

EMERGING RELOCALIZATION AND ITS SEEMINGLY INCONSISTENT IMPACT ON ARBITRATION

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This article analyses the development in the relationship between arbitration and courts. The wave of internationalization and globalization that inspired the theory of arbitration's delocalization is giving way to an emerging relocalization. This results in a restriction of the scope of arbitrability and a strengthening of the intensity of court control on arbitral awards. This also results in greater enforceability of annulled awards. While the former effects of relocation may seem to restrict arbitration autonomy, the latter effects appear to enhance it. This apparent inconsistency is in reality based on a consistent trend in which courts pay increased attention to their own fundamental values.

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I. INTRODUCTION

Arbitration remains the preferred method for resolving disputes arising out of international commercial contracts: in a relatively recent survey, as many as 97% of the participants answered that they would choose arbitration rather than court proceedings.¹ However, the context in which international disputes take place is not static, and in the last few decades,

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1. SCH. OF INT'L ARB., QUEEN MARY UNIV. OF LONDON & WHITE & CASE, 2018 INTERNATIONAL ARBITRATION SURVEY: THE EVOLUTION OF INTERNATIONAL ARBITRATION 5 (2018).

a change in this approach has become apparent. One of the areas in which changing context has an impact is the relationship between arbitration and courts. This contribution gives some examples of such impact.

As is known, arbitration enjoys wide-ranging legal effects. To start with, courts shall, under Article II of the New York Convention, dismiss a claim and refer the parties to arbitration if it is covered by a valid arbitration agreement.² Moreover, they shall, under Article III of the New York Convention,³ recognize and enforce an arbitral award, with the sole exceptions provided in article V. One such Article V exception is that the subject-matter of the dispute was not arbitrable under the law of the court seized.⁴ Another exception provides that recognition

2. 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (United Nations [U.N.] 330 UNTS 3 [hereinafter New York Convention]). Article II of the New York Convention reads as follows:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

3. Article III of the New York Convention reads as follows:

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

4. Article V(2) (a) of the New York Convention reads as follows: "2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or"

and enforcement may be refused if the award was set aside by a court at the seat of arbitration.⁵

Seen from the point of view of arbitration's autonomy, which in the rhetoric on arbitration is often praised as one of the highest values to safeguard,⁶ the impact of the abovementioned changing climate on these two exceptions may seem inconsistent. However, from the point of view of the courts, a consistent trend may be observed, and it is one in which courts pay increased attention to their own fundamental values.

Below, I will first quickly refer to an area in which we are witnessing what could be defined as a "relocalization" of arbitration: after decades of delocalization drift, courts' more restrictive approach to arbitrability is prompting arbitral tribunals to consider national laws more carefully.⁷ Thereafter, I will examine how courts' increased attention to issues of due process is rendering awards more robust vis-à-vis control by the courts of the seat, thus apparently shifting the center of gravity towards delocalization.⁸

II. ARBITRABILITY, COURT CONTROL, AND CONFLICT RULES

Courts' attitude to the scope of arbitrability is evolving. The pendulum seems to be swinging from an ever-increasing recognition of arbitration and a corresponding enlargement of the scope of arbitrability (intended as the ability of a dispute

5. Article V(1)(e) of the New York Convention reads as follows:

1. 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 where the recognition and enforcement is sought, proof that: ... (e) 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.

6. See Berthold Goldman, *La Lex Mercatoria dans les Contrats et l'Arbitrage Internationaux: Réalité et Perspectives* [*Lex Mercatoria in International Contracts and Arbitration: Reality and Perspectives*], TRAVAUX DU COMITÉ FRANÇAIS DU DROIT INTERNATIONAL PRIVÉ [WORK OF THE FRENCH COMMITTEE ON PRIVATE INTERNATIONAL LAW], 221–70 (1980) (discussing the autonomy of arbitration).

7. See *infra* Part II (discussing the courts' evolving attitude towards the scope of arbitrability and that recently the court has been had a more open and expansive view as to the potential scope of arbitration).

8. See *infra* Part III (focusing on the recognition and enforcement of set-aside awards and the theory of delocalization).

to be resolved by arbitration), to growing skepticism and a corresponding restriction of the scope of arbitrability, as well as a sharpening of court control.

Following seminal decisions rendered by U.S. courts in the 1980s⁹ (which inspired case law well beyond U.S. borders), national courts and arbitral tribunals alike have deemed arbitration appropriate to resolve practically any type of economic dispute—so much so, that the topic of non-arbitrability was relegated to a peripheral role that garnered mainly academic interest. This phenomenon boosted the arbitration community's confidence in arbitration autonomy, prompting declarations of arbitration's both procedural and substantive independence from national laws and calls for reducing the scope of court interference¹⁰ (notwithstanding that the expansion of arbitrability was originally based precisely on court control—on the court's ability to give a second look at the compatibility of the award with the court's public policy, as the just mentioned Mitsubishi case shows).

However, after decades of such declarations of arbitration's detachment from national legal systems, a more restrictive approach is emerging, in part in reaction to criticism to which arbitration has been exposed the past years. While such criticism has first and foremost been directed at investment arbitration,¹¹ commercial arbitration has not been immune from criticism either.¹² Among others (and, in my opinion, not surprisingly),

9. Perhaps the most known decision is *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).

10. See Emmanuel Gaillard, *Aspects Philosophiques du Droit de l'Arbitrage International* [*Philosophical Aspects of Arbitration Law*], 329 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW (2007) (discussing the benefits of increasing the court's deference and decreasing interference as well as the benefits arbitration can have when given procedural and substantive independence).

11. Criticism which led to, among other things, a mandate by the UNCITRAL to its Working Group III to work on a possible reform of investor-State dispute settlement. See U.N. Commission on International Trade Law, *Possible reform of investor-State dispute settlements (ISDS)*, U.N. Doc. A/CN.9/WG.III/WP.142 (Sept. 18, 2017).

12. Pierre Tercier, *Quels défis pour l'arbitrage international?* [*What are the challenges for international arbitration?*], in LA LETTRE DE L'AFA [THE AFA LETTER] 31, ASS'N FRANÇAISE D'ARBITRAGE [THE ASSOCIATE OF FRENCH ARBITRATION, May 2022; see also SCH. OF INT'L ARB., QUEEN MARY UNIV. OF LONDON & WHITE & CASE, 2015 INTERNATIONAL ARBITRATION SURVEY: IMPROVEMENTS AND INNOVATIONS IN INTERNATIONAL ARBITRATION (2015) (presenting feedback to illustrate the

the sometimes enthusiastically supported autonomy of arbitration and the consequently near-total independence from national laws and national courts, seem to increasingly give rise to a mistrust towards the appropriateness of permitting arbitration to resolve those disputes in which an accurate application of the law is deemed to be crucial. As a consequence of the suspicion that arbitration might misuse autonomy, the scope of the disputes that may be arbitrated has been in several instances reduced.¹³

The scope of arbitrability is threatened also by the risk that court control may be restricted so as to prevent courts from meaningfully verifying whether an award is compatible with fundamental principles—what is often referred to as the “minimalist approach.”¹⁴ Interesting developments are taking place in this regard.

French courts, traditionally among the strongest supporters of the minimalist approach, have recently adopted a maximalist attitude. Not unlike the courts of most other countries, French courts are empowered to set aside an award or refuse its enforcement if it manifestly infringes French international public policy¹⁵—powers corresponding to those laid down both in the UNCITRAL Model Law and in the New York Convention.¹⁶

everchanging needs of arbitration in the commercial landscape and polling satisfaction with respect to recent changes in arbitration).

13. *See, e.g.*, GIUDITTA CORDERO-MOSS, *INTERNATIONAL COMMERCIAL CONTRACTS* 347–62 (Cambridge Univ. Press, 2d ed. 2023) (discussing the use of arbitrability and public policy to review the awards of arbitration).

14. *See id.* at 320 (discussing limitations of the “minimalist approach”).

15. CODE DE PROCEDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1492 (Fr.) reads (my translation):

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) the award is contrary to public policy; or
- (6) the award failed to state the reasons upon which it is based, the date on which it was made, the names or signatures of the arbitrator(s) having made the award; or where the award was not made by majority decision.

16. UNCITRAL MODEL L. ON INT’L COM. ARB. art. 34(2)(b)(ii) (amended 2006) (UNCITRAL 1985) reads as follows: “(2) An arbitral award may be set aside by the court specified in article 6 only if: . . . (b) the court finds that: . . . (ii) the award is in conflict with the public policy of this State.” Article V(2)

However, French courts have traditionally strictly applied the restrictive requirement that infringement be manifest, effective and concrete.¹⁷ Thus, not unlike U.S. courts,¹⁸ French courts traditionally pay deference to the arbitral tribunal's own evaluation of the issue of public policy. This means that they traditionally do not proceed to an independent evaluation of the award's compatibility with French international public policy if the issue already has been evaluated by the tribunal. This minimalist approach is meant to enhance the autonomy of arbitration.

Recently, however, French courts have taken a different approach—reflecting the changing climate which is less and less compatible with a blind trust in the autonomy of arbitration. Thus, in disputes involving issues of corruption and economic criminality, French courts have started to independently evaluate the awards' compatibility with French principles, reaching conclusions different from those reflected in the award.¹⁹ This should, in turn, prompt arbitral tribunals to increase their level of accuracy in the application of the law.

Professing an excessive autonomy of arbitration, therefore, exposes arbitration to a restrictive reaction that obtains the opposite result of what the delocalization theory intends to achieve. The scope of arbitrability is reduced, and the intensity

(b) of the New York Convention reads as follows: “2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: . . . (b) The recognition or enforcement of the award would be contrary to the public policy of that country.”

17. See Cour d'appel [CA] [Regional Court of Appeal] Paris, 1e ch., Nov. 18, 2004, 2002/19606 (discussing a violation of international public policy must be “flagrant, effective and concrete” in order for a court to consider setting aside the award).

18. See *Baxter Int'l v. Abbott Laboratories*, 315 F.3d 829 (7th Cir. 2003) (Cudahy, C.J., dissenting) (upholding arbitration award noting that once arbitrators have spoken on antitrust issues the court has no business intervening); see also *Am. Cent. E. Texas Gas Co. v. Union Pac. Res. Grp.*, 93 F. App'x 1 (5th Cir. 2004) (finding the district court did not err in confirming the award established through arbitration); but see *Am. Cent. E. Texas Gas Co. v. Union Pac. Res. Grp.*, 93 F. App'x 1 (5th Cir. 2004).

19. See Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 23, 2022, No. 17-17.981 (lowering the size of the award reached in arbitration); see also Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Sept. 7, 2022, No. 610 FS-B (annulling the award reached through arbitration).

of court control is strengthened. Instead of enhancing arbitration as a mechanism for settling disputes, an excess of autonomy weakens it.

As a corollary, there is growing awareness in the arbitration community²⁰ of the necessity to ensure that arbitral awards give due consideration to the law applicable to the merits—at least as regards to regulatory norms in areas such as corruption and economic crime.

As I have suggested elsewhere,²¹ this emerging re-localization shows that there was no basis for the emancipation from national laws that the delocalization theory so emphatically called for—including the position that conflict rules should not play a prominent role in arbitration and that tribunals should instead have full discretion to apply the rules of law that they deem appropriate. This position was implemented in many institutions' arbitration rules²² and in various arbitration laws.²³ Basically, this implies that the tribunal is free to determine according to which rules it will solve the dispute, without being constrained by objective criteria such as those laid down in conflict rules. This stance might have been seen as a desirable arrangement as long as the illusion of total arbitration autonomy prevailed.²⁴

However, the emerging relocalization demonstrates the benefit of tribunals applying a conflict of laws approach. The application of conflict rules not only provides predictability to the outcome of the dispute, it also provides a legal basis for the tribunal to safeguard public policy while not exceeding its power. This is because if a tribunal wants to avoid rendering

20. See Luca G. Radicati di Brozolo, *Mandatory Rules and International Arbitration*, 23 AM. REV. INT'L ARB. 49, 66 (2012) (pointing to multiple arbitration systems that expect arbitrators to use mandatory rules).

21. CORDERO-MOSS, INTERNATIONAL COMMERCIAL CONTRACTS, at §§ 4.6 and 5.6.1(b).

22. See, e.g., the Arbitration Rules of the ICC, LCIA, SCC, and UNCITRAL.

23. CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] art. 1511 (Fr.) (allowing arbitral tribunals to decide disputes in accordance with laws that it considers appropriate when the rules chosen by the parties do not apply).

24. This position was not always unanimously shared. See generally Linda Silberman & Franco Ferrari, *Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong*, in CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION 257–323 (Franco Ferrari & Stefan Kröll eds., 2d ed. 2019) (discussing party autonomy in arbitration).

an award that may be annulled or refused enforcement, it may need to consider rules not chosen by the parties. For example, an award violating E.U. competition law may risk infringing public policy. However, if the parties have chosen a non-E.U. law to govern the contract, and the tribunal does not follow the parties' instructions and considers E.U. competition law, the tribunal risks exceeding its power. Each of these risks exposes the award to annulment and refusal of enforcement. Conflict rules permit tribunals to ascertain the scope of the parties' choice of law (it does not extend to competition law) and provide objective criteria to determine the applicability of E.U. competition law. Thus, if the tribunal's decision is based on conflict rules, its consideration of E.U. competition law would not constitute an excess of power. Therefore, by applying conflict rules, tribunals may consider rules that must be considered to avoid infringing public policy, while at the same time avoiding violating the parties' instructions. Without conflict rules, it becomes necessary to forge a legal basis for the tribunal's consideration of rules that were not chosen by the parties, but the disregard of which might render the award unenforceable (such as competition law rules).

Once again, what may seem to be an undesirable constraint on the tribunal's discretion—application of conflict rules—is instead more favorable to arbitration than a tribunal's total discretion.

III. RECOGNITION AND ENFORCEMENT OF SET ASIDE AWARDS

Section II demonstrated that courts' increasingly restrictive approach to arbitrability and heightened exercise of control may inspire arbitral tribunals to be more accurate in their selection and consideration of the applicable law. This suggests that the until-recently praised delocalization of arbitration is giving way to a certain relocalization. However, a seemingly contradictory development may be detected in national courts' approaches to the enforcement of awards that were annulled by a court at the seat of arbitration.

Annulment of an award in its country of origin is, pursuant to Article V(1)(e) of the New York Convention, permissible grounds to refuse the recognition and enforcement of that award. This provision, and the corresponding provision of

the UNCITRAL Model Law,²⁵ demonstrate the importance of considering the legal system of the tribunal's seat and contradict the opinion, linked to the delocalization theory, that the tribunal's seat has no relevance to the legal framework of the arbitration proceedings. Indeed, courts of the seat can annul the award, and awards that have been annulled in their state of origin are traditionally considered unenforceable.²⁶

Also in this context, French courts apply a standard more favorable to the autonomy of arbitration and enforce annulled awards. For a long time, French courts, together with some U.S. decisions referred to below, were alone in this approach. More recently however, courts from other countries have joined this arbitration-friendly approach—as will be explained below, not so much out of a desire to affirm arbitration's autonomy, but rather as a reaction to annulment decisions that did not meet the enforcement court's due process standards.²⁷

The background for enforcing annulled awards is article VII of the New York Convention,²⁸ which permits courts to apply their own enforcement regime if it is more favorable to arbitration than the Convention regime. French courts deem foreign awards to be part of an autonomous, international

25. Article 36(1) (a) (v) of the UNCITRAL Model Law reads as follows:

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the proof that: . . . (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made

26. See Linda J. Silberman & Robert U. Hess, *Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration* [hereinafter *Enforcement of Annulled or Set Aside Arbitral Awards*], in *CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION* 1515–42 (Stefan Kröll et al. eds. 2023) (providing an overview of case law giving annulment at the place of origin of the award with the effect of preventing enforcement).

27. See *infra* notes 33–34, 42, and 47 (providing examples of foreign courts reactions to annulment decisions).

28. Article VII of the New York Convention reads as follows:

1. 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.

system,²⁹ and thus not subject to the jurisdiction of the courts in the country of origin.³⁰ Applying their own, more favorable, enforcement regime, French courts enforce annulled awards.³¹

U.S. courts have similarly enforced annulled awards, although on different bases and with less consistency. For example, in one controversial case, a U.S. court enforced an award that had been set aside in its country of origin (Egypt) based on the need to implement the public policy interest in the finality of awards.³² In a later example, a U.S. court enforced an award that had been annulled in its country of origin (Mexico) based on the fact that the set aside proceedings there had not provided a fair hearing and that annulment had been based on a supervening change in legislation that had retroactively rendered the dispute non-arbitrable.³³ By contrast, a U.S. court refused enforcement of an award annulled in its country of origin (Nigeria) because the Nigerian legal system was deemed to have provided the parties sufficient opportunity to be heard.³⁴ So while the first mentioned enforcement decision can be explained in a light similar to the French approach, the later decisions show that enforcement was not based on the autonomy of arbitration, but rather on perceived defects of the annulment decision.

29. See Silberman & Hess, *supra* note 26, for an overview of the literature on this issue showing the different approaches; see *id.* at §B for the French approach.

30. Rather inconsistently, however, French courts have the authority to set aside awards rendered on French territory, even though the dispute is international. See CODE DE PROCÉDURE CIVILE [C.P.C.] [CIVIL PROCEDURE CODE] arts. 1518–1527 (Fr.) (detailing the circumstances under which French courts can set aside a tribunal award).

31. The most well-known example is the *Hilmarton* case. Cour de cassation [Cass.] [supreme court for judicial matters], 1e ch. civ., Mar. 23, 1994, Bull. civ. I, 104; see also Cour de cassation [Cass.] [supreme court for judicial matters], 1e ch. civ., Oct. 9, 1984, Bull. civ. I, 248 and Cour de cassation [Cass.] [supreme court for judicial matters], 1e ch. civ., June 29, 2007, Bull. civ. I, 250 (providing examples of French courts enforcing annulled awards). For a recent decision, see Cour d'appel [CA] [regional court of appeal] Paris, 16e ch., Jan. 11, 2022, 20/17923.

32. *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F. Supp. 907, (D.D.C. 1996).

33. *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración y Producción*, 962 F. Supp. 2d 642 (S.D.N.Y. 2013).

34. *Esso Expl. and Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp.*, 397 F. Supp. 323 (S.D.N.Y. 2019).

In support of the delocalized approach to arbitration, scholars have advanced a linguistic argument.³⁵ According to this argument, because the English text of Article V of the New York Convention (“[r]ecognition and enforcement of the award may be refused [...] only if [...]”), uses the verb “may,” enforcement courts have the discretion to enforce an award even though the following conditions for refusal of enforcement are met.

In reality, however, the verb “may” in Article V is coupled with the condition “only if,” and is therefore meant to express that the only acceptable grounds for refusing recognition and enforcement are those listed in the provision. The text, in other words, says nothing about courts’ discretion to recognize and enforce an award notwithstanding that a ground for refusal exists. This position is confirmed by looking at other language versions of the Convention, particularly the French, Spanish, and Russian versions.³⁶

Even setting aside the linguistic argument for courts’ discretion, there are good reasons to approve of courts’ discretion in the context of Article V. For instance, if an arbitration was flawed by a violation falling within Article V’s exceptions, but such a flaw was not very serious or did not affect the outcome of the decision, reasons of effectiveness suggest that the award should be recognized and enforced notwithstanding the flaw.³⁷

35. See Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, 12 MEALEY’S INT’L ARB. REP., no. 4, 20 (1997) (supporting a delocalized approach to arbitration) see also Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 ARB. INT’L 227 (1998) (supporting a delocalized approach to arbitration); Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in their Country of Origin*, 11 INT’L ARB. REP., no. 9, 22, 23 (1996) (supporting a delocalized approach to arbitration); Fifi Junita, *Public Policy Exception in International Commercial Arbitration—Promoting Uniform Model Norms*, 5 CONTEMP. ASIA ARB. J. 45, 59–60 (2012) (pointing out the discretionary power Article V of the New York Convention gives to arbitral tribunals).

36. I can only express a considered opinion on these versions, which suggest the same position.

37. Some countries reflect this discretion in the legislative text concerning procedural irregularity. See, e.g., Lov om voldgift, 01. jan 2005 nr. 43 §§ (e) (allowing Norwegian courts to set aside an arbitral award if the arbitral procedure runs against local law); see also Lag (1999: 116) om skiljeförfarande, § 34(1)(6) (permitting a party to request that the arbitral award be set aside due to improper action of the arbitrator).

However, with respect to enforcing annulled awards, courts should apply their discretion very restrictively in order to avoid undesirable results, such as the possibility of creating conflicting decisions. A good example of this phenomenon is the previously mentioned French case *Hilmarton*.³⁸ There, the first award (that was favorable to the other party, OTV) was annulled in Switzerland; as a consequence of the annulment, Hilmarton initiated new arbitral proceedings that resulted in a second award favorable to Hilmarton. In the meantime, OTV had sought to enforce the first award in France. The first award had been annulled by Swiss courts, but because French courts do not accept state courts' power to set aside an international award, they enforced the annulled award against Hilmarton. Later, and after having won the second arbitral process that was commenced as a consequence of the annulment of the first award, Hilmarton sought to enforce the second award in France. However, the French courts declined to enforce it because they already had enforced the first award between the same parties and on the same issues.³⁹ Thus, enforcing the second award would have been a violation of the principle of *res judicata*.

The result, after many years of costly litigation, was that the award that had been annulled was enforced, while the award that was valid and enforceable was not enforced. This is evidently not a desirable solution, but it is difficult to avoid if courts enforce annulled awards.

While a court disregarding an annulment made in the award's country of origin was previously the exception rather than the rule,⁴⁰ courts today more often adopt a flexible approach.⁴¹ Under this approach, if the annulment decision meets criteria that satisfy the enforcement court, the set aside

38. Hilmarton, *supra* note 31.

39. Cour de cassation [Cass.] [supreme court for judicial matters], 1e civ., Mar. 23, 1994, No. 92-15.137 (Fr.).

40. For an overview of case law giving annulment at the place of origin of the award the effect of preventing enforcement, see Linda Silberman & Robert U. Hess, *Enforcement of Arbitral Awards Set Aside or Annulled at the Seat of Arbitration* § A (Pub. L. & Legal Theory Rsch. Paper Series Working Paper No. 22-14).

41. There are different rationales for this flexible approach. See *id.* at § C; see also Crina Baltag, *Article V(1)(e) of the New York Convention: To Enforce or Not to Enforce Set Aside Arbitral Awards?*, 39 J. INT'L ARB. 397, 400 (2022) (enumerating the three approaches); William W. Park, *What is to be done with annulled*

will be considered and the award will not be enforced. If, to the contrary, the enforcement court finds that the annulment decision did not comply with due process, the award will be enforced.

Adopting this more flexible approach, a Dutch court decided to enforce an award (one of the many decisions rendered in the dispute complex facing Yukos and the Russian state), notwithstanding the fact that the award had been set aside in its country of origin, Russia.⁴² The Dutch court decided to disregard the annulment after having observed that the Russian annulment court lacked impartiality and independence. By contrast, Dutch courts consider annulment decisions, and consequently refuse enforcement of annulled awards, when they deem the foreign set aside decision to be acceptable.⁴³

Similarly, and as mentioned above, U.S. courts have enforced awards that have been set aside in their country of origin based on assessments that the annulment decisions violated basic notions of justice.⁴⁴ However, U.S. courts have refused to enforce awards that have been set aside when there were no reasons to criticize the annulment.⁴⁵ In another earlier case, a U.S. court enforced an annulled award based simply on notions of pro-arbitration policy, and without further detailed

awards?, in *ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES*, Ch. 11-C-1 at 352 (Oxford Univ. Press 2012) (providing examples of a more flexible approach).

42. Hof's-Amsterdam 28 april 2009, Yukos Capital S.A.R.L./Oao Rosneft (Neth.); *see also* Yukos Capital SARL v. OJSC Rosneft Oil Company [2012] EWCA (Civ) 855 (U.K.) (mentioning the decision of the Dutch court).

43. *See* HR 24 november 2017, Maximov/OJCS Novolipetsky Metallurgicheskyy Kombinat (Neth.) (exemplifying the Dutch court declining to enforce the award set aside in another country).

44. *See* Corp. Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Expl. y Prod., 962 F. Supp. 2d 642 (S.D.N.Y. 2013) (showcasing that the U.S. court enforced the award set aside by another country because the foreign court decision violated the basic notion of justice). For an analysis of U.S. case law, *see* Silberman & Hess, *supra* note 40, at § C.

45. *See* Baker Marine, Ltd. v. Chevron, Ltd., 191 F.3d 194 (2d Cir. 1999) (illustrating that the U.S. court refused to enforce the set aside award in Nigeria because there were no legitimate reasons to enforce it); *see also* Esso Expl. & Prod. Nigeria Ltd. v. Nigerian Nat'l Petroleum Corp., 397 F. Supp. 323 (S.D.N.Y. 2019) (providing another example of the U.S. court refraining from enforcing a set aside award from another jurisdiction when there were no legitimate reasons to enforce it).

analysis.⁴⁶ However, this decision appears to be an isolated one, and remains a controversial decision.

English courts, for their part, exercise their discretion to determine whether annulment of the award poses an obstacle to enforcement. The preferred approach is that enforcement of annulled awards shall be refused, unless the annulment decision was manifestly wrong or perverse.⁴⁷

In summary, the recent flexible approach taken by courts to the enforcement of annulled awards does not direct its examination to the award itself, but rather to the foreign annulment decision.

This could, at first glance, seem to be an extraneous element in the regime established by the New York Convention. Indeed, the Convention does not empower enforcement courts to review annulment decisions. Rather, under the Convention, it is the arbitral award itself that is the object of courts' recognition and enforcement, not the annulment decision.

The impression that courts' attention is directed to the wrong target is reinforced by looking at the United States' Restatement on International Commercial and Investor-State Arbitration (the "Restatement"). After reiterating the rule contained in Article V(1)(e) of the New York Convention (according to which recognition and enforcement of an award may be refused if the award was set aside by a competent court in its country of origin), the Restatement specifies that an annulled award may nevertheless be recognized and enforced if the annulment decision "is not entitled to recognition under the principles governing the recognition of judgments in the court, or in other extraordinary circumstances."⁴⁸

It is worth noting that the Restatement's reference to the recognition and enforcement of the annulment decision may

46. See *Chromalloy Aeroserv. v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996) (exemplifying a U.S. court enforcing an annulled award based on pro-arbitration policy while also analyzing the relationship between Articles VII and V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in their reasoning).

47. See *Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm) (dismissing the application to enforce the award); see also *Malicorp Ltd v. Government of the Arab Republic of Egypt* [2015] EWHC 361 (Comm) (granting Egypt's application to set aside the order of enforcement of the award).

48. RESTATEMENT ON THE U.S. LAW OF INTERNATIONAL COMMERCIAL AND INVESTOR-STATE ARBITRATION §4.14(b) (AM. L. INST., Proposed Final Draft, 2019).

be confusing: it is not the annulment decision that is being recognized, but the award. Article V(1)(e) of the New York Convention does not regulate recognition of annulment decisions. Indeed, recognition of foreign court decisions falls outside of the scope of the New York Convention. Furthermore, decisions annulling arbitral awards are generally excluded from the scope of application of international conventions on recognition and enforcement of foreign judgements—such as the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters⁴⁹ or the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.⁵⁰ Therefore, it is up to the domestic law of each country to determine the criteria for recognition of these foreign court decisions. In many countries, such as the United States, foreign court decisions may be recognized if certain criteria are met, including, for example, that the court had jurisdiction, that the decision is final, and that it was rendered in the respect of due process principles.⁵¹ In other countries, such as Norway,⁵² foreign court decisions are only recognized on the basis of a treaty or a statute. As there are no treaties or statutes that permit recognition of annulment decisions, Article V(1)(e) could never be applied in Norway if it required recognition of the annulment decision.

The Restatement's reference to the recognition of the annulment decision, therefore, should not be seen as implying that the New York Convention requires that the annulment

49. Article 2 (3) reads as follows: "This Convention shall not apply to arbitration and related proceedings."

50. Article 1 (2) (d) reads as follows: "The Convention shall not apply to: . . . (d) arbitration."

51. See Uniform Foreign-Money Judgments Recognition Act, 13 U.L.A. 263 (1986) (having been adopted in many U.S. states and enumerating when foreign court decisions may not be recognized). For comments and references, see William W. Park, *Annulled Arbitration Awards Reflections on International Arbitration*, in REFLECTIONS ON INTERNATIONAL ARBITRATION – ESSAYS IN HONOUR OF PROFESSOR GEORGE BERMAN 641, 641–52 (Julie Bédard & Patrick W. Pearsall eds., 2022).

52. Section 19-6 (1) of the Dispute Act reads as follows:

Civil claims that have been decided in a foreign state by way of a final and enforceable ruling passed by that state's courts or administrative authorities or by way of arbitration or in-court settlement, shall also be legally enforceable in Norway to the extent provided by statute or agreement with the said state . . .

decision be recognized in the enforcement country before recognition and enforcement of the annulled award may be refused. Instead, such reference should be seen as a guideline for the exercise of the enforcement court's discretion under Article V(1)(e) of the New York Convention. If the annulment court complied with basic principles of jurisdiction, due process, and finality, the award's annulment should be deemed a sufficient basis for refusing recognition and enforcement of the award.

Admittedly, this explanation does not fully defeat the impression that directing courts' attention to the annulment decision rather than to the award does not fully correspond to the structure of the New York Convention. Indeed, the other grounds for refusing recognition and enforcement listed in Article V all concern qualities of the award: the award was rendered without the parties' consent, it was rendered following an irregular procedure, enforcement would violate public policy, etc. Moreover, nothing in the language of Article V(1)(e) suggests that the provision does not concern the award;⁵³ the provision applies if the award is not final and binding, or if it has been annulled.

The new flexible approach, requiring an inquiry into the specific qualities not of the award, but of the foreign annulment decision, could thus be seen as an anomaly. As was mentioned above, the New York Convention does not regulate recognition of foreign annulment decisions, nor does it regulate annulments rendered in the country of origin of the award. However, at a closer look, there is no incompatibility between this new trend and the structure of the New York Convention.

This new approach under Article V(1)(e) does not concern foreign annulment decisions directly. Rather, it only evaluates them incidentally for the purpose of ascertaining whether the award has the quality of effectiveness that is required under Article V(1)(e). Therefore, the trend does not exceed the scope of the New York Convention by assuming the enforcement courts' power to scrutinize foreign annulment decisions. Instead, the quality of the annulment decision is but a mere step in the evaluation of whether the award has the effectiveness necessary for the enforcement court to exercise its discretion to refuse recognition and enforcement. An award that was

53. New York Convention, *supra* note 5.

annulled in its country of origin is generally deemed not to have the necessary effectiveness; however, if the annulment decision is not acceptable, the award's effectiveness is not affected.

Considering the importance of predictability in international commercial law, any objective criteria that can guide the exercise of courts' discretion are welcome. Therefore, rather than granting the enforcement court full discretion on whether to recognize and enforce an annulled award, it is preferable to be able to predict that an annulled award may be recognized and enforced if the annulment decision violated principles of due process.

It would be inappropriate to extend this discretion to other considerations, such as whether the award was set aside for reasons that constitute an annulment ground in the country of origin, but not in the country of enforcement. When parties choose the seat of arbitration, they choose to arbitrate under the legal system of that country. Such a choice necessarily includes that country's grounds for annulment. The enforcement country, by contrast, is chosen by only one party. It would thus contradict the very basis of arbitration (the principle of consent), if the enforcement country disregarded an annulment because its legal system does not have the same annulment grounds as the legal system that was chosen by the parties.⁵⁴

IV. CONCLUSION

The context of arbitration is changing, and this change influences the relationship between courts and arbitration in a way that may seem to be inconsistent, if seen from the point of view of arbitration autonomy.

The wave of internationalization and globalization that inspired the theory of delocalization is giving way to an emerging relocalization. As discussed in Section II, this emerging relocalization results in a restriction of the scope of arbitrability and a strengthening of the intensity of court control, which, in turn, highlights the usefulness of tribunals' use of conflict rules. As seen in Section III, this emerging relocalization also results in greater enforceability of annulled awards. Thus, while

⁵⁴ But compare Park, *supra* note 41, at 652, suggesting that it would be wise to disregard an annulment based on grounds peculiar to the annulment jurisdiction.

the former effects of relocation may seem to restrict arbitration autonomy, the latter effects appear to enhance it.

This apparent inconsistency, however, conceals a common rationale: courts are increasingly concerned with safeguarding the principles that are fundamental to their own legal systems. This concern can result in a restriction, or expansion, of arbitration autonomy, depending on where the infringement of the court's principles stems.

From the point of view of arbitration generally, this emerging relocalization has a consistent implication: tribunals should not indulge in an illusion of delocalization and unfettered exercise of discretion detached from national laws. Awareness about the legal framework regulating the validity and enforceability of the award is an assumption, and it implies awareness by the Tribunal of which laws are applicable, as well as their accurate consideration.