CHROMALLOY: UNITED STATES LAW AND INTERNATIONAL ARBITRATION AT THE CROSSROADS

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INTRODUCTION

International commercial arbitration as a favored means of dispute resolution is arguably enjoying its greatest popularity ever.[1] Arbitration as a means of effective international dispute resolution has grown rapidly over the last twenty-five years, and most transnational contracts today contain some provision for arbitration.[2] The uncertainties of litigation in foreign courts[3]—often perceived as unnecessarily lengthy, procedurally cumbersome, costly, and, on occasion, biased in favor of the domestic party—makes arbitration an attractive alternative.[4] Arbitration enables parties to draft provisions for future

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[1] A telling example is provided by the docket growth of the International Chamber of Commerce's International Court of Arbitration in Paris. See Horacio Grigera Naón, Introductory Note, ICC Int'l Ct. Arb. Bull., Dec. 1996, at 1, 1 (noting "ICC arbitration['s] . . . ever increasing case-load, . . . updating and upgrading of . . . resources to handle its growing responsibilities, and an ICC Court which has expanded its multinational membership"); News from the Court, ICC Int'l Ct. Arb. Bull., Dec. 1996, at 4, 5 (noting "dramatic increase" in cases from 285 in 1987 to 427 in 1995, with further increases expected).

[2] See, e.g., Gary B. Born, International Commercial Arbitration in the United States: Commentary and Materials 6 n.23 (1994) ("'[I]n international cases, where jurisdictional problems are bound to arise in the event of dispute, the practice of incorporating arbitration clauses into contracts is becoming almost universal.'" (quoting Justice Michael Kerr, International Arbitration v. Litigation, 1980 J. Bus. L. 164, 164)); Michael Kerr, Preface to the Second Edition, in W. Laurence Craig et al., International Chamber of Commerce Arbitration at xi, xiii (2d ed. 1990) (observing that it would now be "surprising" for parties to international contract not to include arbitration clause).

[3] See, e.g., Gerold Herrmann, The Arbitration Agreement as the Foundation of Arbitration and Its Recognition by the Courts, in International Arbitration in a Changing World 41, 42 (Albert Jan van den Berg ed., 1994) (characterizing arbitration agreement in transnational setting as expression of parties' preference for arbitration over litigation in national courts).

[4] See Born, supra note 2, at 2-3:

legal proceedings that meet their specific needs and can provide for greater equality between the potential adversaries.[5] Such goals can be accomplished while remaining largely detached from the domestic judicial system of either party.

The autonomy of the arbitral alternative, however, is limited. Parties will often initiate domestic proceedings in connection with a dispute referred to arbitration.[6] Domestic courts may act to enforce both the agreement to arbitrate as well as the eventual award rendered by the arbitrators.[7] The courts may also act to appoint the arbitrators themselves.[8] Finally, domestic courts may act to assist in procedural matters and, in some cases, decree interim measures.[9] In

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> [I]nternational arbitration is often designed and accepted particularly to assure parties from different jurisdiction[s] that their disputes will be resolved neutrally. Among other things, the parties seek a neutral decisionmaker (detached from the governmental institutions and cultural biases of either party) applying internationally neutral procedural rules (rather than a particular national legal regime). In addition, international arbitration is frequently regarded as a means of mitigating the peculiar uncertainties of transnational litigation—which can include protracted jurisdictional disputes and expensive parallel proceedings—by designating a single, exclusive dispute resolution mechanism for the parties' disagreements.

[5] See id. at 2 (noting "defining characteristic" of arbitration as its flexibility in allowing parties to agree upon scope of procedures to govern resolution of dispute); Jack J. Coe, Jr., International Commercial Arbitration: American Principles and Practice in a Global Context 59-60 (1997) (highlighting ability to tailor arbitral proceedings, both as to choice of substantive law and procedural matters).

[6] For a more complete discussion of the various methods by which judicial intervention can be and is most commonly sought, see generally Andreas Bucher, Court Intervention in Arbitration, in International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity? 29, 29-44 (Richard B. Lillich & Charles N. Brower eds., 1994).

[7] In the United States, the Federal Arbitration Act (FAA) supplies the specific jurisdictional grant to courts to enforce arbitral awards. See 9 U.S.C. §§ 2, 9-10 (1994) (permitting enforcement of agreements to arbitrate and awards rendered by arbitrators, subject to limited defenses). For a discussion of FAA provisions, see Born, supra note 2, at 188-91. The FAA is discussed in greater detail infra Part I.B. In the international arena, the enforcement of agreements to arbitrate and awards is governed by the terms of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, see infra note 16, by which state signatories are bound to recognize and enforce foreign arbitral awards in accordance with its provisions. The Convention is discussed in greater detail infra Part I.A.

[8] See Jain v. de Mere, 51 F.3d 686, 692 (7th Cir. 1995) (upholding district court's power to appoint arbitrators in international arbitration); Pacific Reinsurance Management Corp. v. Ohio Reinsurance Corp., 814 F.2d 1324, 1328 (9th Cir. 1987) (upholding district court's appointment of arbitrators in domestic arbitration); see also Bucher, supra note 6, at 30-32 (discussing judicial role in composition of arbitral tribunal).

[9] See, e.g., Carolina Power & Light Co. v. Uranex, 451 F. Supp. 1044, 1051-52 (N.D. Cal. 1977) (holding that court has power to decree preaward attachment); see also Rules of Arbitration of the International Chamber of Commerce art. 23(2) (1998) ("[I]n appropriate circumstances . . . parties may apply to any competent judicial authority for interim or conservatory measures."). For a more general discussion, see Andreas F. Lowenfeld, In-

addition, courts at the situs, the location where the arbitration occurs, often have the authority to nullify the award.[10]

Given this domestic judicial involvement, parallel and inconsistent judgments between an arbitral tribunal and a domestic court can occur, creating a complex problem of international commercial law. Historically, to most scholars and practitioners, such conflicting results were viewed as hardly any conflict at all: The award, deemed to be subject to the domestic law in which it was rendered, simply ceased to exist.[11] However, recent scholarship attributing a denationalized character to arbitral awards[12] has renewed debate over the proper resolution of this conflict. Further complicating the matter is the existence of a complex web of treaty instruments that govern the international enforcement of arbitral awards and foreign judgments and seek to coordinate their interaction with domestic legal systems.[13] The resulting collision of domestic and international standards in this

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ternational Litigation and Arbitration 364-65 (1993) (noting that many United States courts have nonetheless declined to permit preaward attachment in connection with international arbitrations, except in maritime cases).

10 Under the United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration, U.N. GAOR, 40th Sess., Annex 1, U.N. Doc. A/40/17 (1985), an award may be set aside by a competent court if the dispute is nonarbitrable or if the award conflicts with domestic public policy. See id. art. 34(2)(b). In the United Kingdom, arbitration law prior to 1979 permitted an extensive right of appeal of an award on questions of law, and British courts had the power to nullify an award based upon erroneous conclusions of fact or law; as amended, the new Arbitration Act still permits limited review on questions of law that "substantially affect" the rights of the parties. Arbitration Act, 1996, ch. 23, § 69(3) (Eng.). For a discussion of relevant foreign law addressing the review of arbitral awards, see generally Daniel M. Kolkey, Attacking Arbitral Awards: Rights of Appeal and Review in International Arbitrations, 22 Int'l Law. 693 (1988).

11 See, e.g., Pieter Sanders, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 6 Neth. Int'l L. Rev. 43, 55 (1959) (noting that to "enforc[e] a non-existing arbitral award would be an impossibility").

12 See Charles Jarrosson, Comment, 1994 Revue de l'Arbitrage 329, 335-36 (noting that view of award as not integrated into juridical order of state in which it was rendered as continuing evolution in international arbitration law); Jan Paulsson, Rediscovering the New York Convention: Further Reflections on *Chromalloy*, Mealey's Int'l Arb. Rep., Apr. 1997, at 20, 27 (arguing that "an arbitrator is not an emanation of a sovereign, and . . . his award may be given effect without necessary reference to the acceptance or tolerance of the legal system of the place where he rendered his award"). For a more detailed discussion of this trend towards a denationalized view of arbitral awards, see infra Part III.B.

13 See, e.g., Born, supra note 2, at 16-24 (providing overview of major arbitration treaty instruments); David P. Stewart, National Enforcement of Arbitral Awards Under Treaties and Conventions, in International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?, supra note 6, at 163-68 (same). While the United States is not a party to any recognition of judgments convention, significant examples can be found internationally. See infra note 71 and accompanying text (discussing international recognition conventions). For an example of a bilateral judicial recognition treaty between countries (which became relevant in proceedings in France related to the *Chromalloy* case), see infra note 106.

unguided context threatens not only to undermine the success of international arbitration, but also to create strife in judicial relations between nations.

United States courts addressed this issue for the first time in *Matter of Chromalloy Aeroservices (Arab Republic)*.[14] In *Chromalloy*, a district court upheld the validity of a foreign arbitral award, in the process rejecting the judgment of a foreign court which earlier had nullified it.[15] The decision involved two main issues: (1) whether the arbitral award remained valid despite its nullification by a court at the situs, thus permitting confirmation under the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention);[16] and (2) whether the rule provided for by the New York Convention superseded those for the recognition of foreign judgments in the United States generally.

Faced with competing presumptions under United States law that favor enforcement of both arbitral awards and foreign judgments, the district court chose to recognize the arbitral award, despite the existence of a colorable defense to its enforcement under the terms of Article V(1)(e) of the New York Convention.[17] In reaching this conclusion, the court applied, for the first time in the United States, Article VII of the New York Convention,[18] which appeared to permit the invocation of more favorable provisions of United States domestic law on arbitration, contained within Chapter One of the United States

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[14] 939 F. Supp. 907 (D.D.C. 1996).

[15] See id. at 914.

[16] See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 [hereinafter New York Convention]. The New York Convention, the main international agreement governing the enforcement of foreign arbitral awards in the United States, is described in greater detail infra Part I.A.

[17] See *Chromalloy*, 939 F. Supp. at 909-10, 914. Article V(1)(e) provides that:

> Recognition and enforcement 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.

New York Convention, supra note 16, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 40, 42. Recognition of foreign awards implies granting them a res judicata effect, whereas enforcement means the actual execution of the award.

[18] See *Chromalloy*, 939 F. Supp. at 909-10. Article VII(1) provides that:

> 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.

New York Convention, supra note 16, art. VII(1), 21 U.S.T. at 2520-21, 330 U.N.T.S. at 42.

Federal Arbitration Act (FAA).[19] As will be discussed, this choice proved to be highly controversial.

Unfortunately, given the magnitude of the legal issues at stake and the controversial grounds adopted by the district court, the opinion was remarkably brief and avoided full analysis of some of the more important issues involved. In particular, the court did not carefully examine the interplay between the FAA and the New York Convention, leaving little guidance for the resolution of future conflicts over the recognition and enforcement of foreign arbitral awards and judgments. At best, the court's reasoning was insufficient; at worst, incorrect.

This Note will critique the *Chromalloy* analysis, identify the key issues raised by the decision, and suggest the proper interpretation of the New York Convention as a major multilateral legal instrument.[20] Part I discusses the New York Convention, as well as relevant portions of the FAA and state law regarding enforcement of foreign judgments. Part II presents the facts and reasoning employed by the district court in *Chromalloy*, and offers a critical analysis of the case, particularly regarding the problems posed by the court's reliance on Article VII of the New York Convention as the basis of its decision. Part III examines the relationship between the respective rules for the recognition of arbitral awards and foreign judgments. This Note then proposes guidelines for handling such conflicts in the future and argues that Article V is the more appropriate mechanism to consider all of the relevant interests.

I
THE ENFORCEMENT OF FOREIGN ARBITRAL AWARDS IN THE UNITED STATES

This Part provides a general overview of the laws controlling the enforcement of foreign arbitral awards in the United States, primarily

[19] 9 U.S.C. §§ 9-10 (1994) (providing that district court "must" confirm arbitral award unless award was procured by fraud, arbitrators were evidently partial or corrupt, arbitrators were guilty of prejudicial misconduct, or "arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made"). The purpose of the FAA and its relation to the New York Convention are explored further infra Part I.B.

[20] The approach that this Note endorses is based on aspects of U.S. domestic law as well as wider international considerations. Especially relevant in this context, then, are the decisions of foreign courts, which serve not merely as important sources of guidance for United States courts, but also constitute critical independent sources for the interpretation of an international convention with uniformity as one of its primary goals. See Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(3)(b), 1155 U.N.T.S. 331, 340 (providing that subsequent practice in application of treaty constitutes formal source of interpretation under general international law).

focusing on the obligations contained in the New York Convention, the chief international instrument governing the subject. Proper application of the Convention's provisions, as is the case with any legal instrument, requires careful consideration of the goals and purposes of the Convention. The task of sorting out the intent of the drafters of the Convention is particularly important here, as they embraced several conflicting policies. This Part therefore will discuss the goals of the New York Convention, its key provisions, and the inherent conflict between two of these provisions, Articles V and VII. This Part will then briefly outline the relevant domestic United States law found in the FAA and state law on enforcing foreign judgments, provisions which were at issue in the *Chromalloy* case.

A. The New York Convention

In the United States[21] and more than one hundred other countries, the New York Convention governs how domestic courts determine the effect of a foreign arbitral award.[22] Concluded in 1958, the Convention is considered "by far the most significant contemporary international agreement relating to commercial arbitration."[23] One of the primary goals of the Convention[24] was to make arbitral awards rendered in a foreign country enforceable (subject only to very limited defenses) in any other state party to the Convention,[25] thereby eliminating the need for parties to first confirm the award in the courts of

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21 When adjudicating a motion to recognize and enforce a foreign award falling under the New York Convention, a United States court must, as a matter of law, apply the Convention's provisions. Congress has incorporated the Convention into United States domestic law as Chapter Two of the FAA. 9 U.S.C. §§ 201-208 (1994). For an overview of the FAA's provisions, see infra Part I.B.

22 See New York Convention, supra note 16, arts. III, V, 21 U.S.T. at 2519-20, 330 U.N.T.S. at 40. As of 1996, 136 countries had ratified, acceded, or succeeded to the Convention. See 21 Y.B. Com. Arb. 389-93 (1996). The United States acceded to the Convention in 1970. See United Nations Conference on International Commercial Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Dec. 29, 1970, 21 U.S.T. 2517, T.I.A.S. No. 6997.

23 Born, supra note 2, at 18.

24 Other significant goals included requiring national courts to recognize and enforce agreements to arbitrate and referring parties to arbitration when they had entered into an agreement subject to the Convention. See New York Convention, supra note 16, arts. II(1), (3), 21 U.S.T. at 2519, 330 U.N.T.S. at 38, 40. The practical effect of such provisions is to divest domestic courts of jurisdiction when the parties have executed a proper agreement to arbitrate.

25 Under the Convention's terms, the state where the award was rendered does not have to be a party to the Convention for a court to recognize the award. However, more than two-thirds of the states that are parties to the Convention (including the United States) have chosen, under Article I(3), to apply the Convention on the basis of reciprocity. In other words, the state will recognize an award only if made in the territory of another state party to the Convention. See Lowenfeld, supra note 9, at 344.

the foreign state before attempting to have that judgment recognized elsewhere.[26]

1. *Goals of the Convention: Proenforcement Bias versus Uniformity in Application*

The drafters of the New York Convention had two primary goals: greater enforceability of arbitral awards[27] and greater uniformity of enforcement practice.[28] The Convention achieved the enforceability goal largely through the simplification of enforcement proceedings, in particular by abolishing the cumbersome *double exequatur* procedure required under the terms of its predecessor, the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards, and by enumerating and limiting the defenses to recognition and enforcement.[29]

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[26] See id. (noting that "[w]ithout such a convention, it had often been difficult or impossible to enforce an arbitral award outside the state in which the arbitration had taken place, where [a] defendant might well not be established or have assets").

[27] See Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15 (1974) (citations omitted):

> The goal of the Convention and the principal purpose underlying American adoption and implementation of it, 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 observed and arbitral awards are enforced in the signatory countries.

[28] See Born, supra note 2, at 20 ("An important aim of the Convention's drafters was uniformity: they sought to establish a single, stable set of rules for the enforcement of arbitral agreements and awards.") (citing Albert Jan van den Berg, The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation 1-6 (1981)); see also Leonard V. Quigley, Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049, 1065 (1961) (stating that "drafting of [the Convention] was complicated by the desires of some delegates to institute a uniform system of international procedural rules of enforcement for foreign awards").

[29] Convention on the Execution of Foreign Arbitral Awards, Sept. 26, 1927, 92 L.N.T.S. 302 [hereinafter Geneva Convention] and Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 158. "Exequatur" describes the process whereby an enforcing court authorizes the execution within its jurisdiction of a foreign judgment or award. Under the scheme promulgated by the Geneva Convention, arbitral awards could only be enforced once they were "final" and not subject to appeal or other recourse in the country where they were rendered. See 92 L.N.T.S. at 305. This scheme required obtaining leave for enforcement, or exequatur, from the rendering country. Thus, the party seeking to enforce an award needed the approval of two jurisdictions; hence the term "double exequatur." See van den Berg, supra note 28, at 266-67 (describing double exequatur and its elimination in New York Convention). In addition, under Article 2 of the 1923 Geneva Protocol, see Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157, 158, the arbitration was governed "by the law of the country in whose territory . . . [it] takes place." Together these provisions left international arbitration securely tied to the law of the situs, creating significant opportunity for abuse as a losing party could forestall or even defeat enforcement abroad by mounting spurious challenges to the award at the situs. See van den Berg, supra note 28, at 267 (noting that system of double exequatur "could lead to delaying tactics on the part of the respondent who could forestall the award becoming final by instituting setting aside procedures in the country in which the award was made"); see also Paulsson, supra

The Convention also aimed to make the process of enforcing foreign awards more uniform. This was largely accomplished through the enumeration of certain limited and exclusive grounds in Article V by which signatory states could refuse to enforce an award.[30] The drafters believed uniformity would create a safer and more stable legal environment in which arbitration could prosper and thereby serve the purposes of the Convention by preserving expectations and minimizing forum shopping.[31]

Unfortunately, however, pursuit of these goals can often lead to conflict. For if the quest to establish uniform standards in award enforcement ultimately leads to the adoption of the lowest common denominator among state signatories (i.e., a convention permitting a myriad of potential defenses to enforcement), then enforceability overall will be weakened. Individual states could slow the development of international standards by adopting domestic laws that vary considerably from international norms.[32] By the same token, however, if derogation from the language of the Convention is permitted in order to improve enforceability,[33] then a significant measure of uniformity is lost. Whether this price is worth paying is debatable; that it is a price is undeniable.

2. *The Basic Framework*

The central obligation of the New York Convention can be found in Article III,[34] which requires the courts of signatory states to recognize and enforce foreign arbitral awards unless one of the exceptions

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note 12, at 25 (noting that "the choice of an unfamiliar venue for arbitration [was] fraught with danger").

30 See New York Convention, supra note 16, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40; infra note 35 (enumerating grounds on which enforcement of foreign arbitral award may be refused).

31 See Hamid G. Gharavi, *Chromalloy*: Another View, 12 Mealey's Int'l Arb. Rep. 21, 21-22 (Jan. 1997) (noting parties may purposely try to arbitrate in forum where arbitral awards can be more easily overturned under local law).

32 For example, the Egyptian law of arbitration at the heart of the *Chromalloy* case included "two uniquely Egyptian" grounds for annulment of awards, including "if the arbitral award fails to apply the law agreed by the parties to the subject matter of the dispute" and "if nullity occurs in the arbitral award, or if the arbitral proceedings are tainted by nullity affecting the award." Paulsson, supra note 12, at 21. Paulsson has described the latter of these grounds as "circular and obscure" and "likely to lead to applications for annulment." Id. at 31 n.5 (citing Bernard Fillion-Dufouleur & Philippe Leboulanger, Le Nouveau Droit Egyptien de l'Arbitrage, 1994 Revue de l'Arbitrage 665, 682).

33 For example, by allowing the unilateral introduction of looser domestic standards for recognition and enforcement, such as the use of the FAA in the *Chromalloy* case. See infra Part II.A.2 (discussing *Chromalloy* court's use of FAA in finding enforcement appropriate).

34 See New York Convention, supra note 16, art. III, 21 U.S.T. at 2519, 330 U.N.T.S. at 40 ("Each Contracting State shall recognize [foreign] arbitral awards as binding and en-

enumerated in Article V applies.[35] Given the limited defenses available under Article V to an award's enforcement, the interplay between the two articles clearly evinces a strong presumption in favor of recognition of a foreign arbitral award. The interplay also demonstrates a foreign arbitral award's clearly superior status under United States law in comparison to a foreign judgment, given that the provisions of the New York Convention constitute an affirmative international treaty obligation of the United States, and as such, the supreme law of the land.[36]

3. *The Purpose and Meaning of Article VII*

One of the more controversial aspects of the New York Convention can be found in Article VII.[37] Deemed to constitute a "more favorable right" provision,[38] the Article has been interpreted as calling for the application of a state's domestic or treaty law when such law provides more liberal grounds for enforcement than under the Convention.[39] This allows the party seeking enforcement to choose the body of law more favorable to its case.[40] The New York Conven-

force them in accordance with the rules of procedure of the territory where the award is relied upon . . . .").

[35] Article V enumerates an exclusive list of grounds on which recognition or enforcement of a foreign arbitral award may be withheld: (1) incapacity of the parties to agree to arbitrate or other invalidity of the arbitration agreement; (2) inability to present a party's case during the arbitration proceedings; (3) award exceeding the scope of the submission to arbitration; (4) irregularities in the composition and procedure of the arbitral tribunal; (5) award not binding, set aside or suspended at the situs of the arbitration; (6) nonarbitrability of the subject matter of the dispute; and (7) award contravening public policy. See New York Convention, supra note 16, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40.

[36] See U.S. Const. art. VI ("[A]ll Treaties made . . . under the Authority of the United States, shall be the Supreme Law of the Land."). By contrast, the enforcement of foreign judgments is a matter of state law, and is not governed in the United States by any treaty obligation. See infra Part I.C.

[37] See New York Convention, supra note 16, art. VII, 21 U.S.T. at 2520-21, 330 U.N.T.S. at 42; see also supra note 18 (providing full text of Article VII(1)).

[38] See van den Berg, supra note 28, at 81.

[39] See id. at 88 & n.225 (citing prevailing construction in German legal writing); see also Paulsson, supra note 12, at 20 (noting Article VII provides that "national rules or indeed other treaties shall be given preference if they are more favourable to enforcement"); Problems in Enforcement of Foreign Arbitral Awards, 6 World Arb. & Mediation Rep. 77, 77 (1995) (remarks of Vincent Sama) (noting that Article VII allows domestic forum to apply its own arbitration law if that law is more proenforcement than under the Convention).

[40] Although the plain language of Article VII would not seem to preclude a similar reliance upon defenses to enforcement under domestic law by the party opposing enforcement, such an interpretation would create new obstacles and thus be contrary to the object and purpose of the Convention to improve recognition and enforcement. See van den Berg, supra note 28, at 84 (arguing that language must pertain only to party seeking enforcement in order to avoid result "wholly inconsistent with the pro-enforcement bias of the Convention and the aim of the [more favorable right] provision itself"). The

tion thus represents a minimum standard from which state signatories cannot derogate but which permits states to retain existing liberal norms or take further unilateral steps to facilitate enforcement.

European courts have also supported this interpretation of Article VII as a "more favorable right" provision.[41] Of particular interest regarding *Chromalloy* are the recent decisions of French courts applying Article VII in cases where an award has been set aside by a competent authority at the situs. In 1981, France enacted a specific statute concerning international arbitration that limited the grounds for nonrecognition and enforcement of foreign awards.[42] Under this legislation, French courts may not refuse enforcement of a foreign award on the ground that the award was set aside in the country of origin. Since the law's enactment, French courts have held that a party seeking enforcement may rely, by virtue of Article VII, upon the more favorable provisions of French law that do not recognize the

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Bundesgerichtshof, the German Supreme Court, has ruled decisively that only the party seeking enforcement may rely upon Article VII's importation procedure. See id. at 85 n.214 (citing Judgment of Feb. 12, 1976, Bundesgerichtshof [Supreme Court], Germany, translated in 2 Y.B. Com. Arb. 242, 242-43 (1977) (holding that Article VII allows party seeking enforcement to base its request for enforcement on domestic law)); see also Judgment of June 29, 1989, Oberlandesgericht [Court of Appeal], Frankfurt, translated in 16 Y.B. Com. Arb. 546, 547 (1991) ("This most favorable right principle, which allows the *most successful party* in an arbitral award the choice of the most favorable means to obtain a declaration of enforcement, does not only apply to treaties . . . [but also] to domestic law.") (emphasis added).

41 See, e.g., the position of French Courts in Bomar Oil N.V. v. Entreprise Tunisienne d'Activités Pétrolières, Cour d'appel [Court of Appeal], Versailles, Jan. 23, 1991, 1991 Revue de l'Arbitrage 291, 296, translated in 17 Y.B. Com. Arb. 488, 490 (1992) ("It follows [from Article VII of the New York Convention] that a French court, when faced with an application to set aside an arbitral award, may have to put aside the provisions of the New York Convention if French domestic law is more favourable than the New York Convention."); German courts in Judgment of Feb. 12, 1976, Bundesgerichtshof [Supreme Court], Germany, translated in 2 Y.B. Com. Arb. 242, 243 (same) and Judgment of June 29, 1989, Oberlandesgericht [Court of Appeal], Frankfurt, translated in 16 Y.B. Com. Arb. 546, 547 (same); Dutch courts in Judgment of Apr. 24, 1991, Rechtbank [Court of First Instance], Amsterdam, translated in 17 Y.B. Com. Arb. 572, 573 (1992) (ruling that New York Convention applies to enforcement of arbitral award in Netherlands); and Swiss courts in Judgment of Apr. 20, 1990, Handelsgericht [Commercial Court], Zurich, translated in 17 Y.B. Com. Arb. 584, 584-85 (1992) (applying New York Convention's provision).

42 See Decree No. 81-500 of May 12, 1981, 1981 D.S.L. 240 (codified as N.C.P.C., arts. 1501-1507), reprinted in Nouveau Code de Procédure Civile, 674-77 (85th ed. Dalloz 1993) (Fr.). Under Article 1502 of the new law the only grounds for denial of recognition and enforcement of a foreign award are: (1) the invalidity of the arbitration agreement; (2) irregularities in the composure or appointment procedure of the arbitration tribunal; (3) incompatibility of the award with the mandate of the arbitration; (4) failure to respect due process; and (5) the award's contravention of international public policy. See id. art. 1502.

setting aside of an award by a court at the situs as a proper defense to recognition and enforcement.[43]

While there is no United States court decision which has analyzed squarely the proper interpretation of Article VII, in *Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier*,[44] a case addressing Article V, the Second Circuit observed that the basic goal of the Convention as a whole was to remove obstacles to enforcement and noted the Convention's "general pro-enforcement bias."[45] Such a bias conforms with the well-established United States public policy in favor of international arbitration and lends support to the prevailing international interpretation of Article VII.[46]

Thus it appears the drafters of the Convention were willing to sacrifice, to a degree, the Convention's uniformity goal to allow parties to avail themselves of more lenient domestic standards for en-

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[43] See, e.g., Polish Ocean Line v. Jolasry, Cour de cassation [Supreme Court], France, Mar. 10, 1993, 1993 Revue de l'Arbitrage 255, translated in 19 Y.B. Com. Arb. 662, 663 (1994). The court stated:

> Art[icle] VII does not deprive any interested party of any right it may have to avail itself of an arbitral award in the manner and to the extent allowed by the law of the country where such award is sought to be relied upon. As a result, a French court may not deny an application for leave to enforce an arbitral award which was set aside or suspended by a competent authority in the country in which the award was rendered, if the grounds for opposing enforcement, although mentioned in Art[icle] V(1)(e) of the 1958 New York Convention, are not among the grounds specified in Art. 1502 N.C.C.P.

Id., 1993 Revue de l'Arbitrage at 258, translated in 19 Y.B. Com. Arb. at 663; Hilmarton v. Omnium de Traitement et de Valorisation, Cour de cassation [Supreme Court], France, Mar. 23, 1994, 1994 Revue de l'Arbitrage 327, 328, translated in 20 Y.B. Com. Arb. 663, 665 (1995) (ruling that party seeking enforcement can rely on Article VII, and, therefore, more favorable provisions of French domestic law to enforce award); Pabalk Ticaret Ltd. Sirketi v. Norsolor, S.A., Cour de cassation [Supreme Court], France, Oct. 9, 1984, 1985 Revue de l'Arbitrage 431, 432 (1985), translated in 11 Y.B. Com. Arb. 431, 446 (1986) (holding that a "judge cannot refuse enforcement [of an arbitral award] when his own national legal system permits it"); Ministère Tunisien de l'equipement v. Société Bec Frères, Cour d'appel [Court of Appeal], Paris, Feb. 24, 1994, 1995 Revue de l'Arbitrage 275, 280, translated in 22 Y.B. Com. Arb. 682, 685 (1997) (enforcing award despite its nullification at situs, holding that, as a result of Article VII, court "may not refuse to grant exequatur when its national law permits it"). While the award in the *Polish Ocean Lines* case had not been set aside but merely suspended pending the decision to annul, the Cour de cassation similarly based its grounds on the primacy of Article VII, and therefore, French law, over conflicting provisions in Article V(1)(e). Presumably, this stemmed from the irrelevance under French law of whether or not the award eventually would be annulled. For a more detailed discussion of the history of the *Hilmarton* litigation, see infra notes 107-08 and accompanying text.

[44] 508 F.2d 969 (2d Cir. 1974).

[45] Id. at 973.

[46] See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (noting "emphatic federal policy in favor of arbitral dispute resolution" as "policy [which] applies with special force in the field of international commerce").

forcement.[47] While the Convention's preparatory works, the *travaux preparatoires*, give little guidance to the exact scope of Article VII, the preference for enforceability over uniformity may have been merely a reflection of pragmatic, rather than ideological, considerations.[48] In any case, it seems clear that the drafters did not intend to introduce new obstacles to the recognition and enforcement of awards.[49]

4. *Tensions Between Article VII and Article V*

Article VII can thus be understood as a nod towards greater enforcement at the expense of a degree of uniformity, given the manner in which it effectively imports domestic norms into the operation of an international legal instrument. This interpretation has created some tension between its provisions and those of Article V, which in setting out an exclusive list of grounds for nonrecognition, represents a significant step towards achieving uniformity of practice among state signatories.[50] Furthermore, most countries generally adhere to the uniform standards laid out in Article V.[51] This tension between enforceability

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[47] See, e.g., Paulsson, supra note 12, at 20 (arguing persuasively that purpose of New York Convention was "not to establish a comprehensive and unitary scheme" for enforcement of arbitral awards, but rather to further facilitate enforcement of foreign awards). This proenforcement thrust best explains the existence of Article VII, as the Convention was not intended to detract from any greater rights of enforcement a party might enjoy under domestic law, nor to prevent a country from enacting more liberal enforcement provisions than the Convention.

[48] See U.N. ESCOR, Conf. on Int'l Com. Arb., 18th mtg. at 5-8, U.N. Doc. E/CONF.26/SR.18 (1958) (summarizing debate over Convention and highlighting practical considerations of drafters). The drafters may have realized that agreement upon more liberal standards than those introduced by the Convention was impossible at the time.

[49] See Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) (discussing availability of public policy defense under Article V(2) of Convention and noting that "expansive construction of this defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement"); see also Bergesen v. Joseph Muller Corp., 710 F.2d 928, 932 (2d Cir. 1983) (opting for expansive interpretation of awards "not considered as domestic" under terms of Convention, in order to effectuate drafters' proenforcement purposes); Hamid G. Gharavi, Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention, 6 J. Transnat'l L. & Pol'y 93, 95 (1996) (noting drafters' success in "eliminating the need for judicial proceedings to confirm [an] award in both the rendering and enforcing countries").

[50] See New York Convention, supra note 16, art. V., 21 U.S.T. at 2520, 330 U.N.T.S. at 40. Of course, Article V can also be said to be a proenforcement provision as well, given its strict limitation on the permissible grounds for nonrecognition (although the elastic terms of V(1)(e) would also allow an enforcing court at its discretion to refuse recognition on other grounds if the award had been set aside).

[51] For example, Article 36(1) of the UNCITRAL Model Law, see Report of the U.N. Comm. on Int'l Trade L., U.N. GAOR 40th Sess., Supp. No. 17, at 92, U.N. Doc. A/40/17 (1985), from which a number of national arbitration laws have been derived, is almost an exact replica of Article V of the New York Convention. See Kenneth T. Ungar, The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Com-

on one hand and uniformity on the other, however, can be at least partially reconciled by noting that both articles promote the same ends: the recognition and enforcement of foreign awards.

The deeper tension, however, is the potential divergence between the two articles regarding where judicial competence to evaluate awards lies and which article should control in the event of conflict. In *Chromalloy*, the court chose to apply Article VII, implying that the power to review the award belongs to the court where enforcement is sought.[52]

Yet there are strong arguments for vesting in the courts of the situs the primary competence to review arbitral awards. While arbitral decisions generally cannot be appealed,[53] courts at the situs are often in a better position to review the proceedings for conformity with procedural regularities and guard against manifest miscarriages of justice.[54] Furthermore, many have argued that the courts at the situs should possess the ultimate competence to determine an award's vitality, providing a safety valve against questionable awards that may wreak havoc with a losing party's assets worldwide. As van den Berg has noted:

> A losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction. If that were not the case, in the event of a questionable award a losing party could be pursued by a claimant with enforcement actions from country to country until a court is found, if any, which grants the enforcement. A claimant would obviously refrain from doing this if the award has

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mercial Arbitration, 25 Colum. J. Transnat'l L. 717, 732-34, 743-53 (1987) (noting similarity between rules laid down in Article 36 and New York Convention); see also Born, supra note 2, at 38 (noting adoption of UNCITRAL Model Law by Australia, Bermuda, Bulgaria, Canada, Cyprus, Hong Kong, Mexico, Nigeria, Russian Federation, Scotland, and Tunisia, and its consideration by the United States, Germany, and New Zealand).

52 See Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 909 (D.D.C. 1996) ("[T]he award was made in Egypt, under the laws of Egypt, and has been nullified by the court designated by Egypt to review arbitral awards. Thus, the Court *may*, at its discretion, decline to enforce the award.") (emphasis added). Egypt, the party resisting enforcement of the award, argued that a sufficient ground had been established to deny recognition under Article V as a result of the award's nullification by the foreign court at the situs, and that this primary competence should not be circumvented by recourse to Article VII, which facilitates enforcement of arbitral awards on the basis of local law. See id. at 907, 908-10, 914. For a critique of the court's decision, see infra Part II.B.

53 See Lowenfeld, supra note 9, at 327-28 (noting "absence of appeal [as] . . . one of the principal features of arbitration, sometimes seen as an advantage, in that it reduces costs and opportunity for delay, sometimes viewed as a disadvantage, in that errors may go uncorrected").

54 For example, corruption of the arbitrators or the inability of one side to present its case.

been set aside in the country of origin and this is a ground for refusal of enforcement in other Contracting States.[55]

Rather, by vesting ultimate authority in the courts of the situs, an improper award can be eliminated at the source and the specter of inconsistent judgments avoided.[56] As Paulsson has noted, "[u]nless other legal systems respect that outcome, the consequence might be inconsistent decisions and vast confusion."[57]

However, such a standard risks subjecting the arbitral process to local political considerations, leaving the system unable to remedy instances of "hometown justice."[58] Furthermore, enhancing the role of the courts at the situs runs contrary to the increasingly popular view of international arbitration as delocalized and detached from domestic systems of law.[59] Finally, to accept this argument requires one to overcome the plain language of Article V itself, which seems to grant discretion whether or not to recognize the award to courts where enforcement is sought.[60]

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55 van den Berg, supra note 28, at 355.

56 See Gharavi, supra note 31, at 23 (arguing that enforcement of set aside awards "may result in the coexistence of two conflicting awards").

57 Paulsson, supra note 12, at 27-28.

58 See Gharavi, supra note 49, at 104. Gharavi notes the case of Sonatrach v. Ford, Bacon & Davis, Inc., Trib. pr. inst. [Court of First Instance], Brussels, Dec. 6, 1988, translated in 15 Y.B. Com. Arb. 370, 375-77 (1990), in which a Belgian court enforced an arbitral award rendered in Algeria against a state-owned Algerian enterprise. The ruling came despite the award's nullification by an Algerian court, due to suspicions of Algerian government influence in having the award set aside.

59 For a more detailed discussion of the denationalized character of arbitration, see infra Part II.B.

60 Interestingly, the level of discretion to be exercised under Article V is more ambiguous under the French version of the text, which is equally authoritative, and thus relevant towards forming a uniform body of practice in applying the Convention's provisions. The French version reads, "La reconnaissance et l'exécution de la sentence ne seront refusées, sur requête de la partie contre laquelle elle est invoquée, que si cette partie fournit à l'autorité compétente du pays où la reconnaissance et l'exécution sont demandées la preuve . . . ." See New York Convention, supra note 16, 330 U.N.T.S. at 41. For the English version, see id., 21 U.S.T. at 2520, 330 U.N.T.S. at 40. This may lend support to the view that an annulment ground made out under Article V should never be refused by the enforcing court. See, e.g., van den Berg, supra note 28, at 355 (arguing that "an elimination of the ground for refusal that the award has been set aside in the country of origin . . . [is] undesirable"). But if the text is read literally, that "recognition and enforcement will not be refused . . . unless" the award has been annulled or suspended, it appears that the reviewing court is not required to refuse enforcement of the award in all cases. Put another way, there would still be no affirmative obligation to enforce the nullification decision. See Paulsson, supra note 12, at 22 (noting that Article V "does not command a refusal to enforce when there has been an annulment"); see also Born, supra note 2, at 649 (noting that French version of Article V is equally authoritative as English in providing that "Article V's exceptions permit, but do not require, non-recognition"). From a purely American perspective, the English language version was the one ratified by Congress, and thus was the one considered in *Chromalloy*. See Matter of Chromalloy Aeroservices

The New York Convention is thus characterized by fundamental underlying tensions. These include the tension between greater uniformity and enforceability as well as between the role of the courts of the enforcing forum versus those of the situs. Rather than being ignored, these tensions should be given due consideration by courts in interpreting the Convention's provisions.

B. The Federal Arbitration Act

The New York Convention has been implemented in most countries through national legislation.[61] This has made the effect of the Convention dependent upon the implementing legislation as well as the interpretation given to such legislation and the Convention by national courts.[62]

In the United States, the New York Convention has been implemented in domestic law as Chapter Two of the Federal Arbitration Act (FAA).[63] The FAA is divided into three chapters. Chapter One (sections 1-16), enacted in 1925, is generally regarded as dealing exclusively with domestic arbitration, although the definition of commerce in 9 U.S.C. § 1 includes "foreign" commerce. It was originally enacted in order to curb judicial hostility towards arbitration[64] and make agreements to arbitrate enforceable in United States courts.[65] Under the Act, courts faced with a validly concluded agreement to arbitrate are required to stay judicial proceedings and compel arbitration in ac-

(Arab Republic), 939 F. Supp. 907, 909 n.2 (D.D.C. 1996) ("The French language version of the Convention, (which the Court notes is *not* the version codified by Congress), emphasizes the extraordinary nature of a refusal to recognize an award . . . .").

61 Treaties and international agreements can either be self-executing or require implementing legislation, depending on the intention of the state parties to the agreement and whether existing domestic law is adequate for a country to fulfill its obligations. While a non-self-executing agreement would not have the force of binding domestic law until the implementing legislation was enacted, the country ratifying or acceding to such an agreement would be under an international obligation to do so within a reasonable time. See Restatement (Third) of the Foreign Relations Law of the United States § 111, n.5 (1987).

62 See Born, supra note 2, at 20 ("The effect of the Convention is therefore dependent on both the content of such national legislation and the interpretation given by national courts to both the Convention and national implementing legislation.").

63 9 U.S.C. §§ 1-16, 201-208, 301-307 (1994).

64 See, e.g., United States Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006, 1007, 1009-10 (S.D.N.Y. 1915) (noting "hostility of English-speaking courts to arbitration contracts" and affirming primacy of court proceedings); Tobey v. County of Bristol, 23 F. Cas. 1313, 1320 (C.C.D. Mass. 1845) (No. 14065) (expressing primacy of national courts over arbitration tribunals); Sanford v. Commercial Travelers' Mut. Accident Ass'n, 41 N.E. 694, 694 (N.Y. 1895) (rejecting on public policy grounds referral of contract dispute to "referee" rather than court of law).

65 See 9 U.S.C. § 2 (1994) (providing that agreements to arbitrate "shall be valid, irrevocable, and enforceable").

cordance with the agreement's terms.[66] Chapter Two (§§ 201-208) was added in 1970 to implement the United States' accession to the New York Convention.[67] As one commentator has noted:

> There is considerable "overlap" among the various sources of U.S. law affecting international arbitration agreements and awards. Arbitral awards and agreements falling under the New York Convention are of course governed by both the Convention and the second chapter of the FAA (which implements the Convention). In addition, however, these awards are *also* ordinarily governed by the first, "domestic" chapter of the FAA, at least to the extent it is not "in conflict" with the Convention. . . . [I]t is not always clear whether precedents developed under the domestic FAA are applicable under the Act's second chapter.[68]

This lack of clarity regarding domestic arbitration law proved to be a major issue in the *Chromalloy* case.[69]

C. *The Practice of Enforcing Foreign Judgments*

In contrast to foreign arbitral awards, the United States is not a party to any recognition of judgments treaty and thus is under no affirmative international obligation to recognize judgments of foreign courts. Despite this lack of international obligation, however, such judgments are normally enforced in the United States as a matter of state law.[70]

About half of the states in the United States have enacted versions of the Uniform Foreign Money-Judgments Recognition Act of 1962 (Uniform Act),[71] which governs enforcement of foreign judgments.[72] Even those states which have not formally adopted its provisions tend to follow its principles, which are expressed in the Restatement (Third) of the Foreign Relations Law of the United

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66 See id. § 4 (describing procedure for obtaining stay and for obtaining order of the United States District Court "directing that such arbitration proceed in the manner provided for in such agreement").

67 See id. §§ 201-208. A third chapter was added in 1990 to implement the Inter-American Convention on International Commercial Arbitration. See id. §§ 301-307.

68 Born, supra note 2, at 32 (emphasis in original).

69 See infra Part II.B.2.

70 Generally this occurs as long as there is no serious conflict with public policy or due process requirements.

71 13 U.L.A. 263-75 (1986). The Act calls for recognition of judgments granting or denying a sum of money unless one of the grounds for nonrecognition under § 4 can be shown (e.g., lack of jurisdiction, due process, public policy, or fraud). See id. §§ 4, 13 U.L.A. 268. For a discussion of the Uniform Act, see Lowenfeld, supra note 9, at 391-92.

72 Currently, the Uniform Act is in force in over twenty states. See Unif. Foreign Money-Judgments Recognition Act of 1962, 13 U.L.A. 80 (Supp. 1998) (listing jurisdictions which have adopted Act, including California, New York, and Texas).

States (Restatement).[73] The general rule provides that "final and conclusive"[74] foreign judgments are to be given full faith and credit within the United States in the same manner as sister state judgments.[75] Only in the limited circumstances enumerated in the Uniform Act will the recognition of foreign judgments be withheld.[76]

Thus in the case where a dispute results in an arbitral award and an inconsistent judgment, United States courts are faced with the dilemma of having to choose between two strong, yet conflicting, presumptions of enforcement. The *Chromalloy* case addressed this collision.

II
EVALUATION AND IMPLICATIONS OF *CHROMALLOY*

A. The Chromalloy *Case*

1. The Facts

On June 16, 1988, Chromalloy Aeroservices (CAS), a Delaware corporation with its principal place of business in San Antonio, Texas, entered into a contract with the Arab Republic of Egypt to perform inspection, repair, and upgrade services on Egyptian Air Force helicopters.[77] Attached to the contract as an appendix was an agreement stating that "any dispute or difference arising from th[e] contract"

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[73] See Restatement (Third) of the Foreign Relations Law of the United States §§ 481-482 (1987). Professor Lowenfeld outlined the relationship between the Restatement and the Uniform Act:

> The Restatement . . . took the Uniform Act as its basic text for the chapter on judgments, except that the Restatement's rules are not limited to money judgments. Since the Restatement, in turn, purports to reflect the "American" rule, foreign states . . . which condition recognition and enforcement of foreign judgments on reciprocity should (unless the opposite is shown in a particular case) be prepared to accept the Restatement as evidence of American recognition practice even for those states that have not adopted the Act.

Lowenfeld, supra note 9, at 391. As the District of Columbia had not enacted the Uniform Act at the time of the *Chromalloy* case, this Note will cite to the relevant provisions of the Restatement for evidence of the general guidelines for the recognition of foreign judgments. Similar rules can be found in the Restatement (Second) of Conflict of Laws §§ 98, 117 (1971 & Supp. 1989).

[74] Unif. Foreign Money-Judgments Recognition Act of 1962 § 2, 13 U.L.A. 264 (1986).

[75] See id. § 3, 13 U.L.A. 265 (stating "foreign judgment is enforceable in the same manner as the judgment of a sister state").

[76] The grounds for nonrecognition supplied fall into two categories: mandatory (award rendered in a system of law which lacks impartiality or due process, or lack of personal or subject matter jurisdiction) and discretionary (failure to serve upon a party notice of the proceedings, fraud, violation of public policy, conflict with another judgment, breach of the party's choice of forum, or serious inconvenience of litigating in the foreign forum). See id. § 4, 13 U.L.A. 268.

[77] See Final Award of Aug. 24, 1994, In Arbitration: Chromalloy Aeroservices vs. the Arab Republic of Egypt 3 [hereinafter Arbitral Award] (on file with the *New York Univer-*

would be referred to arbitration, the decision thereof being "final and binding" and not subject to "any appeal or other recourse."[78]

Following several delays and adjustments to the schedule, Egypt, citing delays in the works, notified CAS's representatives in Cairo on December 2, 1991 that it was terminating the contract.[79] After notifying Egypt that it "did not accept the notice of cancellation," CAS proceeded to initiate arbitration proceedings,[80] which subsequently took place in Cairo under Egyptian law[81] and were governed by the UNCITRAL Arbitration Rules.[82]

On August 24, 1994, the Arbitral Tribunal issued its award.[83] The Tribunal held that, under Egyptian law, Egypt was not entitled to terminate the contract since the formal notice period in the contract was never observed[84] and, in any case, the prerequisite conditions for termination did not exist.[85]

However, Egypt refused to pay the award, and on October 28, 1994, CAS filed a motion for recognition and enforcement of the award in the United States District Court for the District of Columbia.[86] On November 13, 1994, Egypt petitioned the Egyptian Court of Appeals in Cairo for nullification of the award.[87] Egypt then filed a petition with the district court in Washington on March 1, 1995, seeking a stay of the proceedings pending the decision of the Cairo Court.[88] While this motion was denied, the final decision of the Cairo Court preceded that of the district court anyway.

On December 5, 1995, the Cairo Court of Appeals nullified the arbitral award, citing the alleged failure of the arbitrators to apply

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sity Law Review). The total contract price was $32 million, the bulk of which CAS was to receive upon completion of the work. Id. at 4.

78 See Contract Between Chromalloy Aeroservices and Egyptian Air Force of June 1988, app. E [hereinafter Contract] (on file with the *New York University Law Review*).

79 See Arbitral Award, supra note 77, at 5. Egypt then drew down CAS's letters of guarantee for performance, leaving CAS with net receipts of less than $1 million. See id.

80 See id.

81 See Contract, supra note 78, app. E (providing that "both parties have irrevocably agreed to apply Egypt laws and to choose Cairo as the seat of the court of arbitration").

82 See Arbitral Award, supra note 77, at 11.

83 See id. at 65-66.

84 See id. at 33-34.

85 See id. at 39. As a consequence, the Tribunal ruled that CAS was entitled to receive nearly $17 million in compensation for the work it had performed prior to the notice of termination. See id. at 40.

86 See Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 908 (D.D.C. 1996).

87 See id.

88 See id.

Egyptian administrative law.[89] According to the Cairo Court, the application of Egyptian administrative law instead of civil law would have given more latitude to the government in its relations with private entities. This misapplication was deemed to amount to a failure to apply the choice of law of the parties, and therefore constituted grounds for the award's nullification under Article 53(1)(d) of the Egyptian Law of Arbitration.[90] Despite the action of the Cairo Court of Appeals, however, on July 31, 1996, the district court granted CAS's petition to recognize and enforce the arbitral award in the United States.[91]

2. *The Court's Reasoning*

The district court justified its holding through two lines of reasoning. First, the district court held that the more favorable right provisions of Article VII of the New York Convention enabled CAS to invoke Chapter One of the FAA for the recognition and enforcement of its award.[92] Since the setting aside of an award by a foreign court did not constitute a ground for nonenforcement under section 10 of the FAA,[93] and the conditions for the application of the common law doctrine of "manifest disregard of the law"[94] had not been met, the court had to confirm the award.[95] Although Article V(1)(e) of the New York Convention recognizes the setting aside of an award by a court at the situs as a possible discretionary ground for nonenforcement, Egypt was unable to rely upon this provision since CAS's right to invoke the more favorable provisions of domestic law through Arti-

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[89] See Minister of Defense v. Chromalloy Aeroservices, Decision of the Cairo Court of Appeals, Comm. 7th Cir. at 5, 9-10 (Dec. 5, 1995) (translation on file with the *New York University Law Review*).

[90] See id. at 9 (quoting Law No. 27/1994, Concerning the Arbitration of Civil and Commercial Matters, art. 53(1)(d) (Egypt), providing that "[a]n action[ ] for the nullity of the arbitral award cannot be admitted, except for the following causes: . . . (d) if the arbitral award excluded the application of the law agreed upon by the parties to govern the subject matter in dispute . . .").

[91] See *Chromalloy*, 939 F. Supp. at 914.

[92] See id. at 910:

> In other words, under the [terms of Article VII of the] Convention, CAS maintains all rights to the enforcement of this Arbitral Award that it would have in the absence of the Convention. Accordingly, the Court finds that, if the Convention did not exist, the Federal Arbitration Act ("FAA") would provide CAS with a legitimate claim to enforcement of this arbitral award.

[93] See 9 U.S.C. § 10 (1994) (providing that award may be vacated for fraud, bias or misconduct of arbitrator, or improper execution or exercise of power exceeding that granted to arbitrator).

[94] For a discussion of this doctrine, see infra note 133.

[95] See *Chromalloy*, 939 F. Supp. at 910-11 (applying both § 10 and "manifest disregard of the law" standards, concluding "[t]he Court's analysis thus far has addressed the arbitral award, and, as a matter of U.S. law, the award is proper").

cle VII[96] superseded Egypt's claim under Article V. As Article V merely grants courts discretion to deny recognition of arbitral awards, it could not be construed as creating the sort of vested right in enforcement of the foreign judgment that Egypt claimed.

The court's second line of reasoning addressed the effect owed to the judgment of the Cairo Court of Appeals. The court held that the judgment did not merit recognition in the United States because the Egyptian court demonstrated such open hostility towards the institution of arbitration, and because effectuating the decision would violate the strong United States public policy in favor of arbitration.[97]

B. The Difficulties in Chromalloy *of Relying Upon Article VII: Problems and Process*

While the *Chromalloy* decision was not appealed, it merits serious reconsideration. Although on the facts it is difficult to argue with the case's ultimate result, its theoretical underpinnings and the practical effects its two lines of reasoning will have on award recognition and enforcement are problematic. This is important not only to American judges, but also to an international legal order that relies upon uniform interpretation and application of treaty instruments like the New York Convention to resolve transnational disputes.

The dilemma posed in *Chromalloy* exposed a number of structural inadequacies in both the FAA and the New York Convention, yet the delicate interplay between the two instruments was neglected by the court, and the decision's inability to frame the legal issues clearly is unfortunate given their importance. This section evaluates the *Chromalloy* decision, concluding that the court incorrectly relied upon Article VII of the Convention to support its holding.

Two major problems exist with the court's reliance on Article VII. First, the importation of domestic norms, by virtue of Article VII, introduces a significant element of disunity into the Convention. This disunity can detract from the Convention's goals when the national legislation which has been effectively imported seriously diverges from the standards for nonenforcement enumerated in Article V. Relying on Article VII also can be highly problematic in that it forces a court to look at the arbitral award in the vacuum of its national arbitration law, devoid of competing concerns such as the

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[96] See New York Convention, supra note 16, arts. V, VII, 21 U.S.T. at 2520-21, 330 U.N.T.S. at 40-44 (using mandatory term "shall" in Article VII and discretionary term "may" in Article V).

[97] See *Chromalloy*, 939 F. Supp. at 913 ("The U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law.").

weight that should be attributed to conflicting foreign judgments. These dangers posed by an unrestrained use of Article VII crystallized in the French and Swiss *Hilmarton* litigations described later in this section.[98]

Secondly, an even greater problem may exist under United States law, namely, the inapplicability of the enforcement provisions of Chapter One of the FAA to international arbitration. If this is in fact the case, the court's resort to Article VII was not only unwise in its policy implications, but also presumptively improper, since there would be no more favorable rights available under domestic law. These concerns will be addressed in turn.

1. Reliance on Article VII and the Introduction of Disunity

a. The Increased Nonuniformity in the Application of the Convention. As noted previously, the text of Article VII seems to indicate a decision by the drafters to emphasize enforcement over uniformity.[99] However, the ability to rely upon more liberal provisions of domestic law via Article VII clearly undermines the goal of uniformity in the application of the Convention. The *Chromalloy* court arguably should have tried harder to preserve this relative uniformity by basing its decision on the more conservative provisions of Article V.

Instead, by allowing CAS through Article VII to rely on provisions of United States domestic arbitration law, the court only added to the uncertainty of the enforcement process. While this is not to say that the use of Article VII should be eschewed in all situations,[100] its invocation and consequent "channeling" of domestic norms into international arbitration should be done only after careful consideration, given its impingement of uniformity, increased legal uncertainty, and only marginally better enforcement.[101] Rather than embracing the inconsistent application of domestic and international law, the court arguably should have striven harder to preserve a uniform international

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98 See infra notes 107-11 and accompanying text.

99 See supra Part I.A.3.

100 In those areas of law where uniformity has not been achieved, the continued application of Article VII should not be regarded as problematic, as it could be argued that it is better to aim at one of the Convention's goals than at none. For a discussion of some of the areas of nonuniformity remaining after the New York Convention, see Ungar, supra note 51, at 727.

101 See supra Part I.A.3 (describing role of Article VII). While this Note argues that the use of Article VII is ill-advised in the enforcement of awards context, the Article is still valuable in enforcing agreements to arbitrate, conditions for which are less clearly delineated in the Convention, and thereby arguably indicative of reduced uniformity considerations.

application of the Convention's limited defenses against recognition and enforcement, thereby better serving one of the Convention's overarching goals.

b. The Inability to Address the Problem of Inconsistent Awards and Judgments. By forcing a court to rely upon provisions of domestic law alone in deciding whether to enforce an award, the use of Article VII can effectively deprive a court of the ability to consider relevant factors under the New York Convention such as the award's history or potential defects to its viability. By avoiding the problems that this Note highlights, the *Chromalloy* decision thus fails to offer any constructive guidance for future cases faced with the same dilemma. If foreign awards are to be enforced in the United States under a "*Chromalloy* rule" of sole reliance upon Article VII of the New York Convention,[102] the existence of a nullifying decision, irrespective of its legitimacy, becomes largely irrelevant.[103]

A presumption that all foreign judgments setting aside arbitral awards which do not comport with the nonconfirmation grounds enumerated in FAA section 10 are unrecognizable in the United States—essentially equating United States law with public policy—would be overreaching and parochial towards the foreign states involved.[104] Such extension of the public policy defense would clearly contravene the unambiguous presumption in favor of recognition of judgments found in the Restatement.[105]

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[102] And thus the dictates of sections 9-10 of the FAA. See infra notes 116-17 and accompanying text.

[103] Despite concluding that enforcement was mandated as a result of the recourse to Article VII, the court also noted that the Egyptian judgment was independently unworthy of recognition given its irreconcilability with the strong U.S. public policy in favor of international arbitration. The court thus demonstrated the kind of analysis that resort to Article V would require anyway. See Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 913-14 (D.D.C. 1996).

[104] The reliance of a foreign court upon a cause of action that does not exist under U.S. law does not normally constitute a ground for nonrecognition. See Ricart v. Pan American World Airways, Inc., No. CIV.A.89-0768, 1990 WL 236080, at *2 (D.D.C. Dec. 21, 1990) (citing Restatement (Third) of the Foreign Relations Law of the United States § 482 cmt. f (1987)). Nor is this the understanding given to the Article V(2) public policy defense, either internationally or domestically. See, e.g., Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 973 (2d Cir. 1974) (noting that "expansive construction of [the Article V(2)] defense would vitiate the Convention's basic effort to remove pre-existing obstacles to enforcement" and that to "read the public policy defense as a parochial device protective of national political interests would seriously undermine the Convention's utility").

[105] See Restatement (Third) of the Foreign Relations Law of the United States § 482 rep. note 1 (1987):

> Since specific grounds for resisting recognition of a foreign judgment, such as lack of procedural fairness, are separately enumerated [in § 482], few judg-

Thus, the problem arises where Article VII may appear to demand the enforcement of an award set aside at the situs, despite the existence of a nullifying judgment itself perfectly recognizable under the rule provided by the Restatement and in accordance with United States public policy.[106] At the same time, the enforcement-resisting party may attempt to seek recognition of the foreign judgment through the same or separate proceedings.

The potential for chaos when a court's consideration of these factors is thus restricted by the combination of Article VII and local law is substantial. Perhaps no better example may be found than the recent saga of the French and Swiss *Hilmarton* litigations, where French courts refused, on the basis of Article VII and French law, to consider

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ments fall in the category of judgments that need not be recognized because they violate the public policy of the forum. That a judgment was rendered on a cause of action not known to or rejected by the forum in which recognition is sought is not sufficient to defeat recognition.

106 It should be noted, however, that the position of U.S. courts faced with this dilemma is at least somewhat more comfortable than that of their European counterparts. In France and in many other European states the recognition and enforcement of both arbitral awards and foreign judgments are governed by international treaties. See William W. Park, Illusion and Reality in International Forum Selection, 30 Tex. Int'l L.J. 135, 189-90 (1995) (analyzing European treatment of conflicting presumptions regarding treaties and arbitral awards). The issue is potentially troublesome for a number of European states, many of whom have concluded a web of bilateral recognition agreements. The matter was averted in CAS's successful attempt to enforce its award in France despite Egypt's invocation of the 1982 Franco-Egyptian Treaty of Judicial Cooperation, as the terms of that treaty merely point to those of the New York Convention when the enforcement of an arbitral award is involved. See Paulsson, supra note 12, at 21-22 (describing court treatment of treaty incorporating New York Convention); Chromalloy Award Survives Challenge, 12 Mealey's Int'l Arb. Rep. 5, 5 (Apr. 1997) (same). However, the incorporation of the New York Convention does not always characterize bilateral treaties, and in any event the potential for conflicting presumptions should serve as a warning to states in concluding such agreements. In contrast, the United States has not acceded to any judgments recognition conventions, nor are there any specific federal statutes regulating the subject. As a consequence, recognition of judgments in the United States is a substantive matter of state law. See Restatement (Third) of the Foreign Relations Law of the United States § 481 cmt. a (1987); see also Island Territory of Curacao v. Solitron Devices, Inc., 489 F.2d 1313, 1318-19 (2d Cir. 1973) (answering question whether foreign judgment is enforceable under New York law). Award recognition, on the other hand, involves a binding international obligation of the United States and remains a matter of federal law. In the case of conflict between the outcomes prescribed by these two sets of norms, a strong argument can thus be made that federal law must prevail; otherwise, the United States would risk being in violation of its international obligations. See Victrix Steamship Co. v. Salen Dry Cargo A.B., 825 F.2d 709, 712-13 (2d Cir. 1987):

> The obligations of the United States under the [New York] Convention would be undermined if they were not determined according to a uniform body of federal law .... We think, however, that the Convention preempts state [arbitration] laws and leaves the entire subject of foreign arbitration awards governed by its terms.

Whether such a technical approach is desirable is another question.

the decision of Swiss courts to set aside an arbitral award rendered in Switzerland.[107] This situation was further complicated by the issuance of a second arbitral award, which—after initially being confirmed in the lower French courts—was eventually disregarded by the Cour de cassation in favor of the original award.[108] The negative consequences

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[107] *Hilmarton* involved an arbitration conducted in Switzerland between a British and French company over certain consultation fees. The original arbitral proceedings were decided in favor of the French party, Omnium de Traitement et de Valorisation (OTV). However, Hilmarton, the British party, appealed the decision to the Geneva Cour de justice, which annulled the award in November 1989. See Hilmarton v. Omnium de Traitement et de Valorisation, Cour de justice [Court of Appeal], Geneva, Nov. 17, 1989, 1993 Revue de l'Arbitrage 315, 321, translated in 19 Y.B. Com. Arb. 214, 219 (1994) (holding that Swiss public policy was not offended by contract, and that arbitral award was therefore arbitrary). The decision was subsequently affirmed by Switzerland's highest court in April 1990. See Omnium de Traitement et de Valorisation v. Hilmarton, Tribunal fédéral [Supreme Court], Switzerland, Apr. 17, 1990, 1993 Revue de l'Arbitrage 315, 324-25, translated in 19 Y.B. Com. Arb. 214, 222 (1994) (characterizing arbitral award as "manifestly untenable, as far as it is evident that it violates Swiss law").

In the interim, however, OTV successfully enforced the award in France (which under French law is done ex parte), a decision which was affirmed by both the Paris Cour d'appel in December 1991, see Hilmarton v. Omnium de Traitement et de Valorisation, Cour d'appel [Court of Appeal], Paris, Dec. 19, 1991, 1993 Revue de l'Arbitrage 300, 301-02, translated in 19 Y.B. Com. Arb. 655, 656-57 (1994) (affirming decision of Paris court), and France's highest court, the Cour de cassation, in March 1994, see Hilmarton v. Omnium de Traitement et de Valorisation, Cour de cassation [Supreme Court], France, Mar. 23, 1994, 1994 Revue de l'Arbitrage 327, 328, translated in 20 Y.B. Com. Arb. 663, 664-65 (1995) (upholding enforcement of arbitral award despite its nullification by Swiss courts). Both courts based their decisions on the overriding nature of Article VII of the Convention, which, in conjunction with French law, barred any consideration of the Swiss judgment. Interestingly, as discussed supra note 60, a possible interpretation of the French text of Article V may indicate a lack of discretion regarding the enforcement of the nullifying decision, which if anything should have strengthened the provisions of Article V vis-a-vis Article VII in French courts.

[108] New arbitration proceedings had been instituted in Geneva after the French lower court enforced the original award but prior to its affirmation by the Cour de cassation. In April 1992, a second award was rendered, this time in favor of Hilmarton. Hilmarton then successfully proceeded in February 1993 to enforce in France both the second award and the Swiss judgment nullifying the first. See Hilmarton v. Omnium de Traitement et de Valorisation, Tribunal de grande instance [Court of First Instance], Nanterre, Sept. 22, 1993, translated in 20 Y.B. Com. Arb. 194, 196-97 (1995) (ruling that the exequatur granted to the first award in France did not "deprive the interested party of the means of recourse which are available to it" under Swiss law). The decision was subsequently affirmed by the Versailles Cour d'appel in June 1995. See Hilmarton v. Omnium de Traitement et de Valorisation, Cour d'appel [Court of Appeal], Versailles, June 29, 1995, 1995 Revue de l'Arbitrage 639 (1995), translated in 21 Y.B. Com. Arb. 524 (1996). The Cour d'appel noted that:

> Enforcement of the award, obtained before the award was wiped out in the Swiss legal system, cannot result in "freezing" the dispute in the French legal system at the stage where it was on the date of the award, and consequently in depriving all recourses regularly taken abroad against this award of all effect in France. . . . To reach a different conclusion would be to allow the systematical prevalence of the decision which has been first recognised or enforced in France, whatever its value in the foreign legal system. . . . [I]t is certainly not

of utilizing Article VII in conjunction with French law are thus evident in the manner in which the French courts were unable to evaluate the circumstances surrounding the award's annulment in Switzerland, nor even to take into consideration the existence of a competing award once the petition to enforce the second award was brought before the lower French courts. The result was the anomaly, for a time, of two contradictory awards existing in the same legal system, generating a level of confusion and uncertainty seriously undermining the usual advantages of arbitration.

Hilmarton is often cited to illustrate the consequences of enforcing set aside arbitral awards, presenting the specter of conflicting court decisions and multiple arbitral awards between the same parties.[109] Yet what *Hilmarton* amply demonstrates is the potential negative consequences of a rule which will never allow the setting aside of an award by a competent court at the situs to constitute an independently sufficient ground for nonenforcement. The application of more favorable French law[110] in the case was mandated by Article VII, and purely as a matter of Convention interpretation, the *Hilmarton* decisions seem correct. Whether this is the best way for other state signatories to proceed, however, is less clear. By directing that the original award be enforced solely on the basis of local law, thereby cutting off all consideration of other events, Article VII may not be flexible enough for some situations.[111] The reliance upon similar reasoning in

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the purpose of the enforcement to maintain decisions in France which do not exist any more abroad.

Id., 1995 Revue de l'Arbitrage at 643-44, 21 Y.B. Com. Arb. at 628.

Yet in June 1997, these decisions were themselves strikingly reversed by the Cour de cassation, which held that the integration of the original award in the French legal system had constituted a bar to the recognition of any further awards or foreign judgments to the contrary. See Omnium de Traitement et de Valorisation v. Hilmarton, Cour de cassation [Supreme Court], France, June 10, 1997, 1997 Revue de l'Arbitrage 376, 377, translated in 22 Y.B. Com. Arb. 696, 697-98 (1997) ("[T]he existence of a final French decision bearing on the same subject between the same parties creates an obstacle to any recognition in France of court decisions or arbitral awards rendered abroad which are incompatible with it."); see also Emannuel Gaillard, Enforcement of a Nullified Foreign Award, N.Y.L.J., Oct. 2, 1997, at 3 (discussing court's decision).

109 See, e.g., Gharavi, supra note 31, at 3 (noting that such result tends to "violate the intended uniformity of the Convention and damage the image of international commercial arbitration") (citations omitted). But see Paulsson, supra note 12, at 28 (characterizing *Hilmarton* as "two-headed white rhinoceros which attracts our attention but does not endanger our daily walk to work").

110 See supra text accompanying notes 42-43 (discussing French law).

111 For example, some have criticized the annulment grounds of the Swiss court as being outdated. See Paulsson, supra note 12, at 28. Yet while it is conceivable that legitimate grounds for nullifying an award might exist which do not fit neatly into the articulated grounds of local law, the use of Article VII does not permit any evaluation of these considerations.

Chromalloy has now carried these dilemmas into American jurisprudence.

2. *Chapter One of the FAA May Be Inapplicable to the Enforcement of Foreign Awards*

The problematic approach of utilizing Article VII to enforce set aside awards thus raises serious concerns. Yet a more severe problem may exist under United States law: whether certain provisions of Chapter One of the FAA are applicable to international arbitration to begin with. This Note argues that Chapter One may be inapplicable to enforce foreign awards because, first, United States courts appear to lack the proper jurisdiction under the terms of its provisions, and, second, the enactment of Chapter Two would appear, by its own terms, to be exclusive.

The plain language of Chapter One[112] of the FAA seems to indicate that cases involving the recognition and enforcement of foreign awards were not contemplated at the time of the Act's inception. This does not mean, however, that international arbitration is outside the reach of the Act per se. The terms "commerce" and "maritime transactions" used to determine the extent of the FAA's application were defined broadly in section 1 so as to include transactions with foreign parties.[113]

Nevertheless, in contrast to a court's power to stay proceedings under section 3 when an agreement to arbitrate has been validly concluded—which applies regardless of the designated situs of the arbitration[114]—the procedure pertaining to the confirmation of foreign awards remains strongly linked to the jurisdictional basis of United

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112 See 9 U.S.C. §§ 1-16 (1994).

113 9 U.S.C. § 1 (1994) ("'Maritime transactions', as herein defined, means . . . or any other matter in foreign commerce"; "'Commerce', as herein defined, means commerce among the several states or with foreign nations"); see also Reynolds Jamaica Mines v. La Société Navale Caennaise, 239 F.2d 689, 693 (4th Cir. 1956) (finding FAA applicable to contract between American and French parties creating Panamanian corporation); Al-Salamah Arabian Agencies Co. v. Reece, 673 F. Supp. 748, 750 (M.D.N.C. 1987) (concluding FAA applied to contracts negotiated and performed outside United States between American and Saudi Arabian parties); El Hoss Eng'g & Transp. Co. v. American Indep. Oil Co., 183 F. Supp. 394, 398-99 (S.D.N.Y. 1960) (concluding FAA applied to sales agreement between American and Lebanese corporations), rev'd on other grounds, 289 F.2d 346 (2d Cir. 1961). In addition, section 8 appears to authorize the application of Chapter One to arbitration proceedings concerning actions in admiralty. See 9 U.S.C. § 8 (1994) ("If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, . . . the court shall have jurisdiction . . . to proceed with arbitration").

114 See 9 U.S.C. § 3 (1994) (allowing stay of proceedings pending arbitration by "any of the courts of the United States" where such motion may be brought); see also Scherk v. Alberto-Culver Co., 417 U.S. 506, 518-19 (1974) (enforcing arbitration clause between American and German party and staying U.S. court proceedings under section 3 of FAA).

States courts.[115] This is because section 9 of the FAA, which provides the general rule for award confirmation, vests jurisdiction to confirm an award only with the court specified by the parties in the agreement, or, failing such an agreement, with the court "in and for the district within which such award was made."[116] On the basis of this language, then, it would appear that, unless the arbitration agreement specifically provides otherwise, no United States court is prima facie competent to confirm a foreign award under Chapter One of the FAA.[117] Given these difficulties, whether CAS would have been able to enforce an award rendered in Egypt in a United States court in the absence of the New York Convention is doubtful.[118] Thus, it is difficult to see what more favorable rights of domestic law Article VII could have pointed to in this case.

Whether Congress intended Chapter One of the FAA to encompass the enforcement of foreign awards is not merely a procedural matter of jurisdictional oversight, but rather affects the substantive standards to be exercised by United States courts. Since a vacating court's basis for jurisdiction under section 10 is its location at the situs, it seems unlikely that Congress intended a United States court to review an award rendered outside the United States under the enumerated tests of that section.[119] Given this framework, it should not be surprising that there is no comparable provision to Article V(1)(e) of

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115 See Varley v. Tarrytown Assocs. Inc., 477 F.2d 208, 210 (2d Cir. 1973) (reversing award-confirming judgment on grounds that district court lacked proper jurisdiction under section 9 of FAA).

116 9 U.S.C. § 9 (1994).

117 Similarly restrictive language can be found in the provisions for vacating an award under section 10, see 9 U.S.C. § 10 (1994) ("In any of the following cases the United States court in and for the district wherein the award was made . . . ."), or modification or correction under section 11, see 9 U.S.C. § 11 (1994) ("In either of the following cases the United States court in and for the district wherein the award was made . . . ."). In addition, section 4 does not appear to give courts the power to order arbitration outside their district, such action being limited to "the district in which the petition for [such] an order . . . is filed." 9 U.S.C. § 4 (1994).

118 Some authority does exist, however, to support the contention that Chapter One of the FAA applied to cases involving foreign awards before the accession of the United States to the New York Convention. See Standard Magnesium Corp. v. Fuchs K.G. Metallwerke, 251 F.2d 455, 458 (10th Cir. 1957) (holding that order to compel arbitration under section 4 of FAA was not prerequisite to enforcement of arbitral award rendered in Norway before conclusion of New York Convention).

119 The use of the phrase "may make an order vacating the award" to describe the court's power under that section may be a further indication of congressional intent for the nonapplication of § 10 to foreign awards. See 9 U.S.C. § 10 (1994). While an American court may vacate an award rendered in its district, it clearly does not have such power in respect of a foreign award. See International Standard Elec. Corp. v. Bridas S.A. Petrolera, 745 F. Supp. 172, 177-78 (S.D.N.Y. 1990) (refusing to use domestic substantive law to set aside foreign award). This textual deficiency may not represent an insurmountable obstacle to the adaptation of section 10 to cases involving international arbitration, how-

the New York Convention[120] under the enforcement criteria of section 10. The confirmation of an award set aside by a foreign court simply appears never to have been contemplated.[121]

Even if the standards for vacating an award under section 10 could arguably have been applied to foreign awards in the absence of the New York Convention, the continued reliance by courts after the Convention's incorporation into United States law seems ill-founded. The enactment of Chapter Two of the FAA could be considered to constitute *lex specialis* (i.e., the specific rule governing the general) and as a result could be viewed as superseding the more general provisions of Chapter One, particularly given that chapter's principally domestic focus. That Chapter Two should be considered the exclusive source in domestic law on the question of recognition and enforcement of foreign awards[122] is a point underscored by section 207 itself, which in regulating the confirmation of foreign awards clearly provides that "[t]he Court shall confirm the award *unless it finds one of the grounds* for refusal or deferral of recognition or enforcement of the award *specified in the said Convention*."[123] The adoption of such explicit language limiting the grounds for denial of recognition to those contained within Article V would seem to provide a clear indication of congressional intent on the issue.[124]

Nonetheless, a possible counterargument for the continued application of section 10 could point to section 208 of the FAA, which prescribes the residual application of Chapter One to proceedings under Chapter Two where there is no conflict between the two chapters.[125] The argument posits that Article VII, part of United States

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ever, since it could be argued that the effects within the United States of nonrecognition of a foreign award are identical to those of vacating a domestic award.

120 See supra note 17 (discussing New York Convention).

121 It would seem exceedingly difficult to ascribe such a view to the FAA, which was enacted 33 years before the New York Convention, and which despite the broad jurisdictional grant in section 1, is overwhelmingly domestic in focus. The reason that no provision similar to Article V(1)(e) can be found in Chapter One of the FAA in almost all likelihood had nothing to do with international arbitration; rather, its absence is best explained by the fact that it would be anathema for one U.S. court to ignore the full faith and credit requirements of the Constitution and disregard the judgment of a court in a sister state.

122 This is different from the situation in France where the 1981 Arbitration Law specifically governs international arbitration. See generally Decree No. 81-500 of May 12, 1981, supra note 42.

123 9 U.S.C. § 207 (1994) (emphasis added).

124 It could be argued that such a specific provision would override even the conflicting authorization of Article VII itself. Thus the clear language of section 207 would limit U.S. courts to the grounds explicitly enumerated in Article V, regardless of whether Article VII permits the interjection of domestic norms.

125 See 9 U.S.C. § 208 (1994) (providing that "Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter

law by virtue of the New York Convention's incorporation through Chapter Two of the FAA, defuses the conflict between section 10 and Article V of the Convention. Since Article VII permits reliance upon domestic norms even if they are incompatible with the provisions of the Convention (as long as they are more favorable towards enforcement), such norms would arguably qualify as nonconflicting Chapter One provisions. This combination of Article VII and section 208 would thus supposedly facilitate the revival and continued reliance on section 10 in those cases where the latter provides more liberal enforcement standards.[126]

The drawback to this rather elaborate and perhaps strained legal construction is the difficulty in maintaining that the domestic grounds for vacatur listed in section 10 do not conflict with the clear language of section 207,[127] which establishes Article V as the *exclusive* source of grounds for nonrecognition and enforcement.[128] Although Article VII authorizes the invocation of domestic law, the domestic law in this case *includes* section 208, which by its own terms limits the application of Chapter One to those instances where it does not conflict with Chapter Two.[129] Thus even if section 10 is capable of addressing for-

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or the Convention as ratified by the United States"). An example of a Chapter One provision meeting these requirements is section 11, see 9 U.S.C. § 11 (1994), which grants U.S. courts the power to modify or correct an award. No similar provision is found in the Convention. See Productos Mercantiles e Industriales, S.A. v. Faberge USA, Inc., 23 F.3d 41, 45-46 (2d Cir. 1994) (finding no conflict between similar article in inter-American convention as incorporated in Chapter Three and provisions of Chapter One, and that consequently section 11 of FAA could be applied).

126 This appears to be Professor Born's position on the issue, although he notes that the possibility of nonrecognition of an award under the terms of Article V makes the application of the mandatory enforcement provisions of sections 9-10 "less clear." See Born, supra note 2, at 504. Nevertheless, he argues that:

> The better view is that the FAA's "domestic" enforcement requirement is applicable, and unaffected by, the unavailability of mandatory enforcement under the Convention .... [Given the existence of Article VII] it is impossible to conclude . . . that the Convention preempts more "pro-enforcement" national arbitration regimes (like §§ 9 and 10), or that § 208 precludes reliance on § 9 .... Nor does § 207—which merely incorporates Article V's exceptions—indicate any intention to preempt § 9 in cases where it would require enforcement of an award that the Convention does not.

Id. at 504, 504 n.104. It would seem, however, that Born's analysis is primarily relevant to those cases in which the enforcement of a non-domestic award rendered in the United States is sought. In that case, the award is subject to the concurrent application of Chapters One and Two of the FAA. Such analysis does, however, implicitly reject the contention of this Note that section 207 of the FAA constitutes *lex specialis* and therefore overrides Chapter One.

127 See supra text accompanying note 123 (explaining section 207).

128 See Hamid G. Gharavi, The Legal Inconsistencies of *Chromalloy*, 12 Mealey's Int'l Arb. Rep. 21, 21-22 (May 1997) (discussing exclusivity).

129 See id.

eign awards and could be theoretically preserved through Article VII of the Convention, the exclusive provisions of section 207—which are *also* part of domestic law—would seem to create an impermissible conflict, and thus prevent reliance upon section 10 in those cases falling exclusively under Chapter Two.[130] While this interpretation would restrict reliance on domestic law, it should not represent a significant setback to the chances of an award's enforcement given the court's discretion under Article V of the Convention to reject a petition for nonrecognition. It would, however, strongly promote the goal of uniformity in the Convention's application. Hence, the application of Article VII—possible only through a strained legal construction[131] that only marginally improves enforcement—seems ill-advised. None of these problems, however, appeared to be considered by the *Chromalloy* court, which instead mechanically relied upon section 10 via Article VII to enforce the award.[132]

Both *Chromalloy* and *Hilmarton* illustrate the stark choices posed by a reliance upon Article VII. While the provision is undoubtedly a powerful instrument for the enforcement of arbitral awards, it comes at the cost of interjecting a large degree of disuniformity and uncertainty into the award confirmation process. Furthermore, by directing judges to apply the dictates of local law notwithstanding other pertinent considerations, the article may lead to an inflexible and excessively liberal approach vis-a-vis award enforcement. Finally, an overreliance on domestic law may create new obstacles to the enforcement of awards,[133] thereby working against both the letter and spirit of the Convention.

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130 This is to be distinguished, however, from the case where both Chapters One and Two of the FAA may be invoked, such as when an arbitration is held in the United States between two foreign entities. In that case, there are no jurisdictional doubts as to the applicability of Chapter One of the FAA, giving the party seeking enforcement a choice of which set of norms to rely upon. See Bergesen v. Joseph Muller Corp., 710 F.2d 929, 934 (2d Cir. 1983) ("Since [the FAA and the Convention] overlap in this case the [party seeking enforcement] has more than one remedy available and may choose the most advantageous."); see also Spector v. Torenberg, 852 F. Supp. 201, 205 (S.D.N.Y. 1994) (citing *Bergesen*'s reasoning).

131 It could be argued that the interpretation proffered here suffers from the same overly technical approach and is contrary to the proenforcement spirit of the Convention. However, as a matter of policy, the proposed construction here better accommodates all of the interests involved in the enforcement of foreign awards, and only marginally decreases the prospects of enforcement.

132 See Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 910-11 (D.D.C. 1996).

133 One such obstacle would be the use of the manifest disregard of the law doctrine, which is a common law defense to the enforcement of arbitral awards. Originally introduced in dicta by the Supreme Court in the domestic arbitration case of Wilko v. Swan, 346 U.S. 427, 436-37 (1953), overruled by Rodriguez De Quijas v. Shearson/American Express,

This is not to say that the basic premise behind the use of Article VII in these situations is incorrect; to the contrary, this Note argues that awards nullified at the situs can be enforced elsewhere. However, the more proper vehicle to achieve such a result is Article V. As will be seen, its inherent discretion presents a more flexible approach that lets judges weigh all the relevant considerations, including the proper level of respect and deference due a judgment of a foreign court. In short, this Note argues for a more restrained use of the Article VII hammer when the more precise instrument of Article V is available.

Inc., 490 U.S. 477, 485 (1989) ("[I]nterpretations of the law by the arbitrators in contrast to manifest disregard are not subject . . . to judicial review for error in interpretation."), the doctrine has been interpreted subsequently as presenting grounds for nonrecognition when the "arbitrator understood and correctly stated the law but proceeded to ignore it," Kanuth v. Prescott, Ball & Turben, Inc., 949 F.2d 1175, 1179 (D.C. Cir. 1991) (citing Siegel v. Titan Indus. Corp., 779 F.2d 891, 893 (2d Cir. 1985)), a formula which has been criticized as unsatisfactory and unclear. See San Martine Compania de Navegacion, S.A. v. Saguenay Terminals, Ltd., 293 F.2d 796, 801 n.4 (9th Cir. 1961) (offering that arbitrators' use of law may amount to partiality); see also Marta B. Varela, Arbitration and the Doctrine of Manifest Disregard, 49 Disp. Resol. J. 64, 65 (1994) (noting that application of doctrine necessarily involves review of award on merits and is therefore incompatible with desired "one stage procedure" nature of arbitration).

The *Chromalloy* court allowed Egypt to argue that the arbitral award did not merit enforcement under the manifest disregard doctrine because the arbitrators applied Egyptian civil instead of Egyptian administrative law. See *Chromalloy*, 939 F. Supp. at 911. The court concluded, however, that no such disregard had taken place. See id. Rather, it noted, "[a]t worst" the award "constitute[d] a mistake of law, and thus [was] not subject to review" by the court. Id.

Yet the *Chromalloy* court should never have considered the doctrine as it introduces an additional element of potential mischief to the award confirmation process and deals another blow to the goal of global uniformity in international arbitration. Application of the manifest disregard doctrine in these circumstances would seem to violate the New York Convention by constituting an additional defense to enforcement beyond the exclusive grounds of Article V. See Avraham v. Shigur Express Ltd., No. 91 Civ. 1238, 1991 U.S. Dist. LEXIS 12267, at *10 (S.D.N.Y. Sept. 3, 1991) (defense unavailable under Convention); International Standard Elec. Corp. v. Bridas S. A. Petrolera, 745 F. Supp. 172, 181 (S.D.N.Y. 1990) (same); Brandeis Intsel Ltd. v. Calabrian Chems. Corp., 656 F. Supp. 160, 165 (S.D.N.Y. 1987) (same); Ipitrade Intern, S.A. v. Federal Republic of Nigeria, 465 F. Supp. 824, 826 (D.D.C. 1978) (disallowing sovereign immunity defense and holding that defenses under Article V are exclusive). In Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 977 (2d Cir. 1974), the Second Circuit declined to rule on the matter, but noted that there was "strong authority for treating as exclusive the bases set forth in the Convention for vacating an award." Furthermore, Article VII's operation ostensibly is restricted to those provisions of domestic law that *favor* enforcement. See supra text accompanying notes 37-46 (discussing Article VII). Finally, as a practical matter, United States courts are poorly situated to comment upon the degree of compliance on the part of arbitrators applying a foreign system of law. See Office of Supply, Gov't of Republic of Korea v. New York Nav. Co., Inc., 469 F.2d 277, 379-80 (2d Cir. 1972) (discussing limited power of review); American Constr. Mach. & Equip. Corp. v. Mechanised Constr. of Pakistan, Ltd., 659 F. Supp. 426, 429 (S.D.N.Y. 1987) (stating that scope of review is extremely limited). Overall, then, despite its conclusion that no manifest disregard had occurred, the *Chromalloy* court never even should have considered the doctrine on the merits. That it did so is yet another flaw in its approach.

III

ARTICLE V AS A BASIS FOR ENFORCING FOREIGN ARBITRAL AWARDS

While the district court's reliance on Article VII of the New York Convention, and more specifically section 10 of the FAA, is open to substantial criticism, the court could have achieved the same outcome by applying Article V. This approach would have allowed the court to exercise a significant degree of discretion in facilitating enforcement without introducing a damaging degree of disuniformity to the Convention. As will be discussed, this view garners support not only from the degree of discretion inherent in the text of Article V itself, but also by the increasingly accepted modern view of arbitral awards as detached from the domestic law of the situs. This detachment leaves courts at the enforcement stage free to grant recognition irrespective of any doubts expressed by courts at the situs as to the award's viability. As a result, rather than basing a decision on the cumbersome and unbalanced approach of Article VII, this Note advocates that courts balance various considerations as an exercise of their discretion under Article V.

In stating that "[r]ecognition and enforcement of the award may be refused . . . if . . . the award . . . has been set aside" by a competent authority at the situs, Article V(1)(e) of the New York Convention in essence supports the notion that the courts at the situs are generally in the best position to review an arbitral award.[134] This is evident from the text of the Article itself, which allows courts at the enforcement stage to simply rely upon the existence of a nullification decision, and deny recognition on that ground alone.[135] Such an approach has a number of key benefits, including the promotion of judicial efficiency, and is supported by notions of international comity.

Nevertheless, while a decision of a foreign court to nullify an arbitral award carries some weight and influence internationally,[136] it should be granted no greater deference than any other foreign judgment under United States law and should be subjected to similar stan-

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134 See New York Convention, supra note 16, art. V(1)(e), 21 U.S.T. at 2520, 330 U.N.T.S. at 42; see also supra text accompanying notes 53-57 (discussing reasons for review by courts at situs).

135 See New York Convention, supra note 16, art. V, at 42.

136 See Paulsson, supra note 12, at 25 (characterizing failure to establish full international character of awards as a "disappointment . . . crystallised precisely in Article V(1)(e). . . ." and stating that "the New York Convention breathes hot and cold; the 'double exequatur' of the Geneva Convention is no longer required, but annulment in the country of origin may nevertheless be given effect [extraterritorially]").

dards of review.[137] Thus, careful examination of both the award and a judgment setting it aside is necessary to determine the proper effect to accord the judgment upon the award's validity. While Article VII does not allow for such a balancing of interests, the inherently discretionary nature of Article V is well suited to such an evaluation.

A. The Court's Discretion Under Article V

The plain language of Article V, specifically in its use of the term "may," seems to indicate the discretionary character of the defenses to enforcement of awards available under that Article.[138] This discretion stands in stark contrast to Article III, which, in setting out the Convention's central obligation, provides that courts of "[e]ach contracting state *shall* recognize . . . and enforce" foreign arbitral awards.[139] Taken together, the interplay between the two Articles illustrates that while refusal to recognize and enforce an award in a situation where none of the Article V defenses is available would be a clear breach of the letter and spirit of the Convention, a decision to recognize and enforce an award despite a colorable Article V defense would be not only permissible under the Convention's terms, but would in fact accord with its proenforcement purposes.[140]

The Convention's prepatory works, the *travaux préparatoires*,[141] also lend support to the discretionary character of Article V. While

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137 See Uniform Foreign Money-Judgments Recognition Act of 1962 § 4, 13 U.L.A. 268 (1986) (listing grounds for nonrecognition); Restatement (Third) of the Foreign Relations Law of the United States § 482 (1987) (same). A judgment obtained by fraud, for example, should not be given effect in the United States, regardless of its context.

138 See New York Convention, supra note 16, art. V, 21 U.S.T. at 2520, 330 U.N.T.S. at 40-41; see also supra note 17 (discussing Article V(1)).

139 New York Convention, supra note 16, art. III, 21 U.S.T at 2519, 330 U.N.T.S. at 40 (emphasis added).

140 See Gary H. Sampliner, Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin, 11 Mealey's Int'l Arb. Rep. 22, 23 (Sept. 1996) ("[A]s one indication of the 'pro-enforcement bias' . . . [the Convention's] authors knew to use the mandatory 'shall' language in the articles contemplating enforcement of awards, while not using such language in the article that sets forth defenses to enforcement.") (citations omitted); see also Paulsson, supra note 12, at 26 (commenting on Convention's choice of language).

141 International law authorizes recourse to supplementary means of interpretation for treaties, including the preparatory work of a treaty, an approach that is codified in the Vienna Convention. See Vienna Convention on the Law of Treaties, supra note 20, art. 32, 1155 U.N.T.S. at 331. Professor Brownlie writes:

> When the textual approach . . . either leaves the meaning ambiguous or obscure, or leads to a manifestly absurd or unreasonable result, recourse may be had to further means of interpretation, including the prepatory work of the treaty and the circumstances of its conclusion. Moreover, such recourse may be had to verify or confirm a meaning that emerges as a result of the textual approach.

some of the early drafts of the Convention stated that recognition and enforcement "shall" be denied, the final version clearly uses the term "may." This change in language can be considered evidence of the drafters' rejection of Article V as a mandatory basis for denial of enforcement.[142] The granting of such discretion stands in sharp contrast to the mandatory refusal provisions of Article II of the convention's predecessor, the 1927 Geneva Convention.[143] Since dissatisfaction with the prior mandatory refusal provisions was a major impetus behind the conclusion of the New York Convention, the discretionary nature of Article V should hardly be considered an accident.[144]

Nonetheless, some have expressed the view that whatever the technical wording of Article V, an enforcing court should always defer to the judgment of a court at the situs, and that Article V(1)(e) could never really be construed to permit enforcement of an award under such circumstances.[145] Yet such an approach would seem to contravene the plain meaning of the Article[146] as well as the jurisprudence of foreign courts of other state signatories.[147] Given the history of the

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Ian Brownlie, Principles of Public International Law 630 (4th ed. 1990) (footnotes omitted).

142 The travaux preparatoires reflect this change. See U.N. Doc. E/CONF.26/L.34 & SR.25 (1958). But see Gharavi, supra note 49, at 95 (noting Article V's influence on drafters); van den Berg, supra note 28, at 355 (noting that drafters did not intend annulled awards to be enforceable elsewhere). Such views are arguably supported by the French version of the text, which, as noted, is "equally authentic." New York Convention, supra note 16, art. XVI, 21 U.S.T. at 2522, 330 U.N.T.S. at 48 (stating that Chinese, English, French, Russian, and Spanish texts are equally authentic); see also supra note 60 and accompanying text (comparing French and English versions of Convention).

143 See Geneva Convention, supra note 29, art. II, 92 L.N.T.S. at 305-06 (stating that enforcement shall be refused if certain conditions are met).

144 See supra text accompanying notes 27-29 (discussing goals of drafters of New York Convention).

145 See Albert Jan van den Berg, Consolidated Commentary, 19 Y.B. Com. Arb. 475, 590-93 (1994) (arguing that Article V(1)(e) automatically invests setting aside of award with extraterritorial effect, precluding enforcement elsewhere); cf. Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871, 875-76 (S.D.N.Y. 1987) (staying enforcement proceedings when annulment proceedings were initiated at court at situs).

146 See Paulsson, supra note 12, at 24 (noting that states cannot violate Article V by *enforcing* award, only by refusing to enforce in situation not falling under Article V); see also Gharavi, supra note 49, at 3 n.47 (conceding that Convention places ultimate authority on matter with courts of enforcing state, despite arguing setting aside does have extraterritorial effect) (citing Quigley, supra note 28, at 1066).

147 For example, as the High Court of Hong Kong has held, courts where enforcement motions are brought clearly have the power to enforce the award in question, irrespective of whether a ground for nonenforcement is demonstrated under Article V. See Judgment of July 13, 1994, High Court [Supreme Court], Hong Kong, July 13, 1994, reprinted in 20 Y.B. Com. Arb. 671, 679 (1995), where the judge noted:

> Had I thought that the defendants' rights had been violated in any material way, I would, of course, have taken a different view. However, this is an obvious case where the court can exercise its discretion to enforce the award

nonenforcement provisions and their plain language, the inherently discretionary nature of Article V should be considered a crucial aspect of the Convention, not only as a means of furthering its proenforcement policies, but also to protect awards from arbitrary annulment.

B. *The Setting Aside of an Award at the Situs Does Not Destroy its Extraterritorial Existence*

The discretionary application of Article V(1)(e) not only conforms with its plain language, its history, and judicial interpretation, but also fully conforms with the approach that nullification of an award at the situs does not destroy the award's independent existence. This increasingly common view advocates that once final,[148] arbitral awards are deemed to have taken on an independent international existence separate from the judicial system of the state in which they were rendered.[149] With the award detached from the law of the situs, courts in foreign jurisdictions may enforce it whether or not it has been nullified.[150] The alternative approach—in effect the regime per-

notwithstanding a ground of opposition in the New York Convention being made out.

[148] "Final" here means that the arbitral proceedings have been completed and that the rights and duties of the parties have been determined.

[149] As the Cour de cassation noted in *Hilmarton*, "[T]he award rendered in Switzerland is an international verdict which is not integrated in the legal system of that State, so that it remains in existence even if set aside, and its recognition in France is not contrary to international public policy." Hilmarton v. Omnium de Traitement et de Valorisation, Cour de cassation [Supreme Court], France, Mar. 23, 1994, 1994 Revue de l'Arbitrage 327, 328, translated in 20 Y.B. Com. Arb. 663, 665 (1995) (enforcing award). For a history of the *Hilmarton* litigation, see supra notes 107-08 and accompanying text; see also Polish Ocean Lines v. S.A. Jolasry, Cour de cassation [Supreme Court], France, Mar. 10, 1993, 1993 Revue de l'Arbitrage 255, 258, translated in 19 Y.B. Com. Arb. 662, 663 (1994) (holding that application to set aside and subsequent suspension of award in Poland could not justify refusal of enforcement in France); Société Pabalk Ticaret Sirketi v. Société Anonyme Norsolor, Cour de cassation [Supreme Court], France, Oct. 9, 1984, 1985 Revue de l'Arbitrage 431, 432, translated in 11 Y.B. Com. Arb. 484, 489 (1986) (noting that even if award is nullified elsewhere, French judge cannot refuse enforcement if his own legal system permits it); Minestère Tunisien de l'équipment v. Societe Bec Freres, Cour d'appel [Court of Appeal], Paris, Feb. 24, 1994, 1995 Revue de l'Arbitrage 275, 280, 284, translated in 22 Y.B. Com. Arb. 682, 685, 690 (1997) (enforcing award set aside at the situs); Inter Maritime Management, S.A. v. Russin & Vecchi, Tribunal fédéral [Supreme Court], Switzerland, Jan. 9, 1995, translated in 22 Y.B. Com. Arb. 789, 796 (1997) (court enforcing award despite pending application for its nullification at the situs, noting that "an award can be 'binding' in the sense of Art[icle] V(1)(e) of the [New York] Convention without having executory force in the country where it is rendered"); Jarrosson, supra note 12, at 335-36 (noting that arbitrator rules while situated in state territory, but not as official emanation of that state).

[150] See Paulsson, supra note 12, at 24 (arguing that "core objective of the New York Convention [was] to free the international arbitral process from the domination of the law of the place of the arbitration," in effect to "delocalise" award). Despite this assertion, however, Paulsson also seems to recognize that whatever the intentions of the drafters, the existence of Article V(1)(e) prevents the complete delocalization of arbitral awards from

petuated by the Geneva Convention—by contrast leaves the parties completely at the mercy of the courts at the situs and the myriad of procedural and substantive hurdles of local law. The whims and obstacles of courts at the situs potentially could derail an otherwise valid award, thereby seriously undermining the advantages of arbitration.[151]

The proposition that setting aside the award does not have an automatic extraterritorial effect is also supported by the element of discretion granted to courts in the enforcing state under Article VI of the New York Convention. Article VI holds that a court "may, if it considers it proper, adjourn the decision on the enforcement of the award" if application for an annulment or suspension of the award has been made to the competent authority referred to in V(1)(e).[152] While United States courts have tended to grant stays under these circumstances,[153] they have explicitly reserved the right to enforce "their unfettered right of discretion."[154] United States courts review-

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the place of the arbitration by virtue of its inherent recognition, at least to some degree, of authority in the courts at the situs. See id. at 25 (noting view of Article V(1)(e) "as 'a hitherto rock-solid rampart against the true internationalisation of arbitration, because in the award's country of origin all means of recourse and all grounds of nullity applicable to purely domestic awards may be used to oppose recognition abroad'") (quoting Yves Derains, Foreword, Hommage a Frederic Eisemann, 5, 13 (1978) (translated by author).

151 See infra note 164 and accompanying text (describing potential effects of local law in *Chromalloy* case). One of the key purposes of arbitration is to allow the parties to structure the "ground rules independently." Gharavi, supra note 31, at 3 (arguing that choice of forum is often instrumental part of contract, most likely heavily negotiated in exchange for reciprocal concessions, and that courts thus should not liberate parties from "ground rules" they themselves have set). Such an argument presupposes that by choosing the situs of arbitration the parties have consented to the overall jurisdiction of its courts, see Gharavi, supra note 49, at 99; van den Berg, Annulment of Awards in International Arbitration, in International Arbitration in the 21st Century, supra note 6, at 157. This argument ignores the great degree of delocalization that has been accomplished and destroys one of the purposes of arbitration. See Paulsson, supra note 12, at 25-26. At any rate, most modern laws in major centers for arbitration today, such as the United States, United Kingdom, France, Belgium, and Switzerland, provide for very limited review of awards rendered in their countries.

152 New York Convention, supra note 16, art. VI, 21 U.S.T. at 2520, 330 U.N.T.S. at 42. It should be noted, however, that the language of Article VI is clearly more discretionary, as the phrase "if it considers it proper" is not found in the text of Article V. The presence of this phrase in Article VI likely reflects the notion that the interests of comity are much weaker when an appeal is merely pending (and may in fact be denied) as opposed to when a foreign court has ruled adversely on the matter.

153 See, e.g., Spier v. Calzaturificio Tecnica S.p.A., 663 F. Supp. 871, 876 (S.D.N.Y. 1987) (deferring enforcement proceedings pending testing of award under Italian law); Fertilizer Corp. of India v. IDI Management, Inc., 517 F. Supp. 948, 962 (S.D. Ohio 1981) (adjourning enforcement pending decision under Indian law).

154 *Fertilizer Corp. of India*, 517 F. Supp. at 961. In *Spier*, one judge noted that enforcement surely would be forthcoming if the action to set aside were "transparently frivolous." *Spier*, 663 F. Supp. at 875. van den Berg has called for courts presented with such a request to proceed under a presumption of enforcement unless, in evaluating the appeal, the award is shown to be so defective that it likely will be overturned in the country of origin. See

ing this question have also tended to reaffirm the independence of the award.[155]

Similarly, United States courts examining the interplay between foreign awards and *confirmation* judgments at the situs have considered both decisions to be independent and entitled to recognition separately.[156] It thus might seem inconsistent for United States courts to view an award as independent from the reviewing judgment of the court of the situs if the judgment confirmed the award, but to regard the award as inseparable from a decision to set it aside.

In sum, there appears to be strong authority that the effect of annulment of an arbitral award by a foreign court can be restricted to that country's territory and that the nullifying decision cannot prevent other jurisdictions from giving effect to the award.[157] Ultimately, for a United States court, the question should be which judgment merits recognition under United States law.[158]

C. *The Balance of Considerations*

The strong presumptions operating in favor of the recognition of both arbitral awards and foreign judgments create a powerful poten-

van den Berg, supra note 28, at 353-54. Yet, as Paulsson has astutely noted, this would be a curious practice if decisions of the courts at the situs were to be considered sacrosanct; one would assume the courts would always stay proceedings. See Paulsson, supra note 12, at 24.

155 See *Fertilizer Corp. of India*, 517 F. Supp. at 958 (holding, despite granting stay pending review in Indian courts, that pending challenge to award does not affect its binding nature).

156 See Victrix Steamship Co. v. Salen Dry Cargo AB, 825 F.2d 709, 713-14 (2d Cir. 1987) (holding that party can pursue enforcement of both award and judgment separately); Waterside Ocean Navigation Co. v. International Navigation Ltd., 737 F.2d 150, 154 (2d Cir. 1984) (holding that party's seeking of confirmation judgment did not divest it of its separate right to enforce award on merits).

157 See Gaillard, supra note 108, at 3.

158 See Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 914 (D.D.C. 1996) ("[T]he question is [not whether the Egyptian nullification was correct under Egyptian law, but rather] whether this Court should give *res judicata* effect to the decision of the Egyptian Court of Appeal."). Even if a nullifying judgment is recognized in the United States under the rules pertaining to recognition of foreign judgments, its effect should be limited to collateral estoppel as to the factual aspects of the case in order to prevent them from being "tried afresh." See Hilton v. Guyot, 159 U.S. 113, 143 (1895). For a discussion of the differences in res judicata and collateral estoppel effects of arbitral awards in U.S. jurisprudence, see Born, supra note 2, at 682-87. Thus a judgment of a foreign court setting aside an award for reasons which *do* constitute a valid defense against enforcement under U.S. law (e.g., corruption) will, upon its recognition, result in nonrecognition of the award. In contrast, a foreign judgment based upon reasons not recognized as valid defenses to enforcement (e.g., mistake of law) would have a more limited effect. In this latter case, while the fact that an award has been set aside still presents potential grounds for nonenforcement by virtue of Article V(1)(e) of the New York Convention, the court may nevertheless decide to uphold the award.

tial for conflict when the two contradict each other. Rather than resorting to Article VII, this Note proposes that the elastic formula of Article V(1)(e) is at present the best mechanism for a court to reconcile the two while giving proper regard to the Convention's underlying policies. Accordingly, in determining whether to refuse enforcement on the basis of Article V(1)(e), this Note proposes that a court weigh a number of considerations, including: (1) the specific grounds advanced for the award's infirmity; (2) the intentions of the parties in making the agreement regarding the finality of arbitration and the extent of judicial review;[159] (3) the enforcement policies of the forum where recognition is sought and the strong proenforcement policies of the international system as a whole; (4) the need for uniformity in the application of the Convention; and (5) the general presumption in favor of the recognition of foreign judgments. Together, these considerations represent a theoretical framework in which courts can evaluate all relevant concerns and give effect to the decision which best comports with the public policy of their judicial system.

The first proposed factor, the specific defense to the arbitral award, is particularly important because it allows determination of whether the defense falls under the rubric of any of the other four defenses of Article V. If it does not, a more detailed examination may be warranted to ensure it is compatible with the public policy of the enforcing forum. The second factor looks to the intentions of the parties in making the agreement to determine whether some form of judicial review was contemplated or whether the award was indeed intended to be final. This is particularly important in light of the fact that the strong public policy behind binding arbitration is premised on notions of protecting party autonomy and contractual will.[160]

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[159] Certain countries have enacted statutes which reduce the supervisory power of their courts to review international arbitral awards rendered in their territory. For example, the arbitration law of Switzerland generally allows for the exclusion of judicial review if none of the parties are citizens or domiciles of that country; Belgium has a similar law which is mandatory. See generally van den Berg, supra note 152, at 140-46. While this may be a step in the right direction, whether to exclude all judicial review, even that based on the limited grounds of Article V(1)(e), remains a problematic issue, and may in fact only encourage decreased care on the part of the arbitrators in conforming to the dictates of their task. A better alternative may be found in the provisions of the European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. at 349, 374, which allows nonrecognition of an arbitral award nullified at the situs only if the nullification was based upon one of the grounds enumerated in the Convention itself. See Park, supra note 106, at 170 (describing European Convention).

[160] See, e.g., Coe, supra note 5, at 59 ("Perhaps the most basic hallmark of international commercial arbitration is the liberty enjoyed by the parties in fashioning the proceedings."); Howard M. Holtzmann, Balancing the Need for Certainty and Flexibility in International Arbitration Procedures, in International Arbitration in the 21st Century, supra

Related is the third factor, the enforcement policies of the forum and the strong proenforcement bias of the international system as a whole. In general, the regime established by the New York Convention is heavily weighted in favor of upholding validly concluded arbitral awards, and once the choice has been made to resort to the arbitral process, a party seeking to overcome an adverse decision faces an uphill battle. Outside the limited grounds of Article V, the case for denying enforcement becomes comparatively weak. Nonetheless, while the case for enforcing a nullifying judgment is significantly strengthened if its rationale falls under one of the other defenses under Article V or is otherwise compatible with local law, a judgment is not necessarily contrary to public policy if the grounds appear reasonable and the decision supported. Overall, however, the proenforcement policies of the international system would tend to favor enforcement of the arbitral award in those circumstances where the foreign judgment does not comport with an Article V ground. The same is true of the fourth factor, which considers the need for uniformity in application of the Convention.

Finally, the fifth factor, the presumption in favor of foreign judgments, is meant to retain awareness of the general level of respect to be accorded to the judgments of foreign courts. The two most commonly cited rationales for judgment recognition are comity accorded to the courts of a foreign nation and notions of judicial economy.[161] These rationales do not disappear when the judgment opposes the enforcement of an arbitral award. Again, despite the clear preference for enforcing arbitral awards under the New York Convention, courts at the situs remain in the best position to review the arbitral proceedings.[162] While enforcing courts should be free to deny recognition of nullifying judgments when the justice of the individual case so requires, this competence should not be overlooked.

Yet while courts at the situs are in the best position to review an arbitral award and the accompanying proceedings,[163] thus according a certain level of deference to their decisions, the possibility that such review will be exploited by one of the parties to evade the decision of

note 6, at 3, 5 (noting party autonomy as "fundamental principle" governing arbitral procedures).

161 See generally Lowenfeld, supra note 9, at 370-72.

162 See supra text accompanying notes 53-57.

163 Int'l Standard Elec. Corp. v. Bridas S.A. Petrolera, 745 F. Supp. 172, 178 (S.D.N.Y. 1990) (holding that U.S. court is not proper forum to review validity of award rendered in Mexico, despite fact that proceedings were governed by United States law, and that courts of Mexico should exercise that power).

the arbitrators is quite real.[164] Furthermore, even if the decision is completely valid under foreign law, those laws themselves may be inherently unfair or offensive to United States standards of public policy. In any of these cases, courts at the enforcement stage should be able to exercise an independent review of both the award and its nullification before using their discretion under Article V to enforce one or the other.[165]

The proposed approach is not immune from criticism, including the charge that reliance on a rule of discretion itself engenders a high degree of disuniformity and unpredictability. Yet while a discretionary rule always entails a certain amount of ambiguity, the preservation of uniformity is not necessarily compromised by the adoption of a flexible standard. It is the similarity in legal parameters and reasoning which harbors legal certainty, even though the final outcome may vary in different jurisdictions (as is often the case with application of discretionary rules by different courts in the same legal system). A uniform application of Article V would establish an identical framework of considerations and thereby improve the legal environment in which international arbitration operates. Such increased certainty is only reinforced further in the context of a presumption in favor of decisions of the court at the situs.

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164 In writing about the *Chromalloy* case, Sampliner noted a "disturbing propensity" on the part of Egyptian courts to "nullify arbitral awards in favor of foreign parties against Egyptians or its government for seemingly arbitrary reasons." Sampliner, supra note 140, at 6 n.18 (citing Arab Co. for Touristic & Hotel Inv. v. Amprival Contracting Co. of Italy, No. 7058/111J (Cairo Ct. App. 1995), where award was nullified because it attached copy of arbitral agreement as appendix to award (as permitted under ICC rules) rather than quoting it in text, and Arab Republic of Egypt v. Arab Org. for Industrialization, 8165/8 (South Cairo Ct. 1st Inst. 1985), where court attempted to nullify Swiss award against its government and assess "moral damages" against other party and ICC for allowing arbitration to proceed, which had "injured the standing of a state . . . having a glorious history.") Born has stated that the setting-aside decision of the foreign court should not be given deference if that decision is "manifestly corrupt, biased or arbitrary." Born, supra note 2, at 649. As Paulsson has succinctly stated, such "mischief should not so easily be allowed, and that is why the non-mandatory nature of Article V(1) is critical." Paulsson, supra note 12, at 6-7.

165 Even if the examination of a foreign judgment could be incorporated at the award enforcement stage, the problem in *Hilmarton*—the conflict between two separate and contradicting arbitral awards, see supra note 108—could still arise. Even under the rule this Note proposes, it remains conceivable that two conflicting awards could emerge from the same arbitration agreement, and eventually a court would be asked to choose between them. It could be argued, however, that the enforcement of the second award may be refused under grounds of public policy as well as res judicata. At any rate, the remote possibility of future multiple arbitration proceedings seems like a small price to pay for retaining the power to refuse recognition of nullifying judgments in cases of grave injustice to the rights and interests of the parties or where U.S. public policy is clearly compromised. See Paulsson, supra note 12, at 28.

A more compelling criticism is leveled by Paulsson, who notes that:

> It is nevertheless wise to eschew invidious comparisons [between decisions rendered in different legal systems], and that is why it surely must be preferable to use the Article VII approach ("our law requires us to enforce the award even though your courts annulled it") rather than the Article V(1)(e) approach ("we exercise our discretion to enforce an award which your court annulled even though we recently denied enforcement of an award annulled in country X, because we are not convinced by what your judge did").[166]

The proposed Article V analysis, however, also takes these elements of comity into consideration, as evidenced by the general level of deference given to the decision of the courts at the situs. Moreover, given the desire not to offend foreign courts, it would seem strange to adopt an interpretation giving no weight to their decisions whatsoever.

Rather, basing the decision upon Article V(1)(e) of the Convention better comports with the judicial policy interests at stake. The exercise of discretion under Article V allows a court to take all of the pertinent considerations into account and links the effect to be given to the award and the judgment. In general, only judgments independently deserving of recognition should be capable of barring enforcement of an award, but the decision would remain a matter of discretion for the enforcing court. Moreover, the proposed shift in the legal basis of the decision would minimize the possibility of conflicting proceedings, such as occurred in *Hilmarton*, since the exercise of discretion under Article V(1)(e) could be viewed as creating a res judicata effect as to the validity of the nullifying judgment.[167]

D. Application to Chromalloy

Reviewing the facts of *Chromalloy*, the decision to enforce the award could have been justified as an exercise of the court's discretion under Article V(1)(e). Under the first factor, which assesses the specific grounds advanced for the award's infirmity, the Egyptian decision was based upon the alleged misapplication of law by the arbitrators,[168] a ground that does not appear under Article V of the New York Convention. Thus, it would be proper for the district court

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166 Paulsson, supra note 12, at 7.

167 This res judicata effect would prevent parallel proceedings to enforce the foreign judgment. It would not prevent, however, a de novo review of the exercise of discretion under Article V(1)(e). See generally First Options of Chicago v. Kaplan, 514 U.S. 938 (1995).

168 See supra text accompanying notes 89-90.

to review the Cairo Court's judgment more carefully. Not only is misapplication of the law generally considered inappropriate to international arbitration under United States law, but the arbitral award clearly shows that the arbitrators were not convinced that the application of Egyptian administrative law would lead to a different legal outcome.[169] The second factor, the intention of the parties in making the agreement, also weighs squarely in favor of the arbitral award, given the clear and unambiguous language in the contract that it be "final and binding" and not subject to "any appeal or other recourse."[170]

The third factor, the enforcement policies of the forum and the proenforcement bias of the international system as a whole, similarly weighs in favor of the award. On closer inspection, the judgment of the Cairo Court of Appeals appears to be based upon an intrusive de novo review of the arbitral award, including on several occasions a reopening of the factual holdings of the arbitrators. Such an invasive standard of judicial review could well be considered offensive to both international and American public policy regarding arbitration, given its failure to respect party autonomy and its undermining of their contractual agreement to settle their differences finally and exclusively through arbitration.[171] Furthermore, it could be argued, as the

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169 See Arbitral Award, supra note 77, at 30. Even assuming the arbitrators were wrong in this conclusion, this would most certainly constitute an error of law rather than its misapplication, which is generally not considered to constitute permissible grounds for nullifying an award. See Bernhardt v. Polygraphic Co., 350 U.S. 198, 203 n.4 (1956) (misconstruction of contract by arbitrators not open to judicial review); Restatement (Third) of the Foreign Relations Law of the United States § 488 cmts. a & b (1987) ("[A]n error of law by the arbitrators is not a ground for nonrecognition.").

170 Contract, supra note 78, app. E. In fact, it is doubtful whether the parties ever would have agreed to arbitrate at all had the level of review that the Cairo Court of Appeals subsequently applied been known at the time. As Sampliner has stated, "[s]urely, a party with reasonable expectations in CAS's position could not have expected that an ultimate arbitral award could be appealed in Egypt's courts and made subject to review, essentially, of the arbitrator's legal reasoning," noting also that the negotiating history of the contract clearly showed that the arbitration clause was only inserted after Egypt attempted, and CAS refused, to have the Egyptian courts resolve all disputes. Sampliner, supra note 140, at 5 n.12.

171 See The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 13 (1972) ("There are compelling reasons why a freely negotiated private international agreement, unaffected by fraud, undue influence, or overweening bargaining power . . . should be given full effect."). This general presumption has been applied with special force in regard to agreements to arbitrate. See Scherk v. Alberto-Culver Co., 417 U.S. 506, 515-16, 519 (1974). Consequently, judicial review of arbitral awards has been narrowly limited. See Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp., 628 F.2d 81, 83-84 (D.C. Cir. 1980) (noting narrow boundaries of public policy defense to arbitral award and that "the strong federal policy in favor of voluntary commercial arbitration would be undermined if the courts had the final say on the merits of the award"); Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960) ("[T]he court's function in confirming or vacating an arbitration award is severely limited.").

Chromalloy court did, that the Egyptian judgment was based upon a "suspicious view of arbitration"[172] incompatible with the unambiguous United States public policy in support of the institution.[173] Finally, the Egyptian judgment reflected indications of bias in the language of the decision, including its total rejection of CAS's version of the facts previously accepted by the arbitration panel in favor of the Egyptian government's views.[174] In sum, then, the strong United States and international policy on arbitration would clearly favor enforcing the award in these circumstances, as opposed to a foreign judgment completely at odds with it.

The fourth factor, the need for uniformity in application of the Convention, while itself not dispositive, would also counsel against recognizing the foreign judgment in these circumstances. Not only does the Egyptian judgment facially diverge from the standards articulated under Article V, but both the unusual standard it applied and the arguably arbitrary manner in which it did so would thankfully seem to represent an aberration to the international system rather than a growing trend.

Finally, the fifth factor, the general presumption in favor of foreign judgments, while cautioning respect for the Cairo Court, cannot overcome the difficulties already detailed, nor alone dictate what decisions merit recognition under American law. Clearly the majority of the factors outlined in this Note advocate in favor of enforcement of the arbitral award. On balance, then, it would seem that a decision to refuse recognition to the judgment of the Cairo Court of Appeals, and consequently to enforce the award under the court's Article V discretion, would have been warranted.

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172 Matter of Chromalloy Aeroservices (Arab Republic), 939 F. Supp. 907, 911 (D.D.C. 1996).

173 See *Revere Copper & Brass*, 628 F.2d at 83 ("There is a strong public policy behind judicial enforcement of binding arbitration clauses.") (citing Wilko v. Swan, 346 U.S. 427, 431 (1953), for proposition that one goal of FAA was to provide alternative to complications of litigation); see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 631 (1985) (emphasizing court's "strong belief in the efficacy of arbitral procedures for the resolution of international commercial disputes").

174 The Egyptian court used such highly charged language as "imposing" (to describe the manner of the decisionmaking process by two arbitrators who ruled for CAS), "prejudicial" (in reference to the award itself), and "irreparable serious harm" (to describe the damage the award would supposedly inflict on Egypt). See Minister of Defense v. Chromalloy Aeroservices, Decision of the Cairo Court of Appeals, Comm. 7th Cir., at 5, 6 (Dec. 5, 1995). However, counsel for CAS himself later admitted that it could not produce the "smoking gun." See Sampliner, supra note 140, at 6. In any case, the mere possibility of bias underscores the need to exercise discretion on the matter.

CONCLUSION

Chromalloy raises a number of interesting questions of international law as to the interplay between a foreign arbitral award and a judgment nullifying it. Unfortunately, the district court's decision failed to address a number of these complexities. Although the reliance of the court on Article VII of the New York Convention comports with the accepted interpretation of that Article, the reference to Chapter One of the FAA as the governing law for granting effect to the award appears inappropriate. The language of section 10 of the FAA seems to indicate that it was not intended to apply to cases involving international arbitration, and the grounds for nonenforcement enumerated thereunder to a large extent reflect this narrow scope. Furthermore, the enactment of Chapter Two, and specifically the reference to the exclusivity of grounds for nonenforcement found in the New York Convention under section 207, supports the contention that the district court's application of Article VII was incorrect. This misapplication is even more troubling since, by resorting to Article VII, the court failed to give due weight to one of the primary goals of the Convention: the promotion of uniformity.

Instead, the court's decision in *Chromalloy* could have been founded upon more solid and flexible grounds by utilizing the discretion granted to the court by Article V of the Convention. Since a court is never obligated to deny recognition of an award that has been set aside, it may consider jointly both the award and the foreign judgment, as well as the pertinent interests and policies, before deciding which decision should be given effect. This Note contends that the decisive test should be whether the foreign judgment merits recognition on its own force. This approach acknowledges the superior position of the foreign court to review the arbitration, but also recognizes that a decision used to breach the parties' agreement to arbitrate their dispute, or that violates strong American public policy interests, should not be respected automatically.