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On the 50th Anniversary of the New York Convention, Revisiting Annulment and Vacatur Through the Prism of in re: Chromalloy, Baker Marine, *and* Termorio

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Summary: I. Introduction. II. Annulled Awards and the *in re: Chromalloy, Baker Marine* and the *TermoRio* Trio. III. *TermoRio S.A. v. Electranta S.P.*: A New Doctrinal Development. IV. The Need for a Polestar: A Secondary Tribunal's Dilemma and Solution. V. Conclusion.

I. Introduction

The Convention on the recognition and enforcement of foreign arbitral awards, that now is so commonly known as the New York Convention, celebrates its 50th birthday. Adopted by the United Nations' diplomatic conference on June 10, 1958, and having entered into force on June 7, 1959, this multilateral international effort is likely the most successful diplomatic juridic achievement in modern times if measured by two very salient criteria: (i) the number of signatories and (ii) its historically unpredictable service to the world of commerce, particularly in an era of economic globalization. The Convention has served as a conceptual predicate that fills the jurisprudential void necessary to provide cross-border disputes with a universally accepted methodology for international dispute resolution, i.e., a means of adjudicating disputes without submitting the merits of contentions to judicial proceedings. Hence, the Convention meaningfully has contributed to the creation of a coun-

terpart to economic globalization that this author, not euphemistically but accurately, best describes as "*jurisprudential globalization*".

By requiring the judiciary of signatory states to grant full force and effect to private agreements to arbitrate and, therefore, to recognize and enforce arbitral awards issued where the seat of arbitration is located in a foreign contracting or signatory state, the Convention has made possible the seemingly impossible: practically universal recognition, confirmation, acceptance, and enforcement of arbitral awards. This juridic effect highlights and underscores the Convention's unprecedented success in this most exigent ambit.

To be sure *jurisprudential globalization* shall be fully realized upon the community of nations' creation of transnational courts of civil procedure competent to exercise jurisdiction over private parties seeking the resolution of particular disputes arising from cross-border controversies. Such tribunals, however, are yet to be fashioned and although much ink has been spilled in laudable efforts aimed at articulating cross-cultural juridic premises for such courts, the overwhelming percentage of the task to be accomplished in the development and establishment of this transnational rubric still remains in the inkwell. Accordingly, efforts undertaken to explore the possibility of the Convention's perfect workings are particularly timely during this most meaningful birthday celebration.

(i) Scope of Aspiration

This article purports to submit to sustained analysis the much discussed tension between the permissive wording of the Convention's Article V(1)(e) recognition and enforcement of an arbitral award *may* be refused under specific circumstances enunciated in subsection (1)(e) of Article V, and the mandatory stricture asserted in the very Convention's Article VII(1) providing that parties may not be divested of any right that they may have to avail themselves of the benefits of an arbitral award rendered

consonant with the law or treaties of the country where such award is sought to be relied upon. Specifically, the conceptual ramifications of the decisions rendered in the trilogy, *In Re: Chromalloy*, *Baker Marine*, and the *TermoRio* shall be studied by analyzing four specific areas of inquiry. First, *In Re: Chromalloy*, *Baker Marine*, and *TermoRio*, shall be scrutinized so as to suggest that their respective legal holdings are not as conceptually irreconcilable as they may first appear pursuant to a mere surface, and regrettably, prevalent reading. Second, it shall be suggested that the *TermoRio* decision crafts a new, but insufficient, test that indeed facilitates the question of annulment or vacatur for both primary (rendering) and secondary (enforcing) states. Third, considerable effort shall be allocated to "*deconstructing*" the *TermoRio* analysis, *dicta*, and holding. Fourth and finally, an attempt shall be ventured to suggest a comprehensive or wholistic reconciliation among all three opinions, the identification of a simple test, and an incident underscoring of a need for a more elaborate polestar to be followed in the annulment of vacatur of arbitral awards by both primary and secondary states. Let us begin.

II. Annulled Awards and the *in re: Chromalloy*, *Baker Marine* and the *Termorio* Trio

The doctrinal development of U.S. arbitration placing arbitral proceedings in *pari materia* with judicial actions certainly promoted a national policy favoring arbitration so as to minimize the longstanding historical prejudices that had nourished judicial and academic skepticism towards arbitral proceedings generally. The confirmation of arbitral awards, however, has spawned a tension between two policies. First, the national policy supporting confirmation of foreign arbitral awards is certainly a requisite predicate to the preservation and enhancement of the very principles that international commercial arbitration seeks to further: international commerce, uniformity, transparency of standard, predictability, and *party-autonomy*. The second policy consideration, of equal standing with the

first, is the deference to be accorded to a tribunal of competent jurisdiction in the primary state that vacates an arbitration award rendered in that jurisdiction on the ground that it is inimical to the substantive law of the rendering state. This tension, to some extent, is embodied in the plain language of Articles V and VII of the New York Convention. Specifically, Article V(i)(e) reads:

> 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 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. (emphasis supplied)

Significant effort has been allocated to examining the permissive *may* as according the secondary state where enforcement is sought discretion in refusing confirmation of the foreign arbitration award vacated or otherwise suspended by a competent tribunal in that jurisdiction. The problem is simple. Does the Convention's regime contemplate having a court in the secondary state sit in judgment of a tribunal in the primary state to determine whether the tribunal in the primary state properly applied it's own substantive law in vacating or otherwise suspending an arbitration award, the rendition of which, by the arbitral tribunal, comports with the substantive law of the secondary state? Is this philological normative basis to be taken seriously, and if so, how? Are tribunals in the secondary state where enforcement is sought best placed to sit in judgment of the legal analysis underlying the vacatur of an arbitration award by the primary state? Would investing secondary states with the ability to sit in judgment of vacatur proceedings undertaken by the primary state provide the non-prevailing party with an incentive to apply to multiple secondary signatory states for confirmation of the award vacated in the primary state?

Clearly, a rubric must be developed such that signatory nations seeking to confirm an arbitration award that was vacated

by a competent tribunal of the primary state may so proceed in a manner that is consonant with rudimentary precepts of comity and due deference and recognition for the judiciary of the primary state. The answers to these queries must be harmonized with the strictures asserted in Article VII (1) of the Convention:

> 1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor 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.

Certainly, the precepts of *party-autonomy*, uniformity, transparency of standard, and predictability, would be undermined should courts fail to fashion a conceptual underpinning reconciling the permissive *may* enunciated in Article V(1)(e) with the mandatory language asserted in Article VII(I). The jurisprudence directly addressing this issue suggests a development favoring deference afforded to any vacatur entered by the primary state. Although the three principal opinions on this issue are very well reasoned analyses, they do fail to craft: a universal construct that would decisively provide a polestar for arbitrators, practitioners, courts, and captains of industry who seek to confirm an arbitration award in a secondary state while fearing the parochialism that may be endemic to judicial review of the arbitration award by a competent tribunal in the primary state. Even though the Convention's framework certainly contemplates a party's right to seek vacatur of an award before a tribunal within the jurisdiction of the rendering state (Article V(1)(e)) the breadth of grounds upon which a primary state may vacate an award, in contrast with the substantially more narrow principles upon which a secondary state may premise vacatur, may certainly detract from the prevalence of the principle of *party-autonomy* to the extent that it emphasizes judicial intervention pursuant to a broad scope of review at the conclusion of an arbitration proceeding that the parties envisioned as bringing finality to a dispute and susceptible to appellate review only

on the most narrow grounds and raider the gloss of strong presumptions in favor of the arbitral tribunal's decision.

The District Court for the District of Columbia addressed whether a judicial ruling issued by a competent tribunal of the rendering state vacating an arbitration award should be disturbed. The case lacked precedent and the Court quite aptly identified it as one of "first impression"[1]. There the Court observed that "[w]hile Article V provides a discretionary standard, Article VII of the Convention requires that, '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... of the count[r]y where such award is sought to be relied upon.' (internal citations omitted). In other words, under the Convention, [petitioner] maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention"[2]. The facts of the case provide much necessary perspective for any analysis of the Court's reasoning and holding.

Petitioner, *Chromalloy* had entered into a contract with the Republic of Egypt and the Air Force of the Arab Republic of Egypt (collectively referred to as "Egypt") for the provision, maintenance, and repair of helicopters belonging to the Egyptian Air Force. Within approximately two and one half years of executing the agreement, Egypt unilaterally notified *Chromalloy* that it was cancelling the agreement[3]. *Chromalloy*, however, advised Egypt that it "rejected the cancellation of the contract" and commenced arbitration proceedings on the basis of the arbitration clause contained in Article XII and Appendix E of the Con-

[1] In the matter of Chromalloy Aero Services and The Arab Republic of Egypt, 939 F.Supp. 907, 908 (D.D.C. 1996). In addition, deeper into the opinion, the court reiterated that as it had "stated earlier, this is a case of first impression. There are no reported cases in which a case of the United States has faced a situation, under the Convention, in which the court of a foreign nation has nullified an otherwise valid arbitral award". *Id.* at 911.

[2] *Id.* At 910.

[3] *Id.* At 908.

tract.'"[4] The record suggests that Egypt drew down *Chromalloy* letters of guaranty by approximately $11,475,968.00.

After a protracted arbitration proceeding the arbitral panel ordered Egypt to pay to *Chromalloy* $272,900.00 plus five percent interest, and $16,940,958.00 plus five percent interest. Additionally, the panel also instructed *Chromalloy* to pay to Egypt 606,920 pounds sterling, in addition to five percent interest from a date certain[5]. *Chromalloy* applied to the district court for enforcement of the award and virtually two weeks later, Egypt filed an appeal with the Egyptian Court of Appeal, petitioning for nullification of the award. Egypt also filed a motion with the district court to stay *Chromalloy*'s petition to enforce the award.

Significantly, the Egyptian Court of Appeal "suspended the award" causing Egypt to file with the district court a Motion to Dismiss *Chromalloy*'s petition. Finally, Egypt's Court of Appeal at Cairo entered an order nullifying the award[6].

Upon observing that it had original jurisdiction pursuant to the Foreign Sovereign Immunities Act, 28 U.S.C. §1330,[7] three

[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] 28 U.S.C. § 1330. Actions against foreign states, reads:

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

28 U.S.C. section 1605 provides seven exceptions to sovereign immunity that codifies what has become known as the "Restrictive Theory of Sovereign Immunity". They may be summarized as follows:

(a) "A foreign state shall not be immune from the jurisdiction of the United States or of the states in any case"

(i) when the foreign sovereignty "has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terns of the waiver"

(ii) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity in a foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that state causes a direct effect in the United States [§ 1605(a)(2)];

(iii) in which the rights and property taken in violation of international law are at issue and that property or any property exchanged for such property is present in the United States in correction with a commercial activity carried on in the United States by a foreign state; or that property or any property exchanged for that property is owned or operated by an agency or instrumentality of a foreign state and that agency or instrumentality is engaged in a commercial activity in the United States [§ 1605(a)(3)];

(iv) in which rights and property in the United States acquired by succession or gift or rights in immovable property situated in the United States are at issue [§ 1605(a)(4)];

(v) not otherwise encompassed in paragraph (2) above, in which money damages, are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortuous act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment, except this paragraph shall not apply to [§ 1605(a)(5)];

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be based, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceipt, or interference with contract rights;

(vi) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitration, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or

critical premises meaningfully contributed to confirmation of the award irrespective of the collateral estoppel/*res judicata* issues pervading the analysis. First, the arbitral tribunal decided, based on the allegations, to reject Egypt's argument that the contract at issue should be governed by Egyptian administrative law. Instead, the "panel held that it did not matter which substantive law they applied - civil or administrative." Therefore, the district court concluded that this decision, at most, rose to the level of a "mistake of law" but certainly does not provide a premise for vacatur of the arbitration award. Together with this observation, the Court reasoned that the Egyptian court's rendition of the arbitration award as null under Egyptian law is but a reflection of the skeptical view of arbitration that

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may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D)(i) of this subsection is otherwise applicable [§ 1605(a)(6)1],

(vii) not otherwise covered by paragraph (2), in which money damages are sought against a foreign state for personal injury or death that was caused_ by an act of torture, extrajudicial killing, aircraft, sabotage, hostage taking, or the provision of material support or resources (as defined in section 2339A of title 18) for such an act if such act or provision of material support is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency, except that the court shall decline to hear a claim under this paragraph. [§ 1605(a)(7)].

This seventh exception is qualified by two provisions providing that a court shall not have jurisdiction to prosecute a cause against a foreign nation where the foreign state (a) "was not designated as a state sponsor of terrorism under § 60) of the Export Administration Act of 1979 (citation omitted) or § 620A of the Foreign Assistance Act of 1961 (citation omitted) at the time the act occurred, unless later so designated as a result of such act or the act is related to Case Number 1:000V03110(E.G.S.) in the United States District Court for the District of Columbia; and

(b) even where the foreign state at issue is designated as a sponsor of terrorism, the act in question occurred within the national territory of a foreign state and that state was not accorded an opportunity to arbitrate pursuant to international law or "neither the claimant nor the victim was a national of the United States [citation omitted] when the act upon which the claim is based occurred".

Conditions under which an action in admiralty may be brought are also set forth in the subsections to section 7.

predated the Supreme Court's command in Mitsubishi. The opinion underscored that:

> In Egypt, however, it is established that arbitration is an exceptional means for resolving disputes, requiring departure from the normal means of litigation before the courts, and the guarantees they afford. Egypt's complaint that, the Arbitration Award is null under Arbitration Law, . . . because it is not properly grounded under Egyptian law, reflects this suspicious view of arbitration, and is precisely the type of technical argument that U.S. courts are not to entertain when reviewing an arbitral award"[8].

Thus, critical to the adjudicative process was the strong policy favoring arbitration, minimizing judicial intervention into arbitral proceedings, and the very exigent and universally cognizable flaws that must be gleaned, beyond just "mere" technical mishaps, for the non-confirmation, recognition, or enforcement of an arbitral award on the part of the secondary state[9]. The question becomes whether this very compelling policy that was the product of decades of doctrinal development should be invested with such weight so as to engulf other policy considerations of equal standing arising from-the organizing principles governing the relationship between and among the judiciaries of different sovereigns. Two propositions seem critically important for purposes of uniformity and harmonization. At the outset, a policy cannot be adopted that ignores the Convention's vision that the rendering state's vacatur of an arbitration award simply cannot be ignored in favor of the secondary state's command to confirm, recognize, and enforce foreign arbitral awards but for those falling within the narrow purview of the Convention's Article V, where the exercise of judicial discretion is to be applied in the context of a strong presumption favoring confirmation of an award. Similarly, despite the explicit language of Article V(I)(e), a

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[8] *Id.* at 911 (omitting internal citations and references to case law and authority).

[9] The Court in *Chromalloy*, quite significantly, does not use the terms "primary state" or "secondary state". Likewise, the Convention also is bereft of any reference to "primary state" or "secondary state". As shall be examined, the terms appear to be the product of jurisprudence and is significantly developed in Termorio v. Electranta, 487 F.3d 928 (C.A.D.C. 2007).

primary state's refusal, suspension, or nullification of an arbitration award should not mechanically, without more, suffice to render an award void by the secondary state without engaging in an inquiry that satisfies the command in Article VII.

Second, although the district court explicitly references *Scherk v. Alberto-Culver*[10], the proposition contending that an arbitration agreement is but a type of form selection clause upon which the Court heavily relies, is really first articulated and developed with the Supreme Court in *The Bremen v. Zapata*. This observation notwithstanding, confirmation of the arbitration award despite the Egyptian tribunal's nullification found measurable analytical support in this tenet. The Court recognized that "[a]n agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause.... the invalidation of such an agreement... would not only allow the respondent to repudiate its solemn promise but would, as well, reflect a parochial concept that all disputes must be resolved under our laws and in our courts"[11].

The deference ascribed to the parties' decision to arbitrate all disputes arising out of or pertaining to the contract at issue in Egypt is testimony to the primacy provided to the precept of *party-autonomy*. In effect, the Court views its role as an enforcing or confirming tribunal as practically performing a ministerial function in confirming awards in the context of a national policy favoring the confirmation of awards by signatory nations except for extreme scenarios where Article V is triggered. Moreover, Article V(1)(e) is not a mechanical formulistic ground for vacatur, certainly in the Court's analysis, when read together with the prescription embodied in Article VII. Simply stated, because a court in the rendering state nullifies an arbitral award, triggering an Article V(1)(e) issue for possible refusal of confirmation, dismissal of the petition seeking confirmation, recognition, or enforcement does not *automatically* attach.

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[10] *Chromalloy*, 939 F.Supp. at 911.
[11] *Id.*

Third, the facts of record underscore debilities in Egypt's effort to have the U.S. court render *res judicata* effect to the Egyptian tribunal's vacatur. In particular, the record established that the arbitration agreement at issue between Egypt and *Chromalloy* precluded any appeal to Egyptian courts[12]. Even though the Court does not particularly stress this very important condition of the arbitration agreement in its *res judicata* analysis, it is an element that should be conceded meaningful significance. Egypt directly, expressly, unilaterally, and with full knowledge breached a material term of the arbitration agreement by seeking appellate recourse in the Egyptian judiciary, a course of action that the parties *explicitly excluded in their agreement*, perhaps for fear of the very prospect of having the judiciary of a sovereign adjudicate the legal viability of an arbitration award entered against the sovereign itself and its instrumentality, in this case the Egyptian Air Force. This fact alone likely precluded the Circuit Court of Appeal for the District of Columbia from rendering any pronouncement concerning the propriety of the district court's ruling in *Chromalloy*.

Instead, the *res judicata* argument is grounded on the "strong public policy behind judicial enforcement of binding arbitration clauses. A decision of this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy"[13].

This application of public policy should not be understood in a vacuum that reads out of the opinion Egypt's stark and uncontroverted breach of the arbitration agreement by pursuing appellate recourse within the very Egyptian judicial system. While it appears violative of the Convention's framework simply to have this most important, but less than all encompassing, consideration eliminate the pronouncements of a primary state's

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[12] Appendix E to the contract defines the "Applicable Law Court of Arbitration." The clause in pertinent part provides:

It is . . . understood that both parties have irrevocably agreed to apply Egypt (*sic*) Laws and to choose Cairo as seat of the court of arbitration. [...]

The decision of said court shall be final and binding and cannot be made subject to any appeal or other recourse. (Appendix E to the Contract). *Id.* at 912.

[13] *Id.* at 913 (omitting citations and internal quotations).

vacatur of an arbitration award, a responsible reading of the *Chromalloy* opinion compels engrafting upon Article V's permissive "*may*" the conceptual category of judicial temperament and reasoning that proactively should scrutinize primary state awards in the context of the terns and conditions of the governing arbitration agreement. This standard is consonant with the narrow grounds enunciated in Article V and simultaneously does not wrest from the judiciary in the primary state the panoply of premise embodied in its substantive law that may give rise to the nullification of an award rendered within its jurisdiction.

Put simply, *Chromalloy* must be read within the parameters of the stark and uncontroverted disregard for the parties' agreement that the Egyptian tribunal exercised. The discretion that Article V vests in secondary state tribunals that conceivably shall have to be exercised, under certain circumstances, as disregarding the ruling of a tribunal in the rendering state must be grounded on objective and universal disregard of commonly held juridic precepts. The issue in Chomalloy with respect to the nonnative ground on which the Court elected to disregard the Egyptian tribunal's vacatur is not one of policy as it is a proposition of law.

Scarcely three years following the district court's analysis and holding in *Chromalloy*, the Second Circuit in *Baker Marine v. Chevron Nigeria Ltd.*[14] affirmed the district court's ruling denying petitions to enforce awards rendered a foreign jurisdiction, in large part, based upon the vacatur entered by a court in the rendering state. Here too close scrutiny of the procedural and factual configuration commands attention.

Baker Marine centers on a contract that it and Danos and Curole Marine Contractors, Inc. ("Danos") executed with Chevron Corporation ("Chevron") pursuant to which Baker Marine would provide local support while Danos supplied management

[14] Baker Marcie Nigeria Ltd. v. Chevron Nigeria Ltd. 191 F.3d 194 (2nd Cir. 1999).

and technical equipment for the barge services rendered in favor of Chevron[15].

The Operative Agreement contained in the arbitration clause identifying Nigeria as the seat of the arbitration also provided for the application of Nigerian substantive law. In addition, the parties agreed that any judgment entered upon the award would issue in whatsoever court had jurisdiction over the matter[16]. *Baker Marine* averred that both Danos and Chevron violated the contracts and proceeded to prosecute claims in accordance with the arbitration agreement in Lagos, Nigeria. Two awards were entered in Baker Marine's favor for $2.23 million in damages against Danos, and a second award issued a different panel ensued against Chevron in *Baker Marine*'s favor for $750,000[17]. Predictably, *Baker Marine* sought immediate enforcement of both awards before the Nigerian Federal High Court. Respondents Danos and Chevron also sought recourse to the same court filing papers to vacate the award based upon multiple grounds. The Nigerian Federal High Court vacated both awards. The grounds for vacatur were succinct. Four fundamental and principal premises were articulated. First, the court held that the arbitrators wrongfully awarded punitive damages. Second, it concluded that the arbitral tribunal exceeded the scope of the sub-

[15] *Id*. At 195.

[16] The arbitration clause in pertinent part stated:

Any dispute, controversy or claim arising out of this Contract, or the breach, termination or validity thereof, shall be finally and conclusively settled by arbitration in accordance with the Arbitration Rules of the United Nations Commission on International Trade Law (Uncitral).

Separate clauses specified that the arbitration "procedure (insofar as not governed by said Uncitral rules...) shall be governed by the substantive laws of the Federal Republic of Nigeria" and moreover, the clause stated that the contracts "shall be interpreted in accordance with the laws of the Federal Republic of Nigeria." In this connection, the agreements asserted that "judgment upon the award of the arbitrators may be entered in any court having jurisdiction thereof," and that the agreement and any award arising from it "shall be governed by the 1958 United Nations Convention on Recognition and Enforcement of Foreign Arbitration Awards".

Nigeria is a party to the New York Convention.

[17] *Id*. At 195-96.

missions. Third, it was observed that parole evidence was wrongfully admitted. Finally, the court acknowledged that the awards were inconsistent[18].

Baker Marine filed claims with the Federal District Court for the Northern District of New York petitioning confirmation of the awards pursuant to the FAA, implementing the Convention. The petitions were denied based upon principles of comity and Convention strictures. Specifically, the district court noted that "'it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts'"[19].

Very much like the district court in *Chromalloy*, *Baker Marine* first placed considerable emphasis on Article VII, forcing the Second Circuit to revisit the very tension that the district court in *Chromalloy* identified between Article V 1(e) and Article VII. Also, it now had to accord some part of its analysis to distinguishing the case at bar from *Chromalloy*. Because *Baker Marine* had argued that "the district court's ruling failed to give effect to Article VII of the Convention, which provides that the 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 the treaties of the count[r]y where such award it sought to be relied upon,'" the Second Circuit simply asserted that it [was] sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under the law of Nigeria"[20].

Central to the Second Circuit's holding were two simple but virtually case dispositive findings. First, "[t]he governing agreements make no reference whatever to United States law."

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[18] *Id.* at 196. The Second Circuit's opinion states that these grounds were advanced as basis for vacatur, "among other things." By way of example, the Nigerian High Court found that the award entered against Danos "was unsupported by the evidence." *Id.*

[19] *Id.*

[20] *Id.* At 196-97.

Second, "[n]othing suggests that the parties intended United States arbitral law to govern their disputes"[21].

It is in addressing *Baker Marine*'s contention that Article V(1)(e)'s use of the now very familiar permissive "*may*", that the Second Circuit deems it necessary to distinguish Baker Marine from *Chromalloy*. With surgical precision, the Court honed in on the solitary but material factual predicate that rendered the Egyptian tribunal's vacatur of no juridic moment for purposes of a confirmation, recognition, and enforcement of award analysis. The Court highlighted and underscored, albeit in a footnote, that "[a]fter the arbitrator entered an award in favor of the American Company, the American Company applied to the United States courts for confirmation of the award, the Egyptian government appealed *to its own courts*, which set aside the award the district court concluded that Egypt was seeking `to repudiate its solemn promise to abide by the results of the arbitration,' and that recognizing the Egyptian judgment would be contrary to the United States policy favoring arbitration"[22].

The Second Circuit's studious word selection should not be overlooked. The observation that the Egyptian government "*appealed to its own court's*," cannot be underestimated. Egypt not only disavowed a material tern of the arbitration agreement, but proceeded to engage in the very activity that this particular clause sought to proscribe. This difference, without more, warrants a different result from *Chromalloy* that does not necessarily give rise to a disparate legal analysis. The Court also distinguished itself from *Chromalloy* by stressing that *Baker Marine*

[21] *Id*. Additionally, the court observed:

> Furthermore, as a practical matter, mechanical application of domestic arbitral law to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary `with enforcement actions from country to country until a court is found, if any, which grants the enforcement.' *Id.* [citing to A.J. van den Berg, *The New Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* 355 (1981)].

[22] *Id*. (citing *Baker Marine*, 191 F.3d at 912, 913) (emphasis supplied).

"is not a United States citizen, and it did not initially seek confirmation of the award in the United States. Furthermore, Chevron and Danos did not violate any promise in appealing the arbitration award within Nigeria. Recognition of the Nigerian judgment in this case does not conflict with United States public policy"[23]. Accordingly, affirmance was deemed consonant with (i) comity considerations, (ii) the strictures of both Article V(1)(e) and Article VII(1), without doing violence to the command asserted in either article, (iii) U.S. public policy, and (iv) the analysis and diametrically opposite holding in *Chromalloy*.

The reference to the words "in this case" and to "United States public policy" deserve attention. Despite denial of the petition seeking confirmation, the Second Circuit's careful crafting of language to reflect that the holding is appropriate "in this case" suggests that Articles V and VII are not to be mechanically applied as a practically perfunctory task when faced with a petition seeking confirmance of an arbitral award vacated by competent tribunals in the rendering state. The particularities of the case at issue form and transform the applicable analysis. Stated otherwise, *Chromalloy* and *Baker Marine* are perfectly reconcilable opinions, and under one view, standing for this same doctrinal principle for the following two reasons; (i) *Chromalloy* does not stand for the proposition that a secondary state is obligated to affirm an arbitration award that has been nullified by a competent tribunal in the primary state or rendering state; (ii) *Baker Marine* does not stand for the proposition that a secondary state must dismiss a petition seeking confirmation of a award rendered in the primary state and nullified by a competent tribunal of the primary state. To the contrary, both opinions acknowledge, admittedly with less clarity than would be desired, that the tribunal in the secondary state, while not standing in judgment of the acts, omissions, and analysis of the competent tribunal of the primary state nullifying the arbitration award entered in that jurisdiction, engage in a reasoned analysis of whether *party-autonomy* was violated by the reviewing tribunal of the rendering state.

[23] *Id.*

There is no question but that the term *party-autonomy* appears nowhere in either the *Chromalloy* or the *Baker Marine* opinions. As also referenced, it is equally beyond dispute that the holdings in both cases are indeed diametrically opposed. What remains the same, however, is an analysis that does not purport to question the primary state's construction or application of its own substantive law, but rather whether in applying its substantive organic law and jurisprudence the competent tribunal of the rendering state did violence to the plain language of the arbitration agreement, i.e. the will of the parties, or stated doctrinally through the prism applied here for analysis, the principle of party- autonomy.

Instead of "deconstructing" its analysis to reflect the actual principle or principles around which the opinion is organized, both courts elect to articulate the more abbreviated, but less helpful, "rationale" that says that somehow the actions of the competent tribunal in the rendering state in *Chromalloy* offend U.S. public policy while the Nigerian court's vacatur comports with U.S. public policy. Thus, "U.S. public policy", nowhere defined in either opinion, is transformed into a conceptual "catch-all" clause that is but a please substituting the reasoned activity of judging whether the competent tribunal in the primary state disregarded *party-autonomy* or the plain language of the arbitration clause at issue, in applying its substantive law leading to the nullification of an arbitration award. The "public policy" referenced in both opinions is not the "public policy" enunciated in Article V(2)(b).[24] Therefore, without complete awareness but with keen analysis, the courts carefully crafted an implicit test with the nomenclature "public policy" that in effect constitutes a judicial standard consisting of a determination of whether the competent court in the rendering state vacated an award in such Manner as to disavow a material term of the arbitration clause[25].

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[24] In fact neither opinion rests any part of its rationale or holding on Article V(2)(b). This section is simply not even referenced.

[25] For completeness' sake, in *Hilmarton v. Omnium de Traitement et de Valorisation-OTV,* 20 Y.B. Com' Arb. 663 (1994), the French Court de Cass-

III. *TermoRio S.A. v. Electranta S.P.*: A New Doctrinal Development

An important doctrinal development on how best to address whether a secondary state indeed may decline a petition seeking confirmation, recognition, and enforcement for an arbitration award that was vacated in the rendering state by a competent tribunal as advanced by the D.C. Circuit in 2007 in *TermoRio S.A. v. Electranta S.P*[26]. Appellant TermoRio entered into a contract with Electrificadora del Atlantico S.A. E.S.P. ("Electranta") a state owned power utility pursuant to which TermoRio would

ation held that Article VII affords those parties seeking enforcement of foreign arbitration awards the right to take advantage of domestic law more favorable to enforcement than Article V. The parties had agreed to ICC arbitration in Geneva, where Swiss law would govern any dispute. After a controversy arose between the parties the arbitrator denied the claim holding that the contract violated Swiss public law. A Swiss Court annulled the award on the single ground that the arbitrator had misconstrued Swiss public policy. Despite the annulment, OTV sought to enforce the award in France under the New York Convention. Hilmarton asserted that the award had been vacated in Switzerland, the rendering state. The Court de Cassation disagreed and relied on Article 1502 of the French New Code of Civil Procedure, pursuant to which the annulment in the primary state does not constitute the ground for rejecting enforcement. The Court thus held that domestic French law favored OTV's application to enforce the annulled award.

To resolve the issues raised by the reference authority, a respected commentator had suggested that the New York Convention should be amended to eliminate the country of origin's power to vacate and arbitral aware. See Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 37 Tx. Int'l. L.J.* 43, 85-87 (2002). In this commentator's opinion, the country whose laws were applied to the controversy should be the only sovereign state with authority to vacate an award. This proposed solution, however, does not address the issue of the country of enforcement's discretion to enforce arbitration awards according to its domestic law. This discretion is contrary to the tenet of *uniformity* and causes potential conflicting decisions where one country vacates the award and another enforces it, without truly providing for any guidance for the resolution of such inevitable conflicts.

[26] Termorio S.A. v. Electranta, S.P 487 F.3rd 928 (C.A.D.C. 2007). *Vid. infra*, pp. 593-607.

generate energy for Electranta's purchase. Electranta, however, allegedly failed to meet its obligations under the contract and the dispute was submitted to an arbitration tribunal in Colombia consonant with the power purchase agreement. The tribunal ruled in favor of TermoRio, entering an award in excess of $60 million.[27] Upon issuance of the award, Electranta filed an extraordinary writ in a court in Colombia seeking to vacate the award. Colombia's highest ranking administrative court, the Consejo de Estado ("Counsel of State") vacated the award "on the ground that the arbitration clause contained in the parties' Agreement violated Colombian law"[28].

TermoRio filed an action in the district court against Electranta and the Republic of Colombia petitioning enforcement of the arbitral award. The district court dismissed the petition on multiple grounds, but most notably upon the finding that "there is nothing in the record here indicating that the proceedings before the Consejo de Estado were tainted or that the judgment of the Court is other than authentic, the district court was, as it held, obliged to respect it"[29]. The Circuit Court affirmed the judgment "holding that, because the arbitration award was lawfully nullified by the country in which the award was made, appellants have no cause of action in the United States to seek enforcement of the award under the FAA or the New York Convention[30].

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[27] *Id*. At 929.

[28] *Id*.

[29] *Id* The translated iteration of the arbitration clause at issue reads:

> Any dispute or controversy arising between the Parties in connection to the execution, interpretation, performance or liquidation of the Contract shall be settled through mechanisms of conciliation, amiable composition or settlement, within a term no longer than three weeks. If no agreement is reached, either party may have recourse to an arbitral tribunal that shall *be governed from in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce*. The tribunal shall be made up of three (3) members appointed by the Chamber, and shall be seated in the city of Barranquilla [Colombia]. The award, which shall be binding on the parties, must be rendered within a maximum tern of three months. *Id*.

[30] *Id* The Circuit Court clarified that it neither would adjudicate whether the doctrine of forum *non conveniens* may be applied by a district court to dismiss a petition seeking confirmation, recognition and enforcement award.

The opinion is comprehensive and particularly impressive because of the manner in which it fully integrates, into what may be synthesized as an analysis resting on eleven fundamental premises, no less than seven policy considerations. Foremost as a point of departure the Court revisited the vibrant national policy favoring alternative dispute resolution by arbitration. In this regard, it also placed considerable emphasis on the close connection between the need to have global enforceability of awards purporting to bring finality to private disputes in the area of private international law and a climate of economic globalization. Without necessarily articulating it in such terms, the Court appreciates the contribution of the concept of *party-autonomy* to dispute resolution in a climate of proliferating transnational commerce. It observed that "[a]s international trade has expanded in recent decades, so too has the use of international arbitration to resolve disputes arising in the course of that trade. The Convention's purpose 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 enforced in signatory countries." Moreover, the Court proceeded to note that "the utility of the New York Convention in promoting the process of international commercial arbitration depends upon the willingness of national courts to let go of matters they would normally think of as their own"[31].

Third, the Court, quite adroitly, examined how the Convention is a structured framework providing for different regimes of analyses attaching to a competent court in the primary state and a court of first instance in a secondary forum adjudicating a petition seeking confirmation of an award[32]. While certainly this

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Likewise, the Court declined to decide whether 9 U.S.C. section 302 incorporates the New York Convention instead of other legal provisions related to the New York Convention. Here the Court explains that because the "Panama Convention and the New York Convention are substantively identical for purposes of this case and neither party challenges the district court's analysis. We therefore resolve this matter with reference to and using the language of the New York Convention. *Id.* at 933.

[31] *Id.* at 933-34 (citing *Scherk v. Alberto-Culver Co.* and *Mitsubishi*), (citations and internal quotations and brackets omitted).

[32] The Circuit Court enunciated that:

observation is corroborated by the language contained in Article V(1)(e) (ostensibly according to the primary state all the latitude for vacating an award endemic to its national substantive law) and Article V as it pertains to the secondary state where confirmation, recognition, and enforcement is sought, the analysis substantively shies from crafting a standard or methodology that would provide uniformity and predictability to an enforcing court's exercise of discretion when adjudicating a petition seeking confirmation of an award that was vacated in the primary state. Indeed, the recitation of the dual standard applicable to rendering competent tribunals and secondary state courts adjudicating petitions for confirmation is helpful in identifying the general subject matter to be examined. The analysis, however, falls disappointingly short of drawing a cognizable distinction between the conceptual difference inherent in granting a petition for confirmation despite a vacatur entered by a competent tribunal of the primary state because it misapprehends a fundamental tern in the arbitration clause, and a tribunal in a secondary state confirming an arbitral award despite the nullification of such an award by a competent court of the primary state based upon the proposition that the award is contrary to the substantive law of that jurisdiction.

The identification of two regimes contained in the Convention for purposes of vacatur attaching to the primary state and the secondary state is certainly accurate, as represented in the opinion. Doubtless the primary state has the greater latitude accorded to it by the substantive law of its jurisdiction, while the secondary state is "limited" to those grounds enunciated in Arti-

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[T]he 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) the 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 flee 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. [citation omitted]. However, the Convention it equally clear that when an action for enforcement is brought in a foreign state, the state may refuse to enforce to award only on the ground explicitly in Article V of the Convention. *Id* at 935.

cle V of the Convention. The disappointment in the opinion is the want of a synthetic extrapolation based upon *Chromalloy*, *Baker Marine*, and the very fact pattern underlying TermoRio. The analysis would be quite simple.

Without impairing the rights accorded to parties arbitrating in the primary state; that is to respecting the primary state's jurisdiction over an award for review and nullification purposes, a secondary state would be invested with a nonnative ground for nullification where the primary state disregarded a material teen in the arbitration clause. This single analysis, which is succinct and quite readily applicable where warranted, as it is easily identifiable, would reconcile the "tension" between the primary state and the secondary state concerning nullification and confirmation issues. Also, such analysis would harmonize any ostensible or surface inconsistencies between the "infamous" permissive "*may*" contained in Article V and the strictures enunciated in Article VII concerning rights of enforcement. Despite distinguishing *Baker Marine* from *Chromalloy* on this ground, the Court of Appeals was hesitant to fashion a test or "rule of law" that would generate uniformity, predictability, certainty, party-autonomy, and transparency of applicable standard.

(i) Deconstructing *TermoRio*: Engrafting Normative Legal Status On A Policy Tenet

The identification of the primary state entails, upon reading the opinion, a more complex analysis than merely identifying the arbitral seat, which usually defines the rendering state or jurisdiction. The *indicia* defining a primary state entails

(i) parties' nationality,

(ii) place of performance,

(iii) arbitral seat,

(iv) place of transaction or occurrence, and

(v) an analysis of the totality of circumstances, including party expectation[33].

Moreover, as to the secondary state, the Court of Appeals commented on the public policy reasoning so clearly articulated in *Baker Marine*. It pronounced that "[t]he Court [the Second Circuit] also remarked on the undesirable consequences that would likely follow from adoption of *Baker Marine*'s argument: as a practical matter, mechanical application of a domestic arbitral award to foreign awards under the Convention would seriously undermine finality and regularly produce conflicting judgments. If a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of the other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement[34]. Accordingly, the Court of Appeals reasoned that adoption of appellants' argument would undermine the very principles that the Convention precisely seeks to preserve and promote; "an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully `set aside' by competent authority in the State in which the award was made. This principle controls the disposition of this case"[35].

Again, this very important policy consideration certainly deserves to be highlighted and stressed, but it cannot be elevated to the level of a binding norm or controlling judicial construct. A policy argument is precisely that, a proposition that has consequences beyond an immediate case and that therefore must be considered in any adjudicative process, irrespective of the facts or the particular controversy. Hardly, however, should such policy be case dispositive or otherwise deemed so overwhelming in

[33] *Id.* At 935.

[34] *Id.* at 936 (citing *Baker Marine*, 191 F.3d at 197 n.2 (quoting A.J. van den Berg, The New York Arbitration Convention of 1958: *Towards a Uniform Judicial Interpretation* 355 (1981)).

[35] *Id.*

character and nature so as to engulf any other consideration. In addition, a policy attendant to a rule of law is too general and thus lends itself to the pernicious practice of mechanical application rather than the reasoned analysis incident to the application of a legal precept to a fact pattern.

The battle of underlying policies between Article V(1)e and Article VII was deftly addressed. The Court itself identified the dangers endemic to engrafting upon a policy consideration nonnative judicial character. In the context of distinguishing *Chromalloy*[36], it noted that "appellants are simply mistaken in suggesting that the Convention policy in favor of enforcement of arbitration awards effectively swallows the command of Article V(1)(e). A judgment whether to recognize or enforce an award that has not been set aside in the State in which it was made is quite different from a judgment whether to disregard the action of a court of competent authority in another state"[37].

The question ultimately did not rest, as examined by the Circuit Court, on the issue of disregard for a foreign tribunal's modification or nullification of an arbitral award rendered within its jurisdiction. Instead, considerable weight is placed on the need to recognize that a court in a secondary state or more specifically U.S. courts, neither are invested with unfettered authority to confirm an award in direct defiance of a judgment nullifying that very award nor privileged to "go behind an

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[36] On this point the Court noted:

"We need not decide whether the holding in *Chromalloy* is correct, because, as appellees point out, 'the present case is plainly distinguishable from *Chromalloy* where an express contract provision was violated by pursuing an appeal to vacate the award. Here, Electranta preserved its objection that the panel was not proper or authorized by law, promptly raised it in the Colombian courts, and received a definitive ruling by the highest court on this question of law.'" *Id.* at 937.

[37] *Id.* at 937; see also *Yusuf Ahmed Alghanim & Sons v. Toys R Us, Inc.*, 126 F.3d 15, 23 (2d Cir. 1997) (holding that "[t]he 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").

award" in the *absence of extraordinary circumstances*[38]. Accordingly, the analysis in determining confirmation where a competent court of the rendering state nullified an award rests on a finding of "extraordinary circumstances" that the court did not find present.

The analysis, however, did not limit itself merely to considerations pertaining to the confirming court in the secondary state. To be sure, the Court of Appeals went so far as to articulate the borders of the test of public policy arising from Article V(2)(b). In this regard the Court understood that such a standard "cannot be simply whether the courts of a secondary state would set aside an arbitration award if the award had been made and enforcement sought within its jurisdiction . . . [T]he Convention contemplates that different Contracting States may have different grounds for setting aside arbitration awards"[39]. Thus, the Court concluded, "it is unsurprising that the courts have carefully limited the occasions when a foreign judgment is ignored on grounds of public policy[40].

The eighth premise upon which the Court predicated affirmance arose from the Convention's history emphasizing that parties are empowered to seek to vacate or modify an award in the rendering state pursuant to the law of that jurisdiction. According to the Court's analysis "the language and history of the

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[38] *TermoRio*, 487 F.3rd at 938.

[39] *Id.* at 938.

[40] *Id.* The public policy ground for determining whether to credit the judgment of a court in the primary state vacating an arbitration award has been the subject matter of extensive commentary. The Court of Appeals quite judiciously articulated the standard and cited some of the better known comments on the subject:

> A judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the state where enforcement is sought. [citations and internal quotations omitted]. The standard is high and infrequently met. As one court wrote, '[o]nly in clear-cut cases ought it to avail defendant.' [citation omitted]. In the classic formulation, a judgment that 'tends clearly' to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or of private property is against public policy.

Convention make it clear that such a motion is to be governed by domestic law of the rendering state"[41].

Ninth and finally, a classical analysis of the elements defining "primary state status" was undertaken. No less than six factors were considered:

(i) the matter was deemed "a peculiarly Colombian affair" because it concerned Colombian parties,

(ii) a service contract with Colombia as a place of performance,

(iii) the contract spawned an arbitration in Colombia,

(iv) the Colombian arbitration decision led to litigation in Colombia,

(v) the parties agreed to be bound by the laws of Colombia, and

(vi) the Consejo de Estado is the highest ranking expositor of Colombian law.

When these factors are considered in their totality, together with a complete absence of any wrongful or aberrant treatment of the terms of the arbitration clause at issue, the Court of Appeals found yet additional support for its affirmation of the district court's ruling.

(ii) Seeking Order From Chaos

Certainly the *TermoRio v. Electranta* opinion suggests a specific doctrinal development that superficially appears to favor allocating a competent tribunal in a primary state broad and almost unfettered non-reviewable discretion, absent the most extreme and egregious conduct, to determine the validity of an arbitration award rendered in its jurisdiction and applying the

[41] *Id.* at 939.

substantive law of the primary state. The corollary to this proposition is that the secondary state is extraordinarily limited in confirming an award that previously had been vacated by a competent tribunal in the rendering state. The trend, however, is much deeper and complex.

It is significant to note that *Chromalloy* and *Baker Marine* remain binding jurisprudence. Moreover the Court of Appeals in TermoRio certainly did not reverse or even criticize *Chromalloy*. The opinion limited its treatment of *Chromalloy* simply to distinguishing it from the case before it. In this same vein, the reasoning in *Baker Marine* was not exalted over that embodied by the *Chromalloy* opinion. The Court of Appeals correctly gleaned that *Baker Marine* was procedurally and factually closer to the TermoRio facts and juridic development than *Chromalloy*. While indeed the Court of Appeals does characterize its holding as standing for the proposition that the district court did not err in dismissing appellants' claim to enforce the disputed arbitration award[42], its analysis does provide for fertile ground meriting further examination.

IV. The Need for a Polestar: A Secondary Tribunal's Dilemma and Solution

Despite the Convention's sophisticated framework contemplating different regimes for the review of arbitration awards in primary and secondary states, neither the Convention's language nor the analysis in *TermoRio* set forth a transparent standard to be applied by courts in secondary states reviewing awards vacated or modified by competent tribunals of the primary state, although *TermoRio*'s treatment of *Chromalloy* may implicitly have done so, as already has been suggested. By neither criticizing nor reversing *Chromalloy*, the appellate court implicitly, if not altogether explicitly, crafted a standard of review for courts in secondary states that does not place these tribunals in the awkward and inadequate position of sitting in judgment of a

[42] *Id.* at 933.

foreign court's interpretation, construction, and application of its own substantive law, which presumably is foreign to the courts in the secondary states.

The test is simple. Where a competent tribunal in the rendering state vacates an arbitral award and in so doing disregarded a material term in the arbitration clause that would have directly affected the adjudication of vacatur, a court in a secondary state, where confirmation of the award was vacated in the primary state is sought, should be rightfully empowered to grant the petition seeking confirmation despite the competent tribunal's vacatur or modification in the rendering state. No doubt the test is far from perfect, but it does enjoy the virtues of simplicity, ease of application, and does not place the courts in secondary states in the virtually untenable posture of rendering judgment as to the manner in which a foreign tribunal interpreted and applied its own substantive law. Moreover, the proclivity or penchant that parties whose awards have been vacated by competent tribunals in the rendering state may have in attempting to secure recognition, confirmation, and enforcement of a vacated award by applying to multiple courts *in seriatum* in the hope of reversing the rendering state's court pronouncement, is significantly mitigated, if not altogether dispelled from a practical perspective.

Queries certainly do remain with respect to what, for example, may constitute a material term in an arbitration clause? Similarly, it is conceivable that the concept of "harmless error" may apply to a vacatur issued by a competent tribunal in the rendering state with respect to some provision in the applicable arbitration clause. Still, some may view this paradigm as an unwarranted limitation foisted upon a tribunal by a foreign tribunal (that of the secondary state reviewing a petition for confirmation). Under this view, any formal amendment to the Convention or the development of jurisprudence promoting this test would be construed as a violation of international law in that it may be construed to constitute an undue interference with a sovereign's exercise of its sovereignty through the judicial system. These issues cannot find immediate formulistic resolution.

(a) Limiting The Primary Tribunal: A New Role For The Judiciary

A competent tribunal of the rendering state should not be accorded unbridled discretion in applying the substantive law of its jurisdiction pursuant to papers seeking vacatur of an arbitration award without accountability where material provisions of the arbitration clause have been ignored or violated to justify nullification. A return to fundamental doctrine is important in analyzing this issue. Even though it is here recognized that neither domestic nor international commercial arbitration can exist without judicial intervention of some kind, thus rendering relevant and inevitable the development of transnational courts of civil procedure with jurisdiction over private claims arising from cross-border disputes, it is essential to the integrity of arbitration as an alternative dispute resolution methodology for judicial intervention to be minimized. By *minimized* it is suggested that the role of the judiciary be circumscribed to that of a facilitator subordinate to the arbitral process. Because arbitration is governed by the precept of *party-autonomy*, even in its very jurisdictional genesis as a creature of contract, and its goal is but the specific resolution of disputes between parties and not the equitable administration of justice through the implementation of statutory and case law in furtherance of social policies that transcend the particular dispute at issue, bestowing upon a competent tribunal in the rendering state unbridled appellate review, certainly does violence to the most important of principles underlying arbitration as an alternative dispute resolution methodology. Thus, "*minimize*" as used here connotes a *qualitative* (not quantitative) change in the relationship between courts and arbitral proceedings such that courts are "limited" to facilitating the implementation of the arbitral tribunal's rulings, as, for example, with the compulsion of hostile or otherwise recalcitrant witnesses. It does not connote or denote a mere "lessening" of judicial intervention.

The *TermoRio* opinion is fundamentally positive in at it does appear to have reached the fight result. Its reliance on public policy does seem to engraft upon such concerns the semblance of normative value. Instead, the legal community would have been better served were greater emphasis placed on developing the conceptual categories that a court in a secondary state adjudicating a petition seeking confirmation, recognition, and enforcement of an arbitration award that has otherwise been vacated, nullified, or modified by a competent tribunal in a primary state, should use as a guidepost. Lastly, the Court's trepidation in seeking to harmonize the surface tensions in the language contained in Article V (providing a court with authority to refuse recognition of an arbitration award) and Article VII (granting parties the right to avail themselves of any right they may possess to enforce an arbitral award in a jurisdiction where such an award is expected to be relied on.) This issue is inextricably intertwined with the lack of doctrinal development applicable to the principles governing the relationship between rendering state tribunals and secondary state courts.

V. Conclusion

Under any analysis, the *Chromalloy*, *Baker Marine* and TermoRio trio must be understood as a significant first step towards the development of a comprehensive regime that will redefine the role of courts:

(i) in rendering states reviewing arbitration awards,

(ii) with respect to the nature of their intervention in arbitral proceedings,

(iii) as between competent tribunals in rendering states and tribunals in secondary states called to reach diametrically opposite results, and

(iv) such that the fundamental precepts of *party-autonomy*, uniformity, predictive value, and transparency of standard are furthered.

Reasoned examination does suggest that the *Chromalloy*, *Baker Marine*, and TermoRio trilogy indeed answer, at least at a preliminary level that excludes application of analytical jurisprudence, four inquiries that compel scrutiny. First, does the Convention's regime contemplate having a court in a secondary state sit in judgment of a tribunal in the primary state to determine whether the tribunal in that state properly applied its own substantive law in vacating or otherwise suspending an arbitration award, the rendition of which, by the arbitral tribunal, comports with the substantive law of the secondary state? Second, is this philological nonnative basis to be taken seriously, and if so how? Third, are tribunals in the secondary state where enforcement is sought best placed, or competent at all, to sit in judgment of the legal analysis underlying the vacatur of an arbitration award by the primary state? Fourth, would investing secondary states with the ability to sit in judgment of vacatur proceedings undertaken by the primary state provide the nonprevailing party with an incentive to apply to multiple secondary signatory states for confirmation of the award vacated in the primary state?

What remains then are not answers to questions but methodologies to be developed so as to arrive best at these answers in a manner that is consonant with the fundamental precepts that form and transform arbitration: a happy fiftieth birthday offered to our beloved Convention is a befitting end to this modest note.

ABSTRACT: There is tension between articles V(1)(e) and VII(1) of the New York Convention but they are not irreconcilable. There is also tension between the US policy supporting confirmation of foreign arbitral awards and the deference to be accorded to a tribunal that vacates an arbitration award rendered in its jurisdiction. Nevertheless, the Chromalloy, Baker Marine and TermoRio decisions may be harmonised and provide for a test with which to ascertain the role of courts in arbitral proceedings and whereby, if a competent tribunal in the state where an arbitral award was rendered va-

cates the award and in so doing disregards a material term in the arbitration clause that would have directly affected the adjudication of *vacatur*, a court in the state where recognition is sought should be rightfully empowered to grant the petition seeking confirmation of the award despite the competent tribunal's *vacatur* or modification in the rendering state.

KEY WORDS: INTERNATIONAL COMMERCIAL ARBITRATION - NEW YORK CONVENTION - ANNULLED AWARD - RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARD

RESUMEN: Existe tensión entre los artículos V(1)(e) y VII(1) del Convenio de Nueva York, pero no son irreconciliables. También hay tensión entre la política de los Estados Unidos favorable al reconocimiento de laudos arbitrales extranjeros y el respeto que se debe a un tribunal que anula un laudo arbitral dictado en su propio estado. Sin embargo, las sentencias dictadas en los casos Chromalloy, Baker Marine y TermoRio pueden ser armonizadas y proporcionar un test con el que establecer el papel de los tribunales ordinarios en los procedimientos arbitrales: si el tribunal competente, en el Estado en el que el laudo arbitral fue dictado, anula dicho laudo y al hacerlo pasa por alto una parte sustancial del contenido del convenio arbitral, que hubiera afectado la decisión sobre nulidad, un tribunal del Estado en el que se solicita el reconocimiento puede conceder en Derecho dicho reconocimiento, a pesar de la nulidad o modificación lograda en el Estado en que se dictó el laudo.

PALABRAS CLAVE: ARBITRAJE COMERCIAL INTERNACIONAL- CONVENIO DE NUEVA YORY. ANULACIÓN DEL LAUDO – RECONOCIMIEN TO Y EJECUCIÓN DE LAUDOS ARBITRALES EXTRANJEROS