

## Forum Shopping and Post-Award Judgments

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### I. INTRODUCTION

The forum shopping theme comes into play in multiple ways in the context of post-award judgments. Post-award judgments can take several forms, depending on whether the award is set aside,<sup>1</sup> confirmed, recognized or enforced. Creative parties may forum shop for a set-aside, confirmation, recognition or enforcement judgment and seek to rely on its effects in subsequent proceedings relating to the same award in another country. The courts in that other country will have to assess the effects they give to the foreign post-award judgment. This paper examines how courts respond to such forum shopping attempts. It assesses whether a decision to set aside, confirm, recognize or enforce an arbitral award might affect subsequent attempts to recognize or enforce that award elsewhere.

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<sup>1</sup> As a matter of terminology, we use the term to “set aside” or to “annul” an award when referring to proceedings nullifying an award before the national courts of the seat of the arbitration. The term “set aside” is found in Article V(1)(e) of the New York Convention. Convention on the Recognition and Enforcement of Foreign Arbitral Awards art. V, June 10, 1958, 21 U.S.T. 2517, 33 U.S.T.S. 4739 [hereinafter New York Convention]; in some jurisdictions, such as the United States, the terminology may be to “vacate” an award. See Federal Arbitration Act, 9 U.S.C. § 10 (2002). Note that Article V(1)(e) refers both to the country “in which” or “under the law of which” the award was made, in identifying the place for set-aside that will justify non-recognition of an award. References in the paper to annulment at the “seat” or “place of arbitration” should be understood to include the rare situation where a different *lex arbitri* is chosen by the parties.

Part II of the paper considers the most straightforward issue of all: what is the role of a court requested to recognize and enforce an award that has been set aside at the seat of arbitration? Should it enforce the award and ignore the judgment of the foreign court? Or should it respect the decision of the foreign court and refuse to enforce the award? Additionally, what criteria should be used by a court in making its decision? The paper offers a tentative hypothesis that a “judgment route”—that is, the use of foreign judgment principles—should be invoked by a national court to assess whether or not to give effect to a foreign set-aside.

In Part III of the paper, this paper goes on to consider whether such judgment principles have application to other post-award judgments, such as judgments confirming (or refusing to set aside) an award and judgments recognizing and enforcing a foreign award. The paper concludes and explains that the judgment recognition framework does not have application outside the “set-aside” context. Unlike a judgment setting aside an award, which is expressly included as an exception to recognition and enforcement in Article V(1)(e) of the New York Convention, other post-award judgments are not referred to in the Convention as possible exceptions to recognition and enforcement.

## II. FORUM SHOPPING AND THE APPROACH TO SET-ASIDES

Although the Convention provides grounds for exceptions to recognition and enforcement of an arbitral award,<sup>2</sup> it says nothing about the grounds for review or set-aside at the place of arbitration. Thus, each country establishes its own regime for reviewing and/or annulling awards rendered in that country. It is therefore not surprising to learn that informed parties and their counsels are likely to take into account the legal regime with respect to set aside when they select the *situs* for the arbitration. A 2006 study offered some evidence that the legal regime (including the extent to which awards are challenged at the seat) was the single most important criterion for a corporation in selecting the *situs* for arbitration.<sup>3</sup> A later 2010 study also found that the

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<sup>2</sup> New York Convention, *supra* note 1.

<sup>3</sup> See PRICEWATERHOUSECOOPERS & QUEEN MARY UNIV. OF LONDON, INTERNATIONAL ARBITRATION: CORPORATE ATTITUDES AND PRACTICES 13–14 (2006),

formal legal infrastructure, including the approach to annulment, was the most influential factor in the choice of a seat.<sup>4</sup>

Of course, a robust set-aside regime might be of greatest concern if other New York Convention States were required to refuse recognition or enforcement of an award that had been set aside at the *situs*. But that is not the case. The Convention compels recognition and enforcement of arbitral awards, but provides for certain exceptions; and Article V(1)(e) is one of the grounds on which recognition and enforcement “may be refused” at the request of the party against whom it is invoked.<sup>5</sup> Its parameters are that “the award has not yet become binding on the parties, or has been set aside, suspended by a competent authority of the country in which, or under the law of which, that award was made.”<sup>6</sup> However, as underscored by the permissive language, there is no obligation to refuse recognition or enforcement, and a country is nonetheless free to enforce an award that is set aside in the country where the award is rendered.

Leaving aside for the moment that the “permissive language” extends to all of the Article V grounds, at least as understood in the English version of the Convention,<sup>7</sup> there is a good reason for permitting a recognizing court to evaluate the annulment. Set-aside itself permits a check on the arbitral process in the place of arbitration. In addition, although a number of countries prefer the approach of the Model Law to harmonize the grounds for set-aside and recognition, several others have different views as to how interventionist courts should be in supervis-

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available at [http://www.pwc.be/en\\_BE/be/publications/ia-study-pwc-06.pdf](http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf).

<sup>4</sup> See WHITE & CASE & QUEEN MARY UNIVERSITY OF LONDON, 2010 INTERNATIONAL ARBITRATION SURVEY: CHOICES IN INTERNATIONAL ARBITRATION 18 (2010), available at [http://www.whitecase.com/files/upload/fileRepository/2010International\\_Arbitration\\_Survey\\_Choices\\_in\\_International\\_Arbitration.pdf](http://www.whitecase.com/files/upload/fileRepository/2010International_Arbitration_Survey_Choices_in_International_Arbitration.pdf).

<sup>5</sup> New York Convention, *supra* note 1, art. V(1)(e).

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Matter of Arbitration Between Chromalloy Aeroservices, a Div. of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907, 909 n.2 (D.D.C. 1996); cf. Emmanuel Gaillard, *The Enforcement of Awards Set Aside in the Country of Origin*, 14 ICSID REV. 16, 32–33 (1999).

ing arbitration in their jurisdiction,<sup>8</sup> and the Convention does not limit that autonomy.

The question is then raised as to how countries that are party to the New York Convention should respond to a set-aside at the seat of arbitration. On one view, an award that is set aside is not an award at all and thus there is no award to recognize or enforce (“*Ex nihilo nil fit*”).<sup>9</sup> Arbitration is perceived as an extension of the legal regime of the country in which the arbitration takes place, and therefore the courts’ oversight of the arbitration should be conclusive. Moreover, proponents of this view consider that parties have consciously chosen to arbitrate at a particular place and should therefore understand possible exposure to a set-aside. Accordingly, in countries following such a view, courts generally refuse to recognize or enforce an award set aside at the seat of the arbitration.

A series of recent decisions in Russia, represented by the case *Ciments Français v. Sibirskiy Cement*, deal with these issues.<sup>10</sup> An award made in Turkey in favor of *Ciments Français* was set aside by the Turkish court on grounds that the arbitrators had failed to address certain arguments, and that the award violated the Turkish *ordre public*.<sup>11</sup> Notwithstanding the set-aside, on application of *Ciments Français*, the Arbitrazh Court of Kemerovo Region recognized the award.<sup>12</sup> A year later, the Supreme

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<sup>8</sup> See, e.g., English Arbitration Act, 1996, c.23, § 103 (Eng.), available at <http://www.legislation.gov.uk/ukpga/1996/23/part/III/crossheading/recognition-and-enforcement-of-new-york-convention-awards>.

<sup>9</sup> See generally Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia*, 27(2) J. INT’L ARB 179 (2010); see also Alan Scott Rau, *Understanding (and Misunderstanding) “Primary Jurisdiction,”* 21 AM. REV. INT’L ARB 47 (2010).

<sup>10</sup> *Ciments Français v. Sibirskiy Cement*, Vysshii Arbitrazhnyi Sud RF [Highest Arbitration Court of the Russian Federation], Aug. 27, 2012, VESTNIK VYSSHEGO ARBITRAZHNOGO SUDA RF [VESTN. VAS] 2012, No. 17458/11 (Russ.). See also Elvira R. Gadelshina, *Ciments Français: Russian Putabali No More*, KLUWER ARB. BLOG (Mar. 22, 2012), available at <http://kluwerarbitrationblog.com/blog/2012/03/22/ciments-francais-russian-putrabali-no-more/>.

<sup>11</sup> *Ciments Français*, VESTN. VAS 2012, No. 17458/11, p. 11 (Russ.).

<sup>12</sup> *Ciments Français v. Sibirskiy Cement*, Arbitrazh Court of Kemerovo [Arbitration Court of Kemerovo], July 20, 2011 (Russ.), XXXVI Y.B. COM. ARB. 325,

Arbitrazh Court reversed and denied recognition to the award, holding that recognition of a foreign arbitral award at odds with a national court decision is contrary to domestic public order.<sup>13</sup>

In Germany, courts view the award as inextricably linked to the judicial regime of the seat of the arbitration.<sup>14</sup> In determining whether to enforce an award, German courts look to the award's status in the country where it was made, without engaging in scrutiny of the annulment decision itself.<sup>15</sup> German law even goes so far as to provide that a court may reverse its earlier decision to enforce an award if it is subsequently set aside at its *situs*.<sup>16</sup> A 1999 German case is illustrative. A German Higher Regional Court refused to enforce an award set aside in Russia;<sup>17</sup> however,

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325 (2011). The decision to enforce was based partially on Article IX(2) of the European Convention on International Commercial Arbitration of 1961, Apr. 21, 1961, 484 U.N.T.S. 364, No. 7041 (1963–1964) [hereinafter *European Convention*]. Article IX(2) provides that an award set aside will only be relevant if the reason for set-aside is one in the list of reasons set forth in Article IX(1) of said Convention. See Mike McClure, *An Unlikely Mix—the Russian Courts, a French Cement Company, and the 1961 European Convention on International Commercial Arbitration*, KLUWER ARB. BLOG (Sept. 28, 2011), available at <http://kluwerarbitrationblog.com/blog/2011/09/28/genevaconventio/>.

<sup>13</sup> *Ciments Français*, VESTN. VAS 2012, No. 17458/11 (Russ.). However, the Russian national court decision on which the Supreme Arbitrazh Court based its reasoning has subsequently been reversed and the effects of this reversal on the non-recognition of the Turkish award remain to be assessed.

<sup>14</sup> See Erica Smith, *Vacated Arbitral Awards: Recognition and Enforcement Outside the Country of Origin*, 20 B.U. INT'L L.J. 355, 363–64 (2002); see also DANA FREYER, *The Enforcement of Awards Affected by Judicial Orders of Annulment at the Place of Arbitration*, in ENFORCEMENT OF ARBITRATION AGREEMENTS AND INTERNATIONAL ARBITRAL AWARDS—THE NEW YORK CONVENTION IN PRACTICE 757, 785 (E. Gaillard/D. Di Pietro eds., 2008).

<sup>15</sup> FREYER, *supra* note 14, at 784–85; Günther J. Horvath, *What Weight should be Given to the Annulment of an Award under the Lex Arbitri? The Austrian and German Perspectives*, 27 J. INT'L ARB. 249, 259–66 (2009).

<sup>16</sup> Horvath, *supra* note 15, at 259–66; ZIVILPROZESSORDNUNG [ZPO] [CODE OF CIVIL PROCEDURE], Dec. 5, 2005, § 1061(3) (Ger.). An English translation of the law was done by Samson-Übersetzungen GmbH, Dr. Carmen von Schoning (2012), available at [http://www.gesetze-im-internet.de/englisch\\_zpo/englisch\\_ch\\_zpo.html](http://www.gesetze-im-internet.de/englisch_zpo/englisch_ch_zpo.html).

<sup>17</sup> Oberlandesgericht [OLG] [Higher Regional Court] Oct. 28, 1999 (Ger.),

when the highest Russian court subsequently overturned the annulment decision and confirmed the award, the German Federal Supreme Court followed suit and reversed its decision, deeming the award enforceable.<sup>18</sup>

A recent decision of the Supreme Court of Chile offers an even more extreme view. In *EDF Internacional S. A. v. Endesa Internacional S. A. and YPF S. A.*, the Court held that it would not recognize or enforce an award annulled in Argentina.<sup>19</sup> The Court relied upon Article 246 of the Chilean Code of Civil Procedure, which provides that the authenticity and effectiveness of an award “shall be proven by its approval by a superior court of the seat of arbitration.”<sup>20</sup> The language suggests that the Court is adopting a double exequatur requirement that was expressly rejected in the New York Convention,<sup>21</sup> and that the Chilean courts will only enforce an award that has been confirmed at the seat. At minimum, however, it indicates that annulments at the place of arbitration will be respected in Chile.

Should this approach become the dominant view in recognition and enforcement practice, forum shopping for selection of the arbitral seat would become absolutely critical since a decision to set-aside there would have a broad extraterritorial effect. In selecting the arbitral seat, the parties would be aware that any set aside judgment at the *situs* would result in the award not being recognized or enforced in most jurisdictions. But such complete deference to the set-aside at the place of arbitration undermines one of the goals of international arbitration—to offer neutral

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XXV Y.B. COM. ARB. 717, 719 (2000); see Freyer, *supra* note 14, at 785.

<sup>18</sup> Bundesgerichtshof [BGH] [Federal Court of Justice], Feb. 22, 2001 (Ger.), XXIX Y.B. COM. ARB. 724 (2004).

<sup>19</sup> Corte Suprema de Justicia [C.S.J.] [Supreme Court], 8 septiembre 2011, “EDF Internacional S.A. c. Endesa Internacional S.A. and YPF S.A.,” Rol de la causa: 4390–2010, arbitraje, 5(3) ARBITRAJE: REVISTA DE ARBITRAJE COMERCIAL Y DE INVERSIONES p. 915 (Chile).

<sup>20</sup> CODIGO DE PROCEDIMIENTO CIVIL [CÓD. PROC. CIV] [Civil Procedure Code], art. 246 (Chile).

<sup>21</sup> See Albert. Jan. van den Berg, *The New York Convention of 1958: An Overview*, THE INT’L COUNS. FOR COM. ARB. 17 (2008), available at [http://www.arbitrationicca.org/media/0/12125884227980/new\\_york\\_convention\\_of\\_1958\\_overview.pdf](http://www.arbitrationicca.org/media/0/12125884227980/new_york_convention_of_1958_overview.pdf).

transnational dispute adjudication in contrast to a national court. To the extent that local favoritism or bias produces idiosyncratic and/or parochial set-asides, it is sensible to permit a country asked to recognize or enforce awards some discretion as to how to treat the set-aside. The difficulty is that, in addition to the lack of uniformity among countries as to the approach to take to set-aside judgments, no guidelines exist to determine when an award that has been set aside should be enforced. Furthermore, to return to the forum shopping theme, an enforcing court's attitude toward set-asides will certainly lead to forum shopping at the enforcement stage.

Other practical factors are, of course, at play when considering where to seek recognition or enforcement of an award. The choice of forum for recognition/enforcement will most often be dictated by where the defendant's assets are located,<sup>22</sup> although in some cases one may look to recognition in a jurisdiction without assets in the hope of achieving a decision with either influential or precedential effect.<sup>23</sup> And in many cases, the award debtor will

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<sup>22</sup> In the United States, courts have been unanimous in holding that an independent basis of adjudicatory jurisdiction—either personal jurisdiction over the award debtor or quasi-in rem jurisdiction over his property—is necessary in order to enforce an arbitral award. *See, e.g.*, *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 2012 U.S. App. LEXIS 26207 (5th Cir. Dec. 21, 2012); *Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393 (2d Cir. 2009); *Glencore Grain Rotterdam B. V. v. Shivnath Rai Harnarain Co.*, 284 F.3d 1114 (9th Cir. 2002). In other countries, however, the consent to arbitrate in a New York Convention country is construed as concomitant consent to enforce that award in other Convention countries without the need for any other connection to the defendant or his property. *See* Int'l Commercial Disputes Comm. of the Ass'n of the Bar of the City of New York, *Lack of Jurisdiction and Forum Non Conveniens as Defenses to the Enforcement of Foreign Arbitral Awards*, 15 AM. REV. INT'L ARB. 407 (2004); *see generally* Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT'L ARB. 439 (2012). *See also* MAXI. SCHERER, *THE NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A COMMENTARY*, art. III, paras. 17, 22 (R. Wolff ed., 2012).

<sup>23</sup> In the absence of assets, an award creditor might be hoping to use the judgment as precedent in a jurisdiction where the award defendant does have assets, or even to independently enforce that judgment against the debtor's

have assets in numerous jurisdictions, leading to multiple enforcement actions with potentially different results—a situation certainly contemplated by the New York Convention.

The completely opposite approach—that is, to treat a set-aside at the place of arbitration as irrelevant—has its own unattractive features. Such a view is illustrated in France, which takes a strong pro-arbitration position and negative attitude toward set-asides.<sup>24</sup> French arbitration law, both the prior and present versions, eliminate the Convention's Article V(1)(e) as a basis for non-recognition/enforcement.<sup>25</sup> The two leading decisions from the French Cour de Cassation, *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*<sup>26</sup> and *PT Putrabali Adyamulia v. Rena Holding, Ltd.*,<sup>27</sup> enforced awards that had been set aside at the place of arbitration. In *Putrabali*, the Court explained that “an international arbitral award is not anchored in any national legal order [and thus] is a decision of international justice whose validity must be ascertained with regard to the rules applicable in the country where its recognition and enforcement are sought.”<sup>28</sup> The French view is thus that international arbitration is part of a transnational legal order and is not attached to the national legal regime at the seat.<sup>29</sup>

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assets elsewhere. For a more extensive discussion of this issue, see *infra* at III. B.

<sup>24</sup> For a rather comprehensive treatment of the history of this approach in France, see C. Koch, *The Enforcement of Awards Annulled in their Place of Origin: The French and US Experience*, 26 J. INT'L ARB 267 (2009).

<sup>25</sup> CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] arts. 1520, 1525 (Fr.). An English translation of the law was done by E. Gaillard/N. Leleu-Knobil/D. Pellarini, INT'L ARB. INST. (2011) available at [http://www.iaiparis.com/pdf/FRENCH\\_LAW\\_ON\\_ARBITRATION.pdf](http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf).

<sup>26</sup> *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration] 327 (1994).

<sup>27</sup> *PT Putrabali Adyamulia v. Rena Holding, Ltd.*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, reprinted in REVUE DE L'ARBITRAGE [Review of Arbitration], 507 (2007), XXXII Y.B. COM. ARB. 299 (2007).

<sup>28</sup> *PT Putrabali Adyamulia*, XXXII Y.B. COM. ARB. 299, 302 (2007).

<sup>29</sup> See, e.g., P. Fouchard, *La portee internationale de l'annulation de la sen-*

The most recent decision in France, albeit of a lower court, follows this approach of treating an award annulled at the seat of arbitration as fully enforceable in France, barring any other Convention ground justifying non-enforcement.<sup>30</sup> In *Maximov v. Novolipetsky Steel Mill*, the Tribunal de Grande Instance de Paris enforced an award rendered in Russia and set aside by the Russian courts.<sup>31</sup> The underlying dispute concerned an agreement for the purchase and sale of shares between Mr. Maximov and Novolipetsky Steel Mill (“NLMK”). The seat of the ICAC tribunal (International Commercial Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation) was Russia,

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*tence arbitrale dans son pays d'origine [The international scope of the annulment of the award in his home country]*, REVUE DE L'ARBITRAGE 329 (1997) (Fr.); E. Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: The French Experience*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION 505, 505 (A. J. van den Berg ed., 1999); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION (2010).

<sup>30</sup> Under French Civil Procedure Law, revised in 2011, recognition and enforcement is automatically ordered so long as the award has been shown to exist and enforcement would not be manifestly contrary to public policy. CODE DE PROCÉDURE CIVILE [C.P.C.] [Code of Civil Procedure] art. 1514 (Fr.). An English translation of the law was done by E. Gaillard/N. LeleuKnobil/D. Pellarini, INT'L ARB. INST. (2011) available at [http://www.iaiparis.com/pdf/FRENCH\\_LAW\\_ON\\_ARBITRATION.pdf](http://www.iaiparis.com/pdf/FRENCH_LAW_ON_ARBITRATION.pdf). However, parties resisting enforcement may appeal the decision on grounds mirroring those in the New York Convention art. V, namely that the tribunal lacked jurisdiction, was improperly constituted, exceeded its jurisdiction, there was a violation of due process, or recognition/enforcement of the award would violate public policy. *Id.* arts. 1520, 1525. Notably absent from this list is that the award has been set aside in the place it was made. Therefore, under French law, the fact that an award has been set aside by the competent court is accorded no weight. This omission is presumably justified on the basis of the “more favorable right” provision of Art. VII of the Convention, which allows a party seeking enforcement to rely on a domestic law instead of the Convention if that domestic law is more favorable to enforcement. See ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION, 85 (1981); see also Freyer, *supra* note 14, at 761–62.

<sup>31</sup> *Maximov v. Novolipetsky Steel Mill*, Tribunal de Grande Instance de Paris [TGI] [Court of First Instance of Paris], May 16, 2012 (Fr.).

and the tribunal rendered a U.S. \$300 million award in favor of Maximov. The Moscow Arbitrazh Court annulled the award on the ground that under Russian law corporate disputes are not arbitrable. The decision was affirmed by the Federal Arbitrazh Court of the Moscow District, and subsequently by the Supreme Arbitrazh Court. Notwithstanding the set-aside in Russia, Maximov sought to enforce the award in the Tribunal de Grande Instance de Paris. On May 16, 2012, the court enforced the award, holding that the annulment of the award at its seat was an insufficient basis for refusal to enforce the award and that a valid arbitration award procured in accordance with the parties' agreed contractual method should be recognized and enforced.

The French view has often been criticized. Not only does it completely disregard the decision of a court at the place of arbitration, but the French approach also creates particular complications in cases where a second award is made after the annulment of the first, and the outcome of such second award differs from that of the first. If the French courts have enforced the first award, they will refuse to enforce the second one on *res judicata* grounds. But nothing prevents the award creditor of the second award from seeking recognition of that award in some other place. This situation arose in *Hilmarton*, where an annulled Swiss award was enforced in France.<sup>32</sup> A subsequent second Swiss award was denied enforcement in France on *res judicata* grounds,<sup>33</sup> but was enforced in England.<sup>34</sup>

*Putrabali* is an even more unfortunate example of the forum shopping opportunities presented by the French approach.<sup>35</sup>

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<sup>32</sup> *Hilmarton Ltd. v. Omnium de Traitement et de Valorisation*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., Mar. 23, 1994, reprinted in *REVUE DE L'ARBITRAGE* [Review of Arbitration] 327 (1994).

<sup>33</sup> *Omnium de Traitement et de Valorisation v. Hilmarton*, Cour de Cassation [Cass.] [supreme court for judicial matters] 1e civ., June 10, 1997, reprinted in *REVUE DE L'ARBITRAGE* 376 (1997).

<sup>34</sup> *Omnium de Traitement et de Valorisation S. A. v. Hilmarton Ltd.*, [1999] Q. B. 222.

<sup>35</sup> For a more comprehensive discussion of *Putrabali*, see Richard W. Hulbert, *When the Theory Doesn't Fit the Facts—A Further Comment on Putrabali*, 25 *ARB. INT'L* (2009); see also Philippe Pinsolle, *The Status of Vacated Awards in France: The Cour de Cassation Decision in Putrabali*, 24(2) *ARB. INT'L* 277

An award rendered in an English arbitration between a French buyer and an Indonesian seller resulted in an award in favor of the French party. The award was annulled in part by an English court on the basis of an error of law (review of such questions not having been excluded under the English Arbitration Act). As a result, a second award was then rendered, this time in favor of the Indonesian party. The French party sought enforcement of the *initial* award in its favor in France, and the Indonesian party sought enforcement of the later award in its favor in France. The view of the French courts, including the Cour de Cassation, was that only the first award could be enforced and that the second award was precluded by the first.<sup>36</sup> The forum shopping tactic here is apparent, where the first award resulted in dismissal of the claimant's case. Exequatur was sought primarily to prevent subsequent enforcement in France of the later award. And, under the strict French approach of giving no weight to annulments, the claimant's forum shopping strategy was successful.

As we see, neither the "enforce-all" or "enforce-nothing" approach is desirable. But an intermediate approach of leaving the issue to the "discretion" of the recognizing court has the disadvantage of lacking any guidance or uniformity. How does the court decide whether or not a particular award that is set aside should be enforced?

One view, endorsed by various arbitration experts, is that awards that are set aside will be enforced only if the ground for annulment exceeded the grounds for non-recognition under the Convention; otherwise, the set-aside judgment should be respected. This approach appears to be similar to the emerging practice in Canada.<sup>37</sup> Jan Paulsson also takes that position. He argues that

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(2008).

<sup>36</sup> PT Putrabali Adyamulia v. Rena Holding, Ltd., Cour de Casation [Cass.] [supreme court for judicial matters] 1e civ., June 29, 2007, *reprinted in* REVUE DE L'ARBITRAGE [Review of Arbitration] 507 (2007).

<sup>37</sup> It appears that no Canadian court has been squarely faced with enforcing an annulled award, but several have decided enforcement actions with set-aside actions pending at the *situs*. The courts have expressed that they must recognize an award unless one of the grounds of refusal in Article 36 of the UNCITRAL Model Law is present, and within that they have discretion to enforce the award. In deciding whether to grant a stay of proceedings pending the outcome courts

a local annulment ought not to prevent international recognition or enforcement of a New York Convention award unless the grounds for the annulment were those identified by the Convention itself.<sup>38</sup> This approach is similar to that in Article IX(1) of the European Convention, which provides that a set-aside will not be recognized unless it was based on one of the specific grounds specified in Article IX(1)(a) to (d) of that Convention.<sup>39</sup> But the New York Convention is not so limited and failed to adopt that solution. In particular, under the New York Convention, where the parties have agreed to arbitration in a place where substantive legal review is part of the arbitral regime, annulment on that basis would appear to be appropriate.

The late Hans Smit offered the suggestion that all annulments should presumptively be disregarded in cases where the setting aside has taken place in the “home court” of one of the

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have indicated that there must be a “serious issue to be tried” (from the point of view of the Canadian court) in the foreign set-aside action. If not, a stay will not be provided and the award will be enforced. *Europcar Italia S. p. A. v. Alba Tours Int’l Inc.*, 23 O. T. C. 376, [1997] O. J. No. 133, para. 22 (Can. Ont. Ct. J.); *Powerex Corp. v. Alcan Inc.*, 2004 B. C. S. C. 876, [2004] B. C. J. No. 1349 (Can.). Except for a small subset of cases falling within the Federal ambit, enforcement of awards is to be determined by provincial law; however, Article 34 of the Model Law has been implemented throughout the provinces and territories in Canada (except arguably Quebec). Henri. C. Alvarez, *The Implementation of the New York Convention in Canada*, 25(6) J. INT’L ARB. 669, 670 (2008).

<sup>38</sup> See Jan. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment (LSA)*, 9 ICC INT’L CT. OF ARB. BULL. 14 (1998).

<sup>39</sup> European Convention, *supra* note 12. For an application of Article IX(1) of the European Convention by the Austrian Supreme Court, see *Kajo-Erzeugnisse Essenzen GmbH v. DO Zdravilisce Radenska*, Oberster Gerichtshof [OGH] [Supreme Court], Oct. 20, 1993 and Feb. 23, 1998 (Austria), XXIV Y.B. COM. ARB. 919 (1999). The Austrian Supreme Court enforced an award that had been annulled by the Supreme Court of Slovenia because it violated Slovenian public policy, due to certain aspects of the contract that gave the claimant a monopoly power. Austria is a party to both the New York Convention and European Convention, but the court looked to the European Convention as the one having the most favorable approach to arbitration. For a more comprehensive discussion of this case and the reasoning behind it, see Horvath, *supra* note 15, at 256–59; see also Freyer, *supra* note 14, at 764.

parties, and at the party's request.<sup>40</sup> As noted by others,<sup>41</sup> that proposal is strikingly over inclusive even though it identifies the kinds of concerns one has about local bias and parochialism at the *situs*, particularly where a state-owned entity is involved and that state was the only realistic place of arbitration.

Gary Born offers several criteria for denying effect to an annulment decision in the arbitral seat: annulments that (1) are based on local public policies or non-arbitrability rules in the annulment forum, (2) are based on judicial review of the merits of the arbitrators' substantive decisions or on other grounds not included in Articles (V)(1)(a) to (d) of the Convention, or (3) fail to satisfy generally applicable standards for recognition of foreign judgments.<sup>42</sup> However, it is not clear why non-arbitrability rules of the seat, particularly if that is the applicable law or has a close connection to the parties, should be excluded altogether. Also, parties who choose a seat could expect the legal regime at the seat to control, and if judicial review is part of that regime, there seems few reason for objection. Nevertheless, Gary Born's focus on judgment recognition is particularly appropriate, and Linda Silberman, in a prior article, proposed precisely that solution to deal with the problem of annulled awards.<sup>43</sup> Similarly, William Park in several articles has argued for treating annulment decisions "like other foreign money judgments, according them deference unless procedurally unfair or contrary to fundamental notions of justice."<sup>44</sup>

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<sup>40</sup> See Hans Smit, *Annulment and Enforcement of International Arbitral Awards: A Practical Perspective*, 18 AM. REV. INT'L ARB. 297, 304 (2007).

<sup>41</sup> See Rau, *supra* note 9, at 109.

<sup>42</sup> GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 2691 (2009).

<sup>43</sup> Linda J. Silberman, *The New York Convention After Fifty Years: Some Reflections on the Role of National Law*, 38 GA. J. INT'L & COMP. L. 25, 32–36 (2009).

<sup>44</sup> WILLIAM W. PARK, *Duty and Discretion in International Arbitration*, in ARBITRATION OF INTERNATIONAL BUSINESS DISPUTES: STUDIES IN LAW AND PRACTICE 353, 363 (2nd ed., 2012); see also William W. Park, *Duty and Discretion in International Arbitration*, 93 AM. J. INT'L L. 805 (1999). Professor Park refers to a comity approach to foreign judgments, whereas Professor Silberman refers to national law on judgment recognition and enforcement. The basic concept is the same: that recognition of annulment decisions should depend on whether

According to Linda Silberman, there are good reasons to look to the law on recognition and enforcement of foreign judgments for guidance in determining whether a set-aside judgment should be respected: When a court at the arbitral seat sets aside an arbitral award, a second court asked to recognize and enforce the award has no obligation under the Convention to do so. However, if the award is annulled, there is now a judgment from a national court, and a court that enforces an arbitral award set aside by that national court has accordingly refused to recognize the foreign judgment. Under this view, national laws on recognition and enforcement of foreign judgments can offer guidance as to when refusal of recognition of such a judgment is appropriate. If the judgment is one that would be entitled to recognition, the set-aside should be respected and the award should not be enforced. However, if the judgment is one that does not meet the criteria for recognition and enforcement under national law, such as fairness of process or international public policy (which would incorporate international standards for respecting arbitral awards), the set-aside judgment should not be respected and the award should be enforced.

The most recent draft of the American Law Institute's Restatement of the Law Third on International Commercial Arbitration<sup>45</sup> has adopted such a regime for purposes of U.S. law. Section 4-16 (b) of the Draft Restatement provides:

“Even if a Convention award has been set aside by a competent authority, a court of the United States may confirm, recog-

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the set-aside judgment is consistent with fundamental notions of justice and international public policy that is part of judgment-recognition law in most jurisdictions. Professor Silberman also argues that in the U. S. the recognition and enforcement of a foreign judgment annulling a Convention award would fit the type of case where a federal standard of recognition/enforcement would be in play. *See* Silberman, *supra* note 43, at 33 n.36; *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 481 cmb. a (1987) (stating that recognition and enforcement of foreign judgments is typically a matter of state law unless there is a basis for federal jurisdiction such as a treaty or federal statute). Here the New York Convention and Chapter 2 of the Federal Arbitration Act call for a federal standard.

<sup>45</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-16 (Tentative Draft No. 2, 2012).

nize, 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.”<sup>46</sup>

One can even find the outlines of a “judgments route” in existing U.S. case law.<sup>47</sup> In the most notable case in which a U.S. court enforced an award annulled at the seat, *Chromalloy Aeroservices v. Arab Republic of Egypt*,<sup>48</sup> the district court enforced an Egyptian arbitral award even though the award had been set aside by the Egyptian courts. The district court viewed Article V as providing a permissive standard, under which the court could exercise its discretion about whether or not to enforce an award that had been set aside. Ultimately, the court rested its decision on Article VII of the Convention, holding that Sections 9 and 10 of the Federal Arbitration Act would require enforcement of the award if the Egyptian award were a U.S. award. That rationale is misconceived, however, since Sections 9 and 10 apply only to domestic U.S. awards and the court’s attempt to equate an Egyptian and a U.S. award in that way misconstrues Article VII.<sup>49</sup> However, in its opinion, the court also posed the question of whether the Egyptian set-aside judgment could itself be recognized and granted *res judicata* effect. The district court answered its own question, finding that recognition of the annulment decision would violate U.S. public policy in favor of “final and binding arbitration of commercial disputes”<sup>50</sup> and rejecting any concerns of comity in these circumstances.<sup>51</sup>

Taken to the extreme, a “judgments framework” that viewed finality in arbitration as a public policy justification to

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<sup>46</sup> *Id.* § 4–16(b).

<sup>47</sup> Maxi Scherer, *Effects of Foreign Judgments Relating to International Arbitral Awards: Is the Judgment Route the Wrong Road?*, 4 J. INT’L DISP. SETTLEMENT 587 (2013).

<sup>48</sup> In the Matter of the Arbitration Between Chromalloy Aeroservices, a Division of Chromalloy Gas Turbine Corp. & Arab Republic of Egypt, 939 F. Supp. 907 (D. D. C. 1996).

<sup>49</sup> For a further critique of the reasoning in *Chromalloy*, see Rau, *supra* note 9, at 102–11.

<sup>50</sup> *Chromalloy*, 939 F. Supp., at 913.

<sup>51</sup> *Id.* at 913–14.

refuse to enforce any set-aside would look very much like the French approach of giving no weight to set-aside judgments. The inadequacies of that approach,<sup>52</sup> would apply equally here, and thus a more nuanced analysis of the public policy exception to recognition of judgments is called for.

Another U.S. case that lends support to a recognition of judgments approach is a case—like most of the U.S. cases in which the issue has arisen—that respected the set-aside and *refused* to enforce the award. In *Spier v. Calzaturificio Tecnica, S. p. A.*,<sup>53</sup> an Italian court set aside an Italian arbitral award on the ground that the arbitrators exceeded their powers, a decision which was upheld by the Court of Cassation. The federal court in New York respected the set-aside judgment and refused to enforce the award. Although not specifically referencing the law of judgments, the court does appear to have given some attention to that point:

“[The applicant’s] reference to the permissive “may” in Article V(1) of the Convention does not assist him since, as in *Baker Marine*, [the applicant] has shown no adequate reason for refusing to recognize the judgments of the Italian courts.”<sup>54</sup>

Several other U.S. decisions, although not explicitly adopting a judgments approach, may be read as consistent with such an approach. For instance, in *Baker Marine* the Second Circuit found that the petitioner “has shown no adequate reasons for refusing to recognize the [set-aside] judgments of the Nigerian court.”<sup>55</sup> Absent reasons for declining to recognize the annulment judgments, the Court refused to enforce the arbitration award.<sup>56</sup>

However, for a judgments framework to offer an effective solution to the problem of annulled awards, a court must be able to point to criteria for assessing the judgment. The need for impartial tribunals, fairness of proceedings, and specific public policy relating to arbitration would appear to be relevant factors

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<sup>52</sup> Discussed *supra* pp. 121–26.

<sup>53</sup> *Spier v. Calzaturificio Tecnica, S.p. A.*, 71 F.Supp.2d 279 (S. D. N. Y. 1999).

<sup>54</sup> *Id.* at 288.

<sup>55</sup> *Baker Marine (Nig.) Ltd. v. Chevron (Nig.) Ltd.*, 191 F.3d 194, 197 (2d Cir. 1999).

<sup>56</sup> *Id.* at 198.

both in the United States and elsewhere.<sup>57</sup> Applied properly, such criteria should have led the D. C. Circuit Court of Appeals in *TermoRio S. A. E. S. P. v. Electranta S. P.*<sup>58</sup> to enforce a Colombian arbitral award, notwithstanding its annulment by the Colombian court. In *TermoRio*, the Colombian court set aside the arbitral award on the ground that selection of the ICC Rules in the arbitration agreement was invalid under Colombian law. The D. C. Court of Appeals might be said to have looked to the law of judgments in that it considered whether the Colombian judgment violated any “basic notions of justice” that would justify non-recognition of the Colombian judgment.<sup>59</sup> The court viewed the public policy exception to judgments as a narrow one,<sup>60</sup> found no violation of public policy, and therefore respected the set-aside. However, the court erred in failing to invoke the public policy exception to take account of how accepted international arbitration practice was frustrated by the Colombian set-aside. In fact, the Colombian judgment, annulling an arbitration award on the parochial ground that the use of ICC rules was invalid under Colombian law, is inconsistent with international arbitration principles; accordingly, such a judgment should have been seen as repugnant to the public policy of the United States.

The decision of the Amsterdam Court of Appeal in *Yukos Capital SARL v. OAO Rosneft*,<sup>61</sup> reflects how a “recognition of foreign judgments” framework operates to permit enforcement of an award that has been set aside. The Dutch court granted leave to enforce in the Netherlands four arbitral awards issued by the International Commercial Arbitration Court (ICAC) at the Chamber of Commerce and Industry of the Russian Federation in arbitral proceedings brought by Yukos Capital against Yuganskneftegaz to recover on four loan agreements. The award in favor of

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<sup>57</sup> RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, *supra* note 44, § 482.

<sup>58</sup> *TermoRio S. A. E. S. P. v. Electranta S. P.*, 487 F.3d 928 (D. C. Cir. 2007).

<sup>59</sup> *Id.* at 938–39.

<sup>60</sup> *Id.* at 939 (“Accepting that there is a narrow public policy gloss on Article V(1)(e) of the Convention and that a foreign judgment is unenforceable as against public policy to the extent that it is repugnant to fundamental notions of what is decent and just in the United States, appellants’ claims still fail.”).

<sup>61</sup> *Yukos Capital SARL v. OAO Rosneft*, Hof’s-Amsterdam [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

Yukos was set aside by the commercial court in Russia, and that decision was upheld by two Russian appeals courts. Among the grounds relied upon for setting aside the award was a failure to disclose that the managing partner of the law firm representing Yukos had organized conferences in which the arbitrators had participated. Although the district court in the Netherlands refused to enforce the award based on the Russian set-aside judgment, the Amsterdam Court of Appeal reversed. The Court of Appeal looked to rules of private international law to determine whether the Russian court judgments should be recognized. It concluded that a foreign judgment rendered by a judicial body that is not impartial and independent should not be recognized.

Another recent Dutch decision considered similar issues. In *Maximov v. NLMK*, an award, annulled in Russia, but enforced in France, was also presented to the Dutch courts for enforcement. The first instance court confirmed the “judgments” approach, granted the annulment judgment and refused enforcement of the award.<sup>62</sup> The Amsterdam Court of Appeal did not reverse, but did not explicitly invoke the judgments-framework rationale it adopted in *Yukos*.<sup>63</sup> Indeed, the Court of Appeal referred to aspects of its judgment in *Yukos* as presenting a “troublesome picture”.<sup>64</sup> Nevertheless, the Court of Appeal concluded that the presumption of recognition given to a judgment is trumped only if the party resisting recognition of the foreign annulment provides sufficiently specific evidence of partiality and dependence.<sup>65</sup> The parties were instructed to elaborate on a number of specific questions of Russian law relating to annulment of arbitral awards and asked to comment more specifically on the proceedings in the Russian court.<sup>66</sup> Whether this case indeed marks a change in the *Yukos* judgments approach is unclear but perhaps the subsequent decision will prove to be enlightening.

In some countries, one potential complicating issue in a

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<sup>62</sup> *Maximov v. NLMK*, Amsterdam District Court, Nov. 17, 2011 (Neth.), XXXVII Y.B. COM. ARB. 274 (2012).

<sup>63</sup> Hof's-Amsterdam 8 September 2012, No. 200.100.508/1, (*Maximov/NLMK*) (Neth.).

<sup>64</sup> *Id.* para. 2.11

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* paras. 2.13–15.

judgments approach to recognition and enforcement might be the reciprocity requirement, when it is part of national judgments law. Reciprocity was an issue for a Ukrainian court that was asked to recognize English arbitral awards made in favor of a Russian company (as assignor of a Cypriot company) against a Malaysian company (Pacific).<sup>67</sup> The court in the U.K. set aside the awards,<sup>68</sup> but the Ukrainian court chose to enforce the awards. The Ukrainian court held that the lack of reciprocity between Ukraine and the U.K. with respect to the recognition and enforcement of judgments meant that the English court set-aside judgment was not entitled to effect. One may be somewhat skeptical of the court's determination that there was in fact a lack of reciprocity between the U.K. and Ukraine in light of a different Ukrainian court's conclusion that there was reciprocity with respect to recognition and enforcement of judgments.<sup>69</sup> Just as there is a danger of parochial set-asides, there is a danger of "parochial" refusals to respect a set-aside where, as here, it is the local party who asks for recognition of the award and wants the set-aside ignored.

The judgments framework described above should be limited to the treatment of set-asides at the place of arbitration (or under the law of arbitration) as expressly provided for in the New York Convention. As shown by Maxi Scherer elsewhere,<sup>70</sup> and as explained more fully in Part III of the paper, the use of a "judgments route" raises some important practical and theoretical issues and thus should not extend to judgments confirming, rec-

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<sup>67</sup> Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd., Court of Appeal of the Odessa Region, July 16, 2012, No. 1511/2458/2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/25273828>.

<sup>68</sup> Pacific Inter-Link SDN BHD v. EFKO Food Ingredients Ltd., [2011] EWHC (Comm) 923. The English court set aside the awards on the ground that no valid arbitration agreement existed, and therefore, the tribunal had lacked jurisdiction. This had been a primary issue in the arbitration itself, and largely came down to whether the terms of the contract had been adequately agreed to over the course of a particular telephone conversation. Evidently, the English court thought not, basing its reasoning on the conclusions in the earlier case of *Grace Shipping v. Sharp & Co.*, [1987] 1 Lloyd's Rep. 207.

<sup>69</sup> BTA Bank v. Ablyazov and others, District Court of Kyiv, June 1, 2012 (Ua.), available at <http://reyestr.court.gov.ua/Review/24526659>.

<sup>70</sup> Scherer, *supra* note 47.

ognizing, or enforcing arbitral awards.<sup>71</sup> The distinction between a judgment that sets aside an award and other post-award judgments is justified by the Convention itself. The Convention provides in Article V(1)(e) for an exception to recognition and enforcement when an award is set aside, but is silent as to the effects of other post-award judgments.<sup>72</sup>

However, even the attempt of using judgments principles to evaluate a set-aside has been met with a number of criticisms.<sup>73</sup> Among the specific objections are that a judgments approach to set-aside is superfluous in some cases (*e.g.* when it is not a primary jurisdiction that renders the set-aside), vague in others, fails to provide international harmony, is at odds with the text of the Convention and creates the effect of blacklisting certain legal systems.

Indeed, a judgments approach is unnecessary where the set-aside occurs at a place other than the primary jurisdiction because the Convention itself does not authorize an exception to recognition and enforcement in such a case. However, as for objections

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<sup>71</sup> See *infra* p. 330.

<sup>72</sup> Under existing law, the distinction between set-aside and confirmation judgments may encounter difficulty. The Uniform Foreign Country Money Judgments Recognition Act, excludes foreign arbitral awards and agreements to arbitrate from coverage of the Act, leaving that to federal law, but then states that “[a] judgment of a foreign court confirming or setting aside an arbitral award, however, would be covered by this Act.” THE UNIFORM FOREIGN COUNTRY MONEY JUDGMENTS RECOGNITION ACT, § 2 cmt. 3 (2005). *Cf.* AM. L. INST., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE (2006), that also brings judgments of foreign courts confirming or setting aside awards within its scope, but does so only for the purpose of ensuring that federal and not state law governs the question. See § 1(a)(iii). The ALI proposal makes clear that the Act itself does not resolve the question of when a judgment setting aside or confirming a foreign arbitral award should be recognized, but only that *if the judgment is to be recognized* it meet the criteria set out in the proposed Act. Accordingly, there is room to rely on the Convention to draw the distinction between judgments of set-aside and judgments confirming an award.

<sup>73</sup> See Albert Jan van den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, Apr. 28, 2009, 27 J. INT’L ARB. 179, 190–93 (2010); Scherer, *supra* note 47.

to using a judgments framework to assess judgments of set-aside at the seat, there are several responses. Unless there is a Protocol to deal with the problem of annulled awards, there will never be any harmonization or consistency in the approach to awards that have been set aside. It is true that the judgments solution is based on the national judgments law in each Contracting State and therefore lacks uniformity. However, in looking at recognition and enforcement practices comparatively, one finds a basic similarity and generally agreed-to criteria.<sup>74</sup> Moreover, a “judgments” solution is less vague than the mere “discretion” that appears to be the only viable alternative and a “judgments framework” offers certain identifiable principles—and a set of legal rules to apply—to determine when a set-aside should be respected and when it should not.

Furthermore, the arguments that a judgments framework is at odds with the text of the Convention are not convincing.<sup>75</sup> Professor Albert Jan van den Berg argues that the judgments approach creates “‘a mirror recognition in the reverse’: a foreign arbitral award can be recognized if a foreign court judgment is not recognized . . . [which] turn[s] the New York Convention upside down.”<sup>76</sup> The fact that the judgments approach is not explicitly provided for in the Convention is of little significance. Indeed, if there were such a requirement, no method for determining when an annulled award should be enforced is viable because the Convention is silent on that point.<sup>77</sup> In fact, a discretionary standard arguably does the least violence to the Convention’s inclusion of the word *may* (which various standards discussed above appear to transform into a *must* or *must not*), and of the discretionary standards, arguably the judgments approach is the most principled.

Similarly, a judgments approach does not lead to the black-listing of various legal systems more than any discretionary standard.<sup>78</sup> To be sure, the danger of ruling on countries’ legal

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<sup>74</sup> See generally Linda J. Silberman, *Some Judgments on Judgments: A View from America*, 79 KING’S L.J. 235, 237–38 (2008).

<sup>75</sup> Van den Berg, *supra* note 73, at 190–93.

<sup>76</sup> *Id.* at 190 (internal quotation marks omitted).

<sup>77</sup> Discussed *supra* pp. 116–18.

<sup>78</sup> Van den Berg, *supra* note 73, at 192.

systems is avoidable when either an “always enforce annulled awards” or “never enforce annulled awards” standard is adopted, but these approaches are problematic for other reasons.<sup>79</sup> Moreover, the danger of courts sitting in judgment of other countries’ judiciaries appears overstated. Courts have long employed the judgment recognition framework to non-arbitration related judgments, and no discernible blacklist of legal systems has resulted. Indeed, the class of cases where a party attempts to enforce a set-aside award is relatively small and therefore unlikely to culminate in the wholesale blacklisting of legal systems.

In sum, private international law rules on recognition and enforcement of judgments offer identifiable principles to assess whether or not a set-aside of an arbitral award in the courts of the seat should be respected.

### III. FORUM SHOPPING AND OTHER POST-AWARD JUDGMENTS

The previous part of this paper has dealt with the issue of forum shopping in relation to set-aside judgments. This part addresses the same issue in relation to other post-award judgments, *i.e.* judgments confirming, recognizing or enforcing arbitral awards. Like set-aside judgments, those other post-award judgments can lead to situations of forum shopping. For instance, one of the parties may obtain a confirmation judgment in one country, typically at the seat of the arbitration,<sup>80</sup> and then subsequently rely on the preclusive effect of that confirmation judgment in subsequent recognition and enforcement proceedings relating to the same award in another country.

The “judgment route” first proposed by Linda Silberman and adopted in Part II of this paper consists of applying foreign judgment principles when assessing whether or not to give effect to a foreign set-aside. It leaves open the question whether, and if so how, foreign judgment principles should be applied to other

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<sup>79</sup> *Supra* pp. 314–21.

<sup>80</sup> Except in the unusual case in which the parties have chosen to submit the arbitration to a law other than the law of the seat. In this situation, the award might also be presented for set-aside proceedings in the country of the law chosen by the parties. *See* New York Convention art. V(1)(e) referring to the “authority of the country in which, *or under the law of which*, that award was made” as the competent authority for set-aside proceedings (emphasis added).

post-award judgments. We will now address this question, first regarding confirmation judgments, and second regarding recognition and enforcement judgments.

### A. Foreign Confirmation Judgments

For foreign confirmation judgments,<sup>81</sup> the use of foreign judgments principles has long been accepted under the heading of the so-called parallel entitlement approach. This doctrine allows the award creditor, having obtained a foreign confirmation judgment, to seek recognition and enforcement of that judgment, in lieu and in place of the award. In other words, the enforcing court grants effect to the foreign confirmation judgment, applying the forum's foreign judgment principles.

The parallel entitlement approach is followed in the U.S. according to well-established case law<sup>82</sup> and endorsed by the draft U.S. Restatement on International Commercial Arbitration.<sup>83</sup> According to the Restatement, “[o]nce an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award or as a foreign judgment, or both.”<sup>84</sup> Similar options can be found in

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<sup>81</sup> The term “confirmation judgment” will be used in this section as encompassing judgments refusing to set aside an award, unless mentioned otherwise.

<sup>82</sup> *Ocean Warehousing BV v. Baron Metals and Alloys Inc.*, 157 F.Supp.2d 245 (S. D. N. Y. 2001); *Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994); *Oriental Commercial & Shipping Co. v. Rosseel NV*, 769 F. Supp. 514 (S. D. N. Y. 1991); *Victrix SS Co. v. Salen Dry Cargo AB*, 825 F.2d 709 (2d Cir. 1987); *accord* *In re Waterside Ocean Navigation Co., Inc.*, 737 F.2d 150 (2d Cir. 1984); *Fotochrome Inc. v. Copal Co.*, 517 F.2d 512 (2d Cir. 1975). *Cf.* *Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973).

<sup>83</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–3(d) (Tentative Draft No. 2, 2012).

<sup>84</sup> *Id.* § 4–3 cmts, at 72, lines 10–12. The exact scope of the parallel entitlement approach, however, is often not clearly identified. Although it is clear that the parallel entitlement approach allows parties an option (*i.e.*, to seek enforcement of the award or the foreign confirmation judgment), the precise terms of such option are less clear. Does the parallel entitlement approach provide mutually exclusive alternatives (*i.e.*, the parties must choose to enforce *either* the award *or* the confirmation judgment) or does it provide non-

other common law countries, including Australia,<sup>85</sup> India,<sup>86</sup> and Israel.<sup>87</sup> In the U.K., courts have sometimes granted award creditors the option to enforce a foreign confirmation judgment instead of the award;<sup>88</sup> however, it is unclear whether this rule applies to awards falling under the New York Convention.<sup>89</sup> Variants of the parallel entitlement approach also exist—or existed—to some

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exclusive paths to enforcement (*i.e.*, the parties may choose to seek enforcement of *both* the award *and* the confirmation judgment)? If it is the latter, then may the parties pursue both options in parallel (*i.e.*, seek enforcement of the award and the confirmation judgment *at the same time*) or only as subsequent actions (*i.e.*, seek enforcement of the confirmation judgment only *after* an enforcement action regarding the arbitral award was unsuccessful, and vice versa)? From a U.S. perspective at least, it seems that the parallel entitlement approach allows the broadest possible option. U.S. courts have taken no issue with the fact that the party sought enforcement of the award and the confirmation judgment at the same time (*Island Territory of Curacao v. Solitron Devices Inc.*, 489 F.2d 1313 (2d Cir. 1973)) or in subsequent actions (*Seetransport Wiking Trader Schiffahrtsgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994), allowing an action to enforce a foreign validating judgment even though the same court had found in a previous action that the enforcement of the award itself was time-barred). *But see* *Commission Import Export S.S. v. The Republic of the Congo*, Civ. No. 12-743, 2013 WL 76270 (D. D. C., Jan. 8, 2013), discussed *infra* p. 140.

<sup>85</sup> *Biakh v. Hyundai Corp.*, Supreme Court of New South Wales, Oct. 17, 1988 (Australia), XV Y.B. COM. ARB 360 (1990).

<sup>86</sup> *Harendra H. Metha v. Mukesh H. Metha*, Supreme Court, May 13, 1999 (India), XXV Y.B. COM. ARB 721 (2000).

<sup>87</sup> CA 10854/07 *Pickholz v. Sohachesky*, Mar. 17, 2010 (Isr.) (cited by Talia Einhorn, *The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards*, 12 Y.B. PRIVATE INT'L L. 3 (2010)).

<sup>88</sup> *East India Trading Co. Inc. v. Carmel Exporters and Importers Ltd.*, [1952] 1 ALL E.R. 1053, [1952] Q.B. 439; *International Alltex Corp. v. Lawler Creations Ltd.*, [1965] IR 264 (High Ct., Kenny, J.); Jonathan Hill, *The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England*, 8 J. PRIVATE INT'L L. 159, 177 (2012).

<sup>89</sup> DICEY, MORRIS AND COLLINS: *THE CONFLICTS OF LAWS*, 902 paras. 16–165 (Lord Collins of Mapesbury et al. eds., 15th ed. 2012) (stating that for awards falling within the scope of the New York Convention, “[i]n almost all cases, the proper course will be direct enforcement of the New York Convention award itself.”).

extent in some civil law jurisdictions. For instance, the parallel entitlement approach was applied in Germany until a recent Supreme Court decision, as discussed below.<sup>90</sup> Switzerland still applies the parallel entitlement approach in most circumstances.<sup>91</sup>

One might argue that the parallel entitlement approach does not involve any forum shopping strictly speaking. Indeed, just like a set-aside, the confirmation of an award can (generally) only be sought at the seat of the arbitration. The award creditor thus has no choice and cannot “shop around” to obtain a favorable confirmation judgment.

Nevertheless, the parallel entitlement approach results in situations that are equivalent to forum shopping. Under the parallel entitlement approach, the award creditor may *indirectly* obtain enforcement of the award *qua* the foreign confirmation judgment, although the *direct* route of enforcing the award itself is barred in the forum. For instance, in *Seetransport v. Navimpex*, a U.S. court refused enforcement of a foreign award (with seat in France) on the basis that it was time-barred. The same court granted enforcement of a French judgment having confirmed the award since the statute of limitations for enforcing the French judgment

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<sup>90</sup> Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.), discussed *infra* p. 144. For previous case law, Swiss and German buyer v. German seller, Bundesgerichtshof [BGH] [Federal Supreme Court], May 10, 1984 (Ger.), X Y.B. COM. ARB. 427, 428–29 (1985); U.S. exporter X v. German (F.R.) importer Y, Bundesgerichtshof [BGH] [Federal Supreme Court], Mar. 27, 1984 (Ger.), X Y.B. COM. ARB. 426 (1985); Frankfurt am Main Court of Appeal, July 13, 2005, NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006); Hamburg Court of Appeal, Nov. 5, 1991, NEUE JURISTISCHE WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT [New Legal Weekly Judicial Report] 658.

<sup>91</sup> Tribunal Federale (TF) (Federal Supreme Court) July 28, 2010 (Switz), 30 ASA BULL. 97 (2012); Swiss Federal Tribunal, 4A.137/2007, July 20, 2007, 25 ASA BULL. 798, 803 (2007). COMPARATIVE LAW OF INTERNATIONAL ARBITRATION 812 (Jean-François Poudret & Sébastien Besson 2nd ed. 2007). *Contra* M. Patocchi & C. Jermini, Art. 194 para 11, in INTERNATIONALES PRIVATRECHT (Heinrich Honsell et al. eds., 2nd ed. 2007). For France, see Dominique Hascher, *Recognition and Enforcement of Arbitration Awards and the Brussels Convention*, 12 ARB. INT'L. 233, 254 (1996).

had not expired yet.<sup>92</sup>

A recent 2013 U.S. decision sheds some doubts as to whether this option remains.<sup>93</sup> In this case, the award creditor had obtained a judgment from the London High Court recognizing a foreign award in the U.K., and sought enforcement of this English judgment in the U.S. at a moment in time when an action to enforce the award was already time-barred.<sup>94</sup> The District Court of the District of Columbia dismissed the action, taking issue with the award creditor's "maneuver" trying to profit from the longer limitations period applying to foreign judgment enforcement actions, instead of the shorter limitations period applying to foreign awards.<sup>95</sup>

One can imagine other situations in which the award creditor obtains indirectly the enforcement of the foreign confirmation

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<sup>92</sup> See *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

<sup>93</sup> *Commission Import Export S. S. v. The Republic of the Congo*, 916 F.Supp.2d 48 (D.D.C. Jan. 8, 2013). The decision rejected on preemption grounds an attempt to rely upon the Uniform Foreign-Country Money Judgments Recognition Act to obtain recognition of an earlier English judgment recognizing an award that itself would have been barred by the three year statute of limitations provided for in § 207 of the Federal Arbitration Act. The case should have been much easier than the court made it because the English judgment—one of recognition outside of the arbitral seat—should not have been considered a judgment entitled to recognition. See *infra* at III.B. The preemption point has more relevance where courts have adopted the parallel entitlement approach so that a party that has obtained a confirming judgment in a court at the *situs* of the arbitration has both an award and a judgment that can be enforced.

<sup>94</sup> In the U.S., proceedings to seek recognition or enforcement of a New York Convention award must be filed within 3 years. See Federal Arbitration Act, 9 U.S.C. § 207 (2006). The limitations period for actions to recognize or enforce foreign judgments is a matter of state law.

<sup>95</sup> The court held that such "maneuver" was preempted since it would create an obstacle to the accomplishment of the purposes of the statute of limitations contained in the Federal Arbitration Act (Federal Arbitration Act, 9 U.S.C. § 207 (2006)), which aims at creating a uniform limitations period and protecting the award debtor's interest in finality. *Commission Import Export S. S.*, 916 F.Supp.2d, at 54.

judgment although the direct enforcement of the award would not have been possible in the forum. This is particularly the case if the foreign court used a more lenient standard than the one that the enforcing court would have itself applied to the control of the award. This may lead to situations in which the foreign award judgment is enforced, although the award itself would not have been permitted enforcement.<sup>96</sup>

Such a dichotomy (refusal to enforce award but enforcement of the foreign confirmation judgment relating to the same award) is due to the fact that the parallel entitlement approach leads to the application of different control standards.<sup>97</sup> The enforcement of foreign awards is governed in most cases by the New York Convention, and the control focuses on the arbitral tribunal (*e.g.*, its composition and jurisdiction based on a valid arbitration agreement), the conduct of the proceedings before it (*e.g.*, a fair arbitral process), and the resulting award (*e.g.*, no violation of public policy).<sup>98</sup> To the contrary, the enforcement of foreign judgments is generally governed by the *lex fori*'s principles (or any regional harmonizing instrument) and the control focuses on the jurisdiction of the foreign court, the proceedings

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<sup>96</sup> The following hypothetical case may illustrate this point: assume an award was rendered in country A and the arbitral tribunal found it had jurisdiction vis-à-vis a party that has never signed nor intended to be bound by the arbitration agreement. Assume country A has a very liberal regime concerning the confirmation of awards rendered in that country, only permitting refusal of confirmation of the award on grounds of due process and public policy, thus leaving the control of the validity existence and scope of the arbitration agreement entirely to the arbitral tribunal. The award creditor obtains confirmation of the award in country A applying its liberal regime. The award creditor then obtains enforcement of the confirmation judgment in country B since the validating judgment complies with country B's judgment standard, *i. e.* the validating judgment was rendered by a competent court in fair proceedings and was not obtained by fraud. As a consequence, the confirmation judgment is enforced in country B, although had the award creditor applied for the enforcement of the award in country B directly, country B would have applied the New York Convention standard under which the courts of country B would have controlled the existence of a valid arbitration agreement and would have refused the enforcement of the award.

<sup>97</sup> For more detail, see Scherer, *supra* note 47.

<sup>98</sup> New York Convention, *supra* note 1, art. V.

conducted before it, and the judgment it rendered.<sup>99</sup> Importantly, most developed jurisdictions generally prohibit review of the findings of the foreign court. As a consequence, a court cannot refuse enforcement of a foreign judgment on the basis that it would have reached a different result, save where the decision of the foreign court is so shocking that it amounts to a violation of the forum's public policy.

Accordingly, if the award creditor chooses enforcement of the foreign confirmation judgment (in lieu of enforcement of the award itself), the control by the enforcing court is limited to the jurisdiction of the foreign court (not the arbitral tribunal), the proceedings in the foreign country (not the arbitration proceedings) and any possible violation of public policy by the judgment (not by the award).<sup>100</sup> In particular, the enforcing court cannot review the findings of the foreign court regarding the validity of the award, including, for instance, whether there was a valid arbitration agreement, an independent and impartial arbitral tribunal and a fair arbitral process. These issues are left to the exclusive control of the foreign court.

As such, the results of the parallel entitlement approach are equivalent to forum shopping: it permits the award creditor to change the applicable control standard by using a foreign confirmation judgment, and to eventually obtain indirect enforcement of the award (*qua* the foreign confirmation judgment) where the direct route of enforcing the award in the forum would have been barred.

The logical follow-up question is whether such results are problematic and should be prevented. One might argue that the indirect enforcement of the award *qua* the foreign award judgment under the parallel entitlement approach should always be allowed because it favors the enforcement of awards.<sup>101</sup> As such, it is in line with the pro-arbitration and pro-enforcement bias under the New York Convention and in many arbitration-friendly

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<sup>99</sup> Silberman, *supra* note 74, at 237–38.

<sup>100</sup> Einhorn, *supra* note 87, at 60.

<sup>101</sup> George A. Bermann, “Domesticating” the New York Convention: the Impact of the Federal Arbitration Act, 2(2) J. INT’L DISP. SETTLEMENT 317, 322 (2011).

jurisdictions.<sup>102</sup>

However, it does not seem sensible to allow the enforcement of foreign awards—directly or indirectly—if the courts at the place of enforcement have no control over the most basic requirements concerning the award’s validity. As detailed above, as a result of the change in the relevant control standard under the parallel entitlement approach, the enforcing court is not in a position to review the findings of the foreign court as to the most fundamental requirements of international arbitration, including (i) the existence of a valid arbitration agreement, (ii) an independent and impartial arbitral tribunal, or (iii) a fair arbitral process. Leaving these issues to the exclusive control of the foreign court seems highly problematic.

In addition, there are a number of other possible criticisms to be made against the parallel entitlement approach.<sup>103</sup> First, the parallel entitlement approach is problematic because it leads to a duplication of the cause of action.<sup>104</sup> As explained above, the parallel entitlement approach allows the award creditor to seek enforcement of *both* the award and the foreign award judgment in parallel or subsequent actions.<sup>105</sup> This duplication of the cause of

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<sup>102</sup> See, e. g., *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983) (“section 2 [FAA] is a congressional declaration of a liberal federal policy favouring arbitration agreements”); *IPCO (Nigeria) Ltd. v. Nigerian Nat’l Petroleum Corp.*, [2005] EWHC 726 (“[there is] a predisposition to favor enforcement of New York Convention Awards . . . even when a ground for refusing enforcement is established, the court retains a discretion to enforce the award.”); *Hainan Mach. Imp. & Exp. Corp. v. Donald & McArthur Pte Ltd.*, High Court (Sing.), XXII Y.B. COM ARB. 771, 778 (1997) (“the principle of comity of nations requires that the awards of foreign arbitration tribunals be given due deference and be enforced unless exceptional circumstances exist”).

<sup>103</sup> Martin L. Roth, *Recognition by Circumvention: Enforcing Foreign Arbitral Award as Judgment under the Parallel Entitlement Approach*, CORNELL L. REV. 573, 588–89 (2007).

<sup>104</sup> For more details, see Scherer, *supra* note 47.

<sup>105</sup> This potential was realized, for instance, in the U.S. case *Seetransport v. Navimpex* where a party first unsuccessfully sought enforcement of an arbitral award and then sought enforcement of a French judgment relating to the same award. *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v.*

action may be seen as a judicial harassment of the award debtor. After having successfully fought the action seeking to enforce the award, the award debtor also must defend against the subsequent action seeking to enforce the foreign award judgment. This risk of judicial harassment was identified by the German Supreme Court as one of the main reasons why, in 2009, it departed from its previous line of case law that had allowed a parallel entitlement approach. Supported by the large majority of commentators,<sup>106</sup> the *Bundesgerichtshof* explained that a parallel entitlement approach was not compatible with the legitimate interests of the award debtor, noting that “[t]he protection of the debtor commands that he/she is not confronted with more than one enforcement proceeding in one and the same forum.”<sup>107</sup> Indeed, whereas the multiplication of post-award proceedings concerning the same award in *different* countries may seem a natural consequence of the multitude of separate legal orders existing in the world, the multiplication of proceedings concerning the same award in the *same* country should be avoided. There is no reason why the award creditor should be allowed to get “two bites at the apple” in the same forum.

Second, the parallel entitlement approach ignores the fact that confirmation judgments may have no enforceable subject matter. Enforcement requires that the judgment contains an order that can be executed, if necessary by use of the forum’s public force. This requirement is not met, in particular, for declaratory

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Navimpex Centrala Navala, 29 F.3d 79 (2d Cir. 1994).

<sup>106</sup> See e. g., H. Plafimeier, *Ende des “Doppelexequatur” bei ausländischen Schiedssprüchen* [End of the “Doppelexequatur” in foreign arbitral awards], ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 82 (2010) (Ger.); R. Schutze, *Der Abschied vom Doppelexequatur ausländischer Schiedssprüche* [Farewell to Doppelexequatur of Foreign Arbitral Awards], RECHT DER INTERNATIONALEN WIRTSCHAFT [RDIW] [Law of the International Economy] 817 (2009); cf. more critical, G. Borges, *BGH: Doppelexequatur von Schiedssprüchen unzulässig* [Doppelexequatur of arbitral awards inadmissible], KOMMENTIERTE BGH-RECHTSPRECHUNG LINDENMAIER-MÖHRING [LMK] [Annotated BGH Jurisdiction Lindenmaier-Moehring] 30812 (2010).

<sup>107</sup> Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009 (Ger.), ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (286), 2009.

judgments or judgments simply dismissing a claim.<sup>108</sup> In most civil law jurisdictions, confirmation judgments (or judgments refusing to set aside the award) merely contain a non-enforceable declaration as to the validity of the award and/or a dismissal of the underlying claim to set aside the award. As such they are not capable of enforcement. For instance, in *Seetransport v. Navimpex*, the U.S. court enforced a French judgment in which the Paris Court of Appeal found that the award was valid and refused to set it aside.<sup>109</sup> Such a judgment has no enforceable subject matter and should thus not be open for enforcement in the U.S. or elsewhere.

To the contrary, in most common law jurisdictions, the foreign court enters a judgment on the terms of the award, rather than just declaring the award confirmed or not set aside.<sup>110</sup> Arguably, if the court orders the award debtor to perform the award, *e.g.* to pay the damages awarded therein, the judgment contains an enforceable content. Accordingly, some authors make a distinction between simple declarations as to the enforceability of the award and judgments entering the terms of the award, with only the latter to be open for enforcement in a third country.<sup>111</sup>

However, it would be unsatisfactory if the options of the award creditor under the parallel entitlement approach depended on such a formalistic difference, *i.e.*, whether or not the foreign court entered a judgment in the terms of the award or issued a declarative order. Also, there might be instances where the difference between the two categories (declarative order and judgment upon award) is not easy to establish.<sup>112</sup> In any event, irrespective of the formalistic differences, in both cases, the ultimate goal is the same, *i.e.* to grant effect to the award's findings. In the words

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<sup>108</sup> See LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14-003, at 64.

<sup>109</sup> *Seetransport Wiking Trader Schiffahrtgesellschaft MBH & Co. v. Navimpex Centrala Navala*, 29 F.3d 79 (2d Cir. 1994).

<sup>110</sup> For instance, under English law, the court may issue an enforcement order or enter judgment in the terms of the award. See Arbitration Act, 1996, 15 Eliz. 2, c. 23, §§ 66(1)-66(2), 101(3) (Eng.) (for New York Convention awards).

<sup>111</sup> Hascher, *supra* note 91, at 245-46; LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 16-163, at 902.

<sup>112</sup> Hascher, *supra* note 91, at 247 (referring to "labelling problems").

of the Spanish Supreme Court, in both cases, “the claim’s real aim [i]s to enforce the arbitral award.”<sup>113</sup> Accordingly, it is therefore only consistent to limit the award creditor’s options to do exactly that, *i.e.* to seek enforcement of the initial award, and not of the subsequent confirmation award judgment.

### *B. Foreign Recognition or Enforcement Judgments*

This section deals with cases in which the award creditor has obtained a foreign recognition or enforcement judgment and seeks to rely on that foreign judgment in subsequent proceedings concerning the same award in the forum, using relevant doctrines of *res judicata* or claim/issue estoppel. Contrary to the situation of confirmation judgments described in the previous section, this situation is a clear-cut case of forum shopping. With very few limitations,<sup>114</sup> the award creditor may “shop around,” go to an arbitration-friendly jurisdiction, obtain a positive recognition and enforcement judgment, and seek to rely on the judgment’s preclusive effects in the forum.

In a series of recent cases, courts in the U.K. have applied relevant English foreign judgment principles (including principles of issue estoppel) to grant effect to foreign recognition or enforcement judgments.<sup>115</sup> In 2011, in *Chantiers de l’Atlantique SA v. Gaztransport & Technigaz SAS*,<sup>116</sup> the High Court dealt with an award in which the arbitral tribunal (with seat in London) had dismissed all claims. The successful respondent in the arbitration

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<sup>113</sup> *Union Naval de Levante SA v. Bisba Comercial Inc.*, S.T.S. [highest court of ordinary jurisdiction], Oct. 9, 2003 (Spain), XXX Y.B. COM. ARB. 623, 624 (2005).

<sup>114</sup> *See supra* note 22.

<sup>115</sup> The relevant principles of issue estoppel under English law are as follows: (1) the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; (2) the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and (3) the issues raised must be identical. *See Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (no 2)*, [1967] 1 A.C. 853 (H.L.); *The Sennar (no 2)*, [1985] 1 W.L.R. 490, 494 (H.L.); LORD COLLINS OF MAPESBURY ET AL., *supra* note 89, paras. 14–030 ff, at 679.

<sup>116</sup> *Chantiers de l’Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3883 (Eng.).

sought recognition and enforcement of the award in France and the other party resisted arguing that the award had been obtained by fraud. The French courts dismissed this latter argument and declared the award enforceable. The other party also applied for the award to be set aside in the U.K. on the basis that it was obtained by fraud. Flaux J—after having found that the award had not been obtained by fraud—held *obiter* that the same party had already raised these matters in resisting recognition and enforcement before the French courts and lost, and thus was barred under the relevant English law principles of issue estoppel from raising those matters again before the English court.<sup>117</sup>

A similar analysis can be found in the U.K. decision relating to the *Yukos* dispute discussed earlier.<sup>118</sup> As mentioned above, an arbitral tribunal with seat in Russia had rendered four awards in favor of the claimant and those awards were subsequently set aside by the Russian courts. The claimant was nevertheless successful in enforcing the awards in the Netherlands, since the Dutch courts found that the Russian set-aside judgments were the result of partial judicial proceedings.<sup>119</sup> Although having obtained payment of the award, the claimant then sought recognition and enforcement of the award in England and in the U.S. in order to collect post-award interest (close to U.S. \$160 million). In the English proceedings, the preliminary question arose as to whether the respondent could re-litigate the (im)partial nature of the judicial proceedings that led to the Russian set-aside judgments, or whether it was barred from doing so due to the earlier findings on this issue by the Dutch courts.

The High Court, *as per* Hamblen J, found that this was a case of issue estoppel and that the respondent was barred from reopening the issue of the (im)partial nature of the Russian proceedings which had been decided by the Dutch courts in a final and binding judgment.<sup>120</sup> On appeal, the Court of Appeal agreed

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<sup>117</sup> *Id.* [313]–[318].

<sup>118</sup> *See supra* p. 326.

<sup>119</sup> *Yukos Capital SARL v. OAO Rosneft, Hof's-Amsterdam* [ordinary court of appeal in Amsterdam], Apr. 28, 2009 (Neth.), XXXIV Y.B. COM. ARB. 703 (2009).

<sup>120</sup> *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2011] EWHC (Comm) 1461, [107] (Eng.). On the background of the dispute, *see* J. van de Velden, *The*

that the relevant question was whether the Dutch judgment met the English requirements for issue estoppel. However, contrary to the first instance judge, the Court of Appeal found that those requirements were not met since the issues at stake were not the same. The Court of Appeal held that the question of whether the Russian courts should be regarded as partial and dependent was not the same issue in the Dutch and in the English context:

“The standards by which any particular country resolves the question whether courts of another country are ‘partial and dependent’ may vary considerably [ . . . ]. It is our own [English] public order which defines the framework for any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court . . . ”<sup>121</sup>

In other words, because the legal standard for public policy is a different one in each country, the issues at stake were not the same and the Court of Appeal did not grant estoppel effect to the findings in the Dutch judgment. It is nevertheless clear that the Court of Appeal would have no objections in principle to applying relevant principles of issue estoppel and granting preclusive effect to the foreign recognition and enforcement judgment if the

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“*Caution lex fori*” approach to Foreign Judgments and Preclusion, 61 INT’L & COMP. L.Q. 519, 521 ff. (2012).

<sup>121</sup> *Yukos Capital SARL v. OJSC Rosneft Oil Company* [2012] EWCA (Civ) 855, [151] (Eng.). Cf. the points made by Linda Silberman in an earlier article in connection with Yukos’ attempt to enforce both the arbitral award (and/or the Dutch judgment) in New York. For several reasons, the Dutch judgment, even as the judgment later in time, should not be the focus for the New York court. Rather, the court in New York should apply its judgment-recognition principles to the Russian judgment setting aside the arbitral award. First, the Dutch judgment is analogous to an exequatur on a judgment; it has only territorial reach and thus need not be “recognized.” Second, even applying principles of U.S. judgments—recognition law, a foreign judgment—here the Dutch judgment—need not be recognized if it conflicts with another final and conclusive judgment. Thus, it is for the New York court to form an independent conclusion about whether to respect the Russian set-aside based on principles of U.S. judgment recognition. See Silberman, *supra* note 43, at 36.

test for issue estoppel was met.

Finally, the same rationale can also be found in a short *obiter* remark in the U.K. Supreme Court's decision in *Dallah Real Estate and Tourism Holding Company v. The Ministry of Religious Affairs, Government of Pakistan*.<sup>122</sup> In this case, recognition and enforcement had been denied by the lower courts in the U.K. and the case was before the U.K. Supreme Court when set-aside proceedings concerning the same award were brought in France. Lord Mance noted that "an English judgment [in the recognition and enforcement proceedings] holding that the award is not valid could prove significant in relation to [the French] proceedings if French courts recogni[z]e any principle similar to the English principle of issue estoppel."<sup>123</sup>

In sum, there can be no doubt that English courts grant preclusive effect to foreign recognition or enforcement judgments if the relevant test for issue estoppel is met (and they expect courts in other countries to do the same).<sup>124</sup> Accordingly, an award

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<sup>122</sup> *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.).

<sup>123</sup> *Id.* [29]. Lord Collins took a more nuanced approach, saying that determinations made by the court at the seat in an annulment action may result in preclusive effect over subsequent enforcement actions, but did not suggest that preclusion runs the other way. Ultimately, of course, the French court in upholding the award gave no effect to the English judgment, including any preclusive effect to the determinations of the English court. *Gouvernement de Pakistan, Ministere des Affaires Religieuses v. Societe Dallah Real Estate and Tourismes Holding Co.*, Cour d'appel [CA] [regional court of appeal] Paris, Feb. 17, 2011 (Fr.), XXXVI Y.B. COM. ARB. 590 (2011). *Dallah* applied for enforcement of the award in France and the Government subsequently sought to set the award aside there. In upholding the award, the French court did not grant preclusive effect to the English decision. For a discussion on this point, see G. A. Bermann, *The U.K. Supreme Court Speaks to International Arbitration: Learning from the Dallah Case*, 22 AM. REV. INT'L ARB. 1, 8–9, (2011).

<sup>124</sup> *Cf.* not related to judgments recognizing or enforcing foreign awards but judgments recognizing or enforcing foreign judgments (so-called "judgments on judgments"): *Owens Bank Ltd. v. Bracco*, [1992] 2 A.C. 443 (H.L.) (indicating, *obiter*, that an Italian judgment enforcing a foreign judgment from St. Vincent might have issue estoppel effect in England in proceedings relating to the same St Vincent judgment); *House of Spring Gardens Ltd. v. Waite*, [1985] F.S.R. 173

creditor may obtain recognition or enforcement of an award outside the U.K. and subsequently rely on the preclusive effect of the foreign judgment in subsequent recognition and enforcement proceedings concerning the same award in the U.K.

In the U.S., there seems to be little case law on this issue. In *Belmont Partners LLC v. Mina Mar Group Inc.*, one party sought confirmation in the U.S. of an award rendered in the U.S. whereas the other party cross-motivated to vacate the award.<sup>125</sup> In enforcement proceedings concerning the same award in Canada, the Superior Court of Justice in Ontario had recognized the award and ordered its enforcement. The U.S. court found that the Canadian judgment merited comity and its findings constituted *res judicata* for the U.S. court.<sup>126</sup>

The draft Restatement on International Commercial Arbitration adopts this approach. According to the Restatement, a U.S. court “[i]n deciding whether to grant post-award relief, [and whether to] re-examine a matter decided at an earlier stage of the proceedings [ . . . ] by a foreign court,” should apply the forum’s relevant principles, including “claim and issue preclusion, and recognition of foreign judgments.”<sup>127</sup> Accordingly, if the forum’s relevant standards on claim or issue preclusion are met, a U.S. court should give preclusive effect to a foreign judgment that considered the same claim/issue in a previous recognition or

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(C.A.) (granting estoppel effect to a Irish judgment refusing to set aside a prior Irish judgment and thus barring the defendant from re-litigating the same issues in a subsequent enforcement action in the U.K.).

<sup>125</sup> *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W. D. Va. 2010).

<sup>126</sup> The three prong test of *res judicata* applied by the district court was that the foreign judgment (i) constituted a final judgment on the merits, (ii) between the same parties, and (iii) concerning the same cause of action. Regarding the requirement of identity of cause of action, the U.S. court noted that “although no motion to vacate was brought in the prior proceedings [in Canada], the plaintiff need not proceed on the same legal theory as in the first suit.” *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743, 752 (W. D. Va. 2010). It added that pleading before the U.S. court contained “substantially the same factual allegations as were reviewed by the Ontario Superior Court.” *Id.*

<sup>127</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 (Tentative Draft No. 2, 2012).

enforcement action.<sup>128</sup>

Since foreign judgment principles, including principles of claim and issue preclusion, are governed in the U.S. by state law and thus may vary depending on the state in which the post-award proceedings are brought, the Restatement does not contain any precise directions.<sup>129</sup> Nevertheless, the comments to the relevant section in the U.S. Restatement contain a further important explanation: “[w]hether a prior judicial determination is given preclusive effect in a post-award action may depend on, among other things, the law that governed that determination in the prior action.”<sup>130</sup> If that law is different, no preclusive effect should be given. As an example, the Restatement commentator lists issues of public policy and concludes that “[i]n such instances, it may be inappropriate for a [U.S.] court to treat the prior judicial determination as binding [ . . . ].”<sup>131</sup>

The above described solution adopted in the U.K. and the U.S. clearly allows the award creditor to forum shop to obtain a favorable recognition or enforcement judgment in a foreign country and rely on the preclusive effects of that foreign judgment in subsequent proceedings concerning the same award in the forum. A good example of such forum shopping can be found in *Chantiers de l'Atlantique*, discussed earlier.<sup>132</sup> In this case, the respondent in the arbitration (having successfully defended against all claims) went to the French courts to have the award recognized and then relied on the preclusive effect of the French judg-

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<sup>128</sup> Bermann, *supra* note 101, at 324.

<sup>129</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 reporter’s notes b(ii) (Tentative Draft No. 2, 2012) (“The Restatement thus takes the position that these judgment recognition question are no different in nature from those presented in other situations involving successive court rulings. Rather than propound wholly new rules for the arbitration context, the Restatement embraces the forum’s existing rules on claim and issue preclusion, “law of the case,” and recognition of foreign country judgments, as the case may be.”). *Cf.* also Linda Silberman’s view, *supra* note 44, that in the arbitration context, the standard should be federal.

<sup>130</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4–8 cmt. c (Tentative Draft No. 2, 2012).

<sup>131</sup> *Id.*

<sup>132</sup> *See supra* p. 338.

ment in subsequent set-aside proceedings in the U.K. The aim of the proceedings in France was obviously not to enforce the award (which having dismissed all claims, left nothing to enforce) but possibly to simply create an estoppel effect in subsequent proceedings in the U.K.<sup>133</sup>

This solution to give effect to foreign recognition and enforcement judgments and allow forum shopping is problematic for a number of reasons.<sup>134</sup> One important criticism relates to the fact that neither the English nor the U.S. cases take into account the location of the seat of the arbitration. In particular, courts in these countries grant preclusive effect to foreign recognition and enforcement judgments in subsequent proceedings concerning the same award even when brought in the forum that was the seat of the arbitration. For instance, in *Chantiers de l'Atlantique*, the English judge (albeit in *obiter*) held that a party was estopped from re-litigating in England, the seat of the arbitration, an issue that had been decided in a foreign (French) recognition and en-

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<sup>133</sup> *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.).

<sup>134</sup> Sometimes the view has been expressed that recognition or enforcement judgments have necessarily or *per se* only a territorial scope and are thus incapable of producing extra-territorial effects, *i.e.* effects outside the country in which they were rendered. *See e.g.*, Bundesgerichtshof [BGH] [Federal Supreme Court] July 2, 2009, ZEITSCHRIFT FÜR SCHIEDSVERFAHREN [ZFS] [Journal of Arbitration] 285 (287), 2009 (Ger.) (holding that “a foreign enforcement judgment [ . . . ], like any enforcement judgment, merely aims at having a territorially limited effect, *i. e.*, for the territory of the state in which it is rendered” and adding that therefore it is “as per its subject-matter incapable of been enforced elsewhere.”); Frankfurt am Main Court of Appeal, July 13, 2005 (Ger.), NEUE JURISTISCHE ONLINE-ZEITSCHRIFT [New Legal Online Journal] 4360 (2006) (holding that a Romanian judgment refusing to enforce an arbitral award was incapable of being recognized in Germany since it only determined that the award had effect in that forum, *i. e.*, in Romania). *See also* J.-F. Poudret & S. Besson, *supra* note 91, at 812; G. Kegel, *Exequatur sur exequatur ne vaut in* FESTSCHRIFT FÜR WOLFRAM MÜLLER-FREIENFELS [Festschrift for Wolfram Mueller-Freienfels] 377, 378 (Dieckmann et al. eds. 1986). *Cf.* Silberman, *supra* note 43, at 36 note 48 (suggesting that a judgment relating to recognition or enforcement of an award “may have only territorial scope,” but leaving the question open). Maxi Scherer does not agree with this analysis. For a detailed analysis, *see* Scherer, *supra* note 47.

forcement judgment.<sup>135</sup> Similarly, in *Belmont Partners*, the U.S. court granted preclusive effects to a Canadian recognition and enforcement judgment, although the seat of the arbitration was in the U.S.<sup>136</sup>

The question of whether and to what extent the seat of arbitration plays a role in international arbitration remains one of the most complex and debated questions in the field and is not the topic of this paper.<sup>137</sup> The fact is, however, that the U.K. and the

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<sup>135</sup> *Chantiers de l'Atlantique SA v. Gaztransport & Technigaz SAS*, [2011] EWHC (Comm) 3383 (Eng.); *Good Challenger Navegante SA v Metalexportimport SA*, [2003] EWCA (Civ) 1668 (Eng.). Cf. *Dallah Real Estate and Tourism Holding Co. v. The Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46 (Eng.) (holding, also *obiter*, that the English refusal to recognize the award could produce preclusive effects in France, seat of the arbitration).

<sup>136</sup> *Belmont Partners LLC v. Mina Mar Group Inc.*, 741 F.Supp.2d 743 (W. D. Va. 2010).

<sup>137</sup> On the one hand, according to the traditional judicial or territorial view, an award's legal force stems from the law of the seat and the courts in that country have a supervisory function over the arbitration proceedings as well as primary jurisdiction when it comes to the assessment of the validity of the award. See, e. g., F. Mann, *The UNCITRAL Model Law—Lex Facit Arbitrum*, LIBER AMICORUM FOR MARTIN DOMKE 157 (1967), reprinted in 2(3) ARB. INT'L 241(1986); Sir R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19 (2001); B. Leurent, *Reflections on the International Effectiveness of Arbitration Awards*, 12 ARB. INT'L 269 (1996); W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION 113–20 (1992). On the other hand, according to a delocalized or contractual view, arbitration is based on party autonomy and detached from the laws of the seat and the supervising control of the courts in that country. See, e. g., P. FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL [International Commercial Arbitration] 401 ff. (1965); P. Fouchard, *L'Autonomie de l'arbitrage commercial international [Autonomy of International Commercial Arbitration]*, REVUE DE L'ARBITRAGE [Review of Arbitration] 99 (1965); B. Goldman, *Les conflits de lois dans l'arbitrage international de droit prive [Conflicts of Laws in International Arbitration in Private International Law]*, VOL II RECUEIL DES COURS DE DROIT INTERNATIONAL [Report of Courses on International Law] 351 (1963); B. Goldman, *Arbitrage international et droit commun des nations [International arbitration and common law of nations]*, REVUE DE L'ARBITRAGE [Review of Arbitration] 115 (1965); A. VON MEHREN, LIMITATIONS ON PARTY

U.S. follow a rather territorial view and accept, among other things, that the courts at the seat of the arbitration exercise a certain supervisory function in controlling the validity of the award. Under this view, it seems counterintuitive, if not illogical, to grant preclusive effect in post-award proceedings at the seat to issues previously decided in a recognition or enforcement judgment by a non-seat court. Doing so gives priority to the findings of non-seat courts over the findings of the courts at the seat which are supposed to exercise a supervisory function. Put differently, the supervisory function of the courts at the seat becomes an empty shell if those courts are to give preclusive effect to a determination regarding validity of the award (*e.g.*, establishing the existence of a valid arbitration agreement) given by any court around the world asked to recognize and enforce the same award.

One might argue that one needs to balance the need to maintain the supervisory function of the courts at the seat (under a territorial view), with the need to grant comity to foreign judgments under the forum's foreign judgment principles. This balancing exercise, however, is missing in the case law described above. Courts in the U.K. and in the U.S. grant preclusive effect to foreign recognition or enforcement judgments emanating from a non-seat country, without making any distinction as to whether this will affect the supervisory function of the courts at the seat, and without even discussing this point. The U.S. Restatement does not contain any discussion or distinction in this respect either.<sup>138</sup> These views are difficult to reconcile with the territorially influenced view which the courts in the U.S. and the U.K. generally take in international arbitration.

A second criticism of the above detailed solution adopted in the U.K. and U.S. relates to the application of the New York Convention. Assume the seat of the arbitration is in country C1. Assume the award creditor unsuccessfully tried to seek recognition or enforcement of the award in country C2 (a New York Convention country). Referring to Article V(1)(a) of the New

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CHOICE OF THE GOVERNING LAW: DO THEY EXIST FOR INTERNATIONAL COMMERCIAL ARBITRATION 19 (1986); EMMANUEL GAILLARD, LEGAL THEORY OF INTERNATIONAL ARBITRATION 35 (2010).

<sup>138</sup> RESTATEMENT OF THE LAW (THIRD), THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION § 4-8 (Tentative Draft No. 2, 2012).

York Convention, the court in C2 held that the award was based on an invalid arbitration agreement. The award creditor subsequently starts the recognition and enforcement proceedings in the forum (country C3, also a New York Convention country). In those proceedings, the award debtor argues that the foreign judgment from C2, and in particular its finding that there was no valid arbitration agreement, should be granted preclusive effect and that the award thus should be refused recognition and enforcement.

In such a situation, granting preclusive effect to the foreign court's determination of the invalidity of the arbitration agreement (provided that the foreign judgment meets the forum's relevant requirements for judgment recognition and *res judicata* or claim/issue estoppel) means that the forum's court is not allowed to review that determination. Accordingly, even if the forum's court were to come to a different conclusion (*i.e.*, the arbitration agreement is valid under Article V(1)(a)), the preclusive effect would prevent the forum from recognizing or enforcing the award. This is true, even where the foreign court's finding is obviously erroneous under the New York Convention.

This outcome is certainly far from satisfactory. In this situation, one could even argue that granting preclusive effect to the foreign court's determination of the invalidity of the arbitration agreement would violate the forum's obligations under the New York Convention to recognize and give effect to valid arbitration agreements.<sup>139</sup> Indeed, one could further argue that the question of a valid arbitration agreement is so central to the respect which New York Convention countries owe to foreign awards that accepting preclusive effect of a determination by a foreign court on this issue may be seen to constitute an abdication of the forum court's obligations under the Convention.

On that basis, it has been suggested that foreign recognition or enforcement judgments should only be given preclusive effect if they granted (as opposed to refused) such effect.<sup>140</sup> However, it

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<sup>139</sup> New York Convention, *supra* note 1, art. II.

<sup>140</sup> Hill, *supra* note 88, at 188. *Cf.* Hamburg Court of Appeal, Jan. 24, 2003, XXX Y.B. COM. ARB. 509 (2005) (holding that a Polish judgment denying enforcement cannot be recognized in Germany because it is a decision on procedural, rather than substantial matters).

seems unsatisfactory that the effect of a judgment depends on its outcome (*i.e.* whether granting or refusing the action). Therefore, it seems preferable that foreign recognition and enforcement judgments should not be granted preclusive effect at all.<sup>141</sup> In any event, the general and unlimited application of principles of issue/claim estoppel (as practiced in the U.S. and U.K.) might, in certain circumstances, lead to situations undermining the purposes and objectives of the New York Convention and the signatories countries' obligations thereunder.

#### IV. CONCLUSION

After an award has been rendered, parties may forum shop in order to obtain a post-award judgment (setting aside, confirming, recognizing or enforcing the award) and rely on the effects of that judgment in subsequent proceedings relating to the same award. This paper examines the effects of such forum shopping attempts and concludes that a distinction needs to be drawn between set asides and other post-award judgments. On one hand, Article V(1)(e) of the New York Convention permits national courts to grant effect to foreign set-asides, but fails to provide criteria as to when they should do so. As explained in Part II of this paper, the general framework for foreign judgments can provide guidance and help national courts in assessing whether or not to grant effects to foreign set-asides. On the other hand, for other post-award judgments, the New York Convention is silent as to their effects. As shown in Part III of this paper, there are good reasons not to extend the "judgment route" rationale to those other post-award judgments and not to grant them effects in subsequent proceedings concerning the same award.

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<sup>141</sup> For more details, see Scherer, *supra* note 47.