Requirements for the Enforceability of Arbitral Awards: A Comparative Overview*

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Contents

I. The problem defined

1. The rationale for the enforceability of arbitral awards and the legal challenges it faces.
2. The relevant legal sources and their interaction.
3. Scope and outline of the paper.

II. The fundamental approaches underlying national rules on the enforceability of arbitral awards

4. *Lex facitum arbitrum.*
5. Arbitral awards as expressions of an autonomous legal order.
6. A third way.

III. The requirements for the enforceability of arbitral awards in the light of the various approaches to the problem: selected aspects

7. Need for *exequatur vs.* direct enforcement.
8. Enforceability *vs.* non-enforceability of foreign annulled awards.
9. Domestic *vs.* international or transnational public policy.

IV. Conclusions

10. A perennial problem?

* Text of the author's presentation at the Symposium on *Judicial Control Over Arbitral Awards: Scope, Vacation and Public Policy*, held at the Lyon Catholic University on 26 and 27 April 2019.

I. The problem defined

1. The rationale for the enforceability of arbitral awards and the legal challenges it faces

Arbitration is a form of administration of justice that is distinguished from that administered by State courts fundamentally in that the basis of the arbitrators' jurisdiction – at least in the case of voluntary arbitration – is the consent of the parties in dispute.

Arbitration is thus an expression of party autonomy. In their arbitration agreement, parties not only decide to resort to adjudicators they themselves appoint (or by institutions they designate) in respect of an existing dispute or of the disputes potentially emerging from a given legal relationship, but they are also free to stipulate when and how those adjudicators will resolve their dispute.

Notwithstanding its contractual basis, the essence of the arbitrators' activity is jurisdictional in nature, and in this respect, arbitration is broadly comparable with judicial proceedings before State courts. The effects of the arbitral award – notably its binding force upon the parties and its enforceability – are also analogous to those of judgments emanating from courts.[1]

By virtue of its binding nature, an arbitral award that has acquired the status of *res judicata* may serve as the basis for the rejection of the same claim if resubmitted to a State court. In terms of enforceability, specific performance of the award may be demanded by the successful party from the defaulting one, if necessary, by coercive means.

[1] See, on this, Gary Born, *International Commercial Arbitration*, 2nd edition (Alphen aan den Rijn: Kluwer Law International, 2014), pp. 216 f.; Nigel Blackaby, Constantine Partasides *et al.*, *Redfern and Hunter on International Arbitration,* 6th ed. (Oxford: Oxford University Press, 2015), p. 27.

Both effects generally require the cooperation of State courts or other public entities. The principal challenge faced by the enforcement of an arbitral award lies precisely in ensuring that cooperation.

Ordinarily, such cooperation should be granted as a form of recognition of private ordering, which is inherent to a liberal society and required by the proper functioning of a market economy. Concerning the enforcement of foreign awards, the needs of international trade, which demand the mobility of judgments and awards across national borders, also play a decisive role. But perhaps the most compelling reason for the enforcement of arbitral awards is the respect owed to party reliance. In fact, if States allow parties, under prescribed conditions, to agree on arbitration as an alternative dispute resolution mechanism, then it would frustrate their legitimate expectations if public judicial bodies were to deny enforcement of an award validly rendered pursuant to such an agreement.

However, in order that State courts may lend their coercive powers to the enforcement of arbitral awards, the arbitration agreement, the arbitral proceedings and the award must meet certain minimum requirements. The crux of the matter lies in determining precisely what those requirements should be, and the extent to which the arbitral award is to be scrutinized by State courts in order to ensure compliance with them. The responses to these issues, as we shall see below, are varied, and may differ depending often on whether the award was rendered by a tribunal seated in the country where the enforcement is requested or seated abroad, in short on whether the award is domestic or foreign.

Paradoxically, in order to enforce an arbitral award, litigation before State courts – which parties originally intended to avoid by resorting to arbitration – often becomes inevitable and may lead, as we shall see below, to different results according to where it is conducted.

This in essence will be the subject matter of this paper. Considering the international context in which the problems alluded to increasingly arise, we shall concentrate on the enforcement of foreign arbitral awards,

although reference will also be made as necessary to the enforcement of domestic awards.

2. The relevant legal sources and their interaction

As a preliminary step, our topic requires determination of the relevant legal sources and consideration of the way in which they interact.

It is a well-known fact that the enforcement of foreign arbitral awards is now largely regulated by international sources. Most notably there is the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which reached the 60th anniversary of its entering into force on 7 June 2019 and now has 159 signatories.[2]

As a *double convention*, in the sense that it deals with both the adjudicatory authority of arbitrators and the recognition and enforcement of their awards, the New York Convention has secured almost worldwide efficacy for arbitration as an alternative dispute resolution mechanism. This is no small achievement, considering that it has no parallel in terms of judgments emanating from State courts.

Even so, the New York Convention does not entirely render redundant national laws in respect of the enforcement of arbitral awards. In fact, pursuant to the principle of national treatment enshrined in Article III of the Convention, Member States are to enforce those awards in accordance with the rules of procedure of the territory where the award is relied upon, albeit under the conditions laid down in its subsequent provisions. Furthermore, by virtue of Article VII(1) of the Convention, its provisions do not deprive an interested party of the right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where its enforcement is sought.

[2] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958, in force 7 June 1959, (1959) 330 UNTS 3. For a comparative overview of the Convention's interpretation and application in its signatory jurisdictions, see George A. Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards. The Interpretation and Application of the New York Convention by National Courts* (Springer, 2017).

The New York Convention thus leaves significant leeway to national laws in respect of the enforcement of foreign arbitral awards. Due to this 'porosity' of the Convention, differences between national approaches regarding the enforcement of arbitral awards have often resurfaced over the past six decades in cases falling within its scope of application.

3. Scope and outline of the paper

This paper will basically seek to point out the principal differences that subsist between national legal systems in respect of the enforcement of arbitral awards, notwithstanding the purported degree of uniformity introduced in this field by the New York Convention.

As a first step, we will attempt to outline the fundamental approaches to arbitration as adopted by various national jurisdictions which, in turn largely account for differences in enforceability practices. These approaches can be referred to as the *territorialist*, the *autonomist* and the *pluralistic*. The most relevant expressions of these approaches will then be analysed with regard to three crucial aspects of the legal framework of foreign arbitral awards enforcement of, namely the need for an *exequatur* from a State court, the enforceability of foreign annulled awards and the public policy clause.

In a paper of this type, our comparison is necessarily confined to a selected number of legal systems embodying the identified approaches: the English and German systems as representatives of the territorialist; the French and Swiss systems in what concerns the autonomist; and the Portuguese system in respect of the pluralistic approach.

A final reflection will be devoted to the issue of whether and to what extent a compromise between those approaches is feasible under the current state of the law, and whether such a compromise is indeed necessary or even desirable.

II. The fundamental approaches underlying national rules on the enforceability of arbitral awards

3. Lex facitum arbitrum

In an oft-quoted essay published over half a century ago, F.A. Mann put forward the view that 'arbitration, like any other institution of municipal law, requires a firm legal basis which can only be found in the recognition and implementation of the idea of *lex facit arbitrum*'.[3]

According to this idea, 'every arbitration is a national arbitration, that is to say, subject to a specific system of national law'. Indeed, as the learned author submitted, '[n]o one has ever or anywhere been able to point to any provision or legal principle which would permit individuals to act outside the confines of a system of municipal law; even the idea of the autonomy of the parties exists only by virtue of a given system of municipal law and in different systems may have different characteristics and effects'. Similarly, the author went on to say, 'every arbitration is necessarily subject to the law of a given State'. This law would be the *lex arbitri*, which in most countries is assumed, as stated by Dr. Mann, to be the law of the arbitral tribunal's seat. According to this view, arbitrators are thus inevitably subject to the legislative jurisdiction of country in which they operate, which lays down whether and on what conditions arbitration is permitted at all. More specifically, Mann claimed, '[t]he law of the arbitral tribunal's seat initially governs the whole of the tribunal's life and work. In particular, it governs the validity of the submission, the creation and composition of the tribunal, the rules of the conflict of laws to be followed by it, its procedure, the making and publication of its award'. At no point, the author submitted, is it possible or desirable to leave the firm ground of a specific legal system and to have resort to some 'droit anational'. This, he concluded, almost certainly

[3] See '*Lex Facit Arbitrum'*, in Pieter Sanders, (ed.), *International arbitration: Liber amicorum for Martin Domke* (The Hague: Nijhoff, 1967), pp. 241 ff.

expressed the English approach at the time of his writing: ‘an arbitration having its seat in England is always and necessarily governed by English rules of procedure’.

This view was upheld a decade and a half later by the English Court of Appeal in *Bank Mellat* v. *Helleniniki Tecchniki S.A.*,[4] decided in 1983, in which Lord Kerr stated:

> ‘Despite suggestions to the contrary by some learned writers under other systems, our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.’

This approach to arbitration, which has often been described as a form of *territorialism*, still prevails to a large extent in English law. It was in fact enshrined in the UK Arbitration Act 1996, albeit in a rather attenuated form, *inter alia* by stating in Section 2(1) that the provisions of its Part I ‘apply where the seat of the arbitration is in England and Wales or Northern Ireland’.[5]

A similar rule can be found for example in Section 1025(1) of the German Civil Procedure Code[6], according to which:

> ‘The provisions of this Book apply if the place of arbitration as referred to in section 1043 subs. 1 is situated in Germany.’

[4] [1984] Q.B. 291. See, on this ruling, F. A. Mann, ‘England Rejects “Delocalized” Contracts and Arbitration’, (1984) 33 ICLQ 193.

[5] See, on this provision, V.V. Veeder and Ricky H. Diwan, 'England & Wales', in Lise Bosman (ed.), *International Handbook on Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, supplement No. 98, 2018), p. 36.

[6] On which see Stefan Michael Kroll, 'Germany', in Lise Bosman (ed.), *International Handbook on Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, supplement No. 98, 2018), pp. 27 f.

This rule also reflects the dominant opinion among German scholars, which Leo Raape famously epitomized in his *Private International Law* treatise,[7] by stating that:

> 'The arbitral tribunal does not throne above the Earth, nor does it float in the air, it must "land" somewhere.'

A more recent formulation of the same idea is found in Pieter Sanders' monograph entitled *Quo Vadis Arbitration?*, in which the renowned Dutch author and practitioner wrote that 'arbitration can only exist and as such be recognised when based on a law, which regulates this private form of dispute settlement and exercises control over it as, in the case of arbitration, the jurisdiction of the court is ousted'.[8]

4. Arbitral awards as expressions of an autonomous legal order

A fundamentally different view has prevailed in France, at least in what concerns international arbitration, which Berthold Goldman defined in his 1963 Hague lectures[9] as 'celui dont la procédure échappe […] à l'application d'un droit étatique'. An entire school of thought flowed from Goldman's thesis. Shortly after his cited writing, Philippe Fouchard defined international arbitration, in his 1965 doctoral thesis as:

> 'un arbitrage détaché de tous les cadres étatiques, soumis à tous égards à des normes et à des autorités véritablement internationales, c'est à dire, […] supra-nationales, extra-nationales, ou mieux, anationales.' [10]

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[7] See *Internationales Privatrecht,* 5th ed. (Berlin and Frankfurt a.M.: Franz Vahlen, 1961), p. 557.

[8] See *Quo Vadis Arbitration? Sixty Years of Arbitration Practice* (The Hague: Kluwer, 1999), p. 248.

[9] See 'Les conflits de lois dans l'arbitrage international de droit privé', *in Recueil des Cours de l'Académie de La Haye de Droit International,* tome 109 (1963-III), pp. 351 ff. (at p. 359).

[10] See *L'arbitrage commercial international* (Paris: Dalloz, 1965), p. 23.

This concept of international arbitration had its most recent exposition in Emmanuel Gaillard's book on legal theory of international arbitration, originally published in 2008,[11] in which the author argued for a 'representation' of arbitration:

> 'qui accepte de considérer que la juridicité de l'arbitrage puisse être puisée non dans un ordre juridique étatique, qu'il s'agisse de celui du siège ou de celui du ou des lieux d'exécution, mais dans un ordre juridique tiers, susceptible d'être qualifié d'ordre juridique arbitral.'[12]

This view, according to Professor Gaillard, would correspond to 'a strong perception among international commercial arbitrators that they do not administer justice on behalf of a given State, but rather that they exercise a jurisdictional function in the service of the international community'.[13]

Ultimately, this approach to international arbitration entered the case law of the French *Cour de Cassation*, which stated in the 2007 *Putrabali* case[14] that:

> 'La sentence internationale […] 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.'

The provisions on arbitration of the French Code of Civil Procedure, last amended in 2011, have largely enshrined this view. International arbitration is indeed defined in Article 1504 of the Code as:

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[11] See *Aspects philosophiques du droit de l'arbitrage international* (Leiden and Boston: Martinus Nijhoff, 2008), also available in English under the title *Legal Theory of international arbitration* (Leiden and Boston: Martinus Nijhoff, 2012).

[12] Id., p. 60.

[13] Id., ibid. (author translation).

[14] Arrêt No. 1021 du 29 juin 2007, Cour de cassation, Première chambre civile, available at www.courdecassation.fr.

‘L’arbitrage qui met en cause des intérêts du commerce international.’

Pursuant to Article 1518 of the Code, awards rendered in such arbitrations may only be the object of a request for annulment: no appeal from those arbitral awards thus lies in the French courts.

However, parties may exclude the possibility of such an annulment by a special agreement. According to Article 1522, § 1, of the Code:

‘Par convention spéciale, les parties peuvent à tout moment renoncer expressément au recours en annulation […]. ‘

By allowing parties to opt out of the jurisdiction of French courts, even in cases that might otherwise justify annulment of the award, the *Code de Procédure Civile* in fact permits them to exclude the applicability of any provisions of French procedural law regarding international arbitrations held in France. The ‘delocalization’ of those arbitrations, long advocated by French 20th Century legal scholarship, was thus accomplished.[15]

Swiss federal law followed suit, albeit in a somewhat more restrictive fashion, by providing in Article 192(1) of the Federal Private International Law Act:[16]

‘Si les deux parties n’ont ni domicile, ni résidence habituelle, ni établissement en Suisse, elles peuvent, par une déclaration expresse dans la convention d’arbitrage ou un accord écrit ultérieur, exclure tout recours contre les sentences du tribunal arbitral; elles peuvent aussi n’exclure que pour l’un ou l’autre des motifs énumérés à l’article 190, 2e alinéa.’

6. A third way

[15] See, for a detailed account of the jurisprudential developments that led to this result, Arthur Taylor von Mehren, ‘International Commercial Arbitration: The Contribution of the French Jurisprudence’ (1985-1986) 46 Louisiana Law Review 1045.

[16] For a critique of which, see Jean-François Poudret and Sébastien Besson, *Droit comparé de l’arbitrage international* (Zurich: Schulthess, 2002), pp. 828 f.

A third approach to arbitration, positioned somewhere between the other two visions, has in the meantime increasingly gained ground.

One of its foremost proponents is Jan Paulsson, who dedicated a few enlightening pages to this issue.[17] His starting point is *legal pluralism* – a notion espoused by many comparatists, including the present author.

Despite all efforts aimed at the harmonization or the unification of the law (of which the UNCITRAL Model Law on International Commercial Arbitration provides a prominent example in the field covered by this paper[18]), our 'globalized' world is still characterised by a plurality of legal systems, which to a large extent reflect the idiosyncrasies and the particular sense of justice of national or local communities.

A plurality of legal orders – not just the *lex arbitri,* as advocated by Mann, but also not necessarily a single autonomous, supranational legal order, like that devised by Goldman, Fouchard and Gaillard – may accordingly give effect to arbitration.

Perhaps the most apt normative expression of this idea is the New York Convention itself. While not espousing the notion of an 'international arbitration award', as originally proposed, the Convention allows the enforcement of foreign arbitral awards without requiring their approval by the courts of their countries of origin: such is the consequence of the abolition of the *double exequatur,* as postulated by the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards.[19]

Admittedly, the Convention allows denial of the enforcement of foreign arbitral awards where: (i) the arbitration agreement on which they were founded is invalid under the law of the country where the award was made (Article V(1)(a)); (ii) the arbitral procedure has failed to conform with the law of the country where the arbitration took place (Article V(1)(d)); or

[17] See *The Idea of Arbitration* (Oxford: Oxford University Press, 2013), pp. 29 ff.

[18] See UNCITRAL Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, with amendments adopted on 7 July 2006, available at www.uncitral.org.

[19] See Convention on the Execution of Foreign Arbitral Awards, Geneva, 26 September 1927, (1929-1930) 92 League of Nations Treaty Series 301.

(iii) the award has yet to become binding on the parties or alternatively 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 (Article V(1)(e)). In this way the drafters of the Convention gave some degree of acknowledgement to the *lex arbitri*.[20]

At the same time, as already mentioned, the Convention also allows an involved party to avail itself of the more favourable rules of the *lex loci executionis* (Article VII(1)). In any event, the final word in respect of arbitrability and public policy issues raised by the award is given by Article V(2) of the Convention to the law of the country of enforcement.

No single legal system – be it either the *lex arbitri* or an overarching *ordre juridique arbitral* –, but rather a multitude of systems is accordingly competent to decide on the enforceability of the arbitral award. Consequently, under the Convention enforcement of an award may be denied in one country but upheld in another. This conclusion may seem rather disappointing – given the undeniable complexities it may lead to – but it is certainly more realistic than those reached by either of the former approaches.

When looking for a national legal system that has adopted this third *pluralist* approach in any given way, then the Portuguese Voluntary Arbitration Law of 2011 may be cited as an example.[21] Based upon the UNCITRAL Model Law, the Portuguese Act devotes an entire chapter to international arbitration, which Article 49 (1) defines, in characteristically French style, in the following manner:

> 'An arbitration is considered international when international trade interests are at stake.'

[20] See, for a through discussion of this issue, Albert Jan van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Deventer: Kluwer, 1981), especially pp. 275 ff and 391 f.

[21] See, for an English translation and analysis of this law, Dário Moura Vicente, 'Portugal', in Lise Bosman (ed.), *International Handbook of Commercial Arbitration* (Alphen aan den Rijn: Kluwer Law International, supplement 82, 2014).

All the same, Portuguese law does not adhere to the delocalization approach advocated in French legal literature since the 1960s, as Article 61 of the Act expressly states that:

> 'The present Law is applicable to all arbitrations that take place in Portuguese territory, as well as to the recognition and enforcement in Portugal of awards made in arbitrations seated abroad.'

Thus, under the Portuguese Act it is not possible to opt out of the jurisdiction of Portuguese courts in what concerns the annulment of awards rendered in arbitrations that take place in Portugal.

At the same time, a significant caveat was introduced in Article 54 concerning the annulment of awards rendered in international arbitrations taking place in Portugal on the grounds of breach of public policy:

> 'An award made in Portugal, in an international arbitration in which non-Portuguese law has been applied to the merits of the dispute, may be set aside on the grounds provided for in article 46, and also, if such award is to be enforced or produce other effects in national territory, whenever such enforcement leads to a result that is manifestly incompatible with the principles of international public policy.'

By virtue of this provision, the international public policy of the Portuguese State may only be invoked in annulment proceedings if the award is to be enforced or produce other effects in the national territory. [22]

The Portuguese arbitration statute has thus made a considerable concession to the pluralistic approach to arbitration, in that it allows awards rendered in Portugal in international arbitrations to remain immune to

[22] See, for a broader discussion of this provision, Dário Moura Vicente, 'Impugnação da sentença arbitral e ordem pública', *in Estudos em homenagem a Miguel Galvão Teles*, vol. II (Coimbra: Almedina, 2012), pp. 327 ff.; and António Sampaio Caramelo, *A impugnação da sentença arbitral* (Coimbra: Coimbra Editora, 2014), pp. 85 ff.

annulment, even if contrary to Portuguese public policy, insofar as they are not intended to be enforced in the country, but rather elsewhere.

III. The requirements for the enforceability of arbitral awards in the light of the various approaches to the problem: selected aspects

7. Need for *exequatur vs.* direct enforcement

We will now consider the specific requirements for the enforceability of arbitral awards in the light of the different approaches to the problem as outlined above.

First and foremost, the question arises of whether and to what extent an act of *exequatur* should be deemed necessary in order that an arbitral award may be enforced by the courts of a given country.

The response is categorically in the affirmative in legal systems that promote the *delocalisation* of international arbitration: if arbitral awards can be rendered within the territory of the forum State without any regard to local rules concerning the arbitration agreement or the arbitral procedure, and if parties may opt out of local court jurisdiction to set aside arbitral awards, then the enforcement of such awards in that State must necessarily be preceded by an act aimed at verifying whether the award meets a number of minimum requirements.

Such is the position of French law, which expressly requires an act of *exequatur* in respect of all awards rendered abroad or in international arbitrations that took place in France.[23] This is the main purpose of Article 1516, § 1, according to which:

[23] See, on this, Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *Traité de l'arbitrage commercial international* (Paris: Litec, 1996), p. 901.

> ‘La sentence arbitrale n'est susceptible d'exécution forcée qu'en vertu d'une ordonnance d'exequatur émanant du tribunal de grande instance dans le ressort duquel elle été rendue ou du tribunal de grande instance de Paris lorsqu'elle a été rendue à l'étranger.’

In France, an arbitral award rendered in an international arbitration, even if conducted on French soil, is thus equated with a foreign arbitral award. If parties have renounced to their right to request the annulment of the award, pursuant to Article 1522, § 1, mentioned above, they are entitled to an appeal from the *ordonnance d’exequatur*, pursuant to Article 1522, § 2, of the Code.

A similar regime applies in Switzerland, whenever the parties have excluded the possibility of setting aside arbitral awards rendered in the country. To this end, Article 192(2) of the Federal Private International Law Act provides that:

> ‘Lorsque les parties ont exclu tout recours contre les sentences et que celles-ci doivent être exécutées en Suisse, la convention de New York du 10 juin 1958 pour la reconnaissance et l'exécution des sentences arbitrales étrangères s'applique par analogie.’

Accordingly, in both France and Switzerland the requirement of an *exequatur* in respect of awards rendered in the forum State in international arbitrations is the price to be paid for the delocalization of such arbitrations in those jurisdictions.

A different stand is taken by countries that have not adopted the delocalization theory. Such is the case of Portugal, where awards rendered in arbitrations conducted in the national territory are directly enforceable by State courts, notwithstanding their international nature. This is ensured by Article 42(7) of the Voluntary Arbitration Law (which applies to international arbitration by virtue of the referral to the rules governing domestic arbitration contained in Article 49(2) of the Law), according to which:

> ‘An arbitral award that cannot be appealed and that is no longer subject to amendments under article 45 has the same binding effect on the parties as the final and binding judgement of a State court, and is enforceable as a State court judgement.’

This rule, however, does not extend to the enforcement of foreign awards, as the Supreme Court decided in its ruling of 18 February 2014,[24] according to which:

> ‘A foreign arbitral award is not automatically enforceable in Portuguese territory (it does not constitute an enforceable title) without being previously submitted to revision and confirmation by the competent court in light of the national legal system, in spite of the fact that it is covered by the [New York] Convention.’

This differentiation can be readily explained. Awards rendered in arbitrations seated in Portugal, even if they fall within the notion of international arbitration as defined in Article 49, are as a matter of law subject to control of their formal regularity through the setting aside procedure provided for by Article 46 of the Voluntary Arbitration Law. Foreign awards, by contrast, are by their nature exempt from such a control, and accordingly should not be enforced in Portugal without having first been reviewed by an appropriate national court.

8. Enforceability *vs.* non-enforceability of foreign annulled awards

The three basic approaches have equally relevant consequences regarding the fate of arbitral awards that have been annulled in their country of origin.

[24] Case No. 1630/06.2YRCBR.C2.S1, available at www.dgsi.pt.

Whereas according to the territorial approach such awards should necessarily be denied enforcement in the forum State, since they are devoid of any effect under the *lex arbitri*, the autonomous approach, on the contrary, is prone to disregard this circumstance and to assess enforceability of the award with complete independence from the arbitral law.

This was the conclusion reached by the French Supreme Court in the already mentioned *Putrabali* case, in which the Court held that an arbitral award rendered and annulled in England could be enforced in France on the following terms:

> '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.'

Although the French Court invoked the more favourable rights provision of the New York Convention, the major premise of its ruling was, as mentioned above, the notion that 'la sentence internationale […] n'est rattachée à aucun ordre juridique étatique'.[25]

This, however, is not a notion that one may directly derive from the New York Convention. As Pieter Sanders, its founding father, has pointed out, '[o]n the basis of the NYC the judge must refuse leave for enforcement of an annulled award',[26] except when the interested party relies upon Article VII(1) of the Convention. In such a case, however, as Sanders also noted,

[25] For a critical assessment of this ruling, see Richard W. Hulbert, 'When the Theory Doesn't fit the Facts. A Further Comment on Putrabali', (2009) 25 *Arbitration International* 157.

[26] See *Quo Vadis Arbitration?,* p. 414.

'we leave the domain of the NYC and enter into the domain of national arbitration law or the domain of a treaty'.[27]

Hence, a *pluralistic approach* to arbitration affords a degree of leeway to the enforcement of foreign annulled awards; but that enforcement will be based neither on the New York Convention itself, nor on a supranational arbitration law of sorts, but rather on the law of the country where the enforcement is sought.

As rightly noted by George Bermann in his 2017 Hague lectures, Article VII of the Convention 'suggests that a court may, and indeed must, recognize and enforce a foreign award – even if the New York Convention would itself allow non-recognition or non-enforcement – as long as domestic law would require its recognition and enforcement'.[28]

This includes cases in which the foreign annulment order would not be recognised in the country where enforcement of the arbitral award is requested, as happened in the ruling rendered by the Amsterdam Court of Appeal in the 2009 *Yukos* case, affirmed by the Dutch Supreme Court in 2010.[29]

However, in such cases enforcement of the annulled award remains firmly grounded on the domestic law of the country of *exequatur*, notably its public policy exception. This may justify denying effects to the foreign judgment annulling the award, for example because it was politically motivated, obtained through corruption or failed to guarantee due process.

9. Domestic *vs.* international or transnational public policy

[27] Ibid., p. 76.

[28] See George A. Bermann, *International Arbitration and Private International Law* (Leiden: Brill/Nijhoff, 2017), p. 544, note 1485.

[29] Hoge Raad, *OAO Rosneft v. Yukos Capital S.à.r.l.,* ruling of 25 June 2010, available at www.rechtspraak.nl. For a comment, see Albert Jan van den Berg, 'Enforcement of Arbitral Awards Annulled in Russia. Case Comment on Dutch Supreme Court of 25 June 2010', (2011) 28 *Journal of International Arbitration* 617.

A final point of fracture between the three basic approaches to arbitration concerns the public policy exception. Pursuant to Article V (2) (b) of the New York Convention:

> 'Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that […] the recognition or enforcement of the award would be contrary to the public policy of that country.'

But this begs the question of what, for the purposes of this provision, is to be understood as the public policy of the country of enforcement.

According to one possible view, this notion equates with domestic public policy, i.e, the sum of the mandatory rules of that country. Any award that violates such rules should accordingly be denied enforcement. This is the understanding of that notion implied by a strictly territorial approach to arbitration.

Such an application of the public policy notion by an English court in the context of the enforcement of a foreign arbitral award occurred in *Soleimany v. Soleimany*,[30] in which the High Court held that 'the enforcement here is governed by the public policy of the *lex fori*'.

Subsequently, in *IPCO (Nigeria) Ltd. v. Nigerian National Petroleum,*[31] the Court held that 'the relevant public policy is English public policy' and that the analysis was whether the 'enforcement of the award would offend against English public policy'.

The contrary view, stemming from the autonomist approach, construes the said notion as referring instead to *transnational public policy*. This would comprise certain basic legal tenets that have purportedly acquired universal acceptance and are part of the so-called *ordre juridique arbitral*. As Gaillard[32] puts it:

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[30] [1999] Q.B. 785.
[31] [2017] UKSC 16.
[32] *Op. cit.,* p. 177.

> ‘dans l’ordre juridique arbitral, la constatation que le droit choisi par les parties contrevient aux valeurs fondamentales de la communauté internationale permet aux arbitres de faire prévaloir ces valeurs sur les dispositions de la *lex contractus.* La protection de ces valeurs est assurée par des règles, constitutives de l’ordre public réellement international, dégagées à partir de la constatation que les États s’accordent, même s’ils ne sont pas nécessairement unanimes, à condamner certaines pratiques telles que la corruption, le trafic de stupéfiants ou d’organes humains, à protéger certaines parties jugées faibles ou même, comme dans le cas d’embargo décrétés par la communauté internationale, à promouvoir certaines politiques destinées à assurer la paix et la sécurité internationales.’

The problem with this view of public policy is that it presupposes a consensus among national legal systems that actually does not exist. Suffice it to mention in this respect the duty to act in accordance with good faith during contractual negotiations. This notion is close to the hearts of several civil law countries, whose Civil Codes expressly enshrine it. The notion was rejected, however, by the Judicial Committee of the English House of Lords (the precursor of the UK Supreme Court) in *Walford* v. *Miles,* on the grounds that it ‘is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations’.[33]

Again, a third way is provided by the *pluralistic approach* to arbitration, according to which the notion of public policy, as enshrined in Article VII(1) of the New York Convention, refers neither to domestic public policy nor to transnational public policy*,* but rather to *international public policy*. This expression is best understood as comprising those legal principles of national law that cannot be derogated from even in international situations, in spite of the fact that a judgment or award has been rendered abroad.

[33] [1992] 1 All ER 453.

The distinction between this pluralistic notion of public policy and the territorial approach has been neatly drawn by Portuguese Courts. In a ruling of 16 January 2014,[34] the Lisbon Court of Appeal decided that Article 33 of the Portuguese law regulating commercial agency contracts,[35] which grants agents the right to goodwill compensation ('indemnização de clientela') in case of contract termination, is a rule of internal as opposed to international public policy. Accordingly, the rule does not prevent the recognition and enforcement in Portugal of a foreign arbitral award that denies the right to goodwill compensation to a commercial agent acting in Portugal on behalf of a foreign company. The Supreme Court confirmed this ruling on 23 October 2014.

The Portuguese Voluntary Arbitration Law of 2011 gave normative expression to this view, by stating in Article 56(1)(b)(ii) that the recognition and enforcement of a foreign arbitral award may be denied if the court finds that:

> 'The recognition or enforcement of the award would lead to a result clearly incompatible with the international public policy of the Portuguese State.'[36]

Internal, or domestic, public policy is thus clearly distinguishable from international public policy, which is a considerably more restrictive notion.

Yet, each State is entitled to maintain its own notion of international public policy, and as such the concept is eminently susceptible to variations in its interpretation from country to country. In fact, international public policy may be described as the kernel of each legal system: those rules and principles that will under no circumstances yield to foreign divergent rules or principles.

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[34] Case No. 1036/12.4YRLSB.S1, available at www.dgsi.pt.

[35] See Decree-Law No. 178/86, of 3 July 1986, amended by Decree-Law No. 118/93 of 13 April 1993.

[36] See, on this provision, Dário Moura Vicente (ed.), *Lei da Arbitragem Voluntária Anotada,* 4th ed. (Coimbra: Almedina, 2019), pp. 191 ff., with further references.

Although it should not be confused with national mandatory rules, the public policy exception so understood may therefore have different meanings in each Contracting State of the New York Convention.

IV. Conclusions

10. A perennial problem?

Our inquiry has shown that, despite the significant efforts undertaken over the past century or so to unify, or at least harmonize, this field of the law, a uniform set of rules governing the requirements for the enforceability of arbitral awards is still non-existent.

In fact, as we have seen, those requirements vary considerably between countries; and to a large extent this is owing to the different approaches in respect of arbitration that prevail in those countries.

One may, of course, identify a trend, which globalization and the advent of the information society have largely promoted, to move away from the strict territorialism that still prevailed in this legal domain into the mid-20th Century.

But we are still far from the universal recognition of a single, transnational legal order governing arbitration in general and the enforcement of foreign arbitral awards in particular.

The question nevertheless remains of whether, and to what extent, a compromise between the above-mentioned legal regimes can and should be sought.

However, we doubt it is feasible in the current state of the law. The differences revealed by legal comparison in this field are not of a purely technical nature, but rather, as we have sought to demonstrate, the result of deeply-rooted divergences in respect of the sources of arbitrators' adjudicatory powers and of the extent to which national courts should give effect to their awards.

A pluralism of legal systems is thus, to a large extent, inevitable in the field of international arbitration. Such a pluralism, ultimately, is nothing more than a consequence of the cultural nature of the law and of the inescapable diversity of its expressions across national borders.

Private International Law nevertheless ensures an 'orderly pluralism' ('un pluralisme ordonné') in the sense given to that expression by Mireille Delmas-Marty.[37] That is precisely the type of pluralism that the New York Convention allows in respect of the enforcement of foreign arbitral awards.

[37] See *Les forces imaginantes du droit,* vol. II, *Le pluralisme ordonné* (Paris : Éditions du Seuil, 2006), pp. 26 ff.