

THE NEW YORK CONVENTION AFTER FIFTY YEARS: SOME REFLECTIONS ON THE ROLE OF NATIONAL LAW

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I. INTRODUCTION

One can only marvel at the success of the New York Convention¹ over its fifty-year span, and as Gary Born wrote in the second edition of his *International Commercial Arbitration: Commentary and Materials*, quoting International Court of Justice (ICJ) Judge Stephen Schwebel, "It works."² Even though one can identify particular flaws, the Convention has proved a success in providing a basic framework that has ensured the enforcement of arbitration agreements and arbitration awards for the international commercial community.

One important feature of a successful international convention is the autonomous and uniform interpretation of the convention by national courts.³ With respect to the New York Convention, there are indications that an international standard has emerged at numerous points. Article II(3), providing for exceptions to the enforcement of arbitration agreements, is generally understood to refer only to traditional contract defenses and not to broader public policy concerns. Also, with respect to Article V's "procedural defenses" to enforcement of awards (such as lack of notice or the ability to present one's case), a truly anational standard has emerged in interpreting those defenses.

Still, the role for national law has been left relatively open in the structure of the New York Convention (the Convention), and, not surprisingly, has contributed to the failure in reaching a truly international standard for international commercial arbitration. Interestingly, with respect to the substantive defenses to enforcement, where national law is given a prominent role, such as arbitrability (Article V(2)(a)) and public policy (Article V(2)(b)), national courts have not been parochial in using national law applicable under these Articles, and national courts have acknowledged the need to take account

¹ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

² GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION: COMMENTARY AND MATERIALS* 21 (2d ed. 2001); see also Stephen M. Schwebel, *A Celebration of the United Nations New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 12 *ARB. INT'L* 83, 85 (1996).

³ I have previously written about this issue in the very different context of the Hague Convention on the Civil Aspects of International Child Abduction. See Linda Silberman, *Interpreting the Hague Abduction Convention: In Search of a Global Jurisprudence*, 38 *U.C. DAVIS L. REV.* 1049 (2005). For a more general discussion of the need for uniform interpretation of multilateral treaties, see Martin A. Rogoff, *Interpretation of International Agreements by Domestic Courts and the Politics of International Treaty Relations: Reflections on Some Recent Decisions of the United States Supreme Court*, 11 *AM. U. J. INT'L L. & POL'Y* 559 (1996).

of international and not merely domestic norms. Accordingly, these Convention exceptions for national law have not created great disharmony where one might have thought they would.

However, there are other areas involving arbitration agreements and awards where national law plays a predominant role and has given rise, and will continue to give rise, to an increase in litigation with respect to both arbitration agreements and awards. This Article discusses three such areas: (1) Convention country treatment of awards that have been set aside by the arbitral seat; (2) procedural requirements imposed by national law for enforcement of arbitral awards; and (3) the appropriate choice of law rule for determining whether an agreement is null and void under Article II of the Convention.

II. THE PROBLEM OF SET-ASIDES AND ARTICLE V(1)(e) OF THE CONVENTION

While the Convention offers standards for recognition and enforcement of an arbitral award in the courts of another country,⁴ it says nothing about the grounds for review or set-aside at the place of arbitration. Thus, each country is free to superintend an arbitration that takes place in its territory and an arbitration award that is rendered in that country. The Convention, pursuant to Article V(1)(e), allows the non-recognition or non-enforcement of an award that has been set aside “by a competent authority of the country in which, or under the law of which, the award was made.”⁵ But there is no obligation to refuse enforcement of the award, which means that a country is nonetheless free to enforce an arbitration award set aside in the country where the award was rendered.⁶ There may be some good reasons for such a system. On the one hand, some check on the arbitral process in the place of arbitration is desirable. At the same time, there is a danger of local favoritism and parochialism that might lead the country where the arbitration takes place to set

⁴ New York Convention, *supra* note 1, art. V.

⁵ The language of Article V(1) of the Convention (in English) is “Recognition and enforcement of the award *may be refused*.” The italicized language in the French text is *ne seront refusés . . . que si*” – which has a mandatory quality.

⁶ Note that the permissive language is used for all grounds set forth in Article V, and thus it appears that a judge has discretion to recognize or enforce an award even when one of the grounds for non-recognition or non-enforcement is satisfied. But it is generally thought that, unless there has been a waiver, a judge would abuse that discretion if the judge recognized or enforced an award when a ground for refusing recognition or enforcement is found to exist, other than in the case where the ground for refusal depends upon the decision of a foreign judge, i.e., Article V(1)(e). See JEAN-FRANÇOIS POUURET & SÉBASTIEN BESSON, *COMPARATIVE LAW OF INTERNATIONAL ARBITRATION* 829 (Stephen V. Berti & Annette Ponti trans., 2d ed. 2007).

aside an award on grounds that are peculiarly idiosyncratic to that country. To mediate this balance, the Convention appears to leave discretion to the country where the award is sought to be enforced, but provides no guidance as to when enforcement is appropriate.⁷

Two limitations of the Convention are now apparent. First, it does not provide any kind of uniformity for when an award may be set aside. Second, it offers no guidelines as to when an award that has been set aside should nonetheless be enforced. Because that determination is left to national law, there is a possibility that an award which is set aside is still enforceable somewhere.⁸ One example of the latter trend is in France. Because national law in France eliminates Article V(1)(e) from its international arbitration law,⁹ an award set aside elsewhere will always be enforceable in France, provided there is no other basis for non-recognition under the Convention. In two French decisions, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*¹⁰ and *PT Putrabali Adyamulia v. Rena Holding, Ltd.*,¹¹ the Cour de Cassation enforced the awards that had been set aside at the place of arbitration and gave

⁷ For a discussion of how annulled awards have been treated in various countries, see Dana Freyer, *The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE 757 (Emmanuel Gaillard & Domenico di Pietro eds., 2008).

⁸ More generally, the Convention is structured to permit enforcement of awards in one country and not in another, even if that is not a desired outcome. However, the set-aside presents a more difficult dilemma because the aftermath of a set-aside is often a second award. Thus, there is the possibility of enforcement of conflicting awards. See *infra* text accompanying notes 13–20.

⁹ Article 1502 of the *Code de Procédure Civile* lists the exclusive grounds on which an international award may be refused recognition or enforcement in France; Article 1502 does not contain any reference to an annulment in the country of origin. CODE DE PROCÉDURE CIVILE [C.P.C.] art. 1502 (Fr.), available at http://195.83.177.9/upl/pdf/code_39.pdf. Thus Article V(1)(e) is not part of French law, and apparently is not required by the Convention because Article VII provides that the Convention shall not deprive a party of more favorable rights of recognition and enforcement under the law of the country where the award is sought to be relied upon. See New York Convention, *supra* note 1, art. VII. An explanation of the reasoning behind Article 1502 of the *Code de Procédure Civile* is provided in Richard W. Hulbert, *When the Theory Doesn't Fit the Facts: A Further Comment on Putrabali*, 25 ARB. INT'L 157, 158–59 (2009).

¹⁰ Cour de Cassation [Cass. 1e civ.] Mar. 23, 1994, note Jarrosson (Fr.), reprinted in 1994 REVUE DE L'ARBITRAGE 327 (1994).

¹¹ Cour de Cassation [Cass. 1e civ.] June 29, 2007, note Gaillard (Fr.), reprinted in 2007 REVUE DE L'ARBITRAGE 507 (2007). An English translation of excerpts of the decision by Richard Hulbert can be found in Linda Silberman & Richard Hulbert, *International Commercial Arbitration, Additional Cases and Materials* 223–28 (Spring 2009) (unpublished teaching materials, on file with the author) [hereinafter *Putrabali* in *Additional Cases and Materials*].

no weight to the set asides. The Court explained that the recognition of an annulled award “does no more than consecrate the nature of the international arbitrator, the true international jurisdiction for this type of controversy, who cannot acknowledge another judge.”¹² The French perspective considers an arbitral award as unattached to any national legal order or any forum and having no nationality, but as one capable of being accepted and enforced throughout the world.

The French approach creates significant complications, particularly in cases where a second award is made after the annulment. Not only are other countries likely to respect the annulment, but they will also enforce the later award. The result is inconsistency and unpredictability. For example, in the *Hilmarton* case, where there was a subsequent second award (inconsistent with the first) rendered in Switzerland after the initial award had been set aside by a Swiss court, an English court enforced the second award¹³ even though a French court had already enforced the first award¹⁴ and had refused to enforce the second.¹⁵ Certainly international arbitration ought to do better than this.

The *Putrabali* arbitration fared no better.¹⁶ An award rendered in an English arbitration between a French buyer and an Indonesian seller resulted in an award in favor of the French party that was annulled in part by an English court on the basis of an error of law (review of such questions not having been excluded under the English Arbitration Act).¹⁷ There was then a second award in favor of the Indonesian party. The French party sought enforcement of the *initial* award in its favor in France, and the Indonesian party sought enforcement of the *later* award in its favor in France. The French courts, all the way to the Cour de Cassation, enforced only the first award and saw the second as precluded by the first.

The French solution, particularly in a case like *Putrabali* where there were two inconsistent awards at the time that enforcement of the earlier award was sought, is particularly unattractive. As Richard Hulbert emphasizes in his recent article on *Putrabali*, the award for which exequatur was sought was

¹² See *Putrabali* in Additional Cases and Materials, *supra* note 11, at 227.

¹³ *Omnium de Traitement et de Valorisation S.A. v. Hilmarton Ltd.*, [1999] 2 Lloyd's Rep. 222 (Q.B.) (Eng.).

¹⁴ *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation-OTV*, Cour de Cassation [Cass. 1e civ.] Mar. 23, 1994, note Jarrosson (Fr.), *reprinted in* 1994 REVUE DE L'ARBITRAGE 327 (1994).

¹⁵ *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de Cassation [Cass. 1e civ.] June 10, 1997 (Fr.).

¹⁶ For an excellent and extensive analysis of the *Putrabali* arbitration and judicial decisions, see Hulbert, *supra* note 9.

¹⁷ See *Putrabali* in Additional Cases and Materials, *supra* note 11, at 227.

dismissal of the claimant's case.¹⁸ The likely strategy by the party seeking exequatur was a tactical maneuver to prevent subsequent enforcement in France of the later award, since the first award could have been raised as a defense if the claimant had brought subsequent litigation in France.

Whatever one may think of the French approach, none of the other alternatives is perfect. One solution for Contracting States is to take an approach completely opposite from the French and always refuse to enforce an award that has been set aside by a court at the arbitral situs.¹⁹ This approach rests on the parties' choice of a regime of arbitration law: the parties should have understood the risks of annulment when they chose to arbitrate at a particular place. If the courts at the situs are known to be interventionist or protectionist, the parties have only themselves to blame because they assumed those consequences when they chose to arbitrate there. In the *Putrabali* case,²⁰ for example, it might well be argued that because the parties chose English arbitration law and its attendant consequences, including appeals on issues of law to the extent that the arbitration agreement does not exclude such review (as it did not in *Putrabali*), the parties should have to abide by the arbitration regime that they have chosen, including substantive review of the law. Thus, once the English court set aside the award on a ground that has been part of English arbitration practice for decades and a new award is rendered, it is the English judgment setting aside the award that should be recognized, and the initial award should not be enforced anywhere.

But other cases may be more troubling, and the solution of holding the parties to their chosen "arbitration regime" is not entirely satisfactory. In some situations, the place of arbitration is chosen largely for convenience of the parties or as a neutral site, or as the only place where certain parties, such as governmental entities, will (or can) agree to arbitrate. For example, in the recent D.C. Circuit decision in the United States, *TermoRio S.A. E.S.P. v. Electranta S.P.*,²¹ the only realistic place of arbitration with respect to an agreement with a Colombian governmental entity was probably Colombia. The resulting set-aside by the Colombian court appeared to be the result of local favoritism. Nonetheless, the court in the United States honored the

¹⁸ Hulbert, *supra* note 9, at 167–68.

¹⁹ Proponents of this view argue that once the award is annulled, it ceases to exist and cannot be recognized or enforced anywhere. For recent criticism of this position, see Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 303–07 (2007).

²⁰ Cour de Cassation [Cass. 1e civ.] June 29, 2007, note Gaillard (Fr.), *reprinted in* REVUE DE L'ARBITRAGE 507 (2007).

²¹ 487 F.3d 928 (D.C. Cir. 2007). *See also infra* text accompanying notes 40–42.

annulment and refused to enforce the award—a decision that has been criticized by various commentators.²²

Another approach to Article V(1)(e) is to accept the discretionary text of Article V(1) as just that, and view the discretion about whether or not to enforce an award that has been set aside as belonging to the court in the Contracting State asked to enforce the award. That seems to be the position taken in the case of *Chromalloy Aeroservices v. Arab Republic of Egypt*,²³ by United States District Court Judge Green who observed that “Article V provides a permissive standard, under which this Court *may* refuse to enforce an award.”²⁴ Relying on Article VII of the Convention,²⁵ Judge Green found that national law—in particular, the standards adopted in the Federal Arbitration Act—justified recognition of the award.²⁶

Alternatively, it might be thought that the discretion in the English text of Article V in general (including Article V(1)(e)) is better understood as directing States party to the New York Convention to identify in their own law the circumstances when a vacated award should be enforced. French law, for example, does not implement the provisions of Article V(1)(e), and the more favorable approach to set-asides under French law is authorized by Article VII of the Convention.²⁷

The uncertainty about enforcement of awards that have been set aside at the place of arbitration inevitably means litigation at the enforcement stage. And because there is no uniformity of practice, not only is choice of forum for enforcement critical, but other tactical maneuvering, as already seen in the *Putrabali* context, is common-place. Another example of litigation tactics around arbitration is the use of anti-suit injunctions to prioritize a favorable

²² See, e.g., 2 GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2685–87 (2009).

²³ 939 F. Supp. 907 (D.D.C. 1996).

²⁴ *Id.* at 914.

²⁵ Article VII of the Convention gives an interested party the right to invoke the national law of the country where the award is sought to be relied upon to uphold an arbitration award. New York Convention, *supra* note 1, art. VII.

²⁶ *Chromalloy*, 939 F. Supp. at 910. However, the majority of courts in the United States have refused to enforce an award that has been set aside at the arbitral seat. See, e.g., *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928 (D.C. Cir. 2007); *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir. 1999); *Spier v. Calzaturificio Tecnica S.p.A.*, 71 F. Supp. 2d 279 (S.D.N.Y. 1999). The Court of Appeals for the District of Columbia in *TermoRio* did not overrule *Chromalloy*, but distinguished it on various grounds, including the fact that all the connections in *TermoRio* were with Colombia (Colombian parties, Colombian seat, and Colombian law), and that there was no finality clause precluding judicial review as there was in *Chromalloy*. *TermoRio*, 487 F.3d at 937.

²⁷ See Hulbert, *supra* note 9, at 159.

forum or to prohibit enforcement in a particular forum. In the *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (Pertamina)*²⁸ litigation, a court in Indonesia issued a provisional injunction restraining the winning party, a Cayman Island company, from attempting to enforce its Swiss arbitral award in the United States. A court in the United States then issued its own injunction to restrain the Indonesian party from proceeding with its annulment action.²⁹ In the end, the Fifth Circuit Court of Appeals held that the U.S. anti-suit injunction was not appropriate since even a successful suit annulling the award in Indonesia would not prevent a court in the U.S. from enforcing the award.³⁰ But one should not conclude that anti-foreign-suit injunctions are always inappropriate in proceedings to enforce an arbitral award. In subsequent proceedings in *Pertamina*, a New York federal court involved in execution proceedings brought against property of Pertamina issued an anti-suit injunction restraining Pertamina from proceeding with an action in the Cayman Islands directed against the New York execution proceedings.³¹ The Second Circuit Court of Appeals, modifying the injunction slightly, affirmed the issuance of the anti-suit injunction in this context, observing that it was not enjoining Pertamina from defending an enforcement proceeding in another jurisdiction because the Cayman Islands proceeding was not really an enforcement proceeding at all.³²

In the absence of an amendment to the New York Convention or a Protocol to deal with the problem of annulled awards, one possible solution is to look to the law on recognition and enforcement of foreign judgments to provide guidance. When a court at the arbitral seat sets aside an arbitral award, a second court asked to recognize and enforce the award has no obligation under the Convention to do so. However, there is now a judgment from a national court, and a court that enforces an arbitral award set aside by that national court is thus refusing to recognize the foreign judgment. National laws on recognition and enforcement of foreign judgments could offer guidance for when refusal of recognition of such a judgment is appropriate. If the judgment is one that would be entitled to recognition, the set-aside should be respected and the award should not be enforced. However, if the judgment is one that does not meet the criteria for recognition and enforcement under national law,

²⁸ 335 F.3d 357 (5th Cir. 2003).

²⁹ *Id.* at 361–62.

³⁰ *Id.* at 369.

³¹ *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 465 F. Supp. 2d 283 (S.D.N.Y. 2006).

³² *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 500 F.3d 111 (2d Cir. 2007).

such as fairness of process or international public policy (which would incorporate international standards for respecting arbitral awards), then the set-aside judgment should not be respected and the award should be enforced.

A “judgments” solution to the problem of annulled awards has the limitation that it too lacks uniformity. That is to say, recognition and enforcement of foreign judgments is generally governed by national law and not international standards. Indeed, even though the Member States of the European Union are obligated to enforce judgments of other Member States pursuant to the EU Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters,³³ arbitration is outside of its scope. Thus, there is no assurance that New York Convention Contracting States would treat a set-aside judgment in a uniform way, and accordingly, it might be thought there would be no improvement of the present situation. However, in looking at transnational recognition and enforcement practices comparatively, one finds a basic similarity of frameworks in various countries. Most countries accept a general principle of recognition and enforcement of foreign judgments³⁴ and most agree in a general way on the criteria that give rise to exceptions to that principle.³⁵ A “judgments” solution would at least provide identifiable principles—even if pursuant to national law—to help determine when a set-aside should be respected and when it should not.³⁶

A recent decision by the Amsterdam Court of Appeal, *Yukos Capital SARL v. OAO Rosneft*,³⁷ reflects how a “recognition of foreign judgments” framework

³³ Council Regulation 44/2001, 2001 O.J. (L 12) 1 (EC).

³⁴ Even some notable outliers to judgment recognition, such as Sweden and the Netherlands, have carved out judicial exceptions to non-recognition, and in 2004 Belgium changed its *révision au fond* procedure so that review on the merits is no longer permitted. Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT’L L. REV. 173, 187–89 (2008).

³⁵ Linda J. Silberman, *Some Judgements on Judgments: A View from America*, 19 KING’S L.J. 235, 237–38 (2008).

³⁶ In the United States, recognition and enforcement of judgments is treated as a matter of state law in most cases, but the recognition and enforcement of a foreign judgment annulling a New York Convention award would fit the type of exception where federal law is called for. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 cmt. a (1987) (stating that recognition and enforcement of foreign judgments is typically a matter of state law unless there is a basis for federal jurisdiction such as a treaty or federal statute). The principles of recognition and enforcement and the grounds for non-recognition and non-enforcement are found in §§ 481–482 of the Restatement (Third). For a more extensive and comprehensive treatment of recognition and enforcement principles in the United States, see AM. LAW INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006).

³⁷ *Yukos Capital SARL/OAO Rosneft*, Gerechtshof [Hof], Amsterdam, Apr. 28, 2009,

can operate to permit enforcement of an award that has been set aside. The Dutch court granted leave to enforce in the Netherlands four arbitral awards issued by the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation in arbitral proceedings brought by Yukos Capital against Yuganskneftegaz to recover on four loan agreements.³⁸ The award in favor of Yukos was set aside by the commercial court in Russia, and that decision was upheld by two appeals courts in Russia. Among the grounds relied upon for setting aside the award was a failure to disclose that the managing partner of the law firm representing Yukos had organized conferences in which the arbitrators had participated. Although the district court in the Netherlands honored the Russian judgment setting aside the award and refused to enforce the award, the Amsterdam Court of Appeal took a different view. It looked to rules of private international law with respect to whether the decisions of the Russian courts should be recognized, and concluded that a foreign judgment rendered by a judicial body that is not impartial and independent should not be recognized. The Amsterdam Court of Appeal then pointed to evidence submitted by Yukos Capital as well as a substantial body of case law in various European countries that demonstrated the lack of independence and impartiality of the Russian judiciary with respect to the Yukos affair. It found an undeniable connection between the present dispute and the altercations in Russia that led to the dismantling and bankruptcy of the Yukos Oil Company.³⁹

Acceptance by courts in the United States of a judgments-recognition principle in dealing with set-asides might have resulted in a different outcome in the *TermoRio* case. In *TermoRio*, the basis of the Colombian court's decision was that the arbitration agreement selecting the ICC Rules was invalid under Colombian law.⁴⁰ Such a foreign judgment annulling an arbitration award on this parochial ground is inconsistent with international arbitration principles; accordingly, that judgment would be "repugnant to the public policy of the United States,"⁴¹ a basic ground for nonrecognition of a foreign

No. 200.005.269/01 (Neth.); see also Emmanuel Gaillard, *Enforcement of Annulled Awards: The Dutch Chapter*, N.Y. L.J., June 4, 2009, at 3 col. 1.

³⁸ At the time of the loan "Yukos Capital, a Luxembourg based company, and Yuganskneftegaz both formed part of the Yukos Group to which Yukos Oil Company also belonged." Gaillard, *supra* note 37. Eventually, Yuganskneftegaz became part of Rosneft, a Russian state-owned oil company. *Id.*

³⁹ *Id.*

⁴⁰ *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 931 (D.C. Cir. 2007).

⁴¹ RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(2)(d) (1987).

country's judgments in both the United States and elsewhere. Of course, the standard for "public policy" in the context of the New York Convention and international arbitration should not be one of parochial or national interests, but of broader international scope.⁴²

Gary Born, in his impressive new treatise on arbitration, suggests that courts in the United States "will likely disregard foreign annulment decisions relying on an extensive substantive review of the tribunal's decision" or foreign annulment decisions that are procedurally tainted or based upon local public policy.⁴³ Born appears to endorse an approach similar to that in Article IX(1) of the European (Geneva) Convention,⁴⁴ which does not recognize a set-aside unless it was based on one of the specific grounds specified in Article IX(1)(a) to (d) of that Convention.⁴⁵ But the New York Convention is not so limited. In particular, under the New York Convention, where the parties have agreed to arbitration in a place where substantive legal review is part of the arbitral regime, annulment on that basis would appear to be appropriate. Adopting the framework of recognition and enforcement of foreign judgments to evaluate the set-aside would catch procedurally tainted or parochially based set-asides but would leave substantive review in place if it were part of the annulment regime at the situs.⁴⁶ Other countries may find that their own national laws on recognition and enforcement of judgments will lead to similar results as to when a set-aside should be respected and when it might be ignored. Thus, the

⁴² Cf. *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969, 974 (2d Cir. 1974) (identifying standard of "public policy" in context of recognition and enforcement of awards under the New York Convention).

⁴³ 2 BORN, *supra* note 22, at 2687.

⁴⁴ European Convention on International Commercial Arbitration art. IX(1), *opened for signature* Apr. 21, 1961, 484 U.N.T.S. 349, 374–76.

⁴⁵ Jan Paulsson offers a similar proposal, arguing that a local annulment ought not to prevent international recognition or enforcement of a New York Convention award unless the grounds for the annulment were those identified by the Convention itself. See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT'L CT. ARB. BULL. 14 (1998).

⁴⁶ Interestingly, the initial approach of the Reporters for the newly initiated American Law Institute Project on international commercial arbitration is along the same lines. See RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 13(c) (Council Draft No. 1, Oct. 14, 2009). It provides:

Although a Convention award has been set aside by a competent foreign authority, a court of the United States may recognize or enforce the award if the judgment setting aside the award is not entitled to recognition under the principles governing the recognition of foreign judgments in the court where recognition or enforcement of the award is sought, or in other extraordinary circumstances.

use of the “recognition of judgments” framework would provide some guidance for set-asides under the New York Convention, other than the European Convention solution, which it chose not to adopt.

Interestingly, the issue of the relationship between awards and judgments may arise in a second way in the *Yukos* case. *Yukos Capital* is now seeking to enforce that arbitral award (and/or the Dutch judgment) in a New York court.⁴⁷ Thus, there are now two “judgments” as well as one award for the New York court to consider. Under the approach I have proposed, the New York court should consider whether the Russian set-aside judgment is to be respected as a matter of U.S. judgments-recognition law. Using those principles, it might reach the same conclusion that the Dutch court did—that there was not an impartial system of tribunals operating in Russia. But how should the court in the United States treat the Dutch judgment itself? If a judgment-recognition framework is accepted, does that mean that the Dutch judgment, as the judgment later in time, should itself be recognized?

The answer is no, for two reasons. The first is that the judgment relating to recognition or enforcement—like an exequatur on a judgment—does not necessarily have territorial scope and thus need not be “recognized.”⁴⁸ Second, even applying the principles of U.S. judgments-recognition law, a foreign judgment need not be recognized if it conflicts with another final and conclusive judgment.⁴⁹ Thus, it is for the court in the United States to draw an independent conclusion about whether to respect the Russian set-aside judgment.

⁴⁷ Uzma Balkiss Sulaiman, *Yukos Dispute Continues in New York*, GLOBAL ARB. REV., Sept. 23, 2009.

⁴⁸ There are numerous questions to consider about the relationship between awards and judgments, but for the purposes of this Article, I have offered the limited solution of using a judgments framework to decide whether or not a second country should give effect to a judgment of set-aside rendered at the seat of arbitration. It might well be that a similar approach should be adopted to deal with a judgment confirming an award at the seat, particularly where arguments to set aside the award are made and rejected, and where a subsequent challenge to recognition and enforcement in another country raises the same grounds. On the other hand, an exequatur or a judgment relating to recognition or enforcement may have only territorial scope and thus need not be “recognized” in another country. Further analysis of these questions will follow in future work.

⁴⁹ *Cf. Byblos Bank Europe, S.A. v. Sekerbank Turk Anonym Syrketi*, 40 A.D.3d 497, 837 N.Y.S.2d 54 (N.Y. App. Div. 2007), *aff'd*, 885 N.E.2d 191 (N.Y. 2008) (refusing to enforce judgment of Belgian court, which had failed to recognize prior Turkish judgment because at the time Belgium had a *révision au fond* procedure and itself had departed from *res judicata* principles).

III. PROCEDURAL RULES FOR ENFORCEMENT OF AWARDS: JURISDICTION AND FORUM NON CONVENIENS

A second recent issue that has created litigation around arbitration pertains to the procedural rules about the appropriate forum for enforcement of an arbitral award. This issue may not be as widespread or as “international” a problem as the set-aside issue, but it is potentially as important. Article III of the New York Convention allows the country of enforcement to establish rules of procedure for recognition and enforcement of Convention awards. The only limitation is that those conditions be substantially the same as for domestic awards.⁵⁰ Thus, it would seem quite appropriate that countries require a basis of jurisdiction over the defendant where recognition or enforcement is being sought.

The International Commercial Disputes Committee of the Association of the Bar of the City of New York looked at this question with respect to the law in the United States on this issue as well as the requirements imposed by other countries.⁵¹ Interestingly, it appears that in some countries there may be no requirement of a jurisdictional nexus in order to enforce a foreign arbitral award.⁵² This may seem strange to a U.S. trained lawyer, but it is possible to understand the lack of any requirement as based on the consent to arbitrate itself. In other words, it could be argued that an agreement to arbitrate in a country that is a signatory to the Convention is tantamount to a consent to jurisdiction to enforce that award in the courts of any other signatory country.⁵³ However, such an argument was expressly rejected by the Court of Appeals for

⁵⁰ New York Convention, *supra* note 1, art. III.

⁵¹ Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of N.Y., *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407 (2004) [hereinafter N.Y. City Bar Committee Report]. (The author was a member of that Committee as well as the Subcommittee that wrote the Report.)

⁵² *See id.* at 413–14 n.26. According to the N.Y. City Bar Committee Report, France, Germany, Italy, and Sweden appear to provide a forum for enforcement even when there is no connection between the debtor or his property and a particular place within the country. *Id.*; *see also* Rosseel N.V. v. Oriental Commercial & Shipping Co. (U.K.) Ltd., [1991] 2 Lloyd's Rep. 625 (Q.B.) (Eng.) (indicating that the presence of assets in the jurisdiction is not a precondition for the enforcement of a New York Convention award). The N.Y. City Bar Committee Report, which did not cite *Rosseel*, indicated that English law did require at least the presence of property. N.Y. City Bar Committee Report, *supra* note 51, at 414–15.

⁵³ *See* William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 285–87 (2006).

the D.C. Circuit in *Creighton Ltd. v. Qatar*,⁵⁴ in which the court held that Qatar did not waive its objection to personal jurisdiction over an enforcement action against it in the United States when it agreed to arbitrate in France. In September 2009, the Second Circuit Court of Appeals also ruled that it was proper to require personal jurisdiction over the foreign defendant or its property as a prerequisite to enforcement of an arbitral award.⁵⁵

Other countries also appear to require a connection between the award debtor or his property and the place of enforcement in order to bring an action to confirm or enforce an award.⁵⁶ However, it has been pointed out by Professor Rusty Park that general principles of judicial jurisdiction do not necessarily control in situations governed by an international treaty, and the formal statutory requirements in other countries may not tell the whole story.⁵⁷ Thus, in order to ascertain actual practice in other countries, it may be necessary to probe further than the information provided by the N.Y. City Bar Committee Report.

Case law in the United States has added even more complexity to the jurisdictional question. At least one case, *Base Metal Trading, Ltd. v. OJSC*, in the Fourth Circuit, indicated that the presence and/or attachment of property in the state was not, on its own, a sufficient basis for enforcement of an arbitral award.⁵⁸ The N.Y. City Bar Committee criticized *Base Metal Trading* as

⁵⁴ 181 F.3d 118 (D.C. Cir. 1999).

⁵⁵ *Frontera Res. Azer. Corp. v. State Oil Co. Azer.*, 582 F.3d 393 (2d Cir. 2009); *see also* *Telcordia Tech, Inc. v. Telkom SA, Ltd.*, 458 F.3d 172, 178–79 (3d Cir. 2006) (assuming without discussion that personal jurisdiction was necessary for suit to enforce a New York Convention award rendered in South Africa and suggesting that its finding of sufficient contacts was colored by the fact that the proceeding was for the enforcement of an award rather than a merits adjudication); *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114, 1120–22 (9th Cir. 2002) (observing that either personal jurisdiction over the defendant or its property would satisfy due process); *Base Metal Trading, Ltd. v. OJSC*, 283 F.3d 208, 212–13 (4th Cir. 2002) (indicating that the presence of attachment of property in a state is not sufficient for enforcement of an arbitral award).

In *Frontera*, the Second Circuit introduced another puzzling issue by holding that foreign states and their agents are not entitled to protection under the Due Process Clause and overruled its prior decision in *Texas Trading & Milling Corp. v. Nigeria*, 647 F.2d 300 (2d Cir. 1981). The Second Circuit then remanded the case for the district court to determine whether the defendant was in fact an “agent” of the sovereign.

⁵⁶ N.Y. City Bar Committee Report, *supra* note 51, at 413–14 (identifying China, Japan, and Switzerland as having such requirements). As one example, it states that the Japanese Arbitration Law provides for jurisdiction of enforcement actions in the district court at the place of arbitration, the general forum of the counterparty, the location of the object of the claim, or the location of the debtor’s seizable assets. *Id.* at 413 n.24.

⁵⁷ *See* Park & Yanos, *supra* note 53, at 267.

⁵⁸ *Base Metal Trading*, 283 F.3d at 213.

completely misreading Supreme Court precedent and pointed to a Ninth Circuit case, *Glencore Grain Rotterdam B.V. v. Shivnath Rai Harnarain Co.*, which observed that either personal jurisdiction over the defendant or its property would satisfy the requirements of Due Process.⁵⁹ The N.Y. City Bar Committee also embraced the view that the requirement of personal jurisdiction to enforce an arbitral award is mandated by the Due Process Clause of the U.S. Constitution, and thus, even without such a ground being identified in the New York Convention, lack of jurisdiction provides a valid basis for refusal of recognition or enforcement of a Convention award.⁶⁰ In *Glencore Grain* itself, the Ninth Circuit ultimately held that the activities of the defendant in the forum did not suffice for either general or specific jurisdiction, and it could not identify any property of the defendant on which to base jurisdiction.⁶¹ One troubling aspect of the court's opinion, however, was its invocation of the possibility that "unreasonableness" might prevent the assertion of jurisdiction even if sufficient contacts were found. The court suggested that because India or England was a more appropriate forum with respect to a suit to confirm an arbitration award, jurisdiction could therefore be "unreasonable."⁶² Such a view is inconsistent with the objectives of the New York Convention and the important principle that the purpose of the Convention was to make arbitral awards enforceable worldwide. Still, other cases—one in the Second Circuit, *Monegasque de Reassurances S.A.M. v. Nak Naftogaz of Ukr.*,⁶³ have ignored this fundamental aspect of the Convention by invoking the doctrine of *forum non conveniens* to dismiss an action requesting confirmation of an arbitration award. The Second Circuit held that Article III of the New York Convention accommodated the application of *forum non conveniens* because the doctrine was "procedural" and has been applied in the United States in the enforcement of domestic arbitral awards.⁶⁴

The use of *forum non conveniens* to limit confirmation or enforcement of Convention awards threatens the international currency of the awards the Convention was designed to enhance. In its opinion, the Second Circuit expressed concern about chilling international trade and even discouraging

⁵⁹ *Glencore Grain*, 284 F.3d at 1120–22.

⁶⁰ N.Y. City Bar Committee Report, *supra* note 51, at 408–09.

⁶¹ *Glencore Grain*, 284 F.3d at 1123–28. It should be noted that the Second Circuit in *Frontera* held that foreign states are not "persons" entitled to rights under the Due Process Clause. *Frontera*, 582 F.3d at 400; *see also* *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002).

⁶² *Glencore Grain*, 284 F.3d at 1125–26.

⁶³ 311 F.3d 488 (2d Cir. 2002).

⁶⁴ *Id.* at 495–98.

arbitration when suits to confirm were brought in places without any connection to the parties or the transaction. To that end, the court was reluctant to allow a party complete freedom in deciding where to enforce an award.⁶⁵ The point takes on additional poignancy when combined with the forum shopping that may occur with respect to uncertainty about enforcement of awards that have been set aside. But it is difficult to imagine that worldwide enforcement would really have such a deleterious effect; indeed, worldwide enforcement was the very objective of the Convention. If awards could be enforced only in “convenient” fora, parties expecting to lose an arbitration would be encouraged to identify countries with no contacts with the judgment or the underlying transaction in which to keep their assets in order to avoid execution of the award.⁶⁶ In the particular circumstances of *Monegasque*, however, the claimant attempted to confirm the award not only against the award debtor, a Ukrainian company, but also against the Ukraine, which was not a party to the underlying agreement or proceeding, on the theory that the company had acted as the alter ego of the Ukraine itself.⁶⁷ In this context, application of *forum non conveniens* seems appropriate, and the N.Y. City Bar Committee agreed that “*forum non conveniens* should be available as a defense to enforcement of an arbitral award against a defendant who was not a party to the proceeding that resulted in the award.”⁶⁸

IV. NULL AND VOID AGREEMENTS—WHOSE LAW?

Another set of Convention issues that has led to significant litigation activity involves situations where a party challenges the validity of the arbitration agreement. Article II(1) provides that each Contracting State shall recognize an arbitration agreement in writing so long as it concerns a “subject matter capable of settlement by arbitration.”⁶⁹ Article II(3) of the Convention

⁶⁵ *Id.* at 497.

⁶⁶ This concern was expressed by the Court of Appeals for the District of Columbia Circuit in *TMR Energy, Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303–04 (D.C. Cir. 2005).

⁶⁷ *Id.* at 301.

⁶⁸ N.Y. City Bar Committee Report, *supra* note 51, at 43; *see also* Park & Yanos, *supra* note 53, at 293–94 (stating that *Monegasque* “may well have been correctly decided on the narrow facts of the case”).

⁶⁹ New York Convention, *supra* note 1, art. II(1). In this Article, I do not address the choice of law aspects of non-arbitrability under Article II(1) of the Convention. However, there is thorough and insightful treatment of the subject in 1 BORN, *supra* note 22, at 516–35. For a recent article on the choice of law aspects of arbitrability, see Stavros L. Brekoulakis, *Law Applicable to Arbitrability: Revisiting the Revisited Lex Fori*, in *ARBITRABILITY: INTERNATIONAL AND COMPARATIVE PERSPECTIVES* 99 (Loukas A. Mistelis & Stavros L. Brekoulakis eds., 2009).

requires a Contracting State, at the request of one of the parties, to refer the parties to arbitration “unless it finds that the . . . agreement is null and void, inoperative or incapable of being performed.”⁷⁰ Article II says nothing about what law determines whether an agreement meets those conditions. Moreover, the generally accepted concept of separability would indicate that the reference to the “agreement” in this context is a reference to the validity of the arbitration agreement itself and not the main contract. And in most cases, there will be no express choice of law clause designated to cover the *arbitration* agreement,⁷¹ even if there is a general choice of law clause with respect to the contract itself.

Article V, in the context of recognition and enforcement, does identify the relevant law on particular matters. Thus, Article V(1)(a) provides that recognition and enforcement may be refused if, “*under the law applicable to them,*” the parties were under some incapacity; or “the agreement is not valid *under the law to which the parties have subjected it,* or failing any indication thereon, *under the law of the country where the award was made.*”⁷² Article V(1)(d) contains an exception to recognition and enforcement if the composition of the arbitral authority or the arbitral procedure is not in accordance with the agreement of the parties, or, if there is no agreement, is “not in accordance *with the law of the country where the arbitration took place.*”⁷³ Article V(2)(a) provides for an exception to recognition and enforcement if “[t]he subject matter of the difference is not capable of settlement by arbitration *under the law of that country.*”⁷⁴ Article V(2)(b) has an exception where the award is contrary to the public policy of the state “*where enforcement or recognition is sought.*”⁷⁵

As noted, there is no direct choice of law reference with respect to agreements under Article II of the New York Convention. Some aspects of the Article II(3) defenses have appropriately been interpreted according to an international standard, such as whether a clause is sufficiently pathological that it is either “null and void” or “incapable of being performed”; but other aspects

⁷⁰ New York Convention, *supra* note 1, art. II(3).

⁷¹ Of course, if there is such an express choice of law clause applicable to the arbitration agreement, the principle of party autonomy would ensure that such law would govern. The application of the parties’ express choice is also consistent with the choice of law reference in Article V(1)(a) dealing with the validity of the agreement in an enforcement context.

⁷² New York Convention, *supra* note 1, art. V(1)(a) (emphasis added).

⁷³ *Id.* art. V(1)(d) (emphasis added).

⁷⁴ *Id.* art. V(2)(a) (emphasis added).

⁷⁵ *Id.* art. V(2)(b) (emphasis added).

are less clear. If the question is one of mistake, duress, or waiver with respect to the arbitration agreement, what law should govern that question?⁷⁶

Courts in the United States have tended to apply forum law in determining the validity of the arbitration agreement in cases subject to the Convention.⁷⁷ In *Rhone Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro*, the Court of Appeals for the Third Circuit alluded to the ambiguity in Article II as compared with Article V.⁷⁸ It then concluded that the interpretation of Article II(3) most consistent with the overall purposes of the Convention finds that “an agreement to arbitrate is ‘null and void’ only (1) when it is subject to an internationally recognized defense such as duress, mistake, fraud, or waiver . . . or (2) when it contravenes fundamental policies of the forum state.”⁷⁹ The court rejected application of the law of the place of arbitration (Italy) which required that there be an odd number of arbitrators and instead used what might be characterized as an international standard, subject to fundamental policies of forum law (U.S. law) to uphold the agreement.⁸⁰ The deviation between that choice of law reference and the express choice of law reference found in Articles V(1)(a) and (d) may result in an arbitration agreement that will be respected by a court even though the subsequent award may not eventually be enforced. Another disadvantage with the application of forum law is that it might also lead to litigation maneuvering by the respective parties in order to secure a choice of law advantage on the issue of validity.

Courts in other countries have looked to the law of the place of arbitration to determine whether the arbitration agreement is null and void.⁸¹ This choice

⁷⁶ For recent commentary regarding the law applicable to determine whether a clause is “null and void,” see Piero Bernardini, *The Problem of Arbitrability in General*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, *supra* note 7, at 503; R. Doak Bishop, Wade M. Coriell & Macelo Medino Campos, *The ‘Null and Void’ Provision of the New York Convention*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS: THE NEW YORK CONVENTION IN PRACTICE, *supra* note 7, at 275, 294.

⁷⁷ See 1 BORN, *supra* note 22, at 461–62.

⁷⁸ *Rhone Méditerranée Compagnia Francese di Assicurazioni e Riassicurazioni v. Achille Lauro*, 712 F.2d 50, 53 (3d Cir. 1983).

⁷⁹ *Id.* at 53 (citations omitted).

⁸⁰ *Id.* at 52–55; see also *Ferrara S.p.A. v. United Grain Growers Ltd.*, 441 F. Supp. 778, 780–81 n.2 (S.D.N.Y. 1977) (suggesting that forum law should apply as part of the law of remedies), *aff’d without reported opinion*, 580 F.2d 1044 (2d Cir. 1978).

⁸¹ See, e.g., *Sonatrach Petroleum Corp. (BVI) v. Ferrell Int’l Ltd.*, [2001] 1 All E.R. (Comm.) 627 (Q.B.D.) (Eng.) (concluding that in the absence of express choice of law clause and where venue of arbitration is identified, the arbitration agreement, and substantive contract, are governed by the law of the place of arbitration); *XL Ins. Ltd. v. Owens Corning*, [2000] 2 Lloyd’s

of law rule has the advantage of meshing the choice of law reference in Article II(3) with that of Article V(1)(a), thereby avoiding the difficulty that an agreement considered valid at the outset might result in the award being set aside because the agreement did not meet the requirements of the law chosen or the law of the place of arbitration.⁸² Moreover, although the New York Convention is not directed to arbitral tribunals, arbitrators have taken a similar approach when faced with a challenge to the arbitration agreement. In *Seller (Korea) v. Buyer (Jordan)*, the arbitrators, finding support from their obligation to render an enforceable award and pointing to Article V(1)(a), determined that the applicable law governing the validity of the arbitration agreement was that where the arbitration took place and where the award was rendered.⁸³ Note, however, that the arbitral situs is often chosen for reasons of convenience and the law at the arbitral situs may have little connection to the parties and the underlying transaction.

Still other courts have subjected the question of the validity of the arbitration agreement to the law applicable to the *contract*, whether through an express choice of law clause governing the contract,⁸⁴ or in the absence of an express clause, the choice of law rules that would apply to the contract.⁸⁵ But

Rep. 500 (Q.B.D.) (Eng.) (stating that the selection of arbitration in England reflects parties' implied choice of English law to govern the validity of arbitration clause); American Bureau of Shipping v. Copropriété Maritime Jules Verne, Cour d'Appel [CA] Paris, Dec. 4, 2002, note Gaillard (Fr.), *reprinted in* 2003 REVUE DEL'ARBITRAGE 1286 (2003) (analogizing to the conflict rules provided in Article V(1)(a)); Corte app., Genoa, Feb. 3, 1990, Della Sanara Kustvaart-Bevrachting & Overslagbedrijf BV v. Fallimento Cap. Giovanni Coppola Srl, *reprinted in* 17 Y.B. Com. Arb. 542, 543 (1992) (pointing to choice of law rule in recognition/enforcement context as a basis for evaluating an arbitration agreement when it is invoked to derogate from the jurisdiction of the national court).

⁸² JULIAN D.M. LEW, LOUKAS A. MISTELIS & STEFAN M. KRÖLL, *COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION* ¶ 6-55, at 119 (2003).

⁸³ Case No. 6149 (Korea v. Jordan), 20 Y.B. Com. Arb. 41 (Interim Award) (I.C.C. 1990).

⁸⁴ *See, e.g.,* Motorola Credit Corp. v. Uzan, 388 F.3d 39, 50–51 (2d Cir. 2004) (holding that where parties choose Swiss law to apply to the contract, Swiss law also determines the validity of the arbitration agreement); Peterson Farms, Inc. v. C & M Farming Ltd., [2004] EWHC (Comm) 121 Lloyd's Rep. 603 (Q.B.D.) (Eng.) (stating that, on application for set aside of an English arbitral award, the tribunal should have determined the validity of the arbitration agreement according to parties' express choice of substantive law applicable to the main contract); *see also* Union of India v. McDonnell Douglas Corp., [1993] 2 Lloyd's Rep. 48 (Q.B.D.) (Eng.) (stating that an express choice of law clause may be understood to govern the commercial bargain as well as the agreement to arbitrate).

⁸⁵ *See* cases cited in 1 BORN, *supra* note 22, at 475–76 n.313 (listing several cases in which courts applied the substantive law governing a contract, even in the absence of an express choice-of-law clause). In the United States, the Restatement (Second) of Conflict of Laws § 218 refers to the validity and effect of arbitration agreements to the law selected by § 187 or § 188 of the

this approach is in some tension with the separability doctrine,⁸⁶ and the choice of law rules that would apply to the contract in the absence of an express choice are often unclear and do not offer any degree of predictability. For that reason, some have suggested an alternative reference that selects the law of a jurisdiction connected to the transaction, the parties, and the arbitration that validates the agreement.⁸⁷ Such an approach has been adopted in legislation in some countries, for example, in the Swiss private international law statute.⁸⁸ Indeed, it has been argued that a validation principle would be consistent with Article V(1)(a) of the New York Convention because the reference to the “law to which the parties have subjected” the arbitration agreement could accommodate an implied choice of law rule.⁸⁹ Moreover, the discretionary language in Article V(1)(a) allows courts to refuse to recognize an award but does not require non-recognition. Thus, national courts should be permitted to recognize arbitral awards where the underlying agreement is not valid under the choice of law referenced in Article V(1)(a) but is valid under a choice of law principle that selects the law that validates the agreement.⁹⁰

In the future, we may find even more attention directed to the conflict of laws issue on the validity of the arbitration agreement in light of provisions included in the 2005 Hague Convention on Choice of Court Agreements (Choice of Court Convention).⁹¹ That Convention—which aspires to be the

Restatement (the law chosen by the parties or the law that has the “most significant relationship to the transaction and the parties” under the principles stated in § 6). RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 218 & cmt. b (1971). Comment b to § 218 notes that the state whose local law governs the arbitration agreement will usually be the state whose local law is applied to other issues relating to the contract, but acknowledges that this will not always be so. Indeed, Comment b offers as one such example that where arbitration is to take place in a particular state, the law of that state may have the “most significant relationship” to the issue of the arbitration agreement. *Id.* § 218 cmt. b. It should be pointed out, however, that § 218 is a general provision applicable to both domestic and international agreements, and neither the Comments nor Reporter’s Notes consider the effect of the New York Convention and the choice of law reference in Article V(1)(a) of the Convention.

⁸⁶ However, the English court in *Peterson Farms, Inc. v. C & M Farming, Ltd.*, [2004] EWHC (Comm) 121 Lloyd’s Rep. 603 (Q.B.D.) (Eng.), emphasized that the “autonomy” of the arbitration agreement was not the relevant concern in the choice of law context, and that the appropriate law was the law chosen by the parties to govern the contract as a whole.

⁸⁷ See 1 BORN, *supra* note 22, at 497–504 (endorsing a validation principle).

⁸⁸ See Bundesgesetz über das Internationale Privatrecht [Federal Code of Private International Law] Dec. 18, 1987, SR 291, art. 178 (Switz.). An unofficial English translation of the text of the Swiss statute can be found at <http://www.umbricht.ch/pdf/SwissPIL.pdf>.

⁸⁹ 1 BORN, *supra* note 22, at 501.

⁹⁰ *Id.*

⁹¹ Convention on Choice of Court Agreements, *opened for signature* June 30, 2005, 44 I.L.M. 1294.

New York Convention analogue for courts—contains a provision requiring courts to respect a choice of court agreement unless the agreement is “null and void.”⁹² Thus, Article 5 of the Choice of Court Convention requires courts of a Contracting State to that Convention to decide a dispute, “unless the agreement is null and void under the law of that State.”⁹³ Unlike the New York Convention, there is an express choice of law reference to the law of the forum state, and that “law” includes the conflict of laws rules of the forum state.⁹⁴ Thus, the chosen court’s *choice of law* rules will be invoked to determine the validity of the choice of court clause. To ensure conformity and avoid some of the difficulties of the New York Convention with respect to enforcement of agreements and recognition of awards, the Choice of Court Convention uses the same reference with respect to when a state must dismiss in favor of the chosen forum, i.e., unless “the agreement is null and void under the law of the State of the chosen court.”⁹⁵ This includes the choice of law rules. The Choice of Court Convention contains the same reference again on recognition and enforcement of a judgment where jurisdiction was based on the choice of court clause, i.e., that the agreement was null and void under the law of the State of the chosen court,⁹⁶ including its conflict of laws rules. Thus, the choice of law rules at the chosen forum will determine the applicable law governing the validity of the clause itself.

This is not to suggest that a similar solution would work for agreements under the New York Convention. The arbitral situs has much greater “anationality” than a chosen court, and reference to the conflict of laws rules of the arbitral situs would not necessarily be in keeping with the parties’ intention. But the formal framework developed for the issue of validity of the forum selection clause in the Choice of Court Convention and the objective of harmonizing the prejudgment and postjudgment contexts for assessing validity suggests that another look should be taken at these issues in the arbitration context, whether by developing an international approach to the choice of law issue, or by a formal amendment to the New York Convention.

⁹² *Id.* art. 5(1).

⁹³ *Id.*

⁹⁴ That the reference to “law” in Article 5(1) includes the choice of law rules is made clear in TREVOR HARTLEY & MASATO DOGAUCHI, EXPLANATORY REPORT ON THE CONVENTION OF 30 JUNE 2005 ON CHOICE OF COURT AGREEMENTS ¶ 125 (2007) (Permanent Bureau of the Conference ed., 2007), *reprinted in* RONALD A. BRAND & PAUL M. HERRUP, THE 2005 HAGUE CONVENTION ON CHOICE OF COURT AGREEMENTS: COMMENTARY AND DOCUMENTS 236 (2008). For more on the background of this provision, see BRAND & HERRUP, *supra*, at 79–82.

⁹⁵ Convention on Choice of Court Agreements, *supra* note 91, art. 6(a).

⁹⁶ *Id.* art. 9(a).

V. CONCLUSION

At the same time I offer these reflections on aspects of the New York Convention where the role for national law has created uncertainty and confusion, I recognize how important the Convention has been in creating a vibrant climate in which international arbitration has flourished. But after fifty years, it might be time to do some fine-tuning to a few limited provisions, and it is with that possibility in mind that I have offered these comments.