

# Recognition and Enforcement of Annulled Foreign Arbitral Awards in the Country of Origin under the 1958 New York Convention: the US and French Approaches

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The recognition and enforcement of annulled foreign arbitral awards in the country of origin under the 1958 New York Convention is subject to doctrinal discussions. A relevant article of the 1958 New York Convention became the subject matter of many cases in some large economies. These cases and doctrinal views are very important for other countries that did not host such a case before their national courts. Therefore, the purpose of this paper is to analyse the relevant article of the 1958 New York Convention and compare delocalization and territorial theories.

**Keywords:** Foreign Arbitral Awards, Annulled Arbitral Awards, New York Convention, International Arbitration.

## Introduction

In international arbitration law, the most important problem is the recognition and enforcement of foreign arbitral awards. It is a serious issue for the efficient functioning of the international arbitration system. Arbitral awards are issued by ad hoc or institutional arbitrations and they have effect in the country of the seat of arbitration. To have an effect in other countries, recognition and enforcement of foreign arbitral awards is necessary in other national courts. Therefore, many international conventions were created at the regional or international level, such as the Panama Convention or the Buenos Aires Convention. The New York Convention is the most important international arbitration convention at the international level. It entered into effect as the growth of international commerce in the post-WWII era increased, and it has over 150 signatory parties. It sets a number of refusal reasons in recognition and enforcement of foreign arbitral award cases. Under the New York Convention (1958), the recognition and enforcement of a foreign arbitral award may be refused based on reasons as follows (Ay, 2019, p. 504, 505):

- Invalid arbitration agreement;
- Improper notice of appointment of arbitral tribunal to parties;
- The arbitral awards outside the scope of arbitration terms;

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- Improper composition of arbitral tribunal;
- Non-binding or non-final arbitral awards on the parties or arbitral awards have been suspended, set aside or annulled by a competent authority in which that foreign arbitral award was made;
- Non-arbitrable disputes in the country in which the recognition and enforcement of foreign arbitral awards is sought;
- Public policy defence.

Pursuant to the New York Convention (1958) Article V(1)(e), if a foreign arbitral award is set aside or annulled by the competent authority in which that foreign arbitral award was made, it may be refused before national courts.<sup>1</sup> In order to dismiss the request for enforcement of the arbitral award based on this provision of the New York Convention, a court decision must first be submitted that the arbitral award has been annulled or the enforcement of the arbitral award has been suspended (Akinci, 1994b, p. 12). In this situation, while the supervisory court which is at the seat of arbitration has primary jurisdiction to annul the foreign arbitral award within its territory, the enforcement court abroad has power to consider enforcing or refusing the foreign arbitral awards in its territory as a secondary jurisdiction (Harisankar, 2015, p. 47). This article is a very important issue between primary and secondary jurisdictions in the recognition and enforcement of foreign arbitral awards and the effect of primary jurisdiction on secondary jurisdiction, as the interpretation of the term *may* in the text of the New York Convention creates many debates in practice and doctrine. A major legal discussion in doctrine as well as in practice is the use of “may” – a non-obligatory word – instead of the use of “must,” an obligatory word, in Article V(1)(e) of the New York Convention (Dobias, 2019, p. 4). While an arbitral award annulled by the competent court of primary jurisdiction cannot be recognised and enforced in secondary jurisdictions, it is permitted in some secondary jurisdictions. Both situations are explained as territorial and delocalized approaches, respectively. The legal reasoning behind the territorial approach is that since such an arbitral award does not exist, it cannot be recognized and enforced. It can be explained that “the seat anchors the arbitration to the legal order of the State in which it takes place” (Thuren, 2017, p. 37). Unlike the territorial approach, it is possible to recognize and enforce a foreign arbitral award set aside in the country of origin. The delocalized approach can be explained as follows:

“An international arbitral award, which does not belong to any state legal system, is an international decision of justice and its validity must be examined according to the applicable rules of the country where its recognition and enforcement are sought” (PT Putrabali Adyamulia..., 2007; Harisankar, 2015, p. 49).

It is seen from the explanations that both theories are contradictory to each other. Although the purpose of the New York Convention is to create a uniform interpretation and practice of recognition and enforcement of foreign arbitral awards, the interpretation of Article V(1)(e) of New York Convention may cause different results.

<sup>1</sup> New Convention(1958) Article V (1) (e)

“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”.

## 2. French Approach

### a. *Pabalk Ticaret v. Norsolar*

The problem of the enforcement of annulled arbitral awards was handled for the first time in the case of *Pabalk Ticaret v. Norsolar* (Tripkovic, 2018, p. 34). The parties had made an agent's contract and decided to solve their dispute arising out of their contract in the Vienna Arbitration. The arbitral tribunal decided to solve the dispute in accordance with internationally accepted rules. Since the seat of arbitration is in Vienna, the losing party filed an annulment case before the Vienna courts. The Vienna Higher Regional Court ruled that the arbitral tribunal solved the dispute in accordance with equity and it is excess of power and annulled it. Although the arbitral award was annulled before the Vienna courts, the winning party filed an enforcement case before the French courts, and the French Court of Cassation decided to enforce it. As a result of this decision by the French Court of Cassation, it became the first recognition and enforcement decision of an arbitral award set aside in the country of origin. After this decision, arbitral awards set aside in the country of origin are consistently recognized and enforced in France (Tarman, 2010, p. 129). Therefore, it is a landmark decision in France.

### b. *Chromalloy Aeroservices v.s. Egypt*

*Chromalloy Aeroservices v.s. Egypt* (known as the "Chromalloy case") is a very important case that favored the delocalized approach. Chromalloy Aeroservices filed an enforcement case before French and American courts. In the course of enforcement cases before American and French courts, the Egyptian government filed an annulment case before Egypt's courts based on the fact that the arbitral award is contrary to Egyptian law; thus, the Cairo Court of Appeal annulled the arbitral award. However, this annulment decision could not prevent the enforcement of arbitral awards in France and the U.S.A. The U.S. court ruled that national courts are free to enforce arbitral awards set aside in the country of origin. French courts enforced the arbitral awards referenced in the *Pabalk Ticaret v. Norsolar* case (Tarman, 2010, p. 128). In this case, the U.S. Courts' delocalization approach became cause célèbre in the U.S. as a judgment permitting the recognition and enforcement of a foreign arbitral set aside in the country of origin. Later, the Baker Marine case was filed before the U.S. courts (Bağçekapılı Vincenzi, 2016, p. 106).

### c. *Hilmarton Case*

The well-known *Hilmarton* case concerned a conflict between an English company *Hilmarton* and *Omnium de Traitement et de Valorisation (OTV)*, a French company. *Hilmarton* claimed payment of commissions allegedly due to help *OTV* gain a public works contract in Algeria. Swiss law was the applicable law in the agreement between *OTV* and *Hilmarton* and the seat of arbitration was Geneva. The Swiss sole arbitrator dismissed *Hilmarton's* claim based on the legal reason that the contract between the parties infringed the basic principles of the Algerian legal system, which prohibited the payment and use of an intermediary in the course of the procurement of public works contracts. Therefore, the sole arbitrator found this contract between both parties unlawful. However, in 1989, the Geneva Court of Appeal annulled the arbitral award, ruling that the arbitrator's decision was arbitrary and could thus be annulled in accordance with Swiss legislation. The Swiss Federal Tribunal confirmed this decision on 17 April 1990. In the course of case annulment before the Swiss courts, *OTV* sought to have the arbitral award recognized and enforced in France. The Paris Court of First Instance accepted the enforcement of the arbitral award on 27 February 1990. However, since the arbitral award had been annulled in

Switzerland, Hilmarton appealed the exequatur decision of the Paris Court of First Instance before the Paris Court of Appeal. The Paris Court of Appeal confirmed the First Instance Court decision on 19 December 1991 notwithstanding the annulment decision of country of origin in the following words:

“The provision of Article V(1)(e) of the Convention – according to which exequatur must be denied to an award which has been set aside in the country in which it was made – does not apply when the law of the country where enforcement is sought permits enforcement of such an award. In case, recognition and enforcement is sought in France of an arbitral award rendered in Geneva; the award having been set aside by the Swiss courts is not a ground for denying exequatur under Art. 1502 NCCP” (Cour d’appel (Court of Appeal)..., 1994; Koch, 2009, p. 272).

The French Supreme Court confirmed the decision of the Paris Court of Appeal on 23 March 1994 as follows:

“Lastly, the award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside and its recognition in France is not contrary to international public policy” (Koch, 2009, p. 272).

However, Hilmarton did not give up on the enforcement of the Swiss arbitral award in France. Therefore, it sought to enforce the Swiss court’s judgment on the arbitral award annulment, and a French court in Nanterre confirmed the recognition of the Swiss court’s annulment. The dispute was refiled as an arbitration case in Switzerland, and a new arbitral award was issued in favour of Hilmarton. Hilmarton sought to enforce this last arbitral award in France, and the French courts agreed to confirm it to enforce. As a result of this situation, there were two conflicting arbitral awards in the French courts. On the one hand, one arbitral award in favour of OTV, on the other hand, a second and last arbitral award in favour of Hilmarton. There were conflicting judgments. Finally, the French courts resolved this legal problem by dismissing the awards in favour of Hilmarton (Gharavi, Freyer, 1998, p. 120, 121; Bird, 2012, p. 1037). As a result of this situation, the Hilmarton case shows that French courts “appear to accord no weight to decisions of foreign courts, including the arbitral seat, annulling an arbitral award” (Born, p. 2680; Bird, 2012, p. 1037–1038). National courts may deliver contradictory decisions.

### 3. The U.S. Approach

#### a. *Baker Marine Ltd. v. Danos v. Chevron*

In the *Baker Marine* case, the Second Circuit Court of the United States Court of Appeals refused the enforcement of foreign arbitral awards set aside by Nigerian courts by referencing Article V(1)(e) of the New York Convention, unlike the *Chromalloy* case. In the *Baker Marine* case, Baker Marine and Danos had made a contract with Chevron to offer some services in relation to Chevron’s economic activities in the oil sector in Nigeria. After a dispute arose between the parties, it was solved in Nigerian arbitration in accordance with Nigerian law. The arbitral tribunal ruled that Baker Marine was awarded USD 750 000 against Chevron and USD 2.23 million against Danos. Both awards had been annulled by Nigerian Courts. Even though both arbitral awards were annulled by the court which hosts the seat of arbitration, Baker Marine sought the enforcement of arbitral awards in the U.S. At first, the enforcement request was rejected by the New York District Court, which ruled that the New York Convention denies the enforcement of arbitral awards set aside in the country of origin. Later, this decision was upheld by the U.S. Court of Appeal. Before the Court of Appeals, Baker Marine claimed that the arbitral awards were annulled by the Nigerian courts based on reasons that are incompatible with the U.S. law as valid

grounds to vacate or annul an award. Referencing the Article VII of the New York Convention, Baker Marine claimed that the U.S. Court of Appeals may enforce the arbitral award in spite of the decisions made by the Nigerian courts. This argument was not accepted by the U.S. courts since the parties had agreed that the dispute was decided to be solved in arbitration in Nigeria in accordance with Nigerian law. Therefore, the U.S. arbitration law could not be reason of rejection of enforcement of arbitral awards set aside in the country of origin (Thuren, 2017, p. 39).

### **b. Termo Rio v. Electranta**

In 1997, Termo Rio and Electranta, two Colombian companies, made an agreement concerning the construction of a power plant and the sale of the power generated by this power plant in Colombia. After certain time passed, a conflict arose between Termo Rio and Electranta. Then, Termo Rio commenced an arbitration process based on an agreement in accordance with the ICC Rules in Colombia. On 21 December 2000, the ICC arbitral tribunal awarded USD 60.3 million in favor of Termo Rio owing to the breach of the contract by Electranta. Electranta filed an annulment case before the Colombian courts to vacate this arbitral award, and then the award was annulled by the Colombian Council of State (*Consejo de Estado*). The reasons of cancellation of arbitral awards were that ICC procedural rules were not in compatible with Colombian law. Naturally, Termo Rio became unsatisfied and took the case before the U.S. courts to enforce an annulled arbitral award. The U.S. District Court for the District of Columbia rejected the application to enforce arbitral award by applying the New York Convention Article V(1)(e) and ruled that the arbitral award had been properly annulled by Colombian courts and thus cannot be enforced in the U.S. (TermoRio S.A.E.S.P. (Colombia)..., 2008; Lazic Smoljaic, 2018, p. 222). The U.S. Courts stated that an enforcement of foreign arbitral awards set aside lawfully in the country of origin “would seriously undermine a principal precept of the New York Convention: an arbitral award does not exist to be enforced in other Contracting States if it has been lawfully ‘set aside’ by a competent authority in the State in which the award was made” (Thuren, 2017, p. 39). After this case was appealed to the US Court of Appeals of the District of Columbia Circuit, this decision was affirmed. The US Court of Appeal of the District of Colombia Circuit ruled that the Colombian courts had primary jurisdiction over the arbitral award and were therefore the competent authority to annul the arbitral award. It further stated that “because there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of that court is other than authentic, appellees contend that appellants have no cause of action under the FAA (Federal Arbitration Act) or the New York to enforce the award in a Contracting State outside of Colombia” (Thuren, 2017, p. 39–40). The U.S. courts followed territorial approach in the *Termo Rio* case like it was followed in the *Baker Marine* case but unlike the *Chromalloy* case.

## **Conclusion**

First of all, taking into consideration of abovementioned cases, French courts accept the delocalization approach and U.S. courts have a high tendency to follow the territorial approach, except in the *Chromalloy* case. Both approaches have pros and cons. Their discussions revolve the principle of comity, legal certainty, and inconsistent judgements of the national courts, because it is the absolute refusal reason of the recognition and enforcement of annulled arbitral awards (Ruhi, 2019, p. 108). The advantages offered by the territoriality theory are legal certainty, consistent judgments, and the principle of comity. It may be supported within the scope of mutual respect and trust between primary

and secondary jurisdictions. It is compatible with the view that “if an award is annulled, it ceases to exist.” It creates legal certainty and avoids inconsistent results between different jurisdictions (Thuren, 2017, p. 40). By this way, a party will not seek the enforcement of a foreign arbitral award since it knows that the recognition and enforcement of foreign arbitral awards will be refused under Article V(1)(e) of the New York Convention (1958). As a result of this situation, it will not seek an available jurisdiction to find a flexible court (Berg, 1998, p. 15). However, an arbitral award may be illegally or arbitrarily annulled in the country of origin. It creates unjustified results in primary and secondary jurisdictions for the winning party of an arbitration case. At this point, supporters of the delocalization theory claim that it should be accepted under national legal systems. Thanks to the delocalization theory, a foreign arbitral award that was illegally or arbitrarily annulled in the country of origin may be recognized and enforced in a secondary jurisdiction. It protects the winner party of an arbitration case in the secondary jurisdiction in case of such situations. Additionally, it is an arbitration-friendly approach. However, this theory is criticized for possibly creating inconsistent judgments. The Hilmarton case is an extreme example of the negative consequences of the delocalization approach (Gharavi, Freyer, 1998, p. 117). There are diverging decisions between national courts and even French courts. The delocalization theory causes *forum shopping*. A party may seek flexible jurisdictions to enforce their annulled arbitral award in the country of origin in secondary jurisdictions (Ekşi, 2009, p. 138). It may be refused notwithstanding the delocalization theory. There may be an unnecessary loss of time and money. If we compare the advantages and disadvantages of the territorial and delocalization theories, the territorial theory could be considered as a basic principle, while the delocalization theory may be viewed as an exception. It may be a good option to develop a uniform interpretation and practice of the recognition and enforcement of foreign arbitral awards by opting for the territoriality theory as a basic principle and the delocalization theory for exceptional situations. However, the New York Convention (1958) grants high discretionary power to primary jurisdictions. Annulment reasons should be listed in this Convention. For example, in Article XI of the European Convention on International Commercial Arbitration of 1961, the listed annulment reasons of an arbitral award in the country of origin differ from those in the New York Convention.<sup>2</sup> If an arbitral award is annulled in the country of origin pursuant to Article IX of the European Convention, there is no refusal reason of recognition and enforcement of foreign arbitral awards. By this way, an arbitral award which was annulled due to arbitrary reasons cannot be a refusal reason in a secondary jurisdiction (Akıncı, 1994a, p. 150). Such

<sup>2</sup> European Convention on International Commercial Arbitration Article IX

1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.

a solution plays a very important role for the uniform interpretation of the New York Convention. The U.S. and French courts can interpret the New York Convention uniformly.

Secondly, New York Convention Article V(1)(e) does not become subject to cases. These cases are illustrative for other jurisdictions which do not host recognition and enforcement of foreign arbitral award cases. Scholars from such countries share their opinion based on developments from big economies in some papers under their national legal systems. For example, Claus von Wobeser states that “[t]here is no case law or authority on this issue in Mexico. The particular circumstance in which a Mexican court would be willing to enforce an award that has been set aside at the seat of the arbitration would depend on the particular circumstances under which the award was set aside, a matter within the scope of analysis of the grounds for enforcement to be made by the judge hearing the case” for the interpretation of Article V(1)(e) of New York Convention in Mexico (Wobeser, 2017, p. 685). Mexican courts may reference abovementioned cases.

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## **Recognition and Enforcement of Annulled Foreign Arbitral Awards in the Country of Origin under the 1958 New York Convention: the US and French Approaches**

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### **S u m m a r y**

The interpretation of the New York Convention Article VI(e) is a very important matter regarding the recognition and enforcement of annulled foreign arbitral awards. This provision became the subject of cases in some large economies. French and US courts follow opposite interpretations of recognition and enforcement of foreign annulled arbitral awards. Their case law shed lights on other jurisdictions which may solve a dispute of recognition and enforcement of foreign annulled arbitral awards.

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