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UNIFIED NATIONAL LEGAL TREATMENT OF INTERNATIONAL COMMERCIAL ARBITRATION: A CONTINUING CHALLENGE (*)

By Horacio A. Grigera Naón¹

The continuous expansion of International Commercial Arbitration translates into newly forged national legislations and important case law developments that have revisited basic principles of arbitration law. To mention but a few, France,² Mexico,³ Costa Rica,⁴ and Florida⁵ have all, to different degrees, revised the legislative and regulatory frameworks that governed arbitration in their respective jurisdictions.⁶

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² Décret No 2011-48 du 13 Janvier 2011 portant réforme de l'arbitrage [Decree No 2011-48 of January 13, 2011 on the Reform of Arbitration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Jan. 11, 2011.

³ Código de Comercio [cód. com.][Commercial Code], as amended, Diario Oficial de la Federación [D.O.], 27 de Enero de 2011 (Mex.) (Articles 1415 — 1480 of the Commercial Code; Daily Official Gazette, 27 January 2011 — the “Revision.”); Francisco González de Cossio, *Amendments to the Mexican Arbitration Statute*, 1 INT’L COM. ARB. BRIEF Issue 2, page 6; Nadia Darwazah & Baptiste Rigauadeau, *Clues to Construing The New French Arbitration Law*, 28 J. INT’L ARB. 381 (2011).

⁴ Ley No. 8937, Ley sobre Arbitraje Comercial Internacional basada en la Ley Modelo de la Comisión de las Naciones Unidas para el Derecho Mercantil Internacional (CNUDMI).

⁵ Bill CS/HB 821 modifying Florida Statutes Chapter 684. (effective on July 1, 2010). The 2010 Florida Statutes, Title XXXIX Chapter 634 on International Commercial Arbitration, FLA. STAT. ANN. § 684 (West 2010).

⁶ Although recent modifications of international arbitration rules are not the subject of this paper, mention should be made of the new International Chamber of Commerce Arbitration Rules coming into effect in 2012. ICC Dispute Resolution Rules, 2012 Rules of Arbitration, available at <http://www.iccwbo.org/court/arbitration/id4199/index.html>. See also, Nathalie Voser, *Overview of the Most Important Changes in the Revised ICC Arbitration Rules*, 29 ASA BULL. 783 (2011) (providing a succinct examination of the most significant revisions implemented by the 2012 ICC Rules); Arzu Ongur Ergun, *The New [2012] Arbitration Rules of International Chamber of Commerce [“ICC”]*, 4 ANKARA B. REV. 81 (2011).

However, far from showing convergence in their approaches, such developments often illustrate recurring differences in dealing with primary issues of international commercial arbitration. Such differences naturally impact this field's continuing evolution, and contrast with the seemingly growing consensus on procedural matters developed by practitioners and arbitrators within the four corners of the arbitral procedure.⁷

In the United States, a string of recent U.S. Supreme Court decisions has dealt with the pivotal issue of authority repartition between arbitrators and courts.⁸ These decisions, which have mostly occurred in domestic labor and employment cases, raised policy issues normally not at stake in international commercial arbitration.⁹ However, these rulings have not expressly dealt with the interpretation of the scope of an international arbitration agreement—especially in light of the national policy favoring the enforceability of international arbitration clauses.¹⁰ This distinction is all the more important since, in domestic cases, such policy favoring arbitration does not extend to issues pertaining to the existence, validity, or enforceability of the arbitral agreement.¹¹

⁷ See Bernard Hanotiau, *International Arbitration in a Global Economy: The Challenges of the Future*, 28 J. INT'L ARB. 89, 91 (2011) (observing that the globalization of the economy and the increase of international arbitration as the preferred method of dispute resolution have contributed to a convergence and harmonization in the rules governing arbitration); see also Radicati Di Brozolo, *The Impact of National Law and Courts on International Commercial Arbitration: Mythology, Physiology, Pathology, Remedies and Trends*, PARIS J. INT'L ARB. 663 (2011) (“The consequence of this change in State attitudes is that international commercial arbitration is less and less influenced and limited by domestic legal systems and controls.”).

⁸ *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010); *Rent-A-Center, W., Inc. v. Jackson*, 130 S. Ct. 2772 (2010); *Granite Rock v. Intern. Broth. of Teamsters*, 130 S. Ct. 2847 (2010); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

⁹ For example, in the areas of labor and employment law, the cases *Rent-a-Center* and *Granite Rock* are essentially concerned with balancing employer-employee interests in light of the agreed upon arbitration clause.

¹⁰ Especially regarding U.S. Supreme Court decisions in the seminal cases *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) and *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). In these cases the tribunal applied a pro-arbitration interpretation policy in construing and enforcing arbitration agreements.

¹¹ See *Granite Rock Co. v. Int'l Broth. of Teamsters*, 130 S. Ct. 2847, 2957-58 (2010) (emphasizing that in labor disputes, as in other disputes, the permissive policies favoring arbitration only apply once the validity and existence of the arbitration agreement have been properly asserted).

Also referred to as gateway or threshold issues,¹² these issues were recently addressed by the U.S. Supreme Court in *Rent-a-Center West Inc. v. Jackson*,¹³ *Granite Rock Company v. International Brotherhood of Teamsters*,¹⁴ and *AT&T Mobility LLC v. Concepcion*.¹⁵

In *Rent-a-Center*, the Court held that where the issue of arbitrability itself has been expressly delegated to the arbitrators, the question of whether the arbitration agreement was unconscionable was to be decided by the tribunal and not by the courts.¹⁶ In that case, the claimant, Mr. Jackson filed an employment discrimination suit against his former employer, Rent-a-Center West Inc., in the United States District Court for the District of Nevada.¹⁷ In response, Rent-a-Center filed a motion to dismiss the claim and compel arbitration.¹⁸ Mr. Jackson objected to the motion arguing that the arbitration agreement was unconscionable and therefore unenforceable.¹⁹ Rent-a-Center contended that because the arbitration agreement allocated the issue of enforceability to the arbitrator's exclusive authority, the question of whether the agreement was vitiated by unconscionability—and thus unenforceable—fell within the ambit of the arbitrator's jurisdiction.²⁰ The District Court granted Rent-a-Center's motion but failed to address Jackson's procedural unconscionability arguments.²¹ On appeal, the Ninth Circuit reversed in part and held that where "a party challenges an arbitration agreement as unconscionable, and thus asserts that he could not meaningfully assent to the agreement, the threshold question of unconscionability is for the court."²²

¹² *Rent-A-Center*, 130 S. Ct. at 2777 (observing that "parties can agree to arbitrate 'gateway' questions of arbitrability,' such as whether the parties have agreed to arbitrate or whether their agreement covers a particular controversy) (citing *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444, 452 (2003)).

¹³ 130 S. Ct. 2772 (2010).

¹⁴ *Granite*, 130 S. Ct. at 2847.

¹⁵ *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

¹⁶ *Rent-A-Center*, 130 S. Ct. at 2780.

¹⁷ *Jackson v. Rent-a-Car-Center-West, Inc.*, No. 03:07-CV-0050-LRH (RAM), 2007 WL 7030394 (D. Nev. June 6, 2007).

¹⁸ *Id.*

¹⁹ *Id.* at 2.

²⁰ *Id.* at 3.

²¹ *Id.* (refusing to examine the procedural unconscionability arguments raised by Jackson because the doctrine of unconscionability requires satisfaction of both substantive and procedural elements, and here, the substantive prong was not met).

²² *Jackson v. Rent-a-Center W., Inc.*, 581 F.3d 912, 920 (9th Cir. 2009).

Writing for the majority, Justice Scalia reversed the judgment of the Court of Appeals for the Ninth Circuit and affirmed once more the principle that, unless the parties have clearly and unequivocally delegated the decision of such matter to the arbitrators, it is for the courts to decide on the validity, enforceability, and scope of the arbitration clause—and not for the arbitrators.²³ In *Rent-a-Center*, the arbitration clause expressly referred its interpretation, formation and enforceability to the arbitrators.²⁴ More interestingly, the Court reasoned that because Mr. Jackson had not specifically invoked the unconscionability of the provision that expressly delegated the issue of arbitrability to the arbitrators,²⁵ then, as a consequence, it was for the arbitrators to decide on the alleged unconscionability of the arbitration clause.²⁶ In referring the case to arbitration, the Court applied the *Prima Paint/Buckeye* rationale and considered the arbitration clause a separate contract.²⁷

Likewise, in *Granite Rock Company v. International Brotherhood of Teamsters*,²⁸ the U.S Supreme Court reiterated the principle pursuant to which gateway issues are to be determined by the courts except where the parties have expressly delegated the decision of such issues to the arbitrators.²⁹

²³ *Rent-a-Center*, 130 S. Ct. at 2778.

²⁴ The Mutual Agreement to Arbitrate Claims contained in his employment contract read: “[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relation to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable.” *Rent-A-Center*, 130 S.Ct. at 2775 (2010).

²⁵ *Id.* at 2779 (“[a]ccordingly, unless Jackson challenged the delegation provision specifically, we must treat it as valid under § 2, and must enforce it under §§ 3 and 4, leaving any challenge to the validity of the Agreement as a whole for the arbitrator”).

²⁶ *Id.*

²⁷ *Id.* Under *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967), challenges to the validity of the contract containing the arbitration clause are to be determined by the arbitrators. However, challenges to the validity of the arbitration clause itself are to be decided by the courts of law. In *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006), the same reasoning applied when objections to the jurisdiction of the arbitrators was premised on a stale statute invalidating the contract covered by the arbitration clause.

²⁸ 130 S. Ct. 2847 (2010).

²⁹ *Granite Rock Co. v. Int’l Broth. of Teamsters*, 130 S. Ct. 2847, 2858 (2010) (“[O]ur precedents hold that courts should order arbitration of a dispute only where the court is satisfied that neither the formation of the parties’ arbitration agreement *nor* (absent a valid provision specifically committing such disputes to an arbitrator) its enforceability or applicability to the dispute is in issue.”).

Framed differently than *Rent-a-Car*, the dispute in *Granite Rock* turned not on *whether* but on “*when* the CBA [collective bargaining agreement] that contain[ed] the parties’ arbitration clause was ratified and thereby formed.”³⁰ In *appearance*, the issue was thus tailored as one of time and not existence. Yet, as the Court pointed out, the conceptual boundary that separates the two notions is artificial at best, articulating that the question of time was necessarily subsumed under the broader question of existence.³¹

In *Granite Rock*, the parties agreed that the District Court had jurisdiction to determine the arbitrability of their ‘date-of-ratification’ dispute. However, they disagreed on the outcome of that decision, respondent Local contending that the District Court erred in finding that CBA’s ratification date was an issue for the court to decide.³² The Court of Appeals agreed and reversed the District Court’s judgment, holding that the CBA’s arbitration clause controlled the parties’ issue for three reasons. In reaching this conclusion, the court considered the following: (1) the clause clearly covers the related strike claims;³³ (2) the ‘national policy favoring arbitration’ requires that any ambiguity concerning the scope of the parties’ arbitration clause be resolved in favor of arbitrability;³⁴ (3) Granite Rock ‘implicitly’ consented to arbitrate the ratification-date dispute ‘by suing under the contract.’³⁵

The U.S. Supreme Court reversed.³⁶ Reiterating the *First Option/Buckeye* rationale, as well as its more recent *Rent-a-Center* judgment, the Court held that courts should compel arbitration only when the court considers that there are no issues regarding the formation of the parties’ arbitration agreement or its applicability to the dispute.³⁷ Where a party contests either or both matters, the court must resolve the disagreement.³⁸

³⁰ *Id.* at 2856.

³¹ *Id.* at 2860 (“for purposes of determining arbitrability, *when* a contract is formed can be as critical as *whether* it was formed.”).

³² *Id.*

³³ Granite Rock Co. v. Int’l Broth. of Teamsters, 546 F.3d 1169, 1177 (9th Cir. 2008).

³⁴ *Id.* at 1178.

³⁵ *Id.*

³⁶ Granite Rock Co. v. International Broth. of Teamsters, 130 S. Ct. 2847, 2866 (2010).

³⁷ Absent a valid provision specifically committing such disputes to an arbitrator. *Id.* at 2855-56.

³⁸ *Id.* at 2857-58.

The Court further clarified that the question of *when* a contract is formed is not necessarily different from the question of *whether* it was formed at all. Quite logically, until the contract comes into effect, the contract is not formed, and the same goes for the arbitration agreement stipulated therein. Consistent with that approach, the *when* issue is subsumed under the *whether* determination.³⁹

To determine when the matters allegedly covered by the arbitration clause become effectively arbitrable, one must first determine when the underlying contract came into effect and whether the parties ever consented entering into an effective agreement on the alleged date. Indeed, absent a distinct stipulation as to the arbitration clause's effective date, if the main contract does not enter into effect, then the arbitration agreement does not come into effect.⁴⁰ Accordingly, determining the arbitration clause's timeliness issue amounts to determining when the main contract began to exist—which is a determination for the courts. In other words, if the question of timeliness—i.e. when the arbitration agreement comes into effect and when the matters covered by the clause become arbitrable—amounts to a determination of whether the parties to the main contract consented to enter into such an agreement on a specific date, then the timeliness issue falls within the court's jurisdiction—and not to the arbitrator.⁴¹

In *AT&T Mobility v. Concepcion*,⁴² a decision on a motion to compel arbitration, the U.S. Supreme Court, showing little sympathy for class action arbitrations, rejected the argument that the arbitration clause was unconscionable because it prohibited parties from having recourse to

³⁹ *Id.* at 2860 (stating that “as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether agreement’s provisions were enforceable during the period relevant to the parties’ dispute.”).

⁴⁰ Unless there is a distinct stipulation as to the arbitration clause's effective date. *Id.* at 2860 (“for purposes of determining arbitrability *when* a contract is formed can be as critical as *whether* it was formed. That is the case where, as here, the date on which an agreement was ratified determines the date the agreement was formed, and thus determines whether the agreement’s provisions were enforceable during the period relevant to the parties’ dispute.”).

⁴¹ *Id.*

⁴² *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

class-action proceedings.⁴³ In 2002, Vincent and Liza Concepcion signed an agreement with AT&T for the sale and service of cellular phones.⁴⁴ The phones purchased by the Conceptions from AT&T were advertised as free. However, AT&T charged the Conceptions sales tax based on the phones' retail value.⁴⁵ To challenge this practice, the Conceptions sued AT&T in the United States District Court for the Southern District of California. Their complaint, which alleged *inter alia* that AT&T had engaged in false advertisement and fraud,⁴⁶ was later consolidated in a class action.

In 2008, AT&T opposed such consolidation and moved to compel arbitration under the terms of its contract with the Conceptions.⁴⁷ The Conceptions objected to AT&T's motion, contending that the arbitration agreement's prohibition of class-action proceedings was "unconscionable and unlawfully exculpatory" under California law.⁴⁸ Despite viewing the arbitration agreement favorably, the District Court ultimately denied AT&T's motion and sided with the Conceptions.⁴⁹ On appeal, the Ninth Circuit affirmed, holding that the arbitration agreement was

⁴³ The clause specifically provided that "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." *Id.* at 1744. The U.S. Supreme Court showed a similar lack of sympathy in *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758 (2010), a case in which it decided to reverse a decision to vacate a partial award holding that class arbitration was not excluded pursuant to a clause "silent" on that issue.

⁴⁴ 131 S. Ct. at 1744.

⁴⁵ *Id.*

⁴⁶ By charging sales tax on phones it advertised as free.

⁴⁷ The cell phone contract provided for arbitration of all disputes but disallowed class action arbitrations. *Id.*

⁴⁸ 131 S. Ct. at 1745.

⁴⁹ In doing so, the District Court held that the arbitration clause was unconscionable because AT&T had not shown that bilateral arbitration adequately substituted for the deterrent effects of class actions. 131 S. Ct. 1740, 1745. The District Court's decision was based on *Discover Bank Laster v. AT&T Mobility L.L.C.*, 36 Cal. 4th 148, 162-65 (2005) where the court found that (1) a waiver of class arbitration in a consumer contract of adhesion is unconscionable under certain circumstances and should not be enforced, and (2) prohibition of class action waivers in arbitration agreements is not preempted by the FAA. 131 S. Ct. 1740, 1745 (citing *Laster v. AT&T Mobility Inc.*, 584 F.3d 849, 857 (9th Cir. 2009)).

unconscionable and that the *Discover Bank* rule⁵⁰ was not preempted by the FAA.⁵¹

Granting certiorari, the U.S. Supreme Court had to resolve whether § 2 of the FAA preempted the Supreme Court of California's decision in *Discover Bank*.⁵² The outcome of that initial determination conditioned whether the Ninth Circuit had correctly denied AT&T's motion to compel arbitration or not.

The Court began its analysis by characterizing § 2 as the embodiment of a liberal federal policy favoring arbitration.⁵³ Central to this characterization is the principle that courts must place arbitration agreements on equal footing with other contracts and enforce them according to their terms.⁵⁴ Sometimes referred to as the saving clause, the last clause in § 2 authorizes agreements to arbitrate to be invalidated by generally applicable contract defenses, such as fraud, duress, or unconscionability.⁵⁵ However, such defenses cannot operate if they solely target arbitration.⁵⁶

The Court observed that California courts have frequently invoked the saving clause to find arbitration agreements unconscionable. In fact,

⁵⁰ Holding waivers of class-arbitration in consumer contracts unenforceable.

⁵¹ In *Discover Bank*, the California Supreme Court applied California's doctrine of unconscionability to class-section waivers in arbitration agreements and held: "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then... the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced." *Discover Bank v. Superior Court of Los Angeles*, 113 P.3d 1100, 1110 (Cal. 2005). The Ninth Circuit observed that such interpretation of California law did not discriminate against arbitration—which the FAA prohibits—and that "class proceedings will reduce the efficiency and expeditiousness of arbitration." Additionally, it noted that *Discover Bank* placed arbitration agreements with class-action waivers on the exact same footing as contracts that bar class-action litigation outside the context of arbitration.

⁵² That is, the rule automatically classifying most collective arbitration waivers in consumer contracts as unconscionable.

⁵³ See 131 S. Ct. at 1744 ("Section 2 of the Federal Arbitration Act (FAA) makes agreements to arbitrate 'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'").

⁵⁴ *Id.*

⁵⁵ 9 U.S.C. § 2.

⁵⁶ *Id.* at 1746.

the *Concepcions* argued that the *Discover Bank* rule, given its roots in California's unconscionability doctrine and policy against exculpation, fell within the boundaries of the saving's clause since the unconscionability doctrine upon which it rests "exists at law or in equity for the revocation of any contract."⁵⁷

According to the Court, when State law prohibits the arbitration of a particular type of claim, the FAA displaces the conflicting rule. But the question remains when, as here, a doctrine generally thought to be applicable is alleged to operate in a fashion that disfavors arbitration. To answer that question, the Court reiterated its reasoning in *Perry v. Thomas*.⁵⁸ Although § 2's saving clause preserves generally applicable contract defenses, it certainly does not safeguard state law rules that impair and hinder the accomplishment of the FAA's objectives.⁵⁹ Siding with AT&T, the Court ultimately concluded that the arbitration agreement was not unconscionable because "requiring the availability of class-wide arbitration interfere[d] with fundamental attributes of arbitration and thus create[d] a scheme inconsistent with the FAA."⁶⁰

Evidenced by the above decisions, the Supreme Court's approach contrasts with the French approach to both domestic and international arbitrations.⁶¹ According to French arbitration law, it is for the arbitrators to decide matters concerning their own jurisdiction—including any jurisdictional objections as to the existence, validity, and scope of the

⁵⁷ *Id.* at 1747.

⁵⁸ 482 U.S. 483, 492 (1987) (noting that the FAA's preemptive effect might even extend to grounds traditionally thought to exist 'at law or in equity for the revocation of any contract.').

⁵⁹ 131 S. Ct. at 1748 ("[A] federal statute's saving clause "cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself.") (citing *American Telephone & Telegraph v. Central Office Telephone, Inc.*, 524 U.S. 214, 227-28 (1998)).

⁶⁰ 131 S. Ct. at 1748.

⁶¹ *See* Décret No 2011-48 du 13 Janvier 2011 portant réforme de l'arbitrage [Decree No 2011-48 of January 13, 2011 on the Reform of Arbitration], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Jan. 11, 2011 (entrenching a little further the principle of *compétence-compétence* pursuant to which french courts, unlike U.S. courts, must affirmatively decline jurisdiction over any issue arising under a matter covered by an arbitration agreement, and notably in situations where such issue touches the parties' consent to arbitration).

arbitration agreement.⁶² Indeed, pursuant to Article 1448 of the French Code of Civil Procedure, a court of law shall decline its jurisdiction in favor of arbitration in a dispute subject to an arbitration agreement when the dispute is brought before the court after the arbitral tribunal has been constituted.⁶³ Otherwise, the court shall equally decline jurisdiction unless it finds the arbitration agreement to be manifestly void or inapplicable—matters that the court will consider only on the basis of a *prima facie* inquiry.⁶⁴ In conclusion, there is little margin for French courts to retain jurisdiction to decide gateway or threshold issues even in situations in which the inexistence, unenforceability, or invalidity of the arbitration agreement is alleged.⁶⁵

Significant differences between French and U.S. arbitration may also be noticed in the recognition and enforcement of foreign awards, and more particularly concerning the enforceability of an award set aside by the courts of the arbitral seat. Indeed, absent clear evidence that the foreign judgment setting aside the award is contrary to U.S. public policy,⁶⁶ U.S. courts are generally reluctant to enforce such awards.⁶⁷ This reluctance is due to Article V(1)(e) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the “New

⁶² E. Gaillard & P. De Lapasse, *Le Nouveau Droit Français de l'Arbitrage Interne et International*, RECUEIL DALLOZ 175 (2011).

⁶³ NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art 1448 (Fr.).

⁶⁴ *Id.*; E. Loquin, La Réforme du Droit Française de l'Arbitrage, RTD. Com. 255, 264 (2011).

⁶⁵ *See* E. Loquin, La Réforme du Droit Français de l'Arbitrage, RTD. Com. 255, 264 (2011) (observing that only in instances of *prima facie* invalidity will a court retain jurisdiction over the dispute).

⁶⁶ A foreign award is contrary to public policy if it is “repugnant to fundamental notions of what is just and decent.” *See* Tahan v. Hodgson, 662 F.2d 862, 864 (D.C.Cir.1981) (citing Rest.2d Conflict of Laws § 117, comment c (1971)).

⁶⁷ Exceptionally, in *Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C. 1996), a U.S. District Court granted the confirmation of an award set aside in Egypt under Egyptian law after the initiation of proceedings to confirm such award in the United States. In its decision, the U.S. court referred to Article VII of the New York Convention. Clashing with the decision of the Egyptian courts to set aside the award because it would have disregarded the application of Egyptian Law to the merits of the dispute, it relied upon U.S. federal public policy. Under Article 53 (1)(D) of Egyptian Law 27 of 1994 on arbitration on civil and commercial matters, an award rendered in Egypt may be set aside if it “. . . eliminates the application of the law which the parties to arbitration have agreed to apply to the subject of the dispute.” (Arbitration in Africa, E. Cotran & A. Amisshah Editors, at 408 (1996)).

York Convention”),⁶⁸ which denies extraterritorial effects to a foreign award set aside in the country of origin.⁶⁹

The French approach is very different from the U.S. approach. French courts will not take into account the laws or decisions of the country of the arbitral seat when considering the recognition or enforcement of foreign awards.⁷⁰ Indeed, according to French law, “international arbitral awards are not anchored in any national legal order, constitute an international justice decision, and their validity must be ascertained on the basis of the rules applicable in the country in which its recognition and enforcement is sought.”⁷¹

A French court will recognize or enforce a foreign award set aside in the country of the seat of the arbitration only if two conditions are met: (i) the award is not manifestly contrary to French international public policy; and (ii) the party seeking recognition or enforcement produces a copy of the award.⁷² The New York Convention permits any party to the enforcement procedure of a New York Convention award to assert any rights it may avail itself of under the local law or the treaties of such country.⁷³ Further, French courts are likely to favor the application of French provisions on the recognition and the enforcement of foreign awards over Article V(1)(e) of the New York Convention in such instances because French jurisprudence allows for the enforcement of

⁶⁸ Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517; T.I.A.S. No. 6997, *entered into force* 7 June 1959.

⁶⁹ *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194 (2d Cir.1999); *see also* *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 928 (2007) (holding that “under York Convention, Colombian arbitration award would not be enforced after being set aside, regardless of whether grounds relied upon for nullification would have been valid in United States”).

⁷⁰ Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, Bull. civ. I, No. 05-18.053 [hereinafter *Putrabali*]. The case can also be found at 3 *REVUE DE L'ARBITRAGE* 507 (2007).

⁷¹ *Id.*; Emmanuel Gaillard, *Note—29 juin 2007—Cour de cassation (1re Ch. civ.)*, 3 *REV. ARB.* 517 (2007); Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24 *ARB. INT'L* 277 (2008).

⁷² NOUVEAU CODE DE PROCÉDURE CIVILE [N.C.P.C.] art 1514, 1515 (Fr.).

⁷³ Art. VII(1), Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) 330 U.N.T.S. 3; 21 U.S.T. 2517; T.I.A.S. No. 6997, *entered into force* 7 June 1959.

a foreign award that had been previously set aside by the courts of the arbitral seat.⁷⁴

More shocking are the disparities that have occurred in the enforcement of arbitral awards where the deciding courts had applied the same laws to the arbitration. Indeed, the validity or enforceability of an arbitral award may be viewed very differently depending on the forum in which the award is subject to court review. This is so even when (i) such enforceability requires passing judgment on the validity and scope of the arbitration agreement on the basis of which the award was rendered; and (ii) both national courts involved applied the law of the arbitral seat in determining such issues.⁷⁵

Dallah Real Estate v. Pakistan illustrates these disparities.⁷⁶ There, the Supreme Court of the United Kingdom had to decide on Respondent Government of Pakistan's objections⁷⁷ to the enforcement in England of an award rendered in France pursuant to Article V(I)(a) of the New York Convention.⁷⁸ The key issue was whether Respondent was a party to the agreement between Appellant Dallah—a group providing services for the Holy Places in Saudi Arabia—and the Awami Hajj Trust (“The Trust”) established by the President of Pakistan to provide services to Pakistani pilgrims visiting Mecca for the Hajj.⁷⁹ The agreement, which was intended for purposes of building housing near Mecca to accommodate the pilgrims, contained an arbitration clause signed by Dallah and the Trust.⁸⁰ Appellant sought enforcement of the award in the High Court of England. The High Court denied enforcement, finding that Respondent was not a party to the agreement.⁸¹ The Court of Appeals affirmed, and Dallah appealed to the British Supreme Court.

⁷⁴ *Putrabali*, 3 REVUE DE L'ARBITRAGE 507 (2007).

⁷⁵ *Id.*

⁷⁶ *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Gov't of Pakistan* [2010] UKSC 46 (Nov. 3, 2010), http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2009_0165_Judgment.pdf.

⁷⁷ *Id.* These objections were based on Article V (I)(a) of the New York Convention and reflected by Section 103 (2)(b) of the English Arbitration Act of 1996.

⁷⁸ And reflected under Section 103(2)(b) of the English Arbitration Act.

⁷⁹ A few months after the agreement between Dallah and the Trust was signed, the Trust was dissolved.

⁸⁰ *Dallah*, UKSC 46 (Nov. 3, 2010) at ¶4.

⁸¹ *Id.* at ¶10.

Respondent Government of Pakistan alleged that the arbitration agreement was invalid under the laws of the arbitral seat, France.⁸² Specifically, Respondent denied being a party to the arbitration agreement under French law.⁸³ After determining that French law governed the issue, the Supreme Court of the United Kingdom rejected the enforcement of the award.⁸⁴ The Court ruled that, while arbitral tribunals have the power to decide their own jurisdiction, such a determination remains subject to court review when one of the parties seeks to enforce or set aside the award—regardless of where the arbitral seat is.⁸⁵ In doing so, the Court rejected Appellant’s argument that the fact that Respondent did not challenge the award in the courts of the seat precluded judicial review in Britain of the tribunal’s jurisdiction. Under French law, the issue was whether there was “common intention” in the actions of Respondent and Appellant that would indicate Respondent was a party to the agreement.⁸⁶ The Court ruled that Respondent had satisfactorily proven that the actions of the parties showed no such intention.

These same issues were raised to set aside that award and others rendered in the same case before the Paris Court of Appeals in *Gouvernement de Pakistan —Ministère des Affaires Religieuses*.⁸⁷ By running essentially the same analysis⁸⁸ under the same French law, and of the same facts considered by the English Supreme Court, the First Chamber of the Paris Court of Appeals denied the motion to set aside the arbitral award against the Pakistani Government, thereby upholding the arbitration agreement’s validity and its extension to the Pakistani

⁸² The enforcement of an arbitral award can be refused if the arbitration agreement is deemed invalid under applicable law—in this case French law. The agreement would be invalid if the party against whom the award is sought to be enforced was not party to the agreement.

⁸³ *Dallah*, UKSC 46 (Nov. 3, 2010) at ¶1.

⁸⁴ *Id.* at ¶70.

⁸⁵ *Id.* at ¶22, 23. Art. V of the New York Convention allows a party who did not consent to arbitration to challenge the tribunal’s jurisdiction.

⁸⁶ *Dallah*, UKSC 46 (Nov. 3, 2010) at ¶17,18.

⁸⁷ Cour d’appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 17, 2011. For a note of this decision, Gilles Cuniberti, *Divergence d’Appréciation entre Juges Français et Anglais du Contrôle sur l’Existence d’une Convention d’Arbitrage*, PARIS J. INT’L ARB. 433 (2011).

⁸⁸ Both courts applied France’s substantive rules of international commercial arbitration that govern the issue of whether an arbitration agreement’s scope *ratione personae* should extend to a non-signatory.

State.⁸⁹ Accordingly, the French court considered that the Government of Pakistan's conduct sufficed to show that it had intended to become a party to the arbitration agreement.

If such developments prove anything, it is the paramount importance of (i) looking before leaping when selecting the seat of the arbitration, and (ii) becoming aware of the uncertainties that may arise when enforcing an award in a forum distinct of the arbitral seat. Such developments also reveal that the lack of a unified national treatment of vital matters concerning international commercial arbitration is a source of unpredictability, which in turn may negatively affect its future development. Even greater inconstancy or inequalities of treatment may exist if—in the absence of an arbitration agreement—the resolution of international disputes is left to national courts of law. This is troubling because the objective of agreeing to arbitration is precisely to minimize uncertainty and insecurity in the realm of international transactions.

It is certainly desirable to obtain a unified, or at least harmonic, treatment of central arbitral issues by national legislators because it would certainly safeguard international commercial arbitration autonomy from the unwarranted national courts interference. However, such harmonization cannot be attained merely through the worldwide adaption of similar legal texts by national legislators. Rather, those texts must also be uniformly interpreted and applied by national courts in a manner that reflects the same liberal approach in favor of international arbitration. This approach may require a differentiated legislative treatment of domestic and international commercial arbitration. Additionally, national courts may be required to avoid applying to international commercial arbitrations solutions that are normally fashioned for domestic cases. Applying solutions fit for domestic cases leads courts to reach conclusions based on public policy concerns and principles normally excluded from the province of international commercial arbitration.

Rather, international arbitration cases should be resolved under more permissive policies—those favoring arbitration as a method of international dispute resolution. Such differentiated treatment may have the salutary effect of ensuring that international commercial arbitration issues are governed by rules and principles specifically adapted to their particular characteristics. Simultaneously, this treatment will avoid the extension of the application of such rules or principles to specific domestic law areas, where other policies and principles deserve special

⁸⁹ Cour d'appel [CA] [regional court of appeal] Paris, 1e ch., Feb. 17, 2011.

or prevailing consideration when matters covered by such areas are subject to arbitration in a domestic setting.

Whether attaining such harmonization falls within the realm of fantasy or not remains to be seen, but it seems unquestionable that such harmonization is all the more desirable. After all, international commercial arbitration can only progress under the benevolent shadow of national legislators and of courts fully cognizant of the positive role played by international commercial arbitration in the world economy.