



ENFORCEMENT OF ARBITRAL AWARDS SET ASIDE IN THE COUNTRY OF ORIGIN

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ABSTRACT

Enforcement of arbitral awards set aside in the country of origin belongs to the category of topics which have, due to controversies they are usually associated with, always attracted attention of legal scholars and practitioners. In this sense, whether awards which have been annulled in their country of origin can in spite of the annulment be enforced in other jurisdictions is the question which has been subject to various theoretical constructions from all sides of the spectrum – from those who adhere to the opinion that annulment deprives an award of any legal effect meaning that it is impossible to enforce it anywhere, over those in the middle who claim that the issue should be observed on a case-to-case basis and relevant surrounding circumstances which is why no single answer to the imposed question could or should be given, to those who strongly proclaim that enforcement of set-aside awards be allowed.

Accordingly, the diversity of approaches has also been confirmed in practice, as on the basis of relevant case law it will be seen that courts of various jurisdictions have taken different positions towards the same issue – some of them have found set-aside awards to be enforceable, some of them, on the other hand, have sided with a contrary view.

Based on this preliminary discussion, although it can easily be concluded that the subject is so diversified that no consistent answer to the question could be developed, therefore causing an extremely high degree of legal unpredictability and non-uniformity which inevitably generate additional negative consequences, this thesis argues that it is precisely due to the lack of such answer that another possible answer should be adopted – to deprive the current debate of its object by structurally changing the mechanism currently employed for control over arbitral awards.

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INTRODUCTION

After arbitral proceedings have come to an end and an arbitral award has been rendered, this does not necessarily mean that the battle between the parties is over, especially if the losing party is not satisfied with the outcome of the proceedings and is not willing to comply with the award.

Traditional and long ago established devices entrusted to the dissatisfied party are the application for setting aside in the country of award's origin and the possibility to resist enforcement of an award in particular jurisdictions where enforcement is sought.

In this sense, an application for annulment has usually been considered as a smart and crucial defending step for the losing party. The underlying *rationale* of such line of thinking is that if the award is vacated, there is a high degree of certainty that its enforcement will be refused in any other jurisdiction where it is sought. This scenario comes as a result of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards¹, which proclaims that one of the grounds upon which the enforcement may be refused refers to precisely those situations where the award “[...] 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.”²

However, the story is far from simple given that there have been cases where the enforcement of the annulled award was nevertheless granted. This being said, it can be seen that the possibilities for enforcement arise even under the regime of the New York Convention itself, based on its Article VII, which is universally known and referred to as the “more favourable right rule” and the potentially, but disputably permissive character of Article V(1)(e) based on the semantic distinction between “must” and “may”, which allegedly empowers courts in

¹ *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, New York, 10 June 1958, United Nations Treaty Series, vol. 330, No. 4739 [hereinafter: the New York Convention or the Convention].

² *Id.* art. V(1)(e).

enforcing jurisdictions with discretion when deciding whether to enforce an annulled award or not.

Furthermore, a regional instrument known as the European Convention on International Commercial Arbitration³ enables enforcement of vacated awards by making the ground upon which the award was set aside in the country of origin relevant, unlike the New York Convention where grounds because of which annulment in country of origin occurred are not addressed. In this sense, it can be concluded that the European Convention seeks to limit the application of the New York Convention.

Having in mind that the issue at hand is far from settled, it is completely understandable that it has given rise to never-ending debates among scholars and practitioners. However, what has given weight to this question is the evident conflict between different but equally important objectives. The proponents of the enforcement tend to emphasize that allowing enforcement is a mechanism which can be used to limit the scope and influence of potentially exotic or parochial grounds for setting aside existing in some national laws. On the other hand, others strongly oppose by claiming that such practice undermines legal harmony as it allows and encourages existence of conflicting decisions on the same subject matter. Moreover, they add that permitting enforcement undermines certainty and predictability as seen from the perspective of the parties, as they can never be sure whether the once annulled award may suddenly re-emerge in another jurisdiction. Lastly, concerns for international comity and the need to respect sovereignty of foreign states, which accordingly includes providing respect to decisions of their courts, demand that full effect be given to annulment decisions, while at the same time pro-enforcement bias as one of arbitration's key characteristics requires a completely different result.

³ *European Convention on International Commercial Arbitration of 1961*, Geneva, April 21, 1961 United Nations Treaty Series, vol. 484, No. 7041 [hereinafter: the European Convention]

Having established the basic notions of the problem pertaining to the enforcement of awards set aside in the country of origin, the purpose of this thesis will be to address the current debate as well as to examine whether any systematic improvement can be made in order to find a sustainable solution. In order to fulfil that task, after the respective regimes under the two mentioned conventions have been assessed, the focus will be put on two jurisdictions that have been chosen for targeting this subject. These jurisdictions are the United States and France which, although at one point in time seemed to follow the same direction, have in the meantime taken “divergent paths”.⁴ Additionally, another helpful perspective will come from the so-called “Yukos saga” – a series of disputes following the collapse of Yukos, at one time Russia’s largest oil company.

Finally, it will be shown that the current legal framework pertaining to the interplay between annulment and enforcement proceedings does not seem to satisfy neither highly demanding needs of businesses nor standards mandated by any legal system which has an ambition to ensure predictability and certainty. Furthermore, due to the evident necessity to introduce changes to the contemporary mechanism of control over arbitral awards, some possible solutions will be examined.

⁴ Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin*, 26 Journal of International Arbitration Kluwer Law International 267-292 (2009).

CHAPTER 1 – COUNTRY OF ORIGIN

1.1. What is meant by “country of origin”

When speaking about the issue of enforcement of annulled awards, in order to understand the gist of the problem, some attention should be devoted to properly understanding what is meant by the term “country of origin”. This term is usually equated and used interchangeably with the concept of nationality of an arbitral award, according to which awards, provided that they meet necessary criteria, have nationality of a particular country and are for that reason subject to a certain form and degree of control exercised by that country’s judiciary system.⁵

Naturally, the next question which arises in this context is related to the criteria to be used for purposes of determination which country will be considered as country of award’s origin. What stems from the formulations employed in Article V(1)(e) of the New York Convention, as well as Article IX of the European Convention, is that the criteria used to ascertain the nationality of an award are two-fold, given that they consist of a combination of territorial and procedural aspects. This means that, based on these two conventions, country of origin is the state *in which* or *under the law of which*⁶ the award was made.⁷

The legislative history of the New York Convention suggests that this duality of criteria occurred as a result of the drafters’ effort to reconcile the conflicting views expressed by different countries towards the issue whether a specific award would be viewed and treated as

⁵ See Markus Petsche, *The Growing Autonomy of International Commercial Arbitration* 101 (2005).

⁶ Although the New York Convention is silent as to the question whether the phrase “under the law of which” refers to substantive law applied to the merits or rather to the law governing the procedure, the universally accepted view is that this is the procedural law, which has been supported by case law.

Additionally, during the drafting process of the European Convention, the proposition was made to explicitly state that the law under which the award was made means *the law governing the arbitration proceedings*, which would undoubtedly eliminate any dilemmas and uncertainties, but the desire of the drafters to follow the formulation of Article V of New York Convention as closely as possible prevailed and the proposition was rejected. See Dominique T. Hascher, *Commentary on the European Convention 1961*, Yearbook Commercial Arbitration XXXVI 504, 536 (2011).

⁷ The New York Convention, *supra* note 1, art. V(1)(e).

domestic or foreign. This issue was deemed to be of significant importance primarily because of the consequences that the determination of nationality bears in respect of the applicable form of judicial review – domestic awards are subject to annulment procedure while foreign awards are reviewed in the proceedings triggered when enforcement of the award is sought.⁸ In particular, the final and current formulation of Article V(1)(e) was proposed and strongly supported by the shared views of French and German delegates, as they asserted that the territorial criterion referring to the place where the award was made might not be adequate enough to exclusively govern determination of an award's nationality. Instead, they claimed that place of arbitration could be accidental, artificial or sometimes difficult to exactly determine, especially in those situations where the award was agreed upon by correspondence of the arbitrators.⁹ These two countries argued that a more appropriate determining factor is of procedural nature.¹⁰ In particular, the procedural law under which the award was made was their suggestion.¹¹ This proposition was based on the traditional view followed at that time in French and German legal doctrine, which was also supported by the expressive enactment in the legislation of both countries.¹² Subsequently, German and French arguments were acknowledged by the drafters of the Convention, as they recognized the possibility for the arbitration proceedings to be governed by the law other than the law of the country of the seat of arbitration, which led to the amendment of the initial text and inclusion of the procedural criterion to the final wording.

⁸ Albert Jan Van Den Berg, *When is an arbitral award non-domestic under the New York Convention of 1958*, 6 Pace L. Rev. 25, 32-39 (1985).

⁹ *Id.* at 34.

¹⁰ The German representative supported his argument by stating an example where the two German businessmen, both residents of the UK, determined London as the place of arbitration mostly because of the reasons related to convenience and practicality. For the law governing the arbitral procedure they chose German law. The representative here expressed the view that application of the territorial criterion which would qualify the award as English would not be adequate or right and would seriously infringe the will of the parties. *See* Van Den Berg, *supra* note 8, at 35.

¹¹ *Id.*

¹² This position in national legislation leaning towards the procedural criterion as far as determination of the nationality of the award is concerned has been since then abandoned in these two jurisdictions. *See* Petsche, *supra* note 5, at 102.

The problem evolving from described duality of criteria is that it may lead to qualification of the arbitral award as having two nationalities, which contradicts the widely promoted objective of centralization of court control in one country and also jeopardizes legal certainty and predictability by granting jurisdiction for the annulment proceedings to two different countries.¹³ Furthermore, it opens up the possibility for emergence of conflicting decisions if the award is set aside in the country where made, while, at the same time, seen as completely valid in the country under the law of which it was made.¹⁴

However, it should be said that such scenario where arbitral proceedings are governed by the procedural law other than the law of the country where the arbitration has its seat, in practice can be perceived rather as a mere theoretical possibility than something regularly happening in practice.¹⁵ This is due to the understanding that opting for different procedural law heightens the probability for occurrence of various complications, compromising the highly praised objectives of efficiency and speed, which are traditionally referred to as inherent characteristic of dispute resolution via arbitration.

In conclusion, it can be said that the contemporary prevailing criterion is the territorial one, which means that the country where the place or seat of arbitration will be treated as the country of origin of the award, with the effect that only the decision setting aside rendered by the courts of this country will have legal relevance.¹⁶ In other words, courts of the country of the award's origin have exclusive competence to decide on setting aside of the award,¹⁷ which has been confirmed by numerous court decisions.¹⁸

¹³ *Id.*

¹⁴ Hascher, *supra* note 6, at 536.

¹⁵ Albert Jan van den Berg, *Should the Setting Aside of the Arbitral Award be Abolished?*, 29 ICSID Review 263, 271 (2014).

¹⁶ Tibor Varady et al., *International commercial arbitration: A transnational perspective* 1135 (6 ed. 2016).

¹⁷ Van den Berg, *supra* note 15, at 266.

¹⁸ In *ISEC v. Bidas* ISEC filed a petition in the United States district court to vacate the award. The petition was dismissed because this court concluded that it lacked subject matter jurisdiction to vacate a foreign arbitral award, explaining the dismissal by stating that, given that the parties had subjected themselves to the procedural law of

1.2. Role of “country of origin”

As the question whether it is possible to enforce awards that have been set aside in the country of their origin has been around for a significantly long period of time, the problem has been addressed from different perspectives. Namely, the problem has been approached through observing philosophical and conceptual understandings of arbitration and its ties to a particular country.

The first view¹⁹ finds its justification in the judicial theory of arbitration, strongly emphasizing the role of the seat of arbitration, to the point of equating it with the municipal jurisdiction's *forum*. It has been submitted that this view seeks to “anchor the arbitration to the legal order of the state in which it takes place”²⁰ After applying this particular reasoning to the question whether or not the court before which enforcement of a foreign annulled award is sought should give any effect to such award, the answer seems to be in the negative, as it can be concluded that the award ceases to legally exist in the country of origin and that enforcing a non-existing award practically amounts to impossibility.²¹

The opposite approach²², on the other hand, negates the impact of the seat of arbitration award, by refusing to accept that particular arbitration is integrated into that country's legal order. Furthermore, it is thought under this philosophy that arbitration does not exist because a particular state decided to empower it with jurisdiction to resolve certain disputes, but that it rather “derives power from the sum of all the legal orders”.²³ The consequence that follows is

Mexico, and that the governing procedural law was that of Mexico, only Mexican courts had jurisdiction to vacate the award. *See International Standard Electric Corp. v. Bidas Sociedad Anonima Petrolera*, 745 F. Supp. 172 (S.D.N.Y. 1990); Varady et al., *supra* note 16, at 987.

¹⁹ The example of a country following this view is England.

²⁰ Emmanuel Gaillard, *The enforcement of awards set aside in the country of origin*, 14 ICSID Review - Foreign Investment Law Journal 16, 17 (1999).

²¹ As explained by Pieter Sanders who is one of the creators of the New York Convention. *See Pieter Sanders, New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* 6 Netherlands International Law Review 43, 55 (1959).

²² Dominant, for example, in France.

²³ Emmanuel Gaillard, *supra* note 20, at 18.

that annulment according to this approach does not seem to deprive the award of its effects, making it perfectly reasonable and possible to enforce an award that has been set aside in another jurisdiction.

CHAPTER 2 - ENFORCEMENT OF SET-ASIDE AWARDS AT TREATY LEVEL

2.1. Approach under the 1958 New York Convention

2.1.1. Scope of application

The main focus of the New York Convention, as can be concluded from the Convention's title, is the recognition and enforcement of foreign arbitral awards. However, the meaning of the term "foreign arbitral award" is more precisely defined in Article I of the Convention, where two definitions can be found.²⁴ The first one is more straightforward, as it explicitly stipulates that the Convention applies to arbitral awards made in another contracting State, while the second one, which can be seen as an additional element to the first definition given that these two are connected with the word "also", provides that the Convention's scope of application also extends to recognition and enforcement of awards not considered as domestic in the State where the enforcement is sought.²⁵ The second definition is well in accordance with previously elaborated view expressed by certain delegations during the drafting process of the Convention as regards the possibility to arbitrate in one country under the laws of another, which ultimately led to the second definition being inserted into the final text of the Convention.²⁶

In this sense, the New York Convention has made a clear departure from its ancestor, the 1927 Geneva Convention, by leaving the requirements of nationality or residence of the parties out of the definition related to Convention's application. Such significantly broader scope of application, aiming at further facilitation of enforcement of arbitral awards²⁷ and partnered with a large number of signatory countries, bears some relevance from the perspective of the

²⁴ Albert Jan Van den Berg, *The New York Convention of 1958: An Overview*, in *The Enforcement of Arbitration Agreements and International Arbitral Awards*, The New York Convention in Practice, (Emmanuel Gaillard & Domenico Di Pietro 1 ed. 2009), at 2.

²⁵ *Id.*

²⁶ *Id.*

²⁷ UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 8 (Emmanuel Gaillard & George A. Bermann 2016).

enforcement of annulled awards, meaning that a vast majority of arbitral awards sought to be enforced in the jurisdiction other than the jurisdiction of country of origin will fall under governance of Article V(1)(e). As has been mentioned, this article lists the fact that the award was set aside in its country of origin as one of the grounds for refusing enforcement. This implies that setting aside has an extra-territorial effect, as the enforcement of an annulled award will not be granted,²⁸ according to the first glance at the text of the Convention.

However, contrary to this classical approach, which gives universal effects to the setting aside decision, the proponents of the contrasting international approach have argued that some justifications and bases for enforcing vacated awards nevertheless can be found by relying on permissive character of Article V(1)(e) itself, as well as on Article VII of the Convention.

2.1.2. Permissive character of Article V(1)(e)

Those who have sided with the mentioned international approach have been relying on literal interpretation and the used formulation “may refuse”, as opposed to “shall refuse” that can be found in some other articles of the Convention.²⁹ Therefore, their position is that there is a complete discretionary power resting with the enforcing court to enforce or not to enforce an award. They further support their argument by invoking teleological interpretation and the need to interpret international treaties in light of their object and purpose.³⁰ In this sense, the pro-enforcement character of the Convention together with strong emphasis on the need to facilitate enforcement of arbitral awards in general by, *inter alia*, limiting grounds for refusal only to a small number of most serious grounds, would provide additional justification for allowing enforcement of annulled awards.

²⁸ Van den Berg, *supra* note 24, at 4.

²⁹ Such as Articles II, III, VII of New York Convention, where “shall” is used.

³⁰ United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations Treaty Series, vol. 1155, art. 18.

Additional argument in favor of optional nature of refusal stems from historical interpretation, more specifically the comparison between Article V(1)(e) of the New York Convention and the mandatory language used in the 1927 Geneva Convention that the “[a]ward shall be refused.”³¹ Given that the intention behind introducing the New York Convention was to supplant its predecessor, it may be concluded that the drafters decisively chose to entitle enforcement judges with discretionary power.³²

Moreover, another pro-enforcement perspective came, interestingly, as a counter-argument to its opponents who alleged that use of mandatory language found in French version of the Convention was very indicative. Namely, some authors³³ engaged in an extensive syntactic analysis of formulations employed in other language versions of the Convention. In this sense, examination of versions in five official languages was conducted. The final result of this assessment not only showed that four out of five official languages³⁴ leaned towards permissive nature of the article, clearly leaving room for judicial discretion, but that use of a certain grammar form in the French version could not be understood as in explicitly contradicting the wording in other four languages and therefore could not be a factor deserving to be relied on to dominantly affect the interpretation of the Convention.³⁵

Furthermore, another linguistic argument comes from the examination of Arabic version of the Convention, though it was not examined in the initial assessment, as it can to some extent be

³¹ Convention on the Recognition and Enforcement of Foreign Awards, *Travaux Préparatoires - Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 32, U.N. DOC E/Conf.26/8/Rev.1 (1958), art. 2(c)

³² Jared Hanson, *Setting Aside Public Policy: The Pemex Decision And The Case For Enforcing International Arbitral Awards Set Aside As Contrary To Public Policy*, 45 *Georgetown Journal of International Law* 826, 833 (2014).

³³ Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 *Arb. Int'l* 227, 229-30 (1998).

³⁴ Namely English, Chinese, Russian, and Spanish. It should be mentioned that Arabic was not the official language until 1979, unlike others which were established as official languages when United Nations were founded. See Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards: An Analysis of the Legal Framework and Its Interpretation in Case Law and Literature* 75 (2010).

³⁵ Jan Paulsson, *May or Must Under the New York Convention: An Exercise in Syntax and Linguistics*, 14 *Arb. Int'l* 227, 229-30 (1998); Alfons, *supra* note 34, at 78.

considered of importance due to the mere fact that this was the most recent translation of the text, meaning that the United Nations had an opportunity to clarify the genuine intention behind the disputed provision.³⁶ Nevertheless, as the character of this article in the Arabic version still remained rather permissive, the final conclusion of the linguistic approach supports the claim that Article V(1)(e) is of optional nature.

On the other hand, the view that the enforcement judge retains discretionary power when deciding on application to enforce an award that has been annulled, has encountered strong opposition in scholarship, mostly relying on the rule that “*ex nihilo nihil fit*” and that the creators of the New York Convention would not have possibly supported such legal impossibility.³⁷ Furthermore, as drafting history of the Convention may prove to be an important factor in treaty interpretation due to its ability to reveal the intention of the creators and the exact result that was trying to be achieved via certain provisions, by observing *travaux préparatoires* it can be seen that neither the word “may” nor its possible semantic implications were the object of any discussion³⁸ among different delegations at the 1958 New York Conference.³⁹

In addition, the practice of the courts in enforcement jurisdictions can also be of relevance, as there have been no documented reports of decisions relying solely on pure discretion of the court in the situations when the enforcement of the annulled award has occurred.⁴⁰

Furthermore, as has been documented in case law, courts have been persistent in refusing to enforce awards in the presence of grounds (a) to (d) despite the potentially permissive

³⁶ Alfons, *supra* note 34, at 78.

³⁷ *Id.*

³⁸ Interestingly, it was the other part of Article V(1)(e) of the Convention, namely the definition and application of the formulation “has not become binding” that was extensively debated, while the part dealing with the award set aside in its country of origin was given much less space.

³⁹ Marike R. P. Paulsson, *The 1958 New York Convention in Action* 201 (2016).

⁴⁰ Van den Berg, *supra* note 15, at 16.

interpretation of the words used, which means that there would be no reason to treat ground (e) differently in comparison with all other grounds enumerated in the same list.⁴¹

However, drafting history of the article may introduce another point of view on the matter and even provide some form of reconciliation of previously elaborated standings. Despite the well-founded argument that the drafters of the Convention recognized “the rule of the thumb” and the mentioned principle “that nothing follows out of nothing” according to which an annulled award cannot be enforced in another jurisdiction simply because it ceased to exist, it has been also submitted that the drafters acknowledged that some exceptions to this principle would be completely justified if fairness demanded such result.⁴² Furthermore, even though the drafters recognized that listing specifically which grounds for annulment in the primary jurisdiction (their main focus of attention in this sense was possibility of eliminating the so-called “local standards of annulment”) would be deemed acceptable and logical from the perspective of the enforcement court, they feared that such solution would interfere with domestic provisions and procedures for post-award control over arbitral awards in country of origin, which was thought to be the issue beyond competence of the New York Conference.⁴³ This is why it can be concluded that, although the final text of the Convention remained silent on this particular issue, the possibility of empowering enforcement courts with discretion, not in each and every situation, but under exceptional and limited circumstances, was acknowledged.

⁴¹ Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?* 31 Journal of International Arbitration 575, 590 (2014).

⁴² M. Paulsson, *supra* note 39.

⁴³ *Id.*

The previous issue was also recognized and further extensively elaborated by Jan Paulsson who made a distinction between local (LSA)⁴⁴ and international standards of annulment (ISA).⁴⁵ The need for distinguishing these two arose out of the understanding that “local peculiarities”,⁴⁶ upon which courts of certain jurisdictions may base their decision to annul the award, have rather negative consequences for international arbitration in numerous aspects, undermining the trust of commercial subjects being only one of them. Additionally, strong emphasis has been put on suggestions to ignore annulment decisions based on local standards, since “the choice of a particular place of arbitration should not facilitate such subterfuge by dint of an unusual or internationally unusual local rule”.⁴⁷ The impact of this categorization of standards unfolds in such direction that annulment on the basis of a local standard is perceived to have merely territorial effect, meaning that the annulment has relevance only in the boundaries of jurisdiction of country of award’s origin, whereas the award set aside on a ground of international character has extra territorial or, in other terms, *erga omnes* effect,⁴⁸ making it impossible to enforce the award anywhere abroad.

Moreover, Albert Jan Van den Berg, who strongly supports the position that the decision setting aside results in depriving the award of any legal effect both in primary and secondary jurisdiction, still nevertheless recognizes situations where the discretionary power of the

⁴⁴ “The rich experience of international trade law since 1958 has told us what an ISA is: a decision consistent with the substantive provisions of the first four paragraphs of Article V(1) of the New York Convention and Article 36(1)(a) of the UNCITRAL Model Law. Everything else would be an LSA, and entitled only to local effect”. See Van den Berg, *supra* note 15, at 17. However, some authors have stated that the determination which standard can be qualified an LSA rests with the enforcement court, which inevitably leads to the prohibited examination of merits of the award. Therefore, according to this author, differentiation between LSA and ISA is not justified. See Pieter Sanders, *Quo Vadis Arbitration? : Sixty Years of Arbitration Practice* 77 (1999).

⁴⁵ See Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)* , 9(1) ICC Bulletin 14 (1998).

⁴⁶ Margaret L. Moses, *The principles and practice of international commercial arbitration* 64 (2017).

⁴⁷ Alfonso, *supra* note 34, at 73.

⁴⁸ Sanders, *supra* note 44, at 77; M. Paulsson, *supra* note 39.

enforcing judge is to be given effect – insignificant violations triggering one of the grounds or failure of the parties to invoke the ground timely in arbitration proceedings.⁴⁹

Based on the foregoing analysis, although both views can be defended with compelling arguments providing both positions with more or less reasonable justifications, it must be concluded that the view favoring the argument for permissive nature of Article V(1)(e) can be the potential source of a high degree of legal unpredictability as it opens space for courts in secondary jurisdictions to adopt and apply legal theories in an inconsistent and contradictory manner, which ultimately makes it impossible to predict the outcome under this article of the Convention.⁵⁰

2.1.3. More-favorable-right provision in Article VII of the New York Convention

Another possibility to enforce an award vacated in its country of origin is by relying on Article VII of the Convention, and its formulation that “[t]he provisions of the present Convention shall not [...] deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.”⁵¹ This article is widely known as the more favorable right principle, which empowers the party seeking enforcement to rely on a more favourable rule if such rule exists in the legal system of the enforcement country. France is the example of a country enforcing arbitral awards outside of New York Convention, where the enforcement could be obtained and justified on the basis of this article. This is possible due to the fact that French legislation on recognition and enforcement of foreign arbitral awards does not recognize

⁴⁹ Albert Jan van Den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, April 28, 2009, 27 J. Int'l Arb. 179, at 186 (2010).

⁵⁰ Marike R. P. Paulsson, *Enforcement of Annulled Awards: A Restatement for the New York Convention?*, Kluwer Arbitration Blog, December 21, 2017, available at <http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention>

⁵¹ The New York Convention, *supra* note 1, art. VII.

setting aside in country of origin as one of the grounds for refusing enforcement,⁵² which evolves from the predominant internationalist view in France that arbitral awards are not anchored to any national order, but are instead decisions of international justice whose validity must be ascertained in accordance with the rules applicable in the country where its enforcement is sought“.⁵³

However, the approach that Article VII could be used as a tool for enforcing annulled awards, provided that the more favourable rule does exist in the law of the enforcement country, has also been criticized. Namely, some authors⁵⁴ have suggested that an annulled award is not at all covered by the scope of Article VII, the main argument being based on the involvement of the word “award”. More specifically, this view is in accordance with the principle that the annulment in country of origin deprives the award of any legal effect, therefore, it can no longer be considered as an existing award at all.⁵⁵ It is further stated that although Article VII provides for the possibility of relying on more favourable domestic rule, this only applies in relation to formal requirements - in situations where the country of enforcement imposes less strict formal conditions necessary for granting enforcement⁵⁶, the party seeking enforcement will be able to avail himself of the more favourable rule notwithstanding the fact that the requirements under the New York Convention are not met – but cannot apply in circumstances when the award is non-existent, according to law chosen by the parties, either via choice of the seat of arbitration either some other procedural law under which the award was made.⁵⁷

Another argument against application of Article VII comes from the perspective of Convention’s *travaux préparatoires* and the idea that intention of the creators could not have

⁵² Van den Berg, *supra* note 15, at 20.

⁵³ *Id.*

⁵⁴ Thadikaran, *supra* note 44, at 592.

⁵⁵ Van den Berg, *supra* note 15.

⁵⁶ For example, in relation with Article IV, which requires the duly authenticated original award or a duly authenticated copy thereof along with the original arbitration agreement or a duly authenticated copy thereof.

⁵⁷ Thadikaran, *supra* note 41, at 593.

possibly been to dilute the concept of annulment of awards, especially having in mind the Draft version of the Convention where it was provided that enforcement “*may only* be refused” in the presence of specific grounds, one of which was the annulment in country of origin. By using formulation “*may only*”, the goal the drafters were trying to achieve was limitation of possible grounds on which enforcement should be rejected, and certainly not to provide space for refusing to give any effect to the annulment.⁵⁸

2.2. Approach under the 1961 European Convention

2.2.1. Contextual background

European Convention on International Commercial Arbitration, similarly to the New York Convention, represents the final result of numerous attempts, which started in 1950s, to improve national arbitration legislation, as well as enforcement of arbitral awards. Although both conventions were in drafting procedure at roughly the same time, while the Working Group engaged on the preliminary draft of the European Convention was excessively occupied with the issue of how to limit or eliminate the burning problem of double control⁵⁹, the conclusion of New York Convention occurred in June 1958, which eventually led to the understanding that the existing draft of European Convention should be changed as to exclude provisions on enforcement of arbitral awards.⁶⁰ Furthermore, after assessment of New York Convention had been performed, some important conclusions *vis-à-vis* future European Convention were drawn on this basis. Firstly, it was observed that as the New York Convention regulated enforcement of foreign arbitral awards, it was not concerned with grounds for setting aside in country of origin. Furthermore, it was realized that European Convention was an instrument that was aimed at settling a variety of issues related to arbitration, in other words, it was not, as opposed

⁵⁸ *Id.*

⁵⁹ Van den Berg, *supra* note 15, at 11.

⁶⁰ *Id.*

to the New York Convention, intended to cover only a single aspect of international commercial arbitration, but rather to provide answers to many different questions. A consequence of this was the imposition of a question what should to be done with awards set aside in country of origin on grounds that were not at the same time grounds for refusing enforcement listed in New York Convention.⁶¹ Afraid of possible negative effects that this question could introduce, a possible proposed solution was “to limit, in the European draft convention, the grounds on which an award may be set aside internationally, in the country of origin, by virtue of Article V(1)(e) of the New York Convention, to the ground for refusal of enforcement set out in that Convention”.⁶² Therefore, it can be seen that the main concerns of the drafters working on the European Convention were no longer related to question of double control, but rather to possible methods that could be used to limit the impact of setting aside on parochial grounds in country of origin.⁶³

2.2.2. Article IX of the European Convention

The sought limitation was accomplished via Article IX of the European Convention which enlisted all of the grounds that could be considered serious enough to lead to a refusal of enforcement. This article provides that a vacated award may not be enforced only if the annulment was based on the enlisted grounds, which correspond to the first four grounds of Article V(1) of the New York Convention. This means that awards set aside in their country of origin may nevertheless be enforced if the annulment was based on a valid ground existing in the relevant law of country of origin, but not listed in Article IX.⁶⁴ In other words, it can be said that the European Convention may be considered as a codification of the mentioned doctrine devoted to local standards of annulment.⁶⁵ However, it must be mentioned that the award must

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Alfonso, *supra* note 34, at 57.

⁶⁵ M. Paulsson, *supra* note 50.

have been rendered and annulled in a contracting state in order to fall under the scope of this provision.⁶⁶

2.2.3. Interrelation with the 1958 New York Convention

Even though these two conventions have distinct ambitions, as has been said that the European Convention governs a variety of issues related to arbitration, while the New York Convention only governs the specific regime of recognition and enforcement, the overlapping section between them consists of justifications for enforcement of annulled awards.⁶⁷ This interplay was acknowledged by the drafters of the European Convention, especially having in mind that it was known that prospective contracting states to European Convention would inevitably be affiliated with both conventions. Therefore, the need for settling this issue was addressed in the second paragraph of Article IX,⁶⁸ where it was explicitly stated that the European Convention limits the application of Article V(1)(e)⁶⁹ of the New York Convention solely to the cases of setting aside on grounds listed in Article IX(1) of European Convention. This would simply mean that if the winning party seeks enforcement, in a country that is a contracting state of both conventions, of an award previously annulled in country of origin on the ground of public policy, the enforcement court will grant enforcement of such an award.

Some of possible justifications for the mentioned formulation of Article IX(2) were provided by Ferenc Majoros⁷⁰. These are, namely, “the rule of maximum efficacy”, “specificity” and “*lex posterior derogat legi priori*.”

Under the rule of “maximum efficacy”, if the same subject matter is simultaneously covered by more than one convention with similar or identical goals and objectives, the precedence is to be

⁶⁶ Alfonso, *supra* note 34, at 60

⁶⁷ *Id.*

⁶⁸ The European Convention, *supra* note 2, art. IX(2).

⁶⁹ Alfonso, *supra* note 34.

⁷⁰ Ferenc Majoros, Konflikte zwischen Staatsverträgen auf dem Gebiet des Privatrechts 84 (1982).

given to the one that provides for the most effective solution. As the purpose of both New York and European Convention⁷¹ can generally be seen as promotion of policies that can improve the whole system of international arbitration and having in mind that one of the main arbitration's objectives is to facilitate enforcement of arbitral awards to the extent possible, it can be concluded that the European Convention is, strictly speaking from this perspective, more effective as it to some extent clearly allows enforcement of annulled awards.

In respect of Majoros's rule of "specificity", which is undisputedly in accordance with the general principle of "*lex specialis derogat legi generali*", having in mind that the New York Convention merely provides for refusal of enforcement in the cases where annulled award is sought to be enforced, whereas European Convention goes beyond and lists four grounds capable to justify possible refusal to enforce annulled award, it can be concluded that European Convention is in this sense more specific and therefore deserves priority over New York Convention.

Lastly, the third rule, namely "*lex posterior derogat priori*", a traditional rule that "the later law repeals earlier law" speaks in favor of application of 1961 European Convention in situations when it comes into a conflict with 1958 New York Convention.

Here, it should also be noted that although it is quite clear that according to Article IX(2) of the European Convention this convention takes precedence over the New York Convention when the question of enforcement of annulled awards is at stake and that more favourable national law has priority over Article V(1) of New York Convention, the outcome may not be quite as obvious in situations in which there is interaction between these two conventions and national laws which may have different rules for enforcement of foreign arbitral awards. The example

⁷¹ Even though they, as has been said, have rather distinct ambitions – goal of the New York Convention is more specific and focused on enforcement of arbitral awards as one narrow section of arbitration law, while European Convention attempts to solve various issues related to arbitration, it is without doubt that they have a common and universal objective. See Alfonso, *supra* note 34.

of such interaction would be a situation in which national law of a country, which is a party to both conventions, provides for even more lenient conditions than those offered by European Convention for enforcement of annulled awards.⁷² For answering this question, the final clause⁷³ of the European Convention, which states that its provisions will not affect applicability of other international agreements, may be engaged to justify reliance on Article VII of the New York Convention and therefore it might be concluded that more favourable national law takes precedence over Article IX(1) of European Convention as well.

⁷² Association for International Arbitration, *Arbitration in CIS Countries: Current Issues* 151 (2012).

⁷³ The European Convention, *supra* note 2, art. X(7).

CHAPTER 3 - LOCALIZED APPROACH TO ENFORCEMENT OF ANNULLED AWARDS

The two jurisdictions whose position on the enforcement of set-aside awards should be observed are France and the United States. The first reason for choosing precisely these two jurisdictions lies in their well-known importance for arbitration in general. The second reason is the existence of highly relevant case law related to the subject of enforcement of annulled awards. However, the third and the most important reason is that these two jurisdictions not only represent perfect illustrations of treatment accorded in enforcing jurisdictions to awards annulled in the place of origin, but they also accurately indicate and further emphasize the controversy and complications behind the question whether annulled awards should be enforced or not.

Interestingly, as is suggested by case law and the court decisions rendered in the 1990s, France and the United States at the beginning took very similar approaches towards the issue, as a result of which annulled awards were held to be enforceable.⁷⁴ However, the situation has drastically changed over the years as these two jurisdictions have taken rather divergent paths.⁷⁵

3.1. The US position

The question of whether awards that have been set aside could be enforced, despite having received significant attention by specialists and scholars in the United States, has been referred to as not having enough judicial exposure in order to develop a unique and cohesive approach,⁷⁶ especially having in mind that the issue has reached federal level only a few times. However, although this opinion may to some extent be true, some basic conclusions regarding the United

⁷⁴ Koch, *supra* note 4, at 267.

⁷⁵ *Id.*

⁷⁶ Goldstein, *supra* note 84, at 20.

States' current approach may still be drawn. Furthermore, it is precisely due to this lack of the cohesive approach that the real scope of the problem can be seen.

Here, it can be said that France and the United States have started from similar positions as the first US decision⁷⁷ dealing with the enforcement of annulled awards primarily found its justification in the more-favorable-right provision found in Article VII of the New York Convention. However, such basis for allowing enforcement was not followed in the decisions that came afterwards, as it appears quite clear that these subsequent decisions dominantly relied on the optional character of Article V(1)(e) of the New York Convention and the scope of court's discretion when deciding on the issue of enforcement.

The landmark case *Chromalloy v. Egypt*⁷⁸ involved an award rendered on August 24, 1994, in Cairo, in the arbitral proceedings conducted between an American company – *Chromalloy Aeroservices* as claimant and *the Arab Republic of Egypt* as respondent. Egypt was ordered to pay a certain amount of money to Chromalloy, which was the result reached through the application of Egyptian law, as this law had been chosen as governing law in the parties' contract.⁷⁹ Afterwards, Chromalloy sought enforcement in the United States, but in the meantime, on December 5, 1994, the award was annulled in Egypt, due to the finding that the arbitrators had failed to “apply the law agreed upon by the parties to govern the subject matter in dispute”, which is the ground for annulment stated in Article 53(1)(d) of the Egyptian law on arbitration.⁸⁰ The annulment court held that the arbitral tribunal was mistaken in its determination which Egyptian substantive law was to be applied – civil or administrative.⁸¹

⁷⁷ *In re Chromalloy Aeroservices*, 939 F.Supp. 907 (D.D.C.1996).

⁷⁸ *Id.*

⁷⁹ Koch, *supra* note 4, at 276.

⁸⁰ Hamid Gharavi, The international effectiveness of the annulment of an arbitral award 92 (2002).

⁸¹ *Id.*, fn.344.

However, despite the annulment, the award was nevertheless enforced in the United States by the United States District Court for the District of Columbia on July 31, 1996.⁸²

The District Court's interpretation and application of the New York Convention have been described as quite interesting,⁸³ as the Court initially revoked Article V(1)(e) and its supposedly permissive character suggested by the word "may", concluding that it was entitled to exercise its discretion and enforce an award that had been set aside at the seat of arbitration.⁸⁴ However, the Court did not proceed with exercising this discretion, nor did it further engage in explaining when and how this discretion should be exercised, but it rather chose to rely on "the more-favorable-right provision" of Article VII of the New York Convention, stating that while Article V(1)(e) with its formulation that "recognition and enforcement *may* be refused" was clearly of permissive character, Article VII was, according to the Court's interpretation, of mandatory nature, because of the employed formulation that "no party *shall* be deprived of the rights it would have to avail itself of an arbitral award in the manner and to the extent allowed by the law [...] of the country where such award is sought to be relied upon."⁸⁵ Moreover, the court found that if the award was enforceable under the Federal Arbitration Act⁸⁶ ("FAA"), then grounds for refusal of recognition of an award specified in the New York Convention were "irrelevant except to the extent these same grounds constituted reasons for *vacatur* under the FAA".⁸⁷ Having noted this, the Court proceeded to determine whether it was possible to enforce the award under the FAA, or, in other words, whether there were any grounds present for vacating the award under Section 10 of the FAA. Here, the District Court, having determined

⁸² *Id.*, at 93.

⁸³ Robert C. Bird, *Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a "New" New York Convention*, 37 North Carolina Journal of International Law & Commercial Regulation 1013-1058, at 1031 (2012).

⁸⁴ Marc J. Goldstein, *Annulled Awards in the U.S. Courts: How Primary is "Primary jurisdiction"?*, 25 American Review of International Arbitration 19, at 20 (2014).

⁸⁵ Koch, *supra* note 4, at 276.

⁸⁶ The Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16.

⁸⁷ Goldstein, *supra* note 84.

that the application of Egyptian civil instead of administrative law could only amount to a mistake of law and not to the manifest disregard of the law as one of the grounds for vacating the award under the FAA, finally stated that “as a matter of US law, the award is proper”.⁸⁸

The Court later on examined whether it was under obligation to recognize *res iudicata* effect of the annulment judgment. More specifically, it devoted attention to the question of whether rules of international comity between different states required it to recognize such an effect.⁸⁹ In the end, the Court here held that a strong public policy embodied in the pro-enforcement approach towards foreign arbitral awards demanded that the annulled award in question be enforced, despite the considerations of international comity.⁹⁰

Considering the level of criticism *Chromalloy* had encountered in the years that followed, it can be concluded that its reasoning at present seems to be rather outdated. The decisions of United States’ courts that came afterwards all showed divergence from the approach taken in *Chromalloy*.

In *Yusuf Ahmed Alghanim & Sons v. Toys*,⁹¹ even though this was not a case clearly and solely dealing with enforcement of an annulled award, it had the relationship between the New York Convention and the FAA examined by the United States Court of Appeals.⁹² The final result was the holding that the enforcement of an award could only be refused for the reasons enumerated in Article V of the New York Convention, denying the position established in *Chromalloy* that FAA contained more favourable standards of enforcement.⁹³

⁸⁸ Koch, *supra* note 4, at 276.

⁸⁹ *Id.* at 277

⁹⁰ Goldstein, *supra* note 84, at 29.

⁹¹ *Yusuf Ahmed Alghanim & Sons v Toys "R" Us, Inc.*, 126 F.3d 15 (2d Cir. 1997).

⁹² Matthias Claudius Lerch, *Recognition/enforcement of annulled awards under special consideration of the Amsterdam Court of Appeals' decision of 28 April 2009*, in *Selected papers on international arbitration* (Daniele Favalli, Xavier Favre-Bulle & Andreas Furrer 2011).

⁹³ *Id.*

Furthermore, the *Yusuf* holding was confirmed through *Baker Marine v. Chevron*.⁹⁴ In this case, Baker Marine sought enforcement in Nigeria, while Chevron, as the losing party, filed an application for annulment before Nigerian courts. The action for annulment turned out to be successful for Chevron and the award was consequently annulled on the ground that the arbitrators “had improperly awarded punitive damages, gone beyond the scope of the submissions, incorrectly admitted parole evidence, and made inconsistent awards, among other things.”⁹⁵ Nevertheless, Baker Marine attempted to enforce the award in the United States. After the District court denied enforcement, the United States Court of Appeals (Second Circuit), first analyzed Baker Marine’s reliance on Article VII and the fact that the award had been annulled on the grounds not recognized under US law as valid grounds for *vacatur*.⁹⁶ Ultimately, the Court confirmed the decision of the District court, negating the possibility to apply the FAA. It held that, as it could not be shown that it was parties’ intention that domestic arbitral law would govern their dispute, the FAA could not be applied as a more favorable local law under Article VII because its mechanical application not only would be inconsistent with the framework set out in the New York Convention, but it would also undermine the finality of awards and allow for emergence of conflicting decisions.⁹⁷ In addition to that, Baker Marine later contended that it was appropriate for the court to exercise the discretion granted under Article V(1)(e). However, this was rejected by the court on the ground that this would stand in confrontation with the purpose of the FAA, which is ensuring that the parties’ arbitration agreements are enforced exactly in accordance with their terms. Finally, given that it was clear that the parties had opted for Nigeria as the place of arbitration and that there was no visible intention of

⁹⁴ *Baker Marine (Nig.) Ltd v. Chevron (Nig.) Ltd*, 191 F.3d 194 (2d Cir. 1999).

⁹⁵ John M. Barkett, Frank Cruz-Alvarez, Sergio Pagliery & Marike R. P. Paulsson, *Perspectives on the New York Convention under the Laws of the United States: The US Public Policy as a Gloss of Article V(1)(e)*, Kluwer Arbitration Blog, September 14 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/09/14/perspectives-new-york-convention-laws-unitedstates-us-public-policy-gloss-article-v1e/>

⁹⁶ *Id.*

⁹⁷ Lerch, *supra* note 92, at 116.

submitting the dispute under arbitral law of any other country, more specifically – the United States, and also bearing in mind that there were no allegations that Nigerian court violated Nigerian law, the Court of Appeals held that “[I]f a party whose arbitration award has been vacated at the site of the award can automatically obtain enforcement of the awards under the domestic laws of other nations, a losing party will have every reason to pursue its adversary with enforcement actions from country to country until a court is found, if any, which grants the enforcement.”⁹⁸ Finally, a conclusion that can be reached based on *Baker Marine* is that although, unlike in *Chromalloy*, the annulled award was not granted enforcement, the existence of discretionary power under Article V(1)(e) was acknowledged.

In *TermoRio S.A.E.S.P. and LeaseCo Group, LLC. v. Electranta S.P., Electrificadora del Atlantico S.A. E.S.P.*⁹⁹, discretion given to the enforcing courts under Article V(1)(e) of the New York was further defined. The arbitral award in this case had been annulled by the Colombian court on the ground that the arbitration agreement was in violation of Colombian law, but TermoRio chose to ignore the setting aside and tried to enforce the award in the United States despite its annulment in Columbia.¹⁰⁰ The United States Court of Appeals for the District of Columbia Circuit recognized Colombian court as a competent authority to review the award as there was no evidence that could suggest that the annulment proceedings were “tainted or that the judgment of that court [was] other than authentic.”¹⁰¹ TermoRio also saw its chance in drawing a comparison between the case in question and *Chromalloy*, insisting that the annulled award should be enforced because of public policy reasons,¹⁰² but the court responded that the present case and *Chromalloy* were plainly distinguishable and also that it was wrong to claim “that the Convention policy in favor of enforcement of arbitration awards effectively swallows

⁹⁸ Barkett et al., *supra* note 95.

⁹⁹ *TermoRio S.A.E.S.P. and LeaseCo Group, LLC. v. Electranta S.P., Electrificadora del Atlantico S.A. E.S.P.* (487 F.3d 928 (D.C. Cir. 2007)).

¹⁰⁰ *Id.*

¹⁰¹ Bird, *supra* note 83, at 1034.

¹⁰² *Id.*

the command of Article V(1)(e)."¹⁰³ Furthermore, the court emphasized the importance of giving respect to the purpose of the New York Convention and its policy of establishing and maintaining uniform enforcement of awards, which is made possible through forcing national courts to "let go of matters they normally would think of as their own".¹⁰⁴ The court further held that the courts in the US may enforce a previously annulled award provided that a judgment arising out of nullification proceedings can be seen as "repugnant to fundamental notions of what is decent and just in the State where enforcement is sought," explaining that "the standard is high, and infrequently met," and concluding that it should be used "only in clear-cut cases ought it to avail the defendant."¹⁰⁵ Finally, a conclusion which can be drawn on the basis of *TermoRio* is that deference to the annulling decision should be given priority, as the New York Convention itself does not promote the regime of routinely second-guessing the lawful judgment of the competent authority in the country of award's origin. This means that only in the presence of extraordinary circumstances will the enforcing judge exercise discretion supposedly granted under Article V(1)(e) of the New York Convention. These circumstances, according to the Court's decision in this case, must be interpreted very narrowly and be of a character that violates the most basic notions of morality and justice,¹⁰⁶ which undeniably sets up a very high, if not even impossible to reach, threshold that must be met if the court is to recognize and enforce an annulled award.¹⁰⁷ Thus, after this decision, it seems that the attention of the US courts regarding the issue of enforcement of set-aside awards has gravitated from examination whether local standards of enforcement provided for more favorable treatment to the narrowly interpreted application of Article V(1)(e) of the New York Convention. It should be noted here that although as the result of the proceedings at hand the award was not enforced,

¹⁰³ *Id.*

¹⁰⁴ Barkett et al., *supra* note 95.

¹⁰⁵ Bird, *supra* note 83, at 1034.

¹⁰⁶ Lerch, *supra* note 92, at 117.

¹⁰⁷ Koch, *supra* note 4, at 287.

the Court not only acknowledged that Article V(1)(e) “left discretion on the table”,¹⁰⁸ as was the case in *Baker Marine*, but it defined in which situations it would be acceptable to exercise such discretion.

Based on the previously elaborated decisions, the first conclusion that can be made, shows the obvious reluctance of courts in the United States to enforce annulled awards. However, the decision in *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Production*¹⁰⁹ represents the proof to that different outcomes may still happen. The arbitral tribunal sitting in Mexico rendered an award in Comissa’s favour, which was subsequently set aside by Mexico's Supreme Court. The relevant issue that gave rise to the annulment-enforcement-related complications emerged because of the changes in Mexican legislation. Namely, at the moment of the conclusion of the contract as well as at the time when the dispute arose, Pemex was authorized to enter into arbitration agreements with private contractors. But, while the arbitral proceedings were still ongoing, this authorization was withdrawn through Mexico’s legislative act and the jurisdiction over the respective claim was assigned to a different court, which ultimately changed the statute of limitations to 45 days counting from the moment of the emergence of the dispute.¹¹⁰ These events made the dispute non-arbitrable in the end and the Mexico's Supreme Court annulled the award for that reason. However, Comissa filed an enforcement action before the United States District Court for the Southern District of New York and the Court granted enforcement. The appeal was filed to the Second Circuit which vacated the District court’s judgment and remanded for the District court, whose task became to assess the nullification judgment rendered by Mexican court.¹¹¹ The

¹⁰⁸ Barkett et al., *supra* note 95.

¹⁰⁹ *Corporacion Mexicana de Mantenimiento Integral ("COMMISA") v. Pemex-Exploracion y Produccion ("PEP")*, 962 F.Supp. 2d 642 (S.D.N.Y. 2013).

¹¹⁰ Goldstein, *supra* note 84, at 27.

¹¹¹ Marike R. P. Paulsson, *Comissa v. PEMEX The Sequel: Are the Floodgates Opened? The Russian Doll Effect further defined*, Kluwer Arbitration Blog, August 11 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/08/11/reserved-pemex-decision/>

District court on remand found that the nullifying decision was contrary to the basic principles of justice, which is the result of the fact that the nullifying decision deprived the private party of its basic expectations of having the opportunity to protect its rights, which expectations were adversely affected through the retroactive application of new legislation. For the reaffirmation of this uncontroversial and quite universal principle, the *Pemex* decision has been widely applauded.¹¹² Furthermore, it has been marked as positive development which signified movement from the mainstream view of blindly respecting annulments that occurred in primary jurisdictions.¹¹³ However, having in mind that this decision explicitly supported the view that Article V provided for the unfettered discretion of the enforcing court, where the guiding principles for exercising such discretion are not only concerns of international comity, which is of vital importance, faced criticism among scholars¹¹⁴ for two main and mutually dependent reasons. The first reason is the general fear that enforcing annulled awards solely on the basis of the permissive “may” might open the doors to forum shopping and undermine predictability in application of the New York Convention, which is because the manner of exercising discretion in the present case brings the risk of “opening the floodgates” for allowing numerous different interpretations of grounds enumerated in Article V(1).¹¹⁵ The second reason revolves around the justification used for allowing enforcement, in the form of the so-called “US Public Policy Gloss” for Article V(1)(e),¹¹⁶ as a result of which the New York Convention, as an international convention, was unjustifiably and incorrectly interpreted in accordance with a national principle of a particular jurisdiction.

¹¹² Goldstein, *supra* note 84, at 27.

¹¹³ Luca G. Radicati di Brozolo, *The Enforcement Of Annulled Awards: Further Reflections In Light Of Thai-Lao Lignite*, 25 *American Review of International Arbitration* 47, 55 (2014).

¹¹⁴ M. Paulsson, *supra* note 111.

¹¹⁵ *Id.*

¹¹⁶ A term created by Marike Paulsson. See *Id.*

Pemex, however, seems to be the only example after *Chromalloy* of actual enforcement of annulled awards. The most recent U.S. decision, in *Thai-Lao Lignite*¹¹⁷ case, follows the pattern set by *Baker Marine*, *TermoRio* and *Pemex*.¹¹⁸ An arbitral award was issued in favor of Thai Lignite, based on which it sought enforcement in the United States, United Kingdom and France. The enforcement was sought after the limitation period for challenging the award in Malaysia had expired¹¹⁹ and was eventually granted in the United States and the United Kingdom. However, after that, the Government of Laos, as the award debtor, applied for a prolongation of a time limit for challenging the award because, as it said, it was unaware of that period's exact duration. Afterwards, it applied for the annulment before the Malaysian High Court which vacated the award on the ground that the arbitrators had exceeded their jurisdiction. This was later affirmed by the Malaysian Court of Appeal. The Court of Appeal of Malaysia found, based on the fact that one of the parties was a foreign sovereign, who had insufficient knowledge of Malaysian law, that it was appropriate and suitable to elongate the time for challenging the award. The setting aside occurred almost a year and a half after the enforcement in the United States was granted¹²⁰ and then Government of Laos successfully moved to vacate the US recognition judgment alleging that the award had been set aside in country of origin, which triggered Thai Lignite to file an appeal. It was observed by the Court that Article V(1)(e) of the New York Convention provides the enforcing court with discretion to enforce or not to enforce an award that has been set aside in the primary jurisdiction.¹²¹ It further elaborated that the scope of discretion granted is "constrained by the prudential concern of international comity." As established in *TermoRio*, a decision setting aside an award must be given respect

¹¹⁷ *Thai-Lao Lignite (Thailand) Co., Ltd. & Hongsa Lignite (Lao Pdr) Co., Ltd. v. Government of the Lao People's Democratic Republic*, 2014 WL 476239 (S.D.N.Y. Feb. 6, 2014).

¹¹⁸ Goldstein, *supra* note 84, at 27.

¹¹⁹ Brunda Karanam, *Finality v. International Comity – Enforcement of Awards annulled in the Primary Jurisdiction*, Kluwer Arbitration Blog, September 27 2017, available at <http://arbitrationblog.kluwerarbitration.com/2017/09/27/finality-v-international-comity-enforcement-awards-annulled-primary-jurisdiction/>

¹²⁰ *Id.*

¹²¹ *Id.*

to in all cases, except for those situations in which it would offend the public policy of the country where enforcement is sought.¹²² *Pemex* further clarified the scope of discretion by holding that that US courts are guided by “fundamental notions of what is just and decent”, hence they may choose to refuse to recognize a foreign court’s setting aside decision.¹²³ However, although the Court for the most part relied on *Pemex*’s reasoning, here in *Thai Lignite* an annulled award was not recognized, as the Court stated that the factual findings of *Thai Lignite* were far less capable of violating the fundamental notions of justice. This is because the decision of the Mexican court in *Pemex*, apart from being politically driven which is certainly a problem of its own, was undoubtedly flawed, with high potential for offending basic notions of justice, because it gave respect to the retroactive restriction on arbitrability of the dispute, consequently depriving one of the parties of its right to protect its legitimate interests. On the other hand, in *Thai Lignite*, the annulling forum did not lack neutrality and the ground for annulment was excess of jurisdiction by the tribunal, which is the internationally recognized standard for annulment,¹²⁴ as opposed to lack of arbitrability which belongs to the category of local standards of enforcement. Finally, the Court decided to give priority to the decision of primary jurisdiction annulling the award,¹²⁵ because there were no circumstances indicating such serious violations of justice that would defend disregarding comity considerations.¹²⁶

As on overall conclusion of the approach taken by the United States’ courts, it can be said that, despite the fact that reasoning employed in discussed cases showed reasonable understanding of some possible implications that enforcement or, rather, non-enforcement of annulled awards may create, they, by recognizing and exercising discretionary powers under Article V(1)(e) of the New York Convention opened the doors to unpredictable outcomes, which, as has been

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Di Brozolo, *supra* note 113, at 52.

¹²⁵ Karanam, *supra* note 119.

¹²⁶ Di Brozolo, *supra* note 113, at 51.

said, threatened to destabilize the system created by the New York Convention which, in turn, demands a high degree of predictability so that it can achieve its main goals related to liberalizing and facilitating enforcement of annulled awards.

3.2. The French position

“If an award is set aside in the country of origin, a party can still try its luck in France”¹²⁷ is a sentence by Albert Jan van den Berg that perfectly describes the situation under the French approach, where the annulled awards are normally enforced despite being legitimately set aside in the country of origin, with justification for this found in Article VII of the New York Convention. Therefore, France, although a signatory of the New York Convention, does not apply the Convention when it comes to the enforcement of annulled foreign arbitral awards, but its local standards of enforcement, which it finds more favorable than the regime under the New York Convention.¹²⁸ The regime under French law is more favorable simply because Article 1502 of the New Code of Civil Procedure does not list an award’s annulment in country of origin as one of the reasons for refusing enforcement.¹²⁹ As opposed to the US approach where the focus is predominantly on Article V(1)(e), accompanied with the questions related to court’s discretion and whether foreign nullifying judgments should be given *res iudicata* effect, this issue is completely disregarded when it comes to enforcement in France because, according to French law, setting aside decision has no international effectiveness,¹³⁰ which is supported by the understanding that international arbitral awards cannot be treated as anchored in the legal

¹²⁷ M.B. Holmes, *Enforcement of Annulled Arbitral Awards: Logical fallacies and fictional systems*, 79 Arbitration – the international journal of arbitration, mediation and dispute management 244, 250, n.37 (2013).

¹²⁸ Koch, *supra* note 4, at 269.

¹²⁹ *Id.*

¹³⁰ *Id.* at 287.

system of the arbitral seat, but rather as bearing stand-alone legitimacy.¹³¹ This further means that arbitral awards are regarded as products of “international justice”.¹³²

The above mentioned view has been crystallized through French case law and the jurisprudence of French *Cour de Cassation* in three famous cases: *Norsolor*, *Hilmarton* and *Putrabali*.¹³³

The issue of enforcement of annulled awards was analyzed for the first time in *Norsolor*¹³⁴ where the award had been annulled by the competent court – Vienna Court of Appeals. Initially, the Court of Appeals refused to enforce the award but the enforcement was nevertheless granted by *Cour de Cassation* which held that upholding the Court of Appeal’s negative decision regarding enforcement would violate the party’s right to enforce the award as allowed by French law, all in accordance with Article VII of the New York Convention.¹³⁵ The Court also held that the exact scope of application of Article 12 of the New Code of Civil Procedure, which answers the question of whether and how French law would oppose such enforcement, should have been examined by the lower court. However, the lower court’s answer to that question was never delivered in this case, as the nullifying decision was later reversed by the Austrian Supreme Court.¹³⁶

The case that offered further insight into the question of enforcing annulled awards was the *Polish Ocean Line*.¹³⁷ In that case, the award had been rendered and annulled in Poland. The French *Cour de Cassation* granted enforcement, relying on Article VII of the New York

¹³¹ Holmes, *supra* note 127, at 248, n.22.

¹³² Francisco González de Cossío, Enforcement of annulled awards: towards a better analytical approach, 32 *Arbitration International* 17, 18 (2015).

¹³³ *Id.*

¹³⁴ *Norsolor S.A. v. Pabalk Tigaret Sirketi S.A.*, Tribunal de grande instance of Paris, March 4 1981. Cour d’appel of Paris, December 15, 1981. Cour de cassation, October 9, 1984.

¹³⁵ De Cossío, *supra* note 132, at 18.

¹³⁶ Gharavi, *supra* note 80, at 78.

¹³⁷ *Société Polish Ocean Line v Société Jolasry*, Cour de Cassation, March 10 1993.

Convention and the fact that French legislation did not enlist setting aside in country of origin as one of the grounds for refusing enforcement.¹³⁸

The mentioned approach was more deeply defined in *Hilmarton*.¹³⁹ *Cour de Cassation* allowed enforcement of an award that had been set aside in Switzerland. The justification for this decision was found in the *ratio* utilized in previously mentioned cases – that French law on enforcement of arbitral awards was more favorable than the regime under the New York Convention.¹⁴⁰ However, the Court went even further and put emphasis on the international aspect of arbitral awards, according to which awards, despite being rendered in a certain country or under the law of that country, cannot be perceived as belonging to the legal order of that country, but they instead must be seen as truly international – “the Swiss award is an international decision that is not incorporated in the legal order of said State. Its existence continues regardless of its annulment given that its enforcement in France is not contrary to international public policy.”¹⁴¹

The above standpoint was confirmed in *Putrabali*.¹⁴² The arbitral tribunal issued an award unfavorable to the claimant, which led to the award being challenged and partially set aside by the English High Court and returned to the original arbitrators for correction so that it would correspond to the Court’s ruling. The respondent, however, sought enforcement of the first award in France. The Paris Court of Appeal acted in line with the reasoning set out in *Hilmarton*, that annulment in country of origin is not the reason to deny enforcement under Article 1502 of the New Code of Civil Procedure. The decision was confirmed by the ruling of *Cour de Cassation* in which the Court underlined the international character of the award, qualifying it

¹³⁸ Gharavi, *supra* note 80, at 78-79.

¹³⁹ *Hilmarton Ltd v. Omnium de Traitement et de Valorisation – OTV France*, Cour de cassation, 1994; 20 Yearbk. Comm. Arb’n 663 (1995).

¹⁴⁰ De Cossío, *supra* note 132, at 19.

¹⁴¹ *Id.*

¹⁴² *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices*, Cour de cassation, June 29, 2007.

as a “decision of international justice”.¹⁴³ Such qualification essentially means that, owing to the fact that an arbitral award is detached from any national legal order, it stays unaffected by the actions of the courts at the place of arbitration – these courts may merely decide on the existence of an award in their own jurisdiction and whether it complies with requirements established in that national law, but they cannot govern the way the award will be treated in secondary jurisdictions.¹⁴⁴

As has been already explained, enforcement of set-aside awards seems to be a perfectly normal course of events in France, all because of the fact that this jurisdiction simply does not identify arbitral awards as part of the legal order of the country of its origin, but rather as operating in an international legal order.¹⁴⁵ In other words, French courts completely disregard primary jurisdiction’s review of an arbitral award and leave it to their courts as courts of a secondary jurisdiction to decide whether the award will, after fulfilment of certain conditions as required by the relevant rules on enforcement of foreign arbitral awards, be allowed to enter their legal system. Furthermore, when such understanding of the awards’ nature is combined with Article VII of the New York Convention which mandates that more favorable standard of enforcement be applied when enforcement of an annulled award is sought, the overall conclusion is that a mere fact that an award has been annulled in country of origin does not have a detrimental impact on the possibility of enforcement in France.

The French approach, according to Emmanuel Gaillard, embraces full autonomy of international commercial arbitration and the unacceptability of subordinating arbitration to any national legal order.¹⁴⁶ It has been further claimed that, by combining its domestic law with an international legal system, it creates fruitful ground for the better and more effective mechanism

¹⁴³ De Cossío, *supra* note 132, at 19.

¹⁴⁴ Lerch, *supra* note 92, at 113.

¹⁴⁵ *Id.*

¹⁴⁶ Holmes, *supra* note 127, at 249.

for resolution of international disputes, a mechanism which provides that the creditors' legitimate expectations related to enforcement of his rights will be given full respect.¹⁴⁷ In that sense, French approach deserves approval as a more "sophisticated and plausible" view¹⁴⁸ than the one present in the United States.

However, the position taken by French law is prone to serious opposition as well. Apart from the high potential for emergence of conflicting decisions regarding the same dispute, French position has been criticized from an additional perspective. In this respect, it has been stated that liberal French approach towards set-aside awards is in fact not that liberal after all, as it is based on the tendency of French courts to regard foreign judgments with suspicion or even consider them inferior, which might be because French civil law tradition has had its own way of evolutionary development, to a certain degree different from the one in other civil law or common law jurisdictions.¹⁴⁹ Furthermore, the decision in *Putrabali*, establishing that "*justice internationale*" is controlled by the country where enforcement is sought only reinforced the argument that French law shows unacceptable nationalistic tendencies in this sense, as it on one hand decides to remain unreachable by foreign judgments, but on the other hand preserves the right for itself to dictate the rules of international arbitration,¹⁵⁰ which is, according to authors who line with this view, intolerable.

3.3. The "Yukos saga"

The so-called "Yukos saga" revolves around the fall of Yukos, a group of companies which was the most successful player of Russian oil production industry. The first case of interest here is *Yukos Capital S.A.R.L. v. OAO Rosneft*.¹⁵¹ It bears similarities with *Pemex* in the sense that

¹⁴⁷ De Cossío, *supra* note 132, at 27.

¹⁴⁸ *Id.*

¹⁴⁹ Holmes, *supra* note 127, at 249.

¹⁵⁰ *Id.* at 250.

¹⁵¹ *Yukos Capital S.A.R.L. v. OAO Rosneft*, Court of Appeal Amsterdam, April 28, 2009.

the enforcing courts in both cases resorted to assessment of fairness and notions of justice of foreign judgment annulling the award(s).¹⁵² The case deals with intra-group loan agreements executed between Yukos Capital and Yuganskneftegaz, another member of the group, which later got acquired by Rosneft.¹⁵³ These agreements gave rise to a dispute that was resolved via arbitration commenced under the auspices of Russian Chamber of Commerce and Industry in Moscow.¹⁵⁴ The proceedings ended in Yukos Capital's favor as it obtained four arbitral awards in the amount of US\$425 million.¹⁵⁵ Soon afterwards, Rosneft applied for the annulment of the awards before the Russian Commercial court and was successful.¹⁵⁶ Despite the annulment, Yukos Capital sought enforcement in the Netherlands and the Court of Appeal of Amsterdam granted it, holding that "a Dutch court is not compelled to deny leave for recognition of an annulled arbitral award if the foreign decision annulling the arbitral award cannot be recognized in the Netherlands."¹⁵⁷ The Court's reasoning engaged in explaining that the decisions to set aside were flawed in as much they were contrary with requirements of due process, as the proceedings were most likely spoiled by biased and partial conduct of the court considering the political background of the case, and therefore were in violation of Dutch public order, which is why they could not be recognized.¹⁵⁸ The matter was later brought before the Dutch Supreme Court which held the recourse against the Court of Appeal's decision inadmissible because it would violate Article III of the New York Convention, the purpose of which is to enable national treatment to foreign arbitral awards and to deter enforcing courts from "imposing unduly complicated enforcement proceedings and insurmountable hurdles at the recognition and enforcement stage"¹⁵⁹. Given that Dutch law does not provide for an appeal against the

¹⁵² Varady et al., *supra* note 16, at 1166.

¹⁵³ Yarik Kryvoi, Yukos v Rosneft: Russian Courts are not independent, June 27 2011, *available at* <http://www.cisarbitration.com/2011/06/27/yukos-v-rosneft-russian-courts-are-not-independent/>

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ Varady et al., *supra* note 16, at 1165.

¹⁵⁷ *Yukos Capital S.A.R.L. v. OAO Rosneft*, *supra* note 151.

¹⁵⁸ Varady et al., *supra* note 16, at 1166.

¹⁵⁹ UNCITRAL Secretariat Guide, *supra* note 27, at 90.

decision granting enforcement of Dutch arbitral awards, this would imply that had the Supreme Court, according to its opinion, admitted the appeal in this case, it would have thus required a more onerous condition for the enforcement and as a result of this would have discriminated a foreign arbitral award.¹⁶⁰

The decisions of both courts encountered serious criticism. First of all, the Court of Appeal's reasoning was said to be brought on insufficient evidence¹⁶¹, as impartiality was not established directly and individually regarding the setting aside proceedings, but was rather based on the general assumption, supported by reports of non-governmental organizations, that all Russian courts lacked neutrality in cases such as this where state interests were involved.¹⁶² Secondly and more importantly, the decision of the Court of Appeal was considered to be wrong as it misapplied the New York Convention because it adopted the unsustainable view that in order to give respect to the annulment decision rendered by the foreign court, the enforcing court must first investigate whether such decision meets the conditions required under the enforcing forum's rules on recognition and enforcement of foreign judgments.¹⁶³ This incorrect application of the New York Convention despite being problematic in and of itself, suffers from additional flaws. Namely, when the Court of Appeal decided not to give deference to the setting aside decisions made by Russian courts, it is quite clear that it has failed to provide respect to rules of international comity. However, the danger does not merely lie in the failure to follow this principle for the sake of the principle, but it rather has to do with possible negative consequences ignorance of foreign judgments may bring to international arbitration. In this sense, it may be concluded that there is nothing written in the New York Convention that could justify or authorize courts of one contracting state of the New York Convention to assess the

¹⁶⁰ Van den Berg, *infra* note 165, at 620.

¹⁶¹ On the other hand, it is usually understood that impartiality is never concrete, but is in fact always behind the scenes.

¹⁶² Van den Berg, *infra* note 165, at 620.

¹⁶³ Van den Berg, *supra* note 15, at 19.

quality of judiciary of another contracting state and would, according to Van den Berg, lead to creation of a “blacklist” of countries whose judiciary is not of sufficient quality.¹⁶⁴ Although a list like that could have its advantages in the sense that it could trigger jurisdictions in question to resort to drastic reforms in order to meet and keep up with required standards of quality, this would be outweighed by the adverse effects which would almost certainly cause trouble to the functioning of international commercial arbitration as it brings a significant level of unpredictability into the regime of the New York Convention, the purpose of which is to facilitate enforcement of arbitral awards through creating and maintaining a high degree of cooperation between the contracting states. Consequently, if these contracting states are allowed to simply disregard decisions of other contracting states, cooperation will not be present and the predictability of the legal framework will be compromised, which would all ultimately force the potential parties to refrain from concluding arbitration agreements and taking part in arbitration.

Furthermore, shortcomings can also be identified in relation to the decision of The Supreme Court as well. Here, it has been stated that this Court unjustifiably divested Rosneft of its right to challenge the decision of the Court of Appeals, while at the same time Yukos Capital was allowed to challenge the refusal of enforcement that was initially rendered.¹⁶⁵ This amounts to violation of the principle of “equality of arms” embodied in Article 6 of the European Convention on Human Rights.¹⁶⁶

However, another Yukos case that attracted attention of the media as well as legal scholars and practitioners all around the world is the famous *Yukos Shareholders v. Russia*. The case deals with the dissolution of Yukos after which its majority shareholders entered into arbitration

¹⁶⁴ Van den Berg, *infra* note 165, at 191.

¹⁶⁵ Albert Jan Van Den Berg, *Enforcement of Arbitral Awards Annulled in Russia – Case Comment on Dutch Supreme Court of 25 June 2010*, 28 Kluwer Law International 617, 641 (2011).

¹⁶⁶ *Id.*

under UNCITRAL rules against Russia, claiming that this state had violated its respective obligations regarding unlawful expropriation under the Energy Charter Treaty.¹⁶⁷ The result of the arbitral proceedings administered by the Permanent Court of Arbitration in the Hague were the largest arbitration awards in history, in the amount of USD 50 billion and rendered in favor of Yukos Shareholders. However, they were later annulled by the Hague District Court on the ground that a valid arbitration agreement was lacking, because the Court found that the arbitral tribunal lacked jurisdiction as Russia, although having signed the ECT under which the claim was brought, this treaty was never ratified.¹⁶⁸ Furthermore, the Court found that provisional application of the ECT was not possible, which led to the final conclusion that Russia was not bound by Article 26 of the ECT where the offer to arbitrate was stated.¹⁶⁹ Nevertheless, Yukos shareholders appealed the annulment decision while initiating enforcement proceedings in several jurisdictions, including France and the United States among others.¹⁷⁰ The case is still on appeal in the Netherlands and its final resolution is yet to be seen. In relation to the shareholders' attempts to enforce the awards, although it should be mentioned that the fact that the awards have been annulled is not the only problem, as this case has been connected with high political tensions and the question of interrelation between sovereign immunity and enforcement which is always prone to causing complications, annulment still remains a factor of paramount and decisive importance.

Given that the United States and France are among jurisdictions where enforcement is sought, it remains to be seen how the facts and legal points of this case will fit under the two previously

¹⁶⁷ Annet van Hooft et al., *Yukos – the saga continues: arbitral awards against Russian Federation annulled by court in The Hague*, April 22, 2016, available at <https://www.twobirds.com/en/news/articles/2016/global/yukos--the-saga-continues>

¹⁶⁸ Ben Knowles et al., *The US\$50 billion Yukos award overturned – Enforcement becomes a game of Russian roulette*, Kluwer Arbitration Blog, May 13 2016, available at <http://arbitrationblog.kluwerarbitration.com/2016/05/13/the-us50-billion-yukos-award-overturned-enforcement-becomes-a-game-of-russian-roulette/>

¹⁶⁹ *Id.*

¹⁷⁰ Knowles et al., *supra* note 168.

elaborated approaches. The conclusions that can preliminary be drawn is that more success of enforcement is to be expected in France, having in mind that this jurisdiction, as has been seen, does not give effect to the foreign annulling judgment and, by relying on Article VII of the New York Convention, enforces arbitral awards that have been set aside in country of origin.

As regards the situation in the United States, although this jurisdiction has shown that it was willing under special circumstances to allow for the possibility to enforce set-aside awards, as the discretion granted under Article V(1)(e) provides for such result when the circumstances of the case are so organized that it may be concluded that the annulling decision violates the most basic notions of justice. In the present case, minding that neutrality of the annulling court, as opposed to the one in *Yukos Capital v. Rosneft*, is undisputed, it appears that the enforcement of the award is not very likely to occur.

However, although the issue whether and under what conditions these awards would nevertheless be enforced from the perspective of the operation of the New York Convention, another perspective that may prove to be relevant, particularly because it additionally emphasizes undesirable implications related to the whole subject of enforcement of annulled awards, comes from the fact that *Yukos Shareholders v. Russia* is an investment dispute. In this context, the situation does not seem to be very optimistic, if basic features and principles of investment law are observed. Knowing that protection accorded to the investors is one of the key concepts of investment law, the question that arises in this situation is whether investors will truly be protected if such degree of legal unpredictability is preserved. Consequently, prospective investors will show less readiness to actually invest, which does not suit anyone's interests, neither the host-state's which will be deprived of possible developments nor the investors' who will not be able to make profits.

CHAPTER 4 – SOLUTIONS

Based on what has been previously established and suggested by case law, it can be said that the diversity of approaches and the lack of a unique and consistent answer to what should be done with annulled awards is a problem which has too many negative consequences to be left untreated. In that sense, a few suggestions regarding possible solutions can be crystalized.

4.1. “New” New York Convention

As New York Convention celebrates its 60th birthday this year, it has been argued by many scholars and practitioners that it has become quite outdated and therefore unable to satisfactorily respond to issues that frequently arise in the context of international arbitration. It is for this reason that it has been claimed that “the New York Convention has proved itself to be unreliable, unpredictable and inconsistent because there is wiggle room in the New York Convention and occasionally its objectives seem to have very poor resonance.”¹⁷¹

When it comes to enforcement of awards set aside in the country of origin, the problems may not necessarily be related merely to the Convention’s age but rather to the mentioned gaps and uncertainties the Convention has had since the very beginning of its existence. This is why certain reparations of the Convention have been suggested – either in the form of a wholly new convention or through amendments added to the existing text.¹⁷²

One of the suggestions came from Albert Jan Van den Berg and the famous Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements,¹⁷³ also known under the name of Miami Draft. The suggested modifications are directed at reducing the discretionary power of the enforcing court deriving from the controversially permissive “may refuse” in

¹⁷¹ Marike R. P. Paulsson, *The 1958 New York Convention From An Unusual Perspective: Moving Forward By Parting With It*, 5 Indian Journal of Arbitration Law 23, 24 (2017).

¹⁷² Gharavi, *supra* note 80, at 157.

¹⁷³ Albert Jan van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards*, available at <http://www.newyorkconvention.org/draft+convention>.

Article V(1)(e) of the New York Convention, which is done through inserting “shall refuse” instead of the current formulation. Consequently, by reducing the possibility of exercising discretion, greater degree of predictability and uniformity of the legal framework is likely to be ensured,¹⁷⁴ as the enforcing courts in different jurisdictions are prevented from rendering conflicting decisions on the same grounds. However, as this change of language would lead to the possibility that the enforcement of awards set aside merely for the purpose of protecting the “self-serving local interests” would inevitably be blocked, the proposed provision further stated that denial of enforcement shall only occur if the annulment was based on grounds (a) to (e)¹⁷⁵ – in this sense it resembles an attempt to curb the effects of local standards of annulment and in this sense resembles the relevant provision of the European Convention.

Generally speaking, although arguments in favor of adopting changes to the regime of the New York Convention might be strong considering the mentioned problems, proponents of a contrary view have been proclaiming that the New York Convention despite its evident flaws still succeeds in serving its purposes satisfactorily enough and moreover, that the process of revision would lead to a greater number of losses than actual gains¹⁷⁶ and further, that the revision or replacement with a new convention may even be practically impossible due to the abundant number of currently registered ratifications coupled with the almost certain lack of will on the side of the member states to deal with often very complicated aspects of treaty law.¹⁷⁷ Furthermore, Emmanuel Gaillard, elaborating that the proposed changes should not be made, went even beyond discussing practical problems and argued that Van den Berg’s proposal as to changes of Article V(1)(e) would make no significant difference¹⁷⁸ when compared with the

¹⁷⁴ Marike R. P. Paulsson, *The Miami Draft: the Good Twin of the NYC*, Kluwer Arbitration Blog, October 7 2010, available at <http://arbitrationblog.kluwerarbitration.com/2010/10/07/the-miami-draft-the-good-twin-of-the-nyc/>

¹⁷⁵ Bird, *supra* note 83, at 1014.

¹⁷⁶ Gaillard, Emmanuel, *The Urgency of Not Revising the New York Convention*, in 50 Years of the New York Convention: ICCA International Arbitration Conference 689-696 (Albert Jan Van den Berg 2009).

¹⁷⁷ M. Paulsson, *supra* note 172, at 25.

¹⁷⁸ Gaillard, *supra* note 177, at 695.

current text, because reducing the impact of local standards of enforcement would still remain powerless in certain situations. For instance, it would still remain incapable of solving the situations in which the court of the seat of arbitration treated the local party more favorably and was guided solely by the potential benefits of that party, but the annulment was, on its surface, based on internationally accepted grounds.¹⁷⁹ In these situations, if the new formulation is strictly followed, it would mean that the enforcement of an award annulled in order to protect the interests of the local party will not be possible, which is in fact contradictory to the purpose that was sought to be achieved through the change of formulation and proclamation of the acceptable grounds for annulment.¹⁸⁰

Additionally, here it should be stated that one of the major flaws visible in the operation of the legal framework related to arbitration and enforcement of arbitral awards under the New York Convention is actually the absence of a multilateral convention governing annulment of arbitral awards.¹⁸¹ Such convention could be of crucial importance considering that at the present moment nullification is governed purely by national laws which, despite the undisputed level of harmonization achieved by the UNCITRAL Model law, make it possible for the setting aside to be based on any ground,¹⁸² no matter how strange or exotic. As regards the danger of national courts' reliance on purely local standards of annulment, one may argue that in this case it is the task of enforcing courts to solve the problem by simply disregarding setting aside based on such local peculiarities in accordance with the mentioned Paulsson's doctrine of local standards of annulment. However, such approach itself may be somewhat problematic. This is because the New York Convention evidently remains silent as to the relevance of reasons on which the annulment judgment was based, which means that courts in different enforcement jurisdictions

¹⁷⁹ *Id.* at 695.

¹⁸⁰ *Id.*

¹⁸¹ Gharavi, *supra* note 80, 157.

¹⁸² *Id.*

are in no way obliged to look into the specific ground(s) because of which the award had been annulled, which naturally leads not only to the deterioration of uniformity and consistency or to conflicting decisions regarding the same dispute, but even to a possible violation of the New York Convention if this treaty is applied in a manner that is inconsistent with its exact wording or a lack thereof. As per the conflicting decisions, they might arise quite frequently if currently still informal theory of local standards of annulment is applied as some courts may find that disregarding local standards of annulment is appropriate in a particular case, while, at the same time some other courts, perhaps due to underqualified judges or a variety of other factors, may very well be even completely unaware of the existence and possible impacts of these standards. In this sense, there have been propositions that the new legal framework of control over arbitral awards be introduced – the one that would cover not only recognition and enforcement as is currently the case under the New York Convention, but also the annulment¹⁸³ both from its procedural and substantive aspects. In relation to the procedural changes, some authors have suggested that the first step should be to amend the qualification of the award's nationality and to leave the "under the law of which" part out of the formulation, which is due to the opinion that the New York Convention itself in this aspect made a retrograde move in comparison to its predecessor Geneva 1927 Convention. The purpose of this change would be to avoid all the negative consequences (some of which are unjustified extension of jurisdiction over annulment of arbitral awards and the occurrence of conflicting decisions) of the co-existence of two legitimate authorities with jurisdiction over annulment proceedings.¹⁸⁴ The next step would be to phrase the reasons for annulment in such a way that they are applicable only to the most seriously flawed arbitral awards but which also reflect the reasons for refusing enforcement under the Convention in order to avoid present discrepancies.¹⁸⁵ Furthermore, when it comes to

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

enforcement of annulled awards, the solution in this respect that could diminish the legal uncertainty and the alleged discretionary power of enforcing courts currently existing due to the Convention's mentioned use of word "may" might be to impose the obligation to refuse enforcement of an annulled award, except in certain limited situations.

Furthermore, some other authors who have advocated for the new convention have emphasized the problems related to the interrelation between annulment in country of origin and enforcement in another jurisdiction under the New York Convention which were particularly visible in *Pemex*, which has been criticized on the grounds that it is unacceptable for the enforcing court to retain "an unfettered discretion to enforce annulled awards if the annulment violates the US notions of public policy and is repugnant to the most fundamental principles of morality and justice".¹⁸⁶ The decision in *Pemex* brought up many questions, especially those related to the role and interplay between international comity and public policy under Article V(1).¹⁸⁷ In order to avoid these problems, it has been, *inter alia*, suggested that the national annulment of the arbitral awards should no longer exist.¹⁸⁸

4.2. Reform of procedural mechanism for control over arbitral awards

Hypothetically speaking, if the mechanism for control over arbitral awards as it is known today is left to the past, the question that naturally arises is what its substitute could be, in other words, which mechanism could be utilized for the purpose of control over arbitral awards.

¹⁸⁶ M. Paulsson, *supra* note 172, at 28.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

4.2.1. Abolishment of the action to set aside

One of the main arguments strengthening the proposal to abolish the set-aside proceedings is the occurrence of the so-called “Russian doll effect”, which according to Marike Paulsson means that “the parties have to go through many layers of arbitral and judicial adjudication before knowing whether the resolution of a dispute leads to enforcement of an award or not”.¹⁸⁹ These layers not only drastically affect the length of the proceedings and cause undesired delay to the final resolution of the dispute consequently diminishing one of the key advantages of arbitration reflected in speedy finalization of the process,¹⁹⁰ but they also provide space for conflicting and inconsistent decisions in various jurisdictions, which usually happens when the party satisfied with the outcome of the annulment proceedings seeks and achieves enforcement in other jurisdictions even though the case has not yet gone through all of the available appellate instances in the country of origin. This is even more visible after realization that the grounds on which the awards are reviewed in national courts are very similar, if not the same, both in the annulment and recognition proceedings, which opens up the controversial issue of double control, which is itself capable of introducing problems in terms of often unnecessary duplication of the proceedings, consequently postponing the ultimate settlement of the dispute¹⁹¹ and therefore disrupting reasonable expectations the parties have towards legal aspects of their future behavior.

However, the potential for prolongation is not a problem as striking as the issue of possible coexistence of conflicting decisions, which is precisely what occurred in *Dallah*¹⁹² case where the complications arose due to the uncoordinated enforcement and annulment proceedings as

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ This delays effective enforcement of an award as one of the key advantages of dispute settlement via arbitration and eventually undermines the willingness of prospective parties to submit their dispute to arbitration.

¹⁹² *Dallah Real Estate and Tourism Holding Co v. The Ministry of Religious Affairs, Government of Pakistan* UKSC 46 2010

the enforcement in the secondary jurisdiction was granted before the setting aside court rendered its decision. Another example comes from *SPP v. Egypt*,¹⁹³ where the District Court of Amsterdam granted enforcement of the award rejecting the respondent's argument that there was no valid arbitration agreement. Interestingly, during the very same day, the Paris Court of Appeal set aside the award precisely on the basis of the lack of a valid arbitration agreement.¹⁹⁴ In previous cases, the conflicting decisions can be avoided through "closing the temporal gap"¹⁹⁵ via Article VI of the New York Convention which states that if the setting aside proceedings are ongoing, the enforcing court "may, if it considers it proper, adjourn the decision on the enforcement of the award."¹⁹⁶ However, the question arises as to whether Article VI can be truly effective, as its application, due to its permissive language embodied through "may" and "if it considers proper" depends purely on the unlimited discretion of the enforcing court. When the obvious lack of a precise standard¹⁹⁷ that would provide for the situations in which the adjournment is appropriate is merged with a great variety of factors¹⁹⁸ that have been and are being considered as relevant by the courts worldwide, it is quite clear that that this article, although having very reasonable *rationale* and purpose, cannot adequately solve the problem in each and every situation.

Another argument favoring the non-existence of the action to set aside arises from the view that it is not acceptable that the courts of primary jurisdiction, have the last say as to the possible effects of the award or the total lack thereof,¹⁹⁹ especially, as has been mentioned, if the setting aside occurred on strange local grounds. Furthermore, the questionability of some courts' expertise and adequate knowledge regarding arbitral questions raises the issue why should

¹⁹³ *Southern Pacific Properties v. Arab Republic of Egypt*, District Court of Amsterdam 1984.

¹⁹⁴ Van den Berg, *supra* note 15, at 23.

¹⁹⁵ UNCITRAL Secretariat Guide, *supra* note 27, at 264.

¹⁹⁶ The New York Convention, *supra* note 1, art. VI.

¹⁹⁷ UNCITRAL Secretariat Guide, *supra* note 27, at 264.

¹⁹⁸ *Id.*

¹⁹⁹ Van den Berg, *supra* note 15.

decisions of these courts be given universal effects in every other jurisdiction. Additionally, as observed from the perspective of fairness and equality between the parties, given that it has been claimed that “a losing party must be afforded the right to have the validity of the award finally adjudicated in one jurisdiction”²⁰⁰ if, on the contrary, the problem is assessed from the position of the winning party, the question arises as to why should the losing party be treated more favorably and empowered with the right to protect its interests to deprive the award of its effects both at the seat of arbitration and automatically in the possible enforcing jurisdiction(s) while at the same time it becomes impossible for the award creditor to enforce the award in another jurisdiction according to the law of which the award, hypothetically, except for being annulled, appears to have no flaws which demand refusing enforcement. However, the possible counter-argument would be to ask whether it is really possible for the award to be free from mistakes if it got annulled in its country of origin, excluding here those situations where the annulment occurred on local grounds or because of underqualified or partial judiciary. This would mean that such an award would not be granted enforcement even in the scenario that annulment proceedings were never even commenced in the country of origin.

4.2.2. Control only in enforcement proceedings

This solution comes as the answer to fixing the consequences of abolishing the setting-aside action. It involves limiting supervision over awards only to the enforcement stage – in other words, only when the enforcement is sought will the courts scrutinize the award, on grounds enumerated in Article V of the New York Convention. However, this necessarily and directly imposes a number of problems. Firstly, from the perspective of the losing party, it is in this case inevitably deprived of its right to effectively challenge the award, especially bearing in mind that arbitral proceedings are in most jurisdictions organized as one-instance proceedings,

²⁰⁰ *Id.* at 24-25.

without possibility to appeal the decision, simply because it has no knowledge where to exercise that right nor the possibility to do so – it has to wait for the winning party to seek enforcement either at the seat of arbitration or any other jurisdiction where the assets suitable for the execution of the award are located and then to protect itself and resist enforcement through saying that there exist grounds because of which the award should not be enforced. Secondly, what follows up from the previously mentioned reason is the obvious lack of legal predictability, due to the fact that the losing party can never be sure that the legal battle is over, as the award creditor may continuously attempt to enforce the award whenever it finds that the other party possesses assets. Thirdly, such unpredictability may prove to be extremely undesirable in terms of cost generation. This is because, as has been said, the winning party may engage in numerous enforcement proceedings which ask for a variety of expenditures. Lastly, it may be argued that having no control over the arbitral award goes against the interest of the seat of arbitration, which is a statement that finds its merits in jurisdictional theory of arbitration, according to which arbitration can exist in a particular jurisdiction because that jurisdiction has allowed so. Therefore, the courts of that jurisdiction should be given the right to examine whether awards created in their territory are in accordance with relevant requirements dictated by law(s) of that country.

4.2.3. Establishment of a new International Court

However, the solution that could, at least theoretically, produce better results might be a drastic change in the current procedural framework regarding control over arbitral awards. Here, the procedural reform is primarily oriented to the establishment of a purely international body which would possess exclusive jurisdiction to review arbitral awards. The variations on the theme can be numerous, therefore this reviewing jurisdiction could take the form of annulment

proceedings²⁰¹ while the enforcement would stay in the hands of national courts, or the international body will be able to exercise jurisdiction for the question of nullification of the awards, but also on their enforceability.

The first option envisages a regime where the total control over arbitral awards in terms of annulment proceedings is transferred from the states to a completely independent national body. Clearly, the inspiration for this was found in the operation of the ICSID model, due to its proven success and effectiveness.²⁰² This model, at least in terms of the control stage, owes its effectiveness to the total exclusivity over the annulment of the awards – no state court has any power in this sense over the award as the procedure entails formation of an *ad hoc* Committee consisting of three members whose eligibility depends on compliance with specific requirements.²⁰³ Furthermore, as the award can only be annulled in the presence of a limited and narrowly construed number of grounds specifically enumerated in Article 52(1) of the ICSID Convention²⁰⁴, the interference of both peculiar and over diversified local standards of annulment becomes irrelevant. When this mechanism is assessed from the perspective of enforcement of annulled awards, the establishment of the international body with exclusive competence to set aside an award can be seen as an appropriate solution as it may be argued that the question of whether an annulled will or not be enforced would lose its relevance simply because once annulled, the award will truly be seen as non-existent. Still, in order for the proposed system to function this smoothly, as to avoid any possible uncertainties, the question is whether it would be necessary to explicitly provide that the annulled awards are not enforceable, especially given that this topic is prone to various theoretical constructions aimed at justifying enforcement of such awards. Nevertheless, the answer would most likely be in the

²⁰¹ Gharavi, *supra* note 80, at 163.

²⁰² Van den Berg, *supra* note 15, at 25 ; Gharavi, *supra* note 80, at 174.

²⁰³ Gharavi, *supra* note 80, at 177.

²⁰⁴ Convention On the Settlement of Investment Disputes between States and Nationals of Other States, March 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159, art. 52(1).

negative, because this mechanism would function completely differently from the mechanism that is currently employed in international commercial arbitration and therefore, different arguments used to rationalize enforcement of annulled awards, such as, for instance, internationality of arbitration in the sense of its separation from any national legal system or the annulment on parochial grounds, can hardly be used in this situation. However, what seems to be problematic about adoption of a mechanism resembling the ICSID model is the question of states' sovereignty and their willingness to deprive themselves of supervision over arbitral awards.²⁰⁵ Furthermore, additional complications might emerge in the sense that legitimacy of such international body may appear to be questionable, hence the need for regulating the issue by adopting a convention, which is always a difficult task, as has been mentioned in the part discussing the possibility of amending or replacing the New York Convention. On the other hand, as it may rightfully be argued that arbitration under ICSID actually shows in practice that the states are ready to give up their autonomy and sovereignty, it should be said that investment arbitration in this sense may be distinguished from the settlement of commercial disputes as there the states have bargained to give up their jurisdictional prerogatives in order to accomplish a goal of attracting a greater number of investors and investments, which ultimately promotes development and brings a variety of benefits to the host-country.²⁰⁶ In this context, although it may be argued that improvements to the functioning of international commercial arbitration are an objective worth considering, having in mind that the benefits to the state are neither direct nor instantly visible it is quite doubtful that the states will be so eager to limit their rights regarding control of arbitral awards.

²⁰⁵ Serhat Eskiyyörük, *Towards a transnational dispute resolution*, available at https://www.trans-lex.org/bibliopdfs/serhat_eskiyyoruk.pdf

²⁰⁶ Katherine L. Lynch, *The Forces of Economic Globalization - Challenges to the Regime of International Commercial Arbitration* 120 (2003).

The second possible option has been suggested by Howard Holtzmann and Stephen Schwebel and, similarly to the one previously discussed, involves the establishment of an international body which would operate under the name of “International Court of Arbitral Awards”. However, this one differs in that it completely excludes the supervisory role of national courts²⁰⁷ in the domain of post-award stages of arbitration, which is described as this system’s main advantage. Therefore, this would automatically bring benefits from the perspective of predictability, uniformity and consistency of decisions.²⁰⁸ The suggestion is justified by the argument that, as long as international commercial arbitration continues to depend on national courts it cannot become truly international, especially given that the winning party will have to go before the courts of the losing party’s country in order to ask for the enforcement of the award from the potentially biased judges, which can all be avoided if the arbitration becomes designed in a manner that provides for complete autonomy and separation from national legal systems.²⁰⁹ Not only is this well in line with the delocalized perception of arbitration according to which legitimacy of arbitral awards is not derived from national law of the seat of arbitration or any other country, but it even to some extent goes beyond this theory. This because delocalization theory, strictly speaking, still remains captured in the realm of theories and is a concept not recognized by the New York Convention, as argued by Fouchard,²¹⁰ as the New York Convention itself still dominantly, if not only, relies on national courts, not merely because enforcement is confided to national judiciary, which is certainly out of the question at the present moment, but also because it significantly relies on the law of the country of award’s origin in a number of provisions. For instance, apart from the Article V(1)(e)’s reference to the “competent authority in the country of which or under the law of which the award was made”,

²⁰⁷ *Id.* at 119.

²⁰⁸ *Id.*

²⁰⁹ Eskiyyoruk, *supra* note 205.

²¹⁰ Philippe Fouchard & Berthold Goldman, Fouchard, Gaillard, Goldman on International Commercial Arbitration 978 (1999).

the validity of the arbitration agreement, in the absence of the parties' indication of the applicable law, will be examined under the rules of the country of award's origin.²¹¹

When speaking of aspirations towards converting the theory of delocalization into reality, another, the third solution that could be offered assumes going even further than is suggested under the previously elaborated approaches. This would mean that the new court will not only deal with the post-award stage in terms of control over arbitral awards, but that the resolution of the whole dispute will take place under the auspices of this institution of supranational character. In other words, this would lead to a complete and drastic change as compared to the currently present situation in international commercial arbitration. More specifically, this would require the establishment of an "International Court of Arbitration" that would resemble an ICSID model not only from the perspective of supervision over the award as in the previously elaborated solution, but would also involve administration of the dispute by the institution. In essence, the characteristics that should be borrowed from ICSID and implemented into the structure and operation of the proposed international body are its autonomy and the fact that it is a self-contained²¹² system which has no dependence on assistance of any national court. This would certainly ensure more consistency and predictability, making international commercial arbitration truly international. However, here apply exactly the same problems that could be seen in the discussion devoted to the establishment of the international body mentioned in previous two solutions. Namely, these problems revolve around the lack of political will as well as reluctance on the side of the national states, but, in this case, fears are even of greater diameter because certain problems related to jurisdictional questions are likely to arise given that states are usually not ready to abandon their sovereign rights,²¹³ especially having in mind that issues

²¹¹ The New York Convention, *supra* note 1, art. V(1)(a).

²¹² Christoph Schreuer, *Interaction of International Tribunals and Domestic Courts in Investment Law*, Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 74, 91 (2010).

²¹³ Eskiyyoruk, *supra* note 205, at 176.

of arbitrability of disputes that could be submitted to international arbitration, which can be quite controversial in and of itself, could be even more complicated in this event when the states are asked to transfer jurisdiction over certain disputes to a supranational body over which they retain no control, as opposed to regular arbitration where courts have a supervisory role throughout the whole duration of arbitral proceedings as well as in later stages dealing with review of an award. However, although at present moment it may very well be the case that formation of this court is impossible or unrealistic, it should be borne in mind that “many of the developments in international arbitration that seem ordinary today would have been thought to be impossible dreams²¹⁴ 100 years ago”.²¹⁵ In fact, like formation of International Tribunals for Crimes and International Criminal Court was thought to be unimaginable and it was due to the events of World Word II that the establishment of these bodies was triggered,²¹⁶ the needs of contemporary highly globalized world together with various evolutions of technology and business practices might suggest that it is necessary to reorganize international commercial arbitration so that it can follow the needs of the contemporary business world.

²¹⁴ *Id.*

²¹⁵ Eskiyyoruk, *supra* note 205, at 177

²¹⁶ *Id.*

CONCLUSION

As has been seen, the question of enforcement of awards set aside in the country of origin, due to its paramount importance for the functioning of international commercial (and investment arbitration as well, as has been shown) has provoked significant attention from audience professionally involved in arbitration or law in general, but also from general audience whose interest was attracted because of political implications attached to some of the cases.

It undoubtedly remains intellectually interesting to get occupied with various interpretations of articles of the New York Convention, more specifically Article V(1)(e) and Article VII, and the questions whether the former provides for discretion of the enforcing court to allow enforcement of an annulled and whether the latter, how and when makes it possible for annulled awards to be enforced. Furthermore, it is even more interesting to see the interplay between the New York Convention and the European Convention with the latter's attempt to limit the effects of local grounds of annulment as per which the New York Convention has remained silent. Additionally, when enforcement of annulled awards is tackled by the courts of concrete jurisdictions, such as the United States and France, who have taken different approaches towards the issue, the present subject appears to be even more intellectually challenging.

However, this amount of legally challenging questions with possible answers which may drastically differ from one another, only serves to prove that this field of international arbitration is utterly overcomplicated, which ultimately goes against the interests of legal systems *per se*, but also the interests of commercial subjects who expect the highest degree of predictability possible.

Taking this into account, it is quite clear that solutions for the mentioned problems will not come by simply leaving things as they are at this moment, but that some steps towards improvement of the current system must be made in order to make it function adequately. In

this sense, the solutions examined in this thesis, consisting either of changes inserted into the New York Convention or the establishment of a completely different procedural mechanism for control over arbitral awards, or, more likely, a mixture of all of these elements, although evidently and undisputedly facing more or less major obstacles, may be utilized in order to reach the goal of maximally efficient arbitration.

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