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The Role of National Courts in the Post-arbitral Process: The Possible Issues with the Enforcement of a Set-aside Award

Rishabh Jogani*

1. Introduction

An arbitral award is ideally a final determination of the rights of the parties, which is supposed to bring an end to the dispute and resolve issues. The only recourse under most arbitral laws against arbitral awards are provisions for the setting aside or *vacatur* of the award. Parties who are dissatisfied with an arbitral decision can apply to the courts of the seat, courts which are supposed to have a supervisory role in the arbitral process. A party wishing to avoid enforcement may decide, or rather attempt, to challenge the decisions ordering enforcement at all levels of a judicial system. If in such a case the award is retained by the superior courts then such an award is easily enforceable in the territories of Member States of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention). However, if the courts of the seat set the award aside can or should the courts of another country enforce such an award? Should primacy be given to the award over the set-aside judgment?¹

“A party may pursue his case vigorously, its witnesses may perform on the day and Counsel’s eloquent legal arguments may secure a favourable decision. But all this will have been for nothing if the successful party cannot collect on the judgment or award.”²

This comment by Rawding truly incorporates the importance of the enforcement of arbitral awards and goes to display the essential role of national courts in the arbitral process. One may say that an award which cannot be enforced is of little utility to a party. It is common knowledge that the arbitral process culminates with the passing of the award by the tribunal and then begins the process of enforcement of the award.

The New York Convention provides for the enforcement of awards internationally. It provides for a framework which makes it possible for a successful party to have an international award enforced in the territories of Member States.³ The successful party is capable of enforcing an award passed internationally, through the court of any country in which the award is enforceable. The Convention, however, also lists certain exclusive grounds under which courts of Member States may refuse enforcement.⁴

The courts of the member countries by virtue of art.V of the New York Convention have the discretion to enforce an award or not. Article V(1)(e) provides that enforcement may be refused by a court in the country where enforcement is sought, if it is argued that the award is not yet final and binding or was suspended or set aside by the courts of the country.

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¹ The author would like to thank Dr Maxi Scherer of Queen Mary, University of London for her guidance in writing this article.
⁴ New York Convention art.III.
where it was made. This provision has been the cause of confusion and has resulted in conflicting decisions between the courts of many nations which treat a set-aside award differently. With reference to the situation arising out of this conflict, Kosheri has stated that enforcement is increasingly becoming a matter of importance, in view of the fact that the relative legal positions differ in each country, despite the adherence of these countries to the New York Convention.

The object of this paper is to analyze this conflict, weigh the arguments on both sides of the debate, under the principles of the New York Convention, and to comment on the position on the enforceability of such awards.

2. Judicial Treatment of Set-aside Awards

The vacatur or setting aside of an award does not mean that the party who wishes to rely on it has no remedy. Where an award has been set aside at the original seat, parties may try to have the award enforced in another jurisdiction. The enforcing court then has the discretion to determine whether it should grant the enforcement of the award in spite of its having already been set aside at the seat. Although there are many examples of cases where awards set aside in the seat are enforced in another New York Convention State, for the purposes of this analysis, the discussion is restricted to a few limited cases where the courts have relied on the provisions of the New York Convention to enforce or deny enforcement to an award set aside by a foreign court.

Dallah v Government of Pakistan

In Dallah, the claimant was a Saudi Arabian company, which was hired by the Government of Pakistan to build accommodation for Pakistani pilgrims in Mecca. Although the Government of Pakistan was directly involved in most parts of the transaction (through its ministry of religious affairs) it never entered into the contract. Instead a trust was created by a presidential ordinance. The ordinance lapsed and the trust ceased to exist. The claimant sought to recover its dues through the local courts but could not obtain a favourable order from the Pakistani national courts, because of the legal non-existence of the trust: a non-existent trust obviously could not be made to pay the amounts due. Even though the claimant had entered into an agreement with the trust, in essence a government-created entity, there was no express agreement with the Government of Pakistan itself. The claimant, in order to recover its dues, initiated arbitration under the rules of the International Chamber of Commerce (ICC) in Paris, against the Government of Pakistan—the “true party” with which it felt it had entered into the contract. The Government of Pakistan raised a technical objection before the arbitral tribunal stating that it had never entered into the contract and therefore it was not possible for it even to have granted consent to arbitrate, hence the tribunal had no jurisdiction. The arbitral tribunal decided in favour of the claimant, by concluding that although the Government never entered into the contract, the trust was the “alter ego” of the Government.

The decision was challenged and appealed to the Supreme Court of England which held that the tribunal had erred in its finding that Dallah and the Government of Pakistan had entered into an agreement to arbitrate. The position taken by the French Court of Appeal, however, became a cause for concern. Pakistan called on the French Court to “vacate” the award on the strength of the English Supreme Court decision. The French Court took a completely different view and held that under the law of France, there was a constructive determination of consent and that as the Government of Pakistan had been involved in the entire contractual process from the initial negotiations, and had only offered to create a special trust for administrative convenience, there was an intention that there be a contractual relationship between Dallah and the Government of Pakistan. Consequently the French Court rejected the decision of the English Supreme Court and applied French law and principles.

Gary Born points out that the decisions raise questions about the effectiveness of the entire working of the New York Convention and international arbitration.

Chromalloy Aeroservices v Arab Republic of Egypt

In Chromalloy, a US court relied on a domestic American arbitration statute to enforce an award which had been set aside in the seat, based in Egypt. The case involved a contract for procurements relating to military helicopters entered into between Chromalloy Aero-services Inc (the claimant) and the Air Force of Egypt. The claimant agreed to provide the parts, and repairs and maintenance for the Egyptian helicopters. Egypt subsequently terminated the contract as a result of disputes. The claimant commenced arbitration proceedings, and simultaneously Egypt drew upon Chromalloy’s letter of guarantee. The tribunal held in favour of the claimant who applied to the American district court for enforcement.

However, before the district court could decide the Chromalloy enforcement petition, the award was nullified in the Egyptian Court of Appeal on the ground that it had not been validly entered into. The Appeal Court held that the arbitrators had erroneously applied Egyptian civil law instead of Egyptian administrative law.

Despite the award being set aside, the American court held that it was required to enforce the award under art.VII of the New York Convention notwithstanding the provisions of art.V(1)(e), because the law of the US had a pro-arbitration policy which favoured enforcement. The court held that art.VII mandated it to apply domestic law to enforce an arbitral award, if the domestic law was more favourable than the Convention. The court held that since the grounds on which the award was set aside were essentially restricted to

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Egypt and that the domestic law had no provision barring a vacated award from being enforced the court had to enforce the award.

Scholars such as Rogers and Schwartz have criticised the Chromalloy decision. According to Schwartz, if the US District Court had accepted and recognised the setting aside of the award by the Appeal Court of Egypt, the seat, there would have been no award to enforce. However, Rivkin argues that the decision was well founded and well within the ambit of the New York Convention.

**Putrabali Adyamuli v Société Rena Holding**

In *Putrabali* an Indonesian company (Putrabali) sold certain goods to a French company (Rena Holding). The contract contained an arbitration clause mandating arbitral proceedings under the International General Produce Association (IGPA) Rules. A dispute arose when the cargo was lost in a shipwreck. The claimant commenced arbitration proceedings in London under the IGPA Rules. The arbitral tribunal held in favour of Rena Holding in an award dated April 10, 2001. The claimant challenged the award before the English High Court, which partially set aside the award. The Court also held Rena Holding liable for breach of the contract. However, an enforcement order was issued by the President of the Tribunal de Grande Instance de Paris enforcing the 2001 award in France.

Subsequently, another French tribunal ruled in favour of the claimant and ordered Rena Holding to pay the contract price. Placing reliance on the English decision, Putrabali challenged the decision of the Tribunal de Grande Instance before the Cour d’Appel de Paris. The Appeal Court dismissed the appeal against the enforcement order, stating that the setting aside of an award in a foreign country would not prevent an interested party from enforcing the award in France, so long as the award was valid under French law. Additionally, the Court held that the enforcement of the 2001 award would not be contrary to international public policy.

On appeal to the French Cour de Cassation it was ruled that an international arbitral award is not anchored to any national legal order, and it is a decision of international justice the validity of which must be ascertained under the applicable laws of the country of enforcement. The Court held that, pursuant to art.VII of the New York Convention, it was open to a successful party, relying on French law, to seek enforcement in France of an award set aside at the seat, since French law did not recognise the setting aside of an award at the seat as a valid reason to deny enforcement.

Commenting on the decision, Alain Farhad points out that the decision establishes two bases for enforcement of an arbitral award set aside at the seat in France. First, the impact of a set-aside decision of a national court is limited to the jurisdiction of the court and secondly, the New York Convention art.V(1)(e) annulment of an award at the seat “may”

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constitute a ground for refusing recognition and enforcement but is not a mandatory ground for such refusal.\textsuperscript{23}

According to E. Gaillard, the reasoning of the French Court in \textit{Putrabali} was that the courts of each country were given a discretion to determine, on the basis of their own standards, the validity of an international arbitral award and such decisions would not affect the objective existence of the award as it derived legal force from all legal systems and was not restricted to one country.\textsuperscript{24}

\textbf{Corporación Mexicana de Mantenimiento Integral v PEMEX-Exploración Y Producción}

In \textit{PEMEX},\textsuperscript{25} an American corporation, \textit{Corporación Mexicana de Mantenimiento Integral} (COMMISA), entered into a contract with a Mexican state-owned company, \textit{PEMEX-Exploración y Producción} (PEMEX), to build natural gas platforms in the Gulf of Mexico. The contract had an arbitral clause providing for ICC governed arbitration, seated in Mexico.

Following a number of disputes between the parties, COMMISA initiated proceedings and PEMEX terminated the contract via administrative recession. PEMEX tried to avoid the proceedings by challenging the jurisdiction of the tribunal. The Mexican appellate court took the view that an arbitral tribunal was incapable of deciding a dispute based on public policy and administrative action and hence set aside the award. Interestingly the court relied on the provisions of a statute brought into effect after the arbitral proceedings had commenced.

The district court relied on the provisions of the Inter-American Convention on International Commercial Arbitration 1975 (the Panama Convention)\textsuperscript{26} and the American legislation to hold that the award was valid and enforceable, in view of the fact that the decision to set it aside was taken by a court that was biased towards protecting the interests of a state entity. It should be noted that the Panama Convention has provisions similar to the New York Convention.

The district court in its reasoning held that it was inappropriate for the Mexican courts to set aside an award on the basis of a law subsequently enacted to protect the state’s own interests and such a decision violated principles and natural justice and was hence unenforceable.\textsuperscript{27}

The above decisions certainly recognise that the New York Convention arts V and VII allow for the enforcement of a set-aside arbitral award in certain situations. The question therefore that really arises is whether recognition and enforcement should be granted to an award set aside by another court. In the next section, an attempt is made to deal with the issue, by weighing the arguments advanced for and against the enforcement of a set-aside award.


\textsuperscript{25} \textit{Corporación Mexicana de Mantenimiento Integral v PEMEX-Exploración Y Producción} No.10 Civ. 206 (AKH), 2013 WL 4517225, (S.D.N.Y., August 27, 2013).

\textsuperscript{26} Inter-American Convention on International Commercial Arbitration 1975.

\textsuperscript{27} SDNY Confirms $400 Million Arbitration Award Set Aside by Foreign Court", \url{http://us.practicallaw.com/5540-2607} [Accessed July 8, 2015].
3. Arguments For and Against Enforcement of Set-aside Awards

Gaillard argues that if the seat at which an arbitration is held is not the sole link between the arbitral process and national legal systems, it would be appropriate to recognise an award set aside in another state, in view of the fact that the law of the seat would have no precedence over or effect on the laws of the enforcing jurisdiction. Therefore, one would need to look at the conceptual approach to arbitration of the enforcing state. The following paragraphs present and critically analyse the arguments for and against enforcement of a set aside arbitral award.

Arguments against enforcement

Rivkin has pointed out that the indiscriminate enforcement of arbitral awards need not necessarily contribute to the health of international arbitration as an institution. Parties who enter into international agreements will eschew the arbitration route for the settlement of their disputes, unless they can be assured that arbitral awards obtained by, for example, fraud or bribery, or that are otherwise corrupt, would not be enforced against them.

The critics of enforcement of awards set aside in the original jurisdiction have generally based their criticism of such enforcement on the reasoning that: (1) the annulled award is non est; (2) there is a risk of reopening the dispute; and (3) the judgments of foreign courts ought to be given respect and accordingly recognised. I deal with these arguments in further detail in the following paragraphs.

An annulled award is non est

The order of annulment or vacatur ends the existence of an award. It can be argued that, if one is to treat an arbitral award as a domestic court decision, which is simply appealed against and subsequently reversed, set aside or revoked by the superior court then the award would not have any existence in view of the finality of the decision of the superior court. Schwartz has suggested that an award which is set aside ceases to exist and is simply non est in law and all a court has to do is to recognise the decision of the court of the seat and give effect to that decision.

The treatment of an arbitral award as a decision of a court simply reversed by a superior court is based on the concept of the territoriality of arbitration. Scholars who argue in favour of a link between the seat and the award would suggest that the award derives its legal validity under the law of the seat where it was made. To such scholars, an award is integrated into the national system of the seat of its origin and the supervising court has jurisdiction over the arbitral proceedings and over the award. The setting aside of the award by the court would simply come about when a decision of a superior court overturns the decision of a court below. Under general principles of law, the decisions of superior courts...
always prevail and the decision of a court below ceases to exist upon the pronouncement by a superior court on its invalidity. However, the other school of thought affords an international status to an arbitral award. In *Putrabali* and *Chromalloy* the courts restated the principle of an international arbitral award being a decision of international justice.

On this point one must conclude that the very enforcement of an award which is set aside really depends on how the domestic courts of the enforcing nation view an international award: as a decision linked to the territory of a Member State which derives its force from the legal system of that state or as an international award which has its own independent existence.

**Risk of reopening the dispute**

There is an essential question to be decided in cases of the enforcement of set-aside awards, namely whether courts should give res judicata effect to a decision setting aside an award or should enforce an award on the basis of their own independent judgment, without regard to the decision of the foreign court.

The *Dallah* decision of the English Supreme Court was a conclusive determination of the lack of jurisdiction of the arbitral tribunal. The French Appeal Court, however, refused to accept this determination as appropriate. The eventual effect was that two determinations were made on the same issue, namely whether the Government of Pakistan had given consent to the agreement to arbitrate. The English Supreme Court held in the negative, the French Court in the positive. The decision of the English Court of Appeal was carried all the way up to the Supreme Court of England and was sustained by that court. The dispute was obviously argued before all the courts and a final determination was made in a long order of the Court. The French Court of Appeal, however, simply chose to hear the dispute again and decide on the validity of the consent to arbitrate. The findings of the French Court on the same issue were contrary to those of the English Court. The issue that this entire case raises is of importance, namely whether res judicata effect can be given to the decision of an English court and conclusively put an end to the dispute or whether the dispute has to be re-litigated.

Andrew Rodgers has pointed out that judicial recognition is given to the fact that a dispute heard by a superior court in another jurisdiction and decided upon by that court, resulting in a final adjudication of the dispute, is not then permitted to be re-litigated before the courts of another jurisdiction. A res judicata effect is given to the decision of the courts of another country. It has been suggested that, by refusing to recognise the decision by a relevant court to set aside an award, an enforcing court risks re-litigation of a dispute which has already been conclusively decided. The enforcing court, which could simply recognise the set-aside decision, as suggested by Schwartz, and reject the application for enforcement instead risks rehearing the issue on the merits of the entire application for set aside.

This is certainly a great risk but the essential question is whether there is any real need for re-litigation. Enforcement courts, one must remember, are not courts of appeal, but rather are courts which seek to ensure the compliance of an order or award; they do not sit and decide on the validity of that decision and its merits. Courts dealing with international decisions generally do afford res judicata effect to decisions of foreign courts. The exception to giving effect to such decisions is found in cases where the foreign court lacked jurisdiction, the decision was obtained by fraud or misrepresentation or the enforcement of the decision would violate the public policy of the concerned nation.

In his defence of the *Chromalloy* decision, Rivkin argues that the court found that it was the policy of the US to enforce arbitral decisions and that the award was enforceable under

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the Federal law of the US, and therefore to recognise the decision of the Egyptian court would be against the public policy of the US.

A solution to this issue probably lies within the *Dallah* case: the English Supreme Court indicated (per Lord Mance) that it risked deciding on an issue which would be raised before the French courts but it still went on to decide upon the issue. The French courts would then have discretion to decide whether French jurisprudence recognised the concept of issue estoppel or something similar. The English Supreme Court felt that the issue should be left open for the subsequent French court hearing to decide whether to give res judicata effect to the decision of the English Court and not decide upon the point of law already decided upon or simply to ignore that decision and hear a matter on the merits.

Respect for foreign judgments

Rodgers questions the disregard of foreign judgments and asks:

“How [would] the principle of res judicata … survive demands where the acceptability of the laws of the one country would be measured by the judges of another?”

Although the decisions of arbitral tribunals are capable of being rejected or set aside, where enforcing courts disregard a decision to set aside this gives rise to a very peculiar problem. Rodgers has suggested that disregarding set-aside judgments in effect totally disregards principles of comity and risks making courts of the enforcing country courts which are to sit in appeal over the decisions of another country’s courts, interpreting the laws of that country. The courts of the US in *Baker Marine*, distinguishing the *Chromalloy* decision, have also held that it was improper for them to enforce an award set aside by courts in another jurisdiction, as it would be against the principles of comity and the spirit of the New York Convention.

In his critical analysis of the *Chromalloy* decision, Rodgers raises important questions about why the demands of public policy based on principles of comity, res judicata and treaty obligation are ignored in favour of one preferring enforcement. Rodgers puts forward an interesting scenario: a case where two nations are in a friendly relationship with each other and have entered into treaties whereby they enforce the decisions of each other’s courts, as if they were domestic decisions. The national legislation of the enforcing country also is inclined towards the ready recognition and enforcement of awards, quite similar to the position in *Chromalloy*. When in such a case an award, set aside in the seat, is presented for enforcement the question arises whether the judge should give more weight to a set-aside decision since, under the terms of the treaty, the decision setting aside the award is in fact a domestic adjudication or whether the judge should decide in favour of enforcement, owing to the language of the local legislation as well as the mandate of the New York Convention, as interpreted in *Chromalloy*.

Rodgers argues that this sort of case is probably rare, but does raise an important issue. Can a court, bound by treaty obligations to treat a decision of another country’s court, disregard that decision in favour of an arbitral award which is enforceable under the domestic arbitration statute? There is obviously a clash between the two essential public policy requirements in this case.

In *Yukos* the Dutch courts refused to allow a Russian set-aside decision to affect the validity of the arbitral award, owing to the finding by the Dutch courts that the courts in Russia were likely to have been biased whilst deciding upon the validity of the arbitral award in favour of *Yukos*. In the proceedings for enforcement in England of the *Yukos* award, the English Court of Appeal held that the courts of England were empowered to decide on the validity of a decision of a foreign court and to refuse to give effect to it if that decision were found to be tarnished by bias. The Court also stated that it was open to a
party to attack the validity of a decision of a foreign court if the party could prove that the validity of that decision was limited owing to bias or fraud.

It is the author’s opinion that enforcing courts could deny recognition of a judgment of a foreign court if they were to find against the jurisdiction of the relevant court or to find that the decision of the foreign court was influenced by bias.

**Arguments favouring enforcement**

The arguments in favour of enforcing a set-aside award are most strongly available through French jurisprudence. The decisions of the French courts in *Dallah* and *Putrabali* point out how the French courts treat an arbitral award as one which is detached from the seat. The arguments in favour of enforcing a set-aside award are based on the principles that: (1) the award derives its force from the autonomous nature of arbitration and not domestic law; (2) the New York Convention arts V and VII permit such enforcement; and (3) awards set aside on domestic law issues should be given due recognition if they do not violate international public policy. These arguments are discussed in the following paragraphs in greater detail.

The award derives its force from the autonomous nature of arbitration and not from domestic law

The courts enforcing awards set aside at the seat have obviously based their decisions on the specific reasoning that, for the purposes of enforcement, arbitral awards are not linked to the place of enforcement. As is evident through their decisions, there is a clear line of reasoning that an arbitral award, once passed by the arbitral tribunal, is an award which has its own force and does not need the domestic law of the seat to give it validity or authenticity.

This approach of the courts is based on the theory of the delocalisation of arbitration, according to which an award is not to be limited to the seat and is not limited to the legal limitations of the seat, as it operates in its own transnational space. Supporting the delocalisation view, Gaillard points out that tribunals do not derive power from the seat or its domestic law but instead draw on the aggregate of the world’s legal orders, which recognise the validity of the agreement and the award.

When judging the validity of an award one is asked to remember that an arbitral decision in essence is a private instrument, the validity of which is ensured by the courts of the various nations which enforce the award. The theory of the delocalisation of arbitration has been prevalent in French jurisprudence for many years. French jurists such as Dunmore have argued that an arbitral instrument is international in nature and the tribunal derives its jurisdiction from the agreement of parties to have their disputes settled by resorting to arbitration.

The critics of the transnational approach argue, however, that an award is tied to the seat and it derives legitimacy under the law of the seat. The English court in *A v B* felt that an arbitral clause referring to the seat is like a clause which indicates that it is the choice of parties to be tied exclusively to the courts of that jurisdiction alone. The court felt that an
indication of the seat of origin is therefore an indication that the parties want to refer to one court only for all matters pertaining to the validity of the award.\textsuperscript{42} According to Paulsson, arbitration is not an exercise of sovereign power, it is a private forum and when an international dispute is resolved through it, the award may be given effect without any reference to the place where it was rendered.\textsuperscript{43}

One may argue that the enforceability of an award set aside in its home jurisdiction therefore really depends on the view the courts wish to follow, that is, whether they treat an award as being detached from the seat completely and existing on its own in a transnational order or whether it belongs to the country where it was made and is to be enforced accordingly. The wording of the New York Convention leaves the issue open.

It is the author’s opinion that arbitration is a resort to a private forum, which is selected by the parties and the jurisdiction of which is conferred by the agreement to arbitrate. Therefore, any exercise to link the award to a particular municipal location ought to be avoided, if the result would be to limit the international character of an arbitration and the consequent award.

The New York Convention permits such enforcement

The Convention was drafted with the intention of securing the enforcement of arbitral awards across Member States. The only recourse for a party resisting enforcement would be to attack an award by showing impropriety in the conduct of the tribunal such as lack of jurisdiction, an improperly constituted tribunal or a breach of the principles of natural justice.

Courts that enforce arbitral awards which are set aside in the courts of the seat rely on two articles, arts V(1)(e) and VII.

Courts have relied upon the provisions of art.V to enforce an award, although set aside at the original seat. It is interesting to note that the New York Convention in art.V uses the words “may be refused” whilst referring to the role of the enforcing court. It has been suggested that the use of the word “may” is to indicate a permissive discretion imposed on the enforcing court.\textsuperscript{44} Paulsson also argues in favour of a reading of art.V which gives the enforcing court discretion.\textsuperscript{45} Scherer has pointed out that art.V(1)(e) provides for a reading which empowers courts to refuse recognition or enforcement of an award which has been set aside. However, no guidance is available under the New York Convention on the grounds or reasons for which courts should do so. There is a multitude of different and diverging opinions, with extreme positions on either side of the scale being taken.\textsuperscript{46} Rivkin suggests that a party seeking enforcement could refer to the discretionary nature of art.V(1)(e) in support of its position. Jan Paulsson has argued that the language of art.V is permissive and confers discretion on the judges of the enforcing court to give effect to the award, irrespective of whether it is set aside in another jurisdiction.

Dunmore points out that the Chromalloy court in reaching its decision relied on the reading of the word “may” in art.V as giving the enforcing court discretion to decide whether to enforce an award, or to set aside at the seat, or not.

It is the author’s opinion that art.V by the use of the word “may” allows an enforcing court to exercise its own independent opinion regarding the validity of an award. The wording of art.V seems to be more permissive in granting discretion to national courts at the enforcement stage.

\textsuperscript{44} Dardana Ltd v Yukos Oil Co [2002] EWCA Civ 543; [2002] 1 All E.R. (Comm) 819.
The Chromalloy court relied on art.VII to enforce an award set aside in Egypt, by applying the more favourable domestic arbitration statute. The French courts have also relied upon this decision in cases such as Dallah\(^{47}\) and Putrabali\(^{48}\) to apply the French arbitral law, which is certainly more favourable towards arbitration than the New York Convention. Paulsson suggests that art.VII provides for a method whereby enforcing courts could prevail over a bar to jurisdiction, if any, that could be created by applying art.V.

Article VII has been called the “more favourable right” provision, referring to how it permits the enforcing court to disregard the New York Convention and its provisions to enforce an award under domestic statute. The provisions of art.VII allow the party seeking enforcement to rely on the domestic law and seek enforcement of an award, notwithstanding the Convention.\(^{49}\) However, the art.VII route is also a tricky one. If a party elects to rely on any other provision, in either domestic law or Treaty, it cannot then at the same time rely partly on the New York Convention.\(^{50}\)

The court in Chromalloy felt that art.VII required it to apply the more favourable domestic arbitration statute and to enforce the award notwithstanding the setting aside of the award at the seat.

Article VII is an interesting provision: it is suggested that it was probably incorporated into the Convention in order to let members with a more favourable arbitration statute apply the provisions of their own law or treaty instead of the Convention. Paulsson suggests that an enforcing court relying on art.VII and applying its own domestic law certainly does not need to consider other issues with regard to the validity of the award or the decision setting it aside, in view of the fact that the court in such a situation would only be applying its own legal system and not the Convention.

An award may have been set aside on domestic law issues
An award could have been set aside based on a unique law of the jurisdiction of the seat. National courts often set aside awards on a formal basis, holding either that those awards are inconsistent with the legal standards or that there is some defect in the award. For example one may take Bechtel,\(^{51}\) where an award passed by a tribunal seated at Dubai was set aside as being improper. The court set aside the award, holding that the method of taking evidence was improper and hence the award was invalid. The issue was that one of the witnesses did not take the oath before he gave his testimony, although it was not suggested that his testimony was false. The court felt that there was an improper application of mandatory provisions of the law and accordingly set aside the award. The award was however enforced by the French courts, which chose to ignore the set-aside.\(^{52}\)

Michael Dunmore cites Abnaa Al-Khalaf Co,\(^{53}\) where an award was set aside by the courts of Qatar on technical grounds. The highest court of Qatar held that the award was invalid, as it was not made in the name of the Emir of the State of Qatar, a formal requirement under the domestic law. Although the case was eventually settled, Dunmore suggests, albeit with good reason, that such an award, even if set aside in the seat, would be easily enforceable as it was done under local standards.

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\(^{49}\) Yukos Capital Sarl v OAO Rosneft Case No.200.005.269/01 April 28, 2009 Amsterdam Gerechtshof.


\(^{52}\) International Bechtel Co Ltd v Department of Civil Aviation of the Government of Dubai Case No.288/2002 Court of First Instance, Dubai.

\(^{53}\) Abnaa Al-Khalaf Co v Sayed Aghajaved Raza Challenge No.64 of 2012 Supreme Court of Qatar.
Both the above cases are really awards set aside by courts on technical grounds that probably would not occur were the seat a different one. Jan Paulsson describes such set-aside decisions as “local standard annulments” and opines that awards set aside on the basis of a local standard, that is, on the basis of specific domestic law issues, should be internationally enforceable. An award is enforceable internationally, even if set aside elsewhere, so long as it does not offend internationally accepted norms or standards.

This argument by Paulsson is surely the most persuasive, that an award which has been set aside on the basis of “local standards” is not necessarily invalid for the rest of the world. An enforcing court which might reject an enforcement action to an award set aside on the basis of such “local standards” would probably do grave injustice to other countries. It is the author’s opinion that if parties to international transactions wished to be bound by local law and its limitations, they would not opt for an international arbitration but instead would choose to resort to a domestic remedy, which is probably more cost effective. The reasoning behind the passing of the New York Convention was to provide a level playing field in international arbitration and to reduce the hurdles in the process of enforcement. Courts which annul an award based on local standards do so on the basis of their own legal principles and it would be against the spirit of international public order to force the legal principles of one nation on another. In the opinion of the author, the setting aside of awards on the basis of local standards is surely the strongest reason to disregard these judgments.

In conclusion, the crucial question that remains to be answered is whether it is permissible for courts to enforce an arbitral award which has been set aside in its seat or whether they should simply recognise the decision to set aside and refuse to recognise the award. It has been demonstrated that an enforcing court is given the discretion by the New York Convention in arts V and VII, therefore there is no bar under the Convention. The next question before the court then is whether the award was set aside on local standards. The court has to decide whether the reasons for setting aside are acceptable under its domestic order or are unique to the jurisdiction of the seat. If the court finds the reasons to be unique or extremely difficult to accept it would rather enforce the award than give effect to the annulment decision, which would have no standing under its own domestic law. In the author’s opinion, as regards the arguments about reopening a dispute and respecting foreign judgments, an enforcing court would rather enforce an award that conforms with its legal jurisprudence than recognise and accept the decision of a foreign court which probably militates against the jurisprudence and principles of law of the nation.

4. Conclusion

International judicial inconsistency raises an important question regarding the enforceability of an arbitral award, set aside at the seat. However, taking into consideration the weighing of the repercussions of the positions of both schools of thought, the school that argues for enforcement notwithstanding the decision to set aside and the school that argues against the recognition and enforcement of a set-aside award, the author must conclude that it is truly a situation which is brought about only by the “open to interpretation” wording of the New York Convention.

When one compares the arguments dealing with giving effect to an award set aside elsewhere, one must keep in mind the approach an enforcing court takes towards an arbitral award and its basis. That is, if a court treats an arbitral award as a decision deriving its legal force from a particular legal jurisdiction or as an international award which has its own independent existence. This approach towards the basis of an arbitral decision is essential when assessing whether an enforcing court shall give effect to an award notwithstanding its being set aside elsewhere.

The author is of the opinion that a set-aside judgment should not be a ground for denying enforcement to an arbitral award if that award is capable of being enforced under some domestic provision or was set aside by a court for reasons that do not fall within the ambit
of art. V of the New York Convention. Article V, as demonstrated earlier, by use of the word “may” confers upon the enforcing court the discretion to decide whether it would give effect to an award set aside at the seat.

However, one must remember that the role of the national courts of the seat cannot be completely done away with in the arbitral process. The courts of the seat still play an important role, for they refer the parties to arbitration and appoint tribunals when there is an attempt to resist the process. The author is of the opinion that the most essential role that the various national courts need to play is to ensure that parties are able to arbitrate freely and that a genuine award issued by a competent tribunal is valid and enforceable.