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‘‘The Enforcing Courts ‘Discretion’ under the New York Convention: How much discretion lies with enforcement courts towards foreign arbitral awards?’’

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Contents

A. Introduction

Although most national laws and arbitration rules such as the UNCITRAL arbitration rules[1] and the ICC rules[2] state that arbitral awards are final and binding and parties must respect the decision of the arbitral tribunal, it does not mean they are directly enforceable without national judicial assistance.[3] Arbitral awards are not automatically enforced, even in countries where the arbitration process was held (the seat of arbitration) although most awards are voluntarily complied with.[4] When a losing party refuses to comply, then the award may need to be given legal effect by the courts of the country where enforcement has been sought, taking the form of a judgment or an enforcement order.[5] However, the near universal adoption of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral awards (New York, 10 June 1958) (hereinafter the NYC or the Convention) was considered a most significant achievement in the international arbitration field, having been ratified by 154 states.[6] The

[1] UNCITRAL Arbitration Rules (as Revised in 2010) <www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf> Accessed on 27 May 2015

[2] ICC Arbitration Rules (2012) <http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/> Accessed on 27 May 2015

[3] Margaret Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, Cambridge 2008) p84

[4] R. Doak Bishop and Elaine Martin, 'Enforcement of Foreign Arbitral Awards' <http://www.kslaw.com/library/pdf/bishop6.pdf> p1, Accessed on 15 August 2015

[5] M Moses, ibid

[6] New York Arbitration Convention, <http://www.newyorkconvention.org/news> Accessed on 06 June 2015

Convention, as the cornerstone of international commercial arbitration,[7] provides a straightforward and clear direction to the member states to recognise and enforce international (foreign) arbitral awards.[8] Its main aims are to provide legal effect to agreements and to arbitrate and enforce international arbitral awards in the member states regardless of where the arbitration process is held.[9] Although there should be little scope for amending its provision once adopted, different interpretations of the NYC provisions by national courts and differences in their implementation have led to inconsistency in national treatments of arbitration agreements and arbitral awards. This has had the effect of thwarting the aims of harmonising the law in this area as intended by the Convention. However, as Professor Mauro Rubino notes, ''… the Convention did leave to each state some latitude. It is therefore up to that state to exercise, with prudence, the discretion which it has under its laws''.[10] The question is, how much discretion there should be and where balance of power should lie.

The provisions of the NYC create an overlap between the jurisdiction of courts at the seat and the enforcing court's jurisdiction, in particular the grounds for refusal of enforcement provided under Article V of the Convention (identical to the grounds for 'setting aside' arbitral awards by the

[7] ICCA's Guide to the Interpretation of the 1958 New York Convention, International Council For Commercial Arbitration, <http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf> p7, Accessed on 6 June 2015

[8] N Blackaby and others, *Redfern and Hunter on International Arbitration*, 5th Edition – Student Version (OUP, Oxford 2009) p634

[9] Articles II and III of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 10 June 1958) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf> Accessed on 06 June 2015

[10] M Rubino, *International Arbitration Law and Practice*, 2nd Edition (Kluwer Law International, Netherlands 2001) p929

court of the seat provided by the UNICTRAL model law)[11]. This symmetry gives rise to a dual process that the awards may have to go through.[12] Article V provides specific and limited grounds for refusing the enforcement of an award that a party against whom it is invoked must prove to the courts of the country wherein the recognition and enforcement is sought. The courts of the member states cannot allow for more than those exclusive grounds even when the arbitrator committed mistakes in fact or law.[13]

Despite the concept of finality of arbitral awards, it is recognised globally that in certain cases, awards may be annulled, challenged or remain unenforced. The question is, who should make that decision and where? Although the ‘‘Seat’’ is given priority in terms of supervision, this is not given global recognition, and cases have been seen where decisions at the seat have been disregarded when it comes to actions for enforcement before courts of other countries. This makes it difficult for parties to anticipate with certainty when action is required and where and similarly difficult for legal advisers to give clear and unequivocal advice. This has led parties go ‘forum shopping’ among courts of different jurisdictions to find a court that permits the enforcement of the arbitral award that has been set aside by the courts at seat.[14] The question therefore is how much discretionary power enforcing courts have to enforce annulled awards.

[11] UNCITRAL Model Law on International Commercial Arbitration (1985) with amendments as adopted in (2006) <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> Accessed on 06 June 2015

[12] E Gaillard and D Pietro (edts), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Convention in Practice* (Cameron, UK 2009), p43

[13] E Gaillard and D Pietro, ibid, p56

[14] L Silberman and M Scherer, ‘Forum Shopping and Post-Award Judgments’ (2013) New York University Public Law and Legal Theory Working Papers, p313

In practice, the majority of NYC member states show a pro-arbitration stance in both enforcing arbitration agreements and arbitral awards.[15] However, the controversy arises on whether an award made in a specific country is related to the legal system of that country and therefore up to that country's courts to decide on the validity of such an award.[16]

In discussing the underlying issues, the positions that foreign enforcement courts have taken towards a foreign award after the courts of the seat have decided on it, either by confirming the award or setting it aside will be reviewed. In the case where a court of the seat confirms an award, the question is how much scope a foreign enforcement court has to re-examine the validity of the award. Similarly, in the case where the court of the seat has set aside an award, what are the grounds for deciding whether or not to enforce it particularly in light of Article (V.i.e). For this, leading (and recent) cases from different jurisdictions will be reviewed. It is also relevant to discuss where a party fails to take action at the courts of the seat and the impact of this on enforcement of the award.

Therefore, this paper will focus particularly on Article V of the Convention, the article which provides the grounds to resist enforcement of foreign arbitral awards and will start with an outline of the key principles of international commercial arbitration and the general theory of the enforcing court's discretion, according to the NYC. The second part will look at the practice of the enforcing court's discretionary power under Article V and the scenarios seen during the implementation of the grounds mentioned in the article. Those scenarios exist in three different situations depending on

[15] ICCA Guide to the NYC, ibid, p7

[16] M Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, Cambridge 2008) p2

the position taken by the courts of the seat; namely, whether the award has been confirmed or set aside, or where no action has been taken by the parties and accordingly, the position taken or that should be taken by the enforcing courts. The paper will goes on to consider whether reform is required internationally to address the uncertainty or whether in fact the position is sufficiently usable and consistent with the aim of the current international instruments especially the NYC.

B. Background to International Commercial Arbitration (ICA)

Arbitration as an alternative dispute resolution is handled by private persons not belonging to any governmental body,[17] the power they have in resolving disputes being based on the parties agreement to arbitrate. However, it is obvious that arbitrators cannot proceed the arbitration alone without the assistance of the judicial system of the country in different aspects. Therefore, it is necessary to clarify some of the principles of international commercial arbitration and its relationship with state courts.

i. Role of the Courts in the ICA

Fundamentally, law is what make the arbitration agreements respected nationally and internationally. Since the courts are the enforcers and protectors of the law, there may be some truth when saying that arbitration would not exist without the courts.[18] Such legal assistance to arbitration can be referred to at different stages of the arbitration procedures. Before the beginning of arbitration, the national laws restrict the parties' autonomy to resort

[17] Gary Born, *International Commercial Arbitration*, 2nd edition (Kluwer Law International, Hague 2001) p1
[18] ibid

to arbitration by determining the subjects and matters that can be solved through arbitration.

At the beginning of arbitration proceedings, the national courts may play a key role. National courts help to enforce the arbitration agreement by not accepting proceedings in court where an arbitration agreement between parties has been made.[19] National Courts may also intercede if the parties fail to make adequate provision for the constitution of an arbitral tribunal and if there are no applicable institutional or other rules, the intervention of a national court may be required to appoint the arbitral tribunal, the chair-person, or respondent's arbitrator.[20] During the arbitration process, the national courts may have to rule on challenges to jurisdiction of the arbitral tribunal when one of the parties raises such an issue.[21] Moreover, the tribunal may need the assistance of the national courts when it intends to call witnesses, issuing interim measures or obtaining evidence etc. Arbitrators needs the national court's assistance in these procedures as they lack the power to force someone to do something.[22]

At the end of the arbitration process, similarly, the national courts exercise judicial control over the arbitral award by ensuring that the arbitration procedures are correct; a supervision exercised on the issuing of an execution order or through ruling on challenges to an award. Of course, the main role of the national courts is the enforcement of the arbitral award if the losing party does not comply voluntarily.[23]

[19] N Blackaby and others, *Redfern and Hunter on International Arbitration*, 5th Edition – Student Version (OUP, Oxford 2009), p443
[20] Ibid, p443
[21] Ibid, p444
[22] N Blackaby and others, ibid, p451
[23] Ibid, p463

ii. The Territoriality Principle

Most states impose a degree of supervision on arbitration processes held in their territories.[24] Therefore, the seat of arbitration is a principal element in the arbitration process.[25] The law of the seat determines the law governing the arbitral procedures in the absence of agreement, the grounds for setting aside and the nationality of the award and other core issues. The principle of territoriality gives the courts at the seat supervisory power over the award by allowing parties to challenge it on specific grounds, besides any actions that might be taken by parties through the courts at the seat at the start or during the arbitration process. The proponents of this principle maintain that although the idea of arbitration is based on the parties' autonomy, the law governing such an autonomy should be determined on the basis of territoriality which points to the law of the seat.[26] The UNCITRAL Model Law and the NYC both adopted this territoriality principle. The Model Law allocates the functions and powers under its provisions to the courts of the seat.[27] The legal basis for the courts at the seat is to exercise their power upon the award and the whole arbitration process. The territoriality principle is also what gives the court, where the recognition and enforcement of an award is sought, the supervisory power to test the validity of the award.[28] The explanatory note of the UNCITRAL Model Law states that, ''In addition to designating the law governing the arbitral procedure,

[24] M Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, Cambridge 2008), p57

[25] S Garimella, 'Territoriality Principle in International Commercial Arbitration - The Emerging Asian Practice' (2014) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2584332> Accessed on 22 August 2015

[26] S Garimella, ibid, p1

[27] Article 6 of the UNCITRAL Model Law <https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf> Accessed on 06 June 2015

[28] S Garimella, ibid, p2

the territorial criterion is of considerable practical importance in respect of articles 11, 13, 14, 16, 27 and 34, which entrust State courts at the place of arbitration with functions of supervision and assistance to arbitration''.[29] Furthermore, the NYC gives clear support to the 'territorial' principle; by referring the foreign enforcement court to the law of the country where the arbitration 'took place' or where the award 'was made' to decide, whereas the party against whom the award is invoked can challenge with regard to the validity of the arbitration agreement,[30] the composition of the arbitral authority and the arbitral procedure[31] and in particular, whether the award has become binding or not.[32] However, certain commentators and countries – France, for example - believe that an international arbitral award is not related to any particular legal system, even the country in which it was made.[33] This counterargument to territoriality is called the 'Delocalisation Theory', which states that a state should not be involved in the arbitration proceedings especially when the parties are not its citizens and the matter of the dispute has no connection to the state.[34] According to this argument, the courts of the country where the recognition and enforcement of an award are sought decide the case without reference to what the courts of the seat have decided. This principle has been adopted in practice by some countries such as France.

iii. The Principle of Finality

[29] Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf> paragraph 14, Accessed on 22 August 2015

[30] Article V.i.a of the NYC

[31] Article V.i.d, ibid

[32] Article V.i.e, ibid

[33] V den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* – ICCA Congress Series no. 10 (Kluwer Law In-ternational, Hague 2001), p170

[34] M Moses, *The Principles and Practice of International Commercial Arbitration* (CUP, Cambridge 2008) p56

One of the commonly accepted advantages of arbitration is the finality of the award, whereby arbitration laws and rules make it difficult to set aside an award with only a few exceptions. By choosing arbitration rather than litigation, parties have intended to exclude court interference, preferring the finality and expediency of arbitration.[35] The principle of finality of arbitral awards implies that no higher instance will review the award on the merits of the case and is widely adopted in many arbitration laws and arbitration institutions rules. It satisfies the parties need for a swift end to their disputes through not allowing appeals on points of merit nor substantive laws[36].

The finality of awards is supported by the parties' autonomy, where the parties have the right to agree that their dispute, or any disputes that may arise between them in the future, should be settled by a private judge, arbitrator, private court, or arbitration tribunal to choose the applicable laws to their disputes.[37] As such, the grounds for challenging an arbitral award are limited to procedural and jurisdictional grounds such as an exceeding of the arbitrator's mandate, misconduct, agreement invalidity, arbitrability generally or public policy.[38] In *Iran Aircraft Industries v AVCO Corporation*,[39] the United States court of appeal ruled that the award being final and binding did not mean that it could not be challenged by setting aside or resisting

[35] The Explanatory Note on the UNCITRAL Model Law, ibid, paragraph 15

[36] A Saleem, 'Finality of Awards: Is it the Key Feature of the New Saudi Arbitration Law that will put the Country in the Global Map of Arbitration?' (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2354019> p1, Accessed on 27 August 2015

[37] Clive Schmitthoff, 'Finality of arbitral awards and judicial review' <http://link.springer.com/chapter/10.1007/978-94-017-1156-2_21> Accessed on 29 August 2015

[38] M Moses, ibid, p194, 199

[39] *Iran Aircraft Industries v AVCO Corporation*, United States Court of Appeals – 2nd Circuit, 980 F.2d 141, decided on 24 November 1992 <https://law.resource.org/pub/us/case/reporter/F2/980/980.F2d.141.29.92-7217.html> Accessed on 27 August 2015

enforcement. This implies that no courts can decide on the matter of the dispute except through arbitration.

Jurisdictions approach the level of finality differently. There are jurisdictions where awards are final in terms of any substantive review of the case under any circumstances. Other jurisdictions allow for a reviewing of the substance of the case under strict and severe limitations.[40] A few jurisdictions do not recognise the concept of finality at all, and in which the arbitral award is subject to all challenges as with judicial judgments.[41] Recently, the Bahrain legislature adopted the principle of finality of arbitral awards in all types of arbitration (National and International Awards), issuing a new law of Arbitration (Law No. 9, 2015)[42] which adopted the UNCITRAL Model Law to the letter. Therefore, the only method to challenge arbitral awards, whether national or international, in Bahrain, is by setting aside.

The NYC offers a type of court review to the enforcement courts even though most national laws promote the principle of finality. It allows states in which enforcement of the award is sought to review awards, not as an appeal mechanism but as a way to resist the enforcement application.[43] Theoretically, the finality of arbitral awards and the lack of a right to challenge the merits may be a benefit in term of ending the disputes. However, article V of the NYC contains the same grounds for challenging as those stated in article 34 of the UNCITRAL Model Law. Thus, an arbitral award

[40] English Arbitration Act 1996, Section 69 <http://www.legislation.gov.uk/ukpga/1996/23/data.pdf> Accessed on 04 July 2015
[41] A Saleem, ibid, p9
[42] Bahrain Arbitration Law 2015, issued on 05 July 2015 <http://www.legalaffairs.gov.bh/Media/LegalPDF/K0915.pdf> Accessed on 11 July 2015
[43] Abdulrahman Saleem, ibid, p10

might be subject to review by the courts of the seat as well as any foreign review from the courts of the country where the award was submitted.

iv. The Principle of *res judicata*

The res judicata doctrine is based on two justifications; namely, public interest where there should be an end to any dispute and that no one can be proceeded against twice for the same issue.[44] Margaret Moses, states ‘‘A final and binding arbitral award has *res judicata* effect, which means that the same issues covered by the award cannot be arbitrated or litigated again between the same parties, as long as the award is not vacated. Once an award has been confirmed by a court, it normally has the same *res judicata* effect as a court judgment. Moreover, even unconfirmed awards may be treated as *res judicata*.’’[45] The International Law Association also stated that ‘‘The term res judicata refers to the general doctrine that an earlier and final adjudication by a court or arbitration tribunal is conclusive in subsequent proceedings involving the same subject matter, the same legal grounds and the same parties (the so-called ‘triple-identity’ criteria). Although terminology may differ as between jurisdictions to the expression res judicata, this doctrine in its wide sense has existed for many centuries and in different legal cultures’’.[46]

Res judicata has a positive effect where a judgment or an award is made final and binding between the parties and having to be implemented, subject to any available appeal or challenge. On the other hand, a negative effect is

[44] J Wong, ‘Court or Arbitrator – Who Decides Whether Res Judicata Bars Subsequent Arbitration under the Federal Arbitration Act?’ (2005) 46 (1) Santa Clara Law Review, p53

[45] M Moses ,ibid, p188

[46] International Law Association, Berlin Conference (2004) – International Commercial Arbitration <http://www.ila-hq.org/download.cfm/docid/446043C4-9770-434D-AD7DD42F7E8E81C6> Accessed on 22 August 2015, p2

that the subject matter of the judgment or award cannot be litigated a second time.[47] It is generally accepted nevertheless that the res judicata doctrine applies well to international arbitration, accepting that issues of res judicata might arise in international commercial arbitration in a myriad of different situations, including between two arbitral tribunals or a state court and an arbitral tribunal.[48]

C. The Enforcing Court's Discretionary Power under the NYC: The Law

i. Legal or Economic motive

International commercial arbitration can be defined as ''a means by which international disputes can be definitely resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers''.[49] Hence, a main attribute of international arbitration is the non-governmental, where the arbitrators do not belong to any governmental hierarchy, something which should prevent states from interfering in the arbitration proceedings. It is for this reason that it is argued by some that international arbitration should be detached from the legal system of the seat.[50] A valid arbitration agreement should therefore effectively preclude the jurisdiction of national courts and be given global effect by the NYC and UNCITRAL Model Law. It is a duty on the courts of the member states to refrain from hearing cases where the parties have agreed to resolve the dispute through

[47] Ibid, p3
[48] ibid
[49] Gary Born, *International Commercial Arbitration*, 2nd edition (Kluwer Law International, Hague 2001) p1
[50] M Moses, ibid, p2

arbitration.[51] It might also be seen to be logical not to allow the enforcing courts to refuse enforcement of awards on the basis that arbitration is a private dispute resolution and as such, no court can dispute the decision of a group of private persons.[52] Courts in France, Belgium, Austria and the USA tend to adopt this approach.[53] Most other countries used to have onerous domestic laws dealing with foreign arbitral awards, but when the NYC came into force, all the member states reformed their domestic rules to be in line with the Convention.[54] This will be discussed more in paragraph (D-II).

The United States supreme court described the aim of the NYC as follows, ''The goal of the Convention, and the principal purpose underlying American adoption and implementation of it, was to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries''.[55] Similarly, in the *Ajay Kanoria v Tony Francis Guinness*, the English supreme court stated, "… It is not surprising when the limited circumstances in which an English court can be persuaded to refuse enforcement of a New York Convention award concern the structural integrity of the arbitration proceedings. If the structural integrity is fundamentally unsound, the court

[51] Article II of the NYC

[52] J Paulsson, 'Arbitration in Three Dimensions' (2010) <http://www.lse.ac.uk/collections/law/wps/WPS2010-02_Paulsson.pdf> Accessed on 01 August 2015

[53] N Blackaby and others, *Redfern and Hunter on International Arbitration*, 5th Edition – Student Version (OUP, Oxford 2009) p651

[54] V den Berg, *The New York Arbitration Convention of 1958 - Towards a Uniform Judicial Interpretation* (Kluwer Law & Taxation, Hague 1981) p81

[55] *Scherk v Alberto-Culver Co.*, United States Supreme Court, Case No. 73-781, Decided on 17 June 1974 <http://caselaw.findlaw.com/us-3rd-circuit/1158356.html#sthash.Hkk7KsvW.dpuf> Accessed on 21 August 2015

is unlikely to make a discretionary decision in favour of enforcing the award''.[56]

However, given the contradictory French and English positions in the leading case of *Hilmarton*[57], one may wonder if such differences from the state's point of views towards international arbitral awards might not have an economic motive. In this particular dispute there were two arbitral awards; the first award was in favour of OTV (a French company), which had been enforced by the French courts. A second award replaced the first one after Swiss courts set it aside, the new award in favour of Hilmarton (an English company) being enforced by the English courts but refused to be so enforced by the French courts. The result was that the French courts enforced the award in favour of the French party, and the English courts enforced one in favour of the English party. Clearly, this raises doubts regarding the motives behind the different positions taken by the states.

ii. The Obligatory Nature of Article III

The fact that courts of member states 'shall' recognise arbitral awards means that it is a straightforward duty on that courts not to review or reconsider the awards.[58] That is also stressed in the UNCITRAL Model Law.[59] However, Article III does not address a situation of conflict in an award and different judgments resolving the same dispute between the same parties. The question is whether a state court should enforce the foreign award or the foreign judgment. No definite answer can be found either in laws or

[56] *Ajay Kanoria v Tony Francis Guinness*, [2006] EWCA Civ 222, Lord Justice May, paragraph 30
[57] *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663
[58] H Radhi, 'International Arbitration and Enforcement of Arbitration Awards in Bahrain' (2014) 1(1) BCDR International Arbitration Review p35
[59] Article 36, UNCITRAL Model Law

cases, with national courts having different approaches in this regard as can been seen in Section D below.

Furthermore, although Article III gives a direct order to the contracting states to recognise and enforce foreign awards, it does not give instructions regarding the procedural requirements for doing so. Instead, the Article refers the contracting states to apply their domestic procedural rules on recognising and enforcing foreign awards.[60] The fact that these procedural rules differ from one country to another begs the question that it might be better if the Convention puts some instructions in this regard, or at least highlights the important rules; for instance, the time bar for the enforcement application and the form for such an application.[61]

iii. The word '*may*' in Article V

It is a matter of controversy as to what the word 'may' means in the content of Article V of the convention. ''It is arguable that in a case where a ground for refusal of enforcement is present and proved, the enforcement court nevertheless has a residual discretionary power to grant enforcement in those cases in which the violation is de minimis''[62] Van den Berg is of view that, ''It is to be noted that the opening lines of both the first and the second paragraph of Article V employ a permissive rather than mandatory language: enforcement ''*may be*'' refused. For the first paragraph it means that even if a party against whom the award is invoked proves the existence of one of the grounds for refusal of enforcement, the court still has a certain discretion to overrule the defence and to grant the enforcement of the

[60] ICCA Guide to the NYC, ibid, p28
[61] ICCA Guide to the NYC, ibid, p69
[62] E Gaillard and D Pietro, ibid, p56

award.''[63] Van den Berg continues, ''For the second paragraph it would mean that a court can decide that, although the award would violate the domestic public policy of the court's own law, the violation is not such as to prevent enforcement of the award in international relations''.[64]

A successful resistance of the enforcement of a foreign award in one jurisdiction does not mean that it cannot be enforced in another jurisdiction. ''The court before which recognition or enforcement is sought has a discretion to recognise or enforce even if the party resisting recognition or enforcement has proved that there was no valid arbitration agreement. This is apparent from the difference in wording between the Geneva Convention on the Execution of Foreign Arbitral Awards (1927) and the New York Convention. The Geneva Convention provided - "shall be refused" - for refusal of recognition and enforcement, including the ground that it contained decisions on matters beyond the scope of the submission to arbitration. The New York Convention (and section 103(2) (b) of the 1996 Arbitration Act) provides - "Recognition and enforcement of the award may be refused.''[65] Therefore, the NYC provides national courts with a discretion on enforcing international arbitral awards and accepts resistance to such enforcement limited by the provision of Article V which established the minimum requirements for recognition of international awards where states are free to go to less restrictive ones.[66] This is exemplified in *Astro v First Me-*

[63] V den Berg, The New York Arbitration Convention of 1958 - Towards a Uniform Judicial Interpretation (Kluwer Law & Taxation, Hague 1981) p265
[64] V den Berg, ibid
[65] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, Lord Collins at paragraph 126
[66] E Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) Foreign Investment Law Journal p16, 45

dia,[67] an international arbitral award refused enforcement by Singapore courts at the seat on the basis that the arbitral tribunal had no jurisdiction. However, the same award was accepted and enforced by the courts in Hong Kong regardless any other court's decision. The court in Hong Kong refused (by using its discretion granted by the NYC when it says 'may') to stop enforcement (even when there were grounds to do so) as the party had acted in bad faith by not raising the issue earlier.

However, the Australian courts interpret 'may' makes the grounds provided in Article V are mentioned just as examples and they are not restricted. According to this understanding, the Australian courts give themselves the discretion to refuse the enforcement of an award on the basis of other grounds.[68]

iv. The More Favourable Right Provision (Article VII)

A key article, which Van Berg refers to as the 'more-favourable-right-provision',[69] states that the NYC shall not prejudice any other multilateral or bilateral agreements or national laws of the member states when they are more favourable than NYC provisions to any of the parties. Therefore, a party seeking recognition and enforcement of an international arbitral award can turn to the national laws or treaties applicable in the enforcement court forum that are more favourable than the rules of the Convention.[70]

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[67] *Astro Nusantara International B.V. v PT First Media TBK,* HCCT 45/2010

[68] V den Berg, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) ICC International Court of Arbitration Bulletin, p2

[69] V den Berg, *The New York Arbitration Convention of 1958 - Towards a Uniform Judicial Interpretation* (Kluwer Law & Taxation, Hague 1981) p81

[70] ICCA's Guide to the Interpretation of the 1958 New York Convention, International Council For Commercial Arbitration, <http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf> p26, Accessed on 6 June 2015

For example, since the French domestic law is more lenient than Article V in regards of awards enforcement, parties who seek to enforce arbitral awards in France prefer to rely on the French domestic rules.[71] Interestingly, the France national law has not adopted article V.1.e of the Convention.[72] This means that awards that have been set aside in the seat of arbitration can still be enforced in France (as well as in the USA and Belgium, which took a similar direction in several cases).[73]

At its 39th session in 2006, the United Nations Commission on International Trade Law (UNCITRAL) recommended that, ‘‘Taking into account also enactments of domestic legislation, as well as case law, more favourable than the Convention in respect of form requirement governing arbitration agreements, arbitration proceedings and the enforcement of arbitral awards. Considering that, in interpreting the Convention, regard needs to be paid to the need to promote recognition and enforcement of arbitral awards, - the UNCITRAL - recommends that Article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, should be applied to allow any interested party to avail itself of rights it may have, under the law or treaties of the country where an arbitration agreement is sought to be relied upon, to seek recognition of the validity of such an arbitration agreement’’.[74] However, the practice of states in applying this article is still ambiguous, which can be seen even in the practice of a single state, as Emanuel Gaillard says: ‘‘It

[71] ICCA Guide to the NYC, ibid, p103
[72] ibid
[73] V den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* – ICCA Congress Series no. 10 (Kluwer Law International, Hague 2001) p165
[74] Recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958, Adopted by the UNCITRAL on 7th July 2006

is not entirely clear whether and if so to what extent the courts in the United States adhere to that concept. In any event, the vast majority of the courts in the other Contracting States do not enforce arbitral awards that have been set aside in the country of origin, either under the Convention or otherwise''.[75]

D. The Exercising of Enforcing Court's Discretionary Power under the NYC, Article V: Examples

Once an international arbitral award is issued, according to the national arbitration laws of countries, the loser party has the right to submit to the courts of the seat for recourse against the award on specific grounds by means of what is called 'setting aside'.[76] This part of the thesis will discuss the positions that foreign enforcement courts have taken towards a foreign award after the courts of the seat have decided on the application of setting aside, either by confirming the award or setting it aside.

I. First Scenario: An Award that has been confirmed at the seat

In the case where a court of the seat confirms an award, giving it an absolute res judicata, the question is how much scope a foreign enforcement court has to re-examine the validity of the award when a respondent resists its recognition or enforcement on certain grounds.

1. The Grounds of Party Incapacity or Invalid Agreement under Article V.1.a

[75] E Gaillard and D Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Con-vention in Practice* (CMP, UK 2009), p62

[76] In some jurisdictions it is called 'annulment'

This article highlights two grounds. The first ground relates to the incapacity of the parties in an arbitration agreement. The word incapacity in the context of this article signifies a lack of power to contract.[77] That may arise when an award is issued against a respondent who denies being a party to the arbitration agreement. This may be also resolved by the enforcement court as a part of examining the arbitrator's jurisdiction.[78] When the enforcement court finds that a respondent is not a party to the arbitration agreement, it signifies a lack competence on the part of the arbitrator, resulting in the enforcement of the award being denied.

The incapacity defence may also arise when the respondent is a state-owned company. During an enforcement action, the court examines the capacity of a state entity by an in depth look at the national laws of the country of such an entity, for example; the constitution, commercial laws and budget law etc. These laws determine whether a state entity is allowed to enter into an arbitration agreement and the conditions and restrictions that must be followed by the entity in order for the state to be bound by such an agreement.[79] Reviewing all those laws of a foreign country is a hard process for any judge and it is highly likely that each judge will have a different interpretation of such laws. However, if the petitioner does not raise this matter at the beginning of the contract, a court may not accept the challenge to resist enforcement since the party freely entered into the agreement; making it impossible at that stage to rely on its own law to frustrate such an agreement. It is moreover a general principle of law that a state

[77] ICCA Guide to the NYC, ibid, p84

[78] V den Berg, 'New York Convention of 1958: Refusals of Enforcement' (2007) 18(2) ICC International Court of Arbitration Bulletin, p28

[79] H Radhi, 'International Arbitration and Enforcement of Arbitration Awards in Bahrain' (2014) 1(1) BCDR International Arbitration Review, p41

owned entity cannot use its own law to deny an arbitration agreement.[80] This can be seen under English company law as well, where once a party gives the impression of capacity and the other party has responded to this, lack of capacity cannot be used as grounds to get out of the agreement.[81] Swiss law also states clearly that if a state or an entity owned by the state is party to an arbitration agreement, such a party cannot rely on its national law to deny the arbitrability of the dispute or its capacity to be a party of the arbitration agreement.[82]

The second ground under Article V.1.a is the invalidity of the arbitration agreement. The article provides two bases to determine the law governing the arbitration agreement and under which the validity of the agreement may be invoked. The primary basis is the law chosen by the parties to govern their arbitration agreement. The subsidiary basis is the law of the country where the award was made (The law of the Seat).[83] In practice, the matter of arbitration agreement validity might allow enforcing courts to reconsider the merit of the awards.[84] A traditional judge may interpret this article by reviewing the origin of the dispute, again applying the law of the country where the award was made in order to decide on the validity of the agreement.[85] What makes it more problematic is that the judge of an enforcing court is a national judge and not familiar with foreign laws and other jurisdictions. In this regard, the United States Court of Appeal decided

[80] N Blackaby and others, *Redfern and Hunter on International Arbitration*, 5th Edition – Student Version (OUP, Oxford 2009), p98
[81] *Freeman & Locker v Buckhurst Park Properties Limited* [1964] 1 All ER 630, Mr Justice Diplock
[82] The Swiss Federal Private International Law Statute of 18 December 1987, Paragraph 2, Article 177, <http://www.arbitration-ch.org/dl/f0dfb3d5405ec0edda11d250406ed322/IPRG_English_translation.pdf> Accessed on 14 August 2015
[83] E Gaillard and D Pietro, ibid, p57
[84] ICCA Guide to the NYC, ibid, p86
[85] H Radhi, ibid, p37

that, ‘‘Only when there is no genuine issue of fact concerning the formation of the agreement should the court decide as a matter of law that the parties did or did not enter into such an agreement’’.[86] In *Sourcing Unlimited Inc. v Asimco International Inc.*, *a* United States court applied the estoppel principle to refute the respondent’s argument of invalidity of the arbitration agreement.[87] The appeal court concluded that the estoppel principle “precludes a party from enjoying rights and benefits under a contract while at the same time avoiding its burdens and obligations.”

2. The Ground of Misconduct of the Arbitral Tribunal under Article V.1.b

Although arbitrators are allowed a wide discretion in conducting arbitral proceedings, fairness necessarily is the standard of their conduct.[88] Beside the requirements of proper notice of the appointment of arbitrators and the commencement of arbitral proceedings, Article V.1.b concludes with the phrase; ‘or was otherwise unable to present his case’, a catch-all phrase that seems to act as a general ground for refusal of recognition and enforcement of arbitral awards. In *Iran Aircraft Industries v AVCO Corporation,*[89] the court refused to grant a leave of enforcement since the respondent was not given the opportunity to submit his full evidence to the tribunal, something

[86] *China Minmetals Materials Import and Export Co. v Chi Mei Corporation*, United States Court of Appeals – 3rd Circuit, Case No. 02-2897, 02-3542 – Decided on 26 June 2004 <http://caselaw.findlaw.com/us-3rd-circuit/1158356.html#sthash.Hkk7KsvW. dpuf> Accessed on 21 August 2015

[87] Sourcing Unlimited Inc. v Asimco International Inc., United States Court of Appeals - 1st Circuit, Case No. 07-2754, Decided on 22 May 2008 <http://caselaw.findlaw.com/us-1st-circuit/1098454.html#sthash.0RPtONjx.dpuf> Accessed on 21 August 2015

[88] ICCA Guide to the NYC, ibid, p89

[89] *Iran Aircraft Industries v AVCO Corporation*, United States Court of Appeals – 2nd Circuit, 980 F.2d 141, decided on 24 November 1992 <https://law.resource.org/pub/us/case/reporter/F2/980/980.F2d.141.29.92-7217.html> Accessed on 27 August 2015

which the United States Court of Appeal considered that rendered the respondent to be unable to present his case. In *Ajay Kanoria v Tony Francis Guinness*[90], Lord Justice May held that a request for enforcement of the award should be refused inasmuch that the respondent was not given proper notice of a highly important material part of the arbitration proceedings, rendering him unable to present his case.

In some cases, misconduct in an arbitral tribunal may amount to a violation of the public policy of the country where the award is sought.[91] Emanuel Gaillard suggests, ‘‘Article V.1.b cannot be considered as having the effect that a violation of due process would not also fall under the public policy provision of article V.2.b because due process generally is conceived as pertaining to public policy. Thus, a court may also on its own motion refuse enforcement of an award for violation of due process on the basis of article V.2.b’’.[92]

3. The Ground of Exceeding the Tribunal's Jurisdiction under Article V.1.c

In general, unless the parties agree otherwise, the arbitral tribunal has the power to rule on its own jurisdiction, which includes determining the validity of the arbitration agreement, the constitution of the tribunal itself and matters capable of being resolved by arbitration.[93] However, parties can challenge such a decision of the arbitral tribunal before the court of the seat

[90] *Ajay Kanoria v Tony Francis Guinness*, [2006] EWCA Civ 222 at paragraph 32

[91] International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (The 70th Conference of the International Law Association, New Delhi 2002) <http://www.ila-hq.org/download.cfm/docid/032880D5-46CE-4CB0-912A0B91832E11AF> Accessed on 15 August 2015

[92] E Gaillard and D Pietro, ibid, p58

[93] UNCITRAL Model Law on ICA, Article 16

or even the enforcing court. As Lord Mance said, the concept of competence-competence is respected in all jurisdictions, however, all courts have the power to review the decision of the arbitral tribunal on the matter of its jurisdiction.[94] This is illustrated in *China Minmetals Materials Import and Export Co. v Chi Mei Corporation*[95], where the United States Court of Appeal declared, ‘‘Despite the principle presumption in favour of allowing arbitrators to decide in their own jurisdiction, it appears that every country adhering to the competence-competence principle allows some form of judicial review of the arbitrator's jurisdictional decision where the party seeking to avoid enforcement of an award argues that no valid arbitration agreement ever existed’’. However, establishing a judicial review on an award on jurisdictional grounds must not allow a reviewing of the facts or merits of the dispute. Emanuel Gaillard emphasises this by saying that, ‘‘The question of whether an arbitral tribunal has exceeded its authority should not lead to a re-examination of the merits of the award’’.[96]

On the other hand, it is clear that the arbitral tribunal must have jurisdiction over all parties to the arbitration proceeding. The fact that a party may be an entity owned by a government does not make the government party to the contract. This is illustrated in the case of *Dallah Real Estate V Government of Pakistan,*[97] ‘‘The fact that an arbitration agreement is entered

[94] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46

[95] *China Minmetals Materials Import and Export Co. v Chi Mei Corporation*, United States Court of Appeals – 3rd Circuit, Case No. 02-2897, 02-3542 – Decided on 26 June 2004 <http://caselaw.findlaw.com/us-3rd-circuit/1158356.html#sthash.Hkk7KsvW.
dpuf> Accessed on 21 August 2015

[96] E Gaillard and D Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards – The New York Con-vention in Practice* (CMP, UK 2009), p59

[97] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46

into by a State-owned entity does not mean that it binds the State, and whether the State is bound depends on the facts in the light of the principles''.

An explanatory note of the Model Law states that, ''In those cases where the arbitral tribunal decides to combine its decision on jurisdiction with an award on the merits, judicial review on the question of jurisdiction is available in setting aside proceedings under Article 34 or in enforcement proceedings under Article 36''.[98]

The task of the English courts in determining the parties to the arbitration agreement is whether they have the 'Common Intention' to be obliged by such agreement. ''In order to determine whether an arbitration clause upon which the jurisdiction of an arbitral tribunal is founded extends to a person who is neither a named party nor a signatory to the underlying agreement containing that clause, it is necessary to find out whether all the parties to the arbitration proceedings, including that person, had the common intention (whether express or implied) to be bound by the agreement''.[99] Therefore, in order to determine whether someone is party to an arbitration agreement through the 'common intention' test, the court will probably need to go through all the pre-contract negotiations to verify if the party had participated in such negotiations that could affect the terms of the contract and to see whether other parties were dealing with him as a party to such a contract. This process will probably lead to the merits of an award being reviewed by the enforcing courts.

[98] Paragraph 26, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006 <www.uncitral.org/pdf/english/texts/arbitration/ml-arb/MLARB-explanatoryNote20-9-07.pdf> Accessed on 22 August 2015

[99] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan*, ibid

The convention in Article V.1.c provides the solution of separating the award where the enforcing court may deny the enforcement of a part of the award which has been corrupted by arbitrators exceeding their authority. National courts should rarely accept these grounds for enforcement refusal since they conflict with the prohibition on reviewing the merits of the award.[100]

4. The Public Policy Test under Ground V.2.b (Domestic or International Public Policy?)

Public policy is hard to define especially since states may define it differently. Most countries do not have legislation defining 'public policy' although national courts have established some standards in this regard. The Cassation Court in Bahrain, for example, defines public policy as, ''Rules of law which are meant to achieve a public, political, economic or social interest relating to the supreme interest of the society and rank higher than the interest of individuals and which all individuals are bound to consider and apply. Individuals shall not prejudice it by their own agreements even in case that such agreements yield to them individual interests, as the individual interest shall not stand against public interest whether there exists a law forbidding such individual agreement or not''.[101]

In modern terminology, law scholars recognise two categories of public policy; domestic and international public policy. In regards to the NYC, the issue of public policy arises particularly in deciding the matter of arbitrabil-

[100] William Park, 'National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration' (1989) 63 Tulane Law Review 647, 709

[101] *Adnan A. Rasool v Sadiq Ahmed*, Case No 252/2005, Court of Cassation (Kingdom of Bahrain), judgment issued on 2nd January 2006 - (Own Research)

ity as a ground for refusal of awards enforcement.[102] In general, public policy also concerns the application of almost all grounds of Article V. The public policy test must be applied through its international perspective or through applying its most basic notions of morality and justice.[103] As Lord Justice Waller says in the case of *Westacre v Jugoimport,*[104] ‘‘It is legitimate to conclude that there is nothing which offends English public policy if an Arbitral Tribunal enforces a contract which does not offend the domestic public policy under either the proper law of the contract or its curial law, even if English domestic public policy might have taken a different view’’.

In the same context, the International Law Association have recommended that, ‘‘When the violation of a public policy rule of the forum alleged by a party cannot be established from a mere review of the award and could only become apparent upon a scrutiny of the fact of the case, the court should be allowed to undertake such reassessment of the facts’’.[105]

II. Second Scenario: An Award that has been Successfully Set Aside at the Seat

[102] Article V.2.a of the NYC

[103] *Parsons & Whittemore Overseas Co. v RAKTA and Bank of America*, US Court of Appeals 2nd Cir – 508 F.2d 969 (1974)

[104] *Westacre Investments Inc v Jugoimport-SDRP Holding Company Limited and others* [1999] C.L.C. 1176

[105] International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (The 70th Conference of the International Law Association, New Delhi 2002) <http://www.ila-hq.org/download.cfm/docid/032880D5-46CE-4CB0-912A0B91832E11AF> Accessed on 15 August 2015

In cases where the courts of the seat have set aside an award, what options are there and on what basis can an enforcement court decide whether or not to enforce such an award?

1. The Award is not binding based on Article V.1.e

The grounds (e) are divided into three parts. **The first part** concerns a case when the award has not yet become 'binding'. The New York Convention's predecessor, the Geneva Convention of 1927 stated that in order to obtain recognition and enforcement the award must necessarily become 'final'.[106] Most courts consider the word 'final' as an order from the courts of the seat that must be obtained to enforce the award.[107] However, the New York Convention avoided that by using the word 'binding' which complies with the nature of arbitration and by which a party can apply for enforcement once the arbitral tribunal has issued the award, without need to wait for any decision from the courts of the seat.[108] As stated by Emmanuel Gaillard, ''The drafters of the New York Convention, considering this system as too cumbersome, abolished it by providing the word 'binding' instead of the word 'final'.''[109] However, there are still differences between courts over when an award is considered to be binding. The Swiss Federal Tribunal holds that an international arbitral award is 'binding' in the sense that no ordinary means of recourse are any longer available against it.[110] On

[106] Convention on the Execution of Foreign Arbitral Awards (Geneva Convention, 26th September 1927), Article 1.d <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/LON/PARTII-7.en.pdf> Accessed on 10 June 2015

[107] E Gaillard and D Pietro, ibid, p61

[108] ICCA Guide to the NYC, ibid, p101

[109] E Gaillard and D Pietro, ibid, p61

[110] *Compagnie X SA v. Federation Y*, The Swiss Federal Tribunal, 09 December 2008, Case No. 4A_403/2008 <http://www.newyorkconvention1958.org/index.php?lvl=author_see&id=339> Accessed on 27 August 2015

the other hand, the Convention does not restrict awards with any requirements to consider them as binding. Article III obliges the contracting states to recognise and enforce arbitral awards as binding. Therefore, the NYC presumes the bound attribute of international arbitral awards without any restrictions.[111]

The second part of grounds (e) is the case where an award has been set aside by a court of the country in which, or under the law of which, the award was made. A direct objection on the recognition of awards that have been set aside by the courts of origin is that there is no award existing once it has been set aside from the only competent authority - the court of the seat using its supervisory jurisdiction over the award.[112] The opposite opinion counters by saying that, as international awards are not connected with any legal system of states, each state uses its own discretion in recognising or enforcing them.[113] French law, for example, does not recognise Article V.1.e of the convention, so, setting aside an award in the seat is not a ground to refuse the enforcement in France.[114]

In *Chromalloy,*[115] the French courts enforced an award that had been set aside by the court at the seat , in this case Egypt, on the basis that it is an international award and its existence was not affected by the decision of the courts at the seat. The US Courts also enforced the award of *Chromalloy*[116] and stated that Article V of the NYC is permissive where the court *may* re-

[111] *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), paragraph 10
[112] ICCA Guide to the NYC, ibid, p102
[113] V den Berg, ibid, p170
[114] ICCA Guide to the NYC, ibid, p103
[115] *Republic Arab of Egypt v Chromalloy Aero Services*, Paris Court of Appeal, Case No. 95/23025, ruled on 14 January 1994 <http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=147> Accessed on 22 August 2015
[116] *Re Chromalloy Aero services v the Arab Republic of Egypt*, 939 F. Supp. 906 - D.C. Cir. 1996

fuse an enforcement of the award with the enforcing court having the discretion to examine the award under US domestic law.

However, the question which may arise in this respect is to what extent do the enforcing courts adhere the judicial rulings of other courts, whether setting them aside or confirming them, and again, if a second arbitral award is issued after the court of the seat has set aside the first award; scenarios in fact seen in the leading case of *Hilmarton*,[117] in which a Swiss award was enforced in France even though it had been set aside in Switzerland. The French court concluded that, "The award rendered in Switzerland is an international award which is not integrated in the legal system of that State, so that it remains in existence even if set aside."[118] After the award had been set aside, there were new arbitration proceedings in Switzerland with a new tribunal issuing an award the reverse of the abolished one. The French Court of Cassation refused to enforce the new award and insisted on enforcing the first one as having res judicata.[119] On the other hand, the English courts agreed to enforce the second award and considered the first one as redundant after it had been set aside by the courts at the seat.[120]

In order to grant leave for the enforcement of foreign awards, the French courts apply the French Civil Code and Civil Procedure.[121] French law, unlike other national laws, does not contain the equivalent of Article V.1.e in its civil code.[122] Therefore, the result of any challenge will have no effect in

[117] *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663
[118] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) Foreign Investment Law Journal p16, 45
[119] *Hilmarton Ltd v OTV*, Cour de cassation, 23 March 1994 (1995) 20 Yb Comm Arb 663
[120] *Ominum De Traitement Et De Valorisation S.A. (OTV) v Hilmarton Limited* [1999] WL 477773
[121] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to be?' (2014) 31 (5) Journal of International Arbitration ,p577
[122] ICCA Guide to the NYC, ibid, p102

France, with any enforcement proceedings starting afresh. France has a de-localised outlook to arbitration and consequently French courts often come to different decisions on the same awards accepted by other courts. This may seen in the following cases:

In *Soc PT Putrabali Adyamulia v Soc Rena Holding*,[123] an award from an arbitration tribunal in England, which had been set aside by the English court, was later enforced in France on the basis that the award was an international award and did not form part of any national legal system.[124]

In *Norsolor,*[125] the court of cassation in Paris reversed a decision by of the court of appeal which had dismissed leave to enforce the award on the grounds that the court of appeal had exclusively referred to Article V.1.e of the NYC and ignored Article VII of the Convention and Article 12 of the new French code of civil procedure which must be read and interpreted altogether.[126] In this case, the court of the seat - the Austrian court - found that there was inadequate analysis by the tribunal through applying the *lex mercatoria*, whereas the French court respected the choice of the tribunal. By applying French domestic law, the French court overrode the decision of the Austrian court, which was nevertheless the competent authority able to set aside the award under the NYC. Subsequently, it was held that any

[123] *Soc PT Putrabali Ad yamulia v Soc Rena Holding*, Cour de cassation, 29 June 2007 (2007) 32 Yb Comm Arb 299

[124] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin' (1999) Foreign Investment Law Journal p16, 45

[125] *Pabalk Ticaret Sirketi S.A. v Norsolor S.A.*, Court of Cassation, 9th October 1984, Case no. 83-11.355

[126] New York Convention Guide <http://www.newyorkconvention1958.org/index.php?lvl=notice_display&id=118&seule=1> Accessed on 31 July 2015

award sought to be enforced in France must be tested only by French law, irrespective of the validity of such an award under the law of the seat.[127]

In a recent French case[128], a Paris court of appeal ruled to uphold an award enforcement and denied the respondent's defence although the award had been annulled by the courts of Egypt. The Paris court applied the French law on enforcement of the award, seen in this case as being more favourable than the NYC.[129] Such rulings on cases are based on the national laws of France which facilitate the recognition and enforcement of international arbitral awards and require fewer conditions than those stated by the New York Convention.[130]

In *Yukos Capital S.a.r.L v OJSC Oil Company Rosneft*[131] the high court put a criteria to decide on when an award should be enforced in England even if set aside by the court at the seat. The court has to look at the judgment of setting aside the award and if it finds that such a judgment is in breach of the principles of justice or obtained by fraud or against public policy, it will be considered unsatisfactory and contrary to the principle to refuse the enforcement of an award that has been set aside through an improper judgment.[132]

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[127] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to be?' (2014) 31 (5) Journal of International Arbitration ,p577

[128] *Egyptian General Petroleum Corporation (EGPC) v National Gas Company (NATCAS)*, Paris Court of Appeal, 24 November 2011, Case no. 10/16525

[129] The judgment was reversed by the Court of Cassation but for reasons not related to NYC

[130] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46 Lord Collins at paragraph 124

[131] *Yukos Capital S.a.r.L v OJSC Oil Company Rosneft* [2014] EWHC 2188 (Comm), Mr Justice Simon at paragraph 12

[132] ibid, paragraph 20

In the same context, in *Nikolai Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*[133] the Dutch court of appeal stated that although Article V.1.e of the NYC provided a ground for not enforcing an arbitral award set aside by the court at seat, there should be exceptions when the trial at the seat is conducted unfairly. The job of the enforcing court is to determine whether the trial procedures for setting aside the award at the seat were fair and consistent and just.[134]

The third - and final - part of grounds (e) is where an award has been suspended by the courts in the country of origin. However, the Convention does not put a definition on the word 'suspension'.[135] In this regard, an automatic suspension as a result of starting an action of setting aside an award is not sufficient to be considered as grounds under this part. In order for such a suspension to be considered as grounds for refusal of enforcement, it must be an independent order by the court of the seat.[136]

2. Courts of the Seat versus Courts of Enforcement

As the same grounds apply for setting aside an award and for resisting enforcement, the courts of the country where the enforcement of an award is sought may interpret the same grounds differently from the court of the country of origin.[137] French law does not consider the law of the seat of arbitration to be involved in the arbitration itself, based on the fact that the

[133] *Nikolai Viktorovich Maximov v OJSC Novolipetsky Metallurgichesky Kombinat*, Court of Appeal of Amsterdam, Case No. 200.100.508/01, ruled on 18 September 2012 at paragraph 2.9
[134] Ibid at paragraph 2.13
[135] ICCA Guide to the NYC, ibid, p104
[136] E Gaillard and D Pietro, ibid, p63
[137] V den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* - ICCA Congress Series no. 9 (Kluwer Law International, Hague 1999), p515

seat of arbitration has nothing to do with the arbitration proceedings.[138] Moreover, it holds that the question of validity of an international arbitration agreement must not be examined under the law of the seat nor by any other system of law but rather based on principles of international public policy.

In England, the Supreme Court ruled that, ‘‘In an international commercial arbitration, a party which objects to the jurisdiction of the tribunal has two options. It can challenge the tribunal's jurisdiction in the courts of the arbitral seat or it can resist enforcement in the court before which the award is brought for recognition and enforcement. These two options are not mutually exclusive, although in some cases a determination by the court of the seat may give rise to an issue estoppel or other preclusive effects in the court in which enforcement is sought. The fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court’’.[139]

In *First Media v Astro*,[140] the Court of Appeal in Singapore held that a party could choose to actively challenge the award or passively defend the enforcement of the award.[141] In contrast, the courts of Hong Kong in *Astro v First Media*[142] concluded that although the Court of Appeal in Singapore had held the arbitration, the tribunal had no jurisdiction and this was now res judicata, under the well-established principle of good faith. Consequent-

[138] Ibid, p516
[139] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46, Lord Collins at paragraph 98
[140] *First Media TBK v Astro Nusantara International BV and others* [2013] SGCA 57
[141] Dylan McKimmie and Meriel Steadman, 'Singapore Court of Appeal New ruling on active and passive remedies for challenging jurisdiction' (2014) 2 International arbitration report p26, 28
[142] *Astro Nusantara International B.V. v PT First Media TBK*, HCCT 45/2010

ly by not acting sooner, the court opted to use its discretion under Article V of NYC and granted enforcement; the court deciding that by failing to challenge when they had the opportunity they lost the right to raise the issue as a defence.

The general understanding from the Convention is that its main aim is to give the enforcing courts the power to recognise and enforce the foreign award without concern to what the courts at seat decided. The English courts clearly adopted this understanding in *Diag Human SE v The Czech Republic*,[143] where the Convention located the enforcement of foreign arbitral awards to the enforcing court and not to the court of the home jurisdiction. That also was also stressed in *Dowans Holding SA v Tanzania Electric Supply Co Ltd*,[144] where Mr Justice Burton emphasised that deciding the issue of whether an award became binding was the mission of the enforcing court regardless of the opinion of the court at seat in this issue.

III. Third Scenario: No Action was Taken at the Seat

It is necessary at this point to discuss the matter of a losing party's failure to take action at the court of the seat and its impact on the enforcement of the award; something that the Convention did not deal with. This is the situation when a party to arbitration proceedings does not use a defence while he has the opportunity to do so and seeks to raise such a defence before the enforcement court for the first time.[145] A Russian court has ruled that a respondent is estopped from relying on the grounds of a lack of jurisdiction

[143] *Diag Human SE v The Czech Republic* [2014] EWHC 1639 (Comm), Mr Justice Eder at paragraph 14
[144] *Dowans Holding SA v Tanzania Electric Supply Co Ltd* [2011] EWHC 1957 (Comm), Mr Justice Burton at paragraph 24
[145] ICCA Guide to the NYC, ibid, p81

of the arbitral tribunal and that they did not raise such an objection during the arbitration procedures.[146] The International Law Association says as a recommendation that, ‘‘When a party could have relied on a fundamental principle before the tribunal but failed to do so, it should not be entitled to raise the said fundamental principle as a ground for refusing recognition or enforcement of the award’’.[147]

That is illustrated in the case of *Dallah Real Estate V Government of Pakistan*[148] where the English supreme court briefed, ‘‘A person who denies being party to any relevant arbitration agreement has no obligation to participate in the arbitration or to take any steps in the country of the seat of what he maintains to be an invalid arbitration leading to an invalid award against him. The party initiating the arbitration must try to enforce the award where it can. Only then and there is it incumbent on the defendant to deny the existence of any valid award to resist enforcement’’.[149]

E. Conclusion

The New York Convention marks the greatest step in the harmonisation of international commercial arbitration. The Convention gives a straightforward instruction to member state courts to recognise and enforce

[146] Dana Feed A/S v OOO Arctic Salmon, Russian Federation, Federal Arbitrazh Court – Northwestern District, 09 December 2004, Case No. A42-4747/04-13 (Yearbook Commercial Arbitration – Vol XXXIII 2008, Volume 33, p658)

[147] International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards (The 70th Conference of the International Law Association, New Delhi 2002) <http://www.ila-hq.org/download.cfm/docid/032880D5-46CE-4CB0-912A0B91832E11AF> Accessed on 15 August 2015

[148] *Dallah Real Estate and Tourism Holding Company V The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46

[149] Ibid, Lord Mance at paragraph 23

foreign arbitral awards. At the same time, the Convention provides the party against whom the award is invoked with certain legal grounds on which they may, if they can prove one of them, resist the enforcement of the award successfully. Those grounds are mentioned exclusively in Article V of the Convention, which aims to ensure fair and lawful procedures to the loser party.

Commercial parties, through choosing arbitration as an alternative dispute resolution, expect certainty and predictability at the start as well as during and after the arbitration proceedings. Challenging the arbitral award or resisting the enforcement are the main worries for parties after the awards have been issued. At this stage, the arbitral tribunal lacks the power to be involved in any subsequent procedures especially with regard to the enforcement of the award as its jurisdiction ends after issuing the award. In contrast, national courts can become the main players at this point either by challenging the award or resisting its enforcement.

The main object of the NYC and the UNCITRAL Model Law is to unify the treatment of arbitration and arbitral awards by national courts. One might be tempted to assume that the goal of unification has been achieved as these international instruments – the NYC and the UML – have succeeded worldwide and they are at the top of the most successful instruments in the area of international commercial law. However, that view may be contested once a look is taken at the different approaches taken by national courts towards an award. Sometimes these approaches are undertaken through a difference in interpretation of the provisions of the Convention. Nevertheless, many cases show that courts misunderstand the real meaning of the Convention provisions. To this end, a number of recommendations

can be made in relation to the purpose of the Convention, which, as stated, aims to unify the standards of recognition and the enforcement of foreign awards in all contracting states. With this in mind and in reference to all the issues discussed above, it would be recommended that:

- State courts should be dissuaded from interpreting the provisions of the Convention through the rules of their domestic law. In case if the text of the Convention seems ambiguous, states should take into account its context and purpose.
- Actions must be taken by national courts to attempt to incorporate the interpretation of NYC in order to perfectly achieve its aim of harmonising international arbitration.
- In interpreting Article V, courts shall narrowly construe the grounds for refusal of enforcement.
- The establishment of an International Court of Arbitration for challenging international arbitral awards rather than at the courts of the seat.
- While the Convention is considered the most successful instrument in transnational commercial law, there is nothing wrong in reconsidering the structure of the Convention, which has six decades of experience, and reevaluating its effectiveness in order to avoid any misinterpretation by the courts.

These recommendations do not derogate the NYC itself but are directed to national court procedures in applying the convention where there are different results arising from different interpretations of the Convention's provisions. Therefore, acknowledging the success of the Convention as the international instrument that it is, the main work now lies in seeking to unify

the different interpretations of the Convention by the national courts of all the member countries.

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