

Enforcement of Arbitral Awards Annulled in Russia

Case Comment on Court of Appeal of Amsterdam, April 28, 2009

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By a decision dated April 28, 2009, the Court of Appeal in Amsterdam granted enforcement of four arbitral awards annulled by the Russian courts under the New York Convention of 1958. The Court of Appeal's principal reason was: "[S]ince it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision [sic] by the Russian court must be disregarded." In the author's opinion, the Court of Appeal's reasoning is at odds with the New York Convention of 1958.

I. INTRODUCTION

The case concerned a dispute between Yukos Capital Sarl ("Yukos Capital") and OAO Rosneft ("Rosneft") concerning four loan agreements between Yukos Capital as lender and OJSC Yuganskneftegaz ("Yuganskneftegaz") as borrower concluded at the time that Yukos Capital and Yuganskneftegaz formed part of the Yukos group. Subsequent to an auction, Rosneft acquired the majority of the shares in Yuganskneftegaz. A dispute about the loans ensued and Yukos Capital filed for arbitration with the International Court of Commercial Arbitration at the Chamber of Trade and Industry of the Russian Federation. By four arbitral awards of September 19, 2006, the arbitrators decided that Yuganskneftegaz was to pay Yukos Capital some 13 billion roebel (exclusive of interest and costs).

By judgments of May 18 and 23, 2007, the *Arbitrazh* Court of the City of Moscow set aside the four arbitral awards on the ground of violation of the right to equal treatment, violation of the agreed rules of procedure and the appearance of a lack of impartiality and independence on the part of the arbitrators. The Federal *Arbitrazh* Court of the Moscow District and, subsequently, the Supreme *Arbitrazh* Court of the Russian Federation affirmed the judgments on appeal on August 13, 2007 and in cassation on December 10, 2007, respectively.

Notwithstanding the setting aside by the Russian courts, Yukos Capital sought enforcement of the four awards in the Netherlands. Yukos Capital's request for enforcement was based primarily on Article 1075 of the Netherlands Code of Civil Procedure

^{*} The present article is based on a legal opinion that, at the request of Rosneft's cassation lawyers, I provided in conjunction with the recourse to the Netherlands Court of Cassation against the Court of Appeal decision.

(DCCP) in conjunction with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, June 10, 1958 (“New York Convention”). Yukos Capital based its application alternatively on Article 1076 DCCP.¹

The President of the District Court in Amsterdam denied Yukos Capital’s application by a decision of February 28, 2008,² based on the ground for refusal of enforcement set forth in Article V(1)(e) of the New York Convention:

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

(e) The award ... has been set aside ... by a competent authority of the country in which ... that award was made.

By a decision dated April 28, 2009, the Court of Appeal in Amsterdam reversed the decision denying enforcement by the President of the District Court and granted enforcement of the four awards annulled by the Russian courts. The principal reason for the Court of Appeal’s decision reads as follows:

3.10 Based on the foregoing, the Court concludes that since it is very likely that the judgments by the Russian civil judge setting aside the arbitration decisions are the result of a dispensing of justice that must be qualified as partial and dependent, said judgments cannot be recognized in the Netherlands. This means that in considering the application by Yukos Capital for enforcement of the arbitration decisions, the setting aside of that decision [sic] by the Russian court must be disregarded.³

Rosneft has brought a recourse in cassation against the decision of the Court of Appeal. Thus, the Netherlands Court of Cassation (*Hoge Raad*) will be confronted with a question that has been addressed by many commentators, including myself: the enforcement of annulled awards.

In this case comment I will examine the approach taken by the Amsterdam Court of Appeal in light of the case law and academic writings on the subject. I will not address the Court of Appeal’s reasoning, especially not since the case is still *sub judice*.

However, I would like to make an exception for one aspect of the Court of Appeal’s reasoning because I consider it to be fundamentally wrong. The Court of Appeal is of the opinion that it can deduce from press publications and reports of a general nature as well as from criminal law procedures in Russia that the civil judges in the present case lacked impartiality and independence. That is an extremely serious accusation by judges regarding their colleagues in another country and one would expect that there is solid evidence for it. Yet, the Court of Appeal acknowledged: “Yukos Capital has furnished no direct evidence of the partiality and dependence of the individual judges who ruled on the Rosneft claim for the annulment of the arbitral awards.”⁴ This did not deter the Court of

¹ Article 1076 DCCP contains a statutory regime for the recognition and enforcement of foreign arbitral awards outside the New York Convention. Such a regime is contemplated by the more-favorable-right provision set forth in art.VII(1) of the New York Convention. *See also infra*.

² The original text is available at <www.rechtspraak.nl>, Case No. LJN BC8150.

³ Court of Appeal of Amsterdam (Enterprise Division), April 28, 2009, LJN BI2451 s. 3.10.

⁴ *Id.* s. 3.9.4.

Appeal from assuming a lack of impartiality and independence in the present case: “in part because partiality and dependence, by their very nature, take place behind the scenes.” A lack of impartiality and independence should be factually (and demonstrably) present in a given case, or else there should be (provable) circumstances present that have created an appearance of a lack of impartiality or independence on the part of the judges in question. The Court of Appeal’s reasoning amounts to a purportedly systematic lack of impartiality and independence of the Russian judiciary: the very fact that the judgment in the *Yukos Capital* case was pronounced in Russia would indicate that the judges considering the application to set aside the arbitral awards could not be independent and impartial. The Court advances this conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges involved in all three instances.

Be that as it may, in this case comment I will focus on whether arbitral awards annulled in the country of origin can still be recognized and enforced abroad. In my opinion, there are at least five different possibilities regarding that question, which I will discuss below.

With regard to the five possibilities, it is important to make a distinction between the application of the New York Convention (to which possibilities 1 through 3 relate), application outside the scope of the Convention (to which possibility 4 relates), and finally a change in the New York Convention (to which possibility 5 relates).

It is furthermore of importance, in my opinion, to provide separate analyses of these five possibilities. In the discussion regarding the recognition and enforcement of arbitral awards set aside in the country of origin, those possibilities are sometimes confused with one another, which results in an unclear debate. For instance, it is argued that the French case law regarding *Hilmarton* interprets the New York Convention in such a way that enforcement of arbitral awards annulled abroad is allegedly possible under the Convention. However, a further examination of the French case law shows that the French judge does not base this unconventional point of view on an interpretation of the New York Convention itself, but on French national law regarding the recognition and enforcement of international arbitral awards rendered abroad, and applies said law via the more-favorable-right provision of Article VII(1) of the Convention (i.e., possibility 4 concerning application outside of the Convention, as further discussed below).

I can be brief about the New York Convention in general.⁵ The Convention is intended to facilitate the recognition and enforcement of foreign arbitral awards. Article I defines the scope (arbitral awards rendered in another Contracting State). Article III obligates a Contracting State to recognize and enforce a foreign arbitral award. Article IV specifies the conditions for submitting an application for recognition and enforcement, and Article V summarizes the grounds for refusing recognition and enforcement. The first paragraph contains the grounds that a respondent must advance and prove. The second paragraph concerns grounds that the court can apply on its own initiative (public policy).

⁵ A.J. VAN DEN BERG, *THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION* (1981).

A distinction that is not always fully appreciated is the difference between refusal of enforcement and the setting aside of an arbitral award.⁶ Refusal of enforcement has only a territorial effect (i.e., is mostly limited to the country in which the enforcement order is refused). A court in another country can arrive at an opposite decision by granting enforcement of the same award in that country. In contrast, the setting aside of an arbitral award has an *erga omnes* effect (see below). Once the award has been annulled in the country where the award was made, it is no longer eligible for recognition and enforcement in the Contracting States. Setting aside thus provides legal certainty.⁷

The aforementioned distinction is also referred to as the difference between the country with “primary jurisdiction” and the country with “secondary jurisdiction.”⁸ As summarized by the Fifth Circuit of the U.S. Court of Appeals:

The New York Convention provides a carefully structured framework for the review and enforcement of international arbitral awards. Only a court in a country with primary jurisdiction over an arbitral award may annul that award. Courts in other countries have secondary jurisdiction; a court in a country with secondary jurisdiction is limited to deciding whether the award may be enforced in that country. The Convention “mandates very different regimes for the review of arbitral awards (1) in the [countries] in which, or under the law of which, the award was made, and (2) in other [countries] where recognition and enforcement are sought.” Under the Convention, “the country in which, or under the [arbitration] law of which, [an] award was made” is said to have primary jurisdiction over the arbitration award. All other signatory states are secondary jurisdictions, in which parties can only contest whether that state should enforce the arbitral award. It is clear that the district court had secondary jurisdiction and considered only whether to enforce the Award in the United States.⁹

The case law under the New York Convention is reported in Part V-A of the *Yearbook of Commercial Arbitration*. Since 1976, (extensive) excerpts of more than 1500 decisions from fifty-eight Contracting States have been published and analyzed therein.¹⁰

In the present case, it was not an issue that the “competent authority” referred to in Article V(1)(e) of the Convention is the Russian court that ruled on the annulment of the arbitral awards. Nor was it an issue that the Russian courts are exclusively competent to rule on the setting aside of arbitral awards made in Moscow. It is a generally accepted rule that the authority to set aside an arbitral award is vested exclusively in the courts of the country in which the arbitral award was made (also referred to as “country of origin”).¹¹

⁶ The English terminology for annulment is “setting aside” (New York Convention), “annulment,” or “vacatur” (United States). Substantively, these terms have the same meaning.

⁷ VAN DEN BERG, *supra* note 5, at 355–57 (“Is the setting aside of the award in the country of origin a necessary ground for refusal of enforcement?”). See also *infra*.

⁸ See M. Reisman, *The Breakdown of the Control System of the New York Convention*, in *SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION* 114 (1992).

⁹ *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara et al. & Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, U.S. Court of Appeals, 5th Cir., March 23, 2004, XXIX Y.B. COM. ARB. 1262 (2004) (U.S. No. 482 sub. 5) (references omitted).

¹⁰ See A.J. van den Berg, *Consolidated Commentary on the Court Decisions Concerning the New York Convention*, the latest version of which appeared in XXVIII Y.B. COM. ARB. 562 (2003).

¹¹ See art. V(1)(e) *in fine* of the Convention: “has been set aside ... in the country in which, or under the law of which, that award was made.” The clause “or under the law of which” refers to the theoretical case of the parties having agreed to arbitrate in country X under the arbitration law of country Y. In practice, such an agreement is never or almost never reached. See VAN DEN BERG, *supra* note 5, at 22–24.

Finally, in the present case it was not at issue that the arbitration was governed by Russian arbitration law (Law of the Russian Federation on International Commercial Arbitration of August 14, 1993).¹²

II. THE THREE POSSIBILITIES UNDER THE NEW YORK CONVENTION

As noted, it is first necessary to examine whether the New York Convention itself offers the possibility of recognizing and enforcing an arbitral award that has been set aside in another country.

A. FIRST POSSIBILITY: APPLICATION OF ARTICLE V(1)(E) OF THE CONVENTION

The most obvious approach is to apply the text of the Convention. The text states as a ground for refusal the fact that the arbitral award “has been set aside ... by a competent authority of the country in which ... that award was made.” Based on this text, the enforcement court should refuse to enforce an award if the party against whom enforcement is sought asserts and proves three elements, i.e., that the arbitral award:

- (1) has been set aside;
- (2) by the competent authority (i.e., court);
- (3) in the country in which it was made.

The text of the Convention specifies no additional conditions for the setting aside of an arbitral award in the country of origin as a ground for refusal of enforcement. Moreover, the legislative history of the New York Convention makes no mention of any discussion concerning such conditions. The same is true of the 1927 Geneva Convention, the predecessor of the New York Convention.

The case law under the New York Convention follows the first possibility almost unanimously. In those cases where enforcement of a foreign arbitral award has been refused due to annulment by the court in the country of origin, the enforcement court has applied the text of Article V(1)(e) of the Convention and refused to grant leave for enforcement without imposing further conditions on the method or grounds of annulment in the country of origin:

The U.S. Court of Appeals for the Second Circuit refused to allow enforcement in *Baker Marine* with regard to two arbitral awards that were made in Lagos and annulled by the court in Nigeria.¹³ The Nigerian court annulled the first arbitral award based on the fact that the arbitrators had, amongst other things, wrongly awarded damages as a penalty, had gone beyond the scope of the dispute submitted to the arbitrators, wrongly admitted

¹² INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION, Suppl. 17, Russian Federation Annex 1-1-1-10, English translation available at <www.kluwerarbitration.com/arbitration/DocumentFrameSet.aspx?ipn=12381>.

¹³ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. et al.*, U.S. Court of Appeals, 2d Cir., August 12, 1999, XXIV Y.B. COM. ARB. 909 (U.S. No. 288) (1999).

extrinsic evidence to the contract and made inconsistent decisions. The Nigerian court annulled the second arbitral award on the basis of the fact that it was not supported by evidence.

The U.S. Court of Appeals for the District of Columbia refused to allow enforcement in *TermoRio* with regard to an ICC arbitral award, made in Bogota, that was annulled by the Council of State (*Consejo del Estado*) in Colombia on the ground that the arbitral proceedings had taken place on the basis of the ICC Arbitration Rules, the application of which was not permitted by Colombian law at that time.¹⁴

The U.S. District Court for the Southern District in New York refused to allow enforcement in *Spier* with regard to an arbitral award that was set aside by an Italian court due to violation by the arbitrators of their mandate.¹⁵

The German Court of Appeal (*Oberlandesgericht*) in Rostock refused to grant leave of enforcement of an arbitral award that was set aside by a Russian court.¹⁶

The *Oberlandesgericht* in Dresden refused to enforce an arbitral award, made in Minsk, Belarus, that was set aside by the Belarusian court based on the lack of a valid arbitration agreement and the failure by one of the arbitrators to participate in the deliberations.¹⁷

In a special case, the Netherlands Hoge Raad in *SEEE* reached the conclusion that the returning of the arbitral award by the court in Vaud Canton qualified as annulment as provided in Article V(1)(e) of the Convention.¹⁸

The *Karaha Bodas* case is a good example of the application of Article V(1)(e) of the Convention. In that case, the U.S. Court of Appeals for the Fifth Circuit had to rule on an arbitral award that had apparently been made in Geneva. The Swiss Federal Tribunal declared inadmissible the request for annulment, whereupon the request for annulment was filed with the court in Jakarta. The Indonesian court set aside the arbitral award. The U.S. court came to the conclusion that in that case the place of arbitration was Switzerland and for that reason the Swiss courts were exclusively competent to rule on the request for annulment of the award.¹⁹ Thus, according to the Fifth Circuit court, the arbitral award had not been set aside by “a competent authority of the country in which, or

¹⁴ *TermoRio S.A. E.S.P. et al. v. Electranta S.P. et al.*, U.S. Court of Appeals, District of Columbia, May 25, 2007, No. 06-7-58, XXXIII Y.B. COM. ARB. 955 (U.S. No. 621 sub. 1-20) (2008).

¹⁵ *Martin I. Spier v. Calzaturificio Tecnica S.p.A.*, U.S. District Court, Southern District of New York, October 22 and November 29, 1999, XXV Y.B. COM. ARB. 1042 (U.S. No. 325) (2000).

¹⁶ *Oberlandesgericht, Rostock*, October 28, 1999, XXV Y.B. COM. ARB. 717 (FR Germ. No. 51 sub. 4-7) (2000). The reasons for annulment cannot be identified from the published decisions. After the aforementioned decision of the *Oberlandesgericht* in Rostock, the Russian court revised the annulment of the arbitral awards and declared them to be once again legally valid. On this basis, the arbitral award could then still be recognized and enforced in Germany pursuant to the New York Convention, see *Bundesgerichtshof* (Federal Supreme Court), February 22, 2001, XXIX Y.B. COM. ARB. 724 (FR Germ. No. 63 sub. 6-8 en 10) (2004).

¹⁷ *Oberlandesgericht* (Regional Court of Appeals), January 31, 2007, XXXIII Y.B. COM. ARB. 510 (FR Germ. No. 110) (2008).

¹⁸ *Société Européenne d'Etudes et d'Entreprises (SEEE) v. Federal Republic of Yugoslavia, Hoge Raad*, November 7, 1975, NJ 1975 No. 274, I Y.B. COM. ARB. 195 (Netherlands No. 2D) (1976).

¹⁹ *Karaha Bodas Co., L.L.C.*, *supra* note 9, at 8-19, 57-62. This case is also referred to as the “anti-suit injunction” by the U.S. court with regard to the action for reversal in Indonesia; see, *inter alia*, *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, U.S. Court of Appeals, 2d Cir., September 7, 2007, XXXIII Y.B. COM. ARB. 1009 (U.S. No. 627 (5, 18-19)) (2008).

under the law of which, that award was made” as it is stated in Article V(1)(e) of the Convention.

In my opinion, there are also good reasons to uphold the annulment of the arbitral award in the country of origin as grounds for refusal of enforcement abroad, as provided for under Article V(1)(e) of the Convention:

[A]n elimination of the ground for refusal that the award has been set aside in the country of origin would, in my opinion, be undesirable. A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.²⁰

Moreover, Article V(1)(e) ought not to be applied selectively and all grounds for annulment are to be taken into account. As the U.S. Court of Appeals for the Second Circuit put it:

In sum, we conclude that the Convention mandates very different regimes for the review of arbitral awards (1) in the state in which, or under the law of which, the award was made, and (2) in other states where recognition and enforcement are sought. The Convention specifically contemplates that the state in which, or under the law of which, the award is made, will be free to set aside or modify an award *in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief*. See Convention Article V(1)(e). However, the Convention is equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce the award only on the grounds explicitly set forth in Article V of the Convention.²¹

The conclusion regarding the first possibility is that the text of Article V(1)(e) of the Convention must always be applied when an arbitral award has been set aside by a court in the country where it has been made.

B. SECOND POSSIBILITY: RESIDUAL DISCRETIONARY POWER UNDER ARTICLE V TO ALLOW ENFORCEMENT DESPITE THE EXISTENCE OF GROUNDS FOR REFUSAL

One of the characteristics of the grounds for refusal of enforcement named in Article V of the New York Convention is that they constitute a limitative enumeration. Enforcement “may be refused . . . only if . . .” Thus, the enforcement court may not refuse enforcement on the basis of a ground that is not set forth in the Convention. That principle has been generally accepted in the case law under the Convention.

Conversely, however, the question arises of whether an enforcement court must refuse enforcement under all circumstances if one of the grounds expressly set forth in Article V(1) has been asserted and proven. If this question is answered in the affirmative,

²⁰ VAN DEN BERG, *supra* note 5, at 355.

²¹ Yusuf Ahmed Alghanim & Sons v. Toys “R” Us, Inc., U.S. Court of Appeals, 2d Cir., September 10, 1997, XXIII Y.B. COM. ARB. 1058 (U.S. No. 261 sub. 19) (1998) (emphasis added).

the next question is whether such a power can be applied to all the grounds listed in Article V(1).

In a number of judgments under the New York Convention, courts (especially in Hong Kong) have upheld the possibility that Article V(1) of the Convention can be interpreted in such a way that the court deciding on enforcement has a “residual discretionary power” to allow enforcement despite the fact that a ground for refusal of enforcement has been advanced and proved.²²

This power is based specifically on the wording of the English text of Article V(1) of the Convention: “Recognition and enforcement of the award *may* be refused ...” (emphasis added), wording that also appears in the Chinese, Russian, and Spanish texts. In contrast, the French text of Article V(1) appears to offer no leeway for a residual discretionary power: “seront refusées [shall be refused].”²³ Contrary to what some commentators claim, the drafters of the Convention did not consciously choose the word “may.” The travaux préparatoires do not mention any discussion regarding a choice between “may” and “shall” in relation to Article V(1)(e).²⁴ Nor, in my opinion, does Article 33(4) of the Vienna Convention offer any consolation in this case.²⁵

To the extent that courts in the Contracting States interpret the Convention as giving them a residual discretionary power with regard to the enforcement of arbitral awards, they make use of it with restraint, and only in two situations:

- (1) the ground for refusal concerns a *de minimis* case (e.g., an insignificant violation of the applicable rules of arbitration), and
- (2) if the party that invokes the ground for refusal has failed to invoke that ground in a timely fashion in the arbitral procedure.

These two situations can arise with respect to the grounds for refusal (a) through (d) of Article V(1) of the Convention (i.e., lack of a valid arbitration agreement; violation of

²² See A.J. van den Berg, *Residual Discretion and Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards Under the New York Convention*, in VIII CURRENT LEGAL ISSUES IN INTERNATIONAL COMMERCIAL LITIGATION (1996).

²³ New York Convention, art. XVI stipulates that “the Chinese, English, French, Russian and Spanish texts shall be equally authentic.”

²⁴ The English text of the Geneva Convention of 1927 (art. 2) and ICC Preliminary Draft Convention of 1953 (art. IV) contain the word “shall.” Without any discussion, it was changed in the draft from ECOSOC of 1955 into “may” (art. IV). The proposal from the Netherlands (authored by Prof. Sanders) of May 26, 1958 also contained the word “may” (U.N. Doc. E/CONF.26/L.17). A German amendment of May 28, 1958 (art. V), however, contained the word “shall” (U.N. Doc. E/CONF.26/L.34). The “Three Power Working Paper” of June 2, 1958 once again contained the word “may” (art. IV) (U.N. Doc. E/CONF.26/L.40). Some commentators believe it is possible to deduce from this course of events that the drafters of the Convention “consciously” chose the word “may.” Nothing supports this. On the contrary, the explanation by the German delegate during the plenary meeting does not make mention of any reason for changing “may” to “shall” (U.N. Doc. E/CONF.26/SR/14, 2–3). In addition, Germany was one of the three powers that proposed the Three Power Working Paper, which proposal, as stated, contained the word “may.” The German amendment with the word “shall” was not even brought to a vote at the New York Conference. See <www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_travaux.html>.

²⁵ Art. 33(4) provides: “Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.”

the right to equal treatment and the ability to present one's own case; violation of the rules for the appointment of arbitrators or the arbitral procedure). The Convention itself contains no estoppel or waiver provision with respect to the grounds for refusing enforcement of foreign arbitral awards.

It is, however, important to note that in the more than 1500 published decisions, not one court has applied the residual discretionary power with respect to Article V(1)(e) of the Convention in a case where an arbitral award had been set aside in the country of origin.²⁶

This is understandable because an award that has been set aside in the country of origin no longer exists legally. It is not possible that an arbitral award that has been set aside would be brought back to life during an enforcement procedure under the Convention in its country of origin or abroad. The maxim "*ex nihilo nil fit*" applies here.²⁷

This is also the point of view of one of the "founding fathers" of the New York Convention. Shortly after returning from New York, Professor Sanders wrote that if an award was set aside in the country of origin, the "Courts will . . . refuse the enforcement as there no longer exists an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement."²⁸

Some commentators are of the opinion that an arbitral award that has been set aside still continues to exist legally, reasoning that it is not based on the arbitration law of the place of arbitration, but on the arbitration agreement between parties.²⁹ This is a theory inspired by French law and doctrine, which, however, in my opinion is based on an unconventional (and in my opinion inconsistent) vision of international arbitration, as will be explained below. The vast majority of legislation, case law and scholarly writings apply the principle of territoriality of arbitration.

It may be added that the arbitral awards in the *Yukos Capital* case are governed by Russian arbitration law. As mentioned above, that law is set forth in the aforementioned Law of the Russian Federation on International Commercial Arbitration of August 14, 1993. This modern arbitration law is based on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law

²⁶ *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, a possible exception might be the decision of the U.S. District Court for the District of Columbia, XXII Y.B. COM. ARB. 1001 (1997) (U.S. No. 230). The reasoning in this case, however, is unclear, and in subsequent decisions, the U.S. courts have distanced themselves from the *Chromalloy* opinion. See *infra*.

²⁷ See van den Berg, *supra* note 10, at 650: "Within the framework of the Convention it is difficult to conceive that the residual power to enforce would also apply to the case where the award has been set aside in the country of origin [ground (e), see *infra*] as the award no longer legally exists."

²⁸ P. Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, NETHERLANDS INT'L L. REV. 43, 55 (1959); *The New York Convention*, in P. Sanders, *Rapporteur Général, Union Internationale des Avocats*, 2 ARBITRAGE INTERNATIONAL COMMERCIAL—INTERNATIONAL COMMERCIAL ARBITRATION 293, 321 (1960). An interview with Prof. Sanders concerning the origins of the Convention, is available at <www.arbitration-icca.org/index.html>. See, e.g., *IPOC International Growth Fund Ltd. v. L.V. Finance Group Ltd.*, Court of Appeal, British Virgin Islands, June 18, 2008, XXXIII Y.B. COM. ARB. 406 (2008) (BVI No. 1 sub. 3) with regard to an arbitral award made in Switzerland: "The decision of the Swiss Supreme Court confirms the Second Convention Award. Had that court set aside the award, the appeal would have fallen away altogether because there would be no Award that could be the subject of enforcement proceedings."

²⁹ See, e.g., P. Lastenhouse, *Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene*, 16 J. INT'L ARB. 26 (No. 2, 1999).

(UNCITRAL).³⁰ The Russian Law contains in Article 34 the procedure and grounds for setting aside an arbitral award.³¹

Like practically every arbitration law in the world, Russian arbitration law is territorially defined. Article 1(1) of the Russian Law provides as follows: “The present Law applies to international commercial arbitration if the place of arbitration is in the territory of the Russian Federation.”

The opinion that an arbitral award no longer exists after it has been set aside also prevails under Netherlands law. Article 1067 DCCP provides: “As soon as the judgment setting aside an arbitral award has become final and binding, the competence of the ordinary courts is restored, unless the parties have agreed otherwise.” Other arbitration laws provide that after a setting aside the dispute is remanded to the same or another arbitral tribunal. Chaos would ensue if the annulled award would be enforced in another country, whilst the subject matter of that award is retried in arbitration in the country of origin.

However, some commentators argue that the residual discretionary power of the enforcement court can be applied to Article V(1)(e) of the Convention even if the arbitral award has been set aside in the country of origin. The leading commentator in that debate is unquestionably Professor Paulsson. In his opinion, the grounds for refusing an arbitral award set aside in the country of origin named in Article V(1)(e) of the New York Convention should be limited to cases in which an “international standard annulment” (ISA) has been applied.³² In his opinion, under the Convention an enforcement court can indeed recognize and declare enforceable an arbitral award that has been set aside in the country of origin, in keeping with a “local standard annulment” (LSA). According to Professor Paulsson, the difference between an ISA and an LSA is:

The rich experience of international trade law since 1958 has told us what an ISA is: a decision consistent with the substantive provisions of the first four paragraphs of Article V(1) of the New York Convention and Article 36(1)(a) of the UNCITRAL Model Law. Everything else would be an LSA, and entitled only to local effect.

In a response to Professor Paulsson’s article, I argued that his reasoning is not legally correct under present law:

³⁰ The text and commentary for the most recent version of UNCITRAL Model Law on International Commercial Arbitration is available at <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf>.

³¹ Russian Arbitration Act, art. 34(2) provides: “An arbitral award may be set aside by the court specified in article 6(2) only if: (1) the party making the application for setting aside furnishes proof that: a party to the arbitration agreement referred to in article 7 was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the Russian Federation; or he was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or the award was made regarding a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or (2) the court finds that: the subject-matter of the dispute is not capable of settlement by arbitration under the law of the Russian Federation; or the award is in conflict with the public policy of the Russian Federation.”

³² J. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT’L CT. ARB. BULL. 14 (No. 1, 1998).

The problem, however, is that, after annulment, an arbitral award no longer exists under the applicable arbitration law (which is mostly the arbitration law of the place of arbitration). How can a court before which such an 'award' is presented declare it enforceable? *Ex nihilo nil fit*. This legal impossibility appears to exist in any case under the New York Convention, since it explicitly refers in Article V(1)(e) to the applicable arbitration law.³³

What Professor Paulsson advocates is existing treaty law under the 1961 European Convention on International Trade Arbitration, Geneva, April 21, 1961. The European Convention does not apply in the present case, since the Netherlands is not a party to it. The European Convention provides in Article IV(2): "In relations between Contracting States that are also parties to the New York Convention ... paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above." Grounds (a) through (d) listed in paragraph 1 of Article IX are the grounds for annulment of an arbitral award that falls under the European Convention. These grounds are very similar to the grounds for refusal of enforcement set out in Article V(1)(a)–(e) of the New York Convention.

What is written treaty law under the European Convention cannot be transposed to the New York Convention through an interpretation. If this were possible, then Article IX(2) of the European Convention, quoted above, would not have been necessary. In order to rescue an arbitral award set aside in the country of origin abroad, a legal basis such as the European Convention is necessary.

A solution as offered by the European Convention and advocated by Paulsson will hopefully be future law under a revised New York Convention, as I advocate (see fifth possibility below). Failing relevant provisions in the current version of the New York Convention, Paulsson's theory cannot be applied in cases falling under the New York Convention.

Even if Paulsson's theory were accepted, enforcement in the *Yukos Capital* case still should be refused. The arbitral awards were set aside by the Russian court on the basis of grounds for setting aside that appear in the UNCITRAL Model Law which, in Paulsson's qualification, bears the "ISA" seal of approval. This concerns, in particular, violation of the right to equal treatment, violation of the agreed rules of procedure, and the appearance of a lack of impartiality and independence of the arbiters.³⁴ Whether a foreign enforcement court would have interpreted and applied these internationally recognized grounds differently is irrelevant in a proceeding regarding enforcement of an arbitral award under the New York Convention.

In addition, if courts determine by themselves which foreign annulment of an arbitral award is acceptable and which is not, they not only act in breach of the New York Convention, but they could also find themselves in a political minefield. By stigmatizing the judicial system of another country, the political relationship between countries could come under pressure. This may and should not happen when courts in the Contracting States interpret and apply the New York Convention.

³³ A.J. van den Berg, *Enforcement of Annulled Awards?*, 9 ICC INT'L CT. ARB. BULL. 16 (No. 2, 1998).

³⁴ Russian Arbitration Act, art. 34(2), *supra* note 31.

The term “binding” in Articles III and V(1)(e) of the New York Convention is a further reason why arbitral awards set aside in the country of origin cannot be recognized and enforced under the Convention. Article III provides the basic obligation for Contracting States: “Each Contracting State shall recognize arbitral awards as binding.” Article V(1)(e) provides a first ground for refusal “The award has not yet become binding on the parties.” In many countries, an arbitral award is binding as soon as it has been made.³⁵ However, when an arbitral award has been set aside in the country of origin it is no longer binding upon the parties, the obligation for the Contracting States to recognize and enforce the award is no longer in force, and in fact a further ground for refusing enforcement arises. Consequently, Articles III and V(1)(e) do not leave any room for application of the discretionary power with regard to the second ground for refusal in Article V(1)(e) (annulled arbitral award).³⁶

Based on the above, it must be concluded that the residual discretionary power, with regard to grounds (a) through (d) of Article V(1) of the Convention, offers no possibility of enforcement of an arbitral award set aside in the country of origin.

C. THIRD POSSIBILITY: RECOGNITION OF FOREIGN COURT JUDGMENT UNDER ARTICLE V(1)(E)

In *Yukos Capital*, the Court of Appeal opted for a different approach. It opined that “the Dutch court is, in any event, not obliged to refuse enforcement of an arbitral award that has been set aside if the foreign judgment setting aside the arbitral award cannot be recognized in the Netherlands.”³⁷ According to the Court of Appeal, “[it] must first be considered, on the basis of general law [*commune recht*], whether the decisions by the Russian civil court to set aside the arbitral awards of 19 September 2006 can be recognized in the Netherlands.”³⁸

The Court of Appeal was obviously considering the recognition of a foreign court judgment as developed in the Netherlands case law.³⁹ In doing so, the Court of Appeal created a “a mirror recognition in the reverse”: a foreign arbitral award can be recognized if a foreign court judgment is not recognized. Here, the Court of Appeal turned the New York Convention upside down.

The Convention itself requires that a foreign arbitral award not be recognized if it is set aside by a foreign court judgment. It therefore does not concern a recognition under general law, as the Court of Appeal incorrectly assumes, but a recognition under treaty law. The Convention provides that an arbitral award that “has been set aside ... by a

³⁵ See, e.g., Art. 1059(1) DCCP.

³⁶ See also Oberlandesgericht, Rostock, October 28, 1999, XXV Y.B. COM. ARB. 717 (2000) (FR Germ. No. 51 sub. 5): “The arbitral award in this case was set aside by the Moscow City Court and by the Moscow Court of Appeal; hence, it is no longer *binding* and may no longer be recognized in [Germany]” (emphasis added).

³⁷ Court of Appeal of Amsterdam decision, *supra* note 3, s. 3.5.

³⁸ *Id.* s. 3.6.

³⁹ See L. STRIKWARDA, INLEIDING TOT HET NEDERLANDS INTERNATIONAAL PRIVAATRECHT [INTRODUCTION TO DUTCH INTERNATIONAL PRIVATE LAW] 267 (9th ed. 2002).

competent authority of the country in which ... that award was made” may not be recognized. The courts in the Contracting States are therefore required to follow the Convention under international law.

The sort of recognition advocated by the Court of Appeal is at odds with Article V(1)(e) of the Convention. The Convention does not provide, either explicitly or implicitly, for the need to recognize the foreign court judgment regarding setting aside according to the general law of the forum, or any other basis for recognizing foreign court judgments. Indeed, most treaties and related instruments specifically exclude the recognition (and enforcement) of court judgments pertaining to arbitration. For example, Article 1(d) of Council Regulation 44/2001 (EC) is not applicable to arbitration.

As explained above, Article V(1)(e) of the Convention requires that the enforcement court establish three elements based on the evidence presented by the respondent: whether the arbitral award (1) has been set aside, (2) by the competent authority (court), (3) in the country in which it was made. A recognition of the court judgment under local law or otherwise is not covered by those elements. The text of Article V(1)(e) does not include the words “unless the decision of the competent authority cannot be recognized in the country where recognition and enforcement of the award are sought” or “unless the decision of the competent authority would be contrary to the public policy of the country where recognition and enforcement of the award are sought,” as is provided for the arbitral award in Article V(2) of the Convention as a ground for refusal of recognition and enforcement.

Moreover, the question arises as to what regime would apply to the recognition of the foreign court judgment setting aside the arbitral award. The Court of Appeal believes that this is the law of the forum, since it refers to assessment under “general law [*commune recht*].”⁴⁰ Other countries may have a different regime or none whatsoever for the recognition of foreign court judgments. That may lead to an undesirable discrepancy: an arbitral award annulled in the country of origin would be refused enforcement in one country under Article V(1)(e) of the New York Convention, whereas the same award would be enforced in another country because in the latter country the local regime for the recognition of foreign court judgments leads to a non-recognition of the court judgment setting aside the arbitral award. Such a discrepancy is in conflict with the uniform treatment of arbitral awards envisioned by the drafters of the New York Convention. It is also contrary to the notion of the setting aside of an arbitral award, the most prominent international effect of which is that it has *erga omnes* effect.

The *erga omnes* effect of annulment is of great importance because the parties should know where they stand. If an arbitral award has been set aside, it cannot be enforced anywhere in the world.⁴¹ In that case, the parties must arbitrate anew or, if a provision such as Article 1067 DCCP is applicable, put the dispute before a court.

⁴⁰ Court of Appeal of Amsterdam decision, *supra* note 3, s. 3.6.

⁴¹ Except in France outside the New York Convention (see fourth possibility *infra*).

Uncertainty is created if an arbitral award that no longer exists is indeed recognized and enforced in some countries.⁴²

If there are any deficiencies in the court judgment on setting aside, there are generally remedies available in the country where the judgment was made for redressing those deficiencies. It was also for that reason that Article VI was included in the New York Convention: pending the setting aside proceedings in the country of origin (including an appeal of a judgment to set aside), the enforcement court can suspend the application for enforcement under the New York Convention until a final and binding decision has been reached on the setting aside. It is not up to the foreign enforcement court under the Convention to assume the role of (appellate) court in the country of origin, or to rule on the setting aside as court of last resort.

Furthermore, it is not the responsibility of courts in Contracting States to determine which other Contracting States have a deficient judiciary. This would, moreover, result in the creation of a “blacklist” of countries where, according to courts in other countries, the judiciary is purportedly not in a good shape. The New York Convention is not intended for such a determination. Many other bodies exist where alleged abuses by a country’s judiciary can be addressed. The Regional Court of Appeal in Dresden justifiably considered in a case that: “We cannot agree with the claimant that all Belarusian court decisions are illegitimate because [Belarus’s] President is a dictator. Court decisions rendered in dictatorships may be correct.”⁴³

One of the few conceivable exceptions to the application of Article V(1)(e) of the Convention concerns matters such as fraud, based on the general legal principle of *fraus omnia vitiat*. In the United States, this is referred to as a “public policy gloss on Article V(1)(e).” The U.S. Court of Appeals for the District of Columbia advises great caution in that respect:

The decision in *Baker Marine* notes that the “[r]ecognition of the [foreign court’s] judgment in [that] case d[id] not conflict with United States public policy,” 191 F.3d at 197 n. 3, thus at least implicitly endorsing a “public policy” gloss on Article V(1)(e). However, the decision does not say that a court in the United States has unfettered discretion to impose its own considerations of public policy in reviewing the judgment of a court in a primary State vacating an arbitration award based upon the foreign court’s construction of the law of the primary State. Rather, as appellees argue, *Baker Marine* is consistent with the view that, “[w]hen a competent foreign court has nullified a foreign arbitration award, United States courts should not go behind that decision absent extraordinary circumstances not present in this case.”⁴⁴

The “extraordinary circumstances” must be irrefutably established in the relevant case (“present in this case”). One cannot discern the determination of those circumstances in the decision by the Court of Appeal of Amsterdam.

⁴² See also *supra*.

⁴³ Oberlandesgericht, Dresden, January 31, 2007, XXXIII Y.B. COM. ARB. 510 (2008) (FR Germ. No. 110 sub. 5).

⁴⁴ *TermoRio S.A. E.S.P. et al. v. Electranta S.P. et al.*, U.S. Court of Appeals for the District of Columbia, May 25, 2007, XXXIII Y.B. COM. ARB. 955 (No. 06-7-58, 2008) (U.S. No. 621 sub. 14) (emphasis added).

To my knowledge, the question of recognition of the foreign court judgment setting aside an arbitral award has rarely been dealt with previously in cases under the New York Convention. It first occurred in the now infamous case *Chromalloy v. Egypt*⁴⁵ which was decided by the U.S. District Court for the District of Columbia. The case concerned an arbitral award that was made in Cairo in an arbitration between Chromalloy and the State of Egypt that was set aside by the Egyptian court. The U.S. District Court for the District of Columbia, however, declared the arbitral award enforceable on rather unconvincing grounds.⁴⁶ In this case, the respondent (the State of Egypt) had also requested separately that the judgment by the Egyptian court be recognized as a final judgment. The District Court refused that request, invoking the “US public policy in favor of final and binding arbitration of commercial disputes.” That is not public policy that is applied within the framework of recognition of foreign court judgments.

In subsequent court decisions in the United States, the U.S. courts distanced themselves from *Chromalloy*. In particular, the U.S. Court of Appeals for the District of Columbia refused to follow its District Court in the aforementioned *TermoRio* case.⁴⁷ So did the U.S. Court of Appeals for the Second Circuit in *Baker Marine*⁴⁸ and the District Court for the Southern District of New York in *Spier*.⁴⁹

Thus, it must be concluded that by adding the condition of a recognition of the court judgment setting aside the award in the country of origin to Article V(1)(e) of the Convention, the Court of Appeal has applied the Convention incorrectly.

III. THE FOURTH POSSIBILITY: APPLICATION OF DOMESTIC LAW OUTSIDE THE NEW YORK CONVENTION (ARTICLE VII(1))

The three possibilities described in the previous Part relate to a possible interpretation of the New York Convention itself. However, there is also a possibility outside the Convention. In my opinion, this is an important distinction because the discussion concerning the enforcement of an arbitral award set aside in the country of origin is frequently clouded by mixing up the possibilities within and outside the Convention.

Article VII(1) of the New York Convention provides:

The provisions of the present Convention shall not ... deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or treaties of the country where such award is sought to be relied upon.

This provision is also known as the “more-favorable-right provision.” It is based on the consideration that, if another treaty or the national law has a more favorable regime for the enforcement of foreign arbitral awards, a party is free to invoke that regime.

⁴⁵ *Chromalloy Gas Turbine Corp. v. Arab Republic of Egypt*, U.S. District Court for the District of Columbia, XXII Y.B. COM. ARB. 1001 (1997) (U.S. No. 230).

⁴⁶ *Van den Berg*, *supra* note 33, at 18–19.

⁴⁷ *See supra* notes 14 and 44.

⁴⁸ *See supra* note 13.

⁴⁹ *See supra* note 15.

An example is Article 1076 DCCP, which cites this possibility in so many words: “if an applicable treaty permits recourse to the law of the country where the recognition or enforcement is sought.” Parliamentary history makes it clear that the regime of Article 1076 DCCP was included in the Dutch arbitration law precisely because of Article VII(1) of the New York Convention.⁵⁰

Article 1076 DCCP is unhelpful in the *Yukos Capital* case because it also contains as a ground for refusal of enforcement the fact that “the arbitral award has been set aside by the competent authority of the country in which that award was made” (Article 1076(1)(A)(e) DCCP).⁵¹

It is to be noted here that if an applicant opts for the national regime regarding enforcement of foreign arbitral awards on the basis of the more-favorable-right provision of Article VII(1) of the Convention, it is generally assumed that this regime applies in its entirety. A combination of both (“cherry picking”) is not allowed due to the interrelationship of the provisions of the Convention.⁵² The Netherlands legal system follows this principle by making a clear distinction between enforcement of foreign arbitral awards according to a Convention (Article 1075 DCCP) and according to the national (Dutch) regime on the enforcement of foreign arbitral awards (Article 1076 DCCP).⁵³

In France, the domestic law on the enforcement of arbitral awards made in an international arbitration outside France is more liberal than the New York Convention. This also explains why there is relatively little French case law concerning the interpretation and application of the New York Convention. The parties seeking enforcement in France, and with them the courts, invoke *en masse* Article VII(1) of the Convention, in order subsequently to apply the French national regime concerning the enforcement of awards made outside France.

One striking aspect of the French domestic law on the enforcement of foreign awards is that annulment of the arbitral award by the court in the country of origin does not constitute a ground to refuse enforcement. France is one of the few countries that offers such an option based on domestic law concerning the enforcement of foreign awards.

As discussed in my article *Enforcement of Annulled Awards?*, the French theory leads to inconsistent and bizarre results, as shown by the famous *Hilmarton* case, in which setting aside judgments by the Swiss Federal Tribunal were ignored by the French courts.⁵⁴

⁵⁰ Netherlands Lower House of Parliament, 1983–84 session, 18, 464, no. 3, at 35.

⁵¹ *Id.* at 36: “Ground e was included as a final ground for refusal in article 1076, based on the example of Article V of the New York Convention, which contains an analogous provision.”

⁵² VAN DEN BERG, *supra* note 5, at 85–86.

⁵³ Some commentators argue that a combination is possible. See, e.g., D. DI PIETRO & M. PLATTE, ENFORCEMENT OF INTERNATIONAL ARBITRATION AWARDS 171–73 (2001). This leads to confusing situations, as demonstrated by the *Chromalloy* case (*see supra*). However, the vast majority of court judgments are based on a separate treatment.

⁵⁴ Van den Berg, *supra* note 33, at 16–17. See, inter alia, *Hilmarton v. Omnium de Traitement et de Valorisation (OTV)*, Cour de cassation, March 23, 1994, XX Y.B. COM. ARB. 663 (1995) and Cour de Cassation, June 10, 1997, reported in XXII Y.B. COM. ARB. 696 (1997) (France No. 27), which includes an overview with references to the various judgments made in these proceedings by Swiss and French courts.

A recent and illustrative example is *Putrabali*.⁵⁵ This case concerned a sale of pepper by Putrabali to Rena Holding. The contract provided for dispute resolution in London according to the arbitration regulations of the International General Produce Association (IGPA). Following a dispute, an arbitral award was made on April 10, 2001. On an application by Putrabali, the arbitral award was partly set aside by the High Court in London. The IGPA arbitration tribunal subsequently made an improved arbitral award on August 21, 2003. In the meantime, Rena Holding sought enforcement of the first award dated April 10, 2001 in France. In spite of the fact that this award had been set aside in England, the French court granted leave for enforcement. The Cour de cassation gave reasons for the decision as follows:

Mais attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées; qu'en application de l'article VII de la Convention de New-York du 10 janvier 1958, la société Rena Holding était recevable à présenter en France la sentence rendue à Londres le 10 avril 2001 conformément à la convention d'arbitrage et au règlement de l'IGPA, et fondée à se prévaloir des dispositions du droit français de l'arbitrage international, qui ne prévoit pas l'annulation de la sentence dans son pays d'origine comme cause de refus de reconnaissance et d'exécution de la sentence rendue à l'étranger. Que dès lors, c'est sans encourir les griefs du pourvoi que la cour d'appel a décidé, à bon droit, que la sentence du 10 avril 2001 devait recevoir l'exequatur en France.⁵⁶

This is a purely French point of view that is shared by hardly any other country. The argument that the arbitral award is not related to any national legal system is contradicted by the English Arbitration Act 1996, which provides that an arbitration, including an arbitral award, is governed by the Arbitration Act in England (and Wales and Northern Ireland).⁵⁷

The French point of view becomes even more eccentric by qualifying the English arbitral award as “une décision de justice internationale.” The Cour de cassation does not specify the origin of the “justice internationale,” but it states that the “justice internationale” is controlled in the country where enforcement is sought. This means in concrete terms: by the French court based on French (international) arbitration law.

The Cour de cassation refers to the more-favorable-right provision of Article VII(1) of the New York Convention, and declares the application to be admissible. In other

⁵⁵ *Société PT Putrabali Adyamulia v. SA Rena Holdings*, Cour de cassation, June 29, 2007, XXXII Y.B. COM. ARB. 299 (2007) (France No. 42), original texts available at <www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_10607.html>.

⁵⁶ Informal translation: “An international arbitral award, which is not anchored in any national legal order, is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought. Under art.VII of the [1958 New York Convention], Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules and could invoke the French rules on international arbitration, which do not provide that the annulment of an award in the country of origin is a ground for refusing recognition and enforcement of an award rendered in a foreign country. Hence, the Court of Appeal properly decided that the award of 10 April 2001 must be granted leave for enforcement in France.”

⁵⁷ UK Arbitration Act 1996, s. 2(1) (“The provisions of this Part apply where the seat of the arbitration is in England and Wales or Northern Ireland”).

words, the entire French *demarche* regarding the partially annulled English arbitral award takes place outside of the New York Convention, and is based on French law.

The Cour de cassation then reasons that French international arbitration law does not contain the ground for refusal to enforce an arbitral award that has been annulled in its country of origin. In this way, the partially annulled arbitral award of April 10, 2001 is declared enforceable by the French court in France.

Putrabali, in turn, had sought leave for enforcement of the improved English arbitral award of August 21, 2003. This was refused by the French court, based on the fact that leave for enforcement had already been granted of the arbitral award of April 10, 2001 (that had been partially annulled in England).⁵⁸

The consequence is that the partially annulled arbitral award of April 10, 2001 cannot be enforced in any Contracting State with the exception of France (due to Article V(1)(e) of the New York Convention), while the improved arbitral award dated August 21, 2003 can be enforced in all Contracting States with the exception of France. This incongruent result is highly undesirable and certainly does not deserve to be imitated outside of France.⁵⁹

In conclusion, Article VII(1) of the Convention as applied in France would be of no avail in the *Yukos Capital* case. Article 1076 DCCP, which contains a regime regarding the enforcement of foreign awards outside the Convention, provides in the first paragraph under (ae) as ground for refusal of enforcement that an arbitral award has been set aside in the country of origin.

IV. THE FIFTH POSSIBILITY: AMENDMENT OF THE NEW YORK CONVENTION

It becomes clear from the above that the current version of the New York Convention offers no possibility to recognize and enforce an arbitral award that has been set aside in the country of origin. This requires a legal solution based on a treaty. Such a basis is offered by the European Convention on International Commercial Arbitration of 1961, which, however, does not apply in the *Yukos Capital* case, since the Netherlands is not a Contracting State to this Convention. The relevant Article IX of the European Convention was explained above in this case comment.

On the occasion of the celebration of the fiftieth anniversary of the New York Convention held on June 10, 2008 in Dublin, I proposed that a number of the provisions in the Convention be amended.⁶⁰ The proposed text contained in Article V of the “Hypothetical

⁵⁸ Société PT Putrabali Adyamulia v. SA Rena Holdings, Cour de cassation, June 29, 2007, available at <www.courdecassation.fr/jurisprudence_2/premiere_chambre_civile_568/arret_no_10608.html>.

⁵⁹ Within France there is the same degree of inconsistency. The notion of “la sentence internationale, qui n’est rattachée à aucun ordre juridique étatique” applies to arbitral awards made outside of France. A “sentence internationale” made in France is connected to the French “ordre juridique étatique”: arts. 1492–1507 of the Code de procédure civile concerning international arbitration in France apply to a “sentence internationale” made in France. This also includes the annulment (“*annulation*”) of the judgment (art. 1504).

⁶⁰ Text and commentary are available at <www.newyorkconvention.org>.

Draft Convention on the International Enforcement of Arbitration Agreements and Awards” reads as follows:

3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that: ...
- (g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph;

In the Explanatory Note, I explained this proposal as follows:

Ground (g) Award Set Aside in Country of Origin

88. The action to set aside (annul, vacate) an arbitral award is contemplated by virtually all arbitration laws. The competence to consider and decide on the setting aside of an arbitral award belongs exclusively to the courts of the country where the award was made (the country of origin, which is equivalent to the place of arbitration). Setting aside is to be distinguished from enforcement which can be considered and decided by courts of any country insofar as it concerns the courts’ (territorial) jurisdiction.

89. Ground (g) adopts the solution offered by Article IX(2) of the European Convention on International Commercial Arbitration of 1961. Accordingly, the refusal of enforcement is limited to cases where the award has been set aside on grounds equivalent to grounds (a) to (e) of Article 5(3) of the Draft Convention. Grounds (a) to (e) of Article 5(3) correspond in turn to generally recognized grounds for setting aside an arbitral award resulting from international arbitration (see Article 34(2)(a) of the UNCITRAL Model Law).

90. The term “equivalent” is chosen since the wording of the grounds for setting aside may differ under domestic law. The expression refers to grounds that may be semantically different but are comparable in content and scope.

91. The solution proposed in ground (g) of article 5(3) of the Draft Convention means, in particular, that a setting aside on (domestic) public policy or parochial grounds in the country of origin is not a ground for refusal of enforcement under the Draft Convention.

92. Ground (g) offers a solution between two extreme positions. On the one hand, Article V(1)(e) of the New York Convention provides as a ground for refusal of enforcement an award that has been set aside on any ground in the country of origin. On the other, according to French courts, the setting aside of the award in the country of origin is no ground for refusal of enforcement at all in France. The French courts take that position outside an application of the New York Convention.

93. Ground (g) concerns the situation that the award has been set aside in the country of origin. If an action for setting aside the award is pending in the country of origin, the provisions of Article 6 apply.

94. Ground (g) does not include the expression “under the law of which” the award was made as it is the case for Article V(1)(e) of the New York Convention. Having regard to the observations made ... above, the reference to the country where the award was made suffices. In practice, parties almost never agree to the applicability of arbitration law other than the law of the place of arbitration.

The explanation quoted above provides a summary of what, in my opinion, applies *de lege lata*. Whether the proposed amendment of the text of the Convention possibly applies *de lege ferenda* remains an open question.

The provisions of Article IX(2) of the 1961 European Convention show that even at the end of the 1950s, drafters of treaties on arbitration were aware of the fact that the setting aside referred to in Article V(1)(e) of the New York Convention by the court in the country of origin could relate to all possible grounds. It was the 1961 European Convention that restricted that possibility.

Thus, the current state of affairs, in my opinion, is that the enforcement of an arbitral award that has been set aside in the country of origin is possible only if a treaty offers a legal basis for it. This is provided by Article IX(2) of the 1961 European Convention for clearly defined grounds. Without such a solution provided in a treaty, it is, in my view, legally not possible, on the basis of the New York Convention, to recognize and enforce an award abroad that has been set aside in the country of origin.