The Recognition and Enforcement of Foreign Arbitral Awards in Malaysia: Has the New York Convention 1958 Achieved Its Goal of Harmonising Laws of Its Contracting States?

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Statement

I hereby declare that this thesis has not been, and will not be, submitted in whole or in part to another University for the award of any other degree.

Signature: …….

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Thesis Summary

The New York Convention on the Recognition and Enforcement of Foreign Awards 1958 (NYC 1958) is one of the most successful international treaties, with 168 Contracting States to date. The NYC 1958 governs the recognition and enforcement of arbitration agreement and foreign arbitration awards. Using a doctrinal methodology, this thesis investigates harmonisation in the implementation and application of NYC 1958 on the recognition and enforcement of foreign arbitral awards with Malaysia as a case study. First, the thesis ascertains the standards of harmonisation expected in the implementation of NYC 1958 by Contracting States. Second, the thesis investigates the regulatory framework governing the recognition and enforcement of foreign arbitral awards in Malaysia. Third, the thesis critically analyses whether there is harmonisation on controversial issues regarding the recognition and enforcement of foreign awards by the Contracting States, specifically on the enforcement of the annulled arbitral award, allocation of the onus of proof and failure to challenge an award before a supervisory seat. Fourth, the thesis evaluates the position of the controversial issues in Malaysia. The standard of harmonisation expected of NYC 1958 is for Contracting States to interpret and apply NYC 1958 uniformly. The thesis finds that there is no harmonisation in the application of NYC 1958 on the controversial issues by Contracting States. It discovers that Contracting States' courts have adopted distinct approaches in the interpretation and application of NYC 1958. The thesis also finds that Section 39(1)(a)(vi) of the Malaysian Arbitration Act 2005 departs from Article V(1)(a)(d) of NYC 1958 and proposes amendments to it. The amendment is important for Malaysia to conform to its obligations as a Contracting State of NYC 1958 and to harmonise the implementation of Article V(1)(d) of NYC 1958. While the thesis evaluates Malaysian position on the controversial issues, it finds that two of the three controversial issues are yet to see Malaysian courts. It proposes recommendations for the Malaysian courts, should cases involving the controversial issues arise in Malaysia.

Chapter 1 Introduction

1.1 Introduction

The plaintiff, a Russian company, entered into a palm oil contract with the defendant, a Malaysian company. The arbitration clause in their agreement stated that the forum of the arbitration would depend on the party filing a claim.[1] It was agreed that if the defendant filed a claim, the forum would be the International Commercial Arbitration Court at the Chamber of Commerce and Industry (hereinafter, ICAC Ukraine) in Ukraine, whereas if it was the plaintiff, then the forum would be the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russia (hereinafter, ICAC Russia). Subsequently, upon termination of the contract by the plaintiff, the defendant filed a claim and commenced arbitral proceedings in the ICAC Ukraine. Meanwhile, the plaintiff filed a claim against the defendant in ICAC Russia. The defendant objected to the jurisdiction of the Russian Tribunal, whereas the plaintiff did not object to the claim in ICAC Ukraine proceedings.

Upon receiving an arbitral award rendered by the ICAC Russia, the plaintiff sought to enforce the award in Malaysia. The defendant challenged the award issued by the ICAC Russian at the Moscow Arbitration Court to set aside the award.[2] The Moscow Arbitration Court rejected the defendant's application to set aside and held that the arbitration procedure was consistent with the parties' agreement and not inconsistent with Russian public policy. The defendant then applied to resist the enforcement of the award in Malaysia, arguing that the arbitral tribunal was not in accordance with the arbitral agreement and that the arbitral award was in conflict with public policy under the principle of *res judicata.*

Significantly, the Malaysian High Court held that there was no issue of *res judicata* as different tribunals heard different issues. It referred to the decision of the Moscow Arbitration Court and upon assessing the Russian Court decision, along with other evidence submitted by the parties, the Malaysian High Court found that the defendant failed to prove its challenge under Sections 39(1)(a)(c) and 39(2)(b) of the Malaysian

[1] *Open Type Joint Stock Co. Efirnoye (' EFKO') v Alfa Trading Ltd* [2012] 1 MLJ 685.
[2] Ibid [24].

Arbitration Act 2005 (hereinafter, AA 2005). The High Court also contended that it had no supervisory power to re-assess the arbitral award and it was bound to recognise and enforce the foreign arbitral award, until and unless it found any grounds under Section 39 of AA 2005. This case is an example of how the Malaysian Courts have changed their attitude towards pro-arbitration approaches in accordance with the very spirit of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (hereinafter, NYC 1958), which was founded on a 'pro-enforcement bias'.[3]

There were some initial challenges faced by the arbitration community in Malaysia during the early stages of ratification of NYC 1958.[4] The Court of Appeal's case *Sri Lanka Cricket* indicates a situation where the legislature was relaxed in adopting changes to the legislation.[5] It was unfortunate that the Court of Appeal subsequently restricted the application of NYC 1958, thus undermining the spirit behind it, by imposing a strict and mandatory condition that is merely evidential in nature. This case illustrates the wider contemporary situation in cross-border business transactions, where most situations involve two or more parties from different countries with different backgrounds and applications of law.

International commercial arbitration (hereinafter, ICA) offers a neutral forum for dispute resolution that is 'particularly suitable for cross- border and cross-cultural disputes'.[6] The enormous growth of ICA is attributable to the adoption of NYC 1958,[7] which is also a successful international convention with 168 signatories to date.[8] NYC 1958 provides a

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[3] ICCA, *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* (International Council for Commercial Arbitration 2011). The researcher uses 'pro-enforcement bias' to connote the intentions of the drafters of NYC 1958 to allow maximum enforcement of foreign awards as much as possible by limiting the circumstances where foreign awards may be refused. The term is also used by UNCITRAL, ICCA, Gaillard & Kaiser, Paulsson, Sorieul, Harder, Lewis and Eker in their work.

[4] Sundra Rajoo, 'Towards Broader Adoption and Uniform Interpretation of the New York Convention – A Malaysian Perspective' (2013) 3 Malayan Law Journal Articles cxivi.

[5] In the case of *Sri Lanka Cricket (formerly known as Board of Control for Cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd*) [2006] 3 MLJ 117, the Court of Appeal in the case held that the foreign arbitral award in this case should be set aside due to the failure of the Respondent to prove that Singapore was indeed a party to NYC 1958 and hence fulfilled the mandatory requirement in Section 2(2) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (CREFA 1985).

[6] Loukas Mistelis and Crina Baltag, 'Recognition and Enforcement of Arbitral Awards and Settlement in International Arbitration: Corporate Attitudes and Practices.' (2008) 19 American Review of International Arbitration 319, 320.

[7] Rajoo, 'Towards Broader Adoption and Uniform Interpretation of the New York Convention – A Malaysian Perspective' (n 4).

[8] United Nations Treaty Collection, 'Status Convention on the Execution of Foreign Arbitral Awards' (*United Nations Treaty Collection*)

standard regime for the recognition and enforcement of foreign awards.[9] International business' preference for ICA is attributable to assurances that foreign awards are readily and expeditiously enforceable under NYC 1958.[10] This research analyses the implementation of NYC 1958 in the recognition and enforcement of international arbitral awards in Malaysia, from its accession to NYC 1958 up until June 2021.

1.2 Limitations of the Study

The research is confined to ICA, rather than the entire regime of arbitration in Malaysia. The focus is on harmonisation in the implementation of foreign arbitral awards under NYC 1958. NYC 1958 is an international convention, providing a standard international regime for the recognition and enforcement of arbitration agreements and foreign arbitral awards. The research limits the analysis to (1) foreign arbitral awards, (2) commercial arbitral awards in Malaysia and (3) the recognition and enforcement of foreign awards.

First, the research is limited to foreign arbitral awards.[11] Section 3.5 of the thesis discusses the scope of international awards enforceable in Malaysia. While NYC 1958 does not provide a definition of an award, it does specify the scope of awards covered by NYC 1958. Article I of NYC 1958 provides for two types of awards that are the subject matter of this convention: (1) awards subject to the territorial criterion of the State where the award was made, (2) awards that are not considered domestic in the State where enforcement is sought. Sections 38(1) and 38(4) specify the foreign awards that are enforceable in Malaysia. Foreign arbitral awards enforceable in Malaysia under the regime of NYC 1958 are awards made in another Contracting State of NYC 1958 and awards concerning commercial matters.

Second, the research is limited to commercial arbitral awards. NYC 1958 covers both commercial and non-commercial awards. It offers a commercial reservation that may be entered into by Contracting States upon ratifying or acceding to NYC 1958. Contracting

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<https://treaties.un.org/Pages/LONViewDetails.aspx?src=LON&id=549&chapter=30&clang=_en> accessed 16 May 2021.

[9] Gary Born, *International Arbitration : Law and Practice* (Wolters Kluwer Law & Business ; Turpin Distribution Services distributor 2012) 11.

[10] William S Fiske, 'Should Small and Medium-Size American Businesses Going Global Use International Commercial Arbitration Comments' (2004) 18 Transnational Lawyer 455, 459.

[11] Foreign and international awards will be used interchangeably to connote awards that were made in a State other than the enforcement State.

States may restrict the application of NYC 1958 'to differences out of legal relationships, whether contractual or not, which are considered as commercial under the law of the State making such declaration'.[12] Malaysia entered a commercial reservation upon acceding to NYC 1958 in 1985.[13]

Third, the thesis is limited to the recognition and enforcement of foreign awards. This research notes the twin objectives of NYC 1958, which are to promote harmonisation in the recognition and enforcement of foreign awards and the recognition and enforcement of arbitration agreements. A study of the *travaux préparatoires* of NYC 1958 shows that Article II of NYC 1958 on arbitration agreements was included in the very last week of the NYC 1958 Conference. The drafters of NYC 1958 initially intended to have a separate protocol for the recognition of arbitration agreements. Due to the limitations of the study, this research will critically investigate and analyse law cases concerning the recognition and enforcement of arbitral awards.

1.3 Research Questions

The research answers four research questions, which are:

i) What is the standard of harmonisation expected of NYC 1958 pertaining to the recognition and enforcement of foreign arbitral awards?
ii) What is the legal regulation pertaining to the recognition and enforcement of foreign arbitral awards in Malaysia?
iii) Is there is harmonisation in the application of NYC 1958 pertaining to these controversial issues on the enforcement of foreign arbitral awards?
    a. Whether a foreign arbitral award annulled by its supervisory court can be enforced in another State?
    b. What is the position on the allocation of the onus of proof in relation to whether an award-debtor is party to an arbitration agreement?
    c. Whether an award-debtor's failure to challenge an award before its supervisory court preclude a challenge before an enforcement court in another State?

[12] New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in New York on 10 June 1958, entered into force 7 June 1969) 330 UNTS 3 No. 4739 (NYC 1958) art. I (3).
[13] See Chapter 3 for a discussion of the reservations declared by Malaysia.

iv) What is the position in Malaysia on these controversial issues?

1.4 Research Aims

First, the thesis seeks to contribute to a more comprehensive understanding of the implementation and application of NYC 1958 on the recognition and enforcement of foreign arbitral awards in Malaysia. Even though Malaysia has been a Contracting State to the NYC 1958 since 1985, very limited attention has been accorded to the application of NYC 1958 in Malaysia. As ICA is increasingly popular in Malaysia, the thesis aims to contribute to the analysis of the application of NYC 1958 by Malaysian courts and the recognition and enforcement of awards.

Second, the thesis aims to test whether there is harmonisation in the implementation of NYC 1958 to these controversial issues on the enforcement of foreign awards (see Section 1.3). Chapter 2 explains the standard of harmonisation expected of NYC 1958, whereby Contracting States are expected to adopt uniform interpretation and application of NYC 1958. The thesis critically examines the application of NYC 1958 by Contracting States' courts to the controversial issues presented in Section 1.3. The thesis investigates whether respective Contracting States have adopted uniform interpretation and application of NYC 1958 in the recognition and enforcement of foreign awards.

1.5 Research Objectives

The main objective of this research is to critically analyse and examine harmonisation in the implementation of NYC 1958 and the recognition and enforcement of foreign arbitral awards in Malaysia.

To achieve that, the sub-objectives of the research are:

i) To analyse the theory of harmonisation and the standard of harmonisation expected of NYC 1958;
ii) To analyse the provisions and legal framework for the recognition and enforcement of foreign arbitral awards in Malaysia;
iii) To investigate whether there is harmonisation in the application of NYC 1958 to controversial issues as set out in 1.3;

iv) To analyse what the Malaysian position is on these controversial issues.

1.6 Rationale of the Research

It is undisputed that the international recognition and enforcement of foreign arbitral awards is one of the attractions of ICA. The future of ICA seemed to be much brighter when NYC 1958 was enacted in 1958.[14] This research is important as it investigates if there is harmonisation in the application of NYC 1958 as the key international convention of ICA. As NYC 1958 turns 63 years this year, with 168 contracting States to date, it is one of the most successful international treaties the world has ever seen. NYC 1958 aimed to provide an international convention governing the recognition and enforcement of foreign awards that would go further than the Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (hereinafter, GC 1927) and consequently facilitate the effectiveness of arbitration for private dispute resolution.[15]

NYC 1958 aims to promote and facilitate ICA for private dispute resolution in cross-border transactions.[16] With 168 signatories from all over the world,[17] NYC 1958 provides for a 'pro-enforcement regime' by stipulating straightforward procedures to recognise and enforce foreign awards and limit the defence to refuse the recognition and enforcement of awards.[18] Thus, in most parts of the world, it is easier to enforce foreign awards, rather than foreign judgments. The enforcement of a foreign judgment is still a complicated, time-consuming and expensive process and subject to conflict of rules principles.[19] Prior to NYC 1958, due to the diversity of domestic laws on the subject, the

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[14] Pelagia Ivanova, 'Forum Non Conveniens and Personal Jurisdiction: Procedural Limitations on the Enforcement of Foreign Arbitral Awards Under the New York Convention Note' (2003) 83 Boston University Law Review 899.

[15] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (10 June 1958) UN Doc E/CONF.26/8/Rev.1.

[16] David J McLean, 'Toward a New International Dispute Resolution Paradigm: Assessing the Congruent Evolution of Globalization and International Arbitration' (2009) 30 University of Pennsylvania Journal of International Law 1087, 1090.

[17] UNCITRAL, 'Status Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' (*UNCITRAL*, 2020) <https://uncitral.un.org/en/texts/arbitration/conventions/foreign_arbitral_awards/status2> accessed 10 January 2020.

[18] Born (n 9) 11.

[19] Paolo Contini, 'International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 8 The American Journal of Comparative Law 283, 283.

recognition and enforcement of foreign arbitral awards was among the most complex problems known to jurisprudence in private international law.[20]

The lack of comprehensive research in this area involving Malaysia necessitates this analysis of the recognition and enforcement of arbitral awards. This research builds upon the researcher's LLM dissertation research, assessing the impact of globalisation on the recognition and enforcement of foreign arbitral awards in Malaysia. There is no known or published study at a doctoral level on the implementation of NYC 1958 in Malaysia, even though various journal articles have been written on this topic.[21]

1.7 Theoretical Framework

One of the attractions of ICA is the finality of its awards, as the merits of its awards cannot be properly challenged before a higher court.[22] NYC 1958 provides effective and predictable procedures for the recognition and enforcement of foreign arbitral awards.[23] It only provides a minimum level of control and allows Contracting States to exercise discretionary control over some matters pertaining to the enforcement of foreign awards.[24] NYC 1958 grants substantial powers to enforcement courts to recognise, enforce and also refuse the enforcement of awards.[25] Therefore, an enforcement court

[20] Marike Paulsson, *The 1958 New York Convention in Action* (Kluwer Law International 2016) 31.
[21] Choong Yeow Choy and Sundra Rajoo, 'Interpretation and Application of the New York Convention in Malaysia' in George A Bermann (ed.), *Recognition and Enforcement of Foreign Arbitral Awards : The Interpretation and Application of the New York Convention by National Courts* (Springer International Publishing 2017); Weng Kwai Mah and Nahendran Navaratnam, 'Recognition and Enforcement of Arbitral Award' in Tun Ariffin Zakaria, Sundra Rajoo and Phillip Koh (eds), *Arbitration in Malaysia: A Practical Guide* (Sweet & Maxwell 2016); S Rajoo, *Law, Practice and Procedure of Arbitration* (2nd edn, Lexis Nexis 2016); Rajoo, 'Towards Broader Adoption and Uniform Interpretation of the New York Convention – A Malaysian Perspective' (n 4); PS Sangal, 'Alternative Dispute Resolution: A Glance at the Law of Malaysia and India' (1996) 3 Malayan Law Journal Articles xxix; Grace Xavier, 'Comparative Study of Arbitrations in Malaysia and Selected Jurisdictions in the European Union' (2002) 4 Malayan Law Journal Articles lxxxix; Mohamed Fahmi Ghazwi, Ahmad Masum and Nurli Yaacob, 'Recognition and Enforcement of International Arbitration Awards: A Case Study of Malaysia and Saudi Arabia' (2014) 1 International Journal of Accounting and Financial Reporting 541; Lam Ko Luen, 'Arbitration Reform in Malaysia: Adopting the Model Law' in Anselmo Reyes and Weixia Gu (eds), *The Developing World of Arbitration : A Comparative Study of Arbitration Reform in the Asia Pacific* (Bloomsbury Publishing PLC 2018).
[22] Clifford J Hendel and Maria Antonia Perez Nogales, 'Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations' in Katia Fach Gomez and Ana Mercedes Lopez Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 187.
[23] ibid 188.
[24] Thomas Clay and Sara Mazzantini, 'Reasons and Incoherencies Regarding the Enforcement of Annulled Foreign Arbitral Awards' (2018) 7 Indian Journal of Arbitration Law 141, 141.
[25] Crina Baltag, 'Enforcement of Arbitral Awards Against States' (2008) 19 American Review of International Arbitration 391, 398.

may use the discretionary power granted by NYC 1958 to apply its own laws to an application to recognise and enforce a foreign arbitral award. With the large number of Contracting States, coming from diverse legal backgrounds, harmonisation in the application and interpretation of NYC 1958 is desirable.

Harmonisation is a solution to the problem of the diversity of commercial law regimes among Contracting States.[26] The research defines harmonisation as a process of bringing rules of law close to a similar condition or concept, but not in exactly the same way, and it does not require the complete elimination of diversity in laws. The research will use the term harmonisation throughout this thesis. The research investigates whether there is harmonisation in the application of NYC 1958 by Contracting States. The analysis is limited to controversial issues pertaining to the enforcement of annulled awards, the allocation of onus of proof in relation to whether an award-debtor is party to an arbitration agreement and the preclusion to challenge an award in the enforcement seat, upon failure to annul the award in the supervisory seat. These three controversial issues (as stipulated in Section 1.3) are directly related to the finality of an award and the role of the supervisory seat in ICA.

The goal of harmonisation in this research is to bring the rules on recognition and enforcement of foreign awards under NYC 1958 to similar application, while still maintaining the diversity of law of Contracting States. The research adopts Andersen's definition of 'uniformity', which connotes the harmonisation intended in this research. Harmonisation refers to 'the varying degree of similar effects on a phenomenon across the boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form'.[27] As Chapter 2 discusses, the goal of harmonisation in this research refers to varying degrees of reaching a similar outcome through the application of textually harmonising instruments.[28] Thus, the focus of the analysis on the harmonisation of the controversial issues discussed in Chapters 4, 5 and

[26] Eric A Posner, 'Arbitration and the Harmonization of International Commercial Law: A Defense of Mitsubishi' (1998) 39 Virginia Journal of International Law 647, 648–649.
[27] Camilla Baasch Andersen, 'Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through A Global Jurisconsultorium of the CISG' in Mads Tønnesson Andenæs and Camilla Baasch Andersen (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 32.
[28] The researcher adopts Andersen's textual and applied 'uniformity' to the 'harmonisation' referred to in this thesis to reflect the thesis' argument on the differences between the concept of uniformity and harmonisation. Andersen uses harmonisation and uniformity interchangeably in her work.

6 is on how Contracting States' courts actually apply and interpret NYC 1958 to resolve issues arising before them.

NYC 1958 has a deliberate harmonising effect on contracting parties. It is intended to be a uniform code to deal with the enforcement of foreign awards, and to be applied in a similar way by every contracting party.[29] The process of harmonisation in the enforcement of foreign arbitral awards is justified by most legal authors on the basis that it produces certainty and predictability, which are desirable qualities that attract the international business community.[30] Even though Articles III and IV of NYC 1958 indicate a 'pro-enforcement bias' to facilitate the enforcement of foreign awards, the flexibility granted to enforcement courts in Article V may undermine the very spirit of NYC 1958.[31] The thesis investigates whether the flexibility granted by Article V of NYC 1958 specifically on the three controversial issues impede the harmonising goal of NYC 1958.

Chapter 2 establishes the standards of harmonisation expected of NYC 1958 in its application by Contracting States. To ensure the harmonisation of NYC 1958, the convention needs to be interpreted in a similar way by enforcement courts in any part of the world. As NYC 1958 is an international convention, it is indeed part of public international law. Therefore, NYC 1958 must be interpreted in accordance with the rules of interpretation of international law, pursuant to Articles 31–33 of the Vienna Convention on the Law of Treaties 1969 (hereinafter, VCLT 1969).[32] Article 31 refers to the primary elements of a treaty: the ordinary meaning of its terms, their context and the

[29] AD Barber, 'Does the New York Convention Have the Same Desired Effect in the East as It Does in the West?' (2009) 1 6 <https://ssrn.com/abstract=1589690 or http://dx.doi.org/10.2139/ssrn.1589690> accessed 20 April 2016.

[30] Leonard D Graffi, 'Securing Harmonized Effects of Arbitration Agreements under the New York Convention' (2006) 28 Houston Journal of International Law 663, 671; Serhat Eskiyoruk, 'Harmonisation on the Performance of International Arbitral Awards' (2010) 3 Ankara Bar Review 61, 62; Richard Garnett, 'International Arbitration Law: Progress towards Harmonisation' (2002) 3 Melbourne Journal of International Law 400, 401; Fernando Dias Simões, 'Harmonisation of Arbitration Laws in the Asia-Pacific: Trendy or Necessary?' in Muruga Perumal Ramaswamy and João Ribeiro (eds), *Trade Development through Harmonization of Commercial Law* (UNCITRAL Regional Centre for Asia and the Pacific New Zealand Association for Comparative Law 2015) 221; Paul B Stephan, 'The Futility of Unification and Harmonization in International Commercial Law The Fifteenth Sokol Colloquium on Private International Law: Unity and Harmonization in International Commercial Law' (1998) 39 Virginia Journal of International Law 743, 746.

[31] Paulsson, *The 1958 New York Convention in Action* (n 20) 3.

[32] Convention on the Law of Treaties (adopted in Vienna on 22 May 1969, opened for signature on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 332 No. 18232 (VCLT 1969) arts 32–32.

treaty's object and purpose. Second, Article 32 refers to legislative history that may be referred to confirm a meaning upon the application of Article 31 or if such application produces ambiguous or absurd meaning.[33] Third, as the NYC 1958 is available in five official languages, all texts are deemed to be equally authoritative and to have the same meaning. In circumstances where comparing official texts produces different meanings, upon thorough application of Articles 31 and 32, the court must adopt a meaning which reconciles the texts according to the object and purpose of NYC 1958.

The analysis involves a critical examination of the controversial issues of the recognition and enforcement of foreign awards. First, this research will examine the available provisions in NYC 1958 pertaining to controversial issues. Second, the research will analyse the approach adopted by Contracting States and proposals from scholars pertaining to controversial issues. Third, the research will investigate whether there is harmonisation in the application of NYC 1958 to controversial issues by examining current practices by Contracting States' courts. The research will analyse law cases from the Contracting States of NYC 1958 and determine whether there is harmonisation in the application of relevant provisions. Finally, the research will investigate the practice in Malaysia and if the issues are yet to arrive before the Malaysian court, propose a solution for the Malaysian courts, should controversial issues arise in the future.

1.8 Research Methodology

The research methodology will be primarily qualitative research and analysis. The methodological approach followed is doctrinal research using Malaysia as a case study.

1.8.1 Doctrinal Research

Doctrinal research asks what the law is on a particular subject matter.[34] The definition of doctrinal research is 'a synthesis of rules, principles, norms, interpretive guidelines and values' which 'explains, makes coherent or justifies a segment of the law as part of a larger system of law'.[35] The researcher, in conducting doctrinal research, collects and subsequently analyses relevant legislation and law cases to investigate the law in that

[33] Ibid.
[34] Ian Dobinson and Francis Johns, 'Legal Research as Qualitative Research' in Michael McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press 2007) 20–21.
[35] Terry C Hutchinson, 'Doctrinal Research : Researching the Jury' in D Watkins and M Burton (eds), *Research Methods in Law* (Routledge (Taylor & Francis Group) 2013) 7–8.

particular area.[36] This thesis investigates the theory of legal harmonisation and subsequently analyses the goal of harmonisation in the implementation of NYC 1958. In determining the standard of harmonisation expected of NYC 1958, this thesis scrutinises the text of NYC 1958 and its *travaux préparatatoires* to explore the intention of the drafters as regards the harmonisation expected in the implementation of NYC 1958 by Contracting States.

This doctrinal research critically examines the essential features of statutes and law cases to establish a complete set of statements of law on the research's subject matter.[37] First, the research explores the legislation and law cases pertaining to the recognition and enforcement of foreign awards in Malaysia. Further, the research critically analyses the legislation and relevant law cases from the NYC 1958 Contracting States in order to examine the practice of States as the enforcement courts of NYC 1958 awards on three controversial issues (see Section 1.3). The researcher then examines whether there is harmonisation in the application of NYC 1958 by enforcement courts to controversial issues. Finally, the researcher investigates if there are any reported cases in Malaysia involving controversial issues and makes recommendations to be adopted by the Malaysian courts, should similar cases arise in Malaysia in the future.

1.9 Previous Studies

There is no previous doctoral research examining the implementation of NYC 1958 in Malaysia. While there are articles and book chapters written on the recognition and enforcement of awards in Malaysia, the researcher submits that these articles do not explore harmonisation in the application of NYC 1958 in Malaysia.[38]

On the harmonisation of the application of NYC 1958 the Contracting States, Berg initiates and suggests efforts to continue to seek for harmonisation in the interpretation of

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[36] Dobinson and Johns (n 34) 20–21.
[37] Hutchinson (n 35) 9–10.
[38] Mah and Navaratnam (n 21); Luen (n 21); Choy and Rajoo (n 21); WSW Davidson and Sundra Rajoo, 'Malaysia Joins the Model Law Arbitration Community' (2006) <http://www.malaysianbar.org.my/adr_arbitration_mediation/arbitration_act_2005_malaysia_joins_the_model_law.html> accessed 5 July 2015; Rajoo, 'Towards Broader Adoption and Uniform Interpretation of the New York Convention – A Malaysian Perspective' (n 4); Sundra Rajoo and WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law as Applied in Malaysia* (Sweet & Maxwell Asia 2007); Sundra Rajoo, *The Malaysian Arbitration Act 2005 (Amended 2011) : An Annotation* (Lexis Nexis Group Worldwide 2013); Ghazwi, Masum and Yaacob (n 21).

NYC 1958 by the courts in order to reach a uniform interpretation.[39] Paulsson considers the international law elements of NYC 1958 and she establishes a snail diagram to connote the correct implementation of the rules of interpretation in accordance with the Vienna Convention 1969.[40] Bermann recently published a book compiling reports from 44 jurisdictions of NYC 1958 contracting States pertaining to the interpretation and implementation of NYC 1958, including Malaysia.[41] However the reports are not comprehensive and do not critically analyse harmonisation in the implementation of NYC 1958 to controversial issues but rather country reports on the application and implementation of NYC 1958. Eker, in conducting research on the harmonising role of NYC 1958, finds that it has no dynamic relevance other than in setting the agenda for possible steps to increase the effectiveness of ICA.[42]

The research acknowledges that Andersen developed 'uniformity' to connote with harmonisation in the implementation of the Convention on Contracts for the International Sale of Goods 1980 (hereinafter, CISG 1980). The research finds that it is of heuristic value to adopt Andersen's standard of textual uniformity and applied uniformity in discussion of the application and implementation of NYC 1958. For NYC 1958 is also a harmonising instrument intended to bring harmonisation in the recognition and enforcement of foreign arbitral awards. CISG and NYC 1958 share attributes similar to public international law instruments. Also, Lewis adopts a similar concept in the application of Andersen's definition of uniformity, through analysing the interpretation and uniformity of the UNCITRAL Model Law on International Commercial Law (similar, UML).[43] Lewis finds that UML has affected the degree of convergence in the arbitration laws of Hong Kong, Singapore and Australia.

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[39] AJ van den Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (Kluwer Law International 1981) 395.
[40] Paulsson, *The 1958 New York Convention in Action* (n 20).
[41] Stephan Balthasar, *International Commercial Arbitration: International Conventions, Country Reports and Comparative Analysis* (Beck, Hart & Nomos 2016).
[42] Bihter Kaytaz Eker, 'The Harmonising Role of the New York Convention' (Queen Mary University of London 2018).
[43] Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration : Focusing on Australia, Hong Kong and Singapore* (Kluwer Law International 2016).

1.10 Thesis Roadmap

Chapter 2 introduces NYC 1958 and explores its aims and objectives. It further examines the scope of awards enforceable under NYC 1958. It defines harmonisation and determines the goal of harmonisation expected from this thesis. Most significantly, Chapter 2 reveals the standard of harmonisation expected in the application of NYC 1958 by Contracting States. It explains that as a public international law instrument, NYC 1958 must be interpreted in accordance with Articles 31–33 of VCLT 1969. Next, Chapter 3 explores the recognition and enforcement of foreign awards in Malaysia. It defines an award and examines the scope of foreign awards enforceable in Malaysia. It defines the different legal processes of recognition, enforcement and setting aside of awards in Malaysia. Chapter 3 critically examines the implementing provisions of NYC 1958 in Malaysia, Sections 38–39 of AA 2005. It analyses available reported law cases in Malaysia to see the Malaysian courts' position on the application of NYC 1958 to the recognition and enforcement of foreign awards.

Chapters 4, 5 and 6 explore three controversial issues in the application of NYC 1958 on the recognition and enforcement of foreign awards. These chapters critically analyse important controversial cases from various Contracting States of NYC 1958. Further, the chapters find that there is no harmonisation in the application of NYC 1958 on the controversial issues, except in Chapter 6 on the issue of whether an award-debtor's failure to challenge an award before a supervisory court precludes a challenge before an enforcing court in another State, where the award-debtor *does not raise* any challenge at the supervisory seat. The chapters then examine if there are any relevant cases in Malaysia on the matter. Finally, the chapter proposes the best view the Contracting States' courts could adopt to strive for the harmonious application of NYC 1958, which is also in conformity with the treaty interpretation rules stipulated under Articles 31–33 of VCLT 1969. Finally, Chapter 7 concludes by answering the research questions posed in Section 1.3. Chapter 7 also suggests proposals for the Malaysian government and NYC 1958 Contracting State courts to adopt.

Chapter 2 Harmonisation Standards of the New York Convention 1958

2.1 Introduction

This chapter seeks to answer the first research question, i.e. what is the standard of harmonisation expected of NYC 1958? First, it explores the objectives and aims of NYC 1958 to examine the harmonising goal of NYC 1958. The chapter also investigates the *travaux préparatoires* of NYC 1958 to examine the improvements secured by NYC 1958 compared to its predecessors. Second, the chapter scrutinises the scope of NYC 1958, which concerns the recognition and enforcement of arbitration agreements and foreign arbitral awards. This section also explains the definition of relevant legal processes and terms adopted in this thesis, such as recognition, enforcement, challenge of an award, set aside, foreign award and reservation.

Third, the chapter analyses the theory of legal harmonisation and explains the definition of harmonisation adopted in this thesis. It examines the features of NYC 1958 as a public international law instrument. Fourth, the chapter adopts Andersen's definition of uniformity and investigates the standard of harmonisation expected in the implementation of NYC 1958. This section explains the textual harmonisation and applied harmonisation expected in the implementation of NYC 1958 by Contracting States. The chapter also explores monistic and dualistic legal systems to understand the implementation of NYC 1958 in Contracting States' legal systems. Finally, the chapter examines the treaty interpretation rules stipulated by VCLT 1969 as one of the rules of interpretation for the application of NYC 1958 to ensure uniform application by the courts of NYC 1958 Contracting States.

2.2 Objectives and Aims of NYC 1958

The chapter begins by exploring the objectives and aims of NYC 1958 in order to understand the rationale behind the adoption of NYC 1958. NYC 1958 aims to harmonise laws on the recognition and enforcement of foreign awards. It may be deemed as the 'first pillar in harmonisation of arbitration law'.[44] The objective of NYC 1958 is to attract as

[44] Garnett (n 30) 405.

much ratification as possible to achieve its harmonising goal. It resulted from a compromise where the NYC 1958 delegates aimed to have a maximum number of ratifications. A large number of ratifications will subsequently contribute to harmonise laws on recognition and enforcement of foreign awards and contribute to the effectiveness of ICA as a private law disputes settlement.

First, the final act to NYC 1958 expressed that the aim of NYC 1958 was to 'contribute to increasing the effectiveness of arbitration in the settlement of private law disputes'.[45] As reflected in the final act to NYC 1958, the purpose of NYC 1958 was to encourage the recognition and enforcement of foreign arbitral awards and hence contribute to predictable outcomes for international business actors.[46] NYC 1958 would also encourage the expansion of trade and promote general well-being and prosperity, as well as further progressive development of international law, which is also one of the purposes of the UN.[47] NYC 1958 also contributes to the promotion of trade and developing international law and co-operation between nations.[48]

Second, a study of the *travaux préparatoires* for NYC 1958 indicates that NYC 1958 was established to overcome the inadequacies of GC 1927 in terms of facilitating the enforcement of foreign arbitral awards but at the same maintaining respect for the principle of State sovereignty.[49] NYC 1958 is the result of a compromise between the idealistic notion of international arbitration and the protection of State sovereignty. Delegates to the NYC 1958 Conference concluded the texts of NYC 1958 by reaching an equilibrium between the idea of creating a fully international arbitration regime or a-national arbitration to facilitate international trade and attract States by maintaining respect for the principle of State sovereignty.

NYC 1958 is built on the principle that ICA cannot work independently and needs assistance from domestic courts. It offers a realistic solution to meet the needs of the

[45] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15).
[46] Hans Bagner, 'Article I' in Herbert Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Conventiom* (Kluwer Law International 2010).
[47] 'Summary Record of the Sixth Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.6.
[48] ibid.
[49] ECOSOC 'Report of the Committee on the Enforcement of International Arbitral Awards' (28 March 1955) E/AC.42/4. Rev.1; E/2704.

business community while safeguarding the jurisdiction prerogatives of sovereign States. NYC 1958 seeks to replace the inadequate GC 1927 and accommodate international arbitration players within an international regime to be adopted in domestic law to facilitate the recognition and enforcement of arbitration agreements and awards.[50] NYC 1958 is indeed a step forward compared to GC 1927 (see Section 2.2.1).

2.2.1 Improvements Secured by NYC 1958

A study of the *travaux préparatoires* for NYC 1958 explores three main improvements secured by NYC 1958 compared to its predecessor. First, the scope of applicability of NYC 1958 is broader than its predecessor, GC 1927. The scope of application of NYC 1958 is broader as the parties to arbitration do not need to be subject to the jurisdictions of contracting States, even though States may enter a reservation to limit applicability only to awards made in contracting States.[51] GC 1927 specifies two conditions for an arbitral award to be applicable, recognised and enforced under GC 1927: (1) the award must be made in a Contracting State and (2) made between persons who are subject to the jurisdiction of a Contracting State.[52] The scope of application of GC 1927 was limited to domestic awards made in a Contracting State and between Contracting State nationals.

The scope of application of NYC 1958 goes beyond GC 1927 as the NYC 1958 delegates decided to remove the mandatory reciprocity conditions of Article 1 of GC 1927. The NYC 1958 provides for two types of awards that are the subject matter of this convention: (1) awards that are subject to the criteria of the territory where they were made, (2) awards that are not considered to be domestic in the State where enforcement is sought.[53] Thus, the general applicability of NYC 1958 is for any foreign award made in a State other than the enforcement State and an award other than a domestic award. However, to attract ratification by more States, Article I(3) allows contracting States to enter into reciprocity and commercial reservations. Nevertheless, as discussed in Section 2.3.3.4, the high number of ratifications reduced the impact of reservation provisions. Indeed, the scope of

[50] Julian DM Lew, Loukas A Mistelis and Stefan Kröll, *Comparative International Commercial Arbitration* (Kluwer Law International 2003) 21.
[51] NYC 1958 (n 13) art 1.
[52] Geneva Convention on Execution of Foreign Arbitral Awards of 1927 (adopted in Geneva on 26 September 1927, entered into force 25 July 1929) (1929) 92 LNTS 302 No 2096 (GC 1927), art 1.
[53] NYC 1958 (n 13) art I.

applicability of NYC 1958 far exceeds that of GC 1927, as the general application of NYC 1958 adopted the idea of 'international awards' suggested by the ICC.

The second improvement in NYC 1958 is the elimination of the requirement for 'double *exequatur*', which was both troublesome and heavily criticised. Article 4 of GC 1927 specifies two requirements for a party wishing to enforce an arbitral award: (1) to produce the original award or a duly authenticated copy of the award in accordance with the law of the State where the award was made and (2) to produce documentary evidence that the award has become final where the award was made.[54] Therefore, a party wishing to recognise or enforce an award in accordance with GC 1927 must first seek leave from the court where the award was made to ensure the award was final, and then seek second leave from the court in the Contracting State where the enforcement was sought. This requirement of 'double *exequatur'* acted against the facilitation of international trade.

Despite the struggles faced by the NYC 1958 delegates in reaching a compromise between facilitating international trade and respecting the principle of State sovereignty, it managed to remove the requirement for 'double *exequatur'* from the provisions of NYC 1958.[55] The final adopted version of Article III of NYC 1958 removed the requirement for a party claiming to enforce an award to prove that the award was final in the State where the award was made. The drafters of NYC 1958, in this sense, decided to go with the term 'binding award' rather than 'final award' to avoid demanding enforcement procedures as in GC 1927.[56]

A third improvement is the shift in the burden of proof to the party seeking to challenge enforcement of the award.[57] Article 4 of GC 1927 put the onus for (1) proving that an award was duly authenticated in the State where it was made and (2) producing documentary evidence that the award had become final in the State where the award was made onto the party claiming to recognise or enforce the arbitral award. Therefore, the

[54] GC 1927 (n 53) art 4.
[55] 'Consideration of the Draft Convention: Text of Articles III, IV and V proposed by Working Party 3' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (26 May 1958) UN Doc E/CONF.26/L.43.
[56] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39) 9.
[57] ibid.

winning party in an arbitration proceeding has to prove these two requirements in the court where the enforcement takes place.

Article III of NYC 1958 works in opposition to the system provided by the GC 1927 regime. According to Article IV, a party seeking to enforce an award need only supply the arbitration agreement and the award, while a party wishing to challenge an award must then prove the grounds to refuse or challenge it, as provided in Article V of NYC 1958.[58] Here, NYC 1958 provides for positive and 'pro-enforcement bias' requirements to encourage the facilitation of ICA for private dispute resolution. It is up to the party resisting the enforcement of an award to prove one of the exhaustive grounds stipulated under Article V of NYC 1958.

2.3 Scope of NYC 1958

NYC 1958 covers two essential ingredients of successful ICA, i.e. (1) the recognition of arbitration agreements and (2) the recognition and enforcement of arbitral awards. NYC 1958 was never intended to provide a complete set of rules for ICA, but rather to provide for and harmonise the two most important aspects of international arbitration, which are the obligation to give effect to arbitration agreements and the recognition and enforcement of foreign awards.[59] NYC 1958 covers the beginning and end of the arbitration process by compelling the parties to enter into an arbitration agreement at the beginning and then, at the end of the process, it covers the rules regarding the enforcement of arbitral awards.[60] The courts of Contracting States are required to recognise arbitration agreements and to recognise and enforce foreign arbitral awards made in a State other than their own.[61]

2.3.1 Recognition and Enforcement of Arbitration Agreements

The first scope covered by NYC 1958 is the obligation to recognise arbitration agreements. Arbitration, being a consensual dispute resolution method, may only take effect provided the parties have unanimously agreed to settle their dispute through

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[58] NYC 1958 (n 12) arts IV–V.
[59] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39) 10.
[60] Garnett (n 30) 403.
[61] Reinmar Wolff, *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Commentary* (Hart 2011) 3.

arbitration.[62] The NYC 1958 drafters were uncertain as to whether they should include a provision on arbitration agreements in a convention specifically intended for the recognition and enforcement of foreign arbitral awards.[63] The NYC 1958 drafters first agreed to draft a separate clause on arbitration agreements to be included as an additional protocol to the convention.[64] Only in the very last week of the NYC 1958 Conference did the drafters agree to include a provision to recognise arbitration agreements in NYC 1958.[65] Article II (3) of NYC 1958 obliges the court of a contracting State, upon receiving a request from one of the parties, to refer the matter to arbitration pursuant to the arbitration agreement made by the parties thereto. Article II (2) of NYC 1958 specifies the conditions for a valid arbitration agreement: (1) the arbitration agreement must be in writing and (2) it must be signed by both parties in an exchange of letters or telegrams. This thesis limits its analysis to the second scope of NYC 1958, i.e. the recognition and enforcement of foreign arbitral awards.

2.3.2 Recognition and Enforcement of Foreign Arbitral Awards

The second scope of NYC 1958 is the recognition and enforcement of foreign awards. In most cases, the winning parties in arbitration proceedings carry out the awards voluntarily without seeking recognition and enforcement from the courts.[66] It was anticipated that only a minority of award-debtors would have to seek the recognition and enforcement of foreign awards from the courts.[67] In this situation, award-debtors need to seek recognition and enforcement in domestic courts where the assets of the award-debtors are located.

Article III of NYC 1958 imposes a general duty on Contracting States to recognise and enforce such awards provided in accordance with the procedures laid down in Article IV of the Convention. Articles IV and V of NYC 1958 stipulate an 'enforcement regime' for

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[62] ICCA, 'ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges' (2011) <http://www.arbitration-icca.org/media/1/13890217974630/judges_guide_english_composite_final_jan2014.pdf>.
[63] 'Summary Record of the Second Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.2; 'Summary Record of the Seventh Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.7; 'Summary Record of the Ninth Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.9.
[64] 'Summary Record of the Ninth Meeting' UN Conference on International Commercial (n 63).
[65] 'Summary Record of the Twenty-fifth Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.25.
[66] Mistelis and Baltag (n 6) 322.
[67] ibid.

the recognition and enforcement of foreign awards where the party claiming to enforce an award has to supply documents pursuant to Article IV, and then it is up to the party resisting enforcement to prove one of the five limited grounds under Article V (1), and the enforcement court to consider one of the grounds under Article V (2).[68] NYC 1958 covers the recognition, enforcement and setting aside of an award. This chapter examines the terms recognition, enforcement and set aside to understand the differences between these three distinct legal processes in NYC 1958.

2.3.2.1 Definition of Recognition and Enforcement of Awards

As reflected in the full title of NYC 1958, the terms recognition and enforcement are often embraced together. However, these two terms have distinctive meanings and different roles in ICA. The recognition of awards and the enforcement of awards both refer to legal processes in which an award is given effect in the legal system of the State where recognition or enforcement is sought.[69]

Recognition refers to the legal process of incorporating an award into a State's legal system.[70] It is the first step to give effect to an award.[71] Courts may grant recognition to awards independent of the enforcement of awards.[72] Recognition also denotes an *exequatur* where a domestic court decides to confirm the validity and binding effect of an award.[73] Recognition is a defensive process whereby a party obtaining recognition of an award seeks to prevent the award-debtor raising the same issue already decided in an arbitration proceeding in a new court proceeding.[74] The party seeking to enforce the award may use the recognition obtained as a 'shield' to enforce the award by invoking the *res judicata* effect that the issues between the parties that were decided in arbitration

[68] Sirko Harder, 'Enforcing Foreign Arbitral Awards in Australia against Non-Signatories of the Arbitration Agreement' (2012) 8 Asian International Arbitration Journal 131, 137.
[69] Reinmar Wolff, *New York Convention : Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10 1958 : Article-by-Article Commentary* (Second, München, Germany : Verlag CH Beck 2019) 6.
[70] Dinis Braz Teixeira, 'Recognition and Enforcement of Annulled Arbitral Awards under the New York Convention' (2019) 8 Indian Journal of Arbitration Law 1, 7.
[71] Wolff (n 69) 6.
[72] Nigel Blackaby and others, *Redfern and Hunter on International Arbitration* (5th edn, Oxford University Press 2009) 627; Teixeira (n 70) 7.
[73] Wolff (n 69) 6.
[74] Blackaby and others (n 72) 627; Wolff (n 69) 6.

not be raised again in a new court proceeding.[75] Recognition of an award only involves giving effect to the legal status of the award in a domestic legal system.

Enforcement is a legal process of carrying out award provisions through available legal means in the enforcement State.[76] Enforcement of an award is the next step whereby the winning party seeks to carry out the award obtained through available legal means.[77] Contrary to the recognition process, the enforcement of awards 'presupposes' the process of recognition of awards.[78] NYC 1958 only provides for an obligation on the enforcement State to enforce the award but does not specifying the legal means which the winning party may apply. Contrary to recognition, enforcement is used as a 'sword' to compel the award-debtor to satisfy the award via legal means available in the enforcement State. [79]

2.3.2.2 Setting Aside an Award

Article V of NYC 1958 provides exhaustive and narrow grounds for enforcement Courts to apply upon application by a party opposing the recognition and enforcement of a foreign award. However, NYC 1958 is silent on the grounds for the challenge of an award by the supervisory seat. Set aside constitutes a legal process available to primary jurisdiction, i.e. the supervisory seat of the award.[80] In contrast, the process of recognition and enforcement of a foreign award is available to the secondary jurisdiction of an award, i.e. the court where enforcement is sought.[81] The effect of setting aside an award under Article VI is permanent and invalidates the said award for enforcement in any State in the world, whereas the effect of a refusal to enforce an award is limited to the State where the refusal is ordered.[82] Nevertheless, Contracting States have adopted distinct approaches in their application of Article V(1)(e) read together with Article VI on the enforcement of annulled awards. as discussed in Chapter 4.

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[75] Blackaby and others (n 72) 627–628; Wolff (n 69) 6.
[76] Teixeira (n 70) 7.
[77] Blackaby and others (n 72) 628.
[78] ibid 627; Teixeira (n 70) 7.
[79] Wolff (n 69) 6.
[80] ibid 8.
[81] ibid.
[82] Patricia Nacimiento, 'Article V (1) (A)' in Herbert Kronke, Patricia Nacimiento and Nicola Christine Port (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 206.

The award debtor in challenging an award in the court where the award was rendered intends to set aside the award in full or in part.[83] The setting aside of an award attacks the award at its source to prevent the award from recognition and enforcement by courts in other States. However, as the grounds which the supervisory court may adopt to set aside an award are unregulated, this may hinder the uniform application of Article V(1)(e) of NYC 1958, as discussed further in Chapter 4. UML aims for the convergence of domestic law on this issue by adopting the grounds available under Articles V(1)(a)-(d) of NYC 1958 into Section 34 of UML. Section 34 specifies rules pertaining to the process of setting aside by the primary jurisdiction, i.e. the court where the award was rendered. However, as discussed in Section 2.3.1, the soft law status of UML renders it optional for the States adopting UML to adopt Section 34 in full or alter it to meet the needs of the domestic law of States.

2.3.3.3 Foreign Arbitral Awards

Article I(1) of NYC 1958 provides for the scope of awards under NYC 1958 whereby it will apply to the recognition and enforcement of foreign arbitral awards made in the territory of a State other than the State where recognition and enforcement are sought. Article 1(1) also mentions that it shall apply to awards not considered domestic awards in the enforcement State. NYC 1958 provides for two types of arbitral awards: (1) awards subject to the territorial criterion where the award was made, (2) awards not considered domestic in the State where enforcement is sought.[84] NYC 1958 does not define the meaning of an award.[85]

Article I(1) is an attempt to reconcile and find a compromise between two views covering two types of awards subject to NYC 1958. The *travaux préparatoires* of NYC 1958 show that there were two majority views presented by the NYC 1958 drafters, (1) those mainly favouring the principle of the place of arbitration and (2) those favouring the principle of the nationality of the award.[86] The former refers to territorial criterion of the place where the award was made, and the latter refers to the law the award was subject to. In ICA, the

[83] Wolff (n 69) 8.
[84] NYC 1958 (n 13) arts 1(1) – I(2).
[85] Lew, Mistelis and Kröll (n 49) 699.
[86] 'Consideration of the Draft Convention: Report of Working Party 1, UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (2 June 1958) UN Doc E/CONF.26/L.42.

parties have autonomy to choose the place of arbitration and the law governing arbitration.

2.3.3.4 Reservations

NYC 1958 allows States to enter into two types of reservation prior to ratifying or acceding to NYC 1958. The scope of applicability of foreign awards is limited due to the reservations entered into by Contracting States. First, a Contracting State may enter into a reciprocity reservation. It allows Contracting States to enter into a reservation upon ratifying or acceding to NYC 1958 so that they will only recognise and enforce arbitral awards made in another NYC 1958 contracting State. To date, 80 Contracting States of NYC 1958 have entered into reciprocity reservations and a further nine Contracting States have entered into a reservation such that they will only apply NYC 1958 to the extent of States granting reciprocal treatment.[87] This reservation reduces the applicability of NYC 1958 and puts NYC 1958 into a similar situation to GC 1927. Nevertheless, with 168 Contracting States to date, the reciprocity requirement no longer has a significant impact on the overall effectiveness of NYC 1958.[88]

The second reservation offered by NYC 1958 is a commercial reservation whereby Contracting States may restrict the application of NYC 1958 only 'to differences out of legal relationships, whether contractual or not, which are considered as commercial under the law of the State making such declaration'.[89] There are currently 52 NYC contracting States that have entered into commercial reservations, thus limiting the applicability of NYC 1958 only to commercial matters.[90] However, as the goal of NYC 1958 is to increase the effectiveness of arbitration in the settlement of private law disputes, this commercial reservation does not go against the obligation of Contracting States to enforce and recognise foreign arbitral awards that are commercial in nature.

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[87] UNCITRAL Secretariat, *UNCITRAL Secretariat Guide on the Convention o the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)* (2016th edn, United Nations Publication 2016) <https://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/2016_Guide_on_the_Convention.pdf> accessed 2 January 2020.
[88] Bagner (n 45) 32.
[89] NYC 1958 (n 13) art I(3).
[90] UNCITRAL Secretariat (n 87).

2.4 Definition of Harmonisation of Law

This section provides a definition of harmonisation as employed in this thesis. Harmonisation is defined as a process of bringing rules of law close to a similar condition or concept but not in exactly the same way and embracing diversity of laws. The definition of harmonisation is important to determine the standard of harmonisation expected by the implementation of NYC 1958 in Section 2.6.

2.4.1 Harmonisation and Unification of Law

All the definitions mentioned below attempt to define harmonisation as a process of bringing rules of law close to a similar condition or concept, but not in exactly the same way, and they do not require the complete elimination of diversity of laws. Meanwhile unification, on the other hand, aims at the sameness of rules to be adopted and applied in the same way. This research defines harmonisation as a process of bringing rules of law close to a similar condition or concept but not in exactly the same way and not requiring the complete elimination of diversity of laws. In other words, the harmonisation of law is often associated with the aim of similarities of laws while retaining diversity, while unification aims for absolutely identical rules. The two terms, harmonisation and unification, are indeed interrelated, as harmonisation refers to a consensus on the interpretation of specific terminology whereas uniformity requires conformity to and unison of rules.[91] Furthermore, the goal of harmonisation is to achieve a system within which laws will operate efficiently to create stability and predictability, where harmonisation does not presuppose a system of identical rules of absolute uniformity.[92]

At a general level, linguistically, harmonisation refers to introducing two or more subjects that are in agreement with one another.[93] Also, the term harmonisation is often used to connote a similar meaning, or sometimes used interchangeably with integration,

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[91] Katherine L Lynch, *The Forces of Economic Globalization : Challenges to the Regime of International Commercial Arbitration* (Kluwer Law International 2003) 198.

[92] Stelios Andreadakis, 'Regulatory Competition or Harmonisation: The Dilemma, the Alternatives and the Prospects of Reflexive Harmonisation' in Mads Tønnesson Andenæs and Camilla Baasch Anderson (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 58.

[93] Mads Tønnesson Andenæs, Camilla Baasch Andersen and Ross Ashcroft, 'Towards a Theory of Harmonisation' in Mads Tønnesson Andenæs and Camilla Baasch Anderson (eds), *Theory and Practice of Harmonisation* (Edward Elgar 2011) 576.

homogenisation, convergence, unification or parallelism. Andenæs, Anderson and Ashcroft explain the differences between these terms as follows:[94]

> [C]onvergence means to come together … Uniformity implies the creation of something identical. Homogenisation is defined in terms of uniformity. Parallelism is slightly different as there need not be uniformity, but the processes may be aiming at the same direction.

In this section, the discussion only revolves around the notions of harmonisation and unification as, despite having a slightly different meaning, the term harmonisation is frequently employed as the converse of unification,[95] and both play a vital role in ICA.[96] Even though the above concepts have similar linguistic meanings to harmonisation, they should not be used interchangeably with harmonisation in order to avoid confusion in research, debates and discussions on the subject of harmonisation.[97]

Most scholars argue that the definition of harmonisation is problematic as different literature uses the term interchangeably with unification, whereas a minority holds that these terms have distinct and independent meanings. Nevertheless, Zeller, Korzhevskaya, Goldring and Andredakis provide identical definitions of harmonisation, and all those definitions refer to making laws 'similar' to connote the harmonisation of law and also use the terms 'sameness', 'identical' and 'unity' to connote the unification of law.[98] Boodman's definition of harmonisation, interestingly, adds the element of the retention of individuality of laws, which is a completely opposite view to the goal of traditional unification proponents aiming for the total elimination of diversity of laws through harmonisation.[99] However, there is no clear agreement among scholars on the definition of harmonisation, as it has various similar meanings, with similar terms, but dependent on the subject matter of the context in which the term is used.[100]

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[94] ibid.
[95] Anzhela Korzhevskaya, 'Do We Still Need a Convention in the Field of Harmonisation of the International Commercial Law Comments' (2014) 1 BRICS Law Journal 82, 83.
[96] Lynch (n 91) 198.
[97] Andenæs, Andersen and Ashcroft (n 93) 576.
[98] Bruno Zeller, *CISG and the Unification of International Trade Law* (Routledge-Cavendish 2007); Korzhevskaya (n 95) 83; John Goldring, '"Unification and Harmonisation" of the Rules of Law' (1978) 9 Federal Law Review 284, 289; Andreadakis (n 92).
[99] Martin Boodman, 'The Myth of Harmonization of Laws' (1991) 39 American Journal of Comparative Law 699, 705.
[100] Lynch (n 91) 199.

The thesis adopts the goal of harmonisation which is achieving a system within which laws will operate efficiently to create stability and predictability. Harmonisation in this research does not presuppose a system of identical rules with absolute uniformity.[101] Unlike harmonisation, the goal of the unification of laws is the standardisation of statutes employing uniform instruments that will be adopted and applied in the same way.[102] The proponents of unification also pursue the objective of eliminating diversity in laws in transnational transactions.[103]

2.4.2 Andersen's Harmonisation of Law

For this thesis, the term harmonisation does not connote the traditional use of unification, which requires absolute uniformity with identical rules. Rather, this thesis will associate the use of harmonisation with the modern term uniformity, as promoted by Andersen, where the degree of similarity of rules is not required to be absolute. As such, harmonisation in this research refers to the process of setting rules on recognition and enforcement of foreign awards to achieve greater functional similarity, but which do not aim to achieve absolute uniformity. The goal of harmonisation in this research is bringing rules on recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining diversity in the law of Contracting States.

This research adopts Andersen's definition of 'uniformity'.[104] Andersen defines uniformity as 'the varying degree of similar effects on phenomena across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form'.[105] Andersen not only uses the more accommodating term 'similar' to explain unification, but her definition of uniformity also reflects more on the notion of harmonisation. Andersen's definition of uniformity mirrors the definition of harmonisation as contended by the majority of scholars, as explained above.[106]

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[101] Andreadakis (n 92) 58.
[102] Lynch (n 91) 198.
[103] ibid.
[104] The researcher acknowledges that Andersen uses 'uniformity' to connote the functionality expected in the UN Convention on Contracts for the International Sale of Goods (CISG 1980). Both CISG 1980 and NYC 1958 are harmonising instruments. The research adopts Andersen's definition and categorisation of 'uniformity', 'textual uniformity' and 'applied uniformity' to benefit this research.
[105] Andersen (n 27) 32.
[106] Andersen's notion of 'uniformity' connotes the definition of harmonisation in this research.

Additionally, it is also clear that she uses the terms harmonisation and uniformity interchangeably and does not point to any differences between them. Andersen's modern unification of laws refers to a situation where independent States voluntarily submit to a set of rules, and the success of her 'uniformity' depends upon the degree of similarity attained even though it is of varying degrees and not absolute. A set of rules or laws that have uniform law labels will only be methodologically harmonised when they have been implemented cross-jurisdictionally similarly and promoted similarity in that area of law.[107] By categorising them as textual uniformity and applied uniformity, she argues that attainment of the goal of uniformity to varying degrees is where a similar outcome is reached through the application of textually 'uniform' instruments.[108]

2.4.3 Reasons for Harmonisation in the Application and Interpretation of NYC 1958

The thesis seeks harmonisation in the application of the NYC 1958 by Contracting States for three main reasons. First, and the most important reason, NYC 1958 stipulates 'international legislative standards' for rules pertaining to the recognition and enforcement of foreign arbitral awards.[109] NYC 1958 minimised the gap between domestic arbitration laws on the recognition and enforcement of foreign awards.[110] It is important that Contracting States of NYC 1958 apply similar interpretation and application of NYC 1958. NYC 1958 is one of the most successful international treaties the world has ever had, with many ratifications secured.[111] As of June 2021, with 168 Contracting States, more than four fifths of States are signatories to NYC 1958.[112] Furthermore, UML follows the regime of NYC 1958 on rules for the recognition and enforcement of foreign awards. The resolution adopted by the General Assembly on the adoption of UML stipulates that it believes that the modernisation of articles in UML contributes to the promotion of uniform interpretation and application of NYC 1958.[113] UML is adopted by 80 States at the time of writing.[114] With Contracting States coming

[107] Andersen (n 27) 32.
[108] ibid 33.
[109] Wolff (n 69) 5.
[110] Renata Brazil-David, 'Harmonization and Delocalization of International Commercial Arbitration' (2011) 28 Journal of International Arbitration 445, 453.
[111] Wolff (n 69) 5.
[112] UNCITRAL (n 17).
[113] UNGA Res 40/72 (11 December 1985) General Assembly 40th Session 308.
[114] 'Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' (*United Nations Commission on International Trade Law*) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> accessed 8 January 2020.

from diverse law backgrounds, NYC 1958 provides for a standard regime on the enforceability of foreign awards in other States. Regardless of whether a Contracting State is a monist or a dualist State (see Section 2.6.1.1), a Contracting State is expected to interpret and apply NYC 1958's provisions in accordance with the rule of treaty interpretation under VCLT 1969. Whilst diversity of laws in Contracting States is expected, the courts of Contracting States are expected to interpret and apply NYC 1958 provisions similarly.

Second, harmonisation in the application of NYC 1958 is desirable for the efficacy of ICA as a private dispute resolution mechanism preferred by international business. The final act to NYC 1958 stipulates that the aim of NYC 1958 is to 'contribute to increasing the effectiveness of arbitration in the settlement of private law disputes' (see Section 2.2).[115] NYC 1958 provides some level of certainty to parties in ICA whereby they can seek to recognise and enforce foreign arbitral awards 'almost anywhere in the world'.[116] In comparison to foreign judgments, it is still easier to enforce foreign awards in most parts of the world.[117] The enforcement of foreign judgments depends on a specific bilateral or international treaty ratified by the State where the enforcement is sought, taking into consideration the State where the judgment was made.[118] For the enforcement of foreign awards, harmonisation in the application of NYC 1958 by NYC 1958 instils certainty that foreign awards made in a large number of Contracting States are enforceable in most parts of the world.

Third, harmonisation in the application of NYC 1958 increases judicial efficiency in the recognition and enforcement of foreign awards. Harmonisation in the implementation of NYC 1958 would improve judicial efficiency and avoid unnecessary litigation that might hamper the enforcement of international arbitral awards. Judicial inefficiency would cause various severe problems and cost to both the public purse and private actors.[119] Inefficiency within the judiciary would encourage litigation and might work against the

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[115] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 17).
[116] Wolff (n 69) 5.
[117] ibid.
[118] For example, Brussels I Regulation facilitates the recognition and enforcement of foreign judgments of Member States of the European Union. Also, Malaysian REJA 1958 facilitates the enforcement of foreign judgments made in Commonwealth States as specified in Schedule I of REJA 1958 in Malaysia.
[119] José Angelo Estrella Faria, 'Future Directions of Legal Harmonisation and Law Reform : Stormy Seas or Prosperous Voyage ?' (2009) 14 Uniform Law Review - Revue de droit uniforme 5, 19.

reasons why the parties chose to enter into arbitration in the first place, which is to reduce litigation costs and avoid lengthy litigation procedures in court. NYC 1958 provides a straightforward and efficient procedure to enforce foreign arbitral awards, no matter where enforcement is requested.[120] Harmonisation in the application and interpretation of NYC 1958 would reduce the risk of valid but unenforceable awards.[121]

Harmonisation in this research refers to the process of setting rules on the recognition and enforcement of foreign awards to achieve greater functional similarity, but rules which do not aim to achieve absolute uniformity. Considering the diversity of laws in the Contracting States of NYC 1958, it is unlikely to seek total uniformity in the application and interpretation of NYC 1958. The *travaux préparatoires* for NYC 1958 indicate that NYC 1958 was established to overcome the inadequacies of GC 1927 in terms of facilitating the enforcement of foreign arbitral awards, but at the same maintaining respect for the principle of State sovereignty.[122] NYC 1958 itself is a product of compromise between the facilitation of international trade and maintaining the Principle of State Sovereignty. Therefore, it is expected that courts in enforcement States will exert some control over the enforceability of foreign awards, as NYC 1958 allows some discretion under Article V of NYC 1958. Chapters 4, 5 and 6 of the thesis investigate whether there is harmonisation in the application and interpretation of NYC 1958 on controversial issues by Contracting States.

2.5 New York Convention 1958 as a Public International Law Instrument

While ICA is private international law, NYC 1958 is an instrument of public international law. NYC 1958 is a treaty by purview of Article 2 of VCLT 1969 which defines a treaty as 'an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or two or more related instruments and whatever its particular designation'.[123] NYC 1958 is an example of a

[120] Peter Gillies, 'Enforcement of International Arbitration Awards - The New York Convention' (2005) 9 International Trade and Business Law Review 19, 19.
[121] Mary B Ayad, 'Towards a Truly Harmonised International Commercial and Investment Arbitration Law Code (HICIALC): Enforcing MENA-Foreign Investor Arbitrations via a Single Regulatory Framework: A New Map for a New Landscape' (2010) 7 Macquarie Journal of Business Law 285, 294.
[122] ECOSOC 'Report of the Committee' (n 48).
[123] VLCT 1969, art 2.

successful treaty both in the number of Contracting States and how it contributes to the effectiveness of ICA as a private dispute resolution system.[124]

2.5.1 Hard Law and Soft Law Theories

Harmonisation in the implementation of NYC 1958 relates to the status of NYC 1958 as a treaty in international law. The degree of harmonisation expected of international law instruments varies greatly, depending on whether an instrument is hard law or soft law. These instruments or "vehicles", in Goode's terminology, are capable of effecting different standards of harmonisation. Goode asserts that there are at least nine vehicles of harmonisation, namely:[125]

> …(1) a multilateral Convention without a Uniform Law as such; (2) a multilateral Convention embodying a Uniform Law; (3) a set of bilateral Treaties; (4) Community legislation – typically, a Directive; (5) a Model Law; (6) a codification of custom and usage promulgated by an international nongovernmental organisation; (7) international trade terms promulgated by such an organisation; (8) model contracts and general contractual conditions; (9) restatements by scholars and other experts.

The first four instruments above secure legal force, whereas the rest of them are not capable of securing legal force and depend on the State and commercial actors incorporating them as a 'basis of ideas'.[126] In Goode's categorisation, NYC 1958 is capable of becoming either of the first two instruments depending on the Contracting State's implementation of NYC 1958, as discussed in Section 2.6.1.

The thesis explores the theoretical conception of hard law and soft law through legal positivist, constructivist and rationalist lenses to examine the standard expected in the implementation of NYC 1958. NYC 1958 is a hard law instrument fulfilling the elements of both the hard law concept from legal positivists and hard legalisation theory from rationalists.

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[124] August Reinisch, 'The New York Convention as an Instrument of International Law' in Franco Ferrari and Friedrich Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention* (Kluwer Law International 2020).
[125] Roy Goode, 'Reflections on the Harmonisation of Commercial Law Part I: Activities Concerning the Unification of Law' (1991) 1991 I Uniform Law Review 54, 57.
[126] ibid.

2.5.1.1 Legal Positivists: Binding and Non-binding Law

NYC 1958 is hard law according to the binding and non-binding test of legal positivists. NYC 1958, a well-known and successful harmonising instrument in ICA, is binding upon Contracting States. NYC 1958 Contracting States are obliged to incorporate the provisions of NYC 1958 into their legal systems. The binding efficacy of an instrument is the absolute criterion for legal positivists to acknowledge a hard law instrument.[127] An instrument that comes with a binding commitment is hard law, while an instrument that does not possess any binding commitments is soft law.[128] NYC 1958 is a treaty imposing obligations on Contracting States to recognise and enforce arbitration agreements and foreign arbitral awards. A distinctive characteristic of hard law is the ability to bind and impose legal obligations.[129] Hard law is the 'hardest' due to the obligation on parties to take the law as it is.[130]

In contrast, soft law allows the parties to choose to either agree upon their contract or modify it to suit the needs of the parties. There is no obligation to take soft law as it is. Klabbers rejects soft law being law, as soft law implies a lack of political or moral commitment and therefore is left to its own devices (or for the State to determine how to utilise soft law).[131] Legal positivist scholars only regard binding instruments as law and often reject the concept and existence of soft law due it not being more or less binding.[132]

2.5.1.2 Rationalists: Degree of Legalisation Test

Rationalist scholars submit that the concept of binding and non-binding effect is a misleading one.[133] However, rationalists do acknowledge that the binding effect concept is efficient to reflect the degree of commitment by States in implementing international

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[127] Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706, 713.
[128] Gregory Shaffer and Mark A Pollack, 'Hard and Soft Law' in Jeffrey L Dunoff and Mark A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2012) 198.
[129] ibid.
[130] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade Law' in Ian &Mistelis Fletcher Loukas & Cremona, Marise (ed), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2001) 16.
[131] Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic Journal of International Law 167, 168–169.
[132] Shaffer and Pollack (n 127) 713.
[133] ibid.

instruments.[134] Abbott and Snidal introduced the concept of 'degree of legalisation' to assess the distinctive features of hard and soft legalisation.[135] The theory of legalisation determines the efficacy and standard of harmonisation intended by international instruments such as NYC 1958. Legalisation refers to a specific set of characteristics that international instruments may or may not retain, depending on three factors: obligation, precision and delegation.[136]

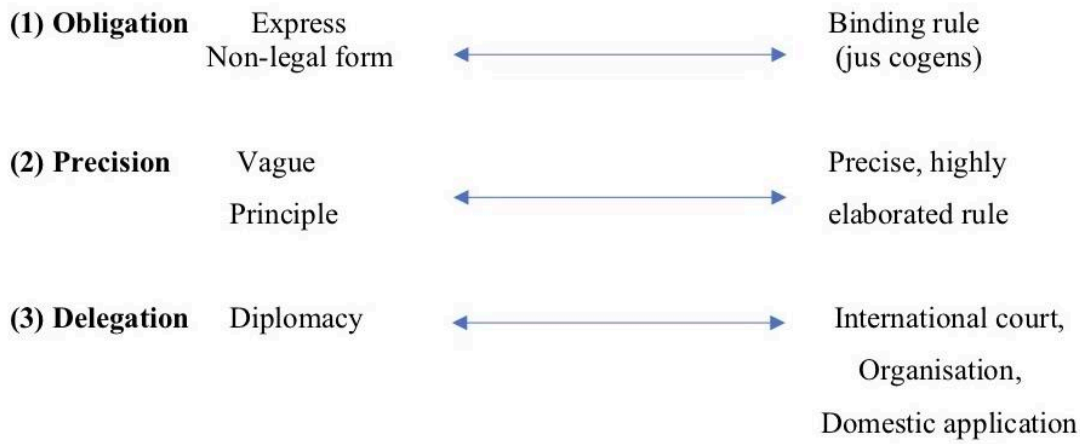

Diagram 1: The dimensions of legalisation[137]

Diagram 1 above refers to the degree of legalisation when the attributes on the right connote the strongest or hardest forms of the dimension of legislation, whereas the attributes on the left refer to the weakest (softer) forms of the dimension of legalisation. Referring to the categorisation of hard and soft legalisation seen through the prism of legalisation, Abbott and others define hard law as 'legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law'.[138] Therefore, for an instrument to be hard legalisation, according to this legalisation concept, it must possess all three dimensions of legalisation at the highest level. Soft law, on the other hand, covers the rest of the instruments that do not fulfil one or more requirements of obligation, precision and delegation.

[134] Shaffer and Pollack (n 128) 199–200.
[135] Kenneth W. Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421, 421.
[136] Kenneth O W. Abbott and others, 'The Concept of Legalization' (2000) 54 International Organization 401, 401.
[137] ibid 404.
[138] W. Abbott and Snidal (n 135) 705.

NYC 1958 is hard law in accordance with the degree of legalisation test provided by the rationalists. NYC 1958 fulfils the hardest form of the dimension of legalisation in three criteria: obligation, precision and delegation. NYC 1958 is 'legally binding obligations that are precise … and that delegate authority for interpreting or implementing the law'.[139] First, NYC 1958 fulfils the obligation element for hard legalisation theory. Obligation refers to a legal obligation whereby the State or other actors such as international organisations are compelled and legally bound to follow specific rules or commitments.[140] The NYC 1958 is a treaty intended to be binding on Contracting States. Articles I(1) and III of NYC 1958 adopt a universal principle whereby NYC 1958 imposes an obligation on Contracting States to recognise and enforce foreign arbitral awards made by States other than the enforcement State. The universal principle of NYC 1958 imposes an obligation on an NYC 1958 Contracting State to recognise and enforce any arbitral awards made in a State other than the enforcement State, regardless of whether the State of origin of the award is a Contracting State of NYC 1958 or not.

However, the hardest degree of obligation of a treaty such as NYC 1958 may be lessened if the instrument includes 'softening devices', such as escape clauses and reservations.[141] Article 1(3) of NYC 1958 allows Contracting States to adopt two types of reservations: reciprocity reservations and commercial reservations. The first reservation of NYC 1958 allows Contracting States to make a reservation upon ratifying or acceding to NYC 1958 so that they will only recognise and enforce arbitral awards made in other NYC 1958 Contracting States. Nevertheless, with 168 Contracting States to date,[142] almost five-sixths of the States in the world, the reciprocity requirement no longer has a significant impact on the overall effectiveness of NYC 1958.[143] The second reservation offered by NYC 1958 is a commercial reservation whereby Contracting States may restrict the application of NYC 1958 to commercial matters only.[144]

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[139] Shaffer and Pollack (n 127) 714–715.
[140] W. Abbott and others (n 136) 401.
[141] Kenneth W Abbott, 'The Many Faces of International Legalization The Challenge of Non-State Actors: Standards and Norms in International Law' (1998) 92 American Society of International Law Proceedings 57, 59.
[142] UNCITRAL (n 17).
[143] Bagner (n 45) 32.
[144] NYC 1958 (n 12) Art I (3).

Second, NYC 1958 also fulfils the second requirement for hard legalisation. Precision connotes the idea that rules or laws are apparent and distinct from defining an instrument unambiguously.[145] NYC 1958 is a precise convention regulating arbitration agreements and the recognition and enforcement of awards. The Economic and Social Council of the United Nations specifically passed resolution 604 (XX1) to convene a conference and subsequently concluded a convention on the recognition and enforcement of foreign arbitral awards so as to increase the effectiveness of arbitration in the settlement of private law disputes.[146] NYC 1958 imposes precise obligations on contracting States to recognise and enforce foreign arbitral awards and arbitration agreements. Articles I and III provide for a precise obligation for Contracting States to recognise and enforce foreign arbitral awards. Article II stipulate precise rules for the obligation to recognise and enforce arbitration agreements.

Third, NYC 1958 fulfils the third and last element for hard legalisation. Delegation indicates that an instrument empowers a third party, e.g. a court, to implement, interpret and apply the rules and to resolve any disputes regarding the instrument.[147] Hard legalisation requires the hardest delegation element, in that a third party, such as an international court, organisation or domestic court has the authority to implement, interpret and apply the rules of the instrument.[148] Upon ratifying NYC 1958, Contracting States must directly implement NYC 1958 in the domestic sphere or transform NYC 1958 into domestic law of the State. The implementation of NYC 1958 in domestic law depends on whether a Contracting State is a monist or dualist State. NYC 1958 empowers the courts of Contracting States to recognise and enforce foreign arbitral awards made in other States. NYC 1958 also furnishes discretionary powers on enforcement courts to decide matters pertaining to the refusal of enforcement of awards under Article V of NYC 1958.

2.5.1.3 Constructivists: Effectiveness of Law

The thesis submits that the position of NYC 1958 as a hard law instrument further enhances the effectiveness brought by NYC 1958 in harmonising the rules on the

[145] W. Abbott and others (n 136) 401.
[146] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15)
[147] W. Abbott and others (n 136) 401.
[148] W. Abbott and Snidal (n 135) 401.

recognition and enforcement of foreign arbitral awards. Constructivists prefer soft law such as UML rather than NYC 1958. They focus on how international instruments are capable of effecting changes in a State's position on specific rules through 'transnational processes of interaction, deliberation, persuasion and acculturation over time'.[149] They put more emphasis on the effectiveness of law in the implementation stage, rather than its binding efficacy in the initial enactment period.[150]

The thesis argues that uniform interpretation in the implementation of NYC 1958 is important for the efficacy of international law on the recognition and enforcement of foreign awards. The main attraction of ICA is the worldwide enforceability of awards, brought by harmonisation in the implementation of NYC 1958. The facilitation of a soft law instrument such as UML complements the effectiveness of NYC 1958. The constructivists favour soft law over hard law for its ability to facilitate shared norms and a common purpose. [151] However, the soft law character of a model law allows States to 'cherry-pick' the rules and may undermine harmonisation in its adoption. Constructivists focus more on implementation in action, rather than black-letter law. Unlike legal positivists and rationalists, constructivists assert that the classification of hard and soft law is too narrowly focused on the interpretation and enforcement of law by courts and does not take into account the operation of international law, which is on an interactional basis over time.[152]

2.5.1.4 The UNCITRAL Model Law on International Commercial Arbitration

UML is an example of a soft law. UNCITRAL introduced UML in 1985. There were massive disparities between various domestic arbitration laws and a necessity to harmonise the laws governing international arbitration.[153] In 1985, UNCITRAL adopted Resolution 40/72, convinced that UML, together with NYC 1958 and the Arbitration Rules of UNCITRAL, 'significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations'.[154] UML was adopted as a response not to embark on a revision of

[149] Shaffer and Pollack (n 128) 199.
[150] Shaffer and Pollack (n 127) 713.
[151] ibid 708.
[152] Shaffer and Pollack (n 128) 199.
[153] Gerold Herrmann, 'UNCITRAL's Work towards a Model Law on International Commercial Arbitration' (1984) 4 Pace Law Review 537, 544.
[154] UNGA Res 40/72 (11 December 1985) General Assembly 40th Session 308.

NYC 1958 but instead as a means to promote the clarification of some issues and concerns by drafting uniform rules on arbitral procedures.[155] UML has been a very successful product of UNCITRAL, having been adopted by 80 States at the time of writing.[156] UML sets out rules and principles that can be adapted to provide or improve the domestic laws governing ICA.[157] UML covers all stages from arbitration agreements to judicial reviews of awards, with a specific intention being to satisfy the 'desirability of uniformity of the law of arbitral procedures and the specific needs of ICA practice'.[158] UML was further amended in 2006 to conform to modern arbitration rules and practices in ICA.

UML is soft law and confers soft legalisation on ICA. A State adopting UML may adopt it in its entirety or partially in an effort to conform to the domestic law of that State. Legal positivists regard UML as soft law as it lacks any binding effect. A model law in its very essence serves as guidance for domestic legislators.[159] UML also confers soft legalisation on ICA. The degree of legalisation theory specifies the hardest target of the three elements of obligation, precision and delegation in order to connote an instrument to confer a hard degree of legalisation. UML lacks the first criterion of obligation as, by its nature, a model law does not possess a binding rule. UML as model law does not obligate States to adopt it, as a State in adopting UML may pick and choose the rules to suit the needs of the State. On the other hand, UML does fulfil the requirement of precision for hard legalisation. UML, in its aim to promote uniformity in laws on arbitral procedures, incorporates precise arbitration rules. Next, UML does not fulfil the third element of delegation as the adoption of UML does not delegate but recommend that States give consideration to adopt UML.[160] It is up to States to delegate the adoption of UML to a judicial body in its territory. UML is soft law that confers soft legalisation as it does not fulfil the criteria in the hardest form of obligation, precision and delegation.

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[155] Herrmann (n 153) 539.
[156] 'Status UNCITRAL Model Law on International Commercial Arbitration (1985), with Amendments as Adopted in 2006' (n 114).
[157] Royston Miles Goode, Herbert Kronke and Ewan McKendrick, *Transnational Commercial Law : Text, Cases, and Materials* (Oxford University Press 2007) 633.
[158] UNGA Res 40/72 (n 154).
[159] Gabrielle Kaufmann-Kohler, 'Soft Law in International Arbitration: Codification and Normativity†' (2010) 1 Journal of International Dispute Settlement 283, 295.
[160] UNCITRAL 'Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006' (Amended on 7 July 2006) A/40/17 Annex I & A/61/17 Annex I.

2.6 Standards of Harmonisation in the Implementation and Application of NYC 1958

As discussed in Section 2.4, the goal of harmonisation in this research is bringing the rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining diversity of law in Contracting States. While ICA is known as one of the most successful private international laws for decades,[161] NYC 1958 is a public international law instrument.[162] It is, therefore, of heuristic value to adopt Andersen's standard of textual uniformity and applied uniformity in discussions on the implementation of NYC 1958. Based on the discussion above in section 2.4, harmonisation is very much dependent on a process to bring laws closer to the extent that they become 'similar'. Anderson categorises her 'modern uniformity' into two separate categories: the similarity of legal texts (textual uniformity) and similarity in the implementation of uniform texts (applied uniformity).[163] The attainment of harmonisation is where the application of textually harmonised instruments reaches a similar outcome.

The standard expected, due to the public international law element, is for a Contracting State to adopt textual harmonisation and applied harmonisation in the implementation and application of NYC 1958. First, Contracting States of NYC 1958 are expected to implement the provisions of NYC 1958 as closely as possible in order to achieve textual harmonisation. Second, the courts of a Contracting State are expected to apply NYC 1958 by adopting uniform interpretation to ensure similar application of the text of NYC 1958 in all Contracting States.

Harmonisation in the application and interpretation of NYC 1958 is important to ensure the relevance of ICA as the preferred method to resolve cross-border commercial disputes. The 2018 International Arbitration Survey revealed that the most valuable characteristic of ICA is the enforceability of awards.[164] NYC 1958 provides for a standard

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[161] SI Strong, 'Beyond the Self-Execution Analysis: Rationalizing Constitutional, Treaty, and Statutory Interpretation in International Commercial Arbitration' (2013) 53 Virginia Journal of International Law 499, 509.
[162] ibid.
[163] Andersen (n 27) 32–33.
[164] White &Case LLP and Queen Mary University of London School of International Arbitration, '2018 International Arbitration Survey: The Evolution of International Arbitration' (*Queen Mary University of London & White & Case LLP*, 2018) 7 <http://www.arbitration.qmul.ac.uk/media/arbitration/docs/2018-International-Arbitration-Survey---The-Evolution-of-International-Arbitration-(2).PDF> accessed 1 April 2021.

regime for the recognition and enforcement of foreign awards, having four-fifths of the world as Contracting States. Also, NYC 1958 is a hard law instrument which is binding upon Contracting States and confers the hardest legalisation in international law. However, has NYC 1958 achieved harmonisation through its implementation, by having four-fifths of the world ratify NYC 1958 to date?

2.6.1 Textual Harmonisation: Textual Implementation of NYC 1958 in Domestic Law

Textual harmonisation requires varying degrees of similarity for the textual implementation of NYC 1958 into the domestic law of contracting States.[165] The test for textual harmonisation requires a thorough examination of the wording of the provisions of NYC 1958. The standard of harmonisation for the textual harmonisation expected of NYC 1958 is for Contracting States to adopt the provisions of NYC 1958 as closely as possible to the original texts of NYC 1958. Textual harmonisation does not require absolute sameness in the implementation of textual provisions, i.e. verbatim word-by-word transplanting of the original texts of NYC 1958 into the domestic law of Contracting States, but rather similarity in the implantation or transformation of the texts of NYC 1958 and domestic law implementing NYC 1958.

NYC 1958 is a hard law and a binding international convention which has the hardest degree of legalisation, as discussed in section 2.5.1. Upon ratification, NYC 1958 specifies obligations for Contracting States to either directly apply or transform the provisions of NYC 1958 into their domestic legislation. The degree of textual harmonisation expected of a hard law such as NYC 1958 is higher than that of a non-binding soft law such as UML 1985. UML is a model law, and it is natural to expect States to make some modifications when adopting a model law to suit the needs of domestic law. However, Contracting States of NYC 1958 are expected to fulfil the obligations stipulated by NYC 1958, in good faith, by implementing the textual harmonisation of NYC 1958 as similarly as possible.

[165] Andersen (n 27) 33.

The ratification of NYC 1958 does not automatically secure its implementation in Contracting States.[166] An international convention or a uniform text is formally implemented into a Contracting State's law by way of direct adoption through ratification or enactment of national legislation.[167] The application of NYC 1958 via the domestic law of Contracting States depends on whether a State is a monist or dualist State. Upon the ratification of harmonisation instruments, a contracting State must incorporate them into its domestic law without amendment or delay.[168]

What may hamper the direct textual harmonisation of a uniform instrument is a delay by the national legislature in adopting or amending domestic law in accordance with NYC 1958.[169] Additionally, for States requiring translations of the texts of harmonisation instruments, there is the risk of inaccurate translation that might concern the essential aspect of agreed rules in the original versions of texts.[170] Besides, the reservations entered by States when ratifying the convention must not be intentionally misused to limit the harmonising impact of a convention.[171]

2.6.1.1 Reception of NYC 1958 at the Domestic Level

To investigate the reception of NYC 1958 into domestic law, it is important to explore the theoretical relationship between international law and domestic law. Traditional theories that are often discussed by scholars regarding the relationship between international and domestic law are monism and dualism theories. NYC 1958, as an international law instrument, 'binds individuals, but only mediately and through the State'.[172] The two conflicting theories of monism and dualism describe the affiliation of international and domestic law.[173] Discussion of the reception of NYC 1958 at the

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[166] Mohamed Aboul-Enein, 'The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards: What Needs to Be Done for the Future' (2008) 2 Dispute Resolution International 178, 79.
[167] Estrella Faria (n 119) 26.
[168] Andrew Tweeddale and Keren Tweeddale, *Arbitration of Commercial Disputes : International and English Law and Practice* (Oxford University Press 2005) 436.
[169] Michael Joachim Bonell, 'International Uniform Law in Practice – Or Where the Real Trouble Begins' (1990) 38 American Journal of Comparative Law 865, 867.
[170] ibid.
[171] ibid.
[172] JG Starke, 'Monism and Dualism in the Theory of International Law' (1936) 17 British Year Book of International Law 66, 71.
[173] George Slyz, 'International Law in National Courts Symposium Issue: The Interaction between National Courts and International Tribunals' (1995) 28 New York University Journal of International Law and Politics 65, 67.

domestic level plays an important role as the principles of treaty interpretation under te VCLT 1969 (see Section 2.6.2.1) may not be applicable to the application of implementing the legislation of NYC 1958.

NYC 1958's reception at the domestic level depends on whether a Contracting State conforms to a monist or a dualist legal system.[174] NYC 1958 is a treaty intended to go further than GC 1927 and to harmonise the essential aspects of ICA, including in the recognition and enforcement of foreign arbitral awards. Treaties employ the principle of *pacta sunt servanda*. NYC 1958 binds contracting States and they must implement NYC 1958 in good faith.[175] Article 26 of VCLT 1969 reaffirmed the principle of *pacta sunt servanda* that States must meet their obligations specified by treaties.[176] NYC 1958 operates on the basis of consent. To respect the prerogative right of the sovereignty of States, a State must expressly offer consent to be bound by NYC 1958. NYC 1958 expects Contracting States to either (1) transform NYC 1958 into their domestic law without delay or amendment or (2) to give effect to NYC 1958 by having their domestic civil procedures conform to it.[177]

2.6.1.1.1 Monist States' Implementation of the New York Convention 1958

In a monist legal system, NYC 1958 is directly incorporated into a State's domestic law without the need to enact implementing legislation upon ratification or accession in accordance with the constitution of the State.[178] Monists regard international and domestic law as one single system, whereby the domestic legal system includes a variation of international law orders.[179] Monists assert that there is only one single legal system in which all legal systems, including domestic and international law, are grouped together. Therefore, international law automatically becomes part of domestic law.[180]

Monists can be further grouped into two types: (1) monists with supremacy of domestic law and (2) monists with supremacy of international law.[181] The main difference between

[174] Paulsson, *The 1958 New York Convention in Action* (n 20) 40.
[175] Malcolm N Shaw, *International Law* (5th edn, Cambridge University Press 2003) 810–811.
[176] VCLT 1969 (n 35) art 26.
[177] Paulsson, *The 1958 New York Convention in Action* (n 20) 40–41.
[178] David Sloss, 'Domestic Application of Treaties' in Duncan B Hollis (ed), *The Oxford Guide to Treaties* (Oxford University Press 2011).
[179] Slyz (n 173) 67.
[180] Ibid 29.
[181] Antonio Cassese, *International Law* (2nd edn, Oxford University Press 2005) 213.

these two types concerns the supremacy of international and domestic law.[182] Both monism theories emphasise that international and domestic law are part of the same system of norms, but only the second monism theory asserts the supremacy of international law over domestic law.[183] In the monist system, NYC 1958 is directly applicable to a State upon ratification or accession.

Since a State legislature in the monist system is relaxed concerning the requirement of international law to enact legislation, the State executive is responsible for ensuring obedience to and implementation of NYC 1958 at the domestic level, and the State judiciary must then give effect to it through its judicial decisions.[184] However, there are situations where a monist State legislature has enacted implementing legislation to assist court and executive officers to give effect to a treaty within domestic law. For example, the USA, which conforms to the monist legal system, enacted Federal AA, Title 9 as implementing legislation to give effect to the implementation of NYC 1958 in the United States. In practice, monist States have divergent ways of implementing international treaties, depending on whether a treaty is self-executing or non-self-executing.

2.6.1.1.2 Dualist States' Implementation of the New York Convention 1958

In a dualist legal system, to implement NYC 1958, a State needs to incorporate NYC 1958 into its domestic legislation.[185] A key characteristic of a dualist legal system is that international treaties have no special status in the constitution and the obligations of treaties will only have effect in domestic law via the enactment of implementing legislation.[186] Dualists assume that international law and domestic law form two distinct and separate systems. Domestic law prevails over international law at the domestic level.

In a dualist system, international law, once transformed through the enactment of new legislation or changes to current domestic law, is binding as rules of domestic law and not international law.[187] In this sense, judges in dualist systems may implement the legislation of international law as a domestic matter, which may be unfavourable towards

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[182] Sloss (n 178) 3.
[183] ibid.
[184] Slyz (n 173) 67.
[185] Paulsson, *The 1958 New York Convention in Action* (n 20) 41.
[186]Sloss (n 178).
[187] Slyz (n 173) 67.

certain international law instruments including NYC 1958. In transforming the provisions of NYC 1958 into domestic law, Contracting States must ensure that the provisions are modelled as closely as possible on the texts of NYC 1958. The implementation of NYC 1958 permits a State legislature to modify the textual transformation of NYC 1958 provisions to suit its domestic level framework.[188] This process of implementation might result in divergence in application and hence hamper the very objective of NYC 1958, which is to facilitate the recognition and enforcement of arbitral awards.[189]

In dualist States, there will be implementing legislation that reproduces or incorporates the text of NYC 1958 into domestic implementing legislation.[190] For example, one of the provisions of implementing legislation for NYC 1958 in Malaysian law, Section 39(1)(a)(vi) of Malaysian AA 2005, is textually dissimilar to Article V(1)(d) of NYC 1958 (see Section 3.8.5 for further details). Therefore, a judge in Malaysia would have to apply Section 39(1)(a)(vi) as it is, even if the provision contradicts Article V(1)(d) of NYC 1958. Implementing legislation prevails over NYC 1958 in dualist States.

These conflicting monism and dualism theories are still very important in treaty implementation when examining the behaviour and obedience of States as regards carrying out their international law obligations. Textual harmonisation in the implementation of NYC 1958 in monist States is guaranteed through the direct application of NYC 1958 in self-executing monist States. On the other hand, textual harmonisation in dualist States' and monist States' enacting implementing legislation may be compromised by the transformation process. First, NYC 1958 is available in five official languages. In a situation where implementing legislation is in a language other than one of the five official languages, translation of the official provisions may result in textual divergence that may be applied differently by domestic courts. Second, there is the possibility that a domestic judge may apply implementing legislation using statutory interpretation in accordance with the domestic law of the State.

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[188] Paulsson, *The 1958 New York Convention in Action* (n 20) 41.
[189] George A Bermann, 'Recognition and Enforcement of Foreign Arbitral Awards : The Interpretation and Application of the New York Convention by National Courts' in George A Bermann (ed), *Recognition and Enforcement of Foreign Arbitral Awards : The Interpretation and Application of the New York Convention by National Courts* (Springer 2017) 8.
[190] ibid.

Divergence in the application of implementing legislation might hamper the intended harmonisation goal, which is achieving a system in which laws will operate efficiently to create stability and predictability of the system. The goal of harmonisation in this research is bringing the rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining the diversity of law of Contracting States (see section 2.4). Therefore, the thesis focuses on the application of NYC 1958 by the Contracting States' Courts by determining whether there is harmonisation in the application of NYC 1958 on the controversial issues raised in Chapters 4, 5 and 6 of this thesis.

2.6.2 Applied Harmonisation of NYC 1958: Uniform Interpretation

The focus of the harmonisation intended in this thesis is on applied harmonisation, i.e. how the courts of Contracting States apply NYC 1958's provisions. Applied harmonisation refers to the actual application of NYC 1958's provisions, where courts apply and interpret the texts of international conventions. Section 2.2 explains that NYC 1958 cannot function independently without assistance from the courts. NYC 1958 empowers domestic courts with the duty to recognise and enforce foreign arbitral awards once satisfied that the conditions stipulated by NYC 1958 are satisfied. Transportable arbitral awards would mean nothing without the certainty and predictability of enforcement procedures for awards at the enforcement stage.

The thesis focuses on the promotion of uniform interpretation of NYC 1958. 'There is no uniformity' in the rules of interpretation applied by NYC 1958 Contracting States.[191] In 2008, UNCITRAL, in their efforts to maintain the harmonisation of uniform law, published a report based on a survey relating to the implementation of NYC 1958 by Contracting States at the domestic level.[192] According to the report,[193] the courts of Contracting States were applying diverse methods of rules to interpret NYC 1958 and its implementing legislation in the domestic sphere.[194]

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[191] Wolff (n 69) 19.
[192] UNCITRAL, 'Report on the Survey Relating to the Legislative Implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)' (2008) <http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_implementation.html>.
[193] ibid.
[194] Wolff (n 61) 19.

The yardstick to measure the harmonisation or uniformity of NYC 1958 is having NYC 1958 applied cross-jurisdictionally and arriving as a similar legal phenomenon to the extent intended.[195] However, there is a danger that NYC 1958 may not be interpreted in a similar manner by Contracting States.[196] To avoid worrying levels of uncertainty and predictability, which would be undesirable for the efficacy of ICA, it is of paramount importance that NYC 1958 be interpreted uniformly by the courts.[197] Uniform interpretation refers to the achievement of similar results across different jurisdictions in the application of NYC 1958.[198]

NYC 1958 is built on the principle that ICA cannot function independently without assistance from domestic courts.[199] The uniform interpretation of the NYC 1958 is among the essential characteristics of its success.[200] The challenge is the possibility of a multiplicity of interpretations of NYC 1958, depending on whether a court in a particular Contracting State is arbitration-friendly or not.[201] Promoting the uniform interpretation of NYC 1958 is a pragmatic way to alleviate possibly negative results that might temper an effective judicial reading, hence harmonising that particular area of law.[202]

Contracting States face identifiable challenges in achieving textual harmonisation in the application of NYC 1958. First, there is a concern over a homeward trend, where domestic courts tend to treat uniform law like any other domestic law.[203] Contracting States must recognise the international character of NYC 1958 as it belongs to a different legal system and is not part of domestic law. Second, at the domestic level, there will be a strong temptation for judges to apply domestic rules of interpretation in the absence of

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[195] Camilla Baasch Andersen, 'A New Challenge for Commercial Practitioners: Making the Most of Shared Laws and Their Jurisconsultorium' (2015) 38 University of New South Wales Law Journal 911, 913.
[196] Bonell (n 169).
[197] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39).
[198] Filip De Ly, 'Uniform Interpretation: What Is Being Done?' in Franco Ferrari and Friedrich Rosenfeld (eds), *Autonomous Versus Domestic Concepts under the New York Convention* (Kluwer Law International 2020).
[199] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39) 5.
[200] Linda Silberman, 'The New York Convention after Fifty Years: Some Reflections on the Role of National Law International Commercial Arbitration: Fifty Years after the New York Convention' (2009) 38 Georgia Journal of International and Comparative Law 25, 26.
[201] Giuditta Cordero Moss, 'Risk of Conflict Between the New York Convention and Newer Arbitration-Friendly National Legislation?' (2003) 1 Stockholm Arbitration Report 1, 2.
[202] Estrella Faria (n 119) 32.
[203] Andersen (n 195) 916.

any international tribunal supporting uniform interpretation or internationally uniform rules of interpretation.[204] The issue is which rule of interpretation judges should use in interpreting implementing legislation that transforms an international convention such as NYC 1958. Many judges are tempted to revert to a homeward trend and to refer to domestic law in which they are well versed. This 're-nationalisation' of a harmonising law such as NYC 1958 is a backward step and should be prevented. Divergence in interpretation by judges may hamper achieving applied harmonisation of NYC 1958.[205]

2.6.2.1 Vienna Convention on the Law of Treaties 1969

As a public international law instrument, the NYC 1958 must be interpreted in accordance to Article 31 to 33 of the VCLT 1969. Even though the VCLT 1969 came into force after the NYC 1958, the VCLT 1969 is still relevant as Articles 31–33 of VCLT 1969 have been accepted as *customary international law*.[206] Therefore, VCLT 1969 is applicable to all NYC 1958 Contracting States, irrespective of whether they are also parties to VCLT 1969 or not.[207]

Article 31
General rule of interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

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[204] Royston Miles Goode and others, *Transnational Commercial Law : Texts, Cases and Materials* (2nd Editio, Oxford University Press 2015).
[205] Goldring (n 98) 307.
[206] Wolff (n 61) 20; Paulsson, *The 1958 New York Convention in Action* (n 20) 43.
[207] Wolff (n 61) 20.

Article 32
Supplementary means of interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
(a) leaves the meaning ambiguous or obscure; or
(b) leads to a result which is manifestly absurd or unreasonable.

Article 33
Interpretation of treaties authenticated in two or more languages

1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.
2. A version of the treaty in a language other than one of those in which the text was authenticated shall be considered an authentic text only if the treaty so provides or the parties so agree.
3. The terms of the treaty are presumed to have the same meaning in each authentic text.
4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted.

Domestic courts must apply and interpret the provisions of NYC 1958 in accordance with Articles 31 to 33 of VCLT 1969, above. First, Article 31 of VCLT 1969 provides that NYC 1958 shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of NYC 1958 in context and in light of its object and purpose. Article 31 is the general rule and a starting point for all treaty interpretation.[208] Priority must be given to the original texts of NYC 1958 in context regarding the provision and object and purpose of NYC, which is provided by the final act to NYC 1958.[209] NYC 1958's object and purpose in lieu of Article 31(2) of NYC 1958, is to 'contribute to increasing the effectiveness of arbitration in the settlement of private law disputes'.[210]

Second, Article 32 of VCLT 1969 stipulates two situations where recourse may be made to supplementary mean,s including the *travaux préparatoires* of NYC 1958. First, the courts of Contracting States may refer to supplementary means to confirm the meaning

[208] Richard K Gardiner, *Treaty Interpretation* (Second, Oxford University Press 2015) 628.
[209] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15).
[210] Ibid.

resulting from the interpretation of Article 31 of VCLT 1969. Second, this supplementary means may be used if the interpretation based on Article 31 contributes to an ambiguous or vague meaning or leads to an absurd or unreasonable result. The *travaux préparatoires* for NYC 1958 include ICC Draft 1953,[211] ECOSOC Draft 1955,[212] replies from governments and NGOs regarding the possibility of concluding a new convention and debates on the text of NYC 1958, reports from the ICC and the ECOSOC Committee, amendments suggested by working groups at the UNCICA Conference and State delegations up until the adoption of the final act of NYC 1958 on 10 June 1958.[213]

Given NYC 1958's large number of Contracting States, the issue is whether those Contracting States that did not actively participate in the NYC 1958 Conference (such as Malaysia) are obliged to invoke the *travaux préparatoires* as a supplementary means of interpreting the provisions of NYC 1958. Regardless of whether a Contracting State of NYC 1958 is a party to VCLT 1969 or participated in the NYC 1958 Conference, the Contracting State must interpret the provisions of NYC 1958 in accordance with Articles 31 and 32 of VCLT 1969, including recourse to the *travaux préparatoires* of NYC 1958.[214] In international law, Articles 31 and 32 of VCLT 1969 *constitute customary international law* and were reaffirmed in the case of *Sovereignty over Pulau Ligitan and Pulau Sipadan* [215]

Third, the interpretation of NYC 1958 in any of its five official languages shall be equally authoritative and presumed to have the same meaning in each official text as specified under Article XVI of NYC 1958. Article 33 of VCLT 1969 provides that all five official languages of NYC 1958 will be deemed equally authoritative, unless NYC 1958 provides otherwise. In a situation where a comparison of official texts of NYC 1958 results in a difference in meaning (under the application of Articles 31 and 32 of VCLT 1969), the courts shall adopt a meaning that best reconciles the official texts, and according to the object and purpose of the treaty, which is to increase the effectiveness of arbitration for private dispute settlement.

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[211] ECOSOC 'Statement Submitted by the International Chambers of Commerce' (Received 18 September, recorded on 28 October 1953) E/C.2/373
[212] ECOSOC 'Report of the Committee' (n 48).
[213] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 17).
[214] ibid.
[215] *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia)*, ICJ Reports 2002, 625 [37].

Theoretically, the courts of Contracting States must apply and interpret NYC 1958 in accordance with the rule of interpretation under Sections 31 to 33 of VCLT 1969, as explained above.[216] The interpretation of NYC 1958 by a Contracting State's court depends on the legal system and constitution of that State, whether it is a monist or dualist state (see Section 2.6.1). A monist state faces less risk of not conforming to the rules of interpretation under VCLT 1969 either as a Contracting State of VCLT or recognising Articles 31–33 as *customary international law*. On the other hand, in a dualist state, as the provisions are part of domestic law, there is a danger that the courts will then refer to statutory interpretations available in domestic legislation rather than resorting to the rules on treaty interpretation under VCLT 1969. NYC 1958 will have less relevance if there is no harmonisation on its implementation in practice.[217] It is not only the adoption of the texts of NYC 1958 into the domestic law of contracting States, but also the process of harmonisation, that necessitates actual application by the affected parties and uniform interpretation by judges in domestic courts.[218]

In practice, the survey in 2008 (see Section 2.6.2) identified that NYC 1958 Contracting Courts were applying diverse methods and rules of interpretation in the application of NYC 1958 in their domestic courts. The thesis endeavours to investigate the practice in another Contracting State, Malaysia, and how the Malaysian courts apply NYC 1958 in the recognition and enforcement of foreign awards in Malaysia. Chapter 3 will critically evaluate the application of NYC 1958 by Malaysian courts.

[216] Gardiner (n 208) 68.
[217] Estrella Faria (n 119) 30.
[218] Bonell (n 169).

2.7 Conclusion

NYC 1958 was adopted in 1958 to contribute to increasing the effectiveness of international arbitration for private dispute settlement. A study of the *travaux préparatoires* of NYC 1958 reveals that NYC 1958 was concluded to overcome the shortcomings of GC 1927 but, at the same time, maintain the principle of State Sovereignty. The chapter finds that NYC 1958 was a result of a compromise between the notions of idealistic truly international arbitration and the prerogative rights of State Sovereignty. Section 2.2 reveals the improvements secured by NYC 1958 compared to GC 1927 and the compromise made by the delegates. NYC 1958 covers the recognition and enforcement of arbitration agreements and foreign arbitral awards. The chapter explains the differences in the legal processes of recognition, enforcement and challenge of an award.

The chapter defines harmonisation as a process of bringing rules of law close to a similar condition or concept, but not in exactly the same way, and embracing diversity of laws. The thesis adopted the goal of harmonisation which achieving a system within which laws will operate efficiently to create stability and predictability. The goal of harmonisation for this research is bringing the rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining diversity in the laws of Contracting States. The chapter finds that NYC 1958 is an international law instrument that fulfils the criterion of hard law according to legal positivists and rationalists. The binding status of NYC 1958 and hardest legalisation requirements' fulfilment renders NYC 1958 an instrument capable of bringing the hardest standard of harmonisation to the recognition and enforcement of foreign awards.

The standard of textual harmonisation expected of NYC 1958 is for a Contracting State to textually harmonise the implementation of the texts of NYC 1958 into the Contracting State's legal system, depending on whether the State is a monist or dualist State. Textual harmonisation in the implementation of NYC 1958 in monist States is guaranteed through the direct application of NYC 1958 in self-executing monist States. On the other hand, textual harmonisation in dualist States and monist States enacting implementing legislation may be compromised by the transformation process.

The chapter also reveals that to fulfil the goal of this research, the focus of the thesis will be on applied harmonisation, on how the Courts actually apply and interpret the provisions of NYC 1958. NYC 1958 must be interpreted uniformly by Contracting States courts to avoid worrying levels of uncertainty and predictability, which would be undesirable for the efficacy of ICA. Uniform interpretation refers to the achievement of similar results across different jurisdictions in the application of NYC 1958.[219]

As a public international law instrument, NYC 1958 must be interpreted in accordance with Articles 31 to 33 of VCLT 1969. First, the courts must interpret NYC 1958 in good faith with the ordinary meaning given to the terms in NYC 1958 according to the aim of NYC 1958 which is to contribute to the effectiveness of international arbitration for private dispute settlement. Second, recourse to the *travaux préparatoires* of NYC 1958 may be made to confirm a meaning upon the application of Article 31 or if such application produces an ambiguous or absurd meaning. Third, as NYC 1958 is available in five official languages, all texts are deemed to be equally authoritative and to have the same meaning. In circumstances where comparing official texts produces different meanings, upon thorough application of Articles 31 and 32, the court must adopt a meaning which reconciles the texts and according to the object and purpose of NYC 1958.

[219] Ly (n 198).

Chapter 3 The Recognition and Enforcement of Foreign Arbitral Awards in Malaysia

3.1 Introduction

This chapter endeavours to answer the second research question of this thesis, which is to critically analyse the legal regulation on the recognition and enforcement of foreign awards in Malaysia. Malaysia is a case study in this thesis, and it is important to understand the laws and practices of Malaysian courts regarding the recognition and enforcement of foreign awards.

The chapter begins by introducing the main legislation stipulating the laws on arbitration, both domestic and international, in Malaysia, AA 2005. AA 2005 adopted UML and was strongly influenced by the New Zealand Arbitration Act. Next, the chapter explores the Reciprocal Enforcement of Judgments Act 1958 (hereinafter, REJA 1958), as its provisions are still in force in Malaysia today, where a party applying to recognise or enforce a foreign award in Malaysia may choose to either enforce under NYC 1958 (via Sections 38–39 of AA 2005) or REJA 1958. The chapter investigates Malaysia's accession to NYC 1958 in 1985. As Malaysia is a dualist State, Malaysia enacted implementing legislation, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (hereinafter, CREFA 1985). CREFA 1985 was repealed by Sections 38–39 of AA 2005.

The chapter also stipulates the scope of foreign awards that are recognisable and enforceable in Malaysia. It also defines recognition and enforcement according to Malaysian law and evaluates the attitude of the courts in applying and interpreting the implementing legislation of NYC 1958, i.e. AA 2005. Then the chapter critically examines the implementation and application of Sections 38 and 39 of AA 2005 in Malaysia. Section 38 involves the procedure for an application to recognise or enforce a foreign award in Malaysia. Section 39 deals with challenges seeking to refuse enforcement of awards on the exhaustive grounds available under Section 39 of AA 2005. While acknowledging that only limited reported cases are available in Malaysia, especially on ICA, the chapter offers an overview of the practice of Malaysian courts regarding the recognition and enforcement of foreign awards.

3.2 Arbitration Act 2005

AA 2005 is the main legislation governing arbitration in Malaysia. As reflected in the preamble to AA 2005, it is 'an act to reform the law relating to domestic arbitration, provide for international arbitration, the recognition and enforcement of awards and for related matters. It serves as a single regime for the recognition and enforcement of domestic and foreign arbitral awards in Malaysia.'[220] It came into force in Malaysia on 15 March 2006 as a timely replacement for the outdated Malaysian Arbitration Act 1952 (hereinafter, AA 1952).[221]

Even though AA 2005 embraced several elements of English AA 1996, it was a first in the Malaysian legal history of arbitration not to follow English arbitration legislation *verbatim*.[222] AA 2005 repealed AA 1952 'to bring Malaysian arbitration law in line with modern arbitration practice'.[223] Malaysia adopted an internationalist approach in adapting to the needs of international best practice and aligning its adherence to the provisions of UML, thus deviating from Malaysia's previous regime where the courts were allowed to intervene in most arbitral proceedings.[224] The main difference between the two regimes of domestic arbitration and international arbitration in AA 2005 is the extent of the discretionary power granted to the courts to supervise. AA 2005 responds to the fact that international arbitration parties may prefer to avoid extensive judicial intervention by Malaysian courts.[225] The New Zealand Act 1996, which is also a single Act with two regimes, 'strongly influenced' Malaysian AA 2005, recognising that UML is perfect for both domestic and international arbitration.[226]

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[220] Cyrus Das, 'Enforcement of Awards under the New Arbitration Act 2005: An Overview' (2007) 1 Malayan Law Journal Articles xliv, xliv.
[221] Thayananthan Baskaran, 'Recent Amendments to the Malaysian Arbitration Act' (2012) 28 Arbitration International 533, 533.
[222] Rajoo and Davidson (n 38) 2–3.
[223] Sundra Rajoo, 'Internationalisation Through Institutional Arbitration : The Malaysian Success Story' in VK Bhatia (ed), *International Arbitration Discourse and Practices in Asia* (London, England New York, New York : Routledge 2018).
[224] Syed Ahmad Idid and Umar A Oseni, 'The Arbitration (Amendment) Act 2011: Limiting Court Intervention in Arbitral Proceedings in Malaysia' (2014) 2 Malayan Law Journal Articles cxxxii, xx.
[225] W Davidson and Sundra Rajoo, 'The New Malaysian Arbitration Regime 2005' (2006) 4 Malayan Law Journal Articles cxxx, cxxxv.
[226] iibid.

Sections 38 to 39 of AA 2005 are the current implementing provisions of NYC 1958 governing the recognition and enforcement of foreign awards in Malaysia (see Sections 3.7 and 3.9). The previous regime in Malaysia was a dual regime where there were two principal forms of legislation dealing with domestic and international arbitration. Before 2006, Malaysian AA 1952 dealt with the recognition and enforcement of domestic arbitration, whereas CREFA 1985, the implementing legislation of NYC 1958, dealt with the recognition and enforcement of international awards[227] (see Section 3.4).

Malaysia subsequently amended AA 2005 in 2011 and 2018 to provide greater clarity and address the lacunae in Malaysian law regarding meeting Malaysia's obligations as a NYC 1958 Contracting State. Two important amendments were made to ensure textual harmonisation in the implementation of NYC 1958 in Malaysia. The amendments in 2011 portray Malaysia's commitment to observing its obligation to textually transform the grounds under Article V (1) (a) of NYC 1958 into domestic law. First, the amended Section 39(1)(a)(ii) replaced the word 'Malaysia' with 'the State where the award was made'. Previously, in absence of any express law agreed by the parties, the defence under Section 39(1)(a)(ii), only available to an arbitration agreement, was not valid under Malaysian law. The amendment to Section 39(1)(a)(ii) allows the courts in Malaysia to refuse the enforcement of award, in the absence of an express agreement between the parties, if the party opposing the enforcement of an award proves that the arbitration agreement is not valid in accordance with the law where the award comes from. Second, Malaysia added a new sub-section (3) to Section 39, where it provides that only part of an award which contains a decision on a matter submitted to arbitration may be recognised and enforced subject to the possibility that the decision may be separated from a part where the parties agreed not to submit to arbitration. This amendment conforms to Article V(1)(c) of NYC 1958.

The Malaysian court implemented AA 2005 with a pro-arbitration stance and held that that the court must take into consideration Malaysia's treaty obligations under NYC 1958. In the case of *Innotec Asia Pacific Sdn Bhd v Innotec GmbH [2007]* 8 CLJ 304, the court granted an order to stay proceedings under Section 10 of AA 2005, despite the defendant's objection that Section 10 was not applicable to this case as it involved

[227] Das (n 220) xliv.

international arbitration where the seat was not in Malaysia. The High Court held that as AA 2005 was based on UML, Section 10 of AA 2005 should be interpreted widely to include the obligation to grant a stay of court proceedings to aid international obligations as it portrays observance to Malaysia's obligation under NYC 1958. The Court went even further to explain that even if assuming Section 10 is not applicable to international arbitration, there was nothing in AA 2005 to exclude the general jurisdiction of the Malaysian court staying civil proceedings pending arbitration proceeding based on mutual agreement between the parties.[228] It was the duty of the court to interpret laws and to comply with conventions such as NYC 1958, where Malaysia is one of the Contracting States.[229]

3.3 Reciprocal Enforcement of Judgment Act 1958

Prior to Malaysia's accession to NYC 1958, a party could apply to enforce a foreign arbitral award as a foreign judgment under the Reciprocal Enforcement of Judgments Act 1958 (hereinafter, REJA 1958), as long as the award was made in a Commonwealth State subject to a reciprocity clause. These Commonwealth States are listed in the First Schedule of REJA 1958. The States listed under the First Schedule are the UK, Hong Kong, Singapore, New Zealand, the Republic of Sri Lanka, India and Brunei. To date, this Act is still applicable.[230] Section 2 of REJA 1958 specifies that a judgment includes arbitral awards, unless an award is made by a tribunal in a country outside Commonwealth jurisdiction.[231] Section 3 of REJA 1958 stipulates the conditions for the enforcement of foreign judgments, including foreign awards where: (1) the award is final and conclusive, (2) payable under a sum of money and (3) rendered by a tribunal of a country specified in the First Schedule.[232] Order 69 Rule 9 of the Rules of Court 2012 incorporates the provisions of REJA 1958.[233] The enforcement of foreign awards under REJA 1958 serves as an alternative to enforcement under AA 2005. Enforcement under AA 2005 is preferable as the States specified in the First Schedule of the REJA 1958 Act are also Contracting States to NYC 1958.[234]

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[228] *Innotec Asia Pacific Sdn Bhd v Innotec GmbH* [2007] 8 CLJ 304 [47–49].
[229] ibid.
[230] Malaysian Reciprocal Enforcement of Judgments Act 1958 (REJA 1958), First Schedule.
[231] ibid, s. 2.
[232] ibid, First Schedule.
[233] Rules of Court 2012 (ROC 2012), o. 69 r. 9.
[234] Choy and Rajoo (n 21) 655.

3.4 Accession to NYC 1958

Malaysia acceded to NYC 1958 on 5 November 1985.[235] The implementing legislation enacted to give effect to it was the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (hereinafter, CREFA 1985), which came into force on 3 February 1986. Malaysia did not participate in the NYC 1958 Conference in New York in 1958 but it did attend the Conference as an observer, as Malaysia had just achieved independence at that time. Similar to most Commonwealth States, Malaysia is a dualist State. The application of international law in Malaysia is through the implementation of international law at the domestic level. Therefore, in Malaysia, international and domestic law work in separate and distinct spheres and legal systems. Domestic law prevails over international law at the domestic level. NYC 1958 first needs to be transformed into domestic legislation through an act of Parliament before it can have a substantial and material effect on the law in Malaysia.

3.4.1 Implementing Act of NYC 1958: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985

CREFA 1985 served as the implementing legislation of NYC 1958 in Malaysia until it was repealed by AA 2005. The provisions of CREFA 1985 are very similar to the model legislation introduced by the Commonwealth Secretariat in 1981.[236] For example, unlike the official texts of NYC 1958, CREFA 1958 reproduces a definition section similar to the Model Bill. The previous regime for enforcement of foreign awards under CREFA 1958 stipulated that it had to be read together with the Malaysian AA 1952. AA 1952 granted wide supervisory power to the Malaysian courts over the recognition and enforcement of foreign awards, unless a foreign award was held under ICSID or KLRCA.

The *Sri Lanka Cricket* case reflects how the practice of the Malaysian courts differed in the application of NYC 1958 in Malaysia prior to AA 2005. *In Sri Lanka Cricket (formerly known as the Board of Control for Cricket in Sri Lanka) v World Sport Nimbus Pte Ltd (formerly known as WSG Nimbus Pte Ltd*) [2006] 3 MLJ 117, the respondent

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[235] UNCITRAL Secretariat (n 87).

[236] KW Patchett and Commonwealth Secretariat, 'The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Explanatory Documentations Prepared for Commonwealth Jurisdictions'.

sought to enforce an award made in Singapore. The appellant appealed to the Court of Appeal to challenge the enforcement of the Singapore award, arguing that the court lacked jurisdiction to allow enforcement as Singapore was not in declared as a party to NYC 1958 in a Gazette Notification pursuant to Section 2(2) of CREFA 1985. Despite acknowledging that the failure to declare was perhaps an oversight, the Court in *Sri Lanka Cricket* allowed the appeal and refused to enforce the Singaporean award. In interpreting Section 2(2) of CREFA 1958, the Court held that the word 'may' in Section 2 means 'must' and the Parliament must have intended the gazetting requirement to be mandatory.

Nonetheless, the current practice in Malaysia is to interpret that the requirement for gazette notification is not mandatory and merely evidential, and it is enough to show that a State is in fact a Contracting State of NYC 1958. The reciprocity requirement reflects Malaysia's reciprocity reservation on the implementation of NYC 1958. In 2010, the Federal Court came to a contrary position in interpreting the same provision. The facts of the case were similar to *Sri Lanka Cricket*. In *Lombard Commodities Ltd*, the appellant appealed against the the Court of Appeal's refusal to enforce an award made in the UK as no gazette notification had been issued stating that the UK was a NYC 1958 Contracting State.[237] The Court of Appeal followed the decision in *Sri Lanka Cricket*.

The Federal Court reversed the Court of Appeal's decision and held that Section 2(2) on the requirement of Gazette Notification is merely evidential in nature and it was never in dispute that the UK is a Contracting Party to NYC 1958.[238] The Federal Court in this case drew an analogy with an English case, *Minister of Public Works of Kuwait v Sir Frederick Snow & Partners* [1981] 1 Lloyd's Rep 596, with regard to a conclusive evidence interpretation of Section 7(2) of English AA 1975, which is *in pari materia* to Section 2(2) of CREFA 1985. The Federal Court also looked into the legislative intent of CREFA 1985, which is to give effect to NYC 1958 provisions. The court ruled that the enforcement of an NYC 1958 award may only be refused pursuant to Section 5 of CREFA 1985 (equivalent to Article V of NYC 1958).

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[237] *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 1 CLJ 13.
[238] ibid [27–29].

3.5 Scope of International Awards Enforceable in Malaysia

Malaysia has only implemented the territorial criterion in determining the scope of international awards in Malaysia. Section 2 of AA 2005 provides a definition of awards which is 'a decision of the arbitral tribunal on the substance of the disputes and includes any final, interim or partial award and any award on costs or interest but does not include interlocutory orders'. The scope of awards enforceable under NYC 1958 according to Article I covers (1) where it will apply to the recognition and enforcement of foreign arbitral awards made in the territory of a State other than the State where recognition and enforcement are sought (territorial criterion) and states that (2) it shall apply to awards not considered domestic awards in the enforcement State (nationality criterion). (see Section 2.3.3.3). In Malaysia, determining whether or not an award can be considered an international or a domestic award is very important, as the two categories receive different treatments in Malaysian courts.

An international award enforceable in Malaysia must satisfy the territorial criterion, which means the award must come from a foreign State that is a party to NYC 1958. Section 38(1) of AA 2005, when read together with Section 38(4), stipulates that an award made in a foreign State which is a party to NYC 1958 shall be recognised and enforced as a judgment.[239] These provisions reflect the scope and reciprocity reservation entered by Malaysia in acceding to NYC 1958.

However, AA 2005 is silent on the transformation of scope pertaining to the nationality of awards, i.e. international or domestic awards. Nevertheless, AA 2005 provides for a

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[239] Malaysian AA 2005, s 38.

(1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognized as binding and be enforced by entry as a judgment in terms of the award or by action.

(2) In an application under subsection (1) the applicant shall produce—
  (a) the duly authenticated original award or a duly certified copy of the award; and
  (b) the original arbitration agreement or a duly certified copy of the agreement.

(3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.

(4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.

definition of international arbitration, as opposed to none provided by NYC 1958. In Section 2 of Malaysian AA 2005:

> "international arbitration" means an arbitration where—
> (a) one of the parties to an arbitration agreement, at the time of the conclusion of that agreement, has its place of business in any State other than Malaysia;
> (b) one of the following is situated in any State other than Malaysia in which the parties have their places of business:
> (i) the seat of arbitration if determined in, or pursuant to, the arbitration agreement;
> (ii) any place where a substantial part of the obligations of any commercial or other relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or
> (c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one State.

3.5.1 Definition of the Recognition and Enforcement of Awards

The recognition and enforcement of foreign awards in Malaysia are two distinct legal processes. The enforcement process presupposes the recognition process of the said award (see Section 2.3.2.1). Recognition refers to a legal process of incorporating an award into a State's legal system.[240] The Federal Court in the case of *Siemens Industry Software GmbH & Co KG (Germany)* held that Section 38 of AA 2005 'stipulates the 'recognition procedure' which enables the successful party to convert an award into a judgment and, for purposes of enforcement, to seek leave from the High Court to enforce the said arbitral award as a judgment of the High Court'.[241]

Enforcement is a legal process of carrying out award provisions through available legal means in the enforcement State.[242]. The court explained that the intention and purpose of Section 38 is to ensure that the successful party is able to execute reliefs granted by the arbitral tribunal.[243] Sections 38 and 39 govern the recognition and enforcement of foreign awards in Malaysia (see Sections 3.7–3.9). After the court has granted an order for the recognition and enforcement of award, the award transforms into an order of the court where the Courts of Judicature Act 1964, the Rules of Court 2012 (hereinafter, ROC

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[240] Teixeira (n 70) 7.
[241] *Siemens Industry Software GmbH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors* [2020] 5 CLJ 143 [29].
[242] Teixeira (n 70) 7.
[243] *Siemens Industry Software GmbH & Co KG (Germany)* (n 241).

2012) and other related laws will be applicable for the purposes of execution and enforcement.[244]

In Malaysia, the time limitation for the recognition or 'registration' of an award is within six years from when the award was issued in accordance with Section 6(1) of the Limitation Act 1963. The time limitation for the enforcement or 'execution' of an award as a 'judgment' of the award is within twelve years after the award was registered as a 'judgment' in a Malaysian court.[245] In the case of *Christopher Martin Boyd v Deb Brata Das Gupta* [2014] MLJU 1817, the award in question was issued on 4th January 2000 and was registered as the judgment of the court on 19th January 2004. The appellant filed to enforce the award on 14th March 2012 and was opposed by the Respondent. The Federal Court held that for the registration of an arbitration award as a judgment of the High Court pursuant either to the Arbitration Act 1952 or Arbitration Act 2005, the limitation period is six years from the issuance of that award by an arbitration tribunal. As for the arbitration of an award which has been registered as a judgment of the court, the limitation period is twelve years pursuant to Section 6(3) of the Limitation Act 1953 under which the award may be enforced.

3.5.2 Setting Aside of Awards

The setting aside of awards in Malaysia refers to a legal process where the court sets aside an award completely in the State where the award was rendered.[246] Setting aside constitutes a legal process available only to primary jurisdiction, i.e. the supervisory seat of the award[247] (see Section 2.3.2.2). The High Court in the case of *Thai-Lao Lignite Thailand Co Ltd. and Hongsa Lignite (Lao PDR) Co. Ltd. and Government of the Lao People's Democratic Republic* [2013] held that while the Malaysian court may exercise an enforcement function under Section 39(1)(a)(vii) of AA 2005, only the supervisory court may set aside an award pursuant to Section 37 of AA 2005.[248] The grounds for setting aside in Section 37 are similar to the grounds to refuse the recognition and enforcement of awards under Section 39, except the grounds under Section 39(1)(vii).

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[244] *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] 3 CLJ 534, 553.
[245] Section 6(3) of the Limitation Act 1963.
[246] *Malaysian Bio-Xcell Sdn Bhd* (n 244), 542.
[247] Wolff (n 69) 8.
[248] *Thai-Lao Lignite Thailand Co Ltd. and Hongsa Lignite (Lao PDR) Co. Ltd. and Government of the Lao People's Democratic Republic* [2013] 1 LNS 83.

A challenge or setting aside of awards in Malaysia under Section 37 of AA 2005 is only available to arbitral awards, both domestic and international, where the seat of the award is in Malaysia. In the case of *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* [2013], the High Court allowed the Defendant's application to strike out the Plaintiff's application to set aside an award made in Singapore pursuant to Section 37 of AA 2005. The High Court held that Section 37 must be read in harmony with Section 3 of AA 2005 where Section 3 explicitly 'indicated the unequivocal intention of Parliament that s. 37 was not applicable to foreign or international awards where the seat or place of arbitration was not in Malaysia'.[249]

3.5.3 Reservations on the Implementation of the New York Convention 1958

International arbitral awards enforceable in Malaysia under the regime of NYC 1958 are subject to reservations declared by Malaysia when it first acceded to NYC 1958. A State, on ratifying or acceding to a treaty, may make a reservation to refuse to be bound by particular provisions only while expressing its consent to be bound by the rest of the treaty.[250]

Article 2 of VCLT 1969 defines a reservation as

> …a unilateral statement … made by a State when signing, ratifying, accepting, approving or acceding to treaty whereby it purports to exclude or to modify the legal effects of certain provisions of the treaty in their application to that State.

The power of a State to enter into reservations portrays the principle of the sovereignty of States where the State may give and refuse consent to be bound by international law[251] (see Section 2.3.3.4).

First, Malaysia declared that it would only enforce foreign arbitral awards made in another NYC 1958 Contracting State. Section 38(1) read together with Section 38(4) of AA 2005 portrays the reciprocity reservation entered by Malaysia. Section 38(1) of AA 2005 stipulates that the High Court will recognise an arbitral award made in Malaysia or

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[249] *Twin Advance (M) Sdn Bhd v Polar Electro Europe BV* [2013] 3 CLJ 294 [27-29].
[250] Shaw (n 175) 821.
[251] ibid 822.

a foreign State as binding and enforce it by entry of judgment. [252] Section 38(4) restricts the application of 'foreign State' to the Contracting States of NYC 1958.

Recent cases in Malaysia portray the application of the reciprocity reservation entered by Malaysian courts. The recent practice is that it is no longer compulsory to declare Contracting States of NYC 1958 in a Gazette (see Section 3.4.1). It is sufficient to show that the State where the award was made is a Contracting State to NYC 1958. In the case of *Lombard Commodities Ltd v Alami Vegetable Oil*, the Federal Court allowed the appeal and held that the requirement under Section 2(2) of the CREFA 1985 to declare the UK is a party to NYC 1958 in a Gazette was merely an evidential position and it was never disputed that UK was an NYC 1958 contracting State.[253] The Court of Appeal's decision in the *Sri Lanka Cricket* case would have the effect of imposing an additional condition which is contrary to Article III of NYC 1958.

Second, Malaysia declared that it would only enforce foreign arbitral awards considered as commercial under its own domestic law. AA 2005 is silent on this commercial reservation. Section 2 of repealed CREFA 1985 limited application of the recognition and enforcement of foreign awards under the NYC 1958 only to awards considered commercial under Malaysian law. Nevertheless, the reported cases on recognition and enforcement in Malaysia examined in Sections 3.6 and 3.8 involved commercial matters, even though the cases did not expressly mention the commercial reservation entered by Malaysia.

The Malaysian Civil Law Act 1956 (hereinafter, CLA 1956) and the Malaysian Competition Act 2010 stipulate a definition for 'commercial' matters under Malaysian law. First, Section 5(1) CLA 1956 defines commercial law as "the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally".[254] Second, Section 3(4) of the Malaysian Competition Act 2010 defines "commercial activity" thus:

> any activity of a commercial nature but not including—
> (a) any activity, directly or indirectly in the exercise of governmental authority;

[252] Malaysian AA 2005, s. 38(1).
[253] *Lombard Commodities Ltd* (n 237).
[254] Malaysian Competition Act (CLA 1956), s. 5(1).

> (b) any activity conducted based on the principle of solidarity; and
> (c) any purchase of goods or services not for the purposes of offering goods and services as part of an economic activity.[255]

Even though Malaysia has adopted most of the law principles in UML in its latest AA 2005, it has not included a definition for the term commercial. Article 1(1) of UML outlines and defines that the term "commercial":

> …should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.[256]

3.6 Section 38 of the Arbitration Act 2005[257]

Section 38 stipulates procedures for the recognition and enforcement of awards in Malaysia. It is a comprehensive section dealing with both domestic and international awards.[258] Section 38 is a transformation of Articles III and IV of NYC. Article III of NYC 1958 serves as the core of NYC 1958 as it provides for the mandatory recognition and enforcement of foreign and international awards with minimal supervision from domestic courts.[259] The purpose of Article IV is to provide conditions of necessary evidence for the enforcement court regarding an arbitral award.[260] If the enforcement party complies with the requirements under Article IV, the 'presumption of enforceability

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[255] Malaysian Competition Act 2010, s. 3(4).
[256] UML (n 187) art 1(1).
[257] Malaysian AA 2005, s. 38: Recognition and Enforcement
1) On an application in writing to the High Court, an award made in respect of an arbitration where the seat of arbitration is in Malaysia or an award from a foreign State shall, subject to this section and section 39 be recognised as binding and be enforced by entry as a judgment in terms of the award or by action.
2) In an application under subsection (1) the applicant shall produce—
(a) the duly authenticated original award or a duly certified copy of the award; and
(b) the original arbitration agreement or a duly certified copy of the agreement.
3) Where the award or arbitration agreement is in a language other than the national language or the English language, the applicant shall supply a duly certified translation of the award or agreement in the English language.
4) For the purposes of this Act, "foreign State" means a State which is a party to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in 1958.
[258] Rajoo, *Law, Practice and Procedure of Arbitration* (n 21) 792–793.
[259] Paulsson, *The 1958 New York Convention in Action* (n 20) 97.
[260] UNCITRAL Secretariat (n 87).

of the award' is established.[261] The Malaysian court in the case of *Alami Vegetable Oil Products Sdn Bhd* confirmed that Section 38 was a recognition procedure in order to transform an arbitral award into a judgment.[262]

Section 38(1) of AA 2005 stipulates that an arbitral award where the seat of arbitration is Malaysia or a foreign State which is one of the Contracting States of NYC 1958 must be recognised as binding and enforced by entry as a judgment.[263] Sections 38(2) and 38(3) specify the rules of procedure for the recognition and enforcement of arbitral awards, which is by application in writing to the High Court in Malaysia subject to requirements analogous to Article IV of NYC 1958.[264] Article III requires NYC Contracting States to recognise foreign arbitral awards as binding and to enforce them in accordance with the rules of procedure of the territory where the award is relied upon, subject to the conditions provided under Articles IV and V of NYC 1958. Article III stipulates three important elements, i.e. (1) the obligation to enforce arbitral awards as binding awards subject to Articles IV and V of NYC 1958, (2) the rules of procedure governing the enforcement of such awards and (3) a limitation of no more onerous conditions or higher fees than in the enforcement of domestic awards in the enforcement State.

Sections 38(2)–38(3) of Malaysian AA 2005 codify the textual implementation of Article IV of NYC 1958 in Malaysia. Section 38 of AA 2005 takes inspiration from Article 35(2) of UML, even though the wording more closely resembles the original Article IV of NYC 1958. Article IV of NYC 1958 stipulates the conditions or requirements that must be fulfilled by the requesting enforcement party. By setting up minimum conditions for the recognition and enforcement of foreign arbitral awards, Article IV accommodates further facilitation for a request for the recognition and enforcement of an award.[265] According to Article IV of NYC 1958, the applicant seeking recognition or enforcement of an arbitral award must satisfy two basic conditions, supplying: (1) a duly authenticated original or duly certified award and (2) an original arbitration agreement or duly certified

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[261] Wolff (n 61) 208.
[262] *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* [2016] 12 MLJ 169, [3].
[263] Malaysian AA 2005, s. 38(1).
[264] Malaysian AA 2005, s. 38(2).
[265] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39) 246.

copy. The award needs to be translated and certified if it is not made in the official language of the enforcement State.[266]

3.6.1 Dispositive portion of an Award

In Malaysia, the party applying to recognise and enforce a foreign award only needs to produce a dispositive portion of the award, instead of the entire award. The recent decision of the Malaysian Supreme Court in *Siemens Industry Software GmbH & Co KG (Germany)* in 2020 will be binding on the recognition and enforcement of awards in Malaysia where the Court intends to honour the confidentiality of arbitration by specifying that only the dispositive portion of the award can be registered. The Federal Court agreed with the findings of the High Court that registration of the entire award would undermine the confidentiality of the arbitration proceeding.[267]

In the case of *Siemens Industry Software GmbH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors* [2020], the appellants appealed to the Federal Court to answer the question of whether, for the purpose of recognition and enforcement of foreign awards under Section 38 of NYC 1958, recognition by way of 'entry as a judgment' ought to relate only to the disposition of an award and not the entire award. In this case, the parties entered into a settlement agreement, agreeing to submit future disputes regarding the settlement agreement to arbitration. The appellants commenced an arbitration proceeding in Singapore and a 73-page-award was delivered in 2015. The Singapore tribunal dismissed the appellants' claim in its entirety.

The respondents applied to the High Court to recognise and enforce the award pursuant to Section 38 of AA 2005. The High Court in the first instance held that only the dispositive portion of the award (Part P which sets out the orders and reliefs) would be registered as a judgment, and not the entire award of 73 pages.[268] The High Court held that the function of the High Court as the enforcement court is to give effect to the decision and the Court must be vigilant and not go behind matters already dealt with in the arbitration proceeding in Singapore. In an appeal by the respondents in the Court of Appeal, the Court of Appeal reversed the decision and held that the High Court had no

[266] NYC 1958 (n 12) art III.
[267] *Siemens Industry Software GmbH & Co KG (Germany)* (n 241) [49].
[268] Ibid, 153–154.

jurisdiction to refuse registration of the award as the appellants did not raise any of the grounds under Section 39 of AA 2005. The Court of Appeal held that except for Section 38(3) on matters not submitted to arbitration, Section 38 is silent on the requirement that only part of the award is to be registered.

The Federal Court reversed the decision of the Court of Appeal. The Federal Court highlighted that the High Court did not refuse to recognise and register the award, only the extent of the dispositive portion of the award.[269] The Federal Court drew the analogy of an award with a judgment where the successful party would rely on an order or judgment that encompasses reliefs granted by the court. The Federal Court interpreted the words 'in terms of the award' in Section 38 as referring to only the dispositive portion in the decision of the award. As guidance, the Court also cited practices in England, Australia and Singapore where the courts registered the dispositive portion of an award, instead of the entire award.[270]

Therefore, the production of a duly authenticated award does not necessarily entail the recognition and conversion of the entire award into a judgment of the High Court.[271] Parties seeking to recognise and enforce a foreign award in Malaysia need only produce a dispositive portion of the award containing the decision and relief of the award. This Federal Court's decision is important as it highlights the role of the enforcement court in dealing only with the enforcement of an award and cautions against dealing with matters already decided by an arbitral tribunal.

3.6.2 Application of Section 38 by Malaysian Courts

Despite applying a formalistic and strict approach of having to satisfy both requirements of evidence specified under Section 38 of AA 2005, the Malaysian courts are seen to have consistently allowed the recognition and enforcement of foreign arbitral awards subject to the fulfilment of *prima facie* requirements. In the case of *Cti Group Inc v International Bulk Carriers Spa* [2017] 9 CLJ 499, the Malaysian Federal Court was satisfied that the appellant had complied with the requirements under Section 38 by producing the STA

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[269] Ibid [28].
[270] *Caucedo Investments Inc. and Another v Saipem SA* [2013] EWHC 3375 (England); *AED Oil Limited v. Puffin* [2010] VSCA 37 (Australia); *Denmark Skibstekniske Konsulenter A/S Likvidation v Ultrapolis* 3000 [2010] SGHC 108 (Singapore).
[271] *Siemens Industry Software GmbH & Co KG (Germany)* (n 241) [51].

(the agreement stipulating the arbitral clause), even in the absence of annexures which were the only documents signed by the respondent, and the award at the first stage, i.e. the enforcement stage (see Section 5.7.1 of the thesis for the facts of this case). The Federal Court rejected the previous decision by the Court of Appeal that in consequence of a failure to comply with the mandatory requirements of Section 38, where the appellant did not produce the annexures to the STA, an award can be set aside as of right without the respondent's application to resist enforcement under Section 39 of AA 2005.[272]

Similarly, in the case of *Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd*, the Court allowed the Defendant's application for the recognition and enforcement of an award after being satisfied that formal requirements had been satisfied, as the defendant had submitted a certified copy of the final award and a duly certified copy of the arbitration agreement.[273] In *Agrovenus LLP v Pacific Inter-Link Sdn Bhd*, the Court of Appeal allowed the appellant's appeal to recognise and enforce an award in accordance with Section 38.[274] The Court also held that despite there being an objection to the jurisdiction of the arbitral tribunal from the defendant, the Court accepted a formalistic approach of compliance with Section 38 as a *prima facie* proof where the appellant produced a copy of the award and the sale contract relating to the transaction containing an arbitration agreement.[275]

3.7 Rules of Court 2012: Procedures to Recognise and Enforce Foreign Arbitral Awards in Malaysia

ROC 2012 stipulates specific procedures to recognise and enforce foreign awards in Malaysia. ROC 2012 specifies two methods via which an award-debtor may initiate an action in Malaysia. Sections 38 and 39 of AA 2005 are a transformation of the provisions in NYC 1958 stipulating the requirements for positive evidence that the applicant has to produce in order to recognise or enforce an award. However, AA 2005 does not specify the actual procedure for the recognition and enforcement of an award as NYC 1958 leaves the details of the procedure in accordance with the domestic law of the enforcement State. In Malaysia, the applicant must make an application in writing in the form of an

[272] *International Bulk Carriers Spa v Cti Group Inc* [2014] 8 CLJ 854 [8].
[273] *Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd* [2013] 1 LNS 335 [36].
[274] *Agrovenus LLP v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2014] 4 CLJ 525.
[275] ibid [13].

originating summons to either the High Court of Malaysia, or the High Court of Sabah and Sarawak, whichever is relevant to the case.[276]

The first method is by initiating the originating summons pursuant to Order 28 read together with Order 69 of ROC 2012.[277] This procedure is applicable to both domestic and foreign awards. The arbitration procedure for the enforcement of awards in accordance with Section 38 of AA 2005 is by initiating an arbitration claim under Order 69 Rule 2(1)(k). To start a claim, the applicant must file a Form Five and include a concise statement of the remedy claimed and any question on which the applicant seeks the court's answer, specify the grounds in support of the originating summons, show that the statutory requirement is satisfied, specify the relevant section of AA 2005 the applicant is relying on, specify all respondents that the originating summons will be served on and identify the cost the applicant wishes to seek.[278] Order 69 Rule 4(2) also requires the applicant to include a copy of the award and arbitration agreement that shall be filed by affidavit, which harmonises with the requirements of *prima facie* evidence for the enforcement of an award as stipulated by Article IV of NYC 1958. Order 69 Rule 4(2) of ROC 2012 must be read together with Section 38(2) of AA 2005 and provide the textual harmonisation desired for the implementation of Article IV of NYC 1958 in Malaysia.[279]

Second, the award-creditor may initiate a claim under Order 69 Rule 8 of ROC 2012. Rule 9 specifies that the award-creditor may enforce an award that has become enforceable in the same manner as a judgment given by a court where the award was made in accordance with Order 69 Rule 8. A claim under Order 69 Rule 8 only applies to the recognition and enforcement of foreign awards.[280] However, an award as explicitly specified must be an award enforceable under the law of the State where it was made. This requirement is stricter and not covered by NYC 1958.

This second method to recognise or enforce an award is simpler than the previous one under Order 69 Rule 4, as explained. By virtue of Order 69 Rule 8 (2), an arbitration claim's originating summons must State the name and usual or last known address or

[276] Mah and Navaratnam (n 21) 342.
[277] ibid.
[278] Malaysian Rules of Court 2012 (ROC 2012), Order 69 Rule 4.
[279] Mah and Navaratnam (n 21) 342–343.
[280] Malaysian ROC 2012, Order 69 Rule 9.

business address of the applicant and defendant and state that the award has not been complied with or the extent to which it has not been complied with at the date of application.[281] A literal interpretation of the second part of the requirement for an arbitration claim's originating summons is that the same award must not have been presented previously, to avoid double jeopardy. Together with the arbitration claim's originating summons, the applicant must then provide evidence by way of affidavit, including the original arbitration agreement or a duly certified copy, a duly authenticated original award or duly certified copy, and a translation copy of the award duly certified by a sworn translator or official or a diplomatic or consular agent of the country where the award was made.

Section 38 of AA 2005 read together with Order 69 Rule 8 of ROC 2012 reflects textual harmonisation with Article IV of NYC 1958 in Malaysia. The Malaysian court portrayed a positive 'pro-arbitration' attitude to the recognition and enforcement of an award while the High Court showed some relaxation in procedural matters regarding recognition and enforcement of the said award. The Court ruled that a failure to comply with procedural requirements should not be cause for invalidating an action unless it results in a substantial miscarriage of justice.[282] In the case of *Armada (Singapore) Pte Ltd v Ashapura Minechem Ltd*, the High Court rejected the defendant's application to set aside the order under Order 67 Rule 9 of the Rules of High Court 2012 read together with Sections 2 and 5 of REJA 1958, as the plaintiff had already procured an order for recognition of the award dated 16 January 2014 by virtue of the provisions of Section 38 of AA 2005 read together with Order 69 Rule 8 of the Rules of Court 2012.[283] The omission to include the endorsement order under Order 69 Rule 8 (8) did not nullify the arbitral award.[284]

[281] Malaysian ROC 2012, Order 69 Rule 8 (2).
[282] *Armada (Singapore) Pte Ltd v Ashapura Minechem Ltd* [2016] 9 CLJ 709 [21].
[283] *Armada (Singapore) Pte Ltd* (n 282) [14].
[284] Ibid. [20].

3.8 Section 39 of the Arbitration Act 2005[285]

Section 39 provides exhaustive grounds that a party wishing to oppose the recognition or enforcement of a foreign arbitral award must prove. Section 39 of AA 1958 is a transformation provision for Article V of NYC 1958. Section 39 of AA 2005 must be raised by the party opposing the enforcement of an award. In the case of *Alami Vegetables* [2016], the Court rejected the appeal and held that it was an abuse of court that the appellant only filed an opposing affidavit without relying on any of the grounds under Section 39 of AA 2005.[286]

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[285] Malaysian AA 2005, s 39: Grounds for Refusing Recognition or Enforcement

1) Recognition or enforcement of an award, irrespective of the State in which it was made, may be refused only at the request of the party against whom it is invoked—

a) where that party provides to the High Court proof that—

i. a party to the arbitration agreement was under any incapacity;
ii. the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of the State where the award was made;
iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
iv. the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
v. subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration;
vi. composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or
vii. the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

b) if the High Court finds that—

i. the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or
ii. the award is in conflict with the public policy of Malaysia.

2) If an application for setting aside or suspension of an award has been made to the High Court on the grounds referred to in subparagraph (1) (a)(vii), the High Court may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

(3) Where the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced.

[286] *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil* (n 262) [16].

The wording of Section 39 is very similar to the wording of Article V of NYC 1958 and Article 36 of UML. Article V stipulates two different categories of defence or grounds for refusal to enforce an arbitral award. First, the grounds under Section 39(1)(a) of AA 2005 must be raised or relied on by the defendant or the party opposing the enforcement of an award.[287] Second, the grounds under Section 39(1)(b) are the grounds available for the enforcement court to consider.[288] The sub-sections below examine the application of grounds stipulated under Section 39 by Malaysian courts.

3.8.1 Ground 1: Incapacity

First, the party opposing the recognition and enforcement of a foreign award may raise the ground of incapacity. Section 39(1)(a)(i) of Malaysian AA 2005 reflects the textual implementation of the first part of Article V(1)(a) into Malaysian domestic law. NYC 1958 does not specify what incapacity means. The general rule for the legal capacity requirement to enter into an arbitration agreement is any natural or legal person who has capacity to enter into a valid contract.[289]. The term 'party' in this context refers to physical and legal persons.[290] Therefore, for the purposes of this provision, parties to the arbitration agreement may also be legal entities under public international law, including States and legal organisations.[291]

The party relying on the incapacity ground in Malaysia must prove that the party was not capable to understand the contract, i.e. the arbitration agreement and the effects of such agreement upon him, that is to be bound by arbitration including the awards rendered by the arbitral tribunal. AA 2005 does not stipulate a definition of incapacity. As the recognition and enforcement of foreign awards in Malaysia only covers commercial awards, inferences can be drawn from the Malaysian Contracts Acts 1950. Section 11 of the Malaysian Contracts Act 1950 states that 'every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject'.[292]

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[287] *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd* 2012] 8 MLJ 585 [60] ; *Agrovenus LLP v Pacific Inter-Link Sdn Bhd* (n 274) [16].
[288] *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* (n 287) [60].
[289] Wolff (n 61) 271.
[290] ibid.
[291] ibid.
[292] Malaysian Contracts Act 1950, s. 11.

Section 12 clarifies that a sound mind for the purposes of contracting refers to the capability of a person to understand the contract and form a rational judgment as to the effect of the contract at the time he is contracting.[293] So far, there are no reported cases relying on the ground of incapacity under Section 39(1)(a)(i) of AA 2005 in an application to oppose the recognition or enforcement of a foreign arbitral award in Malaysia.

3.8.2 Ground 2: Invalid Arbitration Agreement

Section 39(1)(a)(ii) stipulates the second ground, which is where the arbitration agreement is not valid according to the law to which the arbitration agreement was subjected or, failing any other indication, under the law of the State where the award was made.[294] Section 39(1)(a)(ii) is a transformation provision of the second part of Article V(1)(a) of NYC 1958. The courts, in applying this provision regarding the validity of the arbitration agreement in question, must respect the sequence provided by NYC 1958 regarding which governing law will prevail.[295] Article V(1)(a) portrays one of the advantages of arbitration where parties that have agreed to submit to it may make their own choice of law explicitly or impliedly in their arbitration agreement. Therefore, in determining the validity of an arbitration agreement, the court will first examine whether there is any specific choice of law chosen by the parties in their arbitration agreement. However, in a situation where there is no choice of law made by the parties, the applicable law will be the law where the award was made.[296]

Malaysian courts are seen to have adopted two different approaches to the application of Section 39(1)(a)(ii) of AA 2005. First, a Malaysian court held that only the supervisory court, i.e. the Court where the award was made, has the jurisdiction to determine matters pertaining to the validity of an arbitration agreement, subject to the parties agreeing on the law governing the agreement. In the case of *Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd* [2016] 5 CLJ 746, the Defendant had agreed to hire a vessel from the Plaintiff for a period of three months with an option to extend for another three months subject to a new extension of hire terms.[297] The Plaintiff delivered the vessel on 23 February 2013 and the Defendant returned it on 30 May 2013 after extending the charter

[293] Malaysian Contracts Act 1950, s. 12.
[294] Wolff (n 61) 271.
[295] ibid 275.
[296] NYC 1958 (n 13) art V(1)(a).
[297] *Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd* [2016] 5 CLJ 746 [2-6].

party for eight days. As the Defendant failed to make payment of USD 1,921,242.05, the Plaintiff commenced an arbitral proceeding in Singapore. The Defendant did not participate in the proceedings and the tribunal delivered an award to the plaintiff.

The Court found that Clause 22 of the Charter Party stipulated that the arbitration shall be conducted according to Singapore law, including any question regarding the existence and validity of the contract, and it was too late for the Defendant to raise the issue in the enforcement Court. The defendant argued that enforcement of the award should be refused due to an invalid arbitration agreement under Section 39(1)(a)(ii) of AA 2005.[298] The Court of Appeal in the *Sintrans* case held that the validity of the arbitration agreement should be determined by the law of the country where the award was made, i.e. in Singapore as specified in the arbitral clause between the parties.[299] The Court found that the arbitration clause was very clear on the law governing the arbitration agreement and the clause was binding upon the parties. As the Malaysian Court was only the enforcement court, it had no jurisdiction to determine the validity of the arbitration agreement. The defendant would have to establish this under Singapore law in the supervisory seat, i.e. Singapore, before invoking refusing enforcement in the enforcement court.[300]

Second, the Malaysian court held that it had the jurisdiction to determine the validity of the arbitration agreement in its capacity as the enforcement court. In the case of *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] 8 MLJ 585, in the application to recognise and enforce an award made in England pursuant to Section 38 of AA 2005, the defendant argued that there was no valid arbitration agreement between the parties to refer the dispute to arbitration.[301] In this case, both defendants were incorporated in the UK and entered into agreement to buy certain goods – RBD Palm Olein and RBD Palm Kernel Oil – from the plaintiff, a Malaysian corporation. The price was agreed and the defendants paid the monies accordingly. The representatives of the parties subsequently met in Istanbul where the parties argued that there was an oral agreement to reduce the freight rate of the goods. There was a draft of an MOU that was

[298] ibid.
[299] ibid [15].
[300] ibid [16].
[301] *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* (n 287).

never signed. The plaintiffs then emailed the defendant requests to deduct the over-payments via a reduction in price for future contracts. The defendants rejected the requests and the plaintiffs then referred the matter to arbitration in England. The defendants, relying on Section 39(1)(a)(ii), (iv) and (v) of AA 2005, argued that the arbitral tribunal had no jurisdiction as the issue of freight reduction was made subject to an MOU that did not contain any arbitration clause.

While the High Court recognised its role as the enforcing court, it found that it had the power to determine the issue of the validity of the arbitration agreement and the jurisdiction of the arbitral tribunal, notwithstanding whether the issue was raised previously by the arbitral tribunal.[302]

The High Court found that enforcement must follow the following principles in determining whether an arbitration agreement exists and valid under the law where the award was made:

a) that the enforcing court must carry out an independent exercise or investigation into the issue;
b) that this exercise or investigation is not by way of review of the tribunal's decision but is an ordinary judicial determination of factual evidence and law;
c) that the tribunal does not have exclusive power to determine the issue;
d) furthermore, regardless of its composition, eminence, high standing or great experience, the tribunal's own view of its own jurisdiction has no legal or evidential value;
e) that the enforcing court is entitled, if not bound, to re-examine any decision that the tribunal may already have rendered on the issue;
f) that the degree of scrutiny of the issue will depend on the national law of the country where enforcement is sought, subject to international conventions; and
g) that the onus of proving this lack of jurisdiction is on the person resisting recognition or enforcement.[303]

In this case, the High Court held that it was immaterial that the Defendant did not raise the issue of the jurisdiction of the arbitral tribunal during the proceedings and held that the Court was entitled and bound to enquire into this matter and examine whether the defendant had provided proof that there was no arbitration agreement between the parties.[304] The High Court dismissed the plaintiffs' application and found there was no arbitral clause between the parties on the MOU pertaining a freight reduction in price.

[302] ibid [60-62].
[303] ibid [58].
[304] ibid [63].

Therefore, the Court found that there was no arbitration agreement in the first place, and thus the issue of its validity did not exist.

In the appeal of the same case, *Agrovenus LLP v Pacific Inter-Link Sdn Bhd* [2014] 4 CLJ 525, the Court of Appeal allowed an appeal to enforce the award despite the Respondent raising objections under Sections 39(1)(a)(ii), (iv) and (v) of Malaysian AA 2005. Pertaining to the objection raised for the invalidity of an arbitration agreement pursuant to Section 39(1)(a)(ii), despite the court holding that the Respondent had failed to provide proof to the court as to why recognition should be refused, the Court of Appeal agreed with the findings of the High Court that it had jurisdiction to determine the validity of the arbitration agreement as raised by the respondent.[305] The Court of Appeal concluded that the arbitral tribunal in London had jurisdiction to determine the matter pertaining to a freight reduction price. It held that even if the oral agreement pertaining to a freight price reduction was an oral agreement, the agreement was 'not one that emerged and existed in isolation' as the agreement has to be read together with the other sale agreement and clause 6.1 of the said sale agreement provided for an arbitral clause and arbitration proceeding according to English Law in London.

Therefore, the Court concluded that a dispute arising out of the sale contract or in relation to it may be taken to an arbitral tribunal pursuant to the sale contract.[306] The court was also unconvinced by the argument of jurisdiction made by the respondents as the they did not raise any objection during the arbitral tribunal proceeding and only raised this issue when applying to have a foreign award recognised and enforced.[307] Accordingly, the respondent stopped relying on the ground of no jurisdiction as he failed to object at the proceedings and caused all parties to act on the basis that he accepted that the arbitral tribunal had jurisdiction pertaining to the issue. The Court of Appeal made an order for the recognition and enforcement of the award.

[305] *Agrovenus LLP* (n 274) [31–32].
[306] *Agrovenus LLP* (n 274) [25].
[307] ibid.

3.8.3 Ground 3: No Proper Notice of the Appointment of an Arbitrator and Unable to Present A Party's Case

Section 39(1)(a)(iii) of AA 2005 provides the third ground for refusal of the recognition and enforcement of an award in Malaysia, which is where the party (1) was not given proper notice of the appointment of an arbitrator or arbitration proceedings or (2) was otherwise unable to present his case. Section 39(1)(a)(iii) is a transformation section for Article V(1)(b) of NYC 1958. Article V(1)(b) of NYC 1958 incorporates the basic notion of a fair arbitral procedure.[308] The fundamental basis for the integrity of the dispute mechanism includes the principle of procedural fairness.[309] Even though the parties have consented to submit to an arbitrator or arbitral tribunal to resolve their dispute or differences, the principle of procedural fairness is applicable to all arbitration proceedings.[310]

In practice, there have been no reported cases in Malaysia where the opposing party invoked Section 39(1)(a)(iii) in order to refuse the enforcement of an award. The party invoking the ground bears the burden of proving to the court that they had not received proper notice of arbitral proceedings and was thus unable to participate in the proceedings. Even though there are no reported cases in Malaysia regarding Section 39(1)(a)(iii) of Malaysian AA 2005, there is a case on the same ground but instead under Section 37(1)(a)(iii) on the setting aside of awards made in Malaysia. In the case of *Hotel Sentral Pudu Sdn Bhd v Teknologi Tenaga Baru Che Lifang*, the applicant applied to the High Court to set aside an award published by the China International Economic and Trade Arbitration Commission (hereinafter, CIETAC) in accordance with Section 37 of AA 2005. The High Court acknowledged that even though Section 37 of AA 2005 provides discretion to the court to set aside an arbitral award, the court must 'save the award as far as practical'.[311] Even so, the court in that case was satisfied that the applicant had succeeded in invoking Section 37(1)(a)(iii) of AA 2005 by proving that they had not received proper notification regarding the arbitration proceedings in CIETAC and was therefore unable to participate in them. The High Court then ordered that the said award

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[308] Maxi Scherer, 'Article V (1) (B)' in Reinmar Wolff (ed), *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Commentary* (Verlag C H Beck oHG, Hart Publishing & Nomos Verlagsgesellschaft mbH & Co 2012) 279.
[309] ibid.
[310] ibid 280.
[311] *Hotel Sentral Pudu Sdn Bhd v Teknologi Tenaga Baru Che Lifang (Beijing) Sdn Bhd* [2018] 1 LNS 583, 10.

be set aside.[312] Applying this case, if a similar ground under Section 39(1)(a)(iii) is invoked, the party invoking the ground bears the burden of proving to the court that they have not received proper notice of arbitral proceedings and is thus unable to participate in them.

In the case of *Agrovenus LLP v Pacific Inter-Link Sdn Bhd & Another Appeal* [2014] 4 CLJ 525, even though this case involves Section 39(1)(a)(ii) on the validity of an arbitration agreement, an inference may be made of how a Malaysian court would apply Section 39(1)(a)(iii). On the application of Section 39(1)(a)(iii), the Malaysian courts would estop the parties relying on the argument of not receiving proper notice and being unable to participate in the proceedings if the party failed to raise objections during the arbitral proceedings or challenge the award in the court where the award was made. In *Agrovenus*, the court criticised the fact that the Respondent did not raise any objection during the arbitral tribunal proceedings and only raised this issue when applying to have a foreign award recognised and enforced.[313] The Court held that the Respondent was estopped from relying on the ground of no jurisdiction as he failed to object at the proceedings and caused all parties to act on the basis that he accepted that the arbitral tribunal had jurisdiction pertaining to the issue.

3.8.4 Ground 4: Excess authority by the arbitrator and a decision on matters beyond the scope of submission to arbitration

Sections 39(1)(a)(iv) and 39(1)(a)(v) of Malaysian AA 2005 transformed Article V(1)(c) of NYC 1958. Section 39(1)(a)(iv) stipulates the first ground for excess arbitrator authority, which is where the award deals with a dispute not within the terms of submission to arbitration. Section 39 (1)(a)(v) provides for the second ground of excess of arbitrator's authority, which is where the award contains decisions on matters beyond the scope of submission to arbitration. Section 39(3) prescribes the third element of Article V(1)(c) of NYC 1958, which is the severability principle.

[312] ibid 583.
[313] ibid.

The foundation of Article V(1)(c) is built on the characteristics of arbitration, which operates on consent by the parties.[314] Thus, arbitrators and arbitral tribunals must only exercise their power in accordance with matters submitted to arbitration as specified in the parties' arbitration agreement.[315] The ground of excess authority available under Article V(1)(c) does not include or concern the arbitrator's lack of competence or lack of a valid arbitration agreement.[316] Article V(1)(c) strictly concerns a situation where the arbitrator or arbitral tribunal has acted or made a decision on matters not contemplated or falling within the scope of the arbitration agreement, even though it may be valid.[317] In deciding on the ground of excess authority, judges should not conduct a re-examination of the validity of an arbitral award.[318]

In practice, Malaysian courts are seen to have adopted a consistent approach in requiring strict and real proofs in challenges on excess of jurisdiction or awards containing decisions on matters beyond the scope submitted to arbitration. First, the Malaysian courts held that participation and failure to challenge at the arbitral proceedings constitutes consent and the defendants shall not rely on grounds of excess of jurisdiction during recognition and enforcement proceedings. In the case of *Agrovenus LLP*, the Malaysian court took into account that the respondent's participation and failure to object at the arbitral proceedings showed his acceptance or consent to the exercise of the proceedings. The Court of Appeal allowed the appellants' appeal to enforce the arbitral award pursuant to Section 38 of AA 2005.[319] Similarly, in the case of *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] 3 CLJ 635, the High Court also criticised the fact that the Defendant did not raise a challenge during the arbitral proceedings nor during the appeal initiated by the Defendant. The Court found that the defendant had accepted the jurisdiction of the arbitral tribunal readily and willingly by his failure to raise a challenge and even filing an appeal to the appeal board upon issuance of the first final award that he was unhappy with.[320]

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[314] Nicola Christine Port, Scott Ethan Bowers and Bethany Davis Noll, 'Article V (1) (C)' in Herbert Kronke and others (eds), *Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention* (Kluwer Law International 2010) 259.
[315] ibid.
[316] Berg, *The New York Arbitration Convention of 1958 : Towards a Uniform Judicial Interpretation* (n 39) 312.
[317] ibid 312.
[318] ibid 313.
[319] *Agrovenus LLP* (n 274) [31–32].
[320] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] 3 CLJ 635.

Also, a Malaysian court found that the arbitrator or arbitral tribunal has a general jurisdiction to deal with all matters relating to a dispute as agreed in the arbitration agreement, including incidental matters. In the case of *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations*, the plaintiff applied to object to the defendant's application to enforce an award and relied on Sections 39(1)(a)(iv), 39(1)(a)(v) and 39(1)(b)(ii) on the ground that the award dealt with a dispute not contemplated or falling within the terms of submission to arbitration and that the award was also in conflict with the public policy of Malaysia.[321] In this case, the plaintiff argued that the arbitrator decided on issues concerning draft statements of final accounts and release of the moiety of retention sum under the contract.[322] The text of the final award portrays that the arbitrator, while he admitted that he granted additional reliefs not specifically pleaded on the final accounts and moiety of the retention sum, believed that the dispute out of this contract would truly be complete and attended. The High Court found that the facts of the case were crystal-clear, that the arbitrator had acted on an issue falling specifically within the subject matter of the arbitration agreement and held that 'it is trite that the arbitrator has a general jurisdiction to deal with all matters relating to the dispute and this will cover incidental matters'.[323] The court also highlighted that Sections 39(1)(a)(iv) and (v) must be interpreted from the right perspective to appreciate the primary objective of Malaysian AA 2005, which is to allow minimum interference by the court.[324]

Similarly, in the case of *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] 3 CLJ 635, the Court held that the arbitral tribunal acted within its jurisdiction by considering other contracts, i.e. the initial contract and sold note issued by the Plaintiff, and not just the sales contract. In this case, a dispute arose between the plaintiff, a limited liability company incorporated in Pakistan, and the defendant, a limited liability company incorporated in Malaysia, pertaining to the sale of 10,000 MT of RBD Palm Olein. The plaintiff commenced arbitration under the Palm Oil Refiners Association of Malaysia (hereinafter, PORAM) Rules of Arbitration and Appeal. Both the first arbitral tribunal and the Final Appeal Board issued awards on behalf of the

[321] *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83.
[322] ibid [30]
[323] ibid [33].
[324] ibid [35].

plaintiff. On the plaintiff's application to enforce the awards, the application was heard previously in a different High Court where the High Court allowed the enforcement of an award issued by PORAM. The Court of Appeal subsequently dismissed the appeal by the defendant. The Federal Court then directed for this case to be remitted in the High Court to hear the defendant's challenges pursuant to Section 39 of AA 2005.

On second hearing before the High Court, the defendant raised challenges under Section 39(1)(a)(iv)-(v) and Section 39(1)(b)(ii) of AA 2005, including that the Final Appeal Board had acted outside the terms of arbitration stipulated in the plaintiff's request and a decision on matters beyond the scope of submission to arbitration.[325] The defendant argued that even though the request for arbitration cited a dispute that arose from a sales contract, the Appeal Board referred and considered other contracts, i.e. the initial contract and sold note issued by the plaintiff, and not just the sales contract.[326] The defendant contended that the Appeal Board delivered the award based on the wrong contract and had acted outside the scope of arbitration.

The High Court allowed the recognition and enforcement of both awards issued by the PORAM arbitral tribunal and Appeal Board to the plaintiff. The Court rejected the defendant's challenges pursuant to Section 39(1)(a)(iv)-(v) and found that the Appeal Board dealt with issues brought up by the parties precisely and the award did not contain a decision beyond scope of submission to arbitration.[327]

Also, in the case of *Agrovenus LLP*, the Court held that the oral agreement on 10 April 2009 to reduce the freight rate component must be read together with the sale contract. The Court of Appeal allowed the appellants' appeal to enforce the arbitral award pursuant to Section 38 of AA 2005.[328] The High Court rejected the appellants' application to enforce the award in the first instance and held that the arbitral tribunal had exceeded its jurisdiction as the original arbitration agreement did not extend to disputes dealt with by arbitration proceedings.[329] The court held that the oral agreement on 10 April 2009 to reduce the freight rate component must be read together with the sale contract on 3 April

[325] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* (n 320) [32]
[326] ibid [33].
[327] ibid [42–45].
[328] *Agrovenus LLP* (n 274) [31–32].
[329] ibid [5]

2009, and thus the arbitral tribunal did indeed have jurisdiction to determine the dispute regarding the oral agreement and the reduction of the freight component price under the sale contract of 3 April 2009.[330]

3.8.5 Ground 5: Composition of the arbitral tribunal or the procedure not being in accordance with the arbitration agreement, or failing that, in accordance with the law of the country where the arbitration took place.

Section 39(1)(a)(vi) of AA 2005 stipulates the grounds available under Article V(1)(d) of NYC 1958. Article V(1)(d) stipulates the grounds for the party resisting the enforcement of an arbitral award by challenging the composition of the arbitral tribunal or the procedure not being in accordance with the arbitration agreement, or failing that, in accordance with the law of the country where the arbitration took place. Article V(1)(d) portrays 'a step forward' and the novelty of NYC 1958 that gives supremacy to the parties' agreement regarding the composition of a tribunal and procedure.[331] Thus, under Article V(1)(d), the law where the arbitration took place only has a 'subsidiary supplementary function' whereby it will only apply if the parties fail to reach or provide an agreement on which the law shall govern the procedural aspect of their dispute.[332]

However, there is a lack of textual harmonisation in the transformation of Article V(1)(d) into Section 39(1)(a)(vi) of Malaysian AA 2005. Section 39(1)(a)(vi) stipulates that:

> …the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, *it was not in accordance with this Act*.

Article V(1)(d) of the NYC 1958 provides that:

> The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, *was not in accordance to the law of the country where the arbitration took place*.

Therefore, Malaysia is actually one step behind in this matter. For while acknowledging the principle of party autonomy, it limits that parties' freedom to the extent that it must

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[330] ibid [25–26].
[331] UNCITRAL Secretariat (n 87).
[332] Christian Borris and Rudolf Hennecke, 'Article V (1) (C)' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958 Commentary* (Verlag C H Beck oHG, Hart Publishing & Nomos Verlagsgesellschaft mbH & Co 2012) 330.

be consistent with Malaysian AA 2005, in the absence of an agreement between the parties. This provision is similar to ECOSOC Draft 1955. Unlike other grounds for refusing to recognise or enforce an arbitral award, Article V(1)(d) specifically mentions that the composition of an arbitral tribunal must be consistent with the agreement of the parties, and only in the absence of such an agreement will the law where the arbitration took place be the governing law.[333] Article V(1)(d) also enshrines the characteristics and nature of ICA where this provision does not provide any minimum requirements for the parties' arbitration agreement relating to which law should govern their dispute. Thus, the parties may agree on any domestic law of any State, any institutional rules or any other available rules of the parties' choice.[334] In practice, there is no case pertaining to the application of a challenge under Section 39(1)(a)(vi) where there is no agreement between the parties.

Nonetheless, should a case arise in Malaysia where the award-debtor resists the enforcement of an award pursuant to Section 39(1)(a)(vi) of AA 2005, in the absence of an agreement between the parties, the Malaysian court would assess the composition of an arbitral tribunal or arbitration procedure in accordance with AA 2005. The thesis proposes that Malaysia should amend its Section 39(1)(a)(vi) to conform to the provisions of NYC 1958, and also UML (see Section 7.4).

In a situation where there is an express arbitration clause governing the law and procedure of arbitration, the Malaysian court adopted a pro-arbitration approach by requiring the defendant challenging the recognition and enforcement to furnish proof to satisfy its onus of proving a defence under Section 39(1)(a)(vi). In the case of *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd*, the parties expressly stipulated in Clause 6 of their contract that

> 6.1 All disputes between the parties in connection with the non-fulfilment or improper fulfilment of the conditions of the contract shall be resolved by means of negotiation.
>
> 6.2 If the parties cannot come to mutual agreement, then dispute should be passed for considering and final resolution to International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine

[333] UNCITRAL Secretariat (n 87).
[334] ibid.

> (the place for legal investigation is Kiev, Ukraine) according to its regulations with three arbitrators present in case when the plaintiff is the Seller, and the dispute should be passed for considering and final resolution to International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation (the place of legal investigation is Moscow, the Russian Federation) according to its regulations with three arbitrators present in case when the Plaintiff is the Buyer.
>
> When the dispute is considered in the given courts, the norms of the substantive and procedural laws of Ukraine when the Plaintiff is the seller is applied; the norms of the substantive and procedural laws of Russia when the Plaintiff is the Buyer is applied.[335]

Clause 6 stipulated that if a non-negotiable dispute arose and the defendant was the complainant in a dispute, the dispute was to be referred to the ICAC Ukraine, according to the regulation of the ICAC Ukraine and the procedural laws of Ukraine. If the complaint was initiated by the plaintiff, the dispute should be referred to the ICAC Russian in accordance with the rules of the ICAC Russia and the procedural laws of Russia.[336]

Subsequently, disputes arose with both parties arguing that the other party breached their contractual obligations.[337] Both parties commenced arbitration proceedings in the Ukraine and Russian arbitral tribunals (see Section 6.6.2.1 of the thesis). First, the defendant initiated a claim concerning a late payment of goods to the ICAC Ukraine and obtained an award in his favour.[338] Second, the plaintiff, without objecting to the arbitral proceedings of the Ukrainian tribunal, initiated a claim for late delivery of goods in the ICAC Russia and obtained an award in his favour.[339] The defendant challenged the award issued by the ICAC Russia at the Moscow Arbitration Court to set aside the award.[340] The Moscow Arbitration Court rejected the defendant's application to set aside and held that the arbitration procedure was consistent with the parties' agreement and not inconsistent with Russian public policy.

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[335] *Open Type Joint Stock Co Efirnoye (' EFKO') v Alfa Trading Ltd* (n 1) [5].
[336] ibid [4–6].
[337] ibid [7].
[338] ibid [8].
[339] ibid [8–13].
[340] ibid [24].

In the High Court of Malaysia, the plaintiff applied to recognise and enforce the award against the defendant in accordance with Section 38 of AA 2005. The defendant applied for refusal to enforce the award pursuant to Section 39(1)(a)(vi) and Section 39(1)(b)(ii) of AA 2005 (see Section 3.8.8 for a discussion of public policy). The defendant submitted that the arbitral procedure was not in accordance with the agreement between the parties, as stipulated under Section 39(1)(a)(vi). The Malaysian High Court in this case allowed the plaintiff's application to enforce the award and rejected the defendant's application to refuse enforcement of the award on the ground that the defendant had failed to prove and show that there was any failure of the plaintiff to comply with the arbitration clause.[341] The Court accepted the finding of the Moscow Arbitration Court that the parties observed the procedure expressly agreed by themselves in the arbitration clause.

3.8.6 Ground 6: Award Not Yet Binding, Has Been Set Aside or Suspended by the Supervisory Court

Section 39(1)(a)(vii) of AA 2005 provides grounds to challenge the recognition and enforcement of an award where the (1) the award has not yet become binding on the parties, (2) the award has been set aside by the country under the law where the award was made and (3) the award was suspended by a competent authority under the law where the award was made. Section 39(1)(a)(vii) of Malaysian AA 2005 is a textual harmonisation of Article V(1)(e) of NYC 1958.

There are no reported cases involving the application of Section 39(1)(a)(vii) of Malaysian AA 2005 to the recognition and enforcement of a foreign award in Malaysia. Nevertheless, an inference may be made from the application of Section 39(1)(a)(vii) of Malaysian AA 2005 in the case of *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] 3 CLJ 534 involving an application for the recognition and enforcement of a domestic award. In this case, the Court of Appeal reversed the decision of the High Court to allow the recognition and enforcement of an award pursuant to Section 38 of AA 2005. The appellant applied to stay the respondent's application or alternatively suspend enforcement of the award pending a second arbitration proceeding between the parties.

[341] ibid [35].

The appellant in this case subcontracted engineering, procurement, construction and commissioning works to the respondent in 2011. The appellant terminated the contract in 2013 and the defendant subsequently challenged this termination in the first arbitral proceeding. The arbitral tribunal then issued an award on behalf of the respondent. In 2017, the respondent applied to recognise the award as a judgment pursuant to Section 38 of AA 2005 but withdrew the application upon an objection by the appellant to the language used in the application.[342]

The appellant subsequently filed a civil suit in 2017 at the High Court in Kuala Lumpur. The respondent applied for a stay of the civil suit and this was allowed by the High Court. The High Court ordered a new arbitration proceeding within one month (second arbitration). The second arbitration commenced in December 2017 with a different arbitral tribunal on the appellant's claim for delivery and transfer of ownership of equipment. In 2018, the Malaysian High Court allowed the respondent's second application to register the first award as a judgment and rejected the appellant's challenge under Section 39(1)(a)(vii) that the award had yet to become binding on the parties. The High Court found that even though there was a link between the first and second arbitration proceedings, it did not make the first award conditional upon the outcome of the second arbitration. The High Court judge held that Section 8 of AA 2005 leaves little room for the court to intervene in the application of specific grounds under Section 39. The application to stay an enforcement should not be allowed as there was no application to set aside the award.

On appeal, the Court of Appeal held that the appellant rightly invoked Section 39(1)(a)(vii) that the first award was not yet binding upon conclusion of the second arbitral proceeding. The Court of Appeal took guidance from another NYC 1958 Contracting State on the application of the term 'not yet binding'.[343] The Court of Appeal found that the High Court judge overlooked the provision of Section 39(2) of AA 2005 which allows discretion for the court to adjourn or provide security if one of the parties invokes a challenge under Section 39(1)(a)(vii) that the award has been set aside or suspended. Section 39(1)(a)(vii) stipulates that the appellant bears the burden of proving

[342] *Malaysian Bio-Xcell Sdn Bhd* (n 244) [6].
[343] ibid [26].

that the award has not yet become binding, has been set aside or suspended by the court where the award was made.

The Court of Appeal explained that

> … it is clear that the construction and interpretation given to Article V of the New York Convention and Article 36 of the Model Law and thereby to Section 39(1)(a)(vii) is that there is power and jurisdiction to entertain a stay or even an adjournment of the application for recognition or enforcement where the resisting parties prove that the award is yet to become binding; that the court is not necessarily confined to refusing or granting the application for recognition or enforcement of the award'.[344]

The Court of Appeal did not provide a definition for the term 'not yet binding' but emphasised the need to carefully scrutinise a discretionary award under Section 39(1)(a)(vii). The Court explained that a refusal to recognise and enforce an award is not dependent upon an application to set aside the award.[345]

The Court of Appeal was satisfied that the appellant had made its case and proved consensual terms to refer the interplay between the award and equipment to a second arbitration made before the judge in the Kuala Lumpur Civil Suit where the respondent did not invoke Section 38 at the civil suit proceeding. The Court relied on evidence from the notice to arbitrate to the Kuala Lumpur Civil Suit and held that it was reasonable to stay the enforcement of the first award as the issue of equipment needed to be resolved by the second arbitration first, as one of the questions for the second arbitration was whether the arbitration award was conditional upon the respondent's ability to deliver the equipment. The Court emphasised the fact that it was the respondent who suggested the Court (Kuala Lumpur Civil Suit) refer the dispute to a second arbitration and that the consensual terms agreed at the Kuala Lumpur Civil Suit proceeding were binding on both parties.

3.8.7 Ground 7: Incapable of Settlement by Arbitration under Malaysian Law

Section 39(1)(b)(i) of AA 2005 provides for the ground of arbitrability to challenge the recognition and enforcement of awards. Section 39(1)(b)(i) is a transformation provision of Article V(2)(a) of NYC 1958. The spirit of Article V(2)(a) of NYC 1958 is a 'security

[344] ibid [46].
[345] ibid [49].

valve' to allow contracting States to protect the public interest of their States.[346] Section 39(1)(b)(i) stipulates that a court may refuse the enforcement and recognition of an arbitral award if the High Court finds that the subject matter of the award is incapable of settlement by arbitration under Malaysian law.

A dispute is not arbitrable in Malaysia when a dispute under an arbitration agreement is against the public policy of Malaysia. Regarding arbitrability, Section 4 of AA 2005 stipulates:

> (1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy.
> (2) The fact that any written law confers jurisdiction in respect of any matter on any court of law but does not refer to the determination of that matter by arbitration shall not, by itself, indicate that a dispute about that matter is not capable of determination by arbitration.

To date, there are no reported cases involving the application of Section 39(1)(b)(i) of AA 2005 in Malaysia. However, the Federal Court in the case of *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 5 MLJ 186 held that a dispute triggered by a statutory notice on Form 16D of NLC is not arbitrable under Section 4(1) of AA 2005. In this case, the appeal concerned whether the right of the appellant (chargee) under the National Land Code (hereinafter, NLC) to foreclose the security under the charge could be stayed under Section 10 of AA 2005 pursuant to an arbitration agreement between the parties. A clause in the agreement between the parties stipulated that the charge shall be governed by the jurisdiction of a Malaysian court and any dispute under the subscription agreement shall be settled by arbitration in Singapore, governed by Singapore law. The appellant claimed that the subject matter of the foreclosure proceeding under the NLC was not arbitrable in a private arbitration proceeding, and hence the respondent could not apply for a stay under Section 10 of AA 2005.

The Federal Court found that the charge did not contain an arbitration clause, unlike the subscription agreement between the parties. The Court held that a charge is a separate and distinct document which is executed after a subscription agreement. As there were

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[346] David Quinke, 'Article V (2) (A)' in Reinmar Wolff (ed), *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards on 10 June 1958 Commentary* (Verlag C H Beck oHG, Hart Publishing & Nomos Verlagsgesellschaft mbH & Co 2012) 380.

no previous Malaysian cases involving arbitrability, the Federal Court took guidance from other foreign jurisdictions, including Singapore where the Singapore Court of Appeal in the case of *Tomolugen Holdings Ltd and another v Silica Investors Ltd and other appeals* [2015] SGCA 57 held that, under the Singapore International Arbitration Act, there will ordinarily be presumption of arbitrability as long as the dispute falls within the scope of an arbitration agreement.[347] However, the presumption can be rebutted in two circumstances (1) where Parliament intended to preclude a particular type of dispute and (2) where it would be contrary to public policy that that type of dispute is permitted to be settled by way of arbitration.

In this case, the Federal Court held that the dispute triggered by a statutory notice on Form 16D of NLC was not arbitrable under Section 4(1) of AA 2005. The Court found that the NLC is a complete and comprehensive code governing the land law of Malaysia and any attempt to contract out of rights under the NLC would be contrary to the public policy of Malaysia.

Thus, should an application to refuse the recognition and enforcement of foreign awards pursuant to Section 39(1)(b)(i) of AA 2005 arise in Malaysia, the court would examine whether the dispute was arbitrable pursuant to Section 4 of AA 2005. Also, the court would take guidance from the case of *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] where the High Court judge cited cases from foreign jurisdictions in determining whether that subject matter was arbitrable in Malaysia.

3.8.8 Ground 8: Public Policy

Section 39(1)(b)(ii) stipulates a ground on which a party resisting the recognition and enforcement of an award may rely, which is where the award is in conflict with the public policy of Malaysia. This provision is the textual harmonisation of Article V(2)(b) of NYC 1958. Article V(2)(b) stipulates another ground that an enforcement court may invoke its own motion to refuse the recognition and enforcement of an arbitral award, it is where the recognition and enforcement of the said award may be contrary to the public policy of the enforcement State. Recent practice shows that most resisting parties will also invoke Section 39(1)(b)(ii) of AA 2005 as one of the grounds to resist the recognition and

[347] *Arch Reinsurance Ltd v Akay Holdings Sdn Bhd* [2019] 5 MLJ 186, [61].

enforcement of an award.[348] Therefore, an enforcement court must apply a narrow interpretation of NYC 1958 in order to portray the 'pro-enforcement bias' of NYC 1958. The public policy ground under NYC 1958 should be interpreted as narrowly as possible and limited to public order which involves a violation of a fundamental principle of justice.[349]

In Malaysia, the party invoking a ground under Section 39(1)(b)(ii) of AA 2005 must prove that the award 'would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of state are exercised'. In the case of the *Open Type Joint Stock Company Efirnoye (EFKO)*, the defendant, in an application to refuse the recognition and enforcement of an award pursuant to Section 38 of AA 2005, also invoked the public policy ground under Section 39(1)(b)(ii) (see Section 3.6.5 for the facts of the case). The defendant argued that it was contrary to public policy and amounted to *res judicata* and so the arbitration award by the Russian tribunal ought not to be recognised, as the Ukrainian tribunal had also made an award in respect of determination of the same contract.[350]

The High Court found that the defendant failed to point to express passages in the awards in which both tribunals considered the other corresponding arbitral proceeding in another jurisdiction and accepted that they were dealing with two different subject matters. The Court found that there were two separate and distinct issues dealt with by arbitral tribunals. While the Ukrainian tribunal dealt with the late payment of monies by the plaintiff and the right to retain monies, the Russian tribunal dealt with late delivery by the defendant and penalties. The court was satisfied that the defendant failed to prove that the enforcement of the award 'would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of state are exercised'.[351] As both arbitration proceedings were in accordance with an arbitration clause agreed by both parties, the High Court held that the question of *res judicata* did not apply in this case and there was no lack of fairness of procedure nor a breach of natural justice.

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[348] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* (n 320), 635; *Open Type Joint Stock Company Efirnoye (EFKO)* (n 1).
[349] Paulsson, *The 1958 New York Convention in Action* (n 20) 222.
[350] *Open Type Joint Stock Company Efirnoye* (n 1) [41–44].
[351] ibid [50].

The Malaysian courts also warned against utilising the ground of public policy under Section 39(1)(b)(ii) as a façade to review matters already decided in arbitration proceedings.[352] In the case of *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] 3 CLJ 635 (see Section 3.8.4), the Defendant also relied on Section 39(1)(b)(ii), claiming that both the final award and the appeal award were contrary to the public policy of Malaysia. The court found that the defendant did not explicitly explain how the awards were in conflict with the public policy of Malaysia but only argued that the award was inconsistent with PORAM terms and thus unfair to the defendant. The court held that since both parties had expressly agreed to arbitrate under PORAM Rules, the defendant was estopped to claim that the awards re contravened PORAM Rules.[353] The court explained that 'it is trite law, contravention of the public policy argument ought not to be utilised as a facade to reopen settled matters in arbitration'. The Court agreed with the plaintiff that the defendant should have brought the challenge under Section 37 of AA 2005 to set aside the award and the attempt to challenge under Section 39 was an afterthought.

[352] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* (n 320).
[353] ibid [48-49].

3.9 Conclusion

The recognition and enforcement of foreign awards in Malaysia is governed by Sections 38–39 of AA 2005. AA 2005 is the main legislation on arbitration, stipulating laws on domestic and international arbitration in Malaysia. It is the first arbitration legislation to not follow word by word England's AA 1996, in an effort to conform to current international practice by adopting UML as its basis. Alternatively, a party applying for the recognition and enforcement of awards in Malaysia may do so under REJA 1958, so long as the award was made in one of the Commonwealth States listed under the First Schedule of REJA 1958. However, current practice is to apply under Section 38 of AA 2005 as the States listed under REJA 1958 are also Contracting States of NYC 1958. The specific procedures to apply under Section 38 of AA 2005 and REJA 1958 are stipulated in ROC 2012.

Sections 38–39 of AA 2005 are also the implementing provisions for Malaysia's treaty obligations under NYC 1958. The case of *Lombard Commodities Ltd* portrays Malaysia's Federal Court 'pro-arbitration' stance in giving effect to application of Section 38 of NYC 1958 (equivalent provision to Articles III and IV of NYC 1958) by interpreting the requirement for gazette notification as not being mandatory and merely evidential, and it is enough to show that the UK is a Contracting State of NYC 1958. Malaysia only implements a territorial criterion in determining the scope of international arbitral awards recognisable and enforceable in Malaysia. An international award in Malaysia is 'a decision of the arbitral tribunal on the substance of the dispute and includes any final, interim or partial award and any award of costs or interest but does not include interlocutory orders'[354] and must be made in another Contracting State of NYC 1958.

Section 38 is a procedural provision to seek the recognition and enforcement of awards in Malaysia. In compliance with Article IV of NYC 1958, parties applying to recognise or enforce an award only need to supply 1) a duly authenticated original or duly certified award and (2) an original arbitration agreement or duly certified copy. These two requirements are mandatory and the courts adopt a formalistic approach in ensuring compliance with Section 38 as prima facie proof to recognise and enforce a foreign

[354] AA 2005, s. 2.

award.[355] The chapter finds that parties seeking to recognise and enforce a foreign award in Malaysia need only produce a dispositive portion of the award containing the decision and relief of the award. The recent decision in *Siemens Industry Software GmbH & Co KG (Germany)* held that the parties need not register the entire award as it would undermine the confidentiality of the arbitration proceeding.

Section 39 of AA 2005 (textual harmonisation of Article V of NYC 1958) specifies exhaustive grounds available for a party opposing the recognition and enforcement of a foreign award to rely on. The grounds available must be raised by the party opposing the recognition and enforcement and he bears the burden of proving the grounds raised.[356] The grounds under Section 39 of AA 2005 are textually harmonised with Article V of NYC 1958, except for Section 39(1)(a)(vi) of AA 2005 where it differs from the corresponding provision of Article V(1)(d) of NYC 1958. Article V(1)(d) of NYC 1958 stipulates grounds where the composition of an arbitral tribunal is not in accordance with the agreement of the parties, or, failing that, not in accordance with law where the award was made. In Malaysia, the composition of an arbitral tribunal must be in accordance with the agreement of the parties, or, failing that, in accordance with AA 2005. Therefore, in Malaysia, in the absence of agreement between the parties, the recognition and enforcement of awards must be in accordance with AA 2005. The thesis proposes that the Malaysian amend its 39(1)(a)(vi) of AA 2005 to conform with its obligations under NYC 1958 and international best practice.

The chapter further examines the application of eight grounds available under Section 39 of AA 2005 by Malaysian courts. First, on the application of the first ground under Section 39(1)(a)(i) on incapacity, the party must prove that the party was not capable of understanding the contract, i.e. the arbitration agreement, and the effects of such agreement upon him, that is to be bound by arbitration including awards rendered by the arbitral tribunal as specified under Section 11 of the Contracts Act 1950.

Second, the Malaysian courts adopted two different approaches in the application of Section 39(1)(a)(ii) of AA 2005 pertaining to the grounds for an invalid arbitration

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[355] *Sisma Enterprise Sdn Bhd v Solstad Offshore Asia Pacific Ltd* (n 273), 9*; Agrovenus LLP v Pacific Inter-Link Sdn Bhd* (n 274)*; International Bulk Carriers Spa v Cti Group Inc* (n 272).
[356] *Alami Vegetable Oil Products Sdn Bhd v Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* (n 252).

agreement. First, the court in *Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd* [2016] held that the Malaysian Court was only the enforcement court and had no jurisdiction to determine the validity of the arbitration agreement, subject to the parties agreeing on the law governing the arbitration agreement. The defendant would have to establish this in the supervisory seat, Singapore, before invoking refusing enforcement in the enforcement court. Second, in the case of *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012], the High Court held that, as the enforcing court, it had the power to determine a challenge to the jurisdiction of an arbitral tribunal. However, upon determination on appeal, the Court of Appeal found that the respondent failed to discharge the burden of proving the grounds for an invalid arbitration agreement under Section 39(1)(a)(ii) and held that the arbitral tribunal in London had jurisdiction to determine the issue relating to the sale contract. Nonetheless, the Court of Appeal agreed with the findings of the High Court that it had discretion to decide on the issue of an invalid arbitration agreement as raised by the respondent under Section 39(1)(a)(ii) of AA 2005.

Third, a party invoking the third ground under Section 39(1)(a)(iii) bears the burden of proving to the court that they had not received proper notice of an arbitral proceeding and were thus unable to participate in the proceedings. Also, an inference made from the application of Section 39(1)(a)(ii) by the court in the case of *Agrovenus LLP v Pacific Inter-Link Sdn Bhd* [2014] reveals that the Malaysian courts would estop parties relying on the argument of not receiving proper notice and being unable to participate in proceedings if the party failed to raise objections during arbitral proceedings or challenge the award in the court where the award was made.

Fourth, on the ground of excess authority by an arbitrator and decisions on matters beyond the scope of submission to arbitration under Section 39(1)(a)(iv), the Malaysian courts held that participation and failure to challenge at arbitral proceedings constitutes consent and the defendants is estopped from relying on the ground of excess jurisdiction during recognition and enforcement proceedings.[357] Second, the court held that an arbitrator or arbitral tribunal has the general jurisdiction to deal with all matters relating to a dispute as agreed in an arbitration agreement, including incidental matters. In the case of *Taman Bandar Baru Masai Sdn Bhd v Dindings Corporation,* the High Court held that granting

[357] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* (n 320); *Agrovenus LLP (*n 274).

reliefs additional to the pleadings by the parties was well within the general jurisdiction of the arbitral tribunal as the jurisdiction includes incidental matters relating to the dispute. Similarly, in the case of *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd* and *Agrovenus LLP,* the court held that the jurisdiction of the arbitral tribunal included consideration of the initial contract, sold note and oral agreement to reduce freight rates arising from the main contract.

Fifth, on the ground under Section 39(1)(a)(vi), in the absence of an agreement between the parties, the Court will look at whether the arbitral tribunal conforms to AA 2005, and not the law where the award was made as stipulated under Article V(1)(d) of NYC 1958. While there are no reported cases of challenges raised under Section 39(1)(a)(vi) in the absence of agreement between the parties, in a situation where there is an express agreement between the parties on the composition of an arbitral tribunal, the Malaysian court examined whether the composition of an arbitral tribunal was in accordance with agreement of the parties. In the case of *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd,* the High Court respected a foreign decision from the Moscow Arbitration Court, having determined a similar challenge acting as the supervisory court, that the arbitral tribunal was to the agreement between the parties.

Sixth, there are no reported cases involving foreign awards on the application of Section 39(1)(a)(vii), pertaining to the grounds on which awards are not yet binding, having been set aside or suspended by the supervisory court. However, on a case involving refusal to recognise and enforce a domestic award, the Malaysian court took guidance from foreign jurisdictions such as the UK and Singapore in interpreting Section 39(1)(a)(vii). The Court of Appeal in the case of *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] was satisfied that the appellant had submitted evidence proving that the award was not yet binding on the parties pending a second arbitration as it was a mutual consensual agreement, based upon a suggestion by the defendant in a Kuala Lumpur civil suit proceeding to refer a dispute for second arbitration. Chapter 4 discusses in detail the application of the grounds under Section 39(1)(a)(vii), in comparison with the court practices of other Contracting States of NYC 1958.

Seventh, a party applying to invoke the ground of arbitrability under Section 39(1)(b)(i) needs to satisfy Section 4 of AA 2005, which defines arbitrability as any dispute

stipulated under the parties' arbitration agreement, unless the agreement is against the public policy of Malaysia. In the case of *Arch Reinsurance Ltd* [2019], the Federal Court held that a dispute sparked by a statutory notice on Form 16D of NLC was not arbitrable under AA 2005. The Federal Court took guidance from a Singapore case, that a dispute is not arbitrable when (1) Parliament intended to exclude certain types of dispute and (2) it would be contrary to public policy to permit such disputes to be arbitrated.

Eight, under Section 39(1)(b)(ii), raising the ground of public policy means that the party applying to invoke must prove that the award 'would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of state are exercised'.[358] The Malaysian courts also caution against exploiting the public policy ground under Section 39(1)(b)(ii) to review or reopen matters already settled by arbitration proceedings.

In conclusion, the limited number of reported cases on the recognition and enforcement of foreign awards in Malaysia portray the Malaysian courts' pro-arbitration stance in minimising judicial intervention as the enforcement court. Nonetheless, as Malaysia departs from Article V(1)(d) of NYC 1958 on the law pertaining to the composition of an arbitral tribunal, the chapter proposes that Malaysia amend Section 39(1)(a)(vi) of AA 2005 to adhere to its obligations under the NYC 1958 and conform to international best practice (see Chapter 7).

[358] *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd* (n 1).

Chapter 4 The Enforcement of a Foreign Award Nullified by its Supervisory Court

4.1 Introduction

This chapter attempts to answer the third research question of the thesis, which is whether there is harmonisation in the application of NYC 1958 pertaining to controversial issues on the enforcement of foreign arbitration. Chapter 4 answers the first controversial enforcement issue: whether there is harmonisation in the application of Section V(1)(e) of NYC 1958 on the enforcement of an arbitral award annulled by the court where the award was made. The enforcement of annulled awards is one of the most controversial issues surrounding the enforcement of foreign arbitral awards.

First, the chapter investigates whether there is harmonisation in the application of Article V(1)(e) of NYC 1958 on the enforcement of annulled arbitral awards by NYC 1958 Contracting States. The chapter begins by defining what an annulled award is and examining relevant provisions stipulated by NYC 1958 pertaining to this controversial issue. As explained in Chapter 2, NYC 1958 Contracting States must apply the provisions of the 1958 in accordance with Articles 31–33 of VCLT 1969. The chapter also discusses the *travaux préparatoires* of Article V(1)(e) of NYC 1958 as guidance to evaluate the intention of the drafters.

The chapter finds that Contracting States' courts adopted three distinct approaches on this issue, i.e. (1) a territorial approach whereby enforcement courts refused to enforce annulled arbitral awards, (2) a delocalised approach whereby enforcement courts recognised and enforced annulled arbitral awards and (3) an assessment approach whereby enforcement courts will assess the grounds of the annulment of awards and decide on their own motion whether to recognise or refuse the enforcement of annulled awards. The chapter critically scrutinises the application of the three approaches by Contracting State courts.

Next, the chapter investigates whether there is harmonisation in the application of Section V(1)(e) of NYC 1958 on the enforcement of an arbitral award annulled by the court where the award was made. The chapter will examine whether there is similar application on the

issue of the enforcement of arbitral awards annulled by Contracting States. Chapter 2 defines harmonisation as a process of bringing rules of law close to a similar condition or concept, but not in exactly the same way, and embracing diversity of laws. The goal of harmonisation in this research is to bring rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining diversity of law of Contracting States.

Chapter 2 also finds that NYC 1958 must be interpreted uniformly by Contracting States, i.e. the achievement of similar results across different jurisdictions in the application of NYC 1958.[359] Finally, as there is no case law in Malaysia on the application of Article V(1)(e) to enforce annulled arbitral awards, the thesis offers a proposal for the Malaysian court, should a case of a foreign award annulled by its supervisory court arise in future.

4.2 Position under the New York Convention 1958

Annulled awards refer to awards set aside by their supervisory courts, the courts in the State where the awards were made.[360] An application to set aside an arbitral award in the State of origin (the supervisory seat) is governed by the domestic law of the State.[361] The issue is whether a secondary (enforcement) court is allowed to recognise and enforce an award annulled by its own supervisory (primary) seat. NYC 1958 provides little guidance on this matter. Article V(1)(e) stipulates that the resisting party may apply for refusal to recognise and enforce an award on the grounds that (1) the award has not yet become binding on the parties, (2) the award has been set aside by the country under the law where the award was made and (3) the award was suspended by a competent authority under the law where the award was made.

Article V(1)(e) provides two discretionary powers: first, for the enforcement court to rule on the enforceability of a foreign award and, second, for the supervisory court to set aside or annul an arbitral award. [362] NYC 1958 does not set any standards for a supervisory court as to 'their decision-making process' in determining whether to set aside or suspend

[359] Ly (n 198).
[360] Christoph Liebscher, 'Article V(1)(E)' in Reinmar Wolff (ed), *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article by Article Commentary* (Second Edi, Verlag C H Beck oHG, Hart Publishing & Nomos Verlagsgesellschaft mbH & Co 2019) 381.
[361] ibid.
[362] Teixeira (n 70) 4.

an arbitral award.[363] The domestic law of the law of the seat governs an application to set aside an award at the supervisory court.[364] Article VI of NYC 1958 further stipulates that the enforcement court 'may', if it considers it proper, adjourn its decision on the enforcement of an award or order a party to provide security if there is an application to set aside or suspend an award pursuant to Article V(1)(e) of NYC 1958.

NYC 1958 Contracting States' courts adopted three distinct approaches to the issue of the enforcement of annulled arbitral awards: (1) a territorial approach where the enforcement court has refused to recognise and enforce a foreign award annulled by the court in the State where the award was made, (2) a delocalised approach where the enforcement court has recognised and enforced an annulled foreign award and (3) an assessment approach where the enforcement court will assess the grounds for an annulment decision and decide on its own merit whether to recognise and enforce an annulled arbitral award.[365] It is essential for Contracting States to apply uniform application of Article V(1)(e) NYC 1958. Do these distinct approaches affect the harmonisation of the application of Article V(1)(e) of NYC 1958 and the effectiveness and attractiveness of ICA?[366]

The dissimilarities lie in the interpretation of Article V(1)(e) manifest different from the way Article V(1) was drafted, as the word 'may', in contrast to the word 'shall' in the mandatory provisions of Articles II and III, allows Article V (1) to be interpreted as optional.[367] The provision must be interpreted in relation to its context, object and purpose, to facilitate the effectiveness of arbitration in private dispute resolution. Upon application of Article 31 of VCLT 1969, Article V(1)(e) allows discretion to enforcement courts to either enforce or refuse to enforce an award annulled by its supervisory seat. Article VI allows an enforcement Court to adjourn 'if it considers it proper' if there is a corresponding proceeding in the supervisory seat on the annulment of the award. Article VI allows proper discretion for the court to decide on the issue of an award annulled by the competent authority where the award was made.

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[363] Wolff (n 69) 381.
[364] ibid.
[365] ibid.
[366] Hendel and Nogales (n 22) 188.
[367] Jose Manuel Alvarez Zarate and Camilo Valenzuela, 'Recognition and Enforcement of Arbitral Awards Annulled in Their Own Seat: The Latin American Experience Interpreting the New York Convention's "Sovereign Spaces"' in Katia Fach Gomez and Ana Mercedes Lopez Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 205.

In addition, Article VII of NYC 1958 allows for a more favourable approach, as it allows an enforcement State to allow the enforcement of award if a more favourable law is available in the State pertaining to the enforcement of a foreign award. The courts adopting a delocalised approach rest their argument on adopting Article VII as the 'escape clause' to apply their own domestic law to favour the recognition of foreign awards and ignore foreign annulment decisions.

4.3 *Travaux Préparatoires* of the New York Convention 1958

Chapter 2 of the thesis finds that as a public international law instrument, NYC 1958 must be interpreted in accordance with Articles 31–33 of VCLT 1969. Recourse to the *travaux préparatoires* of NYC 1958 may be made to confirm a meaning upon the application of Article 31 or if such application produces an ambiguous or absurd meaning. The *travaux préparatoires* may shed some light on the drafters' intention when designing Article V (1) (e) pertaining to the enforcement of an annulled arbitral award.

The drafters of NYC 1958 intended to eliminate the 'double *exequatur'* requirement that existed under the GC 1927 regime. A look further back to before the Second World War reveals that Article 2(a) of the Geneva Convention 1927 used the word 'shall' to connote that it is mandatory for a court to refuse the enforcement of an annulled award. Similarly, Article IV (e) of the ICC (which sparked the whole idea of a new Convention) also proposed using the wording 'shall be refused' to deal with this issue. Article IV (e) of the ECOSOC Draft that was used as the basis for the draft during the NYC 1958 Conference used the word 'may' without explaining why the ECOSOC delegates opted to use 'may' instead of 'shall'.[368] At the NYC 1958 Conference, amendments to Article V (1) proposed by Pakistan used the word 'may' whereas a German amendment proposed to use the word 'shall' or 'may only'.[369] A Netherlands amendment proposed using the wording 'may only'.[370]

[368] ECOSOC 'Report of the Committee on the Enforcement of International Arbitral Awards' (n 48).
[369] 'Consideration of the Draft Convention: Comparison of Drafts Relating to Article III, IV and V' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (29 May 1958) UN Doc E/CONF.26/L.33/Rev.1.
[370] 'Consideration of the Draft Convention: Pakistan amendments to the Draft Convention' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (26 May 1958) UN Doc E/CONF.26/L.17.

The Netherlands delegate at the NYC 1958 Conference noted that an *exequatur* on the requirement that the award needs to be operative where the award was made was unnecessary.[371] He also warned against the risk of permitting the losing party to delay the enforcement of award for a long period by instituting annulment proceedings at the supervisory court.[372] He submitted that it is better to allow discretion for the enforcement court to decide on the matter.[373] The Italian delegate cautioned the NYC 1958 Conference about the 'bold innovation' submitted by the Netherlands delegation pertaining to concentrating judicial control and pertaining to the enforcement of an annulled award by an enforcement court.[374] The proposal ran the risk of two parallel proceedings, as the enforcement court is permitted to rule on an annulment, even when the supervisory court is also deciding on the annulment.[375]

The chairman of Working Party Three presented its draft of Article IV(1)(e) and submitted that Article V(1)(e) 'was drafted with the aim of making the NYC 1958 acceptable to those States which considered an arbitral award to be enforceable only if it fulfilled certain formal requirements which alone made the award binding on the parties'.[376] Working Party Three agreed that an award should not be enforced if, under the applicable arbitral rules, it was still subject to an appeal which had a suspensive effect, but at the same time it felt that it would be unrealistic to delay the enforcement of an award until all time limits provided for by statutes of limitation had expired or until all possible means of recourse, including those which did not normally have a suspensive effect, had been exhausted and the award had become 'final'.[377]

Working Party Three did not explicitly explain its position regarding the enforcement of an annulled award.[378] However, in explaining its proposed Article V (then adopted with amendments as Article VI of NYC 1958), the Chairman explained that the article was recommended to permit the enforcement court to adjourn its decision for enforcement if

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[371] 'Summary Record of the Eleventh Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.11, 5–6.
[372] ibid.
[373] ibid.
[374] 'Summary Record of the Thirteenth Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.13, 3.
[375] ibid.
[376] ibid.
[377] ibid.
[378] 'Summary Record of the Seventeenth Meeting' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (12 September 1958) UN Doc E/CONF.26/SR.17, 3–4.

it was satisfied that the reason for annulment or suspension of the supervisory court was arrived at for good reason. However, Working Party Three also proposed allowing the enforcement court to either enforce an annulled award or adjourn on condition that the party refusing enforcement provide security to avoid abuse of the provision.[379]

It is clear from the *travaux préparatoires* that the drafters aimed to provide the enforcement court with discretion to decide whether to recognise and enforce an annulled arbitral award or adjourn enforcement with security provided by the party opposing enforcement. Some of the delegations allocated the role of supervisory court to the primary court to decide on the annulment of an award.[380] The enforcement court acts as a secondary court, where the primary rule is to follow the decision of the primary court.[381] However, in exceptional circumstances, the enforcement court may depart from the rule and disregard an annulment by a supervisory court.[382]

4.4 Territorial approach

The chapter critically examines the practice of Contracting States' courts regarding the recognition and enforcement of foreign awards annulled by their supervisory courts. The first approach is a territorial approach where the enforcement court refused to recognise and enforce foreign awards annulled by the court in the State where the award was made. The territorial approach, supported by its proponents, asserted the impossibility of recognising and enforcing an award that was annulled by its own seat using the principle of '*ex nihilo nilhil fit'*.[383]

The features of the territorial approach are as follows. First, the territorial interpreted the word 'may' in Article V(1) as must. On the other hand, a delocalised approach and assessment approach proponents (section 4.5 and 4.6) insisted on a literal interpretation of the word 'may' in Article V (1) of NYC 1958.[384] According to Pieter Sanders, the main

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[379] ibid.
[380] Marike Paulsson and Supritha Suresh, 'The New York Convention's 60th Anniversary: A Restatement for the New York Convention?' in Katia Fach Gomez and Ana Mercedes Lopez Rodriguez (eds), *60 Years of the New York Convention: Key Issues and Future Challenges* (Kluwer Law International 2019) 276.
[381] ibid.
[382] ibid.
[383] Hendel and Nogales (n 22) 189. The principle of *'ex nihilo nilhil fit* means nothing comes from nothing, reflecting that an annulled award is incapable of being enforced in any other States as it has ceased to exist.
[384] ibid.

proponent of a territorial approach, this was the position when the NYC 1958 was drafted.[385] The NYC 1958 forms its basis on the 'principle of territoriality' of ICA.[386] The rule of thumb is *ex nihilo nil fit,* which means out of nothing comes nothing.[387] Once an arbitral award is vacated, it ceases to exist, and it is contrary to the public policy of the supervisory seat to enforce such award.[388] The proponents submitted that NYC 1958 provides for such a limitation to avoid circumstances where foreign enforcement courts go against the supervisory court and to ensure the consistency and predictability of ICA.[389]

Second, a territorial approach favours the decision of the court where the award was made, i.e. the supervisory court.[390] The territorial approach accepts that the supervisory court transfers the legitimacy of an award from its domestic procedural law.[391] Thus, an award which has lost its legitimacy in its supervisory court no longer exists and has no legal standing in other countries.[392] The proponents submitted that arbitral awards governed by NYC 1958 cannot be detached from the seat of arbitration.[393] Hence, it is impossible to detach an arbitral award from its supervisory seat.[394] The supervisory seat supervises the assessment of an award through an annulment process.[395] Whereas, the enforcement court controls the recognition and enforcement of an award subject to NYC 1958.[396]

Third, the territorial approach reflects the principle of party autonomy of ICA.[397] Parties choosing the seat of arbitration in their arbitration agreement reflect their consent to be bound by the laws of the seat.[398] Ignoring an annulment decision of a supervisory seat and enforcing an annulled arbitral award demonstrates the 'complete violation of party

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[385] ibid.
[386] Zarate and Camilo Valenzuela (n 367) 209.
[387] Paulsson and Suresh (n 380) 276.
[388] P Sanders, 'New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (1959) 6 Netherlands International Law Review 43, 109–110 <http://www.journals.cambridge.org/abstract_S0165070X00027005> accessed 2 April 2019.
[389] Hendel and Nogales (n 22) 189–190.
[390] Wolff (n 69) 382.
[391] ibid.
[392] ibid.
[393] Zarate and Camilo Valenzuela (n 367) 210.
[394] ibid.
[395] ibid.
[396] ibid.
[397] ibid 211.
[398] ibid.

autonomy' of the parties.[399] Van Der Berg asserts that only a supervisory court has the jurisdiction to provide for a decision pertaining to the regulation of an arbitration proceeding held in its jurisdiction.[400] NYC 1958 derives its legitimacy from consent from sovereign States.[401]

Fourth, the territorial approach proponents argued that NYC 1958 intended to avoid circumstances where two or more different courts were reviewing an international arbitral award.[402] NYC 1958 is silent on the restrictions on a domestic court's power to review an award but provides for narrow grounds for enforcement courts to rely on to refuse the enforcement of an award.[403] Also, the delocalised approach may result in 'floating awards' which are incapable of being set aside conclusively and opening up forum-shopping opportunities for an award-debtor to seek the enforcement of an annulled award in another State.[404]

Fifth, the territorialists maintain that favouring a decision by a supervisory court precludes 'forum shopping' and irregularities coming from an enforcement court enforcing a foreign award annulled by its supervisory court.[405] The key advantage of the territorial approach is that it prevents forum-shopping where parties unable to enforce an annulled award apply to other courts in other jurisdictions.[406]

Sixth, the territorialists favour the 'notion of comity' which seeks to discourage the evaluation of foreign courts' decisions.[407] They argue that NYC 1958 provides for limitations whereby it forbids a foreign court to go against a supervisory court and this is vital to safeguard the harmonisation of ICA.[408] Under the territorial approach, NYC 1958 provides for mandatory minimum conditions for Contracting States to employ in deciding

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[399] ibid.
[400] Albert Jan van der Berg, 'Enforcement of Annulled Awards?' (1998) 9 The ICC International Court of Arbitration Bulletin 15, 15.
[401] Zarate and Camilo Valenzuela (n 367) 210.
[402] Wolff (n 69) 382.
[403] Article V (1) NYC 1958
[404] Philip Devenish, 'Enforcement in England and Wales of Arbitral Awards Set Aside in Their Country of Origin' (2018) 18 Oxford University Commonwealth Law Journal 143, 148.
[405] Wolff (n 69) 383.
[406] Berg, 'Enforcement of Annulled Awards?' (n 400) 15.
[407] Wolff (n 69) 383.wo
[408] Hendel and Nogales (n 22) 189–190.

on the recognition and enforcement of foreign awards.[409] Therefore, Contracting States must conform to these standards to avoid legal uncertainty and protect the finality of ICA.[410] Ignoring decisions from the supervisory court would also lead to dissuading international companies from opting for ICA in future.[411]

4.4.1 Court Decisions

4.4.1.1 Germany

Some cases from German portray the territorial approach where German courts refused to enforce awards annulled by the court where an award was made. German courts held that an award ceases to exist once it has been annulled by its supervisory court and so German Courts could neither recognise nor enforce such an award. German courts rely on the status of an award in its supervisory State. A foreign award needs to be enforceable in the court where the award was made, before it can be enforceable in Germany. In *Rostock* (1999), where the supervisory court cancelled the annulment of a foreign award, the court reversed its previous decision and enforced the award. However, if the parties are Contracting States of the European Convention 1961, the German court held that the it needed to determine whether the ground for annulment was one of the grounds available under Article IX of the European Convention.

4.4.1.1.1 *Oberlandesgericht Rostock* (1999) 1 Sch 3/99

In this case, the applicant entered into a contract with the defendant whereby the contract contained an arbitration clause stipulating that any dispute arising from the contract shall be settled before the Arbitration Commission of the City of Moscow.[412] Upon a dispute arising between the parties on payment, the applicant initiated an arbitration proceeding before the Arbitral Commission for Shipping Matters in Moscow. The arbitral tribunal held that it had jurisdiction on the matter as there was no other arbitral commission on shipping law in Moscow. The arbitral tribunal rendered an award in favour of the applicant, which was then set aside by the court in Moscow on the ground that the arbitration agreement was not certain before the arbitral commission as the explicit name

[409] ibid 190.
[410] ibid.
[411] ibid.
[412] OLG Rostock (1999) 1 Sch 3/99 9 CLOUT Case No. 372 (Germany) available at CLOUT https://documents-dds-ny.un.org/doc/UNDOC/GEN/V00/602/96/PDF/V0060296.pdf?OpenElement and https://newyorkconvention1958.org/index.php?lvl=notice_display&id=247

of the commission did not exist. The Highest Russian Court subsequently affirmed the set-aside decision. The Vice President of the Highest Court of the Russian Federation challenged the set-aside decision and demanded a re-trial of the case.

The Higher Regional Court of Rostrock adopted a territorialist approach and held that the enforcement of an award in Germany requires the award being binding pursuant to the law where it came from. It refused to enforce the award and held that it was no longer 'binding' pursuant to the law where the award was made. The Court also held that it was immaterial that there was a challenge to retry the case in Moscow as the award was no longer binding.

In Germany, an award needs to be binding in where the award was made, in order for it to be recognisable and enforceable in Germany. If the status of an annulled award has changed, as a supervisory court cancelled an annulled decision, a German court will change its previous decision and enforce the award. In 2001, upon an appeal of the same case in the Germany Federal Court, the Federal Court reversed its previous decision and enforced the award in Germany.[413] The Federal Court held that the grounds for refusal of enforcement stipulated under Article V(1)(e) were no longer applicable as the award had become binding in accordance with where the award came from. In this case, the Supreme Court of Moscow subsequently reversed the decision of the Moscow Court of Appeal and sent the case back to the Moscow District Court. Upon a new proceeding, the Moscow District Court refused to set aside the award and recognised it. Therefore, the award became enforceable in Germany.

4.4.1.1.2 *OLG München* 34 Sch 18/10

In a case where both parties are Contracting States to the European Convention 1961, a German court holds that it needs to determine whether the ground for annulment is one of the grounds available under Article IX of the European Convention, and if the answer is positive, the German Court cannot enforce an annulled award as it is no longer an effective award. In the case of *OLG München* 34 Sch 18/10, the respondent, a German trading company, concluded a contract with the applicant, granting an exclusive right for

[413] ibid.

the applicant to distribute harvesting machines in Ukraine.[414] The contract stipulated an arbitration clause whereby any dispute arising from the contract would be settled by arbitration in accordance with the arbitration rules of the ICAC Ukraine. Contrary to their contract, the respondent sold harvesting machines directly to a third party in Ukraine. The applicant subsequently initiated an arbitration claim with the ICAC Ukraine. The ICAC Ukraine issued an award in favour of the applicant in 2009.

The respondent subsequently requested setting aside the award at the City Court of Kyiv in 2010. The City Court of Kyiv set aside the award in September 2010 on the ground that the dealership contract concluded between the parties was contrary to Ukrainian law. Subsequently, the City Court's decision to set aside the award was confirmed by the Appellate Court in October 2010, whereby the Appellate Court agreed with City Court's decision that the award contravened public policy and was subject to annulment by its supervisory court. As the agreement violated Section 12 of the Law on Protection of the Rights of Buyers of Agricultural Machinery, the decision of the arbitral tribunal to award a contractual penalty violated the domestic public order of Ukraine. The High Specialised Court of Ukraine in 2011 and the High Court of Ukraine in 2012 upheld the set-aside decision.

In 2012, the Munich Court rejected the applicant's request to enforce the award in Germany based on Articles V(1)(e) and V(2) of NYC 1958 and Article IX of the European Convention. The Munich Court held that if an award is annulled by its supervisory court, it can no longer be effective and there is no room to enforce the award in Germany. The Munich court accepted that the annulment by the Ukrainian Court was based on Article IX and the public policy of Ukraine. The Court held that the Ukrainian Court was a competent court pursuant to Article V(1)(e) of NYC 1958. It also ruled that for it to determine whether the Munich Court was bound to accept an annulment decision by the supervisory court, the Munich Court need only determine whether the ground for annulment was one of the grounds available under Article IX of the European Convention and need not determine whether it would have come to the same conclusion for the annulment. In addition, to enforce the award would be contrary to Germany's public policy.

[414] OLG München (2012) 34 Sch 18/10, 30.07.2012 (Germany) available at http://www.disarb-db.org/?lang=en&id=2

The applicant appealed the decision to the Federal Supreme Court in 2013.[415] The applicant argued that Section 1061(1) of the German Civil Procedure Code[416] states that the enforcement and recognition of foreign awards must be in accordance with NYC 1958. However, the provisions of other treaties pertaining to the recognition and enforcement of awards shall remain unaffected, as reflected by Article VII of NYC 1958. The Federal Supreme Court refused the appeal and held that Article IX of the European Convention 1961 limits the refusal ground under Article V(1)(e) of NYC 1958 which specifies that the ground for annulment must be one the grounds listed under Article IX (1)(a) to (d) of the European Convention 1961. Therefore, the Court was satisfied that one of the grounds for annulment by the Ukrainian Court was the composition of the arbitral tribunal not being in accordance with the agreement, which is also listed under Article IX(1)(d) of the European Convention 1961. The court also explained that Article V(1)(e) of NYC 1958 and Article IX of European Convention 1961 require German courts to be bound by foreign decisions pertaining to the setting aside of award, even if a German court's own assessment of the case might produce a different result.[417]

4.5 Delocalised approach

The second approach, the delocalised approach, refers to the practice of an enforcement court recognising and enforcing foreign awards annulled by their supervisory seats. This delocalised approach implies that ICA is a 'delocalised' alternative means to resolve a dispute where ICA is a-national and not part of the jurisdiction of States.[418] International arbitral awards are recognised as being detached from any state jurisdiction, and hence an enforcement court shall not take into account the annulment of an international arbitral award.[419] On the other hand, opponents of the delocalised approach submit that NYC 1958 rejects the concept of a-national or truly international awards. The *travaux préparatoires* show that the delegates considered the concept of international awards being truly disconnected from the jurisdiction of States but decided to exclude the

[415] BGH Munchen (2013) III ZB 59/12, 23.04.2013 (Germany), Available at http://www.disarb-db.org/?lang=en&id=2
[416] German Civil Procedure Code, available at https://www.trans-lex.org/600550/_/german-code-of-civil-procedure/#head_46
[417] OLG München (2012) (n 414).
[418] Zarate and Camilo Valenzuela (n 367) 207.
[419] ibid.

concept.[420] Also, the final text of NYC 1958 adopts the territoriality concept, as agreed by most delegates.[421]

There are some features of the delocalised approach. First, it accepts plain language and a literal interpretation of the term 'may' used in Article V (1) (e) of NYC 1958 which allows an enforcement court to use its discretion as to whether to refuse the enforcement of an award that has been set aside by its supervisory court.[422] Unless awards are annulled based on internationally recognised grounds, awards nullified by their supervisory courts should not be refused enforcement in other countries.[423] The delocalised proponents submit that NYC 1958 aims to facilitate and allow the enforcement of foreign awards around the world. Thus, the exception for the enforcement is only where the reason for annulment of an award is based on internationally recognised fundamental grounds, such as where an arbitral tribunal exceeds its jurisdiction and the party has no opportunity to present his case.[424]

Second, the delocalised approach favours the enforcement court and allows it to disregard a decision made by a supervisory court.[425] Paulsson argues that NYC 1958 Contracting States must be inclined to enforce foreign arbitral awards on the basis of international standards to allow ICA to become truly international.[426] He further argues that the only reason not to recognise annulled arbitral awards is in circumstances where the grounds

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[420] ECOSOC 'Statement Submitted by the International Chambers of Commerce' (Received 18 September, recorded on 28 October 1953) E/C.2/373 7-8; ECOSOC 'Comments Received from Governments regarding the Draft Convention on the Enforcement of International Arbitral Awards' (21 January 1955) E/AC.42/1.
The ICC raised the idea of international awards, awards that are completely independent of the jurisdiction of domestic law. The idea of international awards would overcome a deficiency of GC 1927, which was only concerned with awards made between contracting State nationals and enforced in another contracting State. However, the ECOSOC Committee found that the adoption of international awards would be unacceptable to States, as most of them were only willing to ratify on condition of reciprocity. Instead, the ECOSOC Committee suggested a compromise involving drafting Article 1 of the ECOSOC Draft. Article 1 stipulates an obligation for contracting States to enforce arbitral awards made in States other than their own, but also providing an option, reservations for contracting States, should they opt to only limit the recognition and enforcement of awards based on reciprocity.
[421] 'Consideration of the Draft Convention: Report of Working Party 1' UN Conference on International Commercial Arbitration (New York 20 May 1958 – 10 June 1958) (2 June 1958) UN Doc E/CONF.26/L.42.
[422] Liebscher (n 360) 382; Hendel and Nogales (n 22) 190.
[423] Jan Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (1998) 6 Asia Pacific Law Review 1, 1–2.
[424] ibid 2.
[425] Wolff (n 69) 382.
[426] Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (n 423) 1.

for such annulment are 'internationally recognised'.[427] The delocalised approach proponents argue that favouring the decisions by supervisory courts may expose awards to being annulled for reasons that are against internationally recognised standards.[428] On the other hand, the opponents of delocalised theory submit that it disregards 'public law principles' where a State has jurisdiction and a supervisory role to oversee ICA in its jurisdiction.[429] Under the ambit of public international law, jurisdiction and recognition are within the privilege of a State.[430] Also, ICA obtains its limited legitimacy through the State via the enactment of laws and treaties such as NYC 1958.[431] A State may remove the legitimacy of ICA by reinstating its power if it wishes to do so.[432] Private parties are the subjects of States and do not enjoy total freedom.[433] Therefore, the delocalised approach opponents submit adopting delocalised approach to justify the enforcement of annulled arbitral awards is erroneous.[434]

Third, the delocalised approach perceives domestic law as a piece of complex international law which aims to facilitate ICA.[435] Under a delocalised approach, the rights of award creditors will be respected.[436] Should one of the pieces fail to provide justice to either of the parties, others may support it.[437] The delocalised approach proponents argue that the parties choose an arbitral seat mostly for 'reasons of convenience' and without the intent to surrender the jurisdiction of the award fully to the supervisory seat.[438]

Fourth, delocalised proponents argue that the enforcement of an award nullified by its supervisory court is an exceptional occurrence that does not contribute to inconsistencies in courts' decisions pertaining to the same award.[439] They depend on the principle of *res judicata* whereby it avoids re-litigation of a dispute once a final decision has been rendered. On this particular issue of the enforcement of an annulled arbitral award, the

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[427] Hendel and Nogales (n 22) 191.
[428] Wolff (n 69) 383.
[429] Zarate and Camilo Valenzuela (n 367) 206.
[430] ibid.
[431] ibid.
[432] ibid.
[433] ibid.
[434] ibid 206–207.
[435] Francisco González de Cossío, 'Enforcement of Annulled Awards: Towards a Better Analytical Approach' (2016) 32 Arbitration international 17, 27.
[436] ibid.
[437] ibid.
[438] Wolff (n 69) 382.
[439] ibid 383.

enforcement court has to choose whether to favour the decision made by the supervisory court or by the arbitral tribunal.[440] They submit that the principle of *res judicata* best applies to a decision made by the arbitral tribunal as they were the body deciding on the issue in the first place.[441] The advantages of the delocalised approach are reducing the possibilities of intervention caused by numerous States' domestic laws that might impede the harmonised application of ICA.[442]

Fifth, delocalised proponents argue that arbitral awards are 'free-floating autonomous legal orders' that do not cease upon annulment by their supervisory courts.[443] As an exception, they only regard awards made by a purely domestic authority in a particular State being capable of ceasing to exist as they are the product of that particular state.[444] Thus, Article V(1)(e) is not a mandatory provision but rather a suggestion for Contracting States.[445] NYC 1958 does not intend to empower supervisory courts with the determination of arbitral proceedings.[446] On the other hand, delocalised proponents must consider the primary basis of ICA that comes from consenting States agreeing to recognise and enforce foreign awards resulting from an arbitration agreement between parties.[447] NYC 1958 derives its legitimacy from the consent of States by way of States ratifying and acceding to NYC 1958.[448] The delocalised approach is not in sync as the regulations pertaining to the recognition and enforcement of foreign awards derive from States' consent by way of ratifying NYC 1958.[449] NYC 1958 allocates space for States to govern and deal with the recognition and enforcement of annulled arbitral awards.[450]

Sixth, delocalised approach proponents recognise the importance of uniformity in the application of NYC 1958 and the 'pro-enforcement bias' policy of foreign arbitral awards. 'Pro-enforcement bias' in the application of NYC 1958 refers to a method of interpreting NYC 1958 where NYC 1958 should be interpreted to maximise the

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[440] ibid.
[441] ibid.
[442] Zarate and Camilo Valenzuela (n 367) 208.
[443] Hendel and Nogales (n 22) 191.
[444] ibid.
[445] ibid.
[446] ibid 192.
[447] Zarate and Camilo Valenzuela (n 367) 206.
[448] ibid 209.
[449] ibid.
[450] ibid.

enforcement of an award.[451] Delocalised proponents argue that this approach favours a 'pro-enforcement bias' policy by deferring to the decisions of supervisory courts, thus maximising the enforcement of foreign awards.

Seventh, the proponents of a delocalised approach rely on Article VII, the most favourable treatment rule. NYC 1958 does not provide for a relationship between Articles V and VII.[452] Delocalised proponents interpret Article VII as the 'guarantee clause' for an arbitration party that application of the provisions of NYC 1958 will not deprive him of any right he may have to the extent provided by the law or treaties of the enforcement state. Article VII is an alternative option that the enforcement court may rely on to apply its own law or other relevant treaties that are pro-enforcement in nature.[453] Delocalised proponents disregard Article V(1) as a mandatory exception to the enforcement of an annulled award. Instead, they regard Article V(1) as the 'permission clause' to allow an enforcement court neutral control on the enforceability of an annulled award according to the law of the enforcement State, subject to a more favourable treatment of Article VII of NYC 1958.[454]

4.5.2 Court Decisions

4.5.2.1 France

French courts have consistently adopted a delocalised approach. They reject the relevance of annulment by supervisory courts and maintain that only enforcement courts may render a decision pertaining to the enforcement of an arbitral award.[455] French courts hold that an arbitral award has a delocalised and a-national attributes, which makes it capable of being enforced somewhere else, even it has been annulled by its supervisory court.[456] French courts favour the position of an international arbitral award being independent of any legal system. Thus, an arbitral award that has been annulled in France, despite losing its ability to be enforced in France, may still be enforced in other States.[457]

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[451] ibid 208.
[452] Hendel and Nogales (n 22) 192.
[453] ibid 193.
[454] ibid.
[455] ibid 194.
[456] ibid.
[457] ibid.

French courts do not apply Article V (1)(e) as they rely on Article VII of NYC 1958 to apply their own application of French law to international arbitral awards.[458] Therefore, French courts apply French arbitration law that rules out a nullified award being one of the grounds to refuse the enforcement of an arbitral award.[459] Even though the French approach has been criticised, it actually conforms to NYC 1958 as the French Courts apply the discretion given by Article VII of NYC 1958.[460] Van der Berg argues that French courts recognise and enforce annulled arbitral awards by relying on their domestic law and do not conform to NYC 1958.[461] France does not directly incorporate Article V(1) of NYC 1958 into its domestic law. French courts rely heavily on their own domestic law which does not include Article V(1)(e) as a ground to refuse the enforcement of a foreign award.[462] An award annulled by its seat is enforceable in France as Article 1520 of the French Code of Civil Procedure does not provide for the annulment of an award by the supervisory seat being one of the applicable grounds to set aside an award.[463]

The French courts are consistent in their reasoning in adopting a delocalised approach pertaining to the enforcement of annulled arbitral awards. French courts have found that '(1) international awards are independent of the jurisdiction of a supervisory state and a decision of 'international justice',[464] (2) the annulment of international awards only affects the domestic system of the supervisory State,[465] (3) Article V(1)(e) of NYC 1958 allows the enforcement court discretion to enforce annulled awards,[466] (4) enforcing annulled awards arise not contrary to international public policy[467] and (5) Article VII of NYC 1958 allows for the most favourable law, whether domestic law or any other treaties entered by the enforcement State to enforce international awards.[468] [469] On the application

[458] Paulsson and Suresh (n 380) 280.
[459] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* (1994) 92-15.137 (France), available at https://newyorkconvention1958.org/index.php?lvl=notice_display&id=140; *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices* (2007) 05-18.053 (France).
[460] Wolff (n 69) 385.
[461] Hendel and Nogales (n 22) 197.
[462] ibid 196.
[463] Clay and Mazzantini (n 24) 142.
[464] *République arabe d'Egypte v. Société Chromalloy Aero Services (1997) 95/23025 (France)*; *Société PT Putrabali Adyamulia* (n 459).
[465] *Société Hilmarton Ltd* (n 459).
[466] ibid.
[467] *République arabe d'Egypte v. Société Chromalloy Aero Services* (n 464).
[468] *Société Pabalk Ticaret Limited Sirketi v Société Norsolor* (1984) 83-11.355 (France); *Société Hilmarton Ltd* (n 459); *République arabe d'Egypte* (n 464); *Société PT Putrabali Adyamulia* (n 459).
[469] González de Cossío (n 435) 20.

of Article VII, French courts found that there is no provision in French law providing a ground equivalent to Article V(1)(e) of NYC 1958 to refuse the enforcement of foreign awards.[470] French courts have also interpreted the bilateral agreement on judicial cooperation between the State and France (where one of the parties is a Sovereign State) as explicit consent that proceedings involving the State in France shall be governed by NYC 1958 and French law.[471]

French courts adopted a 'pro-enforcement bias' in the enforcement of annulled arbitral awards. They emphasise that international awards exist within the international legal system, and not according to the French legal system.[472] In deciding whether to enforce enforce a foreign arbitral award or not, a French court will look at whether there is any provision in the French legal system to assess if the court can enforce the award.[473] In France, an award is a decision of 'international justice' where the court at the supervisory seat only has jurisdiction in its own territory.[474] The enforcement court has the jurisdiction to decide whether an award is enforceable within its territory.[475]

The French law pertaining to the enforcement of an annulled award is consistent with the aim of NYC 1958, which is to facilitate the enforcement of foreign awards.[476] Nevertheless, by allowing the full recognition of Article VII of NYC 1958, French courts have ignored annulment decisions from foreign courts, including supervisory courts.[477] Such a delocalised approach obstructs the functioning of ICA as international parties will encounter problems in determining when an award is truly final.[478]

4.5.2.1.1 *Société Pabalk Ticaret Limited Sirketi v Société Norsolor* (1984)

The French Supreme Court ruled that a French court may not refuse an annulled arbitral award if domestic French law allows for its enforcement. The Court relied on Article VII

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[470] *Société Hilmarton Ltd* (n 459); *Société PT Putrabali Adyamulia* (n 459); *Maximov v Société Novolipetski Mettalurguicheski Kombinat (NLMK)* (2016) 14-20532 (France).
[471] *République arabe d'Egypte v. Société Chromalloy Aero Services*(n 464).
[472] González de Cossío (n 435) 20.
[473] ibid.
[474] Clay and Mazzantini (n 24) 145.
[475] ibid.
[476] ibid.
[477] Robert C Bird, 'Enforcement of Annulled Arbitration Awards: A Company Perspective and an Evaluation of a New York Convention' (2012) 37 North Carolina Journal of International Law and Commercial Regulation 1013, 1037–1038.
[478] ibid 1038.

of NYC 1958 in allowing a French court to invoke its own domestic law, where it is more favourable to the parties applying to enforce a foreign award in France. In this case, the applicant, a Turkish company, entered into a commercial representation contract with the defendant, a French company. The contract stipulated an arbitral clause where a dispute between the parties shall be settled by arbitration in the International Chambers of Commerce (hereinafter, ICC) in Vienna. A dispute arose pertaining to termination of the contract so that the applicant initiated an arbitration proceeding in Vienna. In 1979, the arbitral tribunal rendered an award in favour of the applicant, ordering the defendant to pay damages. Upon an application to enforce the award in France, the First Instance Court of Paris allowed the recognition and enforcement of the award in France.

In January 1982, the Vienna Court of Appeal set aside the award, partially on the ground that the ICC tribunal breached Article 13 of ICC Rules by its failure to determine the law applicable to the arbitration proceeding. The Paris Court of Appeal subsequently reversed the decision of the First Instance Court of Paris and partially withdrew the enforcement citing Article V(1)(e) of NYC 1958, holding that part of the award had been set aside by the court where the award was made. The applicant appealed to the Supreme Court of France, claiming that the decision by the Court of Appeal was against Article 12 of the French Code of Civil Procedure and Article VII of NYC 1958. It also asserts that the ground for the annulment did not violate international public policy.

The French Supreme Court held that a French court may not refuse the enforcement of an annulled arbitral award, pursuant to Article 12 of the Code of Civil Procedure, in a situation where French domestic law allows it. The Supreme Court reversed the decision of the Court of Appeal on the ground that Article VII of NYC 1958 allows the parties the right to enforce an arbitral award to the extent permissible by the law where enforcement is sought.[479]

4.5.2.1.2 *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* (1994)

The French court adopted a delocalised approach by ruling that a foreign award was not incorporated in any legal system, including the supervisory State. Therefore, a foreign

[479] *Société Pabalk Ticaret Limited Sirketi v Société Norsolor* (1984) (n 468).

award, even though it has been annulled by its supervisory State, is enforceable in France as French law allows it. In addition, Article 1502 of the French Code of Civil Procedure does not stipulate a ground for the refusal of an annulled award, contrary to Article V(1)(e) of NYC 1958. In this case, the defendant, an English company, provided consultancy services for the applicant, a French company, in a submission to acquire and perform a work contract in Algeria.[480] A dispute arose pertaining to the payment of fees and the applicant initiated an arbitration proceeding in Geneva. The arbitral tribunal rendered an award in favour of the applicant. The defendant applied to set aside the award at the supervisory court. The annulment was granted by the Geneva Court of Appeal, and subsequently affirmed by the Swiss Supreme Court. Prior to the annulment, the applicant obtained an order for the recognition and enforcement of an award in Paris just before the annulment confirmation by the Swiss Supreme Court. The defendant subsequently challenged the enforcement order at the Paris Court of Appeal.

The Court of Appeal held that the award was not 'incorporated' in Switzerland's legal system.[481] The Court upheld the enforcement order and held that Article V(1)(e) does not apply when the law of the enforcement State allows for the enforcement of such an award.[482] Therefore, the Court held that the annulled award continued to exist and it was not against international public policy for France to enforce the annulled award.[483] The court also cited Article VII of NYC 1958 which allows a Contracting State not to deny the enforcement of a foreign award if the domestic law of the State allows it.[484] The defendant appealed to the Supreme Court of France, arguing that decision by the Court of Appeal was against Articles 1498 and 1502 of France's Code of Civil Procedure for enforcing an award that no longer exists after being nullified by its supervisory court in Geneva.[485]

On appeal, the French Supreme Court held that the Court of Appeal was right in its application of Article VII of NYC 1958, whereby the party applying to enforce an

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[480] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* (1994) (n 459).
[481] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* (1991) 90-16778 (France), available at https://newyorkconvention1958.org/index.php?lvl=notice_display&id=134&opac_view=6,
[482] ibid.
[483] González de Cossío (n 435) 19.
[484] ibid.
[485] *Société Hilmarton Ltd v Société Omnium de traitement et de valorisation (OTV)* (1994) (n 459).

annulled arbitral award in France may rely on French domestic law, and Article 1502 of the French Code of Civil Procedure does not stipulate grounds for the refusal of an annulled award specified under Article V(1)(e) of NYC 1958.[486] The Supreme Court of France affirmed the decision by the Court of Appeal to uphold the enforcement order.

4.5.2.1.3 *République Arabe d'Egypte v. Société Chromalloy Aero Services* (1997)

Where one of the parties in an application to enforce an annulled foreign award was a State, the French Court interpreted the bilateral agreement on judicial cooperation between the State and France as explicit consent that proceedings involving the State in France shall be governed by NYC 1958 and French law.[487] In the controversial case of *the Arab Republic of Egypt v Chromalloy Aeroservices* (1997), the respondent was a US company that entered into a contract for the procurement and management of military aircraft with the respondent, the Republic of Egypt. A dispute arose on termination of the contract and the appellant initiated arbitration in Cairo. The arbitral tribunal rendered an award in favour of the appellant, and the appellant successfully obtained an enforcement order at the First Instance Court of Paris. Subsequently, the award was set aside by the Cairo Court of Appeal. On appeal at the Paris Court of Appeal, the appellant argued that the enforcement order was contrary to the France-Egypt Convention on Judicial Cooperation and enforcement of the award was contrary to international public policy as the arbitral tribunal violated due process and exceeded the jurisdiction conferred upon it, citing Article 1502 (3) and (4) of the Code of Civil Procedure.

The Court of Appeal affirmed the decision of the First Instance Court and held that the France-Egypt Convention stipulated that the recognition and enforcement of foreign awards in both States shall be allowed in accordance with NYC 1958. Noting this, the Court of Appeal held that both States had impliedly render consent to be bound by the exception of Article VII of NYC 1958, whereby NYC 1958 provides the right for the parties to enforce awards to the extent permitted by the law and treaties in enforcement State. The Court of Appeal also held that as the award made in Egypt, the annulment in Egypt did not affect its existence in France as it was 'not anchored in the legal order of France'. Thus, the enforcement order did not violate international public policy.

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[486] ibid.
[487] *République Arabe d'Egypte v. Société Chromalloy Aero Services* (1997) (n 462).

4.5.2.1.4 *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices* (2007)

The French Supreme Court ruled that a foreign award is not connected to the legal order of the supervisory State and a 'decision of international justice'. This case involves the sale of white pepper by the appellant, an Indonesian company, to the respondent, a French company.[488] A dispute arose over payment for a cargo lost in a shipwreck. The appellant initiated the first arbitration proceeding in London under the Rules of Arbitration and Appeal of the International General Produce Association, as provided by the arbitration agreement. In 2001, the arbitral tribunal refused the appellant's claim and held that the Respondent's refusal to pay for the contract was justifiable. Upon a challenge by the appellant at its supervisory seat in London, the London High Court partially set aside the award and held that the respondent's refusal to pay constituted a breach of contract. In 2003, the arbitral tribunal rendered a second award whereby the respondent was required to pay the contract price.

The First Instance Court of Paris enforced the first award, citing Article VII (a more favourable rights position), even though it had been annulled in London. Subsequently, in 2005, the Paris Court of Appeal affirmed the enforcement order of the first award and held that the enforcement was not against international public policy. In 2007, the Supreme Court confirmed the decision of the Court of Appeal and held that that international award is not connected to legal order of the supervisory State and a 'decision of international justice'. Hence, the enforceability of an international award depends on the law where enforcement is sought.[489] Citing Article VII of NYC 1958, the Supreme Court held that the first award was enforceable in France as Article VII allows for the application of a more favourable provision, whereby the application of French domestic law permits the enforcement of annulled awards.

4.5.2.1.5 *Maximov v Société Novolipetski Mettalurguicheski Kombinat (NLMK)* (2016)

French courts consistently enforce annulled arbitral awards as French domestic law does not stipulate grounds to refuse the enforcement of an annulled award. In the case of

[488] *Société PT Putrabali Adyamulia v. Société Rena Holding et Société Moguntia Est Epices* (2007) (n 459).
[489] González de Cossío (n 435) 19–20.

Maximov v Société Novolipetski Mettalurguicheski Kombinat (NLMK) (2016)**,** the applicant initiated an arbitration proceeding to settle a dispute over payment of the purchase price stipulated in an agreement between the parties. The ICAC Russia issued an award in favour of the applicant. Upon an application by the defendant in 2011, the Moscow Arbitrazh Court set aside the award on three grounds (1) non-disclosure ground, (2) arbitrators not following the price formula as agreed in the agreement and (3) the dispute was a corporate matter and non-arbitrable under Russian law. The Federal Arbitrazh Court upheld the decision and the Supreme Arbitrazh Court refused permission to appeal. The applicant then sought enforcement of the award in France, the Netherlands and England (see Sections 4.6.2.1 and 4.6.2.3).

In 2012, the Paris Court of First Instance allowed the application to recognise and enforce the award. On appeal by the defendant in 2016, the Paris Cour de Cassation affirmed the Court of First Instance's decision and held that the domestic law of France did not provide for the ground of setting aside by a supervisory court as one of the limited grounds to refuse the enforcement of awards.[490] It also affirmed the Paris Court of Appeal's decision that there was no procedural fraud and therefore, the award was enforceable in France.[491]

4.5.2.1.6 *Republique Democratique Populaire Du Lao v Thai-Lao Lignite (Thailand) Co. Ltd & Société Thai Lao Lignite (Lao Pdr) Co. Ltd* (2013)

This was the first case in France where the Court refused to enforce an annulled arbitral award.[492] The Court refused to enforce the award made in Malaysia, not on the ground under Article V(1)(e) but on the ground of the absence of an arbitration agreement. The first respondent, a company incorporated in Thailand, entered into a mining concession contract with the appellant.[493] The second respondent was incorporated to execute the concession contract. In 1994, the first respondent entered into a Project Development Agreement (PDA) with the appellant, whereby the PDA stipulated in an arbitration clause that disputes arising from the contract shall be settled by an ad hoc tribunal in Kuala Lumpur in accordance with UNCITRAL Arbitration Rules and applying New York

[490] *Maximov v Société Novolipetski Mettalurguicheski Kombinat (NLMK)* (2016) (n 470).
[491] ibid.
[492] *Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co. Ltd & Société Hongsa Lignite (Lao Pdr) Co. Ltd* (2013) 12/09983 (France), available at https://www.italaw.com/sites/default/files/case-documents/italaw7690.pdf.
[493] ibid.

law.[494] A dispute arose and the arbitral tribunal seated in Kuala Lumpur rendered an award ordering the appellant to pay both respondents jointly the sum of USD 56,210,000.

The chronology of the court proceedings in Malaysia, the supervisory seat, is as follows: On 15 April 2011, the High Court dismissed the defendant's application to extend the time to set aside the award in Malaysia. The High Court held that Section 37(4) of AA 2005 is discretionary and not mandatory, but only in a limited sense.[495]The defendant filed an application to extend the time limit to apply to set aside the award in Malaysia ninety days after the award was issued.[496] Section 37(4) of AA 2005 in Malaysia stipulates that 'an application for setting aside may not be made after the expiry of ninety days from the date on which the party making the application had received the award'.[497] The High Court took into account that Malaysian AA 2005 adopted UML and inclined towards minimum intervention of the court, and it held that Section 8 of the Court of Judicature Act allows the Court, in a limited sense, to extend the time beyond the allocated time under Section 37(4) of AA 2005.[498]

On 26 July 2011, on appeal by the applicant, the Court of Appeal reversed the decision of the High Court and allowed the extension of time and ordered the recognition and enforcement of the award to be remitted and heard under a different judge in the High Court.[499] The Court of Appeal found that the defendant acted expediently and did not remain idle while the time limit lapsed, whereby it went to challenge enforcement of the award in other parts of the world.[500] On 27 December 2012, the Malaysian High Court ordered the award be set aside on the ground of an excess of jurisdiction by the arbitral tribunal.[501] On 29 May 2014, the Court of Appeal affirmed the decision of the High Court to set aside the award. Prior to the order to set aside the award by the supervisory court

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[494] ibid.
[495] *Government of the Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd* [2012] 10 CLJ 399 (Malaysia) [15].
[496] ibid [4].
[497] AA 2005, s. 37(4).
[498] *Government of the Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao Pdr) Co Ltd* (n 495) [10].
[499] *Government of the Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd* [2011] 1 LNS 1903 (Malaysia) [37].
[500] ibid [26].
[501] *Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v the Government of the Lao People's Democratic Republic* [2013] (n 248).

in 2012, the Paris Court of First Instance granted an order to enforce the award on 15 July 2010.

The Paris Court of Appeal in 2013 set aside the enforcement order on the ground of the absence of an arbitration agreement pursuant to Article 1502 (1) of France's Code of Civil Procedure.[502] The absence of arbitration agreement constitute fundamental procedural ground for non-enforcement of foreign award in France. The Court of Appeal held that the annulment decision by the Malaysian court was not a ground for refusal to enforce the foreign award in France. However, the Court of Appeal accepted the refusal on the ground of the absence of an arbitration agreement in part as the arbitrators acted without an arbitration agreement on compensation for damages resulting from contracts other than the PDA in contravention of Article 19.11 of the PDA. Article 19.11 of the PDA explicitly stipulates that it 'replaces and governs all previous arrangements between the parties except the rights of Hongsa Lignite and /or TLL and Contracts anterior, wider or extended than those contained herein, will remain in effect and will remain unaffected by this Agreement'.[503]

4.6 Assessment Approach

The third approach, the assessment approach, refers to a practice whereby an enforcement court assesses the grounds for an annulment decision and decides on its own motion whether to recognise or refuse the enforcement of an award annulled by a court where the award was made.[504] Marike Paulsson categorises the assessment approach into four further categories: (1) the US approach glossing Article V(1)(e) with public policy, (2) opting for Article VII, (3) if the grounds for annulment violate domestic public policy and (4) annulment that has been accepted by the international arbitration community, where annulment under Local Standard Annulments (LSAs) should not be recognised under NYC 1958.[505]

The thesis finds that enforcement courts adopted the assessment approach by relying on the discretionary power given by a literal interpretation of the word 'may' in Article

[502] *Lao People's Democratic Republic v Thai-Lao Lignite (Thailand) Co. Ltd & Société Hongsa Lignite (Lao Pdr) Co. Ltd* (2013) 12/09983 (France) (n 492).
[503] ibid.
[504] González de Cossío (n 435) 22.
[505] Paulsson and Suresh (n 380) 212.

V(1)(e) of NYC 1958. The Dutch, US and English courts also adopted a 'preferred approach' in the application of Article V(1)(e) whereby the general rule for the courts is to refuse to enforce annulled arbitral awards. However, an exception may be made in exceptional circumstances whereupon the courts will then ignore annulment decisions and enforce annulled awards.

The thesis critically analyses the application of assessment approach by the Dutch, the US and the English courts on the enforcement of annulled awards. First, the English courts will allow the discretion if the Court would arrive at the same conclusion of setting aside an award by assessing its motion and applying English private international law.[506] Among the three States, the English courts were the strictest courts in requiring a heavy burden of proof from applicants to enforce annulled awards. In England, in an application to enforce an annulled arbitral award, the award-debtor must establish a heavy burden of proof to ascertain that a foreign decision is wrong, that it was so tenacious that the decision could not come from good faith but by bias of the foreign court.[507]

Second, the Dutch courts ruled that they would enforce annulled awards if awards and the grounds for annulment contravene the principles of the due process of law or the ground for annulment is contrary to Dutch public policy. On the other hand, the Dutch courts will not enforce an annulled award if the ground for an annulment decision is internationally recognised, or where the ground for annulment is not at least one of the grounds under Article V(1)(a)-(d) of NYC 1958. Third, the US courts (with the exception of *Chromalloy*) will not enforce annulled arbitral awards if it is against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States'.[508]

4.6.2 Court Decisions

4.6.2.1 The Netherlands

Dutch Courts adopted an assessment approach by assessing the grounds for annulment decisions by supervisory seats. The Amsterdam Court of Appeal in *Yukos* held that on the

[506] *Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015] EWHC 361 (Comm) (England); *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA Civ 855 (England).
[507] Devenish (n 404) 147.
[508] *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* (2007) 06-7058 487 F.3d 928 (United States), 20.

application to enforce a foreign award annulled by its supervisory seat, it would assess whether the grounds for the annulment contravene the principles of the due process of law or the ground for annulment is contrary to Dutch public policy. The Dutch Supreme Court in *Maximov* interpreted Article V(1)(e) in accordance with Articles 31–33 of VCLT 1969. The Dutch court compared two divergent authentic texts of NYC 1958 and ruled that the general rule in the Netherlands is the Court restrictive nature of Article V(1). An exception to the general rule is where the Dutch courts are permitted to use limited discretionary power to enforce annulled arbitral awards in exceptional circumstances. These exceptional circumstances include where the grounds for annulment do not at least include one of the grounds under Article V(1)(a)-(d) of NYC 1958, where the annulment grounds are not acceptable according to international standards or where the grounds are against Dutch international private law. The grounds for annulment acceptable by Dutch standards are similar to the ISA grounds suggested by Paulsson (see Section 4.7.1).

4.6.2.1.1 *Yukos Capital S.A.R.L v OAO Rosneft* (2009)

The Dutch Court ruled that it would assess whether the grounds for annulment at the supervisory seat contravene the principles of the due process of law or the grounds for annulment are contrary to Dutch public policy. If the answer is positive, the Dutch Court will ignore the annulment decision and enforce the foreign award in the Netherlands. In the case of *Yukos Capital S.A.R.L v OAO Rosneft* (2009), Yukos (the appellant), a company incorporated under Luxembourg law, a lender concluded four loan agreements with the borrower, OJSC Yuganskneftegaz, a Russian company.[509] At that time both companies were part of Yukos Oil Company, which held all shares in Yuganskneftegaz. The loan agreements stipulated arbitration clauses whereby disputes arising from the agreements were subject to arbitration in the ICAC Russia. In 2004, following a tax assessment imposed on Yukos Oil, Baikal Finance Group, a Russian company, bought 76.79% of the shares in Yuganskneftegaz. Shortly after, Rosneft (the respondent), a Russian State-owned-company, acquired shares from the Baikal Finance Group.

The appellant initiated four arbitration proceedings at the ICAC Russia in Moscow against Yuganskneftegaz, whereby the arbitral tribunal made four awards, a total of

[509] *Yukos Capital S.A.R.L v OAO Rosneft* (2009) 200.005.269/01 Court of Appeal (28.04.2009) (the Netherlands) [2].

approximately 12 billion Russian rubles in favour of the appellant. In 2006, the Respondent merged with Yuganskneftegaz and all assets and liabilities were transferred under the Respondent and Yuganskneftegaz ceased to exist. In 2007, the Moscow Arbitrazh Court annulled the awards rendered in 2006. Subsequently, the Federal Arbitrazh Court of Moscow affirmed the annulment in 2007. The Supreme Arbitrazh Court of Russian Federation dismissed the appeal by the appellant.

Upon an application to enforce the award in the Netherlands, the Amsterdam District Court refused to enforce the awards rendered by the ICAC Russia. The District Court judge held that as the enforcement court, the Court must respect the decision of the supervisory court in setting aside the awards. The District Court held that the Court may grant an enforcement order only in exceptional circumstances such as a violation of the generally accepted principle of due process and partiality of the supervisory court.

The Amsterdam Court of Appeal held that if the ground for the annulment of a foreign award contravenes the principle of the due process of law or the ground for annulment is contrary to Dutch public policy, the Dutch court may ignore the annulment decision and enforce the award.[510] On appeal, the Amsterdam Court of Appeal found that Article V(1)(e) of NYC 1958 does not impose an obligation on Contracting States to automatically deny the enforcement of annulled awards.[511] There is no international recognition of setting aside decisions. The Court of Appeal held that regardless of the ground available under Article V(1)(e) on the refusal to enforce annulled awards, Dutch courts are not obliged to either refuse or enforce an annulled award. The Court of Appeal explained that a Dutch court has discretion to make its own assessment on the grounds for the annulment of a foreign award.

The appellant argued that the Russian judiciary was biased and not impartial in decisions that were politically sensitive and strategic issues, was guided by the interest of the Russian Federation and received instructions from the Russian executive.[512] The appellant submitted that the annulment decisions were motivated by the actions of the

[510] *Yukos Capital S.A.R.L. v OAO Rosneft* (2009) (n 507).
[511] ibid [3.4-3.6].
[512] ibid. [3.7]

Russian Federation dismantling the Yukos Group, gaining control of the Yukos Group and eliminating its political opponents.[513]

In assessing whether the grounds for annulment of the award by the Russian courts were recognisable in the Netherlands, the Court of Appeal found that there was an undeniable link between the dispute and complications in Russia that led to the dismantling and bankruptcy of the Yukos Oil Company. It is also undisputable that there was a close relationship between the respondent and the Russian State as the State owned a majority of the shares of the respondent. The Dutch Court of Appeal also cited European cases where the courts held that criminal prosecution of the Yukos Oil Group was likely to be politically inspired.

One of the occasions where the ground for annulment by the supervisory court contravenes the basic principle of justice or is against the public policy of the Netherlands is when an annulment decision is made partial and dependent. The Court of Appeal held that as the annulment of awards is not impartial and independent, an annulment decision cannot be recognised in the Netherlands. Therefore, the Court of Appeal ignored the Russian annulment decision and granted an enforcement order to enforce the awards. The Respondent's appeal to the Supreme Court was dismissed as Article 1062 (4) and Article 1064 (1) of the Dutch Civil Code of Procedure stipulate no appeal at the Supreme Court against a decision to enforce a foreign arbitral award on the basis of Article III of NYC 1958.[514]

4.6.2.1.2 *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017)

The Dutch Supreme Court interpreted Article V(1)(e) in accordance with Articles 31–33 of VCLT 1969. By comparing the divergence of authentic texts of NYC 1958 in English and French, the Dutch Supreme Court held that the Dutch Court has discretion under Article V(1)(e) to enforce annulled arbitral awards but the Court may only make use of this exception in exceptional cases.

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[513] ibid.
[514] *OAO Rosneft v Yukos Capital S.A.R.L* [2010] 09/02566 Supreme Court (25.6.2010) (the Netherlands).

In the case of *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017), the appellant, a Russian businessman, and the respondent, a Russian company, entered into a sale agreement where the appellant sold 50% of his shares in OJSC, a Russian company, to the respondent at a purchase price to be determined by a formula specified in the agreement.[515] A dispute arose on payment of the balance of the purchase price for the shares. The appellant initiated arbitration proceedings at the ICAC Russia where the appellant claimed 14.7 bn Russian rubles. At the arbitration proceeding, the respondent forwarded a defence and claimed that the applicant should be ordered to pay 5.9 bn Russian rubles as the advance paid exceeded the purchase price. In March 2011, the arbitral tribunal rendered an award in favour of the appellant whereby the respondent was ordered to pay 8.9 bn Russian rubles. The tribunal held that as both parties had made insufficient efforts to complete the calculation of the purchase price within the agreement, the tribunal calculated the purchase price by calculating half the price submissions claimed by both parties at the arbitration proceeding.

On April 2011, the respondent applied to annul the award at the Arbitrazh Court in the City of Moscow. In June 2011, the Arbitrazh Court set aside the award on the ground that, first, the composition of arbitral tribunal was not in accordance with the agreement of the parties due to the fact that the arbitrators did not inform the parties of the links between experts and arbitrators.[516] Experts who assisted the appellant in the proceeding worked in the same institute as the arbitrators and held higher positions than the arbitrators. Second, the Arbitrazh court held that the subject of the validity of the share transfer was not arbitrable under Russian law. Third, the Arbitrazh Court held that the method used by the arbitral tribunal in its determination of the purchase price was contrary to mandatory law in Russia on purchases. Both parties appealed the decision of the Arbitrazh Court. In September 2011, the Federal Arbitrazh Court affirmed the decision of the Arbitrazh Court.[517] The appellant subsequently made a request to the Constitutional Court of the Russian Federation to examine the constitutionality of the annulment decision. The Constitutional Court denied the request and held that its decision was final, and the court would not entertain any further request.[518]

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[515] *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017) 16/05686 Supreme Court (24.11.2017) (the Netherlands) [3.1].
[516] ibid [3]
[517] ibid.
[518] ibid.

In November 2011, the appellant applied to enforce the award at the Amsterdam Court of First Instance pursuant to Article 1075 of the Dutch Code of Civil Procedure and NYC 1958. The respondent challenged the recognition and enforcement of awards relying on Article V(1)(e) of NYC 1958, stating that the award had been set aside by its supervisory court in Moscow. The appellant argued that the Dutch court should ignore the annulment decision as it was tainted with partiality, corruption and other procedural irregularities contrary to Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter, ECHR) and Article 14 of the United Nations International Covenant on Civil and Political Rights (hereinafter, BUPO).

The Amsterdam Court of First Instance held that on the application to enforce an annulled arbitral award, the enforcement court must always assess whether enforcement can be granted on the basis of its own domestic public order.[519] The Court explained that the enforcement order of an annulled arbitral award can only be granted in exceptional circumstances, whereby the recognition of the annulment decision is contrary to Dutch public policy, for example where there was a breach of the principle of due process according to Dutch law.[520] The Amsterdam Court held that the respondent failed to prove his claims of partiality and corruption of the Moscow court as the appellant had knowingly and deliberately chosen to submit to the jurisdiction of the Russian court by voluntarily choosing to arbitrate under Russian law. Also, the respondent failed to provide concrete proof of a close relationship between the respondent and the Russian State. Therefore, the Amsterdam Court of First Instance enforced the award.

On appeal at the Court of Appeal in 2012, the Court affirmed the decision of the Amsterdam Court of First Instance. The Court of Appeal held that, in principle, as the supervisory court had set aside the award, the appellant's request must be refused in accordance with Article V(1)(e) of NYC 1958. However, the Court of Appeal found that it is the obligation of the enforcement court to assess whether an exception must be made to the principle rule, by examining the annulment decision to evaluate whether the decision would be otherwise should the annulment have been handled in accordance with

[519] *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2011) 491569 - KG RK 11-1722 Court of Amsterdam (17.11.2011) (the Netherlands)[4.8–4.9].
[520] ibid.

the principle of due process and impartiality.[521] The Court of Appeal found that it must examine whether the Russian annulment decision allows for an exception to the general rule and appointed two experts to determine this issue. The Court of Appeal in affirming the decision of the Court of First Instance held that the established facts were insufficient to allow an exception to this case and prove that the annulment was not done fairly in Russia.

In a further appeal at the Dutch Supreme Court in recently in 2017, the appellant argued that both the Court of First Instance and the Amsterdam Court of Appeal failed to acknowledge the wide discretionary power granted by Article V(1)(e) of NYC 1958 to assess whether an annulment decision from a foreign court precludes granting an enforcement order for the award in the Netherlands.

The Supreme Court had a rare opportunity to explain that interpretation of NYC 1958 must be in accordance with Articles 31–33 of VCLT 1969.[522] The Supreme Court compared two official texts of NYC 1958 on Article V(1)(e) where the authentic English text uses the term 'may be refused … only if' which in its general meaning indicates that the court has discretion on whether to accept a challenge under the provision.[523] On the other hand, the authentic French uses '*ne seront refusées (...) que si*' where the general meaning indicates that the court has no discretion but must allow an application to refuse an award under Article V(1)(e). Applying Article 33 (4) of VCLT 1969, the interpretation of Article V(1)(e) must take into account the object and purpose of NYC 1958, which is to facilitate the recognition and enforcement of arbitral awards and a meaning that best reconciles these authentic texts. The Supreme Court held that the divergent authentic texts are best interpreted as giving some discretion for the enforcement court to recognise and enforce a foreign award, even when one or more grounds available under Article V(1) arise.[524]

The Supreme Court also held that as its discretion is an exception to the general rule on the restrictive nature of Article V(1), the Court may only make use of this exception in

[521] *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2012) 200.100.508/01 Amsterdam Court of Appeal (18.9.2012) (the Netherlands).
[522] *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017) (n 515)[3.4.2].
[523] ibid [3.4.3].
[524] ibid [3.4.5].

exceptional cases.[525] It interpreted Article V(1)(e) to mean that even if an award is annulled by the court where the award was made, the enforcement court still retains the discretion to allow enforcement of an annulled award in exceptional cases.[526] Exceptional cases include where the ground for annulment is not at least one of the grounds under Article V(1)(a)-(d) of NYC 1958, where the annulment ground is not acceptable by international standards or where the ground is against Dutch international private law.[527] The Supreme Court was satisfied with the assessment made by the Court of Appeal and affirmed its decision to grant enforcement of the award.

4.6.2.2 United States of America

Even though the US courts have not been consistent in their approach to deciding on the enforcement of annulled awards, a 'general consensus' has been developing in recent years.[528] The US courts, with the exception of *Chromalloy*, adopted an assessment approach to the enforcement of annulled arbitral awards. Even though the facts in Chromalloy were different as the parties expressly agreed in their agreement to remove the jurisdiction of the Egyptian courts over an appeal against the award rendered by the arbitral tribunal, the US Court adopted a delocalised approach by invoking Article VII of NYC 1958 and ruling that the award was unenforceable in accordance with US domestic law.

In other cases concerning the enforcement of annulled awards, it is found that the general rule in the US is to refuse the enforcement of annulled foreign awards.[529] The US courts have also found that a decision by a foreign court is generally final except if enforcement of the decision contravenes the public policy of the enforcement State.[530] The US courts place a high burden on the parties seeking to enforce annulled arbitral awards as they must prove 'adequate reason' for refusing to recognise the decision of a supervisory court

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[525] ibid [3.4.6].
[526] ibid [3.4.6].
[527] ibid [3.4.6].
[528] Hendel and Nogales (n 22) 199.
[529] *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* [2007] (n 508); *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016) 13-4022 (United States); *Thai-Lao Lignite (Thailand) Co. Ltd. v Gov't of the Lao People's Democratic Republic* (2014) 10-Cv-5256 (Kmw) (Dcf), 997 F. Supp. 2d 214 (United States).
[530] *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016) (n 529).

and the existence of 'extraordinary circumstances'.[531] In limited circumstances, a US court may apply the limited discretion allowed by Article V(1)(e) whereby the court may disregard an annulment decision if it is against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States'.[532] The court in Baker Marine also cautioned against forum shopping, stating that otherwise "a losing party will have every reason to pursue enforcement actions in every country until a court is found which grants enforcement".[533]

4.6.2.2.1 *Chromalloy*

The first case in the US on the enforcement of annulled awards adopted a delocalised approach where it applied Article VII of NYC 1958 and ruled in accordance with US domestic law. In 1996, the applicant sought to enforce an award made in Egypt at the US District Court in the District of Columbia.[534] The award was annulled by the Egyptian Court of Appeal in 1995. In 1997, the French Court of Appeal affirmed the decision of the First Instance Court and allowed the applicant's application to enforce the annulled award (see Section 4.5.2.1.3).

The US Court, recognising the discretionary power granted by Article V(1) of NYC 1958, applied Article VII of NYC 1958 whereby it explained that the applicant maintained all rights to enforce the award under US law, as it would have in the absence of NYC 1958.[535] The Court also found that the annulled award was proper and in accordance with US law, and the arbitration agreement between the parties precluded an appeal to the Egyptian courts over the award rendered by the tribunal.[536] While assuming that the annulment decision of the Cairo Court of Appeal was proper, the Court found that the annulment decision did not have *res judicata* effect in the US. The Court held that US public policy

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[531] *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* (2007) (n 508); *Baker Marine v Chevron Nig Ltd* (1999) 97-9615, 97-9617) (United States) .
[532] ibid, 20.
[533] Brunda Karanam, 'Finality v. International Comity – Enforcement of Awards Annulled in the Primary Jurisdiction' (*Kluwer Arbitration Blog*, 2017) <http://arbitrationblog.kluwerarbitration.com/2017/09/27/finality-v-international-comity-enforcement-awards-annulled- primary-jurisdiction/> accessed 20 September 2020.
[534] *Chromalloy Aeroservices Inc. v The Arab Republic of Egypt* (1996) 939 F. Supp. 907 (United States).
[535] ibid.
[536] ibid.

favours binding and final arbitration and denied any conflict with the applicant's right to raise Article VII to invoke the application of FAA.[537]

4.5.2.2.2 *Baker Marine (Nig.) Ltd v Chevron (Nig) Ltd & Chevron Corp. Inc.* (1999)

The US Court adopted an assessment approach and assessed the grounds for the annulment decision. Considering that the grounds were similar to the grounds under Article V(1)(c) and (d) of NYC 1958, the US Court of Appeal refused to enforce the annulled foreign award. In the case of *Baker Marine (Nig.) Ltd v Chevron (Nig) Ltd & Chevron Corp. Inc.* (1999), the appellant entered into a contract with the respondents to provide barge services. The contract stipulated an arbitration agreement whereby any disputes between the parties shall be settled by arbitration in accordance with UNCITRAL Arbitration Rules. The contract also provided that the substantive law for the contract would be the law of the Federal Republic of Nigeria and the interpretation of contracts shall be in accordance with Nigerian law.[538]

A dispute arose, and the parties submitted to two arbitral tribunals in Lagos. In 1996, the first arbitral tribunal rendered an award of USD 2.23 m. against the second respondent and a second panel awarded USD 750,000 against the first respondent. Upon application from the Respondents, a Nigerian court set aside both awards. The ground for setting aside the first award was that the arbitrators went beyond the scope of submission to arbitration, while the ground for annulment of the second award was a lack of evidence.[539] In 1997, the US District Court refused the appellant's application to enforce the award and held that 'it would not be proper to enforce a foreign arbitral award under the Convention when such an award has been set aside by the Nigerian courts'.[540]

The Court of Appeal affirmed the decision of the District Court. The appellant appealed to the US Court of Appeal, claiming that the District Court failed to give effect to Article VII of NYC 1958. Contrary to the decision in *Chromalloy,* the Court found that the Respondents did not violate any terms in the arbitration agreement by applying to set aside the awards in Nigeria. The US Court of Appeal held that the awards were set aside

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[537] ibid.
[538] *Baker Marine (Nig.) Ltd v Chevron (Nig) Ltd & Chevron Corp. Inc.* (1999) 97-9615, 97-9617) (United States).
[539] ibid.
[540] ibid.

in Nigeria based on grounds similar to Article V(1)(c) and (d) of NYC 1958. The court rejected Baker Marine's argument that the annulment grounds in Nigeria were not similar to those used in the US. The Court of Appeal refused to enforce the annulled arbitral award, citing that a losing party in the annulment of an award may pursue the enforcement of annulled awards, going from country to country, should an annulled award be capable of being enforced automatically in other states.

4.5.2.2.3 *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* (2007)

The US Court of Appeal ruled that the general principle in the US is to refuse the enforcement of annulled awards as they no longer legally exist. However, a US court may apply the limited discretion allowed by Article V(1)(e), whereby the Court may disregard an annulment decision if it is against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States'.[541] In the case of *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* [2007], the first appellant entered into an agreement to generate energy. A dispute arose and, as stipulated in the agreement, the parties submitted their dispute to an arbitral tribunal in Columbia. The arbitral tribunal rendered an award of more than USD 60 m. in favour of the appellant. Subsequently, the Columbia Council of State, the highest administrative court in Columbia, set aside the award on the ground that it violated Columbian law. The appellants, including the second appellant who was an investor in the first appellant, applied to enforce the award in a US District Court. The District Court dismissed the second appellant and parties and subsequently dismissed the application to enforce the annulled award on the grounds of (1) failure to stipulate a claim and relief and (2) *forum con conveniens*.

The US Court of Appeal held that Article V(1)(e) stipulates a general principle that an award that has been set aside by the competent authority in the court where the award was made no longer exists to be enforced by other Contracting States of NYC 1958.[542] It affirmed the decision of the District Court to refuse to enforce the annulled award and held that the appellants failed to provide sufficient evidence that the annulment decision

[541] *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* (2007) n 508), 20.
[542] ibid, 2-3.

violated the notion of justice of US law.[543] The Court also held that the supervisory court may set aside an award on grounds that are inconsistent with the public policy of the enforcement State.[544] The Court explained that NYC 1958 does not encourage a system whereby enforcement courts 'routinely second-guess' the judgment of the supervisory courts in situations where the supervisory courts legally set aside awards made in their territories.[545] In applying Article V(1)(e), the US Court of Appeal warned against the notion of 'public policy', whereby the test of public policy could only by whether the enforcement Court would arrive at the same conclusion to set aside the award should it determine the matter in accordance with its laws.[546] The Court of Appeal held that as there is a 'narrow public policy gloss' on the application of Article V(1)(e), the Court may disregard an annulment decision if it is against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States'.[547]

4.5.2.2.4 *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016)

The US Court also found that a decision by a foreign court is generally final except if enforcement of the decision contravenes the public policy of the enforcement State. The appellant, a Mexican company, entered into an agreement to build oil platforms in the Gulf of Mexico with the respondent, a Mexican state-owned enterprise. A dispute arose and the appellant initiated arbitration proceedings pursuant to the arbitration agreement. In December 2007, while the arbitration proceedings were being held, the Mexican Congress amended Mexican law and enacted Section 98 which conferred exclusive jurisdiction for disputes relating to public contracts on the Tax and Administrative Court.[548] Subsequently, in September 2009, an arbitral tribunal rendered an award in favour of the applicant of approximately USD 300 m. against the respondent. Subsequently, the US District Court granted confirmation of the award in August 2010. The respondent challenged the award simultaneously in the US Court and the Mexican

[543] ibid, 20.
[544] ibid, 17.
[545] ibid, 17.
[546] ibid, 18.
[547] ibid, 20.
[548] *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016) (n 529), 9.

Court. In September 2011, the Mexican Court of Appeal set aside the award, on the ground that it was not arbitrable, citing the recently enacted Section 98.[549]

Upon a challenge by the respondent citing the annulment decision by the Mexican Court, the US Southern District Court affirmed its previous ruling and confirmed enforcement of the award on the ground that the Mexican annulment decision contravened the basic notion of justice as it applied Section 98 which was not yet enacted at the conclusion of the agreement between the parties.[550]

The US Court of Appeal explained that enforcement of foreign awards in US is governed by two international conventions: the Panama Inter-American Convention on International Commercial Arbitration (hereinafter, Panama Convention) and NYC 1958.[551] Article 5(1)(e) of the Panama Convention is textually similar to Article V(1)(e) of NYC 1958. In this case, the Panama Convention was applicable, considering the parties were subject to the jurisdiction of States that have acceded to the Convention.

The Court ruled that even though the Panama Convention provides 'unfettered discretion' to the District Court to enforce an annulled award, such discretion is only exercisable where the annulment decision is against the 'fundamental notions of what is decent and just' in the US.[552] The Court also found that a decision by a foreign court is generally final except if enforcement of the decision contravenes the public policy of the enforcement State.[553] The Court of Appeal affirmed the decision of the District Court to allow enforcement of the annulled award on the ground that the annulment decision was against the public policy of the US, considering '1) the vindication of contractual undertakings and the waiver of sovereign immunity; (2) the repugnancy of retroactive legislation that disrupts contractual expectations; (3) the need to ensure legal claims find a forum; and (4) the prohibition against government expropriation without compensation'.[554]

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[549] ibid, 10.
[550] ibid, 1.
[551] ibid, 24-25.
[552] ibid, 29.
[553] ibid, 28.
[554] *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016) (n 529), 30.

4.5.2.2.5 *Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa Lignite Co Ltd v Government of Lao* (2017)

The US Court of Appeal explained that under NYC 1958, a party seeking to enforce a foreign award need not wait for a decision on appeals at the supervisory court. An award was rendered in Malaysia under the UNCITRAL Rules of Arbitration (see Section 4.5.2.1.6 and 4.6.2.3.3). The claimant sought to enforce the award in the UK, the US and France. On 5 August 2011, the US District Court granted registration of the award as a judgment in the US enforcing USD 57 million. against the appellant. On 29 May 2014, the Malaysian Court of Appeal affirmed the decision of the High Court in 2013 to set aside the award on the ground of excess jurisdiction by the arbitral tribunal (see Section 4.5.2.2.4).[555] Subsequently, on 6 February 2014, the US District Court set aside the judgment pursuant to Section 60(b)(5) of the Federal Rule of Civil Procedure and Article V(1)(e) of NYC 1958.[556]

The US Court found that NYC 1958 left it with 'exceedingly limited discretion' to defer to the Malaysian annulment decision unless the annulment contravened the basic standards of justice in the US.[557] The US District Court also held that annulment decisions from Malaysian Courts do not contravene basic notions of justice. In 2017, the US Court of Appeal affirmed the decision of the US District Court to set aside the judgment on the award.[558] The US Court of Appeal explained that under NYC 1958, a party seeking to enforce a foreign award need not wait for a decision on appeals at the supervisory court. NYC 1958 allows the award-debtor to enforce an award elsewhere in the world before the award is reviewed by its supervisory court.[559] The US Court compared the word 'may' adopted in Article V(1) of NYC 1958 with the word 'shall' used in Article III.[560]

The US Court applied the principle in *Pemex* whereby it held that 'even though Article V(1)(e)'s permissive language could be read to suggest that a district court has "unfettered discretion" as to whether to enforce such an award, the court's exercise of that discretion

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[555] *Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v The Government of the Lao People's Democratic Republic* (n 499).
[556] *Thai-Lao Lignite (Thailand) Co. Ltd. v Gov't of the Lao People's Democratic Republic* (2014) 10-Cv-5256 (Kmw) (Dcf), 997 F. Supp. 2d 214 (United States).
[557] ibid 5.
[558] *Thai-Lao Lignite (Thailand) C.o Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v Government of the Lao People's Democratic Republic* (2017) (n 527).
[559] ibid, 6.
[560] ibid, 7.

should rather be treated as "constrained by the prudential concern of international comity"'.[561] The US Court of Appeal affirmed the decision of the District Court and held that the District Court had not exceeded its discretion to refuse to order the respondent to provide security and refused to enforce the English judgment which was contradictory to the annulment decision by the Malaysian courts.[562]

4.6.2.3 England

English courts adopted an assessment approach by rejecting territorial and delocalised approaches to the enforcement of annulled arbitral awards.[563] English courts neither directly enforce an annulled award nor directly disregard the annulment of an award by its supervisory court. Instead, an annulled arbitral award may be enforced by an English court, however the annulled award must satisfy a heavy burden of proof of bias and such annulment is 'contrary to principles of honesty, natural justice and domestic concept of public policy'.[564] To date, the English courts have never enforced annulled arbitral awards.[565]

The thesis finds that while the English Courts adopted an assessment approach, they also considered the supervisory court as the primary jurisdiction of an award. Upon application to enforce an annulled arbitral award, the English courts will perform a two-step analysis. First, they will first assess if the award is valid in accordance with English law. Second, the English High Court has ruled that even though an award is valid according to English law, where there is a pending proceeding challenging the award in a supervisory court, the courts may either make (1) an order for immediate enforcement or (2) an order for substantial security.

In deciding whether to enforce a valid foreign award annulled by its supervisory seat, the English courts adopted a 'preferred approach' where they interpreted the word 'may' in Section 103(2) of AA 1996 as allowing discretion to the Court to enforce an award regardless of whether the award has been annulled by its supervisory court pursuant to

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[561] *Corporación Mexicana de Mantenimiento Integral S. De. R. L. De C. V. v Pemex-Exploracion Y Produccion* (2016) (n 529), 27.
[562] *Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v Government of the Lao People's Democratic Republic* (2017) (Malaysia) (n 248), 7.
[563] Hendel and Nogales (n 22) 197.
[564] ibid.
[565] Devenish (n 404) 147.

Section 103(2)(f).[566] In assessing the ground for an annulment decision, such discretion is not exercisable if the Court would arrive at the same conclusion of setting aside the award by assessing its motion applying English private international law.[567] In England, in an application to enforce an annulled arbitral award, the award-debtor must establish a heavy burden of proof to ascertain that a foreign decision is wrong, that it was so tenacious that the decision could not have come from good faith but by bias of the foreign court.[568]

4.6.2.3.1 *Malicorp Limited v Government of the Arab Republic of Egypt and others* (2015)

The London High Court adopted a 'preferred approach' where it interpreted the word 'may' in Section 103(2) of AA 1996 as allowing discretion to the Court to enforce an award regardless of whether the award had been annulled by its supervisory court pursuant to Section 103(2)(f). In assessing the ground for the annulment decision, such discretion is not exercisable if the Court would arrive at the same conclusion of setting aside the award by applying English private international law. The London High Court held that it 'should give effect to the supervisory court's annulment decision unless it offends "basic principles of honesty, natural justice and domestic concepts of public policy"'.[569]

In the case of *Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015], the applicant, a company incorporated in the UK, entered into an agreement with the first defendant, the Government of the Arab Republic of Egypt, represented by the Civil Aviation Authority pertaining to a contract for the design and construction of a new airport at Ras Sudr in 2000.[570] Article 21.3 of the concession contract stipulated an arbitration clause whereby in a dispute which could not be resolved amicably, the dispute would be settled by the Cairo Regional Centre for International Commercial Arbitration (hereinafter, CRCICA).[571] In 2004, the applicant commenced an arbitration at the CRCICA. The arbitral tribunal consisted of one arbitrator appointed by each of the parties and one chair nominated by both of the arbitrators. In 2006, an award was rendered in

[566] *Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015] (n 506).
[567] ibid; *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2*) [2012] (n 506).
[568] Devenish (n 404) 147.
[569] *Malicorp Limited v Government of the Arab Republic of Egypt and others* [2015] (n 506)[22].
[570] ibid [1].
[571] ibid [2].

favour of the applicant, signed by two of the arbitrators.[572] One of the arbitrators, Dr Gabr, who was appointed by the Defendant, suspended his participation as an arbitrator pursuant to a 2006 Administrative Court order.

In 2012, on an application sought to enforce the award made in Cairo against the defendants in London pursuant to Section 101(2) of AA 1996, the London Court granted an order for enforcement. The enforcement order was made on papers and not pursuant to Section 62.18 of Civil Procedure Rules. The second and third defendants were the successors of the Civil Aviation Authority. The arbitral tribunal rendering the award in Cairo previously ruled that the second and third defendants were not parties to the concession contract.

Subsequently, the First defendant applied to set aside the enforcement order. The London High Court set aside the enforcement order pursuant to Section 103(2)(f) of AA 1996 as the award was set aside by the Cairo Court of Appeal in 2012.[573] The applicant challenged the Cairo Court of Appeal's decision before the Egyptian Court of Cassation where the decision was still pending.

The London High Court held that it 'should give effect to the 2012 Cairo Court of Appeal decision unless it offends "basic principles of honesty, natural justice and domestic concepts of public policy"'.[574] The Court adopted a 'preferred approach' where it interpreted that the word 'may' in Section 103(2) of AA 1996 (implementing legislation of Article V(1) of NYC 1958) stipulates discretion for the Court to enforce an award regardless of whether the award has been annulled by its supervisory court pursuant to Section 103(2)(f). However, the Court explained that such discretion is not exercisable if the Court would arrive at the same conclusion of setting aside the award by applying English private international law.[575]

The High Court found that the applicant failed to discharge its burden of proving its allegation that the supervisory court failed to take into account its submission merely

[572] ibid [4].
[573] ibid [14].
[574] ibid [22].
[575] ibid [21].

because it was not repeated in the judgment of the Cairo Court.[576] The Court held that the applicant must provide positive and cogent evidence to prove its claim that the Cairo Court of Appeal was guilty of pro-government bias.[577] The Court also considered the Cairo Court of Appeal decision as final, until and unless the Egyptian Court of Cassation overturned it.[578]

4.6.2.3.2 *Yukos Capital Sarl v OJSC Rosneft Oil Co. (No 2*) (2012)

The English Court ruled that the English court would decide on its own, in accordance with English public order, whether to accept the annulment decision of another foreign State. In the case of *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2*) [2012] EWCA Civ. 855, in another enforcement proceeding in the Netherlands, the Dutch Court of Appeal ignored a Russian annulment decision and granted an enforcement order to enforce annulled awards on the ground that the Russian annulment of the awards was not impartial and independent, thus the annulment decision could not be recognised in the Netherlands (see Section 4.6.2.1.1).

In 2010, the appellant sought to enforce the awards in London pursuant to Section 101 of AA 1996. The respondent raised a defence under Section 103(2)(f) of AA 1996 that the awards 'no longer exist in the legal sense' and it would be contrary to UK public policy to enforce them.[579] In a preliminary trial, the High Court held that (1) the respondent was estopped by the decision of the Dutch Court of Appeal from denying that the Russian annulment decision was tainted with a partial and dependent judicial process and (2) the court may decide on issues raised by the respondent to an act of State.[580] The Court of Appeal in 2012 in an appeal on the issue of estoppel reversed the High Court decision on estoppel and held that the English court would decide on its own, in accordance with English public order, whether to accept the annulment decision of another foreign State.[581] The Court of Appeal remitted this case to be decided at the High Court to assess the annulment decision issues.

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[576] ibid [25].
[577] ibid [26].
[578] ibid [28].
[579] *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2)* [2012] EWCA (n 506) [24-25].
[580] *Yukos Capital Sarl v OJSC Rosneft Oil Co* [2011] EWHC 1461 (Comm).
[581] *Yukos Capital Sarl v OJSC Rosneft Oil Co (No 2*) [2012] (n 506) [155-162].

4.6.2.3.3 *Thai-Lao Lignite (Thailand) Co. Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v The Government of the Lao People's Democratic Republic* (2012)

An English court, in conducting an assessment, will first assess if an award is valid in accordance with English law. Second, the London High Court ruled that even if an award is valid according to English law, where there is a pending proceeding challenging the award in the supervisory court, the courts may either make (1) an order for immediate enforcement or (2) an order for substantial security. In this case, the first applicant, a company incorporated in Thailand, entered into a Project Development Agreement (hereinafter, PDA) to develop a 'Hongsa Project' with the defendant, a government, on 22 July 2004.[582] There were problems and subsequently the Hongsa Project was terminated. An ad hoc arbitration was carried our pursuant to the terms of their agreement. The arbitral tribunal rendered an award ordering a declaration of termination of the PDA and the defendant to pay both applicants jointly USD 56,210,000. On 29 May 2014, the Malaysian Court of Appeal affirmed the decision of the High Court in 2013 to set aside the award on the ground of excess of jurisdiction by the arbitral tribunal (see Section 4.5.2.2.4 on the chronology of the proceedings in the supervisory seat, Malaysia).[583] In 2017, the US Court of Appeal affirmed its District Court decision granting an enforcement order for the award (see Section 4.5.2.2.5).

The applicant initiated an application to recognise and enforce the award in England on 3 August 2010. However, due to a development in the proceedings in the US and Malaysia, the proceedings in England were stayed until the defendant applied to challenge and set aside the application to enforce the award in England on 15 May 2012.[584] On 26 October 2012, the London High Court ordered the defendant to pay security in tranches pursuant to Section 103(5) of AA 1996 (textual harmonisation of Article VI of NYC 1958), and failing that, the applicants were allowed to enforce the award as a judgment in the English court.[585]

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[582] *Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao Pdr) Co Ltd v The Government Of The Lao People's Democratic Republic* [2012] EWHC 3381 (England) [2].
[583] *Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao Pdr) Co Ltd v The Government Of The Lao People's Democratic Republic* [2013] (n 248).
[584] *Thai-Lao Lignite (Thailand) Co Ltd & Hongsa-Lignite (Lao Pdr) Co. Ltd v The Government of the Lao People's Democratic Republic* [2012] (n 580) [10].
[585] ibid [34].

The London High Court ruled that even though the award was valid according to English law, where there is a pending proceeding challenging the award in the supervisory court, two main options are available to the court, granting (1) an order for immediate enforcement or (2) an order for substantial security.[586] The High Court found that it was not appropriate for it to grant an order for immediate enforcement considering the delay in the enforcement proceeding in England and a hearing due in Malaysia within six weeks of the judgment.

4.6.2.3.4 *Maximov v Open Joint Stock Company 'Novolipetsky Metallurgichesky Kombinat"* (2017)

In an application to enforce an annulled arbitral award in England, an English court requires the applicant to prove a heavy burden that annulment foreign decisions 'not only … were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by bias'.[587] In the case of *Maximov v Open Joint Stock Company 'Novolipetsky Metallurgichesky Kombinat'* [2017] EWHC 1911 (Comm.), an award was issued to the applicant by an arbitral tribunal at the ICAC in Russia. Upon an application by the defendant, the Moscow Arbitrazh Court set aside the award on three grounds (1) non-disclosure ground, (2) arbitrators not following the price formula as agreed in the SPA and (3) the dispute was a corporate matter and non-arbitrable under Russian law. The applicant applied to enforce the award in London, Paris and Amsterdam. In 2014, the Paris Court of Appeal affirmed the decision of the Paris Court of First Instance in granting the application to recognise and enforce the award (see Section 4.5.2.1.3). In 2017, the Dutch Supreme Court affirmed the Amsterdam Court of Appeal's decision in granting the applicant's application to enforce the annulled award (see Section 4.6.2.1.2).

In 2017, the London High Court dismissed the application to enforce the award. It held that the applicant 'bears a heavy burden to establish not only that a foreign court's decisions were wrong or manifestly wrong but that they are so perverse as for it to be concluded that they could not have been arrived at in good faith or otherwise than by

[586] ibid [30].
[587] *Maximov v Open Joint Stock Company Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm.) (England) [53].

bias'.[588] The High Court judge also ruled that notwithstanding his criticism on the ground of the Russian annulment decision, he was unconvinced that the grounds of annulment decision 'were so extreme and perverse' to impute bias against the applicant.[589]

4.7 Harmonisation in the Application of Article V(1)(e)

The chapter finds that there is no harmonisation in the application of Article V(1)(e) of NYC 1958 on the enforcement of foreign annulled awards. A critical analysis of cases on this controversial issue shows that Contracting Courts have adopted divergent and distinct interpretation and application of Article V(1)(e). The thesis adopted the criterion suggested by Cassio that NYC 1958 adopted three approaches, i.e. a territorial approach, a delocalised approach and an assessment approach (see Sections 4.4-4.6).[590]

First, the German courts adopted a territorial approach and determine the validity and status of an award in the State where the award was made. The German courts have been refusing to enforce foreign awards nullified by their supervisory seats as these awards are no longer valid in the supervisory seat. The German courts interpret the term 'may' in Article V(1)(e) as must and recognise an annulment decision of the supervisory seat. If the supervisory seat has decided that an award is no longer valid, the German courts will not enforce the annulled award.

Second, the French courts adopted a delocalised approach and relied exclusively on Article VII of NYC 1958, whereby the French courts applied French law to recognise foreign annulled awards. An award annulled by its seat is enforceable in France as Article 1520 of the French Code of Civil Procedure does not provide for the annulment of an award by the supervisory seat as one of the applicable grounds to set aside an award.[591] The French courts consider that foreign awards are independent from the jurisdiction of the supervisory state and make decisions based on 'international justice'.[592] Thus, the annulment of international awards only affects the domestic system of the supervisory

[588] ibid [53].
[589] ibid [62].
[590] González de Cossío (n 435) 17.
[591] Clay and Mazzantini (n 24) 142.
[592] *République arabe d'Egypte* (1997) (n 464); *Société PT Putrabali Adyamulia* (2007) (n 459)

State[593] and Article VII of NYC 1958 allows for the most favourable law, so the French courts apply French law to enforce annulled arbitral awards.

Third, the Dutch, US (with the exception of *Chromalloy*) and English courts adopted an assessment approach (see Section 4.6). The thesis finds that enforcement courts adopted an assessment approach by relying on the discretionary power given by a literal interpretation of the word 'may' in Article V(1)(e) of NYC 1958. The general rule is for the courts to refuse the enforcement of annulled awards. However, in limited circumstances, the courts may exercise discretion to enforce annulled awards. The limited circumstances include contravention of the principles of the due process of law or ground for annulment that is contrary to Dutch public policy, or against public policy to the extent that it is 'repugnant to fundamental notions of what is decent and just in the United States' (the US)[594] or contravenes English private international law (England).

NYC 1958 aims to further international trade and increase economic relationships between Contracting States. Theoretically, Contracting States must apply NYC 1958 harmoniously to ensure the predictability of ICA.[595] However, as discussed in Chapter 2, the application of international treaties depends on Contracting States' courts' application and interpretation of NYC 1958. As there is no universal consensus,[596] the thesis finds that there is no harmonisation in the application of Article V(1)(e) of NYC 1958. Despite adopting similar application of Articles 31–33 of VCLT 1969, the courts arrived at different conclusions, in accordance with the principle of justice in their domestic law.

The thesis favours the assessment approach adopted by the English courts, most of the US courts and the Dutch courts pertaining to the discretionary power to enforce annulled arbitral awards subject to strict conditions that the petitioner must prove before enforcing annulled awards.[597] Both supervisory and enforcement courts play important roles as both have control over the validity of arbitral awards within their jurisdictions.[598] Nevertheless, in practice, an annulled arbitral award may be enforced in situations where (1) an

[593] *Société Hilmarton Ltd* (1994) (n 459).
[594] *TermoRio S.A.E.S.P. & Lease Co. Group LLC v Electranta S.P. & Others* (2007) (n 508), 20.
[595] Paulsson and Suresh (n 380) 277.
[596] Hendel and Nogales (n 22) 194.
[597] ibid 202–203.
[598] ibid 203.

enforcement State that does not include an annulled award as one of the grounds for refusing enforcement and (2) the reason for the annulment of an award is against the public policy of the enforcement State.[599] Also, the enforcement of an annulled arbitral award may be refused if the annulment decision (1) is established based on one of the grounds of Article V of NYC 1958, (2) complies with minimum procedural standards and 3) is able to be recognised by the enforcement court.[600] This standard fulfils the aim of NYC 1958, and permits for a harmonised international situation.[601]

To ensure gradual harmonisation in the application of Article V(1)(e) on the enforcement of annulled awards, the thesis proposes that NYC 1958 Contracting States adopt the criteria suggested by Jan Paulson, the ISAs and the LSAs (see Section 4.8 below). The enforcement Court must ascertain whether the reasons for annulment at the supervisory seat fall within the ISAs, i.e. at least one of the grounds under Article V(1)(a) to (d) of NYC 1958. It is also worth noting that Article IX of the European Convention 1961 specifically provides that an enforcement court may only refuse to enforce an arbitral award annulled by its supervisory seat if the annulment was based on grounds specified under Article V(1)(a)-(d) of NYC 1958. Article IX is consistent with the concept of LSAs and ISAs suggested by Jan Paulsson (see 4.8).

4.8 International Standard Annulments (ISAs) and Local Standard Annulments (LSAs)

Jan Paulsson developed the concept of local standard annulment (hereinafter, LSA) and international standard annulment (hereinafter, ISA).[602] According to this theory, judges in enforcement courts must distinguish the legal reasoning for an annulment decision made by the supervisory seat and only allow the enforcement of an annulled award if the reason are not acceptable to international standards, i.e. the ISA. Local Standard Annulment (hereinafter, LSA) refers to grounds subject to 'local particularities' such as if an award was annulled where it did not fulfil the requirement to be signed by all arbitrators.[603]

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[599] ibid.
[600] Wolff (n 69) 384.
[601] ibid.
[602] Zarate and Camilo Valenzuela (n 367) 212.
[603] Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (n 423) 2.

Article V(1)(e) allows an enforcement Court to refuse the enforcement of a foreign award if it has been set aside by its supervisory seat, without specifying the grounds for the annulment of the foreign award. Paulsson argues that 'Article V(1)(e) of NYC 1958 (1)(e) is not a bar to disregarding LSAs, and that they should be disregarded'.[604] Opponents have criticised that the theory disregards the consent of Contracting States when acceding to or ratifying NYC 1958.[605] The *travaux préparatoires* portray no direct agreement made or agreed by the delegates pertaining to the grounds for the annulment of an award or criteria for accepted international standards.[606] Therefore, allowing the recognition of annulled awards for these reasons demonstrates a breach of the territorial sovereignty of Contracting States.[607] On the other hand, Paulsson argues that Article V(1) 'allows but does not require' refusal to enforce foreign awards where the party against the enforcement proves at least one limited ground under Article V(1) of NYC 1958.[608] As a proponent of a delocalised approach, he relies on the literal permissive term 'may' in Article V(1) to provide judicial discretion for the enforcement court to decide.[609]

Paulsson has suggested that the enforcement Courts assess whether annulment decisions fall within ISA. ISA refers to annulments provided by Article V(1)(a)-(d) of NYC 1958.[610] An annulment decision based on grounds not falling under Article V(1)(a)-(d) of NYC 1958 may be disregarded by the enforcement Court as the annulment only gives effect within the domestic sphere of the supervisory seat. Paulsson contends that the NYC 1958 aims to make the process of recognition and enforcement of awards 'easier', rather than to establish a comprehensive single regime.[611] Therefore, it was not wrong for States to rely on Article VII and adopt delocalised or assessment approach to allow for enforcement of annulled arbitral awards.

4.9 Position in Malaysia

To date, there are no reported cases on the application of Article V(1)(e) to the enforcement of annulled foreign awards in Malaysia. Regardless, the thesis makes an

[604] ibid.
[605] Zarate and Camilo Valenzuela (n 367) 213.
[606] ibid.
[607] ibid.
[608] Paulsson, 'Enforcing Arbitral Awards Notwithstanding Local Standard Annulments' (n 423) 6–7.
[609] ibid.
[610] ibid 24–25.
[611] ibid 7.

inference in the case of *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] involving an application to enforce a domestic award pursuant to Section 38 of AA 2005. The appellant raised a defence under Section 39(1)(a)(vii) claiming that the award had yet to become binding on the parties (see Section 3.6.5 on the facts of the case). The case hinges on the interpretation of the term 'not yet binding' of Section 39(1)(a)(vii), where the appellant argued that the Court of Appeal should refuse to enforce the award as there was a pending second arbitration proceeding.[612] The appellant succeeded in proving there were consensual terms to refer the interplay between the award and equipment to a second arbitration made before the judge in the previous Kuala Lumpur Civil Suit.[613]

The Malaysian Court of Appeal in this case accepted and adopted a consistent approach to the interpretation of Article V(1)(e) (equivalent to Malaysian Section 39(1)(a)(vii)), whereby the court has discretionary power to entertain a stay or adjournment of an application to recognise and enforce a foreign award, if the resisting party can prove that the award is not yet binding on the parties.[614] As there was no previous case on the application of the term 'not yet binding', the Court of Appeal took guidance from other jurisdictions which are also Contracting States of NYC 1958 and UML. In a case where there is no previous ruling on a matter, a Malaysian court may refer to foreign jurisdictions where such decisions are persuasive and not binding. The Court took guidance from a similar approach adopted by the English and Canadian courts, whereby the courts will exercise discretion to either order an adjournment for recognition, or a stay of a recognition order where the party invoking the ground successfully proves valid and cogent reasons.[615]

Applying the approach adopted by the Malaysian Court of Appeal in the case of *Malaysian Bio-Xcell Sdn Bhd*, if there is an application to refuse the enforcement of a foreign award pursuant to Section 39(1)(a)(vii) whereby the award has been set aside by a competent authority in the country where the award was made, the thesis contends that a Malaysian court will adopt an assessment approach whereby it will assess the grounds

[612] *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] (n 244) [25].
[613] ibid [57].
[614] ibid [46-47].
[615] ibid [32]

for the annulment decision and decide whether the annulment decision is enforceable in Malaysia. The assessment approach corresponds to the ruling made in the case of *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] 8 MLJ 585. The court in *Food Ingredients LLC* held that the Malaysian court under Section 39(1)(a) 'has discretion when it comes to refusing and, by the same token, allowing recognition or enforcement of awards'.[616] The Court cited the adoption of the 'may' in Section 39(1)(a), contrary to the term 'shall' in Section 38 of AA 2005. While the term 'shall' connotes a mandatory formalistic nature of Section 38, the term 'may' used in Section 39(1)(a) means that the enforcement court has the power to examine issues raised under at least one of the grounds under Section 39(1)(a) of AA 2005.

The assessment approach adopted by other Contracting States in Section 4.6 portrays that the Courts can make an exception to the general rule on the application of Article V(1)(e) and ignore an annulment decision of a supervisory court. A court will make an exception in exceptional cases where the ground for an annulment decision was either against the due process of procedural law or contravenes the public policy of the enforcing State. The thesis expects that the Malaysian courts would make an exception and ignore an annulment decision if enforcement of the award would contravene the public policy of Malaysia or be against the due process of procedural law in Malaysia. The enforcement of an award contravenes the public policy of Malaysia if the enforcement 'would be wholly offensive to the ordinary, reasonable and fully informed members of the public on whose behalf the powers of state are exercised' (see Section 3.8.8).[617]

The thesis proposes that the Malaysian courts should only raise an exception to the general rule of refusing to enforce an annulled award in cases where the grounds for the annulment of awards are not stipulated in Article V(1)(a)-(d) of NYC 1958. This position is also consistent with the LSA and ISA criteria and Article IX of the European Convention 1969. As Malaysian AA 2005 adopted UML as its basis, Section 37 of AA 2005 stipulates that where a Malaysian court has acted as a supervisory court, i.e. in a case where an award was made in Malaysia, the Malaysian court may only set aside the

[616] *Food Ingredients LLC v Pacific Inter-Link Sdn Bhd and another application* [2012] (n 287) [59]. This case involves a refusal to enforce a foreign award pursuant to Section 39(1)(a)(ii) of AA 2005 on the ground of an invalid arbitration agreement (see Section 3.8.2 of the thesis).
[617] *Open Type Joint Stock Company Efirnoye (EFKO*) (n 1) [50].

award on the grounds stipulated under Section 37. The grounds under Section 37 are similar to Article V(1)(a)-(d) of NYC 1958 (with the exception of Article V(1)(d) – see Section 3.8.5 of the thesis). Therefore, the thesis recommends that Malaysian courts adopt this position.

4.10 Conclusion

The thesis finds that there is no harmonisation in the application of Article V(1)(e) to the enforcement of awards set aside by the competent authority in a State where an award was made. The goal of harmonisation for this research is to bring the rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining the diversity of law of Contracting States. However, NYC 1958 Contracting States adopted three approaches in dealing with applications to enforce awards annulled by their supervisory seats. The German courts adopted a territorialist approach and have been refusing to enforce annulled awards. On the other hand, the French courts adopted a delocalised approach and have consistently enforced annulled arbitral awards by invoking Article VII and applying their own domestic law. Somewhere in the middle is the assessment approach, where the Dutch courts, US courts (with the exception of *Chromalloy*) and English courts assess the reasons for an annulment decision and use their discretion to decide on whether to enforce or refuse an annulled award.

These courts interpreted Article V(1)(e) in accordance with Articles 31–33 of VCLT 1969. However, even a similar manner of interpretation produces different results. The lack of uniform interpretation of Article V(1)(e) stems from the choice of the word 'may' in Article V(1)(e) of NYC 1958. Except for the German courts, NYC 1958 interpreted Article V(1)(e) of NYC 1958 as a non-mandatory provision and allows discretion for Contracting States' courts as to whether to enforce annulled arbitral awards.[618] Secondly, the lack of uniform interpretation of Article V(1)(e) of NYC 1958 derives from the invocation of Article VII on the more favourable rights provision, which permits the enforcement State to apply its own law and treaties if these are more favourable to the applicant.

The thesis favours the assessment approach. However, to ensure gradual harmonisation in the application of Article V(1)(e) to the enforcement of annulled awards, the thesis suggests that enforcement courts examine the grounds for annulment decisions by supervisory courts using Jan Paulson's standards, i.e. LSA and ISA. ISA refers to the grounds available under Article V(1)(a)–(d) of NYC 1958. This position is also consistent

[618] Petr Dobiáš, 'The Recognition and Enforcement of Arbitral Awards Set Aside in the Country of Origin' (2019) IX Czech (& Central European) Yearbook of Arbitration 18–19 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3408735>.

with Article IX of the European Convention 1961. The thesis submits that even though the proposal might not ensure a harmonised result in the application of Article V(1)(e), some control can be instilled, which intends to ensure that the reasons for the annulment of foreign awards conform to international practice, especially, they do not contravene basic procedural due process and international public policy.

Should there be a similar case involving an application to enforce an annulled arbitral award in Malaysia, the thesis argues that Malaysia will adopt an assessment approach. A critical analysis of how the Malaysian Court of Appeal in *Malaysian Bio-Xcell Sdn Bhd* (2020) dealt with its first case for the application of an award not yet binding pursuant to Section 39(1)(a)(vii) of AA 2005 (textual harmonisation of Article V(1)(e) reveals that the Court of Appeal adopted a very consistent approach, i.e. it ruled that a Malaysian court has the discretionary power to entertain a stay or an adjournment if the resisting party can prove that the award is not yet binding on the parties. This view is also consistent with the ruling held in the case of *Food Ingredients LLC* (2012) whereby the High Court specifically ruled that contrary to the mandatory application of Section 38, the word 'may' in Section 39(1)(a) allows the court discretion on whether to enforce or refuse a foreign award. The thesis also suggests that the Malaysian courts adopt Jan Paulsson's ISA and LSA criteria in assessing the grounds for annulment decisions, to ensure that the application of Article V(1)(e) in Malaysia conforms to international best practice.

Chapter 5 Allocation of the Onus of Proof in Relation to Whether an Award-debtor is a Party to an Arbitration Agreement

5.1 Introduction

Chapter 5 answers the second controversial enforcement issue which is to examine if there is harmonisation in the application of Article V(1) to the issue of the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement. The other controversial issue on the recognition and enforcement of foreign awards concerns the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement. Arbitral tribunals in several cases render awards to non-signatories to arbitration agreements.[619] Non-signatories to arbitration agreements in this chapter refers to award-debtors that were not named in an arbitration agreement. In some jurisdictions, non-signatories to an arbitration agreement may be bound by the enforcement of an award made pursuant to an arbitration agreement.[620] The allocation of the onus of proof refers to who bears the burden of proving to a court whether an award-debtor is a party to an arbitration agreement.

First, the chapter will analyse the relevant provisions under NYC 1958. The chapter will also examine the *travaux préparatoires* to analyse the intention of the drafters of NYC 1958 when drafting Article V(1)(a). Next, the chapter investigates court decisions from England, the US and Australia to see how other Contracting States' courts have decided on this issue. The chapter finds that the courts have adopted two distinct approaches: (1) placing the onus of proof onto the award-debtor to prove that it was not a party to an arbitration agreement pursuant to Article V(1)(a) of NYC 1958 and (2) placing the onus of proof onto the award-creditor to prove that the award-debtor was a party to an arbitration agreement under Article IV. The chapter then investigates if there is harmonisation in the application of Article V(1)(a) to this issue. Finally, the chapter reveals the Malaysian courts' position on this matter. The chapter concludes that despite there being no harmonisation on the issue of the allocation of the onus of proof in whether

[619] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (England).
[620] Harder (n 68) 131–132.

an award-debtor is a party to an arbitration agreement, the Malaysian Federal Court adopted an approach which is consistent with the interpretation of NYC 1958 in accordance with Articles 31–33 of VCLT 1969 and conforms to international best practice.

5.2 Position under the New York Convention 1958

Under NYC 1958, the allocation of the burden of proving whether an award is enforceable on non-signatories lies on the award-debtor or the party resisting the enforcement of an award. Non-signatories to an arbitration agreement may raise a defence under Article V(1)(a) to challenge the enforcement of an award in the enforcing State on the ground of the absence of an arbitration agreement. Article IV of NYC 1958 stipulates mandatory conditions for the *prima facie* enforcement of awards (see Section 3.6 of the thesis). In the event that an award-creditor or the party applying to enforce an award satisfies the minimum conditions in Article IV, enforcement courts in NYC 1958 Contracting States are obliged to enforce the award. The necessary conditions are the original or a certified copy of the award and the original or a duly certified copy of an arbitration agreement.[621] On the other hand, Article V(1) stipulates narrow grounds on which an award-debtor may rely to challenge the enforcement of an award in the enforcing State.

The application of Articles 31–33 of VCLT to Article V(1) concerning the allocation of the onus of proof discloses that Article V(1) places the onus of proof on the award-debtor to raise if there is no valid arbitration agreement between the parties, and thus he is not bound by the enforcement of an award. This is consistent with the object and purpose of NYC 1958, which is to facilitate the recognition and enforcement of foreign awards, thus 'increasing the effectiveness of arbitration in the settlement of private law disputes'.[622]

5.3 *Travaux Préparatoires* of the New York Convention 1958

The *travaux préparatoires* of NYC 1958 reveal that the drafters of NYC 1958 drafted Article V(1) with the deliberate intention of shifting the burden to prove the specified grounds including the absence of an arbitration agreement onto the party opposing the enforcement of an award, i.e. the award-debtor.[623] Previously, a similar ground was

[621] NYC 1958, art. IV.
[622] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15).
[623] 'Consideration of the Draft Convention: Report of Working Party 3' (n 55).

available under Article 2 of GC 1927, whereby the onus of proof was assigned to the applicant who sought to enforce an award to prove it. The ground of the invalidity of an arbitration agreement was first raised by the ICC in its ICC Draft 1953, thus putting the onus of proof on the applicant, which was then retained by Article III of the ECOSOC Draft, which served as the draft for the NYC 1958 Conference. It was not until Working Party Three presented their proposals for Articles III, IV and V that the ground of the invalidity of an arbitration agreement became one of the grounds available to refuse the enforcement of an award where the burden to prove this ground shifted to the party opposing enforcement.[624]

5.4 Court Decisions

Contracting States' courts have adopted two distinct approaches to the allocation of the onus of proving an award-debtor is not a party to an arbitration agreement pursuant to Article V(1)(a). First, the English, US and Australian courts held that the onus of proof falls onto the award-debtor to prove that it was not a party to a valid arbitration agreement pursuant to Section 103(2)(b), equivalent to the provisions in Article V(1)(a) of NYC 1958. Second, an Australian court held the opposite view, that the award-creditor bears the onus of proving the *prima facie* requirements under Article IV(1) of NYC 1958 that the award-debtor was a party to an arbitration agreement and an award made pursuant to such an agreement.

5.4.1 England

5.4.1.1 Yukos Oil Co v Dardana Ltd (2012)

First, an English Court of Appeal held that the onus shifted to the award-debtor to prove that it was not a party to the arbitration agreement. In this case, a Swedish arbitration tribunal rendered an award in favour of the respondent on 21 March 2000. The award concluded that the appellant was a party to a written contract dated 17 January 1995 made between the respondent and WAII & A.O. Yuganskenftegas (hereinafter, YNG) stipulating an arbitral clause.[625] The appellant first held under 50% of the share of YNG at the start of the arbitration proceeding, but at the time of an English proceeding, it held 90% of YNG shares.[626] The Swedish arbitral tribunal rendered an award of a total sum of

[624] 'Consideration of the Draft Convention: Report of Working Party 3' (n 55).
[625] *Yukos Oil Co v Dardana Ltd* [2012] EWCA Civ 543 (England)[1].
[626] ibid.

USD 6 m. against the appellant. The appellant applied to set aside the award at the Stockholm District Court and the decision was still pending at the conclusion of the appeal in the English court.[627]

In England, the London High Court granted the respondent permission to enforce the award on 27 June 2000. The appellant then applied to set aside the order under Section 100 and/or Section 102 of AA 1996 or, alternatively, for a stay under Section 103(5) pending determination by the supervisory court in Sweden.[628] On 21 March 2001, the High Court adjourned the applications pending the decision at the Stockholm Court and ordered the appellant to pay a security of USD 2.5 m.[629] The appellant appealed at the London Court of Appeal to set aside the High Court's order and enforce the award. The Court of Appeal found that Section 103(2)(b) of AA 1996 (equivalent to Article V(1)(a)) enabled the appellant to challenge the award on the ground that it was never a party to the arbitration agreement.[630] The Court rejected the appellant's contention that Section 103(2) offers 'discretionary' relief and interpreted that the word 'may' in the provision refers to the possibility of the loss of the right of the appellant to rely on the provision, for instance if there is another agreement or estoppel. [631]

The English Court of Appeal held that the onus shifted to the appellant to prove the defence under Section 103(2)(b) of AA 1996. It was satisfied that the respondent had provided a witness statement, produced a contract and the award and concluded that the appellant 'through its conduct entered as a party into the contract'.[632] Similar to the position of other Contracting States,[633] the enforcement and recognition of an award under NYC 1958 in England involves a two-stage process. First, an award-creditor of a NYC 1958 award in England has a *prima facie* right to recognition and enforcement of the award by producing an original or duly certified copy of an arbitration agreement and award.[634] The Court further explained that '…at the first stage, all that is required by way of an arbitration agreement is apparently valid documentation, containing an arbitration

[627] ibid.
[628] ibid [3].
[629] ibid [3].
[630] ibid [8].
[631] ibid [8].
[632] ibid [14].
[633] Malaysia, the Netherlands, Australia.
[634] ibid [10].

clause, by reference to which the arbitrators have accepted that the parties had agreed on arbitration or in which the arbitrators have accepted that an agreement to arbitrate was recorded with the parties' authority'.[635] Second, the award-debtor may then challenge the enforcement of award, in this case the existence or validity of an arbitration agreement pursuant to Section 103(2)(b).[636]

5.4.1.2 Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan (2010)

An English Supreme Court put the onus of proving that it was not a party to an arbitration agreement under Section 103(2)(b) of the English Arbitration Act 1996 (hereinafter, AA 1996) on the award-debtor. In *Dallah Real Estate and Tourism Co.*, the appellant, Dallah, appealed against a decision of the Court of Appeal refusing to allow the appellant to enforce an arbitral award made by the ICC in Paris against the respondent in England (see Section 5.6.1.2).[637] The respondent, Ministry of Religious Affairs, Government of Pakistan (hereinafter, the MRAP), throughout the proceedings maintained that it was not a party to an arbitration agreement and did not waive its sovereign immunity. Dallah argued in the English court that the MRAP was at all times an 'unnamed party' to the agreement signed between Dallah and the Trust. In the arbitration proceeding, Dallah argued that the Trust was the 'alter ego' of the MRAP and the MRAP was the successor of the Trust. The parties argued that the MRAP had the onus of proving it was not a party to the agreement. In this case, the award was made in France and the Court applied French law in its determination.

There are conflicting arguments by scholars on the onus of proof applied by the English courts in this case. On the one hand, Born argues that the Supreme Court placed the onus of proof on Dallah to submit evidence to justify the arbitral tribunal's first partial awards in its own jurisdiction. Born's criticism is that 'the UK Supreme Court's decision in Dallah is very difficult to reconcile with them – with the Court instead imposing on the

[635] ibid [12].
[636] ibid [10].
[637] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] (n 619).

award-creditor (Dallah) the burden of producing "material sufficient to justify the tribunal's conclusion'.[638] Born relied on the position where the Supreme Court held that:

> The scheme of the New York Convention, reflected in sections 101–103 of the 1996 Act may give limited prima facie credit to apparently valid arbitration awards based on apparently valid and applicable arbitration agreements, by throwing on the person resisting enforcement the onus of proving one of the matters set out in article V(1) and section 103. But that is as far as it goes in law.[639]

Born contends that the Court misapplied NYC 1958, where the burden of proof was allocated to the MRAP to prove that it was not a party to the arbitration agreement, hence there was no valid arbitration agreement bound upon it.[640]

On the other hand, Kleinheisterkamp argues otherwise and asserts that Born makes reference to the judgment 'out of its context'.[641] He submits that the English Court did not place the onus of proof on Dallah, but instead explained the position of the English Court where it had to 'appreciate the presented evidence and weigh the contradicting arguments to conclude whether the award debtor succeeded in overcoming the presumption of validity by eliminating doubts as to whether the agreement is invalid'.[642]

The thesis finds that the English Supreme Court put the onus of proving its defence under Section 103(2)(b) on the respondent, the MRAP. The Supreme Court several times reiterated that the 'the essential question is whether the MRAP has proved that there was no common intention (applying French law principles) that it should be bound by the arbitration agreement'.[643] On the application of Section 103(2)(b), the English Supreme Court was satisfied that the MRAP had satisfied the burden of proof that it was not a party and never considered itself to be 'a true party' to the agreement by producing all relevant

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[638] Gary B Born, 'Dallah and the New York Convention' (*Kluwer Arbitration Blog*, 2011) <http://arbitrationblog.kluwerarbitration.com/2011/04/07/dallah-and-the-new-york-c onvention/> accessed 1 February 2021.
[639] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] (n 619) [30].
[640] Born (n 638).
[641] Jan Kleinheisterkamp, 'Lord Mustill and the Courts of Tennis — Dallah v Pakistan in England, France and Utopia' (2012) 75 The Modern Law Review 639, 645 <http://www.jstor.org.ezproxy.sussex.ac.uk/stable/41857457>.
[642] ibid 646.
[643] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] (n 619) [132] and[148].

materials up to the termination letter that the 'common intention was that the parties were to be Dallah and the trust'.[644]

The Court, on weighing the evidence further, ruled that Dallah failed to satisfy the conditions under Article IV(1) of NYC 1958 and Section 103(2)(b) of AA 1996 on the production of an agreement stipulating agreement of the parties to submit the question of arbitrability to an arbitral tribunal, and resisted the refusal application under Article 103(2)(b).[645] The Court noted that NYC 2958 does not require double *exequatur* and the onus of proof is on the award-debtor to prove exhaustively at least one of the exhaustive grounds of Article V. Nevertheless, the Supreme Court held that 'Article V safeguards fundamental rights including the right of a party which has not agreed to arbitration to object to the jurisdiction of the tribunal'.[646]

The Court further explained that:

> It was common ground that the question whether or not the Ministry of Religious Affairs was a party to the arbitration agreement relied upon by Dallah Real Estate and Tourism Holding Company, under which the ICC award was made, was to be determined under Section 103(2)(b) of the Arbitration Act 1996, and that the law to be applied was French law, being the law of the place where the award was made.

The Court ruled that even though Section 103(2)(b) deals with a case where an arbitration agreement is not valid, the provision also covers cases where an award-debtor claims that the arbitration agreement is not valid as he was never a party to the agreement.[647]

5.4.2 United States

5.4.2.1 China Minmetals Materials Import and Export Co. Ltd v Chi Mei Corporation (2003)

A US Court of Appeal in this case allocated the onus of proof to the award debtor, Chi Mei, to produce evidence to the US District Court that it was not a party to an arbitration agreement in which the arbitral tribunal rested its jurisdiction. This case involves an appeal by Chi Mei Corporation (hereinafter, 'Chi Mei'), a New Jersey corporation, against the District Court's order for the recognition and enforcement of a foreign award

[644] ibid [147] and [162].
[645] ibid [22]
[646] ibid [102].
[647] ibid [77].

in favour of China Minmetals Materials Import and Export Co Ltd (hereinafter, China Minmetals), a company incorporated under the law of the People's Republic of China. A dispute arose involving Chi Mei, China Minmetals and Production Goods and Materials Trading Corp. of Shantou S.E.Z. (hereinafter, Shantou).[648] China Minmetals argued that there was an agreement between the Minmetals and Chi Mei on the sale of alloy, whereby Chi Mei failed to deliver goods even though it had made payment of several million dollars.[649] Chi Mei argued that it never intended nor performed any contract and only had an oral agreement with Shantou to provide discounting services of 7% of the amount in US dollars.[650] It also alleged that the two contracts submitted to the Bank were forged containing signature of employees that were not exist. Chi Mei argued that it only performed his oral contractual duty governing currency transaction with Shantou.[651]

In November 1997, China Minmetals initiated arbitration proceedings before the CIETAC arbitral tribunal as stipulated in the agreement.[652] Despite Chi Mei's objection to CIETAC's jurisdiction, it submitted evidence on the forgery of contracts stipulating an arbitration agreement.[653] The arbitral tribunal rendered an award in favour of China Minmetals, holding that Chi Mei failed to satisfy its burden of proving that the agreement was forged, considering that its action of 'providing documents to the New York Bank and drawing in the letters of credit constituted confirmation of the validity of the contract'.[654] The US District Court granted an enforcement order for the award in July 2001.

The US Court of Appeal in this case allocated the onus of proof to the party resisting the enforcement, Chi Mei, to produce evidence to the District Court that the arbitration agreement in which the arbitral tribunal rested its jurisdiction was void *ab initio*.[655] The Court of Appeal held that the District Court should refuse enforcement of the award in the absence of a valid arbitration agreement between the parties, 'at least in the absence

[648] *China Minmetals Materials Import and Export Co. Ltd v Chi Mei Corporation* (2003) 02-2897, 02-3542 (United States), 2.
[649] ibid, 3.
[650] Ibid, 3-4.
[651] ibid, 4.
[652] ibid, 4.
[653] ibid, 4.
[654] ibid, 5.
[655] ibid, 23.

of a waiver of the objection to arbitration by the party opposing enforcement'.[656] The Court of Appeal also held that it could not grant refusal to enforce the award as China Minmetals had produced evidence to comply with the requirements under Article IV to the District Court. Consequently, the US Court of Appeal vacated the enforcement order and remitted the case for further proceedings on the issue of the validity of the arbitration agreement.[657]

5.4.3 Australia

The courts in Australia took different approaches in the position of the onus of proving whether an award-debtor is a party to the arbitration agreement. In 2011, an Australian Supreme Court-Court of Appeal in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) held that the award-creditor bear the burden of proving that the award-debtor is a party to the arbitration agreement. However, a year later in 2012, an Australian Federal Court contradictorily held that the award-debtor bear the onus of proving that it was not a party to the arbitration agreement.

5.4.3.1 IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011)

Contrary to the position in the UK and US, An Australian court held that the award-creditor bear the onus of proving that the award-debtor was a party to an arbitration agreement. The respondent, Altain Khuder LLC, is a company incorporated in Mongolia.[658] The appellant, IMC Aviation Solutions Pty Ltd (previously known as IMC Mining Solutions Pty Ltd), is company incorporated in Australia. The appellant shared its office with IMC Mining Inc., a company incorporated in the British Virgin Islands.[659] The respondent entered into operations management agreements (hereinafter, OMA) with IMC Mining Inc.[660] The respondent argued that IMC Mining Inc. in OMA refers to IMC Solutions.[661] A dispute arose and the respondent initiated arbitration against 'Australian IMC Mining Inc.'. The respondent filed two claims for USD 6.2 m. and 320,577 against 'Australian IMC Mining Inc.' and 'Australian IMC Mining Inc.' filed a counterclaim of USD 1 m. without making any reference to IMC Solutions.[662]

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[656] ibid, 18.
[657] ibid, 24.
[658] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] VSCA 248, [1].
[659] ibid [5].
[660] ibid [6].
[661] ibid [6].
[662] ibid [9].

The tribunal on 15 September 2009 rendered an award, in favour of the respondent, which ordered 'IMC Mining Solutions Pty Ltd of Australia, on behalf of IMC Mining Inc. Company of Australia, to pay the sum charged against IMC Mining Inc. Company of Australia pursuant to this Arbitral Award'.[663] The Khan-Uul District Court recognised the award on 23 November 2009.[664] In July 2010, the Trial Division granted an enforcement order for the award against both IMC Mining Inc. and the appellant (IMC Solutions).[665] The appellant then applied to set aside the order against itself. The Court stayed that application until the determination of the appeal against the enforcement order in the Court of Appeal.[666]

On the issue of the allocation of the onus of proof, the Court of Appeal held that:

> …at stage one, the award-creditor must satisfy the court, on a prima facie basis, of the following matters before the court may make an order enforcing the award: (a) an award has been made by a foreign arbitral tribunal granting relief to the award-creditor against the award-debtor; (b) the award was made pursuant to an arbitration agreement; and (c) the award-creditor and the award-debtor are parties to the arbitration agreement.[667]

The Supreme Court-Court of Appeal ruled that a *prima facie* entitlement to an enforcement order for an award under Section 9(5) of the Australian International Arbitration Act 1974 (hereinafter, IAA 1974) is established where the award-creditor satisfies the conditions under Section 9(1) upon production of an arbitration agreement that expressly stipulates the names of both award-debtor and award-creditor and an award made pursuant to the arbitration agreement.[668] It further explained that where 'on the face of an arbitration agreement' it stipulates that the award-debtor was not a party to the agreement, the production of only an arbitration agreement and an award are not sufficient to enforce a foreign award under Section 8(1)-(2) of IAA 1974.[669] Therefore, in this situation, the Court should order an *inter parte* proceeding and asked the award-creditor to prove the *prima facie* requirements under Section 9(1).[670] At the *inter parte* proceeding, the onus of proving defences under Section 8(5) and 8(7) only falls on the award-debtor

[663] ibid [13].
[664] ibid [14]
[665] ibid [16].
[666] ibid [16-20].
[667] ibid [135].
[668] ibid [137]
[669] ibid [138].
[670] ibid [140-144].

once the award-creditor satisfies the 'evidential onus of prima facie evidence'.[671] Therefore, once an Australian court was satisfied that the award-creditor had proved that the award-debtor was a party to an arbitration agreement according to where the award was made, then the onus of proof shifted to the award-debtor to prove to the court that it was not a party to the arbitration agreement.[672]

5.4.3.2 Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd [2012] FCA 696

In 2012, the Australian Federal Court held that the award-debtor bear the burden of proving that it was not party to the arbitration government as it was consistent with the provision of Section 9(1)(b) read together with Section 9(5) of IAA 1974. The applicant, Dampskibsselskabet Norden A/S (hereinafter, DKN), a ship owner, entered into a charter party with Beach Building & Civil Group (hereinafter, Beach Civil).[673] A dispute arose, and the applicant initiated an arbitration in London pursuant to the arbitration clause stipulated in the charter party. The arbitrator rendered two awards in favour of the applicant. The applicant sought to enforce the awards in Australia under Section 8 of IAA 1974. The charter party incorrectly stipulated that the parties to the agreement were DKN and 'Beach Building & Construction Group'.[674] Nevertheless, both awards named the respondent as the award-debtor of the awards. The respondent applied to refuse enforcement of the awards arguing that first, it was not bound by the two awards as it was not named in the charter party stipulating an arbitration agreement, and thus the arbitrator had no jurisdiction to hear the dispute. The respondent's second argument on the invalid arbitration clause, as it was against the Australian Carriage of Goods by Sea Act 1991, albeit not relevant to the issue, succeeded.

On the allocation of the onus of proof to prove that the respondent was not a party to this agreement, the Australian Federal Court held that the respondent's mere assertion that it was not the charterer on the face of the charter party agreement was not enough to overcome the *prima facie* proof satisfied by the applicant pursuant to Section 9(5) of IAA 1974.[675]

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[671] ibid [146].
[672] ibid [173].
[673] *Dampskibsselskabet Norden A/S v Beach Building & Civil Group Pty Ltd* [2012] FCA 696
[674] ibid [6].
[675] ibid [76].

The Federal Court further explained:

> …if Beach Civil is to succeed in resisting enforcement of those awards, it must make out one of the grounds specified in s 8(5) and (7) of the Act. In order to achieve that 30 result, it is incumbent upon Beach Civil to identify for the benefit of DKN and the court one or more of those grounds as grounds upon which it intends to rely and then "prove to the satisfaction of the court" one or more of the matters specified in s 8(5) and (7).[676]

The Australian Federal Court, albeit rejecting the challenge by the award-debtor, stipulated that it preferred the approach in *Dardana* whereby the allocation of the onus of proof is on the award-debtor to prove that it was not a party to the arbitration agreement under Section 8 of IAA 1974. As for the award-creditor, the Federal Court was satisfied that it had produced the charter party agreement and the awards to satisfy the need for *prima facie* proof for the enforcement of the awards under Section 9(1) and (5) of IAA 1974. The Federal Court took note of the approach of the Court of Appeal in the case of *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] to require more than the onus of proof stipulated under Section 9(5) for the award-creditor to satisfy the need for evidence to enforce a foreign award. However, it preferred the approach of Lord Mance in the English case *Dardana Ltd v Yukos Oil Co* [2002] 2 Lloyd's Rep 326 as it is consistent with the provision of Section 9(1)(b) read together with Section 9(5) of IAA 1974 (see Section 5.4.1.1).

5.5 Harmonisation in the Application of Article V(1)(a)

The thesis reveals that there is no harmonisation in the allocation of the onus of proof in relation to proving whether an award-debtor is a party to an arbitration agreement. The chapter finds that courts have adopted two distinct approaches to the issue of the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement. England and the US adopted the first approach, by placing the onus on the award-debtor to prove that it was not a party to the agreement pursuant to Section 103(2)(b) of English AA 1996. The English Court of Appeal held that the onus shifted to the appellant to prove the defence under Section 103(2)(b) of AA 1996 and was satisfied that the respondent had provided a witness statement, a contract and an award and

[676] ibid [77].

concluded that the appellant 'through its conduct entered as a party into the contract'.[677] The Federal Court in *Dallah* similarly placed the onus of proof on the award-debtor to prove that it was not a party to the arbitration agreement.[678] Similarly, the US Court of Appeal vacated the enforcement order and remanded the case back to the US District Court for further proceedings on the issue of the validity of the arbitration agreement where it allocated the onus of proof to the party resisting enforcement, Chi Mei, to produce evidence to the District Court that the arbitration agreement on which the arbitral tribunal rested its jurisdiction was void *ab initio*.[679]

Instead, the Australian Court of Appeal adopted a conflicting approach by placing the onus of proof on the award-creditor to satisfy the court that the award-debtor was a party to the arbitration agreement. It held that a *prima facie* entitlement for an enforcement order of an award under Section 9(5) of the Australian International Arbitration Act 1974 (hereinafter, IAA 1974) established that the award-creditor satisfied the condition under Section 9(1) upon production of an arbitration agreement expressly stipulating the names of both award-debtor and award-creditor and an award made pursuant to the arbitration agreement.[680] Only when the court was satisfied that the award-creditor had complied with the mandatory *prima facie* requirements including both parties being parties to the arbitration agreement did the onus of proof shift to the award-debtor to prove to the court that it was not a party to the arbitration agreement.[681] However, the Australian Federal Court did not apply this principle in the case of *IMC Aviation* onto the case of *Dampskibsselskabet Norden.* It contradictorily held that the allocation of the onus of proof was on the award-debtor, to prove that it was not a party to the arbitration agreement. While noting the approach of the learned judges in *IMC Aviation,* the Australian Federal Court applied the principle in the English case of *Dardana* that the onus shifted to the appellant to prove its defence under Section 103(2)(b) of AA 1996.

The English, US and Australian courts' (with exception of *IMC Aviation)* positions were consistent in their interpretation of NYC 1958 in accordance with Articles 31–33 of NYC 1958. Considering the aim of NYC 1958, which is to facilitate the enforcement and

[677] Yukos Oil Co v Dardana Ltd [2012] (n 625) [14].
[678] *Dallah Real Estate and Tourism Co* (n 619)[147]; ibid [162].
[679] *China Minmetals Materials Import and Export Co Ltd v Chi Mei Corporation* (2003) (n 648)23-24.
[680] ibid [137].
[681] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011](n 658) [173].

recognition of foreign awards, the position taken by most of the courts supports the 'pro-enforcement bias' enshrined in NYC 1958, and as demonstrated in the *travaux préparatoires* of NYC 1958.

5.6 Position in Malaysia

The Malaysian Federal Court had an opportunity to decide on a precise case concerning the allocation of the onus of proof in relation to whether an award-debtor was a party to an arbitration agreement.[682] Similar to England and the US, the Malaysian court placed the onus of proof upon the award-debtor to prove that it was not a party to a valid arbitration agreement pursuant to Section 39(1)(a)(ii) of AA 2005. This approach adopted by the Malaysian court is consistent with the interpretation of Article V(1)(a) of NYC 1958 in accordance with Articles 31–33 of VCLT 1969. This approach also reflects the NYC 1958 drafters' intention to facilitate the recognition and enforcement of awards by putting the onus of proof on the award-creditor, with only positive evidence to enforce a foreign award.

5.6.1: *Cti Group Inc. v. International Bulk Carriers Spa* (2017)

On the issue of the onus of proving that the defendant was not a party to the arbitration agreement, a Malaysian Federal Court held that the award-debtor bear the burden of proving that there was no arbitration agreement existing between the parties under Section 39 of AA 2005. In September 2007, CNAN Group SPA entered into a share transfer agreement (hereinafter, STA) with the appellant, Cti Group Inc. and two other parties, Pharaon Commercial Investment Group Ltd (hereinafter, Pharaon) and Mr Mustapha Abdelwahab Laradji (hereinafter, Mustapha).[683]

The STA stipulated the following:

(1) CNAN would sell and transit 51% of its shares in the defendant to the plaintiff (24%), Pharaon (24.5%) and Mustapha (2%).[684] The respondent was not a party to the STA but all of its shares were held by CNAN.[685]

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[682] *Cti Group Inc v International Bulk Carriers Spa* [2017] 9 CLJ 499.
[683] ibid [3–4].
[684] ibid [4].
[685] ibid.

(2) The plaintiff, Pharaon and Mustapha to pay USD 9,282,000 upon signing the STA and the balance of payment by instalments in a 5-year period.[686]
(3) The plaintiff, Pharaon and Mustapha agreed to loan USD 5 m. to the respondent.[687]
(4) Clause 3.3 (hereinafter, Guarantee Clause) stipulated that payment of the balance would be guaranteed by assignment to CNAN part of their claim on repayment of the loan of USD 5 m. to the defendant. Annexure 6 referred to this assignment and was signed by the respondent.[688]
(5) The Guarantee Clause specified that USD 2,450,000 would be deposited into a bank account under the respondent's name. The amount was pledged as security and referred to in Annexure 7 (also signed by the respondent).[689]
(6) Clause 1.2 constituted the annexures as part of STA. However, in the event of conflict, the STA would prevail.[690]
(7) Clause 11.4 stipulated an arbitration clause submitting the dispute between the parties to arbitration under the Rules of the ICC.

A dispute arose and the plaintiff and Pharaon commenced arbitration proceedings before an ICC tribunal against CNAN, Laradji and the respondent.[691] The respondent has always maintained its objection that it was not a party to the arbitration agreement, but the argument was rejected by the tribunal.[692] Subsequently, the tribunal rendered an award amounting to USD 7 m. against the respondent. The Malaysian High Court granted an enforcement order on 16 July 2013.[693] The defendant, on the same order, applied to challenge the award, arguing that the plaintiff did not comply with the requirements under Section 38 of AA 2005 (equivalent to the provisions of Article IV of NYC 1958).[694]

On the issue on the allocation of the onus of proof, the Malaysian High Court ruled that the respondent failed to discharge its burden of producing evidence to show that the arbitral tribunal erred in arriving at its decision under international legal theory and

[686] ibid [5].
[687] ibid [6].
[688] ibid [7].
[689] ibid [8].
[690] ibid [9].
[691] ibid [13].
[692] ibid [13].
[693] ibid [16]
[694] ibid [17]

French law.[695] The Court dismissed the respondent's first claim, setting it aside under Section 38 on the ground that he felt 'constrained' so that the application must be dismissed as the respondent was relying on Section 38 of AA 2005, whereby the respondent must 'request' that the court refuse the enforcement order under Section 39 (textual harmonisation of Article V of NYC 1958).

In 2014, the Malaysian Court of Appeal allowed the respondent's appeal to set aside the award for failure to comply with the mandatory requirements of Section 38.[696] The onus of proof was on the appellant to prove that the respondent was a party to the arbitration agreement whereby the defendant only produced the STA without the annexures in its application to enforce the award before the Malaysian courts. [697]The Court of Appeal in its judgment further held that parties applying to have foreign arbitral awards recognised or enforced under AA 2005 must strictly comply with AA 2005 which gives exclusive privilege and benefit to register a foreign award whereby it can only be challenged on limited and exhaustive grounds under Section 39 of AA 2005.[698] The Court of Appeal rejected the argument that the order to set aside the award could only be made in accordance with Section 39 and held that in consequence of a failure to comply with the mandatory requirements of Section 38, an award can be set aside as of right.[699]

In 2017, the Malaysian Federal Court set aside the Court of Appeal's order and reinstated the enforcement order of the High Court.[700] On the issue of the onus of proving that the defendant was not a party to the arbitration agreement, the Federal Court held that as the setting aside application moved to the second stage under Section 39 of AA 2005, the respondent must then bear the burden of proving that there was no arbitration agreement existing between the parties under Section 39 of AA 2005.[701] The court further explained that the matter must now move to the second stage, as the appellant in the first stage had already discharged the burden imposed upon it under Section 38(2) by producing the STA (albeit without the annexures as the annexures were never in dispute).[702] The appellant

[695] ibid [27].
[696] *International Bulk Carriers Spa v Cti Group Inc.* [2014] (n 272).
[697] *Cti Group Inc. v International Bulk Carriers Spa* [2017] (n 680) [34].
[698] *International Bulk Carriers Spa v Cti Group Inc.* [2014] (n 272) [8].
[699] ibid[8].
[700] ibid [111].
[701] ibid [105-107].
[702] ibid [100].

has thus complied with the requirements under Section 38 of AA 2005. Therefore, it was not sufficient for the respondent to rely on the argument that the appellant had not satisfied the requirements under Section 38(2). Rather, in the second stage, the burden of proof now shifted onto the respondent to prove that it was not a party to the arbitration agreement under Section 39(1)(a)(ii) of AA 2005.

5.6.2 *Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd* [2015]

Similarly, in this case, the Malaysian High Court ruled that:

> …once the plaintiff fulfils all the formal requirements, the legal onus shifts to the defendant to prove any one of the nine grounds of refusal. If the defendant is unable to discharge such a legal burden, the court has no discretion but to recognise and enforce the Australian Arbitral Awards under s. 38(1) AA.[703]

It is clear that the position in Malaysia is that the onus of proving that an award-debtor is not a party to an arbitration agreement falls to the award-debtor to raise and produce evidence to the enforcement court. The High Court cited Section 8 of AA 2005 which stipulates a 'minimalist approach' for the Malaysian courts to only intervene in matters that are specifically permissible by AA 2005. Thus, the award-debtor may only raise any of the grounds allocated under Section 39(1)(a) and (b) of AA 2005.[704]

[703] *Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd* [2015] 6 CLJ 649 [65].
[704] ibid [63].

5.7 Conclusion

The chapter concludes that there is no harmonisation on the issue of the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement. The chapter finds that the courts have adopted two distinct approaches to this issue, either by (1) placing the onus of proof on the award-debtor to prove that it was not a party to an arbitration agreement pursuant to Article V(1)(a) of NYC 1958[705] or (2) placing the onus of proof onto the award-creditor to prove that it had complied with the mandatory *prima facie* requirements of Article IV(1)(b) for a valid arbitration agreement, expressly made between the award-creditor and award-debtor.

The chapter finds that the first approach adopted by a majority of Contracting States' courts conform to the interpretation of Articles IV and V of NYC 1958 according to Articles 31–33 of NYC 1958. The chapter reveals that English, US, Australian and Malaysian courts adopted the first approach. The allocation of the onus of proof was placed on award-debtors in the second stage on the application of Article V(1), whereby award-debtors bear the burden of proving that they were not parties to an arbitration agreement. The second approach adopted by the Australian Court of Appeal placed the onus of proof on to the award-creditor in the first enforcement stage, whereby the award-creditor had to produce evidence that the award-debtor was a party to the arbitration agreement.

The thesis proposes that NYC 1958 Contracting States adopt the first approach of placing the onus of proof on the award-debtor to prove that it was not a party to an agreement pursuant to Article V(1)(a) of NYC 1958 for the consistent and harmonised application of Article V(1)(a) on this controversial issue. The *travaux préparatoires* of NYC 1958 also confirm that the drafters intended to shift the onus of proof to the award-debtor, as opposed to the position of its predecessor, GC 1927. A uniform interpretation of the application of NYC 1958 by Contracting States would certainly contribute towards gradual harmonisation in the recognition and enforcement of foreign awards.

[705] Alternatively, the award-debtor may also raise grounds under Article V(1)(c).

Chapter 6 Does an Award-debtor's Failure to Challenge an Award Before a Supervisory Court Precludes a Challenge Before an Enforcing Court in Another Country?

6.1 Introduction

Chapter 6 considers the third controversial enforcement issue, which is to examine if there is harmonisation in the application of Article V to the issue of whether an award-debtor's failure to challenge an award before a supervisory court precludes a challenge before an enforcing court in another State. Failure to challenge in this chapter refers to two occasions where (1) an award-debtor did not challenge an award in a supervisory court (2) an award-debtor failed in its previous challenge in the supervisory court.[706] It is a generally accepted principle that the court where an award was made has exclusive jurisdiction to hear setting aside proceedings.[707] An enforcing court has discretion to hear an award-debtor's application to refuse a foreign award if the award-debtor raises at least one of the grounds under Article V(1) of NYC 1958. Section 2.3.2 of the thesis explains the differences between setting aside and the recognition and enforcement of foreign awards.

First, the chapter examines the position on this matter under the provisions of NYC 1958. Next, the chapter investigates the *travaux préparatoires* of NYC 1958 on this issue. The chapter then analyses existing decisions from Contracting States on whether an award-debtor is precluded from resisting the enforcement of an award upon failure to challenge and set it aside in a supervisory court. It also examines if there is harmonisation in application by Contracting States' courts on this issue. Finally, the chapter investigates the Malaysian courts' position on this matter.

[706] NYC 1958 does not stipulate or put conditions in whether an award needs to be challenged in a supervisory court before it can be challenged in an enforcement court on grounds under Article V(1) of NYC 1958.

[707] Albert Jan van der Berg, 'Should the Setting Aside of the Arbitral Award Be Abolished?' (2014) 29 ICSID Review - Foreign Investment Law Journal 263, 266.

6.2 Position under NYC 1958

Article V(1)(e) provides that an award-debtor may apply to resist the recognition and enforcement of a foreign award if he proves that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made. As previously discussed in Chapter 4 on the issue of the enforcement of annulled awards, Article V(1)(e) provides two discretionary powers: first, for the enforcement court to rule on the enforceability of a foreign award upon a challenge by the award-debtor and second, for the supervisory court to set aside or annul the arbitral award. [708] The refusal of recognition and enforcement of a foreign award and the setting aside of an award are two distinct legal processes (see Section 2.3.2). On the one hand, the effect of the annulment of a foreign award by its supervisory court invalidates the award being enforced in other states. On the other hand, the enforcing court's refusal to grant recognition and enforcement of an award only cancels the legal effect of the foreign award in the enforcing court's jurisdiction.

Article VI of NYC 1958 further stipulates that an enforcement court 'may', if it considers it proper, adjourn a decision on the enforcement of an award or order a party to provide security if there is an application to set aside or suspend the award pursuant to Article V(1)(e) of NYC 1958. Article V(1)(e) and Article VI refer to the discretionary power of the enforcing Court to rule when the award-debtor raises a defence under Article V(1)(e) upon a successful challenge in the supervisory court. What happens if the award-debtor has failed in its challenge at the supervisory court, but subsequently proceeds to apply to recognise and enforce the award at the enforcement court in another State?

There is no express provision under NYC 1958 on this matter. The most accepted argument is 'a judgment rejecting a challenge against the award at the seat of arbitration does not bind the court at the place of enforcement'.[709] Also, it is unreasonable to interpret that the award-debtor must first challenge the award in the supervisory seat before challenging it again in the enforcement court to resist enforcement of the award as NYC 1958 allows the award-debtor to resist in the enforcement court.[710] The issue is whether

[708] Teixeira (n 70) 4.
[709] Renato Nazzini, 'Enforcement of International Arbitral Awards: Res Judicata, Issues Estoppel, and Abuse of Process in a Transnational Context' (2018) 66 American Journal of Comparative Law 603, 604–605.
[710] Harder (n 68) 153.

the award-debtor's failure to challenge an award in the supervisory court precludes a challenge to resist enforcement of the award in the enforcement court in another country? The award-debtor's 'failure' in this chapter is limited to where (1) the award-debtor raised a similar ground in both challenge proceedings, in the supervisory court and the enforcing court, and (2) the award-debtor does not raise any challenge in the supervisory court but raises a challenge in the enforcing court. A consequence of this issue is that the award-debtor may re-invoke issues already decided in the supervisory seat or litigate for the first time an issue it did not raise in the supervisory seat, before the enforcement court, to challenge the award.[711]

The interpretation of the word 'may' in Article V(1) in accordance with Articles 31–33 of VCLT 1969 stipulates discretion by enforcing courts in deciding whether to enforce or refuse to enforce an award upon a successful annulment proceeding in the supervisory court. An inference of the above interpretation concerning the circumstances where the challenge was unsuccessful is that there is no preclusion arising in the enforcement court. The discretionary use of the word 'may' means that NYC 1958 does not impose a mandatory preclusion on the enforcing court to be bound by the annulment decision of the supervisory court. Thus, the enforcing Court may use its discretion on whether to preclude an award-debtor from resisting enforcement or to proceed with determination of the challenge under Article V of NYC 1958.

There are divergent views by scholars on the issue of whether an award-debtor's failure to challenge an award before a supervisory court precludes a challenge before an enforcing court in another country. First, one view is the award-debtor is not precluded from challenging in the enforcement court upon failure to challenge the award in the supervisory seat, subject to several exceptions. The exceptions to preclusion are in cases (1) where the award-debtor had participated in arbitral proceedings but failed to raise a challenge, (2) where the supervisory court found that the award-debtor was a party to the arbitration agreement and the annulment judgment creates an issue to estoppel in Australia pursuant to Australian law governing the recognition of a foreign judgment.[712] Harder argues that this is 'the only tenable view if it is thought that a ruling by the supervisory court that the award-debtor is not a party to the relevant arbitration agreement

[711] Nazzini (n 709) 605.
[712] Harder (n 68) 155–159.

can never bind a foreign enforcing court'.[713] He contends that setting a condition that the award-debtor must challenge the award before the supervisory seat before invoking the challenge again in the enforcement seat would necessitate 'double litigation' over the same dispute.[714] To preclude the award-debtor from challenging the award in the supervisory seat upon failure to annul the award would 'heavily restrict' the application of Article V(1)(a)-(d) of NYC 1958.[715] He relies on the English court judgement in *Dallah* that the award-debtor's options to either challenge the award in the supervisory seat or in the enforcement court are not 'mutually exclusive' and that the enforcement court is not precluded to rule on the jurisdiction of the tribunal, even where the jurisdiction cannot be challenged at the supervisory seat.[716]

Second, another view is that the award-debtor is precluded from challenging the award in the enforcement court upon failure to challenge the award in the supervisor seat. Nazzini argues that allowing the award-debtor to challenge the award 'on the same issue time and again' in enforcement proceedings in other jurisdictions contravenes the fundamental principal of the finality of an award.[717] He contends that 'if the unsuccessful party had a full opportunity to litigate an issue in a fair trial before an impartial court of competent jurisdiction, relitigating or reopening the issue does not serve the ends of justice'.[718] Nazzini relies on the interpretation of the word 'may' in the case of *Yukos Oil Co*. where the English court held that the word 'may' 'must have been intended to cater for the possibility that, despite the original existence of one or more of the listed circumstances, the right to rely on them had been lost by, for example, another agreement or estoppel'.[719] Therefore, where the supervisory court has rejected a challenge, the award-debtor should be precluded from relitigating issues that have been determined by the supervisory court, except on public policy issues.[720] Nazzini suggests that the 'abuse of process' rule from *Henderson v Henderson*[721] could be raised whereby the rule prevents the award-debtor, upon failure to challenge on a lack of jurisdiction in the supervisory seat, from relying on

[713] ibid 153.
[714] ibid.
[715] ibid 154.
[716] *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, of the Government of Pakistan* [2010] (n 619) [98].
[717] Nazzini (n 709) 606–607.
[718] ibid 607.
[719] *Yukos Oil Co. v Dardana Ltd* [2012] (n 623)[8].
[720] Nazzini (n 709) 637.
[721] *Henderson v Henderson* (1843) 67 Eng. Rep. 313.

the procedural grounds under Article V(1)(b) or (d) of NYC 1958 in the enforcement court.[722]

6.3 *Travaux Préparatoires* of the New York Convention 1958

Under the regime of NYC 1958's predecessor, GC 1927, an annulment decision binds the enforcing court.[723] As previously explained in Section 4.3 of the thesis, the NYC 1958 drafters intended to eliminate the 'double *exequatur*' mandatory requirement that existed in GC 1927. Article 4 of GC 1927 requires the award-creditor to first seek leave from the court where the award was made to ensure the award was final, and then seek second leave from the court in the contracting State where there is to be enforcement of the award. Article III of the ECOSOC Draft which formed the basis of discussions by the delegates at the NYC 1958 Conference similarly provided a mandatory requirement that an award becomes final and its enforcement cannot be suspended.[724] However, the final version of NYC 1958, what we have today, only requires the award-creditor to produce an award and an arbitration agreement to recognise and enforce a foreign award in the enforcement court.[725] The requirement for 'exequatur' from the supervisory seat was removed, and under the regime of NYC 1958, the award-debtor bears the onus of proving that an award is not yet binding or been annulled or suspended by the supervisory court.

The *travaux préparatoires* were silent on whether the enforcement court is bound to follow an annulment decision by the supervisory court. The drafters of NYC 1958 adopted Article V(1)(e) to recognise the supervisory role of the court in the State where the award was made. As discussed in Chapter 4, the wording of Article V(1) that the 'recognition and enforcement of the award may be refused … only if…' conveys the limited discretionary power allocated to the enforcement court to depart from an annulment decision only if the ground for the annulment violates procedural due process or contravenes the public policy of the enforcement state.

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[722] Nazzini (n 709) 622.
[723] Article 2(a) of GC 1927 stipulates that the recognition and enforcement of award shall be refused if the enforcement court satisfied that the award has been annulled by the supervisory court.
[724] ECOSOC 'Report of the Committee on the Enforcement of International Arbitral Awards' (n 48), 1 Annex.
[725] NYC 1958, Article III.

Nevertheless, it is clear that the drafters did not intend to provide a mandatory preclusion for the award-debtor to raise in the enforcement State to resist the enforcement of an award, upon failure to challenge in the supervisory court. The drafters of NYC 1958 explained that for Article V (now adopted as Article VI) it was recommended to permit the enforcement court to adjourn its decision for enforcement if it is satisfied that the reason for annulment or suspension made by the supervisory court was made for good reasons.[726] Rather, the drafters proposed to allow the enforcement court to either enforce the annulled award or adjourn on condition that the party refusing enforcement provide security to avoid abuse of the provision.[727]

6.4 Court Decisions

6.4.1 Where the award-debtor did not raise any challenge at the supervisory seat

6.4.1.1 England: Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, of the Government of Pakistan (2010)

Where the award-debtor did not challenge the award in its supervisory seat, the English court held that the award-debtor was not precluded from challenging the validity of the award in the enforcement court. In this case, the appellant, Dallah, appealed against a decision of the Court of Appeal refusing to allow Dallah to enforce an arbitral award made by the ICC in Paris against the respondent in England.[728] At the Court of Appeal, the respondent, MRAP succeeded in invoking the ground that the arbitration agreement was not valid under Section 103(2)(b) of AA 1996.[729] Dallah was a member of a group providing services to pilgrims to Saudi Arabia and had a long-standing commercial relation with the respondent.[730] Dallah and the MRAP concluded a MOU in July 1995 to provide housing for pilgrims which included plan to purchase land and construct housing facilities for a cost not exceeding USD 242 million. Dallah subsequently bought a larger piece land which cost more than the amount agreed in the MOU.[731] The President of Pakistan established the Trust on 21 January 1996 under Ordinance No, VII, which

[726] 'Summary Record of the Seventeenth Meeting of the UN Conference on International Commercial Arbitration (n 376), 3-4.
[727] ibid 3-4.
[728] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] UKSC 46 (n 619) [1].
[729] ibid [10].
[730] ibid [3].
[731] ibid.

mentioned that where on expiration of every four months, the Ordinance will be repealed and replaced with a new Ordinance.[732] Dallah subsequently successfully negotiated with the Government to increase the cost to USD 345 million.[733]

Finally, an agreement signed on behalf of the appellant, Dallah and Awami Haji Trust (hereinafter, the Trust) on 10 September 1996 stipulated an arbitration clause referring disputes between the parties to ICC Arbitration in Paris.[734] On 6 November 1996, there was a fundamental change in the Pakistan Government and no further ordinance was enacted, so the Trust ceased to exist on 11 December 1996.[735] The appellant initiated arbitration proceedings at the ICC in Paris against the respondent.[736] The respondent throughout the proceedings maintained that it was not a party to an arbitration agreement and did not waive its sovereign immunity. In the first partial award, the ICC tribunal held that the respondent was 'a true party' to the agreement and was bound by the arbitration agreement made between the appellant and the Trust.[737] The final award was rendered in June 2006 in favour of the appellant.

In England, the High Court enforced the final award on October 2006. In July 2008, the High Court reversed its decision and set aside the enforcement order. In July 2009, the London Court of Appeal dismissed the appellant's appeal on the ground of the absence of an arbitration agreement pursuant to Section 103(2)(b) of AA 1996.[738] The MRAP applied to set aside the three awards in the supervisory seat in France on December 2009. In February 2011, the Paris Court of Appeal rejected the Pakistan's application to set aside the award pursuant to Article 1502 (1) of France's Code of Civil Procedure.[739] Upon the application of similar French law to the principle of 'common intention' and determination of whether there was a valid arbitration agreement between the parties, the Paris Court of Appeal ruled that the Pakistan Government had behaved as a party to the agreement, considering its involvement in the negotiation process, and the act of the

[732] ibid [4].
[733] ibid [6-8].
[734] ibid [7].
[735] ibid [8-9].
[736] ibid, 1477.
[737] ibid [9].
[738] ibid, [10].
[739] *Pakistan v Dallah Real Estate and Tourism Holding Co* [2011] 2 WLUK 605 (France).

Secretary of the MRAP as a state organ in informing Dallah in a MRAP letter-headed paper to terminate the agreement.

In 2010, the English Supreme Court affirmed the decision of the English Court of Appeal on its refusal to enforce the award. The English Supreme Court ruled on two important issues. First, on the issue of whether Dallah was precluded from challenging the award at the enforcing court given its failure to challenge it at the supervisory court, the Supreme Court held that 'the fact that jurisdiction can no longer be challenged in the courts of the seat does not preclude consideration of the tribunal's jurisdiction by the enforcing court'.[740] The Supreme Court ruled that if an award-debtor seeks to prove there was no arbitration agreement binding upon it under the law where the award was made, the English court is entitled and bound to review and rule on the arbitral tribunal's jurisdiction.[741] It rejected Dallah's argument that the supervisory court is the primary court and should be the only court to determine the issue of whether an arbitration agreement existed between the parties.[742] The award-debtor has options to either challenge the jurisdiction of the arbitral tribunal at the supervisory court or resist enforcement at the enforcing court.[743]

Second, on the issue of whether the English Court is bound by the decision of the arbitral tribunal on the ruling that the MRAP was a party to the agreement, the English Supreme Court ruled that the tribunal's decision on its own jurisdiction has no legal value and is not binding upon the English Court.[744] It rejected Dallah's argument that, as an enforcing court, the English court 'should do no more than review' the jurisdiction of the tribunal and the validity of the arbitration agreement vis-à-vis the MRAP.[745]

Dallah further argued that the first partial award invoke an estoppel on the issue of jurisdiction, considering the Government's absent attempt to challenge and annul the award in France.[746] Even though Dallah subsequently abandoned the estoppel argument

[740] *Dallah Real Estate and Tourism Co v Ministry of Religious Affairs of the Government of Pakistan* [2010] (n 619) [98].
[741] ibid [104].
[742] ibid [103].
[743] ibid [98].
[744] ibid [30].
[745] ibid [21].
[746] ibid [23].

upon the MRAP's application to set aside the award in France, the English Supreme Court rejected the issue of estoppel and held that a non-signatory of an arbitration agreement is not obliged to participate in the arbitration proceeding or initiate a proceeding in the state where the award was made.[747] The award-creditor may enforce the award anywhere it can, and only upon an application by the award-creditor to enforce the award may the award-debtor resist such enforcement.[748]

The English Supreme Court on 3 November 2010 refused to grant a stay pending proceedings at the supervisory court in France pertaining to the same matter. It subsequently held that, on the application of Section 103(2)(b), it was satisfied that the MRAP had satisfied the burden of proof that it was not a party and never considered itself to be 'a true party' to the agreement by producing all relevant materials up to the termination letter and that the 'common intention was that the parties were to be Dallah and the trust'.[749] The English Supreme Court refused to enforce the award, upon its determination of whether there was common intention to include the MRAP as a party to the arbitration agreement.

6.4.1.3 Australia: IMC Aviation Solutions Pty Ltd v Altain Khuder LLC (2011)

In Australia, an award-debtor is not precluded from resisting the enforcement of a foreign award if it has not challenged the award in the supervisory seat. In this case (see Section 5.4.3.1 of the thesis), the award-creditor also raised an argument of estoppel, claiming that the award-debtor was precluded from raising the ground of jurisdiction as it had not applied to challenge and set aside the award at the supervisory court in Mongolia.[750] The Australian Court of Appeal applied the principle in *Dallah*'s case and ruled that as the award-debtor had consistently denied that it was a party to the arbitration agreement, there was no obligation on the award-debtor to participate in the arbitral proceedings or to seek annulment of the award from the Mongolian court.[751]

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[747] ibid, [23].
[748] ibid, [23].
[749] ibid, [147]; ibid [162].
[750] *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* [2011] (n 658) [318].
[751] ibid [321].

6.4.2 Where the award-debtor has failed in its previous challenge in the supervisory seat

6.4.2.1 England: Minmetals Germany GmbH v Ferco Steel Ltd (1999)

In England, an award-debtor is precluded from raising the same defence, whereby he has failed to satisfy the supervisory upon invoking the same defence previously in the supervisory seat. The English Court ruled that English public policy is strong and respects the decision of a supervisory court on the validity of a foreign award. In this case, the defendant applied to the English court to set aside an enforcement order for two arbitration awards made in China.[752] In March 1993, the defendant entered into a contract to sell 10,000 metric tonnes of steel channels to the applicant. The applicant subsequently sold the channels to China Resources, a Chinese company. A dispute arose on the dimensions and quality of the channels, whereby the applicant referred the dispute to the CIETAC.[753] On 29 September 1995, the arbitral tribunal rendered a first award in favour of the applicant for a total of USD 1,664,938.78 consisting of a refund of the applicant's costs with interest and compensation for the sub-sale to China Resources.[754] The first award cited a reference to another award between the applicant and China Resources with the same amount of compensation made just one day before the first award.[755]

The defendant then applied to the Beijing court to set aside the first award on the ground that it had no opportunity to make its submission on the sub-sale contract.[756] On 8 October 1996, the Beijing Court ordered the case to be remitted to CIETAC 'for a resumed arbitration'. CIETAC subsequently issued a notice to resume arbitration on 10 October 1998 and required the defendant to provide a copy of its application to the Beijing Court to revoke the first award. Nevertheless, the defendant refused to do so, arguing that CIETAC had no jurisdiction to set aside the first award and a re-arbitration must be made pursuant to a new arbitration agreement between the parties.[757] Instead, the defendant invited the arbitrators to Shanghai to 'investigate and obtain evidence' on the issue of the quality of the channels which has been decided in the first award. The arbitral tribunal declined the visit and rendered a second award. There was no occasion on which the

[752] *Minmetals Germany GmbH v Ferco Steel Ltd* [1999] CLC 647, 647.
[753] ibid, 649.
[754] ibid, 650.
[755] ibid, 650–651.
[756] ibid, 650–651.
[757] ibid, 651.

defendant submitted its evidence and argument on the sub-sale contract, as its submission to the Beijing Court to revoke the first award. On 29 March 1997, CIETAC issued a second award on the resumed arbitration and maintained the first award on the ground that it had concluded the issue on the quality of the channels in the first award.[758]

The defendant again applied to the Beijing Court to set aside both awards on the similar ground of the sub-sale where he had no opportunity to present his case. The Beijing Court in February 1998 rejected the defendant's application on the ground that the defendant had failed to submit his case at the resumed arbitration where the Court had suspended the previous proceeding and asked the defendant to present his case at the resumed arbitration.[759] In June 1998, the English court ordered an adjournment of the enforcement of the award pending determination of a renewed application to set aside the awards, but the defendant was ordered to pay a security of 80% of the amount of the award. As the defendant failed to provide this security, the English court in August 1998 directed the defendant to apply to challenge enforcement of the award.

The English court ruled that the defendant was precluded from raising the same defence, whereby he had failed to satisfy the supervisory upon invoking the same defence previously. In 1999, the English court found that the defendant failed to take the opportunity to present his case, when he was given an opportunity to do so.[760] Therefore the English Court held that the defendant was precluded from relying on the defence of being unable to present his case in a manner contrary to the rules of natural justice under Section 103(2)(c), where he failed to take advantage of the opportunity given to him to present his case.[761]

The English Court further held that an issue of public policy arose in this case.[762] The Court explained that, in ICA, a party who has submitted to arbitration by concluding an arbitration agreement is bound by the domestic arbitration law and jurisdiction of the supervisory seat. The Court ruled that it is a strong public policy for the English courts to

[758] ibid, 653.
[759] ibid, 654.
[760] ibid, 658.
[761] ibid, 658.
[762] ibid, 662.

respect the supervisory seat's decision that an award is valid considering the issue has been conclusively settled in the supervisory court.

6.4.2.2 German: OLG Rostock (1999)

In Germany, a judgment on the failure to challenge an award in the supervisory court does not preclude the award-debtor from resisting enforcement of the foreign award in Germany. The award needs to be binding where the award was made in order for it to be recognisable and enforceable in Germany (see Section 4.4.1.1.1 of the thesis). A German Federal Court in 2001 reversed its previous decision and enforced the award in Germany whereby the supervisory court in Moscow subsequently made an order for a re-trial, recognised the award and set aside its previous annulment decision.[763] The Supreme Court of Moscow subsequently reversed the annulment decision and remitted the case to the Moscow District Court. The District Court in a new trial recognised the award. The German Federal Court held that the grounds for refusal of enforcement stipulated under Article V(1)(e) were no longer applicable as the award had become binding in accordance with where the award came from.

*6.4.2.*3 United States: *Chromalloy Aeroservices Inc. v the Arab Republic of Egypt* (1996)

The US District Court in *Chromalloy* ruled that while it considered the annulment decision by the Egypt Court of Appeal, the annulment decision did not have *res judicata* effect in the US. Even though its main argument was on the application of US Federal law upon the invocation of Article VII of NYC 1958 (see Section 4.6.2.2.1 of the thesis), the US court held that recognizing the annulment decision of the Egyptian court would be a contravention of US public policy which favours the recognition and enforcement of foreign awards.[764]

6.5 Is there harmonisation on this controversial issue?

The chapter finds that there is harmonisation in the application of Article V(1) on the issue of whether an award-debtor's failure to challenge an award before a supervisory court precludes a challenge before an enforcing court in another State, where the award-

[763] OLG Rostock (1999) 1 Sch 3/99 9 CLOUT Case No. 372 (Germany) (n 412).
[764] *Chromalloy Aeroservices Inc. v The Arab Republic of Egypt* (1996) (n 534).

debtor *does not raise* any challenge at the supervisory seat, prior to the enforcement proceeding in the enforcement court. Where the award-debtor did not challenge the award before its supervisory seat, the English and Australian courts ruled that the award-debtor was not precluded from resisting enforcement of the award in the supervisory seat.[765] This position adopted by the courts was consistent with the interpretation of Article V(1) and *the travaux préparatoires* of NYC 1958 as discussed in Sections 6.2–6.3 of the thesis.

However, there is no harmonisation in the application of Article V(1)(e) on whether an award-debtor is precluded from challenging an award in the enforcement seat, upon its previous failure to challenge it at the supervisory seat. Rather, in a case where the award-debtor failed in its challenge at the supervisory seat on the same ground on which he subsequently raised it again in the enforcement court, the English court held that the award-debtor was precluded from challenging enforcement of the award as English public policy is strongly in favour of respecting the decision of the supervisory seat (exclusively when the decision is on the same ground).[766] On the other hand, the German court did not preclude the award-debtor from challenging the enforcement of the award in Germany, upon cancellation of the annulment of the award in its supervisory court in Moscow. Similarly, the US court found that its public policy is in favour of the enforcement of an award and ignores the annulment decision of the supervisory court.[767] Thus, a failure to challenge the award in the supervisory court would not bind the US court as the enforcement court. The award-debtor would not be precluded from challenging the same ground in the enforcement seat, even if the supervisory seat had rejected the challenge previously.

6.6 Position in Malaysia

6.6.1 An award-debtor did not raise any challenge at the supervisory seat

In Malaysia, if an award-debtor did not raise any challenge in the supervisory court, it is not precluded from resisting enforcement of the award in Malaysia, if the award-debtor raised at least one of the grounds available under Section 39(1)(a) of AA 2005. The Malaysian Court of Appeal in 2020 ruled that an award-debtor may challenge the

[765] *Dallah Real Estate and Tourism Co* (n 619)*; IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (n 658).
[766] *Minmetals Germany* (n 750).
[767] *Chromalloy Aeroservices Inc* (n 534).

enforcement of an award pursuant to Section 39(1)(a) of AA 2005, regardless of whether it had challenged the award in the supervisory seat or not. Nevertheless, if the challenge was not founded on at least one of the grounds under Section 39(1)(a), the Malaysian courts precluded the award-debtor from raising grounds which were supposed to be under the jurisdiction of the supervisory seat.

6.6.1.1 Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal (2020)

The Malaysian Court of Appeal held that a challenge under Section 39(1)(a)(vii) of AA 2005 and Article V(1)(e) of NYC 1958 is not necessarily dependent on the existence of a challenge to set aside the award in its supervisory seat.[768] The case involved an appeal by the award-debtor to stay the application or alternatively suspend the enforcement of an award pending a second arbitration proceeding between the parties (see Section 3.6.5 of the thesis). The Malaysian court also cited Article VI of NYC 1958 which permits the enforcement court to refuse, stay or adjourn an application to recognise and enforce a foreign award, where the award-debtor has successfully proved to the enforcement court a defence under Article V(1)(e) of NYC 1958.[769]

6.6.1.2 Armada (Singapore) Pte Ltd v Ashapura Minechem Ltd [2016]

On the other hand, an award-debtor is precluded from a challenge in the enforcement court using a defence not available under Section 39(1) of AA 2005. In the case of *Armada (Singapore) Pte Ltd*, the Malaysian High Court ruled that the award-debtor would be estopped to challenge the validity of an arbitration agreement, as it chose not to participate in the arbitration proceeding and other courts' proceedings before the enforcement application.[770] The parties in this case entered into an affreightment contract in April 2008. In September 2008, the defendant informed the plaintiff in writing that the contract was terminated due to a 'force majeure event'.[771] Pursuant to the arbitration clause stipulated in the contract, the plaintiff commenced an arbitration proceeding in

[768] *Malaysian Bio-Xcell Sdn Bhd v Lebas Technologies Sdn Bhd & Another Appeal* [2020] (n 244) [49].
[769] ibid [50].
[770] *Armada (Singapore) Pte Ltd v Ashapura Minechem Ltd* [2016] (n 282) [33].
[771] ibid [10].

November 2008 at the London Maritime Arbitrators Association.[772] The arbitrator rendered an award in favour of the plaintiff in February 2010.[773]

In December 2012, the plaintiff applied to the Malaysian High Court to enforce the award. The Malaysian High Court granted the enforcement order in January 2014 pursuant to Section 38 of AA 2005 and Order 69 of ROC 2012. Leaving procedural matters aside, the defendant only applied to set aside the award (albeit using an erroneous form, designated to set aside a foreign award under REJA 1958) in July 2015. The defendant's arguments were on procedural issues and that the plaintiff was no longer a proper party to the arbitration proceeding and the enforcement proceeding pursuant to a novation notice dated 5 December 2008. The defendant failed to raise specifically any of the grounds under Section 39(1) to resist the enforcement order.

The Malaysian High Court refused the set aside application and held that the defendant would be estopped to challenge the validity of an arbitration agreement upon its failure to participate in the arbitration and other courts' proceedings before the enforcement proceeding. It also ruled that 'the proper place to challenge the validity of the arbitration award should be at the seat of arbitration, i.e. the English court which is the supervisory court rather than in this court which is merely an enforcement court'.[774] The Malaysian court in this case respected the role of the supervisory court, the court where the award was made, to have the jurisdiction to decide on the validity of the award.

6.6.1.3 Archer Daniels Midland Co v TTH Global (M) Sdn Bhd **[2016]**

In this case, the applicant, a company incorporated in the State of Delaware, the United States of America, entered into contracts of sale for US Corn Gluten Meal and US Distillers Grains with the respondent, a company incorporated in Malaysia.[775] The respondent failed to make payments for ten contracts amounting to USD 2,654,804.06 to the plaintiff. In February 2015, the plaintiff commenced arbitration in England under GAFTA Rules as stipulated under the arbitration agreement.[776] The arbitrator rendered an award in favour of the plaintiff in July 2015. The plaintiff sought to enforce the award

[772] ibid.
[773] ibid.
[774] ibid [33].
[775] *Archer Daniels Midland Co v TTH Global (M) Sdn Bhd* [2016] 1 LNS 1282 [7].
[776] ibid [9].

in Malaysia and an enforcement order was granted in January 2016.[777] The respondent subsequently applied to set aside the award in Malaysia, citing jurisdiction issues as the grounds for the application.

This case is another example of the position of the Malaysian court in its preference for the jurisdiction of the supervisory seat. The Court held that it had no jurisdiction to set aside the award and a set aside application can only be made at the supervisory seat in England. The Malaysian High Court explained that it can only refuse to enforce an award if the respondent raises any of the grounds under Section 39(1) of AA 2005, which the respondent did not do.

6.6.2 An award-debtor failed in its previous challenge at the supervisory seat

In Malaysia, the thesis suggests that an award-debtor is not precluded from challenging an award, if it had previously failed in its previous challenge in the supervisory seat. The Malaysian High Court refused to resist the enforcement of a Russian award and accepted the decision of the Moscow Arbitration Court that the parties had conducted the arbitration proceeding in conformity with the arbitration clause agreed by themselves. Nonetheless, the case of *Open Type Joint Stock Company Efirnoye* did not expressly deal with the issue of preclusion. While the Court referred to and accepted the decision of the supervisory seat, it came to the decision by assessing the whole picture, the evidence submitted by the parties.

6.6.2.1 Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd (2012)

In the case of *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd*, the plaintiff, a company incorporated in the Russian Federation, entered into several contracts with the defendant, a company incorporated in Malaysia, to buy palm oil products.[778]

Clause 6 of their contract contained an arbitration clause which stipulated that:

> 6.3 All disputes between the parties in connection with the non-fulfilment or improper fulfilment of the conditions of the contract shall be resolved by means of negotiation.

[777] ibid [4].
[778] *Open Type Joint Stock Company Efirnoye (EFKO) v Alfa Trading Ltd* [2012] (n 1).

> 6.4 If the parties cannot come to mutual agreement, then the dispute should be passed for considering and final resolution to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Ukraine (the place for legal investigation is Kiev, Ukraine) according to its regulations with three arbitrators present in a case when the plaintiff is the Seller, and the dispute should be passed for considering and final resolution to the International Commercial Arbitration Court at the Chamber of Commerce and Industry of Russian Federation (the place of legal investigation is Moscow, the Russian Federation) according to its regulations with three arbitrators present in a case when the Plaintiff is the Buyer.
>
> When the dispute is considered in the given courts, the norms of the substantive and procedural laws of Ukraine when the Plaintiff is the seller are applied; the norms of the substantive and procedural laws of Russia when the Plaintiff is the Buyer are applied.[779]

The arbitral clauses stipulated that if a non-negotiable dispute arose and the defendant was the complainant in a dispute, the dispute was to be referred to the Ukrainian arbitral tribunal. Instead, if the complaint was initiated by the plaintiff, the dispute should be referred to the Russian Arbitral tribunal.[780] Subsequently, a dispute arose whereby the plaintiff contended on the breach of the defendant's contractual obligation concerning late delivery of goods.[781] At the same time, the defendant claimed that the plaintiff breached his obligation concerning late payment for goods.[782]

In October 2008, the defendant initiated a claim concerning a late payment for goods to the Ukrainian tribunal and obtained an award in his favour.[783] The plaintiff subsequently in November 2008, without objecting to the arbitral proceedings of the Ukrainian tribunal, initiated a claim for late delivery of goods in the Russian tribunal and obtained an award in his favour.[784] In the Ukrainian arbitration proceeding, the plaintiff did not raise an objection to the jurisdiction of the Ukrainian tribunal, but utilised its right under the arbitration agreement to file a different claim in the Russian tribunal.[785] The Ukraine arbitral tribunal subsequently rendered an award in favour of the defendant.

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[779] ibid [5].
[780] ibid [4-6].
[781] ibid [7].
[782] ibid.
[783] ibid [8].
[784] ibid [8-13].
[785] Ibid [10].

The defendant raised a jurisdictional challenge at the Russian arbitration proceeding that the plaintiff abused the defendant's procedural rights by initiating a Russian proceeding despite participating in the Ukrainian arbitral proceeding.[786] As the defendant first initiated the claim, he maintained that the Ukrainian tribunal had the exclusive right to hear all disputes between them. As the Russian arbitral tribunal confirmed that it would decide on the jurisdiction challenge in the final award, the defendant applied for an adjournment to prepare its case. Subsequently, the defendant submitted a counterclaim in the Russian proceeding and admitted in it that it submitted to the jurisdiction of the Russian tribunal.[787]

The Russian arbitral tribunal held that, according to the arbitral clause, it had the jurisdiction to hear plaintiff's claim, regardless of another arbitral proceeding initiated by the defendant in Ukraine.[788] It rendered an award in favour of the plaintiff. Following the award issued against him, the defendant challenged the award issued by the Russian tribunal at the Moscow Arbitration Court. The defendant sought to set aside the award on the grounds that the ICAC violated the arbitration procedure, contravened Russian Federation public policy and an invalid arbitral clause.[789] The Moscow Arbitration Court rejected the defendant's application to set aside and held that the arbitration procedure was consistent with the parties' agreement and not inconsistent with Russian public policy. The Moscow Arbitration Court also ruled that the applicant deprived itself from challenging the validity of the arbitral clause as it had submitted to the jurisdiction of the ICAC Russian tribunal by filing a counterclaim at the proceeding.[790]

In the High Court of Malaysia, the plaintiff sought to register and enforce the award against the defendant in Malaysia in accordance with Section 38 of AA 2005. The defendant, in opposing the application to enforce the award, applied for a refusal to enforce the award pursuant to Section 39(1)(a)(vi) and Section 3(1)(b)(ii) of AA 2005. (see Section 3.8.8 for a discussion on public policy). The defendant submitted that the arbitral procedure was not in accordance with the agreement between the parties, as stipulated under Section 39(1)(a)(vi). The defendant's challenge in the Malaysian Court

[786] ibid [14]
[787] ibid [15].
[788] ibid [18].
[789] ibid [24].
[790] ibid[23–28].

pursuant to Section 39(1)(a)(vi) was premised on similar grounds to those it had raised before the Russian Arbitral tribunal and the Moscow Arbitration Court, i.e. (1) that as it had initiated the Ukrainian claim, any further claim should have been brought to the Ukrainian tribunal (2) the plaintiff failed to observe the procedure stipulated in the arbitration agreement and (3) both of the claims in Ukraine and Russia involved the same contract.[791]

The Malaysian court in this case did not expressly rule on the issue of preclusion, where the award-debtor had failed in two of its previous attempts to challenge the award, first, in the Russian arbitration proceeding and second, in the Moscow Arbitration Court. Rather, the court premised its refusal of the defendant's challenge due to its failure to satisfy its onus of proving that there was a failure to adhere to the arbitral procedure pursuant to Section 39(1)(a)(vi) of NYC 1958. The Malaysian High Court in this case allowed the plaintiff's application to enforce the award and rejected the defendant's application to refuse enforcement of the award on the ground that the defendant had failed to prove and show that there was any failure of the plaintiff to comply with the arbitration clause.[792]

Yet, the Malaysian High Court referred to and accepted the decision from the Moscow Arbitration Court and the Russian arbitral tribunal. It respected the decision of the supervisory court where a similar challenge had been decided by the supervisory court. The Malaysian Court was satisfied that the Russian ICAC tribunal and the Moscow Arbitration Court had both heard and decided on this matter and acknowledged that the Russian tribunal had jurisdiction to hear the matter. The Malaysian High Court accepted that both the Russian tribunal and the Moscow Arbitration Court interpreted the arbitration clause (Clause 6) as an express provision allowing the commencement of arbitration in Russia, notwithstanding the existing arbitration proceeding in Ukraine.[793]

Nonetheless, the Malaysian Court did not expressly preclude the award-debtor from challenging the award. Instead, it examined the arbitration clause, the Russian and

[791] ibid [34].
[792] ibid [35].
[793] ibid.

Ukrainian awards, the conduct of the parties and the findings of the arbitral tribunal.[794] It assesses the judgment of the supervisory seat in dismissing the annulment of the award.[795] Having examined the evidence submitted in its entirety, it was satisfied that the parties adhered to the procedure expressly agreed by themselves in the arbitration clause and rejected the plaintiff's challenge under Section 39(1)(a)(vi) of AA 2005. In addition, the court also held that the two tribunals, the Ukrainian tribunal and the Russian tribunal, determined two different matters and arrived at different decisions.

The Malaysian Court criticised the defendant for challenging the award again in the enforcement court in Malaysia as the supervisory court, the Moscow Arbitration Court, had already upheld that the defendant submitted to the jurisdiction of the Russian tribunal by filing a counterclaim during the arbitration proceeding.[796] The court explained that the defendant 'having so submitted to the jurisdiction of the Russian tribunal it ill behoves the defendant to now seek to renege from that position by alleging in this, the enforcement jurisdiction once again, that arbitral procedure was not adhered to'.[797] Applying the principle of this case to the issue of the preclusion of the award-debtor to challenge the award, the thesis suggests that a Malaysian court would not preclude an award-debtor from challenging an award, but would assess the evidence submitted by the parties in its entirety and examine whether the award-debtor had successfully raised at least one of the grounds under Section 39(1) of AA 2005. However, the research argues that in cases where the award-debtor has already participated but nevertheless failed to invoke the same arguments in previous proceedings in the supervisory seat, the Malaysian court will be inclined to refer to and accept the decision of the supervisory seat and preclude the award-debtor from challenging the enforcement of the award on the same ground he failed to raise in a previous proceeding in the supervisory seat.

6.6.2.2 Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd (2015)

The award-debtor in *Murray & Roberts Australia Pty Ltd* did not raise any challenge before the Australian arbitrator nor in the supervisory seat.[798] Instead, the award-debtor

[794] ibid.
[795] ibid.
[796] ibid.
[797] ibid.
[798] *Murray & Roberts Australia Pty Ltd v Earth Support Company (Sea) Sdn Bhd* [2015] (n 703).

in this case applied to challenge the jurisdiction of the arbitrator twice in the Malaysian courts, once before the arbitration proceeding, and another upon an application by the award-creditor to enforce an award made in Australia.

The plaintiff, a company incorporated in Australia, and Marine & Civil Construction Pty Ltd (hereinafter, MCC) a company incorporated in Australia, entered into a joint-venture agreement (JVA) and formed an unincorporated joint venture, Murray & Roberts-Marine & Civil JV (hereinafter, JV entity).[799] In November 2010, JV entity entered into a supply agreement with the defendant, a company incorporated in Malaysia, which stipulated an arbitration agreement between JV entity and the defendant.[800] In February 2011, the plaintiff and MCC dissolved JV entity and terminated the JVA.[801] The plaintiff subsequently took full control of the business.[802]

A dispute arose over the supply agreement and the plaintiff referred the dispute to the Australian arbitrator.[803] The defendant requested the arbitrator to submit to the High Court of Malaya to decide on a preliminary point of whether the defendant was bound to submit the dispute to the arbitration proceeding on the ground that the plaintiff was not a party to the arbitration agreement.[804] The request was rejected by the arbitrator and the plaintiff. Thus, the defendant did not participate in the arbitration proceeding in Australia, contending that it was not obliged to participate until the issue of the jurisdiction of the Australian arbitrator had been resolved.[805] On the preliminary suit in Malaysia brought by the defendant challenging the jurisdiction of the Australian arbitrator to decide on this matter, the Malaysian court dismissed the suit and ruled that as the seat of arbitration was in Australia, any challenge should be decided by the Australian court.[806] Subsequently, the Australian arbitrator rendered four arbitral awards against the defendant. In 2015, the plaintiff applied to the Malaysian High Court to enforce the four awards against the defendant pursuant to Section 38 of AA 2005.

[799] ibid [3-6].
[800] ibid [8].
[801] ibid [9]
[802] ibid [9].
[803] ibid [10-11].
[804] ibid [12].
[805] ibid [14].
[806] ibid [17].

In this case, the court held the award-debtor was precluded from challenging enforcement of the award by raising a defence of validity of the arbitration agreement, where it failed to challenge it in the arbitration proceeding or in the supervisory seat. The Malaysian High Court ruled that it could not allow the defendant 'to raise any issue which the defendant could have raised before the Australian Arbitrator or the Australian supervisory courts'.[807] The court took into account the fact that the defendant had not challenged to set aside the awards in the Australian court, but resisted enforcement of the award in the Malaysian court.[808] The defendant had also previously challenged the jurisdiction of the arbitrator in the Malaysian court, and upon dismissal by the Malaysian court in this preliminary suit, decided not to participate in the arbitration proceeding in Australia. As the enforcement court, the Malaysian Court could not accept the defendant's challenge to enforce the award as it could not rule on the validity of the foreign award.[809] This case also highlighted the Malaysian court's stance in recognising the primary role of the supervisory court.

The Malaysian Court in this case ruled that the award-debtor was precluded from raising a challenge as it failed to participate and challenge the validity of the arbitration agreement when he had opportunities to do so in the arbitration proceeding, and upon the Malaysian court's preliminary dismissal concerning the jurisdiction of the arbitrator. The Malaysian court's approach in this case is similar to the English court's approach in *Minmetals Germany GmbH* (see Section 6.4.2.1). Nonetheless, the Malaysian High Court also ruled that it could not accept the defendant's three arguments, which the defendant relied on, to challenge enforcement of the awards in Malaysia as the grounds did not include at least one of the exhaustive grounds under Section 39(1)(a)-(b) of AA 2005.[810] Therefore, should the award-debtor raised at least one of the grounds stipulated under Section 39(1) or (2) of AA 2005, the Court would be bound to assess whether the award-debtor had successfully proved the ground raised to resist enforcement of the award.

The thesis envisages that should a case arise before the Malaysian court, where the award-debtor has failed to set aside the award before the supervisory seat, the Malaysian court

[807] ibid [69].
[808] ibid [52-53].
[809] ibid.
[810] ibid [67].

would refer to and respect the decision and preclude the award-debtor from resisting enforcement of the award on the same ground, if the award-debtor failed to invoke at least one of the grounds under Section 39(1) of AA 2005. As decided in the *Murray & Roberts*'s case, the Malaysian court would preclude such a challenge as the award-debtor had an opportunity to raise a challenge in the supervisory court and the supervisory court had already decided on the mater. The Malaysian courts' position of preferring the jurisdiction of the supervisory seat can be seen in the cases of *Murray & Roberts Australia Pty Ltd* (see Section 6.6.2.1)*, Armada (Singapore) Pte Ltd Ltd* (see Section 6.6.1.2) and *Archer Daniels Midland Co Ltd* (see Section 6.6.1.3).

6.7 Conclusion

The chapter finds that there is partial harmonisation on the part of Contracting States' courts in the application of Article V(1) of NYC 1958 on whether an award-debtor's *failure* to challenge an award before a supervisory court precludes a challenge before an enforcing court in another State. The chapter limited the award-debtor's *failure* to two occasions, first where the award-debtor did not raise any challenge at the supervisory seat and second, where the award-debtor failed in its previous challenge to annul the award in the supervisory seat. It finds harmonisation in the application of Contracting States' courts on the former occasion, and none on the latter occasion.

NYC 1958 is silent on this matter, although Article V(1)(e) provides discretionary power to the enforcement court to refuse an application for the recognition and enforcement of a foreign award if the award-debtor raises a challenge that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in which, or under the law of which, that award was made. The thesis finds that the interpretation in accordance with Articles 31–33 of VCLT 1969 reveals that NYC 1958 does not impose a mandatory preclusion on the enforcement court to be bound by an annulment decision of the supervisory seat, regardless of the whether the award-debtor's challenge is successful or not. This interpretation is consistent with the context and object of purpose of NYC 1958. The final act to NYC 1958 reveals that NYC 1958 aims to 'contribute to increasing the effectiveness of arbitration in the settlement of private law disputes'.[811]

The chapter finds that there is harmonisation on the former occasion, where the award-debtor did not raise any challenge in the supervisory seat, but challenges the award in the enforcement court by resisting enforcement of the award under at least one of the grounds under Article V(1) of NYC 1958. The English, Australian and Malaysian courts ruled that a failure to challenge in the supervisory seat does not preclude the award-debtor from challenging the award in the enforcement court. This position affirms the interpretation adopted in this thesis.

[811] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15).

However, where the award-debtor failed in its challenge to annul the award in the supervisory seat, there is no harmonisation on whether such a challenge precludes the award-debtor from a challenge in the enforcement court. The English court in *Minmetals Germany GMBH* ruled that the award-debtor was precluded from raising a challenge under Section 103(2)(c) as it is a strong public policy for the English courts to respect the supervisory seat's decision that an award is valid. On the other hand, the German court in *OLG Rostock* held that it was not bound by the decision, and even overturned its previous decision to refuse to enforce the award, as the foreign award had become binding where the award came from. Therefore, the failure to annul the award in the supervisory seat did not preclude the award-debtor from challenging the award in the enforcement seat in Germany. Also, in the US, as US public policy is in favour of the enforcement of awards, the award-debtor's failure to challenge in the supervisory seat did not preclude it from challenging in the enforcement court.

The thesis finds that the failure to challenge (at all) in the supervisory seat does not preclude an award-debtor from challenging an award in Malaysia, as long as the ground to resist enforcement is at least one of the limited grounds under Section 39(1)(a) of AA 2005 (textual provision for Article V(1) of NYC 1958). Nonetheless, if the award-debtor participated in the previous challenge and failed to seek annulment from the supervisory seat, the thesis argues that the Malaysian court would first assess the evidence put forward by the parties including the decision from the supervisory seat. As discussed in Section 6.6, where the supervisory court had already decided on the same issue, the Malaysian court would be inclined to accept the decision of the supervisory seat. However, should the award-debtor raise a defence under at least one of the grounds of Section 39(1), the Malaysian court would examine the issue on its own and decide if it would enforce or refuse to enforce the foreign award.

Chapter 7 Conclusion

7.1 Standard of Harmonisation Expected for the New York Convention 1958

NYC 1958 is the backbone of the international regime for the enforcement of foreign awards and a major improvement on the regime created by GC 1927. Chapter 2 of the thesis finds that textual harmonisation is equally important for Contracting States adopting the provisions of NYC 1958 as closely as possible to the original texts of NYC 1958, depending on whether Contracting States are monist or dualist States. While textual harmonisation ensures the compliance of Contracting States to perform their obligations either by directly implementing NYC 1958 provisions or transposing NYC 1958 texts into domestic legislation, a comprehensive analysis of the position of Contracting States' courts in interpreting and applying these provisions is more significant to test whether there is harmonisation in the application of NYC 1958. Thus, the thesis focuses on applied harmonisation, i.e. on the interpretation and application of Contracting States' courts in interpreting and implementing NYC 1958 on the controversial issues discussed in Chapters 4, 5 and 6 of the thesis.

The standard of harmonisation expected for NYC 1958 is for Contracting States to interpret and apply NYC 1958 provisions or implementing provisions uniformly. The goal of harmonisation in this research is to bring the rules on the recognition and enforcement of foreign awards under NYC 1958 to a similar application, while still maintaining the diversity of law of Contracting States. The research does not aim for absolute sameness in the application of NYC 1958 provisions, which would be rather ambitious, but for the courts of Contracting States to adopt uniform interpretation of NYC 1958, to ensure its harmonious application.

As a public international law instrument, the courts must interpret NYC 1958 in accordance with Articles 31–33 of VCLT 1969. First, Article 31 of VCLT 1969 stipulates that a court must interpret the texts of NYC 1958 in good faith, with ordinary meaning, in accordance with the provisions in their context, and in accordance with the object and purpose of NYC 1958. Thus the interpretation of NYC 1958 provisions must be made in good faith, in ordinary meaning, in accordance with the final act to NYC 1958 which states that the purpose of NYC 1958 is to 'contribute to increasing the effectiveness of

arbitration in the settlement of private law disputes'.[812] Second, recourse may be made to preparatory works, including the *travaux préparatoires* of NYC 1958, where the application of Article 31 to interpret a provision leaves an ambiguous or absurd meaning, or leads to a manifestly absurd or unreasonable result. The *travaux préparatoires* for NYC 1958 indicate that NYC 1958 was established to overcome the inadequacies of GC 1927 in terms of facilitating the enforcement of foreign arbitral awards but at the same maintaining respect for the principle of State sovereignty.[813] Third, as NYC 1958 is available in five official languages, all five official texts of NYC 1958 will be deemed equally authoritative, pursuant to Article 31 of VCLT 1969. However, where a comparison of official texts of NYC 1958 produces divergent meanings, the best interpretation is by reconciling texts, and interpreting them in accordance with an interpretation which contributes to increasing the effectiveness of arbitration, which was the main aim of NYC 1958.

7.2 Recognition and Enforcement of Foreign Arbitral Awards in Malaysia

Sections 38 to 39 of AA 2005 govern the recognition and enforcement of foreign awards in Malaysia. Sections 38 to 39 of AA 2005 are the implementing provisions of NYC 1958. The recognition and enforcement of foreign awards in Malaysia is limited to Contracting States of NYC 1958, as per the reciprocity reservation entered by Malaysia when it first acceded to NYC 1958 in 1985. The Malaysian Federal Court in *Lombard Commodities* removed the strict evidential requirement that the State where the award was made needed to be expressly gazetted in the official Gazette. Therefore, it is sufficient to show that the award was made in another Contracting State of NYC 1958. Alternatively, an award-debtor may apply under REJA 1958, as long as the award was made in one of the Commonwealth States under the First Schedule of REJA 1958.

The recognition and enforcement of awards in Malaysia involves a two-step process. First, an award-creditor may apply to recognise and enforce a foreign award by producing the award and an arbitration agreement stipulated under Section 38 to the High Court. The submission of mandatory proof under Section 38 renders a foreign award *prima facie* enforceable in Malaysia, to be recognisable and enforceable as a judgment of a court. In

[812] 'Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards' (n 15).
[813] ECOSOC 'Report of the Committee' (n 48).

the case of *Siemens Industry Software GmbH & Co KG (Germany) v Jacob and Toralf Consulting Sdn Bhd & Ors* [2020] 5 CLJ 143, the Federal Court of Malaysia held that the party applying to recognise and enforce a foreign award only needs to produce a dispositive portion of the award, instead of the entire award. Second, the award-debtor may then raise at least one of the defences available under Section 39 to resist the recognition and enforcement of the foreign award.

Chapter 3 reveals that Malaysia has textually harmonised the implementation of provisions of NYC 1958 into Malaysian arbitration laws, except the implementing provision of Article V(1)(d) of NYC 1958. The implementing provision of Article V(1)(d), Section 39(1)(a)(vi) of AA 2005 stipulates a defence for the award-debtor whereby in the absence of an agreement between the parties, the composition of an arbitral tribunal and procedure *was not in accordance with Malaysian AA 2005*. This provision contravenes Article V(1)(d) of NYC 1958 which provides ground for award-debtor to resist the enforcement of award where it raises that the composition of an arbitral tribunal and procedure *was not in accordance with the law of the State where the award was made*, in the absence of an agreement between the parties. It is mandatory, in the absence of an agreement between the parties, that the composition of the tribunal and the arbitration proceeding procedure must adhere to the provisions in AA 2005.

The thesis proposes that Malaysia amend Section 39(1)(a)(vi) of AA 2005 (see Section 7.4). It is only practical that Article V(1)(d) of NYC 1958 stipulates that in the absence of an agreement, the award-debtor may raise the ground that the composition of the arbitral tribunal or procedure was not in accordance with the law of the State where the award was made. It is unreasonable to expect that, in the absence of an agreement between the parties, that parties submitting to ICA must make sure that the composition of an arbitral tribunal and procedure observes the provisions of AA 2005. At the arbitration proceeding, the agreement between the parties is subject to the law at the place of arbitration.[814] The parties' agreement on the place of arbitration may also represent

[814] Christian Borris and Rudolf Hennecke, 'Article V(1)(D)' in Reinmar Wolff (ed), *The New York Convention: Convention on the Recognition and Enforcement of Foreign Arbitral Awards Article by Article Commentary* (Second, Kluwer Law International 2019) 345.

implied choice of the parties to be bound by the procedural law of the State where the arbitration was held.[815]

The thesis finds that the Malaysian courts adopted a 'pro-arbitration' attitude to the application of Section 39 of AA 2005. First, on the public policy defence available under Section 39(1)(b)(ii), a Malaysian court warned against the exploitation of a public policy defence to review or relitigate matters already resolved in an arbitration proceeding.[816] Second, the Malaysian courts would also preclude an award-debtor from relying on the ground of excess arbitral tribunal jurisdiction pursuant to Section 39(1)(a)(iv) if it found that the award-debtor participated in but failed to challenge the jurisdiction in the arbitration proceeding.[817] Third, on the ground of an invalid arbitration agreement pursuant to 39(1)(a)(ii) of AA 2005, a Malaysian court held that it had no jurisdiction to determine the validity of an arbitration agreement as there was an express agreement between the parties that the matter of an arbitration agreement was to be determined in Singapore under Singaporean law.[818] However, in the absence of such an agreement, while the Court ruled that it had jurisdiction to determine the issue of the validity of an arbitration agreement between the parties, the Court estopped the award-debtor from relying on the ground under Section 39(1)(a) as the award-debtor had participated in the arbitration proceedings, causing all parties in the proceeding to act on the basis that the award-debtor accepted the jurisdiction of the arbitral tribunal.[819]

7.3 Harmonisation in the Application of the New York Convention on Controversial Issues

To test whether there is harmonisation in the application of NYC 1958 by Contracting States, the thesis critically analyses whether there is harmonisation on the controversial issue of the recognition and enforcement of NYC 1958 awards. The harmonisation goal of the thesis is for Contracting Courts to adopt a similar application of NYC 1958, while retaining the diversity of laws of States.

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[815] ibid.
[816] *Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] (n 323).
[817] *Agrovenus LLP; Hafeez Iqbal Oil & Ghee Industries (Pvt) Ltd v Alami Vegetable Oil Products Sdn Bhd* [2018] (n 320).
[818] *Sintrans Asia Services Pte Ltd v Inai Kiara Sdn Bhd* [2016](n 297).
[819] *Agrovenus LLP* (n 273).

7.3.1 Issue 1: Whether a foreign arbitral award annulled by its supervisory court be enforced in another State?

Chapter 4 of the thesis finds that there is no harmonisation in the application of Article V(1)(e) on whether a foreign award annulled by its supervisory seat may be enforced in another State. Contracting States' courts adopted three divergent approaches on the application of Article V(1)(e) to this issue. First, the German courts adopted a territorial approach and refused to enforce annulled arbitral awards. The courts interpreted the term 'may' in Article V(1)(e) as must and recognised an annulment decision by a supervisory court. Under German law, a foreign award must be legally valid in the State where the award was made, before it is enforceable in Germany. Second, the French courts adopted a delocalised approach and consistently enforced annulled arbitral awards. The French courts relied exclusively on the application of Article VII the NYC 1958 to the award-debtor's right to avail himself of an arbitral award in the manner and extent allowed by the law and treaties entered by the enforcement State. By relying on Article VII, the French courts applied its own Code of Civil Procedure. Article 1520 of the French Code of Civil Procedure allows the enforcement of annulled awards.

Third, the Dutch, most of the US and the English courts adopted an assessment approach, whereby these courts will assess and decide on their own whether to enforce annulled arbitral awards. The courts relied on the interpretation of the word 'may' in Article V(1) which grants discretionary power to enforcement courts to decide. The Dutch Supreme Court in *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017) compared two official texts of Article V(1)(e) in English and French. The English text stipulates the provision 'may be refused … only if' whereas the French text stipulates '*ne seront refusées (...) que si*' where the general meaning indicates that the court has no discretion but must allow an application to refuse an award under Article V(1)(e). The Supreme Court interpreted Article V(1) in accordance with Article 33 of VCLT 1969 and ruled that the best interpretation that reconciles these two authentic texts is granting some discretion to the enforcement court to recognise and enforce a foreign award, even when one of more grounds available under Article V(1) arises.[820] However, such discretion is an exception to the general rule, which is to refuse the enforcement of an annulled award. This discretion only applies in exceptional cases such as where the ground for annulment

[820] *Maximov v OJSC Novolipetsky Metallurgichesky Kombinat (NMLK)* (2017) (n 515).

is not at least one of the limited grounds under Article V(1)(a)-(d), is not acceptable by international standards or is against Dutch international private law.

The thesis favours the assessment approach adopted by the Dutch, most of the US and the English courts. The thesis proposes that enforcement courts in NYC 1958 Contracting States adopt the assessment approach along with Jan Paulsson's ISA and LSA criteria as exceptions. ISAs refer to international standard annulments, where the grounds for the annulment of an award are at least one of the grounds under Article V(1)(a)-(d) of NYC 1958. Any other grounds not under Article V(1)(a)-(d) are LSAs – local standard annulments. The courts must not recognise LSAs and enforce a foreign award if the ground for annulment is not at least one of the ISAs. This position is also consistent with Article IX of the European Convention 1961. Also, Contracting States with arbitration legislation based on UML may have already adopted ISAs when acting as the supervisory seat in an annulment court proceeding.

Section 34 of UML provides that a supervisory court may only set aside an award if the award-debtor raises a challenge under at least one of the grounds under Article V(1)(a)-(d) and Article V(2)(a)-(b) of NYC 1958. While this proposal might not ensure harmonised application of Article V(1)(e) to the enforcement of annulled awards, the proposal guarantees some control to ensure that annulment decisions conform to international best practice. Also, the assessment approach is consistent with the interpretation of Article V(1)(e) in accordance with Articles 31–33 of AA 2005.

7.3.2 Issue 2: What is the position on the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement?

Chapter 5 reveals that there is no harmonisation in the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement. The English, US, Australian and Malaysian courts placed the onus of proof onto the award-debtor to prove that it was not a party to an arbitration agreement, and hence there was no valid arbitration agreement between the parties pursuant to Article V(1)(a) of NYC 1958. On the other hand, an Australian Court of Appeal ruled that the onus of proof was allocated to the award-creditor to produce evidence that the award-debtor was a party to the arbitration agreement, to satisfy the mandatory *prima facie* requirement of Article IV of NYC 1958.

The thesis proposes that enforcement courts adopt the first position, as adopted by the English, US, Australian Federal and Malaysian Courts that the award-debtor bears the onus of proving that it was not a party to an arbitration agreement pursuant to Article V(1)(a) of NYC 1958. This approach is consistent with the interpretation of NYC 1958 in accordance with Articles 31–33 of the VCLT 1969.

7.3.3 Issue 3: Whether an award-debtor's failure to challenge an award before its supervisory court precludes a challenge before an enforcement court in another State?

The thesis limited the award-debtor's *failure* to two occasions, first where the award-debtor did not raise any challenge at the supervisory seat and second, where the award-debtor failed in its previous challenge to annul the award in the supervisory seat. Chapter 6 finds that there is harmonisation on the former occasion, and no harmonisation on the latter. Where the award-debtor did not raise any challenge at the supervisory seat, the English, Australian and Malaysian courts collectively held that the failure to challenge did not preclude the award-debtor from resisting the enforcement of an award in the enforcement seat in England, Australia or Malaysia.

On the second occasion, where the award-debtor had previously failed in its challenge in the supervisory seat to annul an award, the English court held that English public policy is in favour of respecting the supervisory seat's decision. Therefore, the award-debtor is precluded from resisting enforcement of the award in the enforcement seat, upon a failure to set aside the award in the supervisory seat. In contrast, the German and US courts did not preclude the award-debtor from resisting the enforcement of an award. The German court would enforce an award which is legally valid in the State where the award was made. Thus, the supervisory seat's decision not to annul an award would not preclude a challenge in the enforcement court in Germany. Contrary to English public policy, in the *Chromalloy* case it was ruled that US public policy is in favour of the enforcement of foreign awards. Thus, a failure to challenge in the supervisory seat would not preclude a challenge in the enforcement court in the US.

As NYC 1958 is silent on this issue, the thesis presents that the best view is that the award-debtor is not precluded from resisting the enforcement of an award in the enforcing

court, upon a failure to challenge the award in the supervisory seat. The thesis adopts Harder's view that an award-debtor is not precluded from challenging in the enforcement seat, unless 1) the award-debtor had participated in arbitral proceedings but failed to raise a challenge, (2) the supervisory court finds that the award-debtor is a party to an arbitration agreement and an annulment judgment creates an issue of estoppel in accordance with the law of the enforcement State.[821] Also, the thesis argues that while the word 'may' in Article V(1)(e) does not necessarily impose a mandatory preclusion on the award-debtor's challenge in the enforcement seat, upon the existence of a 'successful' annulment decision, why should an 'unsuccessful' annulment decision bind the enforcement court? NYC 1958 only imposes minimum conditions for the enforcement of awards, and to honour the aim of NYC 1958, which is to facilitate the effectiveness of arbitration in private dispute resolution, a better view is to not impose preclusion on the award-debtor, unless he had previously participated in full at an arbitration proceeding.

7.4 Thesis Proposals

The thesis' proposals are as follows:

1. Currently, Section 39(1)(a)(vi) Malaysian AA 2005 stipulates that:

> … the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or , failing such agreement, *was not in accordance with this Act*.

As this provision is not textually harmonised with Article V(1)(d) of NYC 1958, the thesis proposes that the Malaysian government revise this provision. It is unreasonable to expect that, where arbitration was held in a State other than Malaysia, in the absence of an agreement between the parties, the composition of the arbitral tribunal or the arbitral procedure must conform to the provisions of AA 2005.

The thesis proposes to revise Section 39(1)(a)(vi) of Malaysian AA 2005 to:

> … the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or , failing such agreement, *was not in accordance with the law of the State where the arbitration took place*.

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[821] Harder (n 68) 155–159.

This revision would fulfil Malaysia's obligation, in acceding to NYC 1958, to implement the provisions of NYC 1958 as closely as possible into Malaysian domestic legislation. As Malaysia is a dualist State, the provisions of treaties entered into by Malaysia need to be transposed into implementing legislation in Malaysia. This revision would bring harmonisation in the application and implementation of Article V(1)(d) of NYC 1958 in Malaysia. Most significantly, this revision would bring Malaysia's main arbitration legislation, AA 2005, to conform to international best practice.

2. There are no reported cases on the enforcement of annulled arbitral awards in Malaysia. Should a similar case on the enforcement of an annulled arbitral award arise in Malaysia, the thesis proposes that the Malaysian court should adopt an assessment approach and assess the annulment decision of the foreign court. In the case of *Malaysian Bio-Xcell Sdn Bhd* (2020) on the application of Section 39(1)(a)(vii) of AA 2005 (implementing provision of Article V(1)(e)), the Malaysian Court of Appeal ruled that the court had discretionary power to entertain a stay or adjournment if the award-debtor successfully proved that the award was not yet binding on the parties. This case portrays that the Malaysian court interpreted the word 'may' in Section 39(1) of AA 2005 as granting discretion to the court to decide whether the award-debtor successfully raised a ground available under Section 39(1)(a)(vii).

   The thesis proposes that NYC 1958 Contracting States' courts, including Malaysia, adopt the assessment approach along with Jan Paulsson's LSA and ISA classification as exceptions. Where an award-debtor raises a defence under Article V(1)(e) that an award was annulled by its supervisory seat, Article V(1)(e) allows discretionary power for the enforcement court to decide. The thesis proposes that the enforcement court should assess an annulment decision and only recognise it if the annulment ground is at least one of the ISA grounds .

3. On the issue of the allocation of the onus of proof in relation to whether an award-debtor is a party to an arbitration agreement, the thesis proposes that the harmonised interpretation that should be adopted by the enforcement courts of

Contracting States is that the onus of proof is allocated onto the award-debtor to prove that it was not a party to an arbitration agreement. Similar to England and the US, a Malaysian court placed the onus of proof upon the award-debtor to prove that it was not a party to a valid arbitration agreement pursuant to Section 39(1)(a)(ii) of AA 2005. This approach adopted by the Malaysian court is consistent with the interpretation of Article V(1)(a) of NYC 1958 in accordance with Articles 31–33 of VCLT 1969. The thesis proposes that Malaysian courts uphold previous court decisions (see Section 5.6), should a similar issue arise again in future.

4. NYC 1958 is silent on the third controversial issue pertaining to whether an award-debtor's failure to challenge an award before its supervisory court precludes a challenge before an enforcement court in another State. The thesis proposes a view that the award-debtor should not be precluded from resisting the enforcement of an award in the enforcement state, where it has failed to challenge the award in the supervisory seat. An exception to this view is where the award-debtor had participated in the arbitration proceeding but failed to raise any challenge. This view is consistent with Article V(1)(e) which does not provide that the enforcing court is bound to follow the annulment decision of the supervisory seat. Thus, the enforcing court is not bound to follow the decision of the supervisory seat and may decide on its own if the award-debtor raises at least one of the limited grounds under Article V(1)-(2) of NYC 1958.

7.5 Future of the New York Convention 1958

NYC 1958 is one of the most successful international conventions. As the cornerstone of ICA, judges all over the world have interpreted and applied NYC 1958. For over 63 years, NYC 1958 has facilitated the enforcement of foreign awards. There are challenges to achieve harmonisation in the application of NYC 1958. However, nothing is perfect, and we must endeavour for improvement.[822] Efforts to improve the interpretation and

[822] Dimitra A Tsakiri, 'Application of the New York Convention to the Enforcement of Arbitration Agreements' (2018) 36 ASA Bulletin 364, 375 <http://www.kluwerlawonline.com/api/Product/CitationPDFURL?file=Journals%5CASAB%5CASAB2018031.pdf>.

application of NYC 1958 must be applauded and these continuous efforts can lead to gradual harmonisation in the application of NYC 1958.[823]

Scholars have proposed several possible solutions to the problem of the divergent application of NYC 1958 by its 168 Contracting States, including proposals for a new treaty replacing NYC 1958. Berg in 2009 proposed a "new New York Convention' entitled the Hypothetical Draft Convention for the International Enforcement of Arbitration Agreements and Awards.[824] For instance, his proposal to replace the controversial existing Article V(1)(e) is as follows:

> **Article 5- Grounds for Refusal of Enforcement**
>
> 1. Enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article.
> 2. Enforcement shall be refused on the grounds set forth in this article in manifest cases only.
> 3. Enforcement of an arbitral award shall be refused if, at the request of the party against whom the award is invoked, that party asserts and proves that
> (f) the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made; or
> (g) the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph.

As NYC 1958 approached its sixtieth anniversary in 2018, Marike Paulsson reflected on what a radical new dual-convention might look like to replace NYC 1958.[825] She proposed a new structure for a dual convention – where the First Convention deals with the enforcement of awards only where an award was rendered, and the Second Convention deals with the enforcement of awards in any other enforcement States.[826] The supervisory court will deal with setting aside pursuant to Article V(1), whereby the enforcing courts could only refuse the enforcement of awards subject to Article V(2).

Nonetheless, the thesis finds that the most practical solution, for now, is to strive for harmonisation in the application of NYC 1958. While 'monitoring cases, compiling

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[823] ibid.
[824] Albert Jan van der Berg, 'A Closer Look at the Proposed "New New York Convention"' (2008) 3 Global Arbitration Review 14.
[825] Marike Paulsson, 'The Future of the New York Convention in Its Most Extreme Sense: A Dual Convention That Disposes of National Setting Aside Regimes - Kluwer Arbitration Blog' (*Kluwer Arbitration Blog*, 2019) <http://arbitrationblog.kluwerarbitration.com/2018/08/15/the-future-of-the-new-york-convention/> accessed 18 May 2021.
[826] ibid.

trends and recording divergent holdings of case law is no longer enough', it is unrealistic to have a new treaty today, given the current waves of nationalism.[827] With NYC 1958 seeing new Contracting Parties every year, now more than ever, it is impractical to propose a new Convention to replace NYC 1958. Furthermore, with 118 States having adopted UML, where the provisions for the recognition and enforcement of foreign awards are in conformity, most arbitration legislation in more than half of the world conforms to the text of NYC 1958. It is thus reasonable to hold on to NYC 1958 for now and strive for harmonisation in its application by enforcement courts. As Gaillard puts it, 'there is no danger leaving the New York Convention in its current state'.[828]

[827] Paulsson and Suresh (n 380) 292.
[828] Emmanuel Gaillard, *The Urgency of Not Revising the New York Convention* (Albert Jan van den Berg ed, ICCA Congr, Kluwer Law International 2009) 692.

List of Abbreviations

AA 1952	Malaysian Arbitration Act 1952
AA 1975	English Arbitration Act 1975
AA 1996	English Arbitration Act 1975
AA 2005	Malaysian Arbitration Act 2005
Beach Civil	Beach Building & Civil Group Pty Ltd
Chi Mei	Chi Mei Corporation
China Minmetals	China Minmetals Materials Import and Export Co Ltd
CIETAC	China International Economic and Trade Arbitration Commission
CISG 1980	Convention on Contracts for the International Sale of Goods 1980
CREFA 1985	Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DKN	Dampskibsselskabet Norden A/S
GC 1927	Geneva Convention on the Execution of Foreign Arbitral Awards 1927 (also, Geneva Convention 1927)
GP 1923	Geneva Protocol on Arbitration Clauses 1923
IAA 1974	Australian International Arbitration Act 1974
ICA	international commercial arbitration
ICAC Russia	International Commercial Arbitration Court at Chamber of Commerce and Industry, Russian Federation
ICAC Ukraine	International Commercial Arbitration Court at the Chamber of Commerce and Industry, Ukraine
ICC	International Chambers of Commerce
ICCA	International Council for Commercial Arbitration
ICCA Guide	ICCA's Guide to the Interpretation of the 1958 New York Convention

ISA	international standard annulment
JVA	joint-venture agreement
JV entity	Murray & Roberts-Marine & Civil JV
KLRCA	Kuala Lumpur Regional Centre for Arbitration
LSA	local standard annulment
NGO	non-governmental organisation
MCC	Marine & Civil Construction Pty Ltd
MRAP	The Ministry of Religious Affairs, Government of Pakistan
NLC	Malaysian National Land Code
NYC 1958	Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (also, the New York Convention)
OMA	operations management agreements
Panama Convention	Panama Inter-American Convention on International Commercial Arbitration
PDA	Project Development Agreement
Pharaon	Pharaon Commercial Investment Group Ltd
PORAM	Palm Oil Refiners Association of Malaysia
Trust	Awami Haji Trust
UK	United Kingdom of Great Britain and Northern Ireland (also, United Kingdom)
UML	UNCITRAL Model Law on International Commercial Arbitration
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCITRAL Guide	UNCITRAL Secretariat Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards
REJA 1958	Malaysian Reciprocal Enforcement of Judgments Act 1958

US	United States of America
VCLT 1969	Vienna Convention on the Law of Treaties 1969
YNG	WAII & A.O. Yuganskenftegas

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Geneva Protocol on Arbitration Clauses (adopted in Geneva on 24 September 1923, entered into force on 28 July 1924) 27 LNTS 158

New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted in New York on 10 June 1958, entered into force 7 June 1969) 330 UNTS 3 No 4739

UNCITRAL 'Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006' (Amended on 7 July 2006) A/40/17 Annex I & A/61/17 Annex I

Vienna Convention on the Law of Treaties (adopted in Vienna on 22 May 1969, opened for signature on 23 May 1969, entered into force on 27 January 1980) 1155 UNTS 332 No 18232

Malaysian Legislations (available at http://www.agc.gov.my/agcportal/index.php?r=portal2/lom&menu_id=b21XYmExVUhFOE4wempZdE1vNUVKdz09)

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Arbitration Act 2005
Arbitration (Amendment) Act 1980
Arbitration Ordinance 1950
Arbitration Ordinance XIII of 1809
Arbitration Ordinance XIII 1809
Civil Law Act 1956
Competition Act 2010
Contracts Act 1950
Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985
Federal Constitution 1957
Reciprocal Enforcement of Judgments Act 1958
Rules of Court 2012

International Legislations

Australian International Arbitration Act 1974
English Arbitration Act 1950
English Arbitration Act 1975
English Arbitration Act 1979
English Arbitration Act 1996
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