Recognisability and enforceability of annulled foreign arbitral awards: practical perspectives of enforcing countries

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Recognisability and Enforceability of Annulled Foreign Arbitral Awards: 
Practical Perspectives of Enforcing Countries

Nobumichi Teramura

Abstract

The New York Convention left ambiguities regarding recognition and enforcement of foreign arbitral awards set aside in the country of origin. Especially, there are some controversies over Article V (1) (e) and/or Article VII (1) of the convention. Such discussions have taken place not only in the practice of international commercial arbitration, but also in the academic field of arbitration.

This paper aims at proposing practical approaches which enforcing courts may adopt when they deal with recognition and enforcement of annulled foreign arbitral awards. To attain this objective, it will compare and contrast arguments advocated by scholars or practitioners. Through this analysis, this paper suggests that the enforcing courts would take certain steps when they examine recognisability and enforceability of foreign annulled arbitral awards.
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A) Introduction

I) Today’s International Commercial Arbitration

The world is globalizing. With increasing ease and fluidity, people, commodities, and monies are moving across the world. Globalisation has been a factor in creating ever more complex legal disputes, involving parties from different countries, cultures and legal backgrounds. Such circumstances have made parties need to share a method to settle disputes, which is different from litigation (Wahl 1999 p.131).

‘International arbitration has become the established method of determining international commercial disputes (Redfern 2004 p.1).’ It is a private method of dispute resolution, selected by the parties themselves as an effective way of solving disputes between them, without recourse to national court proceedings (Redfern 2004 p.1). Thus, arbitration gives parties substantial autonomy and control over the process of resolving their disputes. This feature is quite crucial in international commercial arbitration because parties do not desire to be subject to the jurisdiction of the other party’s court system fearing the other party’s ‘home court advantages’ thereby seeking a more neutral forum (Moses 2011 p.1).

In addition to those fundamental factors, one of the motivations behind resorting to arbitration is its final and binding arbitral award that cannot be challenged in other proceedings and will be directly enforceable by a court action both nationally and internationally (Blackaby and Partasides 2009 p.32). Such arbitral award is ensured so long as submissive parties may voluntarily implement their obligation once the tribunal issued arbitral awards. However, no one prefers losing. Therefore, there is no surprise that a client disappointed with an arbitral award asks his lawyer, ‘How can I appeal (Craig 1988 p.177)?’ Since appeal to a higher level court is generally
prohibited in arbitration, parties can challenge arbitral awards only if there are some defects in the proceeding (Moses 2011 p.2). They can try to vacate the awards in the court of the seat of the arbitration and can seek the enforcing courts to refuse enforcement of the awards (Id. p.3).

II) Annulment of Arbitral Awards

In most jurisdictions, an arbitral award is presumed as final and binding. Nevertheless, arbitration legislation of almost all countries provide limited avenues for challenging the award (Born 2012 p.303). ‘These avenues include seeking to annul (or “set aside” or “vacate”) an award under the arbitration legislation, and in the courts, of the arbitration (Born 2012 p.303).’

Recently, many countries have a similar or almost identical rule on the annulment of arbitral awards because an increasing number of countries have adopted the same model law. In 1985, the General Assembly of the UN adopted Model Law on International Commercial Arbitration of the UNITRAL (hereafter UNCITRAL Model Law), which was later amended in 2006. However, it is just a guidance for legislators (Pavic 2010 p.152).

III) Legal Frameworks of Recognition and Enforcement of Foreign Arbitral Awards

1) Substance of recognition and enforcement

Recognition and enforcement are different. ‘An award may be recognised without being enforced. However, if it is enforced then it is necessarily recognised by the court which orders its enforcement (Redfern 2004 p.515).’ Thus, it is appropriate to distinguish ‘recognition’ from ‘enforcement.’

(1) In this paper, nullification maintains same meaning as those words.
a) Recognition

Recognition means the integration of the award into the legal system of the state whose court is recognising the award, and the extension of res judicata effect to the concluded disputes (Alfons 2010 p.17).

Recognition without enforcement is a defensive process. It is mainly carried out when the prevailing parties in arbitral proceedings purport to suggest that the dispute has already been settled by requesting a court to identify the award as ‘valid and binding’ on the parties (Blackaby and Partasides 2009 p.627).

b) Enforcement

In contrast to recognition, enforcement is an offensive action. When parties request a court to enforce an award, they ask not only to recognise the award, but also to ensure that it is carried out, by using legal sanctions that are available (Redfern 2004 p.516). In that sense, enforcement goes step further from recognition.

2) Relevant legal documents on recognition and enforcement of annulled foreign arbitral awards

Recognition and enforcement of arbitral awards beyond the jurisdiction of the relevant state are governed by regional and international, bilateral and multilateral agreements (Alfons 2010 p.18). Among them, one of the most predominant treaties is The Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter, the New York Convention), which was signed in 1958. This convention applies to recognition and enforcement of foreign arbitral awards and the referral by a court to arbitration. Approximately, 150 countries around the world have signed the convention to date. As stated below, the New York Convention
poses serious issues on recognition and enforcement of foreign arbitral awards set aside in the country of origin.

In addition, the UNCITRAL Model Law also relates to the recognition and enforcement of foreign arbitral awards as Article 35 and 36 of the Law cover recognition and enforcement of foreign arbitral awards.

3) Lack of clarity of the guidance provided by the New York Convention

The New York Convention sets the guidance for the enforcement of nullified arbitral awards. Article V (1) (e) of the New York Convention provides that ‘[r]ecognition and enforcement of the award may be refused ⋅⋅⋅ if [t]he award⋅⋅⋅ has been set aside⋅⋅⋅ by a competent authority of the country in which, or under the law of which, that [the] award was made [emphasis added].’

However, Article VII (1) of the New York Convention may also be applied to enforcement of annulled arbitral awards. Article VII (1) of the Convention provides that ‘ [t]he 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 law or the treaties of the country where such award is sought to be relied upon.’

These two articles, Articles V (1) (e) and Article VII (1), have given rise to two different schools of thought on the enforcement of arbitral awards annulled in their home jurisdictions (Koch 2008 p.268). The first approach is founded on Article V (1) (e) while the second approach is based on Article VII (1) of the convention, which is known as the more favourable right provision (Koch 2009 p.268).

In addition, there remains other uncertainties, which derive from wordings of Article V (1) (e) of the New York Convention. Especially, the
term ‘may’ is the cause of controversies concerning in which situation the enforcing courts should refuse recognition and enforcement of set aside arbitral awards. This paper will examine discussions on these issues in theory and practice.

IV) Purpose of This Paper and Methodology

Despite the multitude of international or national legislation, uncertainty still remains. For an example:

When an English court decides to annul an arbitral award, applying UK Acts, where an arbitral tribunal rendered the arbitral award, it does not always mean the award is effectively null and void. Instead, the initially prevailing party may still be granted enforcement of the award in other countries where the losing party keeps their assets, for example, in Japan.

Such a possibility that a losing party can enforce the arbitral awards regardless of the previous annulments by competent courts in the forum state has been one of the most hotly debated subjects (Gaillard 2007).

The purpose of this paper is to identify a practical approach for enforcing courts to address the recognition and enforcement of annulled foreign arbitral awards while taking into account legal frameworks of international commercial arbitration, especially, the New York Convention. To do that, it will mainly focus on issues concerning the application of Article V (1) (e) or/and Article VII (1) of the New York Convention. Hence, this paper proceeds as follows: First, as a preliminary discussion, it will evaluate some theoretical controversies which may affect the application of the both Articles. Next, as a first discussion, interrelationships between Article V (1) (e) and Article VII (1) of the convention will be analysed. Then, as a second discussion, it will examine issues surrounding Article V (1) (e) of the
convention. Finally, it will propose an approach for recognition and enforcement of annulled arbitral awards under the current New York Convention regime. Through this analysis, it will argue that enforcing courts would apply Article VII (1) of the convention if there are any domestic laws which are more pro-enforcement than the New York Convention. Otherwise, the countries would apply Article V (1) (e) of the convention in line with international standards.

As the purpose of this article is to propose approaches for recognition and enforcement of vacated arbitral awards in international commercial arbitration, other forms of arbitration, such as consumer arbitration or labour arbitration, will not be taken into consideration.

B) The Preliminary Discussion:

Do Annulled Awards Cease to Exist?

As a preliminary discussion before addressing application of provisions of the New York Convention, this article will examine a controversy relating to the status of nullified arbitration awards, or, arbitral awards themselves.

I) Traditional View: Annulment legally extinguishes arbitral awards?

Territorial approach, which is sometime called as the traditional approach (Drahozal 2000 pp.451-452), is one of the most widely accepted approaches in the world, despite increasing criticisms (Kronke eds 2010 p.326). In short, the approach is against the enforcement of annulled awards in all circumstances (Kobayashi and Murakami 2009 p.216). One of the most prominent supporters of the territorial approach is Professor Pieter
Sanders, a drafter of the New York Convention (United Nations 1999 pp.3-5). In one of his articles, he mentioned the enforcement of annulled arbitral awards. He argues that once the courts of the forum of arbitration have set aside an arbitral award, ‘the [enforcing] Courts will anyhow refuse the enforcement as there does not longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement (Sanders 1959 p.55, emphasis added).’

Van den Berg supports the position. He explains the non-existence argument with further clarifications. First, he points out that when an award has been annulled in the country of origin it has become non-existent in that country (van den Berg 1994 p.16). He argues that when an award has been annulled, it means that the award was legally rooted in the arbitration law of the country of origin, which the parties agreed upon (van den Berg 1994 p.161). Therefore, he asks ‘[h]ow then is it possible that courts in another country can consider the same awards as still valid (van den Berg 1994 p.161) ?’ If their argument is valid, it would seriously affect practice of recognition and enforcement of arbitral awards because no provisions of the New York Convention would be applied to enforcement of such awards after the annulment in the country of origin.


(3) Schwartz is also in this line. In evaluating below-mentioned Chromalloy case, he states: ‘nothing in its decision to suggest that the Court consciously sought to embrace the theory of the “Stateless” award. But, nonetheless, in accepting to enforce an award that had been annulled in its country of origin, the Court necessarily assumed from the outset that, despite its annulment, there still remained in existence an award capable of enforcement. Simple reliance on Article VII of the New York Convention does not otherwise suffice to justify the Court’s decision, for this merely begs the essential question, and that is whether there still exists an award to which Article VII can be applied (1997 p.131).’
II) Criticisms: Irrationality of the traditional view

Despite its wide supports by such prominent scholars, this approach overlooks some fundamental notions of international commercial arbitration. First, the argument entirely contradicts to the sovereignty of countries. As long as a sovereign country has the power to enforce an award, the annulling country cannot reasonably deny the efficacy of the enforcing country’s judicial acts from a practical or theoretical point of view (Davis 2002 p.81; Smit 2007 p.303). Hence, the effect of setting aside is limited within the territory of the country of origin.

At the same time, the argument ignores a fact that the New York Convention recognises a need to establish international awards. When international legal circles started to discuss the necessity of reforming the predecessors of the New York Convention, Geneva Convention of 1927, a preliminary draft of the Convention was provided by ICC. Under the Geneva Convention, ‘enforcement of the award could be refused if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with both the agreement of the parties and the law of the country where the arbitration took place’ (van den Berg 2003 p.16). As the ICC considered that such condition for recognition is main defect of the Geneva Convention (van den Berg 2003 p.16), it stated that ‘the idea of an international award, i.e., an award wholly independent of national laws, corresponds precisely to an economic requirement’ is necessary (ICC 1998 p.2). Though the concept of international awards was subsequently rejected by the drafters of the New York Convention, they recognized that ‘enforcement could be frustrated if it were to be refused in cases where the composition of the arbitral tribunal and the arbitral procedure agreed upon by the parties did

not follow in all details the requirements of a national arbitration law’ (van den Berg 2003 p.16). In this regard, the presumption that national level decisions to set aside arbitral awards in one country extinguish their existence in another jurisdiction is directly against the intention of the drafters of the New York Convention.

Moreover, the mere fact that parties choose a country as the seat of arbitration, or the awards is annulled in the country of origin, is not enough to justify that the award has its legal existence confined to the law of the country of origin alone. Although parties can choose the seat of arbitration, they may have many different reasons for doing so, including neutrality and geographical convenience (Gaillard 1999 p.43). They are not always choosing the place of arbitration with considering the possible challenge to the award in the country (Ibid). Therefore, giving the annulment decision to such transnational effect may, *inter alia*, cause unexpected consequences to the parties.

Adding to those fundamental criticisms, it should be noted that the traditional view contradicts to an analysis of the text of the New York Convention. As Lastenouse correctly points out, ‘had the New York Convention taken the position that, once an award has been annulled it immediately ceases to exist, so that there is nothing left to be enforced, (5) On this point, Goode suggests that parties sometime choose a seat of arbitration for neutrality (2000 p.260). To justify the argument, he cites following arguments by Leurent:

The seat is typically fixed in a place where neither party has a place of business, e.g. the shores of Lake Leman. That location is not selected for its hotel facilities or charming setting, but essentially because of the parties’ confidence in the neutrality of the forum, the quality of the Swiss Private International Law (FSPIL) and the competence of Swiss jurists, arbitrators and judges (the same applies to Paris, London, Stockholm and other places) (Leurent 1996 p.272).’ On the other hand, he states that ‘it is fanciful to suppose that they would be happy to select as the seat as place that happened to be convenient and neutral (2000 p.260).’ However, there is no reason to assume that the relationship between convenience and neutrality is zero-sum.
there would be no need for the second part of Article V (1) (e) (1999 p.26). As long as Article V (1) (e) of the New York Convention provides that an award may be refused if the award has been set aside, it inevitably implies that an award is the ‘award’ within the ambit of the convention (Lastenouse 1999 p.26). Furthermore, Article I (2) of the convention specifies the meaning of the word ‘award’ under the New York Convention. The ‘award’ in the provision includes awards made not only by arbitrators but also permanent bodies to which the parties have submitted. It does not exclude annulled awards from the category of awards for the purpose of the Convention and to which the Convention applies (Lastenouse 1999 p.27).

III) Conclusion of the preliminary discussion

As Goode argues, certainty is an advantageous character of the traditional view (Goode 2000 p.264). Nonetheless, this view overlooks sovereignty of countries, legislative history of the New York Convention, reasonable expectation of parties, and to make matters worse, provisions of the New York Convention. Therefore, arbitral awards would continue to exist even after it is set aside by the courts of the country of origin, at least in other jurisdictions.

(6) Article I (2) provides: [t]he term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

(7) With regard to the relationships between the traditional view advocated by Sanders and the New York Convention, Paulsson states that: [i]t is striking that Prof. Sanders, recognised as one of the fathers of the Convention, did not base his conclusion on anything in the text of Article V (1), but on an extrinsic (and I believe untenable) assumption. This confirms that Article V (1) does not preclude enforcement [emphasis added] (1998 p.20).
C) The First Discussion: Article V (1) (e) or Article VII (1)?

Since the New York Convention does not contain any provisions, at first glance, which clearly spell out the relationship between Article V (1) (e) and Article VII (1), some commentators have tried clear out the ambiguity. However, as discussed below, such efforts were ill-founded. Practice of international commercial arbitration, which has been considered to ignite such discussion, does not support those commentators’ arguments. This section clarifies connection between those two articles through examination of arguments by commentators, case laws, and legislative history of the New York Convention. It will further address the textual interpretation and objectives of Article VII (1) of the New York Convention.

I) Debates by Commentators Lacking Concrete Basis

In *Chromalloy Aeroservices v. The Arab Republic of Egypt* (939 F. Supp. 907 (D.D.C. 1996)), (hereafter *Chromalloy* case), an American court refused to enforce foreign annulled arbitral award by applying its domestic law through Article VII (1) of the New York Convention. This case, in conjunction with the case *Societe Hilmarton Ltd. v. Societe OTV* ((1994) XIX Y.B. Com. Arb. 662) of France and later U.S. cases that took a different position from Chromalloy case, fuelled a discussion among scholars of international commercial arbitration, namely, the discussion on the interplay between Article V (1) (e) and Article VII (1) (Freyer 2000 p.1).

Paulsson advocates that application of Article VII (1) is more preferable than Article V (1) (e) from the perspectives of showing respect to other

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(8) For example, see *Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc.*, 126 F.3d 15 (2nd Cir. 1997)
countries (Paulsson 1998 (1) p.28). On the other hand, Ostrowski and Shany suggest that examination on the enforceability of annulled arbitral awards should be solely on Article V (1) (e) of the convention (1998 p.1670). Koch maintains same opinion (2009 pp.291-292). Petrochilos argues for rather conciliating approach. He insists on applying both articles at the same time since they are ‘co-extensive’ (2004 pp.320-321). However, foundations of their discussion seem to lack concrete basis. Practices of international commercial arbitration, on which their discussions are based, state that.

(9) More precisely, he states as follows: ‘[I]t surely must be preferable, whenever possible, to use Article VII approach (“our law requires use to enforce this award even though your courts annulled it”) rather than the Article V (1) (e) approach (“we exercise our discretion to enforce an award which your courts annulled even though we have often denied enforcement of awards annulled in other countries, because we are not convinced by what your judge did”) (1998 p.28). He also footnoted that ‘[t]he interests of international respect, morality, and intellectual discipline are better served by foreigners saying “if your courts misapply the law we will void them” than by their saying “your courts can do what they like; we will disregard them if they step out of bounds.” (Paulsson 1998 p.28).

(10) Likewise, Davis maintains that simple reliance on Article V (1) (e) of the convention and amendment of Article VII so that it is not applied to enforcement of annulled awards (2002 pp.85-87).

(11) Precisely, he states as follows: ‘[a]s a working hypothesis, there are two routes open to an award creditor seeking to have an annulled award enforced. He must convince the enforcement forum either to discount the judgment setting aside the award in question; or that setting aside is always irrelevant, irrespective of the circumstances of the case at hand. It has thus been hitherto assumed that the former case falls under ‘may’ in Article V (1), whereas the latter under the more-favourable-right provision of Article VII. In other words, that Article V (1) and VII provide two alternative and independent legal bases for the enforcement of annulled awards. This, however, does not seem to be right… Let us take the most straightforward application of Article VII, that is, where under the applicable domestic law annulment is not a ground to deny enforcement (⋯). When a court has recourse to its domestic law and grants enforcement on that basis, it must already be within the discretionary terms of ‘may’ of Article V (1). The court may have no discretion under its domestic law on whether to take account of the setting aside judgment⋯ but it is certainly exercising its discretion under the New York Convention, that is, its discretion to grant enforcement. ⋯ Article V (1) (e) has to apply in all cases where enforcement is granted
II) Actually Consistent Approach in Distinct Case Laws with an Irrational Exception

Some scholars argue that French cases and Chromalloy case in U.S. are in the same school of thoughts (Gaillard and Savage eds 1999 p.916; Lew and Mistelis et al., 2003 p.718; Slater 2009 p.281) and, therefore, they contradict other approaches taken by courts in later U.S. cases (Kronke eds 2010 p.337). However, the aforementioned French cases and later U.S. case laws may be consistent with each other in reality. Except for the irrational Chromalloy case in U.S., French courts, American courts and other contracting states’ courts have applied the New York Convention properly and literally. Their position argues for the application of Article VII (1) when there are any domestic laws in enforcing countries that are more enforcement-friendly than any other provisions of the New York Convention. Otherwise, they have consistently applied Article V (1) (e). In support of this stance, first, this section will analyse French case laws. Next, U.S. Chromalloy case, a cause of misunderstanding, will be examined and third, it will highlights U.S. case laws after Chromalloy case. Furthermore, selected cases in other jurisdictions will be discussed.

1) French approach

France is the jurisdiction that has clearly established that awards set aside in the country of origin may still be recognized and enforced by the enforcing courts (Kronke eds 2010 p.334). French courts have continued to
despite an annulment, because it is not only a permissive but also a referring rule. So what remains to be seen is whether Article VII furnishes all the grounds on which an annulled award can be enforced- in other words, whether Article V (1) refers only to Article VII, so that their respective material fields of application would be absolutely correspondong. (Petrochillos 2004 pp.320-321)

(12) The Chromalloy case arose almost concurrently with the French Hilmarton case, 'tending to add to the supposition of its authority (Slater 2009 p.281).’
justify this position under French national law, made applicable through the ‘more favourable right provision’ of Article VII (1) of the New York Convention (Gaillard and Pietro 2008 p.773). The following cases substantiate the visible and gradual progression of the French courts developing this position.

In *Soc. Pabalk Ticaret Ltd Sirketi v. Soc. Anon. Norsolor* (1984) (hereafter, Norsolor case), the Cour de cassation (French judicial supreme court) recognized that French courts may allow the enforcement of annulled awards through Article VII (1) of the New York Convention (JIL 1985 Vol.2 Issue 2. pp.67-76). In this case, the Cour de cassation overturned the judgment of the Court of Appeals of Paris, which had refused to enforce, citing Article V (1) (e) of the New York Convention as its basis of judgment, an award rendered and annulled in (JIL 1985 Vol.2 Issue 2. P.67).

The Cour de cassation held not only that Article VII (1) of the New York Convention authorized the enforcement of the award under French Law, but also that the Court of Appeals was required under French Civil Procedure Law to examine to what extent French law should oppose such enforcement (Gharavi 2005 p.78; JIL 1985 Vol.2 Issue 2. p.67).

Gaillard states that ‘the decision of the Cour de cassation did effectively establish the principle that Article VII (1) of the New York Convention takes precedence in situations that also implicate Article V (1999 p.21).’ Certainly, the Cour de cassation overturned the decision of the Court of Appeals, which was based on Article V (1) (e) of the New York Convention. However, still, the Cour de cassation did not clarify relationships between the articles (Article V (1) (e) and Article VII) at that moment. Nevertheless, it enforced annulled awards based on French civil procedure law through Article VII (1) of the New York Convention. In that sense, ‘the ruling opened the door by applying the “more favourable rule principle” to the recognition
in France of an award set aside in the country of origin (Gaillard 1999 p.21).

In later cases, French courts more clearly cemented their position. In *Polish Ocean Line v. Jolasry* (1993) XIX Y.B. Com. Arb., 1994, p.662, (hereafter Polish Ocean Line case), the Cour de cassation upheld a decision of the Court of Appeals of Douai confirming the enforcement of an award rendered and suspended (‘abolished’) in the Economic Court of Gdansk, Poland. The Cour de cassation provided guidance in favour of disrespect of local standard annulments. It held as follows:

‘[A] French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art. V (1) (e) of the 1958 New York Convention, are not among the grounds specified in Art. 1502 of the NCCP (XIX Y.B. Com. Arb., 1994 p.663).’

Namely, the Cour de cassation held that ‘French courts may not at all rely on Article V (1) to refuse enforcement, since Article VII of the New York Convention would clearly give precedence to French arbitration law, in particular Article 1502 of the NCCP, over Article V (1) lit. a-d (Alfons 2010

(13) Article 1502 provides: ‘An appeal against a decision which grants recognition or enforce is available only in the following cases:

(1) if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;

(2) if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;

(3) if the arbitrator has not rendered his decision in accordance with the mission conferred upon him;

(4) if due process has not been respected;

(5) if recognition or enforcement is contrary to international public policy’
Recognisability and Enforceability of Annulled Foreign Arbitral Awards

In Societe Hilmarton Ltd. v. Societe OTV (1994) XX Y.B. Com. Arb. 662 (hereafter Hilmarton case), the Cour de cassation more firmly established the case law to recognize enforcement of nullified awards than previous cases. In this case, OTV sought for recognition and enforcement of an arbitral award in France, which was annulled by the Geneva Court in Switzerland. The request by OTV was granted by the Court of First Instance in Paris and then confirmed by the Paris Court of Appeal (Societe Hilmarton Ltd. v. Societe OTV (1991) XIX Y.B. Com. Arb. pp.655-657). The Court of Appeal once more manifested the exclusive relevance of Article 1502 of the NCCP in contrast to Article V (1). It states as follows:

‘The provision of Art V (1) (e) of the Convention- according to which exequatur must be denied to an award which has been set aside in the country in which it was made-does not apply when the law of the country where enforcement is sought permits enforcement of such an award (XX Y. B. Com. Arb. (1995), pp.663-665).’

In the end, the Cour de cassation confirmed the decision and expressed its view of the annulment. It held ‘the award rendered in Switzerland is an international award which is not integrated in the legal system of that State so that it remains in existence, even if set aside and its recognition in France is not contrary to international public policy (XX Y.B. Com. Arb. (1995) pp.663-665).’ Therefore, the French courts have held that an arbitral award has no particular attachment to any legal order, even to the legal order of the place of arbitration (Koch 2009 p.273). The theoretical statement by the Cour de cassation is justifiable under the New York

These grounds apply uniformly for refusing recognition or enforcement of awards rendered outside France (Leurent 1996 p.270)
Convention regime since the Convention came from the necessity of international arbitral awards (ICC 1998 p.2).

Such positions have been maintained in later French holdings. In *Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt.* (XXII Y.B. Com. Arb. (1997) pp.692-693), the Court of Appeals upheld the decision of the lower court that enforced an award rendered and annulled in Egypt. The Court of Appeals reconfirmed the superiority of the NCCP over Article V (1) of the New York Convention (Y.B. XXII Com. Arb. pp.692-693). In a recent decision, *PT Putrabali Adyamulia (Indonesia) v. Rena Holding, et al.* (XXXII Y.B. Com. Arb. (2007) pp.299-302), the Cour de cassation recognised to enforce an arbitral award, which had been set aside in the High Court of London, concluding that the arbitral award in the case was international award (Pinsolle 2008).

In sum, in French courts, Article VII (1) of the New York Convention has precedence over Article V (1) (e) of the convention when there are any domestic norms which are more enforcement friendly than Article V (1) (e) (Leurent 1996 p.283). Article VII (1) has been applied in France because the NCCP does not provide annulment in the country of origin as a ground to refuse enforcement (Derains and Kiffer 2010 p.78). Therefore, if the French approach is adopted in other enforcing countries but domestic laws in those countries do not provide rights for the enforcement of foreign awards, Article VII (1) becomes irrelevant (Davis 2002 p.67). In such a case, ‘[t]he enforcing country must decide how to exercise its Article V discretion without reference to Article VII, because domestic law does not

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(14) While explaining the situation surrounding the New York Convention in France, Leurent suggests that ‘[t]he New York Convention enables the court seized of an application for recognition and enforcement…in accordance with Article VII (1), to refrain from making use of the grounds for refusal of recognition under Article V (1996 p.283).’
contain any rights more favourable to enforcement than the rights prescribed in Article V (Ibid).’ As stated below, U.S. is one of the examples of such countries.

2) Chromalloy case in United States - An aberrant case

In Chromalloy Aeroservices v. The Arab Republic of Egypt, 939 F. Supp. 907 (D.D.C. 1996) (hereafter, U.S Chromalloy case) the U.S. District Court of Columbia made some missteps that might have caused misunderstandings about U.S. approach. In this case, Chromalloy sought the court to enforce an arbitral award, which was set aside by the Cairo Court of Appeal. The Court accepted Chromalloy’s request and recognised to enforce the award.

In its holding, the Court applied Article VII (1) of the New York Convention and then U.S. Federal Arbitration Act. The Court held that Chromalloy maintains all rights to the enforcement of this Arbitral Award as it would have in the absence of the Convention, i.e., the right given by the FAA (939 F. Supp. 907 p.911). As foreign annulment is not a ground for annulment under the U.S. FAA, the court decided that Chromalloy has the

(15) Section 10 of the FAA provides:

§ (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration

· (1) Where the award was procured by corruption, fraud, or undue means.
· (2) Where there was evident partiality or corruption in the arbitrators, or either of them.
· (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
· (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.
· (5) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the
right to invoke more favourable U.S. legislation under Article VII (1) (939 F. Supp. 907, p.907). It considered Article VII (1) was mandatory in requiring the enforcement of an award (Hwang and Chan 2001 p.152).

With regard to the way to treat Article V (1) (e) and Article VII (1), the District Court of Colombia may have followed the French Approach. However, the court’s judgment resulted in misunderstandings towards later U.S. case laws due to its misconstruction of the FAA. Unlike the courts’ judgment, the FAA is not a preferable law to the enforcement in the meaning of the convention’s Article VII (1). In this case, the court’s analysis of the relevant U.S. law was focused on an examination of the grounds for vacating an award in U.S. under Section 10 of the FAA (Mosk and Nelson 2001 p.472), although, it has nothing at all to do with the enforcement of foreign awards (Schwartz 1997 p.132). One may argue that 9 U.S.C. §10 is still applicable because 9 U.S.C. §208 expressly applies all of Chapter 1 of the FAA, including the section to provide actions and proceedings to arbitrators.

§ (b) The United States district court for the district wherein an award was made that was issued pursuant to section 590 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 582 of Title 5.

(16) Delaume states that ‘if the Chromalloy decision is followed, the practical implications of domestic rules are apparent. To the extent that those rules are more liberal than those of the New York Convention, they will significantly curtail its application since (i) the award creditor is likely to rely on domestic law rather than the Convention, or (ii) the courts will be under a mandate to apply the lex fori ex officio if the award creditor fails to invoke it (1997 p.254).’

(17) Similarly, Gharavi states as follows: ‘Doubts may be raised as to the validity of such decision. The court’s reliance on §10 of the Federal Arbitration Act seems erroneous since §10 only lists the grounds under which an award may be vacated not the grounds under which an award may be refused enforcement (1997 p.25).’ Likewise, Hulbert states ‘Judge Green was mistaken in the test she applied. At issue was the enforceability of the award, not in the absence of the Convention, but in the current effectiveness of the Convention and the implementing American legislation (1998 p.131).’
enforce foreign arbitral awards (Sampliner 1997 p.152; Rivkin 1999 pp.537-539). However, this argument overlooks a significant part of the provision. It provides that ‘[c]hapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States’ [emphasis added]. Therefore, section 10 should be applied to the extent that the provision does not conflict with the New York Convention. In any event, application of section 10 by the Court was an erroneous application of the FAA and the validity of such decision is doubtful.

3) United States’ case laws after the Chromalloy

Following U.S. cases support above criticisms against U.S. Chromalloy case. In each case, the courts imply that there is no domestic law which is more preferable than Article V (1) (e) of the convention. Therefore, the arguments that later U.S. case laws recognised superiority of Article V (1) (e) of the convention to Article VII (1) of the convention even when there are more-preferable domestic laws (Carbonneau 1998 p.290; Smith 2002 p.375), cannot be supported.

Martin Spier v. Calzaturificio Technica, S.p.A., 86 Civ. 3447 [CSH], S.D.N.Y (1999) (hereafter Spier case), is one of the notable example of cases that are against U. S. Chromalloy case. In this case, the Court dismissed Spier’s request for enforcing an award set aside in Italy. In justifying the dismissal, the Court cited the holding of the 2nd Circuit Court in case Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., 126 F.3d 15 (2nd Cir. 1997) and then re-insisted that ‘the grounds for resisting to
enforce foreign awards are limited to those found in Article V of the New York Convention [emphasis added] (86 Civ. 3447 [CSH], S.D.N.Y (1999) para.18).

Analysing this case, one might argue that courts of country of origin is free to recognise or set aside an award by based on its domestic law of arbitration while enforcing courts may only review the award in light of Article V of the Convention (Edelstein and Gaillard 2000 p.43). Some might also argue that grounds for rejecting enforcement are limited in those circumstances listed in Article V (Edelstein and Gaillard 2000 p.43). The arguments are correct, at least in U.S. As mentioned above, in U.S., there are no domestic laws or treaties which are more pro-enforcement than the New York Convention. In such a situation, Article V is the only means for the enforcing courts to deal with foreign annulled arbitral awards. The approach was supported in a more recent case, TermoRio S.A. E.S.P. and LeaseCo GROUP, LLC v. ELECTRANTA S.P., et al., 487 F.3d 928 (D.C. Cir. 2007). (20)

4) Other Jurisdictions

Such application of Article V (1) (e) and Article VII (1) is also maintained in other jurisdictions, which have dealt with the issue of

and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief. See Convention art. V (1) (e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention [emphasis added] (126 F.3d 15 para.51).

(19) See, supra pp.16-17
(20) In this case, the court applied Article V (1) (e) of the New York Convention for examining enforceability of annulled arbitral awards instead of the FAA.
enforcing annulled arbitral awards.

German courts have traditionally taken a position that recognises application of Article VII (1) of the New York Convention instead of other provisions of the Convention, in case there are any German domestic law or other treaties ratified by Germany, which are more tolerant than provisions of the New York Convention (Weinacht 2002 p.320).

Decision 28 October 1999 ((2000) Y.B. XXV Com. Arb.pp.717-720) (hereafter, Rostock case) is one example. A party (names undisclosed) sought enforcement of an arbitral award, which had already been set aside by the Municipal Court of Moscow, to a German court and hence applied for recognition and enforcement at the Higher Regional Court of Rostock. Additionally, the party requested a leave for compulsory execution while the proceeding was pending. However, the Court dismissed the application stating as follows:

‘[R]ecognition of the arbitral award must be denied under Art. V (1) (e) of the New York Convention. A declaration of enforcement requires that the foreign award has become binding according to the law applicable to it, that is, that there are no further means of appeal against it before appellate arbitral tribunals or State courts. This aspect must be examined by the court on its own initiative.

An award is no longer binding when it has been set aside by a competent court or appellate arbitral tribunal, even by a temporarily enforceable decision. This [setting aside] decision must be recognized without examining whether it would be recognizable according to the standards for the recognition of foreign decisions. The arbitral award in this case was set aside by the Moscow City Court and by the Moscow Court of Appeal; hence, it is no longer binding and may no longer be

Though the court refused to enforce the award with relevance to Article V (1) (e), it does not mean that the court considers Article V (1) (e) is an only provision which can deal with the recognition and enforcement of annulled arbitral awards. Germany had changed German arbitration law in 1998 (Kroll 2002 p.160). As a result, the enforcement defence of the foreign award’s annulment can no longer be circumvented under the new domestic German arbitration law (Weinacht 2002 p.323). On the other hand, parties could rely on the European Convention. At the time of Rostock case, both Germany and Russia had already ratified the European Convention (UN 2013). Nevertheless, neither party sought application of the Convention in that case (Y.B. XXV Com. Arb. (2000) pp.717-720). As Article VII (1) of the New York Convention only enables a party to base its request on more favourable right provisions, not mandate enforcing courts to apply the law ex-officio (Kronke 2010 pp.444-445), the German court did not examine the European Convention. Hence, German courts were not unwilling to apply Article VII (1). The recent decision of 31 January 2007 (Y.B. XXXIII. Com. Arb. (2007) pp.510-516) (hereafter, Dresden case) clarifies this point.

The Higher Regional Court of Dresden refused to recognise an arbitral award which had been set aside in Belarus. In this case, the U.S. based claimant sought enforcement in Germany against a German-based affiliate of the respondent, a Belarus state-owned enterprise. The respondent requested the German court to refuse recognition of the award on the basis that it was set aside in Belarus. The claimant argued that the decision of setting aside by the Supreme Commercial Court of Belarus should be ignored as Belarus was a dictatorship and the courts sought to secure the financial interest of the state rather than to obtain a fair and just result.
The Dresden Court of Appeal denied enforcement of the award under Article V (1) (e) of the New York Convention with applying the European Convention despite the U.S not being a contracting state of the European Convention. The court justified this as follows:

The European Convention applies because the most-favoured-nation principle [Meistbegünstigungsgebot] applies between the United States and Belarus. The European Convention respects the autonomy of parties who refer their disputes to arbitration more than does the New York Convention; this favours the free exchange of goods, which the most-favoured-nation principle aims at promoting. Also, the Bilateral Trade Treaty between the United States and Belarus devotes a section to arbitration, a fact indicating that the most-favoured-nation principle applies to treaties that are less strict than the New York Convention in respect of arbitral awards (Y.B. XXXIII. Com. Arb. (2007) p.512).

The reasoning does not deny the application of Article VII (1) ’s most favourable right provision. Conversely, the court construed that the European Convention can be evaluated as a more pro-enforcement convention regarding the enforcement of annulled arbitral awards since it limits annulment in certain grounds (Horvath 2009 p.255; Gaillard and Savage eds 1999 p.999). Though the court denied the enforcement in the end (Y.B. XXXIII. Com. Arb. (2007) p.511), at least it treated the European Convention on International Commercial Arbitration (hereafter, the European Convention) Article IX (Setting Aside of the Arbitral Award) of the European Convention -

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

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(21) European Convention on International Commercial Arbitration (hereafter, the European Convention)
(22) Article IX (of the European Convention) - Setting Aside of the Arbitral Award
Convention as a pro-enforcement treaty and recognised application of the Convention through the most-favoured-nation principle. Therefore, this German approach can be reconciled with above-mentioned French approach.

The judgments by Dutch courts are also in line with French approach. In *Yukos Capital Sarl v OJSC Rosneft Oil Co* (hereafter, *Yukos case*) (Y.B. XXXIV. Com. Arb. (2009) pp. 703-714), the Court of Appeal Amsterdam held that an award, which had been annulled in the country of origin, is still enforceable in the Netherlands. Stating that Article V of the New York convention does not obligate member states to refuse enforcement of those annulled awards, the Court held that enforcing courts have to take into account recognisability of annulment decision in Netherlands (*Id.* p.706). To examine the recognisability, the Court suggested that Dutch courts must look to general international private law of Netherland (*Ibid*). Next, the

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(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside;

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

2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.
Court held that a foreign judgment will be recognized –regardless of its nature or extent– if the minimum requirements have been met, such as proper administration of justice. In the end, the Court recognised to enforce those annulled awards since it considered that the annulment decision in Russia was granted by a partial and dependent court and violating above conditions (Id. p.713).

The result of this case was different from the French cases since Article VII (1) of the New York Convention as applied in France would be of no avail in the Yukos case (van den Berg 2010 pp.194-196). The reason is that Article 1076 of the DCCP also contains as a ground for refusal of enforcement the fact that the arbitral award has been set aside (reversed) by the competent authority of the country in which that the award was made (Article 1076 (1) (A) (e) DCCP). Moreover, application of the relevant Article IX of the European Convention was impossible since the country was not a contracting state to this Convention (van den Berg 2010 p.196).

A more recent case clearly confirmed the fact that the country is following the French approach. In Kompas Overseas Inc. v. OAO Severnoe Rechnoe Parokhodstvo (Northern River Shipping Company) (Y.B. XXXVII. Com. Arb. (2012) pp.277-281), Provisions Judge of the District Court of Amsterdam had to determine the enforceability of an

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(23) Article 1076 Recognition and enforcement of foreign award without Treaties- 1. If no treaty concerning recognition and enforcement is applicable, or if an applicable treaty allows a party to rely upon the law of the country in which recognition or enforcement is sought, an arbitral award made in a foreign State may be recognized in the Netherlands and its enforcement may be sought in the Netherlands, upon submission of the original or a certified copy of the arbitration agreement and arbitral award, unless:

(A) the party against whom recognition or enforcement is sought, asserts and proves that:

(e) the arbitral award has been reversed by a competent authority of the country in which that award is made;
award suspended in the country of origin. The Court decided not to apply Article V (1) (e) of the New York Convention and then applied Article VII (1) of the convention for the purpose of enabling the enforcement through the DCCP (Ibid. p.281). This case did not examine enforceability of annulled arbitral awards; nevertheless, it expressed the fact that courts of the country apply Article VII (1) in case there are any domestic norms which are more tolerant to the enforcement.

In sum, a vast majority of jurisdictions which have dealt with enforceability of nullified awards have adopted the French approach of application of Article V (1) (e) and Article VII (1) of the New York Convention. In reality, such application is quite reasonable from the wordings and legislative history of the convention.

III）Wordings and Legislative History of the New York Convention

Article VII (1) of the New York Convention, a more favourable right provision, even if an award is otherwise subject to non-enforcement under the Convention, is understood to mean that a court must enforce the award if domestic law would require enforcement (Chan 1999 p.149). The construction shall be maintained since Article VII (1) uses the word ‘shall’, which expresses mandatory nature of the provision (Mosk and Nelson 2001 p.471). Therefore, so long as there are pro-enforcement domestic laws, parties may seek enforcing courts to apply them and then the courts have to follow such request (Loquin 2003 p.753).

One may argue that the Article VII (1) should not be applied to enforceability of annulled arbitral awards paying respect to the intention of drafters of the New York Convention. However, such statement has no

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(24) Gharavi states that drafters of the New York Convention ‘did not want another country to enforce an award after it had been set aside by a competent authority in the rendering
persuasiveness. Throughout the Draft Convention of the New York Convention, delegates emphasized that the objection of the Article VII (1) is to enable applicants to rely on the most liberal conditions available for enforcement awards (UN DOC E/CONF/26/2). Moreover, ‘[a]lthough the drafters of [the New York Convention] did not specify that this Article [VII] could be used as the basis for enforcing a nullified foreign award, they did not preclude this possibility (Sampliner 1996).’ Hence, text and history of the New York Convention enables a party to rely on Article VII (1) whenever it is available.

IV) Conclusion on the First Discussion

While some may argue that the practice surrounding Article V (1) (e) and Article VII (1) has not reached a consensus, it has common understanding in reality. When enforcing courts have to examine enforceability of nullified arbitral awards, vast majority of them have applied Article VII (1) if there are any conventions in force or domestic law in enforcing countries which are more enforcement friendly than Article V (1) (e). Therefore, in contracting states of the European Convention or countries that have more liberal rules on recognition and enforcement of

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(25) The Secretary-General of the Drafting Convention commented ‘While no objection was raised against the principle embodied in Article VI of the draft that the Convention shall not deprive an interested party of any relevant rights available to it under existing national laws or treaties, some Governments and organizations felt that the present language of Article VI may need further clarifications (1958 p.14).’ The Article VI is counter part of the Article VII of the New York Convention.

(26) Albania, Austria, Azerbaijan, Belarus, Belgium, Bosnia and Herzegovina, Bulgaria Denmark, Germany, Italy, Luxemborg and Spain, as well as in Belarus, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Croatia, Cuba, the Czech Republic, Denmark, France, Germany, Hungary, Italy, Kazakhstan, the FYR of Macedonia, Poland, Republic of Moldova, Romania, the Russian Federation, Serbia, Slovakia, Slovenia, Turkey, the Ukraine and the former Yugoslavia
foreign arbitral awards, e.g., France, courts would apply Article VII (1) of the New York Convention. In such a case, those nullified arbitral awards would be enforced. However, in other countries, courts would apply Article V (1) (e) of the New York Convention. This would lead to the second issue discussed below.

D) The Second Discussion: Discretion to what extent?

Article V (1) (e) of the New York Convention grants discretion to enforcing courts for deciding enforceability of annulled arbitral awards. They may exercise the discretion so long as the awards were set aside by the courts in the seat of the arbitration. The discretion enjoys a wide variety of interpretation and usage among the scholars and practitioners. This section aims at examining to what extent enforcing courts may exercise the discretion. Hence, this section first addresses a fundamental question,

(27) The words of article V (1) (e) of the convention ‘a competent authority of the country in which, or under the law of which, that the award was made’ usually means the courts of the arbitral seat. The reason of this is that ‘an award is “made” at the place at which the arbitration is held, i.e., at the place of arbitration (Mann 1985 pp.107-108).’ Though parties might argue that the country in which the award was made and the country under the law of which the award was made are different in some cases, courts have been extremely reluctant to agree with such argument (Born 2012 pp.111-114, 308-310). Such reluctance is well prescribed in a U.S. case, *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Nagara*, 364 F.3d 291 (5th Cir. 2004), as follows:

’an agreement providing that one country will be the site of the arbitration but the proceedings will be held under the arbitration law of another country by terms such as “exceptional”; “almost unknown”; a “purely academic invention”; “almost never used in practice”; a possibility “more theoretical than real”; and a “once-in-a-blue-moon set of circumstances.” Commentators note that such an agreement would be complex, inconvenient, and inconsistent with the selection of a neutral forum as the arbitral forum (*Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Das Gas Bumi Nagara*, 364 F.3d 291 (5th Cir. 2004)).’
whether or not Article V (1) (e) gives discretion to enforcing courts. Next, it will provide detail analysis of the discretion granted to courts of enforcing countries.

I) A Fundamental Issue: Is there no discretion under Article V (1) (e) of the New York Convention?

The wording of Article V (1) (e) of the Convention, ‘may’ causes some controversies. Some scholars are against the construction that the ‘may’ has rather permissive character. At least, there are two arguments in this line of thought.

Sanders demonstrated his opinion about the ‘may’ as follows:

‘In my understanding "may" points to the requirement that the party against whom enforcement is sought must first have proven that one of the following grounds exists, but that once one or more of the grounds are proven, refusal of enforcement will follow. In conclusion, enforcement of an annulled award cannot be based upon the use of “may” in the heading of Article V. The [New York Convention] does not open the door for refusal of enforcement where one of the grounds of Article V (1) (e) has been proven (Sanders 1999 p.77).’

Another attempt comes from French text of Article V (1) (e). Unlike English version of the Article, French version cannot necessarily be read as ‘may’. The relevant French words are ‘la reconnaissance et l'exécution de la sentence ne seront refusées… que si…’ It can be read as ‘recognition and enforcement of the award will not be refused … unless…’ (Gharavi 2002 p.97).’ Likewise, it is possible to read the French phrase as ‘recognition and enforcement of the award shall not be refused … unless…” (Paulsson 1998
In either case, like Fouchard, one may argue that the wordings obligate enforcing courts to refuse enforcement when the award is set aside in the country of origin (Ibid). The French language version of the Convention is also binding (van den Berg 2003 p.15). Therefore, it seems difficult to ignore the French text argument entirely.

In any event, impacts of both arguments are quite limited. First, the argument by Sanders overlooks the fact that the primary meaning of the word ‘may’ is permissive, rather than obligatory (Moses 2012 p.224; Garner and Black 2009 p.1066). Hence, even if parties prove that the awards were set aside in the country of origin, refusal of the enforcement will not automatically follow. Moreover, though the intention of Sanders in the above argument is not necessarily clear, he might imply that the ‘may’ means mandatory ‘shall’. Even considering this, Article V (1) (e) should be interpreted as a discretionary provision. On this point, Goode provides a conclusive statement as follows:

(28) Paulsson provides more detail analysis of the French text as follows:

The French text unquestionably differs in its phrasing [from English text]. The relevant words are: la reconnaissance et l'exécution de la sentence ne seront refusées... que si... (‘recognition and enforcement of the award shall not be refused ... unless ...’) The problem is not the negative formulation in French: ‘may only if’ is not semiotically different from ‘may not unless’. Rather, it is the use of the future indicative ne seront... que si... (shall not ... unless) instead of the conditional ne pourront être refusées... que si (may not be ... unless). The latter wording would have had precisely the same meaning as the English and would leave no doubt as to the element of discretion; the use of the future indicative suggests that the authors (of the French text) might have had in mind the following unexpressed consequence:

..., auquel cas elles seront refusées (... in which case they shall be refused) (1998 (2) p.228).

(29) He sarcastically puts that, [i]t is only today, apparently, that the discovery has been made that the application of the grounds for refusing enforcement may be optional for the courts ... (Fouchard 1999 p.607).
The discretionary effect of Article V would not have been changed one whit if the word “shall” had been used, because it would have to be read not in isolation but in conjunction with “only”. Thus, the phrase would have become: “Recognition and enforcement of the award shall be refused … only if…” That means no more than that the courts of an enforcing state shall not/may not/cannot refuse enforcement unless one of the stated grounds for so doing exists. It does not imply that if such a ground does exist the court must enforce the award. That construction would necessitate a phrase such as “shall be refused if and only if (Goode 2000 p.249).”

The French text argument is also unacceptable due to the other official language version of the New York Convention. Unlike that French text, Mandarin, Russian and Spanish version of the Convention correspond fully to English one (Paulsson 1998 (2) p.228; Alfons 2012 pp.75-77). It should be noted that the International Law Commission stated that ‘[t]he unity of [a] treaty and of each of its terms is of fundamental importance in the interpretation of [multilingual] treaties and it is safeguarded by combining with the principle of the equal authority of authentic texts the presumption that the terms are intended to have the same meaning in each text (1967 p.225).’ Therefore, when the four other languages grant judicial discretion, the French version must be given the same meaning. In the end, it is unjustifiable to argue that the ‘may’ gives enforcing courts to mandatory obligation. However, this leads to the next question. How shall enforcing courts exercise the discretion?

II) Discretion: When shall courts refuse to enforce nullified arbitral awards under Article V (1) (e) ?

Despite giving enforcing courts discretion to decide whether or not nullified awards are enforceable, the New York Convention does not clearly
provide when the courts may exercise such discretion (Bird 2012 p.1029). As a result, it leaves each contracting states to determine how their courts shall exercise the discretion (Yu 2002 p.198; Mayer 2000 p.171). In some jurisdictions, the ’may’ is construed as rather mandatory, and therefore courts always have to exercise the discretion for refusing enforcement of annulled arbitral awards. In other jurisdictions, courts still avail themselves of the discretion under Article V (1) (e) of the convention. Even for the latter group, it should be noted that the New York Convention expects them to follow certain standards. Here, this article will provide detail examinations of those groups of contracting states and the standards. The examination purports to identify factors that enforcing courts have to consider when they exercise the discretion.

1) Jurisdictions where ’may’ entails mandatory character

In some contracting states, courts clearly state that nullified awards are no longer enforceable in the territory of the states. For example in Germany, the court of the aforementioned Rostock case held that ’[t]his [setting aside] decision must be recognized without examining whether it would be recognizable according to the standards for the recognition of foreign decisions (Y.B. XXII Com. Arb. (2000) p.718).’ It means, in the end, annulled award ’shall’ not be enforced in Germany. In case A SA (Switzerland) v. B Co Ltd (British Virgin Islands), C SA (Ecuador) (Y.B. XXIX Com. Arb. (2004) p.834), Tribunal Fédéral (Federal Supreme Court of Switzerland) held that enforcement of a foreign arbitral award shall be refused where the award has been declared null and void or has been annulled in the country of rendition (p.838).

Some other contracting states interpret the term, ’may’ as ’shall’ in a practical sense. Their domestic laws clearly provide so. One of the notable
examples is China. On April 10, 1987, the Supreme People’s Court of China issued a Notice on the Implementation of China’s Accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter, the Notice) which may be categorized as a source of law. Article 4 of the Notice requires the courts to reject an application for enforcement if any of the grounds enumerated in Article V of the Convention has been proved to exist. Therefore, if the awards have been set aside in foreign courts, the Chinese courts must refuse enforcement of the awards. Likewise, the ICCP provides the annulment of an award at the seat of arbitration as a mandatory ground for refusing to enforce the award.

2) Jurisdictions where ‘may’ maintains original meaning: Need to consider recognisability of a foreign judgment to set aside

In some other jurisdictions, courts are given discretionary power as

(30) Article 840 of the ICCP provides that:

The Court of Appeal shall refuse the recognition or the enforcement of the foreign award if in the opposition proceedings the party against which the award is invoked proves the existence of one of the following circumstances...

5) the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the State in which, or under the law of which, it was made.

(31) As mentioned above, except that irrational case, the U.S. courts have construed Article V (1) (e) as granting discretionary power to enforcing courts literally. See, supra note 18.

English courts have interpreted the phrase in Article V (1) (e) ‘recognition and enforcement of the award may be refused’ literally (Tweeddale and Tweeddale 2006 p.444). In Apis As v. Fantazia Kereskedelmi KFT (2001) 1 All ER Comm 348, the English High Court held that an English award that had been set aside in England may not bar enforcement of that award in foreign countries. Particularly, Judge Jack pointed out an enforcing court might adopt Article V of the convention as a reason for not enforcing the award (1 All ER Comm p.355).

Similarly, in Soleh Boneh v. Uganda Government (1993) 2 Lloyd’s Rep.208, the English Court of Appeal suggested that it was entitled to enforce an award even when the award was subject to set-aside in the country of origin.

Moreover, Japanese scholars suggest Japan would follow this trend because Article 46 (8) of Arbitration Law provides; The court may dismiss the application [for an enforcement
literally provided by the New York Convention. The fact does not necessarily mean that enforcing courts can exercise the discretion freely. In exercising the discretion, the courts have to examine enforceability of annulment decisions or judgments in their countries (Nakano 2011 p.67; Nakamura 2011 pp.226-227). There exist international standards on this matter to which the New York Convention requires the contracting states, that gives weight to the literal meaning of Article V (1) (e), to apply.

Certainly, recognition of the court judgment under local law is not covered by Article V (1) (e) of the convention since it does not include the words ‘unless the decision of the competent authority cannot be recognised in the country where recognition and enforcement of the award are sought’ or ‘unless the decision of the competent authority would be contrary to the public policy of the country where recognition and enforcement of the award are sought (van den Berg 2010 p.191).’

Nevertheless, from practical perspectives, it is inevitable for enforcing courts to take into consideration enforceability of the annulment in their jurisdictions because enforceability of vacated arbitral awards and recognisability of the decisions to set aside are intertwined. A court that enforces an arbitral award vacated by a national court is refusing to recognise the foreign annulment judgment rendered by the national court. More precisely, if a foreign judgment to set aside is one that would be entitled to be recognized, the decision to set aside shall be respected and therefore the award shall not be enforced (Silberman 2009 p.32). Conversely, if the judgment does not meet the criteria for recognition and

\[\text{decision described in paragraph (1) only when it finds any of the grounds described in each of the items under paragraph (2) of the preceding article present (with respect to the grounds described in items (i) through (vii) where award was set aside in the country of origin) of the same paragraph, this shall be limited to where the counterparty has proved the existence of the ground in question) (Hayakawa and Ogawa 2007 p.270)}\]
enforcement under national law, then, the set aside judgment shall not be respected and hence the award would be enforced in enforcing countries (Silberman 2009 pp.32-33). Taking into consideration of the fact that ‘[o]ne of the basic documents that will be submitted in the enforcement proceedings by the party resisting enforcement is the judgment annulling the award (Webster 2006 p.226), it is difficult to examine enforceability of nullified arbitral awards disregarding enforceability of decisions to set aside.

3) Standards for recognition and enforcement of annulment judgments under the New York Convention

Although enforceability of foreign judgments to be governed by domestic laws of contracting states even in the New York Convention regime, as long as they examine the enforceability from one of the provisions of the convention, they would have to take into account objectives of it and standards derive from the objectives.

a) Objectives of the New York Convention: Demands for international standard

In the nineteenth session of the Committee on the Enforcement of International Arbitral Awards, the Committee concluded that it would be desirable to establish a new convention as a successor of the Geneva Convention for the purpose of further facilitating the enforcement of foreign arbitral awards (UN Doc. E/2704 p.5). At the same time, the Committee purported to maintain generally recognised principles of justice and respect the sovereign rights of states (UN Doc. E/2704 p.5). The Committee proposed the draft convention of the New York Convention based on those principles (UN Doc. E/2704 p.5), that still lie on the current New York Convention (UN Doc. E/2840 p.3). As they are closely related yet
in conflict of each other, it is necessary to find an optimal balance.

Enforcement of annulment judgments solely based on rules of the seat of arbitration clearly undermines enforceability of arbitral awards because an annulment decision in the country of origin bars enforcement of the awards in the rest of the world. If the setting aside decision is rendered by a biased court, granting it to transnational effects would result in the emergence of internationally unacceptable standards for enforcement of arbitral awards. Such local peculiarities are not acceptable for other contracting states of the New York Convention (Einhorn 2010 p.63). It should also be noted that such approach would damage sovereignty of enforcing countries.

Nevertheless, non-restricted application of the enforcing country’s domestic laws to examine recognisability of foreign annulment decisions would also subvert above-mentioned objectives of the New York Convention. If that happened, some courts would apply their domestic laws in the unbalanced or unreasonable way for the purpose of protecting their local interests. In such cases, no courts would recognise foreign set aside decisions which are unfavourable to their citizens. Conversely, they would recognise the decisions for the benefit of their citizens even if the decision is based on local peculiarities. Such practice of discretion is against not only the pro-enforcement policy of the New York Convention, but also the establishment of internationally acceptable standards for arbitral awards’ enforcement.

In short, recognisability of annulment decisions shall not be determined solely on the domestic law of the place of arbitration or enforcing countries. Therefore, another standard shall be applied, namely, international standard.

\(^{(32)}\) Parties may choose the place of arbitration for reasons associated with bias (Pengelley 2004 p.209).
b) **International standards: What are they?**

Regarding the international standards, Paulsson insists on the need of adopting international standard annulment under the current New York Convention regime. According to his statement, the international standard annulment is 'a decision consistent with the substantive provisions of the first four paragraphs of Article V (1) of the New York Convention and Article 34 of the UNCITRAL Model Law' (Paulsson 1998 p.30). He states that enforcing courts shall deny effects of annulment decision if courts of the country of origin annulled arbitral awards due to the incapacity of arbitration agreements, lack of proper notice to parties about the arbitration, the awards not falling within the scope of an arbitration agreement and composition of an arbitral tribunal not in accordance with the agreement of the parties. Though there are some criticisms about utilizing those provisions as international standards (Gharavi 2002 p.147;

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(33) First four paragraphs of the New York Convention provides:

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

   (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

   (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

   (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

   (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place

(34) It simply repeats Article V (1) (e) of the New York Convention
Chan 1999 p.194; Park 2006 p.198; Lelutiu 2003 p.361), there is a consensus that the New York Convention Article V and UNCITRAL Model Law Article 34 represent internationally accepted standard for determining enforceability and validity of arbitral awards (Blackaby and Partasides 2009 p.641; Webster 2006 pp.225-226). Therefore, courts in contracting states of the New York Convention have to examine those provisions when they determine enforceability of annulment decisions.

Moreover, international standards for recognition and enforcement of foreign judgments should not be overlooked. Despite some criticisms, there is no doubt that annulment decisions fall into the scope of domestic laws on recognition and enforcement of foreign judgments when they are examined on its recognisability. This is because the annulment decisions are in substance, negative monetary judgments, removing economic gains from the winning party of the arbitration and indirectly handing them back to the losing party (Chan 1999 pp.203-204). While one may become concerned

(35) For example, Ogawa argues that decisions to set aside are out of the scope of Japanese laws on recognition and enforcement of foreign judgments because it purely dealt with procedural issues (2003 p.30).

(36) Chan’s more detail statement is as follows: ‘An international arbitral award, backed by judicial powers, is essentially a monetary determination by arbitrators, apportioning economic interests between the parties of different nationalities. When a court at the country of origin annuls the award, it rejects the apportionment of economic interests determined by the arbitrator and restores the parties to their pre-award economic positions. In substance, if not in form, the judicial annulment of an international award seems to be a negative kind of monetary judgment, taking away economic gains from the winning party of the arbitration proceedings and indirectly handing them back to the losing party. Courts at an enforcement forum would regard an annulment decision as essentially a negative monetary judgment, negating apportionment by the arbitrators of economic interests between the parties. They would treat such a judgment under the ordinary principles governing monetary judgments (Chan 1999 pp.203-204).’ Park’s argument is in this line. He suggests to treat foreign annulment judgments ‘like other foreign money judgments, according them deference unless procedurally unfair or contrary to fundamental notion of justice (Park 2006 p.199).’
about judicial disparities among the states (Mosk and Nelson 2001 p.464), transnational recognition and enforcement practices indicate a basic similarity of frameworks in various countries (Silberman 2009 p.33).

The most frequently used grounds for non-recognition of foreign judgments are lack of jurisdiction of the court that rendered the judgments, insufficient notice, fraud, unfair foreign proceedings, conflict with another final judgment or decision and public policy of the enforcing countries (UNIDROIT 2006 p.30). At least, domestic laws of contracting states that grant the discretion are in this line. Therefore, it is appropriate to evaluate

(37) For example, Japanese Civil Procedure Law provides:

‘Article 118 A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

(i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.

(ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.

(iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.

(iv) A mutual guarantee exists’

Likewise, in U.S., Uniform Foreign Money-Judgments Recognition Act provides;

Section 4. [Grounds for Non-Recognition.]

(a) A foreign judgment is not conclusive if

(1) the judgment was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law;

(2) the foreign court did not have personal jurisdiction over the defendant; or

(3) the foreign court did not have jurisdiction over the subject matter.

(b) A foreign judgment need not be recognized if

(1) the defendant in the proceedings in the foreign court did not receive notice of the proceedings in sufficient time to enable him to defend;

(2) the judgment was obtained by fraud;

(3) the [cause of action] [claim for relief] on which the judgment is based is repugnant to the public policy of this state;

(4) the judgment conflicts with another final and conclusive judgment;

(5) the proceeding in the foreign court was contrary to an agreement between the parties under which the dispute in question was to be settled otherwise than by proceedings in that court; or
Approaches taken by most national courts, that are granted such discretion by domestic norms, are compatible with those frameworks. In Yukos capital case, in examining its discretion given by Article V (1) (e) of the Convention, the court held that a foreign judgment to set aside arbitral awards will not compel a Dutch court to deny leave for recognition of an annulled award if the foreign decision annulling the award cannot be recognised in the Netherlands if that decision is at odds with Dutch public policy (Y.B. XXXIV. Com. Arb. (2009) p.706). Similarly, the U.S. court in Baker Marine case noted that the ‘[r]ecognition of the [foreign court’s] judgment in [that] case d[id] not conflict with United States public policy (191 F.3d 194 (1999)). This fact implies that the U.S court examined enforceability of the judgment to set aside in exercising the discretion under Article V (1) (e). In a later U.S. case, the Court of Appeals held that ‘[w]hen a competent foreign court has nullified a foreign arbitration award, U.S. courts should not go behind that decision absent extraordinary circumstances not present in this case’ and then the court stated that ‘[i]n applying Article V (1) (e) of the New York Convention, [enforcing courts] must be very careful in weighing notions of “public policy” in determining whether to credit the judgment of a court in the primary state vacating an arbitration award (487 F.3d 928 (D.C. Cir. 2007) p.18). Further, in Yukos Capital Sarl v OJSC Rosneft Oil Co (2012) EWCA Civ 855, Court of Appeal of England and Wales justified enforcement courts to examine the compatibility of decisions of setting aside with the public order of enforcing countries.

(6) in the case of jurisdiction based only on personal service, the foreign court was a seriously inconvenient forum for the trial of the action.
4) **Enforceability of foreign nullified arbitral awards**

Regardless of the recognisability of foreign annulment judgments, the enforcement courts have to consider the annulled awards’ enforceability because the non-recognition of the annulment judgment does not automatically lead to the enforcement of the annulled award (Ma 2009 p.278). ‘Where an annulment decision is not given effect, the recognition court should independently apply the first four sub-paragraphs of Article V (1) (e.g., Articles V (1) (a) to (d)) to determine whether or not to recognize the underlying arbitral award (Born 2014 p.3638).’ Moreover, Article V (2) of the New York Convention is also applicable. Enforcing courts may refuse to enforce the annulled awards if the subject matter of the arbitration could not be settled under the law of the enforcing countries or the recognition/enforcement of the annulled awards would be contrary to the public policy of the enforcing country.

III) **Conclusion on the Second Discussion**

The New York Convention gives enforcing courts authority to determine whether or not they should enforce such awards. When exercising the discretion, enforcing courts have to take into account at least two things, recognisability of annulment judgments and enforceability of the nullified arbitral awards. On this point, objectives of the New York Convention require enforcing courts to take into account international standards. Therefore, when examining recognisability of the foreign annulment decisions, enforcing courts shall adopt international annulment approach advocated by Paulsson. At the same time, the courts have to apply international standards on recognition and enforcement of foreign judgments. Moreover, since annulled arbitral awards are still arbitral awards, rules on recognition and enforcement of foreign arbitral awards,
namely, Article V (1) (a) - (d) of the New York Convention and Article V (2) of the Convention shall be applied to them.

E) Concluding Remarks: Practical Considerations

There is no doubt that the New York Convention is one of the greatest inventions in the field of international commercial arbitration. The contribution of the treaties to create uniformed procedure for international commercial arbitration is immeasurable. It has attracted more and more contracting states. As a result, nowadays, it is rather difficult to find a country which has not ratified the convention. It is not too much to say that procedure of recognition and enforcement of foreign arbitral award is unified in the majority of the countries due to the New York Convention.

Nevertheless, it does not mean the Convention is without imperfections or ambiguities. One may identify such vagueness when dealing with enforceability of annulled foreign arbitral awards because of Article V (1) (e) and Article VII (1) of the Convention. Especially after the Chromalloy case in the U.S., many scholars have advocated the need to deal with conflicts between both Articles. Most of them have tried to solve the issues as if approaches of each contracting states and enforcing courts had no consensus. However, in reality, their view on the convention is unified. Most courts, which have examined enforceability of nullified arbitral awards, have applied more favourable right provisions of Article VII (1) whenever their domestic laws have any provisions that make enforcement of arbitral awards easier than that of the New York Convention. Other courts have applied Article V (1) (e) as there was no such domestic laws.

Rather, enforcing courts have to pay careful attention when they apply the Article V (1) (e). The New York Convention grants discretion to
contracting states to determine enforceability of vacated arbitral awards. In some contracting states, their domestic laws or cases state that annulled arbitral awards shall not be enforced. In such a case, parties would have to follow the interpretation by the domestic laws and national courts. On the other hand, some countries declare that they would apply Article V (1) (e) of the convention literally and authorise enforcing courts to exercise their discretion for enforcing nullified arbitral awards. Even so, it does not mean that enforcing courts can freely refuse to or accept to enforce the annulled arbitral awards. At least, they have to examine recognisability of foreign judgments to set aside the arbitral awards and enforceability of the annulled arbitral awards.

When enforcing courts examine recognisability of foreign judgments to annul arbitral awards, they should not overlook the fact that the legislative history of the New York Convention indicates that objectives of the convention seeks contracting states applying international standards if they exercise the discretion under the Article V (1) (e). Therefore, contracting states shall apply international annulment standard approach advocated by Paulsson. They have to inspect whether or not courts of the country of origin rendered such annulment decisions based on international annulment standards, namely, first four paragraphs of Article V (1) of the Convention and Article 34 of the UNCITRAL Model Law. At the same time, enforcing courts would not be able to avoid applying international standards on recognition and enforcement of foreign judgments.

With regard to enforceability of an annulled arbitral awards itself, nobody casts any doubts that it follows ordinary practice of recognition and enforcement of foreign arbitral awards since the fact remains that arbitral awards are still arbitral awards even when they are set aside. Therefore, enforcing courts would have to examine other grounds of refusing foreign
arbitral awards, namely, first four grounds of Article V (1) of the convention and Article V (2) of the convention. Though it seems to produce duplicate procedures, the necessity of preventing abusive annulment decisions may justify such applications.

In sum, enforcing courts of contracting states of the New York Convention take following steps in a case parties seek to enforce arbitral awards set aside in the country of origin.

1) Enforcing courts have to examine applicability of Article VII (1) with reference to domestic laws of enforcing countries. If there exists any provisions which is more pro-enforcement than the provisions of the New York Convention, enforcing courts would apply the domestic law.

2) If such domestic laws are not in place, enforcing courts would analyse applicability of Article V (1) (e) of the convention. They have to confirm whether or not the annulment decision was rendered by the competent authority of the country of origin.

3) In a case that enforcing courts may apply Article V (1) (e), they shall determine whether or not they can exercise the discretion, given by the article, for refusing to enforce such annulment decisions. If any of domestic laws or cases construes that enforcing courts shall refuse the enforcement, the enforcing courts would follow them.

4) If the domestic laws or cases still grant the discretion to enforcing courts, they would examine recognisability of the set aside decision in the light of international standards for annulment and international standards for recognition and enforcement of foreign judgments.

5) If the international standards are not fulfilled, the enforcing courts
would ascertain whether or not the nullified awards are enforceable under the New York Convention.
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