ENFORCEMENT AGAINST A FOREIGN STATE OF AN ARBITRAL AWARD ANNULLED IN THE FOREIGN STATE

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The facts of the case are straightforward. Following the termination by the Government of Egypt (Egypt) of a contract with an American company (CAS) for the provision of parts and maintenance of military helicopters, CAS instituted arbitration proceedings against Egypt pursuant to an arbitration clause providing for the application of Egyptian law and fixing Cairo as the seat of arbitration. An award was rendered and Egypt challenged its validity by bringing annulment proceedings in the Egyptian courts. The courts annulled the award. CAS sought recognition and enforcement of the award in the United States. Egypt objected to recognition “out of deference” for the Egyptian courts.

The first issue facing the District Court concerned jurisdiction. The Court held that it had original jurisdiction under 28 U.S.C. § 1330 (a) by applying the immunity exception contained in 28 U.S.C. § 1605 (a) (6) which was added to the FSIA in 1988. That exception provides, in relevant part, that a foreign state is not immune from the jurisdiction of U.S. courts when the action is brought to confirm an award “governed by a treaty or other international agreement in force... calling for the recognition and enforcement of arbitral awards”, in this case the New York Convention (for the history of the events leading to this FSIA amendment, see Kahale, Legislation in the United States Facilitates Enforcement of Arbitral Agreements and Awards Against Foreign States, 6 J. Int’l Arb. (N° 2) 57 (1989)). This exception would have been sufficient to found the Court’s jurisdic-

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tion. However, the Court also stated that its juris-
diction could also be upheld on the basis of the
United States Arbitration giving effect to the New

Having positively resolved the jurisdictional
issue, the court addressed the question of whether
the award should be granted recognition even though it had been annulled in Egypt. This
question raised two sub-issues: whether the
answer should be sought under the New York
Convention applicable pursuant to Chapter 2 §§
201 et seq. of the Federal Arbitration Act, or
under Chapter 1 of the Act.

To set the issue in proper perspective, it should
be recalled that under Article V (1) (e) of the New
York Convention, recognition "may be refused" if
the award has been "set aside" in the country in
which, or under the law of which, the award was
made. Thus, if the Convention applied, the Court
might have, at its discretion, declined to enforce
the award. The provisions of Article V are, how-
ever, qualified by those of Article VII of the
Convention, according to which the Convention
"shall not deprive" a party seeking recognition of
an award from doing so on the basis of domestic
rules if those are more favorable to recognition
than those of the Convention.

In this particular case, this meant that the Court
had to compare the provisions of Article V of the
Convention with those of § 10 of the Federal Arbi-
tration Act. The court found that under that sta-
tute awards are presumed to be binding and can
be denied effect only in very limited cases, such
as corruption, fraud, partiality, misconduct or
excess of power on the part of the arbitrators
and, possibly, manifest disregard of the law (a
ground of no practical significance in the context
of international awards). Since, as a matter of
U.S. law, the award was proper, the court gran-
ted recognition to the award.

In the absence of earlier judicial pronouncements
on the subject, the court’s ruling must be regarded
as a landmark decision. It is also a decision
which creates a bridge between the U.S. rules
and those of several European countries regard-
ing the respective domains of the New York
Convention and domestic laws.

Thus, for more than a decade, the French
Supreme Court has, pursuant to Article VII of the
Convention, held that the recognition of foreign
awards (including awards annulled in their coun-
try of origin) was governed by French law since it
was more favorable to recognition than the New
York Convention. More recently, the German
Supreme Court has followed suit, and in The
Netherlands the Arbitration Act of 1986 (Article
1076) now specifically gives a party seeking
recognition of a foreign award the option to rely on
Dutch law rather than the New York Convention if
the Dutch rules are more favorable to recogni-
tion.

In those countries and now in the United States,
if the Chromalloy decision is followed, the practi-
cal implications of domestic rules are apparent.
To the extent that those rules are more liberal
than those of the New York Convention, they will
significantly curtail its application since (i) the
award creditor is likely to rely on domestic law
rather than the Convention, or (ii) the courts will
be under a mandate to apply the lex fori ex oficio
if the award creditor fails to invoke it.

These developments contribute to ensuring the
binding character of arbitral awards, thereby
enhancing their international effectiveness. How-
ever, it is only fair to note that the common philo-
sophy which inspires these judicial statutory
developments is not necessarily conducive to
uniformity of concrete solutions. The reason is
that domestic rules are not always coterminous
and that, depending upon the circumstances, they
may lead to different solutions. Although not
intended to promote competition among potential
recognition fora, different domestic rules may
provide the award creditors with interesting oppor-
tunities to engage in forum shopping.