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ENFORCEMENT OF SET ASIDE AWARDS

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Abstract

The question whether an arbitral award, set aside by the court in the seat arbitration, could be enforced in another state or not has received significant attention from various scholars. This issue arises due to myriads of interpretations given by various national courts to the meaning of Article V(1)(e) of the New York Convention, 1958. Two schools of thought- the Territorial and the Delocalised view, have mired the entire debate. The problem in the territorial approach lies in the fact that even after the 1958 Convention there is no uniformity in the grounds on which an award is set aside. On the other hand, critics of the delocalised approach have argued that if the losing party is not afforded the right to challenge the award in one jurisdiction then the losing party could be pursued by the claimant with enforcement actions from country to country until a court is found which grants the enforcement. These uncertainties and conflicts call for a reform of the current international legal framework for enforcing arbitral awards. Harmonisation – uniform laws for enforcement/annulment of awards, and Unification – establishing a supranational court for the control of award, are the two broad categories of the proposed solutions. This paper analyses the viability of these solutions, and also addresses the functioning of bodies such as the ICSID, the Arab Centre for Commercial Arbitration, the Joint Court of Justice and Arbitration. These institutions with prerogatives similar to a supranational court, have been working well and are thus evidence to the fact that the establishment of a supranational court for the control of annulment/recognition of an award is far from being impracticable and unrealistic.

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I. INTRODUCTION

The widespread use of arbitration as a dispute settlement mechanism in international commerce comes with a sophistication of its governing legal mechanisms.[1] Importance in this area is no longer limited to the standard and current question of the enforcement of awards, but also on the enforcement of decisions of national courts on annulment actions against arbitral awards.

In order to enforce an award, the same needs to be presented in the court of the country wherein the award creditor would have interest. However, the award may have been challenged through a setting aside action before the court at the seat of the arbitration. In case the same gets set aside, it leads to the very complex question of its effect on other states. Should the award be vacated by the court in the country of origin be given so much importance that it overshadows or precludes its enforcement in other countries?

To give an example, say A and B have a commercial dispute arising out of their contract. According to their Dispute Settlement clause, the same needs to be resolved by the Arbitration rules of LCIA seated at London. Suppose the award comes in favour of A but B is successful in getting it set aside by the court in London. A, a French national, applies to the court in Paris to enforce the LCIA award in his favour to protect his assets in France. The question which arises now is, if the court in Paris would enforce the award of the LCIA given that the same has been set aside by the court in London i.e., the seat of arbitration?

In most states, the recognition and enforcement of foreign arbitral awards is governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958

[1] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD XIII (Kluwer Law International 2002).

("New York Convention").[2] To answer the above mentioned question it is necessary that to turn to the New York Convention. This, however, is problematic because the provisions in the New York Convention have been subject to different interpretations and therefore, creates a plethora of ambiguities. The entire dispute therefore hangs on the tip of the question if whether one favours Article V to the detriment of Article VII, or opts for the opposite approach.

Article VII of the New York Convention allows the party seeking enforcement of the award to rely on the domestic laws of the country in which enforcement is sought, if these provisions are more favourable to enforcement than those of the New York Convention. However, Article V, which lists the grounds under which an award may be denied enforcement, retains in its paragraph (1)(e) the annulment of the awards in the country in which or under the law of which it was made among these grounds.

Because of this apparent conflict and anomaly, a situation arises wherein due to differences in the legal systems across the world different legal outcomes may be reached on the same set of facts. As a result, there is a systematic uncertainty which ultimately undermines the New York Convention.

There are widely two approaches or schools of thought to deal with this problem- the delocalised approach and the territorial approach. The proponents of the delocalised approach stress on the fact that an award sought for enforcement is independent from the legal system of the country wherein the award was rendered and as such the question of its validity should be judged by the courts in the enforcing country without taking into consideration the decision of the court in the seat of arbitration,

[2] DANIEL GIRSBERGER & NATHALIE VOSER, INTERNATIONAL ARBITRATION: COMPARATIVE AND SWISS PERSPECTIVES 1978 (3rd ed. Kluwer Law International 2016).

or in simpler words, an annulled award may be enforced by a court in the enforcing country. Under the territorial school of thought, an arbitral award is viewed to have been integrated in the legal system of the seat of arbitration and hence, once the same is set by the court in the seat of the arbitration the award loses its validity and ceases to exist. and therefore, the same cannot be enforced by the courts in the country where enforcement of the award is sought.

Part II of this paper discusses in detail the different schools deliberating over this issue and their demerits. Considering that the transnational or the delocalised approach have been widely lauded for its international approach, Part III of the paper explores the foundational basis of this approach through the decisions of various courts, including the courts in France, Belgium, Austria and the US, wherein the delocalised approach has been adopted to recognise an award set aside at the seat of arbitration. Part IV of the paper makes an attempt to deal with the question in light of the Indian experience with enforcing awards. Stressing on the point that India has in general a territorial approach and follows the English courts with respect to arbitration laws, it is shown as to why India would not enforce an award set aside by the court in the seat of Arbitration. There are many existing literature identifying the above problem. There have been further more research into the question of the best choice out of the two schools. In Part V of this paper the suggested solutions to do away the problem has been explored. The debate between harmonisation and unification has been addressed to show why unification of the system should be the way to tackle this issue. Further, the need to have a new multilateral convention and establish a new supranational court for the control of arbitral awards has been suggested.

II. DELOCALISED AND TERRITORAL APPROACH

Article V(1)(e) provides that foreign arbitral award may be refused enforcement if the same has been set aside in the country where the arbitration was seated. The traditionalists thus, in pursuance to this provision, state that an award vacated in the court of the jurisdiction where arbitration took place has no further legal force or effect, and cannot be thus enforced in any other jurisdiction.[3] This view, drawing inspiration from the notions of Westphalian sovereignty, argues that since each State has the exclusive power to regulate and enforce laws relating to persons, property, or events within its boundaries, the law of the seat of arbitration should exclusively regulate the legitimacy and legality of arbitrations that take place within it.

Diametrically opposite is the view which advocates that the system of arbitration is a part of a transnational legal order that is independent of any national legal system. Therefore, the seat court's decision to set aside an award is confined to its own jurisdiction only. As many commentators would argue the delocalised view does not preclude the application of the New York Convention. Article V(1)(e) of the New York Convention, is not a bar to disregarding the national laws and preventing the enforcement of foreign awards. Even if Article V(1)(e) were such a bar, it may be overcome by Article VII which makes this clear, by stating that in case the national laws are more favourable to enforcing or recognising a foreign award, the same shall be given precedence over any other international obligation.

A. THE DELOCALISED VIEW

Under the 1923 Geneva Protocol, the arbitration was governed by both the will of the parties and the law of the country in which the arbitration was conducted.[4] The New York Convention, in a

[3] Albert Jan van den Berg, *Annulments of Awards in International Arbitration*, *in* INTERNATIONAL ARBITRATION IN THE 21ST CENTURY, TOWARDS JUDICIALIZATION AND UNIFORMITY (Richard B. Lillich eds. Martinus Nijhoff 1994).

[4] Protocol on Arbitration Clauses 1923 art 2.

first, marked the beginning of the decline of the role of the seat in an arbitration by way of Article V(1)(d).[5]

The theory of delocalisation can be traced from the 1958 Aramco award[6] in which a tribunal seated at Geneva applied a principle of international law instead of *lex situs* which was the Swiss law in the present case. Taking inspiration from such cases, those advocating for this approach grew in numbers. Till date there has been only so many attempts to define the term 'delocalisation of award'. According to one commentator,[7] delocalisation "*is one of the various aspects of internalisation. It derives mainly from the idea that parties from different countries, in order to achieve neutrality, wish to avoid as much as possible the intervention of their respective courts, and at the same time the application of the rules of their respective countries.*"

Delocalisation, thus, in light of the above definition and the several approaches taken by the courts, would mean the impossibility for any State court to block, through an annulment decision, the enforcement of an award outside its boundaries.[8] Proponents of the delocalised theory would argue that an award, irrespective of the state's local policy or non-arbitrability rules which furthers setting aside an award, must be enforced. The fact that a legal system provides for a review of awards made in locally seated arbitrations, notwithstanding the parties' agreement to resolve disputes by arbitration, should be immaterial for recognition of arbitral awards in foreign jurisdictions.[9] One of the most celebrated commentators, Emmanuel Gaillard, in support

[5] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 108 (Kluwer Law International 2002).
[6] Aramco award, ILR 117 (1963).
[7] P Mayer, *The Trend towards Delocalisation in the last 100 Years*, *in* THE INTERNALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).
[8] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 114 (Kluwer Law International 2002).
[9] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION 3642 (2nd ed. 2014).

of this theory reiterated the finding of the *French cour de Cassation*[10] in stating that refusing to enforce an arbitral award on account of it being set aside by the seat court is unacceptable because the award in not integrated into the legal order of the country of the state simply by virtue of the geographic location. The state of enforcement assumes greater importance in such cases because pursuant to the New York convention the state needs to apply its own local laws to enforce an arbitral award.[11]

This view has received criticism mostly from the proponents of the territorial schools of thought. The seat of arbitration is a very important element of arbitration and as such has greater connection with the arbitration. Seat is the factor which connects the arbitration with a particular State. That state should hence not only govern the procedure related to the Arbitration but also exercise control over the award.[12]

This view finds its basis from Article V of the New York Convention which states that the state in which the award was rendered is free to set aside or modify the award in accordance to its internal laws. If this is applied in its strictest sense it would mean that an annulled award is non-existent as the award would cease to exist *erga omnes.*[13] Therefore, if the award is non-existent at the seat of the arbitration its validity in any other country should not be a question.

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[10] *Pabalk Ticaret Ltd Sirketi* v. *Norsolor SA,* (1986) 11 Y.B. Comm. Arb. 484 (ICC Int'l Cl. Arb.).

[11] Emmanuel Gaillard, 'The Enforcement of Awards Set Aside in the Country of Origin', [1999] 14 *ICSID Review - Foreign Investment Law Journal* 16, 40

[12] Giovanni Zarra, *L'esecuzione dei lodi arbitrali annullati presso lo Stato della sede e la Convenzione di New York: verso un'uniformità di vedute?,* RIV. ARB 561, 574 (2015).

[13] Thomas Clay & Sara Mazzantini, *Reasons and Incoherencies regarding the Enforcement of Annulled Foreign Arbitral Awards,* 7 INDIAN J. OF ARB. L. 141 (2018).

Further, this view may also propagate the problem of forum shopping[14] and creating an international disharmony, both of which are clearly inconsistent with the ethos of the New York Convention. It creates international disharmony in the decision-making in the arbitral sphere as the delocalised view would more often than not end up disregarding the will of the parties. When parties choose a particular country as their seat for the arbitration they also submit to the legal system of that country. So, by refusing to give recognition to a possible annulment decision by a court of that country, the will of the parties would be violated.

Forum shopping is bound to crop up for the simple reason that parties dissatisfied with the decision of one court would immediately move to another country with the most liberal judge in order to enforce the arbitral award. This also furthers disregarding the principle of international comity[15].

B. TERRITORIAL VIEW

Under this approach, every arbitration is believed to be attached to a particular jurisdiction and a seat of arbitration, and is thus subjected to the laws and jurisdiction of the courts in the seat of the arbitration. One commentator in favour of the territorial approach has argued that when the award sought to be enforced has been set aside in its state of origin the very premise of its enforcement gets eroded and as such becomes a non-existing award. It thus, then becomes trite to refuse its enforcement.[16] Further, Albert Jan van den Berg, contends that when an award is applied for enforcement or recognition to a foreign court, then the court is bound by the decision of the court in the country of

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[14] Robert C Blind, *Enforcement of Annulled Arbitration Awards: A Company perspective and an Evaluation of a New York Convention*, 37 NC J INT'L & COM REG 1013, 1044 (2011).

[15] J Paulson, *Rediscovering the New York Convention: Further Reflections on Chromalloy*, 12 MEALEY'S INT. ARB. 26, 28 (1997).

[16] MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW AND PRACTICE 930 (3rd ed. Juris Net Llc 2014).

origin. And as such, if the award was set aside in the country of origin then the foreign court must respect the said decision and refuse to enforce the annulled award.[17] Similarly, Prof. William Park in his seminal work, "The Lex Loci Arbitri and International Commercial Arbitration", following certain decisions[18] refusing to enforce an award annulled in the seat of arbitration, suggested that if an award has been annulled by the court where it was made, enforcement in another country would be difficult as practical matter and hence should be avoided.[19]

This view again has its own demerits. First, there is uncertainty with regard to the contours of transnational public policy. In line with the New York Convention and the UNCITRAL Model Law, most states describe public policy as that which protects principles of 'fundamental justice'. However, the principles encapsulated by the term 'fundamental justice' is a task left to be determined by the States.[20] There may be certain principles subscribed to by many nations although differently interpreted. There may also be principles which go beyond agreement of states which form part of natural law.[21] In the absence of clarity on the source of such transnational principles, they appear as normative rules. It is difficult for courts to apply them without finding them to be an inherent part of domestic public policy.[22]

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[17] Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 PACE L. REV. 25, 42 (1985).
[18] *Judgment of 28 October 1999*, 25 Y.B. Comm. Arb. 718 (ICC Int'l Ct. Arb.); *Judgment of 8 September 2011*, Case No. 4390-2010 (Chilean Corte Suprema).
[19] Park William W, *The Lex Loci Arbitri and International Commercial* Arbitration, 32 INT. & COMP. L. Q. 21, 27 (1983).
[20] Dirk Otto & Omaia Elwan, *Article V(2), in* RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION (Herbert Kronke et al. eds. Wolters Kluwer 2010).
[21] Emmanuel Gaillard, *The Representations of International Arbitration,* 1 J. INT'L DISP. SETTLEMENT 271, 278 (2010).
[22] *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards: Explanatory Note*, in 50 YEARS OF THE NEW YORK CONVENTION 649 (Kluwer Law International 2009).

The adherents of the delocalised view have for long held the view that the use of the word may and not shall or must necessarily point towards the fact that Article V(1)(e) is in fact optional and not mandatory.[23]

One example wherein the enforcing court might not wish to be bound by the decision of the seat court may be found in the *Yukos*[24] case. In this case, an award seated in Russia was successfully set aside by the award debtor in the court of Moscow. This award was then applied for recognition in Netherlands. The respondent resisted the same by stating that the same was set aside by the courts in the seat of arbitration. The petitioner in this case argued that the judicial process in the Russian courts was not entirely free from bias and partiality. Accepting the same, the Dutch courts found it unreliable to depend upon the Russian courts and as such recognised the award set aside at the seat of arbitration. When the same award was placed for enforcement in the English court, the English court too followed the experience of the Dutch court and recognised the award which was set aside by the court in Moscow.[25]

Therefore, the task left to the states is a mammoth one. They need to first, deduce the principles of fundamental justice and public policy which is inherently subjective. The facts in light of the religious, cultural, political, economic scenarios at that time will influence the outcome of the decision. To generalise and then apply them in enforcement applications is difficult.

III. FOUNDATIONAL BASIS OF THE DELOCALISED APPRAOCH

[23] SIMON GREENBERG, INTERNATIONAL COMMERCIAL ARBITRATION: AN ASIA-PACIFIC PERSPECTIVE (Cambridge University Press 2011).
[24] Yukos Capital SARL v. OAO Rosneft, Gerecht-shof Amsterdam, (2009) 34 Y.B. Comm. Arb. 207 (Supreme Court of the Netherlands).
[25] Yukos Capital SARL v. OJSC Rosneft Oil Company, 2014 EWHC 218 (Comm.) 20.

The French courts were the first to have applied the delocalised approached in considering the fate of annulled awards. In France, this rule of law has become the preferred approach for the matter under consideration. This approach can be seen to have been established by the progression of four cases.

A. THE *NORSOLOR*[26] CASE

In 1984, the *Cour de cassation*, the French Supreme Court laid down that it was in fact possible for the French courts to recognise and apply awards which have been set aside by the courts at the seat of the arbitration. The Supreme Court overruled the decision of the Court of Appeals in Paris, which pursuant to Article V(1)(e) of the New York Convention had refused to recognise an award rendered in Austria which was set aside by the Court of Appeals in Vienna.[27]

The French Supreme Court decided so because of Article VII of the New York Convention and also because under Article 12 of the New Code of Civil Procedure, the Court of Appeal was required to consider the recognition of a foreign award under its domestic laws only.

B. THE *POLISH OCEAN LINE*[28] CASE

In 1993 the French Supreme Court again refused to recognise an award despite it being set aside by the court in the seat of arbitration. The Supreme Court upheld the decision of the Court of Appeal in Douai confirming the enforcement of an award suspended in Poland. The Supreme Court held that French courts could not take support of Article V(1)(e) of the New York Convention to refuse recognition of an annulled award. It stated that Article VII of the same convention gives primacy to the

[26] French Supreme Court decision of October 9, 1984, Rev Arb 1985, 341.
[27] Decision of January 29, 1982, Rev. Arb. 1983, 516.
[28] Societe Polish Ocean Line v. Societe Jolasry, (1994) 19 Y.B. Comm. Arb., 662 (French Supreme Court).

domestic laws of the courts in the country where the enforcement of the award is sought. So, unless the grounds under which the award was set aside by the court in the seat are recognised as grounds under the laws of the enforcement country, the award will not be refused recognition.

C. THE *HILMARTON*[29] CASE

The delocalised approach as a firm practice was established by the French Court in this case. Upholding the decision of the lower court, the court held that Article VII of the New York Convention was correctly applied to the given case. The court further held that the award rendered in Switzerland is an international award and is not integrated in the legal system of that State, and thus it remains in existence even if set aside and its recognition in France is not against international public policy.

D. THE *CHROMALLOY*[30] CASE

The delocalised view in the French courts was finally resolved and set firm in the decision given by the Court of Appeal in the *Chromalloy* case. The court held in clear terms that in an application for the recognition of a foreign award before a French court, only the provisions of the New Code of Civil Procedure (domestic law) are important. And if there are clashes vis-à-vis Article V of the New York Convention, pursuant to Article VII the domestic law would prevail. The award made in Egypt is an international award which is not integrated into the legal order of the seat of the arbitration. Therefore, it being set aside at the seat is immaterial for the courts in France.

In Belgium as well, the delocalised approach has been celebrated as the most appropriate approach for the given problem. The

[29] Societe Hilmarton Ltd. v. Societe OTV, (1994) 19 Y.B. Comm. Arb 665 (French Supreme Court).
[30] Chromalloy Aeroservices, Inc. v. The Arab Republic of Egypt, (1997) 22 Y.B. Comm. Arb. 692 (Paris Court of Appeal).

Belgian Court of Instance, in its decision of December 6, 1988 in the *Sonatrach*[31] case refused to interfere with the decision of a lower Belgian court which had recognised and applied an award rendered in Algeria even though the Algerian court had struck the same as being against public policy. In the Belgian experience, the parties resisting the recognition of the annulled award raised Article V(1)(e) of the New York Convention. The same did not come in rescue of the party because, as the Belgian court notes, Algeria was not a party the Convention then and hence the court did not even make reference to Article VII of the Convention unlike the French Court. It is also important to note that like the French New Code of Civil Procedure, even under the Belgian legal order, only the grounds under its laws are considered for setting aside an award and not beyond. The Belgian case law, therefore, due to the peculiarity of the facts, cannot be considered to be as firm and clear as the French case laws. However, the enforcement of set-aside awards under Belgian laws is more justifiable than the French experience because the delocalisation under Belgian law is complete and consistent. Indeed, Belgium's disregard of foreign annulment decisions is in conformity with the possibility Belgian law offers to parties to exclude the annulment control over certain awards rendered in Belgium.[32]

Further, in Austria, the decision widely referred to in support of the delocalised view is the *Radenska* case where the Austrian Supreme Court reversed the decision of the Court of Appeal of Graz which refused to recognise an award rendered in Belgrade that had been annulled by the Supreme Court of Slovenia for

[31] Societe Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures v. Ford, Bacon and Davis Inc, (1990) 15 Y.B. Comm. Arb. 370 (Brussels court of First Instance).

[32] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 89 (Kluwer Law International 2002); E GAILLARD & J SAVAGE, FOUCHARD, GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 903 (Wolters Kluwer 1999).

violation of public policy.[33] The court relying on Article IX of the European convention, which provides the bases for setting aside an arbitral award akin to Article V of the New York Convention, held that a plain reading of the Article IX would show that the setting aside of an arbitral award for violating public policy where it was given does not form a part of Article IX and as in Austria the award retains its legal validity, it thus follows recognition.

This approach of the French court can be seen to have percolated in common law countries as well, such as the USA. This can be seen by considering the following cases.

E. THE *PEMEX* CASE[34]

In this case the US Court of Appeals for the Second Circuit affirmed the decision of the district court which recognised an arbitral award which was set aside by a court in Mexico, the seat of arbitration. In deciding so, the court undertook a liberal interpretation of the Panama Convention (similar to the New York Convention) and held that the use of the word "may" in the Convention means that the court has the discretion to decide if the award set aside according to a foreign law would have the same effect in the enforcing country. Further, the court also noted that neither the New York Convention nor the Panama Convention expressly requires for the non-recognition of an award set aside at the seat of Arbitration. Such a stipulation is required only in terms of the 'principle of comity'.

F. THE *CHROMALLOY*[35] CASE

This case involves the aforementioned award enforced by the Court of Appeals in Paris irrespective of the fact that the same

[33] DO Zdravilisce Radenska v. Kajo-Erzeugnisse Essenzen GmbH, (1999) 24 Y.B. Comm. Arb. 922 (Austrian Supreme Court).
[34] Corporacion Mexicana de Mantenimiento Integral v. Pemex-Exploracion Y Produccion, 962 F. Supp. 2d 642 (2013).
[35] In Re Chromalloy Aeroservices and the Arab Republic of Egypt, 939 F. Supp. 906 (D.C. Cir. 1996).

was annulled in Egypt where the award was rendered. Subsequent to its annulment but prior to its enforcement in France, the award was enforced by the United States District Court for the District of Columbia. The decision of the Court here was in line with the reasoning given by the French Courts. The court therein contrasted Article VII from Article V of the New York Convention to state that while the former provision puts laws more favourable to arbitration (domestic laws in this case) on a higher pedestal the latter provision on the other hand, only qualifies the importance of a foreign court's decision as regards its validity with a "may". That is to say, a court would enjoy absolute discretion vis-à-vis the application/recognition of an award. The court also conducted a comparative analysis of the reasons given by the court at the seat of arbitration (Egyptian court) to set aside the award and the provisions of the Federal Arbitration Act (the American Arbitration Act). The court concluded that the American laws do not recognise the grounds based upon which the award was vacated and as the Egyptian court's decision would in no way effect the application for enforcing the award rendered in Egypt.

Thus, the judicial decisions on various instances have in fact recognised awards which have been annulled at the seat of arbitration. What is important to note at this instance is the flexibility offered by Article VII of the New York Convention to states to enforce set aside awards where their forum's law does not necessarily consider the annulment of awards as a refusal for enforcement of an award. Many often refer to this provision as the hidden treasure[36] of the New York Convention. Article VII offers an evolving and teleological interpretation.

[36] Ph Fouchard, *Suggestions to Improve the International Efficiency of Arbitral Awards*, in IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, (Albert Jan van den Berg ed. Wolters Kluwer 1999).

The international enforcement mechanism has thus travelled a long way from the system of double exequatur requirement under the Geneva Convention to the practice of enforcing annulled awards- thus going from total dependence to total indifference towards the fate of the award in the State in which the arbitral award is rendered.[37]

IV. THE APPROACH IN INDIA

In India, enforcement of foreign awards is subject to the New York Convention and is governed by Part II of the Indian Arbitration and Conciliation Act, 1996. Clause (e) of S. 48(1) of the 1996 Act corresponds to Article V(1)(e) of the New York Convention.

S. 48(1)(e) thus states that the foreign award cannot be enforced if – (i) the award has not yet become binding; or (ii) the award has been set aside or suspended by a competent authority of the country in which or under the law of which the award was made.[38]

So far the courts in India have not as yet delivered a judgment whose ratio can be used to settle the debate as far as the Indian context in concerned.[39] There are a couple of decisions where in the apex institution has in fact held that international arbitration awards must be enforced internationally, and therefore should be international in their validity and effect[40], but an extension of the same to recognise annulled awards is not present.

Many have expressed views with respect to the question if an award annulled at the seat of arbitration can actually be enforced

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[37] HAMID G. GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 107 (Kluwer Law International 2002).

[38] 2 ANIRUDH WADHWA & ANIRUDH KRISHNAN, JUSTICE RS BACHAWAT'S LAW OF ARBITRATION & CONCILIATION 2685(6th edn. Lexis Nexis 2018).

[39] Ciccu Mukhopadhaya, *India*, *in* 23 ICC GUIDE TO NATIONAL PROCEDURES FOR RECOGNITION AND ENFORCEMENT OF AWARDS UNDER THE NEW YORK CONVENTION (ICC 2012).

[40] Brace Transport Corp. of Monrovia, Bermuda v. Orient Middle East Lines Ltd., AIR 1994 SC 1715, 1720.

by the Indian courts under a S.48 application. It is argued that such an application would fail because India majorly has a territorial approach for arbitration and this is so for the following reasons:

1. In Oil and Natural Gas Commission v. Western Co. of North America[41], the Supreme Court was of the view that an arbitral award made under the Indian law could not be enforced by a foreign court unless recognised by the Indian courts. The court held that if an Indian court does not recognise a particular award, the same cannot be enforced even by a foreign court. This case manifested by virtue of an anti-suit injunction and as such the Supreme Court passed injunction against the party to ensue enforcement proceedings in the US courts. The court asserted its jurisdiction over the arbitration even though it was initiated outside India, for the reason that Arbitration Act of 1940 was made applicable. It rejected the contention that an award was independent and stateless and that its enforcement could be done in other country.

2. In another instance, in Badat & Co v. East India Trading Co[42], the court held that foreign arbitral awards, other than awards that are enforceable under the legislation implementing the Geneva Convention and the New York Convention, are enforceable in India on the same grounds and in the same circumstances as they enforceable in England, under the common law grounds of justice, equity and good conscience. English courts generally refuse to recognise awards which have set aside by courts at the seat of arbitration. Under the English laws, when the court at the seat has made an order to set aside the arbitral award, the English court would usually, if not invariably, recognise the said order

[41] Oil and Natural Gas Commission v. Western Co. of North America, (1987) 1 SCC 496.
[42] Badat & Co v. East India Trading Co., AIR 1964 SC 538.

and decline to enforce the award. Therefore, Russel notes, "*Where the competent authority suspends the binding effect of an award, the English court may dismiss the application for enforcement as premature or it may adjourn the application until the suspension is lifted.*"[43]

3. Further, a foreign judgement operates in India as res judicata if it meets the requirements under S. 13 of the Code of Civil Procedure, 1908.[44] Indian courts do not look into the merits of a foreign judgment.[45] If a judgement, therefore, setting aside an award, meets the conditions laid down in S.13, it will act as res judicata and an Indian court will accordingly refuse enforcement of the same award.[46]

Thus, for the above mentioned reasons it is clear that if circumstances were to arise, Indian courts adopting the English approach and the territorial approach would refuse to recognise an award which has been set aside by the court at the seat of arbitration.

V. SUGGESTED SOLUTIONS

The problem arises due to the reason that there is no singular approach which can definitively resolve the dispute. While the territorial approach has been widely favoured for the finality it receives, it is mired with controversies as identified in the previous chapters. The transnational approach adopted by the delocalists even though international in nature affects comity and disturbs international harmony in Arbitration.

Therefore, several commentators have called in for suggestions to improve and work over these anomalies. The solutions are of

[43] DAVID ST JOHN SUTTON ET AL., RUSSEL ON ARBITRATION 469 (23rd ed. Sweet and Maxwell 2014).
[44] R. Vishwanathan v. Rukn-ul-Mulk Syed Abdul Wajid, AIR 1963 SC 1.
[45] Renusagar Power Co. Ltd v. General Electric Co., AIR 1994 SC 860.
[46] P. Ramaswamy, *Enforcement of Annulled Awards- An Indian Perspective,* 19 J. OF INT'L ARB. 461, 469 (2002).

varied nature. Widely these suggestions can be categorised into Harmonisation and Unification. Under the first category suggestions such as harmonisation by the UNCITRAL Model Law (A), annulment pursuant to a local standard (B), exclusion of annulment proceedings (C), have been made. The second category includes formulating a new multilateral convention (D) and, establishing a supra-national body with oversight authority over arbitral awards (E).

A. UNCITRAL MODEL LAW

The attempt towards harmonisation through a uniform system dates back to 1936- the UNIDROIT Uniform Law on International Commercial Arbitration. The dream came true only in 1985 through the UNCITRAL Model Law. The Model law was adopted by many countries to have a uniform legislation for the Arbitration laws. The model law would thus be considered a success if it infact has resulted in ensuring uniformity in the grounds of setting aside an award. However, this statement is far for being considered true.

Several countries have had their deviations from the Model Law. There are countries which are inflexible in their approach and have retained their arbitration laws which are still based on archaic traditions, such as Saudi Arabia and Morocco, and they refuse to come anywhere close to the provisions of the Model Law.[47] For instance, even after the new rules on Arbitration in Saudi Arabia, courts still can review merits of a case to ensure compliance with Islamic laws.[48] And then there are also countries like France, which are so liberal in their approach that they have adopted laws which are far more favourable to arbitration than envisaged by

[47] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 142 (Kluwer Law International 2002).

[48] George Sayen et al., *Arbitration in the Kingdom of Saudi Arabia*, THE IN-HOUSE LAWYER (Feb. 09, 2020, 10:05 PM), http://www.inhouselawyer.co.uk/legal-briefing/arbitration-in-the-kingdom-of-saudi-arabia.

the Model Law. Furthermore, there are countries which have expressly deviated from significant provisions of the Model Law like Tunisia, Brazil, Kenya, Australia, Finland, Iran, Malta and more.[49] Only a handful number of countries like Germany, Hungary, Mexico, Russia, Scotland, Ukraine, Bahrain, Bermuda, Bulgaria, Canada (federal law) etc. have retained the annulment related provisions of the Model Law.

Apart from the issues concerning deviations from the Model law there is the issue of ambiguity and uncertainty with the terms and stipulations in the Model Law. As a result of which courts across the world often end up deciding enforcement applications in a manner which results in anomalies and clashes. This happens because the boundaries of national public policy are not fixed[50]. For instance, Japanese legislation applies the test of "public policy or good morals" in the enforcement process;[51] and Vietnamese legislation requires that the award should not be contrary to the basic principles of Vietnamese law.[52] In such cases even the *traveaux preparatoires* are no significant help especially for flexible terms such as 'public order' or 'binding award' in the Model law.

For these foregoing reasons, use of the UNCITRAL Model to harmonise the arbitration law across countries is not the best solution.

B. INTERNATIONAL STANDARDS OVER LOCAL STANDARDS OF ANNULMENT

This solution recommended by Mr. Paulsson suggests the enforcement of awards which have been annulled on local

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[49] HAMID G GHARAVI, THE INTERNATIONAL EFFECTIVENESS OF THE ANNULMENT OF AN ARBITRAL AWARD 141 (Kluwer Law International 2002).
[50] NIGEL BLACKABY ET AL, REDFERN AND HUNTER ON INTERNATIONAL ARBITRATION 659 (5th ed. Oxford Publication 2009).
[51] Kerr, *Concord and Conflict in International Arbitration*, 13 ARB INTL 140, 141 (1997).
[52] Jan Paulsson, *The New York Convention in International Practice: Problems of Assimilation*, ASA BULLETIN 101, 102 (1996).

particularities.[53] According to him if an award is set because of local standards then enforcement of such an award need not be refused. To distinguish local standards from international standards one needs to take heed of the first four elements of Article V(1) of the New York Convention. The court needs to deduct the incidental renvoi made in Article V(1)(a) to Article V(1)(d) of the New York Convention. This is necessary to prevent the backdoor entry of the local standards of annulling an award. What remains after these deductions are the International Standards of Annulment (ISA). Only ISAs may block the enforcement of an award. Because of the use of the word "may", the discretion is therefore on the courts to enforce an annulled award or not.

However, this approach has been severely criticised by many. First, it would be wrong to assume that the use of the word "may" puts the discretion on the enforcement court because Article V(1)(e) then becomes optional. Such an interpretation does not infact enjoy popular support. Second because, practically, it would not be possible for many countries to adopt such International Standards after years of practice. Many countries have gone through a lot of trouble in adopting the Model Law, or adding a local touch and adopting a system of law which may be considered Arbitration friendly, for example Morocco[54] and Saudi Arabia[55]. Therefore, to forth an international standard with deductions of the incidental renvois might not be something which would be readily accepted by the countries at large.

Finally, this approach may also further aggravate the problem of conflicting decisions because of the discretionary power

[53] J. Paulsson, *Enforcing Arbitral Awards Notwithstanding a Local Standard Annulment*, 9 ICC BULLETIN 14 (1998).
[54] J Robert, *La Convention europeenne sur l'arbitrage commercial international signee a Geneve le 21 avril*, 33 CHRONIQUE 182 (1961).
[55] W Craig, *Uses and Abuses of Appeal from Award*, 4 ARB. INT'L. 201 (1998).

supposedly derived from the use of the word 'may' in Article V of the New York Convention.

C. EXCLUSION OF ANNULMENT PROCEEDINGS

Proposed by Professor Fouchard, this suggestion states that annulment proceedings for international awards as a whole should be dropped.[56] If the annulment proceedings are abolished then the malfunction of the different schools of thought would not exist to begin with.

However, the same cannot be an ideal solution for two reasons. First, history is a living proof of the fact that such an experiment would not be well for the international community. Both in Belgium and Austria such an attempt was made. The international business community vehemently rejected such a change.[57] Second, this approach faces another major problem of defining an international award. In the international arena, there are plethora of instances wherein the countries have shown distinctions in their approach of defining what an international award constitutes. For some countries such as France and Tunisia, international award has been defined in terms of international trade. On the other hand, countries such as Iran and India have adopted an approach of defining international award in terms of the parties i.e., international if one of the parties are not of the home country.

Even if the state was to achieve uniformity in defining "international award" the proposition would still be unreasonable because no one would still be able to ensure that the terms are homogenously and uniformly construed. For instance, the Chinese Supreme Court in an instance had excluded the

[56] Ph Fouchard, *La portee internationale de l'annulation de la sentence arbitrale dans son pays d'origine*, REV. ARB. 329, 351 (1997).
[57] Fraser P Davidson, *Where is an arbitral award made?: Hiscox v. Outhwaite*, 41 THE INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 637 (1992).

enforcement of awards wherein the dispute was between the foreign investor and the government of the host state.[58]

It is also undesirable for the reason that first, the interests and amounts at stake justify annulment proceedings and require an articulation of annulment/enforcement controls so as to avoid that a doubtful award lead to enforcement actions in all States where the losing party has assets until one State finally grants enforcements. And second, this suggestion would deprive the losing party the fundamental prerogative, the right to obtain annulment of the award.[59]

D. A NEW MULTILATERAL CONVENTION

As is clear, there is no uniformity on how the annulment proceedings are to be undertaken, the ground on which an award can be annulled or the procedure post annulment for the enforcement of the same in another country. The new convention would therefore have to cover questions of jurisdiction over the annulment of the award, grounds for setting aside an award and effective annulment/enforcement controls.[60]

A new multilateral convention would essentially fill in the gaps which the New York Convention failed to cover. It is necessary that the provisions of the Article VI of the New York Convention be preserved in the new convention to allow the enforcement court to grant enforcement of an award against which annulment proceedings have been initiated for dilatory purposes. The language however, should be revised to prevent the enforcement court from adjoining its decision on enforcement if annulment

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[58] Wang Shen Chang, *Enforcement of Foreign Arbitral Awards in the People's Republic of China*, *in* IMPROVING THE EFFICIENCY OF ARBITRATION AGREEMENTS AND AWARDS: 40 YEARS OF APPLICATION OF THE NEW YORK CONVENTION, (Albert jan van den Berg ed. Wolters Kluwer 1999).

[59] E Hovarth, *Arbitration in Hungary. The Problematics of the Moscow Convention*, 10 J. INT. ARB. 17 (1993).

[60] Hamid Gharavi, *Chromalloy: Another View,* 12 MEALEY'S INT ARB REP. 21 (1997).

proceedings have been initiated before courts of any country other than the one in which the award has been rendered. The new convention should have a provision alike Article 34(2) of the Model law and retain annulment grounds covering only serious irregularities and not interfere with the merits of the case. The convention should preferably reduce the grounds of annulment under the UNCITRAL Model law. Grounds contained under Article 1502 of the French New Code of Civil Procedure would be apt for the purpose which are:

1. if the arbitrator has rendered his decision in the absence of an arbitration agreement or on the basis of an arbitration agreement that is invalid or that has expired;
2. if the arbitral tribunal was irregularly constituted or the sole arbitrator irregularly appointed;
3. if the arbitrator has not rendered his decision in accordance with the mission conferred upon him
4. if due process has not been respected, and
5. if recognition or enforcement is contrary to international public policy.

However, this is also not free from criticism. The new convention may not be fruitful if it is mired with the same problem of contrasting interpretation by state courts. This may happen because the grounds' ultimate interpretation would still lie under the purview of the national courts when they are deciding on the fate of the award. This may be remedied by a renvoi to an existing supra-national court like the International Court of Justice or establishing a supra-national court with exclusive jurisdiction over the control of arbitral awards.

E. ESTABLISHMENT OF A SUPRA-NATIONAL COURT

Judge Holtzmann suggests the establishment of a supra-national court vested with exclusive jurisdiction over the control of arbitral awards.[61] This court would have the exclusive jurisdiction to monitor the application of the grounds mentioned under Article V of the New York Convention. Each contracting state would have the obligation to abide by and enforce the decisions of the supra-national court.

This court with its supervisory and exclusive jurisdiction would have the sole authority to decide upon the awards rendered by it and would be treated as if they were declared by the apex institution of that particular country.

This proposition has received the endorsement of personalities like Judge Stephen Schwebel, Judge at the International Court of Justice, who has further suggested that the composition of the supra-national court be of 11 to 15 judges, selected to represent the principal international legal systems and civilisations, and the principal trading and arbitration nations of the world.[62]

VI. ESTABLISHMENT OF A SUPRA-NATIONAL COURT: THE APPROPRIATE SOLUTION

While the debate between harmonisation and unification can ensue a neverending debate, the question which requires deliberation is, "which approach would be the best to meet the requirement of the current situation?". It is argued that unification is better than harmonisation because it is both desirable and conceivable.

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[61] HM Holtzmann, *A Task for the 21st century: creating a new international court for resolving disputes on the enforceability of arbitral awards*, *in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

[62] SM Schwebel, *The creation and operation of an International Court of Arbitral Awards, in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

Harmonisation in form of the UNCITRAL Model law never actually materialised into an event which can be celebrated as a success. More so, as explained in the previous chapter, there are glaring examples of the fact that the due to the ambiguities which existed with the Model law framework, confusions were created which ultimately made the entire process futile and thus adding to the already existing problem of contradictions and disharmony.

With unification in the form of creating a supra national court, all the contradicting decisions in the form of recognition and refusal of applying awards can come to rest because of the reason that the body now empowered with the exclusive jurisdiction to sit over annulment proceedings would have a uniform rule for ascertaining if an award needs to be set aside.

Further, all confusions arising out of interpretations of ambiguous terms lead to clashing decisions of various national courts. For instance, with respect to the interpretation of the term public policy or foreign award. It has been proposed that the public policy ground contained in Article V(2)(b) of the New York Convention be replaced by international public policy. This is material because enlightened municipal courts already follow the practice of applying international public policy in cases involving international commercial arbitration.[63] This proposal ensures (a) that the supra-national authority need not attempt to investigate and implement the public policy of any particular state and (b) all confusion is thus done away with given that universal, binding decision with respect to the term's interpretation is given by a supranational court. This also ensures that the arbitration becomes autonomous in its truest sense since the link to the national courts now gets severed.

[63] HM Holtzmann, *A Task for the 21st century: creating a new international court for resolving disputes on the enforceability of arbitral awards, in* THE INTERNATIONALISATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE (Martin Hunter ed. Springer 1993).

Most importantly, unification is the only way by which both the schools of thought reach a situation wherein their views are not severely affected. For instance, the proponents of the delocalised approach are content because the legal validity of an award is no longer linked to the laws of a particular state. And for the other, the award debtor still has a recourse to challenge the validity of the award at a supra national body whose international effectiveness would remain preserved.

It is also important to note that given the ever increasing international trade and business transactions, there are several bodies such as the International Centre for Settlement of Investment Disputes, which is testamentary to the success of a supranational body. These institutions have been working well and thus an evidence to the fact that the establishment of a supranational court for the control of annulment/recognition of award in International Commercial Arbitration is far from being impracticable and unrealistic.

The International Centre for Settlement of Investment Disputes (ICSID) was established in 1965 to address the increasing number of investment arbitration brought against the sovereign states. Since then the ICSID has become a responsible institution in terms of the awards it renders. The originality and effectiveness of the ICSID can be attributed in part to the exclusive jurisdiction which ICSID enjoys over the stay of enforcement,[64] and the annulments of its awards.[65]

Under the ICSID Convention, pursuant to Article 52 an ad hoc committee is responsible to ascertain if an award needs to be set aside. Its enforcement in the courts of the contracting states is a matter which can be decided only by the ICSID. Failure to abide

[64] Convention on the Settlement of Investment Disputes between States and Nationals of Other States 1996 art 52(1).
[65] Christoph Schreuer, *Commentary on the ICSID Convention: Article 52,* 13 ICSID REV. – FOREIGN INVESTMENT LAW JOURNAL 507 (1998).

by the same may invite measures from the World Bank with respect to its policy on extension of credit.[66]

The Amman based Centre established under the Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States has prerogatives similar to that of the ICSID.[67] Like the ICSID, the Arab Centre too has exclusive jurisdiction over awards rendered under its auspices[68] and the grounds under which such an award can be set aside are ones similar to Article 52 of the ICSID Convention.[69] Further, the convention also states that the decision on annulment given by the centre is to be treated as if they were given by the national court of the contracting state.[70]

The Arab Centre for Commercial Arbitration is yet another supranational court which functions as the nodal court of control for the annulment/recognition of arbitral award rendered by it in the courts of the contracting states. This court established under the Amman Convention of 1987, functions both as an arbitral institution and as a court of control. The decisions rendered by this centre are considered final and the awards are not subject to review before courts of any of the contracting state.[71] Further, pursuant to the convention[72] this court has the exclusive jurisdiction with respect to the awards rendered under its auspices.

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[66] A Giardina, *L'execution des sentences du Centre international pur le reglement des differendes relatifs aux investissements*, REV CRIT DIP 27 (182).
[67] AH El-Ahdab, *General Introduction on Arbitration in Arab Countries,* INTL HANDBOOK ON COMM. ARB. SUPPL. 24 (1993).
[68] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 25.
[69] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 24.
[70] Convention on the Settlement of Investment Disputes between the Host States of Arab Investments and Nationals of Other Arab States 1974 art. 26(a).
[71] Amman Convention 1987 art. 27.
[72] Amman Convention 1987 art. 34.

The Joint Court of Justice and Arbitration established under the Organisation for the Harmonisation of Business Laws in Africa in 1993 is another supranational court celebrated for its laudatory attempts to reconcile the arbitration laws all across the African continent. The main aim of the court is to reconcile the differences and the insecurities which exist in the countries because of the contradictory decisions and legal rulings.

The decisions given by the court are considered to have a res judicata effect over the courts of the contracting states and as such the decisions on annulment given by this Joint court are to be considered as if they were rendered by the national courts itself.[73] This court alike other supranational institutions also has the exclusive jurisdiction with respect to the awards rendered by it.[74]

This court is often lauded because of its work towards unifying the arbitration laws in a country wherein a systemised domestic and international arbitration laws did not even exist. Such an accomplishment portrays that forming a supranational court with exclusive jurisdiction is not a utopian idea.

The abovementioned arguments go on to show that the establishment of a supranational body is not in fact unconceivable. There are examples to show how the existence of a supranational body has helped towards creating a system which ensures certainty and harmony. One court to control the commercial arbitral awards would ensure that there are no inconsistencies and confusion with respect to the interpretation of the law and help achieve uniformity which would ultimately propel business transactions and international trade and investments. Thus, establishment of a supranational court is an

[73] Arbitration Rules of the Joint Court of Justice and Arbitration 1993 art. 20.
[74] Arbitration Rules of the Joint Court of Justice and Arbitration 1993 art. 30.6.

appropriate solution to the given problem of enforcing a set aside award.

VII. CONCLUSION

The problem or question if a set aside award can be enforced or not cannot be answered in a normative manner. The two popular schools of thought are correct in their own right but again are severely criticised for their blatant inconsistencies and lacunas.

While the territorial view would assure certainty and effectiveness of a judgment on one hand, the delocalised approach, on the other hand, would stress on the international effectiveness of international arbitration awards. It is correct that an arbitration just because of it being seated at a particular location may not become a part of the legal order of that particular state. It is also thus correct to state that nowhere in the New York Convention is the optional character of Article V(1)(e) clearly indicated. All these contradictions and clashes make it impossible to rule out one particular option for being wrong.

While the French courts have mostly adopted the delocalised approach, it also has been criticised for adopting a flexible arbitration regime which goes much beyond the contours of the New York Convention and the UNCITRAL Model law. Such confusions and anomalies however have not as yet reached the Indian scenario.

In India this question is still considered to be a part of the grey area. As such there has been no decision either by the Supreme Court or any of the High Courts deliberating over the question if an annulled award can be enforced by the Indian Courts. However, given that India has a tendency to adopt a territorial approach given the decisions identified above and the fact that the English court as a rule adopt the territorial approach, it is argued and subsequently proved that the delocalised approach would not apply in India and as such awards which are set aside

at the seat of arbitration would not be enforced by the courts in India under S.48 of the Arbitration and Conciliation Act, 1996. Further, considering the fact that there is no correct way of dealing with the problem, there have been several suggestions to prevent the occurrence of such a problem. It is now sufficiently clear why harmonisation of the annulment laws would be a dead letter. Such efforts were already made in the form of the UNCITRAL Model Law but has not exactly been a success story. There are several inconsistencies and ambiguities with regard to the application of the Model Law. It is not mandatory in nature.

Given these anomalies, the two most suitable solutions would be to have a new multilateral convention for the annulment of international commercial arbitration awards but for its implementation and for the prevention of any allied ambiguity it is necessary that there be a supranational court of control for annulment/recognition of international arbitration awards.

The supranational court, like the similarly existing bodies such as ICSID and JCJA, would have exclusive jurisdiction over the awards rendered under its auspices and would be responsible for deciding upon its annulment and enforceability. Such decisions of the supranational court would preclude the review of any national court and would be considered final and binding upon all the courts of the contracting states. The judgments would be considered to have precedential values over the lower courts as if they so declared by their national courts.

This approach also takes cares of the needs of both the schools of thought. The delocalised adherents are content with the fact that the national legal order of a state does not subsume within itself the arbitral award. The proponents of the territorial approach would accept the same because awards can still be challenged and such a decision would have international effectiveness.

Undoubtedly arbitration continues to be the most preferred international dispute settlement mechanism today. Yet it is mired with controversies, insecurities and tension. There are issues with the overzealous interactions of arbitration with national courts etc. But given these problems there is a unique opportunity with the arbitration community to get over these problems and more with the establishment of a supra-national court which only work towards a quasi-absolute autonomy and independence for the regime of arbitration.

It is now up to the International Private Law community to showcase ambition, zeal and the industry and more importantly imagination and creativity to make this, otherwise ambitious attempt, a living reality. "*It will be the difficult but magnificent task of all those who will be called upon to participate in the construction of this new universe.*"[75]

[75] H Motulsky, *L'evolution recente en matiere d'arbitrage international*, REV. ARB. 11 (1959).