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RECOGNITION AND ENFORCEMENT OF ANNULLED ARBITRAL AWARDS UNDER THE NEW YORK CONVENTION

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Abstract

*In the 60 years since its inception, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ["**New York Convention**"] has become one of the most successful international treaties ever, having been adopted by 157 of the 193 United Nations Member States.*

In this paper, I shall focus my attention on its regime since it represents the internationally accepted standards on the recognition and the enforcement of foreign arbitral awards. I shall be analysing Article V(1)(e) of the Convention which is the cause of a rather intense debate among international scholars. It revolves around the possibility of recognition of annulled foreign arbitral awards.

This paper starts with the introduction of central concepts relating to the debate surrounding Article V(1)(e) of the Convention and the positions that have been put forward in the past decades. I will contextualize the appearance of the New York Convention as well as elaborate on the concepts of 'recognition', 'enforcement' and 'setting aside' of awards, the way they were dealt with by the drafters of the Convention, and the interests at play. I will also cover the controversies over the nationality of the award and the discretionary power of the courts in enforcing annulled arbitral awards. I

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will finish by analysing the regime under other conventions, and the situation of pending and set-aside proceedings.

I. Introduction

Behind the New York Convention lies a long evolution, which is still taking place even in the present day. Thus, to adequately understand the regime of the New York Convention, we must first understand the context in which it came into being.

The New York Convention was drafted in 1958 with the intention of addressing the shortcomings of the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 ["**Geneva Convention**"] and therefore, to facilitate (and encourage) the recognition and enforcement of international arbitration agreements and awards. The requirement of recognition and enforcement of awards was also to provide a maximum level of control which the Contracting States may exert over arbitral awards and to serve international trade and commerce and promote cross-border arbitrations by providing a common international minimum standard that is applicable worldwide. Indeed, for international trade to properly flourish, the recognition and enforcement of arbitral decisions should not be limited, for instance, by the fact that the goods might be located outside the State's territory.[1]

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1 Albert Jan van den Berg, Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam, 27(2) J. INT'L ARB. 181 (2010) [hereinafter "Albert Jan van den Berg"]; Jan Paulsson, Enforcing Arbitral Awards Notwithstanding Local Standard Annulments, 6(2) ASIA PAC. L. REV. 9 (1998) [hereinafter "Paulsson"]; UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 77, G.A. Res. 62/65, U.N. Doc. A/RES/62/65 (Dec. 6, 2007) (United Nations Publications, Vienna, 2016 ed.) [hereinafter "UNCITRAL Guide"]; Robert Briner, Philosophy and Objectives of the Convention, in ENFORCING ARBITRATION AWARDS UNDER THE NEW YORK CONVENTION EXPERIENCE AND PROSPECTS 9 (1999);

These goals were pursued through the establishment of universal deference to foreign arbitral awards that sought recognition abroad. Further, once an arbitral award met the minimum formal requirements, the arbitral award was granted safeguards so that to refuse its recognition, the resisting party would have to prove one of the grounds under Article V of the New York Convention.[2]

A great part of the debate stems from the controversy on whether the New York Convention was intended to be a thorough regime regulating the recognition and enforcement of international arbitral awards or whether it was just supposed to facilitate recognition and to solve the shortcomings of that time.[3]

I will concentrate on Article V(1)(e), where the drafters established a set of criteria to be followed by the enforcing courts when facing a plea to, or not to, recognize and enforce an award.

GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3412, 3608 (2d ed. 2014) [hereinafter "BORN"]; Nadia Darwazeh, Article V(1)(e), in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 302 (Herbert Kronke et al. eds., 2010) [hereinafter "Darwazeh"]; William W. Park, Duty and Discretion in International Arbitration, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 360 (2d ed. 2012) [hereinafter "PARK"]; Nobumichi Teramura, Recognisability and Enforceability of Annulled Foreign Arbitral Awards: Practical Perspectives of Enforcing Countries, 66(4) DOSHISHA L. REV. 113-114 (2014) [hereinafter "Teramura"]; LUÍS LIMA DE PINHEIRO, DIREITO INTERNACIONAL PRIVADO 562 (2d ed. 2012) [hereinafter "PINHEIRO"].

2 Interestingly, the goal was to expand the circumstances under which the award could be recognized, and not to restrict them. This should not be mistaken for an obligation to not recognize nor to establish a unitary regime, since they were not trying to fix unbroken things, but simply face the challenges of the time and tackle the under-enforcement (and not any potential over-enforcement) that was resulting from the double exequatur requirement, which will be addressed *infra*. *See* BORN, *supra* note 1, at 3429; Jaba Gvelebiani, *Recognition of Foreign Arbitral Awards Set Aside in the Country of Origin*, 1 (Mar. 29, 2013), *available at* http://www.etd.ceu.hu/2013/gvelebiani_jaba.pdf [*hereinafter* "Gvelebiani"].

3 BORN, *supra* note 1, at 3431.

In Article V(1)(e), one finds two grants of power: (i) to the enforcing courts, to decide on the enforceability of arbitral awards rendered in foreign jurisdictions, and (ii) to the courts of the country of origin, to set aside the arbitral awards. Regarding the first power, scholars are divided as to whether the enforcing court can still enforce an award under any one of the grounds predicted in Article V. Some hold the view that the interpretation of the New York Convention should be pro-enforcement (*favor arbitrandum*; the pro-enforcement bias, as the U.S. Supreme Court has recognized)[4] and narrow (in order to be easy for enforcements), while some consider that discretion should be granted to the judge, as Article V states that "*the judge may exercise*", when a case falls under any one of the grounds mentioned in Article V.[5]

The recognition of the *second* power of Article V may be found from the power it gives to refuse recognition to an award specifically set aside in the country of origin (Article V(1)(e)). This has led to some authors calling for a "*world-wide nullifying effect*" of set aside decisions,[6] while others try to apply delocalization theories, i.e., detachment of the award from the jurisdiction where it was rendered. Finally, a third party identifies a rebuttable presumption of unenforceability when it comes to vacated awards.[7]

In arbitration, the State allows its adjudicatory prerogatives to be contracted out which means that the result of this private justice administration system will be first integrated into the legal order and then

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4 Glencore Grain Rotterdam BV v. Shivnath Rai Harnarain Co., 284 F.3d 1114, 1120 (9th Cir. 2002), wherein it was held that "the Convention and its implementing legislation have a pro-enforcement bias, a policy long-recognized by the Supreme Court [of the USA]".

5 Nigel Blackaby et al., Redfern and Hunter on International Arbitration 634 (6th ed. 2015) [*hereinafter* "Blackaby et al."]; Born, *supra* note 1, at 3415.

6 Based on the sovereignty of the country of situs. *See* Gvelebiani, *supra* note 2, at 3.

7 Gvelebiani, *supra* note 2, at 2.

see its effects be recognized and carried out.[8] Naturally, in order for States to accept it, they require that a certain amount of scrutiny be maintained over arbitrations and the resulting awards.[9] Judicial annulment has been one of the legal mechanisms through which the States have exerted control. It poses many interesting questions, some of which we have to deal with before we go any further. If the parties decided to remove a certain dispute from the courts, to what extent should judicial annulment operate? And how should it be recognized by other States?

As we may see, we are contending with interests of various types. Deference to the set-aside decision may be, in some situations, the decision which is most in line with party autonomy. The parties may have agreed to arbitrate with a special regard for the chosen seat – for instance, because either they were aware of a certain Local Standard Annulment ["**LSA**"], or they wanted to limit the arbitrators' powers in a certain way, or even because they desired an extensive judicial review and by choosing that arbitral seat, were knowingly trying to preserve that *remedy*. However, the reasons behind the choice are usually more in line with topics like the place's neutrality, faster resolution or mere geographical convenience and may not always relate to encompassing the possible challenge to the award in the country. In fact, it would not be realistic to describe an eventual *extensive judicial review of the arbitral award* as a common motif for the parties

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8 When operating internationally, there are some concerns that should not be forgotten, such as which will be the State with jurisdiction to decide on the validity of the award and the arbitral proceedings? Given how arbitration found its way into the legal world, as a substitute to judicial courts in some manner, it is understood that it should be the country where the award was rendered to exert its control.

9 Vladimir Pavic, *Annulment of Arbitral Awards in International Commercial Arbitration*, *in* INVESTMENT AND COMMERCIAL ARBITRATIONS – SIMILARITIES AND DIVERGENCES 132 (Christina Knahr et al. eds., 2010) [*hereinafter* "Pavic"]; PARK, *supra* note 1, at 358. *Cf.* Henry Fraser, *Sketch of the History of International Arbitration*, 11(2) CORNELL L. REV. 179 (1926).

to arbitrate somewhere.[10] Despite the adagio of the *ignorantia juris non excusat*, one should not get completely out of touch with the reality of situations where the place of arbitration is not even chosen by parties, but by the arbitrators or the institution.[11] In the field of international arbitration, the possibility of an award to produce its effects within other legal orders is of the utmost importance as parties usually tend to choose a neutral seat with no connection to any of them. Later, if a losing party does not voluntarily comply, the wining party will try to see the award enforced in another jurisdiction where the losing party has its assets.

One of the problems presented by the Geneva Convention was the *double exequatur* requirement, according to which the party seeking enforcement would have to demonstrate that in the country of origin, the award was *final*. This meant that it was no longer appealable, nor subject to pending proceedings regarding the award's validity. The party would be required to obtain two decisions of *exequatur*: one in the country of arbitration and the other in the enforcing country. This ended up having the adverse effect of leading to some unnecessary delays provoked by the losing party taking advantage of the system, and rendering the need to obtain *exequatur* in the country of origin before seeking enforcement anywhere else.[12] When

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10 BORN, *supra* note 1, at 3645; PARK, *supra* note 1, at 352; Jan Paulsson, *Arbitration Unbound: Award Detached from its Country of Origin*, 30(2) INT'L & COMP. L. Q. 18 (1981) [*hereinafter* "Paulsson – Arbitration Unbound"].

11 Paulsson, *supra* note 1, at 1-2.

12 Convention on the Execution of Foreign Arbitral Awards, arts. 1(d) and 2, Sept. 26, 1927, 92 L.N.T.S. 301 [*hereinafter* "Geneva Convention"]. Alongside the double *exequatur* requirement, the Geneva Convention was much criticized due to the placement of the burden of proof on the party seeking enforcement instead of charging the resisting party, having too broad grounds to refuse enforcement, and the most criticized: it required the enforcing courts to refuse the enforcement in the cases where the award had been vacated in the country of the arbitration, lack of proper notice or situation of legal incapacity, and in the case of *ultra petita* (when the award goes beyond the parties request), *extra petita* (when the award grants something different from the relief requested); UNCITRAL Guide, *supra* note 1, at 124, 207; Paulsson, *supra* note 1, at 8; BORN, *supra* note 1, at 3607**;** Darwazeh, *supra* note 1, at 304-305.

faced with this issue, the New York Convention drafters received the suggestions of the Dutch delegation and abandoned the *double exequatur* requirement, balancing this modification by moving the burden of proof from the enforcing party to the resisting party. They also adopted a provision according to which the non-binding nature of the award would still be considered a valid ground for denying recognition and enforcement (albeit not mandatory), and passed from a mandatory formulation[13] to a rather permissive one, granting some discretion to the enforcing court.[14] This understanding is further supported by the contrast of the term 'may' used in Article V, and the term 'shall' as present in Articles III and IV, as we shall see *infra.*[15]

II. Recognition, Enforcement and Set aside

When it comes to the effectiveness of an award in another jurisdiction, there are three processes we should pay close attention to: recognition, enforcement, and set aside. Recognition is the legal process by which the award is integrated into the State's legal system, and can be granted independently of the enforcement, for example, to prove that the dispute has already been settled in a binding form between the parties.[16] Enforcement, in turn, is the legal process under which the award's provisions are carried out by the legal means available. It presupposes the previous step of recognition.[17] The judgment carried out by the enforcing

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13 Geneva Convention, art. 2(1).

14 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(1), June 10, 1958, 330 U.N.T.S 4739 [*hereinafter* "New York Convention"].

15 UNCITRAL Guide, *supra* note 1, at 124-25, 207-08; BORN, *supra* note 1, at 3608-3609; Darwazeh, *supra* note 1, at 308-309; Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29(2) ICSID REV. 263, 268 (2014) [*hereinafter* "Albert Jan van den Berg – Setting Aside"]; Paulsson, *supra* note 1, at 9.

16 Recognition consists of granting the arbitral decision a parallel value to a sentence issued by the judicial authorities of the enforcing State, *see* MAURO RUBINO-SAMMARTANO, IL DIRITTO DELL'ARBITRO 1023 (3d ed. 2002).

17 Teramura, *supra* note 1, at 80.

judge should not be a new analysis on the facts of the case or a new ruling (a new judgment on the merits), but rather a verification of the adequacy of the foreign arbitral decision so as to produce its effects and integrate it into the legal order, and a scrutiny of its procedural aspects.[18] Finally, set aside is the annulment procedure that takes place in the courts in which, or under the law of which, the award was made. It differs from the refusal of enforcement due to its territorial effect. Whereas the refusal of enforcement has its effects limited to the jurisdiction of the country where it took place, it is argued whether set aside decisions, on the other hand, carry an *erga omnes* effect and are consequently enforceable abroad.[19] It follows the legal distinction between primary jurisdiction (of the courts of the country that may annul the award) and secondary jurisdiction (other jurisdictions where the enforcement is sought). The first may set aside the arbitral award, while the second might just grant or refuse its enforcement.

Professor Michael Reisman advances a theory according to which, in spite of the discretion granted on the enforcement of annulled awards, there would be an *implicit bargain* between signatory States to the New York Convention. By virtue of this bargain, the courts of the arbitral seat would commit to control awards against the counter-promise of the enforcing courts to respect the outcome of that given control in order to also grant

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18 SAMMARTANO, *supra* note 16, at 1023; Pavic, *supra* note 9, at 152.

19 PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal, [2014] 1 SLR 372, at ¶ 77 (Sing.), wherein the Tribunal explained, "While the wording of Art. V(1)(e) of the New York Convention and Art. 36(1)(a)(v) of the Model Law arguably contemplates the possibility that an award which has been set aside may still be enforced, in the sense that the refusal to enforce remains subject to the discretion of the enforcing court, the contemplated *erga omnes* effect of a successful application to set aside an award would generally lead to the conclusion that there is simply no award to enforce".

some stability and prevent abusive behaviour.[20] This would mean, in exchange, that the courts of the country of origin would be empowered to invalidate a defective arbitrator's decision. Nonetheless, the opinion is not homogeneous: the most favourable provision as well as the permissive language present in the New York Convention – "*may*" – underpins the contrary argumentation: supporting the discretion of the enforcement courts when dealing with annulled awards. It allows, in some circumstances, the overriding of the more restrictive interpretations of the New York Convention's terms.[21]

Jan Paulsson reminds the international community that this distinction of primary and secondary jurisdictions as well as Michael Reisman's theory are not supported in any provision of the text but in the rather vague notions of *assigned functions* and *coherent theory,* and that they contradict the New York Convention's purpose of facilitating the enforcement of the awards.[22]

III. Nationality of the Award

When it comes to determining the nationality of the award[23] and consequently its primary jurisdiction, two main criteria are applied: first, the procedural criterion, according to which the award's nationality would be determined by the procedural environment in which the award had been rendered and second, the territorial approach,[24] according to which

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20 By abusive behaviors one means, for example, the situation of a dishonest losing party running around the world trying to find a court willing to enforce an invalid award, and subsequently claiming that the decision would be valid worldwide.

21 PARK, *supra* note 1, at 361.

22 Paulsson, *supra* note 1, at 22.

23 The award's nationality matters to the extent of determining its effects in a certain legal order. *See* PINHEIRO, *supra* note 1, at 561.

24 It conforms with the development of the modern States, where judicial decisions were understood as sovereign prerogatives and their authority was limited to the national borders. *See* ANTÓNIO MENEZES CORDEIRO, TRATADO DA ARBITRAGEM: COMENTÁRIO À LEI

the award's nationality corresponds to the legal seat, i.e., the place where the award had been rendered. The second criterion has been prevailing ever since the widespread transposition of the UNCITRAL Model Law on International Commercial Arbitration, 1985 ["**Model Law**"] by States resulted in the adoption of the territorial criterion that underpins the whole system.[25]

When parties agree to arbitrate their disputes, they commit to a relevant seat. With this choice comes the expectation of having the proceedings subject to that country's mandatory procedural provisions. Not respecting (directly or indirectly) the choice of *situs* would end up allowing one side to change its mind about judicial review once it knows who would end up in the disadvantaged position.[26] The rationale behind it is that activities taking place in a certain country should be subject to the law of that country.

According to scholars, there is a need to concentrate judicial control over the arbitral process to the courts of the country where the award was rendered as the award can be seen as an *output* of the legal regime of the place of arbitration and it also solves the problem of having a party running around the world trying to enforce the award in every single country.

The controversy that we are dealing with lies not only on different estimations over the advantages and disadvantages resulting from one position or another. It mostly stems from different jus-philosophical understandings and pre-comprehensions over where the legitimacy of the

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63/2011, DE 14 DE DEZEMBRO [ARBITRATION TREATY: IN COMMENTARY OF LAW 63/2011 OF 14TH DECEMBER] 530 (2015).

25 Pavic, *supra* note 9, at 134; Darwazeh, *supra* note 1, at 324.

26 PARK, *supra* note 1, at 365.

arbitration lies, and under what criteria should we examine the validity of arbitration.

F. A. Mann, for instance, sustains that the term *international arbitration* is rather misleading since it would all be based in national law where every arbitral proceeding is subject to a given national system of law.[27] In his view, arbitral proceedings arising from private contractual stipulation will have a national character, and treaties are only operative because they have been accepted by the State controlling the arbitration, which helps sustain the position of supremacy of the national legal system where the arbitral proceedings are carried out.

In his line of argumentation, the idea of party autonomy itself[28] (just like every right or legal power) exists due to a given system of domestic law, which also explains why it takes different shapes in different systems: it is their source.[29] The binding nature is said to be derived from a legal system that is exclusively competent and national due to the following reasons: (i) the principle according to which contracts are governed by the law chosen by the parties exists as a part of a rule rooted in a specific legal system; (ii) the binding nature of the election of a national forum also stems from a given national legal system; (iii) the most effective control of the constitution and functioning of the arbitral tribunal will be carried out by the judges of the place of arbitration and under that given law; (iv) local sovereignty only yields before granted freedoms; (v) arbitration can be deemed as a part of the judicial public service of the country where it

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27 Paulsson – Arbitration Unbound, *supra* note 10, at 360; F.A. Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33(1) INT'L & COMP. L. Q. 193, 198 (1984).

28 As Lima Pinheiro mentions, given the fact that arbitration has contractual foundations, the recognition of its effects would correspond to the arbitration agreement regulating purpose, *see* PINHEIRO, *supra* note 1, at 562.

29 Paulsson – Arbitration Unbound, *supra* note 10, at 360.

takes place; and (vi) even if the arbitration is governed by a foreign law, they will still have to respect the local laws.[30]

It seems that a reasonable way to determine the nationality has fallen under heavy criticism due to the fact that the choice of seat might have been taken on a purely random basis, or simply because it responds to some other concerns completely detached from the realities of international arbitration.

When the award and the whole arbitration are rooted in the national legal system and a competent authority of the given system annuls such award, it ceases to exist under the applicable arbitration law. So then, how can it be enforced at a later stage? Moreover, the combination of Articles III and V(1)(e) further argues against such recognition and enforcement. The Contracting States committed to recognize arbitral awards as binding but when an arbitral award is set aside in the country of origin, it is no longer binding upon the parties.[31]

When it comes to determining the nationality of the award, the following arguments have been put forward in support of the territorial approach:

1. As Jan van den Berg and Sanders framed it, the award would be rooted in the legal system of the country of origin, and with the annulment, it would become non-existent. As there is nothing left to enforce (it would even run against the public policy of the enforcing country), it would be deprived of force worldwide.[32]

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30 *Id.* at 361.

31 Albert Jan van den Berg, *supra* note 1, at 190.

32 Darwazeh, *supra* note 1, at 325-326; Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6 NETH. INT'L L. REV. 43, 55 (1959).

When we theorize about the legal order, we must always start from reality and then proceed to the abstraction. The truth is that the New York Convention grants courts a discretionary power, which is at odds with this theory.[33] If there was nothing left, on what ground would the courts exercise their discretion?

2. While not determining the extent of the jurisdiction taking place in the country of origin, the New York Convention limits the jurisdiction of review taking place in the country of enforcement. Consequently, the enforcing court should defer to the set aside decision, which the drafters intended to grant more competence. This argument has been rebutted for undermining arbitration as an effective international dispute resolution mechanism, given that the court would always have to refuse enforcement, even if the annulment was based on LSA.[34]

3. Courts should also show respect by not insulting the courts of other countries via not paying deference to the nullification decisions rendered there,[35] and watch out for the rather perverse incentive to chase a nullified award around the world and the creation of inconsistent results. To this, it has been contented that each country is entitled to define its own set of rules concerning setting aside awards, without those applying in an international arena, or to other jurisdictions. Accordingly, they say that the inconsistency of results is a more theoretical hypothesis rather than real as it is most likely that if an award found to be defective

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33 Darwazeh, *supra* note 1, at 325-326.

34 *Id.* at 326.

35 It should be noted that there are dangers in the over credence granted to the law of the place of arbitration, namely the incitation to courts to assist losing parties' attempts in overthrowing/resisting and invalidating the arbitrators' decision, and the destruction of legitimate (and maybe settled) expectations. *See* Paulsson, *supra* note 1, at 24.

enough to be set aside in country A, it will not be enforced in country B.[36]

In this regard, courts have frequently raised the issue of the principles of international comity, according to which it would be inappropriate to recognize an annulled arbitral award.[37]

4. The territorial approach would also be in line with the will of the parties. When the parties agree to submit their conflict to a country's arbitration laws, it also covers the right to recourse allowed by their legislation, and parties may expect the enforcing countries to respect that. Nonetheless, it is far from uncommon that parties either don't choose the seat of arbitration, or have their arbitrators' panel choosing for them.[38]

In response to the territorial approach, we saw the emergence of the detachment/delocalization theory. According to this theory, the award should be free from local constraints (instead of being controlled at its origin) and be subject only to international law and the law of the enforcing country, where it was due to see its effects played out.[39] This way, the award would not be anchored in the legal order of the seat of arbitration, and consequently, the choice of the seat would weigh less, since the validity of the award would not depend on the assessment of the

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36 *Id.*; Darwazeh, *supra* note 1, at 328.

37 These principles of comity are normally understood to be the rules observed by states among themselves, not obeying international law, but rather as courtesy or simply convenience. *See* BORN, *supra* note 1, at 3412; ANTÓNIO SAMPAIO CARAMELO, O RECONHECIMENTO E EXECUÇÃO DE SENTENÇAS ARBITRAIS ESTRANGEIRAS 192 (2016).

38 Darwazeh, *supra* note 1, at 328.

39 Pavic, *supra* note 9, at 134; Darwazeh, *supra* note 1, at 331-334.

court of the country where it had been rendered.[40] The detachment theory has also seen some arguments put forward in its favour:

1. A literal interpretation of Article V(1) is unambiguous in finding a grant of discretionary power to the courts of the country where the recognition is sought, to either enforce it or refuse the enforcement.[41]

2. Judgments deciding the underlying dispute should receive a higher degree of deference than those which just set aside foreign arbitral awards. As the United States' Supreme Court noted in the case of *Hilton* v. *Guyot*, we should bear in mind the notion of *res judicata*: "*once a court with jurisdiction has decided the dispute, the parties should not have to re-litigate the dispute elsewhere*".[42] In response, some authors have waived the *chase of nullified awards* and the eventual inconsistencies.[43]

3. The award may suffer from another internationally recognized reason for the court to enforce the award, regardless of the annulment, like estoppel (the party might be estopped from invoking a certain argument or ground).[44]

4. International arbitration is built on the premise that a country's control and oversight upon the arbitration is reduced to the bare

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40 Paulsson – Arbitration Unbound, *supra* note 10, at 358-359, 367; Francisco González De Cossío, *Enforcement of Annulled Awards: Towards a Better Analytical Approach*, 32(1) ARB. INT'L 6 (2016) [*hereinafter* "De Cossío"].

41 Darwazeh, *supra* note 1, at 331.

42 *Id.* at 332; Henry Hilton v. Gustave Bertin Guyot, 159 U.S. 113 (1895).

43 Darwazeh, *supra* note 1, at 331.

44 *Id.*

minimum. It is hence assumed that the New York Convention will be the basis for enforcement of the award in any State.[45]

5. One should also note that Article VII's more favourable right provision manifests this idea of minimum requirements: if a country presents a more favourable legal framework, it should apply.[46]

   An international arbitration may create obligations even if the *lex fori* will not recognize such effect, and a party, when operating internationally, may have greater or lesser rights, with respect to the same relationship depending on which national system it is brought to bear.[47]

6. The legal force of transnational arbitration stems out of the parties' contract and the effect of the proceedings would be left to be controlled by the legal system that is requested to recognize the award.[48] This runs against the argument put forward previously, according to which this internationally binding nature of the contract must be rooted somewhere.

This theory is no longer just theoretical, having been tried in the Swedish decision, *Götaverken,*[49] which opposed Götaverken Arendal Aktiebolag ["**Götaverken**"] against the Libyan General National Maritime Transport Company ["**Libyan Maritime Co.**"] for the delivery ships and payment of the purchase price. The arbitral tribunal of the International Chambers of Commerce ["**ICC**"], with its seat in Paris, ruled in favour of

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45 *Id.* at 333.
46 *Id.*
47 Also, most award rulings are followed by the parties voluntarily.
48 Paulsson – Arbitration Unbound, *supra* note 10, at 363.
49 *Id.* at 367; Nytt Juridiskt Arkiv [NJA] [Supreme Court Reports] 1979 Ö 1243-78 (Swed.).

Götaverken for payment with a reduction of 2%. Libyan Maritime Co. appealed against the decision of the tribunal in France and also opposed the enforcement of the award in Sweden, claiming that the decision was not binding anywhere since it had been challenged in the courts of the country where it had been rendered. The French courts refused jurisdiction for the following reason: France had only been chosen for being a geographically neutral ground for litigation as both parties were foreign to France and the case had no connection whatsoever with this country,[50] so its recognition was not necessary for recognition elsewhere. Additionally, because the ICC Rules no longer mandated the application of the law of the seat in absence of choice, the French court ruled that the award was not "*French in nationality*" and was, therefore, not subject to the French legal order.[51]

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50 This argumentation reasons with two legislative measures adopted by Belgium and Switzerland. The first country's law excluded jurisdiction when it came to applications to set aside awards rendered in Belgium, but among foreigners (to Belgium); whereas the Swiss laws allowed an agreement between the parties, whereby if none was a Swiss national or resident, they could agree not to challenge the award within Swiss jurisdiction. These two norms were perceived by some in the international arena as self-interested and contrary to the scheme provided by the New York Convention. Consequently, a national of a signatory country to the New York Convention deprived of protection might seek reparation of the injury, understood as a treaty violation, against either Belgium or Switzerland. Jan Paulsson argues back as it is not possible to fundament that position, since there is no provision for that in the text requiring any eventual complaint to be based on the rather vague notions of assigned functions and coherent theory, and which are – in Paulsson's view – contradicted by the New York Convention's purpose of facilitating the enforcement of the award. One other thought is that usually, complaints appear from the courts' excessive control, not the other way around. Since the New York Convention does not use the notions of primary and secondary jurisdictions, maybe we should pay more attention to where the consequences of the awards (economic or not) are sought. Finally, the unfair competitive advantage argument also does not stick: parties prefer a rather predictable and reasonable level of control, and consequently we are not seeing a rush for their jurisdictions. *See* Pavic, *supra* note 9, at 145; Paulsson, *supra* note 1, at 21-22.

51 Paulsson – Arbitration Unbound, *supra* note 10, at 358-359, 367; De Cossío, *supra* note 40, at 6.

However, the Swedish court enforced the award despite being challenged in the country of origin. This was viewed by some as representing a shift of control from the place of arbitration to the country of enforcement and sustaining the theory that the binding force of an arbitral award would not necessarily derive from the legal system of the country of origin.[52]

That is not to say that the national law of the seat of arbitration may not work as the foundation of the proceedings, as for instance: (i) if the parties decide to resort to municipal judges in order to have sanctions or assistance beyond their powers; (ii) if a losing party considers an award defective, it will want to have a jurisdiction where it may challenge the award; and (iii) if the award was truly *a-national,* one could ask if it would actually fall under the scope of the New York Convention.[53]

If we were to accept the detachment theory, the effects of the award would be controlled by no authority besides its contractual foundation and the requirements put in place by each jurisdiction. The creditor under an award would see the effects recognized and enforced as a consequence of both national and international legal systems.[54]

To assume that national level decisions to set aside awards in a given country could have the effect of extinguishing their existence in foreign jurisdictions would be to labour against the intention of the drafters of the New York Convention, who wanted international awards to be recognized and enforced, completely independent of national laws.[55]

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52 Paulsson – Arbitration Unbound, *supra* note 10, at 375.
53 *Id.* at 375-376.
54 *Id.* at 358-359, 367; De Cossío, *supra* note 40, at 6.
55 Teramura, *supra* note 1, at 86.

Now we are in a position to ask: do the arbitral awards cease to exist once they are set aside by a competent authority?

As per the territorial approach (also known as the traditional one), the court should not enforce annulled awards, no matter what the circumstance is. This is justified by the logical reasoning that, if the award has been annulled in its country of origin, where it was legally rooted to the arbitration law, it ceases to exist.[56] This is not liquid: as we saw, other scholars claim that the legitimacy of the award does not derive itself from the law of the seat, but rather, from the enforcement forum, in the same way as a contract void in one nation can still be enforced elsewhere. As Jan Paulsson remembers, a contract, a marriage or an adoption can be invalid, and yet its effects can still be felt in a given country which recognized it as valid, even though the courts of the country of origin had annulled it. The same would apply to arbitral awards, clearly showing that it might take its legitimacy from the enforcement forum.[57]

Furthermore, the idea that the award would cease to exist once it is annulled is at odds with the permission granted to the States in the second part of Article V(1)(e), where the New York Convention granted the enforcing courts a discretionary power.[58] So, if it continues to exist, how should the enforcing country deal with the set aside decision?

According to Article V(1)(e), the enforcing countries' courts may refuse recognition and enforcement if the seeking party proves that the award

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56 According to Sanders, it would even be against public order of the enforcing country to enforce a non-arbitral award. *See* Albert Jan van den Berg, *supra* note 1, at 187.

57 Paulsson, *supra* note 1, at 11; PARK, *supra* note 1, at 356; Teramura, *supra* note 1, at 84.

58 Teramura, *supra* note 1, at 86.

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.[59]

This means that there are two authorized jurisdictions to carry out the setting aside of an arbitral award: both the jurisdiction of the country in which, or under the law of which, that award was made. The first term is usually understood to be referring to the courts of the *seat of arbitration*, and not necessarily the place of the hearing or signature.[60] It was the sole jurisdiction authorized in the 1927 Geneva Convention for primary review over an arbitral award but was then extended in 1958 in the New York Convention.[61]

As for the "*law under which the award was made*", it can be read as meaning: (i) the law governing the arbitration proceedings; (ii) the parties' arbitration agreement; or (iii) the substantive law governing the parties' underlying dispute. Nadia Darwazeh adopts the first interpretation, claiming that it refers to the arbitration law in a case where the parties have chosen to submit their award to a different arbitration law, from the arbitration law of the place of arbitration. Nevertheless, it should be noted that in practice, the procedural law tends to coincide with the law of the place where the award was made.[62]

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59 "Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:…(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

60 This may be problematic in situations such as when the arbitration takes place over the internet or on a document basis. The solutions advanced have been: (i) to determine a fictitious place of arbitration; (ii) the place where the arbitrator is; and (iii) use the geographical location of the computer server. *See* Darwazeh, *supra* note 1, at 320.

61 Gvelebiani, *supra* note 2, at 6.

62 Darwazeh, *supra* note 1, at 321; Gvelebiani, *supra* note 2, at 6.

The U.S. Court has come out and supported this understanding in *International Standard Electric Corporation* v. *Bridas Sociedad Anonima Petrolera, Industrial y Comercial*. The Court stated that "*under the law of which*" referred to the arbitral procedural law, and not the substantive law of the contract.[63] With a different understanding, courts in Pakistan and India have sustained that the term refers to the law governing the arbitration agreement and that, consequently, the award could be set aside by the competent authorities of the country governed by the same law as the arbitration agreement. For instance, in *Hitachi* v. *Rupali*,[64] the parties had chosen the law of Pakistan to govern the contract and agreed on the application of the ICC Rules and London as the seat. Later, the Supreme Court of Pakistan held that it had jurisdiction since the parties had chosen the law of Pakistan to govern the arbitration agreement, even if the law governing the arbitration proceedings was the English one. A similar understanding was expressed by the Supreme Court of India in the case of *NTPC* v. *Singer*,[65] where it claimed that matters in respect of the arbitration agreement fall in the jurisdiction of the laws governing the arbitration agreement.[66] However, in *Bharat Aluminium Co.* v. *Kaiser Aluminium Technical Service, Inc.*, the Indian Supreme Court recognized the lack of jurisdiction of Indian courts when the seat of arbitration lay outside India.[67]

With respect to the authority competent to set aside an award, the law applicable to the award, as mentioned in the New York Convention, is commonly accepted to be referring to the courts with jurisdiction to set

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63 Darwazeh, *supra* note 1, at 322; Int'l Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial y Comercial, 745 F. Supp. 172 (S.D.N.Y. 1990).

64 BLACKABY ET AL., *supra* note 5, at 639-640.

65 National Thermal Power Corporation v. Singer Co., (1992) 3 SCC 551 (India).

66 Darwazeh, *supra* note 1, at 322-323.

67 Bharat Aluminium Co v. Kaiser Aluminium Technical Service Inc., (2012) 9 SCC 552 (India).

aside an award in each country and the procedural law governing the arbitration.[68]

IV. Discretion of the Enforcing Court

The drafters' choice of words for Article V(1) has been heavily debated. There are five versions of the New York Convention that are equally authentic: English, French, Chinese, Russian and Spanish.[69] The problem is that they do not mean exactly the same thing: where the English (together with the Chinese, Russian and Spanish) version reads that the judge *may* refuse the enforcement in case one of the grounds is verified (a rather permissive phrase construction), the French version opted for a more imperative word composition by using "*ne seront refusées"* (in a more obligatory sense).[70]

This idea that the French version presents a mandatory sense is rather controversial. There are authors who propose a more permissive approach, sustaining that the French courts do not require the refusal of enforcement in the event of an annulled award, with an interpretation more in line with the French practice, which is famous for resorting to Article VII.[71] Furthermore, one should not overlook the interpretative principles of international law applicable to plurilingual treaties which make a solid case against an *exception française*, i.e., the principle of equal authority of authentic texts, together with the presumption that the chosen terms in each language were intended to share the same meaning in conformity with the unity of the treaty – all together.[72]

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68 UNCITRAL Guide, *supra* note 1, at 217-18; Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 266.

69 New York Convention, *supra* note 14, art. XVI(1).

70 Teramura, *supra* note 1, at 107.

71 BORN, *supra* note 1, at 3429-3431.

72 Darwazeh, *supra* note 1, at 309.

It is also the interpretation more in line with the principles of interpretation of treaties as enshrined in the Vienna Convention on the Law of Treaties, which established the *objective* theory of interpretation in Article 31, although mitigated by the acceptance of a certain subjectivism (Article 31(4)). We should also consider the context of where it is inserted, the historical background and its subsequent application.

However, this is far from unanimous with authors sustaining an interpretation more in the line of the French one (a *mandatory* sense) rather than following the English version (the *permissive* one). Consequently, such scholars support the lack of discretion on the refusal of the annulled awards, sustaining that the judges would be obliged to deny recognition in these cases. To them, annulled awards would not be enforceable any longer.[73]

According to Gary Born, it would be wrong to read Article V as requiring the Contracting States to deny recognition to an arbitral award. The problem – that justified bringing the New York Convention into existence – was of under-recognition and enforcement of foreign arbitral awards and not the other way around. Article III requires Contracting States to recognize foreign arbitral awards provided that the minimum proof requirements of the Convention are verified. However, if any of the situations under Article V is satisfied, the Contracting States no longer remain under the obligation to recognize the award. As Gary Born puts it, we should not take the exceptions of Article V for affirmative obligations in their own right, but rather read them in their context as exceptions to an affirmative obligation established in Article III to recognize foreign arbitral awards.[74] This understanding is later supported by Article VII by extending the possibilities of seeing the award enforced when it enshrines

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73 Teramura, *supra* note 1, at 107; Gvelebiani, *supra* note 2, at 8; PARK, *supra* note 1, at 352.

74 BORN, *supra* note 1, at 3428.

the most favourable provision: an arbitral award can be enforced by the law of the country or other applicable treaties if they allow recognition and enforcement, when the New York Convention does not. This article is a better representative of the objectives of the New York Convention, i.e., the expansion of the circumstances of recognition of the international arbitral awards.[75] If Article V was commanding the Contracting States to not recognize, Article VII would have no purpose since it expressly opens the possibility to recognize annulled awards, which would be absurd if they had ceased to exist.[76]

While the permissive nature of that norm used to be controversial, nowadays it is widely accepted that Article V is indeed a permissive norm granting the Contracting States discretion. In fact, most scholars do not read it as an affirmative obligation to deny recognition as is also supported by the French practice.

This presumption by Born would serve better as a default rule whereby parties do not accept grounds of judicial review beyond Article V(1), unless stipulated otherwise.[77] Hence, if the parties have agreed to broader judicial review than that provided in Articles V(1)(a) to (d), they have contractually accepted judicial review from the arbitral seat, and there is no basis to deny them the efficacy of their accord.[78]

Getting back to the sphere of the discussion about competence, one can always try to defend the mandatory nature of the norm based on the argument that courts at the place of arbitration should have some control

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75 *Id.* at 3429.
76 *Id.* at 3427-3430, 3641.
77 *Id.* at 3645; PARK, *supra* note 1, at 352.
78 BORN, *supra* note 1, at 3645; Paulsson, *supra* note 1, at 18.

over the awards and the arbitral proceedings conducted in their territory, even if just to avoid fraud, corruption, or other misdeeds.[79]

Consequently, to a section of the scholars, we would not be witnessing any treaty violation if annulled awards were not recognized. This can be further understood when comparing the terms used in Articles III (*shall*) and V *(may)*.[80]

In short, while some understand that the text of Article V(1)(e) leaves room for judicial discretion on the part of the enforcing court regarding whether an award must be enforced or refused, others believe that the enforcing court is under an obligation of refusing enforcement.[81]

Despite the divergence, it is not controversial that for the setting aside or the refusal of enforcement of the award to take place, the courts must observe a *rule of de minimis*: for taking such decisions, the violation must be substantial.[82]

V. Recognition and Enforcement of Foreign Arbitral Awards

According to Article III, the Contracting States are bound to recognize and enforce arbitral awards, unless one of the grounds listed in Article V is applicable. Those grounds have been understood by scholars to be exhaustive and exclusive when it comes to denial of recognition of foreign awards under the New York Convention, which balances the permissive tone, as it fits perfectly with the teleological element of the interpretation and its drafting history.[83]

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79 BLACKABY ET AL., *supra* note 5, at 635.
80 PARK, *supra* note 1, at 362.
81 BORN, *supra* note 1, at 648-649.
82 Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 268.
83 BORN, *supra* note 1, at 3426.

Following Jan van den Berg's method of exposition, we identify five possible ways to treat the recognition and enforcement of foreign annulled arbitral awards: (i) when presented with an annulled award, the court should refuse its enforcement; (ii) there should be a discretionary power granted to the enforcing court to decide whether to enforce such award or not; (iii) analyse the recognition of the judicial judgment which set aside the award; (iv) the court should apply domestic law through Article VII of the New York Convention (the *more favourable right* provision); or (v) amend the New York Convention to adapt to the needs and wishes of the international community.[84]

The first approach tells us to interpret Article V(1)(e) as a command for the enforcing court to refuse enforcement if the defendant manages to prove that the arbitral award (i) has been set aside; (ii) by the competent authority; (iii) in the country in which it was rendered. This has been the approach followed by most American cases where the judge shows a certain level of *deference* towards the judge with primary jurisdiction such as in *Termo Rio* v. *Electranta*[85] ["**Termo Rio**"], *Thai-Lao Lignite* v. *Laos*,[86] ["**Thai-Lao Lignite**"] and *Baker Marine* v. *Chevron* ["**Baker Marine**"].[87] Jan van den Berg justifies the legal policy of concentrating judicial control over the arbitral process and the courts at the place of arbitration with the fact that the arbitration and the award tend to be an output of the legal

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84 Albert Jan van den Berg, *supra* note 1, at 179, 181.

85 The *Termo Rio* case got attention, among other reasons, for the refusal in recognizing the vacated award. "For us to endorse what appellants seek would seriously undermine a principal precept of the New York Convention: an arbitration award does not exist to be enforced in other Contracting States if it has been lawfully 'set aside' by a competent authority in the State in which the award was made." *See* Termo Rio v. Electranta, 487 F.3d 928 (D.C. Cir. 2007).

86 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. Aug. 03, 2011).

87 Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd., 191 F. 3d 194 (2d Cir. 1999); Albert Jan van den Berg, *supra* note 1, at 183; CARAMELO, *supra* note 37, at 191.

regime of the place of arbitration and of the arbitration proceedings.[88] It presents the advantage that once the award is annulled, the party cannot go around the world trying to find a flexible court system.[89]

A more recent case where the U.S. District Court showed deference to the set aside decision was in the *Thai-Lao Lignite* case involving two private companies and the Government of Laos. It was later confirmed by the U.S. District Court[90] and the High Court of Justice in England.[91] However, the Paris Court of Appeal[92] denied enforcement for excess of jurisdiction, since the arbitrators had awarded compensation for damages related to a contract which was not the one that contained the arbitration clause. After the U.S. decision to enforce the award, the Government of Laos successfully challenged the award before the Malaysian High Court on the same ground under the Malaysian Arbitration Act of 2005. Subsequent to the setting aside of the award, the Government of Laos filed with the District Court a motion for relief[93] from the court's earlier judgment granting enforcement, which was granted and the award, thus, became no longer enforceable under the U.S. jurisdiction.[94]

The second possible method would be of exercising the discretionary power granted by Article V to allow enforcement despite the existence of grounds for refusal. The enforcing court may only refuse enforcement if

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88 Albert Jan van den Berg, Enforcement of Annulled Awards, 2 ICC INT'L CT. ARB. BULL. 15 (1998) [*hereinafter* "Albert Jan van den Berg – Enforcement"].

89 *Id.*

90 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, No. 10 Civ. 5256, 2011 WL 3516154 (S.D.N.Y. Aug. 03, 2011).

91 Thai-Lao Lignite & Hongsa Lignite v. Government of the Lao People's Democratic Republic, [2012] EWHC (Comm) 3381 (U.K.).

92 Cour d'appel [CA] [regional court of appeal] Paris, Feb. 19, 2013, 12/09983 (Fr.).

93 Thai-Lao Lignite v. Government of the Lao People's Democratic Republic, 924 F. Supp. 2d 508 (S.D.N.Y. 2013).

94 Luca Radicati Di Brozolo, The Enforcement of Annulled Awards: Further Reflections in Light of Thai Lao-Lignite, 25 AM. REV. INT'L ARB. 49 (2014) [hereinafter "Luca"].

the case would fall under a ground laid out in the New York Convention and even if the ground is met, there would still be a residual discretion to decide on the refusal or enforcement.[95] Consequently, decisions like *Chromalloy* v. *Egypt*[96] ["**Chromalloy**"], where the court enforced the arbitral award, are not in violation of the New York Convention. That would happen if the court were to refuse enforcement to an award not tainted with any of the described faults in Article V.[97]

In *Chromalloy*, the U.S. Court enforced an arbitral award, vacated in Egypt on the grounds of misapplication of Egyptian law, against the Arab Republic of Egypt, sustaining their argumentation on the contrast between the permissive nature of Article V and the mandatory nature of Article VII, which, as Born describes it, preserves any provision of the national law which happens to be more favourable. The court, therefore, interpreted the Federal Arbitration Act in a compatible way with a pro-arbitration policy. It also ruled that the set aside decision violated the U.S. public policy.[98]

This understanding is based on the English wording of the New York Convention where the word *may* (that has parallels in three of the other

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95 For example, Lew and Mistelis seem to follow this. *See* LEW ET AL., COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION 707 (2003).

96 In *Chromalloy*, the court held that Article V(1)(e) does not require the court to not recognize the annulled award, which was a decision widely applauded by Gary Born, since the New York Convention would not forbid the recognition in these cases. The *Chromalloy* court decision on whether or not to recognize the award did not actually focus much on the specific grounds upon which the Egyptian annulment decision had been taken, or in the arbitration agreement. Instead, the U.S. court observed that it violated its public policy (which is against "substantive judicial review of awards") and the arbitration agreement. *See* In the Matter of the Arbitration of Certain Controversies between Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corporation and The Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996) *cited in* BORN, *supra* note 1, at 3630-3631.

97 Paulsson, *supra* note 1, at 7; BLACKABY ET AL., *supra* note 5, at 637.

98 BLACKABY ET AL., *supra* note 5, at 637; BORN, *supra* note 1, at 3628.

four official translations) was chosen to grant a permissive/discretionary power, rather than an order.[99] Nevertheless, the *travaux preparatoires* have no mention, whatsoever, of a discussion regarding the choice of words, between 'may' or 'shall'.[100] The weight of this argument diminishes considerably once we notice the effective change that took place from the use of *shall* in the Geneva Convention to the term *may* in the New York Convention. Adding to this, we should remember that, as I previously pointed out, the goal of the New York Convention was not to create a unified system to regulate international arbitration but rather to establish an international minimum standard, while tackling the problems present in the Geneva Convention.

Given this discretion, the court should examine whether the set aside judgment is in conformity with international standards and, depending on the answer, it can decide whether to enforce the award or not.[101] Other than that, the discretion has also been used in two situations: (i) when the situation can be described as a *de minimis* case (an insignificant violation of the arbitration rules applicable) or (ii) if the invoking party has not invoked the ground in a timely fashion.[102]

When defining the terms of the usage of this discretion, authors have suggested that the other grounds in Article V (1)(a)–(d) could be of some utility as to guide the enforcing courts on the matter.[103]

It is in this context that Jan Paulsson categorized the annulment standards as local and international. If the ground upon which the award was set aside was compliant with the substantive provisions of the first four

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99 *See* New York Convention, *supra* note 14, at 14, 15.
100 Albert Jan van den Berg, *supra* note 1, at 186.
101 Teramura, *supra* note 1, at 122-23.
102 Albert van den Berg, *supra* note 1, at 186-187; Gvelebiani, *supra* note 2, at 9.
103 BORN, *supra* note 1, at 3431; Albert Jan van den Berg, *supra* note 1, at 179, 185.

paragraphs of Article V(1) of the New York Convention, it should be refused since these paragraphs represent the internationally accepted grounds to refuse recognition. Otherwise, the court would be free to exercise its discretion, since it would be a LSA when the practices do not fall within these four paragraphs and consequently, do not match the contemporary international standards. For example, the requirement for the award to be signed by all the arbitrators, as it used to be in Austria until 1983.[104] This was the solution adopted in Article IV(2) of the European Convention on International Commercial Arbitration, 1961.[105]

LSAs are not necessarily a bad thing. We must remember that the international community gathers people with very different legal traditions and despite the efforts undertaken in the past decades to harmonize some rules and sectors of the legal traffic, individual systems are still entitled to enact their own local rules that are more in line with their specificities without the responsibility of having every legislative measure be adequate for every legal system, as they legislate for their own countries and not for the entire world.[106]

Against this, van den Berg roots the award in the national legal order of the country of the place of arbitration and believes that the award has ceased to exist after the annulment. The author advocates this solution as a future one to adopt, but sustains that it does not correspond to the New York Convention in force.[107]

According to Jan Paulsson, the New York Convention focused on imposing certain obligations on the judge at the place of enforcement and not on the courts of the place of arbitration as it would have exceeded the

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104 Paulsson, *supra* note 1, at 2, 25.
105 *Id.* at 1-2.
106 *Id.* at 18.
107 Albert Jan van den Berg, *supra* note 1, at 189.

scope of the New York Convention. The New York Convention was aimed at ensuring recognition and enforcement of foreign arbitral awards rather than binding the courts of the place of arbitration to set aside only under specific grounds, hence, letting each country define the grounds upon which they might invalidate an award rendered in their jurisdiction.[108]

Predicting a qualification problem, Paulsson advances that the *enforcing judge* should focus on the content of the decision, rather than the qualification given by the *vacating judge*. In his view, due to the impact of the decision on the resources located in his country, the enforcing judge cannot have lesser authority than the courts of the country of origin to assess whether the award meets the demands of international standards of arbitration, or not.[109] Even if that does happen to be the case, the court still possesses its discretionary power (under Article V) to enforce, or not enforce the award and the *more favourable right* provision (Article VII).

Another argument brought by Paulsson is that if we do not give any *res judicata* effect to a non-annulment decision internationally, why should it be any different when it comes to the annulment ones? Following his approach would grant court decisions equal authority, whether they uphold the award or not. This may be obtained either through Article VII

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108 In 1979, when preparing the UNCITRAL Model Law on International Commercial Arbitration [*hereinafter* "Model Law"], the UNCITRAL Secretariat prepared a study on the New York Convention and noted that it allowed Local Standard Annulments (LSA) to deter the enforcement of the award around the world, and so proposed to adopt the approach of Article IX of the European Convention on International Commercial Arbitration, 1961, with the consequence that the annulment of an award would only deter its enforcement in a Model Law country if the award had been vacated based on the invalidity grounds as acknowledged in the Model Law. However, this was seen as too ambitious and its application would lead to some difficulties. *See* Paulsson, *supra* note 1, at 26; Paulsson – Arbitration Unbound, *supra* note 10, at 24.

109 Paulsson, *supra* note 1, at 26.

or through the term 'may' in Article V(1): it is not quite relevant the technical solution adopted by the State when trying to disregard the LSAs.[110]

When arguing in favour of his proposal, Paulsson notes that it will encourage national courts to conform and act with respect to internationally accepted standards, since their grounds for LSA will not have any effect in the international context, unless they limit themselves to censure solely the kind of behaviour which would lead to non-recognition everywhere.[111]

Distancing from the *Chromalloy* case wherein the U.S. courts had declared that a vacated award was enforceable, in *Baker Marine*,[112] the Second Circuit of Appeals was clear in clarifying that once a court with primary jurisdiction has decided to vacate an award, the U.S. courts will step out of the way and respect the primary jurisdiction of the other country. *Termo Rio's*[113] decision went in the same direction when it claimed that a second jurisdiction court should not enforce an award that has been set aside in the country of origin. This discretion to enforce would be rather narrow and should only be exercised in case the vacating judgment is repugnant to the fundamental notions of recognition and enforcement law or rather if it clearly violates the basic notions of justice where enforcement is sought. It should be noted that the standard is pretty high and not easily met, which is why the doctrine tends to demand a pretty obvious case.[114]

As was pointed out by George Bermann, the enforcing court should autonomously determine whether there exists any ground for refusal,

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110 Pavic, *supra* note 9, at 148; Paulsson, *supra* note 1, at 27.
111 Paulsson, *supra* note 1, at 28.
112 Baker Marine (Nigeria), Ltd. v. Chevron (Nigeria), Ltd., 191 F. 3d 194 (2d Cir. 1999).
113 Termo Rio v. Electranta, 487 F.3d 928 (D.C. Cir. 2007).
114 Luca, *supra* note 94 at 50; Albert Jan van den Berg, *supra* note 1, at 193.

regardless of a previous determination by the court of the seat of arbitration on the matter.[115]

The third option would be the recognition of foreign judgment of annulment under Article V(1)(e), similar to what happened in *Yukos* v. *OAO Rosneft*[116] wherein the Dutch court held that the set aside decision taken by the Arbitrazh Court of the City of Moscow – on the grounds of violation of the right to equal treatment, appearance of lack of impartiality and independence, and violation of the agreed rules of procedure and later confirmed by the Federal Arbitrazh Court of the Moscow District and the Supreme Arbitrazh Court of the Russian Federation – could not be recognized in the Dutch legal order. This way, the annulled award would be denied recognition if the annulment decision was itself entitled to be recognized.[117] It should be subject to criticism; since if we were to give *res judicata* here, we should do it to whoever decides the dispute.

This kind of recognition is at odds with Article V(1)(e) of the New York Convention, which does not provide for any need of recognition of foreign court judgments when it comes to setting aside an award. In fact, most international legal instruments specifically exclude the recognition and enforcement of court judgments related to arbitration.[118] Given the discrepancies among the legislations, this could have a chaotic effect and would conflict with the uniform treatment of arbitral awards envisaged by the drafters of the New York Convention.[119]

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115 George A. Bermann, International Arbitration and Private International Law: General Course on Private International Law (Volume 381), in COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 466 (2017).

116 Yukos Capital SARL v. OAO Rosneft, Hof's-Amsterdam [ordinary court of appeal in Amsterdam], Apr. 28, 2009, 34 Y.B. COM. ARB. 703 (2009) (Neth.).

117 BORN, *supra* note 1, at 3637; Albert Jan van den Berg, *supra* note 1, at 179, 191.

118 Albert Jan van den Berg, *supra* note 1, at 191.

119 *Id.*

It is not the responsibility of the foreign courts to determine which Contracting States have a deficient judiciary.[120] Jan van den Berg pictures this as a bad application of the New York Convention. Furthermore, the importance of the *erga omnes* effect should not be underestimated as it provides predictability to the parties and prevents parties from chasing the other around the world trying to enforce the award everywhere.[121] Also, it would be far from coherent if a national law would grant competence to its national courts to set aside arbitral awards but not respect the same competence when exercised by foreign courts at the arbitral seat.[122]

According to Teramura's point of view, if we were to go down this road and stick to the *third option,* we should do it in consideration of the objectives and standards of the New York Convention, i.e., it should facilitate the enforcement of arbitral awards, while respecting the principles of justice and sovereign rights of States.[123]

What the enforcing judge will do here is, essentially, determine if the grounds to vacate the award were in conformity with international standards and enforce it or not depending on the findings. It would also be consistent with the European Convention on International Commercial Arbitration, 1961.

The fourth alternative is to apply domestic law through Article VII(1), as the French do. Unlike the other three approaches, this approach works outside the New York Convention and it is known as the "*more-favourable-right provision"*. It essentially provides that if there is any other national or

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120 *Id.* at 192.

121 *Id.*

122 PINHEIRO, *supra* note 1, at 604.

123 Also, the "Convention says nothing about proper or improper annulment standards but leaves each country free to establish its own grounds for vacating awards made within its territory." PARK, *supra* note 1, at 360; Teramura, *supra* note 1, at 113-114.

international provision granting a more favourable regime for the enforcement of foreign arbitral awards, the party should be allowed to avail himself of it.[124]

But how should this provision operate? Does it allow the parties to cherry-pick the best provisions from all the national and international legal instruments? Scholars have been answering this question in the negative, that one cannot cherry-pick but must apply the most-favourable law/treaty in its entirety.[125]

As we said, France is known for resorting to this alternative. It was seen in the case of *PT Putrabali Adyamulia (Indonesia)* v. *Rena Holding*[126] ["**Putrabali**"] that this practice is derived from the idea that the arbitral award is not attached to any national legal order, but is, instead, a decision of international justice whose regularity should be controlled in the country where enforcement is sought with regards to their applicable law (in this case, by French courts under French law).[127]

It can lead to highly undesirable results, such as in the *Putrabali* case wherein the enforcing court recognized the partially annulled award but not the improved one. This case revolved around the sale of pepper, from Putrabali to Rena Holding. When a certain dispute arose, the parties

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124 LEW ET AL., *supra* note 95, at 698.

125 The distinction between enforcing the award according to the New York Convention and according to the national regime is also present in the Dutch law. This would justify the low amount of French case-law interpreting the New York Convention, since the parties seeking enforcement usually invoke Article VII and order, consequently, the application of French national legal regime (in French legal order, the annulment of the award does not count among the grounds to refuse enforcement); Gvelebiani, *supra* note 2, at 11; Albert Jan van den Berg, *supra* note 1, at 194; Albert Jan van den Berg – Enforcement, *supra* note 88, at 15.

126 Cour de cassation [Cass.] 1e civ., June 29, 2007, 05-18.053, Bull. civ. I, No. 250 REVUE DE L'ARBITRAGE [REV. ARB.] 2007, 507 (Fr.).

127 De Cossío, *supra* note 40, at 5; Albert Jan van den Berg, *supra* note 1, at 195; UNCITRAL Guide, *supra* note 1, at 126.

commenced arbitration in London, having the arbitral award later partially set aside by the High Court of London. In response, the International General Produce Association made an improved arbitral award. Nevertheless, in the meantime, the French Court ruled in the sense of enforcement of the first award, basing its argumentation on the detachment of the award from any legal order, and on Article VII.[128]

While close to this alternative, Teramura draws his own path: the way to go would be to start by examining the applicability of Article VII(1): if there are provisions which are more pro-enforcement than the New York Convention, then the domestic law should apply. If that is not the case, we should turn to the New York Convention and analyse the applicability of Article V(1)(e). Here, the court should assess whether or not the vacating sentence was carried out by the competent authority of the country of origin.[129]

The fifth possibility is an amendment to the New York Convention. We could adopt the solution of Article IX(2) of the European Convention on International Commercial Arbitration, 1961 by which the refusal of enforcement would be limited to the cases where the award has been set aside on grounds that are equivalent to the commonly recognized grounds for setting aside an arbitral award in international arbitration.[130]

As van den Berg suggested, it would lead to the same effects of Jan Paulsson's proposal, by which parochial grounds would not be binding on the enforcing courts.[131]

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128 Albert Jan van den Berg, *supra* note 1, at 195-196.

129 Teramura, *supra* note 1, at 122-123.

130 Albert Jan van den Berg, *supra* note 1, at 197.

131 Sampaio Caramelo mentions an international trend to abandon this hypothesis: not only have most countries – like France or Germany –been taking it out in the past few years, as

The fact that three years later there was a need to create Article IX(2) of the European Convention shows that the drafters of the New York Convention were aware that the provision laid down in Article V(1)(e) was too broad and relatable to all possible grounds. The drafters, thus, felt compelled to restrict this possibility by reducing the grounds to the first four listed in Article V(1).[132]

A last alternative to all of these proposals would be for the countries within the international *mainstream* to sign a treaty, whereby they would commit to recognize the *res judicata* effect of each other's judicial decisions regarding awards. This would, in turn, create little *clubs* of trustworthy countries, in contrast with the untrustworthy ones, which cannot be seen as a great advancement,[133] although it would deter future attempts to enforce the award within the jurisdiction.

However, it would be patently disproportionate. As Gary Born points out, why should a party be forbidden to correct a failure in the documentation that is present in the application?[134] Denying the *res judicata* effect would be more coherent with the proportionality principle, but would be overlooking the concentration principle.[135] The Model Law provides for

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the ones who have not only no longer applied it, but also view it with bad eyes (like the English legal order). In 1981, van den Berg claimed the dispensability of the formula in his commentary to the New York Convention. Nowadays, only India and Pakistan are still trying to breathe life into it, and have been receiving a fair amount of push back for that. *See* CARAMELO, *supra* note 37, at 181; Albert Jan van den Berg, *supra* note 1, at 197.

132 Albert Jan van den Berg, *supra* note 1, at 198; BORN, *supra* note 1, at 3641.

133 Jan Paulsson, *Awards Set Aside at the Place of Arbitration*, *in* Enforcing Arbitration Awards under the New York Convention: Experience and Prospects 24-26 (1999).

134 BORN, *supra* note 1, at 3405-3406.

135 The parties should exhaust all the legal and evidential allegations relevant to the disputed facts and to indicate the relevant evidence in a timely fashion. *See* Vanlentina Popova, *Popova v. Principles of Bulgarian Civil Procedure*, 2(2) CIV. PROC. REV. 71-72 (2011).

an analogous solution in its Article 23(2),[136] when it comes to the submission of claim and defence during the arbitral proceedings.

In the case of S*ociété Hilmarton Ltd* v. *Société Omnium de traitement et de valorisation (OTV)*, the French courts exposed the flaw of their system by recognizing twice an annulled award rendered in Switzerland.[137] The court failed to address the possibility of a preclusive effect from the annulment decisions and only mentioned that the award was not integrated into the Swiss legal system, consequently remaining in existence regardless of the set aside.[138]

VI. Annulment of Awards

As previously pointed out, some scholars believe the arbitral award to be rooted in the legal order of the country where the award has been rendered. This means that once the award is set aside, it would cease to legally exist and, hence, it may not be brought back to life during an enforcement procedure in a foreign country.[139] As such, the annulment would be enough of a ground for refusal of enforcement abroad, which may be further sustained by: (i) the right of the losing party to have the validity of the arbitral award finally adjudicated in one jurisdiction; and (ii) the clear distinction made by the New York Convention as to the role each court has to play.[140]

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136 "Unless otherwise agreed by the parties, either party may amend or supplement his claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it."

137 Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, 92-15.137 REVUE DE L'ARBITRAGE [REV. ARB.] 1994, 327 (Fr.).

138 BORN, *supra* note 1, at 3626; BLACKABY ET AL., *supra* note 5, at 636-637.

139 Albert Jan van den Berg, *supra* note 1, at 186-187.

140 *Id.* at 185.

This author emphasizes the need to have a *safety valve* in the system in order to neutralize improper awards. In *Commisa* v. *Pemex*,[141] for instance, the U.S. District Court for the Southern District of New York enforced an annulled arbitral award on the grounds that it had been set aside under a law that was not in existence at the time that the parties had entered into the contract.[142]

Jan Paulsson counter argues that this is a scenario less usual than what one might think. Not only because the awards are very rarely set aside, but also because even when they are, it is far from common to be on local standards.[143] He adds that the system can stand some occasional inconsistent decisions. The eventual inconsistent decisions, from time to time, should not be considered an obstacle as they are a normal part of a world where each country considers its legal system as sovereign. Moreover, nowadays, it is far from likely that an award defective enough to be vacated in the country of origin will manage to be enforced in another country. According to a study by van den Berg, Article V(1)(e) is rarely invoked as a ground to set aside an award and even when it is invoked, it is hardly successful.[144]

If we were to take van den Berg's position to its ultimate consequences, as Paulsson does, one could only enforce an arbitral award if there was no possibility of challenge left to be undertaken in the country of origin. In the purist perspective, there would be no difference between 'have been annulled' and 'might be annulled' thereby turning the term 'may' in Article V(1)(e) into 'shall' and 'binding' into 'final' and, consequently, making us

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141 Corporación Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex Exploración y Producción, 962 F. Supp. 2d 642, 644 (S.D.N.Y. 2013).

142 BLACKABY ET AL., *supra* note 5, at 637-638.

143 Local standards are the ones falling outside Article V (1)(a)-(d); Paulsson, *supra* note 1, at 17.

144 *See also* BORN, *supra* note 1, at 3622; Paulsson, *supra* note 1, at 13-21; Darwazeh, *supra* note 1, at 324.

retrocede back to the days of the Geneva Convention of 1927.[145] His criticism goes on to say that to be consistent, one would also have to turn Article VI from a permissive norm into an obligatory one (despite the copious number of applications, in contrast with the small number of them succeeding), allowing an unfair room to the losing party to apply delay tactics and other strategies incoherent with the values that underpin international arbitration and law in general. Nonetheless, van den Berg does not campaign for the granting of adjournments in all situations or against any enforcement until the final saying of the country of origin's courts. In fact, he sets high standards for parties when it comes to trying to impede the award's enforcement. The standards invite the enforcement courts to assess, by themselves, the grounds presented by the party in the application to vacate the award and grant enforcement unless a defect which is likely to lead to the setting aside of the award is proven. These high standards, promoted by Professor van den Berg, have been applied since 1987.[146]

In the perspective of the authors who do not place the foundations of the arbitral awards in the legal system of the country of origin, this approach does not give adequate treatment to the countries' sovereignty. In fact, if we were to attend to it, the effect of the setting aside of the award should be limited to the territory of the country of origin. This is because if the enforcing courts of the sovereign country have the power to enforce an award, a third country cannot simply *disallow* the efficacy of the judicial acts of the enforcing country's courts.[147]

We might be tempted to subscribe to this approach due to the certainty and the predictability it provides us, but it cannot stand when we regard

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145 Paulsson, *supra* note 1, at 15.
146 *Id.* at 16.
147 Teramura, *supra* note 1, at 85.

the legislative history and the *ratio* of the New York Convention, the foreign countries' sovereignty, and the parties' reasonable expectations.[148] Hence, once set aside, the arbitral award does not cease to exist as such. It will merely cease to be enforceable in the country of origin due to the loss of legal effect in the jurisdiction.[149]

Regardless of the whole dispute, cautious judges from the country of origin would be careful when it comes to the exercise of their authority to set aside, especially in international arbitration situations where neither of the parties have any connection to the country nor do the judges have any interest in the conflict or any understanding of the parties' culture and expectations. The same would not serve to the situation of a party being local.[150]

VII. Other Conventions

Three years after the New York Convention came into being, the Economic Commission for Europe of the United Nations ventured to enhance European trade by removing certain difficulties that were deterring the operation of international commercial arbitration. Among such ventures is Article IX, where the drafters laid down the grounds upon which a set aside award could be refused enforcement as well as how to deal with the provisions of the New York Convention.[151] Jaba Gvelebiani identifies, in the Geneva Convention, an objective to limit the effect of set aside decisions on foreign countries, instead of actually guaranteeing the enforceability of annulled awards.[152]

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148 *Id.* at 84-87.

149 Darwazeh, *supra* note 1, at 323.

150 Paulsson, *supra* note 1, at 17-18.

151 Dominique T. Hascher, *European Convention on International Commercial Arbitration of 1961*, *in* ICCA Y.B. COMM. ARB. 507 (Albert Jan van den Berg ed., 2011) [*hereinafter* "Dominique"].

152 Gvelebiani, *supra* note 2, at 12-14.

Article IX essentially reproduces the first four grounds set forth in Article V(1) with the caveat of, in its paragraph 2, providing that with respect to the signatory parties of the New York Convention, "*paragraph 1 of this Article limits the application of Article V(1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.*"[153] From here, we can see that the understanding of drafters of the European Convention of Article V(1)(e) was closer to van den Berg than to either Born or Jan Paulsson, in the sense that they saw it as a *barrier* and that they tried to solve it.[154]

The Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, 1972 ["**Moscow Convention**"] regulates the arbitration of disputes arising from economic, scientific and technical cooperation among the members of the Council for Mutual Economic Assistance in some Eastern European and Asian states. The grounds for refusal of enforcement under the Moscow Convention are: (i) lack of jurisdiction; (ii) denial of a fair hearing; and (iii) the award has been set aside. Clearly, it was modelled after the New York Convention.[155]

The Inter-American Convention on International Commercial Arbitration, 1975 ["**Panama Convention**"] shares the New York Convention's grounds in its Article 5, since it was intended to achieve the same results. This comes after a presumptive obligation to recognize foreign awards.[156]

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153 European Convention on International Commercial Arbitration, art. IX(2), Apr. 21, 1961, 484 U.N.T.S. 7041.

154 Dominique, *supra* note 151, at 507; BLACKABY ET AL., *supra* note 5, at 663; LEW ET AL., *supra* note 95, at 694-95; BORN, *supra* note 1, at 3435, 3624; Paulsson, *supra* note 1, at 10.

155 BLACKABY ET AL., *supra* note 5, at 664; LEW ET AL., *supra* note 95, at 695.

156 LEW ET AL., *supra* note 95, at 695; BORN, *supra* note 1, at 3435.

The role of bilateral conventions should not be underestimated. Although they make it easier to solve conflicts, they could have an adverse effect on the harmonization that was promoted by the New York Convention.[157] Fortunately, like most national legislations on the matter, many of the recent bilateral treaties either refer to the New York Convention or reproduce its content.[158]

These articles have been interpreted in the sense that the list of grounds to refuse as present in Article 36 is exclusive and should be subject to a narrow interpretation. Courts of the Model Law jurisdictions have been defending that there should be no jurisdiction to refuse enforcement beyond the grounds expressed in Article 36(1). The bare use of the term *shall* in Article 35(1) of the Model Law renders the mandatory sense perfectly clear.[159]

Despite the developments and achievements brought by the New York Convention, there were still too many differences among the jurisdictions. This was why the Model Law came to light, although it basically reproduced the same legal provisions on the governance of recognition and enforcement of annulled awards in its Article 36. [160]

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157 As examples, we have the judicial cooperation agreement between Portugal and Angola, Portugal and Mozambique, Portugal and Cape Vert, etc. *See* ELSA DIAS OLIVEIRA, *Reconhecimento de Sentenças arbitrais estrangeiras*, *in* REVISTA INTERNACIONAL DE ARBITRAGEM E CONCILIAÇÃO, 74, 75 (2012).

158 LEW ET AL., *supra* note 95, at 696; BORN, *supra* note 1, at 3435.

159 BORN, *supra* note 1, at 3436.

160 Teramura, *supra* note 1, at 79; *See* United Nations Commission on International Trade Law (UNCITRAL), Model Law on International Commercial Arbitration, 1985 U.N.G.A. Res. 40/72 (Dec. 11, 1985), as amended by U.N.G.A. Res. 61/33 (Dec. 18, 2006): "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice"; *See also* Commonwealth Secretariat, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION,

Until the enactment of the Model Law, each arbitration law had its own grounds for vacating an award. With its wide adoption, more than 60 countries conformed their regimes to the Model Law, despite slight deviations here and there. Nevertheless, some of the most influential jurisdictions when it comes to international commerce, such as France, Switzerland, United Kingdom, or the United States, have not adopted the Model Law.[161]

VIII. Article VI

Article VI of the New York Convention leads to local remedies in cases of court judgment deficiencies. Under this article, pending the setting aside proceedings, the enforcement court may suspend the enforcement application until the courts of the country of origin issue a final and binding decision on the matter.

When deciding to grant, or not, the suspensive effect to the appeal, Article VI works as a *media via* since otherwise it could provide too great a space for delaying tactics.[162]

Given that arbitration works as an alternative to the inefficiencies of international litigation, courts should be exigent when deciding on granting suspension to recognition. Delaying recognition will only frustrate the parties' goal and encourage abusive tactics by the losing party. This might even provide enough time for the debtor to become insolvent, or be unable to satisfy the award due to any other reason.[163]

EXPLANATORY DOCUMENTATION PREPARED FOR COMMONWEALTH JURISDICTIONS 5 (1991); Paulsson, *supra* note 1, at 24.

161 Pavic, *supra* note 9, at 144.

162 UNCITRAL Guide, *supra* note 1, at 124, 207-08; BORN, *supra* note 1, at 3608-3609; Darwazeh, *supra* note 1, at 308-309; Albert Jan van den Berg – Setting Aside, *supra* note 15, at 263, 286; Paulsson, *supra* note 1, at 9.

163 BORN, *supra* note 1, at 3724-3725.

Paulsson's proposal[164] would also impact the interpretation given to Article VI: by only granting the adjournment of the enforcement action, if an international standard annulment is likely to materialize in a given case, then it would place the burden of proof on the resisting party.[165]

It has been generally understood that when it comes to examining their recognisability, set aside judgements fall within the scope of domestic laws on recognition and enforcement of foreign judgments.[166]

When it comes to the recognition and enforcement of domestic awards, the national legislator is completely free to legislate as he deems fit, since there is no international legal instrument as we have for governing foreign awards. Nonetheless, arbitration laws have also been adopting a pro-enforcement approach when it comes to domestic awards, providing refusal only under a very short list of reasons (sometimes the recognition is even automatic, with any decision having only a declaratory character).[167]

As we touched upon previously, the New York Convention represented a series of victories, which can be attested by its rate of implementation and adoption. However, it did not represent the end of the development of international arbitration. There were still needs to take care of, such as the need for more harmonized international standards and less differences among jurisdictions. The Model Law was meant to bring exactly that: Articles 35 and 36 provided that the awards should be recognized, unless

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164 *See* Paulsson, *supra* note 1, at 17.
165 *Id.* at 27-28.
166 Teramura, *supra* note 1, at 116.
167 LEW ET AL., *supra* note 95, at 691-92.

one of the specific listed grounds was present in the case. This list of grounds essentially reproduces Article V of the New York Convention.[168]

IX. Conclusion

The New York Convention was intended to: (i) address the shortcomings of the Geneva Protocol and Convention and by doing so, facilitate (and encourage) the recognition and enforcement of international arbitration agreements and awards; (ii) provide a maximum level of control which Contracting States may exert over arbitral awards; (iii) serve international trade and commerce and (iv) promote cross-border arbitrations by providing a globally applicable common international minimum standard.

These goals were pursued through the establishment of universal deference to foreign arbitral awards seeking recognition abroad, once they met the minimum formal requirements. The parties were also granted safeguards provided in Article V, in the form of grounds laid down for refusing the recognition of foreign arbitral awards, which would have to be proven by the resisting party. The New York Convention was not intended to establish a unitary regime for the refusal of recognition and enforcement, but was rather just facing the challenges of the time and providing uniform international grounds on which enforcing courts might refuse recognition.

Regarding the recognition of arbitral awards, the New York Convention is structured in the following way: Article III requires Contracting States to recognize foreign arbitral awards, provided that the minimum proof requirements are met. Except if any of the situations given in Article V are satisfied, then the Contracting State is no longer under the obligation to recognize the award, rendering the situations of this provision as exceptions to the affirmative obligation established in Article III.

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168 BORN, *supra* note 1, at 3436.

Nevertheless, according to Article VII, the provisions shall not affect the validity of other legal, bilateral or multilateral agreements, if found more favourable than the New York Convention standards.

There have been five different ways presented to treat the recognition and enforcement of foreign annulled arbitral awards: (i) the court should refuse its enforcement; (ii) there would be a discretionary power granted to the enforcing court to decide whether to enforce the award or not; (iii) the court should analyse the recognition of the judicial judgment which set aside the award; (iv) the enforcing court could apply domestic law through Article VII of the New York Convention (*the more favourable right provision*); and (v) there could be amendments made to the New York Convention, adapting it to the needs and wishes of the international community.

Despite the fact that annulment of an award does not put an end to its existence, the arbitration proceedings and the award's validity are closely related to the legal order where the arbitration takes place, not only for the arbitration to be able to proceed properly and to render effective the arbitrator's decisions, but also for the States to be comfortable enough to provide room for the arbitration to flourish.

At the same time, despite the fact that both the objectives of the New York Convention and the sovereignty of the countries should not be neglected, the author does believe that judgments that decide the underlying dispute should receive a higher degree of deference than those which set aside foreign arbitral awards. The consequences of the recognition and enforcement are mostly felt in the enforcing country. Consequently, the right way to solve this problem would be through the third solution of analysing the recognition of the judicial judgment which sets aside an award, with a presumption of its validity, which is also respected by the placement of the burden of proof on the counter party. Thus, it becomes the Contracting State's responsibility to re-examine the judicial decision.

What the enforcing judge will do here is essentially, determine if the grounds to vacate the award were in conformity with international and its national (*vide* Article VII) standards, and enforce it, or not, depending on the findings. If an award is in conformity, the court would simply enforce it.