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CHAPTER 14

Judicial Attitudes towards the Enforcement of Annulled Awards

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Introduction

This chapter explores the issue of the enforcement of annulled awards under the regime of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York 1958 (New York Convention) through an analysis of recent decisions from the courts of the United States, England and France, to suggest the attitude courts in African States should adopt when required to enforce an annulled award. These three jurisdictions have robustly engaged with this question and their courts have proffered different reasons for the positions they take on the issue, which may be instructive to the courts in Africa. The issue is set out in 14.01; and the theoretical and practical effects of annulled awards are briefly discussed in 14.02. The approach adopted by the English courts is briefly examined in 14.03; the US courts in 14.04; and the French courts in 14.05; and a conclusion.

14.01 The Issue

The purposes of the New York Convention are to encourage arbitration and simplify the enforcement of arbitral awards globally. Whereas, the objectives of the New York Convention are clear, the equivocal wording of some of its provisions have been subjected to varied interpretations. Article V (1) (e) of the New York Convention particularly stands out in this regard. It sets out three grounds for the refusal of the enforcement of foreign arbitral awards which have triggered extensive comments and controversy as to their precise interpretation. A case in point is where an award has been annulled at the arbitral seat by a competent authority, Article V (1) (e) of the New York Convention gives national courts of contracting states the discretion to enforce such award. Consequently, the examination over whether courts must or may refuse the enforcement of annulled awards is not just notional, but touches on the essence of the New York Convention. This is because it influences the inquiry into whether such awards can be effectively enforced under the Convention.

14.02 Effects of annulled arbitral awards

Theoretically, three approaches have been advanced on the status of an annulled arbitral award. The first view holds that an annulled award ceases to exist and is unenforceable in any

other jurisdiction. This traditional approach, which reflects the jurisdictional theory of arbitration emphasises the territoriality of the state and in support, van den Berg argues that:

> …the fact that the award has been annulled implies that the award was legally rooted in the arbitration law of the country of the origin. How then is it possible that other country can consider the same as still valid? Perhaps some theories of legal philosophy may provide an answer to this question, but for a legal practitioner this phenomenon is inexplicable. It seems that only an international treaty can give a special status to an award notwithstanding its annulment in the country of origin.[1]

One of the advantages of this approach is that it discourages endless forum shopping for the enforcement of an annulled award.[2]

The second approach presupposes that an enforcing court is at liberty to enforce an award notwithstanding that the award has been annulled at the seat of arbitration.[3] This approach is based on the delocalisation of international arbitration, which reflects the autonomous theory of arbitration and is justified on the grounds that international arbitration "cannot be deemed a manifestation of the state."[4]

Moreover, it is also a fact that the language of Article V (1) of the New York Convention is permissive and not mandatory.[5] Thus, the enforcement of an annulled New York Convention award is at the discretion of the enforcing court. Arguably also, the enforcement of an annulled award can be based on the provisions of Article VII (1) of the Convention. This Article permits an interested party in an arbitration to rely on a more favourable enforcement regime than the Convention itself.[6] In our view, if the enforcing court decides to enforce an

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[1] Van den Berg, A. J. (1994) "*Annulment of Awards in International Arbitration, in Lillich, R. B. and Brower, C. N. (eds.), International Arbitration in the 21st Century: Towards "Judicialisation and Uniformity?* Transnational Publishers, New York, p. 161. This view has also been upheld in *Supplier v State Enterprise* [2008] Yearbook Commercial Arbitration, Vl. XXXIII, p. 510 (Germany Court of Appeal, decided on 31/01/2007).

[2] UNCITRAL Explanatory Note on the Model Law on International Commercial Arbitration, UN DOC.A/40/17 (1994) at 7 (b) (24).

[3] De Cossio, F. G. (2016) "Enforcement of Annulled Awards: Towards a Better Analytical Approach", *Arbitration International*, Vol. 32, No. 1, pp. 17 – 27.

[4] Paulsson, J. (1998) "Enforcing Arbitral Awards Notwithstanding Local Standard Annulments" *Asia Pacific Law Review*, Vol. 6, No. 2, pp. 1 – 34.

[5] Art. V (I) of the New York Convention provides *inter alia*: "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."

[6] In *Hilmarton Ltd v Omnium de Traitement et de Valorisation (OTV)* (1994) Yearbook Commercial Arbitration, vol. XIX, p. 655, (France Supreme Court, decided 1994), the court held an award annulled in Switzerland to be enforceable in France under Art. VII (I) of the New York Convention. Similarly, in *Chromallory Aeroservices v Arab Republic of Egypt*,

award that has been set aside because its own law permits it, such enforcement decision is favoured under the New York Convention.

Unlike the laws of the US and England, French law operates outside the New York Convention and does not distinguish between setting aside on national grounds and setting aside on internationally recognized grounds.[7] French arbitral jurisprudence considers arbitration as belonging to a separate legal order with its own rights, distinct from the legal order of individual states,[8] including that of the seat of arbitration and of the state in which a party wishes to enforce the award.[9]

In addition, French law, relying on Article VII (1) of the New York Convention, applies its arbitration law,[10] whose provisions are more favourable than those of the Convention.[11] Consequently, not all the grounds for annulment of awards under the New York Convention are applied in France.[12] Instead, the grounds for annulment of awards provided in the French Civil Procedure Code (CPC) override those of the Convention.[13] Therefore, French law does not contain as a ground for the refusal of the annulment of foreign awards, the setting aside of the award in the country of origin. Therefore, under French law, awards annulled by other member states of the New York Convention may be enforced.[14]

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939 F Supp 907 (DDC 1996), a US Court relied on Art. VII (I) of the New York Convention to enforce an award rendered and annulled in Egypt.

[7] Jan Paulsson, '*Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)'* (1998) 9(1) ICC Intl Ct Arb Bull 14; Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?* ICSID Review, (2014), pp. 1–26.

[8] Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?* ICSID Review, (2014), pp. 1–26 doi:10.1093/icsidreview/sit053, p.20; Dominique Hascher, France, *The Review of Arbitral Awards by Domestic Courts, in Review in International Arbitral Awards*, IAI Series N°. 6 97-110 (Emmanuel Gaillard ed., 2008); Denis Bensaude, *French Code of Civil Procedure (Book IV), Introductory Remarks, in Concise International Arbitration* 1133-1134 (L. Mistelis ed., 2d. ed. 2015).

[9] United Nation Commission on International Trade Law [UNCITRAL], UNCITRAL Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res 61/33 (Dec. 18, 2006) UN Doc A/RES/ 61/33.

[10] CPC was first introduced by Decree No. 81-500 enacted on May 12, 1981 and reformed by the Decree No. 2011-48 of January 13, 2011 and entered into force on May 1, 2011. International arbitration related provisions are contained in Title II, Book IV. Under Title II, Chapter III focuses on recognition and enforcement of foreign awards or awards rendered in international arbitration proceedings.

[11] Denis Bensaude, *French Code of Civil Procedure (Book IV), Introductory Remarks, in Concise International Arbitration* 1133-1134 (L. Mistelis ed., 2d. ed. 2015).

[12] Although similar in wordings with the provision in the New York Convention (Art 5) and the UNCITRAL Model Law (Art.36) etc.

[13] As per Art. 1520 CPC, other grounds includes: the arbitral tribunal wrongly upheld; or declined jurisdiction; or the arbitral tribunal was not properly constituted; or the arbitral tribunal ruled without complying with the mandate conferred upon it; or due process was violated; recognition or enforcement of the award is contrary to international public policy.

[14] Jan Engelmann, *International Commercial Arbitration and the Commercial Agency Directive: A Perspective of Law and Economics*, Springer, Germany (2017): pp; 50-54.

The decisions examined below from these jurisdictions, where the enforcement of an annulled award is sought, it is usually anchored on public policy considerations.[15] Different jurisdictions treat the issue of public policy differently.[16] This is because, there is no internationally agreed standard on either the meaning of public policy or what constitutes public policy.[17] There is also an absence of guidelines from international arbitration instruments as to how the international public policy defence should be interpreted,[18] thus, shifting the burden onto domestic courts. For example, the Paris Court of Appeal, in accordance with the CPC,[19] has often used the traditional restrictive French approach in explaining that international public policy:[20]

> …. refers to the French conception of international public policy, that is, the rules and values which cannot be violated within the French legal order, even in the framework of situations of an international nature.[21]

Nonetheless, what remains unclear is, the test an enforcing court may apply in order to determine whether or not to enforce an annulled award.

The third approach therefore, synthesises the territorial and delocalisation approaches to establish the criteria to be considered by courts in determining whether or not to enforce an annulled award. This approach is to the effect that an enforcing court should only refuse enforcement of an annulled award if the reason for the annulment is based on 'international standards'.[22] The effect of this third approach is that where an award is annulled on the basis of local standards, an enforcing court may choose to enforce such award.[23] Therefore, according to Paulson, an international standard annulment has to reflect any of the grounds

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[15] Art. V (2)(b) New York Convention; Art. 36(1)(b)ii) Model Law & 34(2) (b)ii) in relation to the set aside of an arbitral award on the ground of public policy.

[16] J.B. Racine, "*Les normes porteuses d'ordre public dans l'arbitrage commercial international*" in E. Loquin, S. Manciaux (dir.), *L'ordre public et l'arbitrage, Actes du Colloque des 15 et 16 Mars 2013* (2014), pp. 7-35, at pp. 8-21.

[17] J.B. Racine, "*Les normes porteuses d'ordre public dans l'arbitrage commercial international*" in E. Loquin, S. Manciaux (dir.), L'ordre public et l'arbitrage, Actes du Colloque des 15 et 16 Mars 2013 (2014), pp. 7-35, at pp. 8-(19-20).

[18] Art. V(2)(b) New York Convention; Art. 36(1)(b)ii) Model Law & 34(2) (b)ii)

[19] Art. 1520 (5) CPC

[20] Art 1520 (5) is interpreted to ensure that "international public policy" is the yardstick instead of the wider 'public policy' as in J-L Delvolvé, J. Rouche, G H Pointon, "*French Arbitration Law and Practice: A Dynamic Civil Law Approach to International Arbitration*, 2nd Ed, Kluwer Law International, The Netherlands (2009), para. 294, p.156

[21] CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France.*

[22] See for example, Paulsson, J. (1998), pp. 20 – 28; Lew, J. D. M., Mistelis, L. A. and Kroll, S. M. (2003) *Comparative International Commercial Arbitration*, Kluwer Law International, The Hague, pp. 719 – 720.

[23] Paulsson, J. (1996) "The Case for Disregarding Local Standard Annulment (LSA) Under the NYC", *American Journal of International Arbitration*, pp. 99 – 114

set out under Article V (1) (a) to (d) of the New York Convention.[24] However, this approach is not flawless. Notably, it leaves Article V (1) (e) of the New York Convention redundant. Arguably, the intention of the drafters of the Convention is that Article V (1) (e) should provide a separate ground for the unsuccessful party to resist enforcement of an award that has been annulled.[25] Given the Paulsson's international standard argument, this separate ground becomes elusive or at best, in abeyance.

There are also some practical effects of the enforcement of annulled awards and these have been the subject of extensive comments and controversy. This is because according to Born, the New York Convention does not prescribe the effects of either annulment or non-recognition of an award.[26] Nevertheless, the text of Articles V and VII of the New York Convention strongly suggest that an annulled or suspended award may, but need not, be denied recognition and enforcement in other contracting states. The crucial question that may then arise in an enforcing court, if an award is set aside at the arbitral seat, is the effect of its judgment (whether to enforce or set aside the award) on such award. Also, can an enforcing court in recognising either the judgment annulling the award or the award, be complying with its obligations under the New York Convention and its national law? These questions remain to be fully answered but go beyond the purpose of this chapter. In the following section, we briefly explore some recent decisions from the courts in England, the US and France, comparatively to tease out their practice or attitudes towards the enforcement of annulled awards, as examples for adoption by courts in Africa.

14.03 Approach of English Courts

In our opinion, the English courts approach to the enforcement of annulled awards has been hard-headed. Though, in principle, English law does not recognise the idea of delocalised arbitration, English courts have formulated a test they will apply to determine whether they will enforce an annulled award.[27] The test for English courts is whether the decision of the annulling court offends basic principles of honesty, natural justice and English public policy.

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[24] Paulsson, J. (1998), p. 29; the same grounds are also set out in Art. 34 (2) (a) of the UNCITRAL Model Law

[25] Koch, C. (2009) "The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience", *Journal of International Arbitration*, Vol. 26, No. 2, pp. 267 – 292; Lastenouse, P. (1999) "Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene" *Journal of International Arbitration*, Vol. 16, No. 2, pp. 25 – 47.

[26] Born, G. B. (2014) International Commercial Arbitration, 2nd ed., Kluwer Law International, The Netherland, p. 3632

[27] Tweeddale, A. and Tweeddale, K. (2007) Arbitration of Commercial Disputes: International and English Law and Practice, Oxford University Press, Oxford, pp. 444 – 445.

According to Darwazeh, in this test, the English courts have interpreted the text "recognition and enforcement of the award may be refused" in the New York Convention, literally.[28]

In *Yukos Capital SARL v OJSC Rosneft Oil Company,*[29] the defendants failed to honour the arbitral award despite the enforcement decision of the Court of Appeal in Amsterdam. Thus, the claimants commenced legal proceedings in England to enforce the award. The preliminary question before the court was whether the common law precludes the enforcement of awards that have been annulled at the place of origin. The court held that the answer was to be found in a test asking whether the court can in the circumstances treat the award as having legal effect. Simon J stated:

> In applying this test, it would be both unsatisfactory and contrary to principle if the court were bound to recognise a decision of a foreign court which offended against basic principles of honesty, natural justice and domestic concepts of public policy.[30]

Similarly, in *Dowans and another v Tanzania Electric Supply Co. Ltd*,[31] the court held that there was no question of an automatic refusal to enforce the award simply because one of the grounds for setting the award aside has been satisfied. The court further stated that "English Courts still retain the discretion to enforce the award, though that jurisdiction will be exercised sparingly". Similarly, the court applied this pragmatic test in the recent case of *IPCO (Nig.) Ltd v NNPC*.[32] This is because the court stated in *IPCO* that, there was no doubt that Section 103 of the English Arbitration Act (EAA 1996) is pre-disposed to the enforcement of New York Convention awards. Thus, even when a ground for denying enforcement is established, the court still retains its power to enforce the award. The court then went on to consider how such discretion would be exercised. The court referred to Lord Mance's dictum in *Dallah Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.[33] Paraphrasing the court's decision, Gross J. held that, the enforcing court could if necessary consider the circumstances in which the original award was rendered and the circumstances in which it was later annulled. Also, the enforcing

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[28] Darwazeh, N. (2010) "Art. V (1)(e)" in Kronke, H., *et al,* (eds.) Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention, Kluwer Law International, The Netherland, pp. 301 – 344.
[29] [2014] EWHC 2188 (Comm).
[30] *Yukos Capital SARL v OJSC Rosneft Oil Company* [2014] at para. 20.
[31] [2011] EWHC 1957 (Comm).
[32] [2014] EWHC 576 (Comm).
[33] [2010] UKSC 46 at pp. 67 – 68

court would not be precluded from forming its own views on whether the foreign entities involved had complied with the appropriate legal rules.

Most recently, in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*,[34] the High Court stated that a claimant seeking to enjoin the court to exercise its discretion to enforce an annulled award

> …bears a heavy burden to establish not only that the foreign court's decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias[35]

In *Maximov,* the defendant agreed to acquire 50% + 1 share of the claimant's holding in OJSC Maxi-Group on the basis of a price calculated in accordance with clauses 3 and 4 of the parties' Share Purchase Agreement. There was dispute as to the calculation of the purchase price, which was resolved by a Russian arbitral tribunal in favour of the claimant. The defendant appealed to the Russian Arbitrazh (Commercial) Court and the court annulled the arbitral award on various grounds. This decision was upheld on appeal to the first appeal court and on paper to the Supreme Court. The claimant brought proceedings to enforce the award in England. He alleged that the decisions of the Russian courts were perverse, and invited the Court to infer that those decisions were therefore procured by bias and should not be recognised by the English Court on the grounds of public policy. The defendant in its defence sought recognition of the Russian judgments which had annulled the award.

Although there was no evidence of actual bias by the Russian courts however, the issue was whether bias could be inferred from the Russian courts' annulment decisions. This was a rare argument and required the English court to come close in scrutinising the Russian courts' annulment decisions on their merits. The claimant application was dismissed and the court held that it is not enough that the English court considers a foreign court judgment wrong or even perverse; the judgment will still be recognised. The court reasoned that such foreign court judgment must be so wrong that no court acting in good faith could have reached it. This is a high threshold to satisfy. The court then concluded that the English court will examine the merits of such judgment only to resolve whether it meets this threshold. Nevertheless, the court was very critical of the Russian courts annulment decisions, finding that the grounds upon which the award was annulled were flawed and some of them were barely even arguable. Nevertheless still, and significantly, the court did not find that the Russian courts annulment decisions were so wrong that the only answer must be that the judges were biased against the claimant.

It can be fairly argued that the above cases demonstrate that English courts will not consider that an arbitral award stands or falls with the decision of the court at the place where the award was made. The courts have shown that an annulled award may survive and be enforced

[34] [2017] EWHC 1911 (Comm)
[35] *Nikolay Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm) at para. 53

in England if the enforcing party can show that the annulling court offended basic principles of honesty, natural justice and English public policy.[36] However, while the possibility of enforcing an annulled award has been recognised under English law and the courts willing to review decisions of a foreign court annulling an award, English courts are yet to enforce an award that has been annulled at the seat of the arbitration by a competent court.

14.04 Approach of US Courts

It appears that, from the case law on enforcement of annulled award in the US, the attitude of the US courts is unpredictable.[37] In a plethora of cases, US courts have considered whether or not to enforce annulled awards. In some cases, US courts have refused or narrowly restricted the likelihood of enforcing an award that has been annulled by a competent authority at the seat of arbitration. For example, in *Chromalloy Aeroservices v Arab Republic of Egypt*,[38] and recently in *Corporacion Mexicana de Mantenimiento Integral, S. de R. L. de C. V. v PEMEX-Exploraciony Produccion* (*COMMISA v PEMEX*),[39] US courts enforced awards that were annulled by competent authorities at the arbitral seats. However, in *Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd*.[40] and more recently, in *Getma Int'l v Guinea*,[41] US courts, while not contradicting or overruling *Chromalloy*, refused to enforce awards annulled by competent authorities at the arbitral seats.

In *Chromalloy*, the US Federal Court for the District of Columbia enforced an award rendered in Egypt against the Arab Republic of Egypt notwithstanding the fact that the award had been annulled by a competent authority in Egypt. The Egyptian court annulled the award on the grounds that the arbitrators erred in applying Egyptian civil law instead of Egyptian administrative law to the dispute. Firstly, the court reasoned that Article V (1) (e) of the New York Convention permits, but does not require the court to refuse, the enforcement of an annulled award. According to Darwazeh, the court's reasoning is consistent with the view that the text of Article V (1) (e) of the Convention is permissive and not mandatory.[42] Lastly, in determining whether the annulled award could be enforced in the US, the *Chromalloy* court went on to consider the text of Article VII of the New York Convention. The court considered generally applicable principles of the US arbitration law and private international

[36] Tweeddale, A. and Tweeddale, K (2005) pp. 425 – 429.
[37] Park, W. W. (2012) Arbitration of International Business Disputes: Studies in Law and Practice, 2nd edn., Oxford University Press, Oxford, pp. 129 – 130.
[38] 939 F Supp 907 (DDC 1996)
[39] No. 10 Civ 206 (AKH) 2013 WL 4517225 (SDNY 2013)
[40] 191 F.3d 194(2d Cir. 1999)
[41] No. 16 – 7087 (DC Cir. 2017)
[42] Darwazeh, N. (2010) pp. 337 – 339.

law as a more favourable rule. Thus, the court held that Chromalloy was entitled to enforcement of the annulled award under the Federal Arbitration Act (US, FAA), notwithstanding the text of Article V (1) (e) of the Convention and the fact that the award had been annulled at the seat by the Egyptian Court of Appeal, the competent authority.

Some commentators have criticised the court's reasoning that pursuant to Article VII, the enforcement rights under domestic arbitration law must prevail over Article V (1)(e) of the Convention.[43] They contend that introducing national law through Article VII will bring about disunity and uncertainty in the interpretation of the New York Convention, especially where the national law conflicts with the Article V grounds. Nonetheless, Gary Born considers the court's decision as well-structured, fundamentally correct and appropriate, he reasoned that:

> …with regards to the effect of annulment of an award, Article VI of the Convention clearly contemplates the possibility of recognising an annulled award, while Article VII expressly negates any suggestion that the Convention forbids a Contracting State from recognising an annulled award.[44]

With regards to Article V (1) (e) of the New York Convention, it appears that the court in *Chromalloy* based its ruling on the premise that the Egyptian court decision was not entitled to be given effect, and that the annulled award merited enforcement under the Convention. The court's consideration with respect to whether to enforce the annulled award and or to give effect to the Egyptian court's judgment annulling the award, centred closely on the specific grounds for the annulment decision and the parties' arbitration agreement. To this end, the US court concluded that the annulment decision breached both a fundamental US public policy – by the Egyptian court's involvement in a detailed substantive review of the award, and the parties' arbitration agreement – which had waived any such review. In our view, the Egyptian court's detailed substantive review of the award was an affront to the

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[43] See for example, Ostrowski, S. T. and Shany, Y. (1998) "Chromalloy: United States Law and International Arbitration at the Crossroads" *New York University Law Review*, Vol. 73, No. 5, pp 1650 – 1693; van den Berg, A. J. (1998) Enforcement of Annulled Awards?" *ICC International Court of Arbitration Bulletin*, Vol. 9, No. 2, pp. 15 – 21; Wahl, P. (1999) "Enforcement of Foreign Arbitral Awards Set Aside in Their Country of Origin: The Chromalloy Case Revisited", *Journal of International Arbitration*, Vol. 16, No. 4, pp. 131 – 140; Chan, R.Y. (1999) "The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy" *Boston University International Law Journal*, Vol.17, No.1, pp.141–214; Freyer, D. (2000) "United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case" *Journal of International Arbitration*, Vol.17, No.2, pp.1 – 9; Sampliner, G.H. (1997) "Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited" *Journal of International Arbitration*, Vol.14, No.3, pp.141–165.

[44] Born, G. B. (2014) p. 3630.

parties' arbitration agreement and the US court's decision to enforce the annulled award was consistent with the New York Convention provisions.

Recently, the US District Court for the Southern District of New York in *COMMISA v PEMEX* enforced an award annulled in Mexico, the arbitral seat, under the 1975 Inter-American Convention on International Commercial Arbitration (the Panama Convention).[45] In *COMMISA*, the award was rendered in favour of COMMISA in an ICC arbitration arising out of a contract for the construction of natural gas platforms between the parties. The award was subsequently confirmed by the US District Court for the Southern District of New York. PEMEX resisted enforcement by appealing the District Court's ruling to the US Court of Appeal for the Second Circuit, and also initiating corresponding annulment action at the arbitral seat, Mexico. PEMEX contended that the arbitrators exceeded their authority by determining the parties' dispute regarding PEMEX's attempted administrative rescission of the contract. Administrative rescissions were not arbitrable according to Mexican law that came into force *after* the parties' arbitration agreement and the arbitration proceedings.

PEMEX's application to annul the award was granted by the Mexican courts. The decisions annulling the award were premised largely on the new Mexican law prohibiting the arbitration of administrative rescissions. The courts reasoned that the arbitrators lacked competence to hear and determine the dispute in its entirety because the rescission and the breach of contract claims were intertwined. Following the annulment of the award at the arbitral seat, the US Court of Appeal for the Second Circuit remanded the matter to the New York District Court for reconsideration. In determining the issue in the light of the Mexican court's annulment decision, the District Court was faced with what it described as the "dilemma" of whether to enforce the arbitral award, or to respect the annulment decision of the Mexican courts.

In concluding whether to enforce the award and or respect the Mexican court judgment annulling the award, the New York District Court found that the Mexican court retroactively applied the Mexican law by rendering administrative rescissions not arbitrable. The New York District Court reasoned that the law applied by the Mexican courts was not in force at the time the parties contracted to arbitrate their dispute. In effect, the New York District Court concluded that COMMISA had a genuine belief that disputes with PEMEX were subject to arbitration, which was ignored by the Mexican courts *ex post* application of the

[45] Art. V of the Panama Convention is virtually identical to Art. V of the New York Convention.

law.[46] Accordingly, the New York District Court held that the Mexican courts judgments annulling the award "violated basic notions of justice" and therefore refused to respect the annulment, but enforced the annulled award.

From both the *Chromalloy* and *COMMISA* cases, it appears that US courts will enforce annulled awards if they find that the annulling court's decision violates the parties' arbitration agreement and that refusing to enforce the award would violate US pro-arbitration public policy. Although, subsequent US courts' rulings have largely endorsed the rudimentary analysis put forward in *Chromalloy*, notwithstanding they have deviated from the broad ruling in *Chromalloy* and declined to enforce particular awards that had been annulled at the arbitral seat.

In *Baker Marine (Nig.) Ltd. v Chevron (Nig.) Ltd*,[47] the US Court of Appeal, Second Circuit, declined to enforce an award that was annulled at the arbitral seat, Nigeria. The US Court of Appeal discussed the *Chromalloy* ruling with approval that, Article V (1) (e) of the New York Convention allows, but does not require, the court to refuse the enforcement of an annulled award; and that Article VII of the Convention permits the recognition and enforcement of Convention awards under US law. However, the court distinguished *Chromalloy* and stated that "recognition of the Nigerian judgment in this case does not conflict with United States policy".[48] Nevertheless, unlike *Chromalloy*, the US Court of Appeal held that Baker Marine, the award-creditor, had "shown no adequate reason for refusing to recognize the judgments of the Nigerian court" annulling the award.[49]

The US Court of Appeal decision in Baker Marine Ltd, did not detail its reasoning. Nonetheless it appears that the court relied on the fact that the parties had not relinquished the rights to appeal from the award under Nigerian law.[50] Furthermore, the court also highlighted the fact that the Nigerian court annulled the awards on grounds of excess authority of the arbitrators and procedural irregularities, both of which are generally accepted grounds for annulment and which would be allowable grounds for refusing recognition and enforcement under the New York Convention. Some commentators have observed that the primary focus of the consideration of the US Court of Appeal ruling in *Baker Marine Ltd* was, whether and

[46] *COMMISA* at pp. 26 – 28.
[47] 191 F3d 194 (2d Cir. 1999).
[48] *Baker Marine Ltd*, 191 F.3d at pp. 196 – 197.
[49] *Baker Marine Ltd*, 191 F3d at p. 197.
[50] *Baker Marine Ltd*, 191 F3d at p. 197, fn.3;

to what degree, the Nigerian annulment decisions were entitled deference by another domestic court; and that this was appropriate.[51]

Most recently, US courts declined to enforce an award that was annulled at the arbitral seat. In *Getma International v. Republic of Guinea*,[52] the US Court of Appeals for the District of Columbia Circuit affirmed the District Court's refusal to enforce an award that had been annulled by the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa (CCJA). The court stated that for an annulled award to be enforced in the United States, it must be satisfied that "the annulment is repugnant to fundamental notions of what is decent and just in the United States. Getma has not satisfied that demanding burden".[53]

In *Getma International*, disputes arose between the parties to a contract to develop and operate Guinea's main port in Conakry. Getma initiated arbitration proceedings after it purported that Guinea had unlawfully terminated the contract without adequate compensation. The said contract stipulated for arbitration administered by, and under the rules of the OHADA CCJA. Under CCJA arbitration, the CCJA functions both as an arbitral institution (providing the applicable procedural rules and other administrative duties), and as a supervising court (with competence to hear and determine applications to annul awards made in a CCJA arbitration). The CCJA on the application of Guinea annulled the arbitral award on the grounds that the arbitrators' conduct in negotiating their fees directly with the parties exceeded their authority and breached the CCJA Arbitration Rules of 2011.[54]

Nevertheless, Getma applied to the US District Court for the District of Columbia to enforce the CCJA annulled award. The US District Court considered the provisions of the New York Convention; the impact of the CCJA's annulment; and the circumstances in which a court may derogate from the general obligation to confirm and enforce a foreign arbitral award annulled by a competent authority at the seat of arbitration. In its application, Getma contended that the CCJA, through correspondences from its Secretary General, 'encouraged'

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[51] Park, W. W. (2012) pp. 426 – 427; Kendra, Th. (2012) "The International Reach of Arbitral Awards Set Aside in Their Country of Origin: a Turning Point?" *International Business Law Journal*, No.1, pp.35–52; Drahozal, Ch. (2000) "Enforcing Vacated International Arbitral Awards: An Economic Approach" *American Review of International Arbitration*, Vol.11, No.4, pp.451–479.

[52] No. 16-7087 (D.C. Cir. 2017).

[53] *Getma International*, No. 16-7087 (D.C. Cir. 2017) at pp. 4 – 5. The court quoted with approval the cases of *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C. Cir. 1981) and *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 938 (D.C. Cir. 2007).

[54] Rules 24.2, 24.3, 25.1 of the CCJA Arbitration Rules and 9 of Decision No. 004/99 / CCJA of 3 February 1999 on Arbitration Fees

the arbitrators to consult with and solicit an agreement from the parties to increase their fees. Thus, Getma argued that the CCJA's annulment of the award was contrary to US public policy because it violated basic notions of justice. The court of first instance found that while the New York Convention does confer upon the courts the discretion to enforce an award notwithstanding its having been annulled, that discretion was narrowly confined. The court reasoned that such discretion would only be exercised where enforcement would be contrary to the US 'most basic notions of morality and justice'. The court further stated that where a foreign court had annulled an arbitral award, a court in the US could only ignore such annulment on 'limited ... occasions' where extraordinary circumstances have been presented. In effect, US courts must be very cautious in considering notions of public policy. Thus, the court held that none of Getma's public policy arguments was sufficient to permit the disregarding of the CCJA's annulment of the arbitral award. To this end, the CCJA's conduct was not repugnant to US public policy.

On Getma's appeal to the US Court of Appeals for the District of Columbia Circuit, it was held that the CCJA is "a competent authority" for purposes of Article V(1)(e) of the New York Convention. For reasons of international comity, the court declined to second-guess a competent authority's annulment of an award in the absence of satisfactory proof of extraordinary circumstances. Therefore, because Getma's arguments failed under this rigorous standard, the District of Columbia Circuit upheld the judgment of the District Court.

Flowing from the cases reviewed above, it appears that the US courts' attitude towards the enforcement of annulled arbitral awards encompasses scrutinising the annulment decision in order to determine whether it will uphold such decision or not. Though the standard has varied, it also seems that if something appears to be erroneous with the annulment decision, the likelihood of upholding such decision is greatly diminished. In *Chromalloy*, an annulled award was enforced because the court reasoned that the annulment decision offended the arbitration agreement of the parties. Also, in *COMMISA* the court enforced an annulled award reasoning that the award was annulled based on a retroactive law. However, in *Baker Marine* an annulled award was refused enforcement because the court found that the annulment decision was not tainted. Also, in *Getma International*, US courts upheld the annulment decision, reasoning that the decision did not breach basic notions of justice.

14.05 Approach of French Courts

French courts are well-known for their pro-enforcement policy in the recognition and enforcement of foreign awards in France, regardless of the position of the court of the origin of the award.[55] This French position on the enforcement of foreign arbitral awards has been reiterated recently in *Veteran Petroleum Limited (Cyprus) v. The Russian Federation (Russia),*[56] where the court dismissed the Russia's argument that the award cannot be recognized and enforced in France after its annulment in the country where the award was rendered. The court ruling explained French law approach as follows:

> "It is settled case-law that Articles 1498 et seq., which have become Articles 1514 and following, of the Code of Civil Procedure on the Recognition and Enforcement of Arbitral Awards, are applicable both to international awards and to awards made abroad, without regard to their internal or international character.
>
> It is also common ground that, on the basis of Article VII of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, the same jurisprudence applies in the French law of international arbitration, which does not provide for the annulment of the award in the country of origin as a ground for the refusal of the recognition and enforcement of the foreign award.[57]
>
> Accordingly, it is irrelevant whether the annulled arbitral awards are international in nature, since they were, like those at issue, rendered abroad.
>
> Accordingly, the plea that the arbitral award on which the seizure was based would have been annulled or rendered null and void in France by the judgment of the District Court of The Hague (Netherlands) of 20 April 2016 is dismissed.

Therefore as a matter of French law, when an award has been set aside or suspended in a foreign jurisdiction, it is not a sufficient ground to dismiss the claim for enforcement of the same award on that ground, unless it is a ground enumerated in the French Civil Procedure

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[55] In *Société Pabalk Ticaret Ltd Sirketi (Turkey) v. SA Norsolor (France)*, the Cour of Cassation held that a French judge cannot refuse exequatur when his national law authorizes it (Cass Civ.1, 9 Oct. 1984: Bull. Civ. I, No. 248; D. 1985. 101).

[56] Decision of 10 Feb 2017, Tribunal de Grande Instance d'Evry (Affaire n°16/04274), regarding the attempts to enforce the Yukos Award in *Veteran Petroleum Limited v. The Russian Federation* (PCA Case No. AA 228); CA Paris 1re, .27 June 2017.

[57] As per *Société Pabalk Ticaret Ltd Sirketi (Turkey) v. SA Norsolor (France)*, (Cass Civ.1, 9 Oct. 1984: Bull. Civ. I, No. 248; D. 1985. 101). The French Court of Cassation had previously ruled that the provisions of Art. VII of the New York Convention shall not deprive any interested party of the right it may have to rely on an arbitral award in the manner and to the extent permitted by the laws or treaties of the country in which the award is invoked. It follows that a French judge cannot refuse exequatur when his national law authorizes it.

Code.[58] This case illustrates and reiterates an established attitude of French courts over the years, enforcing awards that have been set aside or suspended at the seat of arbitration.[59]

According to Professor Emmanuel Gaillard,[60] international arbitration has a transnational legal order in which no state should have the final say on the validity (or otherwise) of the award. Instead, each enforcing court should be entitled to form its own view on the validity of the award, regardless of the position of the courts at the seat of arbitration. Thus, the focus of the French judge is the particular award before him or her, not the conduct of the arbitral tribunal or the judgment rendered by the Court of another country.[61] As a result, French courts consider that an international arbitral award is not "anchored' or 'integrated' into the legal system of the seat of arbitration.[62] Therefore, the view of seat courts on the validity of the award is irrelevant as to whether the award should be enforced or not in France.

The recent development of case law on the compliance of international public policy shows that French courts have made it even more difficult for a losing party to resist enforcement or recognition of an arbitral award, or to obtain its annulment. Moreover, the constant evolution of the courts' approaches in reviewing arbitral awards on the ground of violation of international public policy show the necessary changes adopted in their role of guardians of public policy. These courts attitudes ensure that France remains a pro-arbitration enforcement regime.

The *minimalist and maximalist* tests of review have been used in the last two decades to ascertain whether the award complies with international public policy. According to the maximalist approach, courts in the review process must ensure that all public policy related elements of the case have been identified, examined and appropriately applied. As per the

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[58] Art. 1620 CPP: Previously, the French Court of Cassation had ruled that the provisions of Art. VII of the New York Convention shall not deprive any interested party of the right it may have to rely on an arbitral award in the manner and to the extent permitted by the laws or treaties of the country in which the award is invoked. It follows that a French judge cannot refuse exequatur when his national law authorizes it (Civ. 1, 9 Oct. 1984: Bull. Civ. I, No. 248; D. 1985. 101).

[59] French courts have enforced awards in France notwithstanding their annulment in other jurisdictions. See: Hilmarton, Cass. Civ. 1re, 23.3.1994, Rev. Arb. 1994, S.327; Putrabali, Cass. Civ. 1re, 29.6.2007, Rev. arb. 2007, S.507.

[60] Professor Emmanuel Gaillard, during a paper presentation at a discussion seminar on the "Interpretation and Application of the 1958 New York Convention for the Recognition and Enforcement of Foreign Arbitral Awards", held in Paris, 16 September 2017.

[61] The judgment of the Court of Appeal in *Linde'x case* underlines the consistency of approach by the focus of the court's scrutiny on the award as issued by the arbitrator and not an award revisited by the court in light of the parties' expectations; also see Yukos Award in *Veteran Petroleum Limited v. The Russian Federation* (PCA Case No. AA 228); CA Paris 1re, .27 June 2017.

[62] Jan Paulsson, '*Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA*)' (1998) 9(1)ICC Intl Ct Arb Bull 14.

decision in the *Pyramids Case*,[63] the court before which the review was sought, held that it had unlimited authority to review the fact and law, all the elements allowing it to confirm whether or not the rules of public policy had been applied and due process followed.[64] The court used the maximalist approach until in the early 2000's while increasingly adopting a pro-enforcement and pro-arbitration view, which led to the current adoption of the minimalist standard of review.

According to the minimalist test, the court's scrutiny may consider only the compatibility of the effect of the award's recognition or enforcement with international public policy.[65] The scope of scrutiny is strictly extrinsic[66] and the examination is limited to the "*flagrant, effective and concrete*" alleged violation. It is essential and sufficient for the French court to be satisfied that the award itself and the proceedings in which it was made, complied with the notions of French international public policy to ensure the recognition and enforcement of awards.[67]

However, the level of scrutiny for reviewing awards in the last decade has relatively been dominated by the low standard of a "*fragrant, effective and concrete*" violation of international public policy, and this is mostly in the area of competition law. Since 2014, French courts' scrutiny for reviewing awards have been consistent in using the maximalist approach, thereby ensuring that the awards comply with the rule of international public policy mostly in cases related to corruption and money laundry.

The minimalist approach was followed in *SA Thales Air Defence v. GIE Euromissile and SA AEDS France* or "Thales case",[68] where the award in question ordered *Thales* to pay damages to Euromissile in a dispute concerning a license agreement. None of the parties had argued that the terms of the license agreement were incompatible with European competition law

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[63] *Southern Pacific Properties Ltd (Middle East). v. The Republic of Egypt, well known as the* '*The Pyramids Case*', Cass. 1e civ., 6 Jan. 1987,

[64] Cass. 1e civ., 6 Jan. 1987, *Plateau des Pyramides, ; Southern Pacific Properties Ltd. v. Republic of Egypt*, Rev. Arb. 469 (1987), Award of March 11, 1983, 22 ILM 752 (1983) set aside by a decision of the Paris court of appeal of July 12, 1984 which was confirmed by the Court of Cassation, English version 26 I.L.M. 1004 (1987).

[65] Court of Cassation, 4 Jun. 2008, *SNFV sas v. Cytec Industries BV,* Clunet 2008, 1101; further explained that the evaluation of the facts and their consequences by the arbitrators could not be reviewed because Art.1502 of the NCCP does not provide for such a review and the review. See also CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*; CA Paris, 23 Mar. 2006, *Cytec; CA Paris*, 22 Oct. 2009, *Linde*.

[66] Heitzmann & J. Grierson,'*SNF v CYTEC Industrie*: National Courts Within the EC Apply Different Standards to Review International Awards Allegedly Contrary to Art. 81 EC', 2 Stockholm Int'l Arb. Rev. 39 (2007).

[67] CA Paris, 18 Nov. 2004, *Thalès v. Euromissile.*

[68] CA Paris, Nov. 18, 2004, *Thalès v. Euromissil*, Rev. Arb. 751 (2005);*Thalès Air Defence BV v. GIE Euromissile*: Defining the Limits of Scrutiny of Awards Based on Alleged Violations of European Competition Law, 22(3) J.Intl Arb..239 (2005).

before the arbitral tribunal. Later, *Thales* sought the annulment of the award on the ground that, the agreement breached European competition law. As a result, the award, which gave effect to the contract, violated international public policy. But Thales was estopped from raising new arguments about the dispute as it had not done so during the arbitration. The Court of Appeal dismissed the application as the applicant failed to demonstrate a "flagrant, effective and concrete" violation of international public policy.[69]

In its decision, the Paris Court of Appeal explained that there could not possibly have been a manifest violation since no competition law issue had been discussed before the arbitrators and that, not every breach of international public policy can be invoked for setting aside an award, unless the severity threshold requirement is satisfied.

On the meaning of the threshold "flagrant or manifest", this refers to the substantial nature of the violation.[70] It has been interpreted to mean that, "the task of a reviewing court is to take the award as it is and not to rewrite it".[71] Therefore the violation must be blatantly obvious[72] as opposed to the debatable violation.[73] In other words, the court,

> *"will only determine whether the award… in light of the factual and legal elements that were adopted by the arbitrator, violates public policy"*.[74]

Using the same meaning, the Court of Cassation in *SNF SAS v Cytec Industries BV*, subsequently adopted the same approach as in Thales.[75]

The minimalist test was adopted by the Paris Court of Appeal until its controversial decision in *Linde Aktiengesellschaft and Linde Hellas (Germany) v. Halyvourgiki (Greece)*[76] where it

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[69] CA Paris, 18 Nov. 2004, *Thalès v. Euromissile*, J.D.I. 357 (2005).
[70] Cass. 1re civ., Grands Moulins de Strasbourg, 19 nov.. 1991, Rev. arb. 1992.76, note by L. Idot; CA Paris, 14 June 2001, *SA Compagnie commerciale André v. SA Tradigrain France*; CA Paris, 23 Mar. 2006, Cytec; CA Paris, 22 Oct. 2009, Linde.
[71] Dominique Hascher and Beatrice Castellane, French Case Law Annual Report‖ Paris *Journal of International Arbitration* 2010-4; Also, see the Court limited power as per Art 1520 CPC.
[72] CA Paris, 18 Nov 2004, *Thales v Euromissile*, No 2002/19606 where it was held that a flagrant violation means one which "*crève les yeux* "or in other words is as plain as the nose on the face.
[73] Piero Bernardini, *Scope of Review in Annulment Proceedings - Chapter 9 - International Arbitration and Public Policy* 167, (Devin Bray & Heather L. Bray eds., 2015); Dominique Hascher and Beatrice Castellane, French Case Law Annual Report, *Paris Journal of International Arbitration* 2010-4. (Devin Bray & Heather L. Bray eds., 2015).
[74] Roland Ziadé and Charles-Henri De Taffin, note of 26 November 2009, Paris Court of Appeals‖ 2(4) *Int'l J. Arab. Arb.* 138 (2010) at pp. 149-151; Michael Hwang, Kevin Lim, 'Corruption in Arbitration - Law and Reality' (2012) 8 *Asian International Arbitration Journal*, Issue 1, pp. 1–119
[75] Ibid 70.
[76] CA Paris, Oct. 22, 2009, 08/21022, *Linde AG v. Halyvourgiki AE*, F.X. Train (note), Rev. Arb. (Oct. 2009).

attempted to use a broader scope of review[77] similar to the "*Pyramids formula*"[78]. Nevertheless, the ruling in *Lende's* case was closely similar to that in *Thalès* as in both cases, the Court underlined that an argument which was not canvassed before the arbitrators cannot be raised for the first time before the reviewing court. Otherwise, the court would be thrown into an examination of the merits of new claims, a situation that is beyond its powers.[79]

Two months after the ruling in *Lende's* case, the Court of Appeal made a sharp return to using the minimalist test in *M. Schneider Schältegerätebau und Elektroinstallationen GmbH (Austria) v. CPL Industries Limited (Nigeria)*.[80] Most importantly the limited scrutiny was entirely applied, but this time, in response to the annulment of the award on the basis of an allegation of corruption. In so doing, the court did not follow its previous decision (in similar situation) which applied a thorough examination of the law and fact.[81] On appeal, the Court of Cassation confirmed *Schneider's ruling* in 2014,[82] restating that the control should be limited.

Schneider's case evidences the discontinuance of the trend started by the Paris Court of Appeal in *Lende's* case in the area of competition law, an approach that was not embraced by the Court of Cassation.[83] Despite critics arguing that the approach was based on literally "no review", on the finality of the arbitral award and the prohibition of the revision of awards on their merits by the courts. [84]

This area of the law is in constant evolution. Over the last four years (2014-2017) we have witnessed a new development with a series of judgments from the French courts and their interplay with international dispute resolution.[85] These decisions seem to signal the abandonment of a limited scrutiny of awards to an approach allowing a thorough and stricter scrutiny of the facts and the law, mainly in cases involving allegations of corruption and

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[77] The Court attempted to apply to maximalist approach when it stated in the reasoning of its decision that it could examine in law and in fact, the elements contained in the award.
[78] *Ibid* 61.
[79] Charles Jarosson, *L'intensité du contrôle de l'ordre public*, in Eric Loquin & Sébastien Maciaux, l'Ordre Public et l'Arbitrage, 165-168 (2014), p.167.
[80] CA Paris, Sept. 10, 2009, No 08 / 11757, *M Schneider Schaltgeratebau und Elektroinstallationen GmbH v. CPL Indus. Ltd*, Rev Arb, 2009. pp 920 – 92.
[81] CA Paris, 1er Ch Sept 1993, *Société European Gas Turbies SA v. Société Westman International Ltd.*
[82] Cass, 1e civ., Feb. 12, 2014, *Sté M. Schneider Schältegerätebau und Elektroinstallationen GmbH v. Sté CPL Industries Ltd.*
[83] *Ibid* 80.
[84] See the limit of the minimal approach in Michael Hwang, Kevin Lim, 'Corruption in Arbitration - Law and Reality' (2012) 8 *Asian International Arbitration Journal*, Issue 1, pp. 1–119 para. 173 seq; Emmanuel Gaillard, "Extent of Court Review of Public Policy" 237(65) *N.Y. Law Journal* (5 April 2007);
[85] Only twenty days after the Court of cassation ruling in *Schneider's* (Feb.2014) to date.

money laundry. The common factor in these cases is the absence of the requirement of a "*flagrant*" violation of international public policy.[86] Consequently, the court investigates thoroughly the allegation of corruption and money laundry. Unlike the money laundry case which was set aside, all corruption related awards were ultimately confirmed.

First, the case of *Société Leaders for Management and Services Holding Company (Saudi Arabia) v. SA Credit Foncier de France (France)*[87] is the first of the three corruption-related cases decided by the Paris Court of Appeal, in the wake of the *Schneider's* case. The facts of this case involve a loan agreement between SA Credit Foncier de France (CFF) and Gulf Leaders for Management and Services Holding (Gulf Leaders), subject to an underwriting fee, all payable in three instalments. After the payment of the first two instalments, for some reasons, CFF declined to pay the third instalment, rescinded the loan agreement and claimed a refund of the sums already paid.

CFF began arbitration proceedings against Gulf Leaders to recover the outstanding sums. Gulf Leaders argued that the loan agreement was a product of corruption and therefore there could not be restitution as the contract was void *ab initio.* The ICC arbitral tribunal rendered an award in favour of CFF and dismissed the corruption argument, which had not been proven. Gulf Leaders after that, applied to set aside the award on the grounds of the violation of international public policy.

In defining its level of scrutiny and the approach adopted, the court stated that when a party alleges that an award gives effect to a contract obtained by corruption,[88] the judge in the set aside proceedings must analyse all the elements, facts and law, to determine the illegality of the contract. The court will also examine whether the enforcement of the award will be consistent with international public policy in an "effective and concrete manner".[89] In the ruling, the Court of Appeal found that corruption had not been established and dismissed the claim. It is important to note that this conclusion was made based on the court's reasoning

[86] CA Paris, 4 Mar 2014, *Société de Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France*, Rev.arb2014, 955-957f; CA, 14 Oct 2014 *République du Congo v. SA Commissions Import-Export*, Rev. arb.2014, 1030; CA Paris, 4 Nov 2014, *SAS Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd*, Rev. Arb. 2014, 543.
[87] CA Paris, 4 Mar 2014, *Société Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France.*
[88] Art. 1520 (5) CPC
[89] CA Paris, Pole 1, Ch1.

and definition of corruption, after a thorough review of the facts and law as alleged by the applicant. This decision has recently been confirmed on appeal by the Court of Cassation.[90]

The second case of *Republic of Congo v. SA Commission Import Export* followed the approach adopted in *Gulf Leaders.* The Congolese company, Commission Import Export SA (*Commisimpex*), undertook various public works projects in Congo in which Congo did not pay. The parties then signed an agreement containing an ICC arbitration clause (1992 Agreement), providing a payment schedule for the repayment of debts. Again, Congo failed to pay and *Commisimpex* commenced arbitration and obtained an award in its favour in December 2000. Congo defaulted on its payment. In August 2003, a second agreement was signed in which the parties agreed to the amount due to *Commisimpex* under the 1992 Agreement and the 2000 arbitral award (2003 Agreement). In April 2009, since Congo continued defaulting on its debt under the above agreement, *Commisimpex* commenced arbitration proceedings under the 2003 agreement. This 2003 agreement also provided for an additional debt founded upon a letter dating from 1992, said to have recorded decisions taken at meetings in that year. The 1992 letter had apparently disappeared and was "rediscovered" in 2003.This last arbitration resulted in an award in its favour.

Congo sought the annulment of the award on the ground that the award contravenes international public policy as it gives effect to the 2003 agreement, which was obtained in "a general climate of corruption", of which *Commisimpex* had taken advantage, and was therefore void for the illegal cause.

Applying the same standard of review as the court in *Gulf Leaders*, the Paris Court of Appeal examined the reasoning of the arbitral tribunal and then, re-examined the facts of the case in light of the allegations of corruption put forward by Congo. It found that each of the claims presented as 'suspicious' had plausible explanations in contemporaneous evidence, and that therefore, Congo had not demonstrated that the arbitral award would give effect to a contract concluded in "a general climate of corruption". Further, the Court stated that Congo could not free itself of contractual obligations by alleging *"*a general climate of corruption*"* within its

[90] Cass,1e civ, June 24, 2015, *Société Gulf Leaders for Management and Services Holding Company v. SA Crédit Foncier de France*

administration without specifying the individuals involved and without the alleged beneficiaries being prosecuted.[91]

The third and the most recent of this trilogy of corruption cases is, *SAS Man Diesel & Turbo France v. Sté Al Maimana General Trading Company Ltd*,[92] in which the Paris Court of Appeal applied the test used in the previous two corruption cases. The Court dismissed the application to set aside the award which was alleged, among other grounds, to have given effect to a contract tainted by corruption and consequently will violate French international public policy, if enforced.

Before its ruling, the Court of Appeal first looked at the reasoning of the arbitral tribunal and subsequently, conducted its analysis of the facts, and held that each of the allegations of the appearance of corruption was in fact justifiable by contemporaneous facts and evidence and therefore, concluded that corruption had not been proved.

More recently, in the money laundry related case of *Valeri Belokon (Latvia) v The Kyrgyz Republic*,[93] the Paris Court of Appeal annulled a UNCITRAL arbitral award[94] rendered against the Kirghizstan Republic for the violation of the Bilateral Investment Treaty (BIT) between Latvia and Kirghizstan, on the ground that the enforcement of the award in France would result in allowing the investor to benefit from money laundering activities.

Mr. Belokon, a Latvian citizen close to the President of Kirghizstan, acquired a local bank in bankruptcy in Kyrgyzstan in 2007 and renamed it Manas Bank. In the spring of 2010, political unrest in Kyrgyzstan led to the fall of President Bakiev and due to allegedly suspicious transfers of funds, the Republic of Kirghizstan National Bank (RKNB) took measures which in effect resulted in Manas Bank's nationalisation. On 2 August 2011, Mr Belokon commenced UNCITRAL arbitration proceedings,[95] alleging that the continuing extension of the temporary administration period amounted to indirect expropriation. On 24 October 2014, the arbitral tribunal dismissed all the money laundering accusations raised by

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[91] Valentine Chessa, *La République du Congo v. S.A. Commissions Import-Export, exerçant sous l'enseigne Commisimpex*, CA Paris, 14 Oct 2014, (contribution by the ITA Board of Reporters, Kluwer Law International); La *République du Congo v. SA Commissions Import-Export*, Rev. arb.2014,1030; CA Paris, 4 Nov 2014.

[92] CA Paris, Nov. 4, 2014, *SAS Man Diesel & Turbo France v. Societé Al Maimana General Trading Company Ltd*, Rev. Arb. 2014, 543.

[93] CA Paris, 21 Feb, 2017, No. 15/01650, *The Kyrgyz Republic v. Valeri Belokon*

[94] *Valeri Belokon v. The Kyrgyz Republic*, Award (Oct. 24, 2014).

[95] Under *Art.9.2(d) of the Kyrgyzstan-Latvia* BIT.

Kirghizstan for lack of evidence and rendered an award in favour of Mr. Belokon directing Kyrgyzstan to pay him USD15.2 million.

The Kirghizstan Republic started annulment proceedings in 2015 against the award on the grounds of the violation of international public policy. Kirghizstan argued (as it had during the arbitration proceedings) that the award will give effect to money laundering and other criminal activities that violated Kyrgyz criminal law and public policy.

The Paris Appeal Court, considered the factual elements relied upon by the arbitral tribunal as well as other more recent evidence that was presented. Based on its findings, the Court of Appeal reached a different conclusion from that of the arbitral tribunal and set aside the award. This was on the basis that its recognition or enforcement would be contrary to international public policy. Explaining its decision, the Court said that its task was to determine whether the recognition or enforcement of the award would undermine the fight against money laundering by allowing a party to benefit from criminal activities. In carrying out this assessment, the Court said that it was not limited to the evidence available to the arbitral tribunal or bound by its evaluation of the record, although it added that due process must always be respected.[96]

These four cases reveal the new approach and the extent of the scrutiny that French courts may now perform when dealing with set aside applications based on allegations of a breach of international public policy. In summary, the Paris Court of Appeal appears to conduct a relatively thorough review by examining in detail the evidence that was put before the arbitral tribunal and would consider new evidence where appropriate. This extent of review share similarities with the reasoning in three 2014 Paris Court of Appeal decisions in the area of corruption (*Gulf Leaders, République du Congo v. Commisimpex* and *SAS Man Diesel*), the first two of which have been upheld by the Court of Cassation. For now, this approach is limited to cases where issues of money laundering and corruption are alleged and they also demonstrate that this stricter and thorough control can be used in the context of investment arbitration.

Conclusion

We have not found any relevant cases that addressed this issue substantively from courts in Africa. We suspect that the colonial ties of the various African jurisdictions and their legal

[96] *Belokon's case* is referred by the CA as the first case the Court sets aside an award on allegation of money laundering.

systems and laws will play a major role in the attitude each African jurisdiction will adopt when its courts are confronted with this issue. From our examination of the case law from the three primary jurisdictions, the concepts adopted across the jurisdictions are similar yet, their approaches are different.

The recognition and enforcement of foreign arbitral awards is one of the fundamental principles of the New York Convention in its role of creating a universal framework which enables parties to international arbitration agreements to enforce their foreign arbitral awards with relative ease. Court review of arbitral awards at the seat of the arbitration or in the country where recognition and enforcement are sought includes an examination of (national or international) public policy rules.[97] However as shown above, the content of the rules of international public policy and the judicial attitude in determining the recognition and enforcement of awards may vary from one jurisdiction to the other.[98] Given the broad and diverse approaches adopted by courts on this issue, there is a clear need to narrow the gap in the approaches and to find a universal test to be applied by national courts, which will ease the recognition and enforcement of foreign awards.

In our opinion, first, the award and nothing but the award in question should be the only focus of the reviewing court. Second, when appropriate, the level of scrutiny must be limited but with more effective examination; in order words, courts should *assess* rather than scrutinize the compliance of the award with the rules of public policy.[99] In that sense, the review process will not be subject to the two extremes of: a new trial, or no real review at all. Third, national arbitration laws need to consider including a mandatory requirement for the validity of arbitral awards to include, that all awards made in their territory must conform with their national and internationally recognised public policy rules. Fourth, state courts must play their role in ensuring that the above rules are upheld and as guardians of public policy, should not hesitate to conduct a more detailed scrutiny.

In our considered opinion, these measures, if collectively agreed and taken will bring some much-needed consistency and predictability in this area of the law and further strengthen the provisions and application of the New York Convention.

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[97] Art. V(2)(b) New York Convention.

[98] This is due in part to the limited scope and outdated provisions of the New York Convention and the copying of the New York Convention into the UNCITRAL and also by the impossibility among legal scholars and practitioners to agree on a universal guidelines on these subjects.

[99] C. Jarrosson, "*L'intensité du contrôle de l'ordre public*"in E. Loquin, S. Manciaux (dir.), L'ordre public et l'arbitrage, Actes du Colloque des 15 et 16 Mars 2013 (2014), pp. 161-176.