned in the New York Convention or the Panama Convention, but is found in the 'principle of comity'.

In doing so, according to French jurisprudence, the American judge did not comply with the decision of the seat. This orientation had already been adopted in the famous decisions of *Sté Chromalloy Aero Service* v. *Répub. arabe d'Égypte* ["**Chromalloy**"][22] and *TermoRio S.A. E.S.P.* v. *Electrificadora Del Atlantico S.A. E.S.P.* ["**TermoRio**"].[23]

In the *Chromalloy* decision, the US District Court of Columbia contrasts Article V of the New York Convention with Article VII(1) of the same. It stated that Article V sets out a lenient approach under which a court '*may*' refuse to enforce an award, while Article VII(1) mandates that this Court must consider the interested party's claims under applicable the United States law. The Court, after analyzing whether the Egyptian Court's reasons for vacating the award were

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19 *Id.*

20 New York Convention, *supra* note 2, art. V(1)(e) (That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.).

21 Commisa, 962 F. Supp. 2d 642 (S.D.N.Y. 2013).

22 Award, Caire, 24 August 1994 (Sté Chromalloy Aero Service c. Répub. arabe d'Égypte), INT'L ARB. REP., 11, 1996, 52; *annulled by* Court of Appeal, Cairo, 5 December 1995, REV. ARB. 1998, 723, note Ph. Leboulanger; Y. B. COM. ARB., XXIVa, 1999, 265; *declared enforceable by* 939 F. Supp. 907 (D.D.C. 1996); REV. ARB. 1997, 439, obs. Ph. Fouchard; Y. B. COM. ARB., XXII, 1997, 1001; INT'L ARB. REP., 11, 1996, 54; INT'L ARB. REP., 11, 1996, 22, obs. G. H. Sampliner; RDAI 1997, 253, obs. G. R. Delaume; INT'L ARB. REP., vol. 12(1), 1997, 1, obs. H. G. Gharavi; INT'L ARB. REP., 12, 1997, 1, obs. J. Paulsson; INT'L ARB. REP., vol. 12(5), 1997, 1, obs. H. G. Gharavi; Cour d' appel [CA] [regional court of appeal] Paris, Jan. 14 1997, No. 95/23025, REV. ARB. 1997, 395, note Ph. Fouchard at 329; CLUNET 1998, 750, con note E. Gaillard; N. Y. L. J., 1997, con obs. E. Gaillard; BULL. CIA CCI, 9, 1998, 15, 17, obs. A. J. van den Berg; Y. B. COM. ARB., XXII, 1997, 691 ; INT'L ARB. REP., 12, 1997, B1 et B4.

23 TermoRio S.A. E.S.P. v. Electrificadora Del Atlantico S.A. E.S.P., 421 F. Supp. 2d 87 (D.D.C. 2006), *aff'd*, 487 F.3d 928 (D. C. Cir. 2007).

admissible under Section 10 of the Federal Arbitration Act, Chapter 1,[24] held that the award would not have been vacated under Section 10 of the Federal Arbitration Act and consequently it should be enforced in accordance to Article VII(1) of the Convention.[25]

According to this decision, the judge, based on the merits of the decision adopted by the court of the *situs* of arbitration, verifies its compliance with its public order. The American judge, therefore, considered the decision of the judge of the seat of arbitration, to exclude the enforcement of the award in his State.

The jurisprudential orientation admits that the exequatur of the award, despite its annulment in the seat of arbitration, is founded on two main legal provisions. Reference is made to Article VII of the New York Convention,[26] which provides that the domestic law more favorable to arbitration, prevails over conventional rules (the principle of 'more-favorable-right' provision). Reference is also made to Article 1514 of the French Code of Civil Procedure,[27] which confers, almost automatically, the enforceability to international arbitration awards, except in cases where it is contrary to international public order, and without prejudice to the right to appeal.

The French law should be considered more favorable because Article 1520 of the Code of Civil Procedure,[28] does not allow for the setting aside of a foreign award on account of its rejection in its country of origin. The French law of arbitration, adopting a more liberal approach than the provisions of Article V(1)(e) of the Convention, does not allow its implementation in France.

The French jurisprudence is therefore beyond reproach from a legal point of view, insofar as it applies to Article VII of the New York Convention and respects its language and philosophy.

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24 The Federal Arbitration Act, 9 U.S.C. §10, (2013) ("Same; vacation; grounds; rehearing (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration (1) Where the award was procured by corruption, fraud, or undue means. (2) Where there was evident partiality or corruption in the arbitrators, or either of them. (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced. (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.(b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5.").

25 United Nations Commission International Trade Law (UNCITRAL) Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 303, G.A. Res. 62/65, U.N. Doc. A/RES/62/65 (Dec. 6, 2007) (2016 ed.).

26 New York Convention, *supra* note 2, art. VII.

27 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1514 ("An arbitral award shall be recognised or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to international public policy.").

28 CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1520 ("An award may only be set aside where:
(1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy.").

Such orientation is indicative of a double consistency in the treatment of judgments and rulings issued under foreign conviction.[29]

It also reflects international coherence, since it reserves the same treatment for all foreign judgments, whether they validate or set aside an award. The judgment issued by the seat of the arbitration does not prevent foreign judges from exercising their sovereignty over the awards to which they are required to execute. The judges before whom enforcement is required, may therefore refuse the exequatur for an award that the court at the seat of arbitration considers to be perfectly regular and valid.

This orientation reflects the internal consistency, since the *Hilmarton-Putrabali* decisions grant the same type of treatment for foreign awards and subject them to identical control in the exequatur phase.

It would not be legitimate to grant judges of a State the sole power to annul an award that has repercussions worldwide. This would run the potential risk of unjustified cancellation, or at least, one that is contrary to the approach that other states have about the control that can be exercised in matters of international arbitration.

In fact, if the validity of the decision was placed solely in the hands of the judge at the seat of arbitration, the consequences might be dramatic. Take England, for instance, where the Arbitration Act, 1996 provides countless grounds for rejecting exequatur,[30] respecting a tradition of close scrutiny by the English judge over any arbitration - even international - that takes place in England. If an award annulled in England, (for example due to the lack of 'formal requirements'), could no longer be enforced in another country, the English view of hostility to arbitration would unlawfully apply *erga omnes*.

One of the greatest successes of the New York Convention is that it facilitates the circulation of the award and, at the same time, reduces the importance of the seat of the arbitration in the execution phase of the award.[31] The New York Convention, therefore, does not recognize any role of supremacy in the courts and in the procedural law of the seat, and it even seems to legitimize the existence of divergent opinions among different states regarding the existence, validity, and effectiveness of the arbitral award.

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29 Philippe Fouchard, *La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine* [The International Scope of the Annulment of the Arbitration Award in his Country of Origin], 1997(3) REVUE DE L'ARBITRAGE [REV. ARB.] 329, 352 (1997) (Fr.).

30 Section 68 of the Act provides for challenges to an award on an exhaustive list of nine grounds of 'serious irregularity' affecting the tribunal, the proceedings or the award; Arbitration Act 1996, § 68(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").

31 Stefan Kröll, *Chapter 6: The Concept of Seat in the New York Convention and the Autonomy of Arbitral Award*, *in* 37 THE EVOLUTION AND FUTURE OF INTERNATIONAL ARBITRATION, INTERNATIONAL ARBITRATION LAW LIBRARY SERIES (Stavros L. Brekoulakis, et al. eds., 2016).

For this reason, the editors of the New York Convention have chosen to use the term 'may' in order to leave a margin of discretion to the internal judges called to execute an award annulled in the State of the seat. Thus, it falls upon the national court to decide on the execution of the annulled award from time to time, in light of the criteria established by the provisions of the State concerning the recognition and enforcement of foreign decisions, and the manner in which the law seeks to balance the international comity and the *favor arbitrati.* [32]

Unfortunately, according to the French conception of autonomy and the 'delocalization' of arbitration, an arbitration proceeding cannot be wholly governed by the law of the seat and must find legitimacy in systems other than that of its own, such as the states in which the enforcement of the award is requested.[33]

The place where the arbitration takes place has, in fact, no higher international authority in deciding the fate of the arbitral decision. From this point of view, in the authors' opinion, the first judge has even less authority and legitimacy than that of the State in which enforcement is sought.

This tendency is based on the theory of autonomy in international arbitration, which manifests itself not only in relation to the arbitration agreement but also with respect to the award. It also excludes the extraterritorial efficacy of the annulment ruling of the award.

The seat of the arbitration is essentially a matter of convenience and is totally irrelevant for the purposes of enforcement. The arbitrators are not appointed under the law of the State in which they are located, but under all the legal systems, which recognize, under certain conditions, the validity of the arbitration agreement and recognize its effects. Furthermore, the venue is sometimes artificial because the hearings take place elsewhere.

The resulting award thus finds legitimacy not only in a given system, but also in the transnational system of arbitration ('floating arbitration'). A 'floating' award is an award, which exists unattached to any national law. Thus, it may be enforced when it has been annulled elsewhere because the award is not a creature of some legal system. The recognition of floating awards will allow the application of uniform international standards to determine the validity of an award, rather than let it be subject to the vagaries of diverse domestic laws.[34] The arbitrators do not have any State forum and, consequently, the arbitration award is a non-national ruling. This inexorable logic, however, is fought in a manner that is not worthy of support.

III. Criticisms against the French Conception

Those who adhere to the territorial conception of international arbitration affirm that it is up to that legal system to decide the validity of the award. The seat of arbitration is conceived as one

[32] Thomas Clay, *Le siège de l'arbitrage international entre « ordem » et « progresso »* [The Seat of International Arbitration Between Order and Progress], *in* 5 Cahiers de l'arbitrage (Gazette du Palais eds., 2010), 21; Giovanni Zarra, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di vedute?* [The execution of the arbitration awards at the State of the seat and the Convention of New York: Towards a uniformity of views?] RIVISTA DELL' ARBITRATO [RIV. ARB.] 561, 574 (2015).

[33] Clay, *supra* note 32; Zarra, *supra* note 32.

[34] P. Ramaswamy, *Enforcement of Annulled Awards - An Indian Perspective*, 19 J. INT'L. ARB. 461, (2002).

of the elements of greater connection with arbitration. Therefore, a State would not only have the authority to check the regularity of the procedure, but also to exercise control over the arbitral award.[35]

As stated earlier, this theory finds its basis in Article V of the New York Convention, which provides that the State in which, or by whose law, the award was issued, is free to set aside or change the award in compliance with its internal law. From a strictly legal point of view, the award annulled in the country of origin could no longer be found elsewhere, since the annulled award would cease to exist *erga omnes*.

If the award no longer exists in the country which is the seat, it cannot exist even in the other States where its enforceability is sought.

The main objections that are raised in relation to the French orientation relate to the risk of international disharmony of decision-making in the arbitral sphere and a possible violation of the autonomy and will of the parties. By choosing the seat of arbitration, they would, indirectly, be choosing the legal system applicable, and would implicitly be accepting full control by that State. By refusing to give international effectiveness to a possible annulment decision by the court of the State of origin, the will of the parties would be violated.

Moreover, according to the supporters of this doctrine, this system could lead to the existence of different and contradictory State measures, thus generating disharmony in international arbitration decisions.

This approach would encourage *forum shopping*, as the winning party would not hesitate to seek the most liberal judge in order to obtain enforcement of the arbitral award. The need to respect the decisions of the state of the arbitration seat is based on the principle of *international comity*. According to this principle, no State can make decisions contrary to the State of the arbitration seat, which is completely neutral and in compliance with the principle of '*favor arbitrandi*'.

In our opinion, this logic manifests two, almost ontological, weaknesses. On one hand, it favors State justice over arbitrary justice; on the other it follows a systematic approach, which is not up to the challenges posed by the justice of international trade.

Moreover, this thesis is not consistent with the logic of the New York Convention, which is not intended to create obstacles to the circulation of arbitral awards, but rather to favour them. It would therefore be unjust to give too much weight to the peculiarities of the law of the place of arbitration and to the judges of that place, who may not be in favor of arbitration and, by an annulment ruling, succumb the award, even when in favor of the parties to the arbitration.[36]

The nature of arbitration is, on the contrary, to allow the parties to resolve their disputes before a neutral forum and obtain a decision free from any influence or national political pressure. These are the reasons why the French concept is, in our opinion, accurate and should prevail

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35 Zarra, *supra* note 32.

36 D. H. Freyer & Hamid G. Gharavi, *Finality and Enforceability of Foreign Arbitral Awards: From "Double Exequatur" to the Enforcement of Annulled Awards: A Suggested Path to Uniformity Amidst Diversity*, 13 ICSID REV.--FOREIGN INV. L. J. 101, (1998).

over others.

IV. Conclusion

The French jurisprudential position that we have examined, being consistent with the private nature of arbitration and the award that follows, has the approval of the authors. The award, like the arbitration agreement, has no nationality and consequently must be detached from the State, and disconnected from national laws and policies. An eventual annulment cannot therefore bind the other States where the exequatur is required, since they are able to decide whether the award complies with that autonomous system. Therefore, the world of arbitration can be more organized; the universality of international arbitration must respond to the territorial limitations on the execution of arbitral awards.