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ENFORCING SET ASIDE ARBITRAL AWARDS: FRANCE'S CONTROVERSIAL STEPS BEYOND THE NEW YORK CONVENTION

HAMID G. GHARAVI*

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[C]ould you and I with Fate conspire
To grasp this sorry Scheme of Things entire
Would not we shatter it to bits—and then
Remould it nearer to the Heart's Desire![1]

I. INTRODUCTION

With the advances in technology, world trade has expanded, and, as a result, the potential for more international business disputes has risen significantly.[2] Many businesses are now using international commercial arbitration, as opposed to a national court system, to resolve their international contractual disputes.[3] Arbitration is preferred because it offers the following benefits: confidentiality; freedom to choose the arbitrators, the place of arbitration, and the rules governing the arbitration; and a flexible procedure which is usually more conducive to settlement and less adversarial than litigation.[4] Arbitration is completely private, arbitrators' decisions are not subject to a

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1. OMAR KHAYYAM, RUBAIYAT verse 108 (George F. Maine ed. & Edward Fitzgerald trans., Collins 1969) (1947). Omar Khayyam is the eleventh-century Persian poet and philosopher.

2. *See* AMERICAN ARBITRATION ASSOCIATION, THE INTERNATIONAL ARBITRATION KIT at v (4th ed. 1993) [hereinafter ARBITRATION KIT].

3. *See id.*

4. *See id.*; *see also* ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 1 (1981).

substantive review, and arbitrators are accountable solely to parties to a dispute.[5]

For arbitration to work in an international setting, a legal framework was needed. The 1923 Geneva Protocol on Arbitration Clauses[6] and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards[7] were early attempts to establish this legal framework.[8] Due to the deficiencies of these attempts, the International Chamber of Commerce ("ICC") proposed that the United Nations draft an improved international convention.[9] The United Nations' involvement produced the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("Convention"/"New York Convention").[10] Signed by over one hundred countries,[11] including the United States,[12] it has become "the most important Convention in the field of arbitration and . . . the cornerstone of current international commercial arbitration."[13] The Convention addressed two important aspects of the enforcement of foreign arbitration, requiring, first, the enforcement of foreign arbitral awards and, second, the enforcement of agreements to arbitrate disputes.[14]

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5. *See* Thomas E. Carbonneau & Andrew W. Sheldrick, *Tax Liability and Inarbitrability in International Commercial Arbitration*, 1 J. TRANSNAT'L L. & POL'Y 23, 27 (1992).

6. Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158.

7. Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302 [hereinafter Geneva Convention].

8. *See* HOUSTON PUTNAM LOWRY, CRITICAL DOCUMENTS SOURCEBOOK ANNOTATED, INTERNATIONAL COMMERCIAL LAW AND ARBITRATION 237 (1991).

9. *See id.*

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

11. As of June 25, 1996, there were 109 contracting states (and 26 extensions) to the Convention. *See* XXI Y.B. COM. ARB. 387 (1996). For the list of the contracting states, see *id.* at 389-93.

12. The United States Congress implemented the Convention on July 31, 1970. *See* Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. No. 91-368, § 4, 84 Stat. 692 (1970). As the Supreme Court put it:

> The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1973).

The Convention is reprinted at 9 U.S.C.A. § 201 (West Supp. 1996). For a discussion of the application of the New York Convention to United States law, see Charles H. Brower, II, *What I Tell You Three Times Is True: U.S. Courts and Pre-Award Interim Measures Under the New York Convention*, 35 VA. J. INT'L L. 971 (1995); Robert B. von Mehren, *The Enforcement of Arbitral Awards Under Conventions and United States Law*, 9 YALE J. WORLD PUB. ORD. 343 (1983); Peter D. Trooboff & Corinne A. Goldstein, *Foreign Arbitral Awards and the 1958 New York Convention: Experience to Date in U.S. Courts*, 17 VA. J. INT'L L. 469 (1977).

13. VAN DEN BERG, *supra* note 4, at 1.

14. New York Convention, *supra* note 10, arts. II(1), III, 21 U.S.T. at 2519, 330 U.N.T.S. at 38, 40.

Under Article III of the Convention, the contracting states must "recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon . . . ."[15] Article V of the Convention sets forth the grounds under which a national court may refuse recognition and enforcement of an award.[16] One of the most controversial grounds is contained in Article V(1)(e), which provides that recognition and enforcement of an award may be refused if "[t]he award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."[17] The drafters of the Convention succeeded in eliminating the need for judicial proceedings to confirm the award in both the rendering and enforcing countries.[18] However, they did not want another

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15. *Id.* art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40.

16. Thus Article V(1) provides that recognition or enforcement of an award may be refused if, for example:

> (a) The parties to the [arbitration] agreement . . . were, under the law applicable to them, under some incapacity, or [if] the said agreement is not valid under the law to which the parties have subjected it or . . . under the law of the country where the award was made; or
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> (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
>
> (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration . . .; or
>
> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place . . . .

Id. art. V(1)(a)-(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42.

Further, under Article V(2), recognition or enforcement of an award may be refused if: (i) the subject matter of the dispute "is not capable of settlement by arbitration" under the law of the country where recognition or enforcement is sought or (ii) "[t]he recognition or enforcement of the award would be contrary to the public policy of that country." *Id.* art. V(2), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. It is noteworthy that French law has broaden the public policy exception of Article V(2) to include "international public policy." *See* NOUVEAU CODE DE PROCÉDURE CIVILE [NOUVEAU C. PR. CIV.] art. 1502(5); *see also* Carbonneau & Sheldrick, *supra* note 5, at 27-28.

17. New York Convention, *supra* note 10, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42. For an analysis of Article V(1)(e), see Michael H. Strub, Jr., *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031, 1048-53, 1058-61 (1990).

18. Such was the case under the Geneva Convention, the predecessor to the New York Convention. Geneva Convention, *supra* note 7, 92 L.N.T.S. at 302. Under the Geneva Convention, a party seeking to enforce an arbitral award had the burden of proving among other things that "the award has become *final*" in the country where the award has been made. *Id.* arts. 1, 4(2), 92 L.N.T.S. at 305, 306 (emphasis added). Consequently, a "double" *exequatur* (authorization to execute an award) was required. Thus the party seeking enforcement had to obtain a leave for enforcement from the rendering country before seeking another order of exequatur from the enforcing country. *See id.* art. 4, 92 L.N.T.S. at 306. The Convention succeeded in eliminating the "double exequatur" requirement by replacing the term "final" by the

country to enforce an award after it had been set aside by a competent authority in the rendering country.

For more than a decade, French courts have gone beyond the terms of the Convention by holding that the setting aside of a foreign arbitral award in the rendering country is not a ground for refusing enforcement of the award in France. This practice was recently confirmed by the Court of Cassation (*Cour de cassation*), France's highest court of ordinary jurisdiction, in *Société Hilmarton v. Société O.T.V.*[19] This article will review the legal grounds for the French practice, address the legitimate practical concerns motivating this practice, consider its negative consequences, and finally discuss an intermediary solution between the excessive conservatism of Article V(1)(e) of the Convention and the excessive liberalism of the French jurisprudence.

II. LEGAL GROUNDS IN SUPPORT OF THE FRENCH PRACTICE

France ratified the Convention[20] but still opted for a more liberal approach. Indeed, current French law on international commercial arbitration is very liberal, particularly concerning recognition and enforcement of awards. The French Decree of May 12, 1981, incorporated into the French New Code of Civil Procedure (*nouveau Code de procédure civile*) permits easy enforcement of foreign arbitral awards, an approach which has been criticized for its excessive liberalism.[21] The fact that an award has been set aside or suspended in the country in which, or under the law of which, it was made is not an obstacle to the enforcement of the award in France. Indeed, Article 1502 of the New Code of Civil Procedure does not contain the grounds for refusal mentioned in Article V(1)(e) of the Convention. Rather, Article 1502 provides that an appeal against a decision granting recognition or enforcement of an arbitrary award may be brought only in the following five cases:

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term "binding." New York Convention, *supra* note 10, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42; *see also* VAN DEN BERG, *supra* note 4, at 47.

19. Judgment of Mar. 23, 1994, Cass. civ. 1re, 1994 REVUE DE L'ARBITRAGE [REV. ARB.] 327, *translated in* XX Y.B. COM. ARB. 663 (1995). For a discussion of the *Hilmarton* case, see *infra* Part III.

20. France signed the Convention on November 25, 1958, and ratified it on June 26, 1959. *See* ARBITRATION KIT, *supra* note 2, at 19.

21. Décret No. 81-500 du 12 mai 12 1981, liv. IV, tit. IV, ch. II, 1981 D.S.L. 240 (codified as NOUVEAU C. PR. CIV. arts. 1501-07). For criticisms of the French approach to enforcement of foreign arbitral awards, see *Jacques Béguin, Le droit français de l'arbitrage international et la Convention de New York du 10 juin 1958, in* ACTES DU 1ER COLLOQUE SUR L'ARBITRAGE 217 (1986); Pierre Bellet & Ernst Mezger, *L' arbitrage international dans le nouveau Code de procédure civile*, 70 REVUE CRITIQUE DU DROIT INTERNATIONAL PRIVÉ 611 (1981); Philippe Fouchard, *L'arbitrage international en France aprés le décret du 12 mai 1981*, 109 JOURNAL DU DROIT INTERNATIONAL 374 (1982).

(i) if the arbitrator decided in the absence of an arbitration agreement, or on the basis of a void or expired agreement;[22]

(ii) if the arbitral tribunal was irregularly composed, or the sole arbitrator was irregularly appointed;[23]

(iii) if the arbitrator decided in a manner incompatible with the mission conferred upon him;[24]

(iv) if due process (literally, the principle of an adversarial process) was not respected;[25]

(v) if recognition or enforcement would be contrary to *international* public policy.[26]

By combining the New Code of Civil Procedure with Article VII(1) of the Convention, French courts can legally refuse to apply Article V(1)(e) of the Convention and enforce an award set aside or suspended in the country in which, or under the law of which, it was made. Article VII(1), known as the "more-favorable-right" provision, is an exception to the strict supremacy of international treaties over national laws.[27] Article VII(1) provides that the Convention does 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 the treaties of the country where such award is sought to be relied upon."[28]

The Court of Cassation in *Société Pabalk Ticaret Ltd. Sirketi v. Société Anonyme Norsolor*[29] has increased French liberalism in enforcing foreign arbitral awards. The court held that French judges have the duty, and not just the right, to apply the more-favorable-right provision of Article VII(1) in enforcing a foreign arbitral award, even where enforcement would be otherwise refused under Article V(1)(e) of the Convention.[30] In *Norsolor*, Société Pabalk Ticaret Ltd. Sirketi ("Pabalk"), a Turkish company, and Société Anonyme Norsolor ("Norsolor") entered into an agreement under which Pabalk was to receive commissions for the

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22. NOUVEAU C. PR. CIV. art. 1502(1).

23. *Id.* art. 1502(2).

24. *Id.* art. 1502(3).

25. *Id.* art. 1502(4).

26. *Id.* art. 1502(5) (emphasis added); *cf.* New York Convention, *supra* note 10, art. V(2), 21 U.S.T. at 2520, 330 U.N.T.S. at 42 (stating that recognition or enforcement of an award may be refused if recognition and enforcement are contrary to public policy, not necessarily international public policy).

27. *See* VAN DEN BERG, *supra* note 4, at 81.

28. New York Convention, *supra* note 10, art. VII(1), 21 U.S.T. at 2520-21, 330 U.N.T.S. at 42.

29. Judgment of Oct. 9, 1984, Cass. civ. 1re, 1985 REV. ARB. 431, *translated in* XI Y.B. COM. ARB. 484, 489-91 (1986).

30. *Id.* at 432-33.

delivery of certain products to a third party.[31] Norsolor terminated the agreement, and, claiming the unpaid commissions and damages, Pabalk resorted to the ICC Court of Arbitration.[32] The court designated Vienna, Austria, as a place of arbitration and rendered an award in favor of the Turkish company.[33] In reaching its decision, the court left aside any reference to French or Turkish law and, in light of the international nature of the agreement, applied principles of international *lex mercatoria* (law merchant).[34]

While Pabalk was seeking enforcement of the award in France, on January 29, 1982, the major parts of the award were set aside by the Court of Appeal in Vienna on the ground that the arbitrators had applied *lex mercatoria* instead of the national law.[35] Accordingly, the Court of Appeal of Paris (*Cour d'appel de Paris*) denied Pabalk's request for enforcement of the award.[36] However, the Court of Cassation reversed the decision of the Court of Appeal and held that the award was enforceable against Norsolor.[37] It did so on the ground that nothing in French law authorizes refusal of recognition and enforcement of a foreign award that has been set aside.[38] The Court of Cassation stated:

> Whereas, according to . . . [Article VII of the New York Convention], the Convention does not deprive any interested party of any right that she may have to avail herself of an arbitral award in the manner and to the extent allowed by the legislation or the treaties of the country where such award is sought; as a result, the judge cannot refuse enforcement when his own national legal system permits it, and, by virtue of . . . [Article 12 of the New Code of Civil Procedure], he should, even *ex officio*, research the matter if such is the case.[39]

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31. *See* Case 3131/1979 (Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor), Collection of ICC Arbitral Awards: 1974-1985, at 122 (ICC Ct. Arb. Oct. 26, 1979).

32. *See id.*

33. *See id.* at 122, 124.

34. *See id.* at 123-124. The classical description of *lex mercatoria* was given by James Kent:

> [*Lex mercatoria* is a system of law that does] not rest essentially for its character and authority on the positive institutions and local customs of any particular country, but . . . [consists] of certain principles of equity and usages of trade, which general convenience and a common sense of justice . . . [have] established, to regulate the dealings of merchants and mariners in all the commercial countries of the civilized world.

JAMES KENT, 3 COMMENTARIES ON AMERICAN LAW 2-3 (12th ed. Boston, Little Brown & Co. 1873).

35. *See* Judgment of Oct. 9, 1984, 1985 REV. ARB. at 433.

36. Judgment of Nov. 19, 1982 (Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor), Cour d'appel de Paris, 1983 REV. ARB. 472, *translated in* XI Y.B. COM. ARB. 487 (1986).

37. Judgment of October 9, 1984, 1985 REV. ARB. at 433.

38. *See id.* at 432-33.

39. *Id.* at 432.

The holding of the Court of Cassation in the *Norsolor* case was thereafter confirmed in other decisions.[40] In addition to the above legal grounds, the French jurisprudence concerning recognition and enforcement of foreign arbitral awards also claims justification on practical grounds.

III. PRACTICAL CONSIDERATIONS BEHIND THE FRENCH PRACTICE

There is no doubt that the Convention represented a liberal approach at the time of its drafting and could not have gone farther in this respect without raising opposition. However, legal scholars now maintain that a greater degree of liberalism should be encouraged.[41] They also agree that an award set aside or suspended in the country in which, or under the law of which, it was made should not be an obstacle to the enforcement of the award in a third country.[42] These scholars believe that the choice of the seat of the arbitral tribunal or the law under which the award is made is either left to chance or determined as a concession by one of the parties.[43] As an example, should an arbitral award rendered in Saudi Arabia and containing the word "interest," which may lead to its setting aside by application of local rules in Saudi Arabia, be an obstacle to the enforcement of the award in another country? An affirmative response would encourage the practice of "forum shopping" and cause the parties to choose the seat of the tribunal in a country where the setting aside of the award is easily obtainable.[44] Some commentators have suggested that the international arbitral system should delocalize awards and preclude the courts of the rendering country from making an internationally effective declaration of the award's nullity.[45] Such an objective has not been completely achieved by the Convention. Although the Convention has succeeded in reducing the influence of the place of arbitration,[46] it has not delocalized

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40. *See* Judgment of Mar. 23, 1994 (Société Hilmarton v. Société OTV), Cass. civ. 1re, 1994 REV. ARB. 327, *translated in* XX Y.B. COM. ARB. 663 (1995); Judgment of Mar. 10, 1993 (Société Polish Ocean Lines v. Société Jolasry), Cass. civ. 1re, 1993 REV. ARB. 255, 258, *translated in* XIX Y.B. COM. ARB. 662 (1994).

41. *See, e.g.*, Judgment of Mar. 23, 1994, 1994 REV. ARB. at 331 note Charles Jarrosson.

42. *See id.*

43. *See id.*

44. *See id.* at 333 note Charles Jarrosson.

45. *See, e.g.*, Jan Paulsson, *Delocalization of International Commercial Arbitration: Why and When It Matters*, 32 INT'L & COMP. L.Q. 53, 54-61 (1983).

46. The Convention leaves parties greater freedom to arrange their arbitration proceedings. Under the Geneva Convention, these proceedings had to be in conformity with both the agreement of the parties and the law of the place of arbitration. Geneva Convention, *supra* note 7, art. 1, 92 L.N.T.S. at 305. However, under the New York Convention, the law of the country where the arbitration takes place applies only when the parties fail to refer to existing

awards. On the contrary, the setting aside of the award has been accorded extraterritorial effect insofar as Article V(1)(e) precludes enforcement of an award in other contracting states.[47] Thus particularities of the domestic law of the rendering country might lead to the annulment of an award and bar recognition and enforcement of the award in another jurisdiction.

It must be noted, however, that the excessive conservatism of Article V(1)(e) of the Convention can be partially remedied by the actors of the international business community themselves. To prevent self-induced damages, the seat of the tribunal should be selected after careful study and not left to chance. Furthermore, there is no need to come to the rescue of a party who has conceded to the seat of the tribunal or the governing law in anticipation of reciprocal concessions or benefits. At best, the French indifference towards the fate of the award in the rendering country could be justifiable if the seat of the arbitration tribunal were chosen not by the parties, but rather, by an institutional arbitration center or by the arbitrators. However, as demonstrated below, this indifference has caused such serious adverse consequences that a modification of the French *Norsolor* jurisprudence should be urged.

IV. NEGATIVE CONSEQUENCES OF THE FRENCH PRACTICE

The *Hilmarton* case demonstrates that although legal and practical grounds exist in support of the French practice, this practice should not serve as a model because of the negative consequences it may cause. The facts in this case are as follows. By a contract made on December 12, 1980, Hilmarton Ltd. ("Hilmarton"), an English consulting company, agreed to assist Omnimum de Traitement et de Valorisation ("OTV"), a French company, in obtaining a government contract for the sewerage system of the city of Algiers, Algeria.[48] The consultancy agreement between the parties provided that OTV was to pay to Hilmarton for its services a fee equal to four percent of the amount of the contract.[49] Any contractual dispute between the parties was to be settled by the ICC in Geneva, Switzerland, under the law of the Canton

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arbitration rules. New York Convention, *supra* note 10, art. V(1)(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 42.

47. Even though the Convention places ultimate authority in the enforcing state, Article V(1)(e) allows a party to attack an award on the grounds that it is not yet binding or has been set aside by an authority of the country in which, or under the law of which, the award was made. *See, e.g.*, Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 YALE L. J. 1049, 1066 (1961).

48. *See* Judgment of Nov. 17, 1989 (Société Hilmarton v. Société OTV), *Cour de Justice de Canton de Genève*, 1993 REV. ARB. 315, 316, *translated in* XIX Y.B. COM. ARB. 214 (1994).

49. *See id.* at 317.

of Geneva.[50] OTV obtained the contract in 1983 but paid only fifty percent of the agreed fee.[51] Seeking payment of the balance of the fee, Hilmarton initiated arbitral proceedings before the ICC in Geneva.[52] On August 19, 1988, the ICC rendered an award denying Hilmarton's claim.[53] On November 17, 1989, upon Hilmarton's request, the Canton of Geneva Court of Justice (*Cour de Justice du Canton de Genève*), an appellate court, annulled the award[54] pursuant to Article 36(f) of the Swiss Intercantonal Concordat on Arbitration.[55] The court recognized that the agreement between Hilmarton and OTV had been made in violation of the Algerian law which banned the use of intermediaries in obtaining government contracts.[56] Nonetheless, the court found in favor of Hilmarton because: (i) activities of an intermediary were permitted under the Swiss law, so long as no bribes were paid;[57] and (ii) Hilmarton had met its contractual obligations to OTV and, therefore, was entitled to receive the agreed fee in full.[58] The Swiss Federal Tribunal (*Tribunal fédéral suisse*), the highest court of Switzerland, affirmed the appellate court's decision.[59]

Notwithstanding the annulment of the ICC award by the Swiss appellate court, OTV sought enforcement of the award in France. On February 27, 1990, OTV's request for the enforcement of the award was granted by the Paris Tribunal of First Instance (*Tribunal de grande instance de Paris*), a lower court of ordinary jurisdiction.[60] The Paris Court of Appeal (*Cour d'appel de Paris*) upheld the enforcement on December

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50. *See id.*

51. *See id.* at 318. Justifying its refusal to pay the balance of the fee, OTV alleged that Hilmarton's work had been deficient and detrimental to the relationship between OTV and the Algerian client. *See id.*

52. *See id.*

53. *See id.*

54. *Id.* at 321.

55. *Id.* at 315 note. Article 36(f) of the Swiss Intercantonal Concordat on Arbitration allows an action for annulment of the arbitral award where it is alleged "that the award is arbitrary in that it was based on findings which were manifestly contrary to the facts appearing in the file, or in that it constitutes a clear violation of law or fairness." Swiss Intercantonal Concordat on Arbitration of August 27, 1969, art. 36(f), SR 279, *reprinted and translated in* SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE OF DECEMBER 18, 1987: THE SWISS CODE ON CONFLICT OF LAWS AND RELATED LEGISLATION 196, 212 (Pierre A. Karrer and Karl W. Arnold trans., 1989) [hereinafter SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE]; *see also* Philippe Neyroud & William W. Park, *Predestination and Swiss Arbitration Law: Geneva's Application of the Intercantonal Concordat*, 2 B.U. INT'L L.J. 1, 5 (1983).

56. Judgment of Nov. 17, 1989, 1993 REV. ARB. at 319.

57. *Id.* at 320-21.

58. *Id.* at 321.

59. Judgment of Apr. 17, 1990 (Société Hilmarton v. Société OTV), Trib. fédéral suisse, 1993 REV. ARB. 315, 322, *translated in* XIX Y.B. COM. ARB. 220 (1994).

60. *See* Judgment of Dec. 19, 1991 (Société Hilmarton v. Société OTV), Cour d'appel de Paris, 1re Ch. suppl., 1993 REV. ARB. 300, 301 note.

19, 1991.[61] Finally, on March 23, 1994, the Court of Cassation affirmed the court of appeal's decision, thereby confirming the *Norsolor* jurisprudence and the French trend in favor of delocalized awards.[62] Hilmarton argued that Article V(1)(e) of the Convention applied and that, therefore, enforcement of the annulled ICC award must be refused.[63] Rejecting Hilmarton's argument, the Court of Cassation reasoned that the award "was an international award which was not integrated in the legal system of . . . [Switzerland], so that its existence remained established despite its annulment, and its recognition in France was not contrary to international public policy."[64] The court explained that under the more-favorable-right provision of Article VII(1) of the Convention, OTV could rely upon the applicable French law, such as Article 1502 of the New Code of Civil Procedure.[65] However, unlike Article V of the Convention, Article 1502 does not view the annulment of the foreign award as a ground for refusal of recognition and enforcement of the award in France.[66] Accordingly, the ICC award against Hilmarton could be enforced in France despite the annulment by Swiss courts.[67]

In the meantime, relying on the Franco-Swiss Convention on Judicial Matters of June 15, 1869, Hilmarton sought enforcement of the Swiss Federal Tribunal's decision annulling the ICC award.[68] The Tribunal of First Instance of Nanterre (*Tribunal de grande instance de Nanterre*) recognized the annulment on September 22, 1993.[69] Referring to the judgment of the Canton of Geneva Court of Justice of November 17, 1989,[70] the tribunal found that the judgment was not contrary to the French public policy.[71] OTV appealed the tribunal's decision to the Court of Appeal of Versailles (*Cour d'appel de Versailles*).[72]

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61. *Id.* at 301-02.

62. Judgment of Mar. 23, 1994 (Société Hilmarton v. Société OTV), Cass. civ. 1re, 1994 REV. ARB. at 327-28, *translated in* XX Y.B. COM. ARB. 663, 664-65 (1995).

63. *See id.* at 328.

64. *Id.*

65. *See id.*

66. *See id.* For the list of grounds justifying refusal to recognize and enforce a foreign award under Article 1502 of the New Code of Civil Procedure, see *supra* text accompanying notes 22-26.

67. *See* Judgment of Mar. 23, 1994, 1994 REV. ARB. at 328.

68. *See id.* The Court of Cassation held that Hilmarton's reliance on the Franco-Swiss Convention on Judicial Matters was inapposite because this convention had ceased to be in force on January 1, 1992. *Id.*

69. Judgment of Sep. 22, 1993 (Société Hilmarton v. Société OTV), Trib. gr. inst. de Nanterre, 1re Ch., *discussed in French Court Upholds Annulment of Arbitrator's Ruling*, MEALEY'S INT'L ARB. REP., Jan. 1994, at 7 [hereinafter *Annulment*].

70. *See supra* notes 54-58 and accompanying text.

71. Judgment of Sep. 22, 1993, *discussed in Annulment*, *supra* note 69, at 7.

72. Judgment of June 29, 1995 (Société OTV v. Société Hilmarton), Cour d'appel de Versailles, 1995 REV. ARB. 639.

Following the annulment of the ICC award by the Swiss Federal Tribunal, the dispute was resubmitted to arbitration in Switzerland, and a new award was made on April 10, 1992, this time in favor of Hilmarton.[73] The new award was granted *exequatur* (authorization to execute) in France by the Tribunal of First Instance of Nanterre on May 25, 1993,[74] and OTV also appealed this decision to the Court of Appeal of Versailles. The Court of Appeal of Versailles heard both appeals jointly and, on June 29, 1995, confirmed the enforcement in France of the Swiss Federal Tribunal's decision of April 17, 1990,[75] as well as the *exequatur* of the April 10, 1992, award.[76] Thus the court permitted the coexistence in France of two contradicting decisions between the same parties on the same subject matter. Such a situation, the court stated, did not violate the French international public policy.[77] The court suggested that the parties have recourse to Article 618 of the New Code of Civil Procedure, which permits the Court of Cassation to set aside one of two contradicting decisions.[78]

The goal of the Convention was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which these agreements are observed and arbitral awards are enforced in the contracting states. The *Hilmarton* case, by causing the coexistence of two differing awards concerning the same issues and between the same parties, creates a dangerous situation that violates the intended uniformity of the Convention and damages the image of international commercial arbitration.

The outcome of an award should not depend on a worldwide race for enforcement. As van den Berg pointed out:

> 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.[79]

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73. *See* Judgment of Mar. 23, 1994 REV. ARB. at 329 note Charles Jarrosson.
74. *See id.*
75. Judgment of June 29, 1995, 1995 REV. ARB. at 641-42.
76. *Id.* at 646-47.
77. *Id.* at 640.
78. *Id.*
79. VAN DEN BERG, *supra* note 4, at 355.

Some legal scholars also argue that courts should refuse to enforce a set aside award on the theory that such an award no longer exists.[80] "[E]nforcing a non-existing award would be an impossibility or even go against the public policy of the country of enforcement";[81] hence a possible reason why the French approach is so isolated. In fact, only on two occasions have courts outside of France enforced an award set aside in a rendering country.[82] For example, in *Sonatrach v. Ford, Bacon & Davis*, a Brussels court enforced an ICC award rendered in Algiers, despite the fact that it had been set aside by an Algerian court.[83] Since the Algerian defendant was a powerful national gas company, legal commentators have suggested that the Belgian court suspected Algerian political influence prompted setting aside the award.[84]

There is a need to react against the grounds for refusal contained in Article V(1)(e) of the Convention. These grounds are outdated and may lead to a situation where the international arbitration process will be paralyzed by political interference and prevalence of local rules. However, a total indifference towards the history of the award is dangerous. An intermediary solution should be found between the excessive conservatism of Article V(1)(e) and the excessive liberalism reflected in the French jurisprudence.

V. POSSIBLE INTERMEDIARY SOLUTIONS

In order to encourage local arbitration, a number of countries have adopted arbitration statutes that purport to reduce supervisory powers of local courts over international awards. For example, the law of Belgium of March 27, 1985, suppressed the setting aside procedure in cases where the parties do not have a connection with Belgium, i.e., where none of the parties maintains a citizenship of or residence in Belgium.[85] Switzerland's Federal Statute on Private International Law

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80. *See, e.g.*, P. Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETHERLANDS INT'L L. REV. 43, 55 (1959).

81. *Id.*

82. Judgment of Dec. 6, 1988, Trib. pr. inst. de Bruxelles, *aff'd*, Judgment of Jan. 9, 1990, Cour d'appel de Bruxelles, 8e Ch. (Belg.), *cited in* William W. Park, *Illusion and Reality in International Forum Selection*, 30 TEX. INT'L L.J. 135, 202 n.274 (1995); *In re Arbitration of Certain Controversies Between Chromalloy and Arab Rep. of Egypt*, Civ. No. 94-2339 (D.D.C. July 31, 1996) (relying on Article VII(1) of the Convention to enforce an arbitral award which was set aside by the Court of Appeal of Cairo, Egypt), *discussed in U.S. Court Won't Recognize Egyptian Court Decision Voiding Arbitration Award*, MEALEY'S INT'L. ARB. REP., Aug. 1996, at C54.

83. Judgment of Dec. 6, 1988.

84. *Id.*

85. Loi relative à l'annulation des sentences arbitrales du 27 mars 1985, 1985 Pasinomie 518 (codified as CODE JUDICIARE BELGE art. 1717) (Belg.). For a discussion of this law, see *H. van Houtte, La loi belge du 27 Mars 1985, sur l'arbitrage international*, 1986 REV. ARB. 29, 31; Jan Paulsson, *Arbitration Unbound in Belgium*, 2 ARB. INT'L 68, 68 (1986). The Law of March 27, 1985, provides:

authorizes a party who has "neither its domicile nor its habitual residence in Switzerland" to exclude, by agreement, the possibility of setting aside an award by a Swiss court.[86] There is indeed a recent trend to limit "legal remedies for judicial review and to enable the parties to exclude any review at all."[87] National laws have been reformed to ensure finality, and courts have followed suit by upholding awards, except in most extreme cases.[88] However, reducing the supervisory power of national courts over international arbitral awards only dodges the problem and, given the recent evolution of international commercial arbitration, seems inadequate. Today, almost any dispute can be subject to arbitration, including disputes pertaining to European Community competition law, for example. Removing the supervisory power in the award-making process will lead at best to disharmonious application of the pertinent law and at worst to its evasion.[89]

A more rational solution has been offered by the drafters of the 1961 European Convention on International Commercial Arbitration ("European Convention").[90] Under Article IX(2) of the European Convention, in relations between states that are also signatories to the New York Convention, Article V(1)(e) of the New York Convention may be refused only if the award has been set aside in the country of origin on the grounds listed in Article IX(1) of the European Convention,[91] which replicate those of Article V(1)(a)-(d) of the New York Convention.[92] However, for the reasons proffered by van den Berg, the European Convention's approach is still somewhat unsatisfactory:

> [I]f the enforcement of the award is sought in the country of origin, enforcement would have to be refused in those cases where the award has been set aside in that country, whilst, if enforcement of the same award is sought in another Contracting State, enforcement

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> The courts of Belgium may be seized of a request for annulment only if at least one of the parties to the dispute decided by the arbitral award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgian [sic] or having a branch or any other establishment in Belgium.

Law of March 27, 1985 (unofficial translation in Paulsson, *supra*, at 69).

86. Federal Statute on Private International Law of Dec. 18, 1987, art. 176, SR 291.435.1, *reprinted and translated in* SWITZERLAND'S PRIVATE INTERNATIONAL LAW STATUTE, *supra* note 55, at 27, 154. For a comprehensive analysis of this law, see ANDREAS BUCHER & PIERRE-YVES TSCHANZ, INTERNATIONAL ARBITRATION IN SWITZERLAND (1988).

87. Frank-Bernd Weigand, *Evading EC Competition Law by Resorting to Arbitration?*, 9 ARB. INT'L 249, 254 (1993).

88. *See id.*

89. *See id.* at 252.

90. European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 364.

91. *Id.* art. IX(1)-(2), 484 U.N.T.S. at 374, 376; *see also* VAN DEN BERG, *supra* note 4, at 356.

92. New York Convention, *supra* note 10, art. V(a)-(d), 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42; *see also supra* note 16.

> would not have to be refused in those cases where the award has been set aside in the country of origin on the grounds not listed in the Convention. This is so because the limitation on grounds for refusal of enforcement in other Contracting States is not extended to a limitation on the grounds for setting aside in the country of origin itself. In the country of origin therefore enforcement is to be refused in *all* cases in which the award is set aside in that country.[93]

The European Convention does not provide that the award could be set aside in the country of origin only on the grounds enumerated in the New York Convention; had it done so, it would have caused a fundamental change in the arbitration legislation of the contracting states. Since arbitrators have been given the noble task of arbitrating mandatory rules, it would be unwise to eliminate supervisory control of local courts over the award-making process. Instead, harmonization of the grounds for setting aside awards should be encouraged either through an international convention or national statutes.

Meanwhile, French jurisprudence regarding recognition and enforcement of foreign arbitral awards should be modified in order to avoid results similar to those caused by the *Hilmarton* case. To this effect, French courts should have more recourse to Article VI of the Convention, which provides:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.[94]

Instead of blindly and automatically applying the more-favorable-right provision of Article VII(1)[95] of the Convention, French courts should adopt an approach *in concreto* and rely more heavily on Article VI. It is particularly advisable that Article VI be used in cases, such as the *Hilmarton* case, i.e., when the request for the setting aside or suspension of the award is not based on unreasonable grounds or dilatory tactics and when the country where the setting aside or suspension of the award is requested has comprehensive legislation on international commercial arbitration.

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93. VAN DEN BERG, *supra* note 4, at 356.

94. New York Convention, *supra* note 10, art. VI, 21 U.S.T. at 2520, 330 U.N.T.S. at 42. For an analysis of Article VI, see Strub, *supra* note 17, at 1053-58, 1061-69.

95. *See supra* text accompanying notes 27-28.

To have a better and more complete view of the problem, it is preferable for a judge to wait for a questionable award to be finally adjudicated in the country of origin. Of course by doing so, there is always a risk of delaying the enforcement of an appropriate award. However, such risk seems minor compared to the danger of blindly enforcing a questionable award. Although speedy execution of foreign arbitral awards is important in international arbitration, "the interests of justice" must outweigh this competing concern.[96] Furthermore, the authority before which the award is sought may, in its discretion and on application of the party claiming enforcement of the award, order the other party to provide suitable security.[97]

Unfortunately, Article VI is rarely used by national courts.[98] Experts hypothesize that practicing lawyers are not fully aware of the possibilities offered by this article.[99] The few courts applying it have failed to develop a uniform standard for its application.[100] It would be proper for a court to stay enforcement of a foreign arbitral award under Article VI where the party seeking the stay can create a reasonable presumption that, firstly, the award is likely to be overturned and, secondly, that such a party will be irreparably harmed if the award is enforced.[101] In order for Article VI of the Convention to be applied, the enforcing tribunal should also find that these two factors combined outweigh the harm that the party seeking enforcement of the award may suffer .[102]

VI. CONCLUSION

In general, liberal statutes and jurisprudence on international commercial arbitration should be encouraged. However, they must not be adopted if they have a detrimental effect on legal certainty or quality.

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96. *See, e.g.*, V.S. Deshpande, *Enforcement of Foreign Awards in India, U.K., and U.S.A.*, 4 J. INT'L ARB. 41, 50 (1987) (concluding that justice must prevail over speedy execution of foreign awards).

97. It is left to the court to decide whether such security should be given, and if so, in what form and to which extent. *See id.* at 50-51.

98. For a rare application of Article VI of the Convention by French courts, see JEAN ROBERT, L'ARBITRAGE: DROIT INTERNE, DROIT INTERNATIONAL PRIVÉ 291 (6th ed. 1993). In the United States, Article VI had not been applied by courts until 1979 and has given rise to very little jurisprudence since then. *See* Strub, *supra* note 17, at 1053.

99. *See, e.g.*, Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L LAW. 269, 273 (1979).

100. *See* W. Michael Tupman, *Staying Enforcement of Arbitral Awards Under the New York Convention*, 3 ARB. INT'L 209, 212 (1987) (noting that of the five reported municipal court decisions that have directly addressed the application of Article VI, three courts denied the stay and two courts granted the stay). *But see* Strub, *supra* note 17, at 1058 ("The courts that have applied Article VI have unanimously decided to stay enforcement of the arbitral award pending a recourse action in a foreign country . . . .").

101. *See* Strub, *supra* note 17, at 1070.

102. *See id.*

The French example perfectly illustrates the danger of excessive liberalism in the field of recognition and enforcement of awards.

Nevertheless, the French system alone should not be blamed. The excessive liberalism of the French legislation and jurisprudence concerning recognition and enforcement of awards is only the consequence of the excessive liberalism of the more-favorable-right provision of Article VII(1) of the Convention, which in turn is a response to the conservatism of Article V(1)(e). Finally, these controversial articles result from an elaborate search by the drafters of the Convention for large consensus, such as easier ratification.

As we are approaching the twenty-first century, recent developments in international commercial arbitration demand a modification or at least a clarification of certain aspects of the Convention, as well as the harmonization of the grounds for setting aside awards. In a period of globalization, changes must be made at an international level. It is this way, and only this way, that the New York Convention's paramount purpose of ensuring a large measure of certainty and security in international commercial transactions will be promoted. Any isolated move on behalf of any country to promote local arbitration by the adoption of attractive statutes might engender harmful consequences and lead to the abandonment of arbitration as the preferred method of settling international commercial disputes.