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Effects of Foreign Judgments Relating to International Arbitral Awards: Is the 'Judgment Route' the Wrong Road?

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This article examines and critically assesses the 'judgment route' in international arbitration. The 'judgment' route refers to a growing trend in many jurisdictions to grant effects to foreign judgments relating to international arbitral awards, such as judgments setting aside, confirming, recognizing or enforcing an arbitral award (called 'award judgments' for the purposes of the article). Although there is abundant commentary on the effects of set aside judgments, very little attention has been paid to the other equally important situations where courts confirm, refuse to set aside or simply recognize or enforce an award. This article aims to fill this gap. It is submitted that national courts often err when they grant effects to foreign award judgments. On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments: award judgments differ from other judgments insofar as they relate to a prior adjudication—the award—and thus need to be treated differently. Moreover, on a practical level, the judgment route risks encouraging forum shopping and the multiplication of parallel proceedings, and it increases the likelihood of conflicting decisions. On the basis of these findings, the article concludes that the judgment route taken by courts in many jurisdictions is often the wrong road.

1. *Introduction*

'The operation of legal systems is, in general, territorially described.'[1] Judgments rendered by national courts in one jurisdiction have immediate effects only in the territory of that jurisdiction. Nevertheless, under certain conditions, judgments may be recognized or enforced—and thus granted effect—in another jurisdiction. Those conditions for recognizing or enforcing foreign judgments vary from jurisdiction to jurisdiction but one can formulate

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[1] Lord Collins of Mapesbury and others (eds), *Dicey, Morris and Collins on The Conflicts of Laws* (15th edn, Sweet & Maxwell 2012) vol 1, 664, para 14-002.

the following general principles.[2] First, granting recognition or enforcement to a foreign judgment requires, in essence, that the judgment be rendered in regular and fair proceedings by a competent court and does not violate the forum's public policy. Second, provided that a foreign judgment meets those requirements, it will produce effects in the forum, including (i) preventing the re-litigation of the same issues or claims; and (ii) offering recourse to public force to execute the judgment's orders, if necessary. These principles, irrespective of existing variations in different jurisdictions, will be referred to as 'foreign judgment principles' for the purposes of this article.

The aim of this article is to explore whether and to what extent these foreign judgment principles apply with regard to a particular category of judgments: namely judgments relating to international arbitral awards. In most cases, once the arbitral tribunal has rendered an award, the award debtor voluntarily complies with the award.[3] However, if that is not the case, national courts in different jurisdictions may be called to decide on the validity and effects of the award. For example, the award creditor may initiate enforcement proceedings in countries in which the award debtor is believed to possess assets in order to collect the sums obtained in the award. On the other hand, and possibly at the same time, the award debtor may seek to set aside or annul the award, typically before the courts of the seat of the arbitration.[4] It is thus not uncommon to have judgments from different jurisdictions relating to the same award. For the purposes of this article, these different proceedings relating to international arbitral awards will be called 'post-award proceedings' and the judgments issued in those proceedings relating to the validity and effects of the award will be referred to as 'award judgments'.

The question as to whether the above-described foreign judgment principles apply to award judgments has attracted little attention in scholarly writing.[5] This is surprising given the theoretical and practical implications of this topic. On a theoretical level, it raises the fundamental question whether award judgments are equivalent to other foreign judgments, and if not, in what respects they differ. On a practical level, the application (or non-application) of

[2] For a more detailed analysis, see Linda Silberman, 'Some Judgments on Judgments: A View from America' (2008) 19 King's LJ 235, 237–38. In the European Union, the Council Regulation (EC) 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters [2000] OJ L12 1, or Brussels I Regulation, unifies those principles for the members states. However, since arbitration is excluded from the Regulation's scope (art 1(d)), it is not the Regulation but the member state's common law that applies to judgments relating to awards; See Paul Jenard, 'Report on the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' (1979) 22 OJ C59 1, 13. See also Case C-190/89 *Marc Rich v Società Italiana Impianti PA* [1991] ECR I-03855, Opinion of AG Darmon, paras 52-60; *ABCI v Banque Franco-Tunisienne* [1996] 1 Lloyd's Rep 495.

[3] Queen Mary University of London School of International Arbitration and Price Waterhouse Cooper, *Report on International Arbitration: Corporate Attitudes and Practices* (2008) (corporate counsel reporting that more than 90% of the awards were honoured by the non-prevailing party).

[4] As a terminological remark, when referring to the proceedings nullifying an award before the national courts of the seat of the arbitration, this article uses the term to 'set aside' or to 'annul' an award which is the term found in the New York Convention on the Recognition and Enforcement of Foreign Awards 1958 (the '*New York Convention*') (art V1(e)) whereas in some jurisdictions, like for instance the United States, the corresponding terminology would be to 'vacate' an award. See Federal Arbitration Act 9 USC s 10 (2006).

[5] Jonathan Hill, 'The Significance of Foreign Judgments Relating to an Arbitral Award in the Context of an Application to Enforce the Award in England' (2009) 8(2) J Priv Int L 159; Talia Einhorn, 'The Recognition and Enforcement of Foreign Judgments on International Commercial Arbitral Awards' (2010) 12 YB Priv Int L 43. Cf Sylvain Bollée, *Les méthodes du droit international privé à l'épreuve des sentences arbitrales* (Economica 2004) 278ff.

the foreign judgment principles can be determinative of the outcome of the case. For instance, assuming that the courts in country C2 have found that an international arbitral award made in country C1 is valid and enforceable, do these findings have preclusive effect in country C3 where the award is equally presented for enforcement? Or, assuming the courts in C1, country of the seat of the arbitration, have confirmed the validity of the award, does this finding have any bearing in subsequent enforcement proceedings in country C2 concerning the same award?

One particular issue that has attracted extensive attention is whether an award set aside in one country (typically the country of the seat of the arbitral tribunal) can or should produce effects elsewhere and, if so, to what extent. As detailed below, national courts from different jurisdictions have come to different conclusions, and there is extensive scholarly writing on the issue.[6] However, very few have analysed this issue from the angle proposed in this article, namely applying foreign judgment principles to the set aside judgment. And even less has this exercise been done for other award judgments, such as judgments recognizing, enforcing or confirming foreign arbitral awards.

This article takes a broad approach and examines these different types of award judgments. It shows that in many jurisdictions around the world there is growing interest in applying foreign judgment principles to these types of award judgments. However, these developments are fragmented and lack an overall analysis of their theoretical underpinnings and practical implications. This article attempts to fill this gap by examining and critically assessing this approach, which will be referred to in this article as the 'judgment route'.

Because this article takes a broad and comparative approach in analysing the judgment route, it is necessary to compare and assess concepts and solutions from jurisdictions that take very different approaches to international arbitration. In particular, and as described in more detail below, the question whether an award takes its legal effect from the legal order of the seat (so-called territorial view) or not (so-called delocalized view) is answered differently in different jurisdictions.[7] This fundamental—some may say philosophical—question may influence some of the issues discussed in this article. However, this article tries, to the extent possible, not to delve into this debate. It is submitted that the solutions proposed in this article are valid irrespective of the approach (territorial, delocalized or anything in-between) one adopts.

Section 2 of this article examines how the judgment route works. It describes how national courts in various jurisdictions around the world apply foreign judgment principles to different types of award judgments.

Section 3 of this article contains a critical analysis of the judgment route. It shows that there are a number of important theoretical and practical objections to applying foreign judgment principles to award judgments. It concludes that the application of those principles to award judgments is inappropriate in most cases.

[6] See below at 9–10.
[7] See below at 32–33.

2. *The Judgment Route: Application of Foreign Judgment Principles to Award Judgments*

This section examines how national courts in different jurisdictions apply foreign judgment principles to different types of award judgments. Although these types of award judgments and their exact appellation vary from jurisdiction to jurisdiction, one can distinguish four main categories:

— In most jurisdictions, national courts at the seat of the arbitration may be called to set aside an award if it violates fundamental principles of the arbitration process or its governing law(s).[8] Those judgments will be referred to as 'set aside judgments' in this article.
— Conversely, in some jurisdictions national courts may be called to confirm that an award is valid and effective, typically if the seat of the arbitration was located in that jurisdiction.[9] Those judgments will be called 'confirmation judgments' for the purposes of this article.
— National courts in virtually all jurisdictions may be called to decide on the validity of an award if the award has not been voluntarily complied with and the award creditor thus starts enforcement proceedings to obtain satisfaction of the award on the debtor's assets. For those award judgments this article will use the term 'enforcement judgments'.
— National courts may also be called to decide on the validity of an award if a question regarding the effects of the award is raised which does not relate to its enforcement. The national courts will decide whether or not to recognise the arbitral award, and those judgments will be referred to as 'recognition judgments' in this article.

Applying foreign judgment principles to those different categories of award judgments always comes at the end of a three-step procedure. Step one: the arbitral tribunal issues an award. Step two: a national court (either in the country of the seat or in another country) assesses the validity of the award and renders an award judgment (be it a confirmation, set aside, recognition or enforcement judgment). Step three: the effect of the award is questioned before the national courts of a country other than the one that has rendered the award judgment. In that third country, the award judgment is considered a foreign judgment. The question therefore is whether and to what extent the award judgment has effects according to the above-described foreign judgment principles.

Section 2A deals with both recognition and enforcement judgments and shows that national courts in various jurisdictions have applied foreign judgments principles to these type of award judgments. Using relevant doctrines of *res judicata* or estoppel, courts have granted preclusive effects to issues or claims decided in those foreign award judgments.

[8] See eg 1996 English Arbitration Act, s 68; French Code of Civil Procedure, art 1520; Swiss Private International Law Act, art 190. In some jurisdictions parties may, under some circumstances, agree to waive their right to set aside an award; this is the case, for instance, in France (French Code of Civil Procedure, art 1522) and in Switzerland (Swiss Private International Law Act, art 192).

[9] See eg Federal Arbitration Act 9 USC s 207 (2011). In contrast, in other jurisdictions, such as France, the courts do not have the authority to 'confirm' the award, but may merely refuse to set it aside.

Section 2B addresses set aside judgments and shows how the judgment route is used to determine whether and to what extent awards set aside in the country of origin produce effects in subsequent actions concerning the same award.

Section 2C of this article analyses the effect of confirmation judgments. National courts in some jurisdictions have applied foreign judgment principles to confirmation judgments and have allowed the award debtor to choose enforcement of either the award or of the confirmation judgment, under the so-called parallel entitlement approach. In addition, some national courts have granted preclusive effect to foreign confirmation judgments under relevant doctrines of *res judicata* or claim/issue estoppel.

A. *Effects of Recognition and Enforcement Judgments*

This section analyses the effects of foreign recognition and enforcement judgments. The question is whether to grant foreign recognition and enforcement judgments preclusive effect, according to relevant doctrines of *res judicata* or claim/issue estoppel, in subsequent proceedings concerning the same award. For instance, consider that an award (with the seat of the arbitration in country C1) is enforced or recognized in country C2 and subsequently post-award proceedings concerning the same award are brought, either in the country of the seat C1 or in a third country C3. The question thus becomes whether the recognition or enforcement judgment from C2 may produce effects as a foreign judgment in C1 or C3 and, more specifically, whether the courts in C1 or C3 should afford deference to the findings of the courts in C2 as to the validity of the award.

National courts in some jurisdiction have applied foreign judgment principles and granted preclusive effect to foreign recognition and enforcement judgments according to the doctrines of *res judicata* or claim/issue estoppel. The relevant test for *res judicata* or claim/issue estoppel varies from jurisdiction to jurisdiction and it not the purpose of this article to examine those differences.[10] Irrespective of existing differences, if the forum's test is met, a party is barred from re-litigating issues finally decided in the foreign recognition or enforcement judgment concerning the same award.[11]

Courts in the UK, in a series of recent cases, have applied the relevant English principles of issue estoppel to foreign recognition and enforcement judgments.[12] In 2011, in *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS*,[13] the High Court dealt with an award in which the arbitral

[10] British Institute of International and Comparative Law, 'Comparative Report on The Effect in the European Community of Judgments in Civil and Commercial Matters: Recognition, Res Judicata and Abuse of Process' (2008) <http://www.biicl.org/files/4608_comparative_report_-_jls_2006_fpc_21_-_final.pdf> accessed 2 May 2013.

[11] On the different possible approaches, Sirko Harder, 'The Effects of Recognized Foreign Judgments in Civil and Commercial Matters' (2013) 62 ICLQ 441.

[12] The relevant principles of issue estoppel under English law are as follows: (i) the judgment of the foreign court must be (a) of a court of competent jurisdiction, (b) final and conclusive and (c) on the merits; (ii) the parties to the English litigation must be the same parties (or their privies) as in the foreign litigation; and (iii) the issues raised must be identical. See *Carl Zeiss Stiftung v Rayner & Keeler Ltd (no 2)* [1967] 1 AC 853 (HL); *The Sennar (no 2)* [1985] 1 WLR 490, 494 (HL); Lord Collins (n 1) vol 1, 679, para 14-030ff.

[13] [2011] EWHC 3383 (Comm).

tribunal (seated in London) had dismissed all claims. The successful respondent in the arbitration sought recognition and enforcement of the award in France and the other party resisted arguing that the award had been obtained by fraud. The French courts dismissed this latter argument and declared the award enforceable. The unsuccessful party in the arbitration also applied for the award to be set aside in the UK on the basis that it was obtained by fraud. Flaux J—after having found that the award had not been obtained by fraud—held in *obiter* that as the same party had already raised these matters before the French courts and lost, it was barred under the relevant English law principles of issue estoppel from raising those matters again before the English court.[14]

Similarly, in 2011 and 2012, English courts applied principles of issue estoppel in the case of *Yukos Capital SarL v OJSC Rosneft Oil Company*.[15] In this dispute, an arbitral tribunal seated in Russia had rendered four awards in favour of the claimant and those awards were subsequently set aside by the Russian courts. As discussed in more detail in Section 2B, the claimant was nevertheless successful in enforcing the awards in the Netherlands, since the Dutch courts found that the Russian set aside judgments were the result of partial judicial proceedings.[16] The claimant obtained payment of the award but sought recognition and enforcement of the award in the UK in order to collect post-award interest.

In the English proceedings, a preliminary question arose as to whether the respondent could re-litigate the (im)partial nature of the judicial proceedings that led to the Russian set aside judgments, or whether it was barred from doing so due to the earlier findings on this issue by the Dutch courts.

In the High Court, Hamblen J found that this was a case of issue estoppel and that the respondent was barred from re-opening the issue of the (im)partial nature of the Russian proceedings which had been decided by the Dutch courts in a final and binding judgment.[17] On appeal, the Court of Appeal agreed that the relevant question was whether the Dutch judgment met the English requirements for issue estoppel. However, contrary to the first instance judge, the Court of Appeal found that those requirements were not met since the issues at stake were not the same. The Court of Appeal held that the question whether the Russian courts be regarded as 'partial and dependent' was not the same issue in the Dutch and in the English context:

> The standards by which any particular country resolves the question whether courts of another country are 'partial and dependent' may vary considerably [. . .]. It is our own [English] public order which defines the framework for any assessment of this difficult question; whether such decisions are truly to be regarded as dependent and partial as a matter of English law is not the same question as whether such decisions are to be regarded as dependent and partial in the view of some other court . . .[18]

[14] ibid [313]–[318].
[15] [2011] EWHC 1461 (Comm); [2012] EWCA Civ 855. On the background of the dispute, see Jakob van de Velden 'The "Caution lex fori" approach to Foreign Judgments and Preclusion' (2012) 61 ICQL 519, 521ff.
[16] See below at 11.
[17] [2011] EWHC 1461 (Comm) [107].
[18] [2012] EWCA Civ 855 [151].

In other words, because the legal standard for public policy is a different one in each country, the issues at stake were not the same and the Court of Appeal did not grant estoppel effect to the findings in the Dutch judgment. It is nevertheless clear that the Court of Appeal followed a judgment route rationale in testing whether the Dutch recognition and enforcement judgment met the relevant principles of issue estoppel.[19]

The same rationale can also be found in a short *obiter* remark in the UK Supreme Court's decision in *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan.*[20] In this case, recognition and enforcement proceedings were well underway in the UK, when the French courts started to hear a set aside action concerning the same award. Lord Mance noted that 'an English judgment [in the recognition and enforcement proceedings] holding that the award is not valid could prove significant in relation to [the French] proceedings if French courts recognise any principle similar to the English principle of issue estoppel'.[21]

In sum, there can be no doubt that English courts follow (and expect courts in other countries to follow) a judgment route rationale by applying foreign judgment principles (including principles of issue estoppel) to foreign recognition and enforcement judgments.[22]

Interestingly, the current draft of the US Restatement on International Commercial Arbitration adopts a similar approach, although there seems to be no established US case law on this issue.[23] According to the Restatement, a US court should apply foreign judgment principles (including principles of claim and issue preclusion) in post-award proceedings in order to determine whether it 'may reexamine a matter decided at an earlier stage of the proceedings [. . .] by a foreign court'.[24] Therefore, if the forum's relevant standards on claim or issue preclusion are met, a US court should give preclusive effect to a foreign

[19] Cf Harder (n 11) 456ff.

[20] *Dallah Real Estate and Tourism Holding Co v The Ministry of Religious Affairs, Government of Pakistan* [2010] UKSC 46.

[21] ibid [29] (citations omitted). See also *Good Challenger Navegante SA v Metalexportimport SA* [2003] EWCA Civ 1668 [80]–[90] (accepting, in principle and *obiter*, that a Romanian judgment recognizing and enforcing an award could produce issue estoppel in a subsequent recognition or enforcement action regarding the same award in the UK).

[22] Cf not related to award judgments but judgments on judgments: *House of Spring Gardens Ltd v Waite* [1985] FSR 173 (CA) (granting estoppel effect to an Irish judgment refusing to set aside a prior Irish judgment and thus barring the defendant from re-litigation the same issues in a subsequent enforcement action in the UK); *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (HL) (indicating, *obiter*, that an Italian judgment enforcing a foreign judgment from St Vincent might have issue estoppel effect in England in proceedings relating to the same St Vincent judgment).

[23] The American Law Institute, *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (April 2012) ss 4–8. See however *Belmont Partners LLC v Mina Mar Group Inc* 741 FSupp2d 743 (WDVa 2010). Before the US District Court, one party sought confirmation of an award rendered in the United States, whereas the other party cross-motioned to vacate the award. In parallel enforcement proceedings concerning the same award in Canada, the Superior Court of Justice in Ontario had recognized the award and ordered its enforcement. The US court found that the Canadian judgment merited comity and its findings constituted *res judicata* for the US court. In particular, the District Court found that the Canadian judgment met the relevant three prong test of *res judicta*, ie it constituted a final judgment on the merits, between the same parties, concerning the same cause of action. Regarding the requirement of identity of cause of action, the US court noted that 'although no motion to vacate was brought in the prior proceedings [in Canada], the plaintiff need not proceed on the same legal theory as in the first suit.' It added that pleading before the US court contained 'substantially the same factual allegations as were reviewed by the Ontario Superior Court.' *Belmont Partners* [19].

[24] *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (ibid) ss 4–8.

judgment that considered the same claim/issue in a previous recognition or enforcement action.[25]

Since foreign judgment principles, including principles of claim and issue preclusion, are governed in the United States by state law and thus may vary depending on the state in which the post-award proceedings are brought, the Restatement does not contain any precise directions.[26] Nevertheless, the comments to the relevant section in the US Restatement contain a further important explanation: '[w]hether a prior judicial determination is given preclusive effect in a post-award action may depend on, among other things, the law that governed that determination in the prior action'.[27] If that law is different, no preclusive effect should be given. As an example, the Restatement commentator lists issues of public policy and concludes that '[i]n such instances, it may be inappropriate for a [US] court to treat the prior judicial determination as binding'.[28]

The UK and US approaches therefore follow similar judgment route rationales.[29] First, foreign recognition and enforcement judgments are granted preclusive effect pursuant to foreign judgment principles on claim/issue estoppel. Second, these principles vary from country to country (or even state to state within a federal country) and the foreign recognition or enforcement judgment must therefore meet the forum's relevant standard. Third, despite those variances, one critical element is whether the foreign court has applied the same law as that which the forum's court would apply to this issue. If the legal standard is different, eg for matters relating to public policy, no preclusive effect should be granted. Fourth, the English case law and draft US Restatement do not take into account the location of the seat of the arbitration. In particular, they do not draw any distinction as to whether or not the seat of the arbitration is located in the forum. For instance, as detailed above, some English cases grant preclusive effect to a foreign recognition or enforcement judgment rendered in a non-seat country, and bar a party from re-litigating those issues before the English courts although the arbitral seat was located in England.[30] The implication of this will be explored in Section 3C(i)(b) of this article.

[25] George Bermann, 'Domesticating the New York Convention: the Impact of the Federal Arbitration Act' (2011) 2 JIDS 317, 324.

[26] *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (n 23) ss 4–8, reporter's notes, p. 114, lines 20–22 ('The Restatement thus takes the position that these judgment recognition questions are no different in nature from those presented in other situations involving successive court rulings. Rather than propound wholly new rules for the arbitration context, the Restatement embraces the forum's existing rules on claim and issue preclusion, "law of the case", and recognition of foreign country judgments, as the case may be.').

[27] ibid ss 4–8, comments p. 111, lines 15–17.

[28] ibid ss 4–8, comments p. 112, lines 8–9.

[29] Courts in Hong Kong have also adopted a similar position. See *Karaha Bodas Co LLC v Perusahaan Pertambangan Minyak Dan Gas Bumi Negara* [2003] HKCFI 390 [48]–[53] (accepting, in principle and *obiter*, that recognition and enforcement proceedings in the United States could produce issue estoppel effect in a subsequent recognition and enforcement action regarding the same award in Hong Kong). See also Catherine Kessedjian, 'Court Decision on Enforcement of Arbitration Agreements and Awards' (2001) 18(1) J Intl Arb 1, 11 (some *res judicta* effects must be given, at least to the issues that were argued in the foreign court, or could have been argued but were not ('issue preclusion')).

[30] *Good Challenger Navegante* (n 21) ; *Dallah* (UKSC) (n 20) (obiter); *Chantiers de l'Atlantique SA v Gaztransport & Technigaz SAS* [2011] EWHC 3383 (Comm). See also for the US: *Belmont Partners* (n 23); for Hong Kong: *Karaha Bodas* (n 29).

B. *Effects of Set Aside Judgments*

While the previous section deals with recognition and enforcement judgments (and finds that national courts apply the judgment route in relation to those judgments), this section looks at situations where an award has been set aside by the courts at the seat of the arbitration. The question as to whether an award set aside in country C1 may produce effects elsewhere, for instance, in proceedings seeking to enforce the same award in country C2, has spurred a lot of debate in scholarly writing, and has led to contradictory decisions from national courts around the world.[31] The purpose of this article is not to discuss those various views and decisions, as much ink has already been spilt on those issues, but is rather to analyse whether and to what extent the judgment route could provide a potential solution to this debate.

The starting point for the debate is Article V(1)(e) of the New York Convention which provides, in its relevant parts, that recognition or enforcement of an award 'may be refused [...] if [...] [t]he award [...] has been set aside [...] by a competent authority of the country in which, or under the law of which, that award was made'. Although there can be little doubt that Article V(1)(e) *allows* courts to refuse recognition or enforcement of a set aside award, the New York Convention provides no guidance as to when they *should* do so. This has led to a multitude of divergent opinions, with extreme positions on both sides of the scale.

On the one hand, some are of the opinion that recognition or enforcement of a set aside award should *always* be refused. This opinion is based on the argument that an award that has been set aside ceases to exist and that therefore nothing is left to recognize or enforce ('*Ex nihilio nil fit*').[32]

On the other hand, it has been argued that the fact that an award has been set aside should *never* suffice to prevent its recognition or enforcement. This opinion is based on the view that international arbitration is not linked to any national legal order, including the one of the seat, but forms part of a specific

[31] Austria: Judgment of 20 October 1993, *Radenska v Kajo* (1999) XXVI YB Comm Arb 919 (Austrian Supreme Court). Belgium: Judgment of 6 December 1988, *Société Nationale pour la Recherche, le Transport et la Commercialisation des Hydrocarbures (Sonatrach) v Ford, Bacon & Davis Inc* (1990) XV YB Comm Arb 370 (Brussels First Instance Court). France: Judgment of 24 February 1994, *Ministry of Public Works v Société Bec Frères*, jurisdata no 1994-021127, (1997) XXII YB Comm Arb 682 (Paris Court of Appeal); Judgment of 23 March 1994, *Société Hilmarton v Société OTV*, no 92-15137, [1994] Rev arb 327 (French Supreme Court); Judgment of 14 January 1997, *The Arab Republic of Egypt v Chromalloy Aeroservices Inc*, no 95/23025, (1997) XXII YB Comm Arb 691 (Paris Court of Appeal); Judgment of 10 June 1997, *Omnium de Traitement et de Valorisation v Hilmarton*, no 95-18402 and 95-18403, (1997) XXII YB Comm Arb 696 (French Supreme Court); Judgment of 29 June 2007, *PT Putrabali Adyamulia v Rena Holding et Société Mnogutia Est Epices*, no 05-18053 (2007) XXXII YB Comm Arb 299 (French Supreme Court). Germany: Judgment of 24 January 2003, OLG Hamburg, [2003] SchiedsVZ 237, (2005) XXX YB Comm Arb 509 (Hamburg Court of Appeal). US: *Chromalloy Aero services v Arab Republic of Egypt* 939 FSupp 907 (DDC 1996); *Baker Marine Ltd v Chevron Ltd* 191 F3d 194, 197 n3 (2d Cir 1999); *Spier v Calzaturificio Tecnica SpA* 71 FSupp 2d 279 (SDNY 1999), reargued 77 FSupp 2d 405 (SDNY 1999); *TermoRio SA v Electranta SP* 487 F3d 928 (DC Cir 2007).

[32] See eg Albert Jan van den Berg, 'When Is An Arbitral Award Non-Domestic under the New York Convention of 1958?' (1985) 6 Pace L Rev 25, 41–42; Albert Jan van den Berg, 'Enforcement of Annulled Arbitral Awards?' (1998) 9(2) ICC Ct Bull 15; Richard Hulbert, 'Further Observations on Chromalloy: A Contract Misconstrued, A Law Misapplied, and An Opportunity Foregone' (1998) 13 ICSID Rev For Inv LJ 124, 144; Albert Jan van den Berg, 'The 1958 New York Arbitration Convention Revisited' in *Arbitral Tribunals or State Courts: Who Must Defer to Whom?* (2001 no 15 ASA Special Series) 125; Hamid Gharavi, *The International Effectiveness of the Annulment of An Arbitral Award* (Kluwer Law International 2002) 114; Georgios Petrochilos, *Procedural Law in International Arbitration* (OUP 2004) 336.

a-national or transnational legal order.[33] According to this line of argument, the position of the courts at the seat of the arbitration expressed in the set aside judgment should thus not be binding on courts from other jurisdictions which remain free to recognize or enforce the award if they wish to do so.[34] This view is followed, in particular, in France.[35]

Most authors agree that an intermediate position is preferable, but they disagree as to what such a position should look like.[36] In this context, the judgment route has been offered as a possible solution. The idea is 'to look to the law on recognition and enforcement of foreign judgments to provide guidance' as to when courts, applying Article V(1)(e) of the New York Convention, should refuse to recognize or enforce awards that have been set aside.[37]

The rationale of this judgment route is as follows. The set aside judgment from country C1 is a foreign judgment in country C2 where recognition or enforcement of the same award is sought. In assessing whether the set aside award 'may be refused' recognition or enforcement according to Article V(1)(e), the court in C2 applies its foreign judgment principles, ie the forum's principles regarding the recognition or enforcement of foreign judgments. Accordingly, if the set aside judgment complies with the forum's foreign judgment principles (eg it has been rendered by a competent court, in fair proceedings and does not violate the forum's public policy), the foreign set aside judgment should be given deference and the award refused recognition or enforcement under Article V(1)(e). Conversely, if the foreign set aside judgment does not comply with the forum's foreign judgments principles (eg

[33] See eg Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff Publishers 2010) 35ff.

[34] See eg Jan Paulsson, 'Arbitration Unbound: Award Detached from the Law of Its Country of Origin' (1981) 30 ICLQ 358; Jan Paulsson, 'Delocalization of International Commercial Arbitration: When and Why It Matters' (1983) 32 ICLQ 53; Philippe Fouchard, 'La portée internationale de l'annulation de la sentence arbitrale dans son pays d'origine' [1997] Rev arb 329; Emmanuel Gaillard, 'Enforcement of Awards Set Aside in the Country of Origin: The French Experience' in Albert Jan van den Berg (ed), *Improving the Efficiency of Arbitration Agreements and Awards: 40 Years of Application of the New York Convention* (Kluwer Law International 1999) 505.

[35] See cases cited above at n 31. The French position is also based on the fact that French courts do not apply the New York Convention but the more liberal, ie recognition/enforcement-friendly, statutory French regime which does not include set aside as a possible ground for refusing recognition or enforcement of an award (arts 1514, 1520, 1525 of the French Code of Civil Procedure). Art VII allows New York Convention countries to apply a more favourable local law or, more precisely, allows 'any interested party of any right he may have to avail himself of the arbitral award in the manner and to the extent allowed by the law [...] of the country where such award is sought to be relied upon.'

[36] See eg Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding A Local Standard Annulment' (1988) 9(1) ICC Ct Bull 14; Jan Paulsson, 'The Case for Disregarding LSAs (Local Standard Annulments) under the New York Convention' (1996) 7 Am Rev Intl Arb 99 (suggesting that one should distinguish according to the grounds of the setting aside: set asides based on local (as opposed to international) standards should not lead to refused recognition/enforcement elsewhere); Jan Paulsson, 'Rediscovering the N.Y. Convention: Further Reflections on Chromalloy' (1997) 12(4) Mealey's Intl Arb Rep 20. Cf Gary Born, *International Commercial Arbitration* (Kluwer Law International 2009) 2690 (concerning the recognition of set aside awards under the New York Convention, suggesting that one should adopt an approach similar to the one found in the European Geneva Convention); Pierre Mayer, 'Revisiting Hilmarton and Chromalloy' in Albert Jan van den Berg (ed), *International Arbitration and National Courts: The Never Ending Story* (ICCA Congress Series No 10, Kluwer Law International 2001) 173–76.

[37] Linda Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' (2009) 28 Ga J Intl & Comp L 25, 32. See also William Park, 'Duty and Discretion in International Arbitration' (1999) 93 Am J Intl L 805, 813 ('The soundest policy regarding annulment [judgments] is to treat them like other money judgments, according them deference unless procedurally unfair or contrary to fundamental notions of justice.').

it was rendered by a non-competent court, in unfair proceedings or violates the forum's public policy standards), the award may be recognized or enforced despite the set aside judgment and Article V(1)(e). In short, the application of foreign judgment principles provides the guidance lacking in Article V(1)(e) of the New York Convention.

This solution has gained some support in recent case law. In particular, the Dutch courts have started to apply the above-described judgment route. In *Yukos Capital SARL v OAO Rosneft*, the Amsterdam Court of Appeal heard an enforcement action concerning four awards that had been set aside in Russia, the seat of the arbitration.[38] The court examined whether the Russian set aside judgments met the Dutch foreign judgments principles in order to decide whether the award should be refused recognition or enforcement according to Article V(1)(e):

> [. . .] a Dutch court is not compelled to deny leave for recognition of an annulled arbitral award if the foreign decision annulling the arbitral award cannot be recognised in the Netherlands. [. . .] If the decisions of the Russian civil court annulling the arbitral awards cannot be recognised in the Netherlands, then when deciding on the request for a leave to enforce the arbitral awards no account is to be taken of the decision annulling those arbitral award.[39]

The Dutch court thus examined whether the Russian set aside judgments met the requirements for recognizing a foreign judgment, including, in particular whether it had been rendered in fair proceedings by a competent court. The Amsterdam Court of Appeal found, based on the evidence submitted by the parties, that 'it [was] likely that the Russian civil court decisions annulling the arbitral awards [were] the outcome of a judicial process that must be deemed partial and dependent'.[40] On that basis, the court concluded that the Russian set aside judgments could not be recognized in the Netherlands and therefore 'the annulment of the arbitral awards by the Russian courts must be ignored when deciding on Yukos Capital's request for enforcement of those awards'.[41] The Amsterdam Court of Appeal thus granted leave to enforce the set aside awards.[42]

[38] Judgment of 28 April 2009, (2009) XXXIV YB Comm Arb 703 (Court of Appeal of Amsterdam). The same dispute has another prong before the English courts, discussed above at 6.

[39] ibid 705.

[40] ibid 712.

[41] ibid.

[42] The Dutch courts have applied a similar analysis in *Maximov v OJSC Novolipetskymetallurgichesky Kombinat*. The facts resemble the above-mentioned *Yukos* case: In *Maximov*, a party sought enforcement of an award set aside in Russia and argued that the Russian set aside judgment should not be recognized in the Netherlands because the Russian proceedings were 'tainted by dependence, bias, corruption, and other procedural irregularities'. The Amsterdam District Court judge, sitting in summary proceedings, held that there was no sufficient evidence to that effect. The court stated, however, that 'only then can the judge in summary proceedings deny the operation of the [Russian set aside judgment which had] overturned the arbitral award [. . .], if [. . .] the enforcement of [that judgment] would constitute a breach of Dutch public order, for example because [it] was the result of proceedings in which, by Dutch standards, the principles of proper judicial procedure were unacceptably disregarded.' See Judgment of 17 November 2011, no 491569 KG RK 11-1722, unpublished (Amsterdam District Court), at 4.8. For an excerpt thereof, see (2012) XXXVII YB Comm Arb 274. On appeal, the Amsterdam Court of Appeal has confirmed the decision of the first instance judge, ordering that the appointment of legal experts to assess whether the manner in which the Russian proceedings were conducted are in violation of Dutch public policy. It noted that '[its] obligation to assess these issues [derives] from general Dutch international private law.' See Judgment of 18 September 2012, no 200.100.508/01, unpublished (Amsterdam Court of Appeal) at 2.9.

The judgment route is not only applied by the Dutch courts, it has also found support on the other side of the Atlantic. As regards awards falling under the New York Convention, the current draft of the US Restatement on International Commercial Arbitration states that '[e]ven if [the award] has been set aside by a competent authority, a court of the United States may confirm, recognize, or enforce the award if the judgment setting it aside is not entitled to recognition under the principles governing the recognition of judgments [...]'.[43] In other words, the US court will look at its foreign judgment principles in order to decide whether an award set aside by a competent foreign court may still be recognized or enforced in the United States according to Article V(1)(e) of the New York Convention. The court will determine whether the foreign set aside judgment complies with the forum's requirements for recognition of foreign judgments, including whether it has been rendered in fair proceedings and whether it violates US public policy on a federal or state level.[44] The Restatement thus clearly follows a judgment route regarding set aside judgments, the essence of which has been described by the Restatement's Reporter as follows:

> [...] the Restatement takes as its point of departure the law of judgments of the court where recognition or enforcement [of the award] is sought, inasmuch as a judgment of set-aside is, after all, a judgment.[45]

The position of the draft Restatement might seem innovative from a US perspective, but in fact US case law—albeit rather confusingly—has sometimes used a judgment route rationale when deciding on the recognition or enforcement of set aside awards. For instance, in *Chromalloy*, the courts in Egypt, the seat of the arbitration, had set aside an award which was subsequently presented for enforcement in the United States.[46] The US court assessed whether the Egyptian set aside judgment met the state's requirements for recognition of foreign judgments and found that it violated US public policy.[47] Analysed from this angle, it was therefore only logical that the US court ignored the Egyptian judgment and enforced the award notwithstanding it being set aside.[48]

In the subsequent decisions of *Baker Marine*, *Spier* and *TermoRio*, the US courts faced similar issues of awards being set aside in the country of the arbitral seat (Nigeria, Italy and Columbia, respectively) and presented for enforcement in the United States.[49] Even though in all three cases the outcome

[43] *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (n 23) ss 4–16(b).

[44] ibid ss 4–16, reporters' notes p. 230, lines 4ff.

[45] ibid ss 4–16, reporters' notes p. 230, lines 4–6.

[46] *Chromalloy* (DDC 1996) (n 31).

[47] ibid 911, 913 ('A decision by this Court to recognize the decision of the Egyptian court would violate this clear U.S. public policy [of enforcing binding arbitration clauses].') The Egyptian court had set aside the award on the basis that the arbitral tribunal had misapplied the law, having applied Egyptian civil law, instead of Egyptian administrative law.

[48] The court also used Art VII of the New York Convention which has been sharply criticized. See eg Eric Schwartz, 'A Comment on Chromalloy: Hilmarton, à l'américaine' (1997) 14(2) J Intl Arb 125, 127; Hulbert (n 32) 126–27; Dana Freyer, 'United States Recognition and Enforcement of Annulled Foreign Arbitral Awards: The Aftermath of the Chromalloy Case' (2000) 17(2) J Intl Arb 1, 2ff; Joseph Neuhaus, 'Current Issues in the Enforcement of International Arbitration Awards' (2004) 36 U Miami Inter-Am L Rev 23, 35–37.

[49] *Baker Marine* (n 31); *Spier* (n 31); *TermoRio* (n 31).

differs from *Chromalloy*—insofar as in *Baker Marine, Spier* and *TermoRio* the US courts refused to recognize the awards—all three decisions follow, at least to some extent, a judgment route analysis of the problem. For instance, in *Baker Marine*, the court verified whether there were 'adequate reasons for refusing to recognize the [set aside] judgments of the Nigerian court'[50] and concluded that this was not the case. In particular, it held that '[r]ecognition of the Nigerian judgment in this case does not conflict with United States public policy'.[51] In *TermoRio*, although the court criticized the public policy test used in *Baker Marine*, it followed the judgment route inasmuch as it accepted that the issue was one of recognition or enforcement of the foreign set aside judgment.[52]

US case law on the issue of set aside awards has often been criticized for its inconsistent or shifting positions.[53] However, as shown above, the US cases can be interpreted as generally applying foreign judgment principles to assess, according to Article V(1)(e) of the New York Convention, whether or not to recognize or enforce an award that has been set aside by a foreign court. As such, they can be read as consistent with the judgment route analysis discussed in this article.

C. *Effects of Confirmation Judgments*

Whereas the previous section dealt with awards having been set aside, this section examines the converse situation in which a court in country C1, typically the seat of the arbitration, has either confirmed or refused to set aside the award (both referred to as confirmation judgments in this section, unless otherwise specified). If the award debtor subsequently wants to obtain satisfaction of the award in another country C2, the question is whether or to what extent the confirmation judgment rendered in C1 produces effects in C2 as a foreign judgment.

This question is generally discussed under the heading of the so-called parallel entitlement approach. Under this approach, the award creditor, wishing to obtain satisfaction in country C2, has the option of seeking enforcement of either the award or of the confirmation judgment obtained in country C1. Section 2C(i) describes the parallel entitlement approach in more detail and explains how the judgment route is applied to confirmation judgments.

If the award debtor chooses to enforce the award itself (and not the foreign confirmation judgment, as permitted under the parallel entitlement approach), the question remains as to whether the foreign confirmation judgment from C1 may produce effects in the subsequent post-award proceedings concerning the same award in C2. As detailed in Section 2C(ii), national courts in

[50] *Baker Marine* (n 31) 197. See also for a similar approach, *Spier* (n 31) 288 ('Spier has shown no adequate reason for refusing to recognize the [set aside] judgments of the Italian courts.').

[51] *Baker Marine* (n 31) at FN3.

[52] *TermoRio* (n 31) 938 ('In applying Article V(1)(e) of the New York Convention, we must be very careful in weighing notions of "public policy" in determining whether to credit the judgment of a court in the primary State vacating an arbitration award.'). The *TermoRio* decision is open to criticism on many of its other holdings, in particular the distinction of primary and secondary states which has no founding in the New York Convention. See Born (n 36) 2686–87.

[53] Born (n 36) 2681–88.

different jurisdictions have granted preclusive effect under doctrines of *res judicata* or claim/issue estoppel to foreign confirmation judgments, similar to the effects of foreign recognition or enforcement judgments, described above in Section 2A.

(i) *Parallel entitlement approach*

The idea of the parallel entitlement approach is to give the award creditor the option to seek enforcement either of the award itself or of a foreign judgment that has confirmed the award. The parallel entitlement approach is followed in the United States according to well-established case law[54] and endorsed by the current draft of the US Restatement on International Commercial Arbitration.[55] According to the Restatement, '[o]nce an award has been confirmed by a foreign court at the arbitral seat, the prevailing party may seek to have it recognized or enforced either as an award [...] or as a foreign judgment, or both'.[56] If the award creditor chooses the judgment route, ie seeks recognition or enforcement of the foreign confirmation judgment (rather than the award itself), the court will apply the forum's foreign judgment principles.[57] Namely, it will verify that the foreign confirmation judgment was rendered by a competent court, in a fair proceeding and that it does not violate the forum's fundamental principles of public policy. If that is the case, the court will enforce the confirmation judgment, ie order the award debtor to pay the sums allocated in the award and confirmed by the confirmation judgment.

Similar approaches can be found in other common-law countries, including Australia,[58] India,[59] and Israel.[60] In the UK, courts have sometimes granted award creditors the option to enforce a foreign award judgment instead of the

[54] *Ocean Warehousing BV v Baron Metals and Alloys Inc* 157 FSupp 2d 245 (SDNY 2001); *Seetransport Wiking Trader Schiffahrtgesellschaft mbH & Co v Navimpex Centrala Navala* 29 F3d 79 (2d Cir 1994); *Oriental Commercial & Shipping Co v Rosseel NV* 769 F Supp 514 (SDNY 1991); *Victrix SS Co v Salen Dry Cargo AB* 825 F2d 709 (2d Cir 1987); accord *Re Waterside Navigation Co* 737 F2d 150 (2d Cir 1984); *Fotochrome Inc v Copal Co* 517 F2d 512 (2d Cir 1975). Cf *Island Territory of Curacao v Solitron Devices Inc* 489 F2d 1313 (2d Cir 1973). See however, the recent 2013 decision in *Commission Import Export SS v The Republic of the Congo*, Civ. No. 12-743 (DDC 2013). In this case, the award creditor obtained a judgment from the London High Court recognizing a foreign award in the UK, and subsequently sought enforcement of this English judgment in the United States at a moment in time when an action to enforce the award was already time-barred. The District Court of the District of Columbia dismissed the action, taking issue with the award creditor's 'manoeuvre' trying to profit from the longer limitations period applying to actions for the enforcement of foreign judgments, instead of the shorter limitations period applying to foreign awards. The court held that such 'manoeuvre' was pre-empted since it would create an obstacle to the accomplishment of the purposes of the statute of limitations contained in the Federal Arbitration Act [Act 9 USC s 207 (2006)], which aims at creating a uniform limitations period a uniform and protecting the award debtor's interest in finality. ibid at *6, 7. The decision raises a number of questions, including whether it is appropriate to apply the parallel entitlement approach to recognition and enforcement judgments (as opposed to confirmation judgments).

[55] *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (n 23) s 4-3(d).

[56] ibid s 4-3(d), comments, p. 72, lines 10–12.

[57] ibid s 4-3(d), comments p. 72, lines 12–15 ('If a party seeks recognition or enforcement of a foreign award as a foreign judgment, the forum applies its own standards on the recognition or enforcement of foreign judgments, including any rules of reciprocity that may be applicable.').

[58] Judgment of 17 October 1988, *Biakh v Hyundai Corp* (1990) XV YB Comm Arb 360 (Supreme Court of New South Wales).

[59] Judgment of 13 May 1999, *Harendra H Metha v Mukesh H Metha* 1999(3) SCR 562 (2000) XXV YB Comm Arb 641 (Indian Supreme Court).

[60] Judgment of 17 March 2010, *Pickholz v Sohachesky* CA 10854/07 (Israel Supreme Court) (cited by Einhorn (n 5) 45).

award;[61] however, it is unclear whether this rules applies to awards falling under the New York Convention.[62] Variants of the parallel entitlement approach also exist—or existed—to some extent in some civil-law jurisdictions. For instance, the parallel entitlement approach was applied in Germany until a recent Supreme Court decision, discussed below.[63] Switzerland still applies the parallel entitlement approach in most circumstances.[64]

To fully grasp the parallel entitlement approach, it is important to understand how it came into being. The approach was developed, originally, as a reaction to issues arising in connection with the doctrine of merger. In some legal systems, such as the United States or the UK, by confirming an award, courts may render a 'judgment upon award' that merges the award into the judgment. This merger doctrine provided the basis for some to argue that the award, having merged into the judgment, was no longer independently available for enforcement.[65] Although this view found favour in outdated case law,[66] it has rightly been rejected.[67] In rejecting the idea that the merged arbitral award is no longer available for enforcement, national courts have held that the award creditor had an option to enforce either the judgment or the underlying award.[68] Thus, the parallel entitlement approach was born.

The exact scope of the parallel entitlement approach, however, is often not clearly identified.

First, it is not always clear whether the parallel entitlement approach applies merely to confirmation judgments *stricto sensu* or also to other judgments validating the award, such as judgments refusing to set aside the award. Even though one may legitimately question whether a refusal to set aside automatically equals confirmation of the award,[69] in some jurisdictions, like the U.S.,

[61] *East India Trading Co Inc v Carmel Exporters and Importers Ltd* [1952] 1 All ER 1053 (QB); *International Alltex Corp v Lawler Creations Ltd* [1965] IrR 264. Hill (n 5) 177.

[62] Lord Collins (n 1) vol 1, 902, para 16-165.

[63] Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 287 (German Supreme Court), discussed below at para 86. For previous case law, Judgment of 27 March 1984, BGH, [1984] NJW 2765, (1985) X YB Comm Arb 426 (German Supreme Court); Judgment of 10 May 1984, BGH, [1984] NJW 2763, (1985) X YB Comm Arb 427 (German Supreme Court); Judgment of 5 November 1991, OLG Hamburg, [1992] NJW-RR 658 (Hamburg Court of Appeal); Judgment of 13 July 2005, OLG Frankfurt am Main, [2006] NJOZ 4360 (Frankfurt am Main Court of Appeal).

[64] Judgment of 20 July 2007, 4A_137/2007, (2007) 25(4) ASA Bulletin 798, 803 (Swiss Federal Tribunal); Judgment of 28 July 2010, 4A_233/2010, (2012) 30(1) ASA Bulletin 97 (Swiss Federal Tribunal). Jean-François Poudret and Sébastien Besson, *Comparative Law of International Arbitration* (2nd edn, Sweet & Maxwell 2007) 812. *Contra* Michele Patocchi and Cesare Jermini in Honsell and others (eds), *Internationales Privatrecht* (2nd edn, Helbing Lichtenhahn 2007) art 194, para 11. The situation in France is unclear. See Judgment of 9 December 2003, *Gouvernement de la Fédération de Russie v Noga*, no 01-13341, [2004] Rev arb 337 (French Supreme Court); Judgement of 29 November 1994, *Simon v Battan*, no 92-19.648, [1995] Rev crit DIP 362 (French Supreme Court). See also Dominique Hascher, 'Recognition and Enforcement of Arbitration Awards and the Brussels Convention' (1996) 12(3) Arb Intl 233, 254–55.

[65] See eg Martin Domke, *Domke on Commercial Arbitration* (3rd edn, Thomson/West 2010) s 44:2. See also Richard Mosk and Ryan Nelson, 'The Effects of Confirming and Vacating an International Arbitration Award on Enforcement in Foreign Jurisdictions' (2001) 18(4) J Intl Arb 463.

[66] See eg Judgment of 10 May 1963, *Badat and Co v East India Trading Co* 1964 AIR 538 1964 SCR (4) 19 (Indian Supreme Court), reversed by Judgment of 13 May 1999, *Harendra H Metha v Mukesh H Metha* 1999(3) SCR 562, (2000) XXV YB Comm Arb 641 (Indian Supreme Court).

[67] Indeed, the New York Convention creates an obligation to enforce foreign arbitral awards unless one of the Convention's explicitly defined grounds for refusal is met—none of which concerns the merger of an award into a judgment. Cf Judgment of 13 February 1992, *Robert E Schreter v Gasmac Inc* 7 OR (3d) 608 (Gen Div) (Ontario Court of Justice).

[68] See authorities cited above, n. 54, 58–60.

[69] This is particularly so where the regime of both actions differs. For instance, in the United States, applicable time limits to file the suit are different: proceedings to set aside (or vacate) the award must be filed

courts have applied the parallel entitlement approach to both types of judgments.[70]

Second, different views exist as to whether the parallel entitlement approach should apply to confirmation judgments from all countries, or only to those which originate in countries applying the above-described merger doctrine and only after it is established that such merger actually took place. Courts in civil-law countries tend to follow the latter approach,[71] whereas the view in the United States is that the parallel entitlement approach applies to all confirmation judgments—irrespective of whether they originate from a country that applies the merger doctrine.[72]

Third, although it is clear that the parallel entitlement approach gives parties a choice (ie to seek enforcement of the award or of the foreign confirmation judgment), the precise terms of that choice are less clear. Does the parallel entitlement approach provide mutually exclusive alternatives (ie the parties must choose to enforce *either* the award *or* the confirmation judgment) or does it provide non-exclusive paths to enforcement (ie the parties may choose to seek enforcement of *both* the award *and* the confirmation judgment)? If it is the latter, then may the parties pursue both options in parallel (ie seek enforcement of the award and the confirmation judgment *at the same time*) or only as subsequent actions (ie seek enforcement of the confirmation judgment only *after* an enforcement action regarding the arbitral award was unsuccessful, and vice versa)? From a US perspective at least, it seems that the parallel entitlement approach allows the broadest possible choice. US courts have taken no issue with parties seeking enforcement of the award and the confirmation judgment at the same time,[73] or in subsequent actions.[74]

In sum, even though the contours of the parallel entitlement approach are sometimes blurred, there is little doubt that under this approach foreign confirmation judgments are given effect according to foreign judgment

within 3 months 'after the award is filed or delivered' whereas proceedings to confirm the award may be initiated 'within one year after the award is made.' See The Federal Arbitration Act 9 USC s 9, 12 (2006).

[70] *Seetransport* (2d Cir 1994) (n 54) (enforcing in the United States a French judgment dismissing an application to set aside the award).

[71] For instance, in Germany (prior to the recent Supreme Court decision rejecting the parallel entitlement approach, discussed below at 26) the courts analysed whether the foreign confirmation judgment contained an independent order to pay or on mere declaration for enforceability, and applied the parallel entitlement approach only in the former case. Judgment of 27 March 1984, BGH, [1984] NJW 2765, (1985) X YB Comm Arb 426 (German Supreme Court); Judgment of 10 May 1984, BGH, [1984] NJW, 2763, (1985) X YB Comm Arb 427 (German Supreme Court); Judgment of 5 November 1991, OLG Hamburg, [1992] NJW-RR 658 (Hamburg Court of Appeal); Judgment of 13 July 2005, OLG Frankfurt am Main, [2006] NJOZ 4360 (Frankfurt am Main Court of Appeal). Similarly, Swiss courts apply the parallel entitlement approach only if the foreign confirming court had the power to amend the award's findings. Judgment of 20 July 2007, 4A_137/2007, (2007) 25(4) ASA Bulletin 798 (Swiss Federal Tribunal); Judgment of 28 July 2010, 4A_233/2010, (2012) 30(1) ASA Bulletin 97 (Swiss Federal Tribunal). See also Hascher (n 64) 238–41.

[72] *Seetransport* (2d Cir 1994) (n 54) (applying the parallel entitlement approach to a French judgment, although the merger doctrine does not exist in French law).

[73] *Island Territory of Curacao* (n 54) (the plaintiff sought enforcement of the award and of the foreign validating judgment; the court granted enforcement of the judgment and left the question of the enforcement of the award open). See also Judgment of 28 July 2010, 4A_233/2010, (2012) 30(1) ASA Bulletin 97 (Swiss Federal Tribunal) (claimant sought enforcement of both the award and the validating judgments).

[74] *Seetransport* (2d Cir 1994) (n 54) (allowing an action to enforce a foreign validating judgment even though the same court had found in a previous action that the enforcement of the award itself was time-barred). But see *Commission Import Export* (n 54).

principles. As such, it is a clear example of how the judgment route is applied to this type of award judgment.

(ii) *Preclusive effect of confirmation judgments*

If the award debtor chooses to enforce the award itself (and not the foreign confirmation judgment, if so permitted under the parallel entitlement approach discussed in the previous section), the question remains as to whether the foreign confirmation judgment produces effects in that enforcement action.

National courts in different jurisdictions have granted preclusive effect to foreign confirmation judgments, under the doctrines of *res judicata* or claim/issue estoppel. Similarly to the findings in Section 2A regarding foreign recognition and enforcement judgments, national courts have held that parties are barred from re-litigating points finally decided in a foreign confirmation judgment.

For instance, courts in the UK have considered whether foreign confirmation judgments (mostly judgments refusing to set aside an award) have preclusive effect in subsequent enforcement proceedings in the UK.[75] In *ABCI v Banque Franco-Tunisienne*, Chambers J dealt with a situation in which the French courts had declared inadmissible a motion to set aside the award and the award creditor had brought proceedings to enforce the award in England. The English judge held that the foreign French judgment could have preclusive effect under the doctrine of issue estoppel, but found that there was no compelling evidence that the conditions for issue estoppel were met in the case at hand.[76] One scholar has concluded that there 'is little doubt that, under English law, a judgment of the courts of the seat confirming the award can give rise to an issue estoppel [...] that may be relied upon in later enforcement proceedings in England [...]'.[77]

National courts in civil-law jurisdictions also sometimes grant preclusive effects to foreign confirmation judgments.[78] For instance, in Germany, the

[75] *Westacre Investments Inc v Jugoimport-SPDR Holding Co Ltd* [1999] EWCA Civ 1401, [1999] 3 All ER 864, 881 ('[I]t is clear that if an application to the local court [of the seat of the arbitration to review the award] is made and fails, the result may be an estoppel [...].'); *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] 1 All ER 315 (Comm) 331 ('In a case where a remedy for an alleged defect is applied for from the supervisory court [ie the court at the seat of the arbitration], but is refused, leaving the final award undisturbed it will [...] be a very strong policy consideration before the English courts that is has been conclusively determined by the courts of the agreed supervisory jurisdiction that the award should stand.'); *Gater Assets Ltd v NAK Naftogaz Ukrainiy* [2008] EWHC 237 (Comm) [66] ('[T]here is an argument for saying that this court should not permit the same arguments [than those made before the Russian courts in previous annulment proceedings] to be run again.').

[76] *ABCI v Banque Franco-Tunisienne and Others* [2002] 1 Lloyd's Rep 511 (QB). In particular, the judge was not convinced that the French judgment was considered having *res judicata* under French law, ibid 563-67. This decision was appealed but the Court of Appeal did not consider the question of issue estoppel, see [2003] EWAC Civ 205, [2003] 2 Lloyd's Rep 146. See also not related to award judgments but judgments on judgments, *Owens Bank* (n 22) (indicating, *obiter*, that an Italian judgment enforcing a foreign judgment from St. Vincent might have issue estoppel effect in England in proceedings relating to the same St. Vincent judgment); *House of Spring Gardens Ltd v Waite and others* [1990] 2 All ER 990 (granting estoppel effect to an Irish judgment refusing to set aside a prior Irish judgment and thus barring the defendant from re-litigation the same issues in a subsequent enforcement action in the UK). Cf for Australia: Judgment of 28 January 2011, *Altain Khuder LLC v IMC Mining Inc & Anor* [2011] VSC 1 para 98 (Supreme Court of Victoria) (even though his decision was based mainly on different grounds, Croft J noted that he relied on 'the findings of the Arbitral Tribunal and the reviewing court in Mongolia.').

[77] Hill (n 5) 179. See also Sir Roy Goode, 'The Role of the Lex Loci Arbitri in International Commercial Arbitration' (2001) 17(1) Arb Intl 19, 34.

[78] Other civil-law jurisdictions, like in France, clearly oppose such a solution. See Judgment of 12 February 1993, *Société Unichips Finanziaria v Gesnouin* [1993] Rev arb 176 (Paris Court of Appeal). In this case, the award

Court of Appeal of Munich granted preclusive effects to a Spanish judgment refusing to set aside an award. The German court, after having noted that the Spanish judgment met the requirements for recognition of foreign judgments under German law, followed the Spanish court's determination as to the validity of the award and refused to allow re-litigation of the same issues in the German enforcement action.[79]

In sum, just as national courts grant preclusive effects under relevant doctrines of *res judicata* and claim/issue estoppel to foreign recognition and enforcement judgments (as shown in Section 2A above), the same holds true for foreign confirmation judgments. In both cases, the courts follow a clear judgment route applying foreign judgment principles to these types of award judgments.

* * * * * *

The second section of this article has shown that there is a growing interest in a judgment route analysis in international arbitration. Courts in different jurisdictions apply foreign judgment principles to different types of award judgments. In particular, award creditors may:

— rely on foreign recognition and enforcement judgments and grant preclusive effect to points that have been finally decided by the foreign court (as shown in Section 2A); the same is true for foreign confirmation judgments (as shown in Section 2C(i));
— rely on foreign set aside judgments in order to assess whether an award might be enforced despite the set aside (as shown in Section 2B); and
— enforce foreign confirmation judgments in lieu of, or in addition to, the award itself (as shown in Section 2C(i)).

The judgment route thus appears to be a mechanism of growing importance in coordinating post-award proceedings in different countries. However, as shown in the following part of this article, the judgment route is problematic on a number of counts, both from a practical and theoretical point of view.

3. *Critical Assessment of the Judgment Route*

As shown in Section 2 of this article, courts in different jurisdictions follow the judgment route and grant effects to different types of award judgments. They do so with no or very little reflection as to whether it is appropriate to apply foreign judgment principles to this specific category of judgments. Authorities which follow the judgment route simply assume that award judgments are like other judgments, and that it is therefore appropriate to apply foreign judgment

was unsuccessfully sought to be set aside in Switzerland mainly for violation of the right to be heard; the same arguments were raised in enforcement proceedings before the French courts but the French courts refused to give any deference to the Swiss court's determination of the validity of the award. According to the French court, the Swiss court's determination '[did] not have the effect to eliminate or exclude the control, by the French judge, of the [validity] of the award in order to insert the award in the French legal order.'

[79] Judgment of 22 June 2009, OLG München, [2010] SchiedsVZ 169, 171, (2010) XXXV YB Comm Arb 371 ('the legal conclusion reached in the foreign decision is also binding on the [German] court as to the preliminary question whether there is a valid arbitral award under national Spanish law').

principles to them. For instance, some authorities assume that situations involving award judgments are 'no different in nature'[80] to situations involving other foreign judgments 'inasmuch as [an award judgment] is, after all, a judgment'.[81] Accordingly, they conclude that there is 'no doubt that [award judgments should be] regarded as a judgment for the purposes of the rules relating to enforcement of foreign judgments'.[82]

Section 3 of this article shows that these assumptions are incorrect. Section 3A demonstrates that award judgments are different in nature to most other judgments. Award judgments have a distinctive, ancillary nature insofar as they relate to a prior adjudication, ie the award. As a consequence of their ancillary nature, it is inappropriate to apply foreign judgment principles automatically and unreflectively to award judgments. As detailed below, the policies underlying foreign judgment principles (including comity, fairness, efficiency, harmony in solutions and predictability)—which explain why legal orders grant effects to foreign judgments—do not readily apply to ancillary judgments. Section 3A thus concludes that these types of judgments, because of their distinct ancillary nature, should not be granted, in principle, any extraterritorial effect.

The subsequent parts of this article apply the general findings of Section 3A to the judgment route analysis in distinguishing between enforcement of award judgments, on the one hand, and recognition and enforcement thereof, on the other. Section 3B deals with the enforcement of foreign award judgments.[83] It shows that it is wrong, both for practical and theoretical reasons, to allow the enforcement of foreign award judgments. Accordingly, the award creditor should only be able to seek enforcement of the award itself and not of any confirmation judgment (as allowed under the parallel entitlement approach). Section 3C then deals with the recognition of foreign award judgments.[84] If the award creditor seeks enforcement of the award, the question is whether the enforcing court should give effect to any foreign award judgments, including under relevant doctrines of *res judicata* and claim/issue preclusion. It is submitted that there are important limitations on, and objections to, granting such effects to foreign award judgments.

A. *Ancillary Nature of Award Judgments and Consequences for the Application of Foreign Judgment Principles*

As defined above, award judgments assess whether a foreign award should be confirmed, set aside, recognized or enforced.[85] As such, the main subject of the

[80] *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (n 23) ss 4–8, reporter's notes p. 114, lines 20–21.

[81] ibid ss 4–16, reporters' notes p. 230, lines 4–6. See also Peter Schlosser cited in *Marc Rich* (n 2) Opinion of AG Darmon, para 64 ('A judgment relating to arbitration is a judgment like any other [and thus] can be recognized in another country [. . .] if a legal basis exists for doing so.').

[82] Lord Collins (n 1) vol 1, 877, para 16-109.

[83] Enforcement is the mechanism according to which a judgment is executed or otherwise carried out against a judgment creditor that refuses to comply with the judgment. See eg Chris Clarkson and Jonathan Hill, *The Conflicts of Laws* (4th edn, Oxford University Press 2011) 161; Lord Collins (n 1) vol 1, 664, para 14-003.

[84] Recognition is the precondition for enforcement but also for granting other effects in the forum that do not require the execution of the judgment by means of public force. See eg Clarkson and Hill (n 83) 161; Lord Collins (n 1) vol 1, 664, para 14-004ff.

[85] See above at 2 and 4.

award judgment is a prior adjudication: the award. It is important to understand this ancillary nature of award judgments in order properly to assess its consequences for the application of foreign judgment principles under the judgment route.

(i) *Ancillary nature of award judgments*

The ancillary nature of award judgments means that they relate to, and depend on, the prior adjudication in the award. They do not decide afresh the merits of the underlying dispute put before the arbitrators. Rather, award judgments focus on the validity of the award and its effects in the forum. They do so in two logically distinct steps.

In the first step, award judgments assess the validity of the award. The legal standard for this validity assessment varies depending on the category of award judgment. On the one hand, for recognition and enforcement judgments, in most cases, the New York Convention is used in the 150 Convention States around the world.[86] The recognizing or enforcing court assesses whether the award meets the requirements of Article V of the New York Convention, including whether the arbitration (i) was based on a valid arbitration agreement; (ii) followed basic principles of procedural fairness; (iii) was rendered by impartial and independent arbitrators; (iv) related to arbitrable matters; and (v) resulted in an award that does not violate the forum's public policy. On the other hand, for confirmation or set aside judgments, there is no internationally harmonized standard and national courts thus apply the forum's standards to assess the validity of the award. These standards may differ, depending on the jurisdiction, but frequently are similar, or even identical, to the requirements of the New York Convention.[87]

In the second step, and according to whether the award is found valid or not under step one, award judgments determine the effects of the award. Depending on the category of award judgment involved, the judgment either confirms or annuls the award, or determines whether the award may be recognized or enforced in the forum.

There are important variations of these basic principles in the different jurisdictions around the world. One important difference concerning the enforcement of awards is whether the national court enters a judgment in the terms of the award (eg ordering the award debtor to pay the sum awarded to the award creditor in the award) or simply declares the award enforceable (eg *exequatur*).[88] For instance, under English law, both options exist: the court may either issue an enforcement order or enter judgment in the terms of the award.[89]

Irrespective of these differences, however, award judgments have an ancillary nature in that they relate to the prior adjudication in the award. This is so even

[86] Some New York Convention countries have used the reciprocity reserve provided for under art I(3) of the Convention and thus apply the Convention only to the recognition or enforcement of awards made in another Convention country.

[87] This is particularly so for countries which follow the UNCITRAL Model Law on International Commercial Arbitration. UNCITRAL Model Law, art 34.

[88] French Code of Civil Procedure, arts 1514–1517.

[89] 1996 English Arbitration Act, s 66(1) and s 101(3) (for New York Convention awards).

in the case of a judgment made in the terms of the award: even though the court technically renders a new judgment, it does not decide the merits of the case afresh. Rather than reviewing the merits of the case, the court assesses the validity of the award and determines its effects, according to the two-step analysis described.

Award judgments are not the only ancillary judgments. A parallel may be drawn between award judgments and so-called 'judgments upon judgment'. The latter term refers to judgments relating to a foreign *judgment* (as opposed to judgments relating to an *award* which are the topic of this article). For instance, if a judgment from country C1 has been endorsed (ie recognized, enforced, confirmed etc) in country C2, the question arises whether courts in a third country, C3, can recognize the 'judgment upon judgment' from country C2. Just like award judgments, 'judgments upon judgment' are ancillary in nature inasmuch as they also relate to a prior adjudication: the initial judgment from C1.

The parallel between award judgments and 'judgments upon judgment' can be taken even further. First, just like award judgments, 'judgments upon judgment' proceed in two logically distinct steps: step one, they assess the validity of the foreign judgment; step two, they determine the effects of the foreign judgment in the forum accordingly.[90] Second, also like award judgments, one can distinguish between two different types of 'judgments upon judgment' according to whether the court enters a judgment in the terms of the foreign judgment or rather simply declares the foreign judgment enforceable.[91]

Some might argue that it is inappropriate to assimilate 'judgments upon judgment' and award judgments because they relate to different initial adjudications. 'Judgment upon judgment' relate to foreign judgments rendered by a national court from a sovereign state, whereas award judgments relate to awards which are the product of a private agreement between the parties. It is submitted that despite these differences, which undoubtedly exist, the comparison drawn in the previous paragraphs is nevertheless appropriate. For methodological purposes, awards are assimilated with judgments, not with private agreements. Even though this has sometimes be criticized as a 'legal fiction',[92] it is a fact that the methodology used by national courts, international treaties and scholars alike, is to submit awards to a judgment analysis (reasoning in terms of recognition and enforcement of awards), not to a conflict of laws analysis (reasoning in terms of the law governing the validity of awards).[93] In addition, based on a sociological argument that arbitration is the most common mechanism of resolving international disputes, it has been argued that arbitration awards are 'second-generation' international adjudications.[94]

[90] See above at 20.
[91] Ibid.
[92] Bollée (n 5) 172ff.
[93] Horatia Muir Watt, (2006) 3 Rev arb 700, 702.
[94] Gary Born 'New Generation of International Adjudication' (2012) 61 Duke LJ 775, 819ff.

(ii) *Consequences of the ancillary nature of award judgments for the application of foreign judgment principles*

Recognizing the ancillary nature of award judgments, and their similarity with 'judgments upon judgment', is important for the purposes of determining the possible effects of these types of judgments.

As regards 'judgments upon judgments', it is commonly accepted that it is only the original judgment, and not the ancillary 'judgment upon judgment', that can be recognized or enforced elsewhere under foreign judgment principles. This idea has sometimes been described in civil-law jurisdictions with the French adage '*exequatur sur exequatur ne vaut*'.[95] There is no doubt that the same principle applies in common-law jurisdictions. As Lord Collins has noted, 'it is generally understood that a foreign judgment which recognises the judgment of a third country does not become a judgment for the purposes of recognition and enforcement in England'.[96]

Similarly, concerning award judgments, some authorities—often in passing and without much analysis—state that award judgments recognizing or enforcing a foreign award have necessarily or *per se* only a territorial scope and that they are incapable of producing extra-territorial effects, ie effects outside the country in which they were rendered.[97] According to this view, foreign award judgments 'do not produce international effects because they concern a specific sovereign State on the territory of which they produce effects'.[98] It is not always clear whether such a view applies to all award judgments or whether there is a distinction to be made between judgments entering the terms of the original award (which would have extra-territorial effect) and simple orders declaring the original award enforceable (which would have no extra-territorial effect).[99]

[95] Gerhard Kegel 'Exequatur sur exequatur ne vaut' in Dieckmann and others (eds), *Festschrift für Wolfram Müller-Freienfels* (Nomos 1986) 377ff; Einhorn (n 5) 56 (with further cites).

[96] Lord Collins (n 1) vol 1, 683, para 14-036. See also Case C–129/92 *Owens Bank v Fulvio Bracco* [1993] ECR I-126, Opinion of AG Lenz, paras 20–21.

[97] Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 287 (German Supreme Court) (holding that 'a foreign enforcement judgment [. . .], like any enforcement judgment, merely aims at having a territorially limited effect, ie for the territory of the state in which it is rendered' and adding that therefore it is 'as per its subject-matter incapable of been enforced elsewhere.'); Judgment of 13 July 2005, OLG Frankfurt am Main, [2006] NJOZ 4360 (Frankfurt am Main Court of Appeal) (holding that a Romanian judgment refusing to enforce an arbitral award was incapable of being recognized in Germany since it only determined that the award had effect in that forum, ie in Romania). See also Poudret and Besson (n 64) 812; Kegel (n 95) 377, 378. Cf Linda Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' (n 37) 36 at footnote 48 (suggesting that a judgment relating to recognition or enforcement of an award 'may have only territorial scope', but leaving the question open).

[98] Judgment of 29 September 2005, *Direction générale de l'aviation civile de l'Emirat de Dubaï v Société International Bechtel*, no 2004/07635, [2006] Rev arb 695, (2006) XXXI YB Comm Arb 629 (Paris Court of Appeal) (holding that a foreign set aside judgment cannot be recognized in France because 'like execution orders, [they] do not have international effect because they apply only to a defined territorial sovereignty.') and the note by Horatia Muir Watt (2006) 3 Rev arb 700, 706 ('the exequatur, which concerns the functioning of the State organs of the forum, by its nature does not have extraterritorial effects.').

[99] Hascher (n 64) (seeming to make such a distinction). However, it would be unsatisfactory if the effects of an award judgment were to depend on its mere form. In some jurisdictions, award judgments take the form of a declarative order.; in others the form of a judgment entering the terms of the award; again in others both forms are possible. See above at 20. In all cases, the final aim of the award judgment is the same: to assess the validity of the award and determine its effects in the forum. Therefore, the formal choice should not be determinative of the effects that the resulting award judgment might have in other jurisdictions. See also *Owens Bank* (n 96) Opinion of AG Lenz para 23.

This view—that ancillary judgments, be it award judgments or 'judgments upon judgment', are incapable of producing extraterritorial effects—is based on two premises which are not always clearly identified.

The first premise relates to the territorially limited object of ancillary judgments. The aim of ancillary judgments is to determine whether the original adjudication (ie the award or foreign judgment) is effective in the forum, and if so, to make it equivalent to a domestic judgment. This may result, if necessary, in making use of the forum's public force to enforce the original adjudication. Accordingly, because ancillary judgments aim at making the original adjudication equivalent to a domestic judgment *in the forum* and allowing the use of public force *in the forum*, these judgments are, as per their subject-matter, incapable of producing effects elsewhere.[100]

The second premise relates to the sovereign nature of court judgments. The decision whether or not to grant effects to an adjudication from outside the forum (be it an award or a foreign judgment) is necessarily one that has to be determined according to the forum's rules. As a matter of sovereignty, it is for the forum, and the forum only, to determine the effects it gives to such an adjudication. Any other solution would mean that 'one is not the master in one's own home any more' and rather that one is 'at the mercy' of another country's determination.[101]

Both premises, while correct, do not lead to the purported conclusion that ancillary judgments are incapable of producing extraterritorial effects. Such a conclusion ignores the fact that ancillary judgments have two logically distinguishable steps: as detailed above, they (i) assess the validity of the original adjudication and (ii) determine its effects.[102] Based on the premises mentioned above, determinations regarding the second step (ie the effects of the initial adjudication in the forum) are governed exclusively by the rules of the forum and devoid of any extraterritorial effects. However, the same is not true for the first step: the assessment of the validity of the original adjudication—award or foreign judgment—may well be, and often is, governed by foreign norms and has the potential of producing extraterritorial effects. For instance, looking at award judgments only, under the New York Convention, the determination of the validity of the award requires deciding whether it is based on a valid arbitration agreement. That issue is governed either by the law chosen by the parties or, in the absence of a choice, by the law of the seat.[103] Both the chosen law and the law of the seat may well be foreign to the recognition or enforcement forum.[104] Moreover, any determination of the validity of the award is not, as per its subject matter, inherently limited to

[100] Christophe Seraglini, 'Droit de l'arbitrage', JCP G, no 24, 14 June 2006, I 148, para 7 ('It is clear that a foreign judgment granting exequatur to an award produces no extraterritorial effect since the aim of the exequatur decision is to allow the use of public force in the forum; only the judge of the forum has the power to allow the use of that public force and only for the territory of the forum.').

[101] Kegel (n 95) 377, 383. See also Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 287 (German Supreme Court) ('[t]he question whether enforcement in Germany is possible is, under principles of public international law, to be decided only by German courts.').

[102] See above at 20.

[103] Art V(1)(a) of the New York Convention.

[104] If it is true that the applicable law to the assessment of the validity of the award may be foreign, the rule that allows its application (here: art V(1)(a) New York Convention) is necessarily a rule of the forum (even if it is an international convention of which the forum State is a signatory).

the territory of the forum. For instance, a finding that the award is based on a valid arbitration agreement has the potential to be taken into account elsewhere, ie to produce extraterritorial effects.[105]

Accordingly, the view that ancillary judgments—award judgments and 'judgments upon judgment'—are inherently incapable of producing extraterritorial effects is not convincing. Rather, ancillary judgments, just like any other judgments, *may* produce effects elsewhere. The normative question, however, remains if they *should* do so. To answer this question, it is necessary to consider the policies underlying foreign judgment principles: why do legal orders generally accept, under certain conditions, to grant effects to foreign judgments and allow their recognition or enforcement? Having identified these underlying policies, the subsequent question is: do the same principles equally apply to ancillary judgments?

Several principles and policies are commonly put forward to explain why legal orders grant effects in their territory to foreign judgments. These include comity, fairness, efficiency, harmony in solutions and predictability.[106] First, the principle of comity is mainly used in common-law jurisdictions. Although its influence on foreign judgment principles has arguably lessened over time,[107] the fundamental idea is that one ought to pay respect to judgments rendered by courts of another sovereign nation.[108] Second, fairness and efficiency considerations also support recognition and enforcement of foreign judgments. It would be a waste of time and effort, and be unfair on the litigants, if one simply ignored the fact that another (albeit foreign) court has already looked at the evidence and come to a decision.[109] Finally, the aim for harmonious and predictable solutions equally helps to explain why foreign judgments should generally, under certain conditions, be given effect. The litigants, as well as potentially third parties, have an interest in knowing that the original final judgment stands and that the same dispute cannot be reopened, even in other jurisdictions.[110]

It is submitted that none of these underlying policies readily apply to ancillary judgments. Rather, a policy analysis militates against applying foreign judgment principles to ancillary judgments. First, it makes little (or no) sense to give effect to an ancillary judgment based on a comity analysis. If anything, it seems more logical to pay respect to the initial adjudication. This is not only so because it is the first in time. More importantly, as detailed above, the ancillary judgment does not decide the dispute afresh, but instead assesses the

[105] This is true whether such a finding is found in a judgment entering the terms of the award or in an order declaring the award enforceable.

[106] Hock Lai Ho, 'Policies Underlying the Enforcement for Foreign Commercial Judgments' (1997) 46 ICLQ 443, 445.

[107] See eg in the UK, *Schibsby v Westenholz* (1870) LR 6 QB 155, 159 and *Adams v Cape Industries Plc* [1990] Ch 433, 513. See also Lord Collins (n 1) vol 1, 6, para 1-008.

[108] See eg *Hilton v Guyot* 159 US 113, 163-64 (1895); Bryan A Garner (ed), *Black's Law Dictionary* (9th edn, Thomson Reuters 2009) 303. See also Herbert Barry, 'Comity' (1925–26) 12 VaLRev 353, 354; Joel R Paul, 'The Transformation of International Comity' (2008) 71 LCP 19, 19.

[109] Robert C Casad, 'Issue Preclusion and Foreign Country Judgments: Whose Law' (1984–85) 70 Iowa L Rev 53, 58–59; Pascal de Vareilles-Sommières, 'Jugement étranger (Matières civiles et commerciales)', *Répertoire de Droit International* (Dalloz 2008) paras 6–7.

[110] See Harder (n 11) 450 and the authorities cited therein; Pierre Mayer and Vincent Heuzé, *Droit International Privé* (10th edn, Montchrestien 2010) para 359.

validity of the first adjudication and determines its effects in the forum of the court rendering the ancillary judgment.[111] In other words, the actual dispute is decided only by the initial adjudication and it is this adjudication that should be the basis for any comity analysis.

Moreover, if fairness and efficiency considerations help explain why one should not ignore the fact that a court has previously looked at the evidence and come to a decision, this explanation does not readily apply to ancillary judgments. The court rendering the ancillary judgment does not look at the evidence and come to a decision on the merits. In most jurisdictions, the court reviewing a foreign judgment or award is prohibited from reviewing the merits of the case (*révision au fond*).

Policy considerations related to harmony of solutions and predictability point in the same direction. Granting extraterritorial effect to ancillary judgments (rather than to the initial adjudication) would lead to a serious risk of forum shopping. Under such a system, the losing party would likely seek to challenge the initial adjudication in a jurisdiction that has a strict control standard, and subsequently rely on this ancillary judgment elsewhere. The winning party, to the contrary, would try to get the initial adjudication endorsed (ie recognized/enforced/confirmed etc) in another jurisdiction with a more liberal control standard, and seek to make use of the ancillary judgment in subsequent proceedings elsewhere. In a nutshell, rather than favouring harmonious solutions and predictable outcomes, the granting of extraterritorial effects to ancillary judgment has the potential to increase forum shopping, the multiplication of proceedings and contradictory outcomes.

In sum, it is submitted that there are no good reasons, in principle, to apply foreign judgment principles to ancillary judgments. Instead, the policy considerations underlying foreign judgment principles favour a different approach: that is, generally *not* to grant extraterritorial effect to ancillary judgments. The subsequent sections of this article will apply these general findings to specific situations relating to award judgments.

B. *Enforcing Foreign Award Judgments*

The previous section has shown that a policy analysis militates against applying foreign judgment principles to ancillary judgments due to their distinct legal nature. Applied to award judgments, this means that award judgments should, in principle, not be granted extraterritorial effect elsewhere. Granting extraterritorial effect to those judgments can be done in two ways: either the award judgment is enforced or it is recognized in another jurisdiction. This section deals with the first alternative and shows that it is wrong to enforce foreign award judgments, as allowed under the parallel entitlement approach, described in Section 3B(i) above.[112] It is submitted that allowing the

[111] See above at 20.

[112] As detailed above, national courts in some jurisdictions allow the award creditor to enforce a foreign award judgment that validates the award in lieu of, or in additional to, seeking enforcement of the award itself (so-called parallel entitlement approach). Even though there are some doubts as to the exact scope of the parallel entitlement approach, as shown above, this section proceeds on the assumption that the parallel entitlement approach (i) applies to foreign judgments confirming the award as well as to those refusing to set it aside;

enforcement of foreign award judgments under the parallel entitlement approach is problematic because it leads to a duplication of the cause of action and a change in the relevant control standard. The enforcement of foreign award judgments under the parallel entitlement approach is also misconceived because confirmation judgments generally have no enforceable subject matter.

(i) *Duplication of the cause of action*

The parallel entitlement approach is problematic because it leads to a duplication of the cause of action. As explained above, the parallel entitlement approach allows the award creditor to seek enforcement of *both* the award and the foreign award judgment in parallel or subsequent actions. This potential was realized, for instance, in the US case *Seetransport v Navimpex* where a party unsuccessfully sought enforcement of an arbitral award and then sought enforcement of a French judgment relating to the same award.[113]

This duplication of the causes of actions may be seen as a judicial harassment of the award debtor. After having successfully fought the action seeking to enforce the award, the award debtor also must defend against the subsequent action seeking to enforce the foreign award judgment. This risk of judicial harassment was identified by the German Supreme Court as one of the main reasons why, in 2009, it departed from its previous line of case law that had allowed a parallel entitlement approach. Supported by the large majority of commentators,[114] the *Bundesgerichtshof* explained that a parallel entitlement approach was not compatible with the legitimate interests of the award debtor, noting that '[t]he protection of the debtor commands that he/she is not confronted with more than one enforcement proceeding in one and the same forum'.[115]

Indeed, whereas the multiplication of post-award proceedings concerning the same award in *different* countries may seem a natural consequence of the multitude of separate legal orders existing in the world, the multiplication of proceedings concerning the same award in the *same* country should be avoided. There is no reason why the award creditor should be allowed to get two bites at the apple in the same forum.

(ii) *Change in the relevant control standard*

Apart from the risks related to the duplication of the cause of action identified in the previous section, the parallel entitlement approach is also problematic for

(ii) concerns foreign award judgments irrespective of whether they originate from a country applying the merger doctrine; and (iii) allows the parties to proceed on both the award and the award judgment as parallel or subsequent causes of action. This seems to be the position, at least in the United States. See above at 15–16.

[113] *Seetransport Wiking Trader Schiffahrtgesellschaft mbH & Co v Navimpex Centrala Navala* 989 F2d 572, 581 (2d Cir 1993) and *Seetransport* (2d Cir 1994) (n 54) (allowing an action to enforce a foreign validating judgment even though the same court had found in a previous action that the enforcement of the award itself was time-barred). But see *Commission Import Export* (n 54).

[114] See eg Rolf Schütze, 'Der Abschied vom Doppelexequatur ausländischer Schiedssprüche' [2009] RIW 817; Heiko Plaßmeier, 'Ende des 'Doppelexequatur' bei ausländischen Schiedssprüchen' [2010] SchiedsVZ 82. Cf more critical, Georg Borges, 'BGH: Doppelexequatur von Schiedssprüchen unzulässig' [2010] LMK 30812.

[115] Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 286 (German Supreme Court).

another, independent reason. In allowing the award creditor to seek enforcement of the foreign award judgment in lieu of the award itself, the parallel entitlement approach leads to the application of a different control standard. Indeed, the control standard for enforcement of foreign awards differs significantly from the control standard for enforcement of foreign judgments.

The enforcement of foreign awards is governed in most cases by the New York Convention.[116] As detailed above, under the New York Convention, the control focuses on the arbitral tribunal (eg its composition and jurisdiction based on a valid arbitration agreement), the conduct of the proceedings before it (eg a fair arbitral process) and the resulting award (eg no violation of public policy).[117]

The enforcement of foreign award judgments, on the other hand, is governed by the *lex fori*'s foreign judgments principles. These principles generally focus on the jurisdiction of the foreign court, the proceedings conducted before it and the judgment it rendered.[118] Importantly, in most developed jurisdictions, foreign judgment principles generally prohibit a review on the merits of the findings of the foreign court. As a consequence, the enforcing court cannot refuse enforcement of a foreign judgment on the basis that it would have reached a different result, save where the decision of the foreign court is so shocking that it amounts to a violation of the enforcement forum's public policy.

Therefore, if the award creditor chooses enforcement of a foreign award judgment (in lieu of enforcement of the award itself), the control by the enforcing court is limited to the jurisdiction of the foreign court (not the arbitral tribunal), the proceedings in the foreign country (not the arbitration proceedings) and any possible violation of public policy by the judgment (not by the award).[119] In particular, the enforcing court cannot review the findings of the foreign court regarding the validity of the award including, for instance, whether there was a valid arbitration agreement, an independent and impartial arbitral tribunal and a fair arbitral process. These issues are left to the exclusive control of the foreign court.

The change in the relevant control standard is particularly problematic when the foreign court used a more lenient standard than the one that the enforcing court would have itself applied to the control of the validity of the award. This may lead to situations in which the foreign award judgment is enforced, although the award itself would not have been. In other words, the award creditor may *indirectly* obtain enforcement of the award *qua* the foreign award judgment although the *direct* route of enforcing the award itself is barred.[120]

[116] Except where the enforcing court is of a country that has not signed the New York Convention or where the award was rendered in such a country and the reciprocity requirement of art I(3) applies. However, given the large number of signatory states, these cases are of virtually no importance in practice.

[117] See above at 20.

[118] See above at 1–2.

[119] Einhorn (n 5) 60.

[120] Such situations may occur not only due to the duplication of the control standard but also due to other differences in the legal regimes applying to awards and foreign judgments. For instance, in *Seetransport v Navimpex*, a US court refused enforcement of an award on the basis that it was time-barred. Later, the same court granted enforcement of a French judgment having confirmed the award; the statute of limitations for enforcing the French judgment had not expired yet. See *Seetransport* (2d Cir 1993) (n 113) 581; *Seetransport* (2d Cir 1994) (n 54). But see *Commission Import Export* (n 54).

One might argue that the indirect enforcement of the award *qua* the foreign award judgment should be allowed because it favours the enforcement of awards and, as such, is in line with the pro-arbitration and pre-enforcement bias under the New York Convention.[121] However, it does not seem sensible to allow the enforcement of foreign awards (directly or indirectly) if the courts at the place of enforcement have no control over the most basic requirements concerning the award's validity. As detailed above, as a result of the change in the relevant control standard under the parallel entitlement approach, the enforcing court is not in a position to review the findings of the foreign court as to the existence of a valid arbitration agreement, an independent and impartial arbitral tribunal or a fair arbitral process. It is submitted that leaving these fundamental issues to the exclusive control of the foreign court is problematic.

The facts of the *Dallah* case may serve as an illustration that the change in the relevant control standard, combined with the duplication of the cause of action, can lead to questionable results. In that case, Dallah unsuccessfully tried to enforce an award in England. The English courts refused enforcement on the basis that there was no valid arbitration agreement.[122] The seat of the arbitration being in Paris, the French courts were seized by an action to set aside the award. The Paris Court of Appeal held that the arbitration agreement was valid and thus refused to set aside the award.[123]

Arguably, under the parallel entitlement approach (at least in its broadest scope, as applied in the United States[124]), Dallah would be entitled to seek enforcement of the French judgment in England.[125] The English courts would determine whether the French award judgment met English judgment standards. This could lead the English courts to enforce the French judgment—resulting in a *de facto* enforcement of the award in England although the same award was previously refused enforcement by the UK Supreme Court.

This result could be prevented by arguing that the French judgment may not be enforced in England because of the existence of a prior and irreconcilable English judgment.[126] However, some might take a narrow view of the notion of 'irreconcilability' and argue that the enforcement of a foreign award judgment and the enforcement of an award itself have different subject matters and are therefore not irreconcilable.[127] In addition, and more importantly, it is illogical

[121] Bermann (n 25) 322.

[122] *Dallah* (UKSC) (n 20).

[123] Judgment of 17 February 2011, *Government of Pakistan Ministry of Religious Affairs v Dallah Real Estate and Tourism Holding Company,* no 09/28533, (2011) XXXVI YB Comm Arb 590 (Paris Court of Appeal).

[124] See above at 15–16.

[125] The fact that the French judgment has no enforceable subject matter is discussed below and is an independent reason why the parallel entitlement approach is misconceived. It should be noted that the US courts have allowed enforcement of a French judgment in similar circumstances. See *Seetransport* (2d Cir 1993) (n 113) 581; *Seetransport* (2d Cir 1994) (n 54).

[126] Under English law, like in many other jurisdictions, one of the grounds for refusing recognition/enforcement of a foreign judgment is the existence of a prior inconsistent English judgment. See *Showlag v Mansour* [1995] 1 AC 431 (Privy Council).

[127] In that sense, see Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 286 (German Supreme Court). According to the German Supreme Court, the second action concerning the enforcement of that validating judgment would not be barred by the prior unsuccessful attempt to enforce the award. The Bundesgerichtshof noted that 'the subject matter of both actions are different so that the principle of *res judicata* does not come into play'. See also Judgment of 13 March 1981, *Fratelli Domino v Töpfer & Co* (1992) XVII YB Comm Arb 559, 560 (Italian Supreme Court) (discussing whether enforcement of an English judgment

to allow the award creditor the option of using the foreign award judgment as part of the parallel entitlement approach, but, at the same time, to refuse enforcement of that judgment if it leads to a different result than a prior action concerning the award itself. In other words, it is pointless to allow an option if both alternatives must arrive at the same result. If anything, this example demonstrates that it is better not to allow the optional use of the foreign award judgment in the first place.

Another possibility to prevent the absurd outcome described above would be to refuse enforcement of the French judgment as being contrary to English public policy on the grounds that there was no valid arbitration agreement. This would however amount to introducing through the back door (ie by using the public policy defence) the standard for the enforcement of foreign awards which requires the existence of a valid arbitration agreement. Again, it would be more appropriate to directly apply the relevant control standard for awards in the first place, ie to allow only the enforcement of the award and not the optional enforcement of a foreign confirmation judgment.

This hypothetical example illustrates that the option given to the award creditor under the parallel entitlement approach leads to untenable results. This is the case because of the combined effect of the duplication of the cause of action and the resulting change in the relevant control standard. By allowing the enforcement of a foreign award judgment in lieu of, or in addition to, the award itself, the object of the control shifts from the award and the arbitration to the foreign judgment and the proceedings before the foreign court. This leaves the enforcing court in the awkward position of not being able to control the most basic tenets of international arbitration, such as the validity of the arbitration agreement or the impartiality and independence of the arbitral tribunal, and having to leave those issues to the exclusive control of the foreign court.

(iii) *Non-enforceable subject matter*

Moreover, and in any event, there is another independent reason why the enforcement of foreign award judgments under the parallel entitlement approach is misconceived: most award judgments have a non-enforceable subject matter. Enforcement requires that the judgment contains an order that can be executed, if necessary by use of the forum's public force. This requirement is not met, in particular, for declaratory judgments or judgments simply dismissing a claim.[128] A judgment which declares the award valid and thus confirms it or refuses to set it aside contains no order that can be executed by the use of the forum's public force. It is thus not capable of enforcement.

The facts of the *Dallah* case may once more serve as a useful illustration. In this case, the Paris Court of Appeal found that the award made in France was valid and thus refused to set it aside.[129] This French judgment merely contains

confirming the award was barred on *res judicata* grounds in Italy because the Italian courts had previously denied enforcement to the underlying award).

[128] See Lord Collins (n 1) vol 1, 664, para 14-003.

[129] *Dallah* (Paris Court of Appeal) (n 123).

a non-enforceable declaration as to the validity of the award and a dismissal of the underlying claim to set aside the award. Accordingly, the French judgment lacks any enforceable subject matter and thus should not be open for enforcement proceedings anywhere in the world. For the same reasons, it was wrong for US courts in *Seetransport v Navimpex* to enforce a similar French judgment refusing to set aside an award.[130]

One might argue that the above-described rationale does not hold true if the foreign court enters a judgment in the terms of the award, rather than just declaring the award confirmed or not-set aside.[131] Arguably, a judgment contains an enforceable content if the court orders the award debtor to perform the award, eg to pay the damages awarded therein. Accordingly, some authors make a distinction between simple declarations as to the enforceability of the award and judgments entering the terms of the award, with only the latter being open for enforcement in a third country.[132]

However, as mentioned above, it would be unsatisfactory if the options of the award creditor depended on such a formalistic difference, ie whether or not the foreign court entered a judgment in the terms of the award or issued a declarative order.[133] In both cases, the ultimate goal is the same, ie to grant effects to the award's findings. Also, there might be instances where the difference between the two categories (declarative order and judgment upon award) is not easy to establish.[134] In any event, for the reasons detailed in the previous sections, irrespective of the enforceable or non-enforceable nature of the order/judgment, the enforcement of foreign award judgments under the parallel entitlement approach is not appropriate.

The better view is therefore to abandon the parallel entitlement approach and instead to allow *only* the enforcement of awards and *not* the enforcement of foreign award judgments validating those awards.[135] This conclusion is consistent with the findings in Section 3A above that ancillary judgments, due to their distinct nature, should, in principle, not be governed by foreign judgment principles and thus not be open for enforcement. The ancillary nature of award judgments is very clear under the parallel entitlement approach: when seeking to enforce the ancillary award judgment, the award creditor *in fact* seeks to obtain satisfaction of the initial adjudication in the award. In the words of the Spanish Supreme Court, 'the claim's real aim [i]s to

[130] *Seetransport* (2d Cir 1994) (n 54).

[131] See above at 20.

[132] Hascher (n 64) 246–47; Lord Collins (n 1) vol 1, 902, para 16-163.

[133] See above at n 99. A situation in which the confirmation judgment could contain an enforceable subject-matter is if the court, based on an independent assessment, granted one of the parties a relief that was not contained in the award. For instance, if the validating court decided to award the award creditor post-award pre-judgment interest, this part of the validating judgment, and this part only, has a content for which the party could seek enforcement aboard. In that sense Georg Borges, *Das Doppelexequatur von Schiedssprüchen* (W. de Gruyter 1997) 255.

[134] Hascher (n 64) 248 (referring to 'labelling problems').

[135] Judgment of 9 October 2003, *Union Naval de Levante SA v Bisba Comercial Inc* (2005) XXX YB Comm Arb 623 (Spanish Supreme Court) (dismissing the action seeking enforcement of a Swiss judgment refusing to set aside an award rendered in Switzerland, holding that such action would achieve enforcement of the Swiss award 'by means of improper proceedings'); Judgment of 2 July 2009, BGH, [2009] SchiedsVZ 285, 286 (German Supreme Court) (dismissing action to enforce a US judgment confirming an award rendered in the United States). See also *Marc Rich* (n 2) Opinion of AG Darmon, para 69; Judgment of 21 July 2011, *Odfjell Tankers AS v Miguel Gallego SA* (2012) 5 Revista de Arbitraje Comercial y de Inversiones 280 (Appellate Court of Seville).

enforce the arbitral award'.[136] It is therefore only consistent to limit the award creditor's options to do exactly that, ie seek enforcement of the initial award, and not of the ancillary award judgment.

C. *Recognizing Foreign Award Judgments*

The previous section has shown that enforcing award judgments is problematic and misconceived for a number of reasons. It concluded that the award creditor should not be able to seek enforcement of a confirmation judgment (as allowed under the parallel entitlement approach) but only of the award itself. This leaves open, however, the question whether, in proceedings concerning the recognition or enforcement of an award, effect should be given to foreign award judgments; or, in other words, whether foreign award judgments should be open for recognition.

This sections deals with the recognition of award judgments and critically assesses the judgment route taken by national courts in some jurisdictions in relation to the recognition of foreign award judgments. As detailed in Section 2, national courts recognize foreign award judgments and grant them preclusive effect in subsequent proceedings regarding the same award, using relevant doctrines of *res judicata* or claim/issue estoppel.[137] Moreover, national courts also recognize foreign set aside judgments in order to prevent the set aside award from be enforced according to Article V(1)(e) of the New York Convention.[138]

In this context, the different types of award judgments raise different issues and are thus dealt with separately. For recognition and enforcement judgments as well as confirmation judgments, the analysis in the subsequent sections supports the general findings from Section 3A above that ancillary judgments should not be granted effect (and thus not be recognized). For set aside judgments, however, the analysis must be more nuanced. This difference is explained, in part, by the wording of Article V(1)(e) of the New York Convention, which allows Convention States to take into account foreign set aside judgments.

(i) *Recognizing foreign recognition and enforcement judgments*

This section critically assesses the cases in which national courts have recognized foreign recognition and enforcement judgments and granted them preclusive effect in subsequent proceedings regarding the same award, using relevant doctrines of *res judicata* or claim/issue estoppel.[139] This section first explores the possible implications that the seat of the arbitration might have on this issue. Even though this article does not take a stance in the debate, it is important to note that national case law from some jurisdictions is difficult to reconcile with the general view on the role of the seat taken in those

[136] *Union Naval de Levante* (n 135) 625 [4].
[137] See above at 5–8 and 17–18.
[138] See above at 9–13.
[139] See above at 5–8 and 17–18.

jurisdictions. Moreover, this section shows that if one were to grant preclusive effect to foreign recognition and enforcement judgments, this could only be done in a limited set of cases. However, this section finally concludes that there are important objections to doing so, even in this limited set of cases.

(a) Implications of the seat of arbitration. As detailed in Section 2, English courts regularly recognize foreign recognition and enforcement judgments by granting them preclusive effect under the doctrine of issue estoppel.[140] As also mentioned above, they do so irrespective of the location of the seat of the arbitration.[141] Indeed, in several cases, English courts have found that a foreign judgment enforcing or recognizing an award in a non-seat country could or should be granted preclusive effect in the country of the seat of the arbitration.[142] Similar case law can be found in other jurisdictions, such as the United States and Hong Kong.[143]

This section explores whether the seat of the arbitration should be taken into account under the judgment route, and in particular whether it is appropriate to grant preclusive effect at the seat to recognition and enforcement judgments from a non-seat country.

The questions of whether and to what extent the seat of arbitration plays a role in international arbitration remain some of the most complex and debated questions in the field, with the views espoused by scholars and in the case law demonstrating considerable differences across jurisdictions. This article has no ambition to discuss, or even set out in detail, the range of possible and existing views on this topic. For the purpose of this article, it is sufficient to describe them in very broad and admittedly somewhat general terms, with the specific aim of examining their impact on the question outlined above.

On the one hand, according to the traditional view—sometimes also called the judicial or territorial view—an award's legal force stems from the law of the seat and the courts in that country have a supervisory function over the arbitration proceedings, as well as primary jurisdiction, when it comes to the assessment of the validity of the award.[144]

On the other hand, according to a delocalized or contractual view, arbitration is based on party autonomy and detached from the laws of the seat and the supervising control of the courts in that country.[145] Recognizing that the legal force of the award cannot stem solely from party autonomy, proponents of this theory submit that the award's legal force derives either from those legal orders

[140] See above at 5–7.
[141] See above at 8.
[142] *Good Challenger Navegante* (n 21); *Dallah* (UKSC) (n 20) (*obiter*); *Chantiers de l'Atlantique* (n 30).
[143] *Belmont Partners* (n 23); *Karaha Bodas* (n 29).
[144] This view was expressed most eloquently by Francis Mann in his famous article 'The UNCITRAL Model Law – Lex Facit Arbitrum', originally published in Liber Amicorum for Martin Domke 157 (1967), reprinted in (1986) 2(3) Arb Intl 241. For more recent authorities supporting an exclusive control by the courts of the seat, see eg Michael Reisman, *Systems of Control in International Adjudication and Arbitration* (Duke UP 1992) 113–20; Bruno Leurent, 'Reflections on the International Effectiveness of Arbitration Awards' (1996) 12 Arb Intl 269; Sir Roy Goode (n 77).
[145] See eg Berthold Goldman, 'Les conflits de lois dans l'arbitrage international de droit privé' (1963) vol II Recueil des Cours de Droit International 351 ; Philippe Fouchard, *L'arbitrage commercial international* (Dalloz 1965) 401ff.

in which it will be enforced,[146] or from a transnational legal order, which is autonomous from all national legal orders.[147]

Today, very few authorities still support a purely territorial view and most will agree that a fully delocalized system leads to problematic results. Nevertheless, the extent to which territorial or delocalized views influence national case law varies significantly from jurisdiction to jurisdiction, and the purpose of this article is to explore the consequences thereof for the recognition of award judgments under the judgment route.

Some countries, like France, go a long way in delocalizing international arbitration proceedings, limiting to the greatest possible extent the role accorded to the seat (or place) of arbitration.[148] Logically, under such a view, the seat should also be irrelevant for the purposes of applying foreign judgment principles to award judgments.

Conversely, other countries adopt a more territorial view and accept, among other things, that the courts at the seat of the arbitration exercise a supervisory function in controlling the validity of the award. This is the case, for instance, in the UK and the United States.[149] Under this view, it seems counterintuitive, if not illogical, to grant preclusive effect in post-award proceedings at the seat to issues previously decided in a recognition or enforcement judgment by a non-seat court. Doing so gives priority to the findings of non-seat courts over the findings of the courts at the seat which are supposed to exercise a supervisory function. Put differently, the supervisory function of the courts at the seat becomes an empty shell if those courts are to give preclusive effect to a determination regarding validity of the award (eg establishing the existence of a valid arbitration agreement) given by any court around the world asked to recognize and enforce the same award.

One might argue that one needs to balance the need to maintain the supervisory function of the courts at the seat (under a territorial view), with the need to grant comity to foreign judgments under the forum's foreign judgment principles. This balancing exercise, however, is missing in the case law described above. Courts in the UK and in the United States grant preclusive effect to foreign recognition and enforcement judgments emanating from a non-seat country, without making any distinction as to whether this will affect the supervisory function of the courts at the seat, and without even discussing this point. For instance, in *Chantiers de l'Atlantique*, the English judge (albeit in *obiter*) held that a party was estopped from re-litigating in England, the seat of the arbitration, an issue that had been decided in a foreign recognition and enforcement judgment.[150] Similarly, in *Belmont Partners*, the US court granted

[146] See eg Arthur von Mehren, *Limitations on Party Choice of the Governing Law: Do They Exist for International Commercial Arbitration* (The Mortimer and Raymond Sackler Institute of Advanced Studies, Tel Aviv University 1986) 19.

[147] See eg Emmanuel Gaillard, *Legal Theory of International Arbitration* (n 33) 35ff.

[148] See above at 9–10. Cf Berthold Goldman, 'Arbitrage international et droit commun des nations' [1956] Rev arb 115; Phillipe Fouchard, 'L'Autonomie de l'arbitrage commercial international' [1965] Rev arb 99.

[149] For the UK: *Bank Mellat v Helliniki Techniki* [1984] 1 QB 291 (CA), 301 (on English law's rejection of a 'concept of arbitral procedures floating or delocalized in the transnational firmament'). For the US: Born (n 36) 1285; *JSC Surgutneftegaz v President and Fellows of Harvard College* 167 FedAppx 266 (2d Cir 2006).

[150] *Chantiers de l'Atlantique* (n 30); *Good Challenger Navegante* (n 21). Cf *Dallah* (UKSC) (n 20) (holding, also obiter, that the English refused to recognize the award could produce preclusive effects in France, seat of the arbitration).

preclusive effects to a Canadian recognition and enforcement judgment, although the seat of the arbitration was in the United States.[151] These views are difficult to reconcile with the territorially influenced view which the courts in the United States and the UK generally take in international arbitration.

(b) Inherent limitations to granting preclusive effect to foreign recognition and enforcement judgments. Leaving aside the possible implications of the seat of arbitration discussed in the previous section—which largely depend on whether one subscribes to a territorial or delocalized view of international arbitration—there are a number of inherent limitations to granting preclusive effect to foreign recognition and enforcement judgments under the relevant doctrines of *res judicata* or claim/issue estoppel.

As mentioned above, those doctrines vary significantly and it would go beyond the scope of this article to analyse and compare the relevant requirements in the various jurisdictions around the world.[152] It is possible, however, to formulate some limitations which are generally inherent to the process of granting preclusive effect to foreign award judgments. These inherent limitations thus apply irrespective of specificities in the forum's *res judicata* or claim/issue estoppel doctrines.

First, granting preclusive effect to the foreign recognition or enforcement judgment's determination of the validity of the award presupposes, at a minimum, that the judgment was issued in *inter partes* proceedings in which the interested parties had a full opportunity to argue their case. If the foreign court has declared the award enforceable (or unenforceable) in *ex parte* proceedings, on the sole motion of the award creditor, without the award debtor being notified and able to present defences, the foreign court's determination should not have any preclusive effect in subsequent proceedings, and is thus inherently limited in that respect.[153]

Second, granting preclusive effect to the foreign recognizing or enforcing court's determination of the validity of the award further presupposes that the foreign court applied the same standard as the one the forum would apply to that determination. If, however, the foreign court did not apply the New York Convention but rather a local, idiosyncratic recognition or enforcement standard, there can be little doubt that its determination of the validity of the award based on this local standard should not be given any preclusive effect in subsequent post-award proceedings in a New York Convention State.

Third, even where such a common standard exists (ie in all New York Convention countries which apply the standard of Article V), a distinction needs to be made depending on the specific ground on which recognition or enforcement has been granted (or refused). Some of the grounds contained in

[151] *Belmont Partners* (n 23).

[152] Generally speaking, civil-law countries sometimes apply a narrower test of triple identity (same parties, same cause of action, same legal grounds) whereas common-law principles of issue preclusion or estoppel prevent re-litigation of the same factual and legal issues, even if brought under a different claim.

[153] For example, in France, *exequatur* proceedings in the court of first instance are *ex parte*, ie upon the sole motion of the award creditor. The award debtor may bring its defences only on the appeal level. French Code of Civil Procedure, arts 1516, 1522 and 1525. In England, an application to enforce the award under s 66 of the 1996 English Arbitration Act may be made without notice to the award debtor, unless directed otherwise by the court. Civil Procedure Rules r 62.18(1) and (2).

Article V of the New York Convention aim at protecting the local interests of the recognition or enforcement forum. This is true, in particular, of Article V(2)(b)'s public policy defence. Therefore, any determination in the foreign recognition or enforcement judgment concerning those 'local interest' grounds should not be granted preclusive effect in subsequent proceedings concerning the same award.[154]

This last inherent limitation has been correctly applied in the above-mentioned English case of *Yukos Capital SarL v OJSC Rosneft Oil Company*. In overturning the Commercial Court's decision, the Court of Appeal found that determinations based on public policy in the foreign (Dutch) recognition or enforcement judgment should not be granted preclusive effect. That is so because 'public order' or 'public policy' is inevitably different in each country.[155] Drawing a parallel with foreign judgments (as opposed to foreign awards) obtained by fraud, Rix LJ noted:

> If the judgment [or award] creditor went first of all to a third country where the law was that a foreign judgment [or award] must be recognised even if arguably obtained by fraud, an English courts would presumably neither recognise that judgment [from the third county] nor regard it as giving rise to an issue estoppel, simply because English public policy in this case is different from the third party's public policy.[156]

Put simply, 'the issue for the English court is that of English public order'[157] and not that of foreign public order applied in the foreign recognition or enforcement judgment. Therefore no preclusive effect should be given to the foreign court's determination, which is based on protection of local interests.[158]

The above-described inherent limitations show that careful consideration must be given to whether it is appropriate to grant preclusive effect to foreign recognition and enforcement judgments. In particular, a foreign recognition or enforcement judgment should have no preclusive effect if it (i) is rendered in *ex parte* proceedings or without the parties having a full opportunity to present their case; (ii) applies local recognition or enforcement standards that are different from the forum's standards; or (iii) is based on recognition or enforcement grounds that aim at protecting local interests such as violation of public policy.

[154] Kessedjian (n 29) 10–11.

[155] [2012] EWCA Civ 855 [151].

[156] ibid [154]. Parts of this quote (ie 'English public policy *in this case* is different from the third party's public policy', emphasis added) might suggest that one needs to adopt a case-by-case analysis whether the foreign public policy is different to the forum's one. It is submitted that such a comparison would be highly complex and unnecessarily complicate the analysis. It is submitted that the better view is to not to grant preclusive effect if the foreign court's determination is based on public policy because, as mentioned elsewhere in the judgment, '"public order" or "public policy" is *inevitably* different in each country'. ibid [151] (emphasis added).

[157] ibid [160].

[158] The same inherent limitation can be found in the Restatement of International Commercial Arbitration. The comments on ss 4–8 state that 'although multiple courts in a life cycle of an arbitration may entertain claims that a dispute is non-arbitrable or that an [...] award violated public policy, each court applies its domestic law on arbitrability and public policy.' The comments thus conclude that '[i]n such instances, in may be inappropriate for a court to treat the prior judicial determination as binding, even though both proceedings relate to the same [...] award'. *Restatement of the Law (Third), The U.S. Law of International Commercial Arbitration, Tentative Draft no 2* (n 23) s 4-8, comments p. 112, lines 8-10.

(c) General objections to granting preclusive effect to foreign recognition and enforcement judgments. The previous section has shown that there are important inherent limitations to granting preclusive effect to foreign recognition and enforcement judgments. However, even where those limitations do not apply, it is submitted that granting preclusive effect to foreign recognition and enforcement judgments is inappropriate for two independent reasons.

First reason: Even where the foreign recognition or enforcement judgment's determination is based on a common standard which is detached from the forum's local interests and which, arguably, should be uniformly applied in all New York Convention countries (eg the existence of a valid arbitration agreement), doubts remain as to whether granting preclusive effect to such a determination is appropriate. As a preliminary observation, it would require all 149 New York Convention countries to trust each other's application of the Convention's standard.

For instance, let us assume the foreign recognition or enforcement judgment determines that the award is based on an invalid arbitration agreement applying either the law chosen by the parties or, in absence of a chosen law, the law of the seat of the arbitration, according to Article V(1)(a) of the New York Convention. Granting preclusive effect to that determination of the invalidity of the arbitration agreement (provided that the foreign judgment meets the forum's relevant requirements for judgment recognition and *res judicata* or claim/issue estoppel) means that the forum's court is not allowed to review that determination. Accordingly, even if the forum's court were to come to a different conclusion (ie the arbitration agreement is valid under Article V(1)(a)) applying the same law as the foreign court, the preclusive effect would prevent the forum from recognizing the validity of the award.

This outcome is certainly far from satisfactory. In this situation, one could even argue that granting preclusive effect to the foreign court's determination of the invalidity of the arbitration agreement would violate the forum's obligations under the New York Convention to recognize and give effect to valid arbitration agreements.[159] Indeed, one could further argue that the question of a valid arbitration agreement is so central to the respect which New York Convention countries owe to foreign awards that accepting the determination of a foreign court on this issue may be seen to constitute an abdication of the forum court's obligations under the Convention.

The aforementioned rationale is particularly forceful if the foreign court has refused (as opposed to granted) recognition or enforcement of the award.[160] However, irrespective of the outcome of the foreign recognition or enforcement judgment, there is a second independent reason why those judgments should not have preclusive effect.

Second reason: Giving preclusive effect to foreign recognition and enforcement judgments poses a serious risk of forum shopping and the multiplication

[159] Art II New York Convention.

[160] On that basis, it has sometimes been suggested that foreign recognition and enforcement judgments should only be given preclusive effect if they had granted (as opposed to refused) such action. Hill (n 5) 188. Cf, Judgment of 24 January 2003, OLG Hamburg, [2003] SchiedsVZ 237, (2005) XXX YB Comm Arb 509 (Hamburg Court of Appeal) (holding that a Polish judgment denying enforcement cannot be recognized in Germany because it is a decision on procedural, rather than substantial matters).

of parallel and possibly conflicting post-award proceedings.[161] The award creditor, on the one hand, will likely race to have the award recognized or enforced in a country that is reputed for its liberal, arbitration-friendly approach—counting on the preclusive effect of this judgment. The award debtor, on the other hand, may try to obtain a declaration of non-enforceability in a country which has a more conservative or even arbitration-hostile attitude and rely on the preclusive effect of that judgment.[162] A good example of forum shopping can be found in *Chantiers de l'Atlantique*, discussed above, in which the respondent in the arbitration (which had been successful in seeking a dismissal of all claims) went to the French courts to have the award recognized and enforced and then relied on the preclusive effect of the French judgment in subsequent set aside proceedings in the UK. The aim of the proceedings in France was obviously not to enforce the award (which had dismissed all claims, and therefore there was nothing to enforce) but possibly to simply create an estoppel effect in subsequent proceedings in the UK.[163]

In sum, giving preclusive effect to foreign recognition and enforcement judgments is in fact likely to encourage parties to initiate parallel proceedings and thus may produce potentially conflicting or inconsistent award judgments. Bearing in mind that one of the fundamental objectives of granting preclusive effect to foreign judgments is precisely to enhance international harmony,[164] and accepting that this objective cannot be realized in the case of foreign recognition and enforcement judgments, the better view is not therefore to grant those judgments preclusive effect in the first place.

(ii) *Recognizing foreign confirmation judgments*

This section explores whether foreign confirmation judgments (including judgments refusing to set aside an award) should be granted preclusive effect in subsequent post-award proceedings. As discussed above, national courts in some jurisdictions have recognized and granted preclusive effect to those judgments under the relevant doctrines of claim/issue preclusion and *res judicata*.[165]

The reasons why the judgment route concerning confirmation judgments is problematic closely mirror some of the issues already described above in relation to the preclusive effect of recognition and enforcement judgments.[166] In particular, the inherent limitations to granting preclusive effect, described above, apply equally to confirmation judgments. Accordingly, a foreign confirmation judgment, for the reasons described above, should have no preclusive effect if it (i) is rendered in *ex parte* proceedings or without the parties having a full opportunity to present their case; (ii) applies local

[161] See above at 25.

[162] Negative declaratory actions seeking a declaration that the award is non-enforceable in the forum exist in some jurisdictions, such as in Germany. See Karl-Heinz Böckstiegel, Stefan Michael Kröll and Patricia Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice* 568 (Kluwer Law International 2007)

[163] *Chantiers de l'Atlantique* (n 30). Even though the UK was the country of the seat of the arbitration, the Commercial Court held *obiter* that the French recognition and enforcement judgment had preclusive effect. Concerning this case, see above at 5–6. Concerning the implications of the seat, see above at 32–34.

[164] See above at 24.

[165] See above at 17–18.

[166] See above at 34–37.

standards to confirm the award that are different from the forum's recognition and enforcement standards; or (iii) is based on grounds that aim at protecting local interests, such as violation of public policy.[167]

In addition to those inherent limitations, there is one overall objection against granting preclusive effect to confirmation judgments. Granting such effect to confirmation judgments is likely to incentivize award creditors to pre-emptively bring confirmation proceedings in the seat of the arbitration in order to invoke the confirmation judgment's findings in subsequent recognition or enforcement proceedings elsewhere. The award debtor in turn is likely to cross-motion for the award to be set aside. Accordingly, this solution would likely result in an increase of proceedings regarding the validity of the award before the courts at the seat, either as a preliminary or a parallel action to recognition or enforcement proceedings elsewhere.

Such a potential increase in proceedings concerning the validity of the award at the seat of the arbitration is highly problematic. The multiplication of proceedings is likely to disturb international harmony and consistency of positions in different jurisdictions concerning the validity of the award. In this situation, the only way to guarantee consistency would be to impose a stay on the recognition or enforcement proceedings, pending the resolution of the proceedings about the validity of the award at the seat. Such a solution, however, would not only clash fundamentally with a delocalized view of international arbitration, it would also effectively promote a system of double-exequatur. The so-called 'double-exequatur' refers to a system, existing prior to the New York Convention, in which the award creditor had to first seek confirmation of the award at the seat before being able to have it recognized or enforced elsewhere.[168] One of the main aims and achievements of the New York Convention was to abandon such a system of double-exequatur.[169]

Even though the solution described above would not require a double-exequatur, it would *de facto* result in the undesirable re-emergence of this doctrine. Such a situation would squarely undermine the modern view of arbitration as promoted under the New York Convention.

Therefore, the better view is not to grant preclusive effect to confirmation judgments in subsequent post-award proceedings. In the words of the Paris Court of Appeal in *Unichips v Gesnouin*, the determination that the award was valid by the courts at the seat of the arbitration 'does not have the effect to eliminate or exclude the control, by the French [recognition or enforcement court], of the [validity] of the award [. . .]'.[170]

[167] See above at 34–35.

[168] Under the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927, art 4, the party seeking enforcement of an arbitral award had not only to provide the award and the underlying arbitration agreement but also proof that the award had become final in the country where it was made. Because most national laws did not provide for a specific certificate of 'finality' other than getting an award confirmed or declared enforceable in that country, this was '[p]ractically the only way to prove finality'.

[169] Christoph Liebscher, in Wolff (ed), *The New York Convention on the Recognition and Enforcement of Arbitral Awards – Commentary* (Hart 2012) art V(1)(e), 357–58.

[170] *Unichips* (n 78).

(iii) *Recognizing foreign set aside judgments*

This section explores the effects of foreign set aside judgments. As discussed above, national courts have applied the judgment route to foreign set aside judgments pursuant to Article V(1)(e) of the New York Convention. In essence, if the foreign set aside judgment meets the forum's foreign judgment principles and can thus be recognized, the set aside award is incapable of recognition or enforcement under Article V(1)(e). Conversely, if the foreign set aside judgment fails to meet the forum's foreign judgment principles and thus cannot be recognized, the set aside award is open for recognition or enforcement according to Article V(1)(e).[171]

The judgment route case law concerning foreign set aside judgment does not generate the same objections as those detailed in the previous sections concerning other award judgments. In particular, there is no risk of forum shopping involved: contrary to award recognition and enforcement proceedings, set aside proceedings can generally only be brought in one forum, ie the country of the seat of the arbitration.[172] Accordingly, there is no risk of award creditors and award debtors endeavouring to shop in different jurisdictions for award judgments they can rely on in subsequent post-award proceedings.

Moreover, the distinction between set aside judgments and other award judgments is justified by the New York Convention itself. Article V(1)(e), although its exact meaning and effects are disputed, at a minimum *allows* Convention States to take into account a foreign set aside judgment.[173] As detailed above, the application of foreign judgment principles can provide the framework for national courts in Convention States to assess whether a foreign judgment should be granted effect under Article V(1)(e).[174] To the contrary, the New York Convention contains no similar provision allowing national courts to grant effects to foreign recognition, enforcement or confirmation judgments.

Nevertheless, the judgment route for set aside judgments is not entirely free of concerns either. First, it arguably fails to meet its objective to promote international harmony. As discussed above, the relevant foreign judgment principles vary from jurisdiction to jurisdiction.[175] Therefore, situations may arise whereby a set aside judgment is recognized in one country and yet refused recognition in another. However, the lack of harmonization of foreign judgment principles should not be overemphasized because, despite variances in local standards, similarities do exist.[176]

[171] See above at 10–11.

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

[173] See above at 9.

[174] See above at 10–11.

[175] See above at 1–2.

[176] Linda Silberman, 'The New York Convention After Fifty Years: Some Reflections on the Role of National Law' (n 37) 33.

In addition, the judgment route for set aside judgments does not lead to satisfactory results in all cases. Depending on the ground of recognition in question, one can generally distinguish three categories of such cases.

The first category of cases is the one dealt with in the Dutch *Yukos* and *Maximov* decisions discussed above, whereby recognition is refused under the forum's foreign judgment principles if the foreign set aside judgment is found to be the product of a partial or dependent judicial process.[177] As a consequence, the award may be enforced despite the (unrecognized) set aside judgment. One might criticize the way in which the Amsterdam Court of Appel in *Yukos* came to the conclusion that the Russian set aside judgments were the result of a 'judicial process that must be deemed partial and dependent', based on the evidence before it.[178] However, apart from this criticism, and as a matter of principle, the judgment route works well in this category of cases. Other categories lead to less satisfactory results.

The second category of cases relates to situations in which the foreign set aside judgment is rendered by a court in a country other than that of the seat of arbitration.[179] Even though there is no example in current case law applying the judgment route in these circumstances, there is little doubt that such a foreign set aside judgment would be refused recognition under the forum's foreign judgment principles, which would lead to the award being able to be enforced despite the (unrecognized) set aside judgment. Again, one might say that the judgment route works well in these cases. However, one might also note that the judgment route appears superfluous in these situations since Article V(1)(e) already expressly provides that the set aside must have been made 'by a competent authority, of the country in which, or under the law of which, that award was made'. Accordingly, under Article V(1)(e), the possibility of refusing enforcement based on a set aside judgment only comes into play if that judgment was issued by one of the authorities referred to in that article. If that is not the case, the enforcement of the award cannot be refused under Article V(1)(e). In short, in the category of cases where the set aside judgment was rendered by a court in a country other than the country of the seat of the arbitration, there is no need to use a judgment route rationale in order to make Article V(1)(e) work.

The third category of cases includes all other situations of foreign set aside judgments, for instance where the set aside is based on the lack of (i) a valid arbitration agreement (eg facts of the *TermoRio* case, discussed above)[180]; (ii) an impartial and independent arbitral tribunal or fair arbitral process (eg facts of the *Baker Marine* case, discussed above)[181]; (iii) the arbitrator's power or

[177] See above at 11 and n 42.

[178] Judgment of 28 April 2009, (2009) XXXIV YB Comm Arb 703, 712 (Court of Appeal of Amsterdam).

[179] The same applies to cases in which the parties have chosen to submit the arbitration to a law other than the law of the seat. See above at n 172.

[180] The award was set aside on the basis that the arbitration agreement was not valid under Columbian law because Columbian law at the time of the execution of the arbitration agreement did not permit the use of ICC procedural rules in arbitration. *TermoRio* (n 31) 931. See above at 12–13.

[181] The award was set aside, among other things, on the basis that the arbitral tribunal incorrectly admitted evidence and that the award was unsupported by evidence. *Baker Marine* (n 31)196. See above at 12–13.

excess thereof (eg facts of the *Spier* case, discussed above)[182]; or (iv) a correct application of the law (eg facts of the *Chromalloy* case, discussed above).[183] In all those situations, assuming it was issued by a competent court in fair and regular proceedings, the foreign set aside judgment will be recognized in the forum, unless such recognition would amount to a violation of public policy. Indeed, this was the reasoning in *Chromalloy*. The court found that '[a] decision by this Court to recognize the [set aside judgment] of the Egyptian court would violate this clear U.S. public policy [of enforcing binding arbitration clauses]'.[184]

The problem with using the public policy exception is two-fold. First, refusing recognition to a foreign set aside judgment for violation of public policy because a court finds that the arbitration agreement was invalid although the forum would have found it valid, comes dangerously close to an impermissible review of the merits of that judgment. Problematically, this may see the court reviewing the foreign set aside judgment by applying the forum's own set aside standards.[185] Moreover, the notion of public policy is too vague to provide sufficient guidance as to when a set aside award may, or may not, be enforced in other jurisdictions. This undermines the objective of the judgment route approach which, as detailed above, aims to give guidance in those situations since such guidance is missing under Article V(1)(e) of the New York Convention.[186]

In sum, even though the judgment route for set aside judgments does not generate the same objections as for other award judgments, it cannot provide satisfactory results in all cases. It seems nevertheless a possible option to deal with the effects of set aside judgments under Article V(1)(e) of the New York Convention.

4. *Conclusion*

This article has shown that there is a growing trend of applying a judgement route analysis: national courts in different jurisdictions allow the recognition or enforcement of different types of award judgments, such as confirmation, set aside, recognition or enforcement judgements.[187] However, little attention has been paid so far to the theoretical and practical implications of this approach. Based on the findings of this article, it is submitted that national courts should be careful when taking the judgment route, and this for a number of reasons.

On a theoretical level, the judgment route ignores the distinctive, ancillary nature of award judgments. Award judgments are different from other

[182] The award was set aside on the basis that the arbitrators, deciding *pro bono et aequo*, exceeded their powers. *Spier* (n 31) 281. See above at 12–13.

[183] The award was set aside on the basis that the arbitral tribunal had misapplied Egyptian law, having applied Egyptian civil law, instead of Egyptian administrative law. *Chromalloy* (DDC 1996) (n 31) 911. See above at 12.

[184] *Chromalloy* (DDC 1996) (n 31) 913.

[185] Such argument was correctly rejected in *Baker Marine*. The court expressly rejected the argument that awards should be enforced in the United States because they 'were set aside by the Nigerian courts for reasons that would not be recognized under US law as valid grounds for vacating an arbitration award'. *Baker Marine* (n 31) 196.

[186] See above at 9–10.

[187] See above at 5–18.

judgments insofar as they relate to a prior adjudication, namely the award.[188] As a consequence of this ancillary nature, award judgments should, in principle, not be subject to the application of foreign judgment principles. Indeed, the policies underlying foreign judgment principles which explain why legal orders grant effects to foreign judgments (including comity, fairness, efficiency, harmony in solutions and predictability) do not readily apply to ancillary judgments. Accordingly, only the initial award and not the ancillary award judgment should, in principle, be open to recognition or enforcement, as this article has demonstrated.[189]

Moreover, on a practical level, applying foreign judgment principles to award judgments under the judgment route also leads to problematic results. On the one hand, enforcement of foreign award judgments poses problems due to the necessary duplication of the cause of action, the change in the relevant control standard and because some award judgments do not have an enforceable subject-matter.[190] On the other hand, recognition of award judgments appears equally problematic. First, for recognition and enforcement judgments, it poses a serious risk of forum shopping and leads to the multiplication of parallel proceedings and potentially conflicting decisions.[191] Second, for confirmation judgments, there is a risk that the judgment route may lead to an undesirable re-emergence of the doctrine of double-exequatur.[192] Finally, in relation to set aside judgments, the analysis is more nuanced: even though the judgment route for set aside judgments does not generate the same objections as other award judgments, it cannot necessarily provide satisfactory results in all cases.[193]

Therefore, based on these theoretical and practical objections, the overall conclusion of this article is that national courts err when they automatically and unreflectively apply foreign judgment principles to award judgments. The judgment route taken by courts in many jurisdictions is often the wrong road.

[188] See above at 19–21.
[189] See above at 22–25.
[190] See above at 25–30.
[191] See above at 31–37.
[192] See above at 37–38.
[193] See above at 39–41.