

# **How Courts Treat Foreign Award Judgments: The Unsettled State of US Law and an English Perspective**

Yasmine Lahlou\*

## **Introduction**

The 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the ‘New York Convention’ or the ‘Convention’) ‘was intended to ensure that arbitral awards would be enforced around the world unless the party resisting enforcement proves a fundamental impropriety such as excess of jurisdiction, wrongful constitution of the arbitral tribunal, or denial of the opportunity to be heard. Nevertheless, Article V(1)(e) of the Convention allows courts to decline to enforce a foreign award if it has been set aside in its country of origin without distinction as to the grounds upon which it was annulled.’<sup>1</sup>

Moreover, as noted by a US appellate court, multiple, parallel and substantively overlapping proceedings are a key feature of the New York Convention:

---

\* Yasmine Lahlou is a Partner at Chaffetz Lindsey in New York.

1 Jan Paulsson, ‘The Case for Disregarding LSAs (Local Standard Annulments) Under the New York Convention’ (1996) 7 *Am. Rev. Int’l Arb.* 99 (‘Paulsson’) at 99. Under Article V(1) of the Convention, courts must enforce a foreign arbitral award unless the award debtor can establish one of five narrow grounds for refusing enforcement. In addition, under Article V(2), the court asked to enforce an award may refuse to enforce the award if the award deals with a subject matter that is not arbitrable under the law of the enforcement State or if the award is contrary to the enforcing State’s public policy.

‘By allowing concurrent enforcement and annulment actions, as well as simultaneous enforcement actions in third countries, the Convention necessarily envisions multiple proceedings that address the same substantive challenges to an arbitral award.... In short, multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention.’<sup>2</sup>

As a result, when a court is asked to enforce an arbitral award, another court may have ruled on an application to confirm, annul or enforce that award, as well as on defences against such enforcement. We refer to such court decisions as ‘award judgments’. As a result, litigants will then have competing claims that award judgments must have *res judicata* or claim preclusion effect, or at a minimum, an issue preclusion impact.<sup>3</sup>

In their presentations at the International Council for Commercial Arbitration (ICCA) Mauritius in 2016, Professors Pierre Mayer and Maxi Scherer agreed that award judgments differ in nature from ‘ordinary’ court judgments that resolve the merits of a dispute. Therefore, various policy and practical reasons militate against the automatic application of principles regarding foreign judgments to award judgments.<sup>4</sup> As explained by Scherer, such reasons include: 1. the creation of an unjustified divide between common and civil law countries, where issue estoppel is unknown; 2. the incentive for a race to the courthouse and forum shopping, depending on each litigant’s preferred outcome; and 3. the ancillary nature of award

---

2 *Karaha Bodas Co., LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* 335 F.3d 357 (5<sup>th</sup> Cir. 2003).

3 As one author described the US approach, which is consistent with that in other common law countries, ‘[a]t one end of the spectrum is *res judicata*, or claim preclusion ... [It] bars a party from bringing the same cause of action that he previously brought if he had received a final adjudication on the merits... Collateral estoppel, or issue preclusion, has been described as the narrower first cousin of *res judicata*. It does not bar an entire claim; rather, its scope is limited to a particular issue that the parties have fully litigated in a prior, different cause of action between the parties.’ Burton S DeWitt, ‘A Judgment Without Merits: The Recognition and Enforcement of Foreign Judgments Confirming, Recognizing, or Enforcing Arbitral Awards’ (2015) 50 Tex. Int’l L.J. 495, 503 (‘DeWitt’).

4 Pierre Mayer, ‘The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments’ in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 (Kluwer Law International 2017) (‘Mayer’) at 710; Maxi Scherer, ‘The Effect of Foreign National Court Judgments Relating to the Arbitral Award: An Emerging Conceptual Framework?’ in Andrea Menaker (ed), *International Arbitration and the Rule of Law: Contribution and Conformity*, ICCA Congress Series No. 19 (Kluwer Law International 2017) 691 (‘Scherer’) at 702 *et seq.*

judgments, whose justification rests solely in the existence of a final award.<sup>5</sup> Awards, not award judgments, reflect the final resolution of a dispute and must be granted recognition and comity when the conditions are met. As one author explained, an award judgment implies a ‘judicial determination not of liability *per se* but merely that an arbitral award was valid under the laws of the State in which the judgment was made.’<sup>6</sup> As further explained below, an award debtor may ask the court of the state of the seat, or the state under whose law the award was made, to annul the award – for example, because the debtor’s due process rights were violated. Conversely, because of parallel arbitrations or actions, an award creditor may ask the same court to confirm the award and convert it into a judgment, to defeat the confirmation or recognition of another inconsistent foreign award or judgment in that state. Because of the ancillary nature of such award judgments, many challenge the ‘parallel entitlement’ approach advocated by some, whereby the award and the foreign judgment confirming the award create two separate but equivalent avenues for collection, from which the party seeking enforcement can choose.<sup>7</sup> Instead, the more rigorous approach seems for courts to first

---

5 As one author explained it in an excellent article focused on US law, ‘The enforcement or recognition action is, for all intents and purposes, a suit for ancillary relief. Under the New York Convention, the arbitration provides all the legally necessary adjudication to finally settle rights. Assuming the arbitration and the agreement to submit to arbitration were legally sufficient, the court can never get to the merits of the dispute because there are no longer any merits left to be disputed. Like with a money damages judgment, the only remaining task is collection of the award. Yet when a party brings suit on the foreign judgment confirming, recognizing, or enforcing the arbitral award, the party is seeking ancillary relief for a judgment that was ancillary relief without ever pleading the existence of the dispute on the merits. A cause of action based on an ancillary remedy cannot stand absent an underlying cause of action for which the ancillary relief is required. Under such reasoning, courts have dismissed suits to appoint receivers – an ancillary remedy – absent an underlying claim either at law or in equity. Likewise, it is error for a court to grant a preliminary injunction without the possibility of any other litigation between the parties, as the preliminary injunction is an ancillary remedy to more permanent relief.’ DeWitt at 507 (see n 3 above).

6 See n 3 above, DeWitt at 508.

7 *Ibid.*; DeWitt at 505-506 describing the two competing, and more or less extreme, theories for giving full effect to foreign award judgments. (‘Two theories exist to give full effect to foreign judgments confirming, recognizing, or enforcing arbitral awards. The first, merger, treats the arbitral award as being merged into the judgment when the court in the primary jurisdiction confirms the validity of the underlying award. Where merger operates, the award itself is unenforceable because the judgment has incorporated it, requiring enforcement of the judgment. However, it seems that merger has not been adopted as a valid justification within the United States. No doubt this is fortunate, as merger would appear to be violative of the New York Convention. If the award merges into the foreign judgment, the court will not be able to give recognition and enforcement to the award, thus avoiding the court’s responsibilities under the Convention.’)

analyse the award, and then to give any consideration as to whether the foreign award judgment should be granted effect in those circumstances when the foreign court sets aside the award, as this is expressly contemplated by the New York Convention, or when the issues presented before both courts are completely identical.<sup>8</sup>

In this article, we consider the effect that courts in the United States have given to foreign award judgments when asked to enforce a foreign arbitral award – both judgments made by the supervisory court at the seat of the arbitration upholding or vacating the award and award judgments from other jurisdictions – and attempt both a comparison with English courts in these circumstances and an assessment of the relevant doctrinal landscape under the New York Convention.

First, we will address the approach adopted with respect to award judgments issued by the courts at the seat of the arbitration, before analysing the approach with respect to all other award judgments. As will be examined, both US and English courts generally defer to award judgments by the courts of the seat of the arbitration, although through different avenues. While the English position seems consistent in that they will enforce the foreign award but may give preclusive effect on the issues resolved by the court at the seat, the position is much less clear in the US. This is primarily due to the fact that while the enforcement of foreign awards is governed by federal law, embodied in Chapters 2 and 3 of the Federal Arbitration Act (the ‘FAA’), judgment recognition is governed by state law, with each of the 50 states potentially having its own approach, as well as federal common law.<sup>9</sup> New York courts, for example, have taken the position that award creditors have the option of enforcing the foreign award or the foreign award judgment from the seat. As a practical matter, this is favourable to award creditors because, as considered below, unlike the case for foreign awards, they need not establish the courts’ jurisdiction over the debtor or its assets when enforcing a foreign court judgment. In turn, this potentially gives

---

<sup>8</sup> See n 4 above, Scherer at 704-705.

<sup>9</sup> In the US, foreign judgments are recognised and enforced according to state law or federal common law. The majority of states now follow either the 1962 Uniform Foreign Money-Judgments Recognition Act or the 2005 Uniform Foreign-Country Money Judgments Recognition Act. One or both of these Uniform Acts have been enacted in almost every major hub of international litigation. The recognition of qualifying foreign country judgments ordering or denying payment of money (‘Foreign Country Money Judgments’) presently is governed by state statute in 34 US states, including New York, the District of Columbia, the US Virgin Islands, California, Illinois and Texas. In the remaining US states, the recognition of Foreign Country Money Judgments is governed by judge-made common law. However, to date, no such unification exists at the federal level.

creditors the discovery tools available under New York state law to look for the debtor's assets worldwide.<sup>10</sup>

The US courts' position on the relevance of foreign award judgments from courts other than the seat is even less clear, whereas English courts seem generally inclined to preclude the relitigation of certain issues if they are satisfied that, in addition to the parties, the factual and legal issues litigated abroad and raised before them are identical.

### **Effect of award judgments at the seat**

In the US, the courts at the seat are the courts of 'primary jurisdiction', 'in which, or under the law of which', a foreign arbitral award is made, while all others are courts of secondary jurisdiction. As explained by the Court of Appeals for the Second Circuit (the 'Second Circuit'), the courts of primary jurisdiction '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.'<sup>11</sup> As a flip side, '[i]f a court at the seat refuses to set aside an award, it has confirmed the award's validity. It puts a word onto the particular and unique act a court at the seat does when it recognizes an award's validity.'<sup>12</sup>

#### *Award judgments rendered at the seat generally carry great weight*

Apparently the only federal appellate court to take such position, the Second Circuit, which has jurisdiction over New York, endorsed early on the so-called parallel entitlement view, and accepted a party's freedom to enforce both the foreign award as well as the award judgment confirming it at the seat. In *Island Territory of Curacao*, the court found that the New York Convention did not pre-empt New York's statute for the enforcement of

---

10 The ability to obtain broad asset discovery is one of the most powerful enforcement tools available to judgment creditors in New York. NY CPLR § 5223 provides that a judgment creditor may obtain discovery of 'all matter relevant to the satisfaction of the judgment' by serving a subpoena on 'any person' – including the judgment debtor itself as well as a bank or other third-party garnishee. This form of discovery only becomes available, however, once the enforcing court has entered judgment recognising the foreign country judgment or confirming the foreign arbitral award. The creditor's attorney may issue a subpoena for information concerning the nature and location of the debtor's assets without prior leave of court, although the attorney for the judgment creditor must be prepared to certify his or her reasonable belief that the recipient of the subpoena has information in its possession that will assist in collecting the judgment. 54 NY Jur. 2d Enforcement and Execution of Judgments § 225 (2017) (citing NY CPLR § 2302(a)); NY CPLR § 5224(a) (3) (i).

11 *Yusuf Ahmed Alghanim & Sons v Toys 'R' Us, Inc.* 126 F.3d 15, 23 (2d Cir. 1997).

12 See n 3 above, DeWitt at 512.

foreign country money judgments to allow a party to enforce a judgment confirming the award at the seat:

‘We hold, then, that, since the Convention on Recognition itself and its enforcing legislation go only to the enforcement of a foreign arbitral award and not to the enforcement of foreign judgments confirming foreign arbitral awards, New York state law is not preempted to the extent that it permits, regulates and establishes a procedure for the enforcement of the foreign money judgment. Thus it cannot be doubted that the policy of New York State to recognize foreign judgments prevails in the absence of interference with the federal regulatory scheme.’<sup>13</sup>

On that basis, federal courts in New York have routinely enforced award validating judgments from the seat, instead of the award.<sup>14</sup>

Creditors can have at least two practical reasons to prefer the ‘judgment route’. First, courts in New York, a global financial centre, need not have personal jurisdiction over a debtor or in rem jurisdiction over its assets to enforce a money judgment against the debtor because, according to New York’s state courts, the constitutional due process does not apply to foreign judgment recognition proceedings and New York’s foreign money judgment statute does not contain such a condition. By contrast, the Second Circuit, a federal court, has ruled that due process under the US Constitution requires that, except in certain circumstances involving sovereigns, courts have personal jurisdiction over the award debtor in order to recognise and enforce a foreign award.<sup>15</sup> Thus, once a foreign judgment has been recognised and enforced, a creditor may seek discovery about the debtor worldwide even though that debtor has no personal nexus with New York. Second, the creditor’s action to enforce the award may be time-barred. Indeed, an action to enforce a foreign award in the US must be brought within three years after the award is made under Section 207 of the FAA. In those cases, the ‘judgment route’ operates as a safety valve to allow courts to give relief to the award creditor because the time limitation

---

13 *Island Territory of Curacao v Solitron Devices, Inc.* 489 F.2d 1313, 1319 (2d Cir. 1973) (internal citations omitted).

14 See eg, *V. Corp. v Redi Corp. (USA)* No. 04 CIV. 1683 (MBM), 2004 WL 2290491 at \*3 (S.D.N.Y. 9 October 2004); *Ocean Warehousing B.V. v Baron Metals & Alloys, Inc.* 157 F. Supp. 2d 245, 249–50 (S.D.N.Y. 2001).

15 See *Sonera Holding B.V. v Cukurova Holding A.S.* 750 F.3d 221, 226 (2d Cir. 2014) (regarding award enforcement); *CME Media Enterprises B.V. v Zelezny* No. 01 CIV. 1733 (DC), 2001 WL 1035138, at \*4 (S.D.N.Y. 10 September 2001) (for federal trial court, if the debtor has assets in New York, it has the authority to enforce the foreign award but solely to the extent of the assets in the jurisdiction.); *Lenchyshyn v Pelko Electric* 723 N.Y.S.2d 285 (4th Dept. 2001) (regarding foreign judgment enforcement). But see *AlbaniaBEG Ambient Sh.p.k. v Enel S.p.A.*, 2018 NY Slip Op 00928 (1st Dept. 8 Feb. 2018) (reflecting an evolution on personal jurisdiction for foreign judgments).

to enforce foreign judgments, which is a matter of state law, is generally much longer.<sup>16</sup>

For example, in the 1993 *Seetransport* case, the Second Circuit first blocked an attempt to confirm a foreign arbitral award as untimely under Section 207,<sup>17</sup> before authorising the enforcement of the foreign award judgment under New York's foreign money judgment act.<sup>18</sup>

Two decades later, in 2014, the Court of Appeals for the District of Columbia (the 'DC Circuit') reversed a decision where the lower court had refused to enforce an English award enforcement judgment because the award enforcement action was time-barred under Section 207 of the FAA and such provision pre-empted DC's foreign judgments Recognition Act, which governs the recognition of foreign money judgments.<sup>19</sup> Relying in part on Article VII of the Convention, which reserves the application of domestic laws more favourable to award enforcement than the Convention, the DC Circuit court concluded that the FAA did not pre-empt the Recognition Act.<sup>20</sup>

In England, courts will enforce the final award, not the foreign award judgment from the seat upholding the award. That said, as explained by Scherer, English courts adopt a deferential stance, and will normally enforce the award or at least apply the doctrine of issue estoppel to those issues analysed and resolved by the foreign court of the seat court, if such court reviewed

16 For example, under the DC Recognition Act, which is the statute that governs the recognition of foreign country money judgments by the courts in the District of Columbia, an action to recognise a foreign-country judgment must be commenced before the judgment expires in the rendering country or within 15 years of the judgment's becoming effective in the foreign country, whichever is earlier. DC Code § 15–369.

17 *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala* 989 F.2d 572, 583 (2d Cir. 1993) (dismissing the cause of action to enforce the arbitral award due to statute of limitations but remanding to determine if French judgment confirming the award would still be enforceable in France); cf. *ibid.* at 586 (noting that Second Circuit cases 'embody the parallel entitlements approach: the court may elect to recognize and enforce either the foreign arbitral award or the foreign confirmation judgment irrespective of the validity of the other claim').

18 *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co., Kommanditgesellschaft v Navimpex Centrala Navala* 29 F.3d 79 (2d Cir.1994).

19 *Commissions Imp. Exp. S.A. v Republic of Congo* 916 F. Supp. 2d 48, 57 (D.D.C. 2013), rev'd and remanded *sub nom. Commissions Imp. Exp. S.A. v Republic of the Congo* 757 F.3d 321 (D.C. Cir. 2014).

20 *Commissions Imp. Exp. S.A.*, 757 F.3d at 332. Notably, the English court was a secondary jurisdiction because the seat of the award was Paris. See also *Nat'l Aluminum Co. v Peak Chem. Corp., Inc.*, 132 F. Supp. 3d 990, 998 (N.D. Ill. 2015) ('In sum, there is nothing to suggest that Congressional intent would be frustrated by enforcement of the Illinois Act. Accordingly, the doctrine of conflict preemption does not apply, and the present action is timely under Illinois law. Because Illinois law applies, the Court turns its attention to whether the High Court Judgment is cognizable under Illinois' Uniform Foreign-Country Money Judgments Recognition Act.').

and let the award stand.<sup>21</sup> For example, in the 2008 *Gater Assets Limited v Nak Naftogaz Ukrainiy* case,<sup>22</sup> the award debtor resisted enforcement of an award made in Russia on the basis that the arbitral tribunal had lacked jurisdiction to entertain the dispute and that the award was contrary to public policy. The debtor had, however, already unsuccessfully raised its jurisdictional objection before two Russian courts. As a result, at the outset of his judgment, Justice Tomlison of the High Court made clear that unless the debtor prevailed on the public policy objection in terms relevant to the arbitrators' jurisdiction, the court would be bound by the Russian courts' findings:

'Mr. Higham QC for the Defendant did formally keep open an argument to the effect that ... the arbitration tribunal lacked jurisdiction to entertain the dispute. However this point has already twice been decided against the Defendant by the competent Russian supervisory courts. There can be no prospect of the Defendant escaping the preclusive effect of such determinations unless it succeeds in its argument rooted in public policy and moreover in a manner relevant to the finding that the arbitration tribunal enjoyed jurisdiction.'<sup>23</sup>

This decision reflects the English law position that 'deference should be given to the findings of the courts at the seat upholding the award (at least for issues relating to jurisdiction), unless there are specific circumstances not to do so.'<sup>24</sup>

*Award vacating judgments from the seat generally preclude enforcement of the award*

Under Article V(1)(e) of the Convention, an enforcing court may refuse to enforce an award that has been set aside at the seat. The question then becomes, in Professor Jan Paulsson's view, 'whether and when it is wise for [States] to enforce foreign awards when the Convention would not so require[.]'<sup>25</sup>

There is no universally accepted answer. At one extreme, the French highest Cour de Cassation made it clear 'that the existence of a judgment rendered by the courts of the seat of the arbitration, setting aside an award, does not constitute a bar to the recognition and / or enforcement of the

---

21 See n 4 above, Scherer at 695, quoting *Westacre Investments Inc. v Jugoimport-SDPR Holsing Co. Ltd.* [1999] EWCA Civ. 1401; [1999] 3 All ER 864 at 881; and *In Minmetals Germany GmbH v Ferco Steel Ltd.* [1999] 1 All ER 315 (Comm) 331.

22 [2008] EWHC 237 (Comm) ('*Naftogaz*').

23 *Ibid.* at 3. In the end, the High Court dismissed the public policy argument based on allegations of fraud. It concluded that there was no basis to set aside the enforcement order and noted that nothing short of 'reprehensible or unconscionable conduct' would suffice to invest the court with a discretion to consider denying to the award recognition or enforcement. *Ibid.* at 37-47.

24 See n 4 above, Scherer at 701.

25 See n 1 above, Paulsson at 104.



award in France.<sup>26</sup> On the other end, for Professor Albert Jan van den Berg, an award set aside at the seat should never be enforced.<sup>27</sup> For Paulsson, the enforcement court may only be persuaded by foreign annulment decisions based on international standards of annulment, that is those reflected in the first four paragraphs of both Article V(1) of the Convention or Article 36 of the UN Commission on International Trade Law (UNCITRAL) Model Law, which in substance mirrors Article V of the Convention. The enforcement court should otherwise give no weight to annulment decisions based on idiosyncratic local standards of annulment.<sup>28</sup>

For US courts, their discretion under Article V(1)(e) is confined by prudential concerns for international comity. As the Second Circuit noted in 2016: ‘Any court should act with trepidation and reluctance in enforcing an arbitral award that has been declared a nullity by the courts having jurisdiction over the forum in which the award was rendered.’<sup>29</sup> This deference was the result of a twenty-year maturation.

In 1996 in *Chromalloy*, the district court for the District of Columbia was asked to enforce an award against the Republic of Egypt after that same award had been set aside by an Egyptian court.<sup>30</sup> Egypt opposed that effort, on the basis of Article V(1)(e) of the Convention and because the Egyptian award judgment was *res judicata*. In an approach echoing that of Paulsson, the court refused to give weight to the Egyptian court’s ruling, as it ‘reflect[ed] [a] suspicious view of arbitration, and is precisely the type of technical argument that US courts are not to entertain when reviewing an arbitral award’ and because the parties had expressly agreed in their contract that any award ‘shall be final and binding and cannot be made subject to any appeal or other recourse.’<sup>31</sup> The court also found that the Egyptian court’s annulment of the award violated the strong US policy in favour of upholding arbitral awards, as reflected in the FAA and the Convention.<sup>32</sup> Subsequent cases adopted the *Chromalloy* framework, although the outcome was generally the opposite because of differences in fact.<sup>33</sup>

26 See n 4 above, Mayer at 706, describing the two leading French decisions on the issue: *Hilmarton* (Paris Court of Appeal; 19 December 1991) and *Putrabali* (Civ. 1re, 29 June 2007; *Putrabali* (2 decisions; no. 05-18053 and no. 06-13293), Bull. Civ. I, no. 250 and no. 252)).

27 Albert Jan van den Berg, ‘When is an Arbitral Award Non-Domestic Under the New York Convention of 1958?’ (1985) 6 Pace Law Review 25 at pp 41-42.

28 See n 1 above, Paulsson at 114.

29 See generally *Corporación Mexicana De Mantenimiento Integral, S. De. R.L. De C.V. v Pemex Exploración Y Producción* 832 F.3d 92, 111 (2d. Cir. 2016) (‘Pemex’).

30 *Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt* 939 F. Supp. 907, 908 (D.D.C. 1996).

31 *Ibid.* at 911-912.

32 *Ibid.* at 913.

33 See, eg, *Baker Marine, Ltd. v Chevron, Ltd.* 191 F.3d 194 n.3 (2d Cir. 1999).

In 2007 in *Termorio*, the DC Circuit court evolved and, as an echo to Van den Berg's position, held that 'an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully set aside by a competent authority in the State in which the award was made'. It therefore refused to enforce an award issued and vacated in Colombia.<sup>34</sup> For the court, under the Convention, 'national courts [must] let go of matters they normally would think of as their own.'<sup>35</sup> The courts of secondary jurisdiction cannot ignore the judgment of a court of competent authority as they see fit: 'It takes much more than a mere assertion that the judgment . . . 'offends the public policy' of the secondary State to overcome a defense raised under Article V(1)(e).'<sup>36</sup> In that case, the court concluded that the US public policy was not implicated because this was a purely Colombian matter: the parties were Colombian, the contract was performed in Colombia, and both the arbitration and litigation took place there.<sup>37</sup>

Ten years later, in *Pemex*, it was the Second Circuit's turn to tackle the issue in a dispute over the enforcement of a Mexican award that had been vacated by the Mexican courts on the basis of the retroactive application of legislation adopted by the Mexican Government after the arbitration had started for the purpose of making the arbitration illegal under Mexican law. Although it declared that the 1975 Inter-American Convention on International Commercial Arbitration (the 'Panama Convention') Convention gives near unfettered discretion to district courts to enforce an award annulled at the seat,<sup>38</sup> the *Pemex* court also stressed that such discretion 'is constrained by the prudential concern of international comity, which remains vital notwithstanding that it is not expressly codified in the Convention.'<sup>39</sup> According to the court, a foreign judgment is generally conclusive unless

---

34 *Termorio S.A. E.S.P. v Electranta S.P.* 487 F. 3d 928, 936 (D.C. Cir. 2007) (internal quotations omitted).

35 *Ibid.* at 934 (quoting *Mitsubishi Motors Corp. v Soler Chrysler-Plymouth, Inc.* (1985) 473 US 614, 639 n. 21).

36 *Ibid.* at 937.

37 *Ibid.* at 938 (quoting *Karaha Bodas Co., L.L.C. v Perusahaan Pertambangan Minyak Gas Bumi Negara (Karaha Bodas II)*, 364 F.3d 274, 305-06 (5th Cir. 2004)).

38 See n 29 above, *Pemex*, 832 F.3d at 99. In *Pemex*, the Panama Convention (Inter-American Convention on International Commercial Arbitration, 30 Jan. 1975, 1438 U.N.T.S. 245, O.A.S.T.S. No. 42, 14 ILM 336 - enacted as Chapter Three of the FAA at Pub. L. 101-369, 104 Stat. 448, codified at 9 USC. §§ 301-7 (2010)), not the New York Convention, applied. The Panama Convention embodies the same objectives as the New York Convention, but on a regional basis covering nearly all of the Americas. Canada is the most prominent jurisdiction in the Americas that has not ratified the Panama Convention. At least 19 other countries in the Americas have ratified the Panama Convention including the US, Mexico, Colombia, Venezuela, Brazil, Uruguay, Argentina, Chile, Bolivia, Peru and Ecuador. There is no substantive relevant difference between the two conventions.

39 See n 29 above, *Pemex*, 832 F.3d at 105.

enforcement of the judgment would offend public policy – to the extent that it is ‘repugnant to fundamental notions of what is decent and just.’<sup>40</sup> They note that the public policy exception ‘accommodates uneasily two competing (and equally important) principles: [i] the goals of comity and res judicata that underlie the doctrine of recognition and enforcement of foreign judgments and [ii] fairness to litigants.’<sup>41</sup> Therefore, although the Panama Convention affords discretion to enforce annulled awards, the exercise of that discretion is appropriate ‘only to vindicate fundamental notions of what is decent and just.’ In the end, the court enforced the award and refused to recognise the Mexican court’s annulment because it was based on the retroactive targeted application of legislation and because the award creditor would have had no forum left to vindicate its original claim against Mexico.<sup>42</sup>

More recently, in *Thai-Lao Lignite*, the Second Circuit affirmed a district court’s decision vacating its own earlier judgment enforcing an award because the award had been subsequently annulled at the seat in Malaysia.<sup>43</sup> Because the foreign decision did not offend any ‘fundamental notions of what is decent and just’, the court refused to ‘ignore comity considerations and disregard the Malaysian judgments.’<sup>44</sup>

The English courts’ approach seems similar. In *Malicorp Ltd. v Government of the Arab Republic of Egypt*, the High Court was asked to enforce an award against the Republic of Egypt, which had been set aside at the seat in Egypt.<sup>45</sup> According to Walker J, while English courts have discretion to enforce an award vacated at the seat, ‘it would not be right to exercise that discretion if, applying general principles of English private international law, the set aside decision was one which this court would give effect to.’<sup>46</sup> Turning to ‘the only question’ of ‘whether the set aside decision was one which this court would give effect to’, the court refused to accept Malicorp’s conclusory allegations that ‘the judges responsible for the [Egyptian annulment decision] were guilty of pro-government bias’ without positive and cogent evidence.<sup>47</sup> The court concluded that ‘well established principles as to the recognition of foreign judgments’ left no room ‘as a matter of discretion, to give effect to

40 *Ibid.* quoting *Tahan v Hodgson* 662 F.2d 862, 864 (D.C. Cir. 1981).

41 *Ibid.*

42 *Ibid.* at 107.

43 *Thai-Lao Lignite Co. v Gov’t of the Lao People’s Democratic Republic* 864 F.3d 172 (2d Cir. 2017).

44 *Ibid.* at 181.

45 *Malicorp Ltd v Government of the Arab Republic of Egypt & Ors* [2015] EWHC 361 (Comm) (19 February 2015) (*‘Malicorp’*).

46 *Ibid.*; *Malicorp* at para 21.

47 *Ibid.*; *Malicorp* at para 26.

the Cairo award once it is established, as here, that a set aside decision of the supervisory court meets the tests for recognition.<sup>48</sup>

Scherer described the US and English courts' approach as the 'judgment route', in which courts 'focus on the foreign set-aside judgment and, depending on its status, will decide whether the set aside award can or cannot be enforced under Art. V(1)(e) or any equivalent provision of national law.' Such tendency exists in England 'not only for setting aside judgments but also for the converse situation, *i.e.* for judgments rendered at the seat which validate the award[.]'<sup>49</sup> We now turn to those.

### **The effect of foreign award enforcement judgments remains uncertain in the US**

According to the district court for the District of Columbia, a foreign award judgment by a court of secondary jurisdiction refusing to enforce an award has no preclusive effect on a claim to enforce that award in the US.<sup>50</sup> In general, that court's position seems that 'it is doubtful that these foreign court decisions [regarding the enforcement of an award] would have any preclusive effect on the question whether this court should confirm the arbitration award.'<sup>51</sup> This echoes the above-quoted analysis by the Court of Appeals for the Fifth Circuit, with jurisdiction over Texas, that 'multiple judicial proceedings on the same legal issues are characteristic of the confirmation and enforcement of international arbitral awards under the Convention.'<sup>52</sup>

In one isolated and bizarre decision, *Belmont v Mina Mar*, a federal trial court in Virginia, which was also the seat of the arbitration, applied the doctrine of *res judicata* to recognise a foreign award judgment enforcing the award and bar the debtor's action to vacate the same award.<sup>53</sup>

---

48 *Ibid.*; *Malicorp* at para 28.

49 See n 4 above, Scherer at 695 *et seq.*

50 *BCB Holdings Ltd. v Gov't of Belize* 110 F. Supp. 3d 233, 246 (D.D.C. 2015), *aff'd*, 650 F. App'x 17 (D.C. Cir. 2016), and enforcement granted, 232 F. Supp. 3d 28 (D.D.C. 2017); see also *Salini Costruttori S.p.A. v Kingdom of Morocco* 233 F. Supp. 3d 190, 199 (D.D.C. 2017) ('There is no evidence that the ICC in Paris, or another competent court in France, set aside the arbitral award. Thus, this court need not and should not take into consideration whether or not a secondary court, such as the Administrative Court of Rabat, set aside or declined to enforce a portion of the award.').

51 *Belize Bank Ltd. v Gov't of Belize* 191 F. Supp. 3d 26, 32 (D.D.C. 2016), *aff'd*, 852 F.3d 1107 (D.C. Cir. 2017), citing *Belize Social Dev. Ltd. v Gov't of Belize* 668 F.3d 724, 730 (D.C. Cir. 2012) in which the court had vacated a stay of an action to enforce an award '[b]ecause the pending action in Belize has no preclusive effect on the district court's disposition of the petition to enforce pursuant to the [Federal Arbitration Act] and the New York Convention'.

52 See n 2 above, *Karaha Bodas* 335 F.3d at 357.

53 *Belmont Partners, LLC v Mina Mar Grp., Inc.* 741 F. Supp. 2d 743, 750 (W.D. Va. 2010).

In that case, after Mina Mar and Belmont had settled and suspended an arbitration seated in Virginia, Mina Mar breached the settlement agreement. In turn, Belmont asked the arbitrator to convert the settlement agreement into an award, which the arbitrator did.

Unhappy with the terms of the underlying settlement (and the award), Mina Mar rushed to its ‘home court’ in Ontario and asked the court to recognise the award, stay its enforcement and modify the award to condition Mina Mar’s compliance to Belmont’s delivery of certain shares (which condition was not required under the award). The Ontario court enforced the award as drafted and denied both of Mina Mar’s motions for a stay and to modify the award. Thereafter, when Belmont moved to have the award confirmed and enforced in Virginia, Mina Mar cross-moved to vacate that same award pursuant to 9 USC. § 10(a)(1), which provides that awards procured by corruption, fraud, or undue means can be vacated.<sup>54</sup>

The court, however, found that Mina Mar’s *vacatur* action was barred by the Ontario court’s ruling under the doctrine of *res judicata*.<sup>55</sup> As a result, the court held that ‘claim preclusion bars this Court from deciding whether to modify or vacate the Award.’<sup>56</sup>

While such deference by the court of primary jurisdiction to a court of secondary jurisdiction seems unsatisfactory at best, it also seems clear that the court was intent on containing Mina Mar’s litigious conduct. In fact, in an abundance of caution, the federal court did analyse and reject Mina Mar’s motion to vacate under Section 10 of the FAA on the merits.<sup>57</sup> Therefore, the court’s determination on claim preclusion was arguably *dicta* and must be viewed in the unique circumstances of the case.<sup>58</sup>

In England, the trend seems that courts may apply principles of issue estoppel and will grant preclusive effect to foreign decision with respect to certain issues decided by the foreign court.<sup>59</sup> According to Scherer’s review of English cases, ‘[q]uestions of arbitrability and public policy generally do not create issue estoppel in England, but other issues decided in foreign recognition or enforcement judgments have the potential to do so.’<sup>60</sup> In other words, it seems that English courts will make their own independent assessment of those issues that are explicitly governed by the law of the enforcement forum under Article V(2) of the Convention, but may be more receptive to foreign award judgments in other cases.

---

54 *Ibid.*, *Belmont Partners* at 749.

55 *Ibid.*, *Belmont Partners* at 752–53.

56 *Ibid.*, *Belmont Partners* at 753.

57 *Ibid.*, *Belmont Partners* at 754.

58 The author is not aware of any comparable decision by another federal court, where most of foreign and international award related disputes are brought.

59 See n 4 above, Scherer at 698.

60 See n 4 above, Scherer at 701.

## Conclusion

While it seems settled in the leading US arbitration jurisdictions and in England that a foreign award judgment from the court of primary jurisdiction vacating an award is normally entitled to recognition and deference, the issue seems much less clear for other foreign award judgments, either enforcing or refusing to enforce an award.

There are no sound reasons to advocate any extreme positions, consisting in ignoring or taking wholesale the foreign award judgments. Instead, the proper approach seems for the enforcement court to determine whether the issue litigated before, and addressed by, the foreign court is governed by the same law as in the forum – consistent with the English court’s approach described above. As one author explained, ‘If in confirming an award the primary jurisdiction determines that the arbitration agreement was valid under its law, this should collaterally estop the contestant from relitigating in a secondary jurisdiction invalidity of the agreement under seat law. This issue, which was necessary for the determination that the arbitration and award are valid under the law of the seat, has been determined, and any fact that necessarily contributed to this determination should be considered as established when enforcement is sought in the secondary jurisdiction.’<sup>61</sup> However, other issues relevant under Article V(1) are not necessarily governed by one law under the Convention. It is in such area that differing award judgments can be permitted to coexist.

As a practical matter, award creditors should always first contemplate their first option to seek direct recognition and enforcement in the place where they can collect assets, or obtain information on the location of such assets. In addition, in view of the clear position of the New York courts that they will enforce a foreign award or the foreign award judgment from the seat confirming that award, award creditors have the additional option of seeking confirmation of the award at the seat or, if the debtor challenges the award at the seat, seek affirmative relief from the court at the seat, in ways that ensure that the foreign award judgment will comply with New York’s requirement to enforce foreign country judgments. For example, the straightforward statutory framework in Article 53 of New York’s Civil Procedure Laws and Rules only applies to money judgments, as opposed to other types of relief such as specific performance, and lays out clear grounds to deny recognition

---

61 See n 3 above, DeWitt at 516.

and enforcement.<sup>62</sup> Those must be closely analysed when litigating abroad with a view of eventually using a New York forum.

As made clear above, US law remains unsettled on whether and to what extent foreign award judgments are considered, especially if those judgments have been made outside the seat. That said, litigants must consider the common law tradition's inclination to consider and potentially accept prior courts' findings on issues related to the validity of the arbitration, and frame their briefing accordingly. Finally, because the Convention expressly contemplates that the same issue can be subject to different laws, litigants should pay close attention to the law that is applicable to their issues in each forum to properly promote or resist issue or claim preclusion.

---

62 Article 53 is intended to encourage and facilitate the recognition of Foreign Country Money Judgments in New York. Article 53 codified a set of minimum standards for recognising Foreign Country Money Judgments previously developed by New York courts under the legal doctrine of comity. This codification of the generous common law tradition of recognition was intended to expand – not limit – the ability of New York courts to recognise Foreign Country Money Judgments. Article 53 leaves intact the common law comity standards for judgments that are outside the statute's purview (such as non-money judgments).