

# Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards

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## Introduction

The enforcement of arbitral awards in foreign countries is assured by multilateral conventions or bilateral treaties with the only exception to be refused to enforce on the grounds provided by convention or by treaty. An arbitral award, though it is given the same validity as a judgment of a court, needs support by the court when it is enforced against a losing party, that has not fulfilled an obligation under the award.

On the other hand, after an arbitral award is rendered, it may be subject to annulment by the court, in a country where the award was rendered, upon request by either party if it does not conform to due process of law, non-arbitrability of the subject matter of the dispute or conflicts

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with the public policy of the State. The purpose of the annulment or setting aside of an award is to make the award invalid before it can be enforced in another jurisdiction against the losing party.

The arbitral award is final and binding on the parties and may be filed by the parties with a court seeking an order confirming the award. The confirmation of the award has the same force and effect as a judgment, and claim preclusion (*res judicata*) and issue preclusion (collateral estoppel) are as applicable to orders for confirmation of the award as to judgments.

The court is thus relied on by the parties for supporting arbitration or for enforcing the arbitral award.

## I. Recognition and Enforcement of Arbitral Awards

Awards rendered to settle disputes between parties of different countries need international recognition and enforcement procedures. Multilateral conventions such as the 1958 New York Convention,<sup>(1)</sup> and bilateral treaties such as the Treaty of Friendship, Commerce and Navigation between two countries,<sup>(2)</sup> were signed and ratified to enable inter-jurisdictional awards to be made and enforced.

1. In *Parsons & Whittemore Overseas v. Societe Generale de L'Industrie du Papier* (RAKTA),<sup>(3)</sup> Parsons, an American corporation, agreed to construct a paperboard mill for RAKTA, an Egyptian Government-owned corporation, in Egypt. During the Arab-Israeli Six-

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1. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. June 10, 1958. 21 U.S.T. 2517, 330 U.N.T.S. 38. (New York Convention), which the U.S. acceded on September 30, 1970.
  2. See the Treaty of Friendship, Commerce and Navigation between Japan and the United States of America, Article 4. (1953).
  3. 508 F.2d 969 (2nd Cir. 1974).

Days War of May-June 1967 the Egyptian government, breaking diplomatic ties with the U.S., ordered all Americans to leave its borders unless they applied for special visas. The Agency for International Development (AID), a branch of the U.S. State Department, withdrew funds from the project. The majority of Parsons' work crews left Egypt. With construction nearly completed, Parsons notified RAKTA that it regarded this postponement of the project as excused by the force majeure clause<sup>(4)</sup> under the construction contract. RAKTA disagreed and sought damages for breach of contract. Parsons submitted to arbitration at the International Chamber of Commerce (ICC) under the contract. Three arbitrators issued a preliminary award recognizing the force majeure defense<sup>(5)</sup> as available only for the period from May 28 to June 30, 1967, and that the AID's notification of withdrawal of the funds did not justify Parsons' unilateral decision to abandon the project. It also stated that Parson had made no more than a perfunctory effort to secure special visas. Three years later, the arbitrators rendered the final award; Parsons was held liable to RAKTA for \$312,507.45 in damages for breach of contract, \$30,000 for RAKTA's cost and three fourths of \$49,000 as arbitrators' compensation.

Parsons first filed at New York State Court, after which the case was moved to the U.S. District Court for the Southern District of New York, seeking a declaratory judgment preventing RAKTA from collecting the award out of a letter of credit issued in RAKTA's favor by a U.S. bank, arguing against enforcement of the award on five grounds under the 1958 New York Convention. RAKTA counterclaimed seeking confirmation of the foreign arbitral award. The District Court confirmed the enforcement of the foreign arbitral award rejecting Parsons' defenses.

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4. Force majeure clause, in part, excused delay in performance due to causes beyond Parson's reasonable capacity to control.
  5. *See* I YB. Com. Arb. 130(1976) (The plea of force majeure was rejected.).

On appeal by Parsons, the U.S. Court of Appeals for the Second Circuit affirmed the District Court's confirmation of the foreign award. Among the defenses, such as inadequate opportunity to present defense, arbitration in excess of jurisdiction,<sup>(6)</sup> non-arbitrability, public policy,<sup>(7)</sup> and award in manifest disregard of the law, Parsons argued on ground of public policy that various actions by the U.S. officials subsequent to the severance of the American-Egyptian relations required Parsons, as a loyal American citizen, to abandon the project. The Court stated that the Convention's public policy defense should be construed narrowly and applied only where enforcement would violate the forum state's most basic notions of morality and justice. In equating national policy with U.S. public policy, Parsons plainly missed the mark. To read the public policy defense as a parochial device protective of national political interest would seriously undermine the Convention's utility. A circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the U.S., in acceding to the Convention, meant to subscribe to this supranational emphasis. Regarding award in manifest disregard of the law, the Court recognizing that it is not set forth in the Convention nor in the Federal Arbitration Act (FAA), and grounds set forth in the Convention are exclusive for vacating an award,<sup>(8)</sup> rejected Parsons' defense for failing to provide

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6. New York Convention, Article V 1: Recognition and enforcement of an arbitral 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: ... (b) inadequate opportunity to present defense, (c) arbitration in excess of jurisdiction...

7. *Id.* Article V 2: Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that: (a) non-arbitrability, (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

8. *See* FAA, 9 U.S.C. Chapter 2. § 207: ...The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

The issue of "manifest disregard of the law" will be considered later.

a sound basis for vacating the foreign arbitral award.

2. In *International Standard Electric Corp. v. Bridas*,<sup>(9)</sup> International Standard Electric Corp. (ISEC), a wholly owned subsidiary of International Telephone and Telegraph Co. (ITT), did business in Argentina by establishing a wholly owned subsidiary, Compania Standard Electric Argentina S.A. (CSEA). CSEA later sold 25 % of its share to Bridas, an Argentine company, for \$7.5 million at the same time agreeing to continue to run CSEA as a joint venture under Shareholders Agreement. Six years later, ISEC sold its 97% interest in CSEA to Siemens, a German multinational corporation.

Bridas sought arbitration with the International Chamber of Commerce (ICC) under the agreement claiming the breach of contract and breach of fiduciary obligation for not giving Bridas adequate notice of the proposed sale of its shares to Siemens. Under the agreement the place of arbitration was Mexico City and the governing laws of the agreement were those of the State of New York. The arbitrators awarded Bridas damages of \$6,793,000, legal fees and expenses of \$1million and \$400,000 for the costs of the arbitration.

ISEC petitioned to vacate the award at the U.S. District Court for the Southern District of New York, and Bridas cross-petitioned to enforce the award under the 1958 New York Convention. The Court first addressed lack of subject matter jurisdiction to vacate a foreign arbitral award under the Convention. The courts of Mexico, where the award was rendered, were held to have jurisdiction to vacate or set aside the award. The Court next considered the phrase “or under the law which, that award was made” for setting aside the award in Article V 1(e) of the Convention as referred

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9. 745 F. Supp. 172 (S.D.N.Y. 1990).

exclusively to the procedural law under which the arbitration was conducted, and not the substantive law of contract which was applied in the case. The law of the State of New York was the relevant substantive law, and law of Mexico was the governing procedural law. The Court stated that the whole point of arbitration was that the merits of the dispute would not be reviewed by the courts, wherever they be located. This was the animating principle of the Convention. The courts should review arbitrations for procedural regularity but resist inquiry into the substantive merits of awards. Since the forum of this arbitration was Mexico and the governing procedural law was that of Mexico, only the courts of Mexico had jurisdiction under the Convention to vacate the award. The Court rejected ISEC's defense of manifest disregard of the law, stating that the Convention provided no grounds. It is a creature of domestic arbitration cases, and whatever the concept means, it does not rise to the level of contravening 'public policy' as that phrase is used in Article V of the Convention. The 'manifest disregard' defense, therefore, was held to be not available to ISEC within the context of the Convention. The Court granted enforcement of the award.

3 . In *Lander Co. v. MMP Investments, Inc.*,<sup>(10)</sup> two American corporations contracted for distribution by MMP in Poland of shampoo and other products manufactured by Lander for two years, and then contracted for MMP to become exclusive manufacturer and distributor of Lander's products for five years. Three months after the commencement of the second contract, MMP claimed that Lander's products were defective. Lander's chairman visited MMP in Poland to investigate the alleged problems. Nine months later when Lander terminated the contract, MMP filed for arbitra-

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10. 927 F. Supp. 1078(N.D. Ill. 1996), *rev'd*, 107 F.3d 476(7th Cir), *cert. denied*, 522 U.S. 811(1997).

tion under the contract. The arbitration was proceeded with under the arbitration rules of the International Chamber of Commerce (ICC) in New York with the governing law being that of New York. The award was rendered in favor of Lander for \$536,444 plus interest. Lander filed petition to confirm the award in the U.S. District Court for the Northern District of Illinois, where MMP's office is situated. MMP moved to dismiss Lander's petition on the ground that the New York Convention was inapplicable to the parties' arbitration, and in addition, moved to vacate the award. The Court stated the case was one of first impression, and reviewed the history behind the Convention. The Court dismissed Lander's petition for lack of federal jurisdiction, holding that the Convention did not apply to awards arising out of disputes between U.S. citizens, finding the award as a non-domestic arbitral award.

The U.S. Court of Appeals for the Seventh Circuit reversed. The Court found that the complaint sufficiently alleged jurisdiction under the FAA as well as under the New York Convention. The FAA authorizes suits in federal court to enforce arbitration awards in cases arising out of contracts evidencing a transaction involving interstate and foreign commerce.<sup>(11)</sup> The contract in question fell under this category. The FAA also authorizes the enforcement of arbitration awards in disputes between U.S. citizens if the dispute arose out of a contract involving performance in a foreign country.<sup>(12)</sup> The section adopts the provisions of the New York Convention. There is no ambiguity; the relationship between the parties falls squarely within the inclusion.

4. In *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us*,<sup>(13)</sup> Toys "R" Us, a

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11. See FAA §§ 1 and 2.

12. See FAA § 202.

13. 126 F.3d 15 (2nd Cir. 1997), cert. denied, 522 U.S. 1111 (1998).

U.S. corporation, and its subsidiary TRU(HK)Ltd. contracted a License and Technical Assistance Agreement and a Supply Agreement with Yusuf, a private Kuwaiti company, to grant a limited right to open Toys “R” Us stores, to use its trademark in Kuwait and 13 other countries in the Middle East, and supply with its technology, expertise and assistance in the toy business. The contract continued for eleven years but after the Gulf War the relationships between the parties changed. Toys “R” Us ultimately tried to terminate the agreements, and contracted similar contract with two other companies. Disputes arose between Yusuf and Toys “R” Us relating to the method of termination of the agreements that could not be reconciled.

Toys “R” Us submitted arbitration to the American Arbitration Association(AAA) seeking a declaration terminating the Agreements. Yusuf counterclaimed for breach of contract. Toys “R” Us’ request for a declaration was denied in the arbitration and Yusuf’s right to open toy stores was allowed. Two years later the arbitrator awarded Yusuf \$46.44 million for lost profits under the Agreement plus interest.

Yusuf petitioned the U.S. District Court for the Southern District of New York to confirm the award under the 1958 New York Convention. Toys “R” Us cross moved to vacate or modify the award under the FAA arguing that the award was clearly irrational, in manifest disregard of the law and in manifest disregard of the terms of the agreement. District Court confirmed the award. On appeal by Toys “R” Us, the Second Circuit affirmed the confirmation by the District Court. The Second Circuit agreed with the District Court finding that Toys “R” Us’ cross-motion could be considered under the standards of the FAA<sup>(14)</sup> because the Convention and the FAA afford overlapping jurisdiction, and the fact that a petition to

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14. FAA, §10. In either 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 \*



confirm was brought under the Convention did not foreclose a cross-motion to vacate under the FAA. The Court held that the grounds in Article V of the Convention were the only grounds available for setting aside an arbitral award and on the other hand, as contemplated by Article V 1 (e) of the Convention, the FAA's implied grounds for setting aside were available to non-domestic award rendered in the U.S. The Court referred to "manifest disregard of the law" as implied ground for vacatur, however, in this case the Court found no manifest disregard of the law in the analysis, because the arbitrator was well aware of and carefully applied New York law on lost profits.

5. In *Ministry of Defense of the Islamic Republic of Iran v. Gould Inc.*,<sup>(15)</sup> Iran sought enforcement of an arbitral award, which was rendered by the Iran-United States Claims Tribunal established pursuant to the Algiers Accords,<sup>(16)</sup> by the U.S. District Court for the Central District of California. Gould, a U.S. corporation, which petition to dismiss the award,

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\* the application of any party to the arbitration—

- (a) Where the award was procured by corruption, fraud, or undue means.
- (b) Where there was evident partiality or corruption in the arbitrators, or either of them.
- (c) 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.
- (d) 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.
- (e) 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 arbitrators.

15. 887 F.2d 1357 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990).

16. It is composed principally of two documents: the General Declaration and the Claims Settlement Declaration, dated January 19, 1981. Dept. of State Bull. No. 2047.

was denied by the Court. On appeal by Gould, the U.S. Court of Appeals for the Ninth Circuit affirmed the order of the District Court.

The Ninth Circuit first affirmed the subject matter jurisdiction under the FAA § 203, finding that the Accords themselves represent the written agreement so required.<sup>(17)</sup> The second assertion by Gould was that the New York Convention applied only to arbitral awards made in accordance with the national arbitration law of a Party State as provided for in Article V 1 (e).<sup>(18)</sup> Gould argued that the Tribunal's award in favor of Iran was a creature of international law, and not national law, therefore, did not fall under the Convention pursuant to § 203. The Court stated that § 203 did not contain a separate jurisdictional requirement that the award be rendered subject to a "national law". The fairest reading of the Convention itself appeared to be that it applied to the enforcement of non-national awards. The Court concluded that an award need not be made "under a national law" for a court to entertain jurisdiction over its enforcement pursuant to the Convention.<sup>(19)</sup>

6. A case where a court refused to enforce an award was rendered by the Iran-US Claims Tribunal, in *Iran Aircraft Industries v. Avco Corp.*,<sup>(20)</sup> the U.S. District Court for the District of Connecticut refused to enforce the

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17. *See Dames & Moore v. Reagan*, 453 U.S. 654(1981). (upheld the authority of the President to issue the Executive Order for suspending all claims within the Tribunal.) *Islamic Republic of Iran v. Boeing Co.*, 771 F.2d 1279(9th Cir. 1985).

18. New York Convention, Article V 1(e) (the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or *under the law of which, that award was made.*) [emphasis added]

19. XXIVa Y.B. Com. Arb. 515(1999). (Iran and Gould concluded a settlement agreement on March 31, 1993.)

20. Award in Case No. 261(377-266-3) of 18 July, 1988. XIV Y.B. Com. Arb. 377 (1989). 980 F.2d 141 (2nd Cir. 1992).

award in favor of Iran, which appealed to the U.S. Court of Appeals for the Second Circuit. The Second Circuit affirmed the decision of the District Court stating that in the arbitration, Avco was unable to present its case to the Tribunal under the New York Convention Article V 1(b). Following guidance given at the pre-hearing conference by the Chairman of the Chamber, Avco submitted account receivable ledgers, verified by an internationally recognized public accounting firm, rather than the actual invoices, to the Tribunal. The Chairman, however, resigned and was replaced by French judge. Questioned on the evidence by the Iranian judge, who was absent from the pre-hearing conference, Avco maintained a consistent position as guided by the pre-hearing conference. The Court found that Avco was misled by the Tribunal and denied the opportunity to present its claim in a meaningful manner. One dissenting opinion stated that Avco was on notice that there might be a problem with its proof, especially given the Iranian judge's concerns voiced at trial. Avco took a calculated risk.

Then, Iran, without seeking a rehearing *en banc* and without seeking to petition the U.S. Supreme Court for a writ of *certiorari*, filed a claim at the Iran-U.S. Claims Tribunal accusing the U.S. of breaching its obligations under the Algiers Declarations concerning the enforcement of the Tribunal Award. Iran asserted that principles of customary international law required that awards rendered by an international tribunal be recognized and enforced in domestic courts. Domestic authorities may not review or refuse to enforce such an award. Article V of the New York Convention cannot be applied to those awards. The U.S. replied that the Declarations simply required that the U.S. (1) provide procedures in its domestic law whereby enforcement of Tribunal awards may be obtained; (2) ensure that Iran had access to those procedures; and (3) see that the procedures made available to Iran were at least as favorable as those afforded other parties

wishing to enforce foreign arbitral awards. This the U.S. had done.

The Tribunal stated that the decision by the Second Circuit was erroneous. A careful reading of the Tribunal's award in the *Avco* showed that it was based not on the absence of the invoice underlying Avco's claims, but on a lack of proof that those invoices were payable. The Tribunal held that, through the refusal by the Second Circuit to enforce the *Avco* award, the U.S. had violated its obligation under the Algiers Declarations to ensure that a valid award of the Tribunal be treated as final and binding, valid, and enforceable in the jurisdiction of the U.S.<sup>(21)</sup>

## II. Annulment of Arbitral Award

1. The arbitral award is final and binding on the parties. It may only be vacated or annulled by a court on the grounds provided in the Federal Arbitration Act (FAA), such as corruption, fraud or irregularity during the hearing, or exceeding the arbitrator's power.<sup>(22)</sup>

2. In addition to the grounds under the FAA above, "manifest disregard

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21. Award in Case No. A27(586-A27-FT) of 5 June, 1998. XXIVA Y.B. Com. Arb. 512 (1999). See Christopher R. Drahzal, *Contracting Around RUAA: Default Rules, Mandatory Rules, and Judicial Review of Arbitral Awards*, 3 Pepp.Disp.Resol.L.J. 419(2003). Anuj Desai, *Arbitral and Judicial decision: Case No. A27: The Iran-United States Claims Tribunal's First Award of Damages for Breach of the Algiers Declarations*, 10 Am.Rev. Int'l Arb. 229 (1999). Jessical L. Gelandner, *Judicial Review of International Arbitral Awards: Preserving Independence in International Commercial Arbitrations*, 80 Marq.L.Rev. 625(1997). Sean J. Cleary, *International Arbitration- Foreign Arbitral Awards- Enforcement of Foreign Arbitral Award Refused under Article V 1(b) of New York Convention*, Iran Aircraft Industries v. Avco Corp., 980 F.2d 141(2d Cir.1992), 17 Suffolk Transnat'l L.Rev. 566(1994).

22. *Id.* FAA, § 10.

of the law” is recognized as grounds for vacating an award as was established in *Wilko v. Swan*,<sup>(23)</sup> where the U.S. Supreme Court states by an *obiter dictum* that power to vacate an award is limited and that the interpretation of the law by arbitrators, in contrast to manifest disregard, is not subject, in the federal courts, to judicial review for error.

3. In *Siegel v. Titan Indus. Corp.*,<sup>(24)</sup> a dispute arose out of the evaluation of the book value of stock in a stock purchase transaction. Siegel objected to the valuation provided by Titan’s accountants at \$1.69 million and demanded arbitration. A panel of arbitrators unanimously rendered an award which set the value of stock at \$13,887,263 without revealing calculations in reaching the conclusion. Siegel sought to confirm the award with the U.S. District Court for the Southern District of New York. Titan sought to vacate the award arguing that a manifest disregard of the law had occurred because of the arbitrator’s failure to apply generally accepted accounting principles as required by the agreement between the parties. The Court confirmed the award, rejecting the argument based on the manifest disregard of the law. On appeal by Titan, the U.S. Court Appeals for the Second Circuit affirmed, holding that there was sufficient evidence to conclude that the arbitrators did not act in manifest disregard of the law. The Court found that the arbitrators reached the result based on precise mathematical calculations. The Court referred to the *Wilko* and other cases in stating that the “manifest disregard” test requires something beyond and different from a mere error of law. An arbitrator needs to have understood and correctly stated the law but proceeded to ignore it.

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23. 107 F. Supp. 75(S.D.N.Y. 1952), *rev'd*, 201 F.2d 439(2nd Cir.), *rev'd*, 346 U.S. 427, 436 - 437 (1953).

24. 779 F.2d 891 (2nd Cir. 1985).

4 . In *Westerbeke Corp. v. Daihatsu Motor Co.*<sup>(25)</sup> Daihatsu, a Japanese company, manufactured and supplied Westerbeke, an American corporation, with certain defined gasoline powered engine suitable for boats on an exclusive basis for the latter's product line under a Component Sales Agreement. Westerbeke possessed some rights for Daihatsu's future engine models with a limited right of first refusal. About four years later, Daihatsu developed a new water-cooled, three-cylinder gasoline engine, the E-070, and granted another corporation, B&S, exclusive rights to distribute it. Westerbeke learned of this development and asked Daihatsu for access to the new engine. Both companies failed to agree after negotiation. Daihatsu gave timely notice that it would not renew the original agreement thereby terminating the agreement.

Westerbeke filed actions against Daihatsu and B&S, but later agreed to having those actions dismissed when it submitted to arbitration under the original agreement. The arbitration was conducted pursuant to the Japan American Trade Arbitration Agreement of 1952 in New York. The arbitration proceeded in two phases: liability and damages. The liability phase involved a review of the provisions of the agreement<sup>(26)</sup> particularly whether the E-070 was an engine within the meaning of the agreement. The arbitrator read the provision in favor of Westerbeke and held that E-070 engines was an engine within the terms of the agreement. The arbitrator then, reviewing the damages issue, found the condition precedent under the agreement met and awarded Westerbeke approximately \$4 million in cover damages and lost profit.

Westerbeke brought an action to confirm the award in the U.S. District Court for the Southern District of New York. Daihatsu moved to vacate the

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25. 162 F. Supp. 2d 278 (S.D.N.Y. 2001), *rev'd*, 304 F.3d 200 (2nd Cir. 2002).

26. Article 3.2: When Daihatsu desires to sell in the Territory other water-cooled gasoline engines of fewer than four cylinders for the Products than the Engines...

award, arguing four grounds including that the arbitrator manifestly disregarded New York damages law, and exceeded the scope of his authority. The District Court vacated the award for manifest disregard of the law without referring to the other three grounds, and concluded that only reliance damages could be awarded for a breach of a contractual provision.

On appeal, the U.S. Court of Appeals for the Second Circuit, first referring to the *Wilko* and other cases, stated that a standard of review under this judicially created doctrine was severely limited. To vacate the award the court must find something beyond and different from a mere error in the law or failure on the part of the arbitrators to understand or apply the law. The two-prong test for ascertaining whether an arbitrator had manifestly disregarded the law had both an objective and subjective component. The first objective component was to consider whether the governing law alleged to have been ignored by the arbitrators was well defined, explicit and clearly applicable. The second subjective component was to look to the knowledge actually possessed by the arbitrator. The arbitrator must appreciate the existence of a clearly governing legal principle but decided to ignore or pay no attention to it. *Daihatsu* failed to satisfy the two-prong test. The Court reversed the judgment of the District Court and remanded the case with instructions to confirm the arbitral award.

5. In *Pacific Gas and Electric Co. v. The Superior Court of Sutter County*,<sup>(27)</sup> an error of law was an issue in a State court. Pacific Gas and Electric Co. (PG&E) contracted with Anacapa Oil Co. to purchase natural gas, which was produced from wells owned by the latter. After the enactment of the Natural Gas Policy Act of 1978, which provided the ceiling prices at which

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27. 6 Cal. App. 4th 207, 277 Cal. Rptr. 694 (App. Cal. 3d), *reh. denied*, 227 Cal. App. 3d 846F (App. Cal. 3d), *rev. granted*, 281 Cal. Rptr. 765, 837 P.2d 94 (Cal.1991), *writ issued*, 15 Cal. App. 4th 576, 19 Cal. Rptr. 2d 295 (App. Cal. 3d 1993).

gas by category could be sold, the parties amended the contract taking into consideration the ceiling prices with the condition that if the ceiling prices under the Act ceased to apply to gas produced by Anacapa, the re-determination price terms as provided in the original contract shall apply. On January 1, 1985 when some gas subject to the Act was deregulated, PG&E asked Anacapa to apply the re-determination price terms, but Anacapa refused, contending that none of its gas was deregulated under the Act.

Anacapa filed a complaint with the Superior Court of Sutter County seeking a declaration that the ceiling price be paid under the Act and that PG&E had an implied obligation under the contract to avoid causing physical harm to Anacapa's wells, etc. PG&E responded with a petition to compel arbitration under the contract. The Court granted and ordered arbitration. Arbitrators rendered an award on the three issues in question that (a) the ceiling price ceased to apply to part of Anacapa's gas effective January 1, 1985, (b) PG&E had overpaid for certain gas obtained from Anacapa prior to January 1, 1985 due to misclassification of Anacapa's wells under the Act, and (c) PG&E owed no obligation to avoid damage to Anacapa's wells. On motion by Anacapa, the Superior Court vacated the award for error of law, reasoning that legal errors in the construction of the contracts were apparent on the face of the written award. After review was granted by the Supreme Court of California, the Court of Appeal of California considering the judicial review of arbitration award concluded that regardless of whether a submission was qualified, a mistake of law was ordinarily not subject to judicial review, similarly, errors of fact were not reviewable. Referring to a case of the Supreme Court of California,<sup>(28)</sup> which held that with limited exceptions, an arbitrator's decision was not generally review-

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28. *Moncharsh v. Heily & Blase*, 3 Cal. 4th 1, 10 Cal. Rptr.2d 183, 832 P.2d 899 (Cal.1992).



able for errors of fact or law, whether or not such error appeared on the face of the award and caused substantial injustice to the parties. The arbitrator's reading and application of the contract was clearly within the range of ambiguity, i.e., within the ordinary bounds of semantic permissibility, so there could be no reasonable claim that the contract had been arbitrarily remade. The Court then stated that PG&E had no obligation to avoid causing the escape of gas from Anacapa's wells or to take gas at rates of production sufficient to avoid damages to the wells. The Superior Court erred in setting aside the award based on these issues. The Court issued a peremptory writ of mandamus commanding the Superior Court to rescind its order vacating the arbitration award and a new order confirming the arbitration award.

### **III. Parallel Petitions: Annulment and Enforcement —*Chromalloy and Hilmarton***

1. An interesting case, which is the first case related to annulment and enforcement of a foreign arbitral award, is *Chromalloy Aeroservices v. Egypt*,<sup>(29)</sup> where the former, an American corporation, entered into a military procurement contract with the Government of Egypt to provide parts, maintenance, and repair for helicopters of the Egyptian Air Force. Three and a half years later, Egypt terminated the contract by notifying Chromalloy. In turn, Chromalloy notified its rejection of the cancellation of the contract and commenced arbitration in Egypt under the contract. Egypt drew down Chromalloy's letter of guarantee in an amount of some \$11,475,968. On August 24, 1994, the arbitral panel ordered Egypt to pay Chromalloy the sum of \$272,900 plus interest and \$16,940,958 plus inter-

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29. 939 F. Supp. 907(D.D.C. 1996).

est. The panel also ordered Chromalloy to pay Egypt the sum of 606,920 pounds sterling plus interest. Two months later, Chromalloy applied to the U.S. District Court for the District of Columbia (the U.S. Court) for enforcement of the award. About two weeks later, Egypt appealed to the Cairo Court of Appeal seeking nullification of the award. Three and a half months later, Egypt filed with the U.S. Court a motion to adjourn Chromalloy's petition. A further month later, the Egyptian Court suspended the award. One month later, Egypt filed with the U.S. Court a motion to dismiss Chromalloy's petition. On December 5, 1995, the Egyptian Court issued an order nullifying the award stating that the contract was an administrative contract and that the arbitral panel had failed to apply the applicable Egyptian administrative law applying Egyptian civil law instead. Deviation from the parties' contractual choice of law constituted a ground for annulment of the arbitral award.<sup>(30)</sup> At the hearing at the U.S. Court, Egypt sought to deny the enforcement of the award. Chromalloy sought confirmation of the award arguing that Egypt did not present any serious argument that its court's nullification decision was consistent with the New York Convention or the FAA.

The U.S. Court first stated that under the Convention it must grant Chromalloy's petition to recognize and enforce the arbitral award unless it found one of the grounds for refusal of recognition or enforcement of the award specified in the Convention existed.<sup>(31)</sup> Under the Convention, recognition and enforcement of the award may be refused if Egypt furnished proof that the award had been set aside by a competent authority of the country in which, or under the law of which, that award was made.<sup>(32)</sup> Under

30. XXIVa Y.B. Com. Arb. 265(1999).

31. FAA, §207. The Court states that this is a case of first impression. There are no reported cases in which a court of the U.S. has faced a situation under the New York Convention. *Supra* note 1. 939 F. Supp. at 911.

32. New York Convention, V 1 and V 1(e); FAA §201.

the U.S. laws, arbitration awards were presumed to be binding, and may only be vacated by a court under very limited circumstances, as specified in the FAA.<sup>(33)</sup> The Court also added that an arbitral award would also be set aside if the award was made in manifest disregard of the law. Manifest disregard of the law may be found if the arbitrators understood and correctly stated the law by referring to the case laws but proceeded to ignore it.<sup>(34)</sup>

The U.S. Court after reviewing Egypt's arguments that Egyptian administrative law should govern the contract, and the arbitral panel's holding that it did not matter which substantive law of administrative or civil they applied, decided that though at worst this decision constituted a mistake of law, it was not subject to judicial review by the U.S. court. The arbitral award was proper as a matter of U.S. law. The Court also reviewed the arbitration clause of the contract,<sup>(35)</sup> and concluded that the award was not intended to appeal to any court. The Court stated that a decision by it to recognize the decision of the Egyptian court would violate the clear principle of U.S. public policy in favor of final and binding arbitration of commercial disputes and supported by treaty, by statute and by case law. The Court, rejecting *res judicata*, which Egypt had sought, concluded that the award of the arbitral panel was valid as a matter of U.S. law, and granted Chromalloy's petition to recognize and enforce the arbitral award.

Chromalloy also filed for seeking enforcement of the Egyptian arbitral award in France at the Paris Court of First Instance, which granted *exequatur*, or enforcement, on May 4, 1995. Egypt appealed to the Cour

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33. FAA § 10.

34. *First Option of Chicago v. Kaplan*, 514 U.S. 938, 942 (1995). *Kanuth v. Prescott Ball & Turben*, 949 F.2d 1175 (D.C. Cir. 1991).

35. Arbitration clause: It is ... understood that both parties have irrevocably agreed to apply Egyptian Laws and to choose Cairo as seat of the court of arbitration... The decision of the said court shall be final and binding and cannot be made subject to any appeal or other recourse.

d'Appel, or Court of Appeal, in Paris.<sup>(36)</sup> On January 14, 1997, the Court affirmed the earlier decision stating that French judges may refuse to grant *exequatur* only in those cases specified in the Code of Civil Procedure.<sup>(37)</sup> Judges were not empowered to review the merits of the award. The award made in Egypt was an international award, and its existence remained established despite its being annulled in Egypt and its recognition in France was not in violation of international public policy.

2. Almost at the same time as the *Chromalloy* case was being argued, the case of *Hilmarton v. Omnium de Traitement et de Valorisation* (OTV) was also being argued in Switzerland and France. The facts of this case were that in order to obtain a construction contract for a drainage system in Algeria, OTV, a French company, appointed Hilmarton, a UK company, as its consultant and administrative coordinator. A fee of 4% of the construction contract price was to be paid by OTV to Hilmarton under the contract in three installments. OTV successfully contracted with Algeria but only paid a half of the fee to Hilmarton. Hilmarton initiated arbitration at the ICC in Geneva under the contract. A sole arbitrator rendered an award on August 19, 1988 denying Hilmarton's request, reasoning that the consultant contract was a brokerage contract that used intermedi-

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36. XXII Y.B. Com. Arb. 691 (1997).

37. The French Code of Civil Procedure, Art. 1502. An appeal against a decision granting recognition or enforcement may be brought only in the following cases:

1. If the arbitrator decided in the absence of an arbitration agreement on the basis of a void or expired agreement.
2. If the arbitral tribunal was irregularly composed or the sole arbitrator irregularly appointed;
3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;
4. Whenever due process has not been respected;
5. If the recognition or enforcement is contrary to international public policy.

aries to obtain a contract for OTV in Algeria which was forbidden as a violation of both Algerian law and Swiss public policy.

In this case, a second arbitration award was rendered after annulment of the first award in Switzerland, and enforcement procedures were taken three times in France.

Now, Hilmarton sought an annulment of the award made by the Court of Appeal of Geneva, which annulled the award on November 17, 1989.<sup>(38)</sup> The Court reviewed the award and stated that the intermediary activities were perfectly admissible in Switzerland as long as no bribes were paid. The violation of a foreign law did not offend morality in Swiss law in the present case. The result reached by the arbitrator was arbitrary. The award was annulled. Upon appeal by OTV, on April 17, 1990, the Swiss Supreme Court affirmed the decision, stating that the arbitrator manifestly violated the applicable law. The contract would be illicit only if it violated Swiss law.<sup>(39)</sup>

In the meantime, OTV requested enforcement of the Swiss award in France at the Paris Court of First Instance, which granted *exequatur*, or enforcement, on February 26, 1990. Hilmarton appealed to the Paris Court of Appeal, which affirmed the decision on December 19, 1991.<sup>(40)</sup> Upon appeal by Hilmarton, the Cour de Cassation, or the Supreme Court, affirmed the decision on March 23, 1994. (1st *exequatur*)<sup>(41)</sup> The Court stated that the award rendered in Switzerland was an international award which was not integrated into the legal system of that State, and so remained in existence even if set aside in that State and its recognition in France was not contrary to international public policy.

After annulment of the arbitral award in Geneva, a new arbitrator was

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38. XIX Y.B. Com. Arb. 216(1994).

39. Id. at 220.

40. Id. at 655.

41. XX Y.B. Com. Arb. 663(1995).

appointed to arbitrate. On April 10, 1992, an order was made granting Hilmarton's request and ordering OTV to pay the balance of the fee.<sup>(42)</sup> Hilmarton requested the enforcement of the new award in France at the Nanterre Court of First Instance, which granted the *exequatur* on February 25, 1993. (2nd *exequatur*) OTV appealed to the Versailles Court of Appeal.

Hilmarton also sought enforcement of the annulment decision made by the Swiss Supreme Court at the Nanterre Court of First Instance, which granted the *exequatur* on September 22, 1993. (3rd *exequatur*) The Court stated that French court could only refuse enforcement without reviewing the merits under the Code. The present *exequatur* concerned a decision rendered by a competent court according to Swiss law which applied to the contract at issue. Recourse against an arbitral award did not in principle violate French public policy. The Swiss decision did not go against French public policy.<sup>(43)</sup> OTV appealed to the Versailles Court of Appeal.

The Court of Appeal of Versailles heard jointly the cases of the 2nd and 3rd *exequatur* on the same day and affirmed the decisions in both cases on June 29, 1995.<sup>(44)</sup> Both decisions were appealed by OTV to the Cour de Cassation, which reversed the decision on June 10, 1997,<sup>(45)</sup> stating that while the existence of a final French decision bearing on the same subject between the same parties created an obstacle to any recognition. This meant that as the Supreme Court decision on March 23, 1994 for the 1st *exequatur* already existed, principle of *res judicata* applied.

3. Three years later in 1999 after *Chromalloy*, the Second Circuit decid-

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42. XXI Y.B. Com. Arb. 524(1996).

43. XX Y.B. Com. Arb. 194(1995).

44. XXI Y.B. Com. Arb. 524(1996).

45. XXII Y.B. Com. Arb. 696(1997).

ed *Baker Marine (Nig.) v. Chevron (Nig.)*<sup>(46)</sup> denying a petition to enforce an award which had been annulled in Nigeria, where the award was originally rendered.

The facts were that Baker Marine (Nig.) and Danos contracted with Chevron (Nig.) to provide barge services for Chevron in Nigeria. Later Baker Marine charged Danos and Chevron with violating the contract and submitted to arbitration in Nigeria under the UNCITRAL arbitration rules. The governing law of the contract were the laws of Nigeria. Nigeria is a party to the 1958 New York Convention. One panel of arbitrators awarded Baker Marine \$2.23 million in damages against Danos and a second panel awarded Baker Marine \$750,000 in damages against Chevron in early 1996. Baker Marine promptly sought enforcement of both awards before a Nigerian court. Danos and Chevron filed at the same court to vacate the awards. In November 1996 and May 1997, the Nigerian court set aside both awards concluding that the first award was unsupported by the evidence and that the second one was beyond the scope of the submissions and improperly awarded punitive damages.

Baker Marine sought confirmation of the awards in August 1997 at the U.S. District Court for the Northern District of New York under Chapter 2 of the FAA. The District Court denied the petition concluding that it would not be proper to enforce a foreign arbitral award under Article VI(e) of the 1958 New York Convention when such an award had been set aside by the Nigerian courts. On appeal by Baker Marine, the Second Circuit affirmed by stating that the governing agreements made no reference whatever to the U.S. law, nor did they suggest that the parties intended the U.S. arbitration law to govern their disputes. Baker Marine did not contend that the Nigerian courts acted contrary to Nigerian law nor was it able to show cause for refusing to recognize the judgments of the Nigerian

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46. 191 F.3d 194 (2nd Cir. 1999).

court. The Court added a footnote<sup>(47)</sup> distinguishing this case from *Chromalloy*, where the Government of Egypt violated the contractual provision not to appeal the arbitral award to the court. The U.S. court concluded in *Chromalloy* that the recognizing the Egyptian judgment would be contrary to the U.S. policy favoring arbitration. As Baker Marine (Nig.) was not a U.S. citizen, nor initially sought confirmation of the award in the U.S., and also because Chevron and Danos did not violate any agreement, recognition of the Nigerian judgment, this case did not conflict with U.S. public policy.

4. Two months after the *Baker Marine*, the U.S. District Court for the Southern District of New York in *Spier v. Calzaturificio Tecnica*<sup>(48)</sup> denied a petition to enforce an award which had been annulled in Italy, where the award was originally rendered.

Spier, an American engineer, contracted with Tecnica, an Italian manufacture, to furnish the necessary expertise for manufacturing plastic footwear and ski boots. Four years later, in 1973, Tecnica employed a new footwear production system. Spier claimed compensation from Tecnica alleging that Tecnica established its system from expertise derived from Spier. Arbitration was undertaken by three arbitrators in Italy,<sup>(49)</sup> who rendered a unanimous award in favor of Spier for one billion Italian lira plus interest, stating that as an equitable settlement, Tecica was under an obligation to indemnify Spier for damages caused by its the termination in addition to the royalties paid between 1969 and 1972, irrespective of their own technical consultant's opinion. Tecnica challenged this award in an

47. 191 F.3d at 197 n.3.

48. 663 F. Supp. 871 (S.D.N.Y. 1987) (Spier 1), *renewed petition denied*, 71 F. Supp. 2d 279, *reargument denied*, 77 F. Supp. 2d 405 (S.D.N.Y. 1999) (Spier 2).

49. Arbitration clause: Any disputes that may arise between us concerning this agreement, shall be submitted to arbiters who will act as friendly conciliators and shall be decided by free and informal arbitration 'pro bono et aequo.'



Italian court. That court, the Treviso Tribunal nullified the award, stating that it could not stand because it exceeded the arbitrators' powers though arbitration *pro bono et aequo* may apply to arbitrators in general. Both the Venice Court of Appeal and the Supreme Court of Cassation affirmed that judgment. Spier did not appear at Treviso but filed a petition with the U.S. District Court for the Southern District of New York to enforce the award. The Court deferred the enforcement proceedings while the Italian courts considered the challenge made against the award based on Article VI of the New York Convention.<sup>(50)</sup>

Spier filed renewed a fresh petition at the same Court in New York seeking to enforce the award after the Italian courts decisions annulling the award. The U.S. Court denied the petition after reviewing the cases of the *Chromalloy*, *Baker Marine and Toys "R" Us*,<sup>(51)</sup> it distinguished the *Chromalloy* where the Egyptian parties breached on agreement not to appeal an award and the decision by the court to recognize the decision of the Egyptian court would violate the U.S. public policy in favor of arbitration, whereas the parties of the latter two cases that did not violate any agreement by appealing the award. The Court stated that the ground of the decision by the three Italian courts was in excess of the arbitrators' powers rendering an award, which is the same ground for vacatur as applied according to the FAA.

Spier filed the motion to reargument at the same Court alleging that the court opinion overlooked the terms in the agreement which provided that the arbitrators would have unlimited and unappealable powers to set-

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50. Article VI of the New York Convention: If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V 1(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award.

51. *Chromalloy*, *supra* note 29, *Baker Marine*, *supra* note 46, *Toys "R" Us*, *supra* note 13.

tle disputes between the parties. The Court, composed of the same judge, compared these provisions with those that existed in the *Chromalloy* and held that the terms in the case under consideration did not include the explicit renunciation of any appeal or other recourse found in the *Chromalloy*, and that were the contract language to fall under the U.S. law, it would not bar Tecnica's contention at the Italian courts that the award in Spier's favor exceeded the arbitrators' powers. The decision of the Italian courts nowhere suggested that the contract barred Tecnica from appealing the award to the courts. The Court denied the petition.

#### IV. Confirmation of Arbitral Awards

The parties may apply to the court for an order confirming arbitral award within one year after the award was made.<sup>(52)</sup> The judgment so entered shall have the same force and effect, in all respect, as a judgment in an action.<sup>(53)</sup>

An award under the New York Convention may be enforced or invoked by any party to the arbitration by application to any court having jurisdiction for an order confirming the award as against any other party to the arbitration within three years after the arbitral award. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the Convention<sup>(54)</sup>

In *McDermott International, Inc. v. Lloyds Underwriters of London*,<sup>(55)</sup> McDermott, a Panamanian corporation with its head office in New Orleans,

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52. FAA § 9. (... thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.)

53. FAA § 13. (... and it may be enforced as if it had been rendered in an action in the court in which it is entered.)

54. FAA Chapter 2. § 207.

55. 120 F.3d 583 (5th Cir. 1997). 981 F.2d 744 (5th Cir.), cert. denied, 508 U.S. 951 (1993) (*McDermott II*). 944 F.2d 1199 (5th Cir. 1991) (*McDermott I*).

Louisiana, tendered coverage under an insurance policy for damages arising from the installation of an air-heater exchanger, which was denied coverage by Lloyds' underwriter. An arbitral panel found in favor of Lloyds. There were argument before the court between non U.S. parties on the validity of the arbitration clause. The Fifth Circuit affirmed the decision of the U.S. District Court for the Eastern District of Louisiana confirming the arbitral award that had been filed by Lloyds within three years as required by the FAA.<sup>(56)</sup> The Fifth Circuit added that, consistent with the strong federal policy favoring arbitration, judicial enforcement of arbitration agreements and awards ought to be 'summary and speedy' out of respect for the parties' bargain to keep their disputes out of court. The twin goals of uniformity and 'summary and speedy' judicial enforcement of the arbitration decision are plainly furthered by the court's action confirming the award.

## **V. Annulment, Recognition and Enforcement of Awards under the ICSID Convention**

1. In most cases, annulment of an award is made at a court in the country where the award is rendered. The settlement of investment disputes under the ICSID Convention, however, has a self sufficient scheme for annulment of award within its arbitration system.<sup>(57)</sup> The Chairman of the

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56. FAA § 207.

57. Article 52 of the Washington Convention on the Settlement of Investment Disputes between States and the Nationals of the other States, March 18, 1965, 575 U.N.T.S. 159, 17 U.S.T. 1270.

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
  - (a) that the Tribunal was not properly constituted;
  - (b) that the Tribunal has manifestly exceeded its powers;
  - (c) that there was corruption on the part of a member of the Tribunal;
  - (d) that there has been a serious departure from a fundamental rule of procedure; or
  - (e) that the award has failed to state the reasons on which it is based.

Administrative Council of the International Centre for Settlement of Investment Disputes (ICSID) shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons, who are not members of the Tribunal which rendered the award, upon receipt of a request for annulment of an award.<sup>(58)</sup> It may be considered that the Contracting States, by agreement, delegate authority for annulment of award to arbitrators instead of authorizing the court to annul an award rendered by arbitrators under the ICSID Convention. The case law in this area has been reviewed in an earlier Chapter.

2. The ICSID Convention also provides recognition and enforcement of awards, which is binding on the parties, within its territories as if it were a final judgment of a court in the Contracting State.<sup>(59)</sup> Unless otherwise stated, consent of the arbitration by the Contracting State shall be deemed consent to exclude other remedies. A Contracting State, however, may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitrate. Thus, the Convention was a compromise with the so called 'exhaustion of local remedies' rule under international law.<sup>(60)</sup> Another problem is that after recognition of an award, a state preserves immunity from enforcement and execution.<sup>(61)</sup> In practice, a

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58. *Id.* Article 52(3).

59. *Id.* Articles 53 and 54.

60. *Id.* Article 26.

61. *Id.* Article 55. See Christoph H. Schreuer, *The ICSID Convention: A Commentary*, (Cambridge Univ. Press. 2001). (... It was felt that the time was not ripe for such a drastic step. An attempt to include such a waiver would have run into the determined opposition of developing countries and would have jeopardized the wide ratification of the Convention.) Susan Choi, *Judicial Enforcement of Arbitration Awards under the ICSID and New York Conventions*, 28 N.Y.U. J. Int'l L. & Politics 175(1995/1996).

waiver of immunity is sought, though it depends on the situation.<sup>(62)</sup>

The ICSID Convention as the agreement between States established a method and a route to recognize and enforce awards within the Convention as a self sufficient scheme, whereas commercial arbitration needs a multilateral convention such as the New York Convention or a bilateral treaty to recognize and enforce the award.

## VI. Review and Analysis

1. A foreign arbitral award is in principle assured to be recognized and enforced by the multilateral conventions such as the 1958 New York Convention and a bilateral treaty with possible exception to refuse enforcement on the grounds as provided in the Convention. The grounds for refusal of enforcement are limited to the ones as provided in the convention such as Article V of the New York Convention.

The court in the *RAKTA* case held that the Convention's public policy defense should be construed narrowly and limited to violation of the forum state's most basic notions of morality and justice, not as a parochial device protective of national political interest. The courts in the *RAKTA* case and the *Bridas* case rejected defenses based on manifest disregard of the law because it did not provide grounds for refusal of enforcement in the New York Convention.

The court in the *Lander* case agreed to enforce an award regarding

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62. ICSID Model Clause suggests a general waiver clause. Doc. ICSID/5/Rev. 4 ICSID Report 366. (The Host State hereby waives any right of sovereign immunity as to it and its property in respect of the enforcement and execution of any award rendered by an Arbitral Tribunal constituted pursuant to this agreement.) See Schreuer, *id.* at 1173. Emmanuel Gaillard, *Some Notes on the Drafting of ICSID Arbitration Clauses*, 3 ICSID Review - Foreign Investment L.J., 136 (1988). (The waiver may be limited to particular assets or areas of activity. In any case, the gravity of the decision to waive all or part of the State's immunity calls for the greatest restraint.)

foreign commerce between the U.S. parties under the FAA and the New York Convention. It was one of first impression for the case. Under the FAA, an arbitration agreement or arbitral award between the U.S. parties falls under the Convention if the agreement or award is envisaged to be performed or enforced abroad.<sup>(63)</sup>

2. The grounds for annulment of arbitral award are provided in Article 10 (a) of the FAA and a cause of manifest disregard of the law as stated in the *Wilko* is also admitted as a ground for annulment within the scope of the FAA.<sup>(64)</sup> The New York Convention does not provide for the annulment of an award, only referring to refusal of enforcement of an award which has been set aside pursuant to Article V 1(e). One reason for seeking an annulment of an award is to vacate a defective award in the place of arbitration before enforcement of the award can take place in a foreign country leaving the law of the country where the arbitral award was rendered to be applied. As the scope of the New York Convention is in the enforcement stage, no ground for annulment is needed.

The courts in the *Siegel* and the *Daihatsu* stated that the manifest disregard test required something beyond and different from a mere error in the law. It must be shown that the arbitrator understood and correctly stated the law but proceeded to ignore it. The court in the *PG&E* held that

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63. See FAA § 202. Jennifer D. Nicholson, *Recent Development: Lander Co., Inc. v. MMP Investments, Inc.*, 13 Ohio St.J. on Disp. Resol. 287(1997).

64. See Noah Rubins, "Manifest Disregard of the Law" and Vacatur of Arbitral Awards in the United States, 12 Am.Rev. Int'l Arb. 363(2001). Marcus Mungoli, *Symposium: Effective Resolution of Disputes in the New Millennium: Perception, Myths and the Law: Comment the Manifest Disregard of the Law Standard: A Vehicle for Modernization on the Federal Arbitration Act*, 31 St. Mary's L.J. 1079(2000). Adam Milam, *A House Built on Sand: Vacating Arbitration Awards for Manifest Disregard of the Law*, 29 Cumb. L.Rev. 705(1998/1999). Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 Ga.L.Rev. 731 (1996).

an error of law that formed part of an arbitrator's decision was not subject to judicial review.

3. Parallel petition for annulment and enforcement of foreign arbitral awards may appear in international arbitration cases.

(1) The *Chromalloy* case is a good example. After obtaining an award in Egypt, Chromalloy took action to enforce that award in the U.S. against the losing party's assets there. The losing party, the Egyptian Government, then filed at the Egyptian court to annul the award, and also filed a motion with the U.S. Court seeking to adjourn Chromalloy's petition. During this time each petition in the U.S. and Egypt respectively for enforcement and annulment proceeded in parallel. A decision annulling the award was handed down by the Egyptian court and a later decision was made by the U.S. Court enforcing the award. The U.S. Court stated that under the New York Convention the Court must enforce the award unless it found one of the grounds for refusal as provided in the Convention. One of the grounds for refusal relates to the setting aside of the award; *i.e.*, the award has been set aside by a competent authority of the country in which that award was made as provided in Article V 1(e) of the Convention. The award was set aside by the Egyptian court pending the enforcement procedure in the U.S. Court. The U.S. Court considered this point and held that though applying civil law instead of administrative law in the award may constitute a mistake of law, it was not subject to judicial review by the U.S. court because no grounds for such review were provided in the FAA. The arbitral award is proper as a matter of U.S. law. The U.S. Court also concluded that as the arbitration clause in the contract did not provide for any appeal to any court, recognizing the decision of the Egyptian court would violate clear U.S. public policy in favor of final and binding arbitration of commercial disputes. The U.S. court respected the agreement of the parties.

A French court granted enforcement of the award filed by Chromalloy before the annulment decision of the Egyptian court, and the Court of Appeal affirmed it, stating that the award made in Egypt was an international award and its existence remained established despite its being annulled in Egypt.

(2)The court in the *Baker Marine* denied enforcement of the award rendered and annulled in Nigeria for the reason that no argument was made that the decision of the Nigerian court was contrary to Nigerian law nor was any adequate reason given for refusing to recognize the decision of the Nigerian court. The Court added that as there was no provision seeking to prevent an appeal to any court as in the *Chromalloy*, the parties did not violate any agreement and recognition of the Nigerian judgment did not violate U.S. public policy.

(3)The court in the *Spier* after deferring the enforcement proceedings while the Italian court considered a challenge made to the award, refused to enforce the award by taking the same position as the *Baker Marine* for no agreement barred the parties from appealing to the court. The Italian court based on its decision on the facts that the arbitrator had exceeded his power in rendering the award, which is the same ground for vacatur under the FAA.

4 . Is law applied to arbitration national law or non-national law ? *Lex Mercatoria* is applied to a dispute in arbitration. The court in the *Gould* upheld enforcement of an award not based on national law, stating that the fairest reading of the New York Convention itself appeared to be that it applied to the enforcement of non-national awards, and concluded that an award need not be made “under a national law” for a court to entertain jurisdiction over its enforcement pursuant to the Convention. In the award, the Tribunal referred to law of the State of California as the govern-



ing law of the Purchase Agreement, which was substantively applied to the merits of the case by the Tribunal.<sup>(65)</sup> Considering it and the decision of the Court comparing the wordings in Article V 1(d) and (e), the Court might pay attention to procedural law.

Rivkin has raised an interesting question when he asks whether view that the *Gould* decision's focus on procedure in any way detract from the assertion that U.S. courts were likely to enforce an award based on *Lex Mercatoria*? If anything, the *Gould* decision is likely to enhance the prospects for such enforceability. Combined with a powerful pro-enforcement bias rooted in law and policy, the *Gould* case can only strengthen the likelihood that U.S. courts will respect the parties' choice of a non-national standard to govern the merits of their dispute.<sup>(66)</sup>

The arbitral tribunal may decide a case considering *Lex Mercatoria*, which is not clearly defined, but at least has been recognized as law merchant, custom and usage of trade, general principle of law and *pacta sunt servanda*.<sup>(67)</sup>

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65. *Gould, Inc. v. Ministry of Defense of the Islamic Republic of Iran*, Award in Case Nos. 49 and 50 (136-49/50-2) of 29 June, 1984. X.Y.B. Com. Arb. 281 (1985).

66. David W. Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 Arb. Int'l, 1, at 84 (1993).

67. Rivkin, *id.* at 67. (*Lex Mercatoria* ...exists as an amalgam of most globally-accepted principles which govern international commercial relations: public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contracts, and arbitral case law.) See O. Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 ICLQ 747, 748-50 (1985). Thomas Lundmark, *Verbose Contract*, 49 Am.J.Comp. L. 121 (2001). Gunther Teubner, *Breaking Frame: The Global Interplay of Legal and Social Systems*, 45 Am.J.Comp. L. 149 (1997). *Symposium: Law, Economics & Norms: Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U.Pa.L.Rev. 1765 (1996). Vanessa L.D. Wilkinson, *The New Lex Mercatoria: Realty or Academic Fantasy?*, 12 J. Int'l Arb., 2, 103 (1995). Georges R. DeLaume, *The Internationalization of Law and Legal Practice: Comparative Analysis as a Basis of Law in State Contracts: the Myth of the Lex Mercatoria*, 63 Tul.L.Rev. 575 (1989). Keith Highet, *The Internationalization of Law and Legal Practice: The Enigma of the Lex Mercatoria*, 63 Tul.L.Rev. 613 (1989). Note, *General Principles of Law in International Commercial Arbitration*, 101 Harv. L.Rev. 1816 (1988).

Some arbitration cases with respect to governing law are briefly discussed below.

(1)The *LIAMCO* was a case that arose from the nationalization by Libyan Government of a foreign oil company. An award was rendered in Geneva in favor of Libyan American Oil Company(LIAMCO). The sole arbitrator considered the choice of law clause in the Concession Agreement that Libyan Law when consistent with international law and subsidiarily the general principles of law would apply. Libyan law in this concession included Libyan legislation, Islamic law, custom, natural law and equity. The principles of international law are to refer to those of sources that are accepted by the International Court of Justice, Article 38 of its Statute.<sup>(68)</sup> The award was enforced in the U.S.<sup>(69)</sup>

(2)The *Norsolor* award rendered in Vienna under the ICC Arbitration Rules chose the applicable law by stating that faced with difficulty of choosing a national law the application of which is sufficiently compelling, the tribunal considered that it was appropriate, given the international nature of the agreement (the parties were Turkish and French) to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*. It added that one of the principles which inspired the latter was that of good faith which must preside over the formation and the performance of contracts, and awarded damages on the basis of equity, in accordance with the principles of good faith which inspired the international *lex mercatoria*.<sup>(70)</sup> Norsolor, a French company, filed to set aside the award at the Commercial Court of Vienna, which was

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68. Libyan American Oil Co (LIAMCO)v. Libya, Award of April 12, 1977. VI Y.B. Com. Arb. 89(1981). The other two cases are: BP v. Libya, award of October 10, 1973 and August 1, 1974. V Y.B. Com. Arb. 143(1980). TOPCO v. Libya, award of January 19, 1977. IV Y.B. Com. Arb. 177(1979).

69. Libyan American Oil Co. v. Libya, 482 F. Supp. 1175(D.D.C. 1980).

70. Pabalk Ticaret Ltd. v. Norsolor, Award of October 26, 1979. (ICC case No. 3131). IX Y.B. Com. Arb. 109(1984).

designated by the Austrian Supreme Court. The Court dismissed this action. On appeal, the Court of Appeal partially upheld Norsolor's appeal criticizing the reference to *lex mercatoria* as world law of questionable applicability.<sup>(71)</sup> Finally, the Supreme Court reversed the earlier decision holding that the question whether the arbitral tribunal was entitled to decide according to rules of equity or whether it had to fix the amount of damages one by one is a question governing the course of the proceedings and its effects which, by its nature, could not constitute the ground for annulment of Article 595, para.6 CCP. It had not even been alleged that the result of the application of rules of equity was contrary to a mandatory provision of substantive law. There was, therefore, no ground on which to nullify the arbitral award for reason of Article 595, para 6 CCP.<sup>(72)</sup>

(3) The *Rakoil* award rendered in Geneva under the ICC rules was sought to be enforced in England. As there was no choice of clause in the contract between the parties, the arbitral tribunal held, based on the ICC Arbitration Rules, that internationally accepted principles of law governing contractual relations to be the proper law applicable to the case.<sup>(73)</sup> On filing to enforce the award, the Court of Appeal of England stated that the parties could validly agree that a part, or the whole, of their legal relationships should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law. There was no reason why an arbitral tribunal in England should not, in a proper case, where the parties had so agreed, apply foreign or internation-

71. Werner Melis, Note on the case, IX Y.B. Com. Arb. 163(1984). Rivkin, *supra* note 66, at 77.

72. Norsolor v. Pabalk Ticaret Ltd., decision by the Austrian Supreme Ct., 8 Ob 520/82, of Nov. 18, 1982. IX Y.B. Com. Arb. 159(1984). VII Y.B. Com. Arb. 312(1982). Article 595, para 6 CCP (Austrian Code of Civil Procedure): If the award violates mandatory provisions of law.

73. Deutsche Schachtbau-und Tiefbohrgesellschaft mbH (DST) v. R'as Al Khaimah National Oil Co. (Rakoil), Award of 1982. (ICC case No. 3572). XIV Y.B. Com. Arb. 111, 113(1989).

al law.<sup>(74)</sup>

5. The purpose of an annulment of an award is to make invalid a defective award at the place where the award was rendered before enforcement of the award. Under the New York Convention, the decision for setting aside by a competent authority of the country in which, or under the law of which, that award was made<sup>(75)</sup> is crucial for considering the enforcement of the award in a country where the enforcement is sought. U.S. courts, however, considers the grounds of the foreign decision comparing with the provisions of the FAA when making their decisions.

Professor Park commenting on the decision by the U.S. Court in the *Chromalloy* stated that the Egyptian practice of annulling erroneous awards does not differ significantly from the way American courts vacate awards for “manifest disregard of the law” or improper choice-of-law reasoning, and that to invoke the vacatur standards of the FAA risks giving the impression that American courts can annul foreign awards, a result at odds with existing law and efficient arbitration.<sup>(76)</sup> He also emphasizes that

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74. 24 March 1987. [1987] 2 All E.R. 769. XIII Y.B. Com. Arb. 522, 532(1988).

75. Article V 1(e) of the New York Convention. (the award has been set aside by a competent authority of the country in which, or under the law of which, that award was made.)

76. William W. Park, *Duty and Discretion in International Arbitration*, 93 Am. J. Int'l L. 805, 808 (1999). Also see Andrew M. Campbell, *Refusal to Enforce Foreign Arbitration Awards on Public Policy Grounds*, 144 A.L.R. Fed. 481 (2004). Martina Prpic, *Global Development: New York Convention - Contribution to the 45th Anniversary of the Convention: Setting Aside Recourse and Enforcement of Awards Annulled in the Country of Their Origin*, 10 Croat. Arbit. Yearb. 13 (2003). Radu Lelutiu, Note & Comment: *Managing Requests for Enforcement of Vacated Awards under the New York Convention*, 14 Am.Rev. Int'l Arb. 345 (2003). Erica Smith, Note: *Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin*, 20 B.U. Int'l L.J. 355 (2002). Susan L. Karamanian, *The Road to the Tribunal and Beyond: International Commercial Arbitration and United States Courts*, 34 Geo. Wash. Int'l L.Rev. 17 (2002). Kenneth R. Davis, *Unconventional Wisdom: A New look at Article V and VII \**

the critical point of the issue inherent in judicial review is a tension between two rival goals of efficient dispute resolution, which underlie most aspects of arbitration law. Finality, promoted by freeing awards from challenge, competes with community confidence in control mechanisms that protest against enforcement of aberrant decisions. The second goal of efficient arbitration, community confidence that aberrant awards will not be enforced, implicates judicial scrutiny of an arbitration's basic procedural fairness. Finality to the parties' shared expectations in this regard is as important as speed and economy.

## 6. Confirmation of the arbitral award

Confirmation of an arbitral award is purported to have the same force and effect as a judgment of a court. The parties agree to specify a court, either a State court or a Federal court, and if no court is specified by the parties, a Federal court in and for the district within which an award was made has the jurisdiction under the FAA.<sup>(77)</sup> When the State court confirms the award, the preclusion law (or estoppel law) applies as under judicial proceedings.<sup>(78)</sup> It is

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*\*of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 37 Tex. Int'l L.J. 43 (2002). Mohamad Taherzadeh, *International Arbitration and Enforcement in the U.S. Federal Courts*, 22 Hous. J. Int'l L. 371 (2000). Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 Am.Rev. Int'l Arb. 451 (2000). Ray Y. Chan, Note: *The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy*, 17 B.U. Int'l L.J. 141 (1999). Alan Scott Rau, *The New York Convention in American Courts*, 7 Am.Rev. Int'l Arb. 213 (1996). Michael H. Strub, Jr., Note: *Resisting Enforcement of Foreign Arbitral Awards under Article V 1 (e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 Tex. L.Rev. 1031 (1990).

77. FAA § 9.

78. Ian R. MacNeil, Richard E. Speidel & Thomas J. Stipanowich, *Federal Arbitration Law*, Vol. IV, § 39.1.3.2. (Little, Brown & Co. 1994). (When the arbitration award has been confirmed in a state court, the combination of FAA § 13, the Constitution's Full Faith and Credit clause and 28 U.S.C. § 1738 require the second tribunal to apply the domestic preclusion law of the state court rendering the judgment.)

clear that confirmation transforms the decision of an arbitrator into a public judgment recorded on a judicial docket of a state or federal court.<sup>(79)</sup> Under common law or state statutes before the enactment of the FAA, arbitration awards were fully enforceable in court by bringing a contract action. More expedited procedures for the enforcement of awards were enacted as FAA §9 in addition to the common law action.<sup>(80)</sup>

The *McDermott* was a case involving a dispute between non U.S. corporations concerning the coverage of an insurance policy delivered in London. The insurance company Lloyds was given an award in its favor that it was not bound by an insurance policy. Lloyds filed for an order confirming the award. It is not necessary to ask for enforcement of the award, but it was enough to get a confirmation of the award, because under the award Lloyds was not obligated to pay insurance but sought legal force and effect to render further litigation impossible.

## Conclusion

1. There are two reasons for including this Chapter in my dissertation analyzing party autonomy in commercial arbitration. The first reason is to formally complete the whole scheme of arbitration by adding the final stage of confirmation, annulment, recognition and enforcement of the award given by courts as an element of state power. An arbitral award is to be rendered by the arbitrator, who is a private person selected by the parties, and then the award needs the support of courts of law to give their necessary legal effect. Confirming award is a way to give them the same force and effect as a judgment. Annulling, setting aside or vacating an award requires state power. The ICSID Convention provides for the

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79. *Id.* §39.1.3.1. (What Preclusion Law Governs ?)

80. *Id.* §38.2.2.2. (Historical Background)

annulment or recognition and enforcement of an award within its scheme by agreement between the Contracting States. The recognition and enforcement of an award needs the state power to dispose or collect property or money against a defaulting party where self-help by the winning party is not allowed.

Another reason is a substantive aspect that party autonomy in arbitration is reviewed by the court at the final stage before confirmation, annulment, recognition or enforcement of an award. If some procedure or method as agreed upon or taken by the parties is deemed wrong or improper, the court does not give legal effect to the award. For example, the existence and scope of the arbitration agreement, arbitrability of the dispute, procedure used for the appointment of arbitrator, the arbitration procedure, adequacy of award, not its merits but formality, etc., which are adopted under party autonomy, may be reviewed by the court at the final stage before confirmation, annulment, recognition and enforcement of the award. To analyze party autonomy, it is necessary to consider the final stage administrating by the court and whether the award is compatible with the legal scheme for effecting an award's confirmation, annulment, recognition and enforcement.

2. The UNCITRAL Model Law on International Commercial Arbitration limits interventions by courts in arbitration by providing that in matters governed by the Model Law, no court shall intervene except where so provided in the Law.<sup>(81)</sup> Considering that arbitration is agreed upon and formed by the parties, the Model Law show minimum intervention and support by the court. It respects party autonomy. After rendering the award, however, support from courts is needed to give effect to enforce the award. At

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81. The UNCITRAL Model Law on International Commercial Arbitration, Articles 5 and 6. (1985).

the final stage of arbitration, support from a court is indispensable for confirmation, annulment, recognition and enforcement of the award.

3. In the cases cited above such as the *Chromalloy*, the courts concluded by reviewing the arbitration clause in the contract that the award was not intended to be appealed to any court, and stated that a decision by the court to recognize the decision of the Egyptian court would violate clear U.S. public policy favoring final and binding arbitration of commercial disputes. The court in the *Baker Marine* case distinguished between the facts it was considering and those encountered in the *Chromalloy*; as in its case *Chevron and Danos* did not violate any agreement, recognition of the Nigerian judgment did not conflict with U.S. public policy. The court in the *Spier* case took the same approach as the court in the *Baker Marine* case. Thus the U.S. courts respect the arbitration agreement and decide cases on the basis of the parties' intent when considering enforcement of the award.

Even in the final stage of the arbitration where confirmation, annulment, recognition and enforcement of an award is sought, party autonomy appears with courts asking whether it was appropriately pursued and performed in the arbitration.

In concluding this Chapter, it should be remembered that the U.S. Supreme Court referred to the so called 'second look' in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>(82)</sup> where the arbitrability of the antitrust laws in dispute was upheld and the arbitration proceed-

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82. 473 U.S. 614, 638(1985). (Having permitted the arbitration to go forward, the national courts of the United States will have the opportunity at the award-enforcing stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed. The Convention reserves to each signatory country the right to refuse enforcement of an award where the recognition or enforcement of the award would be contrary to the public policy of that country.)



ed under the arbitration rules of the Japan Commercial Arbitration Association. U.S. courts will review foreign awards when one of the Parties seeks to have recognized the award and enforced in the U.S. in regard to the matter or issue that the U.S. courts perceived as public policy.

The final stage of arbitration is administered and implemented by the court.