TO ENFORCE OR NOT TO ENFORCE: LAYING A STANDARD OF ENFORCEMENT OF ANNULLED AWARDS IN INDIA

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Abstract

*Is it proper for Indian courts to refuse enforcement of annulled awards simpliciter and give effect to a foreign judgment annulling the award? This remains unanswered, and this piece attempts to address this by laying down a suitable standard for India. It first examines the different positions taken internationally, like the internationalist, territorial, and conflict-of-laws approaches. It concludes that the best approach for India to develop its standard of enforcement of annulled awards would be the conflict-of-laws approach. In arriving at this position, this piece journeys through Section 48(1)(e) of the Arbitration and Conciliation Act, 1996 ["**A&C Act**"] and some fundamental principles of arbitration.*

I. INTRODUCTION

The U. N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ["**New York Convention**"] and the UNCITRAL Model Law on International Commercial Arbitration 1985 ["**UNCITRAL Model Law**"] are two primary documents that recognize remedies available to parties, particularly, post-award remedies. India is a signatory to the New York Convention and has adopted the Model Law by enacting the A&C Act. Both instruments—international and domestic—allow a party to resist the enforcement of a foreign award even after an unsuccessful challenge to annul the award at the juridical seat or place of arbitration. It is a given that a court in India would be within bounds to determine for itself whether the foreign award must be refused recognition and enforcement on the specific statutory conditions under Section 48 of the A&C Act, which reflects Article V of the New York Convention. What is not so given is how an Indian court may determine the gravity that must be given to the success of a challenge against the award in the court of the seat. To enforce or not to enforce, that is the question.

As per established principles, judicial control is exercised by a State on two key occasions – one, during annulment or set-aside proceedings by courts at the seat of arbitration and, two, during enforcement proceedings by the courts in all the States where recognition and enforcement are sought.[1] Generally, the international arbitration community refers to it as the "double-control," i.e.,

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the enforcement court being the second controller of the award.[2] However, the situation would be complex if an Indian court were to confront a foreign award that a court has previously annulled at the seat of arbitration. The perplexity in the issue is deciding a standard by which courts in India may deal with this question. So far, Indian courts have not spoken on this issue. However, a few jurisdictions [common law and civil law] have spoken and arrived at their own positions.

Should courts in India even allow a party to pursue enforcement of an award after a successful challenge, i.e., after a court has annulled the award at the seat? If a court can exercise discretion under the A&C Act, does it extend to enforcement of a foreign award annulled by a court at the seat? What must be the standard that courts in India must adopt when considering such annulled foreign awards? Must a court in India give effect to the foreign judgment annulling an award? What is permissible under the Indian rules of conflict of laws? These are all pertinent questions, germane to laying down a standard for the Indian courts when confronted with the issue of enforcement of an annulled foreign award.

In the end, this piece recommends that India should consider adopting a simple conflicts-of-law approach by treating annulments like regular foreign commercial judgments, granting them deference for vacating an award unless the said judicial action is tainted with fundamental procedural impropriety or violates public policy.

II. A SUGGESTIVE PREMISE

Before we travel in search of an appropriate Indian standard and better the purpose of this piece, I will first lay down an example of a typical scenario relevant to our discussion. Say that the parties have agreed to London as the seat of arbitration, a place to which neither party has any connection [nor the main contract]. At the closure of the proceedings, an arbitral award is passed, and the losing party moves to set aside the award claiming the arbitral tribunal should have constituted two arbitrators along with a chairman [an odd number], unlike the actual tribunal, which constituted only two members [without a chairman]. The winning party relies on the arbitration agreement that required a two-member tribunal between the parties [implying no chairman] and that, in any case, Section 15 in the English Arbitration Act of 1996—on the number of arbitrators—is not mandatory in nature. Assume that this argument fails for reasons that the law mandatorily required that the "Unless otherwise agreed by the parties, an agreement that the number of arbitrators shall be two or

[1] *See* Albert Jan van der Berg, *The New York Convention of 1958: An Overview*, 2009 INT'L COUNCIL FOR COM ARB 11, https://cdn.arbitration-icca.org/s3fs-public/document/media_document/media012125884227980new_york_convention_of_1958_overview.pdf.

[2] *See* P. T. First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International BV et al., [2013] S.G.C.A. 47 (Sing.).

any other even number shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal."[3] Also, assume that English courts have held that Section 15 is a non-derogable provision.

There is no particular reason to critique Section 15 of the English Arbitration Act. It is a reasonable provision giving parties the autonomy to appoint an even-numbered tribunal when mutually agreed by the parties.[4] But at the same time, the provision is mandatory in nature, demanding that an even number be understood as requiring the appointment of an additional arbitrator as chairman.[5] The object of this provision is simple – the odd number allows the prevention of a deadlock in the tribunal's decision-making when there is a split in the tribunal as to the decision. The corresponding provision under the Indian Arbitration and Conciliation Act, 1996 ["**A&C Act**"] is much more straightforward: "The parties are free to determine the number of arbitrators, provided that such number shall not be an even number." Here, though Section 10 of the A&C Act is couched in mandatory terms, the Supreme Court of India ["**SCI**"]has taken the view that it is indeed possible for a party to waive any objection as to the number of arbitrators.[6] Accordingly, where two arbitrators make an award, and it is sought to be set aside by one of the parties to the arbitration, that party waives its right to object to the non-fulfillment of the mandatory requirement of Section 10(1) under Section 4 of the A&C Act, which deals with the waiver of the right to object.

Let us assume that the award is set aside by the English court for serious irregularity affecting the tribunal, the proceedings, and the award for failing to adhere to the non-derogable provision of Section 15 of the English Arbitration Act. The question is, does this necessarily have to mean that the award is annulled *erga omnes*? Could not courts in India recognize the award since it would be perfectly valid under its law, and since the reason for annulment by the English court is peculiar to that State, thus, limited to that State alone? If courts in India were not to recognize the set-aside award, are not the international consequences of the arbitral award restricted by virtue of the local law, which award—in fact—had no local nexus whatsoever? Would it not nullify the efforts of a party, who least

[3] Arbitration Act 1996, §15 (Eng.).

[4] *See* GARY BORN, INTERNATIONAL COMMERCIAL ARBITRATION 1668 (2014) ("This approach maintains general recognition of principles of party autonomy, while protecting parties from agreeing too readily to an arbitration mechanism that is particularly likely to result in deadlock.").

[5] *See* BORN, *supra* note 4, at 1668-69 ("… it reflects the usual expectations of commercial parties about efficient and final arbitral proceedings. This conclusion would also have the benefit of providing a partial means of reconciling agreements that appeared to require two arbitrators with mandatory law requirements for an odd number of arbitrators.").

[6] Narayan Prasad Lohia v. Nikunj Kumar Lohia, (2002) 3 SCC 572 (Court referred to § 4 and held that if a party being aware of the provisions of Part-I does not raise any objection to such a non-compliance of § 10). *See also*, P. D. Khanna & Ors. v. Ashwani Khanna & Ors., 2008 SCC OnLine Del 875 (Delhi HC); National Highways Authority of India & Anr. v. Bumihiway DDB Ltd. (JV) & Ors., 2006 10 SCC 763.

expected such a dead-end, all based on a vagary that parties never legitimately expected at the time of contracting.

There is another aspect, besides the imagery of a serious procedural irregularity described above – a situation that that would concern India's public policy and various notions of international due process. Should Indian courts recognize and enforce the annulling foreign judgment if it would lead to contravention of India's notions of international due process and public policy (particularly favoring the enforcement of foreign awards and arbitration agreement via the New York Convention)? The annulling foreign judgment is also part of the enforcement equation and cannot be ignored to determine a standard of the enforcement of annulled awards. Thus, would it not be proper to consider any exceptional circumstances where it would contravene India's public policy to enforce the annulling foreign judgment, for example, a judgment rendered without observing due process of law?

In his influential piece, going back to 1981, called "Arbitration Unbound: Award Detached from the Law of Country of Origin," Professor Jan Paulsson outlined a similar premise, like the one described above, while explaining the undergirding of various approaches debated in the academic realm.[7] The "traditional view," according to Professor Paulsson, is that consequences of arbitration in a given State must be subject to the law of that State – thus, the award's binding nature must exclusively derive from the legal system, which is the seat of arbitration, the *lex loci arbitri*.[8] In other words, it would be based on the premise that one single national legal system must give binding effect to the arbitral proceedings. This view has gotten more nuanced by factoring in the annulment decision and treating it like any other foreign money judgment. Thus, annulled awards would be generally considered unenforceable and respected, except when reasons exist to think that the judgment annulling the award lacks procedural integrity or violates the public policy of the enforcing State. Take, for instance, *Telecordia Tech. Inc.* v. *Telkom S.A. Ltd.*,[9] where a U.S. court considered an I.C.C. arbitration award, seated in South Africa. Here, the South African court had vacated the award and refused to allow the I.C.C. to appoint a new tribunal and *sua sponte* appointed a new tribunal, constituting three retired South African judges nominated by the award-debtor, a South African party. Such is a clear example of a set-aside proceeding lacking procedural integrity.

[7] Jan Paulsson, *Arbitration Unbound: Award Detached from the Law of it Country of Origin*, 30(2) INT'L & COMP. L. Q. 358, 360 (1981).
[8] *See* F. A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION LIBER AMICORUM FOR MARTIN DOMKE 159 – 62 (Pieter Sanders ed. 1967).
[9] 458 F.3d 172 (3rd Cir. 2006).

Another view is subscribed by the proponents of detachment, claiming an "internationalized" award, liberated from the local law, or the seat of arbitration.[10] This view holds international arbitration at a fundamentally different position, resisting an award to be a manifestation of a State's judicial system. Emmanuel Gaillard explains the idea of a detachment in these terms:[11]

> "Arbitral tribunals need not operate like the national courts of a particular state simply because they have their seat there. Arbitrators do not derive their powers from the state in which they have their seat but rather from the sum of all the legal orders that recognize, under certain conditions, the validity of the arbitration agreement and the award. This is why it is often said that arbitrators have no forum."

The detachment is viewed as an "*arbitration escaping the hold of any national law and thus subject directly to international law,*"[12] a free-floating autonomous legal order for arbitration (*un ordre juridique arbitral*) distinct from any national legal orders.[13]

Professor Paulsson finally explains a third view,[14] a new approach he calls "*lex arbitri delocalized,*" which seems to be a more nuanced version of the detachment view. It basically advocates that there need not be only one law of arbitration. In his illustration, Professor Paulsson asserts that nothing would prevent the enforcing State from legislating a rule that a foreign award (wherever rendered) is binding under conditions different from those of the State of origin (e.g., that the foreign award is binding in the enforcing State at the moment it is pronounced). As Professor Paulsson puts it:

> "[T]he question is not so much about whether an award may float—this seems beyond dispute—but whether it may also drift, that is to say enjoy a potential for recognition in one or more enforcement jurisdictions without being ultimately anchored in the national legal system of the country where it was rendered."

Summarily, if the arbitration taking place in France is international in character, the resulting award is not French – it must be allowed to drift. Thus, "*the award, once rendered, would be cast adrift, its effects to be controlled by no other authority than its (unvarying) contractual foundation and the (varying) requirements of the particular jurisdictions in which it may be sought to be relied on.*"[15]

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[10] *See* Pierre Lalive, *Les régles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 REVUE DE I'ARBITRAGE 155.

[11] E manuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 18 (1999).

[12] *See* Ch. N. Fragistas, *Arbitrage étranger et arbitrage international en droit privé*, 49 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 14 (1960).

[13] *See* EMMANUEL GAILLARD, ASPECTS P HILOSOPHIQUES DU DROIT DE L'ARBITRAGE INTERNATIONAL (2008) (English version published as "Legal Theory of International Arbitration"). *See also*, Emmanuel Gaillard*, The Representations of International Arbitration,* 1 J. INT'L DISP. SETTLEMENT 271 (2010).

[14] Paulsson, *supra* note 7, at 360.

[15] Paulsson, *supra* note 7, at 358-59.

Based on doctrinal persuasions, these academic propositions are sometimes demonstrable by State practice in the posture of the courts in civil and common law jurisdictions. The following section of this piece examines the various national case laws and works of commentators. The lack of uniformity is not so surprising – they differ because of the diversity in the jurisdictional outlook of the enforcing States. Nonetheless, the instances of international litigation described below provide a brilliant spread of approaches for considering a standard that would suit Indian legal conditions the most, which is the ultimate goal of this piece.

III. COMPARING NATIONAL APPROACHES TO ENFORCEMENT OF ANNULLED AWARDS

A. The Internationalist Approach

Some European States take the view that an arbitral award is not nullified *erga omnes* if it is annulled at the place of arbitration or in the State of origin. It basically rejects the idea of *ex nihilo nihil fit* (out of nothing comes nothing) in relation to annulled foreign awards entering the territorial boundaries of the enforcing State.[16]

The French courts adopt this "internationalist" approach on the premise of an award's transnational nature and the more favorable-right provision of the New York Convention.[17] Though French courts are generally considered arbitration-friendly, its approach to the enforceability of annulled awards is conditioned by its unique statutory framework. The French Code of Civil Procedure ["**French Code**"] governing the enforcement of foreign arbitral awards has no specific provision, like Article V(1)(e) of the New York Convention, based on which French courts may refuse enforcement on the ground that the incoming award has been set-aside in the State of origin. Article 1526 of the French Code (previously Article 1502) provides that the Court of Appeal may only deny recognition or enforcement of an arbitral award on the grounds listed in Article 1520. Article 1520 (previously Article 1506) provides that:[18]

> "An award may only be set aside where: (1) the arbitral tribunal wrongly upheld or declined jurisdiction; or (2) the arbitral tribunal was not properly constituted; or (3) the

[16] Pieter Sanders, one of the founding fathers of the New York Convention, was a strong advocate of the application of the *ex nihilo nil fit* principle to the enforcement of foreign set-aside awards. *See* Pieter Sanders, *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 6(1) NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 43-59 (1959) (Courts will refuse the enforcement as there does no longer exist an arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement.).

[17] *See generally*, Gaillard, *supra* note 11; William W. Park, *Unity and Diversity in International Law*, 99 BOSTON UNIV. L. REV. ONLINE 22, 26-31 (2019).

[18] *Code of Civil Procedure, Book IV, Arbitration*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 14 (Kluwer Law International 1984, Supplement No. 64, May 2011) (Jan Paulsson & Lise Bosman eds. 2018).

> arbitral tribunal ruled without complying with the mandate conferred upon it; or (4) due process was violated; or (5) recognition or enforcement of the award is contrary to international public policy."

As a consequence, the French national law regarding enforcement of annulled awards applies via the more-favorable-right provision of Article VII(1) of the New York Convention, which provides:

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

The first of such instances was in the case of *Soc. Pabalk Ticaret Ltd Sirketi* v. *Soc. anon. Norsolor* ["**Norsolor**"].[19] The Cour de Cassation considered a foreign award that was partially set-aside in Vienna, and it was held that the New York Convention did not deprive a party of any right he may avail in respect of a foreign award: (a) in the manner and to the extent allowed by the treaties of the enforcing State, and (b) as per the local law of the enforcing State itself. As a result, a court would not refuse to enforce a set-aside award when it is permissible under French national laws.

While the *Norsolor* court did not provide any standard, the decision implicated Article VII of the New York Convention to be a more favorable rule, even taking precedence over Article V.[20] This laid the foundation for cases yet to come wherefrom French courts refined its position. In *Hilmarton Ltd.* v. *Omnium de Traitement et de Valorisation* ["**Hilmarton**"],[21] the Paris Court of Appeal expounded further on the French position that the incorporation of an annulled international award into the French legal system (via means of enforcement) did not violate its international public policy. This was confirmed by the Cour de Cassation,[22] stating that the annulled award continued in existence even after it is set aside by national courts at the seat. The French position was again affirmed by the Paris Court of Appeal in *The Arab Republic of Egypt* v. *Chromalloy Aeroservices, Inc.*[23] and by the Cour de Cassation in *PT Putrabali Adyamulia (Indonesia)* v. *Rena Holding, et al.* ["**Putrabali**"].[24] In

[19] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. Oct. 3, 1984, 83-11.355 (Fr.).
[20] *See* Gaillard, *supra* note 11. *See also*, ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION 89 (1981).
[21] Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Dec. 19, 1991, Bull. civ. I, No. 104, 79 (Fr.). *See also*, XIX Y. B. COMM. ARB. 655-657 (1994).
[22] *Id*, at 663-665.
[23] Cour d'Appel [CA] [regional court of appeal] Paris, 1e ch., Jan. 14, 1997, 95/23025 (Fr.). *See also*, XXII Y. B. COMM. ARB. 691-695 (1997).
[24] Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ. Jun. 29, 2007, 05-18.053 (Fr.). *See also*, XXXII Y. B. COMM. ARB. 299-302 (2007) (The court confirmed that "[a]n international arbitral award – which is not anchored to any national legal order – is an international judicial decision whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement is sought.").

Putrabali, the court also addressed the situation where a tribunal rendered a different award after the first award was set aside at the seat: if so, the parties are expected to race for *exequatur* in the French courts.

Indeed, the French position is settled that it is a fundamental principle of French international arbitration law that annulled foreign awards are enforceable.[25] Scholars generally reference this approach rather uniquely, calling it the "*delocalization of international commercial arbitration*." Expounding this claim, in clarificatory terms, Professor Paulsson writes:[26]

> "Those who reject the delocalisation process seem to mistake the purpose of permitting parties to unbind arbitrations from the law of the situs of proceedings. They wrongly conclude that what is sought is an "escape" from national jurisdictions.
>
> To seek completely to avoid national jurisdictions would be misguided. Indeed, the international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognise and enforce awards. The question is rather whether in certain situations international arbitration may be liberated from the local peculiarities of a place of arbitration…
>
> What this critique misses is that the delocalized award is not thought to be independent of any legal order. Rather, the point is that a delocalised award may be accepted by the legal order of an enforcement jurisdiction although it is independent from the legal order of its country of origin*"*

The delocalization of arbitration also has support, like that of Professor Giorgio Bernini;[27] and it has been criticized, like that by Professor William Park,[28] calling it a "*dangerous heresy*." Supporting the French approach, Emmanuel Gaillard has proclaimed that it to be highly coherent, favoring a universalist concept of arbitration and minimizing local idiosyncrasies. It is clear today that French law has confirmed that French courts may nonetheless recognize a foreign award that has been annulled in the State of origin.

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[25] *See* Directorate General of Civil Aviation of the Emirate of Dubai v. International Bechtel Co. LLC, Cour d'Appel [CA] [regional court of appeal] Paris, Sep. 29, 2005, 2004/07635 (Fr.). *See also*, XXXI Y. B. COMM. ARB. 629 (2006).

[26] Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why It Matters*, 32(1) INT'L & COMP. L. Q. 53, 54, 57 (1983).

[27] Giorgio Bernini, *The Enforcement of Foreign Arbitral Awards by National Judiciaries: A Trial of the New York Convention's Ambit and Workability*, in THE ART OF ARBITRATION: ESSAYS ON INTERNATIONAL ARBITRATION LIBER AMICORUM PIETER SANDERS 50, 58 (Jan C. Schultsz & Albert Jan van den Berg eds. 1982).

[28] William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration*, 32 INT'L & COMP. L. Q. 21 (1983)

B. Territorial Approach

Though the French position has settled for the "internationalist approach," regarded for its pro-enforcement and arbitration-friendly attributes, it is interesting to take note of the French Decree of International Arbitration of 1981,[29] under which the Paris Court of Appeal decided the case of *Société Berardi* v. *Société Clair* ["**Berardi**"].[30] This was before introducing Article 1526 of the French Code, which has no provision for refusing enforcement on the ground of annulment at the seat. Interestingly, before the existence of such specific enforcement conditions [as they are in France now in Article 1526], the *Berardi* court refused to enforce a foreign award because it was set aside in Geneva.

It is fascinating to note that the criteria of French law [which is not based on the UNCITRAL Model Law] are not present in other jurisdictions, and, thus, it is understandable why the internationalist approach may be unique to the French setting. On the other hand, the territorial approach instead sinks a "floating" award: when a court annuls an award, it is considered to have a universal effect such that the award is not enforceable in any other jurisdiction.[31] Professor van den Berg writes in descriptive terms that there is an appreciable distinction between the refusal of enforcement and the annulment of an arbitral award.[32] The refusal of enforcement has a territorial effect. Thus, courts in different jurisdictions can arrive at diametrically opposite conclusions on the enforceability of a foreign award. On the other hand, Professor van den Berg explains, the annulment of the award has an *erga omnes* effect and, thus, once an award is annulled, it can no longer be eligible for enforcement. Ultimately, territorialists argue that this provides legal certainty to international arbitration.[33]

In Asia, Singapore has spoken on this point [although indirectly] while dealing with a related issue on the enforcement of foreign arbitral awards; this was the Singapore Court of Appeal in *P. T. First Media T.B.K. [formerly known as P.T. Broadband Multimedia T.B.K.]* v. *Astro Nusantara International B.V. et al.* ["**Astro**"].[34] The Court of Appeal was of the view that it was not up to courts in Singapore to enforce an incoming foreign award that was successfully challenged at the seat. Admittedly, while there was discretion as per the wordings of Article V(1)(e) of the New York Convention and Article 36(1)(a)(v) of the Model Law, the *erga omnes* effect of an annulled award at

[29] *See* VII Y. B. COMM. ARB. 271-282 (1982) (reprinted in English).
[30] XII Y. B. COMM. ARB. 319 (1982) (Unpublished Case No. 11542 and with a translated excerpt).
[31] *See* Manu Thadikkaran, *Enforcement of Annulled Arbitral Awards: What Is and What Ought to Be?*, 31(5) J. OF INT'L ARB. 575–608 (2014).
[32] Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, 28 April 2009, 27 J. OF INT'L ARB. 179 (2010).
[33] *See* VAN DEN BERG, *supra* note 20, at 355–57 ("Is the setting aside of the award in the country of origin a necessary ground for refusal of enforcement?").
[34] [2013] S.G.C.A. 47 (Sing.).

the seat only led to the conclusion that there was no award in existence; that out of nothing comes nothing.

Generally considered a friendly jurisdiction for international arbitration, Singapore took the territorial approach on the issue, given the lack of international consensus.[35] Calling it "*tentative thoughts,*" Justice Sundaresh Menon [Chief Justice of Singapore Supreme Court] has also commented upon the *Astro* dictum, opening a window into the Singaporean thinking of the effect of annulled foreign awards. His emphasis was on the exercise of party autonomy in selecting the seat and, with the seat, the specific role of the national courts at the seat and, with the national courts, the consequences that ensure from the decisions of such national courts.[36]

At the same time, Justice Menon expressed that in the Singaporean territorial approach, the enforcing court retained the right to refuse the enforcement of the annulling foreign judgment on traditional principles of comity without compromising on the principle of *ex nihilo nihil fit.*[37] According to Justice Menon, a view different from the territorial approach would have led to "*puncturing the aura of finality previously accorded to decisions of seat courts potentially undermines the functioning of arbitration as an international system*."[38] The Singaporean view, therefore, rests on the point that the validity of a foreign award should only be assessed by the national courts at the seat. A "tentative thought" such as this is quite understandable; to assume that a defect which is enough to cause the annulment of an award at the seat would be sufficient to cause the enforcing State to decline to give it recognition.

Like Singapore, Brazilian courts have also taken the view that enforcement should be refused pursuant to Article V(1)(e) of the New York Convention, read in conjunction with Article 38(VI) of the Brazilian arbitration law.[39] This was held by the Brazilian Superior Court of Justice in *EDF International S.A. v YPF S.A. and Endesa Latinoamérica S.A.*[40] The court refused to enforce an

[35] Chief Justice Sundaresh Menon, Chief Justice of Singapore, Patron's Address, Chartered Institute of Arbitrators London Centenary Conference ¶¶ 51-59 (July 2, 2015), https://www.supremecourt.gov.sg/Data/Editor/Documents/ciarb-centenary-conference-patron-address.pdf.

[36] Chief Justice Sundaresh Menon, Chief Justice of Singapore, Standards in Need of Bearers: Encouraging Reform from Within, Singapore Centenary Conference of the Chartered Institute of Arbitrators 19 (September 3, 2015), http://www.ciarb.org.sg/wp-content/uploads/2015/09/Keynote-Speech-Standards-in-need-of-Bearers-Encouraging-Reform-from-.pdf.

[37] *Supra* note 38., at 30.

[38] Menon, *supra* note 35, at ¶ 56.

[39] *Law No 9.307 of 23 September 1996*, *in* ICCA INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 1, 11 (Kluwer Law International 1984, Supplement No. 51, March 2008) (Jan Paulsson & Lise Bosman eds. 2018) (Article 38 states that the homologation request for the recognition or enforcement of a foreign arbitral award can be denied only if the defendant proves that the arbitral award is not yet binding on the parties, or has been set aside or has been suspended by a court of the country in which the arbitral award has been made.).

[40] STJ, 2011/0129084-7, Relator: Ministro Jorge Mussi, 02.12.2015 (Braz.).

incoming foreign award set aside by the national courts of Argentina, the place of the arbitration. The setting-aside, in a way, created a bar to the enforcement in Brazilian territory.

Professor William Park has been [in the past, at least] a strong proponent of the traditional or territorial view that the State of origin [or the place of arbitration] only has the authority to legitimize arbitral authority, subject to conditions that usually take the shape of mandatory rules.[41] According to Professor Park, the tussle is related to our convictions about the local procedural law, the *lex loci arbitri.* Simply put, if proponents of delocalized arbitration assert that arbitral awards may be detached from the State of origin, then what could be a point of reference of a legitimate award, and how can an award remain enforceable? On the other end of the spectrum, the ultimate goal of international commercial arbitration is finality in private dispute resolution, sourced from the place of arbitration, the *lex loci arbitri*; the seat anchors the arbitration to the legal order of the State in which it takes place.[42]

Conceptually, the territorial approach has been criticized for disrupting the internationality of the New York Convention by obliquely inviting local norms, which were tried and thought to be excluded by the New York Convention's enumerated exceptions.[43] In more recent writings, however, Professor Park has given a broader perspective on each side of the debate, that they all invoke the same regard for party intent.[44] On the one hand, if litigants mutually agree to remove a dispute from the courts, why defer to a judicial annulment? On the other hand, parties often agree to arbitration, not in the abstract but in a specific geographical venue, including the final authority of those national courts. Accordingly, the prospect of annulment at the arbitral seat forms part of the bargain.

C. Conflict-of-Laws Approach

The conflict-of-laws approach is a moderate perspective between the claims of the internationalists and territorialists. A somewhat middle position, a sound policy to treat annulment decisions like other foreign money judgments. The annulment should be respected except when reason exists to think that the judgment vacating the award lacked procedural integrity or offends public policy of the enforcing State.[45]

[41] Park, *supra* note 28.
[42] *See* Gaillard, *supra* note 11.
[43] *See* Stefan Kröll, *The European Convention on International Commercial Arbitration: The Tale of a Sleeping Beauty*, *in* AUSTRIAN YEARBOOK ON INTERNATIONAL ARBITRATION 61–74 (Klausegger et al. eds., Manz, 2013).
[44] WILLIAM W. PARK, ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES 352 (2012).
[45] *See generally*, William W. Park, *Unity and Diversity in International Law*, 99 BOSTON UNIV. L. REV. ONLINE 22, 26-31 (2019).

This view primarily rests on the discretionary nature of Article V(1)(e) of the New York Convention (and Article 36(1)(a)(v) of the Model Law)[46] and, in doing so, scrutinizing the enforceability of the foreign judgment annulling the award at the seat. It rejects any absolute prohibition in enforcing an annulled foreign award (at least, under the New York Convention) and the idea of *ex nihilo nihil fit*. The discretion— "may" be refused— cannot, however, have a purely discretionary or arbitrary force but would need to cater to enforcement situations where the right to rely on annulled foreign awards had been lost.[47] Therefore, the question could be, should a corrupt court judgment annulling an award at the seat be disregarded and the said award enforced? Yes. Of course, great care is necessary from otherwise turning this into an exercise of stigmatizing the foreign court's working and the quality of that State's administration of justice.[48]

Since foreign judicial acts are considered outside the scope of the act of State doctrine, it is not off-limits to determine disputed factual issues and apply cogent evidence proving that a foreign court decision is the outcome of fraud, corruption, or political influence.[49] In the words of Justice David Steel (albeit, speaking of a situation involving an appellate foreign court setting-aside a lower foreign court decision) in *Merchant International Co Ltd* v. *Natsionalna Aktsionerna Kompaniya Naftogaz Ukrayiny* ["**Merchant**"]:[50]

> "The issue is not so much the enforcement of the original judgment but the recognition of the judgment setting it aside. If the judgment setting aside the judgment of the lower court lacked due process then the default judgment [enforcing the foreign lower court judgment] will stand… It is well established that a foreign judgment is impeachable on the ground that its recognition would be contrary to public policy: Dicey & Morris: The Conflict of Laws, 14th Ed, Rule 44."

In *Merchant,* the English court noted that the proceedings before the Ukrainian court fell short of guarantees of a fair trial; that the order of the Ukrainian Supreme Commercial Court setting aside the

[46] Under Article V(1)(e) and Article 36(1)(a)(v), respectively, recognition and enforcement "may be refused only if" one of the specified situations applies. *See* Albert van den Berg, *Residual Discretion and Validity of the Arbitration Agreement in the Enforcement of Arbitral Awards Under the New York Convention*, *in* CURRENT LEGAL ISSUES IN INTERNATIONAL COMMERCIAL LITIGATION, VOL. VIII (1996).

[47] Lord Jonathan Mance, Justice of the Supreme Court of United Kingdom, Arbitration – a Law unto itself?, 30th Annual Lecture organised by The School of International Arbitration and Freshfields Bruckhaus Deringer (November 4, 2015), https://www.supremecourt.uk/docs/speech-151104.pdf.

[48] van den Berg, *supra* note 32.

[49] AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors. [2011] U.K.P.C. 7 (Otherwise, the paradoxical result would follow that, the worse the system of justice in the foreign country, the less it would be permissible to make adverse findings on it.).

[50] [2011] E.W.H.C. 1820 (Comm). *Merchant* was upheld on a narrower ground, but with provisional expressions of view in favour of Justice David Steel's reasoning in AK Investment CJSC v. Kyrgyz Mobil Tel Ltd & Ors. [2011] U.K.P.C. 7.

judgment of the lower court lacked regard for the principle of legal certainty and evidentiary principles considered fundamental.[51]

i. *Yukos Saga in the Netherlands and the United Kingdom*

The "Yukos saga" in the Netherlands and English courts firmly established the conflict-of-laws approach in the context of awards rendered by an arbitral tribunal seated in Russia. In the Netherlands, it was the case of *Yukos Capital SARL* v. *OAO Rosneft, Gerechtshof*.[52] Here, the Amsterdam Court of Appeal was approached by Yukos Capital with an award that was set aside by the Arbitrazh Court of the City of Moscow (affirmed by the Russian Supreme Court) on multiple grounds, namely, violation of the right to equal treatment, the agreed rules of procedure, the appearance of a lack of impartiality and independence on the part of the arbitrators. The Court of Appeal held that there was no obligation to refuse the enforcement of a foreign award that was annulled if the annulling foreign judgment could not be recognized in the Netherlands. In the court's view, Russian civil judges were likely to be partial and dependent. Thus, the annulling foreign judgment from Russia could not be recognized.

Commenting on the Amsterdam Court of Appeal, Professor van den Berg writes that the court failed to exercise appropriate caution.[53] While the court acknowledged that the award-creditor had no direct evidence of partiality and dependence of the Russian judges who annulled the award, it nevertheless deduced from press publications and general reports that the Russian judges lacked impartiality and independence. For one court to hold accusations against a foreign court is extremely serious, especially since there was no solid evidence for it. On this issue, Professor van den Berg exclaimed that:[54]

> "A lack of impartiality and independence should be factually (and demonstrably) present in a given case, or else there should be (provable) circumstances present that have created an appearance of a lack of impartiality or independence on the part of the judges in question… The Court advances this conclusion without any concrete evidence of a lack of independence and impartiality on the part of the judges involved in all three instances."

[51] *Id*, at 1828-29.
[52] Yukos Capital SARL v. OAO Rosneft, No. 31. Gerechtshof, Amsterdam, 28 April 2009, XXXIV Y. B. COMM. ARB. 703-714 (2009). *See also*, Lisa Bench Nieuwveld, *Yukos v. Rosneft: The Dutch Courts find that Exceptional Circumstances Exist*, KLUWER ARB. BLOG (Feb. 11, 2010), http://www.kluwerarbitrationblog.com (This intermediate position has so far received little attention among arbitration aficionados, perhaps due to lack of entertainment value as compared with more extreme alternatives. At least one author, however, takes the view that the Amsterdam court in the *Yukos* case adopted this position.).
[53] Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J. OF INT'L ARB., 179, 180-181 (2010).
[54] *Id*, at 181.

The Yukos saga had many episodes in various jurisdictions, including England in *Yukos Capital S.A.R.L.* v. *O.J.S.C. Rosneft Oil Company*.[55] The English Court of Appeal heard a similar objection that the foreign award was set aside by the court at the seat in Russia. Here, the court first considered and ruled that the Act of State doctrine did not prevent an English court from holding whether a foreign court decision (here, the annulling foreign judgment) should be enforced. Foreign judicial acts have been seen as a category outside the Act of State doctrine, thus, not precluding an inquiry whether the decisions of the Russian courts annulling the awards were a result of political influence. It was, nevertheless, necessary under the principle of international comity that a refusal to enforce a foreign judgment was based on cogent grounds of failure of substantial justice, namely, fraud, corruption, political influence, rules of natural justice, etcetera.[56]

While the proceedings escalated to the second appellate court on specific issues, the Queen's Bench Division of the High Court addressed the non-existence of an annulled award.[57] Most interestingly, it observed that by accepting the non-existence of the annulled award, it would be as if the court were bound to recognize a foreign court's decision, which offended the basic principles of morality, natural justice, and public policy. It would be a self-defeating notion (so to speak). The High Court took the position that there was no *ex nihilo nihil fit* principle that precludes the enforcement of the awards; and that the court had the power to enforce the awards at common law notwithstanding the annulling decision of the Russian court.

Lord Jonathan Mance, Baron Mance gives his strong support to the decisions of the English court, according to which the enforcing court may refuse to enforce a foreign judgment annulling an award if the enforcement of the said judgment would violate the public policy of the enforcing State.[58] An internationalist like Professor Paulsson also expresses general sympathy towards enforcement of vacated awards, at least if the annulment was for a local standard, for instance, the State's public policy where the award was made.[59] The conflict-of-laws approach, however, is not without constructive criticism. For example, Professor van den Berg argues that a consideration of the enforceability of the foreign judgment is not required under the New York Convention – it has only led to adding an additional step not contemplated by the Convention.[60] It would seem that the conflict-of-laws approach is the majority State practice, also considering that many jurisdictions have not yet

[55] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2012] E.W.C.A. Civ 855.
[56] DICEY, MORRIS AND COLLINS ON THE CONFLICT OF LAWS (2012) (see Rules 50-52).
[57] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2014] E.W.H.C. 2188 (Comm). *See also*, Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat, [2017] E.W.H.C. 1911 (Comm) (2017).
[58] Mance, *supra* note 49.
[59] Jan Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9(1) ICC INT'L CT. OF ARB. BULL. 14 (1998).
[60] van den Berg, *supra* note 32.

ruled on whether and the conditions under which the enforcing court may exercise such discretion. Nonetheless, there is an expanding body of literature and case law recognizing and enforcing annulled awards conditionally. For instance, Swiss courts, as a general rule, will refuse to enforce annulled awards.[61] But commentators take the view that in situations contravening Swiss public policy to enforce an annulling judgment, the annulled award may be enforceable; or where an award-debtor—opposing the enforcement of the annulled award—has acted in bad faith.[62] The conflict-of-laws approach is similarly followed by Spanish[63] and Hong Kong[64] courts.

ii. The United States

Generally, U.S. courts will refuse to enforce an award vacated at the seat of arbitration unless the vacating judgment offends U.S. public policy. A U.S. District Court first considered this issue for the District of Columbia in *Chromalloy Aeroservices Inc.* v. *The Arab Republic of Egypt* ["**Chromallo**"].[65] Here, the case related to an award rendered in an arbitration seated in Cairo, involving a U.S. company (Chromalloy) and the Republic of Egypt. While Chromalloy sought enforcement in the U.S., the Republic of Egypt appealed the award before a court in Cairo for reasons that the arbitrators had wrongfully applied Egyptian private law rather than administrative law.

Nonetheless, the U.S. district court granted Chromalloy's petition to enforce the award notwithstanding the vacatur of the award in Egypt. It concluded that Article V of the New York Convention created a permissive standard leaving non-enforcement of a vacated award within the discretion of the U.S. courts, while Article VII of the Convention was a mandatory provision, enshrining the parties' right to invoke the more favourable enforcement provisions of national law where enforcement was sought – that being the strong public policy toward enforcing international arbitration awards under the Federal Arbitration Act, 1925 ["**FAA**"]. The district court decided that

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[61] *See* Bundesgericht ["**BGer**"] [Federal Supreme Court], 8 December 2003, 4P.173/2003, https://newyorkconvention1958.org/index.php?lvl=notice_display&id=567.

[62] *See* Elliott Geisinger, *Implementing the New York Convention in Switzerland*, 25(6) J. of Int'l Arb. 698 (2008); BERNHARD BERGER & FRANZ KELLERHALS, INTERNATIONAL AND DOMESTIC ARBITRATION IN SWITZERLAND ¶ 2083 (2015) (*see* footnote 126); Martin Bernet & Philipp Meier, *Recognition and Enforcement of Arbitral Awards*, *in* INTERNATIONAL ARBITRATION IN SWITZERLAND 212 (Elliott Geisinger et al. eds., 2d ed. 2013).

[63] *See* decision dated 16 April 1998, RAJ 2919; decision dated 20 July 2004, RJ 2007/5817 (The mandatory nature of an award cannot be linked to its enforceability in the State where it was rendered, given that, in that case, the mandatory nature of the award, for the purposes of its recognition, would be wrongly identified with the effectiveness of the same in the State where it was made.). *See* Oliver Marsden & Ashley Jones, *Awards Set-Aside at the Seat of the Arbitration: Is Enforcement Still Possible?* PRACTICAL LAW UK ARTICLES 6-599-2365 (2017) (*see* section on Spain).

[64] *See* Karaha Bodas Co. LLC v. Perusahaan Pertamabangan Minyak Dan Gas Bumi Negara [2008] H.K.C.F.A. 98, ¶ 47; Societe Nationale D'Operations Petrolieres de la Cote D'Ivoire – Holding v. Keen Lloyd Resources Ltd., [2001] H.K.C.F.I. 173, ¶ 14.

[65] 939 F. Supp. 907 (D.D.C. 1996).

it was under no obligation to enforce the Egyptian judgment issued in proceedings that contradicted the parties' agreement to waive all judicial recourse against the award and, thus, violated the emphatic U.S. public policy favouring arbitration.

In the decisions that came after *Chromalloy*, the U.S. courts appear to give greater deference to the courts' decisions at the seat; today, either little or nothing is left of the *Chromalloy* decision.[66] It has received sharp criticism.[67] However, commentators go both ways on the *Chromalloy* reasoning; it is really in the eye of the beholder. For example, some suggest that an arbitration clause excluding any recourse is apparently sufficient to make a vacated award enforceable;[68] thus, supporting *Chromalloy*, or at least a modified version of it.[69]

In *Baker Marine Ltd.* v. *Chevron Ltd.* ["**Baker Marine**"],[70] the U.S. Court of Appeals directly addressed this issue. Here, Baker Marine contracted with Danos and Chevron to provide barge services for oil exploration activities in Nigeria. When a dispute arose, arbitration was initiated, and Baker Marine obtained awards against Danos and Chevron. However, the Nigerian Federal High Court set aside both the awards, holding that the arbitral tribunals' findings were not supported by evidence and that the tribunals had incorrectly awarded punitive damages, went beyond the scope of submission, and inconsistent. Nonetheless, Baker Marine sought to enforce both awards in the U.S. before the Court of Appeals, heavily relying on Article VII of the Convention; that Baker Marine had the right to have the awards recognized under the more favourable provisions of the FAA. However, the court rejected the argument and observed that it was a sufficient answer that the parties contracted in Nigeria that their disputes would be arbitrated under Nigerian laws; and there was no reference to U.S. laws whatsoever. Thus, the court held that the arbitration agreement was to be enforced according to the terms, which is also the primary purpose of the FAA. Interestingly, Baker Marine did not raise any contentions that the Nigerian courts acted contrary to Nigerian law. Thus, *Baker Marine* roundly rejected the Article VII approach taken in *Chromalloy*. Having contracted the seat to

[66] *See* Yusuf Ahmed Alghanim & Sons, W.L.L. v. Toys "R" Us, Inc. & Tru (HK) Ltd., 126 F.3d 15 (2d Cir. 1997); Martin Spier v. Calzaturificio Tecnica, S.p.A., 71 F. Supp. 2d 279 (S.D.N.Y 86 Civ. 3447 (CSH) 1999).

[67] *See* Nina H. Mohebbi, *Back Door Arbitration: Why Allowing Non-Signatories to Unfairly Utilize Arbitration Clauses May Violate the Seventh Amendment*, 12 U. PA. J. BUS. L. 555, 563 (2010); William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L ARB. 805, 807 (1999); Nicholas Pengelley, *The Convention Strikes Back: Enforcement of International Commercial Arbitration Awards Annulled Elsewhere*, 8 VINDOBONA J. INT'L COMM. L. & ARB. 195, 200 (2004) (that the FAA does not apply to international arbitration and that the Chromalloy court should not have relied on it).

[68] Christopher R. Drahozal, *Enforcing Vacated International Arbitration Awards: An Economic Approach*, 11 AM. REV. INT'L ARB. 451, 478 (2000).

[69] *See* Pengelley, *supra* note 71, at 200; GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2681-84 (2009).

[70] 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 (2d Cir. 1999).

be Nigeria, the parties had never agreed to have an award governed by the FAA, and there was no reason to apply U.S. domestic arbitration law. Though *Chromalloy* was not overruled, its Article VII approach was relegated to cases where the foreign annulment violated an express waiver of any recourse against the award before the seat court.

Next came the decision of the U.S. District Court for the Southern District of New York in *Martin Spier* v. *Calzaturificio Tecnica, S.p.A* ["**Spier**"].[71] Here, an Italian award (in favour of Martin Spier) was annulled by an Italian court and, ultimately, confirmed by the Italian Supreme Court. In the enforcement proceedings before the U.S. district court, the court firmly based its opinion on the reasoning in *Baker Marine*, rejecting Martin Spier's attempt to apply the *Chromalloy* rationale and have the Italian award recognized by application of the "more favourable" standards of the FAA. The district court held that the Italian courts nullified a valid ground recognized under the FAA relating to arbitrators exceeding their powers. Therefore, the *Spier* court goes even further in marginalizing *Chromalloy*, singling out Egypt's repudiation of its contractual promise not to appeal an arbitral award as the isolated circumstance which violated U.S. public policy articulated in the FAA, thereby justifying the *Chromalloy* decision in the limited sense.

It becomes apparent from the above decision how the pendulum seems to have swung from local enforcement standards under *Chromalloy* to the more recent precedents that relegated the effect *Chromalloy* could have had. Thereafter, in 2007, another annulled award came before the Court of Appeals of the Second Circuit in *Termorio & LeaseCo Group* v. *Electranta S.P. et al.* ["**Termorio**"].[72] This related to a Colombian award in favour of Termorio and against Electrantra (a Colombian State-owned entity). Electranta was successful in vacating the award before Colombian courts on the grounds that the ICC arbitration clause was not valid because at the time it was entered into, it violated Colombian law. Termorio then sought to enforce the award in the U.S. However, the district court denied enforcement, and the Court of Appeals affirmed the same. In rejecting the enforcement, the court specifically rejected the *Chromalloy* approach relied upon by Termorio:[73]

> "The Convention does not endorse a regime in which secondary States (in determining whether to enforce an award) routinely second-guess the judgment of a court in a primary State, when the court in the primary State has lawfully acted pursuant to "competent authority" to "set aside" an arbitration award made in its country. Appellants go much too far in suggesting that a court in a secondary State is free as it sees fit to ignore the judgment of a court of competent authority in a primary State vacating an arbitration award. It takes much more than a mere assertion that the judgment of the primary State

[71] 663 F. Supp. 871 (S.D.N.Y. 1987).
[72] 487 F.3d 928 (D.C. Cir. 2007).
[73] *Id*, at 937.

> "offends the public policy" of the secondary State to overcome a defense raised under Article V(1)(e)."

With *Termorio*, it was made clear that the test of "public policy" was not whether the courts of enforcing State would set aside the foreign award if that was award was assumed to have been made in the jurisdiction of the enforcing State. It would have to be demonstrated that the foreign decision vacating the award violated U.S. "public policy," meaning that it was "*repugnant to fundamental notions of what is decent and just in the State where enforcement is sought*," or when the decision "*tends clearly to undermine the public interest, the public confidence in the administration of the law, or security for individual rights of personal liberty or private property*."[74]

The more recent of such decisions again comes from the U.S. Court of Appeals for the Second Circuit in *Corporacion Mexicana de Mantenimiento Integral, S. de R.L. de C.V. v. Pemex-Exploracion y Producción* ["**Pemex**"].[75] Here again, U.S. courts reaffirmed their willingness to enforce vacated awards in circumstances only where the foreign judgment vacating the award offended U.S. public policy. In *Pemex*, the Court of Appeals affirmed the district court's decision enforcing the award rendered in Mexico under the Panama Convention (Inter-American Convention on International Commercial Arbitration, 1975). Even though the Mexican court had vacated the award, the enforcement took place because the vacating foreign judgment was based on a law that did not exist at the time the parties entered into their contract. The subsequently enacted Mexican administrative law disallowed arbitration of claims against a State instrumentality, which the Mexican court retroactively applied. Nevertheless, the *Pemex* court enforced the award since giving effect to the Mexican judgment would have run counter to the U.S. public policy and repugnant to the fundamental notions of justice.

Finally, the Restatement of U.S. law on international commercial arbitration by the American Law Institute ["**ALI**"] also addresses the issue of an award set aside by a competent court at the seat of arbitration. Specifically, §§ 4-16(a) and (b) states the following:[76]

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[74] *See* Ackermann v. Levine, 788 F.2d 830, 841 (2d Cir. 1986).

[75] 962 F. Supp. 2d 642 (S.D.N.Y. 2013), aff'd, 832 F.3d 92 (2d Cir. 2016). *See also* Thai-Lao Lignite (Thailand) Co., Ltd. v. Gov't of Lao People's Democratic Republic, 997 F. Supp. 2d 214 (S.D.N.Y. 2014), aff'd, 864 F.3d 172 (2d Cir. 2017) [The court held that no extraordinary circumstances existed that would justify the exercise of discretion to enforce the annulled award.]; Getma Int'l v. Republic of Guinea, 862 F.3d 45 (D.C. Cir. 2017).

[76] ALI Restatement (Third) of the U.S. Law on International Commercial and Investment Arbitration, § 4-16. *See also* Compañía de Inversiones Mercantiles SA v Grupo Cementos de Chihuahua SAB de CV, 2019 WL 8223560, aff'd in 970 F.3d 1269 [While recognizing that courts should generally give deference to decisions of the competent authority in the arbitral seat, the district court can ignore this rule when a "foreign judgment setting aside the award is repugnant to fundamental notions of what is decent and just . . . or violated basic notions of justice."].

> "(a) A court may deny confirmation, recognition, or enforcement of a Convention award to the extent that the award has been set aside by a competent authority of the country in which or under the arbitration law of which the award was made.
>
> (b) 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."

The Reporters have stated that, ordinarily, a court will not recognize or enforce an award set aside by a competent authority at the seat. However, they have stated that a foreign award under the New York Convention may be entitled to recognition or enforcement in several narrow situations, despite having previously been set aside. First, the authority purporting to set aside an award may not have been competent to do so. Second, the judgment setting aside the award may not be entitled to recognition under the rules governing judgment recognition in the court where enforcement is sought. That forum would accordingly determine the effect of the foreign set-aside judgment by referencing its own law of foreign judgment recognition. Third, the Reporters have stated that a U.S. court may also disregard a foreign set-aside judgment in highly extraordinary circumstances, even though, under strict application of the forum's principles of foreign judgment recognition, that judgment would ordinarily be recognized. In the example given by the Reporters, the court may do so if the set-aside court knowingly and egregiously departed from the rules governing set-aside in that jurisdiction. It may also do so when other facts give rise to substantial and justifiable doubts about the integrity or independence of the foreign court concerning the judgment in question.

iii. Foreign Judgments Upholding an Award at the Seat

The conflict-of-laws approach has some unavoidable implications – the flipside (so to speak). If an enforcing court considers a set-aside award to recognize the annulling court judgment generally, what about the court judgment upholding the award (or other enforcing court judgments)? Here, the assumption is that the award-debtor was unsuccessful in challenging the award at the seat (or refuting the enforcement before other enforcing courts).

There are no direct answers to this question, but the New York Convention does provide a starting point to this issue. In the New York Convention, some grounds for resisting enforcement are unique and specific to an enforcement situation and considered only by the enforcement court. For example, the grounds under Article V(2) of the New York Convention—on public policy and arbitrability—are specific to the enforcing jurisdiction. Thus, the question of giving recognition to a court judgment upholding an award at the seat does not arise. Moreover, since public policy and arbitrability are

inherently matters on which each State and its courts take different views (albeit, national courts do yearn to bring consistency in terms of an international public policy),[77] the issue would necessarily require re-litigation with the enforcement court.[78] This is also the idea behind Article IX(2) of the European Convention on International Commercial Arbitration, 1961, under which enforcement courts may take no account of the annulment of an award by the courts at the seat for reasons of offending public policy.

As for the grounds in Article V(1) of the New York Convention, the award-debtor has either already raised these issues (before the upholding court at the seat and/or other enforcement courts) or may raise them before the enforcement court for the first time. But if the upholding court at the seat and/or other enforcement courts have already determined finally, why should an award-debtor have a second bite at the apple? Firstly, any enforcement court is generally expected to heed foreign decisions on the same issue, particularly the courts at the seat.[79] Secondly, albeit only a common law feature, an enforcement court has the discretionary power to find an abuse of process – exercisable after taking all the circumstances surrounding the matter, particularly the attempted re-litigation of an issue that is finally determined before another court.[80] This would, of course, depend on the identity of the issues, comity towards the foreign decisions, and avoidance of duplication, repetition, and inconsistency in decision-making. More importantly, however, it is necessary to recognize that there is a great divide between the refusal of enforcement and the annulment of an arbitral award: the refusal of enforcement has only a territorial effect. Thus, courts in different jurisdictions can arrive at diametrically opposite conclusions on the enforceability of a foreign award.[81]

[77] *See generally*, Hebei Import & Export Corp v. Polytek Engineering Co Ltd., [1999] 1 H.K.L.R.D. 665 (H.K.) (Whether public policy in this context meant some public policy common to all civilised nations, or those elements of a state's own public policy which are so fundamental that its courts feel obliged to apply them not only to purely internal matters but also to matters with a foreign element by which other States are affected.).

[78] Yukos Capital SARL v. OJSC Rosneft Oil Company, [2012] E.W.C.A. Civ 855.

[79] Minmetals Germany GmbH v. Ferco Steel Ltd., [1999] 1 All E.R. (Comm) 315; Newspeed Int'l Ltd. v. Citus Trading Pte. Ltd., [2001] SGHC 126, ¶ 6 (Sing.) (the judge at first instance went so far as to say that two bites at the cherry were inadmissible); Hebei Import & Export Corp v. Polytek Engineering Co Ltd., [1999] 1 H.K.L.R.D. 665 (H.K.); Gujarat NRE Coke Ltd. & Shri Arun Kumar Jagatramka v. Coeclerici Asia (Pte) Ltd., [2013] E.W.H.C. 1987 (Comm).

[80] Owens Bank v. Bracco, [1992] 2 A.C. 443 (Eng.); Diag Human Se v. The Czech Republic [2014] E.W.H.C. 1639 (Comm) (Court held that an Austrian court decision to refuse enforcement of a Czech award on the ground that the award was not binding gave rise to an issue estoppel on a later attempt to enforce the same award in England. In so deciding, the court applied an approach endorsed by the House of Lords in *The Sennar (No. 2)*, [1985] 1 W.L.R. 490.).

[81] van den Berg, *supra* note 32, at 182.

Indian commentators also agree that "*the courts of every country apply their own standard while deciding on the enforceability of an award*."[82] Thus, the enforcement (or non-enforcement) of an award in one State would not necessarily lead to the enforcement (or non-enforcement) in other States as well.

D. The European Convention Approach

The European Convention on International Commercial Arbitration of 1961 ["**European Convention**"] came into force shortly after the New York Convention. The European Convention has thirty-one contracting parties, including non-European States, thus, covering a geographical region with high-density international trade transactions.[83] The uniqueness of this international instrument is that it not only codifies enforcement issues but also aspects of conduct and procedure of international commercial arbitration. These procedural issues include a tribunal's establishment, the relationship between tribunals and national courts, conflict of laws issues, and the impact of the annulling of an award on its enforceability.

On the enforceability of the annulled award, Article IX of the European Convention attempts to restrain any local standards (public policy and arbitrability) that could undermine the internationality of the award.[84] Article IX provides:

> "Article IX—Setting Aside of the Arbitral Award
>
> (1) 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

[82]*See* JUSTICE R. S. BACHAWAT, LAW OF ARBITRATION AND CONCILIATION 2871 (Anirudh Krishnan et al., 2017). *See also* Buyer (Poland) v. Seller (Poland), XXX Y. B. COMM. ARB. 509 (2005) (The Hamburg Court of Appeal deemed the Polish Court decision, refusing enforcement, to not have any impact on the present request for enforcement.).

[83]UNITED NATIONS TREATY COLLECTION, STATUS OF EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-2&chapter=22&clang=_en.

[84]*See generally* Buyer (Austria) v. Seller (Serbia and Montenegro), XXX Y. B. COMM. ARB. 421 (2005).

> (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 Article IV of this Convention.
>
> 2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above"

Thus, Article IX(2) limits the application of Article V(1)(e) of the New York Convention to matters codified in Article IX(1) of the European Convention, which is equivalent to Article V(1)(a) to V(1)(d) of the New York Convention, mainly dealing with scope and due process issues. The purpose of Article IX is to avoid an *erga omnes* obligation to enforce a foreign award when the said award is set aside on the grounds of public policy or arbitrability at the seat. Peter Benjamin gives the following illustration:[85]

> "Otherwise, the situation might well arise in which an award made in State A, between nationals of State B and State C, which was to be enforced in either State B or C, could not be because it had been set aside in State A as violating public policy, and notwithstanding the fact that the award was not contrary to the public policy of either State B or C."

Courts in Germany,[86] Austria,[87] and Spain,[88] which are signatories to the European Convention, may still enforce a foreign award annulled for reasons of public policy violations by the court at the seat.[89]

[85]Peter I. Benjamin, *The European Convention on International Commercial Arbitration*, 37 BRITISH Y. B. INT'L LAW 478, 494 (1961).

[86]OLG München OLG-Report 1995, 57, 59.

[87]Buyer (Austria) v. Seller (Serbia and Montenegro), Supreme Court of Austria, 30b221/04b, 26 January 2005, XXX Y. B. COMM. ARB. 421–436 (2005) ["[m]aking an international arbitral award dependent on state approval in the country of origin would deprive international arbitration of its independence."]; Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska, Oberster Gerichtshof, 20 October 1993 and 23 February 1998, XXIV Y. B. COMM. ARB. 919–927 (1999).

[88]Rubí (Barcelona), decision dated 11 June 2007, No. 584/2006.

[89]*See generally* Christopher Koch, *The Enforcement of Awards Annulled in Their Place of Origin*, 26(2) J. OF INT'L ARB. 267, 267 (2009).

IV. LAYING DOWN A STANDARD FOR INDIA

Looking back, the French courts have their favorable arbitration law and their view that an international arbitration award is an international decision detached from any legal order; the Singaporean and Brazilian courts have taken the more conservative or territorial view, believing that out of nothing comes nothing; the Dutch, English, and the U.S. courts have allowed enforcement of vacated awards if the judgment vacating the award could not be recognized pursuant to general rules of conflict of laws; the European Convention restrains the local standards (public policy and arbitrability) that could undermine the internationality of the award and, accordingly, decides the impact of the annulling of an award on its enforceability. What could be more appropriate for Indian conditions?

The French-internationalist view automatically excludes all jurisdictions, including India, that have adopted the UNCITRAL Model Law and, particularly, the wordings of Article 36(1)(a)(v) of the Model Law, which states that enforcement may be refused if the award has been set aside by a court at the seat. In other words, the French position may be followed in jurisdictions, which have enacted a law more favorable to the enforcement of foreign awards than the New York Convention. Moreover, the European Convention is of no relevance to India – India is only a signatory to the New York Convention. Hence, the second and third rationale, i.e., the territorial and conflict of laws approach, have the best chance of taking roots in the Indian soil.[90]

A. Discretion under Section 48 and "award not yet binding"

It is generally established that the finality and conclusiveness of an arbitral award are premised on the fulfillment of three primary conditions: the submission of the parties to arbitration (consent); conduct of arbitral proceedings in accordance with the submission (due process); and its validity by the law of the forum (the *lex loci arbitri*).[91] However, these considerations are obviously not the only value points: Section 48(1)(e) of the A&C Act gives discretion to the courts (may be refused), thus, providing room for enforcement of an award that is set aside or suspended at the seat of arbitration.

At the discretion of courts under Section 48(1)(e), the Delhi High Court has interpreted that the term "may be" meant that conditions for refusing enforcement were to be narrowly construed, giving courts maximum leeway for exercising its discretion in favor of enforcement.[92] The Delhi High Court has

[90]Ciccu Mukhopadhaya, *"India" in ICC Guide to National Procedures for Recognition and Enforcement of Awards under the New York Convention*, 23 ICC INT'L CT. ARB. BULL. (SPECIAL SUPPLEMENT) 198 (2012) (leaning towards the conflict of laws approach).
[91]*See* V. C. Govindraj, Private International Law: A Case Study 131 (2018).
[92]*See* Grain Rotterdam B.V. v. Shivnath Rai Harnarain (India) Co., (2008) 155 D.L.T. 457.

also held that the word "may" in Section 48 cannot be read as "shall," and the court cannot be compelled to refuse enforcement even if any of the grounds under Section 48 were established.[93] This is truly a robust pro-enforcement approach concerning foreign arbitral awards. However, though Section 48 of the A&C Act is interpreted to grant courts discretionary power to allow enforcement despite an established ground of refusal under sub-sections 1 and 2 of Section 48 (including the annulment of the award in the State of origin),[94] there has not been a single instance where the court has used its discretionary power under Section 48(1)(e) to enforce an annulled award.

India has also had instances of expressing its views on Article V(1)(e) of the New York Convention, but on some related aspects like the applicability of double exequatur and when an award becomes binding for considering its enforceability.[95] Courts in India have not yet addressed their views on the enforceability of set-aside or suspended awards.

B. Opposing the Territorial Approach for India

The territorial approach gives extreme deference to the courts' decisions in the country of the award's origin, and it subscribes to the view that the award derives its validity and legal effect only from the law of the seat. These conclusions of the territorial approach may be flawed in light of the plain language of Section 48(1)(e) of the A&C Act and Article V(1)(e) of the New York Convention, which grants the enforcement court discretion to refuse the enforcement of an annulled award; thereby, implying that the law of the seat does not always determine the destiny of the award, keeping it an open possibility that the annulled award continues to exist outside the State of origin.[96]

Policy-wise too, undiscerning deference to annulment is treacherous, with the potential of violating international standards that protect an award from local idiosyncrasies. Of course, awards that are sufficiently flawed and unworthy of recognition for procedural impropriety may never pass the

[93] *See* Cruz City 1 Mauritius Holdings v. Unitech Ltd., (2017) 239 D.L.T. 649.

[94] *See* Ashutosh Kumar et al., *Interpretation and Application of the New York Convention in India*, *in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: THE INTERPRETATION AND APPLICATION OF THE NEW YORK CONVENTION BY NATIONAL COURTS 445, 457 (George A. Bermann ed. 2017).

[95] Although the law of the seat requires a national exequatur for the arbitral award to become binding, under Article V(1)(e) of the New York Convention, the binding character of the award would not depend on an exequatur by the courts of the State of origin. *See* Thaicom Public Company Ltd. v. Raj Television Network Ltd., 2017 (2) Arb LR 321 (Madras HC) [A foreign award can be enforced under Part-II without requirement for recognition for the Courts at the seat.]; Spain: TS, XXXI Y.B. COMM. ARB. 846, 851 (2006) [The binding character of the award may not be made to depend on an exequatur by the court of the State of rendition]; Belgium: Cass., XXIV Y. B. COMM. ARB. 603, 609 (1999) [refusing to apply Jordanian law, according to which an arbitral award becomes binding only after having been confirmed by a court, arguing that it would reintroduce the double exequatur into the realm of the NYC].

[96] *See* LORD MUSTILL & STEWART C. BOYD, MUSTILL & BOYD: COMMERCIAL ARBITRATION: 2001 COMPANION VOLUME 85 (2000) [an arbitral award is not integrated into judicial system of the country where the arbitration was held].

enforcement threshold of another State, therefore, making the enforcement of an annulled award a rare and exceptional occurrence. But the territorial approach would seem incapable of providing a proper standard to adjust accordingly and conduct a qualitative evaluation of a foreign court's decision. Neither does the territorial approach suggest that an award should be considered as losing its legal effect only if the decision setting aside the award was to meet an "international annulment" standard (jurisdiction and due process grounds); hence, disregarding local peculiarities (arbitrability or public policy grounds).

The territorial approach also majorly frustrates party autonomy, negating the fundamental rule under Article II of the New York Convention that the Contracting States shall recognize agreements to arbitrate.[97] On this point, Gary Born directly responded to Justice Sundaresh Menon's view, arguing that the territorial approach frustrated party autonomy and the fundamental rule under Article II of the New York Convention that agreements to arbitrate shall be recognized.[98] Born responded that it might be that the annulment judgment rested on vaguely defined domestic normative value, but not the recognition of the award (as claimed by Justice Menon), which is based on uniform international principle.[99] Born further stated that the whole purpose of the New York Convention was to encourage the enforcement of foreign awards in all signatories (not discourage forum shopping as thought by Justice Menon).[100]

On a different point, some even argue that the notion of *res judicata* is best served when deference is given to the arbitral tribunal's decision versus a subsequent court judgment, considering that the tribunal was the first to resolve the dispute.[101]

C. Supporting the Conflicts-of-Law Approach

As a common law country, with applicable rules of conflict of laws, the English and U.S. examples of the conflict of laws approach to provide the most legally consistent and pro-enforcement approach for India to develop its own standard of recognizing annulled awards. Thus, the best policy would be to treat annulments like other foreign commercial judgments, granting them deference for vacating an award, unless the said judicial action is tainted with fundamental procedural impropriety or violates

[97]Parties do not always submit absolutely to the laws of the seat. *See* Pierre Lastenouse, *Why Setting Aside an Arbitral Award is not Enough to Remove it from the International Scene*, 16(2) J. of Int'l Arb. 43 (1999); Paulsson, *supra* note 59, at 20.

[98] Alison Ross, *Clash of the Singapore Titan*, GLOB. ARB. REV. (Oct. 12, 2015), https://globalarbitrationreview.com/article/1034834/clash-of-the-singapore-titans.

[99]*Id.*

[100]*Id.*

[101]Gary H. Sampliner, *Enforcement of Nullified Foreign Arbitral Awards: Chromalloy Revisited*, 14(3) J. OF INT'L ARB. 141, 161–2 (1997).

public policy. In such circumstances, where the annulment does not meet "international annulment" standards but is instead based on "local standard,"[102] Indian courts might well be justified in exercising their discretion to recognize an annulled arbitral award rather than the annulling court judgment. Such an approach would neatly fit within the framework of the New York Convention and Part II of the A&C Act, as well as India's pro-enforcement policy.

Taking the example of the ALI Restatement, the standard of enforcing of annulled or set-aside awards may be formulated as below, i.e., an Indian court may refuse to recognize the foreign judgment setting aside the award in the following situations:

> "One, for lack of jurisdictional competence of the authority that annulled the award at the seat; two, where the annulling foreign judgment may not be entitled to recognition under the rules governing recognition and enforcement of foreign judgment; three, where highly extraordinary circumstances demand disregarding the annulling foreign judgment (though, under strict application of the rules of foreign judgment recognition, that judgment would ordinarily be recognized)."

Thus, hypothetically, where an award was set aside on the ground that an oath was not taken in the form prescribed by the law of the State at the seat,[103] and given pro-enforcement policy towards foreign arbitral awards, Indian courts may allow the enforcement since that award ought not to have been set-aside for breach of a mere procedural formality. Such annulment would not be a ruling on the substantive law but local idiosyncrasies, and it does not take away the substance of the award in any way.[104] This would be well within the "extraordinary circumstance" where an Indian court may enforce an already annulled award.[105] Similarly, another scenario in which the "court may use its discretion and enforce an award annulled in the country where it was made is when the annulment

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[102]*See* Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32(1) INT'L & COMP. L. Q. 53, 55 (1983); Christopher Koch, *The Enforcement of Awards Annulled in their Place of Origin*, 26(2) J. OF INT'L ARB. 267, 290 (2009); José Manuel Álvarez Zárate & Camilo Valenzuela, *Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's 'Sovereign Spaces'*, in 60 YEARS OF THE NEW YORK CONVENTION: KEY ISSUES AND FUTURE CHALLENGES §13.03 (Katia Fach Gomez ed. 2019); GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES: COMMENTARY AND MATERIALS 32 (1994); Reyadh Seyadi, *Enforcement of Arbitral Awards Annulled by the Court of the Seat*, 84(2) ARB. 128, 135-37(2018); Sampliner, *supra* note 106, at 162. *See* also, Leila Anglade, *Chronicle of a Death Foretold: The Decline of the "Lex Fori Arbitrii" in the Enforcement of International Awards*, 33 IRISH JURIST 220 (1998).

[103]*See* International Bechtel Co. Ltd. v. Department of Civil Aviation of Dubai, 300 F. Supp. 2d. 112 (D.D.C. 2004), aff'd by 360 F. Supp. 2d 136 (D.D.C. 2005) [where an award was set aside on the grounds that an oath was not taken in the form prescribed by Dubai law].

[104]*See* BACHAWAT, *supra* note 87, at 2870.

[105]*See* BACHAWAT, *supra* note 87, at 2869 ["[C]ases which involve a mere procedural formality of the local jurisdiction which even if recognized by Indian courts, would not have resulted in Indian courts setting aside the award had they been in the same position as the court that did, would qualify as cases where Indian courts can exercise their discretion not to enforce the foreign award."].

was on the ground of public policy, and this arises out of the fact that every country sets its own threshold for public policy."[106]

As for rules relating to the recognition and enforcement of foreign judgments in India, the framework is laid out in Section 13 of the Code of Civil Procedure, 1908 ["**CPC**"].[107] Sections 13, considered a substantive law,[108] embodies the rules of conflict of laws concerning the conclusiveness of a foreign judgment sought to be enforced in India.[109] Thus, a court shall not enforce a judgment of a foreign court if it were be found inconclusive under Section 13 on the following grounds, unless:[110]

a. It has not been pronounced by a court of competent jurisdiction
b. It has not been given on the merits of the case;
c. It appears, on the face of the proceedings, to be founded on an incorrect view of international law or a refusal to recognize the law of India in cases in which such law is applicable;
d. The proceedings in which the judgment was obtained are opposed to natural justice;
e. It has been obtained by fraud;
f. It sustains a claim founded on a breach of any law in force in India.

In my opinion, foreign judgments are treated unsympathetically under Section 13 of the CPC, given the mandatory nature ("shall" be conclusive) and the broad scope of exceptions (like sub-section (f) excepting enforcement if "breach of any law in force in India").[111] Given that the statutory standard under Section 13 of the CPC applies to cases of enforcement of foreign judgments, it may be questioned as to whether or not it would also apply when courts are deciding the enforcement of an annulled award and drawing its conclusions about giving recognition to the annulling foreign judgments.

Arguably, the statutory standard under Section 13 would apply only in suit proceedings under Section 44A of the CPC (seeking the enforcement of foreign judgment) but not in an action under Part II of the A&C Act, which is an entirely different enforcement framework with entirely different standards. It may be argued that rules relating to the recognition of foreign judgments, in the context of the

[106] BACHAWAT, *supra* note 87, at 2869.
[107] *See* CODE CIV. PROC. § 2(5) ("foreign court" means a court situate outside India and not established or continued by the authority of the Central Government); CODE CIV. PROC. § 2(6): "foreign judgment" means the judgment of a foreign court. *See also*, Brijlal Ramjidas v. Govindram Gordhandas, (1947) 60 L.W. 701, 702-3.
[108] *See* Raj Rajendra Sardar Moloji Nar Singh Rao Shitole v. Shankar Saran, A.I.R. 1962 S.C. 1737, ¶10 ("The Rules laid down in that section are rules of substantive law and not merely of procedure.").
[109] *See* Smt. Satya v. Shri Teja Singh, (1975) 1 S.C.C. 120, 124 (Supreme Court discussing that Private International Law differs from country to country).
[110] *See* Code Civ. Proc. § 13.
[111] *See* Gracious Timothy Dunna, *Introducing "Public Policy" to Enforcement of Foreign Judgments: Lessons from the Law of Arbitration*, 15(2) TRANSNAT'L DISP. MGMT. (2018).

standard of enforcement of annulled awards, may be derived from common law, which would likely be narrower than Section 13 and more internationally streamlined.

V. CONCLUSION

Section 48(1)(e) of the A&C Act leaves no doubt that the statute aimed to place some standard in considering the enforcement of foreign arbitral awards set aside at the seat of the arbitration. That standard, however, must be carefully drawn by the courts in India. A key feature of arbitration, particularly international arbitration, is the finality and convenience in the enforcement of awards globally. While Indian courts must surely respect foreign annulment decisions, to the extent comity necessitates, a blanket approach of refusing to enforce annulled awards (the territorial approach) would only damage and diminish the value of international commercial arbitration for the lack of a practical and sensible enforcement standard.

Further, Indian courts have clearly held Section 48 of the A&C Act as giving discretion to courts, and such discretion would also apply in matters concerning Section 48(1)(e). This would, by far, make the conflict-of-laws approach most applicable to India and its pro-enforcement policy. It resonates the most.