

The effect of an annulled award on its recognition and enforcement: to enforce, or not to enforce?

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Having been drafted in a permissive, rather than mandatory fashion, the New York Convention provides domestic courts with discretionary powers in relation to the enforcement of annulled awards. The present paper focuses on the issue whether such awards should be enforced or not, and more specifically, whether the enforcing courts should defer to the annulment decision or, on the contrary, give effect to the annulled award itself.

It is the view of this author that while the annulment decisions of courts at the arbitral seat should be deferred to, and be taken into full consideration by enforcing courts, the latter should still have the discretionary authority to enforce or not to enforce such an award. This paper concludes that the threshold for enforcement of annulled awards should be very high, yet attainable.

Introduction

Challenging an arbitral award successfully and getting it set aside can indeed be a challenging task. However, even when a party succeeds in the challenging proceedings, it is not necessarily the end of the matter: a foreign court seized with the enforcement application of the annulled award may disregard the decision of annulment at the arbitral seat, and may recognize and enforce such an award in its forum². In other terms, awards that are seemingly “dead and buried” can sometimes be resurrected or haunt the losing party in other jurisdictions where enforcement of the award is sought³. Other courts, on the other hand, may reject the idea of enforcing awards that were set aside in the country where they were rendered, and rely on the decision of annulment of the respective foreign court⁴.

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² This conclusion is drawn by the analysis of legal acts and case law of France, USA and England. More discussion follows in Section II.

³ Petit, Sherina; Grant, Ben; *Awards set aside or annulled at the seat*, *International Arbitration Report*, published by Norton Rose Fulbright, Issue 10, May 2018, p. 20

⁴ This conclusion is drawn by the analysis of legal acts and case law of Sweden, Italy, the Netherlands, USA and Switzerland. More discussion follows in Section I.

These contradictory approaches for enforcement of annulled awards result from divergent interpretations of articles V(1)(e) and VII(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 7 June 1959 (hereinafter referred to as “the New York Convention” or “the Convention”). The above-mentioned articles read as follows:

Article V

1. 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.

Article VII

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

The issue is that article V(1)(e) is drafted in a permissive, rather than mandatory fashion, using the term “may” instead of “shall”. This ambiguity in conjunction with “favorability” principles set out in article VII(1) has enabled several enforcing courts to consider that they have discretion to enforce an award even if it is not binding or if it has been set aside or suspended in the country of origin.

The present paper focuses only on the enforcement issues of the awards that have been set aside. The objective is to find out whether such awards should be enforced or not, and more specifically, whether the enforcing courts should defer to the annulment decision or, on the contrary, give effect to the annulled award itself. In order to accomplish this objective, this paper analyzes both sides of the issue and presents an overview of contrasting reasons why the enforcing courts should (Section I) and should not (Section II) refuse the enforcement of the award on the ground that it has been set aside. The presentation includes case law illustrations as well as opinions of commentators, scholars and legal practitioners.

Section I. The enforcing court should refuse the enforcement of an annulled award

In legal doctrine, the suggested reasons why the annulment of an award should hold the enforcing courts back from recognition and enforcement are multiple. Firstly, an annulled award does not have any legal force and effect: it has ceased to exist (in case of setting aside), or has never existed (invalid *ab initio* and *ipso facto*) (§1). Secondly, the enforcing courts should intervene less in the procedural and substantive details of the award. They should rather recognize and rely on the review exercised and the outcome accomplished by the courts having the jurisdiction to set aside the award (§ 2). Thirdly, the enforcing courts should honor the parties' agreement to arbitrate their dispute in a particular country or under the laws of a particular country, including their decision to benefit from the rights of recourse allowed under such laws (§ 3).

§ 1. The award has been set aside: there is nothing to enforce!

This approach grants paramount importance to the seat of arbitration, and is characterized as “territorial approach”. Under this approach, “the seat anchors the arbitration to the legal order of the State in which it takes place”.⁵ The territorialists thus find that the courts at the arbitral seat are the most relevant authorities to pronounce upon the regularity of arbitration, and their decision shall be accepted by foreign courts trying the enforcement of arbitral awards.

Professor Albert Jan van den Berg is of the opinion that the annulled award is “legally dead” and *ex nihilo nil fit* (nothing comes from nothing). In his view, the law of the arbitral seat is the primary source of an award's legal force and effect. Consequently, the annulment of an arbitral award by the courts at the arbitral seat shall deprive the award of force in all other countries⁶.

Mr. Gary B. Born has also discussed the question stating that if an award is “annulled,” “set aside,” or “vacated” in the place where it was made, then the award arguably ceases to have legal effect or

⁵ Gaillard, Emmanuel; *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in Albert Jan van den Berg (edit.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention*, ICCA Congress Series, Volume 9 (1999) pp. 505 – 527, at p. 506.

⁶ Berg, Albert Jan van den; “*Enforcement of Annulled Awards?*”, 9(2) The ICC International Court of Arbitration Bulletin 15 (1998) - 1998

existence (or becomes null), at least under the laws of the state where it was annulled, just as an appellate court decision vacates a trial court judgment.⁷

Prof. Pieter Sanders has taken it even further announcing that the enforcement of a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement!⁸

The territorial outlook is also the prevailing choice by most of the courts. For instance, in *TermoRio SA v Electranta (2007)*⁹, a US court held that an award which had been set aside “does not exist to be enforced” in other Contracting States to the New York Convention. In addition, in another enforcement case in Germany¹⁰, the Rostock Court of Appeal held, inter alia, that “an award is no longer binding when it has been set aside by a competent court”. Notably, a similar conclusion was reached by the French Cour d’Appel in *Société Norsolor v. Société Pabalk Ticaret Limited Sirketi*¹¹, where the court stayed the enforcement proceedings pending the outcome of the challenge at the arbitral seat. The Court ruled that “if the award was to be set aside, the enforcement proceeding would be without object”. It was an unusual approach for a French court. The courts of France are famous partisans of the “delocalized” approach, hence it came as no surprise, that the French Cour de Cassation later overturned the decision of the Cour d’Appel.

§ 2. Less intervention, more respect

A further reason again supported by the territorialists why the enforcement of annulled arbitral awards shall be refused, and the setting aside decision of the competent authority at the seat shall be respected, is that the principal review of an arbitral award must take place at the seat of arbitration¹². Instead of the dual system of control over international arbitration – first, by the courts at the seat of arbitration, followed by the courts at the place of enforcement – this argument has thus ambition to introduce a single judicial supervision mechanism to be conducted exclusively at

⁷ Born, B. Gary; *International Commercial Arbitration*, 2nd edition, Kluwer Law International 2014 p. 3389

⁸ Sanders, Pieter; “*New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*”, Neth. Int’l L. Rev. 6 (1959): 55

⁹ *TermoRio S.A. E.S.P. (Colombia) v. Electranta S.P. (Colombia)*, decided May 25, 2007, p. 15

¹⁰ *Hague Yearbook of International Law / Annuaire de La Haye de Droit International*, Vol. 24 (2011) (BRILL 2012), p.393

¹¹ *France / 09 October 1984 / France, Cour de Cassation / Société Pabalk Ticaret Limited Sirketi c. Société Norsolor / 83-11.355* (1984).

¹² Kronke, Herbert, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), page 326

the seat. Otherwise, the authority of the enforcing court to independently assess potential defects of the arbitral award and procedure, and grant the enforcement of an award despite its annulment may have far-reaching consequences¹³.

First, this will prevent the party from attempting *forum shopping* and pursuing its adversary “with enforcement actions from country to country until a court is found that will enforce the award”¹⁴. Regarding this issue, Chief Justice of Singapore Sundaresh Menon has expressed the view that “we have seen the re-litigation of identical issues in different enforcement proceedings in different courts. This is bound to increase costs and further erode the value of finality”¹⁵. In order to avoid this situation, Mr. Gary B. Born puts forward the idea of the preclusive effect of the non-recognition decision in other jurisdictions¹⁶.

Second, the double judicial supervision by enforcing courts over the awards may entail inconsistent results and devalue the fundamental principle of uniformity of international arbitration intended by the New York Convention.

When speaking about inconsistent results, it is worth discussing the *Hilmarton case*¹⁷, where notwithstanding that an award had been set aside in Switzerland – seat of arbitration, it was eventually enforced in France. The dispute concerned the payment of a commission, which pursuant to the award, was not due. Subsequently, a second award was rendered in Switzerland finding that the payment is in fact due, and was thus in direct contradiction with the first one. When the winning party tried to enforce the second award in France, the Cour de Cassation finally rejected the enforcement, reasoning that the first award which had been enforced in France, created an obstacle for enforcement of the second, conflicting award, due to its *res judicata* effect.

By relying on the setting aside decisions by the courts of the arbitral seat and manifesting reluctance to intervene in the review of the arbitral award already tried by the latter, the enforcing court will show its respect towards the high authority of those courts based on the international comity

¹³ Petit, Sherina; Kajkowska, Ewelina; *The Guide to Challenging and Enforcing Arbitration Awards, Global Arbitration Review*, published in June 2019

¹⁴ Berg, Albert Jan van den; *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation (“NYC”)* (Deventer/Boston: Kluwer Law and Taxation Publishers, 1981), at 355

¹⁵ Menon Sundaresh (Chief Justice of Singapore) Menon, ‘CIArb London Centenary Conference’ (2015).

¹⁶ Born, B. Gary; ‘Chapter 25 : Annulment of International Arbitral Awards’, *International Commercial Arbitration* (2nd editio, Kluwer Law International 2014).

¹⁷ *France / 23 March 1994 / France, Cour de Cassation / Société Hilmarton Ltd v. Société Omnium de Traitement et de Valorisation (OTV) / 92-15.137* (1994).

principle. Below is an illustration of how the US courts, one of the most controversial ones in terms of enforcing annulled awards, have reasoned on international comity.

In *Baker Marine*¹⁸, *Spier*¹⁹ and *Termorio*²⁰ cases, the US courts refused the enforcement of annulled awards, relying on principles of international comity. One can deduce from the analysis of the above-mentioned cases that the ultimate standard for the US courts in this connection is that the annulment shall “rise to the level of violating basic notions of justice or be procedurally unfair such that the Court here should ignore comity considerations”.²¹ Unless there is an adequate reason for refusing to recognize the setting aside decisions, they shall be recognized, notwithstanding that the courts have discretionary powers with respect to deferring to or not those decisions. In the stated cases, the US courts have thus not found any adequate reasons for disregarding foreign annulments.

§ 3. Honoring the parties’ agreement: the parties know best

There may be various reasons behind the designation by the parties of a particular forum for the settlement of their dispute. The parties may opt for a particular seat *inter alia* for its arbitration legislation, since the law of the seat of arbitration is subsequently the law governing the arbitration (*lex arbitri*). Despite continuous attempts of harmonization of arbitration laws, they still vary in different countries and will continue to do so²². These differences may be manifested through specific public policy rules, a proper approach with respect to the arbitrability of matters and the like. These questions of mandatory character are out of the spectrum of party autonomy and must be complied with. While party autonomy thus plays an exceedingly important role, the ultimate benchmark is always the *lex arbitri*²³. Therefore, the *lex arbitri* must be an important consideration for the parties before deciding on a particular seat of arbitration.

Once the parties have agreed on an arbitral seat, they acquire access to the rights of recourse permitted for arbitrations conducted therein. The consequence is twofold: for the parties, it is no longer possible to escape the nullification proceedings of the courts of the country elected by the

¹⁸ ‘Baker Marine, 191 F.3d 194 United States Court of Appeals, Second Circuit. August Term, Aug 13, 1999

¹⁹ ‘Spier v. Calzaturificio Tecnica SpA, 663 F. Supp. 871 (S.D.N.Y. 1987)’ (*Justia Law*)

²⁰ ‘TermoRio S.A. E.S.P. (Colombia) v. Electranta S.P. (Colombia), decided May 25, 2007

²¹ This reference to William W. Park has been used by Kirsten (Eversheds) Teo, ‘Annulment, Recognition and Enforcement of Arbitral Award, Set aside an International Arbitral Award’ [2019] Kluwer Arbitration.

²² Hobér, Kaj; “*International Commercial Arbitration*”, Oxford University Press, 1st edition, 2011, p.37

²³ This reference to Mann, *Lex Facit Arbitum, in International Arbitration*, has been done by Professor Kaj Hobér in *International Commercial Arbitration*, Oxford University Press, 1st edition, 2011, p.36

parties through the choice of the arbitral seat. As far as the enforcing court is concerned, the parties naturally expect it to honor, and to be bound by their agreement.

Many countries in the world attach significant importance to the seat of arbitration and consequently rely on the “territorial approach” with respect to the recognition and enforcement of awards. This explains why nowadays the arbitration laws of many countries use such a language that prohibits the courts of law from considering enforcement of awards that have been set aside to be an option. For instance, the Swedish Arbitration Act in its Section 54 concerning the refusal of enforcement and recognition of arbitral awards in Sweden, uses the term “shall” contrasting the term “may” employed in the New York Convention. The same approach has been taken by Italy, Switzerland, China and the Netherlands where the respective provisions of their arbitration acts envisage that the annulment of an award at the arbitral seat creates a mandatory, not discretionary, ground for refusal. However, in practice there are some extraordinary cases where courts have departed from the classical “territorial approach”. For example, a relatively recent case decided by the Amsterdam Court of Appeals *Yukos Capital S.A.R.L. v. OAO Rosneft*²⁴ suggests that the Dutch Courts are willing to move away from a strict “territorial approach”. On this note, it would be interesting to discuss what the “delocalized approach” of recognition and enforcement of annulled arbitral awards has to offer.

Section II. Courts may still recognize and enforce annulled awards

Beside the “territorial approach” rejecting enforcement of annulled awards due to the importance of the arbitral seat, there exists a different concept of arbitration characterized as “delocalized approach”. Pursuant to this concept, the seat of arbitration is chosen for little more than the sake of convenience and the arbitrators operate in an international forum detached from any particular national forum and guided solely by the agreement²⁵.

The “delocalized approach” seems to derive from the non-mandatory nature of Article V(1)(e) as well as from Article VII(1) of the New York Convention which allow the party seeking enforcement to rely on a more favorable provision in the country where the enforcement is sought.

²⁴ Netherlands: *Yukos Capital S.A.R.L. v. OAO Rosneft*, Decision of the Amsterdam Court of Appeal rendered on April 28 2009 in case no. 200.005.269/01

²⁵ Kronke, Herbert, *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International, 2010), page 330

The following section addresses the main arguments underpinning the “delocalized approach” and opposing the contentions put forward by the supporters of “territorial approach”.

§ 1. Articles V(1)(e) and VII(1) favor the enforcement of set-aside awards

The discretionary language of Article V(1)(e) coupled with VII(1) of the New York Convention provide the courts with freedom when it comes to refusing the enforcement of annulled awards. The argument that enforcing courts have discretion and freedom concurrently constitutes a counter-argument of the suggestion of territorialists that once the award has been set aside, it ceases to exist. According to the supporters of “delocalized approach”, this submission explicitly conflicts with the wording of the New York Convention, which would not make any sense where the enforcing courts were bound to refuse the enforcement of set-aside awards. In this regard, van den Berg has argued that enforcing courts are not required to refuse enforcement if they are convinced that enforcement would be proper²⁶.

Thus, in *Yukos Capital SARL v OJSC Rosneft Oil Company*²⁷ a number of arbitral awards were recognized and enforced by the English courts notwithstanding that they had been set aside in Russia. The English court rejected the argument that the awards no longer existed since they had been set aside, but rather held that the annulment was a result of a “partial and dependent judicial system” and should therefore be disregarded in the enforcement proceedings. Interestingly, a similar conclusion was reached by the Dutch court trying analogous cases involving the same award as in the English case. It should be highlighted, however, that in some other cases the Dutch and English courts have refused to enforce such awards. This is the case for *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*²⁸ tried by English courts.

Furthermore, the proponents of “delocalized approach” find that Article VII(1) is mandatory in the sense that if a more favorable rights exist in the country where enforcement is sought, the enforcing court must grant the application even if a ground to refuse exists under the New York Convention²⁹. The rationale behind this approach may be that the New York Convention is the lowest common denominator and only establishes minimum requirements pertaining to the enforcement of awards.

²⁶ Berg, Albert Jan van den; *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (“NYC”) (Deventer/Boston: Kluwer Law and Taxation Publishers, 1981), p. 265

²⁷ *Yukos Capital Sarl v OJSC Oil Co Rosneft* [2014] EWHC 2188 (Comm) (03 July 2014)

²⁸ *Maximov v Novolipetsky Metallurgichesky Kombinat*, [2017] EWHC 1911 (Comm) (27 July 2017)

²⁹ Thurén, Martin Persson; *Enforcement of Annulled Arbitral Awards*, Master’s thesis, Uppsala Universitet, 2017

Therefore, in the scenario where a country has a more favorable framework for enforcing awards (national law or international treaties), that more favorable regime should prevail.

This is exactly the approach that the French courts have taken in numerous cases ruling that the French domestic law does not envisage setting-aside as one of the grounds for refusing the enforcement. In *Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A.*³⁰, the Cour de Cassation held that under Article VII(1) of the New York, the enforcement forum had a duty to determine whether its own law would allow enforcement notwithstanding Article V(1)(e) of the Convention. It went on to grant enforcement of the award based on the relevant French law provision allowing enforcement of set-aside awards. A similar conclusion was reached in the *Polish Ocean Line case*.³¹ In *Hilmarton v Omnium*³², the Cour de Cassation took it further and held that an international award was not integrated into the legal order of the country of arbitral seat, therefore, its existence continued in spite of the setting aside, and that its recognition in France was not contrary to international public policy. A similar ruling can be found in *Chromalloy Aeroservices v Arab Republic of Egypt case*.³³

Thus, Article V(1)(e) has virtually no relevance for France where a more liberal domestic regime for enforcement is in place. Nevertheless, the French approach addressing the interplay between Articles V(1)(e) and VII(1) cannot be easily “exported” when there is no comparable enforcement regime in a domestic law as is the case in the US³⁴.

§ 2. The seat of arbitration does not really matter

One of the characteristics of international arbitration is that the parties come from different countries. If the parties agree on a place of arbitration only by way of compromise or for the sake of convenience, the idea that courts at the arbitral seat have the power to annul an award, let alone that such an annulment may have an international effect, is outdated³⁵. In addition, the focus of the parties when electing an arbitral seat is not necessarily the jurisdiction of a particular court.

³⁰ Decided Oct. 9, 1984 by Court of Cassation, France

³¹ Decided Mar. 10, 1993, *Rev. Arb.* 1993 (at 258–259) = *YCA XIX* (1994), 662 (Court of Cassation, France).

³² Cour de cassation (*Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, decided Mar. 23, 1994), *YCA XX* (1995), 663 (Court of Cassation, France).

³³ *Chromalloy Aeroservices v. The Arab Republic of Egypt*, 939 F. Supp. 907 (decided 1996)

³⁴ V. LAZIĆ-SMOLJANIĆ, *Enforcing annulled arbitral awards: a comparison of approaches in the US and the Netherlands*, *Zbornik Pravnog fakulteta Sveučilišta u Rijeci*, vol. 39, br. 1, p. 219

³⁵ Paulsson, Jan; “*Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*,” *ICC Bull.* 9, no. 1 (1998): 20

Moreover, the parties may not even designate an arbitral forum, leaving that determination to the discretion of arbitrators, in which case the influence of the court at the seat should be excluded.

Even if the enforcing court, based on the principle of international comity put forward by the territorialists, decided to refuse enforcement of a set-aside award, in certain circumstances this approach may undermine arbitration as an effective international dispute resolution mechanism. In fact, when the annulment of the award is based on purely local and not internationally recognized standards for setting aside awards, the refusal only on grounds of international comity would seem unreasonable. For instance, it would be unreasonable to refuse enforcement of an award which has been set aside for violating a local rule that all members of the tribunal be men or of a particular religious confession³⁶. Thus, the enforcing court should have the possibility to evaluate the properness and objectiveness of the reasons underpinning the annulment.

In *Cromalloy case*³⁷, the US court enforced an award set aside in Egypt following a detailed substantive judicial review, notwithstanding that the parties had waived any such review. The US court reasoned that the US public policy favoring final and binding arbitration of commercial disputes compelled it to enforce the award in spite of its annulment at the seat.

More recently, the US court enforced an annulled award in the *Corporación Mexicana de Mantenimiento Integral, S De RL De CV v Pemex-Exploración y Producción*³⁸ case. The arbitral award at issue had been set aside in Mexico on the ground that Pemex, as an entity deemed part of the Mexican government, could benefit from immunity and could not be forced to arbitrate. It was held that the US court's deference to the Mexican court's annulment would run against the US public policy in favor of enforcement.

It is also noteworthy that for the supporters of the "delocalized approach", the concern of inconsistent results is more theoretical than real. They argue that in practice, "an award sufficiently

³⁶ Lastenouse, Pierre; "Why Setting Aside an Arbitral Award is not enough to remove it from the international Scene," *J. Int'l Arb.* 16, no. 2 (1999): 44.

³⁷ *United States / 31 July 1996 / United States, U.S. District Court, District of Columbia / Chromalloy Aeroservices v. Arab Republic of Egypt / 94-2339* (1996).

³⁸ *Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion*, No. 13-4022 (2d Cir. 2016)

defective to be set aside in country A will not pass muster under the autonomous enforcement criteria of country B”.³⁹

As for the avoidance of the dual system of control over international arbitration, in contrast with the “territorial approach” insisting on the importance of judicial supervision at the arbitral seat, the “delocalized approach” suggests replacing the dual system with only one form of judicial supervision to be conducted by the enforcing courts. The rationale behind this suggestion is that the international arbitration flourishes on the presumption that the country of origin would retain only a minimum degree of oversight and control over the arbitral process⁴⁰. Besides, in some jurisdictions the parties can, subject to some reservations, enter into exclusion agreements refraining from challenging the arbitral award. This is the case in Sweden, for example. The role of enforcing courts becomes even more significant in this context. To summarize, judicial supervision by the enforcing courts can therefore ensure the uniformity and inconsistency the territorialists seem to be worried about.

Concluding remarks

Having been drafted in a permissive manner, the New York Convention provides domestic courts with discretion in relation to the enforcement of annulled awards. Different courts have used these discretionary powers in a convergent manner. As a result, two contradictory approaches as to the issue of enforcement have arisen – “territorial” and “delocalized”.

In my view, as far as the importance of the arbitral seat is concerned, the territorial approach is reasonable. The arbitration cannot exist in the legal vacuum. Even if we consider that the arbitration should be detached from the national laws and carry an existence on its own, such possibility shall firstly find its roots in the respective legal acts⁴¹. On the other hand, the approach aimed at depriving the courts from determining whether the enforcement shall or not shall take seems too restrictive. There have been cases where the refusal to defer to the annulment decision have been absolutely justified. For instance, when the annulment procedure has been tainted by procedural errors, or when the local public policy standards or arbitrability rules have based the ground for annulment,

³⁹ Berg, Albert Jan van den; *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (“NYC”) (Deventer/Boston: Kluwer Law and Taxation Publishers, 1981), 336

⁴⁰ Wahl, Philipp; “Enforcement of Foreign Arbitral Awards Set Aside in Their Country of Origin – The Chromalloy Case Revisited,” *J. Int’l Arb.* 16, no. 4 (1999)

⁴¹ Hobér, Kaj “*International Commercial Arbitration*”, Oxford University Press, 1st edition, 2011

or when the court has exercised an extensive substantive review of the award, the enforcing court may be deemed to have the liberty not to unconditionally follow those decisions. There should be a way out.

However, the threshold to enforce annulled awards should be very high, but still not impossible to attain. The high threshold, from my perspective, should correspond to the internationally recognized grounds of setting aside. For instance, the European Convention on International Commercial Arbitration of April 21, 1961 envisages that an award that has been set aside at the arbitral seat may only justify a refusal of enforcement elsewhere if the grounds for the set-aside are among those recognized by the Convention itself, which reflects the grounds set forth in article V(1) of the New York Convention. This approach sounds the most optimal one and has the potential to ensure predictable and objective results.

Concurrently, the national courts should be trusted to the extent to be able to take pragmatic, sophisticated and flexible approach as to whether to refuse or to grant the enforcement. It is thus very important to establish a balanced approach. It has been suggested that a balanced approach can be efficiently put into practice through the constitution of an international body formed under the New York Convention, which would have the sole authority to annul awards⁴². The respective decision shall then be mandatory for all the member-states of the New York Convention. This suggestion, however, sounds too ambitious, as it will require the consent of all the member-states, which will supposedly be hard to obtain.

⁴² Thadikkaran, Manu; *Enforcement of annulled arbitral awards: What is and what ought to be?* 31 J. Int'l Arb. (2014) pp. 575-608, at p. 603 et seq.