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## ANNULLED AWARDS IN THE U.S. COURTS: HOW PRIMARY IS “PRIMARY JURISDICTION”?

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The question of what treatment should be afforded by U.S. courts to an arbitral award falling under the New York Convention that already has been set aside by a court at the place of arbitration is much discussed by specialists in the field but less frequently encountered in the day-to-day work of the courts. The question has reached federal appellate courts and been addressed at that level only twice – in the *Baker Marine*<sup>1</sup> and *TermoRio*<sup>2</sup> cases. The issue has not had sufficient judicial exposure for a cohesive approach to have developed. Each case inevitably raises, among other questions, what respect should be given to the result of a judicial proceeding in a country with which the United States enjoys more or less sanguine diplomatic and trade relations. Principles of comity among nations, drawn from what may be termed the U.S. federal common law of foreign relations, have tended to prevail over principles of deference to the arbitration outcomes of arbitration derived from the New York Convention and the Federal Arbitration Act. In contrast, arbitration theorists who view the arbitration process as being only minimally connected to the State that plays host to the arbitration find deference to the outcomes in the Host State’s courts less compelling. Whereas the issue is far from settled in the United States, there remains a need for discussion despite the extensive literature already devoted to the question. This article explores the evolution of U.S. law, considers how the French theory of “de-localization” fits (or does not) with U.S. law, and concludes that principles of deference to the decisions of international arbitrators, developed in U.S. arbitration jurisprudence, deserve greater weight than they have received when the question of enforcement of an annulled award is presented.

### I. IN THE BEGINNING, THERE WAS *CHROMALLOY*

The 1996 decision of a U.S. district court in Washington, D.C. in *Chromalloy Aeroservices v. Arab Republic of Egypt*,<sup>3</sup> granted recognition of an award made in favor of a U.S. company against the Egyptian State by an arbitral tribunal with its seat in Cairo, Egypt. The arbitration had been conducted under Egyptian arbitration law by agreement of the parties, and the award had been set aside by

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EDITORS’ NOTE: We are publishing this article together with the article by Prof. Luca G. Radicati di Brozolo, *infra* at 47, both of which discuss the *Thai-Lao Lignite* case. We thought each article would be of interest to our readers, particularly since that case is currently pending in the Second Circuit Court of Appeals.

<sup>1</sup> *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999).

<sup>2</sup> *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

<sup>3</sup> 939 F. Supp. 907 (D.D.C. 1996).

the Egyptian court of appeal, which was undisputedly the competent court to hear annulment applications under Egyptian arbitration law. The district court found no misapplication of Egyptian law by the Egyptian court, nor any indication that the American award creditor had been deprived of due process in the Egyptian judicial proceedings. Early in its decision, the U.S. court stated that Article V and its subsection V(1)(e) of the New York Convention granted a court asked to recognize a foreign award under the Convention a discretion to refuse its enforcement if the award had been set aside by a competent court at the seat of arbitration. But the court did not proceed to render its decision in terms of the conditions for the exercise of such discretion. Rather, the court relied upon Article VII of the Convention<sup>4</sup> – the so-called “more favorable right” provision – which states that the Convention shall not deprive a party of a right to enjoyment of an award conferred by domestic law in the country where the award is sought to be relied on.<sup>5</sup> In the understanding of the district court judge in *Chromalloy*, this meant that if the award was entitled to be confirmed under Chapter 1 of the Federal Arbitration Act (“FAA”), then any grounds for refusal of recognition of an award specified in the Convention were irrelevant except to the extent these same grounds constituted reasons for vacatur under FAA § 10.<sup>6</sup> Finding that the district court had an independent basis for jurisdiction over Egypt – the “arbitration exception” to immunity under the Foreign Sovereign Immunities Act – the court held that the award was entitled to confirmation under FAA Chapter 1 and that such confirmation was in conformity with New York Convention, Article VII.<sup>7</sup> The court further held that the Egyptian court judgment was not entitled to be treated as *res judicata* in the United States because the appeal to that court had been taken by the Egyptian State in violation of a clause in the contract that prohibited the taking of any appeal from the arbitral award. Although this holding might have been more fully articulated, one can discern a principle: that the judiciary of the Host State facilitated a breach of the arbitration agreement by the Host State and by doing so attempted to deprive a foreign national that transacted business with the Host State of its rights under international law (*i.e.* the New York Convention).

The application of Article VII in *Chromalloy* has not been adopted as the basis for confirmation of an annulled foreign award in any other U.S. case to the knowledge of the author. It is flawed in critical respects. The error in the district court’s Article VII position was that it did not give proper regard to Congress’ decision, in adopting Chapter Two of the FAA in 1970, to make Chapter Two the exclusive regime for U.S. recognition and enforcement of awards governed by the Convention. Had the U.S. declined to enact FAA Chapter Two, and instead had

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<sup>4</sup> *Id.* at 914.

<sup>5</sup> Article VII provides: “The provisions of the present Convention shall not . . . 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.”

<sup>6</sup> *Chromalloy*, 939 F. Supp. at 909-10.

<sup>7</sup> *Id.* at 914.

elected to treat foreign awards only within the framework of Chapter One without amendment, then none of the grounds for refusal of recognition under the Convention could preclude confirmation under FAA Chapter One. Sections 9 and 10 of FAA Chapter One, together, require a district court having jurisdiction and asked to confirm an award to confirm it unless the award has been vacated or modified, on a ground permitted by § 10, by the district court for the district “in which the award was made.” And while § 10 was eventually interpreted by the Supreme Court to be “permissive” as to its venue requirement: *i.e.* to allow for vacatur either by the district court where the award is made or in another federal judicial district where venue is proper under the general federal venue statute,<sup>8</sup> Congress in enacting the FAA in 1925 presumably did not consider that *any* U.S. district court would have power to vacate an award made in another country.

Be that as it may, Congress decided in adopting FAA Chapter Two that “the Convention . . . shall be enforced in the United States courts in accordance with this Chapter.” To analyze the right to recognition of a Convention award under FAA Chapter One instead of under FAA Chapter Two – and by doing so to disregard Convention grounds for refusal of recognition on the basis that they are not listed as grounds for vacatur under § 10 – does not fall within Convention Article VII. FAA Chapter Two *is* the U.S. domestic law applicable to a foreign award, and Chapter Two expressly reduces the role of Chapter One, so that it applies only “to the extent that chapter is not in conflict with this chapter or the Convention . . . .” France, as we shall see, expressly adopted a more liberal regime than the Convention for recognition of foreign awards;<sup>9</sup> the U.S., in contrast, simply decided that the Convention shall be enforced under FAA Chapter Two.

But the much-maligned *Chromalloy* decision deserves further attention from U.S. courts for its position on the *res judicata* question, which is tantamount to the question of whether the discretion to refuse enforcement of an annulled award under Convention Article V(1)(e) should be exercised. The contractual exclusion of “any appeal” in the *Chromalloy* arbitration clause could reasonably be

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<sup>8</sup> *Cortez Byrd Chips, Inc. v. Bill Harbert Const. Co.*, 529 U.S. 193 (2000). When *Chromalloy* was decided in 1996, the federal circuit courts of appeals were divided on the question of whether the venue specified in §§ 9 and 10, *i.e.* the judicial district where the award was made, was mandatory or permissive. The *Chromalloy* court considered that venue was proper for Chapter One purposes in Washington D.C. because the district court there was the default venue for actions under the Foreign Sovereign Immunities Act. But the court did not specifically address how to reconcile § 10’s “where the award was made” language with the fact that the award before it was made in Egypt.

<sup>9</sup> As noted by Professor Gaillard: “As per its Article VII, the Convention sets only a minimum standard (for recognition and enforcement). States can always be more liberal. . . . [T]he number of cases referring to the New York Convention [in French law] is scarce precisely because the ordinary rules governing enforcement of awards in France are more liberal than those of the Convention and are routinely applied without any need to refer to the Convention.” Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION, ICCA CONGRESS SERIES NO. 14, at 689, 691 (Albert Jan van den Berg ed., 2009).

interpreted as a qualifier of Chromalloy's agreement to embrace Cairo as the seat of the arbitration: that any judicial review of the award would not be a review of the merits of the arbitral decision, but only a review for compliance with any mandatory provisions of Egyptian arbitration law. And since the appeal taken by Egypt was clearly based on the position that the arbitrators had misapplied the applicable substantive Egyptian law, the appeal was a breach of the arbitration agreement by the Host State as a party to the agreement, and that breach was condoned and facilitated by the Host State's own courts when they failed to dismiss the appeal.

## II. AND THEN THERE WAS *BAKER MARINE* (BUT FIRST THERE WAS *TOYS 'R US*)

A year after *Chromalloy*, the U.S. Second Circuit Court of Appeals addressed Article V(1)(e) in a different context. It decided (in the affirmative) the question whether U.S. domestic grounds for annulment of an award applied when a motion is made to vacate a Convention award when the seat of the arbitration was in the United States: *Yusuf Alghanim & Sons v. Toys 'R Us*.<sup>10</sup> *Toys 'R Us* is best known as having established that a Convention award made in the U.S. might be annulled in the U.S. based on manifest disregard of the law (which at that pre-*Hall Street*<sup>11</sup> juncture was broadly accepted as an implied ground for vacatur of domestic awards). The problem created by *Toys 'R Us* results from some unfortunate inconsistency in stating the holding of the case. The actual and correctly stated holding is that "the Convention...allow[s] a court in the country under whose law the arbitration was conducted to apply domestic arbitral law ... to a motion to set aside or vacate [an] arbitral award."<sup>12</sup> But after elaborating the reasons for reaching this conclusion, the Court summarized in these terms: "In sum, we conclude that the Convention *mandates* very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought."<sup>13</sup> The latter statement, unlike the former, indicates that Article V(1)(e) is a positive directive to courts at the seat of arbitration to apply domestic arbitration law grounds for annulment to foreign awards governed by the Convention. And while the Second Circuit clearly intended to go no further than to hold that application of U.S. domestic arbitral law by a U.S. court to a motion to vacate an award made in the U.S. is permitted by and consistent with the Convention, the "*mandates different regimes*" language has had more traction in other American courts, which have accepted without further analysis that the Convention itself *obligates*

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<sup>10</sup> 126 F.3d 15 (2d Cir. 1997), *cert. denied*, 522 U.S. 1111 (1998).

<sup>11</sup> In *Hall Street Assocs. v. Mattel, Inc.*, 552 U.S. 576 (2008), the Supreme Court of the United States famously left unresolved the question whether manifest disregard of the law as an "implied" ground for vacatur of arbitration award is permitted under the Federal Arbitration Act.

<sup>12</sup> 126 F.3d at 21 (emphasis supplied).

<sup>13</sup> *Id.* at 23 (emphasis supplied).

the United States to apply its domestic arbitration law standards of vacatur (FAA § 10) when there is a motion to vacate a Convention award that was issued by a tribunal sitting in the United States.<sup>14</sup>

The somewhat accidental but now disconcertingly entrenched *Toys ‘R Us* position that the Convention “mandates” that courts at the seat apply domestic arbitral law to motions to vacate Convention awards, coupled with the fact that the UNCITRAL Model Law has been adopted in only a handful of U.S. states and not at the federal level,<sup>15</sup> has placed the United States jurisprudentially out of step with much of the world for having not aligned its grounds for annulment of a U.S.-made Convention award, in a codification or in case law, with the Convention’s own grounds for refusing recognition of an award made elsewhere. The American Law Institute’s Restatement (Third) of the Law of International Commercial Arbitration advocates such alignment as a desired change in existing U.S. law.<sup>16</sup>

This *Toys ‘R Us*-sourced “Convention mandate[s] [the] regime[.]” position has become the foundation in U.S. jurisprudence for systematically granting deference to foreign courts’ applications of their own domestic arbitral law in annulment proceedings, when U.S. courts have been asked to recognize foreign awards that have been annulled at the foreign seat of arbitration. If the Convention itself commands the application of U.S. domestic law to annulments of U.S.-made awards, it follows that the Convention stands as the source of authority for other Convention member states to apply their domestic arbitration laws to annulments of awards made in their territories, and it equally follows that the Convention stands as the source of authority for the U.S. courts to take the position that such annulments have extra-territorial *res judicata* effect unless a traditional doctrinal obstacle to *res judicata* (lack of due process, violation of fundamental public policy, etc.) exists.

We can see this reasoning in the *Baker Marine* case in the Second Circuit, decided two years after *Toys ‘R Us*.

The U.S. Second Circuit Court of Appeals in *Baker Marine* elected to give effect under Article V(1)(e) to the annulment of an award at the seat in Nigeria, but did not articulate an approach to the issue that could guide courts in future cases. The appellant’s lead argument was based on Article VII of the Convention, following the lead of the district court in *Chromalloy*, but the Second Circuit took the position that any “right” the award winner might enjoy to “avail” itself of the

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<sup>14</sup> See, e.g., *Gulf Petro Trading Co. v. Nigerian Nat’l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008); *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 935 (D.C. Cir. 2007); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 287 (5th Cir. 2004); *China Minmetals Materials Import & Export Co. v. Chi Mei Corp.*, 334 F.3d 274, 285 (3d Cir. 2003); *Thai-Lao Lignite (Thailand) Co. v. Government of the Lao People’s Democratic Republic*, 2014 WL 476239 at \* 3 (S.D.N.Y. Feb. 6, 2014).

<sup>15</sup> The effect of the Model Law where it is in force is to foster a precise alignment of the domestic law grounds for vacatur of an international award with the Convention’s grounds for refusal of recognition.

<sup>16</sup> RESTATEMENT (THIRD) OF THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-11 (a) (Tentative Draft No. 2, April 16, 2012).

award under U.S. domestic arbitration law vacatur standards could only exist if the parties had indicated an intention to have U.S. domestic arbitration law vacatur standards apply to the award. The appellant's further contention that the Court should exercise the discretion given under Article V(1)(e) to recognize an annulled award was rejected on two grounds: first, that no misapplication of Nigerian law by the Nigerian court was claimed, and second, that no other "adequate reason" for refusing to respect the Nigerian annulment had been presented.

But perhaps we may sensibly ask: If an "adequate reason" for respecting the Nigerian annulment was that the parties had expressly bargained for judicial control over the arbitration and the award by the Nigerian courts, in an arbitration involving Nigerian companies (at least nominally) fighting over commerce in Nigeria, might it not be an "adequate reason" to disregard an annulment at the seat if the parties' actual bargain over the seat of arbitration reflected little more than an agreement on the convenience of the seat as a hub of international air travel? The prevailing idiom of American arbitration law is contractual, not territorial. If judicial control over an arbitral award is a function of what the parties agreed on that subject – within the constraints imposed by law – then U.S. judicial deference to an annulment at the seat of arbitration ought to depend more on what the parties actually agreed upon concerning the role of courts at the seat, and less about "comity" in abstract terms. Whereas the Second Circuit has not returned to this particular terrain since *Baker Marine*, it is certainly open to that court to place *Baker Marine* in this context, and to pronounce a general standard concerning recognition (or not) of annulled awards that takes into account the reasonable implication, for local judicial control, of the parties' selection of the seat of arbitration in any given case.<sup>17</sup>

### III. TERMORIO

In a decision that has come to rival if not surpass *Chromalloy* for the uproar caused among arbitration practitioners and scholars,<sup>18</sup> the U.S. Court of Appeals

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<sup>17</sup> One other case deserving mention in the American canon is *Spier v. Calzaturificio Tecnica, S.p.A.*, 71 F.Supp.2d 279 (S.D.N.Y. 1999). Decided shortly after *Baker Marine*, and with reference to that decision, the district court in *Spier* refused to enforce an award, annulled by an Italian court in Treviso based on arbitral excess of power. The award had been made in Italy by three Italian arbitrators, in the Italian language, and denominated in Italian lire, and under Italian contract law and Italian principles of equity, in favor of an American engineer who had provided manufacturing know-how to an Italian footwear company for the production of ski boots in Italy. *Spier* is essentially in the mold of *Baker Marine*, in holding that "no adequate reason" exists to enforce an annulled foreign award where the award is best characterized as a domestic award within the legal framework of the country where the award was made. In such a case, the intention of the parties to give transnational legal effect to the judicial review of the award in the Seat State is justifiably inferred.

<sup>18</sup> E.g. Fernando Mantilla-Serrano, *Case Note: Termorio S.A. E.S.P. et al. v. Electranta S.P. et al.*, 25 J. INT'L ARB. 397 (2008); Edouard Bertrand, *Termo Rio: The Inverse of Putrabali*, BLOG AVOCATS.FR (Nov. 13 2007), [www.blogavocats.fr](http://www.blogavocats.fr).

for the District of Columbia Circuit decided in *TermoRio*<sup>19</sup> that the annulment by the competent administrative court in Colombia of an award against Colombia’s state-owned electric utility, on the basis that the arbitration *agreement* violated Colombia arbitration law, would be respected and treated as *res judicata* in the United States. Here the Colombian State entity had entered into a commercial contract with a private party, and had provided that disputes under the agreement would be resolved by arbitration under the ICC Rules with a seat of arbitration in Bogotá. But when the Colombia State party lost the arbitration, after having fully participated in it, it sought vacatur in the Colombian court on the basis that the underlying arbitration agreement that the State party had negotiated, signed, and performed, was invalid under Colombian arbitration law because that law specifies that all arbitrations taking place within Colombia must proceed under the Bogotá Chamber of Commerce Rules of Arbitration. The Colombian court agreed, and vacated the award.

The D.C. Circuit, adopting terminology embraced a few years earlier by the Fifth Circuit in the *Karaha Bodas* case, started from the premise that “pursuant to [Article V(1)(e)], a secondary Contracting State normally may not enforce an arbitration award that has been lawfully set aside by a ‘competent authority’ in the primary Contracting State.”<sup>20</sup> For the D.C. Circuit, the principal question was whether there was any irregularity in the nature of a due process violation that would call into question the legitimacy of the Colombian court proceedings. Finding none, the court concluded there was no violation of fundamental U.S. public policy and that the Colombian judgment therefore should be respected. Moreover, the court declared that it was a “fundamental principle” established by the New York Convention that an award that has been annulled by a competent court at the seat of the arbitration no longer exists to be enforced elsewhere. Neither the text of the Convention nor any case law or commentary was cited in support of this proposition.

The proper starting point for analysis in the *TermoRio* case should have been the fact that Colombia was a Contracting State of the New York Convention. And the court should have made reference to Article II of the Convention:

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.

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<sup>19</sup> *TermoRio S.A. E.S.P v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007).

<sup>20</sup> The Court quoted *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nigeria*, 364 F.3d 274, 287 (5th Cir. 2004) where that Court said that “a court in a country with primary jurisdiction over an arbitral award may annul that award.” The D.C. Circuit offered no further analytical support for its adoption of the primary/secondary jurisdiction framework. I discuss *infra* at notes 53 and 54 and accompanying text how that terminology came to be used in *Karaha Bodas* and argue that it is at odds with the text of the Convention and results in a formulaic rather than analytic approach to the question of enforcement of annulled awards that overlooks not only what the Convention actually says and means, but also – in derogation of central tenets of American arbitration law – marginalizes party autonomy as a basis for deciding the legal significance of the seat of the arbitration.



Colombia, through the annulment judgment, had refused to recognize the arbitration agreement of the parties, and thereby had acted in violation of the New York Convention, despite having undertaken an international legal obligation to uphold it. Further, the Colombian court had invoked Colombian domestic law as a basis to excuse the Colombian State from compliance with an international legal obligation, the domestic law being the Colombian arbitration statute that required all Colombia-seated arbitrations to proceed under the Bogotá Chamber's Rules. That was a separate and additional violation of international law, as it is a settled principle of international law that a State may not invoke domestic law as a basis to excuse the State from the performance of an international legal obligation.<sup>21</sup> Further, as the Colombian State entity that signed the contract was chargeable with knowledge of the content of Colombian domestic arbitration law, and nevertheless made and performed an arbitration agreement in conflict with such law by agreeing to arbitrate under the ICC Rules and then proceeding to arbitrate under the ICC Rules, the Colombian State committed a "heads I win, tails you lose" fraud upon its commercial counterparty, entering into a completely one-sided arbitration agreement that could only benefit the State. The State would insist upon enforcement of the award if it prevailed, and failed to disclose to the contracting party that if the State lost the arbitration, then the validity of the arbitration agreement would be denied in a vacatur application to the Colombian court.

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<sup>21</sup> See, e.g., Vienna Convention on the Law of Treaties, Art. 27, May 23, 1969, 1155 U.N.T.S. 331 ("a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46."); William W. Park & Alexander Janos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L. REV. 251, 252 (2006) ("Prevailing opinion holds that an act wrongful under the law of nations remains so even if a nation's internal law deems otherwise"), citing at n.10 thereof Article III of the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*: "The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law." *Report of the International Law Commission to the General Assembly*, 56 U.N. GAOR Supp. (No. 10) at 1, U.N. Doc. A/56/10 (2001). For an application of these principles in an international arbitration context, see the discussion of the Award in ICC Arbitration 10'623 by Matthias Scherer in *The Place or "Seat" of Arbitration (Possibility, and/or Sometimes Necessity of its Transfer?) – Some Remarks on the Award in ICC Arbitration No. 10'623*, 21 ASA BULL. 115 (2003) ("The Tribunal . . . rightly recalled that a State or State entity cannot resort to the State's Courts to frustrate an arbitration agreement into which it freely entered"). *Accord*, EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* 77 (2010) ("The rule according to which a State or State-owned entity that has freely consented to an arbitration agreement cannot hide behind its own domestic law to avoid arbitration is so widely recognized in comparative law and in arbitral jurisprudence that it can be characterized as a general principle of law").

## IV. PEMEX

In the *Pemex* case, decided by a judge of the federal district court in New York last year,<sup>22</sup> the court, on grounds of fundamental U.S. public policy, chose to give no effect to the annulment by Mexico’s Supreme Court of an arbitration award for money damages in favor of a contractor against Mexico’s State-owned energy monopoly. At the time of the contract and at the time the dispute arose, the Pemex enabling law authorized Pemex to enter into arbitration agreements with private contractors. But during the course of the arbitration Mexico by legislative act rescinded that authorization, and re-assigned judicial jurisdiction over the type of claim asserted to a different court than before, one in which the applicable statute of limitations was 45 days from the date the claim arose. Compounding the evisceration of the private contractor’s remedial options against the State, Pemex did not rely upon the abrogation of Pemex’s authority to make arbitration agreements in its array of objections to jurisdiction presented to the arbitral tribunal, but only first raised this point in its judicial application for annulment of the final award. By this time, the contractor’s judicial claim was time-barred under the newly-applicable 45-day rule.

The U.S. district court in this case considered it to be a basic principle of justice, and of the rule of law, that a private party should not be deprived of rights to resolve contract claims against the State, the expected enjoyment of which was established by definite State action pre-contract, through the retroactive application of a new set of laws negating the established expectancy. For the reaffirmation of this uncontroversial and quite universal principle, the *Pemex* decision has been widely applauded.<sup>23</sup>

But the decision does little more than recognize what it calls a public policy “gloss” on Convention Article V(1)(e), the content of which is the long-settled principle that U.S. courts will decline to give *res judicata* effect to a foreign judgment if the losing party was denied due process in the issuing court.<sup>24</sup> This is a helpful principle as far as it goes, but it does not go very far. Indeed the clarity and accessibility of this basic rule of U.S. international law might have the

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<sup>22</sup> *Corporacion Mexicana de Manenimento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Produccion*, 962 F.Supp.2d 642 (S.D.N.Y. 2013).

<sup>23</sup> *E.g.*, *Arbitral Award Enforced in United States Although Annulled Abroad*, Latham & Watkins Client Alert No. 1582 (Sept. 14, 2013); *US District Court confirms arbitral award against Pemex that was nullified at its seat*, Herbert Smith Freehills Dispute Resolution Arbitration Notes (Sept. 18, 2013); Luca G. Radicati di Brozolo, *The Enforcement of Annulled Awards: An Important Step in the Right Direction*, PARIS J. INT’L ARB. 1027 (2013); Monique Sasson, *The Question of U.S. Enforcement of Annulled Foreign Arbitral Awards*, [www.apps.americanbar.org](http://www.apps.americanbar.org) (Feb. 6, 2014).

<sup>24</sup> See American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a) (1986): “A court in the United States may not recognize a judgment of the court of a foreign state if . . . the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law.”

regrettable effect of enticing other courts to treat this public policy exception as the only exception to the presumed legitimacy of foreign award-annulment judgments.

The objection to this momentum in the U.S. case law is that it removes an issue of arbitration law and application of the New York Convention from the arbitration context, and treats the issue like any other question about the entitlement of a foreign judicial judgment to *res judicata* effect in the United States.<sup>25</sup>

#### V. THAI-LAO LIGNITE

The most recent U.S. decision, in the *Thai-Lao Lignite* case,<sup>26</sup> follows the pattern set by *Baker Marine*, *TermoRio* and *Pemex*. The U.S. district court in New York had previously entered judgment recognizing the award made in Kuala Lumpur by a tribunal of three American arbitrators applying New York substantive law, and that judgment had been affirmed by the U.S. Second Circuit Court of Appeals.<sup>27</sup> But thereafter the award was annulled by the competent court in Kuala Lumpur, and the motion of the award debtor Government of Laos to vacate the recognition judgment on the basis of the Malaysian annulment judgment was granted. An appeal to the Second Circuit by the award creditors, private entities of Thai nationality, has been filed, giving that court an opportunity

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<sup>25</sup> There is formidable and thoughtful support for the use of principles applicable to the enforcement of foreign judgments as the primary guideline for discretion in the federal courts. See, e.g., Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgments*, in *FORUM SHOPPING IN THE INTERNATIONAL COMMERCIAL ARBITRATION CONTEXT* 313, 323-26 (Franco Ferrari ed., 2013); Linda Silberman, *The New York Convention after Fifty Years: Some Reflections on the Role of National Law*, 38(1) *GA. J. INT'L AND COMP. L.* 26, 32-35 (2009).

A good case can be made that the Restatement (Third) of Foreign Relations Law does not purport to identify all the grounds on which a U.S. court might deny *res judicata* effect to a foreign judgment that annuls an arbitration award that falls under the New York Convention or the Panama Convention. Under Section 481 of the Restatement, the foreign judicial judgments to which recognition and enforcement will be granted, subject to the exceptions stated in Section 481, are those “granting or denying recovery of a sum of money, establishing or confirming the status of a person, or determining interests in property.” None of these categories squarely applies to a judgment annulling an arbitration award. For the view that the Article V(1)(e) conundrum ought not necessarily be resolved in U.S. courts solely by reference to established international *res judicata* principles, see Ronald A. Brand, *Recognition and Enforcement of Foreign Judgments* at p. 27, Federal Judicial Center (2012) (“Neither the Restatement nor the [Foreign Money Judgment] Recognition Acts include a clear resolution of a possible conflict between a foreign judgment [vacating an arbitral award] and a foreign arbitral award”).

<sup>26</sup> *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 2014 WL 476239 (S.D.N.Y. Feb. 6, 2014).

<sup>27</sup> *Thai-Lao Lignite (Thailand) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 2011 WL 3516154 (S.D.N.Y. Aug. 3, 2011), *aff'd*, 492 Fed. Appx. 150 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1473 (2013).

to consider what principles should guide discretion under Article V(1)(e) when the underlying award, unlike the award in *Baker Marine*, has no meaningful relationship to the seat of the arbitration.

The district court in *Thai-Lao Lignite*, constrained by, but evidently comfortable with, the present state of U.S. law, took the “primary jurisdiction”/“secondary jurisdiction” theme as the central analytical premise of its decision. Indeed, even though the Second Circuit in *Baker Marine* had not adopted that terminology, the district court interpolated it into its understanding of *Baker Marine* as controlling precedent, stating that “the Second Circuit Court of Appeals held that where a court with primary jurisdiction over an arbitral award issues a decision setting aside the award, U.S. courts will honor that decision in the absence of an ‘adequate reason’ not to do so.” The district court made the same interpolation of “primary” and “secondary” jurisdiction into its reading of *TermoRio*, stating that “the D.C. Circuit Court of Appeals held that normally a court sitting in secondary jurisdiction should not enforce an arbitral award vacated by a court with primary jurisdiction over the award, but that there are certain circumstances in which doing so may be appropriate.”<sup>28</sup> Reviewing the record concerning the proceedings in the Malaysian court, and comparing them in particular to *Pemex*, the district court concluded, “[T]he alleged errors Petitioners point out in the proceedings before the Malaysian courts and in the judgments of those courts do not rise to the level of violating basic notions of justice such that the Court here should ignore comity considerations and disregard the Malaysian judgments.”<sup>29</sup> The court offered no analytical foundation for finding “comity considerations” to be present in the New York Convention recognition context to the same extent as if the court were giving recognition to a merits judgment of a case litigated in the Malaysian courts, but obviously the court assumed that essentially the identical comity considerations applied. Said the court, “The Court will not disregard comity considerations and refuse to recognize the Malaysian courts’ judgments unless Petitioners can demonstrate that the process before the Malaysian courts ‘violated basic notions of justice.’”<sup>30</sup>

## VI. FRENCH CUISINE FOR THE AMERICAN PALATE: MORSELS OF DELOCALIZATION FOR THE TERRITORIAL JURIST

None of this American case law discusses or refers to the existence of the distinctly different French case law approach to the question of whether recognition and enforcement may be given to an award that has been set aside by a court at the seat of the arbitration. To some this will seem neither surprising nor disconcerting, as the question presented appears to be a question of U.S. law concerning the *res judicata* effect in the United States of a foreign judicial judgment. To others, the question presented concerns the proper application of the

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<sup>28</sup> *Thai-Lao Lignite*, 2014 WL 476239 at \*4-5.

<sup>29</sup> *Id.* at \*7.

<sup>30</sup> *Id.* at \*8.

New York Convention, whose application should produce disparate approaches and different results in the courts of different Contracting States only if there are compelling reasons for such disparity. And to analyze the question of whether disparity in approach is justified, the approaches taken elsewhere by courts that have given serious thought to the question ought to be examined by U.S. judges.

The *Putrabali* case from the French *Cour de Cassation*,<sup>31</sup> effectively the latest standard-bearer for the French law approach, is a useful point of departure for this discussion.

*Putrabali* was a relatively straightforward sale of goods case, involving a shipment of pepper from an Indonesian seller to a French buyer, and the parties agreed to resolve disputes by arbitration under industry arbitration rules with the seat of arbitration in London. The shipment sank at sea, and arbitration ensued. An umpire rendered an award that the buyer should pay the purchase price despite the loss at sea. The buyer appealed on points of law to the English High Court, as provided in the English Arbitration Act 1996. That court set aside the award in part and remitted the case to arbitration, wherein a second award was rendered in favor of the seller directing the buyer to pay. Prior to the second award, but subsequent to the UK partial annulment of the first award, the seller sought recognition and enforcement in France of the first award.

Had the seller presented the annulled award for recognition and enforcement in the United States, its chances of prevailing would probably have been nil. The parties agreed to arbitrate in the UK; UK arbitration law provided for review on points of law; there was no procedural irregularity or due process violation in the UK court; and there was no claimed egregious error in the UK court's application of UK law.

It will be useful in view of the objectives of this article to address the French *Cour de Cassation's* reasoning in the *Putrabali* case in terms of its resemblance to or difference from principles that a U.S. court could be expected to apply in the same context. First, the court by recognizing and enforcing the award in effect declared that the fact that the award had been annulled by the court at the seat of the arbitration did not cause the award to become non-existent. As far as this goes, U.S. law is not truly different (overlooking as I suggest we should a regrettable *dictum* in the *TermoRio* decision that was entirely unnecessary to the outcome,

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<sup>31</sup> Sté PT Putrabali Adyamulia, Cass Civ. 1, June 29, 2007, available at the website of the *Cour de Cassation*, section "jurisprudence," [http://www.courdecassation.fr/jurisprudence\\_publications\\_documentations\\_2/actualite\\_jurisprudence\\_21/premiere\\_chambre\\_civile\\_568/arrets\\_569/br\\_arret\\_10607.html](http://www.courdecassation.fr/jurisprudence_publications_documentations_2/actualite_jurisprudence_21/premiere_chambre_civile_568/arrets_569/br_arret_10607.html). Readers with ambition to pore through the vast outpouring of French and European commentary that ensued within the first year after *Putrabali* should take advantage of the annotations in Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24 ARB. INT'L 277 (2008). Anglophones with less ambition might read Mr. Pinsolle's article, and the translation of the decision that appears as an Appendix thereto. For an American rendition of the French case law, see Carolyn Lamm, *Comments on the Proposal to Amend the New York Convention*, in 50 YEARS OF THE NEW YORK CONVENTION, *supra* note 9 at 697, 699-700.

and contradictory to the balance of the decision), as U.S. law regards the *application for* recognition and enforcement of the annulled award as jurisdictionally sound under Chapter Two of the FAA, and uniformly accepts that there is discretion conferred by Article V(1)(e) to recognize and enforce the annulled award. Second, the French high court and the U.S. courts share a common understanding of the import of Article VII of the New York Convention: if the domestic arbitration law, applicable to foreign awards, of the State where recognition and enforcement are sought permits recognition and enforcement in circumstances where the Convention would permit refusal of recognition and enforcement, the domestic law should prevail. The main difference is that the U.S. district court in *Chromalloy*, the only U.S. decision that relies upon Article VII, misapplied U.S. domestic arbitration law (because the applied law was not applicable to foreign awards), while the *Putrabali* court applied French arbitration law quite precisely. Unlike Chapter One of the FAA, French arbitration law<sup>32</sup> specifies the grounds on which a French court may refuse recognition and enforcement of a foreign award, and annulment of the award by a court at the seat of the arbitration is not among those grounds. The *Cour de Cassation* could have relied entirely on the Article VII rationale, this ground having been entirely sufficient to dispose of the case, and had it done so one could say that, as far as *Putrabali* goes, it was doctrinally in step with American case law. The underappreciated significance of Article VII, in the U.S. case law, is that it disproves the notion that the Convention *mandates* (absolutely or presumptively) a transnational legal effect for Seat State annulments. Article VII permits every Contracting State to decide as France has decided: that a Seat State annulment shall not be a ground for refusal of recognition.<sup>33</sup>

Instead the French court appeared to endorse the position developed by French scholars and accepted by the subordinate but respected French Court of Appeal for at least 13 years since *Hilmarton*<sup>34</sup> in 1994: that “an international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.” Here is not the place to debate whether indeed, as French commentators

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<sup>32</sup> Precisely, Section 1514 of the French New Code of Civil Procedure provides: “An arbitral award shall be recognized or enforced in France if the party relying on it can prove its existence and if such recognition or enforcement is not manifestly contrary to public policy.” (English translation found at [www.parisarbitration.com](http://www.parisarbitration.com), last visited June 26, 2014).

<sup>33</sup> See Alan S. Rau, *Understanding (and Misunderstanding) Primary Jurisdiction*, 21 AM. REV. INT’L ARB. 47, 106 (2010): “[I]t does not at all follow that [the] ‘supervisory function’ of the courts at the seat must be in any way a permanent or necessary feature of the Convention structure: States of secondary jurisdiction may after all arrogate this function to themselves – they may, that is, simply legislate the seat into irrelevance. However one feels about the French statute, it is at least a gratifying model of clarity in this respect.”

<sup>34</sup> Cass. Civ. 1, March 23, 1994.

of a certain school of thought are wont to assert, the *Cour de Cassation* embraced the notion of an “arbitral legal order.”<sup>35</sup> Read in isolation from French doctrine advocating the existence of an “arbitral legal order,” the *Cour de Cassation*’s parsimonious opinion might be said only to contest the notion of “anchoring.” This might only mean that the Court believed that the connection of the award to any one legal system, whether that of the Seat State or otherwise, has no necessary legal consequences beyond that State’s borders. As to this narrow proposition, American law is actually in partial agreement: there is no expectation that an American judgment granting or denying recognition and enforcement of an international award made at a U.S. seat should be entitled to *res judicata* effect in a foreign court, or that the refusal of a foreign court (whether at the seat or elsewhere) to recognize an award under the Convention would in any way constitute a *per se* preclusion of an application for U.S. recognition and enforcement. But when the foreign judgment is an annulment rather than a refusal of recognition and enforcement, American law does more or less recognize “anchoring” in the Seat State’s legal system. No American court has yet specifically examined whether this distinction is justified. If the award of a panel of three arbitrators of U.S. nationality applying New York law and sitting in Malaysia is denied recognition by a Malaysian court under the New York Convention because the arbitral procedure was not in accordance with the agreement of the parties, that question is addressed afresh, and with deference to the arbitrators, if an application under FAA Chapter Two is made in the U.S. to recognize the same award.<sup>36</sup> But if the award debtor applied under the Malaysia arbitration statute to annul the award on precisely the same ground (under an arbitration statute based on the UNCITRAL Model Law that incorporates the Article V non-recognition grounds as annulment grounds), and prevailed, U.S. courts if they follow existing decisions might well view the award as a Malaysian award and would consider that if they should refuse to respect the annulment it would be an unacceptable affront to the Malaysian State, foreclosed by “comity” principles, unless the Malaysian procedure was transparently corrupt, biased, or lacking in due process. It cannot reasonably be contended that the New York Convention *mandates* these contradictory positions.

American judges (and those who might try to persuade them) should ask: What distinguishes a Seat State decision to annul the award, in terms of U.S. *res judicata* effect, from a Seat State decision merely to refuse recognition under the Convention? The parties’ (or an arbitral institution’s) designation of the seat of

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<sup>35</sup> For more analysis of *Putrabali*, see, e.g., JEAN-LOUIS DELVOLVÉ, JEAN ROUCHE & GERALD H. POINTON, FRENCH ARBITRATION LAW AND PRACTICE: A DYNAMIC CIVIL LAW APPROACH TO INTERNATIONAL ARBITRATION § 417 at 233 (2009). These authors note that in the original French the *Cour de Cassation* termed the award “*une décision de justice internationale*,” which the authors suggest is best understood in English as “an adjudication made by an autonomous jurisdiction of international arbitration.”

<sup>36</sup> See *Thai-Lao Lignite (Thailand) Co. Ltd. v. Government of the Lao People’s Democratic Republic*, 2011 WL 3516154 at \*15-\*21 (S.D.N.Y. Aug. 3, 2011), *aff’d*, 492 Fed. Appx. 150 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1473 (2013)

the arbitration is not a sufficient answer, because if the designation connotes agreement of the parties to give transnational legal effect to Seat State judicial control over the award, there should be no difference in the transnational legal effect given to a Seat State annulment and a Seat State non-recognition.

The implicit premise of U.S. law and the territorialist view in general is that the parties’ choice of the seat (or for that matter an institutional designation of a seat, pursuant to an authority granted by the parties through adoption of institutional rules) domesticates the arbitration, *i.e.*, it causes the foreign arbitration to take on the predominant character of a *domestic arbitration within the Seat State*. And from that perspective, the U.S. decisions can be sensibly explained: Arbitration within a foreign State is legitimate only to the extent that the State legitimates it, and so if a Malaysian court annuls a Malaysian award, on legitimate Malaysian arbitration law grounds, recognition of that award can be seen as an encroachment on Malaysian sovereignty. But what if the award has been pronounced by three New York arbitrators under New York law between Thai and Laotian parties, and what if the Malaysian court employs a provision of its law for merits review of the New York law decision and second-guesses the New York arbitrators? The perception of the award as a domestic Malaysian instrument disregards its fundamental attributes. The award is international, and the French *Cour de Cassation* is correct to view international arbitration awards as such – perhaps less defensibly by applying a *per se* rule than doing so on a case-by-case basis. My example is more extreme than *Putrabali*, as the applicable law in that case was English law and so an argument can be made that the parties there had agreed to Anglicize their arbitration.<sup>37</sup>

The fundamental conflict between the U.S. law, and the French law as pronounced in *Putrabali*, is that the French law declares the “*international arbitration award*” in that case to be an “*international judicial decision*.” U.S. law needs to develop a principle, consistent with U.S. doctrine and flowing from it, that distinguishes for different treatment under Article V(1)(e) those annulled foreign awards whose character is predominantly international.

For certain purposes U.S. law quite legitimately does not distinguish between “foreign” and “international” proceedings and tribunals. Under the New York Convention as implemented by FAA Chapter Two, an award made in Peru between a Peruvian private commercial entity and the Peruvian State concerning Peruvian contract rights invokes federal jurisdiction just as effectively as does an award made in Peru between Brazilian and Uruguayan private commercial parties fighting over land development in Colombia. The Convention makes no distinction between foreign and international, but only refers to awards “not considered as domestic” in the country where recognition and enforcement are

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<sup>37</sup> Whether *Putrabali* would have been decided the same way if one or both parties had been British and the shipment had been destined for a U.K. port is an interesting question that we need not resolve here. The *Cour de Cassation* did not go so far as to declare that *all foreign-made awards* presented for recognition in France are “international legal decisions.”



sought. Under 28 U.S.C. §1782, the so-called foreign judicial assistance statute, the support of a U.S. court to obtain evidence for use in “foreign or international tribunals” is offered on the same grounds whether the “tribunal” involved is a domestic court in another country hearing a domestic case, or is a truly “international” adjudicative body such as an arbitral tribunal constituted pursuant to the dispute resolution clause of a BIT.

But in the context of the proper application of discretion under Article V(1)(e) with respect to a foreign annulment, the French are onto something when they say an arbitral award between Indonesian and French parties made in London is “an international judicial decision” (even if a closer look at the facts might support the view that the parties had Anglicized their arbitration<sup>38</sup>), and we Americans should take heed. It is little more than a rule of judicial convenience to attribute, as U.S. courts do, to each and every agreement of parties on a seat of arbitration that they wish to confer *transnational* authority on the Seat State court’s rulings upon the validity of the award according to the Seat State’s domestic arbitration law.<sup>39</sup> That is the kind of “arcane” legal question to which parties are unlikely to have given much thought at the time of entering into a commercial agreement containing an arbitration clause, and is contrary to the common understanding that a predominant attraction of international arbitration by virtue of the New York Convention is the international portability of the resulting award. This rule of convenience does not often enough correspond to both parties’ true intentions to justify its systematic application. If we look at the *Thai-Lao Lignite* case, for

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<sup>38</sup> Richard Hulbert examined the details of the arbitration agreement in *Putrabali* and found considerable evidence that the parties did indeed intend to “attach” their arbitration to the English “legal order,” going so far as to accept English judicial review on points of law despite the ability under the Arbitration Act 1996 to opt out of such merits review. He therefore questioned whether the *Cour de Cassation* in future cases might elect not to adhere to an “implacable” position that awards are not attached to the legal order of the country of origin, but might allow that a clearly expressed mutual intention of the parties to foster such an attachment would be respected in the context of a proposed French recognition of an annulled award. See Richard W. Hulbert, *When the Theory Doesn’t Fit the Facts: A Further Comment on Putrabali*, 25 *ARB. INT’L* 157 (2009). We may read Mr. Hulbert’s remarks as support for the position that judicial inquiry into the intention of the parties with respect to the “attachment” issue is appropriate in any judicial system that premises its arbitration law on party autonomy, and that evidence of mutual intention of the parties *not to* have their arbitration “attached” to, or “integrated” into, the “legal order” of the place of arbitration should be a factor weighing against presumptive *res judicata* effect for a foreign award annulment judgment.

<sup>39</sup> Professor Rau citing mainly English cases characterizes this judicial attitude as “the *intuition* that, by extension, [the parties by choosing the seat] have *presumptively* chosen to subject themselves both to a certain body of ‘arbitration law,’ and to the supervisory jurisdiction of the courts charged with applying that law.” Rau, *supra* note 33, at 66 (emphasis supplied). But as the cases Professor Rau cites illustrate, this is indeed a judicial exercise in intuition and presumption, more of a way of providing architecture for an edifice of arbitral jurisprudence than a serious attempt at discerning the intention of the contracting parties.

example, why would a U.S. court presume that the parties intended to give transnational legal effect to a Malaysian court’s rulings on the validity of the award under Malaysian domestic arbitration law, when the parties were a private entity of Thai nationality and the Laotian State, the dispute concerned the production of electricity in Thailand to be supplied to the Laotian State in Laos, the agreed substantive law was the law of New York, and the tribunal consisted of three New York lawyers? Absent specific evidence of a contrary intention, should not the operative presumption about the mutual intention of the parties in the selection of Kuala Lumpur as the seat of the arbitration, based on the objective indicia of party nationality, chosen seat, geographic locus of the dispute, chosen substantive law, and nationality of the chosen arbitrators, be that the parties bargained for an “international” arbitral adjudication whose possible annulment at the seat would have legal effect only at the seat, but whose international currency would be tested everywhere according to international standards, *i.e.* the New York Convention and any more liberal enforcement regime in a recognition State (as provided in Article VII of the Convention)?<sup>40</sup>

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<sup>40</sup> Professor van den Berg has led the charge for the territorialists, as much as Professors Paulsson and Gaillard appear to have led the delocalizers. *See, e.g.*, Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, April 28, 2009*, 27(2) J. INT’L ARB. 179 (2010). But his principal arguments are unconvincing. In the United States, France and the Netherlands, at least, the linguistic battle over whether the Article V(1) prefatory phrase “may only be refused if . . .” does in fact confer discretion to recognize and enforce an annulled award, has been resolved in favor of such discretion. The argument that “chaos” in the form of an endless string of recognition proceedings would ensue if the competent court at the seat could not furnish an annulment having transnational effect is at odds with the New York Convention itself: The Convention did away with the “double exequatur” (*i.e.* a confirmation judgment at the seat as a precondition to enforcement elsewhere), and the Convention embraces such “chaos” by permitting an unlimited series of recognition proceedings in different Contracting States, limited only by the practical futility of the endeavor and the persuasiveness of prior judgments granting or refusing recognition in another Contracting State. The argument that the Convention makes no reference to procedural infirmity in the annulment proceedings as a basis to deny *res judicata* to the annulment judgment is also readily answered: the Convention drafters elected not to legislate on this matter, but only to lodge discretion in the courts of Contracting States (both to recognize annulled awards, and to proceed with recognition notwithstanding a pending annulment proceeding).

Finally, I note that the position advocated in the text provides an answer to the “comity” concern – the concern that recognition courts are placed in the diplomatically untenable position of judging the independence and integrity of annulment courts. If the parties’ choice of the seat of arbitration is held not to include an intention to confer transnational effect on an annulment judgment, the denial of *res judicata* effect to such a judgment rests on the politically neutral ground of the intention of the parties.

Treatment of award vacatur judgments under the conventional U.S. framework for giving *res judicata* effect to foreign judgments, which is essentially the current U.S. approach in the Second and D.C. Circuits, has a respectable pedigree in the literature.<sup>41</sup> But recent scholarship develops persuasively the notion that a foreign judicial judgment concerning an arbitral award is a singular archetype that should be treated differently.<sup>42</sup> Indirectly taking issue with the U.S. case law, Professor Scherer asserts that it “makes little (or no) sense to give effect to an ancillary judgment based on a comity analysis. If anything it seems more logical to pay respect to the initial adjudication” – as it is first in time and the only adjudication that deals with the merits.<sup>43</sup> This seems correct but does not go far enough in developing the anti-comity rationale. The point is that *international* arbitral tribunals functioning within the framework of the New York or Panama Conventions have an international legal status that has an equivalent claim to comity with the courts of any Seat State. American judges need not accept the French view that international arbitral tribunals are fully “detached” from the State which functions as the seat. They need only accept that such arbitral tribunals, creatures of the agreement of the parties more than they are creatures of the law at the seat, have an international legal status derived from the Conventions that differentiates them from domestic arbitral tribunals in a foreign State and subordinate municipal courts in that State. And the consequence of that status is that – subject to the clearly expressed common intention of the parties in the agreement – the tribunal’s award and the annulment judgment of a Seat State court ought to start out before a U.S. Court with, at best, merely equivalent claims to deference. And that would lead to the conclusion that no presumption in favor of respecting the foreign court annulment should be applied when non-recognition is urged under Article V(1)(e).

#### VII. WHAT DOES AGREEMENT ON THE SEAT OF ARBITRATION REALLY MEAN? – A POTENTIAL LESSON FROM THE UNUSUAL CASE OF SERBIA AND MILOSEVIC

Granted that the United States courts are unlikely to embrace the de-localization paradigm that underlies the French case law on enforcement of annulled awards. But it remains possible that U.S. court decisions on this question might become more consistent with French doctrine if the question of what

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<sup>41</sup> See William W. Park, *Duty and Discretion in International Arbitration*, 93 AM J. INT’L L. 805, 825-28 (1999).

<sup>42</sup> See Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the ‘Judgment Route’ the Wrong Road?*, 4(3) J. INT’L DISPUTE SETTLEMENT 587 (2013). Professor Scherer correctly observes that the U.S. case law has more or less followed the foreign judgments *res judicata* approach (confirmed in the *Pemex* and *Thai-Lao Lignite* cases that post-date publication of her article), and observes (also correctly) that this has been done “with no or little reflection as to whether it is appropriate to apply foreign judgment principles to this specific category of judgments.” *Id.* at 604.

<sup>43</sup> *Id.* at 610-11.

consequences flow from the parties’ choice of the seat of arbitration, in terms of the supervisory role of Host State courts, were open to being decided in a more nuanced and precise fashion. This would be based on the actual intent of the parties, including in case of doubt, their reasonable expectations in the context of the making of the agreement. Stated another way: If the parties might have agreed to arbitrate somewhere else entirely, do they not also have a subsidiary autonomy to impose certain express (or implied in law) conditions on the selection of the seat that affect those powers of the Seat State’s courts over the destiny of the award?

There is a legal presumption that underlies the U.S. approach that is not so much a territorial presumption but a contractual one: that it was the mutual intention of the parties in agreeing to arbitrate their disputes in Host State X that the arbitration law of X would determine the international enforceability of the award in the event that the award’s alleged invalidity under the arbitration law of X were raised in an annulment proceeding. It is the agreement of the parties that confers power on the Host State’s courts, not the laws of the Host State (because the parties could opt out of them by arbitrating elsewhere) and not any overriding territorial principle of international law as evidenced by the fact, recognized in the New York Convention, that parties might conceivably agree to arbitrate physically in Host State X but under the arbitration law of Non-Host State Y.

The illogic of attributing to the agreement of the parties an *unqualified* and *wholesale* attachment to the legal system of the place of arbitration might usefully be considered from the perspective of the situation, however unusual, where circumstances that arise after the making of the arbitration agreement render the chosen place of arbitration unsuitable. Some 15 years ago I had occasion to represent (with estimable collaborators) an American claimant in an arbitration under the ICC Rules against the Republic of Serbia and a Serbian State-controlled entity, under a contract that had been signed in 1990 when the Federal Republic of Yugoslavia remained a unified federal State. The parties had agreed at that time that Belgrade, Yugoslavia would be the seat of arbitration. At the time the arbitration began in 2000, Yugoslavia had fractured into at least three and perhaps four sovereign States, and Serbia (where Belgrade was situated) had come under the control of the regime of Slobodan Milosevic who, among his many misdeeds, it was alleged, had largely done away with the independence of the judiciary and rendered the Serbian courts mere puppets of the regime. The claimant submitted to the ICC Court that there was no *extant* agreement of the parties on the place of arbitration, as the place chosen in 1990 did not any longer exist in a juridical or political sense in 2000, and on that basis claimant contended that it was for the ICC Court under the ICC Rules to make a designation of a seat of arbitration. The ICC Court charged the arbitral tribunal with the task of making the factual findings and legal conclusions germane to the claimant’s application.

Readers seeking a full account of that situation are referred to the excellent article by the late Professor Pierre Lalive, who delivered an opinion as an expert in the proceedings urging an outcome – a declaration that the original agreement on the seat of arbitration had become inoperative – that the arbitral tribunal did not

adopt.<sup>44</sup> But certainly the claimant presented a serious argument in that case that, for example, at the time it agreed that the seat of the arbitration would be in Belgrade it was a basic underlying assumption of that agreement that the domestic courts that would have competence to decide the validity of the award under Yugoslavia's arbitration law, in case the State applied to set aside the award, would not also be involved in executing the will of the Serbian State in effectuating the confiscation of the claimant's assets that formed the merits of the arbitrated dispute, *i.e.* that the courts had at least such a degree of independence from the State as a party to the contract that they would not be involved in its day-to-day performance.

It is interesting to take note that one branch of the tribunal's reasoning in that case for declining to find the seat of arbitration agreement inoperative was that the presumed eventual annulment of a final award in favor of the American claimant would not be expected to have transnational *res judicata* effect under either French case law like *Hilmarton* and (French) *Chromalloy* or American case law like *Chromalloy*.<sup>45</sup> But as we reflect on how the U.S. case law has evolved, one might wonder how a hypothetical annulled award in that case might have fared. In the relatively stabilized political environment that prevailed in Serbia in the years after the ouster of Milosevic,<sup>46</sup> some semblance of independence of the judiciary was re-established, and if the award had nevertheless been annulled, in proceedings that were not transparently lacking in procedural regularity, and for reasons not transparently pretextual, the fact that the Serbian State had acted in part through judicial decrees of those courts in seizing Claimant's investment might not have been an "adequate reason" under *Baker Marine* to disregard the Serbian annulment.

But if the legal criteria applied in American courts to decide whether to enforce the annulled award took into account not merely the traditional Restatement of Foreign Relations Law factors for deciding the *res judicata* effect of a foreign judgment, but also the actual and presumed expectations of the parties, as reflected in the choice of seat in the arbitration agreement, about the

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<sup>44</sup> Pierre Lalive, *On the Transfer of Seat in International Arbitration*, available at [www.arbitration-icca.org/media/0/12319088070580/transfer\\_of\\_seat.pdf](http://www.arbitration-icca.org/media/0/12319088070580/transfer_of_seat.pdf), originally published in *LAW AND JUSTICE IN A MULTISTATE WORLD, ESSAYS IN HONOR OF ARTHUR T. VON MEHREN* 515 (James A.R. Nafziger & Symeon Symeonides eds., 2002). For another summary of the change of seat proceedings and interim award on that question in the same case, see Matthias Scherer, *supra* note 21, at 117.

<sup>45</sup> Lalive, *supra* note 44, online version at 19.

<sup>46</sup> In fact Milosevic was voted down in an election conducted September 24, 2000 while the tribunal was either working on its interim award or awaiting the outcome of its scrutiny within the ICC Secretariat, and Milosevic, after contesting the election results, bowed to public pressure and domestic insurrection and stepped down on October 5, 2000, six days before the date of the tribunal's interim award of October 11, 2000. As to the date of the award, I rely on Professor Lalive's recollection recorded in 2002. Lalive, *supra* note 44, online version at 18 n.25. As to the parallel chronology of political events in Serbia, see *Overthrow of Slobodan Milosevic*, available at <http://en.wikipedia.org> (last visited April 14, 2014).

role of the Host State’s courts (for example, that those courts would be independent of the State party to the contract at least to the extent of not being involved in its performance), then there would be a greater prospect for recognition and enforcement despite the annulment. And the rationale for the decision would be grounded in the autonomy of the parties and the enforcement of the arbitration agreement – core values of the New York Convention and the FAA – and not in any passing of judgment about the integrity, fairness, or independence of the judiciary in the Host State.

### VIII. “FUSION” CUISINE: AMERICAN CONTRACTUALISM WITH FRENCH SEASONING?

One major difficulty from an American perspective with the French notion of an “Arbitral Legal Order” is its apparently abstract theoretical foundations. That abstraction is at odds with the pragmatic view of American law that arbitration is contractual and that the solution of most legal issues presented concerning arbitration is to determine what the parties intended, using settled principles of contract interpretation with an overlay of federal “policy” favoring arbitration. Applying this basic paradigm of American arbitration law to the question at hand, one can readily see how a *clearly expressed* will of the parties, concerning the role of courts in the Seat State, might lead to a result that conforms to the result that French theory would support.<sup>47</sup> Thus, to use the *Thai-Lao Lignite* case for discussion, the parties in selecting Kuala Lumpur as the seat and Malaysia as the Seat State might have stated expressly that the enforceability of an award outside Malaysia shall not be affected by an annulment by the competent Malaysian court.<sup>48</sup> In such case the award remains partly of the Malaysian legal order – to the

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<sup>47</sup> French theory does not claim to be divorced from the intentions of the parties. See GAILLARD, *supra* note 21, at 20: (“The only certainty is that the parties have decided to have their dispute resolved by way of arbitration and that therefore they have not, by definition, submitted such dispute to the national courts of any given country. The idea that they nonetheless implicitly accepted that the fate of their dispute be ultimately subjected to the conception of the seat’s legal order on arbitration – or, in practice, on what the courts of the seat will decide – seems questionable to say the least.”) And Professor Lalive quite properly referred to “the hierarchy of importance of the various components or elements constituting an arbitration agreement,” of which normally the first-ranking is the desire “to have a possible dispute settled not by a State Court, but by independent arbitrators of their own choice,” and the choice of the seat of arbitration “will, in most cases (but not in all) be a secondary or subordinate” consideration. Lalive, *supra* note 44, online version at 4-5.

<sup>48</sup> In fact, the parties provided in the arbitration agreement that they waived any judicial review of the award to the maximum extent permitted by law. See *Thai-Lao Lignite (Thailand) Co. Ltd. v. Government of the Lao People’s Democratic Republic*, 2011 WL 3516154 at \*3 (S.D.N.Y. Aug., 3, 2011), *aff’d*, 492 Fed. Appx. 150 (2d Cir. 2012), *cert. denied*, 133 S.Ct. 1473 (2013). That clause could readily be interpreted as meaning that any judicial review of the award in Malaysia would have no legal effect outside Malaysia to the extent that a court outside Malaysia could, consistent with the New York Convention and applicable arbitration law, refuse to give effect to the Malaysian judgment.

extent that Malaysian law asserts the right to exercise control over arbitrations that take place within its borders and thereby to deny legal effect within its borders to an award annulled by its courts. But the award also becomes part of the “arbitral legal order.” That is a synthetic construct, but in practice it embraces all the Contracting States of the New York Convention in which the award might be presented for recognition. It is not “a-national” except as a rejection of the nationality of the seat; it is predominantly multi-national.

American law would seem to support the enforceability of such an agreement limiting the international effectiveness of an annulment by a court at the seat. At least if the parties are not domiciled in the Seat State, they are subject to its arbitration law only by virtue of their agreement. A Seat State might legislate that its annulments will be internationally binding on the parties if they opt for the Seat State as their seat. (That this has not been widely done itself suggests how dubious it is to impute such transnational effect to a general contractual designation of an arbitral seat.) But if the parties opted to derogate from that provision of the Seat State’s arbitration law, the New York Convention and the Federal Arbitration Act would mandate enforcement of their derogation agreement.

The main obstacle to nudging U.S. case law in the direction of this contractual orientation is the nomenclature of “primary jurisdiction” and “secondary jurisdiction,” which has been adopted to define the respective powers of different courts in different States in relation to the enforceability of an international award governed by the Convention. Compounding that problem is the misconception that “primary” and “secondary” jurisdiction are constructs required by the New York Convention. What is needed is some close examination of how these concepts entered U.S. law, so that an exit strategy might be fashioned.<sup>49</sup>

Evidently the original source of the American nomenclature of “primary” and “secondary” jurisdiction was a book published by Professor W. Michael Reisman in 1992.<sup>50</sup> Professor Reisman advanced the thesis that the New York Convention mainly through Article V(1)(e) and VI allocates control over awards between courts whose *lex arbitri* applies (said to have “primary jurisdiction”), and courts asked to recognize and enforce awards (said to have “secondary jurisdiction”). Professor Reisman argued that Contracting States in their capacities as secondary jurisdictions not only cede control over an award’s validity under the *lex arbitri* to the courts of the country “in which, or under the law of which, the award was made,” but also agreed that with rare exception such control would extend to giving recognition in the “secondary jurisdiction” to the annulment judgment rendered by the “primary jurisdiction” court.

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<sup>49</sup> Elsewhere than in U.S. case law, it seems to be fairly uncontroversial and settled that the Convention “did not in any way regulate how the courts of the arbitral venue dealt with awards issued in their jurisdictions.” Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience*, 26(2) J. INT’L ARB. 267, 268 (2009).

<sup>50</sup> W. MICHAEL REISMAN, *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR* (1992).

Before any American court had occasion to consider whether to embrace Professor Reisman’s vision of the New York Convention, it was subjected to strong condemnation by Jan Paulsson (then a practicing attorney in Paris) in his seminal articles in 1997 and 1998.<sup>51</sup> Among the vulnerabilities identified: that there was no supportive indication in the *travaux*; that it was at odds with the Convention’s text which provides recognition courts with discretion to proceed with recognition of an award despite an annulment judgments and, separately, despite pending annulment proceedings; that Article VII leaves Contracting States with absolute discretion to adopt arbitration laws that permit award-recognition despite annulment under the *lex arbitri*; and that the “primary-secondary” thesis imposes on the Convention a framework closely akin to the regime of double *exequatur* whose abolition was the Convention’s main inspiration.<sup>52</sup>

Neither the Reisman view nor the Paulsson view figured in the (U.S.) *Chromalloy* or *Baker Marine* decisions. But Professor Reisman’s terminology, if not his thesis, began to find favor in American jurisprudence in the *Karaha Bodas* case in 2003. The issue in *Karaha Bodas* was not whether to disregard the annulment of an award by a competent *lex arbitri* court, but whether the Indonesian court that had annulled the award was a *lex arbitri* court at all – the arbitration having taken place in Switzerland, and the Indonesian award debtor having already sought and failed to have the award annulled in Switzerland. Professor Reisman submitted an expert report on behalf of the Indonesian party, in a losing cause, and his 1992 *Systems of Control* volume was entered as an exhibit. The district court in Houston<sup>53</sup> and the U.S. Fifth Circuit Court of Appeals<sup>54</sup> each rejected the position of the Indonesian party that Indonesia was a country “under the [arbitration] law of which” the arbitration had taken place for purposes of the U.S. court as a recognition court deciding whether to give effect to the annulment under Article V(1)(e). Both courts adopted the terms “primary jurisdiction” and “secondary jurisdiction” merely as descriptive shorthand to distinguish the function of a recognition court from the function of a *lex arbitri* court. Neither the district court nor the Fifth Circuit discussed, much less accepted, the core premise of Professor Reisman’s thesis that what is “primary” about “primary jurisdiction” is a Convention-mandated requirement that Seat State annulment judgments presumptively prevail over the underlying awards when both are presented to a recognition court (a “secondary jurisdiction”).

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<sup>51</sup> Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention*, 7 AM. REV. INT’L ARB. 99 (1997); Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standards Annulment (LSA)*, 9(1) ICC BULL. 14, at 25-28 (May 1998). Professor Gaillard criticized the Reisman thesis – without naming Professor Reisman – on essentially the same grounds. See Emmanuel Gaillard, *Enforcement of Award Set Aside in the Country of Origin*, 14 ICSID REV. 16, 33-35 (1999).

<sup>52</sup> Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding...*, *supra* note 51.

<sup>53</sup> *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 264 F. Supp. 2d 470 (S.D.Tex. 2002).

<sup>54</sup> *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357 (5th Cir. 2003).



For the past decade, this “primary/secondary” terminology has served mostly harmlessly in a descriptive role in American arbitration law,<sup>55</sup> enabling our courts to sort out whether their functions were limited to applying the Article V criteria for refusal of recognition, and occasionally, as in *Karaha Bodas*, helping them to decide whether a foreign court that had been asked to interfere with enforcement of an award had any legitimate right to do so.<sup>56</sup> But it was only for the first time in the *TermoRio* case that a U.S. court assumed, in the context of addressing whether to recognize an annulled foreign award, that “primary jurisdiction” connoted a presumptive international *res judicata* effect for an annulment judgment.

Mediating a divorce of the U.S. judiciary from its decade-long marriage to the flawed theory of “primary” and “secondary” jurisdiction will be no easy task. That is particularly so given the force of *stare decisis*, and the formidable stature of the intellectual architect of this edifice, Professor Reisman. His thesis was repeated more recently in a 2010 article.<sup>57</sup> There, he again argued that the New York Convention assigns power to annul awards to the courts at the seat of the arbitration (or, in the exceptional case, the courts of the place under whose arbitration law the arbitration was conducted).

We read in Professor Reisman’s 2010 articulation of his thesis:

[T]he legal effects which the Convention assigns to the national judicial acts of the primary and secondary jurisdictions differ significantly. The secondary jurisdiction may only decide whether or not to *enforce* the award. There are not to be any “nullificatory” consequences for decisions in secondary jurisdictions:

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<sup>55</sup> Teaching these American concepts to foreign law students and young foreign lawyers a few years ago, I used as illustrations the beloved childhood literary personalities “Thing One” and “Thing Two,” made popular in the Dr. Seuss illustrated classic *The Cat in the Hat*. Notably, Thing One and Thing Two have equal height, identical features, same-length blue hair, matching red jumpsuits, and equally ingratiating smiles. They are twins. One cannot imagine either Thing having, or asserting, primacy or hegemony over the other. The District Court and Fifth Circuit in *Karaha Bodas* might have better served our jurisprudence by adopting Things One and Two, rather than primary and secondary jurisdiction, to describe the respective roles under the Convention of *lex arbitri* courts and recognition courts. But Dr. Seuss did not testify, and Professor Reisman did.

<sup>56</sup> See, e.g., *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 748 (5th Cir. 2012); *Ingaseosas Int’l Co. v. Aconcagua Investing Ltd.*, 479 Fed. Appx. 955, 960-61 (11th Cir. 2012); *Gulf Petro Trading Co. v. Nigerian Nat’l Petroleum Corp.*, 512 F.3d 742, 746 (5th Cir. 2008); *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan, 500 F.3d 111, 123-24* (2d Cir. 2007); *Fitzpatrick Int’l Ltd. v. Republic of Equatorial Guinea*, 2013 WL 5964560 (S.D. Tex. Nov. 7, 2013); *Daebo Int’l Shipping Co. v. American Bulk Transport (BVI) Ltd.*, 2013 WL 214591 (S.D.N.Y. May 17, 2013); *Ocean Partners Holdings Ltd. v. Doe Run Resources Corp.*, 2012 WL 830486 (E.D. Mo. Mar. 12, 2012); *Dedon GmbH v. Janus et Cie*, 2010 WL 4227309 (S.D.N.Y. Oct. 19, 2010); *Four Seasons Hotels and Resorts B.V. v. Consorcio Barr, S.A.*, 613 F. Supp.2d 1362, 1370 (S.D. Fla. 2009).

<sup>57</sup> W. Michael Reisman & Heide Iravani, *Arbitration and National Courts: Conflict and Cooperation: The Changing Relation of National Courts and International Commercial Arbitration*, 21 AM. REV. INT’L ARB. 5 (2010).

they are limited to the question of enforcement and only in that secondary forum. *By contrast, nullificatory (as opposed to non-enforcement) consequences of decisions in primary jurisdictions have a universal effect. In terms of the dynamic of the Convention, once an award has been set aside in a primary jurisdiction, it is not supposed to be enforceable anywhere else.*<sup>58</sup>

As elegant as the explication of this thesis may be, it cannot be reconciled with the text of the Convention. The Convention “assigns” power to courts for only one purpose: recognition and enforcement. Convention jurisdiction is unitary, not primary and secondary. Annulment power, to exist, must have a non-Convention source, typically the legislature of the Seat State in its arbitration statute, assigning such power to its own courts. But one could imagine a Seat State’s legislature enacting arbitration legislation that purports to assign annulment power to the courts of the domiciliary countries of the arbitrating parties, or the courts of any Convention Contracting State where recognition of the award might be sought – a sort of *renvoi* relinquishment of sovereign control over arbitration awards. It may be that this almost never has happened or would happen, but if it did, how could it be said that the Seat State, assuming it is a Contracting State of the Convention, violated the Convention by doing so? What provision of the Convention could one say is violated by a Contracting State’s deliberate relinquishment of the power to annul awards? I submit that there is no such provision, and that the absence of any such provision proves that the Convention makes no “assignment” of annulment power. The Convention merely prescribes the possible consequences in a recognition court if such power exists by reason of the domestic legislation within Contracting States, and if such power is then exercised in a proper case. When annulment power is so exercised, it has such effect in a recognition court as a recognition court may elect to confer. This is what the Convention says. Professor Reisman speaks of the “*dynamic of the Convention,*” but the text of the Convention says nothing about “*universal effect*” for an annulment judgment. In fact quite the opposite is true. The annulment judgment has such effect in the recognition court as the recognition court may elect to bestow upon it. That is the unmistakable plain meaning of Article V(1)(e).<sup>59</sup>

Once American courts are satisfied that they have no presumptive treaty-based duty to respect a foreign annulment judgment,<sup>60</sup> they will be able more clearly to decide what are the discretionary grounds for doing so.<sup>61</sup>

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<sup>58</sup> *Id.* at 12 (emphasis supplied).

<sup>59</sup> For contemporary critiques of the Reisman thesis, *see, e.g.*, Luca G. Radicati di Brozolo, *The Enforcement of Annulled Awards: Further Reflections in Light of Thai-Lao Lignite*, *infra* in this issue at 47, and Luca G. Radicati di Brozolo, *The Control System of Arbitral Awards: A Pro-Arbitration Critique of Michael Reisman’s “Architecture of International Arbitration,”* in *ARBITRATION – THE NEXT FIFTY YEARS, ICCA CONGRESS SERIES NO. 16, PROCEEDINGS OF THE 50TH ANNIVERSARY CONFERENCE 74-102* (Geneva) (Albert Jan van den Berg ed., 2012).

<sup>60</sup> On the question of whether Article V should be considered to raise a presumption that the award should be refused recognition, scholars who have combed the preparatory

If presumptions are to assist in development of a more satisfactory judicial approach, they should be presumptions about the inferences logically to be drawn from the parties' choice of a seat:

*First:* when there is no evident connection of the parties or the transaction to the chosen seat, their choice might be presumed not to include transnational legal effect for an annulment under the arbitral law of the seat,

*Second:* conversely where at least one of the parties is domiciled at the seat or the contract is substantially connected to the seat, it may be presumed that the parties by selecting the seat intended the courts at the seat to be available as the ultimate arbiters of the award's eligibility for recognition anywhere.<sup>62</sup>

*Third:* when the parties fail to choose a seat and one is selected by an institution, the substantiality of the parties' and the transaction's connections to the seat would weigh heavily in deciding whether to give presumptive

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drafts of the Convention and analyzed its texts in the various official languages have found no support for this view. Further, the view that such a presumption would be a type of anti-enforcement bias in what is intended to be a pro-enforcement treaty has been credited to a source no less formidable than the late (and much admired) Professor Pierre Lalive. See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding...*, *supra* note 51 at 17 n.11.

<sup>61</sup> From the fact that the Convention does not empower *lex arbitri*-State courts to annul awards, it follows of course that the Convention does not specify the grounds on which the courts of the *lex arbitri* State might annul an award. The non-enumeration in the Convention of annulment grounds (and consequent non-limitation of such grounds) is regrettably understood in U.S. law to be a Convention "mandate" for courts of the *lex arbitri* State to apply the "full panoply of domestic law grounds" for annulment, and to have such application sustained by a recognition court. But grounds for annulment contained in the arbitration law of the *lex arbitri* state have no status as a basis for refusal of recognition under Article V unless there has been an annulment judgment in the *lex arbitri* State. Were this feature of the Convention merely an indication that the drafters viewed the *lex arbitri* court as more adept at the application of the *lex arbitri*, one would expect the Convention to have given mandatory rather than discretionary effect to the *lex arbitri* court's judgment. And if the discretion were meant to be limited to an assessment of whether there was due process in the proceedings before the *lex arbitri* court, it would have been simple enough so to confine the recognition court's discretion.

<sup>62</sup> Such a presumption might seem to support the much-criticized outcome in the *TermoRio* case, but I submit that on the facts of that case the presumption would be rebutted. The parties' express agreement to arbitrate under ICC Rules indicated a common intention that Colombia's courts could not negatively determine the eligibility of the award for recognition outside Colombia by annulling the award precisely because ICC Rules rather than Colombia Chamber of Commerce Rules were adopted and applied.

Professor Smit proposed that American courts should consider adoption of a bright-line rule of discretion such that they would disregard all annulments that relieve a home State party – whether a State entity or merely a citizen – of an arbitral defeat sustained at home. See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 304 (2007). The feature of the proposal that most obviously commends it is to enable U.S. judges to avoid, as a matter of uniform principle, making judgments about the relative presence or absence of bias and corruption in foreign judicial systems.

international force to an annulment. If the institution selects an un-connected seat on the basis of convenience and neutrality, there is little reason to impose on the parties a presumptive transnational primacy of the Seat State’s court’s decision to annul the award.

American judges when next faced with the question of whether to enforce an annulled foreign award would do a service to international arbitration by examining carefully the premises on which they might proceed. If the New York Convention itself does not mandate presumptive non-recognition of an annulled award, then such a presumption should be rejected as an element of American law unless the presumption has a different and more defensible source, such as the parties’ arbitration agreement. And if “comity” is to remain as the central guiding concept for the exercise of discretion under Article V(1)(e), then American judges should provide a defensible rationale for regarding the judiciary at a foreign seat of arbitration as the legitimate arbiter of the international enforceability of the award and not merely of its enforceability within the country of origin. They should resist the temptation to assume that “primary” jurisdiction is a concept found in the Convention, and recognize that it is only an American jurisprudential shorthand that merely identifies the nationality of courts that have the power of annulment but does not provide meaningful support for the international *res judicata* portability of the annulment judgment. The portability issue, it is submitted, ought to be determined according to the intentions of the parties as determined from their arbitration agreement. This approach not only aligns the jurisprudence of recognition for annulled award with the central contractual paradigm of U.S. arbitration law, but steers courts away from the sort of explicit or implicit judgments about the annulment standards at the seat of arbitration or the fairness of procedures in the Seat State courts that, if made, do indeed raise the kinds of foreign relations concerns that our courts understandably wish to avoid.

## IX. CONCLUSION

“Primary Jurisdiction” and “Secondary Jurisdiction” are unhelpful constructs when U.S. courts must elect whether to give *res judicata* effect to a foreign annulment judgment, or recognition and enforcement under the New York Convention to the arbitral award which that judgment annuls. A Seat State confers “Primary Jurisdiction” on itself by enacting arbitration legislation. But it is the parties to the arbitration agreement, not the Seat State, who decide the *transnational* legal effect of Seat State annulments. The intention of the parties should control. If U.S. courts address the issue of recognition for annulled awards from the perspective of what relationship with the Seat State the parties intended to have, they will arrive at outcomes that are more in harmony with the objectives of the New York Convention, more often properly treating foreign awards as international awards rather than as domestic awards made within a foreign state.

