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ENFORCEMENT OF ANNULLED ARBITRAL AWARDS

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ABSTRACT

This dissertation aims to illuminate the possibility of an arbitral award that has been set aside at the place where it was rendered, to be enforced by the courts of another state, despite the annulment. To this end, I investigated the role of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 and examined the relationship between the interpretation given by authors and national courts. The dissertation is driven by two research questions: first, whether an annulled award can be enforced and second, if the answer to the first question is positive, under which requirements this enforcement can take place. Literature on this topic has focused on the role of Article V(1)(e) of the New York Convention and the discretion it provides to the enforcement courts. The conduction of a comparative analysis suggests that the recent developments in both case law and authority lead to the recognition and enforcement, if the award was annulled according to local standards. Therefore, the adoption of uniform requirements regarding the recognition and enforcement of such an award is necessary, so that the purpose of the Convention and the facilitation of arbitral awards, are effectively served.

ΠΕΡΙΛΗΨΗ

Στόχος της παρούσας διπλωματικής εργασίας είναι να εξεταστεί η πιθανότητα μιας διαιτητικής απόφασης που έχει ακυρωθεί στον τόπο όπου εκδόθηκε, να εκτελεστεί από τα δικαστήρια ενός άλλου κράτους, παρά την ακύρωση της. Για το σκοπό αυτό, διερευνήθηκε ο ρόλος της Σύμβασης της Νέας Υόρκης για την Αναγνώριση και Εκτέλεση Αλλοδαπών Διαιτητικών Αποφάσεων του 1958, ενώ εξετάστηκε παράλληλα η σχέση μεταξύ της ερμηνείας που δίνουν οι συγγραφείς και τα εθνικά δικαστήρια. Η εργασία αυτή καθοδηγείται από δύο ερωτήματα έρευνας: πρώτον, εάν μπορεί να εκτελεστεί μία ακυρωθείσα διαιτητική απόφαση και δεύτερον, εάν η απάντηση στο πρώτο ερώτημα είναι θετική, υπό ποιες προϋποθέσεις μπορεί να πραγματοποιηθεί αυτή η εκτέλεση. Η θεωρία για αυτό το θέμα επικεντρώθηκε στο ρόλο του άρθρου V παράγραφος 1 εδάφιο ε. της Σύμβασης της Νέας Υόρκης και στη διακριτική ευχέρεια που παρέχει στα δικαστήρια εκτέλεσης. Η διεξαγωγή συγκριτικής ανάλυσης υπογράμμισε ότι οι πρόσφατες εξελίξεις τόσο στη νομολογία όσο και στην θεωρία οδηγούν στην αναγνώριση και την εκτέλεση της ακυρωθείσας, εάν η διαιτητική απόφαση ακυρώθηκε σύμφωνα με τους τοπικούς (εθνικούς) κανόνες για την αναγνώριση και εκτέλεση διαιτητικών αποφάσεων. Ως εκ τούτου, είναι απαραίτητη η υιοθέτηση ομοιόμορφων προϋποθέσεων σχετικά με την αναγνώριση και την εκτέλεση μιας τέτοιας απόφασης, έτσι ώστε να εξυπηρετείται αποτελεσματικά ο σκοπός της Σύμβασης και η κυκλοφορία των διαιτητικών αποφάσεων.

"Nature design'd us to compose that sacred union,

which nothing but death can annul.[1].

[1] The School for Fathers, Or, Lionel & Clarissa: A Comic Opera, Volume 13 of Bell's British theatre, 1791

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INDEX OF ABBREVIATIONS

App	Application
Art.	Article
Art.	Articles
Ibid	Ibidem (in the same place)
ed.	Edition
et al	*et alii* (and others)
et seq.	*et sequens* (and following)
FAA	Federal Arbitration Act
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
No.	number
NYC	New York Convention of 1958
p./pp.	page/pages
para.	paragraph

Rep	Reports
supra	see above
UML	United Nations Commission on International Trade Law Model Law
UN	United Nations
UNCITRAL	United Nations Commission on International Trade
UNCTAD	United Nations Conference on Trade and Development
US	United States
v	*versus* (against)
VCLT	Vienna Convention on the Law of the Traties
Vol.	Volume

INTRODUCTION

It was the spring of 1958, when Professor Pieter Sanders, started drafting in his small typewriter in a garden somewhere in Connecticut a proposal that was meant to be presented to the Conference on International Commercial Arbitration, held by the United Nations the following days. No one would have imagined back then, that at this time he was drafting the text that now constitutes the New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards (hereinafter the Convention or NYC). Today, the success of the Convention is undisputed, the problems of the Geneva Convention of 1927 and the double *exequatur* it solved[2], as well as the shape it gave to international commercial arbitration, cannot be compared to any other international legal instrument[3].

Arbitration is a private system of resolving disputes between individuals, corporations, states regarding -almost- every matter of international trade and commercial law through a neutral professional whose expertise and knowledge they trust[4]. This essentially simple system has accomplished to resolve disputes which involve significant commercial interests, in ways more effective than commercial litigation[5]. What is more, this flexible dispute resolution mechanism, provides the parties with final and binding awards – something of immense importance for the success of an international arbitration[6]. A final and binding award means two things. First, it is usually not subject to appeal before state courts, with the exception of limited jurisdictions. Second, it means that the winning party will depend on it and try to have it enforced in the state, where often the losing party has most of its assets[7].

However, this is not always the case, despite the ratification of the Convention by 166 states[8] and its undoubted success. There are certain situations, under which another forum will

[2] Kenneth R. Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43.
[3] Gary Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) 136.
[4] Emmanuel Gaillard, John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999); Nigel Blackaby and others, *Redfern and Hunter on International Commercial Arbitration* (6th ed., Oxford University Press 2009) 1.
[5] Robert Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 1013.
[6] Julian D.M. Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 80.
[7] Margaret Moses, *The Principles and Practise of International Commercial Arbitration* (3rd ed., Cambridge University Press 2017) 3.
[8] UNCITRAL Database, available at:
<https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2>

interfere with the validity of the award rendered or the decision setting aside the award at its seat.

One of these problematic situations is the topic of this thesis – the enforceability of an arbitral award that has been set aside at its seat. For the purposes of this study, the terms 'set aside' and 'annul' will be used interchangeably. The issue is the following: an award is rendered at the arbitral seat, the party who lost will try to have the award set aside, while the winning party will try to enforce it in another state. What happens when the enforcement courts are faced with a request for recognition and enforcement of an award that has *already* been set aside at its seat? Will they decline the request or proceed with the enforcement? Will their decision change if the set-aside judgment does not contain the minimum requirements for recognition or is against their state's public policy? The truth is, there is no definite answer to all these questions. A lot of ink has been spilled by eminent scholars and the views remain divided. However, the last few years there seems to be a new wave of authority, in favour of recognition and enforcement when certain conditions are met.

The purpose of this thesis is to provide a fresh overview of this highly debated issue, especially viewed in light of the legislative developments in Greece. The thesis is divided into two parts. The first part introduces the regulatory framework which governs the issue and the two main approaches that had been proposed, the so-called traditional approaches. Regarding the regulatory framework, two are the main provisions that over the years have been interpreted as allowing for the enforcement of an annulled award: Art. V (1) and VII of the NYC. The two central approaches - opposite to each other - will be meticulously examined: the territoriality and delocalization approach. Although they do not correspond to the current standards, it is essential to understand their rationale **(PART I).**

The second part of this thesis deals with the intermediate approaches, as a solution to the dysfunctionalities of the traditional ones and presents the current position followed by the Greek scholarly writings. In line with the intermediate approach, which accepts the enforceability of an annulled award, in Greece seems to also be the new draft Law on International Commercial Arbitration. Lastly, the question of whether the text of the New York Convention is adequate to address a solution on the problematique presented or requires an amendment, will be discussed **(PART II**).

PART I: PRESENTATION OF THE PROBLEMATIQUE

A. REGULATORY FRAMEWORK

As a preliminary matter and since a significant part of the analysis will concentrate on these two terms, a distinction must be made between 'recognition' and 'enforcement'. Although they seem similar, each one plays a different role according to the parties' strategic options, after the issuance of an arbitral award. The former aims to the recognition of the award with the purpose of preventing the losing party from raising the same issues before a judicial authority – performing thus, a defensive function. The latter has an additional function; the winning party requires the court's assistance in ensuring that the arbitral award will be complied with and that it will be able to receive the assets that it is entitled to, pursuant to the award. A commonly used example employed to explain the differences is that of the 'sword' (enforcement) and the 'shield' (recognition).

In view of the above, the proposition that arbitral awards set aside in their place of origin, can be enforced elsewhere is based according to the main schools of thought, on two provisions of the NYC. Albeit an open-ended text, Art. V(1) of the NYC grants discretion to the enforcement courts -without any further guidance though[9]- to enforce an annulled award[10]. The second provision used in literature to support this idea, is Art. VII NYC, which creates a more favourable regime for the enforcement of awards, by allowing the application of a more favourable rule either that comes from national law or other treaty. It is obvious from the above, that these two Articles provide independent and alternative legal bases[11] which equally and adequately support the view that awards can and should be enforced, despite their annulment at the seat of arbitration.

[9]Catherine Kessedjian, 'Court Decisions on Enforcement of Arbitration Agreements and Awards' (2001) 18(1) Journal of International Arbitration 9; Gary Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) para. 1605 et seq.; Caspar Feest, 'Enforcement of Awards Set Aside at the Seat of Arbitration' (in) Daniel Girsberger, Christoph Müller (ed.) *Selected Papers on International Arbitration Volume 4* (Stämpfli Verlag 2018) 16.

[10] Lew, Mistelis, Kröll (no 6) 16 et seq.

[11]Δημήτριος Μπαμπινιώτης, 'Περί της αναγνώρισης και εκτέλεσης αλλοδαπών διαιτητικών αποφάσεων που έχουν ακυρωθεί στο κράτος έκδοσής τους' (2018) (σε) Διαιτ 1/2018; Kenneth R. Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43.

In addition, it must be noted that both provisions of the NYC are self-executing[12], in the sense that they are applied directly in national court proceedings and override any equivalent provision of national law[13]. This is of great importance, since the self-executed character means that each state's commitments to recognize and enforce arbitral awards, will be fully honoured, hence fulfilling the purpose of the Convention[14].

In supporting the above proposition, that annulled awards can be enforced, both Articles will be examined meticulously. The analysis will begin with Art. V(1)(e) and will particularly focus on the debate whether it grants discretion to the enforcement courts or not **(1)**. In the second part of the analysis, Art. VII NYC will be reviewed with regard to the local enforcement standards **(2)**.

1. Art. V(1)(e) NYC - Discretion to enforce an arbitral award

The whole discussion regarding the enforceability of annulled arbitral awards revolves around the text of Art. V(1)(e) NYC as well as the language used in other Articles of the same Convention. Art. V(1)(e) states: "Recognition and enforcement of the award **may be refused**, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".

The point of reference for the discretion of the enforcing court is the word "may", as the language is quite permissive[15]. A simple read of the text without further analysis would suggest that the enforcing court is not obliged to (as in it "must") recognize the annulled award and

[12] Gary Born, 'The New York Convention: A Self-Executing Treaty' (2018) 40 Michigan Journal of International Law 176 et seq.
[13] ibid.
[14] ibid 129.
[15] Talia Einhorn, 'The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards' (2010) 12 Yearbook of Private International Law 62.

refuse enforcement[16]. It may refuse enforcement, or it may not[17]. Yet, if things were so simple; there would not exist such a huge academic debate about it. In order to give a meaning and a solid answer to the dilemma imposed, a comprehensive analysis of the text and its meaning will be conducted below. Firstly, the text of Art. V(1)(e) will be interpreted according to the Vienna Convention on the Law of the Treaties of 1969 (hereinafter the "Vienna Convention") **(a)**. Secondly, it will be interpreted and viewed in the light of Art. VII of the NYC **(b)** and its relationship with Art. VI NYC will be examined **(c)**.

a) Interpretation according to the Vienna Convention

First tool in this exercise will be the interpretation according to international principles of interpretation, as those codified in the Vienna Convention[18]. The so called "Treaty on Treaties" contains three primary rules on the interpretation of international treaties; the general rule of interpretation laid down in Art. 31, the rule on the supplementary rules of interpretation (Art. 32) and the rule of interpretation in treaties authenticated in two or more languages (Art. 33). The general rule focuses on the main elements of a treaty which are of relevance to its interpretation, namely the ordinary meaning of its terms in their context and the treaty's object and purpose[19]. In case the ordinary meaning does not provide sufficient outcomes, or these are obscure, Art. 32 will direct to the preparatory work of the treaty as well as the circumstances of its conclusion[20]. Lastly, Art. 33 provides that when a treaty has been authenticated in more than two official languages, as it is the case here, then the text is of equal authority in all languages; something that will be examined in the analysis below.

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[16] Francisco González de Cossío, 'Enforcement of annulled awards: towards a better analytical approach' (2016) 32(1) Arbitration International 17; Nadia Darwazeh, 'Article V(1)(e)' (in) Herbert Kronke et al (ed.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 308; See also UNCTAD, '5.7 Recognition and Enforcement of Arbitral Awards: The New York Convention', (2003) UNCTAD/EDM/Misc.232/Add.37.; However, there are national courts which interpret "may" of Article V as "shall", see Lew J, Mistelis L, Kröll S, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) at p. 706, no. 97 referring to Judgment of 2 November 2000, Bundesgerichtshof [Federal Court of Justice] ZIP 2270 (2000) 2271.

[17] Christoph Liebscher, 'Article V(1)(e)' (in) R. Wolff (ed.) *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 – Commentary* (Beck, Hart and Nomos 2012); Davis (no 11).

[18] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 32.

[19] Art. 31.1 of the Vienna Convention on the Law of the Treaties: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

[20] Art. 32 of the Vienna Convention on the Law of the Treaties: "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Art. 31, or to determine the meaning when the interpretation according to Art. 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable".

Some might try to argue that the Vienna Convention cannot be used in order to interpret the NYC. This is so, because the former entered into force in 1980, while the latter in 1959. Art. 4 of the Vienna Convention stipulates that the treaty does not have a retroactive effect[21]; hence, meaning that it cannot be used in order to interpret the meaning of the NYC. However, this is not the case here. The rules contained in the Vienna Convention codify pre-existing customary law[22]. The NYC is an international treaty and as such part of international law[23]. So, the principles embodied in Art. 31-33 can be used to interpret the NYC. In addition to that, the International Court of Justice which in its judgement from 1989 stated that the principles codified in Art. 31 and 32 [of the Vienna Convention] constitute "a codification of existing customary international law"[24], reaffirms this position. In any event, even without having to apply the Vienna Convention, international customary law binds the states[25].

The analysis will start with the interpretation of Art. V(1)(e) NYC according to the ordinary meaning given to its terms in light of its object and purpose **(1)**, it will be followed by the study of its preparatory work **(2)** and lastly the different authenticated texts will be compared **(3)**.

(1) Interpretation according to Art. 31 of the Vienna Convention

The Interpretation of Art. V(1)(e) should begin with the application of the general rule, namely the "ordinary meaning [of the terms of the NYC] in their context and in light of its object and purpose". The terms used in the NYC should have an autonomous meaning, which further implies that the courts should refrain from interpreting the text of the treaty in accordance with their domestic laws[26].

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[21] Art. 4 of the Vienna Convention on the Law of the Treaties: "Without (…), the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".

[22] *North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* Judgment [1969] ICJ Rep 3; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Judgment [1986] ICJ Rep; *Mamatkulov and Askarov v Turkey (GC) (App No 46827/99 and 46951/99)* (2005); *Genocide Case* [2007] ICJ Rep 43; *Dispute Regarding Navigational and Related Rights* [2009] ICJ Rep 213; *Delimitation of the Continental Shelf between Nicaragua and Colombia* (Preliminary Objections) [2016] ICJ Rep 100; Richard Gardiner, *Treaty Interpretation* (2nd ed., Oxford International Law Library 2017); Oliver Dörr, Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018); Paulsson (no 18) 43; Marike Paulsson, 'Interpreting the New York Convention under the Vienna Convention from a National Perspective: Paulsson Snail Diagram, a Judges Tool' (Kluwer Arbitration Blog, July 25 2016).

[23] Gabrielle Kaufmann-Kohler, *et al. ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (The Hague: International Council for Commercial Arbitration 2011)12.

[24] *Guinea-Bissau v Senegal*, Judgment, [1991] ICJ Rep 53 at 70.

[25] Paulsson (no 18) 42-43.

[26] Kaufmann-Kohler *et al.* (no 23) 13.

An interpretation pursuant to the ordinary meaning of the term "may be refused" is as simple as it seems; when awards, that have been set aside at the seat, are not recognized by the enforcing courts, there is no treaty violation taking place[27]. This is further highlighted by the contrast between Art. III of the NYC ("shall")[28] which uses strong, mandatory terms and the language of Art. V ("may"). The distinction described seems to be a conscious choice[29]. It makes clear which obligations of the enforcing courts are mandatory and which are not. Similarly, the most prominent commentary to the NYC, explains that "the court still has a certain discretion to overrule the defence [of the party that refuses the enforcement of the annulled award] and to grant the enforcement of the award"[30].

What is more, interpreting the text of Art. V(1)(e) considering the object and purpose of the Convention, reaffirms the discretion of the enforcing court. The object and purpose do not constitute independent elements of interpretation, rather a way of exemplifying provisions of each treaty[31]. The purpose of the NYC is to encourage international transactions and commerce[32], by making the recognition and enforcement of foreign judgements simple and fast[33]; no one would opt for arbitration if they had to wait months for the recognition of the arbitral award or extra costly proceedings. The convention is thus designed to facilitate the enforcement of arbitral awards and their unhindered circulation[34]. This subsequently leads to a pro-enforcement interpretation of its provisions. It would be highly inconsistent with its purpose to interpret a provision as prohibiting the enforcing courts from recognizing an annulled award, if these courts so wish[35]. On the same note, the grounds for refusal of recognition and enforcement laid down in Art. V are exhaustive[36] and thus, should be construed

[27] William W. Park, 'Duty and Discretion in International Arbitration' (1999) 93 American Journal of International Law 803

[28] Art. III of the New York Convention states: "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following Art.s. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards"

[29] Paulsson (no 18) 46.

[30] Albert Jan Van den Berg, *The New York Arbitration Convention of 1958 – Towards a Uniform Interpretation* (Kluwer Law International 1981) 265

[31] Paulsson (no 18) 45.

[32] Kaufmann-Kohler (no 23) 14.

[33] Gary Born, *International Arbitration: Cases and Materials* (2nd ed, Kluwer Law International 2011) 1000.

[34] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016); Robert Briner, 'Philosophy and Objectives of the Convention' (in) *Enforcing Arbitration Awards Under The New York Convention: Experience and Prospects* (UN 1999).

[35] Μπαμπινιώτης (no 11) 34.

[36] *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA)*, US Court of Appeals 2nd Circuit 508 F.2d 969, 23 December 1974; *Karaha Bodas Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, US Court of Appeal 5th Cir. 364 F.3d 274, 288, 23 March 2004; *Encyc. Universalis S.A.*

and interpreted narrowly[37]. This is further proved by the fact that the pro-enforcement approach with regard to the NYC is followed by many courts[38]. A pro-enforcement interpretation of Art. V(1)(e) is that the enforcing courts do have discretion as to whether to refuse the enforcement that has been annulled in its country of origin[39]. The extend of that discretion and its peculiarities will be examined further below.

(2) Interpretation according to Art. 32 of the Vienna Convention

The role of Art. 32 of the Vienna Convention is to confirm the meaning and the interpretation that results from the interpretation of Art. 31[40]. But even if the interpretation provided by Art. 31 is not sufficient to prove the discretion of Art. V(1)(e) NYC or leads to ambiguous outcomes, Art. 32 still confirms the above meaning[41]. Art. 32 deals with supplementary means of interpretation covering the legislative history as well as the circumstances of the conclusion.

In the present case, the *travaux preparatoires* of the NYC, show that the adoption of the word "may" in Art. V was not coincidental[42]. Its counterpart in the original draft of the ICC (Art. IV) stated "shall" instead[43]. Later, in the next draft prepared, this was replaced by the word

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v. Encyc. Britannica, Inc., US Court of Appeals 2nd Cir. 31 March 2005; *Judgment of 28 July 2010*, German Bundesgerichtshof [Federal Court of Justice]; Emmanuel Gaillard, Jenny Edelstein, 'Baker Marine and Spier Strike a Blow to the Enforceability in the United States of Awards Set Aside at the Seat' (2000) 3(2) International Arbitration Law Review 37; Domenico Di Pietro, Martin Platte, *Enforcement of International Arbitration Awards* (Cameron May 2001) 135; Georgios Petrochilos, *Procedural law in international arbitration* (Oxford University Press on Demand 2004) 304.

[37] *Dallah Real Estate & Tourism Holding Co. v. Ministry of Religious Affairs of the Gov't* [2010] UKSC 46; Julian D.M. Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003); Gary Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) 3425-6.

[38] Paulsson (no 18) 33.

[39] Fifi Junita, 'Pro Enforcement Bias' Under Art. V of the New York Convention in International Commercial Arbitration' (2015) 5(2) Indonesia Law Review 140.

[40] ibid 46.

[41] Dörr, Schmalenbach (no 22) 617 et seq.

[42] Georgios Petrochilos, 'Enforcing Awards Annulled in Their State of Origin Under The New York Convention' (1999) 48 International and Comparative Law Quarterly 856.

[43] United Nations Economic and Social Council 'Enforcement of International Arbitral Awards' (1953) E/C.2/373 (brochure 174), available at: http://undocs.org/E/C.2/373

Art. IV states: "Recognition and enforcement of the award shall be refused if the competent authority to whom application is made establishes : a) that recognition or enforcement of the award would be contrary to public policy in the country in which it is sought to be relied upon; b) that the subject-matter of the award is not capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon; c) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that. being under a legal incapacity, he was not properly represented; d) that the award deals with a difference not contemplated by the agreement of the parties or that it contains decisions on matters not submitted to the arbitrators; e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made. The circumstances referred to in (c), (d) and (e) of the present Art. may only be invoked by the party against whom recognition or enforcement of the arbitral award is sought".

"may"[44]. What is more, the said next draft was largely approved by the various countries, including the change from "shall" to "may"[45]. This modification implies that the drafters "designed" the grounds for non-enforcement to be discretionary[46]. All the above, clarify that the choice of the word "may" was intentional and additionally, shows a wider compromise of the governments to leave some discretion to the enforcing courts in case of annulled awards[47].

(3) Interpretation according to Art. 33 of the Vienna Convention

Concerning the interpretation of uniform law, particular regard must be had at its language; especially, when that has been authenticated in more than two languages. After the interpretation according to the rules of Art. 31-32 and assuming for the sake of the argument that none of these meanings supports the argument that Art. V(1)(e) grants discretion to enforce an annulled arbitral award, pursuant to Art. 33(4)[48] of the Vienna Convention, the meaning that best reconciles the text should be adopted. Linguistic discrepancies between the official texts -if any-, should be resolved by resorting to the interpretational doctrine of Art. 33 and not by rushing to compare the different languages[49].

The NYC was prepared in five official languages, namely English, French, Spanish, Chinese and Russian[50], *all* of which are equally authentic[51]. Also, the working languages were three:

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[44] United Nations Economic and Social Council, 'Enforcement of International Arbitral Awards', (1955) E/2704, E/AC.42/4/ Rev. 1 available at: http://undocs.org/E/2704 Art. IV states: "Without prejudice to the provisions of Art. III, recognition and enforcement of the award may only be refused if the competent authority in the country where recognition of enforcement is sought […] (e) that the award the recognition or enforcement of which is sought, has been annulled in the country in which it was made"

[45] See the Comments by Governments and Organisations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: January 1956 - March 1958, *Travaux Préparatoires*: Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) available at: https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/travaux

[46] Darwazeh (no 16) 309; Davis (no 11) 61.

[47] Petrochilos (no 42) 859.

[48] Art. 33 of the Vienna Convention on the Law of the Treaties states: "1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail. 2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree. 3. The terms of the treaty are presumed to have the same meaning in each authentic text. 4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of Artcles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted*"*.

[49] Ulrich Mayer, 'The Enforcement of Annulled Arbitral Awards: Towards a Uniform Judicial Interpretation of the 1958 New York Convention' (1998) 2 (2-3) Uniform Law Review 588.

[50] See the official texts at: http://www.newyorkconvention.org/new+york+convention+texts

[51] Art. XVI (1) of the New York Convention states: "This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations".

English, French and Spanish[52]. The exercise that must be made here is whether the meaning embodied in the English text "*may*" that certainly provides for discretion, is in accordance with the other four official languages. The Chinese, Russian texts agree perfectly with the English one; so, does the Spanish one, which means that four out of the five official languages "have room for judicial discretion"[53]. It is only the French text that differs – but does not contradict with the English one[54], since a hint of discretion can be reconciled with its text. In any case, the need for unity of the treaty requires that when the majority of the languages confers a specific meaning, then the version that differs must be given the same meaning[55]. Therefore, the interpretation according to Art. 33(4) of the Vienna Convention, leads to the conclusion that the meaning that best reconciles the text is the adoption of the "discretion".

Last but not least, it must be noted that in line with the above argument is the Arabic translation of the Convention. Although it does not constitute an official language, it is the most recent translation of the text, implying that *if* there was an ambiguity regarding the permissive language, it was a good opportunity to "resolve" it by adopting a stronger meaning, comparable to "shall" – something that obviously did not happen[56].

b) Interpretation according to Art. VII NYC

Another argument in favour of the discretion of the enforcing courts to recognize awards that have been set aside, arises from the text and purpose of Art. VII NYC. Art. VII states: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon". It is this very Art. that summarizes the objectives of the Convention, namely, to expand the grounds for which an award can be recognized and enforced[57]. If recognition and enforcement were mandatory under Art. V, then

[52] United Nations Social and Economic Council, 'Rules of Procedure – Travaux Preparatoires', (1958) E/CONF.26/5/Rev. 1 available at: http://undocs.org/E/CONF.26/5/Rev.1, see rule no 32.
[53] Jan Paulsson, 'May or Must Under the New York Convention: An Exercise in Syntax and Linguistics' (1998) 14(2) (in) Arbitration International 229; Claudia Alfons, *Recognition and Enforcement of Annulled Foreign Arbitral Awards : An Analysis of the Legal Framework and its Interpretation in Case Law and Literature* (Peter Lang AG 2010) 78.
[54] Georgios Petrochilos, 'Enforcing Awards Annulled in Their State of Origin Under The New York Convention' (1999) 48 International and Comparative Law Quarterly 858.
[55] ibid 830.
[56] Alfons (no 53) 78.
[57] Born (no 37) 3428.

Art. VII NYC would serve no purpose. The latter allows local courts to deviate from the grounds for refusal laid down in NYC. Thus, the mere power of the enforcement courts to resort to a more favourable rule that allows enforcement, does not compromise with the interpretation that the provision "may be refused" does not leave room for discretion[58]. The above conclusion is further supported by national case law[59]. The United States District Court of Columbia has pinpointed that:

> "Under Art. V, paragraph 1(e) of the Convention, a court may refuse enforcement of an award if 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".[60]

Lastly, given that Art. VII NYC allows every state that has ratified the New York Convention, to bypass the grounds for refusal under Art. V(1)(2) NYC, by adjusting properly their domestic law (under the most favourable provision of Art. VII NYC), it will also be able to provide the enforcing courts with the discretion to recognize an award in case this has been annulled at its seat[61].

c) Interpretation according to Art. VI NYC

Consistent with the view that there is discretion to enforce an annulled award is also Art. VI NYC. It states: "If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Art. V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security". The adjournment depends on the probability of the validity of the setting aside procedure. The provision for adjournment takes into consideration that the result of the setting aside procedure at the seat, will affect the recognition and enforcement of the award. What is more, the granting of adjournment is contingent, and if granted, explains why the annulment of the award will convert the obligation to recognize the arbitral award (as incorporated in Art. III NYC) to discretion[62].

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[58] Μπαμπινιώτης (no 11) 37.
[59] See also *Judgment of 21 September 2005*, German Bundesgerichtshof [Federal Court of Justice]; *Yukos Capital SARL v. OAO Rosneft*, Amsterdam Gerechtshof [Court of Appeal of Amsterdam] 2009;]
[60] *Cont'l Transfert Technique Ltd v. Fed. Gov't of Nigeria*, 697 F. Supp. 2d 46 (D.D.C. 2010)
[61] Born (no 37) 37.
[62] ibid 3641.

The above conclusion is further supported by the purpose of the Convention; namely the easy enforcement of arbitral awards worldwide. Baseless setting aside applications should not cause delays in the recognition and enforcement procedures. Furthermore, it is supported by recent case law. The District Court in the case *Science Applications International Corporation v The Hellenic Republic*[63], decided not amend the 2013 court decision which refused to adjourn the enforcement of the award, until after there was a decision upon the setting aside application taking place before the Greek courts.

2. Art. VII NYC – The more favourable provision

An alternative legal basis that has been suggested under the NYC is that of Art. VII. In this section, (**a**) the role of Art. VII NYC will be presented and then (**b**) particularly the role of the European Convention of 1961 as a more favourable provision.

a) The role of Art. VII NYC

The second school of thought that supports the idea that awards annulled in their place of origin can be enforced elsewhere, finds its base on Art. VII NYC[64] which states: "The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon". This clause is also known as the "more favourable rule*" clause*[65] or as used by Jan Paulsson the "local enforcement standard"[66]. The 'more favourable rule' term seems to have been envisioned as such also by the drafters of the Convention[67]. In other words, the enforcement courts are obliged to[68] apply the more

[63] *Science Applications International Corporation v the Hellenic Republic* (United States District Court Southern District of New York 2019)
[64] Park (no 27)16.
[65] Kenneth R. Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 43; Dirk Otto, 'Art. VII', (in) Herbert Kronke et al (ed.), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 447; Δημήτριος Α. Κούρτης, 'Το Άρθρο VII της Σύμβασης της Νέας Υόρκης (1958) περί αναγνωρίσεως και εκτελέσεως αλλοδαπών διαιτητικών αποφάσεων' (2014) 2 Εφαρμογές Αστικού Δικαίου 118.
[66] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulments' (1998) 6(2) Asia Pacific Law Review 3.
[67] Davis (no 65) 62.
[68] R.Y. Chan, 'The Enforceability of Annulled Foreign Arbitral Awards in the United States: A Critique of Chromalloy' (1999) 17(1) Boston University International Law Journal 141.

favourable provisions -if any- that apply according to their national law or according to the treaties that this state has ratified[69]. In the matter concerned, namely the enforcement of annulled awards, a more favourable provision would mean that there is no provision in national law refusing the enforcement of awards that have been set aside or it sets less strict requirements. In these cases, the enforcement of an annulled award is mandatory[70].

Art. VII NYC is so broadly drafted that both scenarios of national law described above could happen[71] and could allow the enforcement of the annulled award. A typical example on more favourable national law is the French national law, which does not provide any ground for refusal of annulled awards pursuant to Art. 1514, 1520, and 1525 of the French Civil Procedure Code. Yet, this does not undermine the protection of the annulled award, in the sense that French law provides for grounds for non-recognition as per Art. V(1)(a) – (d) of the Convention. It cannot be argued thus that forum shopping is possible under this regime.

The supporters of the local enforcement standard see Art. V(1)(e) challenging in creating truly international awards[72], as it may often be the case that awards are annulled on unjustifiable and non-uniform grounds. In that case, Art. VII safeguards the interests of the parties by allowing the application of the more favourable provision.

In view of the above, Art. VII NYC not only safeguards any more favourable rights but also it creates the opportunity for national jurisdictions to adopt national rules regarding the enforcement of arbitral awards, that are more "*friendly*" to the creation of truly international awards[73].

b) The example of the 1961 European Convention

Apart from the "more favourable" provisions of national law, Art. VII NYC also gives prevalence to any provision of "multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States*".* Such an agreement is the 1961 European Convention on International Commercial Arbitration, which has been

[69] Julian D.M. Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003); Saad Badah, 'The Enforcement of Foreign Arbitral Awards in the GCC Countries: Focus on Kuwait' (2014) 3(1) International Law Research 24.
[70] Petrochilos (no 54) 861.
[71] ibid 875.
[72] Paulsson (no 66) 9.
[73] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience' (2009) 26(2) Journal of International Arbitration 269.

ratified by 27 states[74]. It must be noted that it does not constitute an international instrument for the recognition and enforcement of arbitral awards, such as the NYC[75].

The main provision that is of relevance here is Art. IX(1) – Setting Aside of the Arbitral Award which states: "The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons: (a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or (b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration need not be set aside; (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Art. IV of this Convention".

The grounds for refusal of recognition under the European Convention are better drafted than those of the NYC[76] and as observed, particular grounds listed in the NYC are excluded[77]. The practical function of the European Convention -when applicable- consists in refusing recognition when an award has been set aside for grounds as those expressed in Art. IX[78]. Conversely, an award will be recognized and enforced if it has been set aside for grounds other

[74]United Nations Treaty Collection available at:
<https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en>
[75] Dominique T. Hascher, 'European Convention on International Commercial Arbitration of 1961, Commentary' (in) *Yearbook Commercial Arbitration* 36 (2011) 534.
[76] Emmanuel Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' (in) A.J. van den Berg (ed.), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9, Paris, Kluwer Law International 1999) 37.
[77] See Hascher (no 75) stating at 536 that: "Ground (e) of Art. V(1) of the New York Convention has not been reproduced in the text of Art. IX since setting aside is itself the subject matter of Art. IX".
[78] Albert Jan van den Berg, 'Should the Setting Aside of the Arbitral Award be Abolished?' (2014) ICSID Review 1; Günther J. Horvath, 'What Weight should be Given to the Annulment of an Award under the Lex Arbitri? The Austrian and German Perspectives' (2009) 27 Journal of International Arbitration 256.

than those mentioned in Art. IX. An indicative example of the application of Article IX of the European Convention and the interplay with the NYC can be seen in the *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*[79] case. In this case, an award that had been set aside at its seat due to violation of public policy of Slovenia, was later enforced by the Supreme Court of Austria. Austria is a member both of the NYC and the European Convention, however the Supreme Court applied the later as it was more favourable to the arbitration and hence, to the enforcement of the award.

Therefore, taking into account the analysis above, the idea to imply that an award annulled at its seat can only be enforced in selected countries with more favourable provisions like France, is untrue. An award may be recognized and enforced in *all* 27 states that have ratified the European Convention, including the United States, taking into account always the domicile of the parties involved and the application of the Convention.

B. THE TRADITIONAL APPROACHES TO THE PROBLEM

The above analysis provided us with a general overview of the regulatory framework that governs or could govern the recognition and enforcement of an award that has been set aside at its seat. Provided that the place of arbitration is not the only link between the arbitration proceedings and the national legal orders, it would be entirely correct to set aside an award in a state and recognize it in another. However, all these depend on the approach towards arbitration that each forum holds.

Over the years, the academic debate revolved around two main ones, albeit different at their core, approaches. These approaches adopt opposing views with regard to the status of the national legal order as well as the nature of the arbitral award. In the following section, both traditional approaches will be discussed, starting with the territoriality approach **(1)** and moving to the delocalization approach **(2)**. The merits of each one will be highlighted through case law and their weak points will also be examined.

1. The territoriality approach

The oldest approach, which has been gradually abandoned is the territoriality approach. However, it is essential to comprehend its theoretical background and reasoning. The study

[79] *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Oberster Gerichtshof [Supreme Court of Austria] 1993.

will begin with a thorough presentation of the territoriality approach, as viewed by its main supporters **(a)** and will next underline its main and mostly discussed problems **(b)**.

a) Presentation of the approach

In the course of the analysis, it is essential for methological reasons to begin with the territoriality approach, since it is the starting point for dealing with the problem, on the base of which all the other approaches are developed. After all, that is the reason why it is called "*the traditional*" approach[80]. Francis Mann is considered to be its founder[81], while it finds big support from prominent arbitration practitioners such as Jan van den Berg[82] and Sanders[83].

The theory of territoriality is based on the fact that the arbitral award is embedded into the legal order where the seat of arbitration is located, meaning that the award draws its nationality from that legal order. According to Mann, there is not really "international arbitration" rather national arbitration, given that every award draws its nationality from particular legal order[84]. What is more, from that legal order the arbitral tribunal emanates its powers and these powers are subject to the courts' review. It follows from the above that this approach has the advantage of simplicity and clarity, since the determination of a seat is a simple task[85].

In addition, taking into consideration that the seat has the significance and role of a forum[86], it follows from that proposition that the annulment of an arbitral award has an erga omnes effect. In other words, after its annulment the award ceases to exist in the legal world[87]. Therefore, the

[80] Michael Dunmore, 'Enforcement of Awards Set Aside in their Jurisdiction of Origin' in Klausegger, Klein, et al. (ed.) *Austrian Yearbook on International Arbitration 2014* (C.H.Beck, MANZ Verlag Wien, Stämpfli Verlag 2014) 293.
[81] See Francis Mann, 'The UNCITRAL Model Law – *Lex Facit Arbitrum'* (1986) 2(3) Arbitration International
[82] See Albert Jan Van den Berg, *The New York Arbitration Convention of 1958, Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981).
[83] Peter Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6(1) Nederlands Tijdschrift Voor Internationaal Recht 54.
[84] Mann (no 81)
[85] Χαράλαμπος Παμπούκης, 'Η ακυρωθείσα διαιτητική απόφαση - *Jurisdictio Facit Arbitrum*' (2018) 1 Διαιτησία και Διαμεσολάβηση 11.
[86] Matthew D. Slater, 'On Annulled Arbitral Awards and the Death of *Chromalloy'* (2009) 25(2) Arbitration International 271.
[87] *Götaverken Arendal Aktiebolag v. General National Maritime Transport Company*, Högsta domstolen [Supreme Court of Sweden], 13 August 1979.

enforcement courts cannot give legal effect to an award that does not exist anymore[88] – it is impossible to revive an award under the NYC[89]. *Ex nihilo nihil fit*[90].

The above assumptions are deeply related to positivist assumptions and to the idea of state sovereignty. In the context of this idea, the law of the seat determines the terms under which an arbitral award, even in international arbitration, obtains its validity[91]. These terms are interpreted and applied in a binding manner only by the courts of the seat. It is argued that these assumptions are in line with the text of Art. V(1)(e), which in order to avoid the "double exequatur", introduces the rules of the exclusive jurisdiction of the courts of the seat to rule upon the set aside procedure[92]. This is also why according to this approach, the review of the annulled award is not allowed, neither directly in the context of its recognition, nor indirectly, in the context of the request to enforce the annulled award.

The inability to review the annulled arbitral award means that the enforcement courts cannot confirm whether the court that issued the annulled award has interpreted and applied correctly the grounds for setting aside. It also means that the reasons that led to the annulment of the award cannot be reviewed, as well as the compatibility of the seat's rules for setting aside with the ground that was accepted and led to the annulment[93]. This last observation is the most critical with regard to the territoriality approach, since it brings unorthodox results, as will be discussed below.

Lastly, the supporters of the territoriality approach argue that it creates certainty as to the outcomes of every procedure. The opposite would mean that the party who lost can go to another forum to enforce the award that was annulled, suggesting that it can ultimately lead to a forum-shopping, which should not be accepted[94].

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[88] *PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV and others and another appeal* (2013) Singapore Court of Appeal 76 – 77.
[89] Sanders (no 83) 55.
[90] Albert Jan Van den Berg, 'When is An Arbitral Award Non-Domestic under the New York Convention of 1958?'(1985) 6 Pace Law Review 201; Albert Jan Van den Berg, 'Enforcement of Arbitral Awards in Russia: Case Comment on Court of Appeal of Amsterdam, 28 April 2009' (2010) 27(2) Journal of International Arbitration Kluwer Law International 187.
[91] Δημήτριος Μπαμπινιώτης, 'Περί της αναγνώρισης και εκτέλεσης αλλοδαπών διαιτητικών αποφάσεων που έχουν ακυρωθεί στο κράτος έκδοσής τους' (2018) (σε) Διαιτ 1/2018 53.
[92] Michael Reisman, Brian Richardson, 'The Present – Commercial Arbitration as a Transnational System of Justice: Tribunals and Courts: An Interpretation of the Architecture of International Commercial Arbitration', (in) A.J. Van den Berg (ed.) *Arbitration: The Next Fifty Years* (Kluwer Law International 2012) 24.
[93] Μπαμπινιώτης (no 91) 55.
[94] Linda Silberman, Maxi Scherer, 'Forum shopping and Post Award Judgments' (2013) 2(1) Peking University Transnational Law Review 121.

b) The problems with the territorial approach

The territorial approach is based on dogmatic notions: state sovereignty, legal positivism, judicial nature of arbitration. Such notions leave no room for review of the annulled awards from the enforcement courts and ultimately create problems that lead to the rejection of the territorial approach. To this extend, the adoption of the territorial approach thwarts international arbitration as an efficient dispute resolution regime[95].

First of all, the position that the annulled arbitral award ceases to exist in the legal world is contradicted with the regulatory regime. In particular, it cannot reconcile with the discretion to recognize and enforce annulled arbitral awards under Art. V(1)(e) NYC, namely with the NYC itself. The discretion of Art. V(1)(e) presupposes precisely that the arbitral award exists and can be regarded as such by the enforcement courts[96].

The argument that Art. V(1)(e) NYC provides for an exclusive jurisdiction of the courts of the seat cannot hold true. The Convention is merely a -convention- for the recognition and enforcement of arbitral awards and no rule for exclusive jurisdiction is contained therein. Its role is not to determine which courts have jurisdiction, but to set conditions for the recognition of a foreign arbitral award[97].

What is more, the whole concept of the approach is grounded on an obsolete assumption that the award draws its legal force from the law of the seat[98]. When the NYC was drafted in 1958, the arbitral seat did play a more important role than it does now, when most parties agree on the seat out of convenience, without bearing any importance of the location of the seat itself[99].

A significant problem is also the fact that the territorial approach does not correspond to the parties' agreement meaning that they did not choose submitting the dispute to the exclusive jurisdiction of a certain court. As a matter of fact, by agreeing on international arbitration, they actually meant to avoid any relation with a seat court[100]. The territoriality approach interferes

[95] Daniel Ang 'Enforcement of Arbitral Awards Set Aside at the Seat of Arbitration: The Way Forward for Art. V(1)(e) in Singapore' (2017) 9 Singapore Law Review 7.
[96] Georgios Petrochilos, 'Enforcing Awards Annulled in Their State of Origin Under The New York Convention' (1999) 48 International and Comparative Law Quarterly 862.
[97] Παμπούκης (no 85) 11.
[98] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulments' (1998) 6(2) Asia Pacific Law Review 12.
[99] Pierre Lastenouse, 'Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene' (1999) 16(2) Journal of International Arbitration 43.
[100] ibid

with the parties' intentions, since it enables seat courts to deal with the legal effect of the arbitral award.

Lastly, the territoriality approach contradicts the provisions of the 1961 European Convention. Art. IX(1)(2) not only allows for a discretion, but it also imposes the enforcement of an award that has been annulled in the state or origin, provided that this annulment was not the result of one of the grounds listed in Art. IX(1)(a)-(d). Thus, it cannot be argued that the annulled award ceases to exist; it is totally against the philosophy of the European Convention.

In any case, it is not clear from the Convention which legal order has the jurisdiction to set aside an arbitral award, given that it only contains the grounds for non-recognition in Art. V. For all the above reasons, it is clear that the territoriality approach is not in line with the spirit neither of the NYC, nor of the 1961 European Convention.

2. The delocalization approach

The second traditional approach – the delocalization approach – is fundamentally different from the territorial. It adopts a totally liberal position by supporting that from the moment an arbitral award is issued, its recognition rests with each legal order's rules. This means that the decision of any other jurisdiction bears no significance in its recognition and enforcement, *ergo*, the enforcement courts are free to rule upon the enforcement[101]. One understands that this approach is the total opposite of the territorial approach. Emmanuel Gaillard, one of its main supporters, argues that the arbitral awards draw their lawfulness from more than one legal orders[102].

The above also means that the arbitral award is a "floating norm" which is truly international[103]. International arbitration does not get its power from any national law[104] and that was the purpose of this approach; to disengage international arbitration from procedural and substantive rules of a particular legal order[105]. In addition to that, according to this approach, the power of

[101] Berthhold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé* (Martinus Nijhoff 1963) 347 et seq.
[102] Emmanuel Gaillard, 'L'exécution des sentences annulées dans leur pays d'origine' (1998) 3 Journal du Droit international 645 et seq.
[103] Giulia Carbone, 'Interference of the Court of the Seat with International Arbitration, The Symposium' (2012) 1 Journal of Dispute Resolution 3; Michael B. Holmes, 'Enforcement of annulled arbitral awards : logical fallacies and fictional systems' (2013) 79(3) Arbitration: The Journal of the Chartered Institute of Arbitrators 244.
[104] Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of its Country of Origin' (1981) 30(2) International & Comparative Law Quarterly 358.
[105] Μπαμπινιώτης (no 91) 65.

the arbitrators emanates from "all the legal orders that recognize, under certain conditions, the arbitral agreement and award as binding and valid"[106]. The sum of these legal orders creates a transnational and autonomous legal order[107].

The disassociation of the international arbitral procedure from a legal order described above, also affects the award. The award draws its validity from the international autonomous legal order. Therefore, the annulment of the arbitral award from one legal order, does not equal to non-enforcement in another state, as these courts are free to rule upon that[108]. On a final note, its annulment from the courts of the seat, is totally irrelevant[109].

a) The French experience – an analysis of the French case law

The delocalization approach is mainly followed by the French case law, which tends to follow a more liberal approach towards the recognition and enforcement of arbitral awards[110]. France is a member to the New York Convention and applies pursuant to Art. VII of the Convention, its own more favourable national law[111], as analysed above. Through the combined application of Art. VII NYC and the provisions of the French Code of Civil Procedure, French courts have refused the application of Art. V(1)(e) and proceeded with the enforcement of an annulled award[112]. However, an overview of the French case law suggests not only that it is based on the application of the "more favourable" provision of Art. VII NYC[113], but also that starting

[106] Gaillard (no 76) 18.
[107] Francisco González de Cossío, 'Enforcement of annulled awards: towards a better analytical approach' (2016) 32(1) Arbitration International 17.
[108] Jan Paulsson, 'Delocalization of International Commercial Arbitration: When and Why It Matters', (1983) 32 International and Comparative Law Quarterly 54 et seq.
[109] Pierre Mayer, 'The French Approach as a Starting Point for General Reflections on the Recognition of Foreign Award Judgments' in Andrea Menaker (ed) *International Arbitration and the Rule of Law: Contribution and Conformity* (Kluwer Law International 2017) 706 et seq.
[110] Hamid G. Gharavi, 'Enforcing Set Aside Arbitral Awards: France's Controversial Steps Beyond the New York Convention' (1996) 6 Journal of Transnational Law & Policy 96.
[111] Code de procédure civile – Art. 1520: Le recours en annulation n'est ouvert que si:
1° Le tribunal arbitral s'est déclaré à tort compétent ou incompétent ; ou
2° Le tribunal arbitral a été irrégulièrement constitué ; ou
3° Le tribunal arbitral a statué sans se conformer à la mission qui lui avait été confiée ; ou
4° Le principe de la contradiction n'a pas été respecté ; ou
5° La reconnaissance ou l'exécution de la sentence est contraire à l'ordre public international.
Note that the French Civil Procedure Code restricts the judicial review to: (i) the incompetence of the arbitral tribunal, (ii) irregular constitution of the arbitral tribunal, (iii) excess of authority, (iv) violation of due process and (v) conflict of the award with international public policy. These have been held to be exhaustive. See also Gaillard E, Savage J, *Fouchard Gaillard Goldman on International Commercial Arbitration* (Kluwer Law International 1999) at 923.
[112] Gharavi (no 110) 96.
[113] Catherine Kessedjian, 'Court Decisions on Enforcement of Arbitration Agreements and Awards' (2001) 18(1) Journal of International Arbitration 9.

from this provision in conjunction with different theories, the notion of nationless arbitral award was developed[114]. This kind of award is entirely disconnected from the legal order of the seat. As it will be analysed below, the French case law is based more on these notions than the more favourable provision of Art. VII NYC[115]. Of paramount importance are considered the decisions of the French *Cour de cassation: Norsolor, Hilmarton and Putrabali.*

It appears that a number of other European jurisdictions do follow the French approach regarding the enforcement of annulled awards under VII NYC[116], including Belgium[117], Austria[118] and the Netherlands[119].

An analysis of the case law to that regard is necessary in order to conceive the way that France has applied the delocalization approach. *Norsolor*[120] case is the one of the first French ones that confirmed that annulled awards can be enforced as early as in 1984. In this case, the court of appeal of Vienna annulled an arbitral award that had been made in Austria according to ICC rules, due to the fact that the tribunal applied *lex mercatoria* to the merits of the dispute, given that there was no choice of substantive law made by the parties. Yet, this case was a great opportunity for the French Cour de cassation to discuss the relation between two provisions of the NYC that provide grounds for refusal of recognition, namely Art. V(1)(e) and VII NYC.

It must be noted that the award even it was initially refused recognition in France by the Court of Appeal[121] based on the provision of Art. V(1)(e), this decision was later overturned by the Cour de cassation. In fact, the Court of Appeal by not examining the possibility of the award being enforced under Art. VII NYC and refusing enforcement only under Art. V(1)(e), violated

[114] Kenneth R. Davis, 'Unconventional Wisdom: A New Look at Articles V and VII of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (2002) 37 Texas International Law Journal 63 et seq.
[115] Matthew Barry, 'The Role of the Seat in International Arbitration: Theory, Practice, and Implications for Australian Courts (2015) 32 (3) Journal of International Arbitration, Sydney Law School Research Paper Series No. 15/19 310.
[116] Gary Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) 3627.
[117] See *Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) v. Ford*, (1988) Brussels Tribunal de Première Instance. In this case, the court found that the annulment at its seat, did not prevent the recognition of the award in Belgium – under the provisions of the Belgian Judicial Code, where there was no prohibition of enforcement of an annulled award, thus applying the more favourable provision.
[118] See Judgement of 26 January 2005, Austrian Oberster Gerichtshof, XXX Yearbook of Commercial Arbitration, 421 et seq. "The enforcement in another state of an arbitral award that has been set aside in the country of the seat for violation of public policy is the logical consequence of international (non-state bound) arbitration. Making an international arbitral award dependent on state approval in the country of origin would deprive international arbitration of its independence".
[119] See *Yukos Capital Sarl v. OJSC Rosneft Oil Co* (no 156).
[120] *Pabalk Ticaret Limited Sirketi v. Norsolor SA*, French Cour de cassation civ. le [French Supreme Court], 9 October 1984.
[121] See Decision of 19 November 1982, 1983 Rev. Arb. 472.

the Convention[122]. The Cour de cassation founded its reasoning on Art. VII of the NYC and Art. 12 of the French New Code of Civil Procedure. It held that Art. VII enabled the recognition of the annulled award based on the more favourable provision of the French law, that being Art. 12 of the New Code of Civil Procedure.

This decision is of great gravity, since it opened the door to the application of the more favourable provision, by confirming the prevalence of Art. VII NYC in cases where Art. V(1)(e) is also involved[123]. Without the *Norsolor* case the French courts would not have been capable of creating an alternative for recognizing annulled awards in France, by solely being based on Art. V(1)(e)[124].

Another famous case that showcases the interplay between the courts of the seat and the enforcement courts is the *Hilmarton* case[125], acclaimed for mechanically applying the delocalization approach[126]. This one concerned a dispute between OTV a French company and Hilmarton, an English one. The contract was governed by Swiss law while the place of arbitration was Geneva. The dispute arose out of a payment of commissions claimed by Hilmarton for assisting OTV in obtaining a public works contract in Algeria. In the arbitration proceedings initiated by Hilmarton, the sole arbitrator, rejected its claim on the grounds of violation of mandatory provisions of Algerian law, which prohibited the commission payments in public works contracts.

The award issued was recognized and enforced in France as pursued by OTV, while Hilmarton proceeded to its setting aside in Switzerland. The result was that the award was set aside by the Court of Justice of the Canton of Geneva, a decision that was reaffirmed by the Swiss Federal Tribunal. Hilmarton then also proceeded to the appealing of the award that had been recognized in France. The dilemma that the French Court of Appeal faced was whether to recognize or not an award that had been set aside at its seat. The Court in its decision of December 19, 1991 emphasized that under Art. VII NYC "the judge may not refuse to enforce unless the national law so authorizes", underlining that it can take prevalence over Art. V(1)(e) NYC. Also, an

[122] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience' (2009) 26(2) Journal of International Arbitration 271.
[123] Emmanuel Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' (in) A.J. van den Berg (ed.) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9, Paris, Kluwer Law International 1999) 21.
[124] Petrochilos (no 96) 866.
[125] *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour d' appel [French Court of Appeal], 29 June 1995
[126] Manu Thadikkaran, 'Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?' (2014) 31(5) Journal of International Arbitration 575.

important aspect of this decision (and later repeated by the Cour de cassation[127]) was the observation that the recognition of an award annulled at its seat, *is not* against the international public policy -at least as perceived by the French-. The Cour de cassation went further to state that an international award rendered in Switzerland, does not mean that it is part of the Swiss legal order, adopting by this way an "internationalist" position[128].

The importance of the *Hilmarton* case is not exhausted upon the application of Art. VII NYC, but also to the outcomes of two conflicting decisions in the same legal order. Hilmarton, after the award was set aside in Switzerland, attempted to enforce the new (second) award that granted the commission payment in the French courts. Finally, the award was recognized by the Nanterre Court of First Instance. However, OTV appealed on this decision on the grounds that this would result in two contradictory decisions, one allowing enforcement of the first award that denied the claim and one of the second accord that accepted the claim. Of course, such a situation leads to unsustainable results, as will be discussed below. Nevertheless, the "formula" provided in the first decision of the Cour de cassation has been regularly followed by French case law[129].

In 2007 with the decision in *Putrabali* case, the Cour de cassation reaffirmed its position with regard to annulled awards[130]. This case is about a shipment of pepper sold from an Indonesian company, Putrabali to a French company. As the goods were lost, the latter refused payment and Putrabali initiated arbitration proceedings in London according to the International General Produce Association rules.

The award rendered in favour of *Putrabali* was later appealed before the Board of Appeal, which rendered an award against *Putrabali*. Following that, there was a second award that was in favour of *Putrabali*. At that time, the other company tried to enforce in France the award that had later been aside, while there was a new second award in favour of *Putrabali*. The Paris Court of First Instance recognized the annulled award, and this position was confirmed also by the Cour de cassation which stated: "an international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be

[127] *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de cassation [French Supreme Court], 10 June 1997.
[128] Koch (no 122) 273.
[129] Vesna Lazic-Smoljanic, 'Enforcing annulled arbitral awards: a comparison of approaches in the US and the Netherlands' (2018) 39(1) Zbornik Pravnog fakulteta Sveučilišta u Rijeci 218.
[130] Richard W. Hulbert, 'When the Theory Doesn't Fit the Facts—A Further Comment on Putrabali' (2009) 25 (2) Arbitration International 157.

ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought"[131]. In other words, this decision recognized the existence of an international arbitral legal order, which exists autonomously of other national legal orders. For many commentators however, the above conclusion does not go further than the position held in the *Hilmarton* case[132].

b) The problems with the French approach

All in all, France has consistent jurisprudence regarding the enforceability of annulled awards in France under the more favourable provision of Art. VII NYC[133], despite the problems and the paradoxes that this approach may create.

One important issue is that the French case law does not address the issue of "discretion" under Art. V(1)(e) NYC and in particular whether this exists or not. They only deal with Art. VII NYC, which preserves the parties' right to seek recognition of annulled award, under national law. However, one might argue that the whole logic of the French approach leads to this result; Art. V(1)(e) being permissive, otherwise there would be an internal conflict between the two provisions of the Convention. Yet, the French decisions do not touch upon this very controversial issue. Another extreme position is also that the enforcement of annulled awards is not possible because of the interpretation of the Convention, but because of the national law that allows that[134].

The French approach has also been blamed as meddling with party autonomy[135]. The choice of a particular seat by the parties, means that the wish for that particular forum, lex arbitri as well as the supervision of the courts of the seat. Thus, approaches such this one threat the predictability of a valid award, which the parties most of the times seek for[136].

Additionally, and mainly the *Hilmarton* saga, showcases how a foreign award can be completely disregarded, under the more favourable provision[137]. It appears that there is no

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[131] *Putrabali Adyamuila (Indonesia) v. Rena Holding, et al.*, Cour de cassation [French Supreme Court], 29 June 2007.
[132] Koch (no 122) 275.
[133] See *Maximov v. Novolipetsky Steel Mill*, Tribunal de Grande Instance de Paris [Paris Court of First Instance], Judgement of 16 May 2012; *Lao People's Democratic Republic v. Thai-Lao Lignite Co., Ltd and Hongsa Lignite Co. Ltd*, Paris Cour d' appel [Court of Appeal of Paris], 19 February 2013.
[134] Van den Berg (no 82) 181.
[135] Koch (no 122) 288 et seq.
[136] Jean-Francois Poudret, Sebastie Besson, *Comparative Law of International Arbitration* (2nd ed. Sweet and Maxwell 2007) para. 854.
[137] Gharavi (no 110) 101 et seq.

weight given to the arbitral seat nor to the annulled award, a practice which undermines international relations and foreign legal orders[138]. This ultimately leads to general uncertainty, especially for states that have recently adopted arbitration as a dispute resolution mechanism. Such uncertainty could have the effect of discouraging states from opting for arbitration instead of state courts[139].

Particularly complicated are the cases where two conflicted awards exist. As seen in Hilmarton this does happen in practice. However, if French courts have enforced the first award, they will refuse to enforce the second one on res judicata grounds[140]. Yet, this does not automatically mean nor stop the award creditor to seek enforcement of that second award in another forum.

Lastly, another drawback of the French approach is that it does not fully correspond the spirit of the Convention[141]. The creation of different local standards for recognition and enforcement, actually bypasses the system of the NYC. It may be asserted that it is in line with the fundamental purpose of the Convention, namely the speedy circulation and enforcement of arbitral awards[142], but at the same time it is in disagreement with the need to harmonize and create legal certainty.

[138] Robert Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 1037 et seq.
[139] Gaillard (no 123) 38.
[140] Linda Silberman, Maxi Scherer, 'Forum shopping and Post Award Judgments' (2013) 2(1) Peking University Transnational Law Review 124.
[141] Koch (no 122) 287.
[142] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016).

PART II: A POSSIBLE SOLUTION TO THE PROBLEM

A. THE INTERMEDIATE APPROACHES

Given the analysis above, it is clear that both traditional approaches have serious disadvantages, and their application leads to unsatisfactory outcomes, which are not in line with the spirit and purpose of the New York Convention. In this context, and provided that the majority of the authors prefer a compromising solution[143], a series of intermediate theories has evolved, each of which has as a common denominator - the recognition and enforcement of annulled awards when certain conditions are met[144]. The criteria suggested differ not only between the authors, but also between jurisdictions[145].

First, for instance, Jan Paulsson proposes the examination of whether the foreign judgement is the product local standard annulment (LSA) or international standard annulment (ISA)[146]. The international standards are anything that falls within the scope of the paragraphs (a) to (d) of Art. V(1) NYC [147] and accordingly Art. 36(1)(a) of the Model Law. On the other hand, local standard is every ground of annulment not listed in Art. V(1) NYC, as for example the local rules of non-arbitrability, public policy or the manifest disregard of the law standard found in the US. Therefore, if the award was annulled based on a ground not listed in Art. V(1) NYC, that foreign judgement should not be taken into consideration and the enforcement of said

[143] Maxi Scherer, 'Effects of Foreign Judgements Relating to International Arbitral Awards: Is the 'Judgement Route' the Wrong Road?' (2013) 4(3) Journal of International Dispute Settlement 596.
[144] Hans Smit, 'Annulment of an Arbitral Award and Its Subsequent Enforcement: Two Recent Decisions' (2009) 19(1) The American Review of International Arbitration 187; Χαράλαμπος Παμπούκης, 'Η ακυρωθείσα διαιτητική απόφαση - *Jurisdictio Facit Arbitrum*' (2018) 1 Διαιτησία και Διαμεσολάβηση 10.
[145] Gary Born, *International Commercial Arbitration* (2nd ed., Kluwer Law International 2014) 3622.
[146] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding a Local Standard Annulments' (1998) 6(2) Asia Pacific Law Review 25.
[147] Paras (a) –(d) Art. V(1) NYC state: "(a) The parties to the agreement referred to in Art. II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place".

award is legitimate[148]. Such an approach is founded on the grounds that it will promote the use of international annulment standards by national courts[149].

Gary Born goes a step further, by suggesting the addition of more criteria with regard to the foreign judgement setting aside the award[150]. He specifically argues that a foreign judgement should be denied recognition (and thus, the decision to set aside should bear no effect), if it was based on local public policy of the annulment forum or it was based on a judicial review of the merits of the award.

In the same vein, Linda Silberman in an extensive study, has argued that if the annulment decision meets the criteria for recognition of a foreign judgement under national law, then it should be respected, and the enforcement of the award should not be accepted[151].

Another – rather unusual approach, is the economic one. It suggests the resolution of the problem by agreeing contractually on the enforceability of the annulled award[152]. The default rule will be the non-enforceability, thus enabling the parties to avoid conflicting decisions or multiple proceedings. Ultimately, this approach will lead to a significant cost reduction, something that the parties put special regard to.

In view of the above, they will be examined below, the most prevalent intermediate approaches and the particularities in every jurisdiction. Firstly, the 'judgment approach' will be presented **(1)**. Afterwards, the approach that has been followed by the US courts the last couple of years, leading to how it has been formed today with the addition of the public policy gloss in Art. V(1)(e) NYC, will be reviewed as inspired by the 'judgment approach' **(2)**.

[148] Caspar Feest, 'Enforcement of Awards Set Aside at the Seat of Arbitration' (in) Daniel Girsberger, Christoph Müller (ed.) *Selected Papers on International Arbitration Volume 4* (Stämpfli Verlag 2018) 16.
[149] Julian D.M. Lew, Loukas Mistelis, Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003)
[150] Born (no 145) 3638.
[151] Linda Silberman, Maxi Scherer, 'Forum shopping and Post Award Judgments' (2013) 2(1) Peking University Transnational Law Review 128.
[152] Christopher Drahozal, 'Enforcing Vacated International Arbitration Awards: An Economic Approach' (2000) 11 American Review of International Arbitration 451.

1. The 'judgment' approach

a) An overview

The 'judgment' approach is based on the notion that with regard to the recognition of an annulled award, applicable are the procedural rules governing the recognition and enforcement of foreign judgments[153]. The judgment ruling on the annulment of the award, as emanating from a judicial body, constitutes a foreign judgment. It is named like this due to the fact that before the recognition and enforcement of the arbitral award, precedes a stage of recognition of a foreign annulment judgment that resembles the method of recognizing foreign judgments[154].

This approach is adopted by many authors[155] and jurisdictions that have ratified the New York Convention. These include among others Germany, the United Kingdom[156], the Netherlands and Spain[157]. Its regulatory framework can be found in the rules of international procedural law of the state where enforcement is sought or as argued by some in the provision Art. V(1)(e) NYC, which creates a special international jurisdiction[158]. Yet, founding the judgment approach on Art. V(1)(e) presupposes that not only the principle of international comity but also the grounds for refusing recognition and enforcement of foreign judgments, form criteria which govern the exercise of the discretion provided therein[159]. In other words, the discretion should also include the examination of the grounds for setting aside[160].

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[153] Δημήτριος Μπαμπινιώτης, 'Περί της αναγνώρισης και εκτέλεσης αλλοδαπών διαιτητικών αποφάσεων που έχουν ακυρωθεί στο κράτος έκδοσής τους' (2018) (σε) Διαιτ 1/2018 76.

[154] Χαράλαμπος Παμπούκης, 'Η ακυρωθείσα διαιτητική απόφαση - *Jurisdictio Facit Arbitrum*' (2018) 1 Διαιτησία και Διαμεσολάβηση 16.

[155] See Maxi Scherer, 'Effects of Foreign Judgements Relating to International Arbitral Awards: Is the 'Judgement Route' the Wrong Road?' (2013) 4(3) Journal of International Dispute Settlement; Linda Silberman, Maxi Scherer, 'Forum shopping and Post Award Judgments' (2013) 2(1) Peking University Transnational Law Review 121; William W. Park, 'Duty and Discretion in International Arbitration' (1999) 93 American Journal of International Law arguing towards this direction, at least implicitly.

[156] See *Yukos Capital S.a.r.L v OJSC Oil Company Rosneft* [2011] EWHC 1461 (Comm), Claim no. 2010 Folio 315 and 316.

[157] See *Pavan s.r.l. v. Leng d'Or, SA*, Exequatur No. 584/06, 11 June 2007 Juzgado de Primera Instancia e Instrucción [Court of First Instance] No. 3 (reported in Yearbook of Commercial Arbitration 2010, Vol XXXV (Kluwer 2010) pp. 444-447.

[158] Georgios Petrochilos, 'Enforcing Awards Annulled in Their State of Origin Under The New York Convention' (1999) 48 International and Comparative Law Quarterly 862.

[159] Feest (no 148) 16.

[160] Stephen Ostrowski, Juval Shany, 'Chromalloy: United States Law and International Arbitration at the Crossroads' (1998) 73(5) New York University Law Review 1680.

In particular, the application of the 'judgment' approach consists of the following three steps[161]. First, an arbitral tribunal renders an award. Secondly, the court of the seat, following an application to set aside or recognize, determines the validity of the award and consequently, issues a judgment. Lastly, this judgment is going to be examined and questioned before national courts of another forum and they will have to assess this foreign judgment and its impact based on foreign judgment rules. If the foreign setting aside judgment is in line with the forum's judgment principles, meaning that it does not violate the forum's public policy or has been rendered in unfair proceedings, it will be denied recognition and enforcement. Reversed, if the foreign judgment violates the forum's judgment principles, it will not be recognised and therefore the arbitral award will be recognised and enforced.

International comity does play a role. It requires that national courts respect and give due deference to foreign judgments, unless there are exceptional circumstances[162]. Comity will have a restricting effect in the sense that the foreign judgment will be given priority. This principle will only retreat when a ground, for refusing the foreign judgment according to the national rules, is found.

The judgment approach even though it may be considered to lead to the refusal of recognition and enforcement of an annulled award in most cases, it should be distinguished from the territorial approach. This is because it is opposed to the proposition of the latter that the arbitral award ceases to exist after its annulment. Under the territorial approach, the enforcement courts are obliged to take into consideration the annulment decision as a legal fact, however they cannot review the annulment decision. To the contrary, the judgment approach imposes the review of the annulment decision in the context analysed above.

b) The example of the Yukos Case

The supporters of the judgment approach are of the view that the use of the foreign judgment principles offers the direction missing from Art. V(1)(e) NYC[163]. This approach seems to be getting support also from case law. One of the most renowned cases that follows the judgment approach is the *Yukos Capital S.a.r.L. v, OAO Rosneft*[164].

[161] Scherer (no 155) 590.
[162] *Hainan Machinery Import and Export Corp. v. Donald & McArthy Pte Ltd*., (1995) High Court of Singapore, Yearbook of Commercial Arbitration XXII (1997) pp. 771-779 (Singapore no. 1).
[163] Scherer (no 155) 597.
[164] *Yukos Capital SARL v. OAO Rosneft*, Amsterdam Gerechtshof [Court of Appeal of Amsterdam] 2009.

This much quoted case concerns a dispute arising out of loan agreements between companies belonging to the Yukos Group. The agreements had been made between Yukos Capital as lender and Yuganskneftegaz as borrower. The shares of the latter belonging to the company Yukos Oil Company of the same group, were confiscated and forcibly sold from the Russian Federation as a form of payment of administrative fees imposed to Yukos Oil Company. The bidder then transferred the shares of Yuganskneftegaz to the Russian state company Rosneft. Yukos Capital initiated arbitration proceedings against Yuganskneftegaz in Russia, requesting the payment of the loans. The award was issued in favour of Yukos Capital. Then, Yuganzkneftegaz was absorbed from Rosneft, which appealed against the award rendered in favour of Yukos Capital before the Russian courts. The annulment of the award was granted, and that decision was later reaffirmed by the Russian Supreme Court. Yukos Capital sought the enforcement of the annulled awards in the Netherlands.

The Court of Appeal of Amsterdam expressed the view that the NYC does not contain a provision which makes the recognition of the annulled award mandatory *per se.* Additionally, such an obligation does not arise out of Art. V(1)(e) NYC. The validation of the annulled award thus, would depend on the fulfilment of the criteria set by the rules on recognition and enforcement of foreign judgments. It follows from it, that the award will not be validated if it was rendered in fair proceedings. The Court of Appeal noted that this criterion applies independently from the criteria set by NYC. In particular it stated:

> "This means that, whatever room the 1958 New York Convention otherwise leaves for granting leave for recognition of an arbitral award that has been annulled by a competent authority in the country where it was rendered, 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 recognised in the Netherlands".

This point is of great importance, since it is assumed that the judgment approach can apply in parallel with the discretion provided in Art. V(1)(e) NYC, without affecting it or restricting it. In other words, the Court of Appeal accepted that there had been a violation of the principle of fair trial, since the Russian courts did not seem unbiased in this case, which had a significant

political impact. Yet, it has been criticized as using *rationale* and approaches, which do not make it possible to predict the outcome under Art. V(1)(e) NYC[165].

2. The approach in the US

In the view of the delocalization approach, the US case law seemed to be heading to the same direction as the French one[166]. In other words, the enforcement of an award set aside in its place of origin, does not automatically make it unenforceable in the United States. Although both legal orders appear to have started from the same premises, the rationale has changed in the recent years with US case law taking a shift towards Art. V(1)(e) NYC and particularly by adding an extra standard for allowing enforcement, resembling the judgment approach[167].

Preliminarily, it must be noted that the United States ratified the Convention only in 1970. They were of the view that in many aspects it is contradictory to US law[168]. In the same year, the US Congress enacted Chapter 2 of the Federal Arbitration Act (FAA)[169], in which the Convention was finally embodied. The case law that followed, showcases the interplay and differences between the two instruments[170] as well as the "judgment route rationale" adopted by the US courts when dealing with the recognition and enforcement of annulled awards.

What is more, the draft on the Restatement of the Law Third on International Commercial Arbitration[171] appears to be in favour of the enforcement of the annulled awards, since it stipulates in Art. 4- 16(b) that: "Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments in the court where such relief is sought, or in other extraordinary circumstances".

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[165] Marike Paulsson, 'Enforcement of Annulled Awards: A Restatement for the New York Convention?' (Kluwer Arbitration Blog, December 21 2017) http://arbitrationblog.kluwerarbitration.com/2017/12/21/enforcement-annulled-awards-restatement-new-york-convention/ accessed 30 November 2020.
[166] Kessedjian (no 113) 9.
[167] Scherer (no 155) 598; Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 Journal of International Arbitration 571 et seq.
[168] Born (no 101) 128 et seq.
[169] Stephanie Cohen, 'The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards' (2008) 1 New York Dispute Resolution Lawyer 47.
[170] Ostrowski, Shany (no 160) 1650 et seq.
[171] Restatement of the Law (Third), the U.S. Law of International Commercial Arbitration, paras. 4-16 (Tentantive Draft No.2 2012)

a) The evolvement of the US case law

The first significant case dealing with this issue is the *Chromalloy* case[172] and for that reason, it has been widely discussed in the international literature[173]. The case concerned an award rendered in Egypt ordering the Arab Republic of Egypt to pay to an American company, Chromalloy, various sums. The arbitration was conducted according to the UNCITRAL Arbitration Rules, while Cairo was the seat of arbitration and the arbitration clause provided for the application of "Egypt" laws. Shortly after the award was issued, the government initiated the annulment proceedings before the Cairo Court of Appeal, and it was set aside in 1995, due to misapplication of the applicable Egyptian law. Despite its annulment, Chromalloy tried to enforce the award in France[174] and the United States.

In the US proceedings, the Egyptian government requested the dismissal of the case on grounds of annulment of the award at its seat. In this regard, the district court held that Art. V(1)(e) provided it with a "discretionary standard" while at the same time Art. VII NYC with a mandatory one, thus enabling it to enforce the arbitral award, by applying the Federal Arbitration Act. It then went through generally applicable principles of US arbitration law, to finally determine whether the award could be recognized under US law. It interpreted the FAA as establishing a ground of national policy which favours the enforcement of international arbitration awards and agreements. It specifically stated: 'The U.S. public policy in favor of final and binding arbitration of commercial disputes is unmistakable, and supported by treaty, by statute, and by case law. The Federal Arbitration Act "and the implementation of the Convention in the same year by amendment of the Federal Arbitration Act," demonstrate that there is an "emphatic federal policy in favor of arbitral dispute resolution," particularly "in the

[172] *Chromalloy v. Arab Republic of Egypt*, 939 F.Supp.907, U.S. District Court for the District of Columbia, 31 July 1996.

[173] See Jan Paulsson, 'Rediscovering the N.Y. Convention Further Reflections on Chromalloy' (in) 2(5) *Mealey's International Arbitration Report 20* (1997); Eric Schwartz, 'A Comment on *Chromalloy* - Hilmarton a l'americaine' (1997) 14 Journal of International Arbitration 125; Georges R Delaume, 'Enforcement against a Foreign State of an Arbitral Award Annulled in the Foreign State' (1997) Int'l Business Law Journal 253; Harry Sampliner, 'Enforcement of Nullified Foreign Arbitral Awards – Chromalloy Revisited' (1997) 14 Journal of International Arbitration; David Rivkin, 'The Enforcement of Awards Nullified in the Country of Origin : The American Experience' (in) van den Berg, A.J., (ed.), *Improving the Efficiency of Arbitration Agreements and Awards* (ICCA Congress series No. 9 1999) 528; Radu Lelutiu, 'Managing Requests for Enforcement of Vacated Awards under the New York Convention' (2003) 14 American Review of International Arbitration at 352 characterizing it as "a case of first impression".

[174] *Chromalloy Aeroservices v. Arab Republic of Egypt*, Cour d 'appel de Paris [Paris Court of Appeal], 14 January 1997.

field of international commerce." A decision by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy'.

This very first decision was seen as in favour of those who support the delocalized approach, and from this point of view the setting aside seemed only reasonable[175]. However, as it will be examined below, the US case law formed an approach of its own on this matter and *Chromalloy* has been moved "into a narrow corner of the Convention"[176].

The relationship between the NYC and domestic law, namely the Federal Arbitration Act was examined in the context of the *Alghanim*[177] case. This case concerned a dispute between an Iraqi and a US company. An award was issued in favour of Alghanim in New York, where it was the seat of the arbitration. Alghanim sought to enforce the award in the United States pursuant to the NYC, while the lost party attempted to set aside the award according to the FAA.

The interesting part of this case was the District Court's finding that an award rendered in the US causes an "overlapping coverage" of both the NYC and the FAA. Therefore, seeking enforcement under the NYC and at the same time trying to vacate the award under the FAA is possible. These points were affirmed by the Court of Appeals while it was also clarified that according to the NYC, the authority which issued the award, applies its own domestic law in order to determine whether it should be annulled or not. Thus, in the US, the courts would have to apply the FAA.

While the case did not explicitly address the issue of enforceability of an annulled award, it did provide a basis according to which arbitral awards can be enforced in the US if they meet the requirements of the FAA and they are not contrary to US public policy. That last point will be the centre of analysis further below.

The Baker Marine[178] case concerns a dispute arising out of oil barge services' contract between Baker Marine and Danos and Curole Marine Contractors, Inc. (Danos) and Chevron Ltd and Chevron Corp. Inc. The arbitration proceedings took place in Nigeria and Baker Marine was

[175] Dana Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case' (2000) 17(2) Journal of International Arbitration 1.
[176] Marc Goldstein, 'International Commercial Arbitration' (2000) 34 The International Lawyer 519.
[177] *Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. and TRU (HK) Limited*, United States Court of Appeals, 2nd Circuit, 10 September 1997.
[178] *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd. & Chevron Corp., Inc.; Baker Marine (Nig.) Ltd. v. Danos and Curole Marine Contractors, Inc.*, 191 F.3d 194, U.S Court of Appeals 2nd Circuit, 2 August 1999.

awarded $2.23 million against Danos and also, $750.000 against Chevron. The former tried to enforce the awards in Nigerian courts while the losing parties sought to have the awards vacated before Nigerian courts. Finally, the Nigerian courts set aside both awards for improperly awarding damages and incorrectly admitting parole evidence.

Later on, Baker Marine requested the enforcement of both awards before US Courts. Initially, the district court denied recognition and on its following appeal, Baker Marine asserted that the District Court did not give effect to Art. VII NYC, thus the former was entitled to recognition pursuant to the more favourable provisions of the FAA. While the Second Circuit court did reject the argument, it mentioned *Chromalloy* and why it is differentiated from that case. It specifically stated: "Unlike the petitioner in Chromalloy, Baker Marine is not a United States citizen, and it did not initially seek confirmation of the award in the United States. Furthermore, Chevron and Danos did not violate any promise in appealing the arbitration award within Nigeria. Recognition of the Nigerian judgment in this case does not conflict with United States public policy". In this why, it justified the reason why it could not apply the more favourable provision of Art. VII in this case, while implicitly recognizing and accepting the reasoning of *Chromalloy*.

Spier [179] case or "Spier saga", deals with the request of a US citizen Martin Spier for the enforcement before the US Courts of an award that had been annulled in the Italian courts fourteen years ago. Spier trying to avail of himself of the regime created after the *Chromalloy* case, attempted to enforce the annulled award of what seemed to be a dead claim.

The District Court based its opinion mainly on *Alghanim* and *Baker Marine* cases. It pointed out that the award sought to be enforced was made in another territory than the one where the enforcement is pending; this automatically made it a non-domestic award and the FAA could not be applied. With regard to the *Chromalloy* case, it did not repudiate it, but it did distinguish the differences between the two cases.

A following case in which the court defined thoroughly the circumstances under which an annulled award could be enforced in the US, is the *TermoRio*[180] case. This case dealt with the enforcement of an award rendered in Colombia in favour of TermoRio against a state-owned

[179] *Martin I. Spier v. Calzaturificio Tecnica SpA*, United States District Court, Southern District of New York, 22 October 1999.
[180] *TermoRio S.A. E.S.P. (Colombia), LeaseCo Group and others v. Electranta S.P. (Colombia), et al.*, United States Court of Appeals, District of Columbia Circuit, 25 May 2007.

company, Electranta. The latter sought to have the award vacated in Colombia and it was finally set aside as violating Colombian law.

Later on, TermoRio attempted to enforce the award in the United States. Even though the District Court rejected the enforcement, a decision that was reaffirmed by the Court of Appeals, the latter without disregarding the rationale of *Chromalloy*, expressed that a state does not have to give effect to foreign judicial annulment proceedings that are "grounded on policies which do violence to its own fundamental interests". This means that for a US court to disregard a foreign decision on annulment, the party requesting enforcement would have to prove that this very decision violated US public policy[181]. In other words, that would happen when the setting aside proceedings were "repugnant to fundamental notions of that is decent and just in the United States".

From the above it is understood, that even though the enforcement of the award was rejected, neither the *Chromalloy* decision was reversed, nor the concept of enforcing annulled awards was repudiated[182]. Yet, the standard for recognition and enforcement of such awards was placed too high, making it almost unattainable. Lastly, it seems that the US approach shifted from applying the more favourable provision standard to a strict application of Art. V(1)(e)[183] and hence, clarifying that a public policy gloss exists on this Art[184].

b) Pemex and Getma cases – The discretion of Art. V(1)(e) NYC established and exercised

Pemex[185] case is of utmost importance, since not only is the first federal decision to recognize an annulled award[186] but also because it marked the way of a more receptive approach towards annulled awards, instead of instantly denying their recognition[187]. The dispute arose between a Mexican state-owned entity, Pemex and Commisa, a subsidiary of a Mexican construction and

[181] Koch (no 122) 286.
[182] Joseph E. Neuhaus, 'Current Issues in the Enforcement of International Arbitration Awards' (2004) 36 University of Miami Inter-American Law Review 23.
[183] Koch (no 122) 287.
[184] Mauricio Gomm Santos, Rodney Quinn Smith, 'Addressing the New York Convention's Latest Challenge: Enforcing Annulled Foreign Awards' (2008) SSRN Electronic Journal 11
[185] *Corporación Mexicana De Mantenimiento Integral, S. De R.L. De C.V. v. Pemex-Exploración Y Producción*, No. 13-4022, United States Court of Appeals, 2nd Circuit, 4 August 2016.
[186] Kirsten Teo, 'To Enforce or Not to Enforce Annulled Arbitral Awards?', (Kluwer Arbitration Blog, June 23 2019) http://arbitrationblog.kluwerarbitration.com/2019/06/23/to-enforce-or-not-to-enforce-annulled-arbitral-awards/ accessed 30 November 2020.
[187] Luca Radicati di Brozolo, 'The enforcement of annulled awards: further reflections in light of Thai Lao-Lignite' (2014) 25 The American Review of International Arbitration 47.

military contractor. The contract provided for dispute resolution through arbitration in Mexico City. Following Commisa's filing for arbitration and as the dispute was pending, the Mexican Congress amended the statute of limitations for any action which was related to a public contract from ten years to 45 days. Finally, an award was issued in favour of Commissa in the amount of $300 million.

Later on, Pemex sought for its annulment before the Mexican courts, Commisa had the award confirmed before the United States District Court for the Southern District of New York. Pemex reacted and appealed the decision of enforcement before the US Court of Appeals, which granted the appeal and remanded for the District Court. The latter ruled again in favour of the enforcement of the annulled award, since the Mexican court's decision to set aside the award violated "basic notions of justice". It further explained that the court is granted a discretion under Art. V(1)(e), as to recognize and enforce an award that has been set aside, provided that such a decision is not a product of violation of justice. The Court of Appeals reaffirmed the discretion of the District Court and further reasoned the annulment by stating that: "The high hurdle of the public policy exception is surmounted here by four powerful considerations: (1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation".

In the same vein was the *Getma*[188] case, in which Getma tried to enforce an award in the United States that had been set aside by the Common Court of Justice and Arbitration of the Organization for the Harmonization of Business Law in Africa. The Court of Appeals affirmed the District Court's decision that, for the award to be annulled Getma had to prove that the CCJA's judgement was "*repugnant to the United States's most fundamental notions of morality and justice*". Failing to meet that standard, the court had no other option but to refuse enforcement.

c) The public policy gloss in Art. V(1)(e) NYC - an overview of the US Approach

From the cases examined above, it seems that the US courts are open to the idea of enforcement of an annulled award. Starting from *Chromalloy* and the application of the more favourable

[188] *Getma International v. Republic of Guinea*, 862 F.3d 45, United States Court of Appeals, District of Columbia Circuit, 7 July 2017.

provision, over the years the US courts moved towards the compatibility of annulment with the US public policy, by applying Art. V(1)(e) NYC.

As a matter of fact, a public policy gloss has been added to Art. V(1)(e) NYC by the US courts. Whether that will be used depends on the international comity, as seen in *Pemex* and *Thai Lao Lignite*[189]. When the US courts are faced with enforcement of annulled award issues, they are constrained by the concern of international comity and according to this, they will not enforce the award, unless this violates "the most basic notions of morality and justice". In other words, the public policy exception means that the award has to be repugnant to the fundamental notions of what is just and decent in the United States[190].

The use of concepts of morality and justice implies that the US courts have to make normative judgements upon the annulment decision of the primary jurisdiction and evaluate its "fitness" to be enforced in the United States.[191] In this way, they are placed in a position to act as "umpires" to a foreign court's decision upon annulment.

This use of public policy has been severely criticized for using the ground of Art. V(2)(b) which prevents the enforcement, as a ground for *allowing* the enforcement[192]. Others argue that Art. V(1)(e) provides a clear discretion to the enforcing courts ("may"), however that permissive "may" ends up as in "must", if the bar for allowing enforcement is placed too high[193]. Hence, enforcement courts end up depriving themselves of the discretion they have under Art. V NYC, if the party that seeks the enforcement has to prove the violation of "repugnant fundamental

[189] Marike Paulsson, 'The 1958 New York Convention Turning Into The Battle of Judgements: The Latest in the US Attitude Towards the Enforcement of Annulled Awards', (Kluwer Arbitration Blog, August 24 2017), <http://arbitrationblog.kluwerarbitration.com/2017/08/24/1958-new-york-convention-turning-battle-judgments-latest-us-attitude-towards-enforcement-annulled-awards/> accessed 30 November 2020.
[190] Calvin Jonker 'Foreign Arbitral Awards and the Second Circuit: Enforcement Considerations for Annulments' (2019) 12(2) The Journal of Business, Entrepreneurship & the Law 471.
[191] David Bastian, 'Does the Enforcement of Annulled Foreign Arbitral Awards in the United States Come Down to Normative Judgments?' (Kluwer Arbitration Blog, December 13 2017) <http://arbitrationblog.kluwerarbitration.com/2017/12/13/18965/> accessed 30 November 2020.
[192] John Barkett, Frank Cruz-Alvarez, Sergio Pagliery, and Marike Paulsson, 'Perspectives on the New York Convention under the Laws of the United States: The US Public Policy as a Gloss of Art. V(1)(e)', (Kluwer Arbitration Blog, September 14 2016) <http://arbitrationblog.kluwerarbitration.com/2016/09/14/perspectives-new-york-convention-laws-united-states-us-public-policy-gloss-Art.-v1e/> accessed 30 November 2020.
[193] Roy Goode, 'The Role of the *Lex Loci Arbitri* in International Commercial Arbitration' (2001) 17(1) Arbitration International 22.

notions of what is decent and just in the United States"[194]. All things considered and in view of the *Thai-Lignite* case, the need for a pro-enforcement seat grows bigger and bigger[195].

On a final note, despite the critique on the so-called shifting positions of the US courts[196], the US case law can be construed as following the foreign judgment principles in order to decide whether a vacated award should be recognised or not. To that end, they employ Art. V(1)(e) NYC so that they can assess the possibility of recognition. In that sense, they are not shifting or inconsistent at all[197].

3. The issues arising out of the 'judgment' approach

This approach is indeed based on solid grounds and offers coherent solutions. At the same time, there is justified hesitance as to the priority given to the principle of international comity in relation to the discretion provided under Art. V(1)(e) NYC – especially as used by the US courts. This discretion constitutes a commitment of the enforcement state, arising out of an international treaty, in order to contribute to the circulation of arbitral awards. Thus, it does not necessarily mean that the comity should have priority over the discretion of Art. V(1)(e) NYC.

Additionally, the discretion of Art. V(1)(e) NYC is not an absolute notion. It is subject to criteria that shall be determined in accordance with the purpose of the Convention. These criteria do not match with the grounds for refusing enforcement. A way to achieve this is by incorporating the purpose of the Convention in the public policy of the enforcement courts; a method employed in a way in the *Chromalloy* case[198]. In this case, which has been analysed below, it was stated that the annulment judgment would violate the US public policy, as being contrary to the final and binding resolution of commercial disputes.

Lastly, one of its disadvantages is its complexity in comparison to the traditional approaches, especially the territorial one[199]. It requires not only the review for the criteria of recognition of

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[194] Christopher Koch, 'The Enforcement of Awards Annulled in their Place of Origin: The French and U.S. Experience' (2009) 26(2) Journal of International Arbitration 290.
[195] Brunda Karanam, 'Finality v. International Comity – Enforcement of Awards annulled in the Primary Jurisdiction' (Kluwer Arbitration Blog, September 27 2017) <http://arbitrationblog.kluwerarbitration.com/2017/09/27/finality-v-international-comity-enforcement-awards-annulled-primary-jurisdiction/> accessed 30 November 2020.
[196] Gary Born, *International Arbitration: Law and Practice* (2nd ed., Kluwer Law International 2015) 339 et seq.
[197] Scherer (no 155) 599.
[198] ibid.
[199] Χαράλαμπος Παμπούκης, 'Η ακυρωθείσα διαιτητική απόφαση - *Jurisdictio Facit Arbitrum*' (2018) 1 Διαιτησία και Διαμεσολάβηση 10.

the annulment judgment, but also the criteria for recognising the arbitral award, if the former is refused recognition. Such a lengthy process is costly and causes delays, something that is not in line with the purposes of the Convention. To complexity also lead conflicting decisions. A good example is the *Putrabali case*[200]. If the enforcement court has before it two judgments, one enforcing an award and another one setting is aside, which one will it examine first and according to which criteria will it evaluate if they meet the conditions for being recognised or not?

B. THE ENFORCEMENT OF ANNULLED ARBITRAL AWARDS IN GREECE

As a preliminary matter, it must be noted that the recognition and enforcement of arbitral awards in Greece is governed by the provisions of the decree law 4220/1961, which ratified the New York Convention[201]. What is more, Greece has adopted the UNCITRAL Model Law on International Commercial Arbitration (hereinafter referred as "UML") as part of its legislation, which is subject to amendment as will be discussed further below. However, neither under its current version[202], nor under the proposed amendment, has adopted the proposed Art. 36 of the UML[203], which constitutes an incorporation of the grounds of Art. V NYC. Art. 36 of the Greek Arbitration Law refers to the decree law ratifying the Convention, without any reservations. Lastly, it should be mentioned that Greece has not signed nor ratified the European Convention of 1961 on International Commercial Arbitration, which would provide

[200] See no. 131.

[201] Α. Γραμματικάκη – Αλεξίου, Ζ. Παπασιώπη-Πασιά, Ε. Βασιλακάκης, *Ιδιωτικό Διεθνές Δίκαιο* (Εκδόσεις Σάκκουλα 2017)

[202] Law 2735/1999 on International Commercial Arbitration

[203] Art. 36 UNCITRAL Model Law - Grounds for refusing recognition or enforcement (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only: (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that: (i) a party to the arbitration agreement referred to in Art. 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or (b) if the court fi nds that: (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or (ii) the recognition or enforcement of the award would be contrary to the public policy of this State

for a more favourable regime pursuant to Art. VII NYC, and thus, would permit the recognition and enforcement of an award that has been set aside[204].

In this context, an award "may be refused" recognition and enforcement, if the award has been set aside. Nonetheless, the opposite view, namely that an award "must be refused" recognition has been the predominant approach in the Greek theory until recently **(1)**. The last few years there has been adopted in the Greek literature a more friendly approach, which aligns with the international approach and seems to be influenced by the intermediate approaches **(2)**. To this end, the new draft law on International Commercial Arbitration can me deemed to be favourable to the recognition and enforcement despite the annulment **(3)**. All of these approaches will be analysed below.

1. The views against recognition and enforcement

The holding point of view against the recognition of an annulled award has several arguments and a sufficient number of supporters[205], despite the fact that the issue has not been systemically reviewed. They assert that the grounds for refusing enforcement make the exercise of discretion impossible[206]. In particular, they refer to the invalidity of the arbitration agreement as well as to the violation of different procedural principles, as grounds for setting aside an award or to the grounds of Art. V(2) NYC. They assert that such serious violation cannot result to the enforcement of the award, despite it being annulled. However, this argument does not hold true. The criteria for exercising the discretion shall be distinguished from the proposition that there is actually such discretion. Furthermore, the fact that there is no discretion under Art. V(2) NYC does not mean that it cannot exist under Art. V(1)(e) NYC.

Another argument held against the enforcement is that that the drafters of the Convention did not wish to provide with discretion the enforcement courts by virtue of Art. V(1)(e) NYC[207]. They base this argument on the language of the Convention and in particular on the difference between the English and the French authentic text. Yet, as it has been analysed in detail above[208], the word "may" with this permissive meaning, appears in all other equal authentic

[204] Δημήτριος Α. Κούρτης, 'Το Άρθρο VII της Σύμβασης της Νέας Υόρκης (1958) περί αναγνωρίσεως και εκτελέσεως αλλοδαπών διαιτητικών αποφάσεων' (2014) 2 Εφαρμογές Αστικού Δικαίου 118.
[205] Ευάγγελος Βασιλακάκης, 'Η κήρυξη εκτελεστότητας των αλλοδαπών διαιτητικών αποφάσεων' (1997) σε ΕπισκΕΔ 2/1997; Στέλιος Κουσούλης, *Διαιτησία* (Εκδόσεις Σάκκουλα 2004).
[206] Γεώργιος Βερβενιώτης, *Διεθνής Εμπορική Διαιτησία Ι* (Αντ. Ν. Σάκκουλας 1990)140 et seq.
[207] Κωνσταντίνος Καλαβρός, *Διεθνής Εμπορική Διαιτησία Τόμος Ι: Ο ν. 2735/* (Εκδόσεις Σάκκουλα 2019) 635.
[208] See p. 9 et seq.

texts (Spanish, Chinese, Russian) and thus, the only differentiation appears in the French text. In such extreme cases, the need for unity in the interpretation dictates that the meaning of the majority of the official texts, shall be given also to the one that seems to differ. Besides that, the drafting history of this Article. reveals that the word "shall" was suggested, but in the final text the word "may" was adopted. Thus, the argument that the enforcement courts lack discretion due to the differences in the official texts and the purposes' of the drafters should not succeed.

One more argument is based on the literal interpretation of the Convention. It is argued that the word "may" does not confer discretion to the enforcement courts to either recognise or to refuse[209]. Rather it is due discretion ("pflichtigemäßes Ermessen") since its exercise depends on the criteria set by law. However, neither this argument can hold up. Firstly, there are no criteria set by law to support this proposition. Secondly, a literal interpretation of the text reveals that where the drafters wished for mandatory or due discretion they did so, by using the word "shall" instead of "may".

The above argument is also used to refute the relation of the discretion with the purpose of the Convention. Specifically, it is asserted that even though one of the fundamental purposes of the NYC is the promotion and circulation of arbitral awards[210], such circulation nevertheless should take place under specific conditions, and specifically under the conditions of Art. V and VII NYC[211]. It is not doubted that the discretion shall be used in accordance with the grounds provided in the NYC. However, if the enforcement courts find that the foreign judgment did not set aside the award for one of the grounds provided in the text of the Convention, they have the discretion to allow enforcement, as the annulment judgment is not in line with the provisions of the NYC. In any case, the discretion is not unrestricted, but should always be exercised pursuant to the Convention.

Lastly, in order to support the lack of discretion and the impossibility to enforce an annulled award, certain case law has been used. Yet, this does not constitute a consistent jurisprudence and it must be assessed with cautiousness. The most related cited case is the no. 460/1990 rendered by the Greek Supreme Court, which if closely examined does not take a position with

[209] Καλαβρός (no 207) 638.
[210] UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (2016)
[211] Καλαβρός (no 207) 639.

regard to the issue of annulled awards[212]. It merely states that the court examining a request to enforce an arbitral award, does not review ex-officio the grounds for which itself should refuse enforcement, but this must be done by the party against whom the enforcement is requested.

Hence, taking into consideration the positions presented above, it can be deduced that they are founded on obsolete standards that are not in line with the international practise and jurisprudence.

2. The new approaches to the issue

The last few years, and undoubtedly in light of the international progress in case law and literature as regards to the issue, there has been gradually adopted in Greek theory a more friendly-towards-recognition interpretation of the possibility to enforce an annulled award. These voices are based conceptually on the intermediate approaches, as a response to the complications created by the territorial approach and the inconsistent interpretations of the text of the Convention.

The first authority to support the existence of discretion that allows for enforcement, despite the setting aside, under Art. V(1)(e) NYC stated that the discretion contained therein cannot be unrestricted[213]. In particular it is suggested that an enforcement court does have discretion to allow enforcement, despite the existence of grounds for refusal. Additionally, it is argued that this discretion should always be combined with the provision of Art. VII NYC, which allows the application of a more favourable provision. Definitely such an approach back in 2010 could be considered too progressive, which precisely explains why this support of this position, started gaining more support in 2018.

This first step was followed by another very significant publication. It was one of the first ones to discuss excessively in the Greek language, the 'judgment approach' and its main characteristics. Babiniotis seems to be finding more appropriate the 'pluralistic approach'[214]. He specifically argues that the "judgment approach", as analysed above, does not entirely fulfil the purposes of the Convention. This is due to the fact that it actually gives much weight to the recognition and enforcement of foreign judgments. Such weight is given through the priority

[212] Παμπούκης (no 199) 38.
[213] See Γ. Πετρόχειλος, Α. Παπαευστρατίου, Χ. Ζουμπούλης, 'Η διαιτητική επίλυση των διεθνών διαφορών' (σε) Παμπούκης Χ, *Δίκαιο Διεθνών Συναλλαγών* (Νομική Βιβλιοθήκη 2010) 1309 et seq.
[214] Δημήτριος Μπαμπινιώτης, 'Περί της αναγνώρισης και εκτέλεσης αλλοδαπών διαιτητικών αποφάσεων που έχουν ακυρωθεί στο κράτος έκδοσής τους' (2018) (σε) Διαιτ 1/2018 92.

of comity and respect of the foreign judgment, that only exceptionally recedes. The very fact that in order to examine the compatibility of a foreign judgment with the rules applicable on the recognition and enforcement, domestic rules are used, showcases that the judgment approach is not entirely in line with the purpose of the Convention, in particular with the facilitation of arbitral awards and the speedy resolution.

From this point on, Babiniotis argues in favour of the "pluralistic approach", which is that an arbitral award is governed by multiple legal orders, without any of them being entitled to solely govern its power. This is particularly true for the state of the seat. It is different from the delocalization approach in the sense that the award is not autonomous from any legal order. It means that it can have different outcomes in the enforcement states, regardless of what happened in the state of the seat.

The pluralistic approach foresees that the grounds for setting aside cannot affect the international circulation of the arbitral award pursuant to the NYC[215]. This is also in line with the proposition that the absolute priority given to the international comity is incompatible with the purposes of the Convention. The only question raised should be when the obstruction of the international circulation of an arbitral award that has been set aside, is compatible with the purposes of the Convention.

Another well respected approach is the one proposed by Prof. Pamboukis[216]. In his study, he praises the benefits of the 'judgment approach', which he splits in two stages. In the first stage, the recognition forum (*forum recognitionis*) recognizes or not, the jurisdictional power of the state of the seat. This review will be conducted according to the national law of the recognising state, since there are not unified criteria, and each state shall decide upon its own (in Greece that criterion would be found in Art. 780 of the Civil Procedure Code). If it finds no power, it will not proceed any further. Otherwise, it will proceed to the second stage. This stage regards the evaluation of the annulment grounds and it is also preliminary. Lastly, in case of non-recognition of the annulment decision, the grounds for refusal will be reviewed.

[215] Jan Paulsson, 'Towards Minimum Standards of Enforcement: Feasibility of a Model Law' (in) A.J. van den Berg (ed.) *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (ICCA Congress Series No. 9, Paris, Kluwer Law International 1999)
[216] Παμπούκης (no 199) 24.

The 'judgment' approach has been extensively discussed above[217]; it only need be highlighted the properness of the approach to deal with issues of forum shopping[218]. Given the stages and the process required in order to proceed with the recognition, it is obvious that one cannot go from state to state in an endeavour to enforce the annulled award. This theory also is favourable to the lender of the arbitral award as his expectations, since the lender has a superior right arising out of the arbitral award in comparison with the debtor.

In a nutshell, the Greek authority seems to be shifting towards the recognition of the annulled awards. The above thorough studies showcase the alignment with the international standards as well as the approach of the problem in a more delicate and methological manner. In any case, the view that there is discretion seems to be gaining more and more support. The need for specific standards for enforcement is also self-evident.

3. The new draft law on International Commercial Arbitration

Very promising with regard to the modernization of International Commercial Arbitration in Greece seems to be the new draft law of 2020. It will replace the law 2735/1999, which is a verbatim adoption of the UML, by incorporating the amendments of the 2006 UML[219] as well as by adding new provisions, in line with the international standards. One of its main goals is to make Greece an attractive and competitive forum for arbitrations and investments by adopting arbitration-friendly and flexible provisions, as they will be seen below. The deliberations of the drafting committee lasted six months and it was consisted by top academics and practitioners. One of the issues that arose was whether the new draft law would be merged with the provisions of the Greek Civil Procedure Code, which governs mainly domestic arbitrations. Finally, the separation and distinction of the two texts was chosen.

The purpose of this chapter is not to present the provisions added to the new draft law nor the law itself. Instead, its purpose is to focus on these ones which demonstrate a more friendly approach towards the issue of this thesis, namely the enforcement of annulled arbitral awards. This more friendly approach consists in the pro-enforcement spirit that governs all the new provisions, as it will be shown below.

[217] See p. 28 et seq.
[218] Παμπούκης (no 199) 25.
[219] UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments as adopted in 2006, available at: https://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf

One entirely new provision, inspired from Art. 34(4) UML[220], provides for the correction of the arbitral award, instead of its annulment. In particular, the new draft Art. 34.5 states: "The court may, upon request or on its own initiative, instead of annulling in whole or in part the arbitral award for a defect set forth in the court decision and which may be revoked, refer the dispute back to the arbitral tribunal which issued the arbitral award, for the removal of this defect, at the same time setting a deadline for the issuance of the new arbitral award that will not exceed ninety (90) days. This period may be extended by the arbitral tribunal only if there is good reason." Influenced by Art. 34(4) UML, it provides for a procedure which is quite similar to "remission", mostly used in common law jurisdictions, as a tool to protect an award from being set aside. Contrary to the approach of common law, the referral back to the arbitral tribunal is not employed as a "remedy", rather as a procedure within the setting aside framework[221]. A similar provision can be found in section 68, para. 3 of the English Arbitration Act[222], where the court may refer the case back to the arbitral tribunal for "serious irregularity".

While this provision may refer mainly to procedural defects that are very often and can lead to the annulment of an award, under Art. 34(2) UML, a general principle can be drown from that very provision. The spirit arising out of this provision is a pro-enforcement spirit as confirmed and explained in the explanatory note of the drafting committee[223]. Arbitral awards should not be annulled, unless there is a substantive reason that violates the parties' agreement or public policy. This is supported by the fact that the list of grounds for setting aside an award is exhaustive[224]. In another words, an award shall not be set aside, for mere violations of procedural defence. This pro-enforcement spirit arising out of the new draft provision of Art. 34.5, would allow the enforcement of an award that has been set aside, if certain conditions are met.

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[220] Art. 34 para. 4 of the UNCITRAL Model Law states: "The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside".

[221] United Nations Commission on International Trade Law, 'Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration', (1985) A/CN.9/264, Eighteenth Session 74.

[222] Section 68, para. 3 of the English Arbitration Act titled "Challenging the Award: Serious Irregularity" states: "If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may— (a) remit the award to the tribunal, in whole or in part, for reconsideration, (b) set the award aside in whole or in part, or (c) declare the award to be of no effect, in whole or in part. The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration".

[223] Explanatory Note to the Greek Draft Law on International Commercial Arbitration, 2020

[224] Fifi Junita, 'Pro Enforcement Bias' Under Art. V of the New York Convention in International Commercial Arbitration' (2015) 5(2) Indonesia Law Review 142.

Another new provision is Art. 34.7 providing for a waiver from the right to set aside an arbitral award[225]. Specifically, the proposed Art. stipulates: "By written, express and specific agreement, the parties may at any time waive their right for annulment of the arbitral award. In this case, the possibility of stating the reasons for setting aside during the enforcement procedure is retained". Contrary to what the Greek Code of Civil Procedure provides in Art. 900, the drafters of the new law adopted a provision similar to the one in the French, Swiss[226] and Belgian[227] Code of Civil Procedure. This also comes to contrast with most national arbitration laws, which if they provide for a waiver, that is certainly after the award has been issued and not *ex ante*[228]. Such a right reinforces the view that the new draft law aims at a more friendly-enforcement approach of arbitral awards. A procedure to set aside an arbitral award might in some cases take years, something that the drafters of the New York Convention wished to avoid in view of the need for a speedy resolution[229]. After all parties by seeking to resolve their disputes by arbitration, they do so for the efficiency of the procedure[230]. Also, this does not mean that the judicial review is abolished, but any objections can me made during the enforcement stage. In a nutshell, this ability given to the parties once more reveals indirectly the purpose of the drafters of the law to allow the circulation of the arbitral decisions and to annul an award only in extreme cases.

Lastly, a noticeable new provision is this of Art. 34(2)(a)(ee) which provides an additional ground for setting aside an award. In particular this provision stipulates that an award can be set aside if the grounds of paras. 6 and 10 of Art. 544 of the Greek Code of Civil Procedure are met. These two paras. deal with the review de novo (as a final review stage) in cases of false testimonies, forged documents, briberies and frauds in general. So far, the Greek courts have interpreted narrowly these two provisions, so most likely the cases where this ground will be

[225] The concept is not a new one and is adopted by certain jurisdictions. It is usually opted when the parties have no other connection to that state apart from it being the seat.
[226] Art. 192(1) of the Swiss Federal Statute on Private International Law states: "If none of the parties have their domicile, their habitual residence, or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent written agreement, waive fully the action for annulment or they may limit it to one or several of the grounds listed in Art. 190(2)". It thus provides the parties with the opportunity to include an express agreement on excluding, waiving or limiting the scope of any judicial review of the arbitral award. This also applies to cases where a party has neither residence nor a place of business in Switzerland.
[227] Art. 1717 of the Belgian Judicial code regulates the possibility of totally excluding the right to set aside an arbitral award, even in cases where neither of the parties has Belgian residence or place of business
[228] Konstantinos Kerameus, 'Waiver of Setting-Aside Procedures in International Arbitration' (1993) 41(1) The American Journal of Comparative Law 78
[229] Hossein Abedian, 'Judicial Review of Arbitral Awards in International Arbitration: A Case for an Efficiency System of Judicial Review' (2011) 28 Journal of International Arbitration 565.
[230] Margaret Moses, *The Principles and Practise of International Commercial Arbitration* (3rd ed., Cambridge University Press 2017) 1.

admitted in arbitration, will be rare. If it obvious from the above, that the additional ground provided in Art. 34(2)(a)(ee) wishes to regulate cases of extreme importance to the public policy of the seat and which are not ex-officio reviewed under Art. 34(2)(b). Once more, on one hand this new addition demonstrates the need to maintain minimum standards of policy protection, but also that enforcement is the rule unless a very serious violation of public policy related matters has occurred.

The presentation of the above new draft provisions does not mean in any way to prove that the drafters of the new law on Greek Commercial Arbitration aimed to furnish a way to the enforcement of annulled awards. A general evaluation of the newly added provision merely indicates a shift in the approach that has been the prominent in the authority and case law. Certainly, such a shift focuses on making Greece an attractive seat combined with the fact that investors will take into consideration the arbitration laws in force and the protections they offer, as a factor for selecting an investment.

In this context, the approach adopted by the state courts when they have to deal with issues of setting aside or enforcement, will change accordingly. So far, there has been no case law adopting one or the other view; one may argue that this was due to the lack of the relevant provision in a legislation-level. One thing holds true though: the more friendly to enforcement approach governing the new draft law. Of course, all of this will be confirmed by the explanatory memorandum accompanying the new law. The hypothesis for now is that, the adoption of the new law in conjunction with the change of approach in most authorities, will result to the Greek courts in the next few years most likely being open to the recognition and enforcement of annulled awards, when certain and specific conditions are met.

C. DOES THE NEW YORK CONVENTION REQUIRE AN AMENDMENT?

The division between scholars as to when an annulled arbitral award can be enforced, has led to another, wider discussion: does the New York Convention suffice in order to regulate all these issues or does it need an amendment? Without any doubt, it has been the most successful text in international commercial arbitration and for the past 62 years has been enabling the enforcement of arbitral awards in 166 states. An amendment – if deemed required – does not guarantee that all these states would sign again to its amendment version.

Unquestionably, the dilemma is not new. Jan van den Berg in 2008 proposed the "Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards" as

in his opinion the Convention is in need of modernization[231]. In the same vein, it has been argued that in many aspects it is not totally clear[232]. On the other hand, Gaillard is not in favour of a revision, since according to him there would be more to lose than to earn from such an endeavour[233]. In particular, he suggests that there is no such need as there is not any problem that a new convention could better possibly solve and lastly by leaving the text of the NYC as such, that would create no danger in the future[234].

Regarding the matter at hand, van den Berg in his "Hypothetical Draft" proposes the following amendment on the current Art. V of the NYC:

Art. 5 – Grounds for Refusal of Enforcement

[3]. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that:

(g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph[.]

In order to put an end to the issue of the enforcement of annulled awards, he suggested the replacement of the word "may" with the word "shall". In his explanatory note, he states that the ambiguity created by the interpretation suggesting permissive language, will be finally resolved using word "shall"[235]. However, this proposal neither resolves the issue entirely nor prohibits state court from setting aside awards based on local self-serving interests[236].

The real debate began in light of the *Pemex*[237] decision and in particular, with regard to the extent to which state courts can go under the Convention, when enforcing an award that has

[231] Albert Jan Van den Berg 'Annex I: Text of the Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards' (in) *50 Years of the New York Convention*, van den Berg (ed.) (ICCA Congress Series No. 14, Kluwer Law International 2009); Albert Jan Van den Berg, 'Enforcement of Arbitral Awards in Russia: Case Comment on Court of Appeal of Amsterdam, 28 April 2009' (2010) 27(2) Journal of International Arbitration Kluwer Law International 196 et seq.
[232] Carolyn Lamm, 'Comments on the Proposal to Amend the New York Convention', (in) van den Berg (ed.) *50 Years of the New York Convention* (ICCA Congress Series No. 14, Kluwer Law International 2009) 697 et seq.
[233] Emmanuel Gaillard, 'The Urgency of Not Revising the New York Convention', van den Berg (ed.) (in) *50 Years of the New York Convention* (ICCA Congress Series No. 14, Kluwer Law International 2009) 690.
[234] ibid 691 et seq.
[235] Albert Jan Van den Berg, 'Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory note and annexes' (in) *50 Years of the New York Convention*, van den Berg (ed.) (ICCA Congress Series No. 14 Kluwer Law International 2009) 24-25.
[236] Robert Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 1013.
[237] See no 185.

been set aside. Fifty years after the conception of the Convention, questions such as the role of enforcement courts and international comity came again into play[238]. In the context of this dilemma, there has been suggested the following amendment, which addresses the issues of the problem taking into account all possible particularities. The proposal is a Dual Convention which consists of a Primary and a Secondary Convention[239]. The first one enables the winning party to recognise the award at the seat and this court will assess whether the award rendered is in line with the law of the seat, whether it was based on a valid agreement to arbitrate and in general. An assessment like that means that the courts of the seat will not be able to set aside this award on grounds of public policy[240]. The Secondary Convention will be applied to the courts where recognition and enforcement is sought. These courts will base their assessment on Art. V(2), namely the public policy of the state where recognition is requested. In other words, they will not have to deal with the grounds mentioned in Art. V(2), as this evaluation regarding the lawful procedure will already have been made by the seat courts[241]. The advantage of this proposal is that it removes the issue of the annulled award, out of the deliberations of the enforcement courts since this issue has already been ruled upon, by the seat courts. This decision must be respected by the enforcement courts.

As promising as these proposals look, they do not deal directly with the issue of whether 166 states will actually ratify a second convention. A viable proposal is the adoption of a Protocol to the New York Convention of 1958[242]. This Protocol will either determine when an arbitral award is international and thus not subject to setting aside procedures, whereas in this case the recognition will rest only on the criteria of Art. V NYC by excluding the annulment or will be proving for a direct jurisdictional basis by adapting Art. V(1)(e) NYC[243].

All in all, the Convention has truly been proven to be an effective tool in the recognition and enforcement of arbitral awards. Whether an amendment *per se* is required to deal with the enforcement of an award that has been set aside at its seat, is an issue that as proven can be

[238] Marike Paulsson, 'The Future of the New York Convention in Its Most Extreme Sense: A Dual Convention that Disposes of National Setting Aside Regimes' (Kluwer Arbitration Blog, 15 August 2018), http://arbitrationblog.kluwerarbitration.com/2018/08/15/the-future-of-the-new-york-convention/ accessed 30 November 2020.
[239] ibid.
[240] ibid.
[241] ibid.
[242] Χαράλαμπος Παμπούκης, 'Η ακυρωθείσα διαιτητική απόφαση - *Jurisdictio Facit Arbitrum*' (2018) 1 Διαιτησία και Διαμεσολάβηση 28.
[243] ibid.

solved by merely adopting a Protocol. In any case, the Convention already provides a gateway for the application of a more favourable provision through Art. VII NYC.

CONCLUDING REMARKS

The foregoing analysis provided an overview of the problematique of enforcing an arbitral award that has been set aside and the approaches followed by different authors and in different jurisdictions. Admittedly, the task of deciding which awards are worth of enforcement or not is not an easy one and this analysis reviewed the issue primarily from the angle of the enforcement forum. The approach of this thesis rested on the premise that the relevant regulatory framework does exist and can be found in Articles V and VII of the New York Convention.

The role of the first part of this thesis was to introduce the problematique to the readers. Essential for such an analysis is the presentation of the legal rules that constitute the legal basis for it, namely Articles V and VII of the Convention. In particular, the most controversial provision of Article V(1)(e) was interpreted according to the VCLT and viewed in light of the Convention's other provisions and spirit. This examination was followed by the presentation of the two traditional approaches that had prevailed in legal theory, each one of which is established on entirely different grounds.

In the second part, as a moderate, well-founded response to the problem and the dysfunctionalities of the traditional approaches, come the intermediate approaches. These accept the recognition and enforcement of an annulled arbitral award when certain requirements are fulfilled. The analysis that follows, showcases that the criteria that tend to be established are associated with international standards of annulment and the public policy of the enforcement forum. In the same vein, the Greek scholarship seems to be shifting towards a pro-enforcement attitude regarding the problematique. A question that naturally arises is that after all, maybe it is the Convention that requires an amendment, in order to solve this highly controversial issue and put an end to all the debates.

The approaches canvassed above not only employ different methods to resolve a problem that has for decades now divided authors and practitioners, but most importantly reflect solutions with different rigor and different outcomes. As intellectually stimulating as it may be, it creates confusion and uncertainty for the outcomes of expensive international arbitral proceedings, in which time and certainty are of the essence. The very least that the parties desire out of any dispute is the predictability of a final and binding outcome.

Taking the above into consideration, it becomes quite clear that something more than "scholar creativity" is needed and certainly no problem will be solved with the renunciation of all control that the state courts of the country of origin have, as argued by Fouchard[244].

Constructing an effective framework for arbitral proceedings demands a fine balance between the need for a final award and sufficient procedural defences[245]. Despite the success of the Convention, an amendment and ratification of it by almost 160 states seems rather risky. An attainable solution would be either the adoption of a Protocol to the New York Convention or the harmonization of national arbitration laws. The latter can establish a fair compromise between arbitral autonomy and the need for judicial control mechanisms[246].

[244] Fouchard particularly suggests the abandonment of the role of the state courts in the place of origin and the limit any state action only to the enforcement courts *in* Philippe Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine' (1997) Revue de l'arbitrage, Paris: LGDJ 351.

[245] William W. Park, 'Duty and Discretion in International Arbitration' (1999) 93 American Journal of International Law 803.

[246] Klaus-Peter Berger, 'The Implementation of the UNCITRAL Model Law in Germany' (1998) 13 Mealeys International Arbitration Report 38.

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Explanatory Note to the Greek Draft Law on International Commercial Arbitration, 2020

ΔΗΛΩΣΗ ΠΕΡΙ ΜΗ ΠΡΟΣΒΟΛΗΣ ΔΙΚΑΙΩΜΑΤΩΝ ΠΝΕΥΜΑΤΙΚΗΣ ΙΔΙΟΚΤΗΣΙΑΣ

Δηλώνω υπεύθυνα ότι η διπλωματική εργασία, την οποία υποβάλλω, δεν περιλαμβάνει στοιχεία προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας σύμφωνα με τους ακόλουθους όρους τους οποίους διάβασα και αποδέχομαι:

1. Η διπλωματική εργασία πρέπει να αποτελεί έργο του υποβάλλοντος αυτήν υποψήφιου διπλωματούχου.
2. Η αντιγραφή ή η παράφραση έργου τρίτου προσώπου αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας και συνιστά σοβαρό αδίκημα, ισοδύναμο σε βαρύτητα με την αντιγραφή κατά τη διάρκεια της εξέτασης. Στο αδίκημα αυτό περιλαμβάνεται τόσο η προσβολή δικαιώματος πνευματικής ιδιοκτησίας άλλου υποψήφιου διπλωματούχου όσο και η αντιγραφή από δημοσιευμένες πηγές, όπως βιβλία, εισηγήσεις ή επιστημονικά άρθρα. Το υλικό που συνιστά αντικείμενο λογοκλοπής μπορεί να προέρχεται από οποιαδήποτε πηγή. Η αντιγραφή ή χρήση υλικού προερχόμενου από το διαδίκτυο ή από ηλεκτρονική εγκυκλοπαίδεια επιφέρει τις ίδιες δυσμενείς έννομες συνέπειες με τη χρήση υλικού προερχόμενου από τυπωμένη πηγή ή βάση δεδομένων.
3. Η χρήση αποσπασμάτων από το έργο τρίτων είναι αποδεκτή εφόσον, αναφέρεται η πηγή του σχετικού αποσπάσματος. Σε περίπτωση επί λέξει μεταφοράς αποσπάσματος από το έργο άλλου, η χρήση εισαγωγικών ή σχετικής υποσημείωσης είναι απαραίτητη, ούτως ώστε η πηγή του αποσπάσματος να αναγνωρίζεται.
4. Η παράφραση κειμένου, αποτελεί προσβολή δικαιώματος πνευματικής ιδιοκτησίας.
5. Οι πηγές των αποσπασμάτων που χρησιμοποιούνται θα πρέπει να καταγράφονται πλήρως σε πίνακα βιβλιογραφίας στο τέλος της διπλωματικής εργασίας .
6. Η προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας επισύρει την επιβολή κυρώσεων. Για την επιβολή των ενδεδειγμένων κυρώσεων, τα αρμόδια όργανα της Σχολής θα λαμβάνουν υπόψη παράγοντες όπως το εύρος και το μέγεθος του τμήματος της διπλωματικής εργασίας που συνιστά προσβολή δικαιωμάτων πνευματικής ιδιοκτησίας. Οι κυρώσεις θα επιβάλλονται, ύστερα από γνώμη της τριμελούς εξεταστικής επιτροπής με απόφαση της Συνέλευσης της Σχολής, και μπορούν να συνίστανται στον μηδενισμό της διπλωματικής εργασίας (με ή χωρίς δυνατότητα επανυποβολής), τη διαγραφή από τα Μητρώα των μεταπτυχιακών φοιτητών , καθώς και την επιβολή πειθαρχικών ποινών, όπως η αναστολή της φοιτητικής ιδιότητας του υποψήφιου διπλωματούχου.

   Επιπλέον, παρέχω τη συναίνεσή μου, ώστε ένα ηλεκτρονικό αντίγραφο της διπλωματικής εργασίας μου να υποβληθεί σε ηλεκτρονικό έλεγχο για τον εντοπισμό τυχόν στοιχείων προσβολής δικαιωμάτων πνευματικής ιδιοκτησίας.

Ημερομηνία	**Υπογραφή Υποψηφίου**
30.11.2020	Αικ.Σεφερλή