Evaluation of whether the awards annulled at the seat of arbitration should be enforced in other jurisdictions in the context of juridical theories of arbitration

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The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 can be described as ‘the single most important pillar on which the edifice of international arbitration rests’. However, Article V(1) of the NYC also outlines grounds under which courts ‘may’ refuse such enforcement. The article will focus on Art.V(1)(e). This provision has been exposed to divergent interpretations by national courts which will be analysed in the context of juridical theories of arbitration. Indeed, as recognised by Professor Lew, ‘the attitude of national legal systems towards arbitration and its award depends on the legal nature of arbitration in such systems’.

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I. Introduction

‘The ultimate test of any arbitration proceeding is its ability to render an award which, if necessary, will be recognized and enforced in relevant national courts’. The Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (NYC) has been described as ‘the single most important pillar on which the edifice of international arbitration rests’ for establishing an international framework which allows to enforce awards in its Member States. However, Article V(1) of the NYC (Art.V(1)) also outlines grounds under which courts ‘may’ refuse such enforcement. The article will focus on Art.V(1)(e), which allows for an award that has been annulled in the country of origin to not be enforced in the ‘secondary jurisdiction’. This provision has been exposed to divergent interpretations by national courts ‘despite the adherence of these’ to the NYC. Although attempts to

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4 Wetter (n 1).
7 Rishabh Jogani, ‘The Role Of National Courts In The Post-Arbitral Process: The Possible Issues With Enforcement Of A
enforce such awards ‘occur rather infrequently’, the discrepancies in attitudes amongst various jurisdictions on their enforcement attracts considerable attention. As recognised by Professor Lew, the ‘growing uncertainty over the international framework governing’ the enforcement of annulled awards depends on the ‘the attitude of national legal systems towards arbitration and on the legal nature of arbitration in such systems’. Hence, these divergent interpretations are best analysed in the context of juridical theories of arbitration. In particular, the article will compare the “transnational approach” of the delocalised theories with the more “territorial approach” culminating in the modern seat theory.

Firstly, the delocalised approach to the interpretation of Art.V(1) will be outlined with the main emphasis being on the French legal system. Secondly, theoretical and practical limitations of the delocalised interpretation will be highlighted, showing its indisputable incompatibility with


10 Onyema (n 2) 4.

11 Yeo (n 9) 94.
the NYC. Thirdly, the territorial approach will be outlined. It will be argued that although it stemmed from the strict seat theory, it has now evolved into a more flexible doctrine that has been successfully applied across the globe. Lastly, a policy proposal for a reform of the NYC will be outlines. The article will argue that, whilst annulment of awards at the seat of arbitration should not be categorically seen as a bar to their enforcement in other jurisdictions, the role of national courts in recognising and enforcing annulled awards should be restricted for the purposes of legal certainty and further evolution of arbitration.

II. Delocalised Approach

The delocalised theory holds ‘that awards are not integrated into the legal order of the seat’ and hence,\(^\text{12}\) ‘an enforcing court is free to ignore the decisions of the court at the seat of arbitration’.\(^\text{13}\) Indeed, Gaillard argues that following the development of supra-national arbitration, only the enforcing courts should maintain control over the recognition and enforcement of awards.\(^\text{14}\) In furtherance of this view,

\(^{12}\) ibid.


Paulsson, ‘a notable advocate for the delocalisation theory’,\(^\text{15}\) offers two avenues under which annulled awards at the seat can be enforced in other jurisdiction, arguing that the ‘core objective of the NYC’ is to ‘free the international arbitral process from domination by the law of the place of arbitration’.\(^\text{16}\) Firstly, discretion granted by the permissive ‘may’ under Art.V(1)(e) can be used to apply Art.VII, which allows for the enforcement of annulled awards at the seat by applying more favourable domestic law; secondly, even when Art.VII is unavailable, Art.V(1)(e) can be sidestepped where the award was annulled at the seat under the ‘Local Standards Annulment’ (LSA) instead of the ‘International Standard Annulment’ (ISA).\(^\text{17}\) The latter argument is largely based on the ‘Study on the NY Convention’ prepared by the UNCITRAL Secretariat, where it is noted that ‘particular local circumstances’ might have undesirable effects on the enforcement courts.\(^\text{18}\)

‘Influenced by the liberal concept of the delocalisation theory’, France has substantially relaxed its attitude towards regulating arbitration, resulting in the provisions of the French Code of Civil Procedure 1981 being stripped of all the terminology localising arbitration and pioneering the concept


\(^{16}\) Paulsson (n 6) 8.

\(^{17}\) ibid.

\(^{18}\) ibid 26.
of autonomous legal order. Unlike most jurisdiction, this allowed France to have a ‘comparable legislative framework’ to that of the NYC, since ‘annulment in the country of origin is not amongst the reasons for refusing enforcement’ under French national law. As a result, French courts held that an ‘enforcement forum has a duty’ to apply its own favourable law under Art.VII irrespective of the annulment in the country of origin. The truly transnational approach can be seen from the decision of the French Cour de Cassation in *Hilmarton Ltd v. Omnium de traitement et de valorisation* (1984). There, under Art.VII, the court, enforcing an award which had been set aside at the seat in Switzerland, held that such an award is ‘not integrated in the legal system of that state so it remains in existence even if set aside and its recognition in France is not contrary to international public policy’. This approach was subsequently reaffirmed in *Société PT Putrabali Adyamulia v Société Rena Holding* (2007), where the French courts enforced an annulled award at the seat by holding that

20 Lazić-Smoljanić (n 8) 218.
22 *Omnium de Traitement et de Valorisation SA v Hilmarton Ltd* [1999] 2 All ER (Comm) 146.
'a foreign arbitral award is not anchored to any national order' and that ‘it was for the enforcing court to decide which rules are applicable in relation to enforcement’.\textsuperscript{25}

\section*{i. Delocalised Limitations}

The delocalised approach, seeking ‘to put the enforcing court at the heart of annulled awards for self-preserving reasons is self-defeating’ since it fails to promote ‘consistency, international comity or party autonomy’.\textsuperscript{26}

\subsection*{A. Limitations of Art V}

Paulsson’s first avenue, adopting a permissive interpretation of Art.V(1)(e) with complete disregard of the annulment at the seat of arbitration is unconvincing.\textsuperscript{27} Neither the \textit{travaux préparatoires}, nor the Art.30(4) of the Vienna Convention offer any support for this interpretation.\textsuperscript{28} Additionally, ‘in the more than 1500 published decisions, not one court has applied the residual discretionary power’ to enforce an award annulled at the seat of arbitration.\textsuperscript{29} Lastly, irrespective of several national courts having resorted to the ‘“residual discretionary power” in allowing enforcement despite the

\begin{footnotesize}
\begin{enumerate}
\item Seriki (n 23) 11.
\item ibid 2.
\item Paulsson (n 6).
\item Albert Jan Van den Berg, ‘Enforcement of Arbitral Awards Annulled in Russia Case Comment on Court of Appeal of Amsterdam’ (2010) 27(2) Journal of International Arbitration 179.
\item ibid 187.
\end{enumerate}
\end{footnotesize}
fact that a ground for refusal of enforcement has been advanced and proven', the overwhelming majority of courts considers ‘the erga omnes effect of annulment’ as a prerequisite of arbitration, further derailing Paulson’s first avenue.

Paulsson’s second avenue, rejecting the LSA’s as an appropriate standard of annulment seems to contradict the NYC, which ‘specifies no additional conditions for the setting aside of an arbitral award in the country of origin as a ground for refusal of enforcement’. Even the UNCITRAL Model Law (Model Law) is not uniform on this matter, giving States ‘liberty to deviate’ in this respect. This was confirmed by the interpretation of Art.V(1) by the US Court of Appeals in Yusuf Ahmed Alghanim & Sons v. Toys “R” Us (1997). There, it was held that, whilst under Art.V(1) the supervisory court ‘is free to set aside an award in accordance with its domestic arbitral law and its full panoply of express and implied grounds for relief’, the enforcement courts ‘may refuse to enforce the award only on the grounds explicitly set

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30 ibid 185.
31 ibid 182.
32 Paulsson (n 6).
35 Van den Berg (n 33) 6.
forth in Article V’.\textsuperscript{37} The relevance of LSA was further reinforced by Hamblen J in \textit{Yukos Capital v OJSC Rosneft Oil Company} (2011), where he held that ‘It is not relevant that a foreign court system applies different rules of evidence (…). Nor does it matter that the foreign court has a different procedure from the English courts unless this deprives the judicial process of the quality of substantial justice’.\textsuperscript{38} Moreover, the \textit{travaux préparatoires} of the NYC mention no such conditions and even if it did, considering wide adherence to the Model Law by different jurisdictions, their decisions would automatically bear the ISA’s ‘seal of approval’.\textsuperscript{39}

\textbf{B. Legal Uncertainty}

The delocalised approach to interpreting Art.V does little to promote the finality of arbitral awards; rather, it encourages forum-shopping that leads to legal uncertainty. Once an award has been annulled at the seat, ‘a party should not be entitled to shop around until it finds a venue which will enforce the award’,\textsuperscript{40} placing a disproportional burden on the award debtor to ‘establish integrity’ of the annulled award in every enforcing jurisdiction.\textsuperscript{41} CJ Menon also noted that by disregarding the decisions of the court at the seat, ‘the

\textsuperscript{37} ibid.

\textsuperscript{38} \textit{Yukos Capital v OJSC Rosneft Oil Company} [2011] EWHC 1461 [67].

\textsuperscript{39} Van den Berg (n 28) 189.

\textsuperscript{40} Tweeddale (n 13) 138.

\textsuperscript{41} Yeo SC (n 9) 94.
functioning of arbitration as an international system’ is undermined since the value of finality of an arbitral award is lost.\textsuperscript{42} Indeed, one of the main advantages of arbitration is the fact that the award is final and binding, and ‘it will not [as opposed to litigation] be the first step on a ladder of appeals’.\textsuperscript{43} Moreover, enforcing courts should not ‘seek to ascribe a role (...) that is not contemplated by either the NYC or the parties in their arbitration agreement’.\textsuperscript{44} They are not courts of appeal deciding on the validity of awards on their merits, but rather forums ensuring compliance with awards. Hence, if they start were to start examining the LSAs grounds of awards at the places of origin, there is a great risk of ‘re-litigating a dispute which has already been conclusively decided’ and going against the issue estoppel.\textsuperscript{45}

The importance of the doctrine of issue estoppel has been highlighted by the English court in \textit{Chantiers de L’Atlatique SA v Gaztransport & Technigaz SAS} (2011), where Flaux J held that, because the issue of fraud had been raised by CAT before the French courts, it was ‘barred by issue estoppel from raising those allegations’ again.\textsuperscript{46} However, the Amsterdam Court of Appeal in \textit{Yukos Capital s.a.r.l. v OAO Rosneft} (2009) seems to have disregarded this

\begin{itemize}
\item \textsuperscript{42} \textit{ibid.}
\item \textsuperscript{43} Alan Redfern, Martin Hunter, \textit{On international commercial arbitration} (Student Version, 6\textsuperscript{th} edn, OUP 2015) 29.
\item \textsuperscript{44} Seriki (n 23) 2.
\item \textsuperscript{45} Yeo SC (n 9) 101.
\item \textsuperscript{46} \textit{Chantiers de L’Atlatique SA v Gaztransport & Technigaz SAS} [2011] EWHC 3383 (Comm) [313].
\end{itemize}
doctrine arguing that ‘reliance on the NYC depended on whether or not a decision on the annulment in the country of origin could be recognised in the Netherlands’.\textsuperscript{47} Albeit the fact that the Netherlands does not have a legislative framework comparable to that of the NYC and that the NYC explicitly states that the court ‘may refuse to enforce the award only on the grounds explicitly set forth in the Art.V’,\textsuperscript{48} Dutch general private international law was applied in refusing to recognise annulment by the Russian Courts.\textsuperscript{49} Considering that the enforcement of annulled awards was consequently rejected by the District Court in Hague in 2016, ‘it is questionable whether it was appropriate to apply the “commune recht” with respect to the recognition of foreign judgements annulling an arbitral award’.\textsuperscript{50}

\textit{C. Party Autonomy}

Paulsson and Gaillard both noted that ‘the seat of arbitration is chosen for little more than the sake of convenience’.\textsuperscript{51} Similarly, in \textit{Putrabali}, the French court stated that arbitration is ought to be controlled by the enforcing court.\textsuperscript{52} However, Lord Mance highlighted that ‘empirical evidence suggesting that the choice of the seat is usually the result of a careful consideration of the legal consequences and not merely a

\begin{thebibliography}{99}
\setlength{\itemsep}{0pt}
\bibitem{47} Lazić-Smoljanić (n 8) 228.
\bibitem{48} Van den Berg (n 28) 180.
\bibitem{49} Lazić-Smoljanić (n 8) 226.
\bibitem{50} ibid 228.
\bibitem{51} Gaillard (n 14) 18.
\bibitem{52} Putrabali Adyamulia (n 24).
\end{thebibliography}
matter of convenience’.\textsuperscript{53} Hence, the French ‘nationalistic approach’, disregarding the parties’ choice by ignoring the decision at the seat, would undermine the concept of party autonomy, which is the ‘leitmotif of arbitration’ for territorialists and delocalists alike.\textsuperscript{54} Indeed, this approach also fails to acknowledge the primacy of the arbitration agreement,\textsuperscript{55} ultimately disregarding the contractual nature of arbitration.\textsuperscript{56} As noted by Burton J in \textit{Nikolay Viktorovich Maximov v Open Joint Stock Company ”Novolipetsky Metallurgichesky Kombinat”} (2017), when choosing a particular seat, the parties expressly or impliedly accept that such factors as ‘favouritism on the part of the Russian courts is at the least a real risk’ and should be bound by their decision.\textsuperscript{57}

Since an enforcing court is not necessarily chosen by the parties expressly, but rather by tracking the assets of the arbitration debtor, ‘allowing enforcement courts to appeal to vaguely defined domestic normative values (...) materially alters the bargain between the parties and introduces a significant unstable variable into the arbitral process’, which

\textsuperscript{54} Yeo SC (n 9) 93.
\textsuperscript{55} Seriki (n 23) 12.
\textsuperscript{56} Yu H-l (n 19) 6.
\textsuperscript{57} Nikolay Viktorovich Maximov v Open Joint Stock Company ”Novolipetsky Metallurgichesky Kombinat” [2017] EWHC 1911 [12].
the parties have not contracted for. Ultimately, this would also lead to undesirable discrepancies, conflicting with the ‘uniform treatment of arbitral awards envisioned by the drafters of the NYC’. 

ii. Delocalisation Dismissed

Paulsson’s argument that Art.VII allows to ‘enforce an award without heed to its annulment elsewhere’ seems to be unfeasible in the light of the above limitations. Moreover, considering the fact that there are over one hundred jurisdictions which have implemented Model Law and over thirty signatories to the European Convention on International Commercial Arbitration of 1961, both of which practically mirror Art.V(1), the application of Art.VII appears to be further restricted. Moreover, stating that reliance on Art.VII allows the courts to fulfil the “core objective of the NYC”, subjects arbitral awards to the law of the place of enforcement since the so-called “international justice” is controlled by the enforcing court’s arbitration law. In fact, ‘the comments of the French courts in Hilmarton and Putrabali suggest judicial protectionism’ rather than the promotion of

59 Van den Berg (n 28) 191.
60 Paulsson (n 6) 23.
61 Redfern (n 43).
62 Van den Berg (n 28).
an autonomous, international and uniform arbitral system.63 This approach disregards NYC’s international reach by “anchoring” awards to the seat of enforcement, which is unfounded under the NYC and contradicts the fundamental principle of ‘free-floating transnational legal order’ promulgated by delocalist’s themselves.64

Moreover, the delocalist interpretation of the interplay between Art.V(1) and Art.VII contributes to judicial confusion and consequent misapplication of the law. This can be seen from the US District Court of Columbia decision in Chromalloy, where the question of enforcement of an award annulled by the Court of Appeal in Cairo was raised.65 By following the French approach, the court has effectively applied the provision on vacating awards ‘rendered in the US’ in the case of enforcement of an award rendered in Cairo.66 Hence, the ground for enforcement proposed by the Court was ‘not the public policy that is applied within the framework of recognition of foreign court judgements’, but the domestic one.67 American courts have subsequently departed from this decision, proving that delocalist interpretation invites for judicial confusion.

63 Seriki (n 23) 679.
65 Chromalloy Aeroservices (n 21).
66 Lazić-Smoljanić (n 8) 220.
67 Van den Berg (n 28) 193.
III. Territorial Approach

One of the most influential proponents of the territorial approach, Van den Berg, links arbitral awards to the seat of arbitration by applying the principle of *ex nihlo nil fit.*68 It states that once an award has been annulled at the country of origin, it becomes unenforceable everywhere else since ‘the award derives its legal validity under the law of the seat’.69 Schwartz also suggested that where an award has been set aside at the seat, the enforcing court simply has to give effect to that decision.70 This is linked to the idea that, whilst refusal of enforcement has only territorial effect, annulment of an award, for the purposes of legal certainty, has an *erga omnes* effect.71 This was the reasoning in *OLG Rostock* (1999), where it was held that ‘[a]n award is no longer binding when it has been set aside by a competent court’ and that the annulled award ‘must be recognized without examining whether it would be recognizable according to the standards for (…) foreign decision’.72 Similarly, courts in Singapore seem to apply a strictly territorial approach.73 The Singapore’s Court of Appeal obiter remarks suggest that, whilst the enforcing

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68 ibid.
69 Jogani (n 7) 4.
71 Van den Berg (n 28) p.182.
73 Yeo SC (n 9).
court has discretion to administer any award, the ‘erga omnes’
effect of a successful application to set aside an award would
generally lead to the conclusion that there is simply no award
to enforce’.74 Italy even went as far as to codify the territorial
approach ‘pursuant to Art.840(5) of the Italian Code of Civil
Procedure’.75

Although Professor Sanders, ‘one of the principal drafters’ of
the NYC,76 noted that ‘enforcing a non-existing arbitral
award would be an impossibility’, such awards can still be
enforced without removing awards from the seat.77 Realizing
that Sanders’ ‘abstract vision simply does not correspond to
contemporary commercial reality’,78 a modern territorial
approach allows for a few exceptions.79 The grounds and
criteria under which enforcement of the annulled awards is
justified within the territorial framework can be seen from
the developed jurisprudence on the matter.

74 PT First Media TBK (formerly known as PT Broadband Multimedia
TBK) v Astro Nusantara International BV and others and another
75 Yeo SC (n 9) 96.
76 ibid 93.
77 Peter Sanders, ‘New York Convention on the Recognition and
Enforcement of Foreign Arbitral Awards’ (1959) 6(1)
Netherlands International Law Review 55.
78 Paulsson (n 6) 12.
79 Van den Berg (n 33).
i. English Interpretation

English courts have always operated under the premise that arbitration must be rooted in the law of the seat, rejecting the notion of ‘delocalised arbitration’. In *Yukos Capital Sàrl v OJSC Rosneft Oil Co* (2014), Simon J narrowly construed the permissive ‘may’ under Art.V(1)(e), but also noted that English courts were not bound to recognise a decision of the court of the seat that offended the basic principles of ‘honesty, natural justice and domestic concept of public policy’. Similarly, in *Malicorp Ltd v Government of Arab Republic of Egypt* (2015), in deciding on whether to enforce an award that had been annulled at the seat in Egypt, Walker J established a high threshold for enforcement. He noted that, whilst the enforcing court has a discretion to enforce such an award, the evidence provided must be ‘cogent’ enough to substantiate enforcement. Lastly, in *Maximov*, Burton J consolidated previous case-law, establishing the coherent grounds for the courts’ when making a determination on the enforcement of annulled awards. Firstly, ‘the fact that a foreign court decision is manifestly wrong or is perverse is not sufficient’; secondly, ‘the evidence or grounds must be

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80 Seriki (n 25) 4.
81 Yukos (n 38) [20].
83 ibid [26].
84 *Nikolay* (n 57).
cogent’; thirdly, ‘the decision of the foreign court must be deliberately wrong, not simply wrong by incompetence’.\textsuperscript{85}

### ii. American Interpretation

Moving away from the Chromalloy decision,\textsuperscript{86} ‘American law has evolved in a similar direction, respecting annulment except upon a showing of irregularity by the vacating court’.\textsuperscript{87} In Termorio SA ESP v Electranta SP (2007), the court refused enforcement of an award that had been annulled in Bogota, since no ‘extraordinary reasons’ for its enforcement were established.\textsuperscript{88} Through narrow interpretation of Art.V(1)(e), the court introduced ‘violation of basic notion of justice’ as a threshold for the enforcement of annulled awards.\textsuperscript{89} This decision was then applied in Getma International v Republic of Guinea (2016),\textsuperscript{90} where the court confined discretion to enforce an annulled award when not doing so ‘would be repugnant to the most fundamental notions of morality and justice in the US’.\textsuperscript{91} The TermoRio rationale was rightly applied in Commisa v Pemex-Exploracion (2016), where enforcement of an annulled award was allowed on the basis that the application of retrospective law by

\textsuperscript{85} ibid [15].
\textsuperscript{86} Chromalloy Aeroservices (n 21).
\textsuperscript{87} Park (n 65) 12.
\textsuperscript{88} Termorio SA ESP v Electranta SP 487 F. 3d 928 (D.C Cir. 2007).
\textsuperscript{89} ibid.
\textsuperscript{91} Seriki (n 23) 12.
Mexican courts offended ‘basic standards of justice in the US’.\(^9^2\) Importantly, the Court noted that the public policy exception ‘should not swallow up the rule’ and should only be ‘infrequently met’ by the enforcing courts.\(^9^3\)

### iii. Global Trend

Surprisingly, similar territorial leanings have been recently adopted by the courts in Belgium, where Yukos shareholders were forbidden to seize the property of the Russian state entity, on the grounds that ‘given the annulment by the Dutch District Court in The Hague of the arbitral awards, those cases, in essence, do not form a valid legal ground for enforcement’.\(^9^4\) This judgment is particularly interesting considering the fact that in 1985, Belgium had amended article 1717 of the Civil Code ‘so as to exclude the jurisdiction of Belgian courts to entertain applications for the annulment of awards rendered in Belgium’ and reinforce the transnational nature of arbitration, appearing more arbitration-friendly.\(^9^5\) Although this provision has since been amended, the U-turn of the courts’ attitude towards the role of seat is significant. Similar “change of hearts” occurred

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\(^9^3\) ibid.


\(^9^5\) Paulsson (n 6) 21.
within Hong Kong courts. Notwithstanding the fact that they have often interpreted Art.V(1) as giving ‘residual discretionary power to allow enforcement despite the fact that a ground for refusal had been advanced and proved’, the Hong Kong Court of Appeal in *PT First Media* departed from such interpretation. Hence the enforcement of an award annulled at the seat was rejected.

All of the above examples show a trend of the courts across Europe, Asia and America engaging in a modern territorial approach when dealing with arbitral awards annulled at the country of origin. The narrow interpretation of Art.V(1)(e) suggests that refusal to recognise such awards ‘on the grounds of fraud or breach of natural justice and public policy, is the exception rather than the norm’. This ultimately reaffirms the ‘generally accepted principle’ that for the purposes of an orderly administration of justice, the territorial approach to arbitral awards is desirable.

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96 Van den Berg (n 28) 186.
97 *PT First Media TBK* (n 74).
99 Yeo (n 9) 103.
100 ibid.
IV. Policy Proposal

‘The most effective method of creating a ‘universal’ system of law governing international arbitration has been through international conventions’ and the Model Law.101 These international instruments help to link diverging national legal systems and ‘centripetally’ direct them towards uniformity in the enforcement of arbitral awards.102 Despite the fact that the NYC could perhaps ‘claim to be the most effective instance of international legislation in the entire history of commercial law’, this should not prevent its modernisation.103 The NYC ‘was made for a simpler, less ‘globalised’, world’ and now ‘shows its age’.104 In this context, Art.V(1) appears to be ‘outdated’ and ‘incomplete’, ‘failing to harmonise the grounds for setting aside awards’.105 Firstly, neither its language, nor its legislative history ‘provide any definitive answer to the priority between the two systems of State control’.106 Secondly, its permissive wording fails to establish when the enforcement of an annulled award is appropriate. Respectively, in order to

101 Redfern (n 43) 59.
103 Paulsson (n 6) 9.
104 Redfern (n 43) 61.
safeguard the legitimacy of arbitration, consensus on these matters is not only desirable but is also inevitable.

As can be seen from the decisions in *Maximov* and *TermoRio*, the modern territorial approach has established a high threshold for the enforcement of annulled awards, under which supervisory courts ultimately retain control over the arbitral process, whilst the enforcing courts exercise discretion in their territory. However, in exercising this discretion under Art.V(1), they only enforce an award annulled at the seat in limited circumstances and with the availability of ‘cogent evidence’. Whilst balancing the roles of these courts, the modern territorial approach also encourages the parties to make an informed decision when choosing the seat, emphasising the importance of party autonomy and contractual nature of arbitration. The new draft of the NYC promulgated by Albert Jan Van Den Berg is in conformity with this practice. Under his draft, ‘the courts must refuse enforcement of an award which has been annulled in its state of origin, provided that the annulment was made on the basis of one of the grounds listed in the Convention’. This proposal strikes the right balance between ‘standardising procedure’ and providing flexibility

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107 *Nikolay* (n 57); *Termorio* (n 88).
108 ibid.
109 Van den Berg (n 33).
110 ibid.
for the enforcement court ‘to reject an annulment made on spurious grounds’ and should be formalised.\textsuperscript{111}

V. Conclusion

The issue of the enforceability of awards annulled at their seat is a ‘complex question which depends on the approach of the particular court that hears the matter’.\textsuperscript{112} The article has argued that international awards should be recognised and enforced internationally, rather than being restricted to the domestic laws of the court of the seat. However, for the purposes of ‘maintaining coherence in its jurisprudence and confidence in its efficacy as a dispute-resolution mechanism’, the grounds for the enforcement of awards annulled at the seat of arbitration must be limited.\textsuperscript{113} ‘One of the advantages of arbitration is finality’, hence, ‘unless there are compelling reasons that the decision should not be respected by the enforcing court’, decisions of the court of the seat should be


\textsuperscript{113} Lord Mance (n 53) 1.
treated as final and binding.\textsuperscript{114} Examples of such compelling reasons are the retrospective application of the law\textsuperscript{115} and the refusal to appoint a neutral tribunal,\textsuperscript{116} since these ‘offend the fundamental principles of public policy and natural justice’.\textsuperscript{117} Local formalities of national courts are bound to be involved in the enforcement process since ‘private dispute resolution is no longer a private matter, it is one that affects the public good’.\textsuperscript{118} However, the delocalised formula established in \textit{Hilmarton} and maintained in subsequent French decisions, rendering Art.V(1) practically redundant, is undesirable.

What is indeed desirable is a reform of the NYC, which will reinforce the ‘system of dual judicial control by sovereign nations, first at the place of arbitration and subsequently at the place of enforcement of the award’, as was intended by the drafters of the NYC.\textsuperscript{119} ‘General acceptance of uniform principles and practices’, removed from the undesirable delocalised approach, ‘will increase the efficiency of arbitration and thereby enhance its commercial utility’.\textsuperscript{120} Indeed such grounds have been successfully established by

\begin{itemize}
  \item \textsuperscript{114} Seriki (n 43) 4.
  \item \textsuperscript{115} Corporación Mexicana (n 92).
  \item \textsuperscript{116} \textit{Telecordia Tech. Inc. v. Telkom SA Ltd.}, 458 F. 3d 172 (3rd Cir. 2006).
  \item \textsuperscript{117} Van den Berg (n 33).
  \item \textsuperscript{118} Van den Berg (n 28) 3.
  \item \textsuperscript{119} Chan (n 106) 146.
  \item \textsuperscript{120} Holtzmann (n 102) 2.
\end{itemize}
the ‘pragmatic approach of the English and the US courts’,\textsuperscript{121} which now need to be formalised under the NYC reform.

\textsuperscript{121} Seriki H (n 43) 14.
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