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## ENFORCING ANNULLED ARBITRAL AWARDS: A COMPARISON OF APPROACHES IN THE UNITED STATES AND IN THE NETHERLANDS

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### *Summary*

*This contribution examines the procedural aspects of the enforcement of arbitral awards that were set aside in the jurisdiction where they were rendered. It focuses on recent cases in the United States and the Netherlands, which adopted a different line of reasoning than the approach taken by French judiciary many years ago. According to the latter, an arbitral award set aside in the 'country of origin' may be enforced in France in reliance on national law. Namely, French law on enforcement is more favourable than the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral. The courts in the United States and in the Netherlands in recent cases have taken a different approach. They examine the judgment setting aside the award and ignore the effects of the annulment in certain circumstances. Even though there are some common denominators, there are substantial differences between the line of reasoning of the courts in the US and the Netherlands. They remain distinct although a more recent decision of the Dutch Supreme Court emphasises an exceptional nature of such enforcement so that the difference between the two approaches may seem somewhat mitigated. However, a closer look reveals that substantial discrepancies between the courts in these two jurisdictions have remained. The article provides for a critical view on the enforcement of annulled arbitral awards in general. In particular, it points to drawbacks of variety of unilateral approaches amongst various jurisdictions. Additionally, it suggests the development of internationally accepted standards for the sake of legal certainty and predictability of arbitration, should the acceptance of the enforcement of annulled arbitral appear a majority view amongst academics and arbitration practitioners.*

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## 1. INTRODUCTION

Ever since the French *Cour de cassation* issued its ruling in the *Norsolor* case,<sup>1</sup> the enforcement of annulled arbitral awards has retained the attention of arbitration specialists worldwide. It is true that attempts to enforce an annulled arbitral award occur rather infrequently. Yet in the last 30 years it has become an inevitable part of arbitration practice. Each attempt to enforce an annulled award attracts great attention and the interest of the arbitration community and usually triggers a heated debate. Regrettably the comments on the topic have often been written by the real ‘actors’ – lawyers and arbitrators involved in a particular case. Consequently, numerous publications predominantly either reflect and defend the lawyers’ position taken in a concrete case or defend the arbitrators’ reasoning in an arbitral award. Most importantly, some of the decisions enforcing annulled awards have been driven by political rather than legal reasoning and considerations. Circumstances that justify ‘bias in favour’ of the enforcement in circumstances of a particular case, may hamper an objective legal analysis.

There is no disagreement on the appropriateness of the enforcement of annulled arbitral awards within the context of the supplementary nature of Article IX of the 1961 European (Geneva) Arbitration Convention<sup>2</sup> to the provision of Article V(1)(e) of the New York Convention. However, outside the context of the 1961 European (Geneva) Convention, opinions in arbitration literature are strongly opposed

1 *Pabalk Ticaret Sirketi v. Norsolor S A.*, Cass. Civ. Ire, 9 October 1984, *Rev. arb.* (1985) 421, excerpt published in XI *Yearbook Commercial Arbitration* (1986), pp. 484 *et seq.* An award rendered in Austria was partially set aside by the courts at first and second instance, as it was based on *lex mercatoria*. In France, the Court of Appeal refused to enforce the award because of its annulment in Austria. This decision was reversed by the *Cour de cassation*, holding, *inter alia*, that an award set aside abroad could still be enforced in France by relying on the provision on enforcement in French law which is more favourable than the grounds listed in Article V of the New York Convention. In the meantime, the decisions of both Courts in Austria partially setting aside the award were reversed at last instance so that the award was not set aside in the country of origin after all. Consequently, the French *Cour de cassation* did not enforce an annulled arbitral award, but clearly announced its readiness to do so. It was for the first time in *Hilmarton* that the French Court enforced an annulled arbitral award. In its decision of 19 December 1993 the Court of Appeal of Paris granted the exequatur in France of the arbitral award set aside in Switzerland, excerpt published in XIX *Yearbook Commercial Arbitration* (1994) France no. 18, at pp. 655-657. In its decision of 23 March 1994, the *Cour de Cassation* confirmed this decision and finally enforced the annulled award. *Hilmarton Ltd. v. Omnium de traitement et de valorisation (OTV)*, Cass. Civ., 23 March 1994, *Revue de l'arbitrage* (1994) p. 327, excerpt published in XX *Yearbook Commercial Arbitration* (1995) p. 663 *et seq.*

2 Convention on International Commercial Arbitration, Geneva, 21 April 1961, United Nations, *Treaty Series* (1963-64), Vol. 484, p. 364, NO. 7041 (hereinafter: 1961 European Convention).

regarding the enforcement of an award that has been set aside in the country where it was rendered. In some jurisdictions, such as France and other countries having a comparable legislative framework, the enforcement of annulled arbitral awards has become firmly established practice.

However, it indeed appeared rather difficult to appropriately accommodate this idea within the framework of the 1958 Convention, as the present author already noted in an earlier publication.<sup>3</sup> Moreover, some jurisdictions expressly reject the idea of enforcing awards that were set aside in the country where they were rendered,<sup>4</sup> with the exception of enforcement within the context of the supplementary nature of Article IX of the 1961 European Convention.

The present contribution analyses the approaches to enforce the arbitral awards annulled in the country where rendered taken in the recent case law in the Netherland<sup>5</sup> and in the United States<sup>6</sup> and examines the appropriateness of these approaches.

3 Lazić, V., 'Enforcement of the Arbitral Awards Annulled in the Country of Origin', *Croatian Arbitration Yearbook*, Vol. 13 (2006), pp. 179-204.

4 See e.g., Judgment of the Rostock Court of Appeal of 28 October 1999, *OLG Rostock*, excerpt in *XXV Yearbook Commercial Arbitration* (2000) p. 717. The Court held, *inter alia*, that '[a]n award is no longer binding when it has been set aside by a competent court.' See also the judgment of the German Supreme Court (*Bundesgerichtshof*) of 22 February 2001, No. III ZB 71/99, excerpt in *XXIX Yearbook Commercial Arbitration*, Germany no. 63. Although the prevailing view in the legal literature is that awards annulled in the country where they were rendered cannot be enforced in Germany, some authors have expressed the view that there may be exceptional circumstances in which the enforcement of such awards could be granted, such as when the judgement annulling the award does not comply with requirements for enforcement in Germany. Schlosser, P., *Kommentar zur Zivilprozessordnung* par. 1044 n . 89 (Stein/Jonas, 21 st. ed., 1994). However, such a view does not find support in German case law. In particular, it differs from the view expressed by the Rostock Court of Appeal, in its holding that the decision to set the award aside 'must be recognized without examining whether it would be recognizable according to the standards for the recognition of foreign decisions.'

5 Decision of the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) of 28 April 2009, 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft* (Russian Federation), *Tijdschrift voor Arbitrage (TvA)* 2011/1, p. 15, excerpt in *Yearbook Commercial Arbitration 2009 - Volume XXXIV*, Kluwer Law International (2009), Netherlands No. 31 pp. 703 – 714. Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE, *Y OAO Rosneft (Russian Federation) v. Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case No. LJN: BM1679 available at <http://www.rechtspraak.nl>, excerpt in English in *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Kluwer Law International (2010) Netherlands No. 34, pp. 423 – 426. Decision of Amsterdam District CDourt (Rechtbank Amsterdam) of 17 November 2011, ECLI:NL:RBAMS:2011:BV5646 (*Maksimov v Novolipetsy Steel Mill (NLMK)*); Hof Amsterdam, 18-9-2012, ECLI:NL:GHAMS:2012:BY5010. Hof Amsterdam, 15-4-2014, ECLI:NL:GHAMS:2014:6020. HR, 24-11-2017, ECLI:NL:HR:2017:2992.

6 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013).

## 2. ENFORCEMENT UNDER NATIONAL ARBITRATION LAW

Abundant case law in France and occasional enforcement in other jurisdictions<sup>7</sup> present examples of enforcing the annulled award under national arbitration law. As an annulment in the country of origin is not amongst the reasons for refusing enforcement according to the relevant provision of French law in Article 1520 of the French New Code of Civil Procedure,<sup>8</sup> a party may request enforcement by relying on this provision instead of Article V(1) of the New York Convention. The latter lists the reasons for refusing enforcement which may be invoked by a party resisting the enforcement. The fact that an award has been set aside in the country where it was rendered or under the law of which it was rendered presents a ground on which enforcement can be refused in Article V(1)(e) of the Convention. A party may rely on a national law providing for a more favourable enforcement regime by invoking Article VII(1) of the Convention.

The formula established in *Hilmarton* judgment<sup>9</sup> has been repeatedly maintained in subsequent decisions enforcing annulled arbitral awards in France.<sup>10</sup> Consequently, Article V of the 1958 New York Convention has virtually no relevance there.<sup>11</sup> More importantly, the French courts would enforce arbitral awards annulled in an EU Member State for violating mandatory rules of Community law, such as EC competition law. The circumstances surrounding *SNF v. Cytec*<sup>12</sup> illustrate this potential

7 See e.g., the enforcement in Belgium of an award set aside in Algeria in *Sonatrach v. Ford, Bacon and Davis Inc.*, Brussels Court of First Instance, 6 December 1988, excerpt in XV *Yearbook Commercial Arbitration* (1990) p. 370 *et seq.* The 1958 New York Convention was held to be inapplicable, since Algeria was not a party to it. Accordingly, the enforcement was based on the domestic law on the enforcement of foreign awards. The court concluded that no reasons for refusing the enforcement could have been found under Belgian law and declared the award enforceable.

8 As revised in 2012. Under the previous legislation when *Norsolor* and *Hilmarton* were decided it was a provision under Article 1502.

9 The approach followed by the French *Cour de cassation* can be summarised as follows: The award rendered abroad is an international award which does not have to be incorporated in the legal order of the country where it had been rendered. The relevant provision of French statutory law on arbitration in Article 1502 of the New Code of Civil Procedure does not contain a ground for refusing enforcement as expressed in Article V(1)(e) of the 1958 New York Convention. Accordingly, its enforcement scheme is more favourable than the 1958 New York Convention. Such a more favourable enforcement regime of domestic law can be relied upon on the basis of the 'more favourable right' provision of Article VII(1) of the 1958 New York Convention.

10 See e.g., *Chromalloy Aeroservices v. Arab Republic of Egypt*, *Cour d'appel de Paris*, 14 January 1997, *Mealey's International Arbitration Report*, 12 (1997) 4, p. B-1; *Société PT Putrabali Adyamulia c/ SA Rena Holdings*, *Cour de cassation*, *Iere civ 29 juin 2007*, Bulletin 2007, I, N° 250; Paris Court of Appeal, *Bechtel v. DAC*, 29 September 2005, *Juris-Data* n°2005-287354, *Rev. arb.* 2006.695, commentary by H. Muir Watt; Paris Court of Appeal, *SNF v. Cytec*, 23 March 2006, *Rev. arb.* 2007. 100, commentary by S. Bollée.

11 See e.g., *Chromalloy Aeroservices v. Arab Republic of Egypt*, *Cour d'appel de Paris*, 14 January 1997, *Mealey's International Arbitration Report*, 12 (1997) 4, p. B-1 (stating, *inter alia*, that the application of Art. V 'must then be set aside', at p. B-2).

12 *SNF v. Cytec*, Paris Court of Appeal, 23 March 2006 and the French Supreme Court of 4 June

risk. As consequences of enforcing such arbitral awards may have a direct influence on the internal market, it would be desirable that certain aspects of arbitration be put on the agenda of the EU legislators. This is particularly so considering the importance attached to enhancing the use of out-of-court dispute resolution within the general objective of improving access to justice in the European Union.

### **3. ENFORCEMENT UNDER THE 1958 NEW YORK CONVENTION – THE UNITED STATES**

Obviously the ‘French approach’ can be followed in other jurisdictions which have a comparable legal framework, i.e., as long as a domestic regime on enforcement does not contain the annulment of an award in the country of origin amongst the reasons for rejecting the enforcement. However, an analysis of the relevant case law, especially the United States’ decision in *Chromalloy*,<sup>13</sup> illustrates that the enforcement of an annulled award may appear to be difficult within the framework of the 1958 New York Convention which applies when there is no more favourable domestic enforcement regime. This will be when a domestic enforcement scheme contains identical grounds as Article V of the 1958 New York Convention or in any case when it does provide that the annulment of the award in the country of origin is a reason to refuse the enforcement.

In the *Chromalloy* judgment Judge J.L. Green of the United States District Court, District of Columbia, granted the enforcement of the award notwithstanding the annulment in Egypt where it had been rendered. This decision was extensively discussed in the literature<sup>14</sup> and therefore will not be addressed in detail in the present contribution. Yet this decision is a perfect illustration that the French approach in addressing the interplay between Articles V and VII obviously cannot be easily ‘exported’ when there is no comparable enforcement regime in domestic law as is the case in the United States.

In particular, there is no provision in the United States’ Federal Arbitration Act corresponding to the relevant provision in the French New Code of Civil Procedure, which would offer a more favourable domestic enforcement regime for foreign awards. In other words, there is no provision relating to the enforcement of

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2008, Clunet 2008, 1107; Court of Appeal of Brussels of 22 June 2009.

13 *Chromalloy Aeroservices v. Arab Republic of Egypt*, 939 F Supp. 907 (D.D.C. 1996).

14 E.g., Paulsson, J., ‘Rediscovering the NY Convention: Further Reflections on *Chromalloy*’, *Mealey’s International Arbitration Report*, 17 (April 1997) 4, p. 34; Rivkin, D. V., ‘The Enforcement of Awards Nullified in the Country of Origin : The American Experience’, in : van den Berg, A.J., (ed.), *Improving the Efficiency of Arbitration Agreements and Awards*, ICCA Congress series No. 9 (1999) 528, 534 *et seq.*; Sampliner, G. H., ‘Enforcement of Nullified Foreign Arbitral Awards – *Chromalloy* Revisited’, 14 *J. Int.* (1997), 125 at p. 132; Schwartz, E., ‘A Comment on *Chromalloy* – Hilmarton a l’americaine’ 14 *J. Int’l Arb.* 2 (1997) 125, at p. 132; Gharavi, H.G., ‘*Chromalloy*: Another view’ 12 *Mealey’s Int. Arb. Rep.* 5 (May 1997), 21 at p. 22-23; Van den Berg, A.J., 9 *JCC Bulletin* (Nov. 1998) pp. 15 *et seq.*; Lazić, V., ‘Enforcement of the Arbitral Awards Annulled in the Country of Origin’, *Croatian Arbitration Yearbook*, Vol. 13 (2006), pp. 179-204.

foreign awards in the Federal Arbitration Act outside the treaties. Thus, the 1958 New York Convention is implemented in Chapter 2 and the 1975 Inter-American Convention on International Commercial Arbitration (hereinafter: the 1975 Panama Convention) in Chapter 3. There is no provision on the enforcement of foreign arbitral awards in Chapter 1, which applies to arbitration taking place in the United States. Yet, the *Chromalloy* judgment did rely on Chapter 1, thereby erroneously referring to Section 10 of the Federal Arbitration Act. This provision relates to the grounds for the 'vacation' (or the setting aside) of awards rendered in the United States and does not deal with the enforcement of foreign awards. Subsequent decisions by various courts in the United States rejected, either expressly or impliedly, the application of Chapter 1 on the enforcement of foreign arbitral awards.<sup>15</sup> Also the opinion that Chapter 1 cannot be relied upon for the enforcement of foreign arbitral awards has been a majority view expressed in legal literature.<sup>16</sup>

It is true that the relevant provision of Article 1520 of the French arbitration statutory law also contains reasons for setting aside. However, these grounds are expressly applicable to the enforcement of foreign arbitral awards as provided in Article 1525. There is no such reference in the United States' Federal Arbitration Act which would justify the application of the grounds for 'vacating' awards at the enforcement stage. As the legal reasoning in *Chromalloy* received in that respect rather limited acceptance in subsequent decisions, it is appropriate to state that *Chromalloy* has thereby been pushed into 'a narrow corner of New York Convention jurisprudence'.<sup>17</sup> Regrettably, though, neither of the two judgments addressed *infra*

15 E.g., *Yusuf Ahmed Alghanim & Sons v. Toys "R" Us, Inc.*, 126 F.3d (2d Cir. 1997), excerpt in XXIII *Yearbook Commercial Arbitration*, pp. 1058-1067 (US no. 261). *Baker Marine*, 191 F.3d (2d Cir. 1999), excerpt in XXIV *Yearbook Commercial Arbitration* (1999) (US no. 288) p. 909 *et seq*; *Spier v. Calzaturificio Tecnica, S.p.A., F.Supp.2d (S.D.N.Y. 1999)*, excerpt in XXV *Yearbook Commercial Arbitration* (2000) (US no. 325) p. 1042 *et seq*.

16 See e.g., Schwartz, E., 'A Comment on *Chromalloy* – Hilmarton a l'americaine', 14 *J. Int'l Arb.* 2 (1997) 125, at p. 132; Gharavi, H.G., 'Chromalloy: Another view', 12 *Mealey's Int. Arb. Rep.* 5 (May 1997), 21 at p. 22-23; Van den Berg, A.J., 9 *JCC Bulletin* (Nov. 1998), 15, at p. 17-19. Even those authors generally favouring the enforcement of annulled awards have attempted to avoid the discussion on the correct application of American law in this case, see e.g., Paulsson, J., 'Rediscovering the NY Convention: Further Reflections on *Chromalloy*', *Mealey's International Arbitration Report*, 17 (April 1997) 4, p. 34, n. 35 ('Assuming that Judge Green correctly applied U.S. domestic law, as to which I express no opinion since I am examining universal ramifications of the New York Convention rather than U. S. legislation as such'). In general, only a few authors have argued that Chapter 1 of the United States' Federal Arbitration Act can be used as an alternative basis for enforcing foreign awards. See e.g., Rivkin, D.V., 'The Enforcement of Awards Nullified in the Country of Origin: The American Experience', in: van den Berg, A.J., (ed.), *Improving the Efficiency of Arbitration Agreements and Awards*, ICCA Congress series, No. 9 (1999) 528, 534 *et seq.*; Sampliner, G. H., 'Enforcement of Nullified Foreign Arbitral Awards – *Chromalloy* Revisited', 14 *J. Int. Arb.* 3 (1997), 125 at p. 132. However, this view has found no support in subsequent US case law.

17 Feinacht, F., 'Enforcement of Annulled Foreign Arbitral Awards in Germany', 19 *Journal of International Arbitration* 4 (2002), 313 *et seq.*, at p. 314, n. 6 referring to Marc J. Goldstein, 34 *Int'l Law* 519 (2000).

have expressly distanced themselves from the *Chromalloy* judgment.

### 3.1. *The TermoRio and Pemex judgments*

Obviously, the enforcement of an annulled award could not succeed in the United States by reference to a more favourable regime under domestic law. Yet the United States' courts have found a way to enforce an annulled arbitral award through the enforcement framework under two international treaties - the 1958 New York Convention and the 1975 Panama Convention. The *TermoRio* and *Pemex* judgments have introduced a new aspect when deciding on the enforcement of annulled arbitral awards. In particular, it involves a consideration of the foreign judgment setting aside the award and whose enforcement has been requested in the United States. As such they present a relevant source on the interpretation of Article V (1) (e) of the New York Convention, even though the *Pemex* judgment relates to the application of the Panama Convention. Namely both Conventions contain comparable reasons to refuse the enforcement of arbitral awards. Article V of the 1975 Panama Convention is substantively identical to Article V of the 1958 New York Convention. Thus, both Conventions provide that an annulment in the country where an award has been rendered presents a reason to refuse its enforcement.

As already announced in *Baker Marine*, the Columbia District Court in *TermoRio*<sup>18</sup> noted that there might be circumstances where an arbitration award should be enforced notwithstanding a nullification in the country where the award had been rendered. The Court had to decide on a request for the enforcement of an ICC arbitral award that had been set aside by the competent courts in Colombia. In the arbitral proceedings *TermoRio et al.* prevailed and the state-owned Colombian agency *Electranta* had to pay damages due to a breach of obligations under the contract. The competent Colombian court *Consejo de Estado* ultimately set the award aside. The ground on which it based its decision was that the arbitration had not been conducted in accordance with Colombian law, which did not permit the use of the ICC rules at the time when the arbitral proceedings were held.

*TermoRio* and a US shareholder *LeaseCo* initiated enforcement proceedings before the United States District Court for the District of Columbia. The Court dismissed the request for enforcement because the arbitral award had been set aside by the Colombian courts and alternatively on the ground of *forum non conveniens*. *TermoRio* appealed and argued that the Colombian courts' annulment of the award amounted to a denial of fair process. It further argued that the US courts had discretion under the 1958 New York Convention to enforce an award despite its annulment in the country of origin so that they could refuse to give effect to an annulment that violates the US' own fundamental principles. By maintaining that the Colombian courts' decision was contrary to both Colombian and international law, *TermoRio*

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18 *TermoRio S.A.E.S.P.(Colombia), LeaseCo Group and others v. Electranta S.P. (Columbia) et al.*, 487 F. 3d 928 (D.C. Cir. 2007) excerpt in XXXI Yearbook Commercial Arbitration (2006) at pp. 1457-1461 (US no. 575).



suggested that the enforcement of the annulled award should have been granted.<sup>19</sup>

The United States Court of Appeals for the District of Columbia Circuit<sup>20</sup> denied the application for an appeal and affirmed the decision of the District Court thereby refusing to enforce the award. It held, *inter alia*, that Colombian courts did have primary jurisdiction for setting aside proceedings as the arbitral award had been rendered in that country. In reference to Article V(1)(e) of the 1958 New York Convention, the Court maintained that a country of the enforcement ('a secondary Contracting State') 'normally may not enforce an arbitration award that has been lawfully set aside by a "competent authority" in the primary Contracting State.'<sup>21</sup> It concurred with the appellees that *Consejo de Estado* was undisputedly a 'competent authority' in the primary Contracting State and that there was no evidence that the proceedings had been tainted or the judgment 'other than authentic'.<sup>22</sup> The Court concluded that an enforcement granted despite a lawful annulment in the country of primary jurisdiction 'would seriously undermine a principal precept of the New York Convention: an arbitral award does not exist to be enforced in other Contracting States if it has been lawfully "set aside" by a competent authority in the State in which the award was made.'<sup>23</sup>

When addressing the allegation that Colombian courts' decisions were contrary to both Colombian and international law, the *TermoRio* Court observed that 'there is a narrow public policy gloss on Article V(1)(e) of the Convention' and that a foreign annulment judgment could be unenforceable as being against public policy 'to the extent that it would be repugnant to fundamental notions of what is decent and just in the United States'.<sup>24</sup> The Court concluded that in the case at hand there was no evidence that the annulment judgment 'violated any basic notions of justice to which we subscribe'<sup>25</sup> and accordingly there was no reason why it should not be given effect in the United States. The Court eventually refused to enforce the annulled arbitral award, interpreting Article V(1)(e) of the 1958 New York Convention in a rather unique manner. In particular, it introduced the 'violation of basic notions of justice' test for foreign annulment judgments. However, it emphasised thereby that

19 From the summary of facts in the excerpt *TermoRio S.A.E.S.P.(Colombia), LeaseCo Group and others v. Electranta S.P. (Columbia) et al.*, United States Court of Appeals, District of Columbia Circuit, 06-7058, 25 May 2007, excerpt in XXXIII *Yearbook Commercial Arbitration* (2008), pp. 955 it follows that Termo Rio curiously enough proposed that the Court was to rely on the public policy exception of Article V(2)(b) of the 1958 New York Convention when granting the enforcement of the annulled award. This would be a rather odd proposition considering that the public policy exception in Article V(2) presents a reason for refusing the enforcement of an award and has nothing to do with an annulment judgment. However, no such proposition seems to follow from the judgment itself.

20 *TermoRio S.A.E.S.P.(Colombia), LeaseCo Group and others v. Electranta S.P. (Columbia) et al.*, United States Court of Appeals, District of Columbia Circuit, 06-7058, 25 May 2007, excerpt in XXXIII *Yearbook Commercial Arbitration* (2008), pp. 955-969.

21 *Id.*, p. 961, para. [9] of the excerpt.

22 *Id.*

23 *Id.*, p. 962, para. [10] of the excerpt.

24 *Id.*, p. 965, para. [18] of the excerpt.

25 *Id.*

the concept of public policy should be narrowly construed. In that context, the Court held that since Article V(1)(e) ‘contains no exception for public policy, it would be strange indeed to recognize such an implicit limitation in Art. V(1)(e) that is broader than the express limitation in Art. V(2)(b).’<sup>26</sup>

Unfortunately, the Court in *TermoRio* did not expressly distance itself from *Chromalloy* even though it did not follow the line of reasoning employed therein. Yet it cited a part of the reasoning therein in that ‘a decision by this Court to recognize the decision of the Egyptian Court would violate clear U.S. public policy in favor of binding arbitration clauses.

The ‘violation of basic notions of justice’ test suggested in *TermoRio* was subsequently applied in the *Pemex* judgment of the Southern District Court of New York.<sup>27</sup> In this decision Judge Alvin K. Hellerstein ordered the enforcement in the United States of an arbitral award that had been set aside by a Mexican court. This is the first judgment after the *Chromalloy* case where an annulled foreign award was enforced in the United States, even though for substantially different reasons. The District Court in *Pemex* did not expressly distance itself from the analysis in the *Chromalloy* judgment on the application of Article VII(1), as there is no such provision in the Panama Convention. Instead the line of reasoning adopted in the *Termorio* judgment was followed in *Pemex*, even though in the latter case the governing treaty was not the New York Convention, but the 1975 Panama Convention. As already mentioned, for the issue at hand the 1958 New York Convention and the 1975 Panama Convention are substantially identical.

The decision of the Southern District Court of New York was confirmed in the recent judgment of the Court of Appeals for the Second Circuit.<sup>28</sup> The latter affirmed the holding of the District Court judge that a judgment was unenforceable as against public policy to the extent that it was ‘repugnant to fundamental notions of what is decent and just in the State where enforcement is sought.’<sup>29</sup> Both Courts maintained that there was discretion in enforcing annulled foreign arbitral awards for the recognising court, but only to vindicate ‘fundamental notions of what is decent and just in the United States’.<sup>30</sup>

In this context, proper attention should be paid to the rather peculiar circumstances of the case at hand. First of all, when Commisa, a Mexican subsidiary of the U.S. corporation KBR and a claimant in arbitral proceedings, initiated arbitration at the end of 2004 the dispute with Pemex, a subsidiary of the Mexican state-owned oil corporation, was ‘arbitrable’ in the sense that Pemex was authorised to arbitrate, did agree to arbitrate and actively participated in the arbitration proceedings. Only at a later stage did the dispute become ‘non-arbitrable’ by proclaiming a retroactive application of the relevant Mexican laws, whereas the capacity of Pemex to arbitrate was

26 *Id.*, p. 965, para. [17] of the excerpt.

27 *Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploración y Producción*, No. 10 Civ. 206 (AKH), 2013 WL 4517225 (S.D.N.Y. Aug. 23, 2013).

28 *Corporación Mexicana de Mantenimiento Integral v. Pemex-Exploración Y Producción*, No. 13-4022 (2d Cir. Aug. 2, 2016).

29 *Id.*, p. 29.

30 *Id.*, p. 29-30.

established under prior law.<sup>31</sup> Such retroactive application rendered the dispute ‘non-arbitrable’ and consequently the award was susceptible to annulment. Accordingly, the crucial issue before the US Courts was a retroactive application of laws by the Mexican courts and the unfairness associated therewith. More importantly, it seems that a retroactive application of the relevant statute of limitations would render any claim inadmissible in any forum,<sup>32</sup> i.e., even if the claim would subsequently be filed before the Mexican courts as it would be time-barred.<sup>33</sup> Such a retroactive application of the relevant laws by the Mexican courts when setting aside the arbitral award obviously violates basic notions of morality and justice accepted not only in the United States but in many jurisdictions worldwide. As such it is not surprising that it had to be given no effect. In other words, it would be very difficult indeed to find a way to decide differently in the circumstances of the case at hand.

It is therefore not surprising that the decision of the Southern District Court of New York was confirmed in judgment of the Court of Appeals for the Second Circuit. The latter Court made clear that the rather peculiar facts in the case at hand qualified it as an ‘extraordinary’ case in which the award could be enforced despite the annulment in the country where it had been rendered. In other words, it found that the facts in the present case complied with the criterion of ‘extraordinary circumstances’ where a deference would be ‘repugnant to fundamental notions of what is decent and just’. The Court indicates which considerations are decisive to impinge upon United States’ public policy principles: the vindication of contractual undertakings and the waiver of sovereign immunity, the repugnancy of retroactive legislation that disrupts contractual expectations, the need to ensure that legal claims find a forum and prohibition against government expropriation without compensation.<sup>34</sup>

It may be concluded that extraordinary circumstances would be required for a court in the United States to qualify a foreign annulment judgment as ‘repugnant’ to United States’ public policy considerations that would justify the enforcement of the award in the United States despite the annulment abroad. The Court of Appeals refers to the ‘rare circumstances of this case’<sup>35</sup> and suggests that enforcing an annulled award may be justified only in exceptional cases where ‘the nullification of the award offends basic standards of justice in the United States’. Most importantly, it warns that ‘[a]ny court should act with trepidation and reluctance in enforcing an arbitral award that had been declared nullity by the courts having jurisdiction over the forum in which the award was rendered.’<sup>36</sup> Considering the exceptional nature of the facts in the *Pemex* case, it does not seem likely that the reasoning in this decision will have

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31 *Id.*, p. 34.

32 *Id.*, p. 36.

33 The change in the Mexican law subjected *Commisa*’s claims to the 45-day statute of limitations. Besides, the claim was declared as barred by *res judicata* on an *amparo* action instituted in the Mexican District Court, an issue which the arbitral tribunal presumably could not adjudicate.

*Id.*, p. 37.

34 *Id.*, p. 30.

35 *Id.*, p. 40.

36 *Id.*, p. 40.

substantial relevance and acceptance in future cases.<sup>37</sup>

#### **4. ENFORCEMENT UNDER THE 1958 NEW YORK CONVENTION - THE NETHERLANDS**

##### **4.1. The Yukos judgments<sup>38</sup>**

As for the enforcement of an annulled award outside the 1958 New York Convention, in the view of the present author, as expressed earlier,<sup>39</sup> this could only be possible if the law of the enforcing state does not provide for the annulment of awards as a reason to refuse the recognition or enforcement of a foreign arbitral award, as is the case under French law. In the latter case, on the basis of Article VII(I) of the New York Convention a party may rely on a more favourable national law for the enforcement of foreign arbitral awards. In contrast, Article 1076(1)(A) (e) of the Dutch Arbitration Act provides for the same reason to refuse recognition or enforcement as Article V(1)(e) of the Convention. Therefore, it was not to be expected that the courts in the Netherlands could follow the ‘French approach.’ The latter assumes a more favourable regime for the enforcement of foreign arbitral awards than the New York Convention which does not provide for this particular reason to refuse enforcement.<sup>40</sup> Considering that the Dutch law on the enforcement of foreign arbitral awards does contain this ground to refuse enforcement, the French approach cannot be ‘imported’ into the Netherlands.

Yet the Amsterdam Court of Appeal in its decision of 28 April 2009<sup>41</sup> applied

37 It is true that there are circumstances in which retroactive application of law would implicate a lack of the right to arbitrate. See e.g., *ATA Construction v. Jordan ATA Construction, Industrial and Trading Company v. Hashemite Kingdom of Jordan* (ICSID Case No. ARB/08/2). However, this in itself does not necessarily bar the substantive claim itself or the possibility to institute the claim in other, non-arbitral forum.

38 This part of the contribution is based on the research presented in the earlier publications Lazić, V. ‘The Interpretation and Application of the New York Convention in the Netherlands’, in: G.A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards - The Interpretation and Application of the New York Convention by National Courts*, Ius Comparatum – Global Studies in Comparative Law, Springer Publishing (2017) pp. 689-731 and ‘Enforcing Annulled Arbitral Awards in The Netherlands’, in: H. Koster/F. Pennings/C. Rusu (eds), *Essays on Private & Business Law: A Tribute to Professor Adriaan Dprreesteijn*, Eleven International Publishing, 2017, pp. 195-209.

39 Lazić, V., ‘Enforcement of the Arbitral Awards Annulled in the Country of Origin’, *Croatian Arbitration Yearbook*, Vol. 13, (2006), pp. 179-204. Generally, on the possible approaches in the enforcement of annulled arbitral awards, see Berg., A. J. van den, ‘Enforcement of Arbitral Awards Annulled in Russia’, *Journal of International Arbitration*, Volume 27 Issue 2, Kluwer Law International (2010), p. 182-197.

40 For more particulars on the issue of the possibility to follow the approach of the French courts in other jurisdictions, see Van den Berg., A.J., ‘Enforcement of Arbitral Awards Annulled in Russia’, *Journal of International Arbitration*, Volume 27 Issue 2, Kluwer Law International (2010), pp. 179 – 198, addressing the possibilities for the enforcement of annulled awards.

41 Decision of the Amsterdam Court of Appeal (Gerechtshof Amsterdam) of 28 April 2009, 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*,

another formula to the enforcement of an award that had been set aside by the competent court in the country where the award was rendered. It was the first and so far the only decision to enforce annulled awards in the Netherlands.<sup>42</sup> Deciding on a request for enforcement under the New York Convention, the President of the Amsterdam District Court (*Voorzieningenrechter*) denied the enforcement of awards rendered in Russia under the Rules of the International Commercial Arbitration Court (ICAC) at the Chamber of Trade and Industry of the Russian Federation in Russia, because the awards had been set aside by the competent court in Russia.<sup>43</sup> In its judgment of 28 April 2009, Amsterdam Court of Appeal reversed this decision and granted enforcement for reasons that can be summarised as follows:

The 1958 New York Convention does not require an automatic recognition of annulment decisions in the country where their enforcement is sought. According to the reasoning in paras 3.5 and 3.6 of the judgment 'the New York Convention does not require an automatic recognition of annulment decisions in the country where their enforcement is sought. Instead, Dutch general private international law determines whether the annulment decision can be recognised in the Netherlands.'

Press articles and the reports of international organisations, as well as court decisions in a number of jurisdictions, notably in England and Wales, Lithuania, Switzerland and the Netherlands, illustrate that there is a lack of impartiality and independence on the part of the Russian courts in cases involving the interests of the Russian State. For these reasons, the decision of the Russian court annulling the awards should not be given effect in the Netherlands.

It is irrelevant that the party requesting the enforcement of the award in Yukos Capital did not provide direct evidence of partiality and dependence in the case at hand 'in part because partiality and dependence by their very nature take place behind the scenes'.<sup>44</sup>

Points (2) and especially (3) do not relate to the interpretation of the New York Convention. From a legal point of view, they do not deserve any comment, as they are clearly not based on legal considerations. The arguments used have been rightly subjected to criticism,<sup>45</sup> especially the obviously inappropriate view that there was

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Tijdschrift voor Arbitrage (TvA) 2011/1, p. 15, excerpt in Yearbook Commercial Arbitration 2009 - Volume XXXIV, Kluwer Law International (2009), Netherlands No. 31, pp. 703-714.

42 Here only the relevant legal issues are addressed. References to the rather peculiar facts and circumstances of the case, as well as other 'arbitration unrelated' aspects and considerations, are omitted.

43 Judgment of the Amsterdam District Court of 28 February 2008, ECLI:NL:RBAMS:2008:BC8150.

44 Decision of the Amsterdam Court of Appeal (*Gerechtshof*) of 28 April 2009 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*, case No. ECLI:NL:GHAMS:2009:BI2451, available at <http://www.rechtspraak.nl>; excerpt in *Yearbook Commercial Arbitration – Volume XXXIV*, Kluwer Law International (2009). Netherlands No. 31, para. 21. However, see the subsequent judgment of the Amsterdam District Court of 17 November 2011, ECLI:NL:RBAMS:2011:BV5646, par. 4.9. In this case the Court considered that this reasoning was too general to lead to the conclusion that the Russian judges in this particular case were biased.

45 For a criticism of this decision, see Berg, A. J. van den, *Enforcement of Arbitral Awards*

no need to prove a lack of impartiality in the case at hand. It is to be met with approval that it was not followed in subsequent decisions by the Dutch courts. Thus, the Amsterdam District Court in its decision of 17 November 2011<sup>46</sup> clearly took into consideration whether the issue of the lack of impartiality or independence could be determined in that particular case. This approach is in stark contrast to the line of reasoning adopted by the Court in the *Yukos* case. The latter held that there was no need to ascertain the lack of impartiality in the case that it dealt with. Instead it relied on information in the press and selected literature which was entirely unrelated to the facts and circumstances of the case at hand. It seems, however, that even the Amsterdam Court of Appeal subsequently changed this view in its decision 27 September 2016.<sup>47</sup> In the latter decision, the Amsterdam Court of Appeal did examine whether there had been an unfair trial in the case at hand.<sup>48</sup> However, this part of the reasoning will not be further discussed as it is of no relevance for a legal analysis and interpretation of the Convention.

As for the reasoning under point (1), the Court first held, *inter alia*, as follows: '[4] (...) However, neither this provision [of Art. V(1)(e)], nor the further provisions of the 1958 New York Convention or any other convention compel the Dutch enforcement court to recognize such decision of the Russian civil court directly. The question whether the decision of the Russian civil court annulling the arbitral awards can be recognized in the Netherlands must be answered pursuant to the rules of general private international law.'<sup>49</sup>

After stating that 'a Dutch court is not compelled to deny leave for recognition of an annulled arbitral award if the foreign decision annulling the arbitral award cannot be recognized in the Netherlands',<sup>50</sup> the Court continued to reason that:

'[6] This court shall therefore first examine under general law [*commune recht*] whether the decisions of the Russian civil court annulling the arbitral awards of 19 September 2006 can be recognized in the Netherlands, starting from the consideration that a foreign decision, regardless of its nature and scope, is recognized if a number of minimum requirements are complied with, one of them being the foreign decision came into existence [in proceedings complying with] due process. There is no due process when it must be deemed that the foreign decision was rendered by a judicial

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Annulled in Russia, *Journal of International Arbitration*, Volume 27 Issue 2 (2010) pp. 179-198.

46 President of the District Court of Amsterdam ('*Voorzieningenrechter*, *rechtbank Amsterdam*) of 17 November 2011, 491569/KG RK 11-1722, *Nikolai Viktorovich Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat*, excerpt in *Yearbook Commercial Arbitration 2012 – Volume XXXVII*, Kluwer Law International (2012), Netherlands No. 41, pp. 274 – 276, Kluwer.

47 Decision of the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) of 27 September 2016, ECLI:NL:GHAMS:2016:3911.

48 *Id.*, para. 2.3.1 and 2.3.2.

49 Decision of the Amsterdam Court of Appeal (*Gerechtshof Amsterdam*) of 28 April 2009 200,005,269, *Yukos Capital s.a.r.l. (Luxembourg) v. OAO Rosneft (Russian Federation)*, case No. ECLI:NL:GHAMS:2009:BI2451, available at <http://www.rechtspraak.nl>, excerpt in *Yearbook Commercial Arbitration – Volume XXXIV*, Kluwer Law International (2009), Netherlands No. 31 para. [4].

50 *Id.*, para. [5].

authority that was not impartial and independent.’

Thus, the Court held that reliance on the reason under Article V(1)(e) of the Convention depended on whether or not a decision on the annulment in the country of origin could be recognised in the Netherlands. This reasoning finds no support either in the text and preparatory documents of the New York Convention or in court decisions applying the Convention in and outside the Netherlands. In this context, the reasoning of the US *Pemex* judgment must be distinguished from the reasoning of the Dutch court in the *Yukos* case in view of the repeatedly emphasised ‘exceptional circumstances’ prevailing in the US *Pemex* case. There is not much to be added to the view expressed by van den Berg in his criticism of the decision.<sup>51</sup> Yet another point may be raised with respect to the Court’s reliance on ‘general private international law’ (*commune recht*).

In the view of the Court, the enforcement of an annulled arbitral award depends on whether or not the annulment judgment fulfils the conditions for recognition and enforcement under the general private international law rules of the country of enforcement. Presumably it was meant to refer to the rules on the recognition of foreign judgments developed on the basis of the case law in the Netherlands, as the Court does not refer to any particular provision of any law in the Netherlands. Even though Article 431 of the Dutch Code of Civil Procedure reflects the relevant case law concerning the conditions for enforcement of foreign judgments, the Court could not have expressly referred to this provision as it relates to the ‘enforcement’ of condemnatory judgments. As such, it cannot be relied upon in the context of recognising a foreign annulment judgment. According to the rules developed by the courts in the Netherlands, a foreign judgment may be recognised if certain conditions are satisfied, in particular: whether the foreign court had jurisdiction to decide the case on the basis of internationally accepted criteria, that the requirement of due process has been complied with and the decision is not contrary to Dutch public policy.

However, it is questionable whether it is appropriate to apply the ‘*commune recht*’ with respect to the recognition of foreign decisions to foreign judgments annulling an arbitral award. Namely, the developed case law relates to the recognition of foreign decisions that mainly concern ‘substantive’ claims and obligations of the parties - constitutive, declaratory and condemnatory decisions and judgments rejecting a claim.<sup>52</sup> It is doubtful whether it is appropriate to apply the concept and system of recognition provided for judgments dealing with substantive claims in the context of recognising foreign annulment judgments. The latter do not deal with and do not affect substantive entitlements and obligations of the parties. Instead they have procedural legal consequences and effects: they determine the (lack of) effectiveness of another decision – an arbitral award. It should be emphasised that the issue of the recognition of foreign annulment judgments has never been previously raised

51 Berg., A. J. van den, ‘Enforcement of Arbitral Awards Annulled in Russia’, *Journal of International Arbitration*, Volume 27, Issue 2 (2010), p. 189.

52 Strikwerda, L., *Inleiding tot het Nederlandse internationaal privaatrecht*, Kluwer, Deventer (2015), pp. 291 and 293.

before the Dutch courts. In a similar vein, all decisions relating to arbitration, thus also decisions rendered in setting aside proceedings, fall outside the scope of the Brussels I Regulation on the recognition and enforcement of foreign judgments.

#### **4.2. Incorrect interpretation of Article III of the 1958 New York Convention**

The controversial decision of the Amsterdam Court of Appeal did reach the Dutch Supreme Court,<sup>53</sup> but unfortunately the latter did not engage in a discussion on the appropriateness of the enforcement of annulled arbitral awards in the Netherlands. Namely, the Supreme Court simply declared that recourse in cassation was inadmissible. It based its decision on the interpretation of the relevant provisions of Articles 1062 and 1063 of the Arbitration Act in connection with Article III of the New York Convention. The provisions of Articles 1062 and 1063 relate to the enforcement of arbitral awards rendered in the Netherlands. Considering that recourse in cassation is inadmissible against leave for enforcement with respect to the awards rendered in the Netherlands, the Supreme Court concluded that it was also inadmissible in proceedings for the enforcement of foreign arbitral awards, within the view of Article III of the New York Convention. Namely, it construed the wording in Article III that '[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards ... than are imposed on the recognition or enforcement of domestic arbitral awards' so as to imply that the relevant provisions on the enforcement of domestic awards had to be analogously applied in enforcement under the Convention. This is the first time since the Netherlands ratified the Convention that such an interpretation was applied. After it was raised for the first time in the literature,<sup>54</sup> it received no or little support in legal writings. Yet the Supreme Court based its decision almost exclusively on this particular publication. Before that it not was even doubted that an appeal or recourse in cassation would be unavailable against a decision granting enforcement when the enforcement is requested on the basis of Article 1075, i.e., under the New York Convention.<sup>55</sup>

The correctness of the decision of the Supreme Court must be questioned,

53 Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE, *Y OAO Rosneft (Russian Federation) v. Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case no. ECLI:NL:HR:2009:BM1679 available at <http://www.rechtspraak.nl>, excerpt in English in *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Kluwer Law International (2010), Netherlands No. 34, pp. 423 – 426.

54 For the first time the issue of the 'prohibition of discrimination under Article III of the New York Convention on leave for an enforcement procedure in the Netherlands' was raised in a publication by the Dutch practising lawyer Ph. De Korte, 'Welke consequenties heft het discriminatieverbod van artikel III van het Verdrag van New York voor de Nederlandse exequaturprocedure' *TvA* no. 3 (2007).

55 Decision of the Court of Appeal (*Gerechthof*) of Amsterdam of 16 July 1992, *G.W.L. Kersten & Co. B.V. v. Société Commerciale Raoul-Duval et Cie*, excerpt in *Yearbook Commercial Arbitration*, Kluwer Law International (1992), Netherlands No. 16 – the District Court of Utrecht had granted the request for enforcement and an appeal was permitted.



especially the relevance of the mentioned provisions of the Dutch Act on the 'conditions for enforcement' within the meaning of Article III of the New York Convention. Such interpretation erroneously implies that the purpose of Article III was to unify not only the conditions for the recognition and enforcement of foreign arbitral awards, but also the conditions and procedures for the enforcement of domestic awards. Furthermore, it would seem as if the purpose of Article III was to impose the obligation upon the Member States to have a uniform system of enforcement for both domestic and foreign awards. There is no doubt that the Convention never was intended to achieve such effect and purpose. As rightly pointed out in the commentary to this decision, the interpretation of this provision followed by the Dutch Supreme Court finds no support either in the text of the Convention or in the legislative history of Article III.<sup>56</sup>

It is not only that the Supreme Court incorrectly interpreted the Convention, but it also erroneously applied the relevant provisions of the Dutch Arbitration Act. In particular, it is obviously inappropriate to analogously apply Articles 1062 and 1063 in the context of the enforcement of 'foreign' arbitral awards. This is especially so considering that a party against whom the enforcement of a 'domestic' award is granted does have a remedy against this decision, which is an action for setting aside. In other words, there is no right of appeal or a right of recourse in cassation, but there is another available remedy or means of recourse – an action for setting aside and in exceptional circumstances a request for the revocation of the award.<sup>57</sup> In the procedure for setting aside, a party will have the possibility of both an appeal and recourse in cassation. Obviously, these remedies - setting aside or exceptionally revocation - are not available to a party against which an enforcement of a foreign arbitral award is requested in the Netherlands, as the seat of arbitration is not in the Netherlands. Consequently, the decision of the Supreme Court of 25 June 2010 leaves such a party with no remedy at all even if the lower courts - a District Court or a Court of Appeal - would have rendered obviously incorrect decisions when applying the New York Convention or Dutch law.<sup>58</sup> The reasoning of the Supreme Court that a

56 Berg., A.J., van den, 'Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010, 28 *Journal of International Arbitration*, Issue 6 (2011) pp. 617-641. Yet in its decision of 20 December 2012 The Hague Court of Appeal confirmed the judgment of the Supreme Court and decided that the prohibition of recourse when leave is granted for a foreign arbitral award that falls within the scope of the New York Convention does not infringe the right to a fair trial in Article 6 of the European Convention on Human Rights. See, The Hague Court of Appeal 20 December 2011, ECLI:NL:GHSGR:2011:BU8275, par. 9-13. A similar decision was reached by the Amsterdam Court of Appeal in 2016. See, Amsterdam Court of Appeal, 19 July 2016, ECLI:NL:GHAMS:2016:2948, par. 3.12-3.14. See also, the judgment of the Amsterdam Court of Appeal of 24 June 2014, ECLI:NL:GHAMS:2014:2442, par. 2.6-2.10.

57 For criticism of the judgment of the Supreme Court, see Berg, A.J. van den, *Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010*, *Journal of International Arbitration*, Kluwer Law International (2011) Volume 28 Issue 6, pp. 617-641.

58 Such a result may be contrary to the constitutional right to legal remedies, a right which is also incorporated in the EU (Charter on Fundamental Rights).

possibility for setting aside is available in the country of the seat of arbitration, so that a party is not without a remedy, is difficult to comprehend, especially considering that any such decision can apparently be ignored by the Dutch courts.

It is even more difficult to understand the reasoning of the Supreme Court when the scope of application of the Arbitration Act is taken into consideration. In particular, the scope is very clearly defined: there are provisions that apply when arbitration is held in the Netherlands (Title One) and provisions that apply to arbitrations outside the Netherlands (Title Two). There is no doubt that Article 1062 and 1063 are contained in Title One which regulates arbitration *within* the Netherlands. Accordingly, the provisions on which the Supreme Court relied upon are not meant to be applied in the context of foreign arbitrations.

It should be emphasised that the legal reasoning of the Supreme Court implies that the possibility to appeal and file recourse in cassation against a decision granting enforcement is available when the enforcement is under Article 1076, i.e., when no treaty applies or when its applicability is permitted under a treaty, such as Article VII(1) of the Convention. In the reasoning of the Court this is so because in the enforcement under Article 1076 there is no such requirement which is allegedly imposed under Article III of the Convention. This is an apparent paradox, considering that the Dutch Act provides for the applicability of the same provisions of the Code of Civil Procedure regarding the enforcement of foreign arbitral awards.<sup>59</sup> Consequently, the ruling of the Supreme Court renders this provision meaningless even though it contains more favourable conditions for the enforcement of foreign arbitral awards. Such legal reasoning significantly undermines the effectiveness of the more favourable legal provision of Article 1076. It renders the provision of Article 1076 less likely to be relied upon, even though it contains more favourable grounds for enforcement. Consequently, this provision remains more favourable only with respect to the grounds on the basis of which the enforcement may be refused. Before the ruling of the Supreme Court of 25 June 2010, the provision of Article 1076 had been rather frequently invoked,<sup>60</sup> as it does provide for a more liberal enforcement regime than Article V of the New York Convention within the meaning of Article VII(1) of the Convention. In conclusion, the decision of the Supreme Court is the

59 The different approach in applying these provisions has been explained by the Supreme Court to the effect that these provisions of the Code of Civil Procedure apply unless a treaty provides otherwise (and Article III allegedly does provide otherwise in the view of the Court).

60 See e.g., Decision of *Dubai Drydocks v. Bureau voor Scheeps- en Werktuigbouw [X] B.V.*, President of the District Court of Dordrecht (*Voorzieningenrechter, Rechtbank*, Dordrecht) of 30 June 2010, Case No. 79684 / KG RK 09-85, *Yearbook Commercial Arbitration*, (Kluwer Law International) Netherlands No. 35, p. 299 *et seq.*, relying primarily on Art. 1076 and subsidiarily on Art. 1075 of the Act); President of the District Court of Amsterdam of 18 June 2009, *Voorzieningenrechter, Rechtbank, Amsterdam, LoJack Equipment Ireland Ltd. (Ireland) v. A*, 411230/KG RK 08-3652, 18 June 2009, Netherlands No. 32; Decision of the District Court (*Arrondissementsrechtbank*) of Almelo of 19 July 2000, *Société d'Etudes et de Commerce SA v. Weyl Beef Products BV*, *Yearbook Commercial Arbitration*, Kluwer Law International (2001) Netherlands No. 26.; Decision of the President of the District Court (*Rechtbank*) of Rotterdam of 24 November 1994, *Isaac Glycer v. Moses Israel Glycer and, Eстера Glycer-Nottman*, *Yearbook Commercial Arbitration* (1996) Netherlands No. 19.

result of an incorrect interpretation and application of both the New York Convention and Dutch statutory arbitration law.

Unfortunately, the Dutch legislator when revising the law in 2015 missed the opportunity to remedy the unsatisfactory legal reasoning of the Supreme Court in the decision concerned.<sup>61</sup> Yet under the new 2015 Act jurisdiction for the enforcement of foreign arbitral awards is vested in the Courts of Appeal, whereas jurisdiction for the enforcement of domestic awards has remained with the District Courts. Vesting jurisdiction in different courts could be seen as an indication that the analogous application of Title One on the enforcement of foreign arbitral awards is inappropriate. It is still to be seen in practice whether vesting jurisdiction in the Court of Appeal for enforcing foreign awards in the new 2015 Act will imply the possibility to deviate from the legal reasoning in the decision of 25 June 2010, but unfortunately, it is unlikely that the amendment concerned would in any way alter the *Yukos* rule. Regrettably the incorrect interpretation that Article III precludes the right to appeal and to recourse in cassation has been firmly established as a part of Dutch law and confirmed in subsequent decisions.<sup>62</sup>

In conclusion, the Dutch Supreme Court in its decision of 25 June 2010<sup>63</sup> refused to rule on a recourse in cassation filed against the decision of the Amsterdam Court of Appeal holding the application to be inadmissible. The Court held that Article III of the 1958 New York Convention deprived parties of the right to appeal and recourse in cassation. Thus, *a contrario*, both an appeal and recourse in cassation are available against leave for enforcement granted under Article 1076 of the Dutch Arbitration Act,<sup>64</sup> but not if the enforcement is granted under Article 1075,<sup>65</sup> i.e., under the 1958 New York Convention.<sup>66</sup>

61 Unfortunately, the wording in the final text of the 2015 Act does not seem to imply changes in that respect.

62 See e.g., the judgment of the Amsterdam Court of Appeal of 16 October 2012 ECLI:NL:GHAMS:2012:2875 published in 2014 at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2012:2875>; judgment of the Supreme Court of 15 April 2015 ECLI:NL:HR2015:1077 published on <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:1077>; judgment of the Amsterdam Court of Appeal of 17 July 2016, ECLI:NL:GHAMS:2016:2948 available on <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2016:2948>; judgment of the Amsterdam Court of Appeal of 24 June 2014, ECLI:NL:GHAMS:2014:2442 available on <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2014:2442> (last seen on 9 January 2017).

63 Decision of the Supreme Court (*Hoge Raad*) of 25 June 2010, First Chamber, 09/02565 EE, *Y OAO Rosneft (Russian Federation) v. Yukos Capital s.a.r.l. (Luxembourg)*, original decision in Case No. LJN: BM1679 available on <http://www.rechtspraak.nl>, excerpt in English in *Yearbook Commercial Arbitration 2010 - Volume XXXV*, Kluwer Law International (2010) Netherlands No. 34, pp. 423-426.

64 Article 1076 of the 2015 Arbitration Act applies to the enforcement of foreign arbitral awards when no treaty is applicable, i.e., when the enforcement is sought on the basis of the domestic law on arbitration.

65 Article 1075 applies when the enforcement is sought on the basis of a treaty, i.e., on the basis of the 1958 New York Convention which is the relevant treaty in this respect.

66 This *a contrario* argumentation was subsequently affirmed by the Amsterdam Court of Appeal on 16 October 2012, ECLI:NL:GHAMS:2012:2875, par. 2.5. Here the court decided that Article

### 4.3. Supreme Court Decision of 24 November 2017<sup>67</sup>

After the Amsterdam Court of Appeal had refused to enforce another arbitral award set aside by the Russian courts, the case appeared in front of the *Hoge Raad* (Dutch Supreme Court).<sup>68</sup> Firstly, the *Hoge Raad* stated that in the expert statement, they did not find any reasons to assume impartiality of the Russian Arbitration Court which rendered the annulment decision. The Supreme Court upheld the judgments of the court of first instance and of the Court of Appeal, the reasoning can be summarised as follows.

The court observed that in the authentic English text of Article V of the New York Convention of 1958 (which is consistent with the authentic Spanish text) reference is made to ‘may be refused (...) only if’ - which is an indication that the judge has some discretionary power - while the authentic French text refers to ‘ne seront refusées (...) que si’ - which is an indication that there is a rule that the judge does not have a margin of discretion. The Court relies on Article 33(4) of the Vienna Convention and concludes Article V(1) of the New York Convention was to be given the meaning which, taking into account the object and purpose of the New York Convention, best reconciled the various authentic treaty texts.<sup>69</sup> It has concluded that it would be best to then interpret this provision in such a way that it gives the judge a certain margin of discretion to recognise a foreign arbitral award and to grant enforcement, even if in the specific case one or more of the grounds for refusal set out in this Article V can be applied.<sup>70</sup>

The foregoing means that Article V(1)(e) 1958 New York Convention, must be interpreted in such a way that the setting aside of a foreign arbitration award by a competent authority of the country where the judgment was rendered or pursuant to which national laws the judgment was given, does not prevent the court from using the margin of discretion, under special circumstances, to grant enforcement of a previously annulled arbitral award. Such a special case is, inter alia, the case if the annulment of the arbitration award in the foreign judgment of destruction is based on grounds that do not correspond to the grounds for refusal set out in Article V(1) preamble and under a-d, 1958 New York Convention, and those grounds are also not generally acceptable by international standards. Such a special case also applies if the foreign judgment is not eligible for recognition in the Netherlands if it does not fulfill conditions for the recognition of foreign judgements provided under Dutch private international law.<sup>71</sup>

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1076 did not prohibit recourse in cassation since this prohibition was a matter of national law and found application to foreign arbitral awards only through Article. III of the 1958 New York Convention. See also, the judgment of the Netherlands Supreme Court of 17 April 2015, ECLI:NL:HR:2015:1077.

67 Decision of the Supreme Court (*Hoge Raad*) of 24 November 2017 ECLI:NL:HR:2017:2992.

68 HR, 24-11-2017, ECLI:NL:HR:2017:2992.

69 *Ibid.*, para. 3.4.3.

70 *Ibid.*, para. 3.4.5.

71 *Ibid.*, para. 3.4.6; HR 26 September 2014, ECLI:NL:HR:2014:2838, NJ 2015/478, rov. 3.6.4.

## 5. CONCLUSIONS

At first glance, the approach followed by the Amsterdam Court of Appeal in the *Yukos* case resembles the reasoning of the Circuit Court decision in the *Pemex* judgment. However, a closer look at the *Yukos* decision reveals some fundamental differences between the two judgments. Thus, the Amsterdam Court of Appeal first considered whether the annulment judgment of the Russian court could pass the test as set out in Dutch general private international law. The requirement in dispute here was the one that demands that the judgement that is being recognised – in this case the judgement on the setting aside of the award – fulfils the demands of a decent legal procedure. Only if this is the case can the recognition and enforcement of a foreign annulled arbitral award be refused, according to the Amsterdam Court of Appeal.

The difference with the *Pemex* and *Termorio* judgments is fundamental. Whilst the US Courts considered the public policy gloss to be an exception to the rule laid down in Article V (1) (e) so that there would generally be no recognition and enforcement of an arbitral award that has been set aside by the competent authority in the country of origin, the Amsterdam Court of Appeal developed a hard and fast rule instead of an exception. Thus, when applying Article V (1) (e) of the 1958 New York Convention, each annulment judgment is to be subjected to the requirements as set out in Dutch general private international law. As a Dutch recognizing court always has to consider whether a foreign ‘setting aside judgement’ fulfils Dutch general (*commune*) private international law requirements, it makes Article V (1) (e) redundant.<sup>72</sup>

Such an interpretation of Article V (1) (e) of the 1958 New York Convention is not only incorrect, but is rather unwelcome and counterproductive as it undermines the certainty of the enforcement regime of the Convention which presents a globally unified system for the recognition and enforcement of foreign arbitral awards.<sup>73</sup> It is to be regretted that the reasoning of the Amsterdam Court of Appeal has been upheld in several subsequent cases and accordingly represents the current state of the law in the Netherlands. Finally, the Dutch Supreme Court in its recent decision of 24 November 2017 upholds the view that an annulled award can be enforced in the Netherlands in the circumstances when the judgment annulling the award does not comply with the conditions for the recognition of foreign judgments.

The recent case law in the United States and in The Netherlands illustrates that guidance for the interpretation of the 1958 New York Convention would be welcome, even though the enforcement of annulled awards does not occur very frequently. Yet every attempt to enforce such awards undermines the effectiveness and uniform application of the 1958 New York Convention. The present author is of the opinion that annulled arbitral awards in principle should not be given effect in other jurisdiction where the enforcement is sought, even when the annulment was result of an excessive court control in the country where the award was rendered.

72 A. J. van den Berg, “Enforcement of Arbitral Awards Annulled in Russia, Case comment on Court of Appeal of Amsterdam, April 28, 2009”, *Journal of International Arbitration*, 2010, p. 189-190.

73 *Id.*

By choosing the seat of arbitration in a legal system which has arbitration unfriendly legal framework the parties are deemed to accept such extensive court control and must be aware of the risk that the award ultimately may be annulled for reasons that do not meet internationally accepted standards. The only exception should be if the annulment would imply a denial of access to justice, i.e., if it would result in loss of the right to legal remedy in any forum. Yet it seems that the prevailing view is that there may be other circumstances in which an annulment judgment should be ignored. In any case, the variety of opinions on this issue points to the need of some guidelines on the international level which would favour a more uniform interpretation and application of the Convention and would consequently enhance the degree of legal certainty and predictability in enforcing foreign arbitral awards.

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Sažetak

## **PRESUDE U PREDMETIMA YUKOS I PEMEX: IMAJU LI SUDOVI U NIZOZEMSKOJ I SJEDINJENIM AMERIČKIM DRŽAVAMA ISTI PRISTUP GLEDE OVRHE PONIŠTENIH ARBITRAŽNIH PRAVORIJEKA?**

U članku se analiziraju procesnopravni aspekti priznanja i izvršenja arbitražnih odluka koje su poništene u državi gdje su donesene. Rad se koncentrira na relativno nedavno odlučene slučajeve u SAD i Nizozemskoj, u kojima su sudovi primijenili ponešto drugačiji pristup od onoga koji je primijenila sudska praksa u Francuskoj prije više godina. Pravno rezoniranje francuske sudske prakse kod priznanja poništenih arbitražnih odluka temelji se na primjeni domaćega prava o priznanju i izvršenju arbitražnih odluka. Naime, domaće pravo Francuske povoljnije je od režima priznanja prema Newyorškoj konvenciji o priznanju i izvršenju stranih arbitražnih odluka iz 1958. Sudovi u SAD i Nizozemskoj nedavno su primijenili drugačiji pristup prilikom priznanja i izvršenja poništenih odluka. Sudovi u ovim državama preispitivali su sudske presude kojima su poništene arbitražne odluke te odlučili kako se u određenim okolnostima može otkloniti učinkovitost takvih presuda i priznati odnosno izvršiti poništena arbitražna odluka unatoč odluke o poništenju koju je donio nadležni sud u državi sjedišta arbitraže. Iako pristupi sudova u SAD i Nizozemskoj imaju nekih sličnosti, ipak se pravno rezoniranje sudova u ove dvije jurisdikcije bitno razlikuje. U svojoj odluci iz studenoga 2017. Vrhovni sud Nizozemske (pre)naglašava iznimni karakter okolnosti koje bi opravdale priznanje i izvršenje poništene arbitražne odluke, tako da bi se na prvi pogled mogao steći utisak kako je ponešto ublažena razlika ovoga pristupa sa pravnim rezoniranjem sudova u SAD. Međutim, detaljna analiza ova dva pristupa ukazuje da suštinske razlike ostaju. U članku se iznosi kritika općenito priznanja ili ovrhe poništenih arbitražnih odluka. Osobito se kritizira različitost pravnih pristupa na kojima se u pojedinim državama temelji priznanje poništenih arbitražnih odluka kada je priznanje jednostrano, tj., ne temelji se na nekoj međunarodnoj konvenciji kao što je Europska (Ženevska) konvencija o međunarodnoj trgovačkoj arbitraži iz 1962. U članku se nadalje sugerira postavljanje međunarodno prihvaćenih standarda u interesu pravne sigurnosti i predvidivosti, ukoliko je među arbitražnim stručnjacima prevladavajuće mišljenje o načelnoj prihvatljivosti priznanja i izvršenja poništenih arbitražnih odluka.

**Ključne riječi:** *poništenje arbitražnih odluka; priznanje i izvršenje arbitražnih odluka; priznanje i izvršenje inozemnih presuda; javni poredak; arbitraža; međunarodno procesno pravno.*

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## Zusammenfassung

**VOLLSTRECKUNG AUFGEHOBENER AUSLÄNDISCHER  
SCHIEDSSPRÜCHE: VERGLEICH ZWISCHEN DEN  
NIEDERLANDEN UND DEN USA**

Diese Arbeit analysiert prozessrechtliche Aspekte der Anerkennung und Vollstreckung von Schiedssprüchen, welche im Land, nach dessen Recht sie ergangen sind, aufgehoben wurden. Die Arbeit fokussiert sich auf die vor kurzem beschlossenen Fälle in den Niederlanden und den USA, an welche die Gerichte anders als die in Frankreich vor einigen Jahren herangegangen sind. In Frankreich dürfen die Gerichte bei der Anerkennung aufgehobener ausländischer Schiedssprüche das inländische Recht über die Anerkennung und Vollstreckung der Schiedssprüche anwenden. Französisches Recht bietet nämlich ein günstigeres Umfeld im Vergleich zu dem im Jahr 1958 erlassenen New Yorker Übereinkommen über die Anerkennung und Vollstreckung ausländischer Schiedssprüche. Die Gerichte in den USA und den Niederlanden haben vor kurzem eine andere Vorgehensweise bei der Anerkennung und Vollstreckung aufgehobener Schiedssprüche gewählt. Sie haben die Rechtssprüche, durch welche die Schiedssprüche aufgehoben wurden, überprüft, und haben beschlossen, dass man unter bestimmten Umständen den aufgehobenen Schiedsspruch anerkennen kann. Obwohl die Gerichte in den USA und den Niederlanden ähnliche Vorgehensweisen bei ihren Rechtssprüchen ausgewählt haben, gibt es trotzdem wesentliche Unterschiede in deren Argumentationen. Aus dem im Jahr 2017 gefassten Rechtsspruch des Obersten Gerichtshofs der Niederlande geht hervor, dass die Umstände, welche die Anerkennung und Vollstreckung des aufgehobenen Schiedsspruches als Ausnahme anzusehen sind, so dass man den Eindruck bekommen könnte, dass die Argumentationen dieser Gerichte ähnlich sind. Nähere Analyse zeigt aber, dass es wesentliche Unterschiede zwischen ihnen gibt. In der Arbeit wird die Anerkennung und Vollstreckung aufgehobener Schiedssprüche kritisiert. Insbesondere kritisiert man unterschiedliche Vorgehensweisen für die Anerkennung aufgehobener Schiedssprüche in einzelnen Staaten, wenn die Anerkennung einseitig ist, beziehungsweise wenn sie sich auf keine völkerrechtliche Konventionen stützt, wie zum Beispiel auf der Europäischen Konvention über Internationale Schiedsgerichtsbarkeit. In der Arbeit wird vorgeschlagen, dass man völkerrechtliche Standards in diesem Bereich festsetzen sollte, falls sowohl Akademiker als auch Schiedsgerichtsexperte die Ansicht vertreten, dass man aufgehobene Schiedssprüche anerkennen und vollstrecken sollte.

**Schlüsselwörter:** *Aufhebung der Schiedssprüche, Anerkennung und Vollstreckung der Schiedssprüche, Anerkennung und Vollstreckung inländischer Rechtssprüche, Schiedsverfahren, völkerrechtliches Prozessrecht.*

Riassunto

**LE SENTENZE NEI CASI YUKOS E PEMEX:  
CONDIVIDONO LE CORTI NEI PAESI BASSI E NEGLI  
STATI UNITI D'AMERICA LO STESSO APPROCCIO  
CON RIGUARDO ALL'ESECUZIONE DELLE DECISIONI  
ARBITRALI ANNULLATE?**

Nello scritto si analizzano gli aspetti processuali del riconoscimento e dell'esecuzione delle decisioni arbitrali che sono annullate nello stato dove sono state emesse. Il lavoro s'incentra sui casi recentemente risolti negli USA e nei Paesi Bassi, dove le corti hanno adottato impostazioni in parte diverse rispetto a quella della giurisprudenza in Francia diversi anni fa. Il ragionamento giuridico della giurisprudenza francese in occasione del riconoscimento delle decisioni arbitrali annullate si basa sull'applicazione del diritto interno sul riconoscimento e sull'esecuzione delle decisioni arbitrali. Precisamente, il diritto interno francese è più conveniente rispetto al regime di riconoscimento in forza della Convenzione di New York per il riconoscimento e l'esecuzione delle sentenze arbitrali del 1958. Negli USA e nei Paesi Bassi recentemente si sono adottati approcci diversi in occasione del riconoscimento e dell'esecuzione delle decisioni annullate. Le corti in questi stati hanno vagliato le sentenze giudiziali con le quali sono state annullate le sentenze arbitrali e hanno deciso che in determinate circostanze si possa rimuovere l'efficacia di tali decisioni e riconoscere ovvero dare esecuzione alla decisione arbitrale annullata a prescindere dalla decisione sull'annullamento che è stata emessa dal tribunale competente nel paese sede dell'arbitrato. Benché le impostazioni delle corti negli USA e nei Paesi Bassi hanno alcune similitudini, nondimeno il ragionamento giuridico delle corti in queste due giurisdizioni si differenzia notevolmente. Nella propria decisione del novembre 2017 la Corte suprema dei Paesi Bassi evidenzia (troppo) il carattere eccezionale delle circostanze che giustificerebbero il riconoscimento e l'esecuzione della decisione arbitrale annullata, sì che di primo acchito si potrebbe avere l'impressione che la differenza di questo approccio rispetto all'argomentazione giurisprudenziale statunitense non sia poi così netta. Tuttavia, un'analisi dettagliata di queste due impostazioni dimostra l'esistenza di differenze di fondo. Nel lavoro si espone una critica generale al riconoscimento ed all'esecuzione delle decisioni arbitrali annullate. In particolare, si critica la diversità di impostazioni giuridiche sulle quali nei singoli stati si fonda il riconoscimento delle decisioni arbitrali annullate allorquando il riconoscimento è unilaterale, e cioè si fonda su di una Convenzione internazionale come la Convenzione europea (di Ginevra) sull'arbitrato commerciale internazionale del 1962. Nel lavoro, inoltre, si suggerisce la creazione di standard internazionali riconosciuti al fine di garantire la certezza del diritto e la prevedibilità, qualora tra gli esperti di arbitrato sia invalso il parere di massima sull'accettabilità del riconoscimento e l'esecuzione delle decisioni arbitrali annullate.

**Parole chiave:** *annullamento delle decisioni arbitrali; riconoscimento ed esecuzione delle decisioni arbitrali; riconoscimento ed esecuzione delle sentenze straniere; ordine pubblico; arbitrato; diritto processuale internazionale.*