1. Introduction: Framework of the New York Convention

1.1 Overview

Article III of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter the ‘New York Convention’ or ‘Convention’) requires courts of countries which are signatories to the Convention to ‘recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon’ and subject to no more onerous conditions or higher fees or charges than are imposed on domestic awards. Thus, the Convention’s effectiveness can depend, to a large extent, on national arbitration law.

Although the outcome of an enforcement proceeding under the Convention may turn on how a State applies its domestic laws, the scope of the Convention’s reach depends not on the nationality of the parties but on where the award is made and enforced. Article I states that the Convention applies to ‘the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought.... It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought’. Thus, when recognition and enforcement of an award are sought in a State that is a party to the Convention, the Convention’s rules will apply to awards (i) made in a foreign State that is also a party to the Convention, ie, one other than where recognition and enforcement are sought; and (ii) made

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3 ibid. Art. I(1).
in the State where recognition and enforcement are sought if such award is considered non-domestic in that State.\(^4\)

Article V of the Convention lists the grounds on which an enforcing court may refuse to recognise and enforce an award. This chapter explores the relationship between the Convention’s international arbitral award enforcement mechanism and provisions of national law which have been applied to deny or permit enforcement. Article VII(1) – the Convention’s ‘more-favourable-right’ provision – allows a party seeking to enforce an award to rely on any more favourable national law grounds for enforcement in the country where enforcement is sought even if enforcement could be denied under the Convention’s Article V grounds. As will be illustrated, an uneasy tension exists between Article V(1)(e) and Article VII of the Convention, on the one hand, and the provisions of national law on the other, which has given rise to some interesting and often controversial national court decisions on the recognition and enforcement of awards.

2. Article V and VII Defences to Enforcement

2.1 Overview of Article V

Article V of the Convention sets out a number of alternative grounds on which recognition and enforcement of an award ‘may’ be refused by the enforcing court. If one of the Article V grounds is made out, Article V’s permissive language allows, but does not require, the enforcing court to refuse to enforce the foreign awards.\(^5\) As one commentator has stated:

\(^4\)See Albert Jan van den Berg, ‘When Is an Arbitral Award Non-Domestic Under the New York Convention of 1958?’, \(6\) \textit{Pace L. Rev.} 25, 50 (1985), examining the scope of application of the second criterion in the context of considering the decision of the United States Court of Appeals for the Second Circuit in \textit{Bergesen v. Joseph Muller Corp.}, 710 F.2d 928 (2d Cir. 1983). In \textit{Bergesen}, the Court held that an arbitration between a Norwegian ship owner and a Swiss company where New York was the designated place of arbitration and in which New York law was the applicable law was a non-domestic award within the meaning of the New York Convention. The \textit{Bergesen} Court adopted the view that awards ‘not considered as domestic’ under the Convention denoted awards which were made within the legal framework of another country, for example, pronounced in accordance with foreign law or involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. The Court felt that a broad construction of Article I of the Convention was preferable because it was more in line with the intended purpose of the Convention, which was entered into to encourage the recognition and enforcement of international arbitral awards (ibid. at 932). See also \textit{Stone & Webster, Inc. v. Triplefine Int’l Corp.}, 118 F. App’x 546, 548–49 (2d Cir. 2004); \textit{Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys ‘R’ Us, Inc.}, 126 F.3d 15, 19 (2d Cir. 1997), adopting the reasoning in \textit{Bergesen}.

\(^5\)The discretionary nature of Article V(1) grounds was highlighted in Sup. Ct. Hong Kong, High Ct., 13 July 1994, \textit{China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co.}, XX Y.B. Com. Arb. 671 (1995), where the arbitration panel, although impartial, was not constituted in strict compliance with the arbitration agreement. The losing party (continued...)
The conditional “may” leaps out at any lawyer since it necessarily contemplates “or may not”.6 The list of grounds set out in Article V7 are widely regarded both by the judiciary and leading international arbitration practitioners as the exclusive grounds provided in the Convention for refusing enforcement, subject of course to the applicability of domestic law under Article VII(1).8

2.2 Article V(1)

The grounds specified in Article V(1) must be proven by the party resisting enforcement (‘the party against whom [the award] is invoked’).9 Article V(1) grounds are concerned with minimum standards of fairness and procedural due process concerning the arbitration agreement, the parties and the arbitration itself. Failure to give a party proper notice of the arbitral proceedings,10 decisions by the tribunal which deal with matters outside the scope of the submission to arbitration11 and defects in the composition of the arbitral tribunal12 are a few examples of the grounds for refusing enforcement under Article V(1).

2.2.1 Article V(1)(e)

Of all the provisions of Article V(1), Article V(1)(e) has arguably been one of the most controversial in its application and the source of much debate and commentary by international arbitration practitioners. Article sought annulment of the award under Article V(1)(d), which permits non-enforcement when the ‘composition of the arbitral authority ... was not in accordance with the agreement of the parties’. Judge Kaplan of the Hong Kong High Court found that the objection was insubstantial and exercised his discretion to enforce the award notwithstanding that a ground of opposition in the New York Convention was made out (XX Y.B. Com. Arb. at 679).

8 See Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 265, Kluwer (1981) (stating that under the Convention, enforcement may be refused ‘only if’ the party against whom the award is invoked is able to prove one of the grounds listed in Article V(1), or if the court finds that the enforcement of the award would violate its public policy (Art. V(2)). See also judgment of the United States Court of Appeals for the Second Circuit in Parsons & Whittemore Overseas Co. v. Société Générale de l’Industrie du Papier (RAKTA), 508 F.2d 969, 973 (2d Cir. 1974), I Y.B. Com. Arb. 205 (1976) (observing that while the 1927 Geneva Convention did not circumscribe the range of available defences to enforcement, the New York Convention limits the enforcement defences to those set forth in Article V).
9 New York Convention, Art. V(1).
V(1)(e) allows a court to refuse recognition or enforcement of the award where:

The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.\(^{13}\)

Article V(1)(e), therefore, has two limbs, the first relating to awards which have not yet become binding on the parties, and the second relating to awards which have been set aside or suspended at the place of arbitration. This chapter, in dealing with orders of annulment at the place of arbitration, will focus primarily on the second limb of Article V(1)(e).

Implicit in the wording of the second limb of Article V(1)(e) is the notion that the courts of the country in which, or under the law of which, the award is made have the power to set aside the award by applying their local domestic laws and thereby attempt to preclude its enforcement in other countries.\(^{14}\) Exercising this power, a number of courts have set aside or annulled arbitral awards either (i) based on provisions of the law of the place of arbitration which contain more liberal grounds for setting aside awards than those contained in the New York Convention for refusing to recognise or enforce an award, or (ii) rendered outside their territory – on the basis that the selection of their country’s law as the substantive law of the contract acts also as a choice of that law to govern the recognition and enforcement of the award itself.\(^{15}\)

As will be discussed below, such practices have, in fact, not deterred or precluded the enforcement of set aside awards by the courts of several countries, the most notable of which is France. In fact, a number of courts have relied upon national legislation to support the controversial practice of enforcing arbitral awards which have been set aside or annulled in the place of arbitration.\(^{16}\)

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\(^{13}\) ibid. Art. V(1)(e).

\(^{14}\) Article V(1)(e) contemplated that applications to set aside awards would virtually always be determined by the courts of the country in which the award was made and that the prospect of an award being governed by a different law would only occur if the parties so agreed. See van den Berg, supra note 8, at 350.

\(^{15}\) See, eg., *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 264 F. Supp. 2d 490, 500 (S.D. Tex. 2003) (noting the Central Jakarta District Court’s purported ‘annulment’ of an arbitral award where Indonesian law governed the substance of the contract but the seat of arbitration was Switzerland).

\(^{16}\) Some States, like Belgium, have chosen to allow parties to exclude annulment applications where the arbitral award has no, or only a tangential national connection with the country in question. For example, Article 1717 of the Belgian Judicial Code provides that parties may, by an explicit declaration in the arbitration agreement or by a later agreement, exclude any application for the setting aside of an arbitral award where neither of them is a Belgian national or has its normal place of residence or business establishment in Belgium.
2.3 Article V(2)

Article V(2), on the other hand, permits the enforcing court to refuse to enforce awards which contravene the enforcing forum’s fundamental notions of public policy. The enforcing court may therefore refuse enforcement if under its national law the subject matter of the parties’ dispute is incapable of settlement by arbitration (Art. V(2)(a)), or the enforcement of the award would be contrary to the public policy of that country (Art. V(2)(b)). Unlike the Article V(1) grounds, which require action by the party resisting enforcement, an Article V(2) objection to enforcement may be raised either by the enforcing court (on the court’s own motion) or by the resisting party.

In the United States, New York Convention defences have traditionally been narrowly construed, with the Convention’s public policy defence interpreted to include only violations of the ‘most basic notions of morality and justice’. Many other nations have recognised that a broad interpretation of ‘public policy’ would defeat one of the principal purposes of international arbitration, which is to allow contracting parties from different countries to secure some measure of neutral dispute resolution.

2.4 Article VII(1): The ‘More-Favourable Right Provision’

Article VII(1) of the Convention provides that:

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

19 See Redfern, Hunter, Blackaby, Partasides, supra note 17, at 419–21.
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.20

Often characterised as the ‘more-favourable-right provision’, Article VII allows a party seeking enforcement of a foreign award in a country whose domestic law is more favourable for enforcement than the New York Convention to rely on those more favourable grounds.21 In contrast to the discretionary provisions of Article V, the use of the mandatory ‘shall’ in Article VII(1) is generally understood to mean that if there is a more favourable national law – offering more liberal grounds for enforcement than the Convention – and a party wishes to rely on it, the court must allow reliance on the more favourable local law.22 As permitted by Article VII(1), a number of enforcement courts have gone beyond Article V and applied their more liberal domestic laws in enforcing foreign arbitral awards that have been annulled in the country where the award was made.

2.4.1 A More Favourable Local Law: The European Convention

Example

The 1961 European Convention on International Commercial Arbitration23 (the ‘European Convention’) offers a different solution to the problem of enforcement of annulled awards than Article V(1)(e) of the New York Convention. Under Article IX(2) of the European Convention, in relations between States that are also signatories to the New York Convention, enforcement may be refused only if the award has been set aside on the grounds listed in Article IX(1)(a)–(d) of the European Convention, which mirror exactly the grounds in Article V(1)(a)–(d) of the New York Convention. Thus, the setting aside of an award in the place of arbitration under Article V(1)(e) of the New York Convention does not in itself constitute a ground for refusal to enforce the award.24 When an award has been annulled for a reason other than those listed in Article IX(1), it must be enforced, despite Article V(1)(e) of the New York Convention, if the enforcing

20 New York Convention, Art. VII(1).
21 See van den Berg, supra note 8, at 85, where he submits that an enforcing party which seeks to rely on domestic law concerning enforcement of foreign awards or on another treaty by virtue of the ‘more-favourable-right provision’ of Article VII(1) must rely on that other basis in toto, to the exclusion of the New York Convention.
22 The ‘more-favourable-right provision’ also encompasses bilateral and multilateral treaties such as, for example, the 1961 European Convention on International Commercial Arbitration.
24 Article IX(2) of the 1961 European Convention expressly states that in relations between Contracting States that are also parties to the New York Convention, Article IX(1) of the European Convention ‘limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under [Article IX(1) of the European Convention]’. 
party can rely on the European Convention as the more favourable local law under Article VII(1) of the New York Convention.25

This rule was applied by the Austrian Supreme Court in Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska.26 In this case, the arbitration panel, which was seated in Belgrade, awarded the claimant damages for breach of contract. Upon application of the unsuccessful party, the Supreme Court of Slovenia set aside the award, finding that the contract conferred privileges on the claimant that tended towards giving the claimant a monopoly power and therefore violated the public policy of Slovenia. In the meantime, the claimant sought to have the award enforced in Austria. The Austrian Supreme Court enforced the award, finding that the Slovenian court’s basis for setting aside the award (violation of the public policy of the country of origin) was not a recognised ground for refusing enforcement under Article IX of the European Convention. The Austrian Court held that: ‘a plain reading of Art. IX shows that the setting aside of an arbitral award for violation of the public policy of the Contracting State where it was rendered does not appear among the grounds exhaustively listed in Art. IX(1) of the European Convention as justifying a refusal of recognition or enforcement of an arbitral award’.27

The European Convention approach has been said to constitute a marked improvement over the New York Convention’s recognition of annulment decision rendered in the country in which or under the law of which the award was made because it precludes an annulment decision based on a ‘local particularity or eccentricity’ from blocking the worldwide enforcement of an award.28 Notwithstanding the perceived advantages of the European Convention, however, the Convention has been little used since its signing over 45 years ago.

25 According to its preamble, the object of the 1961 European Convention, which was concluded under the auspices of the United Nations Economic Commission for Europe, is to promote ‘the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical or legal persons of different European countries...’. The Convention thus applies to arbitration agreements concluded for the purpose of settling international trade disputes between physical or legal persons having their habitual place of residence or their seat in different Contracting States (Article I sets out the scope of the Convention).
27 ibid. at 922.
3. The Importance of the Seat of Arbitration

A peculiarity of international arbitration is that parties are required to designate a place of arbitration, also known as the seat of arbitration. The seat of arbitration is less a matter of real geography than a link to the legal order of the country whose law will govern many aspects of the proceedings. In electing a seat, the parties are essentially agreeing to fix their arbitration proceedings to a specific country’s laws notwithstanding that the parties and the matter in dispute may have no connection to the seat and that hearings and deliberations may take place elsewhere. In some jurisdictions, national courts have required something more than a mere tangential interest in or connection to the country in order for it to be considered the seat of arbitration.29

The sporadic practice whereby national courts at the place of arbitration interfere with the arbitral process by annulling awards as a result of perceived contraventions between the award and their local law has served further to underscore the importance of carefully choosing the seat of arbitration. It has also forced international arbitration practitioners to pay closer attention to legal norms at the seat of arbitration which may affect or undermine the eventual enforcement of an award.

4. Issues Surrounding the Enforcement of Awards Set Aside Where Rendered

4.1 Overview

Annulment of the award at the place of arbitration gives the losing party a strong argument for resisting the award’s enforcement elsewhere. Although Article V(1)(e) of the Convention permits Member States to refuse recognition or enforcement to an award set aside where rendered, the Convention lays down no criteria for proper or improper vacatur at

29 A Swedish Court of Appeal declined jurisdiction over an application to set aside an award on the grounds that the arbitration had no real connection with Sweden, notwithstanding that the parties’ contract provided for arbitration under the ICC Rules, designated Stockholm as the place of arbitration and both the parties (a French company, and two US companies) and the sole arbitrator had considered Swedish arbitration law as the law applicable to the proceedings. The Court held that ‘[a] prerequisite for a Swedish court to deal with a dispute, there must be a Swedish judicial interest’ and ‘[f]or such an interest to exist, it is normally required that the dispute or the parties to the dispute have some, albeit minor, connection to Sweden’ (CA Svea, 29 March 2005, Titan Corp. v. Alcatel CIT SA, 20(7) Int’l Arb. Rep. A-1 (2005)); For commentary, see Sigvard Jarvin and Carroll S. Dorgan, ‘Are Foreign Parties Still Welcome In Stockholm? – The Svea Court’s Decision In Titan Corporation v. Alcatel CIT S.A. Raises Doubts’, 20(7) Int’l Arb. Rep. 42 (2005) (criticising the decision in this case as running against the trend in international arbitration and undermining party autonomy in Swedish arbitration law (at 45)).
The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration

Therefore, judicial review of an award at the place where made will be governed by the local arbitration law in force at the time of the application to set aside the award. This brings with it the concomitant risk that the grounds for refusal of enforcement under the Convention may indirectly be extended to include ‘all kinds of particularities of the arbitration law of the country of origin’.

4.2 Stays of Enforcement Decisions Under Article VI

Since a court may refuse to enforce an annulled award, Article VI of the Convention confers upon the enforcing court the discretion to adjourn the decision on the enforcement of the award when an application to set aside or suspend the award has been made to a competent authority of the country in which, or under the law of which, the award was made. The court may also, on the application of the enforcing party, order the party against whom enforcement is sought to give suitable security. As with Article V, the enforcing court has discretion as to whether or not to grant a stay of the enforcement proceeding.

Historically, there have been few cases where stays of enforcement proceedings have been challenged, suggesting that the power under Article VI has rarely been exercised. Recently, however, a number of US decisions have applied Article VI to stay enforcement proceedings pending the outcome of an application to set aside. In Europcar Italia, S.p.A. v. Maiellano Tours, Inc., the United States Court of Appeals for the Second Circuit noted the competing concerns inherent in any Article VI application. On the one hand, the Court was mindful that ‘the adjournment of enforcement proceedings impedes the goals of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation’, but at the same time it emphasised that courts should avoid ‘the possibility of conflicting results and the consequent offense to international comity’.

Given the understanding that ‘a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings’, the recent trend of US courts is to grant a stay where a non-frivolous appeal is pending before a competent authority

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30 Compare the approach of Article IX of the 1961 European Convention which defines those grounds for award annulment that will justify non-recognition.
32 van den Berg, supra note 8, at 355.
33 156 F.3d 310 (2d Cir. 1998).
34 ibid. at 317.
35 ibid.
in a foreign jurisdiction. However, there are no internationally accepted standards for the exercise of discretion by courts to stay enforcement of an award, and the saga of the Hilmarton case, discussed in section 5.2.2 below, illustrates the dangers of refusing a stay.

### 4.3 Does the Foreign Annulment Decision Have Binding Effect?

One interesting issue which has long occupied international arbitration scholars and practitioners concerns the effect or nature of a foreign annulment decision. The traditional or territorial view begins with the premise that every country has the authority to regulate what occurs within its borders and by choosing to arbitrate in a particular country, the parties subject themselves to the laws and courts of that country. Supporters of this view therefore point out that courts in the enforcement country should give binding effect to the annulment decision of a foreign court because “after annulment, an arbitral award no longer exists.” Moreover, it has been said that the enforcement of an award which has been set aside in another country shows a certain measure of disrespect and does not accord with international comity, a crucial concept in international arbitration. Undoubtedly, disregarding decisions of the courts where the arbitration took place can lead to inconsistent judgments and expose a party to a multiplicity of proceedings in various countries as an enforcing party engages in a forum shopping expedition to find a locale where its award will be recognised and enforced.

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38 Albert Jan van den Berg, ‘Enforcement of annulled awards?’, 9(2) ICC Bull. 15, 16 (1998) (referring to the rule of ‘ex nihilo nil fit’ which would render legally impossible the enforcement of an award which no longer exists under the applicable arbitration law. The author however goes on to state that this legal impossibility appears to exist in any case under the New York Convention, since it explicitly refers in Article V(1)(e) to the applicable arbitration law). See also Hamid G. Gharavi, ‘Chromalloy: Another View’, 12(1) Int’l Arb. Rep. 21, 23 (1997).


40 van den Berg, supra note 8, at 355.
On the other hand, the modern or what has been referred to as the ‘denationalized view’ separates the existence of awards from the law of the country of origin. Proponents of the enforcement of awards annulled at the place of arbitration believe that the law of the place of arbitration is not the sole source of the validity of an award and it would be unfair to allow the particularities of the law of the country in which, or under the law of which the award was made to block, through annulment of an award, its enforcement in all countries. They also argue that this approach may even discourage law makers and judges of those countries from annulling (without basis) awards which are rendered against their nationals (especially the State or State-owned companies) once they see the futility of their misconduct in the international context.

5. Approaches of National Courts to the Enforcement of Annulled Awards

5.1 Overview

National courts have taken divergent approaches to the enforcement of annulled awards. This section examines the approaches of a variety of domestic courts, in France, Luxembourg, Germany and the United States. In deciding whether or not to enforce, these courts have adopted different rationales. The decisions of the French courts show France’s strong pro-enforcement bias and have been grounded in France’s domestic law, made applicable through the ‘more-favourable-right provision’ of Article VII of the Convention. This can be contrasted with the German approach, which appears to be more deferential to the status of the award at the arbitral situs. Similarly, United States courts will not readily enforce an award that has been set aside at the arbitral situs, especially when the parties’ agreement makes no reference to US law.

5.2 France

5.2.1 Overview of Cases

The French courts have for some time demonstrated their willingness to recognise and enforce foreign awards under the more liberal enforcement provisions of French domestic law notwithstanding their

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41 Davis, supra note 37, 37 Tex. Int’l L.J. at 58.
42 Jan Paulsson proposes that annulment of an award in the rendering country should not be a bar to enforcement elsewhere unless the grounds of that annulment were ones that are internationally recognised. He also argues that the core objective of the New York Convention is to free the international arbitral process from domination by the law of the place of arbitration and not to establish a comprehensive and unitary enforcement regime. See Paulsson, supra note 6, 9(1) ICC Bull. at 14–15, 28–31.
43 ibid. at 31.
Enforcement of Arbitration Agreements and International Arbitral Awards
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annulment at the place of arbitration. Article 1502 of the French New Code of Civil Procedure (NCCP), which deals with the enforcement of awards which are ‘international’ or rendered outside France, does not contain the ground for refusal mentioned in Article V(1)(e) of the New York Convention.\(^4^4\) Therefore, under French law, the fact that an arbitral award has been set aside in the country in which, or under the law of which, it was rendered is not by itself a ground for refusal of enforcement of the award in France.

As early as 1984, in \textit{Palbalk Ticaret Sirketi v. Norsolor},\(^4^5\) the French Cour de Cassation recognised the possibility for French courts to allow the enforcement of annulled awards. In \textit{Norsolor}, it overturned the decision of the Paris Court of Appeal which had refused to enforce an award rendered in Austria and annulled by the Vienna Court of Appeal on the basis of Article V(1)(e) of the New York Convention.\(^4^6\) The Cour de Cassation held that French judges have the duty, and not just the right, to apply the ‘more-favourable-right provision’ of Article VII(1) in enforcing a foreign arbitral award, even where enforcement would otherwise be refused under Article V(1)(e) of the Convention. French courts have confirmed the applicability of the ‘more-favourable-right provision’ in subsequent decisions. In the 1993 \textit{Polish Ocean Line v. Jolasry} case,\(^4^7\) the French Cour de Cassation enforced an award rendered in Poland but whose enforceability had subsequently been suspended, again on the basis that the annulment or suspension of enforceability (‘\textit{sursis à exécution}’) of the award at the place of arbitration was not one of the grounds for refusing enforcement listed in Article 1502 of the NCCP.

\(^{4^4}\) Article 1502 of the French New Code of Civil Procedure (NCCP) provides that an appeal against a decision which grants recognition or enforcement of an award which is international or rendered outside France may be brought only in the following cases:
   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;
   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.


\(^{4^6}\) The Supreme Court of Austria subsequently reversed the annulment decision of the Vienna Court of Appeal, as a result of which the French Cour de Cassation did not have an opportunity to discuss in detail the conditions of French law governing the recognition and enforcement of awards set aside at the seat. Oberster Gerichtshof, 18 November 1982, \textit{Norsolor v. Pabalk}, 1983(4) \textit{Rev. arb.} 519, IX \textit{Y.B. Com. Arb.} 159 (1984).

This case law was further developed by the French Cour de Cassation in its 1994 decision in the *Hilmarton* case,\(^48\) in which it upheld the decision of the Paris Court of Appeal enforcing an award rendered in Switzerland and annulled by the Swiss court on the basis that the enforcing party was entitled to rely upon French domestic law by virtue of Article VII of the Convention. The *Hilmarton* case is discussed in further detail in Section 5.2.2 below. In 1997, in the *Chromalloy* decision,\(^49\) the Paris Court of Appeal upheld the decision of a lower court enforcing an award that had been rendered in Egypt and annulled by the Egyptian courts. Following the reasoning of the French Cour de Cassation in the *Hilmarton* decision, the Court held that the arbitral award in question was an ‘international’ award which, by definition, was not integrated into the legal order of the annulling State and thus continued to exist notwithstanding its annulment. Based on this rationale, the Court concluded that the recognition of annulled awards by France was not in violation of international public policy.

5.2.2 The Dangers of Enforcing Annulled Awards: The *Hilmarton* Saga

The now notorious *Hilmarton* case illustrates the potential negative consequences of enforcing set aside awards.\(^50\) *Hilmarton Ltd.* (Hilmarton), an English consulting company, agreed to assist Omnium de Traitement et de Valorisation (OTV), a French company, in obtaining a Government contract for the sewerage system of Algiers, Algeria. OTV won the contract but only paid half of the fee due to its dissatisfaction with Hilmarton’s performance. Seeking payment of the balance of the fee, Hilmarton initiated arbitral proceedings in Geneva under the International Chamber of Commerce (ICC) arbitration rules. The Arbitral

\(^{48}\) 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 (1995). See also CA Paris, 10 June 2004, *Bargues Agro Industries v. Young Pecan Company*, 2006(1) *Rev. arb.* 154, XXX *Y.B. Com. Arb.* 499 (2005). In this case, the Paris Court of Appeal enforced an award rendered in Belgium, in spite of the fact that proceedings to annul the award had been commenced in the Belgian courts. The Paris Court of Appeal held that an award rendered in an international arbitration, involving international commercial stakes between parties established in different jurisdictions, was not integrated into the Belgian legal order. As a result, the award’s potential annulment by the Belgian judge could not affect its validity nor prevent its recognition and enforcement in other jurisdictions. In response to Bargues’ request for a stay of the French proceedings under Article VI of the Convention pending the outcome of the Belgian proceedings, the French Court took the view that Article VI was of ‘no assistance’ within the system of recognition and enforcement pursuant to Article 1502 NCCP. Thus, Bargues’ request was denied.


Tribunal rendered an award denying the claim on 19 August 1988 (the First ICC Award’). On 17 November 1989, upon Hilmarton’s request, the Canton of Geneva Court of Justice (Cour de Justice de Canton de Genève), an appellate court, annulled the award.\textsuperscript{51} The Court recognised that the agreement between Hilmarton and OTV had been made in violation of the Algerian law, which banned the use of intermediaries in obtaining Government contracts. However, the Court found in favour of Hilmarton because: (i) activities of an intermediary were permitted under Swiss law, so long as no bribes were paid; and (ii) Hilmarton had met its contractual obligations to OTV and, therefore, was entitled to receive the agreed fee in full.

The Swiss Federal Tribunal affirmed the appellate court’s decision on 17 April 1990.\textsuperscript{52} Before the Federal Tribunal had ruled, but after the Swiss appellate court had annulled the award, OTV sought enforcement of the award in France. On 26 February 1990, OTV’s request for enforcement of the First ICC Award was granted by the Paris Tribunal of First Instance.\textsuperscript{53} The Paris Court of Appeal upheld the enforcement of the award on 19 December 1991.\textsuperscript{54} On 23 March 1994, the French Cour de Cassation affirmed the Court of Appeal’s decision.\textsuperscript{55} In the meantime, however, following the annulment of the First ICC Award by the Swiss Federal Tribunal, the dispute was resubmitted to arbitration in Switzerland, and a new ICC Award (the ‘Second ICC Award’) this time favouring Hilmarton was rendered on 10 April 1992.\textsuperscript{56}

\textsuperscript{53} XIX Y.B. Com. Arb. at 216.
\textsuperscript{54} ibid.
\textsuperscript{56} This saga did not end there. Relying on the Franco-Swiss Convention on Judicial Matters of 15 June 1869, Hilmarton sought enforcement of the Swiss Federal Tribunal’s decision annulling the First ICC Award. The Tribunal of First Instance (TGI) of Nanterre recognised the annulment on 23 September 1993. OTV appealed the TGI’s decision to the Court of Appeal of Versailles. As regards the new award, it was granted exequatur in France by the Tribunal of First Instance of Nanterre on 25 May 1993, and OTV appealed this decision to the Court of Appeal of Versailles, too. Thus at one point there co-existed in the French legal system two contradictory awards, as well as a decision annulling the First ICC Award between the same parties on the same subject matter. The Court of Appeal of Versailles heard both appeals jointly and, on 29 June 1995, confirmed the enforcement in France of the Swiss Federal Tribunal’s decision of 17 April 1990 annulling the First ICC Award, as well as the exequatur of the Second ICC Award. The Court suggested that the parties have recourse to Article 618 of the NCCP, which permits the Cour de Cassation to set aside one of the contradicting decisions. The Cour de Cassation, on 10 June 1997, annulled the two Versailles Court of Appeal judgments rendered in favour of Hilmarton in June 1995 on the grounds of res judicata. The Second ICC Award however remains in force in Switzerland and also in England where it was enforced on 24 May 1999 by the English High Court. See Gharavi, supra note 50, 12(9) Int’l Arb. Rep. at 22.
The Cour de Cassation, which confirmed the enforcement decisions of the lower French courts, did not accept Hilmarton’s argument that France should refuse recognition and enforcement of the first annulled award under Article V(1)(e) of the Convention. Instead the Court looked to Article VII of the New York Convention and determined that OTV could rely on Article 1502 of the NCCP which does not list the ground provided for in Article V(1)(e) among the grounds for refusal of enforcement.

5.2.3 French Cases Post-Hilmarton

French courts, in a number of decisions after Hilmarton, have enforced awards under French domestic law which had been annulled at the place of arbitration. In Direction Générale de l’Aviation Civile de l’Émirat de Dubaiv. International Bechtel,57 the Paris Court of Appeal upheld an enforcement order of an award rendered in Dubai and subsequently annulled by the highest civil court of the United Arab Emirates (UAE). The arbitration arose out of a contract dispute between Direction Générale de l’Aviation Civile de L’Émirat (DAC) and International Bechtel Co. (Bechtel) which was submitted to arbitration in Dubai and governed by UAE law. The award in favour of Bechtel was for approximately $24.4 million. Soon after the award was rendered, DAC petitioned the Dubai Court of First Instance to overturn the award. On 16 November 2002, the Dubai Court overturned the award, finding that the arbitrator had failed properly to swear in the witnesses according to local law.58

Subsequently, on 21 October 2003, the Paris Court of First Instance (‘Tribunal de Grande Instance’ or ‘TGI’) enforced the award against DAC. However, on 15 May 2004, the Dubai Court of Cassation confirmed the lower court’s annulment of the award. Following this decision, DAC appealed to the Paris Court of Appeal to overrule the execution order in light of the Dubai Court of Cassation’s decision annulling the award. DAC argued that (i) the arbitrator had exceeded the scope of its mission by not conforming to local law and (ii) there would be a violation of international public order by enforcing an award in France that is not enforceable in Dubai. The Paris Court of Appeal rejected DAC’s arguments. The Court held that the annulment in Dubai did not have international effect and only related to the sovereign territory where it occurred. The Court noted that DAC’s argument – that an arbitral award

58 Dubai law requires the witness to state, ‘I swear by the Almighty to tell the truth and nothing but the truth’. The Court found that the witnesses in the arbitration had not taken oaths in the form prescribed by Dubai law. See In re Arbitration Between International Bechtel Co. and Department of Civil Aviation of the Government of Dubai, 300 F. Supp. 2d 112, 114–15 (D.D.C. 2004). The United States District Court for the District of Columbia noted that the invalidation of an arbitral award on these grounds ‘registers at the hypertechnical fringe of what Americans would call justice’ (ibid. at 118).
must not be subject to appeal in the country in which it was issued before it can be recognised in France – was incompatible with fundamental principles of arbitration law in France. According to the French Court, one of the aims of the NCCP was to eliminate obstacles to the effectiveness of international arbitral awards.\textsuperscript{59}

A number of other cases confirm the pro-enforcement bias of the French courts. \textit{Clerico v. Cavaterra},\textsuperscript{60} a 2002 decision, involved the enforcement of an award rendered in Italy. The Paris TGI enforced the award, which was at that time being challenged before the Court of Appeal in Rome. The TGI’s decision was appealed before the Paris Court of Appeal. The challenging party argued that the enforcement of the award violated the Convention between France and Italy on the Enforcement of Judgments of Civil and Commercial Matters (Rome, 3 June 1930) (the Rome Convention). Article 1 of the Rome Convention states that an award must be final and enforceable where rendered before it may be enforced elsewhere. The Paris Court of Appeal held that it is not necessary first to exhaust all avenues of appeal against an award for it to be enforceable under French law. The Court followed the reasoning of the decision of the French Cour de Cassation in the earlier case of \textit{ASECNA v. N’Doye},\textsuperscript{61} in holding that French law does not condition enforcement on the definitive nature of the award in the country where rendered.

In \textit{ASECNA}, Mr N’Doye, a Senegalese national, sought enforcement in the French courts of an award rendered in Senegal. The award directed ASECNA, Mr N’Doye’s previous employer, to pay certain sums to him. ASECNA filed an appeal in the Senegalese courts against the award. N’Doye sought enforcement of the award in France. Notwithstanding that the Senegalese courts had suspended the enforceability of the award, the French Cour de Cassation upheld the Court of Appeal’s decision to enforce the award, despite the fact that Article V(1)(e) of the New York Convention and Article 54 of the Bilateral Franco-Senegalese Convention of 29 March 1974 would have

\textsuperscript{59}Interestingly, this case came before the United States District Court for the District of Columbia, see \textit{International Bechtel}, supra note 58, the same Court which decided the \textit{Chromalloy} case (although no mention was made of the \textit{Chromalloy} decision in the judgment of the \textit{Bechtel} Court). Bechtel petitioned the Court to affirm the arbitral award. Given that neither Dubai nor the UAE are signatories to the New York Convention, Bechtel did not seek to assert its claim under the New York Convention but, rather, argued that FAA Chapter 1 applied to the enforcement proceedings. The District Court refused to enforce the award, finding that Chapter 1 of the FAA only applies to foreign awards in circumstances where the parties had agreed that judgment on the award may be entered in a specific United States court. Not surprisingly, Bechtel was unable to secure DAC’s agreement to such a stipulation.

\textsuperscript{60}CA Paris, 10 October 2002.

permitted the Court to refuse enforcement. The Court reasoned that the ‘more-favourable-right provision’ in Article VII(1) of the New York Convention permitted the application of French domestic law. The Court therefore enforced the award under Article 1502 of the NCCP, finding that none of Article 1502’s five enumerated grounds for refusing enforcement were present. The Court observed that the limit on grounds for refusal of enforcement was a ‘cornerstone of French arbitration law’ and the annulment of an award in its country of origin was not among the five listed grounds.

These cases confirm France’s strong policy favouring enforcement of arbitral decisions where awards are being challenged or even have been annulled by a competent authority. French courts justify this position under France’s domestic law, made applicable through the ‘more-favourable-right provision’ in Article VII of the New York Convention.

5.3 Luxembourg

Like the French courts, Luxembourg’s Court of Appeal, relying on Article VII of the New York Convention and Article 1251 of the Luxembourg New Code of Civil Procedure, has ruled that the possibility of an annulment order in the country of origin will not bar enforcement of an arbitration award by the Luxembourg courts. In *Sovereign Participations International S.A. v. Chadmore Developments Ltd.*, the Luxembourg Court refused to stay enforcement proceedings under Article VI of the Convention as to an award rendered in Switzerland that was the subject of annulment proceedings in the Swiss Federal Tribunal. The Court reasoned that Luxembourg domestic law (Article 1251 of the New Code of Civil Procedure) did not include annulment in the country of origin.

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62 See supra note 44.
63 See also the recent decisions of the French Supreme Court in Cass. 1e civ., 29 June 2007, *PT Putrabali Adyamulia v. Rena Holding*, 2007(3) Rev. arb. 507, with note by E. Gaillard, XXII Y.B. Com. Arb. 299 (2007), where following the Hilmarton trend, the French Court enforced an award annulled by the English High Court.
65 ibid. at 722–23.
66 Article 1251 of the Luxembourg New Code of Civil Procedure (CCP) provides:
Subject to the provisions of international conventions, the judge shall refuse to grant an order for enforcement (*exequatur*):
1. if the award may still be attacked before the arbitrators and the arbitrators have not ordered provisional enforcement notwithstanding appeal;
2. if the award or its enforcement is contrary to public policy or if the dispute was not susceptible of settlement by arbitration;
3. if it is established that there exist grounds for annulment envisaged in Article 1023 nos. 3 to 12 (*Grand Ducal Regulation of 8 December 1981*).

Article 1244 of the Luxembourg CCP reads:
An arbitral award may be contested before a District Court only by way of an action for annulment.
as a ground for denying enforcement under Article V(1)(e) of the Convention.\textsuperscript{67} Thus, even if the Swiss courts were to annul the award, Luxembourg would nevertheless enforce it. Accordingly, the Court affirmed the order enforcing the award.

### 5.4 The United States

Following the District Court for the District of Columbia’s decision in \textit{Chromalloy},\textsuperscript{68} it seemed as if the United States was becoming a jurisdiction, much like France, in which arbitral awards that had been vacated at the place of arbitration could readily be enforced. These predictions, however, have proved to be premature: a string of recent US federal court decisions have refused to enforce such awards.\textsuperscript{69} In the process, US courts have emphasised the distinction between the law to be applied in setting aside proceedings and the law that applies to requests for recognition and enforcement. Although \textit{Chromalloy} cannot entirely be reconciled with the subsequent jurisprudence, the cases decided after \textit{Chromalloy} shed some light on the limited circumstances in which a US court may enforce a foreign award that has been annulled by a foreign court.

Annulment may be declared only in the following cases:

1. if the award is contrary to public policy;
2. if the dispute was not susceptible of settlement by arbitration;
3. if there was no valid agreement as to arbitration;
4. if the arbitral tribunal exceeded its terms of reference or powers;
5. if the arbitral tribunal failed to rule on one or more matters in dispute and if the matters omitted cannot be dissociated from the matters on which a ruling was given;
6. if the award was made by an irregularly constituted arbitral tribunal;
7. if there was any failure to observe the right to a fair hearing;
8. if the award does not state the reasons on which it is based, unless the parties released the arbitrators from that requirement;
9. if the award contains contradictory provisions;
10. if the award was obtained by fraud;
11. if the award is based on evidence which is declared false by an irrevocable judicial decision or on evidence admitted to be false;
12. if after the award is made a document or other item of evidence is discovered which would have a decisive influence on the award and was held back by action of the opposite party.

The cases mentioned in paragraphs 3, 4 and 6 shall not be treated as grounds for annulment where the party seeking to rely on them had notice of them during the arbitral procedure and did not raise them at that time (\textit{Grand Ducal Regulation of 8 December 1981}).

\textsuperscript{67} The Luxembourg Court of Appeal referred to, among others, the decision of the French Cour de Cassation of 9 October 1984 in \textit{Norsolor} (supra note 45) and of 23 March 1994 in \textit{Hilmarton} (supra note 48).


A general theme which emerges from the cases is that US courts will not readily grant enforcement of an annulled award. In fact, the Baker Marine Court flatly rejected the notion that a party can seek enforcement of an annulled foreign award in the United States when the parties’ agreements make no reference whatsoever to US law. The inconsistency of this finding with the decision in Chromalloy, as well as the permissive language of Convention Article V(1)(e), heightens the confusion surrounding the proper approach to be applied by US courts. A second theme, which militates against the potential harshness of the first, is that US courts will not blindly accept a foreign court’s purported vacatur of an arbitral award, but will analyse the circumstances of the arbitration to determine whether such a finding is permissible under the New York Convention.

As noted above, some tension exists between Convention Articles V(1)(e) and VII. Differing interpretations of the permissive language of Article V(1)(e) and the ‘more-favourable-right provision’ of Article VII explain, at least in part, subsequent courts’ treatment of – or, it might be said, tacit disregard of – Chromalloy. Adding to this tension is the role of the Federal Arbitration Act (FAA), which grants US federal courts jurisdiction over all claims that fall under the New York Convention, and more specifically the interplay between FAA Chapters 1 and 2.

5.4.1 The Chromalloy Case

The facts of Chromalloy are simple and well-rehearsed. A dispute arose between Chromalloy Aeroservices, an American company, and Egypt in connection with Egypt’s termination of a contract for the supply by Chromalloy to the Egyptian Air Force of parts, maintenance and the repair of helicopters. Chromalloy commenced arbitration in Egypt pursuant to the contract’s arbitration clause which provided for arbitration in Cairo under ‘Egypt [sic] Laws’. The contract also provided that any arbitral award rendered would be ‘final and binding and cannot be made subject to any appeal or other recourse’. Chromalloy obtained an award in its favour which it then sought to have enforced in the United States. In the meantime, however, Egypt made a successful application to the Egyptian Court of Appeal to nullify the award.
In its decision, the US District Court for the District of Columbia relied on both Articles V(1)(e) and VII. Notwithstanding Article V(1)(e), which gives a court discretion to refuse to enforce an award, the Court reasoned that by dint of Article VII’s ‘more-favourable-right provision’, it was obliged to apply the law governing vacating a domestic award under FAA Chapter 1. This unexplained, ill-founded interpretation of Article VII led the Court to consider whether the Egyptian Court’s reasons for vacating the award were grounds that would have justified vacating a domestic award under Section 10 of FAA, Chapter 1. If the reasons would not have passed muster under Section 10, the Court was of the view that Article VII then required it to enforce the award.  

a. Two Questions Left Unanswered

The Court concluded that the award in favour of Chromalloy should be enforced pursuant to FAA Chapter 1, because the ground for annulment employed by the Egyptian Court – mistake of law – is not a recognised basis for setting aside an award under 9 U.S.C. § 10. However, in adopting this novel interpretation of the New York Convention, the Court glossed over the highly contentious issue of whether Section 10 applies at all to recognition and enforcement proceedings under the New York Convention. Indeed, this question has been the subject of intense debate among commentators, with many arguing that Section 10 is applicable only to awards – domestic and foreign – rendered in the United States.

Section 10(a) of Chapter 1 sets forth the statutory grounds for vacating an arbitral award and provides:

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….

Chromalloy, supra note 68, 939 F. Supp. at 910.

The Court simply took the applicability of Section 10 to all enforcement proceedings as a given.

Another issue raised by the Court’s decision in Chromalloy is the relevance of ‘no recourse’ clauses. As part of its analysis into whether the principles of international comity required it to give effect to the Egyptian Court’s judgment, the Court placed specific emphasis on the language in the arbitration clause at issue there that precluded judicial review. The Court concluded that Egypt’s appeal (which was lawful under Egyptian law but in contravention of the no recourse clause) violated United States public policy in favour of enforcing arbitration awards. In making this highly questionable pronouncement, the Chromalloy Court raised a critical issue that has not yet been resolved. The broader ramifications of this aspect of the Chromalloy decision and of the treatment of the issue in subsequent cases is discussed in further detail below.

b. The Baker Marine Decision

At issue in Baker Marine were two disputes arising from a contract between Baker Marine Ltd., Danos & Curole Marine Contractors, Inc. and Chevron Ltd. The contract, involving the provision of barge services in Nigeria, was governed by Nigerian law and provided that disputes would be resolved in Nigeria pursuant to the UNCITRAL Arbitration Rules. The arbitrations resulted in two awards in Baker Marine’s favour.

By its terms . . . it merely sets forth the grounds upon which an award made in the United States may be vacated, which is not the same as refusing enforcement’). See also ‘Explanatory Note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration’, U.N. Doc. A/40/17, ¶ 44, at 24 (United Nations ed., 1994), which seems to confirm this view by implication (‘The setting aside of an award at the place of origin prevents enforcement of that award in all other countries by virtue of article V(1)(e) of the 1958 New York Convention and article 36(1)(a)(v) of the Model Law’). But see Gary B. Born, International Commercial Arbitration in the United States – Commentary & Materials 500, Kluwer (1994) (‘[T]he domestic FAA is available as a means of enforcement even where the Convention applies to an award’); David W. Rivkin, The Enforcement of Awards Nullified in the Country of Origin: The American Experience’, in Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention, ICCA Congress Series No. 9, at 528, 537, Kluwer (1999) (‘[T]he better view is that the FAA’s ‘domestic’ enforcement provisions are applicable to foreign awards’); Nicholas Pengelley, ‘The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annullned Elsewhere’, 8 Vindobona J. Int’l Com. L. & Arb. 195, 199 (2004) (‘[T]he weight of commentary is clearly of the view that the law of the place of enforcement may impose an even greater pro-enforcement bias than is found in the Convention’).

Chromalloy, supra note 68, 939 F. Supp. at 912. Egypt’s Arbitration Law provides that ‘[t]he admissibility of the action for annulment shall not be prevented by the applicant’s renouncement of its right to request the annulment of the award prior to the making of the arbitral award’. See Law No. 27/1994 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters, Art. 54(1).

Baker Marine, supra note 69.
Baker Marine moved for enforcement in the Nigerian courts, while Chevron cross-moved for annulment. The Nigerian Federal High Court set aside the awards on the grounds that the arbitrators improperly awarded punitive damages, went beyond the scope of the submissions, incorrectly admitted parol evidence, and made inconsistent awards, among other things. Baker Marine then sought to confirm the awards in the US District Court for the Northern District of New York. The Court denied enforcement, finding that ‘it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts’.  

**c. The (Ir)Relevance of US Domestic Arbitration Law in Baker Marine**

The United States Court of Appeals for the Second Circuit rejected Baker Marine’s argument that Article VII of the New York Convention entitled it to enforcement under Chapter 1 of the FAA. The Court justified this marked deviation from *Chromalloy* on two major grounds: (i) the parties had contracted to arbitrate in Nigeria; and (ii) nothing in the parties’ agreements mentioned US law or even suggested the parties intended US domestic law to apply.  

In an oft-quoted passage, the Court of Appeals held that Article VII does not require the automatic application of domestic arbitral law to foreign awards. It stated:

> [A]s a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality 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’.  

Although it did not address the applicability of Section 10 of the FAA directly, the *Baker Marine* Court implicitly rejected the *Chromalloy* Court’s reliance on that provision by referring to the Second Circuit’s earlier decision in *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys ‘R’ Us, Inc.* In *Yusuf*, the Court established a clear dichotomy between the jurisdiction

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of a court at the situs of an arbitration and the jurisdiction of all other courts. When a motion to vacate an award is brought in the country in which, or under the law of which, the award is made, that court is free to apply its domestic arbitral law. In contrast, when an action for enforcement is brought in any other court, the court may refuse to enforce the award only on the grounds explicitly set forth in Article V of the New York Convention.

Given that the Court in *Baker Marine* fell into the latter category, Article V(1)(e) gave it discretion to enforce the annulled awards. However, the Court concluded that Baker Marine had ‘shown no adequate reason for refusing to recognize the judgments of the Nigerian court’ setting aside the awards.

**d. The Impact of the ‘No Recourse’ Clause**

Rather than address the *Chromalloy* decision directly, or reject it entirely, the Court in *Baker Marine* attempted to distinguish the two cases. In a footnote, the *Baker Marine* Court emphasised that (i) Chromalloy was an American company (unlike Baker Marine), and (ii) since Egypt was seeking to repudiate its promise to abide by the results of the arbitration, recognising the Egyptian judgment would be contrary to United States policy favouring arbitration. Similarly, reference to the importance of a ‘no recourse’ clause appeared recently in the *TermoRio* decision, as well as in dicta in the *Bechtel* decision (both discussed further below).

Given the pervasiveness of such ‘no recourse’ language in arbitration agreements and in the rules of the major arbitral institutions, these seemingly innocuous statements may well spawn attempts to invoke such language by parties seeking to enforce annulled awards. It is doubtful, however, that such efforts will succeed. The *Chromalloy* Court’s construction of the ‘no recourse’ clause in that case is questionable, and its value as a precedent uncertain, given that such exclusion agreements are not construed in most countries as barring applications to enforce or to set aside awards on the limited grounds

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84 *Yusuf*, supra note 4, 126 F.3d at 21–25.
85 ibid. at 18–20, 22–23.
86 *Baker Marine*, supra note 69, 191 F.3d at 197.
87 ibid. at 197 n.3 (citing *Chromalloy*, supra note 68, 939 F. Supp. at 912, 913).
88 *TermoRio*, supra note 69, 421 F. Supp. 2d at 99 (distinguishing the case under examination from *Chromalloy* on the basis that, inter alia, ‘the agreement did call for the arbitration to be “binding”, but it did not expressly preclude judicial review, or say it was final’).
89 *International Bechtel*, supra note 58, 300 F. Supp. 2d at 118 (in determining whether the nullification of an award by a Dubai court should be granted comity, the District Court noted the presence ‘of a contract provision stating plainly that the award would be final and binding and that there would be no appeal to any court’).
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set forth in the New York Convention and in most modern arbitration laws. Rather, such waivers are given limited scope and are generally treated as barring an appeal on the merits of the award in those relatively few countries which permit such merits review and a waiver thereof.90 US courts have construed the all-pervasive ‘final and binding’ language, as well as the ‘no recourse’ language, to preclude courts only from undertaking a de novo review of the merits of an arbitral award, but not to bar consideration of the standard defences to enforcement set forth in the Convention.91

If the Chromalloy Court’s interpretation of the ‘final and binding’ language is accepted, the consequences will be far reaching, particularly since, as noted above, the rules of most of the major arbitral institutions, including the International Chamber of Commerce (ICC), contain provisions that are similar to the language relied upon by the Chromalloy Court waiving recourse to courts.92 The prevailing view is that the issue of whether such provisions constitute a waiver of the right to seek to vacate an award on non-merits grounds is to be determined by the law applicable to the


91 See Spier, supra note 69, 77 F. Supp. 2d at 407 (denying motion for reargument); Iran Aircraft Industries v. Aveco Corp., 980 F.2d 141, 145 (2d Cir. 1992) (finding that ‘final and binding’ language does not ‘bar consideration of the defenses to enforcement provided for in the New York Convention’); International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990) (considering defences to enforcement under the Convention with respect to an award rendered under the ICC Rules of Arbitration, which provide that award shall be binding and that parties waive their right to recourse). In the domestic setting, see also Hoeft v. MVL Group, Inc., 343 F.3d 57, 63 (2d Cir. 2003) (holding that the provision in an arbitration agreement stating that an award would not be ‘subject to any type of review or appeal whatsoever’ does not deprive a federal district court of jurisdiction under the FAA); accord MACTEC, Inc. v. Gorelick, 427 F.3d 821 (10th Cir. 2005), cert. denied, 547 U.S. 1040, 126 S. Ct. 1622 (2006); Dana H. Freyer and Rona G. Shamoon, ‘Limiting And Expanding By Contract U.S. Court Review Of Arbitral Awards’, 21(3) Int’l Arb. Rep. 29 (2006).

92 The ICC Rules of Arbitration provide: ‘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’ (Rules in force as from 1 January 1998, Art. 26(9)). See also LCIA 1998 Arbitration Rules, Art. 26.9 (‘All awards shall be final and binding.... [T]he parties ... waive irrevocably their right to any form of appeal, review or recourse ... insofar as such waiver may be validly made’); UNCITRAL Arbitration Rules, Art. 32(2) (‘The award shall be made in writing and shall be final and binding on the parties’); ICDR 2006 Arbitration Rules, Art. 27(1) (‘Awards shall be made in writing, promptly by the tribunal, and shall be final and binding on the parties’).
award, which in the absence of a contrary provision is normally the law of the place of arbitration. 93

5.4.2 The Spier Case

Two months after the decision of the United States Court of Appeals for the Second Circuit in Baker Marine, the US District Court for the Southern District of New York again rejected a petition brought under the New York Convention to enforce a foreign award that had been set aside in the country of origin. The award at issue in Spier had been rendered in Italy and was set aside on the ground that the arbitrators had exceeded their authority. 94 The order setting the award aside was affirmed by Italy’s highest court, the Corte di Cassazione.

The Court refused to enforce the award, concluding that the Second Circuit’s decisions in Yusuf and Baker Marine were controlling. Consistent with those decisions, the Court held that it could refuse to enforce the foreign award only on the grounds explicitly set forth in Article V, 95 and, as such, ‘domestic arbitral law may be applied only by “a court under whose law the arbitration was conducted”’. 96 Since in both Baker Marine and Spier the arbitration agreements made no reference to US law, the Spier Court noted, again as Baker Marine instructed, that ‘the intrusion of United States law on the scene would frustrate that law’s public policy since “the primary purpose of the FAA [is] in ensuring that private agreements to arbitrate are enforced according to their terms”’. 97

5.4.3 The TermoRio Decision

Recently, the US District Court for the District of Columbia was given the opportunity to reconsider its 1996 decision in Chromalloy. While not explicitly refusing to follow Chromalloy, the decision in TermoRio S.A. E.S.P. v. Electrificadora del Atlantico S.A. E.S.P. 98 cast serious doubt over the correctness of applying FAA Chapter 1 to recognition and enforcement proceedings. The Court’s decision will, however, serve to perpetuate an unjustified emphasis on the nationality of the parties to an arbitration and the presence or absence of a ‘no recourse’ clause.

93 See van den Berg, supra note 8, at 338–39, 350 (as Professor van den Berg observes, Article V(1)(e) contemplated that applications to set aside awards would virtually always be determined by the courts of the country in which the award was made and that the ‘theoretical’ prospect of an award being governed by a different law would only occur if the parties so agreed).
94 Spier, supra note 69.
95 ibid. 74 F. Supp. 2d at 285–86.
96 ibid. at 286.
97 ibid. at 286 (quoting Baker Marine, supra note 69, 191 F.3d at 197).
98 Supra note 69.
In *TermoRío*, the plaintiffs, a Colombian contractor and its US parent, attempted to enforce an arbitral award issued in Colombia against the Republic of Colombia and one of its majority owned utilities. The defendants refused to comply with the award and succeeded in having it vacated by the Colombian Council of State, which held that the use of ICC procedural rules in the arbitration violated Colombian law.

As part of its decision on the plaintiffs’ application for enforcement, the District Court undertook an analysis of *Chromalloy*. It noted that ‘[t]he court’s decision in *Chromalloy* is both questionable on the merits and distinguishable on the facts’.\(^9\) Of particular interest, the Court, in distinguishing the two cases, emphasised that ‘there is no longer a U.S. party involved in this case, as there was in *Chromalloy*’ (the U.S. parent lacked standing to sue and was dismissed from the action) and that, in contrast to *Chromalloy*, ‘the [arbitration] agreement... did not expressly preclude judicial review, or say it was final’.\(^10\) Further, the Court noted the foreign nature of the arbitration, which concerned ‘a dispute involving Colombian parties over a contract to perform services in Colombia which led to a Colombian arbitration decision and Colombian litigation’.\(^11\)

The potential application of FAA Chapter 1 to the enforcement decision never entered the Court’s deliberation. Instead, the Court properly applied a limited view of public policy infringement, rejecting the plaintiffs’ argument that the Colombian Court’s decision (which was allegedly aimed at producing a specific result – the nullification of the award) met ‘the high standard required to preclude enforcement of a foreign judgment’.\(^12\)

5.4.4 ‘Primary’ and ‘Secondary’ Jurisdictional Dichotomy

Two recent decisions by trial courts in the US Fifth Circuit have reconfirmed the division of jurisdictional competence established in the New York Convention between courts of ‘primary’ jurisdiction and courts of ‘secondary’ jurisdiction. In the process, the decisions have implicitly countered allegations that, following *Baker Marine* and *Spier*, US courts have effectively adopted a per se rule against enforcing vacated awards. These cases instead indicate that US courts will not blindly follow the decisions of foreign courts purportedly setting aside arbitral awards.

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\(^9\) ibid. 421 F. Supp 2d at 98.  
\(^10\) ibid. at 99.  
\(^11\) ibid. at 101.  
\(^12\) ibid. at 102. The US Court of Appeals affirmed the District Court’s decision to refuse the enforcement of the award reasoning that, because the arbitral award was lawfully nullified in Colombia, TermoRío had no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention. See *TermoRío S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 930 (D.C. Cir. 2007).
The issue in *Karaha Bodas* was whether the arbitral award was properly set aside, such that the party against whom the award was made could resist enforcement in the United States on the basis of New York Convention Article V(1)(e). The case arose out of contracts between Pertamina and Karaha Bodas, governed by Indonesian law, for the construction and operation of an electrical power plant in Indonesia. Following an arbitration seated in Switzerland, the Tribunal awarded Karaha Bodas over US$260 million. Pertamina then applied to the Swiss Federal Tribunal to annul the award. The Swiss court rejected Pertamina’s appeal for procedural reasons. Pertamina subsequently filed suit in Indonesia seeking to annul the award, which the Indonesian court granted. Pertamina then sought to resist enforcement of the award in the United States based on the Indonesian Court’s *vacatur*.

Relying on the principles identified in *Yusuf*, the US District Court for the Southern District of Texas examined whether the Indonesian court had ‘primary’ jurisdiction (and was therefore able to annul the arbitral award), or whether it was a Court of ‘secondary’ jurisdiction (and was therefore only able to enforce or refuse to enforce the award). Based on settled case law, the Court concluded that because Switzerland was the arbitral seat, the law of the arbitration was Swiss law, and therefore Swiss courts were singularly empowered to annul the award. Accordingly, the Indonesian court was not a court of competent jurisdiction; it was a court of secondary jurisdiction, whose purported ‘annulment’ was ineffectual for the purpose of a challenge to enforcement under Article V(1)(e). The District Court therefore enforced the arbitral award of more than US$260 million awarded to Karaha Bodas.

A similar conclusion was reached in *Gulf Petro Trading*. In that case, the US District Court for the Northern District of Texas was asked to set aside an award rendered by a Swiss tribunal. Relying on the *Yusuf* and *Karaha Bodas* cases, the Court found that, because the parties agreed that their arbitration was to be conducted in Switzerland, the Court lacked ‘primary’ jurisdiction under the New York Convention. The authority to set aside the award therefore lay ‘well beyond the limited subject matter jurisdiction conferred upon this Court by the Convention and its implementing domestic legislation’.

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103 See *Karaha Bodas*, supra note 15, aff’d, 364 F.3d 274 (5th Cir. 2004).
104 ibid. at 492–93.
105 ibid. at 493–95. See Thomas H. Webster, ‘Evolving Principles in Enforcing Awards Subject to Annulment Proceedings’, 23(3) *J. Int’l Arb.* 201, 202 (2006) (Stating that, in defining primary jurisdiction, courts, with rare exceptions, appear to focus solely on the place of arbitration rather than the law under which the award has been rendered).
107 ibid. 288 F. Supp. 2d at 793.
Interestingly, the decision in *Gulf Petro Trading* lends further support to the positions adopted in *Baker Marine, Spier* and *TermoRio*. Even though the Court in *Gulf Petro Trading* was not faced with an enforcement proceeding and therefore had no reason to address the relationship between Articles V(1)(e) and VII of the New York Convention, the court nevertheless underscored the undesirability of a court of secondary jurisdiction applying domestic law to a foreign arbitral award. Citing *Spier*, the Court stressed that the applicant ‘cannot be heard to argue that the Swiss Court’s decision should not be recognized on the ground that an American court would reach a different result with respect to the award if it had been rendered in the United States’.  

When *Baker Marine, Spier, Gulf Petro Trading* and *TermoRio* are read together, it becomes clear that in the United States, the application of domestic arbitration law standards for vacating awards to foreign arbitral awards will be highly limited. The ‘no recourse’ ghost of *Chromalloy* is, however, lurking in the shadows.

### 5.5 Germany

The approach adopted in Germany is for enforcing courts to base their decision as to whether to enforce on the arbitral award’s status in the country where the award was made. Unlike the French approach which focuses more on the award itself, the German approach is to view the award as inextricably linked with the judicial regime of the country where the award was made. German law provides that courts can reverse their decision on enforceability of an award if it is set aside abroad even after it has been declared enforceable in Germany. Thus, a German decision declaring a foreign arbitral award enforceable may be withdrawn if the award is set aside in the country where issued.

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108 ibid.
109 Section 1061(1) of the German Code of Civil Procedure (Zivilprozessordnung (ZPO)) provides that ‘[r]ecognition and enforcement of foreign arbitral awards shall be granted in accordance with the Convention’. Therefore, under German domestic law, the main legal standard for the enforcement of foreign arbitral awards is the New York Convention although enforcement is also possible pursuant to bilateral and multilateral agreements whereby the ‘more-favourable-right provision’ will apply. Gesetz zur Neuregelung des Schiedsverfahrensrechts (Act on the Reform of Law Relating to Arbitral Proceedings) of 22 December 1997 (BGBl. I, at 3224). This Act entered into force 1 January, 1998, revising the ZPO Book X, which deals with the Arbitration Procedure (Schiedsrichterliches Verfahren).
111 ZPO Section 1061(3) provides that: ‘Wird der Schiedsspruch, nachdem er für vollstreckbar erklärt worden ist, im Ausland aufgehoben, so kann die Aufhebung der Vollstreckbarerklärung beantragt warden’. (If the award is set aside abroad after having been declared enforceable, application for setting aside the declaration of enforceability may be made).
The application of the German approach can be seen from a case relating to a ship repair contract in which an application was made to the German courts for enforcement of an award rendered in Russia. The German Higher Regional Court of Rostock refused to enforce the award on the basis that the award had been annulled (even if not with final effect) by the Russian courts. Following the decision not to enforce by the German Court, the Highest Court of the Russian Federation rendered a final decision which upheld the previously annulled award. As a result, the German Federal Supreme Court reversed the prior decision of the Rostock Court and held that the award should be declared enforceable because the Russian courts had ruled that the award was binding.

The German approach to enforcement is therefore more sensitive to the status of the award in the arbitral situs as it does not view the award as separate from the judicial regime of the country where it was issued or subject the award to full review in the enforcing country. It has been argued that the German approach, which essentially accords a measure of judicial deference to the national court at the place of arbitration, is more in line with international comity and the parties’ choice to arbitrate in the rendering State.

6. Conclusion

As this chapter illustrates, there exists an uneasy tension between the provisions of Article V(1)(e) and Article VII of the Convention. Although both provisions essentially allow for the scrutiny of the award by the enforcing court on the basis of local law, national courts have utilised them in different ways to achieve a level of judicial control over the enforceability of awards which they feel is warranted. For example, it is apparent from the cases examined and discussed in this chapter that countries asked to grant recognition or enforcement of foreign arbitral awards adopt differing approaches to the status of an award annulled at the place of arbitration. On one end of the spectrum are jurisdictions such as France which view the effect of an annulment decision as limited to the territorial borders of the rendering State and thus no bar to enforcement. Countries such as Germany, on the other end, give due consideration and deference to the outcome of any judicial review

proceedings concerning the award in the rendering State. Somewhere in between the two is the approach of United States courts, which seek some measure of independent review of the merits of the foreign annulment decision. The potential complications arising from recognition of annulled awards has led some commentators to argue that, in the interest of achieving a measure of uniformity on the enforcement of awards, an enforcement forum should generally defer to the annulment of the award at the place of arbitration.\footnote{See Smith, ibid., who states that deference to the review of the arbitral situs would provide predictability in the application of the Convention. See also William W. Park, ‘Duty and Discretion in International Arbitration’, 93 Am. J. Int’l L. 805 (1999), reprinted in 15(1) Int’l Arb. Rep. 28 (2000), arguing that courts should generally defer to annulments that are consistent with procedural fairness and international public policy. Others have gone yet further still in the quest for uniformity calling for a supra national authority to control annulment decisions (see Gharavi, supra note 28, at 166–91).} Others however, have taken the view that annulment should not be a bar to enforcement particularly where the grounds of annulment are not internationally recognised standards but rather are reflective of local parochial rules.\footnote{See Paulsson, supra note 6.} Certainly a balance needs to be struck between unconditional respect for all foreign annulments (an outcome that will hardly promote efficiency or respect for international arbitration, particularly where an award has been annulled in bad faith or to protect local interests) and the need to grant aggrieved parties who feel they have been the victim of a tainted arbitration a way to challenge the award.