

# The Status of Vacated Awards in France: the Cour de Cassation Decision in *Putrabali*

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## I. INTRODUCTION

ON 29 JUNE 2007, the French Cour de cassation, the highest court in France, rendered a landmark decision in the *Putrabali* case.<sup>1</sup> This decision is as significant in our view as the decision rendered in 1963 in the *Gosset* case, where the Cour de cassation admitted for the first time the principle of the separability of the arbitration agreement.<sup>2</sup> Quite logically, the *Putrabali* decision has attracted a number of commentaries that are already published or will be published soon.<sup>3</sup>

The reason for this importance may be attributed to the fact that it was the first time that the Cour de cassation had to make a decision on the enforcement in France of awards set aside in the country of origin since the famous *Hilmarton* decisions. In fact, the reasons for this importance are more fundamental. Rather than merely endorsing the solution reached by the Paris Court of Appeal, and subsequently by the Cour de cassation, in the *Hilmarton* case and the subsequent cases, the Cour de cassation provided a firm theoretical foundation for this solution.

The Cour de cassation, following a suggestion in French doctrine, has confirmed the existence of an arbitral legal order, distinct from national legal orders, by affirming that the award was 'not anchored in any national legal system'. It also

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<sup>1</sup> *Sté PT Putrabali Adyamulia*, Cass. Civ. 1, 29 June 2007, available at the website of the Cour de cassation, section 'Jurisprudence', [http://www.courdecassation.fr/jurisprudence\\_publications\\_documentation\\_2/actualite\\_jurisprudence\\_21/premiere\\_chambre\\_civile\\_568/arrets\\_569/br\\_arret\\_10607.html](http://www.courdecassation.fr/jurisprudence_publications_documentation_2/actualite_jurisprudence_21/premiere_chambre_civile_568/arrets_569/br_arret_10607.html).

<sup>2</sup> *Gosset*, Cass. Civ. 1, 7 May 1963, (1963) JCP, Ed. G, Part II, No. 13405, and B. Goldman's note; (1964) *JDI* 82, comment by J.-D. Bredin; (1963) *Rev. Crit. DIP* 615, comment by H. Motulsky; (1963) *Dalloz Jur.* 545, comment by J. Robert.

<sup>3</sup> Already published: (2007) 192 *Petites Aff.* 20, comment by M. de Boisséon; (2007) *Dalloz Actu. Jur.* 1969, comment by X. Delpéch; P.-Y. Gautier obs. at [www.avocats.fr/space/edouard.bertrand](http://www.avocats.fr/space/edouard.bertrand) (4 October 2007); JCP.IV.2606 and 2607 (2007); (2007) *Dalloz Panor.* 180 and (2007) *JDI* 1236, comments by Th. Clay; (2007) *Rev. Arb.* 507, at p. 517, comment by E. Gaillard; (2007) 3 *Gaz. Pal. Cah. Arb.* 14, comment by Ph. Pinsolle; and (2007) *ASA Bull.* 826, comment by P.Y. Gunter. Forthcoming: (2007) *Dalloz*, comment by L. Degos; (2007) *J Int'l Arb.*, comment by A. Mourre; (2007) *Rev. Jur. D Aff.*, comment by J.-P. Ancel.

characterised the international arbitral award as an ‘international judicial decision’. This article will focus essentially on this second aspect by describing the Cour de cassation decision, analysing its legal foundations, and assessing its practical consequences.

## II. THE COUR DE CASSATION’S DECISION IN *PUTRABALI*

Following a brief overview of the facts of the underlying dispute in *Putrabali*, and of the decision of the French Court of Appeal, we will summarise the arguments put forward before the Cour de cassation and the solution given by that court.

### (a) *Facts of the Putrabali Dispute and Decision of the Paris Court of Appeal*

The underlying dispute in the *Putrabali* case was a maritime dispute. An Indonesian company, P.T. Putrabali Adyamulia, sold certain quantities of Muntok white pepper to a French company, Société Est Epices (later Rena Holding). The contract incorporated by reference the rules of the International General Produce Association Ltd (IGPA). Goods were shipped in Indonesia on 27 January 2000. The next day, on 28 January 2000, the seller Putrabali sent declarations of shipment to the brokers for onward transmission to the buyers. On 1 February 2000, the containers and the goods sank off Bangka Island in Indonesia. The dispute arose following this event as the sellers, Putrabali, insisted on being paid for the goods. The sellers then initiated arbitration under the rules of the IGPA and, both arbitrators having been unable to agree, an umpire made an award for the claimant and directed that the buyers should set off the price against presentation of the shipping documents. As is possible under IGPA rules, the buyers appealed, and the Board of Appeal reversed the umpire’s decision, finding that the buyers committed no breach of contract. That award was in turn appealed on points of law before the English High Court. By a judgment dated 19 May 2003,<sup>4</sup> the English High Court partially set aside the award and concluded that the buyers had committed a breach of contract by defaulting on the payment, and remitted the case to arbitration. A second award, dated 19 August 2003, directed the buyers, Rena Holding, to pay to Putrabali an amount of €163,086.04.

In parallel, Rena Holding presented the first award, dated 10 April 2001, for exequatur in France (*i.e.* recognition and enforcement in France). Exequatur was granted and the seller, Putrabali, appealed that decision. The appeal was heard by the Paris Court of Appeal and the decision was rendered on 31 March 2005.<sup>5</sup> In that decision, the Paris Court of Appeal refused to reverse the exequatur judgment. Putrabali argued that the award dated 10 April 2001 had been set aside and that it was a fraud to attempt to enforce it in France. The Paris Court of Appeal replied that the grounds for refusing enforcement in France of an international arbitral award were exhaustively enumerated by article 1502

<sup>4</sup> *The Intan 6 EV360A SN* [2003] 2 Lloyd’s Rep. 700.

<sup>5</sup> Cour d’appel de Paris (1ère Ch. C), 31 March 2005, (2006) *Rev. Arb.* 665, and E. Gaillard’s note.

NCPC, and that the fact that the award had been set aside in the country of origin was not one of those grounds. As a result, there was no obstacle to the recognition and enforcement in France of the award dated 10 April 2001. This solution is not new. It has consistently been decided in France in a series of cases<sup>6</sup> (including *Hilmarton*<sup>7</sup> and, recently, *Bechtel*)<sup>8</sup> that the fact that an award had been set aside in the country where it was rendered is not a ground for refusing enforcement of that award in France.

Following this judgment, Putrabali submitted the issue to the French Cour de cassation, and it was for that court to decide what solution should be given to the issue of the enforcement in France of an award set aside in its country of origin.

(b) *Arguments Before and Solutions Given by the Cour de Cassation*

Putrabali submitted that the Court of Appeal decision should be overturned on seven different grounds. None of these grounds questioned the position that an award set aside in its country of origin can nevertheless be enforced in France.

<sup>6</sup> *Norsolor*, Cass. Civ. 1, 9 October 1984, (1985) *Rev. Arb.* 431, comment by B. Goldman; (1985) *JDI* 679, comment by Ph. Kahn; (1985) *Rev. Crit. DIP* 551, 2nd decision, comment by B. Dutoit; (1985) *Dalloz Jur.* 101, comment by J. Robert; for an English translation, see (1985) 24 *ILM* 360, with an introductory note by E. Gaillard; (1985) 2 *J Int'l Arb.* 67, comment by D. Thompson; (1986) *XI YB Com. Arb.* 484; *Polish Ocean Line*, Cass. Civ. 1, 10 March 1993, (1993) *Rev. Arb.* 255, 2nd decision, comment by D. Hascher; (1993) *JDI* 360, 1st decision, comment by P. Kahn; for an English translation, see (1994) *XIX YB Com. Arb.* 662; *Bargues Agro Industries*, Cour d'appel de Paris (1ère Ch. C) 10 June 2004, (2004) *Rev. Arb.* 733.

<sup>7</sup> *Sté Hilmarton*, ICC Award No. 5622, Geneva, 19 August 1988; extracts in (1994) *XIX YCA* 105 and in (1993) *Rev. Arb.* 327; annulled by the Geneva Court of Justice, 17 November 1989, (1993) *Rev. Arb.* 315, comment by V. Heuzé at p. 179; (1994) *ASA Bull.* 4, comment by A. Mebroukine; exequatur by the French Tribunal de grande instance de Paris (ord. réf.) 27 February 1990, unpublished; annulment confirmed by the Swiss Tribunal fédéral, 17 April 1990, (1993) *Rev. Arb.* 315, comment by V. Heuzé at p. 179; (1994) *ASA Bull.* 4, comment by A. Mebroukine; exequatur confirmed in France by Cour d'appel de Paris, 19 December 1991, (1993) *XIX YCA* 655; (1993) *Rev. Arb.* 300, comment by V. Heuzé at p. 179; (1993) *RTD Com.* 645, comment by J.-Cl. Dubarry and E. Loquin; (1994) *ASA Bull.* 445; Second ICC Award No. 5622, Geneva, 10 April 1992 (Award reversing the earlier award), (1997) 8(1) *ICC Bull.* 53; exequatur of the second award in France by the Tribunal de grande instance de Nanterre (ord. réf.), 25 February 1993, unpublished; exequatur of the Swiss Tribunal fédéral's decision by the French Tribunal de grande instance de Nanterre (ord. réf.), 22 September 1993, (1995) *XX YCA* 194; (1994) 9(1) *Int'l Arb. Rep.* 7, and p. B1; the French Cour de cassation then overturned the appeal lodged against the exequatur decision of the first award, Cass. Civ. 1, 23 March 1994, (1995) *XX YCA* 663; (1994) *Rev. Arb.* 327, comment by Ch. Jarrosson; (1994) *Clunet* 701, comment by E. Gaillard; (1994) *RTD com.* 702, comment by J.-Cl. Dubarry and E. Loquin; (1995) *Rev. Crit. DIP* 356, comment by B. Oppetit; (1995) 23 *Pétries Aff.* 8 (2me esp.), comment by G. Parléani; confirming ordinances according exequatur to the second award and to the Swiss Tribunal fédéral's decision annulling the first award, Cour d'appel de Versailles, 29 June 1995 (two decisions), (1995) *Rev. Arb.* 639, critical comment by Ch. Jarrosson; (1996) *JDI* 120, comment E. Gaillard; (1995) *RTD com.* 758, comment by J.-Cl. Dubarry and E. Loquin; (1995) *JCP I* 3891 para. 17, comment by L. Cadiet; (1996) *XXI YCA* 524; (1996) *IBLJ* 156, comment by E. Robine; overturning these last decisions, Cour de cassation, Cass. Civ. 1, 10 June 1997, (1997) *XXII YCA* 696, (1997) *Rev. Arb.* 329, comment by Ph. Fouchard, spec. No. 17; (1997) *JDI* 1033, comment by E. Gaillard; (1998) *RTD com.* 329, comment by J.-Cl. Dubarry and E. Loquin; (1997) 12(9) *Int'l Arb. Rep.* 1, comment by H.G. Gharavi; exequatur of the second award in England, High Court of Justice, Queen's Bench Div., 24 May 1999, (1999) *XXIVa YCA* 777; (1999) *Rev. Arb.* 867, comment by P. Lastenouse; (1999) *ASA Bull.* 368.

<sup>8</sup> *Bechtel*, Cour d'appel de Paris (1re ch. C) 29 September 2005, (2006) *Rev. Arb.* 695, comment by H. Muir Watt; (2006) *Rev. Crit. DIP* 387, comment by A. Szekely; (2005) *Dalloz Panor.* 3063, comment by Th. Clay; (2006) *JCP I* 148 para. 7, comment by Ch. Seraglini; (2005) 3 *SIAR* 151, comment by Ph. Pinsolle at p. 159 and A. Mourre at p. 172.

This is not surprising. As a matter of French law, it is an established position which could not be criticised with any prospect of success before the Cour de cassation.

In fact, not only did Putrabali not challenge the fact that, under French law, there was no specific ground to refuse the enforcement of an award set aside in its country of origin, but two of the arguments presented by Putrabali specifically referred to 'the rule according to which the fact that an arbitral award had been set aside in a foreign country does not preclude any interested party requesting in France the exequatur of the same award'.

In summary, the arguments submitted by Putrabali revolved around the following lines.

According to Putrabali, the decision of the Court of Appeal had to be quashed because of the following reasons: (i) the existence of an obligation of procedural loyalty that was allegedly breached by Rena Holding; (ii) the fact that the use of the award dated 10 April 2001, and its use before the court as an arbitral award, was an abuse of right; (iii) the fact that the award dated 10 April 2001 could no longer be characterised as an arbitral award within the French meaning of that concept; and essentially (iv) the fact that it was contrary to the express will of the parties, which by definition contemplated the possibility for a party to appeal on points of law, to take into account, for the purpose of enforcement, an award which was in fact in the course of the arbitration proceeding, *i.e.* prior to this appeal being heard.

Notwithstanding the fact that Putrabali was apparently not questioning, in a direct manner, the principle according to which an award set aside in its country of origin can nevertheless be enforced in France, it was clear that it was precisely this principle that was the centre of its criticisms. It was also the first time that the French Cour de cassation had to make a pronouncement on the theoretical justification for this principle which had previously been justified, on a theoretical basis, only in decisions of the Paris Court of Appeal. That being said, given that the Paris Court of Appeal centralises all arbitration matters in the specialised chamber with the same magistrates sitting all the time, the decisions of the Paris Court of Appeal, in matters relating to international arbitration, are extremely authoritative in France.

The Cour de cassation rejected Putrabali's argument. The reasons advanced by the Cour de cassation went far beyond what was strictly necessary in order to reject Putrabali's arguments. The court could have merely pointed out that none of the grounds raised by Putrabali was well founded. Rather, the court decided to provide a theoretical basis for the rule according to which awards set aside in their country of origin can be enforced in another country.

The Cour de cassation rejected the objections advanced by Putrabali as follows:

- [2] However, an international arbitral award – which is not anchored in any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.

- [3] Under Art. VII of the [1958 New York Convention], Rena Holding was allowed to seek enforcement in France of the award rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules. It could also base its request on the French rules on international arbitration, which do not provide that the annulment of an arbitral award by the courts of the country where it was rendered is a ground for refusing its recognition and enforcement.

This holding confirms the following three principles.

First, it is always open to a party to base its request for enforcement and recognition of an arbitral award on French rules rather than under rules of the New York Convention. This is because French rules are more favourable than those of the New York Convention, and because Article VII of the New York Convention allows interested parties to avail themselves of rules that are more favourable. This is an uncontroversial position which is internationally accepted.

Secondly, an international arbitral award is not anchored in any national legal order. The French Cour de cassation thus endorsed the delocalised view of arbitration that has been promoted over the last three decades in French doctrine and that has been accepted on numerous occasions by the Paris Court of Appeal. In the eyes of the French legal system, an international arbitral award is not the product of any national legal order. In the past, the French courts had used the expression according to which the international arbitral award was not 'integrated in the legal order of the country of origin'.<sup>9</sup> This formulation prompted criticisms.<sup>10</sup> The new formulation goes further, and affirms the existence of an arbitral legal order, in which the international arbitral award is anchored, that is distinct from national legal orders. This is certainly the most innovative part of the decision.

Thirdly, the decision confirms that an arbitral award is, in and of itself, an international judicial decision. This proposition seems intuitively correct. In fact, it corresponds to the approach adopted not only in many legal systems, but also by many international conventions and under international law.

### III. LEGAL FOUNDATIONS OF THE *PUTRABALI* DECISION

The reasoning adopted by the French Cour de cassation in order to justify the recognition and enforcement in France of awards set aside in the country of origin rests on two propositions: (i) the fact that an international arbitral award is not anchored in any legal system; (ii) the fact that an international arbitral award is an international judicial decision.

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<sup>9</sup> See *Hilmarton*, Cass. Civ. 1, 23 March 1994, *supra* n. 7, overturning the appeal lodged against the exequatur decision of the first award, though annulled by the Geneva Court of Justice.

<sup>10</sup> B. Leurent, 'Réflexions sur l'efficacité internationale des sentences arbitrales' in *Travaux du Comité français de Droit International Privé* (1995), p. 181, and (1996) *Arb. Int'l* 269; J.-F. Poudret, 'Quelle solution pour en finir avec l'affaire Hilmarton? Réponse à Philippe Fouchard' in (1998) *Rev. Arb.* 7; H. Gharavi, *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law, 2002).

*(a) Arbitral Award is Not Anchored in any National Legal Order*

By confirming that an international arbitral award is not anchored in any national legal order, the French Cour de cassation confirmed the long-standing position of the French courts and that of the majority of the French doctrine, according to which an arbitral award is not grounded in any particular legal order. It thus endorsed the delocalised view of arbitration. Until recently, it was the existence of this delocalised view that justified the solution given by the French courts to the issue of the enforcement of awards set aside in their country of origin. The justification advanced was that the award was not 'integrated' in the legal order of the country of origin.<sup>11</sup> In the *Putrabali* decision, the Cour de cassation went one step further. It confirmed not only that the international arbitral award is not anchored in the legal order of the seat of the arbitration, but it also affirmed that an international arbitral award is not anchored in any other legal national order. The position of the Cour de cassation is therefore that an international arbitral award is not anchored in any national legal order at all.

Contrary to the suggestion of certain authors,<sup>12</sup> that does not mean that the Cour de cassation has, by this decision, endorsed the proposition according to which international arbitral awards float in a legal vacuum. Rather, by this decision, the Cour de cassation has confirmed the very existence of an arbitral legal order which is distinct from national legal orders.

The notion of an arbitral legal order was first crystallised, and justified on a theoretical basis, by Prof. Emmanuel Gaillard in his seminal paper given at the end of the Sixth Brazilian Congress on Arbitration in November 2006.<sup>13</sup> Since then, Prof. Gaillard has developed his analysis in his lectures at the Hague Academy of International Law on the philosophical aspects of arbitration.<sup>14</sup> It is far beyond the scope of this article to summarise the theoretical justifications for the existence of an arbitral legal order distinct from national legal orders, and the practical consequences flowing from the existence of an autonomous arbitral legal order. Readers should consult directly the works of Prof. Gaillard on this issue.

All that can be said in this article is that by its decision of 29 June 2007, the French Cour de cassation has endorsed the existence of an autonomous arbitral legal order.

The existence of an arbitral legal order distinct from national legal orders will no doubt be questioned by a number of practitioners and academics in the arbitration community. This concept may well be described as resting on little more than a mere dictum of the French Cour de cassation that followed a theoretical construction developed in the French doctrine. Yet, back in 1963, when the same French Cour de cassation affirmed for the first time the separability of the arbitration agreement from the underlying contract, it was also a revolutionary concept at the time. It took more than 25 years for jurisdictions not notable for

<sup>11</sup> *Hilmarton*, Cass. Civ. 1, 23 March 1994, *supra* n. 7.

<sup>12</sup> X. Delpech, 'Sentence arbitrale internationale, force exécutoire et conflit de juridictions' in (2007) *Dalloz* 1969.

<sup>13</sup> E. Gaillard, 'Souveraineté et autonomie. Réflexions sur les représentations de l'arbitrage international', closing conference speech, published in (2007) *Revista Brasileira de Arbitragem* (forthcoming) and (2007) *JDI* 1163.

<sup>14</sup> E. Gaillard, 'Aspects philosophiques du droit de l'arbitrage international', *RCADI* (forthcoming).

being hostile to arbitration, such as the English courts, to admit the same concept in the decision of *Harbour v. Kansa* in 1992.<sup>15</sup> Today, however, the separability of the arbitration agreement is internationally accepted and it is recognised as one of the very foundations of the success of international arbitration worldwide.<sup>16</sup>

Similarly, and perhaps more directly analogous to the present situation, it took quite some time for the international arbitration community to admit the idea that arbitrators could apply rules of law other than the law of a given legal system, in order to deal with the merits of the dispute, and that they were not bound by the conflict of laws rules of the seat of the arbitration. The famous paper 'Lex Facit Arbitrum' by F.A. Mann, published in 1967,<sup>17</sup> submitted in essence that only a national legal system could provide the basis upon which the arbitrators were to adjudicate a given dispute, and that the legal system in question had to be selected by applying the conflict of laws rules of the seat of the arbitration. The underlying philosophy was that arbitration had to be amenable to supervision by judges of the seat of the arbitration. Along the same lines, many criticisms followed regarding the existence of a *lex mercatoria*, and the question whether either *lex mercatoria* or, for example, principles common to French and English law could constitute genuine rules of law.<sup>18</sup>

Today, however, it is widely accepted that arbitrators have no forum, and that they are entitled to apply not only the law they deem appropriate, without referring to any rules of conflict of laws, but also more generally rules of law, which includes *lex mercatoria*, the principles common to two given legal systems (as was the case in the *Channel Tunnel* arbitration)<sup>19</sup> or general principles of law (as was the case in the *Andersen* arbitration).<sup>20</sup> This ability is now endorsed by the rules of many arbitral institutions, some of which modified their rules in order to allow it.<sup>21</sup> It is also endorsed by the majority of arbitral doctrine<sup>22</sup> and by various

<sup>15</sup> *Harbour Assurance Co. (UK) Ltd v. Kansa General International Insurance Co. Ltd* [1992] 1 Lloyd's Rep. 1.

<sup>16</sup> The principle of separability of the arbitration agreement is embodied in national legislations such as those of Belgium, Netherlands, Switzerland, Spain, Egypt, Algeria or Tunisia. In other countries, it has fallen upon case law to acknowledge this principle, in the United States (*Prima Paint v. Flood and Conklin*, 388 U.S. 395 (1967)); Germany (Landgericht of Hamburg, 16 March 1977, (1978) III YCA 274); Italy (Court of Appeal of Venice, 26 April 1980, (1982) VII YCA 340); and Japan (Supreme Court, 15 July 1975, (1979) IV YCA 115).

<sup>17</sup> F.A. Mann, 'Lex Facit Arbitrum' in *Liber Amicorum for Martin Domke* (M. Nijhoff, 1967), p. 157.

<sup>18</sup> P. Lagarde, 'Approche critique de la *lex mercatoria*' in *Etudes Goldman* (Litec, 1982), p. 125; A. Kassis, *Théorie générale des usages du commerce* (LGDJ, 1984), No. 584 *et seq.*; M. Mustill, 'The New *Lex Mercatoria*: the First Twenty-five Years' in Maarten Bos and Ian Brownlie (eds.), *Liber Amicorum for Lord Wilberforce* (Clarendon Press, 1987), p. 149, reprinted in (1988) *Arb. Int'l* 86.

<sup>19</sup> *Channel Tunnel Group Ltd and others v. Balfour Beattie Construction and others* [1993] AC 334.

<sup>20</sup> *Andersen Consulting Business Unit Member Firms (ACBU) v. Arthur Andersen Business Unit Member Firms (AABU) and Andersen Worldwide SC (AWSC)*. For the final award, see ICC Award No. 9797, 28 July 2000, 15 (2000) *Int'l Arb. Rep.* 8 Doc. A-1.

<sup>21</sup> See, as a milestone example, the modification of ICC Rules, art. 17, in their 1998 revised edition; Y. Derains and E. Schwartz, *A Guide to the ICC Rules of Arbitration* (2nd edn, Kluwer Law, 2005), p. 232.

<sup>22</sup> See e.g., Fouchard Gaillard Goldman on *International Commercial Arbitration*, edited by E. Gaillard and J. Savage, (Kluwer Law, 1999), para. 1444; E. Loquin, 'Les règles matérielles internationales, notamment dans le domaine du droit des affaires' in 322 *RCADI* (2007); E. Gaillard, 'Transnational Law: a Legal System or a Method of Decision Making?' in (2001) *Arb. Int'l* 59; D. Rivkin, 'Enforceability of Arbitral Awards Based on *Lex Mercatoria*' in (1993) *Arb. Int'l* 67.

international conventions.<sup>23</sup> Admittedly, the UNCITRAL Rules need to be revised in this respect, but the current proposals for revision precisely suggest that the reference in article 33(1) to the applicable 'law' should be modified to refer to the applicable 'rules of law' that arbitrators may apply.<sup>24</sup>

Again, French law was the pioneer on this issue by codifying, in 1981, that arbitrators are entitled to apply 'rules of law', as distinct from the law of a given legal system, in order to resolve disputes, and that they can select the relevant law or rules of law directly, without having recourse to conflict of laws rules.<sup>25</sup> This too was revolutionary at the time, and yet it is now internationally accepted.

Without necessarily predicting the same success to the concept of an arbitral legal order, one must admit that the consequences of the existence of this concept are potentially far-reaching.

For its part, the second proposition upon which the Cour de cassation judgment is based, *i.e.* the fact that an international arbitral award is an international judicial decision, is easier to accept. Yet, if this premise is accepted, a logical consequence is the existence of a distinct arbitral legal order.

*(b) An International Arbitral Award is an International Judicial Decision*

The second justification advanced by the French Cour de cassation in order to reject the challenge to the decision of the Court of Appeal was that an international arbitral award is an 'international judicial decision'.

The proposition according to which an international arbitral award is an international judicial decision does not seem controversial on its face. This may well be because this proposition does not in fact refer to a firmly defined legal notion. The notion of an international judicial decision is far from being uniformly defined. In order to verify the accuracy of the holding of the French Cour de cassation, it is useful to check to what extent an arbitral award can be equated with a judicial decision, and subsequently to determine the circumstances in which the same arbitral award may be characterised as an 'international judicial decision'.

<sup>23</sup> See *e.g.*, Convention on the Settlement of Investment Disputes Between States and Nationals of Other States ('Washington Convention'), 18 March 1965, Art. 42: '(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable'; MERCOSUR Convention on International Commercial Arbitration, Buenos Aires, 23 July 1998, Art. 10; United States-Iran Accords, Algiers, 19 January 1981, Art. V.

<sup>24</sup> Similarly the Rome I Draft Regulation on the Law applicable to contractual obligations enables the parties to opt for 'non-State body of law' under certain conditions: Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) (COM/2005/0650 final, COD 2005/0261).

<sup>25</sup> French New Code of Civil Procedure, art. 1496: 'The arbitrator determines the dispute according to rules of law that the parties have chosen; in default of such a choice, in accordance with rules he deems appropriate. He takes into account all customs in commercial activities'.



(i) *An arbitral award is a judicial decision*

An analysis of notions of judicial decisions and arbitral awards shows that there is no uniform definition of these notions. Even the draft of the Hague Convention for the recognition and enforcement of judgments, now abandoned, did not define the notion of judicial decision. As for arbitral awards, it is well known that there is no definition either of what is an arbitral award.<sup>26</sup>

In fact, both arbitral awards and judicial decisions are primarily defined by their regime. In other words, it is because certain characteristics are identified that a given decision can be characterised as a judicial decision or as an arbitral award, respectively.

Those characteristics are the following:

- (a) judicial decisions and arbitral awards are binding;<sup>27</sup>
- (b) judicial decisions and arbitral awards are intended finally to dispose of a given dispute;<sup>28</sup>
- (c) judicial decisions and arbitral awards have *res judicata* effect;<sup>29</sup>
- (d) judicial decisions and arbitral awards can be recognised and enforced;<sup>30</sup>
- (e) judicial decisions and arbitral awards, even if not enforced or recognised, can nevertheless constitute proof of certain facts or be taken into account as a fact in other proceedings.

<sup>26</sup> Fouchard Gaillard Goldman, *supra* n. 22 at paras. 1346–1366; M. Hunter, A. Redfern, N. Blackaby and C. Partasides, *Law and Practice of International Commercial Arbitration* (4th edn, Sweet & Maxwell, London, 2004), paras. 8-05 to 8-08; J.-F. Poudret and S. Besson, *Comparative Law of International Arbitration* (S. Berti and A. Ponti (trans.)), para. 721 (2007). The UNCITRAL works on the Model Law actually even stumbled on the definition of an award, see H. Holtzmann and J. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law and Taxation, 1989), p. 153.

<sup>27</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, Art. III: 'Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles'; UNCITRAL Model Law on International Commercial Arbitration 1985, Art. 35 (with amendments as adopted in 2006): '(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36'.

<sup>28</sup> French New Code of Civil Procedure, art. 1496; *Braspetro Oil Services Co. v. Management and Implementation Authority of the Great Man-Made River Project*, Cour d'appel de Paris, 1 July 1999, at 14, (1999) 8 Mealey's Int'l Arb. Rep. 24: 'The qualification of [a decision as an] award does not depend on the terms used by the arbitrators or by the parties ... after a five-month deliberation, the arbitral tribunal rendered the "order" of 14 May 1998, by which, after a lengthy examination of the parties' positions, it declared that the request could not be granted because Brasoil had not proven that there had been fraud as alleged. *This reasoned decision – by which the arbitrators considered the contradictory theories of the parties and examined in detail whether they were founded, and solved, in a final manner, the dispute between the parties concerning the admissibility of Brasoil's request for a review, by denying it and thereby ending the dispute submitted to them – appears to be an exercise of its jurisdictional power by the arbitral tribunal ...* Notwithstanding its qualification as an "order", the decision of 14 May 1998 ... is thus indeed an award' (emphasis added).

<sup>29</sup> 'To promote efficiency and finality of international commercial arbitration, arbitral awards should have conclusive and preclusive effects in further arbitral proceedings': ILA, Resolution 1/2006; French NCPC, art. 1476: 'The arbitral award, from the moment that it has been given, will become *res judicata* with respect to the dispute that it has determined'.

<sup>30</sup> New York Convention, Art. III.

As a result, there is no doubt that arbitral awards can be equated with judicial decisions, or more exactly that they share fundamental characteristics in common. Ultimately, this is because arbitration is a way of administering justice.

*(ii) Circumstances in which an arbitral award can be characterised as an international judicial decision*

If there is no uniform definition of the notion of judicial decisions, there is even less a uniform definition of the notion of an ‘international’ judicial decision. An ‘international’ judicial decision can be a decision emanating from an international tribunal, such as the International Court of Justice (ICJ).<sup>31</sup> It can also be a decision rendered by a domestic court in an international matter. Finally, it can mean a decision which produces effects internationally.

In the absence of a uniform definition of international judicial decisions, it is necessary to examine the circumstances in which arbitral awards can be characterised, or have been recognised, as constituting international judicial decisions.

A crucial characteristic of international judicial decisions is that they are not the product of a given national legal order. Conversely, they are recognised by national legal orders in which their enforcement is sought as emanating not from another national legal system (in which it would be a judicial decision of the latter) but from a supra-national legal order.

The question is: what type of arbitral award will pass this test? In order to answer this, it is necessary to consider the point of view of international law and that of various national laws. Moreover, it may be helpful to make a distinction between those arbitral awards whose legal regime is entirely defined by a given treaty (*e.g.* ICSID awards) or, more generally, that are primarily based on a treaty (*e.g.* awards of the Iran–United States Tribunal), and arbitral awards whose legal regime depends both on a treaty (such as the New York Convention) and national laws, *i.e.* the vast majority of commercial arbitral awards.

As a starting point, it is clear that certain arbitral awards are, by definition, international judicial decisions simply because they cannot be characterised, under any analysis, as being the product of a national legal system. This is the case for awards rendered under international law in inter-state disputes. Although, under international law, there is no direct definition of the notion of international judicial decisions, Article 38 of the Statute of the ICJ expressly refers to ‘jurisprudence’ as being one of the sources of international law.

Arbitral awards undoubtedly belong to jurisprudence.<sup>32</sup> Thus, arbitral awards rendered by arbitrators in inter-state disputes do form part of the sources of

<sup>31</sup> M. Bedjaoui, ‘The Reception by National Courts of Decisions of International Tribunals’ in 28 *NYUJ Int’l L and Pol.* 45 (1995–1996).

<sup>32</sup> I. Brownlie, *Principles of Public International Law* (6th edn, OUP, 2003), p. 19. See *e.g.*, *Alabama Claims Arbitration* (1872) Moore Arbitrations i. 653; *Behring Sea Fisheries Arbitration* (1893) Moore Arbitrations i. 755. See also, *Island of Palmas*, RIAA ii. 855 and, generally, the series of Reports of International Arbitral Awards published by the United Nations since 1948, and the Foreword to vol. I.

international law.<sup>33</sup> They are international by nature. The same goes for arbitral awards that are primarily based on a treaty. For example, the awards rendered by the compensation commission established by the Treaty of Versailles, following the First World War, have been recognised in the United States as international judicial decisions: 'the judgments of the Mixed Franco-German Tribunal are *res judicata* against defendant corporation'.<sup>34</sup>

The same goes for awards of the Iran–United States Tribunal. It has been argued, before US courts, that an award rendered by the Iran–United States Tribunal could not be enforced because it was a 'creature of international law, and not national law'.<sup>35</sup> This argument was rejected and the US courts, rightly, pointed out that those awards were international judicial decisions and that they could be recognised as such, without the need for them first to obtain the blessing of a national legal system.<sup>36</sup>

ICSID awards (*i.e.* awards rendered under the 1965 Washington Convention) constitute another example of international judicial decisions. As is well-known, the purpose of the ICSID Convention is to regulate disputes between investors of a contracting state and another contracting state.<sup>37</sup> By definition, ICSID awards are not grounded in any legal order. They are governed entirely by the ICSID Convention. There is no recourse against those awards before national courts.<sup>38</sup> More generally, there is a prohibition on national courts intervening in the ICSID process<sup>39</sup> and, finally, contracting states accept to enforce ICSID awards as a final decision of last instance in their respective legal orders.<sup>40</sup>

ICSID awards exist independently of any national legal order, and even those who promote a strict territorialist approach to arbitration do not question this. By their very nature, ICSID awards are international judicial decisions. Why, then, should awards rendered in investment disputes, but not benefiting from the ICSID Convention,<sup>41</sup> be treated differently from ICSID awards? In fact, they should not. They are primarily based on a treaty, be it a bilateral or a multilateral instrument, and they perform exactly the same function as ICSID awards: they finally settle disputes between foreign investors and host states. As a result, there

<sup>33</sup> Brownlie, *supra* n. 32, quoting such cases as *Chorzów Factory (Jurisdiction)* (1927) PCIJ Ser. A no. 9, p. 31; *Chorzów Factory (Merits)* (1928) PCIJ Ser. A. no. 17, pp. 31, 47; *Fisheries Case* (1951) ICJ Rep. 131; *Pétromány University* (1933) PCIJ Ser. A/B no. 61, p. 243 (consistent practice of mixed arbitral tribunals); *Barcelona Traction Case (Second Phase)* (1970) ICJ Rep. 40.

<sup>34</sup> *Sté Vinicole de Champagne v. Mumm Champagne & Importation Co., Inc.*, 11 F. Supp. 208 (SDNY 1935); Ch. H. Schreuer, 'The Implementation of International Judicial Decisions by Domestic Courts' in 24 *ICLQ* 153 at p. 158 (1975).

<sup>35</sup> *Ministry of Defence of the Islamic Republic of Iran v. Gould Marketing Inc.* (1989) 84 *AJ Int'l L* 556 at p. 558.

<sup>36</sup> *Ibid.*

<sup>37</sup> ICSID Convention, Preamble and Art. 1; Ch. Schreuer, *The ICSID Convention: a Commentary* (Cambridge, 2001), p. 1.

<sup>38</sup> ICSID Convention, Art. 53(1).

<sup>39</sup> *Ibid.* Art. 26.

<sup>40</sup> *Ibid.* Art. 54(1).

<sup>41</sup> Be they Additional Facility awards, Arbitration Institute of the Stockholm Chamber of Commerce awards, ICC awards, LCIA awards, UNCITRAL awards, or other ad hoc awards.

is no reason why they should be treated differently from ICSID awards. They are also international awards by nature, and therefore international judicial decisions.

Some will argue that the legal regime of those awards is not encapsulated in a treaty, like that of ICSID awards, and that as a result they are merely awards rendered in a given country in an investment dispute. Those who adopt this view naturally conclude that awards rendered in investment disputes in, say, Sweden, are Swedish awards and not international awards. This means, however, that those awards are to be treated for all purposes like any other Swedish domestic award.<sup>42</sup> It suffices to enunciate this proposition in order to realise that this view is artificial. It cannot be seriously maintained that an award rendered in Sweden in a BIT dispute is a domestic award. This conclusion is completely divorced from reality. Disputes between investors and host states are the paradigm of international disputes and the resulting award can only be international.

Moreover, accepting the opposite view would result in making the nature of the award dependent on the choice exercised by the investor when the investor files the request for arbitration. When there is an option between ICSID and ad hoc arbitration, the resulting awards would be characterised as international or domestic depending on whether the investor has chosen ICSID or not. This cannot be the correct view.

There is a third reason that leads to the conclusion that awards rendered in non-ICSID investment disputes are international awards. This reason is that even awards rendered in international commercial disputes are also characterised as international judicial decisions. It would be odd if awards rendered in investment disputes followed a different regime.

By awards rendered in international commercial disputes, we mean awards that are based on an arbitration agreement found in a contract, between two private parties, in an international matter. The key issue is to determine to what extent these awards exist as judicial decisions, and produce effects internationally, independently of the 'blessing' given by the legal order of the place of arbitration, be this blessing given directly, through an action to set aside, or indirectly when the time limit to file such an action has expired. An objective conclusion is that, contrary to the view advanced by those who criticise the *Hilmarton* approach, international arbitral awards do exist as judicial decisions independently of the legal order of the place of arbitration for at least three sets of reasons.

First, and this has been observed many times, one of the objectives of the New York Convention was to get rid of the double *exequatur* that prevailed under the regime of the previous Geneva Conventions. Nobody denies this, and nobody denies that this objective was attained by the Convention. It therefore means that an arbitral award benefiting from the Convention exists and can produce effect independently of its *exequatur* in its country of origin.

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<sup>42</sup> This is all the more so as Sweden does not differentiate between international arbitration and domestic arbitration. The Swedish Arbitration Act 1999 applies to both situations without making a distinction. *See* art. 46: 'This Act shall apply to arbitral proceedings which take place in Sweden notwithstanding that the dispute has an international connection'.

Secondly, quite logically, if there is an action to set aside in the country of origin it is not mandatory to stay the enforcement action in another country.<sup>43</sup> This means that the award exists as such, and can be enforced, pending such an action. Moreover, even if the award is set aside in the country of origin, it is not an absolute bar to its enforcement under the Convention.<sup>44</sup>

Thirdly (and this is decisive), nobody dares to question the fact that awards rendered in one of the five countries that give the parties the possibility to waive the action to set aside still benefit from the Convention. These five countries are Belgium, Sweden, Switzerland, Peru and Tunisia.<sup>45</sup> By definition, when the parties have elected to waive their right to challenge the award,<sup>46</sup> there will be no possibility of any blessing by the courts of the country of origin. Yet, the award can be recognised and enforced under the New York Convention. It is a direct recognition of the fact that this award constitutes an international judicial decision.

Some will argue that because the parties have elected to waive their right to challenge the award, it has become 'final' in its country of origin, and that therefore it is only normal that it be enforced under the Convention, but this is simply not true. When the parties have elected not to challenge the award, the award is by no means final in the country of origin. In fact, it is not even part of the legal order of the country of origin. In order to integrate into this legal order, it must be enforced, generally through the New York Convention as if it were a foreign award,<sup>47</sup> thereby leaving the courts of the place of arbitration a certain degree of control over the award.

Thus, awards rendered in those five countries, when the parties have waived their right to challenge the award, exist and can produce effect internationally under the New York Convention without being integrated in any national legal order at all.

I have confined myself to this series of reasons found in the New York Convention in order to show that it is in fact an *internationally accepted* solution that

<sup>43</sup> New York Convention, Art. VI; Gaillard and Savage, *supra* n. 22 at para. 1691.

<sup>44</sup> New York Convention, Art. V(1): see J. van den Berg, *The New York Convention of 1958* (Kluwer Law, 1981), p. 265; G. Delaume, 'Enforcement Against a Foreign State of an Arbitral Award Annulled in the Foreign State' in (1997) *IBLR* 254; Ph. Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine' in (1997) *Rev. Arb.* 329; J. Paulsson, 'May or Must under the New York Convention: an Exercise in Syntax and Linguistics' in (1998) 14 *Arb. Int'l* 227. For a different contextual and historical interpretation, see W. Park, 'Duty and Discretion in International Arbitration' in (1999) 93 *Am. J. Int'l L* 805, esp. at pp. 808–812, reproduced in *Arbitration of International Business Disputes* (OUP, 2006), p. 189, esp. at pp. 196–198.

<sup>45</sup> Belgian Code of Civil Procedure, 10 October 1967 (CJB), art. 1717(4); Swedish Law on Arbitration, 4 March 1999 (SU), art. 51(1); for Switzerland, see Private International Law Statute, 18 December 1987 (PILS), art. 192(1); for Peru, see General Arbitration Law, Law No. 26572, in force 6 January 1996, art. 126; and for Tunisia, Arbitration Code, 27 October 1993, art. 78(2).

<sup>46</sup> Tribunal Fédéral, 4 October 2005, ATF 131 III 173, (2005) *ASA Bull.* 496.

<sup>47</sup> PILS, art. 192(2): 'If the parties have waived fully the action for annulment against the awards and if the awards are to be enforced in Switzerland, the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards applies by analogy'.

international awards exist and can produce effect internationally without being blessed by the law or the court of the country of origin. It also shows that the position long adopted by the French courts according to which an international arbitral award is not integrated in the country of origin does accord with this approach. An international arbitral award stands as soon as it is rendered as an international judicial decision irrespective of the view subsequently taken by the courts of the place of arbitration.

It is therefore no more than a *legal fiction* to maintain that the same award will be retroactively denied any effect (and in fact any existence) in the event that the courts of the place of arbitration subsequently decide to set aside the award. This legal fiction results from a *parti-pris* which equates international arbitrators with judges of the place of arbitration, and it reinstates in practice the need for a double exequatur, thus flying in the face of the goals of the New York Convention. The reality is that, in this situation, there are two decisions: the arbitral award which is an international judicial decision, and a local court decision setting aside this award. If one accepts the existence of these two decisions independently from each other, there are numerous consequences flowing from it.

#### IV. CONSEQUENCES OF THE CHARACTERISATION OF AN INTERNATIONAL ARBITRAL AWARD AS AN INTERNATIONAL JUDICIAL DECISION

The effect of the characterisation of the international arbitral award as an international judicial decision is to acknowledge the fact that the international arbitral award is a judicial decision per se which does not need the blessing of any national court in order to be recognised and enforced. This is not a controversial proposition in fact. When there is no annulment decision or when the challenge is rejected, nobody questions the fact that the international arbitral award is an international decision that can be enforced and recognised in accordance with the New York Convention. Why should there be a difference, then, if a court has decided to annul the award? In theory, there is none.

Given that international arbitral awards are international judicial decisions existing per se, irrespective of the view of the law or the courts of the place of arbitration, the *Hilmarton* debate is significantly reduced. The question for the courts of countries that are not the place of arbitration becomes which decision should prevail between the international arbitral award and the decision of the court of the place of arbitration that purports to annul this award.

In reality, the question is not even which decision should prevail, but under which circumstances the courts of the place of enforcement will recognise the international arbitral award.

The courts of each country where enforcement is sought will have to determine if they accept this award in their legal order. They will do so without regard to the decision reached by the courts of the place of arbitration, although they may well reach the same conclusion and refuse the enforcement of the

award. This is because the decision of the courts of the place of arbitration produces effect only in the legal order of the place of arbitration. This is also why the existence, or indeed the recognition, of the foreign decision purporting to annul the award is no bar to the recognition of the award itself. In other words, by recognising a foreign decision that purports to annul an award, the courts of the place of enforcement only recognise the fact that the decision in question annulled the award in the state in which it was rendered.

The theoretical justification for this reasoning is found in the existence of an arbitral legal order distinct from the national legal orders. It is because the international arbitral award is grounded in the arbitral legal order, and not in the legal order of the place of arbitration, that the existence of this award is out of the reach of the courts of the place of arbitration. All that the courts of the place of arbitration can decide is that this award will be denied existence in their legal order.

Even those who criticise the French position are forced to admit that it is entirely compatible with the New York Convention, if only because of the possibility for the parties to avail themselves of rules that are more favourable than those of the Convention.<sup>48</sup> Moreover, it is certainly compatible with the goals of the Convention as it represents a pro-enforcement approach.

As a result, the debate now focuses on the appropriateness of the French solution. Some authors have pointed out that in the interest of consistency, every contracting state should respect the decisions of the court of the seat of the arbitration.<sup>49</sup> The difficulty with this approach is that the efficiency of the award is sacrificed for the sake of an abstract consistency. In other words, it is a consistency that works only one way: when the award has been annulled. When the award has not been annulled there is no such consistency and any contracting party maintains its rights to enforce or not to enforce the award provided that it stays within the limits provided by the Convention. This result is therefore extremely abstract and artificial and does not do any good for the enforcement of arbitral awards, contrary to the expressed intention of the drafters of the New York Convention.

Unsurprisingly, those who advocate this allegedly consistent solution focus essentially on the decision of the court of the place of arbitration, and simply forget

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<sup>48</sup> New York Convention, Art. VII: '1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon'.

<sup>49</sup> E. Schwartz, 'Do International Arbitrators have a Duty to Obey the Orders of Courts at the Place of the Arbitration? Reflections on the Role of the *Lex Loci Arbitri* in the light of a Recent ICC Award' in *Liber Amicorum in Honour of Robert Briner* (ICC Publishing, 2005), p. 795; H. Muir-Watt in (2006) *Rev. Arb.* 700. For learned constructions on this issue, see S. Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales* (Economica, 2003); H.-G. Gharavi, *International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International, 2002). With a slightly different perspective, advocating for a partial comity policy towards these judgments, and suggesting that no more deference should be given to these judgments than to the arbitral award itself, see Park, *supra* n. 44.

that there was an award in the first place. A good example of this deviation is found in the recent decision of the US Appeals Court of the District of Columbia in the *TermoRio* case.<sup>50</sup> This decision confirmed a decision of first instance that refused enforcement in the United States of an award annulled in Colombia.<sup>51</sup> The striking feature of both decisions, as was rightly pointed out by the commentator of the decision of first instance in the *Revue de l'Arbitrage*, is that the debate revolved exclusively around the effect to be given in the United States to the decision of the Colombian courts annulling the award.<sup>52</sup> It was as if both parties, and the judges, had forgotten that an arbitral award had ever been rendered in the first place.

The crucial question, which was the recognition and enforcement of this award (not the Colombian court decision) was completely lost in unnecessarily lengthy discussions about the alleged deference that the US court should render to the Colombian court decision. As pointed out by learned commentators, this approach is simply wrong under the New York Convention, as it amounts to adding a condition for recognition of an arbitral award which does not exist in the Convention.<sup>53</sup> It is also contrary to the object and purpose of this Convention, which is to promote the recognition and enforcement of arbitral awards, not court judgments purporting to annul them. It also reintroduces the need for a double exequatur, but only to the extent that this double exequatur leads to the inefficiency of the award. Finally, it has devastating practical consequences, as it means that companies that have been able to secure access to arbitration in their contract, but which were not in a position to obtain a neutral place of arbitration, are in a position that is no better than those who have accepted the jurisdiction of the local courts. They are entirely in the hands of the local courts, whilst they believe that they have secured a neutral forum with their arbitration agreement. As a result, in the event that things go wrong, it is *arbitration* as a whole that will be blamed, not the local courts. Perhaps for the next country, the same company will simply accept the jurisdiction of the local courts, as arbitration seems unable to deliver on its promise that it is a neutral forum. The promoters of the *TermoRio* approach, especially those who truly practice arbitration, should perhaps consider this unappealing prospect.

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<sup>50</sup> US Court of Appeals, District de Columbia, 25 May 2007, *TermoRio SA ESP et al. v. Electranta SP et al.*, 2007 U.S. App. LEXIS 12201; *Gaz. Pal. Cah. Arb.*, 13–17 July 2007, p. 49, comment by E. Ordway and B. Derains.

<sup>51</sup> US District Court, District of Columbia, 17 March 2006, *TermoRio SA ESP et al. v. Electrificadora del Atlantico SA ESP et al.*, 421 F. Supp. 2d 87 (D.D.C. 2006). This decision could avail itself of some decisions in line with the doctrine referred to *supra*. See e.g., *Baker Marine v. Chevron*, 191 F. 3d 194 (2d Cir. 1999), reprinted in (1999) XXIVa *YCA* 909 and (2000) *Rev. Arb.* 135, comment by E. Gaillard. England (as would be seen from the *Hilmarton* proceedings, High Court, Queen's Bench Div., 24 May 1999, see *supra* n. 7), and certainly Germany (through ZPO, art. 1061(3)), follow the same trend.

<sup>52</sup> J. Paulsson in (2006) *Rev. Arb.* 786.

<sup>53</sup> *Ibid.* and comment by F. Mantilla-Serrano in *J Int'l Arb.* (forthcoming).



V. COUR DE CASSATION, FIRST CIVIL CHAMBER,  
29 JUNE 2007<sup>54</sup>

*(a) Parties*

Petitioner: PT Putrabali Adyamulia (Indonesia); Respondent: Rena Holding.

*(b) Facts*

PT Putrabali Adyamulia (Putrabali) sold a cargo of white pepper to Est Epices, which later became Rena Holding. The contract between the parties provided for arbitration of disputes according to the Rules of Arbitration and Appeal of the International General Produce Association (IGPA).

A dispute arose when the cargo was lost in the sinking of the ship during transport and Rena Holding failed to pay the contract price. Putrabali commenced IGPA arbitration as provided for in the contract. On 10 April 2001, an IGPA arbitral tribunal in London rendered an award holding that Rena Holding was justified in its refusal to pay the contract price (the 2001 award). Putrabali appealed to the High Court in London, which partially annulled the award. The court deemed that Rena Holding's failure to pay for the cargo amounted to a breach of contract. On 21 August 2003, the IGPA tribunal issued a second award replacing the 2001 award and bearing the same case number (the 2003 award). The 2003 award was in favour of Putrabali and directed Rena Holding to pay Putrabali the contract price.

Rena Holding sought enforcement of the 2001 award in France. The president of the Paris court of first instance granted enforcement. On 31 March 2005, the Paris Court of Appeal denied Putrabali's appeal from the enforcement decision.

The Court of cassation affirmed the lower court's decision. It reasoned that the validity of international arbitral awards, which are independent of a national legal order, is to be ascertained pursuant to the law of the country where enforcement is sought. In the present case, the more-favourable-right provision in Article VII of the 1958 New York Convention allowed Rena Holding to seek enforcement of the 2001 award in France under French arbitration law, which does not list the annulment of the award in the country of rendition as a ground for refusing enforcement.

*(c) Judgment*

Whereas, the award of 10 April 2001 was granted enforcement [exequatur] by the president of the Paris court of first instance at the request of Rena Holding, Putrabali contests the [Court of Appeal's] decision for having denied its appeal from the enforcement decision on the grounds that:

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<sup>54</sup> The General Editor wishes to thank Me Emmanuel Gaillard and Philippe Pinsolle for their invaluable assistance in preparing the translation of this decision from the French original.

- (1) The obligation to act in good faith (*loyauté*) prevents a party from seeking enforcement of an arbitral award when, in accordance with the parties' intention as to the development of the arbitration, a second award replaced the document submitted for enforcement before the [French] court was seized, and deprived it of all legal effect. By submitting for enforcement a document entitled 'award of 10 April 2001' when the arbitral tribunal, which first issued that award, subsequently reheard the case in a second instance as a consequence of an English court setting aside such award and replaced [it] by a second award, bearing the same number, dated 21 August 2003, Est Epices (now Rena Holding) violated its obligation to act in good faith. By considering its request as admissible, the court deciding on the merits violated article 30 NCCP<sup>55</sup> as well as the principle of good faith which governs all proceedings, including enforcement proceedings.
- (2) It is an abuse of right (*abuse de droit*) for a party to seek enforcement of an arbitral award when, in accordance with the parties' intention as to the development of the arbitration, a second award replaced the document submitted for enforcement before the [French] court was seized, and deprived it of all legal effect. By submitting for enforcement a document entitled 'award of 10 April 2001' when, in accordance with the parties' intention, the arbitral tribunal, after having reheard the case, rendered a second award, bearing the same number, dated 21 August 2003, Est Epices (now Rena Holding) abused its right to seek enforcement. By considering its request as admissible notwithstanding this abuse of right, the court deciding on the merits violated article 30 NCCP and the rules governing the abuse of right.
- (3) The rule according to which the annulment of an arbitral award in a foreign state does not affect the right of the interested party to request the award's enforcement in France was not applicable here. Indeed, after the setting aside by an English court of the award of 10 April 2001, the arbitral tribunal, which rendered that award, in accordance with the intention of the parties, reheard the case and, on 21 August 2003, rendered another award bearing the same number, which replaced the first one and deprived it of all legal effect. In this respect too, the challenged decision violates article 30 NCCP, the principle of autonomy and articles 1494, 1498, 1499 and 1502 NCCP.
- (4) In an arbitration agreed to by the parties, only a decision that definitively determines the parties' rights and obligations can be considered an award and therefore be enforceable. By deciding that the document entitled the 'award' of 10 April 2001 could be granted enforcement when, in accordance with the arbitral process agreed to by the parties, the arbitral

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<sup>55</sup> New French Code of Civil Procedure, art. 30 reads: 'An action is the right of the claimant to be heard as to the merits of his claim so that the court can decide whether it is well founded or not. For the opposing party, an action is the right to discuss the merits of that claim'.

tribunal, which rendered the first decision, replaced it by a second decision bearing the same number – [this latter decision] being the only one constituting an award and the only one definitively determining the relative positions of the parties – the court deciding on the merits violated the rule according to which, with regards to the rules of enforcement, only a decision likely to bind the parties may be classified as an arbitral award and articles 1498, 1499 and 1502 NCCP.

- (5) The recognition or compulsory execution of a document entitled ‘arbitral award’ violates international public policy whenever, in accordance with the parties’ intention, and before the [French] court is seized, the arbitrator renders another award bearing the same number and replacing the document submitted for recognition or enforcement to the French court. Hence, granting enforcement of the document entitled ‘award’ of 10 April 2001 was contrary to international public policy since, in accordance with the parties’ intention, the arbitral tribunal replaced this ‘award’ by another award, bearing the same number, dated 21 August 2003, [which] deprived the first [award] of all legal effect. By deciding the contrary, the court deciding on the merits violated articles 1498 and 1502 NCCP as well as international public policy as applicable in the context of enforcement proceedings.

However, an international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.

Under Article VII of the [1958 New York Convention], Rena Holding had the right to seek enforcement in France of the award, rendered in London on 10 April 2001 in accordance with the arbitration agreement and the IGPA rules, and to rely on the French rules on international arbitration, which do not provide that the annulment of an arbitral award by the courts of the country where it was rendered is a ground for refusing its recognition and enforcement.

Hence, the Court of Appeal properly decided that the award of 10 April 2001 must be recognised in France.

