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# ESSAYS

## Debating the Proper Role of National Law under the New York Arbitration Convention

Thomas Carbonneau\*

One of the many consequences of the progressive development of globalization apparently has been to incite a vigorous debate among leading members of the international arbitral community about the role of national law in implementing the enforcement regime of the New York Arbitration Convention (Convention).<sup>1</sup> The debate was provoked by federal court rulings in two recent cases: *Chromalloy Aeroservices v. Arab Republic of Egypt (Chromalloy)*<sup>2</sup> and *Alghanim & Sons v. Toys "R" Us (Toys "R" Us)*.<sup>3</sup> Prior to these opinions, there appeared to have been an implicit consensus in the international community regarding the "anational" character of the Convention.<sup>4</sup>

Both cases involve the Convention's setting aside procedure and the interpretation of the role of national law in applying that procedure. In particular, the questions addressed are: in *Chromalloy*, whether U.S. domestic arbitration law should have the effect of sustaining the transborder enforceability of an international award that has been nullified under the national law of the place of rendition; and, in *Toys "R" Us*, whether U.S. domestic arbitration law should govern the enforceability of an international award rendered in the United States. Despite the similarities in the substantive dimension of the cases, the courts arrived at opposite assessments of the function of U.S. domestic law in the Convention's enforcement framework. The radical contrast in the gravamen of the opinions implies contradistinctive concepts of the

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1. United Nations Convention for the Recognition and Enforcement of Foreign Arbitral Awards, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 3, *codified in* 9 U.S.C.A. §§ 201-208 (1970) [hereinafter Convention].

2. 939 F. Supp. 907 (D.C. Cir. 1996).

3. 126 F.3d 15 (2d Cir. 1997) (the United States Supreme Court denied a petition for certiorari in *Toys "R" Us* in February 1998).

4. See THOMAS CARBONNEAU, *CASES AND MATERIALS ON COMMERCIAL ARBITRATION* ch. 11 (1997).

importance of national law and of the function and standing of the Convention.

### I. THE *CHROMALLOY* OPINION

In *Chromalloy*, a U.S. company—Chromalloy Aeroservices, Inc.—entered into a military procurement contract with the Egyptian Air Force for the supply, maintenance, and repair of helicopters. The Egyptian Government unilaterally terminated the contract, and the parties entered into a lengthy arbitration. Pursuant to the arbitration agreement, the arbitration took place in Egypt and was governed by Egyptian law. An award was rendered that was subsequently nullified by the Court of Appeals in Cairo. Focusing upon the specific provisions of the contract, the Egyptian court determined that the arbitrators had applied the wrong substantive (namely, non-Egyptian) law. Chromalloy then petitioned the federal district court for the District of Columbia to enforce the award pursuant to the Convention and the Federal Arbitration Act (FAA).<sup>5</sup>

In its opinion, the court acknowledged that it was addressing a matter of first impression<sup>6</sup> in the U.S. decisional on arbitration: whether a U.S. court, applying the Convention, should enforce an international arbitral award that has been set aside by a court at the place of rendition. Responding to the argument of the Egyptian Government, the court observed that article V(1)(e) of the Convention provides for the nonenforcement of awards that have been set aside at the place of rendition.<sup>7</sup> The court, however, stated that the language of article V was permissive and, therefore, established a “discretionary standard.”<sup>8</sup> By contrast, the language of article VII of the Convention was mandatory and required the maintenance of a party’s domestic law rights to the enforcement of awards. Article VII provides that: “The provisions of the present Convention shall not 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 . . . of the country where such award is sought to be relied upon.”<sup>9</sup> In the court’s view, “under the Convention, [*Chromalloy*] . . . maintains all rights to the enforcement of this arbitral award that it would have in the absence of the Convention.”<sup>10</sup>

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5. See *Chromalloy*, 939 F. Supp. at 908.

6. See *id.*

7. Article V(1)(e) provides that recognition and enforcement may be refused if: “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.”

8. See *Chromalloy*, 939 F. Supp. at 909.

9. See Convention, *supra* note 1.

10. *Chromalloy*, 939 F. Supp. at 910.

Furthermore, the court deemed that the award would be enforceable under the FAA's deferential review standard.<sup>11</sup>

The Egyptian Court of Appeals' setting aside of the award thereby became a foreign judgment, the enforcement of which no longer implicated the Convention, but rather involved the Foreign Sovereign Immunities Act, various other federal law statutory provisions pertaining to venue and jurisdiction, and the common law applying to the enforcement of foreign judgments.<sup>12</sup> The court concluded that the enforcement of the Egyptian court judgment would "violate" a "clear U.S. public policy [,]" namely, the "[unmistakable] public policy in favor of final and binding arbitration of commercial disputes. . . ."<sup>13</sup> The court rejected the Egyptian Government's arguments based on international comity, the parties' contractual choice-of-law, and the would-be conflict between the Convention and the FAA<sup>14</sup> to conclude that: (1) "the award . . . is valid as a matter of U.S. law"; and (2) "it need not grant *res judicata* effect to the decision of the Egyptian Court of Appeal. . . ."<sup>15</sup>

The result of the opinion is justifiable in terms of the pragmatic ethic that governs international commercial litigation: it preserves the effectiveness of the transborder enforcement of international arbitral awards. The doctrinal foundation of the opinion, however, is more questionable. The court's strained interpretation of article V as establishing a merely "discretionary standard"<sup>16</sup> for enforcement contradicts prior decisional assumptions and practices, and is not supported by the restrictive character of the grounds for review contained in article V. Further, the exercise of would-be judicial discretion under article V could destabilize the transborder framework for enforcement established by the Convention. Moreover, the meaning and effect that the court affixes to the language of article VII could not have been part of the intent of the drafters of the Convention and has not been part of the contemporary decisional practice under the Convention. The court's construction implies that the Convention's enforcement regime could be undermined at any time and in any circumstance by national legal provisions. Evaluated from the standard point of the orderliness and stability of governing norms, the court's tendentious interpretative pragmatism renders the Convention framework chaotic. The proper

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11. *See id.*
  12. *See id.* at 911-12.
  13. *Id.* at 913.
  14. *See id.* at 913-14.
  15. *Id.* at 914.
  16. *See id.* at 909.

function of national law under the Convention is elusive, becomes unclear and unpredictable, and could generate counterproductive results.

According to the Convention's legislative history and express language, national law does have an unmistakable role in the operation of the Convention's enforcement regime.<sup>17</sup> For example, national law should play a controlling role in the determination of some enforcement questions—in particular, a disabling role when it results in the setting aside of an award. Yet, according to the *Chromalloy* court, the national law of the place of enforcement can be used to supplant and supercede the Convention's express provisions by negating the effect of another national law used to set aside an international award.<sup>18</sup> The national law of the enforcement jurisdiction thereby becomes the vehicle for the expression of an international policy on arbitration and the enforcement of international arbitral awards embodied in, but refuted by, the express provisions of the Convention. Pursuing this irony, the policy underlying the Convention—according to the reasoning in *Chromalloy*—is expressed more legitimately and effectively by the contravening provisions of national law.<sup>19</sup>

The dichotomy between the rhetoric and result of *Chromalloy* not only generates confusion, but it also engendered a variety of critical reactions. Proponents of the opinion saw *Chromalloy* as adding to the autonomy of international commercial arbitration by insulating the process from arbitrary national idiosyncrasies on arbitration:

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17. On the one hand, the Convention both symbolizes and embodies the principles and policies of a "world" law on arbitration. The consistent interpretation and uniform application of the Convention by national courts has generated a body of transborder law that sustains the nearly conclusive presumption of enforceability for international arbitral awards. On the other hand, the language of the Convention provides a role for the application of national law in the enforcement of awards. The title of the Convention is itself illustrative of the point. It refers to "foreign" (rather than "international," "transborder," or "anational") awards. The term "foreign awards," which was meant to distinguish Convention awards from their domestic counterparts, reflects the traditional choice-of-law methodology that influenced the drafting of the Convention. Although the Convention now applies to the enforcement of international or anational awards, there is nothing in its original conception that would indicate that it would experience such a transformation.

Moreover, the text of the Convention contains numerous express and implied references to national law. For example, Article II(1) implies that the defense to the enforcement of an arbitration agreement on the basis of subject matter inarbitrability is to be defined by reference to the national law of the contracting state. Article V contains a host of references to national law: defining the parties' capacity to contract ([1][a]); regulating the constitution of the arbitral tribunal or the conduct of the arbitral proceedings ([1][d]); providing the grounds for setting aside the award ([1][e]); or providing the basis for nonenforcement on the grounds of inarbitrability or a violation of public policy ([2][a][b]). To achieve the broadest possible acceptance of the Convention and to promote its worldwide ratification, the drafters gave national law a fundamental role in the application of the Convention's rules on the enforcement of awards.

18. See generally *Chromalloy*, 939 F. Supp. at 907.

19. See *id.*

By limiting the ability of courts in the countries of origin to thwart enforcement abroad through the use of their nullification powers, the court's decision sends a message to business, governments, and arbitrators that they can rely on international arbitration for final and binding resolution of the merits of disputes.<sup>20</sup>

Critics disapproved of the court's disregard of treaty obligations and the opinion's potential for creating inconsistencies in enforcement: "Enforcing set-aside awards may result in the coexistence of two conflicting awards concerning the same issues between the same parties, and thus violate the intended uniformity of the Convention and damage the image of international commercial arbitration."<sup>21</sup>

A leading international arbitration expert agreed with the court's analysis because of its convergence with the transborder reality of arbitral practice. In his view, the *Chromalloy* court correctly construes the Convention as establishing a permissive set of guidelines for the enforcement of awards:

I propose here to demonstrate that the leading commentator on the New York Convention, Prof. Van den Berg, is wrong when he contends that Article V(1)(e) of the New York Convention precludes the enforcement of an award set aside in its country of origin. The fact is that courts of a State bound by the Convention *cannot violate it by enforcing a foreign award*. Rather, a violation would occur if such a court were to *refuse* enforcement in the absence of one of the limited exceptions defined in Article V(1).

This brings us to a core objective of the New York Convention: to free the international arbitral process from the domination of the law of the place of arbitration.<sup>22</sup>

Moreover, other national courts have espoused a similar interpretation of the Convention. For example, the Paris Court of Appeals upheld a lower court decision granting enforcement to the *Chromalloy* arbitral award in France.<sup>23</sup> The court reasoned that, under the 1982 Franco-Egyptian Treaty of Judicial Cooperation, domestic French law applied pursuant to article VII of the Convention.<sup>24</sup> In matters of enforcement, French law (which does not include foreign annulment of the award as a ground for nonenforcement) is less restrictive than the Convention. Apparently, French courts have endorsed this position in

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20. Gary H. Sampliner, *Enforcement of Foreign Arbitral Awards After Annulment in Their Country of Origin*, 11 MEALEY'S INT'L ARB. REP. 22, 28 (1996).

21. Hamid G. Gharavi, *Chromalloy: Another View*, 12 MEALEY'S INT'L ARB. REP. 21, 23 (1997).

22. Jan Paulsson, *Rediscovering the N.Y. Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT'L ARB. REP. 20, 24 (1997) (emphasis added).

23. *See Chromalloy Award Survives Challenge*, 12 MEALEY'S INT'L ARB. REP. 5 (1997).

24. *See generally id.*

other cases. According to one critic of *Chromalloy*, “[f]or more than a decade, French courts have held that the setting aside of a foreign arbitral award in the rendering country is not a ground for refusing enforce[ment] of the award in France.”<sup>25</sup> Replying to the proponents of the decision, this commentator pointedly stated that “[t]he fact that the award was also enforced in France does not make *Chromalloy* immune from criticism.”<sup>26</sup>

## II. THE TOYS “R” US OPINION

In *Alghanim v. Toys “R” Us*, the Second Circuit also addressed the question of the role of the FAA under the Convention.<sup>27</sup> The court held that the grounds under the FAA Section 10 can supplement article V of the Convention as long as they do not conflict with the Convention.<sup>28</sup> The rule of “non-conflicting overlap,” however, only applies to Convention awards that are rendered abroad. For Convention awards rendered in the United States, the FAA grounds can apply to matters of enforcement under the Convention’s setting aside procedure regardless of the possible conflict between the FAA and the Convention. The Second Circuit’s disposition in *Toys “R” Us* appears to conflict not only with the Convention’s general anational character and transborder objectives, but also with the enforcement policy endorsed by the D.C. Circuit in *Chromalloy*.

In November 1982, Toys “R” Us entered into an agreement with Alghanim & Sons in which it granted the privately-owned Kuwaiti business a limited right to open Toys “R” Us stores and use its trademarks in Kuwait and in several other Middle Eastern countries. Pursuant to the agreement, Alghanim opened four toy stores—all of them in Kuwait and only one of which constituted a typical Toys “R” Us outlet. From 1982 to 1993, Alghanim’s operation of the stores resulted in nearly \$7 million in losses. In 1991 and 1992, the parties attempted to renegotiate the transaction: Alghanim wanted Toys “R” Us to assume greater responsibility for capital expenditures, an undertaking that Toys “R” Us was unwilling to accept. In July 1992, Toys “R” Us sent Alghanim a notice of nonrenewal, stating that the parties’ agreement would terminate on January 31, 1993. Alghanim alleged that the notice was late and that, as a result, the term of the agreement was extended for another two years (until January 16, 1995).<sup>29</sup>

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25. Gharavi, *supra* note 21, at 25 n.8.

26. Hamid G. Gharavi, *The Legal Inconsistencies of Chromalloy*, 12 MEALEY’S INT’L ARB. REP. 21, 22 (1997).

27. *See Alghanim & Sons v. Toys “R” Us (Toys “R” Us)*, 126 F.3d 15, 16 (2d Cir. 1997).

28. *See id.*

29. *See id.* at 17.

After a number of unsuccessful attempts to settle their differences, the parties went to arbitration as provided in the contract. Specifically, in December 1993, Toys “R” Us initiated an American Arbitration Association (AAA) arbitration, seeking a ruling that the Toys “R” Us-Alghanim agreement terminated on December 31, 1993. Alghanim counterclaimed for breach of contract. The arbitrator denied Toys “R” Us’ request for a declaratory judgment and agreed with Alghanim’s breach of contract claim. After proceedings that lasted nearly two years, the arbitrator awarded Alghanim \$46 million plus interest for lost profits. The arbitrator’s findings and legal conclusions were set out in an extensive opinion. The arbitration was conducted and the award rendered in New York.<sup>30</sup>

Alghanim petitioned the U.S. District Court for the Southern District of New York to confirm the award under the Convention. Toys “R” Us argued that the award should be vacated under the FAA because it was irrational and in manifest disregard of the law and the terms of the parties’ agreement. The district court agreed with Toys “R” Us that the FAA was applicable and “the Convention and the FAA afford[ed] overlapping coverage.”<sup>31</sup> It ruled, however, that Toys “R” Us’ objections to the enforcement of the award were without merit. The district court then confirmed the award.

On appeal, the Second Circuit addressed the question of the “overlapping coverage” between the New York Arbitration Convention and the FAA. First, it concluded that the Convention was clearly applicable to the enforcement of the award. The transaction giving rise to the arbitration and the award was unequivocally “non-domestic” in character because it involved parties of different nationalities and contract performance principally abroad. The statutory standard (9 U.S.C. § 202) and the interpretative decisional law among federal circuits<sup>32</sup> made the “Convention’s applicability . . . clear.”<sup>33</sup>

Second, the Second Circuit recognized that, under U.S. law, the grounds in article V of the Convention are the exclusive means for setting aside an international or “non-domestic” arbitral award. The FAA may supplement the Convention in such cases, but only “to the extent that [the FAA] is not in conflict with . . . the Convention. . . .”<sup>34</sup> This rule of nonconflicting application applies to both the statutory and nonstatutory

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30. *See id.* at 18.

31. *See id.*

32. *See Bergeson v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983); *Jain v. de Mere*, 51 F.3d 686 (7th Cir. 1995).

33. *See Alghanim & Sons*, 126 F.3d at 19.

34. *Id.* at 20.



grounds contained in Section 10 of the FAA. According to the court, when the "application of the FAA's implied grounds" "are in conflict" with the Convention, they are "precluded."<sup>35</sup> Therefore, only nonconflicting overlap is possible. The court acknowledged that this position is well-settled in the decisional law, including in its own precedent:<sup>36</sup> "There is now considerable caselaw holding that, in an action to confirm an award rendered in, or under the law of, a foreign jurisdiction, the grounds for relief enumerated in Article V of the Convention are the only grounds available for setting aside an arbitral award."<sup>37</sup>

This well-settled position coincides with the purpose of the Convention to establish, in all signatory states (which now number 112), a uniform regime for the enforcement of international or foreign arbitral awards.<sup>38</sup> It is generally recognized that the Convention creates a strong presumption of enforceability by providing for narrow grounds of judicial supervision and by excluding judicial review of the merits of arbitral awards.<sup>39</sup> The nonstatutory grounds under Section Ten (irrationality, capricious and arbitrary awards, manifest disregard of the law, violations of public policy) are derived from the federal decisional law on domestic U.S. labor arbitration.<sup>40</sup> They deal with the special circumstances of that form of arbitration, in which labor arbitrators interpret collective bargaining agreements and federal labor law. They have a variable status among the federal circuits, and make possible (in theory, at least) the judicial scrutiny of the merits of arbitral determinations.<sup>41</sup> Although these grounds, as interpreted, usually pose little serious challenge to the enforcement of domestic arbitral awards, their particularly domestic character and their tolerance for judicial merits review make them inapposite for application in the context of the enforcement of international or foreign arbitral awards. On this score, the nonstatutory grounds conflict with the Convention and—according to the court's reasoning—should be preempted by the Convention's exclusive application.

Third, the Second Circuit, however, noted the special circumstances of the *Toys "R" Us* award, circumstances that took the case out of the

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35. *Id.*

36. *See id. See generally Bergeson*, 710 F.2d 928. *See also Parsons & Whittemore Overseas Co. v. Société Générale de l'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

37. *Alghanim*, 126 F.3d at 20.

38. *See CARBONNEAU, supra* note 4, at 382.

39. *See id.* at 384-85.

40. *See id.* ch. 8.

41. *See id.*

scope of the foregoing framework of applicable rules.<sup>42</sup> The arbitration took place and the award was rendered in New York. Because of its rendition in the United States, the nondomestic award in *Toys "R" Us* triggered the application of article V(1)(e) of the Convention. Under the relevant language of article V(1)(e), a Convention award can be "set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."<sup>43</sup> According to the court, article V(1)(e), therefore, allows for the application of the FAA in an action to set aside such an award: "We read Article V(1)(e) of the Convention to allow a court in the country under whose law the arbitration was conducted to apply domestic arbitral law, in this case the FAA, to a motion to set aside or vacate that arbitral award."<sup>44</sup>

The court assembled support for its position from federal decisional law, foreign judicial practice under the Convention, and scholarly commentators. As the court acknowledged, few, if any, other federal courts have confronted the question of article V(1)(e) "head-on" and the court strained to find precedent for its construction of the text. It cited *Spector v. Torenburg*<sup>45</sup> as directly on point for the same proposition, and it also attempted to forge an alliance between its reasoning and the ruling in *Chromalloy*.<sup>46</sup> *Chromalloy*, however, seems to be directly at odds with the policy implications of the doctrine elaborated by the Second Circuit. Moreover, the court's survey of various commentators and of the practice of foreign courts is selective and fails to emphasize the problematic character of the language of article V(1)(e) to the attainment of the Convention's objectives.

It is true, as the court states, that: "There appears to be no dispute among . . . [scholarly commentators and 'sister signatories to the Convention'] that an action to set aside an international arbitral award, as contemplated by Article V(1)(e), is controlled by the domestic law of the rendering state."<sup>47</sup> It is also accurate to observe that "many commentators and foreign courts have concluded that an action to set aside an award can be brought only under the domestic law of the arbitral forum, and can never be made under the Convention."<sup>48</sup> Or, that: "The Convention provides no restraint whatsoever on the control functions of local courts at

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42. See *Alghanim*, 126 F.3d at 23.

43. *Id.* at 20.

44. *Id.* at 21.

45. 852 F. Supp. 201 (S.D.N.Y. 1994).

46. See *Alghanim*, 126 F.3d at 21.

47. *Id.*

48. *Id.* at 22.

the seat of arbitration.”<sup>49</sup> The court is entirely correct in its final conclusion on this question:

From the plain language and history of the Convention, it is thus apparent that a party may seek to vacate or set aside an award in the state in which, or under the law of which, the award is rendered. Moreover, the language and history of the Convention make it clear that such a motion is to be governed by domestic law of the rendering state, despite the fact that the award is nondomestic within the meaning of the Convention. . . .<sup>50</sup>

The court’s analysis fails to consider that most, if not all, commentators view article V(1)(e) as a domestic law intrusion into the international regime for the enforcement of transborder arbitral awards. The availability of article V(1)(e) makes the practice of international commercial arbitration hazardous and can render the enforcement regime of the Convention dysfunctional in some cases. Under the language of the provision, some or all of the disruptive choice-of-law problems that the Convention intended to remedy re-emerge and confound the aim of creating a unitary transborder framework for enforcement.

In an excerpt cited by the court, the leading scholar on the Convention states, in regard to article V(1)(e), that “the grounds for refusal of enforcement under the Convention may indirectly be extended to include all kinds of particularities of the arbitration law of the country of origin. This might undermine the limitative character of the grounds for refusal listed in Article V . . . and thus decrease the degree of uniformity existing under the Convention.”<sup>51</sup> Another commentator cited by the court also focuses upon the procedural perils of the provision:

If the scope of judicial review in the rendering state extends beyond the other six defenses allowed under the New York Convention, the losing party’s opportunity to avoid enforcement is automatically enhanced: The losing party can first attempt to derail the award on appeal on grounds that would not be permitted elsewhere during enforcement proceedings.<sup>52</sup>

In other words, article V(1)(e) allows a disappointed party to forum-shop and to delay by triggering the application of the local law of the place of rendition. Further, having the award set aside at the place of rendition could render the award unenforceable in all signatory jurisdictions. In effect, the provision can permit such a party to escape and undermine the very enforcement regime the Convention establishes.

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49. *Id.*

50. *Id.* at 23.

51. *Id.* at 21.

52. *Id.* at 22.

The Second Circuit could have adopted another approach to the interpretation of article V(1)(e) in these circumstances. The “emphatic federal policy” on arbitration, especially as it applies to matters of international commercial arbitration, might have warranted extending the rule of nonconflicting overlap to international awards rendered domestically. For example, the application of restrictive domestic provisions could have the effect of thwarting treaty obligations. Even though the Convention itself provides for its subordination to domestic law in some matters, the court could have viewed the language of article V(1)(e) and other similar provisions in the Convention as historical carry-overs—necessary to gain maximum state ratification at the time the Convention was opened for signature in 1958. Arguably, the role of domestic law within the Convention framework has been eclipsed by the continuing process of ratification itself and re-evaluated by the decisional practice of national courts. In other words, uniformly favorable and consistent interpretation of the Convention by courts in signatory states—expressed in part by the emergence of the UNCITRAL Model Law and Rules on Arbitration and the enactment of national laws favoring arbitration—have created international norms on arbitration that render the reference to national law irrelevant and unnecessary.

In effect, the Second Circuit could have adopted a less technical approach to the interpretation of article V(1)(e), emphasizing the Convention’s underlying policy and basic enforcement objectives. An opinion containing such reasoning could have readily been integrated into the federal decisional law on arbitration—more specifically, the decisional law on the Convention. The opinion in *Chromalloy* prepared the way for such a ruling. In *Toys “R” Us*, however, the Second Circuit interpreted the Convention without regard to the practical consequences of its interpretation on enforcement—seemingly, almost exclusively for the sake of doctrinal refinement.

In addition, having the nonstatutory grounds supplement the provisions of the Convention for the enforcement of domestically rendered international awards generates at least a theoretical conflict between the domestic law and the norms and objectives of the Convention. The nonstatutory grounds provide for a form of judicial review of the merits of arbitral awards—a defense to enforcement that exceeds supervision for violations of domestic public policy and for the constraints of subject matter inarbitrability. It is a form of national judicial intervention that the Convention precludes in its stated grounds for review and that most threatens the autonomy of international arbitration. Arguably, even the English statutory position on the judicial supervision of the merits of awards in a non-Convention setting is more

restrictive than the standard adopted by the Second Circuit. It also is justified by a more reasoned appraisal of its need and role.<sup>53</sup>

Finally, the court applies the nonstatutory grounds to the facts of the case and 'swiftly' concludes that none of the arguments advanced on that basis by Toys "R" Us even remotely warrants *vacatur* of the award.<sup>54</sup> As is characteristic of domestic litigation, the court invokes the policy of deferential judicial review and finds that the arbitrator's determinations are well within the bounds of legality and rationality.<sup>55</sup> For example, the court states at one point that the "[i]nterpretation of these contract terms is within the province of the arbitrator and will not be overruled simply because we disagree with that interpretation."<sup>56</sup> The complex doctrinal reasoning applying to article V(1)(e) appears to have been elaborated to reach the conclusion that the application of the domestic rules of enforcement is inconsequential. It may be invigorating for courts to discuss standard of review questions in both the domestic and international setting, but the point of the exercise in *Toys "R" Us*, unlike *Chromalloy*, remains elusive.

### III. CONCLUSIONS

In the final analysis, the Second Circuit may have missed an opportunity to provide doctrinal leadership on the question of the role of domestic law in the Convention's setting aside procedure. If the court had held that domestic enforcement norms are inapposite under the Convention regardless of the award's place of rendition, it could have reinforced the autonomy of the international arbitral process and perhaps made the setting aside procedure less likely of success in other signatory jurisdictions. In so doing, the court could have further suggested that article V(1)(e) only allows fundamental domestic juridical norms to be invoked. In any event, by integrating domestic provisions into the Convention regime, the Second Circuit dilutes and confuses the governing international standard, creates additional potential problems for enforcement, and makes a cohesive interpretation of the federal decisional law on the Convention more difficult. Despite the latitude it took with regard to the Convention and its technical language, *Chromalloy* appeared at least to articulate a coherent and comprehensible policy on the enforcement question.

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53. See THOMAS CARBONNEAU, 1998 SUPPLEMENTARY MATERIALS AND COMMENTARY ch. VII (1998).

54. See *Alghanim*, 126 F.3d at 25.

55. See CARBONNEAU, *supra* note 4 ch. 8.

56. *Alghanim*, 126 F.3d at 25.

In comparing *Chromalloy* and the French Court of Cassation's opinion in *OTV v. Hilmarton*,<sup>57</sup> Professor Emmanuel Gaillard concludes that the policy generated by the decisional law "exemplif[ies] a growing international consensus in favor of the enforcement of an arbitral award set aside by a court at the situs of the arbitration"<sup>58</sup> and "reflect[s] the notion that the seat of an arbitration is not its fundamental anchor; at the recognition and enforcement stage, the place of enforcement is paramount. . . ."<sup>59</sup> To the extent that the Second Circuit's opinion in *Toys "R" Us* privileges the application of domestic law and undermines the modern "anational" character of the Convention, it is definitely out of keeping with the most recent transborder developments on arbitration.

Paulsson, in particular, provides eloquent and persuasive reasons for accepting the approach employed by the *Chromalloy* court.<sup>60</sup> In a recent article, he effectively marshals historical, textual, and practical reasons for subscribing to the methodology advanced in *Chromalloy* and convincingly argues for a separate setting aside regime for international awards. Paulsson's brief on behalf of *Chromalloy* would preclude his endorsement of the Second Circuit's construction of the role of national law in the setting aside procedure (but for its ultimate application) in *Toys "R" Us*. Paulsson, I believe, would agree with the assessment of other distinguished international lawyers, like Newman and Burrows,<sup>61</sup> that *Chromalloy* and *Toys "R" Us* are "difficult to reconcile"<sup>62</sup> and provide for contradistinctive interpretations of the role of national law within the framework of the Convention and of the Convention itself.

Globalization indeed has undone the reign of what Paulsson calls the "die-hard territorialists."<sup>63</sup> But, as Gharavi and other critics of *Chromalloy* suggest, transborder, anational regimes leave lawyers and clients at the mercy of the circumstantial creativity of courts and practitioners.<sup>64</sup> The pragmatists argue that the solution has worked thus far; however, it does provide for a system that operates without a necessary level of self-discipline. *Toys "R" Us* underscores the fragility of such a system in achieving the predictable and orderly administration

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57. Emmanuel Gaillard, *Enforcement of a Nullified Foreign Award*, 218 N.Y.L.J. 3 (1997).

58. *Id.*

59. *Id.*

60. See Jan Paulsson, *The Case for Disregarding LSAs (Local Standard Annulments) under the New York Convention*, 7 AM. REV. INT'L ARB. 99 (1996).

61. See Lawrence W. Newman & Michael Burrows, *Setting Aside Arbitral Awards under the New York Convention*, 218 N.Y. L.J. 3 (1997).

62. See *id.*

63. See Paulsson, *supra* note 60, at 109.

64. See Hamid G. Gharavi, *Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention*, 6 J. TRANS. L. & POL'Y 93 (1996).

of transborder justice. Despite the political difficulties associated with the enterprise, there is no doubt that the Convention needs to be amended to reflect the contemporary realities of the international commercial arbitration process. It is difficult to continue to depend upon the courts' willingness and ability to graft implied content onto the Convention to safeguard the interests of international commerce. *Toys "R" Us* demonstrates that even well-intentioned and sympathetic courts can sometimes produce confounding doctrinal results.

Finally, it is also curious that globalization—a process which is now well-established—is generating a form of arbitral internationalism that ultimately reverts to the content and rule of national law. The questions raised in *Chromalloy* and *Toys "R" Us* were *res nova*. The classical federal court opinions on the Convention,<sup>65</sup> which addressed initial problems of interpretation at a time when the Convention had barely left the orbit of national legal constraints, steadfastly segregated the international and domestic dimensions of arbitration law precisely to avoid compromising the transnational significance of the Convention. *Chromalloy* and *Toys "R" Us* point us in a different direction that, at the very least, privileges the content of the U.S. domestic law of arbitration and, as a consequence, de-emphasize (some would say, undermine) the transborder and anational stature of the Convention. Such a methodology may attest to the universal harmonization of arbitration law, but national law under this new approach is used to supplant a would-be deficiency of the international regime. One wonders what perils may be lurking in the shadows of this new approach and what form of globalization is being contemplated when ultimate regulatory authority is attributed to domestic law? A more forthright statement of the transborder and anational stature of the Convention might assuage many of the anxieties that are generated by the courts' reliance upon the domestic provisions of the FAA to resolve the enforcement questions raised in *Chromalloy* and *Toys "R" Us*.

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65. See CARBONNEAU, *supra* note 4.