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BOOK REVIEW

ENFORCEMENT OF ANNULLED FOREIGN ARBITRAL AWARDS: PERSPECTIVES FROM DOMESTIC AND INTERNATIONAL LAW

Oriola O. Oyewole †

Abstract

Alternative Dispute Resolution (ADR) mechanisms provide parties with a degree of control over their agreement and future settlement of dispute as opposed to litigation which is considered rigid and time-consuming. However, domestic and international commercial arbitration espouses some similarities with litigation, such as formalism, capital intensiveness and time taking. Over the years, in domestic climes and globally, commercial arbitration has grown significantly in traction. Be that as it may, the finality of arbitral awards at the 'seat' of arbitration may not be final in the real sense; especially, when it is subject to annulment.

Against this background, the paper critically examines the circumstances where it would be appropriate for foreign courts to enforce arbitral awards annulled in the arbitral seat. The author has analysed select case law to assess these circumstances and has used the delocalisation theory to build up arguments about the subject matter.

Keywords: International Commercial Arbitration, arbitral awards, delocalisation, enforcement.

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Litigation is a machine which you go into as a pig and come out of as a sausage- Ambrose Bierce

I. The Rise of International Commercial Arbitration

The emergence of Alternative Dispute Resolution (ADR) is not traceable to a specific region because people, since its inception have been attempting to resolve conflicts without using force. Even in the smallest unit family, elders or a neutral person such as the king or a chieftain adjudicated on disputes between two parties.[1] The ancient practices of settling disputes crystallised into the contemporary avenues applicable today. In China, what we see as modern-day ADR was adopted early on. Their stance towards resolving disputes emanated from Confucian and Taoist ethics.[2] Confucius advocated for harmony while spotlighting disruption caused by adversarial proceedings.[3] Hence, it is believed that adversarial proceedings espouse rivalry and harm amity. In ADR proceedings, a neutral party in charge of the matter ensure and guides the parties to continue in fellowship.[4] The agreement reached after the proceedings is then expected to be mutually respected by the parties and recognised.

In ancient Greece, arbitration was entrenched in Greek mythology embodying a formal process.[5] The parties resorted to a lottery to

[1] For instance, in the Nigerian Pre-colonial era, both family and trade disputes were usually settled by neutral and influential members of the societies such as the King, chieftain, and head of the family; *Okpuruwu v. Okpokam* 2 (1998) 4 NWLR Pt 90, 554

[2] Edwin H, W Chan, *Amicable dispute resolution in the People's Republic of China and its implications for foreign-related construction disputes*, 15 CONSTRUCTION MANAGEMENT AND ECONOMICS 540 (1997).

[3] *Id.*

[4] *Id.*

[5] Romesh Weeramantry, *From Giants to Gunboats: the Evolution of State-State Arbitration* in GOURAB BANERJI ET. AL (EDS), INTERNATIONAL ARBITRATION AND

choose an arbitrator. After selecting the arbitrator, their first duty was to ensure a peaceful settlement of disputes between the parties. When the arbitrator's attempt at amicable settlement failed, witnesses were summoned and the parties would submit evidence in writing (documentary evidence).[6] It is also interesting to note that parties often used different tactics to adjourn rulings, reschedule time and challenge the arbitrator's decisions. An unsatisfied party would appeal to the arbitrators, who may then transfer the matter to the court.[7] Plausibly, such an action may impede the ADR process but it may also be construed as a matter of checks and balances for the arbitration process because it tends to prevent arbitrators from abusing their powers. The strategy for deferring rulings by the aggrieved party illustrates the jurisdictional challenges between the court and arbitration i.e. whether the court is competent to set aside an award or enforce an award.

For the Romans, it was customary 'to put an end to litigation' through arbitration.[8] In Greece, arbitration was the strategic tool for resolving inter-state disputes.[9] Furthermore, a cursory look at the Anglo-Saxon period in Britain shows that Anglo-Saxons used varied dispute resolution mechanisms similar to modern-day arbitration, negotiation and mediation.[10] These processes were available to litigants despite a pending lawsuit - 'dispute processing continuum'. Arguably, their objective was to promote and uphold the rule of law,

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THE RULE OF LAW 56-57. Hawaiian Highlanders of Polynesian ancestry also used their traditional system for peaceful settlement of disputes.

[6] *Id.*

[7] Lagos Court of Arbitration (2016).

[8] Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 132 (1934).

[9] Gabriel Shoemaker, *Ancient Greek Arbitration: Practices, Failures and Decline of the Greek World*, 55:24 INTERNATIONAL LAW AND PRACTICES 25-27 (2023). In ancient Greece, the Arbitration clause was known as *Compromissum.*

[10] Valerie E. Sanchez, *Towards a History of ADR:The Dispute Processing Continuum in Anglo-Saxon England and Today*, 11:1 OHIO STATE JOURNAL OF DISPUTE RESOLUTION 2-34 (1996).

legal process, peaceful resolution of disputes and reconciliation of the parties.[11] It is worthy of mentioning that the Anglo-Saxon period enabled the commencement of lawsuits in one of two functionally similar adversarial legal processes i.e. adjudication and arbitration. It implies that these processes co-existed at the starting point and were empowered to deliver legally enforceable judgments.[12] Therefore, both processes were not mutually exclusive but coexisted and complimented each other contrary to the popular perception today.

Another interesting point is that judges and arbitrators persuaded parties to reach a settlement agreement to maintain friendly relations.[13] Further, this practice was entrenched in the dispute processing continuum after the judge had delivered a winner-take-all judgement' on the merits.[14] At this juncture, the judge mostly assumed the position of the mediator or assigned a mediator to assist the parties in negotiating a settlement agreement.[15] Hence, the Anglo-Saxon period did not make arbitration an alternative to adjudication; rather, there was a synchronisation between adjudication and arbitration as dispute resolution mechanisms. Additionally, the judges exercised limited control over arbitration and its outcomes.

Wolaver notes that there are two accounts for the origin of commercial arbitration:

1. …methods used by the gilds and the merchants in the dispatch of their affairs, and

[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.*

2. the examination of the cases in the law of contracts that contained arbitration agreements and the reaction of courts to them.[16]

He concludes that the origin of arbitration is analogous to contracts and that 'merchant practices have generally been regarded as special proceedings under foreign law.'[17] It seems that arbitration is as old as humanity itself, a kind of prehistoric strategy used by traders in settling disputes in commerce.[18]

Redfern (et al.) highlight arbitration's simplicity and rudimentary nature from time immemorial.[19] However, over the years, arbitration has lost its elementary structure due to complex commercial contracts and the proliferation of different legal regimes.[20] In Lord Mustill's words: the history of arbitration 'is now lost forever'[21] and 'it is impossible to piece together the details'. [22] Inferably the emanation of these factors coupled with globalisation and transboundary business activities resulted in the need to recognise and enforce judgments and arbitral awards in a location different from the original seat of arbitration.

[16] For an in depth analysis, see Earl S. Wolaver, *The Historical Background of Commercial Arbitration*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 132-146 (1934).
[17] *Id.* at 146
[18] Godwin Obla, *Arbitration as a Tool for Dispute Resolution in Nigeria: How Relevant Today?* in JUDE OLAKANMI (ED.) ALTERNATIVE DISPUTE RESOLUTION (LawLords Publications 2013)1; AKPATA EPHRAIM, THE NIGERIAN ARBITRATION LAW IN FOCUS 1(West African Book Limited 1997).
[19] ALAN REDFERN ET. AL, LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 1,2 (4th Edition, Thomson Sweet and Maxwell 2004).
[20] *Id.*
[21] Lord Michael Mustill, *Arbitration: History and Background*, 6:2 JOURNAL OF INTERNATIONAL ARBITRATION 43 (1989).
[22] *Id.*

Having analysed the origin of ADR in some domestic jurisdictions,[23] it is essential to now define an arbitral award.

II. Defining an Arbitral Award

It is necessary here to clarify what is meant by an arbitral award. An arbitral award is a term frequently used in domestic and international commercial arbitration, but to date, there is no consensus about the definition of arbitral award in domestic arbitration law or foreign arbitration rules. The broad use of the term arbitral award is sometimes equated with the decision of arbitral tribunals on the claims, procedural issues or substance of the dispute submitted to it. Once the award is made, proceedings terminate.[24] It can also be defined as a final judgment by an arbitrator.[25]

In *Seed Holdings Inc. v. Jiffy International,*[26] the court held *inter alia* that the importance of an arbitration agreement entails that 'the parties intended to submit some disputes to their chosen instrument for the definitive settlement of certain grievances under the agreement'.[27] The award is usually in writing and signed by the

[23] At the 1976 Dean Roscoe Pound Conference, one of Harvard Professors, Frank Sanders, proposed the concept of a multi-door courthouse in 1998. Multi-Door Courthouse is a court-based alternative conflict resolution program. It is a state-managed alternative dispute resolution mechanism that is often developed to provide facilities for the resolution of civil disputes within the court premises. As a result, a variety of solutions for resolving legal issues are available. For more insights, see Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Reshaping Pour Legal System*, 122(349) DICKSON LAW REVIEW 349-351 (2017).

[24] Robert B. Davidson & David W. Plant, *ADR and Arbitration* in LAWRENCE W. NEWMAN AND RICHARD D. HILL (EDS), LEADING ARBITRATORS' GUIDE TO INTERNATIONAL ARBITRATION (3rd Edition 2014)

[25] Black's Law Dictionary(7th Edition, West, 1999).

[26] United States District Court, S.D. New York. March 21, 2014, 5.F Supplementary 3d 565(S.D,N,Y 2014).

[27] *Id.*

arbitrator(s) and parties. It can be partial, interim, interlocutory or final.[28]

In *Fidelitas Shipping Company Ltd. v. V/O Exportchleb,*[29] the judge clarified the meaning of a final award:

> …the test was whether the arbitrator or umpire had in his award exhausted his duties so that there was nothing left for him to do. If he had bid farewell to his office - so that the opinion of the court could decide all the issues one way or the other - then it was a final award. But if there was something left for the arbitrator or umpire to do, even if he retained for himself so little as the assessment of damages, then it was…not a final award.[30]

Therefore, a final award terminates the duties of the arbitrator in that particular arbitration process. It is *the* outcome of the arbitration proceedings. However, interim, interlocutory or partial awards are considered a means to an end. It follows that an annulled award is usually construed as a final award of the tribunal. Their enforceability depends on the law of the seat or the place of enforceability. The focus of this paper while discussing arbitral awards is largely centred around foreign arbitral awards.

III. Distinction Between Recognition and Enforcement of a Foreign Arbitral Award

After the arbitral tribunal has issued a final award the next phase is usually the award's recognition and/or enforcement. Experience shows that the parties may decide to enforce the award, seek recognition or go for both simultaneously. Blackaby and Redfern

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[28] AFE BABALOLA, ENFORCEMENT OF JUDGMENTS 322(1st Ed., Lifegate Publishing, 2009)
[29] (1965) 2ALL ER 4 at 7G-H
[30] *Id.*

posit that if an award is proclaimed enforceable, such official announcement *ipso facto* denotes its recognition.[31]

Recognition of an award underscores the legal effect analogous to a court's judgment. Enforcement means the process of execution after an award's recognition. Assets can be connected for its satisfaction. Whether domestic or foreign, an arbitral award can be enforceable if it has 'finally and conclusively disposed of a separate and independent claim'. It is also possible even if 'it does not dispose of all the claims submitted to arbitration'. [32] However, interim (or temporary) measures are not enforceable because they do not conclusively dispose of a claim.[33]

For instance, the Reciprocal Enforcement of Judgement Ordinance, 1957 and the Foreign Judgments Act, Cap F35, regulate foreign judgment registration in Nigeria. In *Tulip Nigeria Ltd. v. Noleggioe Transport Maritime S.A.S.,*[34] the court held:

> the provision of the Reciprocal Enforcement of Judgment Ordinance Cap 175 1958 and Foreign Judgment Act 1990 will apply in the enforcement of foreign arbitral ward where same has been elevated to the status of a judgment by leave of the High Court been sought and obtained.[35]

Also, the court found that judgment shall become binding on the parties regardless of the place where it was delivered. And the receiving court is under the duty to enforce it.[36] Hence, for an

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[31] NIGEL BLACKABY ET. AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 611 (7th Ed., OUP, 2015).
[32] Zeiler v. Deitsch, United States Court of Appeals, Second Circuit, Aug 23, 2007, 500 F. 3d 157(2d Cir. 2007) ;*Metallgesellschaft A.GV. M/V Capitan Constante,* 790 F.2d 280(2d Cir.1986)
[33] *Id.*
[34] (2011) NWLR 4(Pt . 1237)254
[35] *Id.*
[36] *Id.*

arbitral award to have the same legal status as a judgment, it is subject to the application and attainment of the leave of the court where the award was made to enforce the award like a formal judgment.

Topher Incorporation of New York v. Edokpolor(Trading as John Edokpolor) provides a different perspective on reciprocity.[37] In this case, the plaintiffs brought an action against the defendant for the sum of £2142 awarded in its favour by arbitrators in New York. The defendant requested the High Court to set aside the award because it was 'founded on a foreign arbitration governed by the laws of the State of New York, United States'. The High Court noted the absence of any statute similar to the Arbitrations of Foreign Awards Act 1930 of England and observed that: 'for a foreign arbitral award to be recognised here, there must be a treaty guaranteeing reciprocal treatment or an order in Council to that effect.'[38] Unsatisfied by the High Court's decision, the plaintiff appealed. On appeal, the Supreme Court held:

> 1. A party is not prevented from suing upon a foreign judgment regardless of whether there is reciprocal treatment in the country where it is obtained if no order is made under section 124 to modify the position. 2. A suit brought upon a foreign award ought not to be struck out merely on the ground that there must be a treaty guaranteeing reciprocal treatment in the country where it was made or an order in Council to that effect.[39]

This decision of the Supreme Court answered the question of whether provisions of the rules of the court can override the provisions of an international convention. It also brought to the limelight that a reciprocal agreement is not a condition precedent for

[37] (1965), 1ALL NLR 1, 307.
[38] *Id.*
[39] *Id.*

recognising a foreign award. Rather, an obligation arises if a foreign court of competent jurisdiction has determined a certain sum payable by a party to another party. As observed in one of the cases, 'the liability to pay that sum becomes a legal obligation enforceable domestically by a debt action'.[40] Accordingly, in the absence of a reciprocal agreement between the concerned States, a foreign arbitral award may trigger a legally enforceable obligation in a domestic court through a lawsuit by the secured creditor.

IV. Assessing the Finality of Annulled Awards

International commercial arbitration aims to render a final and binding resolution of the parties' dispute.[41] The party to whom the award was given reasonably expects the award to be carried out without deferral [42] On rendering an award, recognition and enforcement of the award is critical.[43] For instance, the UNICTRAL (United Nations Commission on International Trade Law) Rules of 1976 state that the 'award shall be final and binding on the parties and the parties undertake to carry out the award without delay'.[44]

Further, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (also known as the New York Convention) intends to encourage arbitration and expedite the enforcement of arbitral awards.[45] Article V(1)(e) of the New York Convention provides 'that an award may be denied recognition if it...has been set aside or suspended by a competent authority of the

[40] The rule of Doctrine of Obligation was made in a court case known as Russell v. Smyth, (1842) 9 M & W 810, 81.
[41] GARY B.BORN, INTERNATIONAL ARBITRATION 1047 (1st edition, Wolters Kluwer, 2009).
[42] Blackaby, *supra* note 31, at 621.
[43] *Id.* at 622.
[44] Art. 32(2), UNCITRAL Arbitration Rules, 1976.
[45] Kenneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on Recognition and Enforcement on Foreign Awards*, TEXAS INTERNATIONAL LAW JOURNALS (2002).

country in which, or under the law of which, that award was made'.[46] Flowing from the provision of Art V(1)(e), if an award was annulled or suspended in the seat of arbitration, consequentially, the award would not be recognised nor enforced in another country. However, there is a qualifying clause 'may' not 'must' or 'shall'. The use of the word 'may' makes a certain action discretionary unlike 'must' because it does not indicate compulsion rather it opens a pathway for the local or receiving court to decide. In summary, it is made subject to the powers of the local/receiving court. For a clearer comprehension of these provisions, the drafters should have used 'must' in place of 'may'.

It will be apposite to refer to a couple of opinions at this juncture. Jan Paulson opines that: 'courts cannot violate the convention by enforcing a foreign award'.[47] Van den Berg also said that: 'The drafters of the convention did not consciously choose the word 'may' and they did not mention any discussion regarding a choice between 'may' and 'shall' concerning Article V(1)(e)'. [48] He proposed the dispute should be resolved per the intent of the Convention.[49] On the other hand, Article VII(1) provides:

> The Convention shall not affect the validity of multi-lateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested parties of any right he may have to avail himself of an arbitral award in the manner and to

[46] Art. V(1)(e), New York Convention on the Recognition and Enforcement of Awards, 1958,
[47] Jan Paulson, *Enforcing Arbitral Award notwithstanding notwithstanding Local Standard Annulment*, 9:1 ICC INTERNATIONAL COURT ARBITRATION BULLETIN 14,17 (1998).
[48] Albert Jan Ven den Ber, *Arbitration: Enforcement of Arbitral Awards Annulled in Russia: Case Comment on Court of Appeal of Amsterdam*, April 28, 2009 27 J. Arbitration No. 2, 2010,179
[49] *Id.* at 180

> the extent allowed by the law or the treaties of the country where such award is sought to be relied upon. [50]

Despite the unenforceability of annulled awards provided under Article V of the New York Convention, some internal courts have enforced annulled awards by using Article VII(1) of the New York Convention to utilise '*more favourable right provision'*.[51]

There are two schools of thought on the validity of the award; the traditional perspective and the modern school of thought. The conventional viewpoint believes that the validity of an award is associated with or dependent upon the law of the place of arbitration.[52] As a result, an arbitral award cannot be divorced from the law of the seat of arbitration. If annulled in the seat of arbitration, it becomes null and void and cannot be enforced in another country.[53] On the other hand, the denationalised school of thought differentiates the existence of an award from the seat of arbitration. It believes an award does not have its roots in its country of origin.[54] The circumstances under which a court can enforce a foreign award that has been nullified in the seat of arbitration are considered on the approach of law the court is interested in using. [55] One of the circumstances in which a foreign court would enforce an annulled award of another seat is on the grounds of public policy. [56]

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[50] Art. VII, New York Convention, 1958.

[51] Stephen Cohen, *The New York Convention at Age 50: A Primer on the International Regime for Enforcement of Foreign Arbitral Awards*, 1:1 NEW YORK DISP. RESOL. LAW. 47 (2008).

[52] Keneth R. Davis, *Unconventional Wisdom: A New Look at Articles V and VII of the Convention on Recognition and Enforcement of Foreign Awards*, 37 TILJ 43 (2002).

[53] *Id.* at 9.

[54] *Id.* at 12.

[55] *Id.* at 12

[56] *Resolution of the ILA on Public Policy as a Bar to Enforcement of International Arbitral Awards*, 19:2 ARBITRATION INTERNATIONAL 213-215 (2003); Jonathan I. Blackman & Ellen London, *Respecting Awards Annulled at the Seat of Arbitration: The Road from Chromalloy to Termorio*, AAA HANDBOOK ON

Resolution of the International Law Association on the Enforcement of International Arbitral Awards thus recognised 'the importance of finality in arbitration proceedings but also the role of public policy in upholding fundamental principles, applicable mandatory laws and international obligations'.[57] It also stated:

> The finality of awards rendered in the context of international commercial arbitration should be respected save in exceptional circumstances' and that 'such exceptional circumstances may, in particular, be found to exist if recognition or enforcement of the international arbitral award would be against international public policy.[58]

The aforementioned excerpts demonstrate the significance of arbitral awards' finality while justifying the role of public policy in recognising and enforcing an arbitral award. Therefore 'finality' of an arbitral award is not finality in the real sense but is transmitted to the local court for determination, which means that the local court is vested with discretionary power to either uphold the annulment or overturn it.

Where an award was obtained unjustly or violates notions of public policy, the foreign court can enforce that award even though it has been annulled in the seat of arbitration.[59] In Yurkos *Capital SARL v. OJSC Rosneft Oil Company*,[60] the British court considered two preliminary issues between the parties. They were:

INTERNATIONAL ARBITRATION AND ADR 191 (2nd Ed., Juris Publishing International, 2010).

[57] International Law Association, Resolution was adopted at the 70th Conference, in New Delhi, India. Preamble, Resolution of the ILA on the policy as a bar to Enforcement of International Arbitral Awards.

[58] *Id.* Annex 1, Artcls. 1(a) and 1(b).

[59] *Id.* at 15

[60] (2014) EWHC 2188 (Comm).

> 1. Whether enforcement of arbitral awards that have been set aside by the courts of the seat is precluded under common law. 2. Whether, in principle, interests could be recovered on such arbitral awards under either Russian and/or English law.[61]

Rosneft argued that the award had been set aside by the Russian Courts, Subsequently, it was precluded from enforcement by the Yurkos Capital.[62] The court found that*:* 'as a general position, it would be unsatisfactory and contrary to principle if a court were bound to recognise a decision of a foreign court which offended against the basic principle of honesty, natural justice and domestic concepts of public policy.'[63] The burden is on the party (Yurkos Capital) asserting the violation of natural justice, the basic principle of honesty and domestic concepts of public policy to prove why the set-aside award should not be recognised.[64] Notably, Prof. Albert Van Den Berg was of the view that Yurkos Capital had not provided any evidence of partiality and dependence on the part of the Russian Judges and that the Court of Appeal's inference from press reports in Russia was not substantial enough to warrant a logical basis.[65] He proceeded to say that it is not the duty of courts in Contracting States to decide the flaws of the judiciary in other contracting states. [66]He concluded that this can lead to a 'blacklist' of countries.[67]

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[61] Herbert Smith Freehills, *A Delicate Matter': English Courts considers enforcement of awards set aside by the court of the seat and ability to claim a post-award interest in those circumstances*, 2014, http://hsfnotes.com/arbitration/2014/07/15/a-delicate-matter-english-court-considers-enforcement-of-awards-set-aside-by-the-courts-of-the-seat-and-ability-to-claim-post-award-interest-in-those-circumstances/ (Jan. 7, 2023, 7:00 AM).
[62] *Id.* at 15.
[63] *Id.*
[64] *Id.*
[65] Albert Jan Van Den Berg, *Enforcement of Arbitral Awards Annulled in Russia: Case Comment on the Court of Appeal of Amsterdam*, 27(2) JOURNAL OF INTERNATIONAL ARBITRATION 179-198 (2009).
[66] *Id.* at 22
[67] *Id.* at 22

Albert further observes:

> …..if an award has been set aside in the country of origin, the game is clearly over. A party will refrain from attempting to seek enforcement of the award abroad since it knows that enforcement will be refused…Thus in the case of questionable award, a party cannot shop around the world in order to find a flexible court somewhere which is willing to enforce such an award.[68]

The argument was based on the fact that an annulled award is dead (in other words the 'game is over'). He reiterated that something cannot come out of nothing. It is *ex nihilo nil fil*, which means an annulled award no longer exists.[69] Regarding the interests claimed, the claim was not successful under Russian law, but the court maintained that, in principle, the interest could be retrieved under Section 35A of the Senior Courts Act, 1981 even though the tribunal had not awarded the interests.[70]

On the other side of the spectrum, Jan Paulson believes Article VII has overriding powers over Article V(1)(e).[71] Paulson differentiates between awards set aside on the foundation of International Standard Annulment (ISA) and those set on the foundation of Local Standard Annulment (LSA).[72] He admits that awards annulled on the criteria

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[68] Albert Jan Van den Berg, *Enforcement of Annulled Awards,* 9:2 THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN (November 1998).

[69] *Id.* at 25.

[70] Herbert Smith Freehills, *A Delicate Matter: English Courts Considers enforcement of Awards set aside by the courts of the seats and ability to claim a post-award interest in those circumstances*, 2014, http://hsfnotes.com/arbitration/2014/07/15/a-delicate-matter-english-court-considers-enforcement-of-awards-set-aside-by-the-courts-of-the-seat-and-ability-to-claim-post-award-interest-in-those-circumstances/ > (Jan. 20, 2023, 9:30 AM).

[71] New York Convention, 1958.

[72] Jan Paulson, *Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment (LSA)*, 9:1 THE ICC INTERNATIONAL COURT OF ARBITRATION BULLETIN 14 (May 1998).

of LSA are special and should be given special consideration and even enforced.[73] This unequivocally means that if an annulled award is incompatible with an internationally accepted standard, it can be enforced by a foreign court.[74] Albert objected to Paulson's views because ISA and LSA are not contained in the New York Convention, 1958. As such, Paulson's solution does not have any legal backing; it is not practicable and takes away uniformity which is the intendment of the New York Convention.[75] In the *Gotaverken Case,* [76] the delocalisation policy was extensively discussed and settled.[77] The Paris Court of Appeal held that the legal system of the country of arbitration has no substantial effect on the outcome of the arbitral proceedings unless the parties to the arbitral proceedings agree otherwise.[78] This means the parties are not bound to choose the law of the place of arbitration.[79] As per Paulson :

> The parties have the power to stipulate that the law giving binding effect to the proceedings is not the law of the place of arbitration. It would follow that the courts of the place of arbitration, unless they have other bases of jurisdiction over the parties or the subject-matter, have no particular mission to rule on challenges to awards only because they are rendered within their territory.[80]

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[73] *Id.* at 21.
[74] Kamal Sleiman *Enforcing Annulled Awards under the New York Convention, Part*, 2013, http://apps.americanbar.org/litigation/committees/international/articles/fall2013-1213-enforcing-annulled-awards-under-new-york-convention-part-i.html (Feb. 1, 2023, 7:00 AM).
[75] Van den Berg, *supra* note 68.
[76] General National Maritime Transport Co. v. Gotaverken Arendal AB, (1980) Rev . de l'Arb (1981) 6Y.B Comm.Arb
[77] Jan Paulson, *Arbitration Unbound: Award Detached from the Law of the Country of Origin*, 30 ICLQ (1981).
[78] *Id.* at 34.
[79] *Id.* at 34.
[80] *Id.* at 34.

Then, in the *Hilmarton Case*,[81] an initial award was made by the Switzerland court in favour of the company Omnium de Traitement et de Valorisation SA (OTV), which proceeded to obtain the enforcement of the award in France.[82] But before the award could be enforced, the Supreme Court of Switzerland annulled the initial award. A second tribunal resolved the disputes, arrived at an entirely different decision on the same facts, and made a second award.[83] The French Court found the *res judicata* effect on the initial enforcement order of the original award and held that it precluded the enforcement of a second arbitral award.[84] Hilmarton filed to the French Court for the execution of the second award, claiming that the Swiss Supreme Court had invalidated the first award and that enforcing the first award, which had been annulled, would be contrary to international public policy.[85] The French Supreme Court refused Hilmarton's argument and held that the first award annulled by the Swiss Court was an international award which was not incorporated in the legal system of Switzerland, and, therefore, the award was still substantial despite its annulment.[86] Also, its recognition enforceable in France does not contradict public policy.[87]

As a consequence, it was established that in the French jurisdiction, an 'international award is stateless' and generates its validity primarily from the inclination of the parties rather than the *lex loci*

[81] Omnium de Traitement et de Valorisation SA v. Hilmarton Ltd (1999) ALL ER(D) 704
[82] Michael Polkinghorne, *Enforcement of an Annulled Award in France: The Sting in the Tail*, January 2008, http://www.whitecase.com/files/Publication/9519e3f5-1c7b-4531-8a62-a6ac59dc87de/Presentation/PublicationAttachment/153d6bd2-17f4-48a0-94b2-af4265abf8fc/article_Annulled_awards_v3.pdf (Dec. 3, 2023, 8:00 AM).
[83] *Id.* at 39.
[84] *Id.*
[85] *Id.*
[86] Polkinghorne, *supra* note, 82.
[87] *Id.* at 43.

arbitri or any national law.[88] It is worth noting that French law, particularly, the New Code of Civil Procedure, does not give grounds for refusing to enforce a foreign award that the court of seat has invalidated.[89] This means that French courts would recognise and enforce international awards that are enforceable under French law, notwithstanding whether they had been set aside in the court of the seat.[90] In a similar decision in the *Arab Republic of Egypt v. Chromalloy Air Services*,[91] the United States Courts recognised an award made in Egypt against the Ministry of Defence of the Republic of Egypt, although an Egyptian court had annulled the award because the arbitrators had misapplied the Egyptian law.[92] The court relied on Article V of the New York Convention which provides a standard under which a court may decline to recognise an award if one of the provisions specified as an exception applies.[93] The court, *inter alia*, held:

> The award made in Egypt is by definition an international award which is not integrated into the legal order of that State so that its existence remains established despite it being annulled and its enforcement in France is not a violation of the international public policy.[94]

Subsequently, in the *Norsolor Case*,[95] in the arbitration agreement, the parties to the arbitral proceedings did not choose any national law to be applied in the arbitral tribunal; consequently, the arbitrators resorted to the transnational rules (*lex mercatoria)* for the conduct of

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[88] Roy Goode, *The Role of the Lex Loci Arbitri in the International Commercial Arbitration*, 17:1 ARBITRATION INTERNATIONAL 27 (2007).
[89] *Id* at 45.
[90] *Id* at 45.
[91] DCC YEAR BOOK COMMERCIAL ARBITRATION XX II(1997).
[92] Gary B.Born , *International Commercial Arbitration: International Arbitral Awards* III(2nd Edition, Wolters Kluwer 2014)3629.
[93] *Id* at 3629.
[94] Goode, *supra* note 88, at 45.
[95] Norsolor S.A (France) v. Palbalk Ticaret Sirketi S.A (Turkey) (1981)

the arbitral proceedings.[96] In this case, Norsolor terminated its commercial agency contract with Palbalka Turkish Corporation.[97] Under the aegis of the International Chambers of Commerce, the arbitral tribunal located in Vienna(Austria) pronounced that Norsolor should pay some amount of money according to transnational rules.[98] The award was recognised in Austria and France. But later, it was partially set aside by the Vienna Court of Appeal, and the Paris Court of Appeal reversed the decision based on Article V(1)(e) of the New York Convention 1958.[99] The *Cour de cassation* did not uphold the judgment of the Court of Appeal but based its decision on Article VII of the New York Convention and Article 12 of the New Code of Civil Procedure, emphasising that Article 12 of the New Code of Civil Procedure[100] provides 'to what extent the French Law would oppose such enforcement.'[101]

However, Jan Paulson has argued that if the application of *lex mercatoria* were not allowed in arbitral proceedings then the choice of place of arbitration would have great relevance.[102] Subsequently, this would give rise to 'floating awards'.[103] The term 'floating awards' refers to those awards that are enforceable in any jurisdiction when their annulment is subject to scrutiny by courts in other states.[104]

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[96] *Id.*
[97] Emmanuel Gillard, *The Enforcement of Awards Set Aside in the Country of Origin*, FILJ 14 ICISID Review 16 (1999) 20.
[98] *Id.* at 52
[99] *Id.*
[100] The French New Code of Civil Procedure.
[101] Emmanuel Gillard, *Enforcement of Awards Set Aside in the Country of Origin*, FIJL 14 ICSID Review 16 (1998) 20.
[102] Paulson, *supra* note 77.
[103] *Id.* at 59.
[104] Emmanuel Gilliard, *The Enforcement of Awards Set Aside in the Country of Origin*, FIJL 14 ICISID 16(1999) 40.

The French courts' current attitude is that if a losing party brings an award that has been annulled or set aside in the *lex locus arbitri* before it, Article V of the New York Convention will be rarely invoked.[105] Article VII of the New York Convention empowers the French authorities to acknowledge the right of the party seeking to enforce the annulled award to benefit from the more generous approach of the domestic law of the State where enforcement is requested.[106]

Another situation that potentially leads to a foreign court enforcing a judgment nullified in the country of origin can arise if the foreign court decides to exercise its 'residuary discretionary powers'. According to Paulson again, the word 'may' is permissive. Hence, the residuary powers may be construed to override the arbitral award made at a particular seat. Furthermore, a foreign court can enforce an award that has been annulled in the country of origin when the foreign court acts under the provisions of Article IX(2) of the European Convention on International Commercial Arbitration which provides:

> In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1)(e) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above.[107]

Article IX (1) of the European Convention on International Commercial Arbitration sets out the grounds for the recognition of annulled awards. This approach has been applied in the case of *Kajo v. Radenska,* [108] Austria, as a respondent to the arbitration

[105] Goode, *supra* note 88, at 28.
[106] *Id.* at 62
[107] European Convention on International Commercial Arbitration, 1961.
[108] (1998) XXIV Y.B. Comm.Arb.919 (1999)

proceedings, sought enforcement of the award before the Austrian Supreme Court after the Slovenian Supreme Court set it aside because it violated Slovenia's public policy. The Austrian Supreme Court enforced the annulled award under the European Convention instead of relying on the New York Convention.[109]

The aforementioned disputants contended that either the annulment of an award in the place of arbitration renders the award a nullity, which other States need not (or should not) recognise or enforce. An annulment decision in the arbitral seat should ordinarily be accorded deference by recognition courts in other jurisdictions. [110] Nevertheless, the above circumstances indicate that domestic courts in countries like France, Belgium, Austria and the United States are liberal in recognising and enforcing awards nullified in the arbitral seat. However, this liberal approach by some national courts may hit the doctrine of *res judicata.*

V. Conclusion

This paper has given a brief account of the history of international commercial arbitration. In addition, it has investigated the differences between the recognition and enforcement of foreign arbitral awards. The enforcement of foreign awards is also construed as recognition of such awards.[111] Recognition of an arbitral award may be an action that the creditor may take to protect interests in the property pending the enforcement of such an award. One of the significant findings to emerge from this paper is the effectiveness of the delocalisation theory in enforcing annulled foreign arbitral awards. Some local courts' attitude towards implementing foreign awards demonstrates their peculiarities and socio-legal realities. In

[109] Linda Silberman & Maxi Scherer, *Forum Shopping and Post-Award Judgment*, 2:1 PKU TRANSNATIONAL LAW REVIEW (2014).
[110] Gary B. Born, *International Commercial Arbitration: International Arbitral Awards*, Vol III Wolters Kluwer 3623 (2014).
[111] Blackaby, *supra* note 31.

many instances, the application of the law is contextual. Hence, the award seat may operate on varied factors compared to the local courts. This is where public policy filters in.

In summary, Paulsson, an advocate of a 'stateless' award, has reiterated at various instances that the binding effect of an arbitral award does not have to depend on the national legal system of the country of origin (*Lex Loco Arbitri*).[112] Separating the arbitral award from the arbitral seat could preclude injustice and a review of the conditions for the annulment in the first place. Nonetheless, detaching an award from the place of origin could also put into question the legal effect of its finality.

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[112] Paulson, *supra* note 77.