Transnational Coordination of Setting Aside and Enforcement of Arbitral Awards – A New Treaty and Approach to Reconciling the Choice of Remedies Concept, the Judgment Route, and the Approaches to Enforcing Awards Set Aside?

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The rendering of a final arbitral award can be the starting signal for a multiplicity of state court proceedings. Not all of those will be illegitimate, for instance if an award creditor needs to commence several enforcement proceedings in order to enforce the whole award. More critical, however, and more likely to invite abuse, is the relationship of setting aside and enforcement. Where an award debtor fails to request that an award be set aside, or fails to raise grounds for setting aside, or loses setting aside proceedings, should this award debtor be allowed to rely on those very same grounds again in subsequent enforcement proceedings? Or in turn, if the award is set aside, should the award creditor be allowed to enforce it? All this raises questions of how to coordinate setting aside and enforcement. While coordination mechanisms exist under domestic law, it is submitted that coordination at the transnational level leaves much to be desired. We will therefore take critical inventory of the current level of coordination at the domestic and the New York Convention level, assessing its respective strengths and weaknesses, also in light of well-known doctrines such as the choice of remedies concept and the judgment route. We will then propose wording for a new international treaty, complementing the New York Convention, to improve coordination of setting aside and enforcement and discuss the feasibility of such a project.

Keywords: Annulment, Choice of remedies, Enforcement, Forum shopping, Good faith, Judgment route, New York Convention, Reform, Res judicata, Setting aside

Any arbitral award, regardless of how carefully the tribunal operated, can become the object of state court proceedings. The award debtor may request a state court proceeding.
to set aside the award, or he may simply refuse to voluntarily comply with it, in turn leaving the award creditor no choice but to seek judicial enforcement in state courts. The ensuing potential multiplicity of court proceedings risks resulting in a plethora of contradictory decisions.\footnote{Many have made this observation before, see e.g. with further references, Jean-François Poudret, Conflits entre juridictions étatiques en matière d’arbitrage international ou les lacunes des Conventions de Bruxelles et Lugano, in Festschrift für Otto Sandrock zum 70. Geburtstag 761, passim (Otto Sandrock & Klaus Peter Berger eds, Verlag Recht und Wirtschaft, Heidelberg 2000). Also mindful of this problem, more recently, Yoshimi Ohara & John Lane, Allocation of Competence Between a National Court and an Arbitral Tribunal: Striking a Balance Between Efficiency and Legitimacy of Arbitration – Asian Perspectives, in 20 Evolution and Adaptation: The Future of International Arbitration: ICCA Congress Series 361, 376 (Jean Engelmayer Kalicki & Mohamed Abdel Raouf eds, Kluwer Law International 2019).}

A multiplicity of court proceedings is of course not illegitimate in itself. If an award debtor has insufficient assets in one jurisdiction, the award creditor must be able to commence enforcement proceedings elsewhere. Some of the resulting enforcement decisions may contradict others, but this is of little consequence as long as the award creditor is ultimately able to enforce the whole award, and the award debtor, having lost the arbitration, has no valid reason to complain about the creditor’s enforcement attempts. Thus, there seems to be no pressing practical need for further coordinating multiple enforcement proceedings. Coordinating enforcement proceedings is in any event difficult, as there is no ‘natural’ starting point or point of reference. No enforcement authority is superior to any other. Any enforcement authority in any of the jurisdictions in which the award debtor has assets is equally legitimised to enforce the award. Therefore, we will not deal with the coordination of enforcement proceedings relating to arbitral awards in too much detail.

The situation is different, however, as regards the potential role of enforcement authorities versus the role of setting aside authorities, i.e. usually the courts at the seat (of arbitration)\footnote{We follow the terminology of a leading commentary on the New York Convention, see Reinmar Wolff & Bernd Ehle, New York Convention para. 99 ad Art. I (2d ed., Reinmar Wolff ed., Beck 2019). As alternatives, ‘seat of the arbitral tribunal’ or ‘place of arbitration’ are often used.}.\footnote{Compare in detail infra n. 27.} The ‘competent authority of the country in which, or under the laws of which, [an] award was made’ (Article V(1)(c) of the New York Convention (NYC) or ‘Convention’\footnote{1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards; currently 165 signatory states.}), i.e. the courts at the seat, is granted, as per the structure of the NYC as well as that of most modern arbitration laws, (some) prominence amongst all the state courts potentially dealing with arbitral awards. The question therefore arises whether potential decisions in the context of setting aside proceedings (by the courts at the seat) and enforcement proceedings can and should be coordinated in favour of the setting aside decisions – as the parties’ agreement to arbitrate could be said to include, at least implicitly, the recognition
of the corresponding somewhat prominent role of the courts at the seat. It is submitted, and further developed in the following, that multiple court proceedings that ignore or violate such an agreement are to be considered prima facie illegitimate, and better coordinating setting aside and enforcement in order to discourage such multiple court proceedings would be an improvement over the status quo.

While domestic courts can always attempt to review arbitral awards, i.e. there is little hope to reduce the potential multiplicity of court proceedings, it might be possible to reduce the risk of contradictory decisions by coordinating the outcome of such court proceedings – thereby discouraging, indirectly, the commencement of multiple court proceedings for no good reason in the first place. For if all relevant state courts, i.e. the setting aside and potential enforcement courts, are likely to decide in a similar way, the award debtor’s rights can still be protected, but there is less incentive for approaching those courts multiple times and for illegitimate reasons.

Coordinating and harmonizing the outcome of judicial proceedings across jurisdictions is of course an age-old ideal of private international lawyers. The importance of this topic for the overall effectiveness and efficiency also of commercial arbitration was not lost on courts and arbitration scholars either. Yet the concepts discussed, and the level at which they are supposed to be employed, often remain unclear (infra section 1).

Probably the most notorious topic in the present context is whether awards set aside at the seat may or should be enforced abroad. More generally, authors discuss whether any court decision relating to arbitral awards – what some call ‘award judgments’ – have, or should be given, effect in foreign jurisdictions, a result potentially achieved via the so-called ‘judgment route’ (through the application of rules otherwise applied to the recognition and enforcement of foreign state court decisions on the merits). Both attempts at coordinating setting aside and enforcement require that at least one state court decision has been rendered.

5 See only Christian von Bar & Peter Mankowski, Internationales Privatrecht I: Allgemeine Lehren § 2.98 (2d ed., Beck 2003), attributing the development of this ideal to Friedrich Carl von Savigny, one of the most eminent nineteenth-century German scholars of private international law; compare Sagi Peari, The Foundation of Choice of Law xx (Oxford University Press 2018), with references.


7 Scherer, supra n. 6, at 590.
Building on these analyses, we suggest going even further and discussing whether and how setting aside and enforcement of arbitral awards are coordinated generally at a transnational level – regardless of whether a state court decision has been rendered yet.

We distinguish three scenarios: enforcement is sought to be opposed without prior setting aside proceedings having taken place (Scenario 1, infra section 2); enforcement is sought to be opposed although a request for setting aside was unsuccessful (Scenario 2, infra section 3); and enforcement is sought to be opposed after successful setting aside proceedings, i.e. subsequent to an award being set aside (Scenario 3, infra section 4).

Coordinating and harmonizing the outcome of judicial proceedings across jurisdictions is most easily achieved through the definition and application of uniform rules, like those in the NYC. Yet, as we will demonstrate in the following, the NYC does not provide a comprehensive basis for coordinating setting aside and enforcement. Using it to that effect creates more problems than it solves. We therefore suggest a new treaty – if not on a global than at least on a regional level, such as within the framework of European Union (EU) law (infra section 5).

1 ATTEMPTS AT DISCOURAGING THE COMMENCEMENT OF MULTIPLE COURT PROCEEDINGS

Coordinating the outcome of setting aside and enforcement, in order to discourage the commencement of corresponding multiple court proceedings for illegitimate reasons, requires harmonizing procedural duties as well as the effectiveness of the resulting decision(s) (infra 1.1). Many domestic laws address these issues, although it appears that effective coordination is achieved primarily in purely domestic cases (infra 1.2). Effective coordination at the transnational level will require more creative thinking, to be developed in the subsequent sections.

1.1 MECHANISMS TO COORDINATE

If the outcome of (potential) setting aside and enforcement proceedings is to be coordinated effectively, procedural duties and the effectiveness of the resulting decisions must correlate.

Looking at it from the perspective of procedural duties, the question is whether the award debtor is obliged to actively request the setting aside of the
award, or else be precluded\(^8\) from raising certain defences in an enforcement context. If enforcement authorities prevent the award debtor from raising (again) defences he can raise, or could have raised,\(^9\) in setting aside proceedings, this would to a very large degree and automatically (albeit for the most part negatively) coordinate the outcome of setting aside and enforcement.

Looking at it from the other end, it must also be discussed whether, in case the award debtor actually did request the setting aside, the resulting (favourable or non-favourable) decision has an impact on subsequent decision(s), i.e. those to be rendered by enforcement authorities.\(^10\) For, only to the extent that it does have such impact will the outcome of setting aside and enforcement be (in this case positively) coordinated. And only if it does have such impact, is it justified initially to oblige the award debtor to request setting aside.

In order to discourage multiple court proceedings and increase the efficiency and foreseeability of the dispute resolution process, setting aside and enforcement must therefore be coordinated irrespective of whether a decision has been rendered. The award debtor needs to know whether it is preferable or even necessary to request setting aside, or whether such a request (only) risks precluding the award debtor from raising certain defences in enforcement proceedings.\(^11\)

### 1.2 Comprehensive Domestic Rules and Transnational Chaos?

If setting aside and enforcement potentially occur within the same jurisdiction, what we will refer to as ‘purely domestic cases’, a comprehensive coordination of these types of proceedings is nowadays state of the art in many jurisdictions, as we will briefly recollect in the following,\(^12\) notwithstanding the fact that the details of such coordination may sometimes be unclear or in flux, as the recent and much-noted decision from Singapore in *Rakna Arakshaka Lanka Ltd. v. Avant Garde Maritime Services (Private)* Ltd.\(^13\) demonstrates.\(^14\)

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\(^8\) Currently, the general view is that preclusion may either result from a disapproval of a party’s behaviour or from the fact that a court has already decided an issue, i.e. the application of some form of res judicata concept, see s. 2 and 3 infra.

\(^9\) There are often time limits for requesting the setting aside of an award. Once these time limits have expired, setting aside proceedings are no longer possible. For further details see 2.1 infra.

\(^10\) Compare, generally, Poudret & Beson, *supra* n. 6, § 947. For further details see ss 3 and 4 infra.


\(^12\) See in detail 2.1 and 3.1 infra.


\(^14\) Compare for a discussion of this case Albert Monichino, *The Problem with Rakna: The Scope of the Preclusive Effect of Article 16(3) of the Model Law*, 31 SAcLJ 349 passim (2019); Ohara & Lane, *supra* n. 1, at 369–371.
Domestic law coordinates setting aside and enforcement by defining in which proceedings a party may rely on which type of defences, and under what circumstances, and when this party is precluded from doing so. This form of coordination of setting aside and enforcement is justified with the goal of procedural economy. Achieving effective coordination at a domestic level is feasible, inter alia, because it usually involves only the procedural provisions and courts of one jurisdiction.

In what we will call ‘transnational cases’, however, i.e. in cases where setting aside and enforcement take place in different jurisdictions, their comprehensive and, most importantly, universal coordination is, at present, difficult if not impossible to achieve. Illustrative of this difficulty were several related cases from Hong Kong, decided together in PT First Media TBK v. Astro Nusantara International B.V., also referred to as the ‘Astro saga’. The Astro saga, and the desideratum of a more coherent coordination of setting aside and enforcement in a transnational context, led commentators to intensively discuss the so-called ‘choice of remedies doctrine’. While the objective of coordination can only be lauded, we submit that the doctrine itself is not a novel or distinct concept but simply a new label for debating how to achieve transnational coordination of setting aside and enforcement.

The main difficulty with achieving full and uniform coordination of setting aside and enforcement at a transnational level appears to be the absence of one single legal instrument that could provide the basis for such coordination. We will further illustrate this diagnosis in the subsequent sections. In the vast majority of jurisdictions, enforcement of foreign arbitral awards is subject to the NYC.

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15 For a detailed overview and analysis see 2.1 infra.
16 See e.g. Swiss Federal Tribunal, judgment of 20 June 2017, 143 III 462, c. 3.2.1.
19 As the ‘choice of remedies’ concept is usually understood, it refers to the question of whether a request for setting aside at the seat is a prerequisite for opposing enforcement abroad, i.e. whether the award debtor has the unfettered choice between the active remedy of set aside and the passive remedy of opposing enforcement; see e.g. Er, Hsu & Vickneson, supra n. 11; Monichino, supra n. 18, at 7–8; Poon, supra n. 18; Ye, supra n. 18, at 378.
20 For a detailed overview and analysis see 2.3[a][i] infra.
NYC, as a multilateral convention, only harmonizes the recognition and enforcement of (foreign) arbitral awards. It mentions setting aside in this context without, however, fully harmonizing how the signatory states to the NYC (the ‘Contracting States’) must deal with it. Rather, the NYC leaves it to the Contracting States (‘may’\textsuperscript{21}) to define the exact role that prior setting aside proceedings, or a lack thereof, play in (subsequent) enforcement proceedings. The NYC thus explicitly opens the door to further coordination of recognition and setting aside on the domestic level. However, it refrains from prescribing any specific solution.\textsuperscript{22} Therefore, as a tool for coordinating setting aside and enforcement at a transnational level, i.e. leading to an identical solution in all the Contracting States’ domestic laws, the NYC is of a very limited use, although some have indeed tried to instrumentalize it to that effect, as we will see in the following.\textsuperscript{23}

In addition, transnational coordination of a multiplicity of (potential) court proceedings requires various states to trust one another’s judiciary, which is not a given and would necessitate possibly wide-ranging safeguards. Transnational coordination needs to balance state interests and the parties’ interests, and there may be tensions between the two.\textsuperscript{24}

Domestic law may unilaterally refer to and build on what did or did not happen abroad.\textsuperscript{25} From the perspective of this specific jurisdiction, (foreign) setting aside and (domestic) enforcement could be fully coordinated.\textsuperscript{26} However, this does not lead to a uniform approach at a transnational level. Other jurisdictions, in which enforcement is sought, might decide differently. This is why we must carefully distinguish coordination of purely domestic cases and coordination of transnational cases.

\textsuperscript{21} Compare Art. V(1)(e) (s. 4 infra) and Art. VI regarding a pending request for setting aside. We will not examine the latter provision as the coordination of pending setting aside and transnational enforcement proceedings is beyond the scope of this article.

\textsuperscript{22} See more generally, Gerold Herrmann, Does the World Need Additional Uniform Legislation on Arbitration?, in Arbitration Insights: Twenty Years of the Annual Lecture of the School of International Arbitration: Sponsored by Freshfields Bruckhaus Deringer § 13, § 13.95 (Julian D. M. Lew & Loukas A. Mistelis eds, Kluwer Law International 2007): Art. V(1) NYC ‘addresses exclusively the situation where none of the grounds exist … in which case the judge must or shall enforce’, but the NYC is ‘silent on whether, if a ground exists, enforcement shall be refused or whether there remains discretion to enforce the award nevertheless’.

\textsuperscript{23} See 2.3, 3.5, and 4.1 infra.

\textsuperscript{24} See 5.2[a] infra.


\textsuperscript{26} For such proposals under German law see Stefan Kröll, Die Präklusion von Versagungsgründen bei der Vollstreckbarkeitsverkündung ausländischer Schiedsentscheidungen (OLG Karlsruhe, S. 455 and OLG Düsseldorf, S. 456) IPRax 430, 434–437 (2007); Patrizio Santomauro, Eine Analyse der Kehrtwende in der Präklusionsrechtprechung des BGH – Öl für ein erloschernes Feuer?, 14 SchiedsVZ 178, 183–188 (2016).
In turn, and to briefly summarize the following analysis, to the extent that there is no specific coordination of setting aside and enforcement, the starting point is straightforward, namely, that whatever is not prohibited must be allowed. A party may freely choose between setting aside and enforcement according to the rules applicable to either of them. A party may raise whatever defence it chooses in whatever type of proceedings. Some consider this unsatisfactory and discuss whether general principles, such as good faith or estoppel, limit this choice. The merits and validity of these considerations depend on the Scenario examined. We will now turn to the three Scenarios in detail.

2 ‘SNOOZE’ SCENARIO 1: OPPOSING ENFORCEMENT WITHOUT PRIOR REQUEST TO HAVE THE AWARD SET ASIDE

In Scenario 1, the award debtor resists enforcement while never having requested that the award be set aside. As the American saying goes, ‘if you snooze you lose’. But is this also the case where award debtors fail to initiate setting aside proceedings and subsequently wish to resist enforcement? Should it be the case?

At first sight, Scenario 1 might not seem to raise issues of coordination of setting aside and enforcement. As there was no setting aside request prior to enforcement, no award judgment has been rendered. No coordination of the enforcement authorities’ decision with that of another (foreign) state court is necessary (leaving aside the possible coordination of various enforcement decisions, which involves different policy considerations and is, as explained in the introduction, beyond the scope of this article). Yet the question arises whether precisely the lack of setting aside proceedings at the seat – and it is, in the logic of most modern arbitration laws, only the courts at the seat that are competent to set aside an award27 – has any impact on the enforcement proceedings abroad.

In order to discourage multiple proceedings with the, sometimes illegitimate, purpose of obstructing the enforcement of the award, setting aside and enforcement must be coordinated irrespective of whether setting aside and enforcement proceedings actually occur, i.e. the procedural rules defining whether and how

both types of proceedings may be initiated must be coordinated irrespective of whether the parties will rely on them in a particular case.

Courts and commentators have developed differing approaches for purely domestic (infra 2.1) and transnational (infra 2.2) cases. Some have sought to use the NYC as a basis for coordination, although, it is submitted, those attempts are insufficient (infra 2.3).

2.1 Comparative analysis (1): Coordination in domestic law regarding purely domestic cases

A review of various domestic laws reveals that domestic statutes, case law, and scholarly opinion provide different but usually comprehensive coordination mechanisms dealing with purely domestic cases falling under the ‘Snooze’ Scenario 1. A full comparative assessment is beyond the scope of this article. We shall, however, give a few key examples.

Under section 66(3) of the English Arbitration Act 1996, leave to enforce an award shall not be given where the award debtor shows that the tribunal lacked substantive jurisdiction. Yet there may no longer be a right to raise such an objection only and for the first time at the enforcement stage. In particular, if a tribunal rules that it has substantive jurisdiction, a party failing to challenge such ruling may no longer invoke a lack of the tribunal’s substantive jurisdiction in enforcement proceedings (section 73(2)).

Pursuant to section 1060(2)(3) of the German Code of Civil Procedure (CCP), dealing with the enforcement of domestic (German) awards, grounds for setting aside other than arbitrability and public policy shall not be taken into account in enforcement proceedings if the time limit for requesting the setting aside has expired. This provision does not always necessitate that setting aside proceedings be initiated. If the time limit for requesting setting aside has not expired, the court would simply refuse enforcement while at the same time setting aside the award (German CCP, section 1060(2)(1)). However, the award debtor faces a risk. If the creditor delays enforcement until after the time limit for setting aside has expired, the award debtor is precluded from raising certain grounds.

Under Swiss law, there is no explicit statutory provision coordinating setting aside and enforcement of domestic awards. Yet it is undisputed that a party is precluded, once the time limit for requesting the setting aside of an award has

\[\text{But compare more generally Federal Act on Debt Enforcement and Bankruptcy (SchKG), Art. 81; Swiss Code of Civil Procedure (Swiss CCP), Art. 341(3).}\]
expired, from raising objections in enforcement proceedings that it could have raised in setting aside proceedings.\footnote{Swiss Federal Tribunal, judgment of 9 Dec. 2003, 130 III 125, c. 2.1.1; Bernhard Berger & Franz Kellerhals, International and Domestic Arbitration in Switzerland § 2014 (3d ed., Stämpfli 2015); Daniel Girberger & Nathalie Voser, International Arbitration: Comparative and Swiss Perspectives § 1777 (3d ed., Schulhess 2016); Stefanie Pfisterer & Anton K. Schnyder, Internationale Schiedsgerichtsbarkeit: In a nutshell 171 (Dike 2010); Poudret & Besson, supra n. 6, § 943; Daniel Staehelin, in Basler Kommentar Bundesgesetz über Schuldbetreibung und Konkurs para. 8 ad Art. 81 SchKG (2d ed., Daniel Staehelin & Thomas Bauer eds, Helbing Lichtenhahn 2016).}

For Singapore law, the leading case on the coordination (or rather lack thereof) of setting aside and enforcement of domestic awards is \textit{PT First Media TBK (formerly known as PT Broadband Multimedia TBK) v. Astro Nusantara International B.V. and others and another appeal}.\footnote{[2014] 1 S.L.R. 372, [2013] S.G.C.A. 57, para. 132.} The Singapore Court of Appeal held that parties electing not to challenge a tribunal’s preliminary ruling on jurisdiction, i.e. who fail to request the setting aside of a separate award on jurisdiction, are not thereby precluded from raising the tribunal’s lack of jurisdiction as a defence in the context of enforcement. The decision was only recently followed in \textit{Rakna Arakshaka Lanka Ltd. v. Avant Garde Maritime Services (Private) Ltd.}, where the High Court and the Court of Appeal held that requesting a setting aside of an award rendered in Singapore is not a prerequisite for resisting its enforcement in Singapore.\footnote{Rakna Arakshaka Lanka Ltd. v. Avant Garde Maritime Services (Pte) Ltd. [2018] S.G.H.C. 78; confirmed in this respect (although overturned with regard to an aspect unrelated to the present analysis) by the Singapore Court of Appeal in \textit{Rakna Arakshaka Lanka Ltd. v. Avant Garde Maritime Services (Pte) Ltd.} [2019] S.G.C.A. 33.}

In contrast, Hong Kong seems to be an example of a jurisdiction without an established approach to coordination for purely domestic cases falling under the ‘Snooze’ Scenario 1. Yet the Hong Kong courts had ample opportunity to rule on coordination in \textit{transnational} cases.\footnote{See in detail 2.2, 3.2, and 3.4 infra.} It is likely that they would follow a similar approach in purely domestic cases, i.e. that they would not require the award debtor to request a setting aside of the award prior to resisting enforcement.

\section*{2.2 Comparative analysis (2): Coordination in domestic law regarding transnational cases}

Contrary to these often comprehensive solutions for purely domestic cases, many jurisdictions lack at least detailed statutory provisions for coordinating setting aside and enforcement if there was never any request for setting aside abroad.

When regulating the enforcement of foreign awards, many domestic laws simply refer to the NYC. Examples include sections 100–104 of the English
Arbitration Act 1996, Part III of the Singapore International Arbitration Act 2002, Articles 87–91 of the Hong Kong Arbitration Ordinance, section 1061 of the German CCP, and Article 194 of the Swiss Private International Law Act (PILA). This is unfortunate in the present context because, as already mentioned, the NYC opens the door to further coordination (‘may’) but leaves it to the Contracting States to specify how exactly coordination will take place. While more detail is provided on the enforcement procedure itself, we have not found any statutory provisions relating precisely to the issue of the coordination of (domestic) enforcement and (foreign) setting aside. Yet a number of court decisions, in both common law and civil law jurisdictions, have tried to fill this void.

For instance, Hong Kong courts have frequently held, with the Court of Final Appeal in the Astro Saga eventually confirming this approach, that requesting the setting aside of an award abroad is not a prerequisite for resisting enforcement in Hong Kong. The award debtor may choose between the active (setting aside) and the passive remedy (resisting enforcement). The UK Supreme Court and the Swiss Federal Tribunal came to the same conclusion. The position under German law is now identical also.

2.3 Applying the NYC?

Although domestic rules, in particular case law, regarding the coordination of setting aside and enforcement in transnational cases may seem uniform to some extent, at least those referred to above, there is no guarantee for full and worldwide harmonization (as a reminder: the position under German law was different until

53 See 1.2 supra.
56 Swiss Federal Tribunal, judgment of 4 Oct. 2010, 4A_124/2010, c. 6.3.3.1.
57 BGH [German Supreme Court], judgment of 16 Dec. 2010, III ZB 100/09. In this decision, the BGH reversed its previous position of requiring a request for setting aside abroad; on which see BGH [German Supreme Court], judgment of 7 Jan. 1971, VII ZR 160/69 c. 3. For an extensive discussion see Christian Steger, Die Präklusion von Versagungsgründen bei der Vollstreckung ausländischer Schiedsprüche: Eine Untersuchung im Rahmen des New Yorker Übereinkommens 117–135 (Mohr Siebeck 2015); Rolf A. Schütze, Der Abschied von der Präklusionsrechtsprechung bei der Anerkennung ausländischer Schiedsprüche RfW 417 passim (2011).
very recently). Could the NYC provide a solution? Indeed, scholars and courts have tried to read uniform solutions into this treaty, relying on the concepts of good faith (infra 2.3[a]) or res judicata (infra 2.3[b]).

2.3[a] Measuring the Award Debtor’s Behaviour Against a Standard of Good Faith?

The first and most often invoked concept for coordinating setting aside and enforcement is the principle of good faith, sometimes discussed also under the label ‘estoppel’ or (implicit) ‘waiver’. The idea, in a nutshell, is to take into account the award debtor’s behaviour rather than a (non-existing) foreign award judgment, and to measure this behaviour against a standard of good faith (infra (i)). However, the concept of good faith is not universally, let alone uniformly accepted (infra (ii)). The NYC provides little basis for resorting to good faith in the present context (infra (iii)).

2.3[a][i] Concept of Good Faith and the Basis for Its Application

When discussing the concept of good faith, we must distinguish its possible content from the basis for its application.

As for the content, some allege that a party may, due to considerations of good faith (or estoppel in common law jurisdictions), be precluded from resisting enforcement if this party has not previously attempted to have the award set aside. The underlying rationale is that the award debtor might, by failing to request setting aside but then resisting enforcement, unjustifiably behave in a contradictory way and thereby create false impressions. Yet a significant number of scholars and courts remain sceptical of this proposal in general. To the extent that there is no express obligation to request setting aside, not requesting setting aside cannot, or so these authors argue, create any false impressions, and, as a consequence, there should be no preclusion of the award debtor due to the principle of good faith. While some use no specific label

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38 See e.g. Einhorn, supra n. 6, at 64; Monichino, supra n. 18, at 8–9.


for this conclusion, or simply refer to it under the general good faith discussion, others rely on the ‘choice of remedies concept’ and argue that the choice between an active and a passive remedy is compatible with good faith.\textsuperscript{41} For this last group, good faith may only provide certain limits to the reliance on the choice of remedies concept.\textsuperscript{42}

As for the basis of application of the principle of good faith, some commentators submit that good faith is an inherent principle of the NYC also with regard to the coordination of setting aside and enforcement.\textsuperscript{43} Others contend that the principle of good faith is part of domestic law, and that it is therefore for domestic law to decide whether an award debtor risks preclusion if failing to challenge an award.\textsuperscript{44} A third group agrees with the first that the notion of good faith, in the form of a prohibition of \textit{venire contra factum propium}, is an inherent principle of the NYC. However, this third group considers that the NYC contains, with regard to the coordination of setting aside and enforcement more specifically, a lacuna. It would be for domestic law to fill this lacuna,\textsuperscript{45} which is in essence the result advocated for also by the second group.

We will now briefly assess these arguments.

\textbf{2.3[a][ii] Critical Assessment (1): No Universally Accepted Standard of Good Faith Available}

We submit that, independent of the content and correct interpretation of the NYC, relying on a general principle of good faith is not a viable approach for

\textsuperscript{41} Furlong, \textit{supra} n. 40; Ohara & Lane, \textit{supra} n. 1, at 366; Poon, \textit{supra} n. 18; Rashda Rana, \textit{The Enforceability Of Awards Set Aside At The Seat: An Asian And European Perspective}, 40 Fordham Int’l L. J. 813, 828 (2017).

\textsuperscript{42} See for a particularly instructive remark on this point \textit{Astro Nusantara Int’l B.V. & others v. Pt Ayunda Prima Mita & others CACV 272/2015} (5 Dec. 2016), para. 69.


\textsuperscript{45} Kröll, \textit{supra} n. 26, at 431–432, 434; Joachim Münch, in \textit{3 Münchener Kommentar zur Zivilprozessordnung: ZPO} para. 13 ad § 1061 CCP (5th ed., C. H. Beck 2017); Van den Berg, \textit{supra} n. 40, at 270. In any event, it remains unclear whether national preclusion concepts are to be based on the principle of good faith, res judicata, or on no specific principle.
coordinating setting aside and enforcement in a uniform manner at the transnational level, for at least two reasons.

First, as a matter of fact, there is no universal consensus on the precise content of a general principle of good faith. Some common law jurisdictions, such as England and Singapore, remain sceptical of a good faith approach, or at least reject it as a general overriding principle, although it may be relevant for certain types of contracts. Civil law jurisdictions are more receptive to an overriding principle of good faith, as are other common law jurisdictions such as Australia and Canada, but the precise content of this principle is not uniform.

Second, the argument of invoking good faith in order to limit a party’s choice as to whether to seek setting aside or resist enforcement is often made in a circular way and therefore amounts to a mere *petitio principii*. Not requesting setting aside can violate the principle of good faith only if – as part of the good faith concept – there is already an inherent duty (or, more precisely, an incumbency) to request setting aside first, or a legally protected interest of the other party to have setting aside be requested. Quite often, invoking good faith in the present context amounts to nothing more than to require such a duty (incumbency) or interest in the first place.

2.3[a][iii] Critical Assessment (2): No Relevant Basis for Good Faith in the NYC

We submit that an interest worthy of protection would require that enforcement courts recognize (foreign) setting aside decisions. Else setting aside would have to be requested merely for the sake of it, without any possible impact on enforcement and thus without advancing the ultimate resolution of the parties’ dispute (which is the purpose of invoking good faith or estoppel in the present context). Under the


69 By ‘incumbency’ (Obliegenheit) we mean that there is no strict obligation to seek setting aside first in the sense that if setting aside is not sought the respective party would be in default and potentially liable. Rather, the respective party may do as it pleases but potentially faces the risk of losing something (in this case: being able to resist enforcement in another jurisdiction) – which it may still freely choose to do.
NYC, this decides the debate against invoking good faith in order to coordinate setting aside and enforcement. As Article V(1)(e) NYC signals, precisely such recognition of the foreign setting aside decision is not guaranteed. In case the award is set aside, the court requested to enforce ‘may’ refuse enforcement, without further ado. But, in view of this wording ‘may’, it need not, from the perspective of the NYC, necessarily do so. This is also the approach an increasing number of jurisdictions follows, at least all those which have ultimately recognized and enforced awards that had been set aside at the seat, therefore rejecting the view of some commentators who, in essence, read ‘may’ as ‘must’. Thus, under the NYC regime, a decision granting set aside does not necessarily have a binding effect abroad. There is also nothing in the NYC to suggest that a decision not granting set aside must be treated differently. As the NYC therefore neither directly nor indirectly imposes any duty (incumbency) to request setting aside, the opposing party has no interest worthy of protection that setting aside be requested first. This means that failing to request set aside cannot violate any duty (incumbency). Therefore, it cannot be contrary to any principle of good faith under the NYC. Domestic law may (!) impose such a duty (incumbency), but such solution would, by definition, not be uniform transnationally. The view of those seeing a lacuna in the NYC with regard to a preclusive effect of (non-existent) setting aside proceedings is correct.

Good faith or estoppel have been used also to coordinate arbitral proceedings and enforcement proceedings, but this is a different issue. It does not concern the relationship between (omitted) setting aside and enforcement proceedings.

Finally, reading a principle of good faith incumbent upon private parties into the NYC for the purpose of coordinating setting aside and enforcement would have to be reconciled with the NYC’s subjective scope of application.

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50 See in detail s. 4 infra.
52 When discussing the concept of good faith in the present context, some state that it would be sufficient that a party object to an alleged defect during the arbitral proceedings, see Paulsson, supra n. 44, § 6.01 (E); Swiss Federal Tribunal, judgment of 4 Oct. 2010, 4A_124/2010, c. 6.3.3.1; China Nanhai Oil Joint Service Corp. Shenzhen Branch v. Gee Tai Holdings Co. Ltd. [1994] 3 H.K.C. 375, HCMP 2411/1992 (13 July 1994). Yet the issue of whether alleged defects must be raised with the arbitral tribunal, and may otherwise not be relied upon in front of state courts, has nothing to do with the issue of coordinating setting aside and enforcement in front of various state courts. We therefore leave this debate to one side.
53 Van den Berg, supra n. 40, at 270.
The NYC is an international treaty. It obliges states (the Contracting States), not individuals. Even if the NYC contained any rule of coordination of setting aside and enforcement, and any kind of obligation of good faith and estoppel in this respect, the parties to an arbitration agreement would not be directly bound by it. If anything, individuals could be obliged by domestic law ratifying and/or transposing the NYC into domestic law. While such approach would be compatible with Article VII NYC,\(^{54}\) it would, strictly speaking and as concerns the parties, no longer be an obligation of good faith under the NYC.

In any event, preclusion solutions applying a principle of good faith or estoppel can relate exclusively to grounds mentioned in Article V(1), not those in Article V(2) NYC (arbitrability and public policy). The setting aside court cannot possibly rule on issues of arbitrability and public policy of a yet unknown (foreign) enforcement jurisdiction. Therefore, with regard to these defects, the principles of good faith and estoppel would be irrelevant in any case, since the award debtor cannot be blamed for not having attacked the award in one jurisdiction on the basis of arguments relating to another.\(^{55}\)

2.3[b] Treating Foreign Decisions as Res Judicata?

The other concept often invoked when discussing mechanisms to coordinate setting aside and enforcement is res judicata. Whenever two or more decisions require coordination, (objective)\(^ {56}\) res judicata is used to prevent parties from relitigating issues already decided previously with binding effect.\(^ {57}\)

Res judicata leads to a preclusive effect in two ways.\(^ {58}\) Either the earlier decision has preclusive effect because an issue has already been decided (within the same cause of action); or it has preclusive effect because an issue was not but could have been decided. The latter aspect is also known, in common law jurisdictions, as abuse of process estoppel. A party is precluded, in subsequent proceedings, from raising arguments that it did not but could have, with reasonable diligence, put forward in prior proceedings, provided that raising them

\(^{54}\) Similarly Hovaguimian, supra n. 6, at 97–99.


\(^{56}\) This aspect determines what substantive issues the res judicata effect covers, as opposed to the question of which party is bound; compare Manzur Eskandari & Nicole Schmitt, Grundriss des Zivilprozessrechts §§ 309–313 (C. F. Müller 2012); Swiss Federal Tribunal, judgment of 3 Nov. 1998, 125 III 8, c. 2–3.


\(^{58}\) For a comparison of the res judicata concepts in civil and common law jurisdictions see 3.5[a][ii] infra.
subsequently constitutes abuse.\footnote{Johannes Landbrecht, \textit{Teil-Sachentscheidungen und Ökonomie der Streitbeilegung} 150–151 (Mohr Siebeck 2012).} This principle was established in \textit{Henderson v. Henderson}.\footnote{\textit{Henderson v. Henderson} (1843) 3 Hare 100. The English courts subsequently developed this principle further and limited its scope, with \textit{Johnson v. Gore Wood & Co.} [2002] 2 A.C. 1 ultimately holding that a preclusive effect only occurs if the subsequent reliance on legal arguments that could have been raised in previous proceedings amounted to an ‘unjust harassment’ of the other party.}

The concept of res judicata thus coordinates proceedings indirectly, by defining what arguments the parties may rely upon after (not) having raised them previously. Invoking such concept of an abuse of process estoppel, some therefore argue that the lack of setting aside proceedings might have a preclusive effect on subsequent enforcement proceedings.\footnote{Compare for such proposals Renato Nazzini, \textit{Remedies at the Seat and Enforcement of International Arbitral Awards: Res Judicata, Issue Estoppel and Abuse of Process in English Law}, 7 Contemp. Asia Arb. J. 139, 155–157 (2014).}

However, we submit that neither of the preclusive effects of res judicata is suitable to achieve coordination of setting aside and enforcement in the ‘Snooze’ Scenario 1.

There is no reasonable basis for applying this concept with regard to its first preclusive effect. As just outlined, a prerequisite is the identity of the causes of action in both proceedings. Yet in Scenario 1, there is no decision rendered by any state court at the seat.

There may be more reason for applying the second preclusive effect of res judicata, i.e. some kind of \textit{Henderson} principle (or a civil law version of it, such as preclusion). Nevertheless, we submit that such approach would overstretch the \textit{Henderson} principle,\footnote{However, at least Nazzini, supra n. 61, at 155–157 sees a potential abuse of process in resisting enforcement when there was no setting aside request.} in particular in light of the recent, more restrictive, approach taken by the English courts in \textit{Johnson v. Gore Wood}.\footnote{\textit{Johnson v. Gore Wood & Co.} [2002] 2 A.C. 1, according to which an abuse requires that the second proceedings constitute an \textit{unjust harassment} to the other party. Compare in more detail Landbrecht, supra n. 59, at 154–156.} Not requesting setting aside but then resisting enforcement cannot be considered an ‘unjust harassment’ of the award creditor. There is a fundamental difference between failing to raise arguments in the context of proceedings in which they could have easily been raised, which might justify invoking an abuse of process estoppel, and not initiating (setting aside) proceedings in the first place, which does not suffice to render arguments raised in unrelated (enforcement) proceedings an unjust harassment. Otherwise the application of res judicata principles would result in an effective obligation to request setting aside – of which there is no trace in the NYC and of which we could find no example in a domestic arbitration law.
3 ‘SECOND BITE’ SCENARIO 2: OPPOSING ENFORCEMENT SUBSEQUENT TO AN UNSUCCESSFUL REQUEST TO HAVE AN AWARD SET ASIDE

Unlike the ‘Snooze’ Scenario 1, Scenario 2 concerns cases where a state court has indeed reviewed the award, in the context of setting aside proceedings, has found no fault with it, but the award debtor subsequently resists enforcement in another jurisdiction. As regards the grounds for setting aside or non-enforcement of the arbitral award, the award debtor may thus be seeking the proverbial second bite at the cherry.

We again distinguish purely domestic (infra 3.1 and 3.3) and transnational (infra 3.2 and 3.4) cases. We must also distinguish cases where the award debtor raises defences already brought forward in the setting aside proceedings (infra 3.1 and 3.2), and cases where the award debtor raises new defences in the enforcement proceedings for the first time (infra 3.3 and 3.4).

3.1 RELIANCE ON GROUNDS ALREADY RAISED: (1) PURELY DOMESTIC CASES

Domestic statutes and case law sometimes expressly provide for coordination mechanisms in purely domestic cases falling under the ‘Second Bite’ Scenario 2.

Under English law, the award debtor may not resist enforcement on the basis of grounds that it had already unsuccessfully invoked in setting aside proceedings.64 Singapore case law also indicates that, where a competent court has ruled on a ground relating to the validity of an award, this ground cannot be reargued in Singapore.65

An example66 of an explicit statutory rule can be found in the German CCP. According to its section 1060(2)(2), grounds for refusing enforcement shall not be taken into account if a request for setting aside has been finally dismissed with regard to those same grounds. In the context of German law (as in many other civil law jurisdictions), such (preclusion) rule is necessary because these legal orders grant a binding (res judicata) effect exclusively to the operative part of the decision, not to its underlying reasoning,67 the latter including grounds for setting aside.

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66 For further examples see Born, supra n. 55, at 3734–3739, with numerous references.
Under Swiss law, while there is no explicit statutory preclusion rule, it is settled case law that, at the stage of enforcement, an award debtor may not rely on grounds that the court of setting aside has already rejected. More generally, once the award is no longer subject to setting aside, the award’s res judicata effect prevents attacks on the award in the context of enforcement proceedings on the basis of grounds that were not invoked but existed at the time of rendering of the award.

3.2 RELIANCE ON GROUNDS ALREADY RAISED: (2) TRANSNATIONAL CASES

Just as under the ‘Snooze’ Scenario 1, statutory provisions at domestic level dealing with cases falling under the ‘Second Bite’ Scenario 2 in a transnational context appear to be virtually non-existent. On a transnational level, the only ‘statutory’ provision uniformly available would be the NYC, although, again, the NYC does not provide specific guidance on this issue. Yet courts have stepped in and developed (domestic) solutions via case law.

In Dallah v. Pakistan, the English Court of Appeal had reasoned (obiter) that both a successful and an unsuccessful challenge at the seat are likely to give rise to issue estoppel. The U.K. Supreme Court, also obiter, agreed in principle. In Yukos Capital S.a.r.l v. OJSC Rosneft Oil Co., the English Court of Appeal further elaborated on this idea, clarifying that the same law would need to apply to the relevant issues in both setting aside and enforcement proceedings.

n. 6, at 82-83; Swiss Federal Tribunal, judgment of 13 Apr. 2010, 136 III 345, c. 2.1; BGH [German Supreme Court], judgment of 17 Feb. 1983, III ZR, 184/81, c. III(3)(d).

In Swiss law, there is also an element of hierarchy of the courts involved. Whereas awards are enforced by lower instance courts, only the highest court, the Swiss Federal Tribunal, may set aside; see Swiss CCP, Art. 389(1) for Swiss domestic awards (subject to an agreement by the parties to grant jurisdiction to cantonal courts, see Art. 390) and Swiss PILA, Art. 191, for Swiss international awards.

For the avoidance of doubt, there is no ‘abuse of process estoppel’ under Swiss law, i.e. the fact that setting aside was not requested has no consequence in and of itself. However, the arbitral award, at the latest when setting aside is no longer possible, becomes res judicata (Swiss CCP, Art. 387; Swiss PILA, Art. 190(1)). Due to this res judicata effect, grounds that could have been raised in setting aside proceedings may no longer be invoked in order to oppose enforcement (see infra n. 70). On the other hand, a violation of public policy and a lack of arbitrability may always be taken into account at the enforcement stage, see infra n. 80.

Compare in general Kurt Amonn & Fridolin Walther, Grundriss des Schuldrechts- und Konkursrechts § 19.53 in connection with § 19.38 (9th ed., Stämpfli 2013); Melanie Huber, Reibellstrafrecht, in Ratibandbuch ZPO § 30.22 (Ulrich Has & Reto Margiatoa eds, Schultheiss 2020); Swiss Federal Tribunal, judgment of 3 Sept. 2013, 4A_298/2013, c. 3; Swiss Federal Tribunal, judgment of 25 Jan. 2013, 139 III 126, c. 4.2.


Dallah Estate & Tourism Holding Co. v. Ministry of Religious Affairs, Government of Pakistan [2010] UKSC 46, para. 98; while adding: ‘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’.

Lower instance courts in Hong Kong followed a similar approach, but Hong Kong’s highest court ultimately rejected the application of the concept of issue estoppel in the present context. For instance, in *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, both the High Court and the Court of Appeal had concluded that a foreign judgment rejecting a request to set aside can create an issue estoppel in enforcement proceedings in Hong Kong for issues that were or could have been raised in setting aside proceedings, with the Court of Appeal expressly clarifying, however, that a preclusive effect will not arise with regard to issues of public policy under Hong Kong law. Yet the Hong Kong Court of Final Appeal overturned these decisions, holding that the concept of issue estoppel was not applicable since setting aside and enforcement are not necessarily identical. Instead, the Court held that a party may request setting aside but may still, if unsuccessful, subsequently resist enforcement on the same grounds.

The Singapore courts held that a party may either apply to have the award set aside, or it may apply to the enforcement court to refuse enforcement. Yet these options are alternatives. A re-trial of the same grounds would constitute an abuse of process.

In Germany and Switzerland, commentators disagree as to whether a foreign judgment refusing to set aside an award has, or should have, any preclusive effect in a domestic enforcement context. The issue has not been clarified conclusively by the courts.

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3.3 RELIANCE ON GROUNDS THAT WERE NOT BUT COULD HAVE BEEN RAISED: (1)

PURELY DOMESTIC CASES

Many domestic laws also coordinate setting aside and enforcement where the
award debtor raises arguments in an enforcement context that it could have raised
but did not raise in setting aside proceedings, as long as the latter took place in the
same jurisdiction, i.e. in purely domestic cases.

Under Swiss law, the same principles apply as described under 3.1: once the
award is no longer subject to setting aside proceedings, its validity may no longer
be challenged in the context of enforcement proceedings. The award debtor is
precluded from raising grounds against the award in enforcement proceedings that
it could have raised in setting aside proceedings.\(^79\) This is again subject to Swiss
public policy and objective arbitrability.\(^80\)

German law takes the same approach, in application of section 1060(2)(3) of the
German CCP.\(^81\) According to this provision, the court recognizing an arbitral award
(as a prerequisite for enforcement) may only review objective arbitrability and
German public policy, to the exclusion of all other grounds for setting aside or
refusing enforcement, in case the time-limit for requesting setting aside (pursuant to
German CCP, section 1059(3)) has lapsed, or in case the specific ground has not
been invoked in prior setting aside proceedings.\(^82\)

In jurisdictions belonging to the common law tradition, such a situation is
likely to give rise to an abuse of process (Henderson) argument,\(^83\) although the
details seem not to have been worked out yet.

3.4 RELIANCE ON GROUNDS THAT WERE NOT BUT COULD HAVE BEEN RAISED: (2)

TRANSCONTINENTAL CASES

Despite, yet again, a lack of statutory provisions for transnational cases, a number of
courts have interpreted and sought to apply the NYC (or, more precisely, domestic
law incorporating the NYC) in order to deal with the issue of a reliance on

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79 Berger & Kellerhals, supra n. 29, § 2014.
81 See e.g. Münch, supra n. 45, para. 21 ad § 1061 CCP.
83 Nazzini, supra n. 61, at 154.
grounds in enforcement proceedings that were not but could have been raised in setting aside proceedings abroad.

The Hong Kong Court of Final Appeal, in *Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd.*, stated that, while a party has the option of requesting set aside and, if unsuccessful, may still resist enforcement, this party may be estopped from doing so, or may be found not to act with ‘bona fides’, if it relies on a point in the enforcement context that it had not raised in setting aside proceedings. Yet the precise scope of this (*Henderson*-related) principle, and its relationship to the choice of remedies approach followed otherwise, remain unclear. Singapore courts explicitly referenced this case and purported to follow its reasoning.

As is the case for the scenario described above under 3.2, the solution in Germany or Switzerland is not settled.

### 3.5 Applying the NYC?

Thus, the solutions of domestic law for dealing with cases falling under the ‘Second Bite’ Scenario 2 are not uniform. Could the NYC help? The arguments invoked in this respect are similar to those outlined above (see *supra* 2.3), with res judicata being most prominent (*infra* 3.5[a]) and good faith playing a minor role (*infra* 3.5[b]).

#### 3.5[a] Treating Foreign Decisions as Res Judicata

In the ‘Second Bite’ Scenario 2, the primary point of reference for any coordination exercise of state court decisions is the foreign judgment refusing to set aside the award. Since the concept of res judicata precisely helps coordinate court proceedings and (prior) decisions across jurisdictions, it seems reasonable to explore possibilities to use this concept also in the present context. However, the situation is not as straightforward as it may seem.

The NYC does not contain any provisions regarding, let alone include a comprehensive, concept of res judicata applicable to award judgments (*infra* (i)). Since the understanding of the concept of res judicata differs significantly from one jurisdiction to the next, no uniform solution, on the basis of res judicata, to transnational cases falling under the ‘Second Bite’ Scenario 2 is on the horizon.

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85 See *Aloe Vera of America, Inc. v. Asianic Food (S) Pte Ltd. & another* [2006] S.G.H.C. 78, para. 56.

86 See in detail 3.5[a][iii] *infra.*
Finally we must assess in general the merit of applying this concept to cases falling under Scenario 2 (infra (iii)).

3.5[a][ii] NYC and the Res Judicata of Award Judgments

Some argue that the NYC contains autonomous rules for the res judicata effect of a judgment refusing to set aside an award, making reliance on any domestic concept of res judicata unnecessary. Since Article V NYC permits an enforcement court to review an award in any event,\(^{87}\) this provision would imply that a judgment refusing to set aside an award does not carry any res judicata effect. Others argue that the NYC contains no rules regarding the res judicata effect of a judgment refusing to set aside, which necessitates a consultation of the law of the country of enforcement (including its conflict of laws rules).\(^ {88}\)

We submit that the correct position is that the NYC does not regulate the res judicata effect of award judgments or the law governing it. The only coordination mechanism in the NYC touching upon the subject of res judicata (regarding award judgments) is Article V(1)(e). Yet this provision leaves it to the Contracting States to decide whether to grant res judicata effect to positive setting aside decisions, i.e. those granting set aside — certainly in the view of those jurisdictions that have enforced awards set aside at the seat, thus rejecting any res judicata effect of a positive setting aside decision.\(^ {89}\) Article V(1)(e) does not refer to decisions refusing set aside at all.

3.5[a][ii] Basics of Domestic Res Judicata Concepts

The NYC thus provides no solution to cases falling under the ‘Second Bite’ Scenario 2. Unfortunately, the rules and approaches at domestic level are also too diverse to make any convergence likely.

Civil law jurisdictions, like Germany or Switzerland, at the outset often distinguish formal\(^ {90}\) and substantive\(^ {91}\) res judicata effects. For present purposes, only the latter are relevant, meaning that a judgment binds a subsequent court with regard to its content, i.e. with regard to the decision relating to the cause of action

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87 See for an overview Solomon, supra n. 78, at 519 with references in n. 27.
89 See in detail s. 4 infra.
91 Landbrecht, supra n. 59, at 33; Staehelin, supra n. 90, §§ 24.8–24.14.
Streitgegenstand), although only if the causes of action in both proceedings are identical, and provided the parties are the same. The cause of action is defined by the matrix of the underlying facts (Lebenssachverhalt) together with the specific requests for relief (Antrag).

Some similarity can be identified in this respect in the res judicata concepts of common law jurisdictions. Their res judicata concept also partially refers to causes of action, the latter being the basis of cause of action estoppel. This cause of action estoppel precludes a party from re-litigating the same issues (requirement of identity, Identität), which includes raising arguments in subsequent proceedings that this party could have already put forward in previous proceedings, provided the causes of action in both proceedings between the same parties are identical.

This requirement of identity is, functionally speaking, the same as under civil law systems, but the required scope of such identity may be different. In addition to cause of action estoppel, the res judicata concept in common law jurisdictions relies on issue estoppel. This form of estoppel precludes a party from re-litigating a particular point, be that a factual or a legal issue, that was explicitly decided in previous proceedings, provided the issue in question was an essential element (necessary ingredient) of the first decision. The requirement of identity is somewhat relaxed in this context. Not the cause of action overall but only the specific issue decided must be identical to the one arising in subsequent proceedings. Civil law jurisdictions such as Switzerland or Germany have not implemented any issue estoppel concept, mainly because they grant a binding effect exclusively to the operative part of the decision, not to its underlying reasoning.

Finally, the concept of abuse of process estoppel (Henderson principle), already introduced above, is considered part of the (wider) res judicata doctrine in common law jurisdictions. It broadens the binding (or, more precisely, preclusive)
effect of a first decision with regard to issues that were not but could have been decided therein. There is no equivalent in civil law jurisdictions. This diversity demonstrates that there are, at present, no universally accepted principles of res judicata in general. Equally, no such universally accepted principles exist with regard to coordinating setting aside and enforcement through the application of such principle.\textsuperscript{101}

3.5[a][iii] Critical Assessment: (Un)suitability of the Concept of Res Judicata to Achieve Transnational Coordination

Notwithstanding the foregoing, could some variant of res judicata provide a valid tool for the coordination of setting aside and enforcement if uniform rules were adopted at treaty level? Generally, the concept of res judicata, whether in a litigation or arbitration context, avoids unnecessary (re-)litigation, which protects both the parties and state courts from being burdened with the same matter multiple times.\textsuperscript{102} In addition, to the extent that the application of the res judicata concept leads to a preclusion in particular of defences (potentially) raised by the award debtor in (potential) setting aside proceedings, who is thereby blocked from raising the same defences multiple times, i.e. in the setting aside and again in enforcement proceedings, applying the res judicata concept to setting aside decisions has been considered ‘pro enforcement’, and thus in line with the general purpose and structure of the NYC, as reflected in its Article VII.\textsuperscript{103} Res judicata, at first glance, seems to be a useful tool to coordinate setting aside and enforcement on a transnational level in cases falling under the ‘Second Bite’ Scenario 2.

However, a major obstacle for transnational coordination via res judicata, or more precisely, for the likelihood of it being possible to find a consensus as to which rules should be introduced, appears to be that the concept of res judicata requires the court of one country to trust the decision(s) of a court from another. This trust can only exist where the second jurisdiction accepts that the judicial process in the first jurisdiction is of sufficient quality. Within a particular jurisdiction, it goes without saying that one court trusts the others. In transnational cases, however, such trust cannot be taken for


\textsuperscript{102} Donovan, \textit{supra} n. 25, § 14.36.

\textsuperscript{103} In the context of awards set aside see Fahim Nia, \textit{The Enforcement of Foreign Arbitral Awards} 96 (Nova Science 2017); Solomon, \textit{supra} n. 78, at 519–520.
granted, unfortunately not even within such a tightly knit and closely coordinated judicial area such as the EU. Thus, even if states agree on uniform res judicata rules for award judgments rendered in cases falling under the ‘Second Bite’ Scenario 2, they would also need to agree on mechanisms providing a basis for some form of mutual trust in their respective judiciaries. Providing a basis for such trust is not impossible, as for instance the regime established by the Lugano Convention demonstrates, but it is a fairly complex endeavour.

In any event, and regardless of whether they trust each others’ judiciary generally, states will want to reserve the possibility to refuse enforcement on the basis of their own concepts of public policy. These concepts necessarily differ from one jurisdiction to the next. For even if a concept of ‘international’ public policy is invoked in this context, it will, insofar as state courts decide, always be a certain domestic version of such international public policy – for instance, the international public policy of Swiss law or the international public policy of French law. Whether arbitral tribunals are obliged to uphold the public policy concept of any particular order, on what basis, and of which one, and whether they might be allowed

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105 See the very recent decision of the Court of Appeal in Karlsruhe, judgment of 17 Feb. 2020, 301 AR 156/19. Although rendered in a criminal law context, this decision perfectly illustrates the difficulty of establishing trust even between legally connected jurisdictions. The case related to a Polish extradition request. Since the Court of Justice of the European Union obliges national courts, when reviewing extradition requests under the European Arrest Warrant, to ensure that the European fundamental rights will be respected also in the courts requesting extradition, which includes the principle of the independence of the judiciary, and since the Karlsruhe Court of Appeal had doubts as to whether Polish judges, following recent reforms, were (still) sufficiently independent, the Court refused extradition for the time being. A final decision is outstanding. A Dutch court had similar concerns regarding the independence of the Polish judiciary and has now asked the Court of Justice of the European Union whether the extradition of Polish suspects under the European Arrest Warrant must be halted; see the decision of the Rechtbank Amsterdam [District Court of Amsterdam] of 31 July 2020, 13/751021-20 (ECLI:NL:RBAMS:2020:3776). See more generally Andreas Kulick, Rechtsstaatlichkeitsskize und gegenseitiges Vertrauen im institutionellen Gefüge der EU, 75 JuristenZeitung 223–231 passim (2020).


107 See e.g. Brussels I Regulation, Art. 45(1)(a); Lugano Convention, Art. 34(1).


to follow any uniform transnational concept of public policy, is a separate issue. At the level of domestic law, and the setting aside and enforcement courts will always operate on that level, no uniform concept is likely ever to develop in practice. Therefore, the concept of public policy will always remain as an insurmountable (partial) block to using the concept of res judicata for fully coordinating setting aside and enforcement in transnational cases. We will come back to the importance of public policy.

3.5[b] Measuring the Award Debtor’s Behaviour Against a Standard of Good Faith?

A minority opinion relies on considerations of good faith also in the ‘Second Bite’ Scenario 2, such as the Court of Final Appeal in the case of Hebei Import & Export Corp. v. Polytek Engineering Co. Ltd. Yet we submit that considerations of good faith can and should not be relevant in the present context. In cases belonging to the ‘Second Bite’ Scenario 2, the primary point of reference is not the behaviour of the award debtor (except with regard to single grounds not raised in setting aside proceedings but later invoked in an enforcement context) – which could be benchmarked against a good faith standard – but the foreign judgment (refusing the setting aside), precisely because the ‘Second Bite’ Scenario 2 is about the coordination of the second proceedings with a state court decision already rendered. Relevant considerations are mainly the ones relating to res judicata.

If one nevertheless were to rely on considerations of good faith, the same problems as those discussed under 2.3[a][ii] and 2.3[a][iii] supra arise, such as the unclear content and basis of this principle. In addition, the NYC seems to be even less relevant in the present context. If an award debtor is considered to be precluded from resisting enforcement due to it losing the setting aside proceedings, the potential considerations of good faith could only be triggered by the debtor’s behaviour in these setting aside proceedings. It is hard to see how a convention governing the enforcement of arbitral awards, which nowhere deals with the domestic rules relating to the setting aside of those awards, should be relevant in this context.

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111 See 5.1[b] infra.


113 For the exception of a successful request to set aside, foreseen in the Convention itself, see s. 4 infra.
4 ‘INCORRIGIBILITY’ SCENARIO 3: OPPOSING ENFORCEMENT SUBSEQUENT TO A SUCCESSFUL REQUEST TO HAVE AN AWARD SET ASIDE

When assessing mechanisms to coordinate setting aside and enforcement overall, we also need to discuss the scenario where setting aside was indeed successful, but the award creditor subsequently seeks enforcement of this very same award abroad. Although having lost the setting aside proceedings, the award creditor acts in what could be called an ‘incorrigible’ way (this is of course not a moral judgment) and presses on with enforcing the award regardless. This Scenario 3 has already been the object of extensive coverage in the arbitration community\footnote{For example, Donovan, supra n. 25, §§ 14.5–14.35; Clifford J. Hendel & María Antonia Pérez Nogales, Enforcement of Annulled Awards: Differences Between Jurisdictions and Recent Interpretations, in 60 Years of the New York Convention: Key Issues and Future Challenges 187 passim (Katia Fach Gomez & Ana M. Lopez-Rodriguez eds, Kluwer Law International 2019); Paulsson, supra n. 44, § 6.08(G)–(N); Marike R. P. Paulsson & Supritha Suresh, The New York Convention’s 60th Anniversary: A Restatement for the New York Convention?, in 60 Years of the New York Convention: Key Issues and Future Challenges 187 passim (Katia Fach Gomez & Ana M. Lopez-Rodriguez eds, Kluwer Law International 2019).} so that we can limit ourselves to a brief overview.

Scenario 3 falls squarely within our overall topic of coordinating setting aside and enforcement. More specifically, it also relates to the issue of coordinating court decisions, which means that it is fundamentally different from the ‘Snooze’ Scenario 1 while bearing some resemblance to the ‘Second Bite’ Scenario 2. Yet in terms of coordination, it differs from Scenario 2 in that the NYC contains a provision potentially leading to transnational coordination of cases falling under Scenario 3 but not Scenario 2, namely its Article V(1)(e), which clarifies that recognition and enforcement of awards set aside ‘by a competent authority of the country in which, or under the law of which, that award was made’ indeed ‘may’ be refused.

Nevertheless this gets us only so far, given that there is a controversy as to what ‘may’ means,\footnote{For an overview see Haas, supra n. 88, §§ 21.355–21.358; Scherer, supra n. 6, at 595–599.} and whether courts have the right or even the duty to refuse the enforcement of awards set aside (infra 4.1). Article V(1)(e) NYC thus contains only a rudimentary coordination mechanism for the transnational enforcement of awards set aside at the seat (infra 4.2).

4.1 COMPARATIVE ANALYSIS

Authorities have adopted differing approaches to the enforcement of awards set aside abroad, and therefore to the interpretation of Article V(1)(e) NYC.
The position under English law, for instance, remains controversial. While the Court of Appeal, in *Dallah v. Pakistan*, was strongly in favour of applying the concept of issue estoppel where the same grounds are raised in setting aside and enforcement proceedings, subject to them being governed by the same law, other decisions have highlighted that the setting aside judgment must also not offend basic principles of honesty, natural justice, and domestic concepts of public policy. This would seem to limit unconditional reliance on the setting aside judgment in England by automatically refusing enforcement.

The position under Hong Kong law is that the courts have discretion as to whether to enforce an award that was set aside abroad. Singapore courts have not yet had to rule on the enforceability of an award set aside at seat. Nevertheless, the Singapore Court of Appeal, in *PT First Media TBK v. Astro Nissantara Int’l B.V.*, seems to indicate a reluctance to enforce such awards. Under German law, an award set aside at the seat will normally not be enforced, although there may be exceptions. With regard to Swiss law, the Swiss Federal Tribunal has still not expressly settled the issue. Commentators disagree as to the correct solution.

Considering that the four jurisdictions featured in this analysis may not be the most indicative ones on this particular issue, we add the jurisdictions that have (repeatedly) had to deal with requests for enforcement of awards set aside at the seat. These jurisdictions include France, the Netherlands, and the United States.

French courts have on various occasions enforced awards that had been set aside at the seat. The underlying reasoning was that an award does not cease to exist simply because it was set aside, and that French procedural law does not recognize the setting aside of an award as a ground for refusal of enforcement. Also the *Hoge Raad der Nederlanden* (the Dutch Supreme Court) confirmed the

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117 John Sutton, Gill & Gearing, supra n. 71, § 8–035 with further references. For a recent decision refusing to enforce an award set aside at the seat compare e.g. *Maximov v. OJSC Novolipetsky Metallurgichesky Kombinat* [2017] EWHC 1911 (Comm).
120 BGH [German Supreme Court], judgment of 17 Apr. 2008, III ZB 97/06, c. 15–16; OLG [Superior Regional Court] München, judgment of 30 July 2012, c. II.3.
122 Compare Girberger & Voser, supra n. 29, §§ 1718–1723.
123 Compare for a general overview Hendel & Pérez Nogales, supra n. 114, at 194–201.
enforcement of an award set aside at the seat. It held that such awards may still be enforced in case a setting aside decision is based on grounds other than those set out in Article V(1)(a) – (d) NYC and which do not enjoy international recognition; or when the setting aside decision is irreconcilable with Dutch private international law.\textsuperscript{125} Finally, courts in the United States have adopted different approaches with differing outcomes in terms of granting or rejecting requests for enforcement, depending on the specific degree of comity accorded to the setting aside court.\textsuperscript{126}

4.2 Critical assessment

As this comparative overview reveals, there exists considerable uncertainty with regard to the right approach to enforcing awards set aside abroad and the correct interpretation of ‘may refuse’ to enforce under Article V(1)(e) NYC. We will not add to the already extensive discussion of this issue. However, we would like to contribute three observations relevant to the larger topic of coordinating setting aside and enforcement.

First, we submit that the basic principles applied to coordination in the ‘Incorrigibility’ Scenario 3 should be the same as in the ‘Second Bite’ Scenario 2, where the primary point of reference is not the behaviour of the award debtor but a foreign award judgment (here: setting aside an award). Consequently, it is only the concept of res judicata that should, if at all, govern attempts to achieve coordination, not more problematic concepts such as good faith, estoppel, or waiver.

Second, to the extent that ‘may’ must be understood as granting discretion to the Contracting States with regard to enforcing awards set aside, this shifts the focus from the jurisdiction of the seat to the jurisdiction of enforcement. In other words, if this interpretation is adopted, the NYC allows states to examine more carefully whether any of the setting aside grounds affirmed in the previous judgment were actually fulfilled. The NYC puts no limits on re-invoking setting aside grounds in the enforcement context – and a party may actually have to do so if it wants to resist enforcement of the award where the enforcement court does not

\textsuperscript{125} Hoge Raad der Nederlanden [Dutch Supreme Court], judgment of 24 Nov. 2017, 16/05686 (ECLI:NL:HR:2017:2992).

simply ‘recognize’ the setting aside decision. Under this interpretation of Article V(1)(e) NYC, the provision has virtually no coordinating effect.

Third, interpreting ‘may’ as not giving any discretion to the court of enforcement, and instead concluding that Article V(1)(e) NYC effectively bars enforcement of an award set aside, would heavily restrict the sovereignty of the enforcement courts. Essentially, they would have to ‘recognize’ a foreign award judgment. Implicitly, they would have to (unconditionally) trust the setting aside jurisdiction. Under this reading of the NYC, the coordination mechanism of Article V(1)(e) NYC would be significant. This is not to say that such strong coordination mechanism should be rejected out of hand. While this proposal may seem extreme at first glance, its justification could lie in the principle of party autonomy, namely, the argument that the parties’ choice of a seat indirectly entails a choice of court agreement, with regard to a particular ‘supervisory’ jurisdiction, in favour of the state courts at the seat. Those courts would be tasked with reviewing those grounds for set aside first—albeit not exclusively. Applying a strong coordination mechanism would simply hold the parties to their choice, and the enforcement authorities would ‘trust’ the foreign setting aside court not because they have any reason of their own to do so, but because the parties impliedly ‘instructed’ the enforcement authorities to follow the decision of the setting aside jurisdiction.

5 THE WAY FORWARD: A TREATY COMPLEMENTING (OR AMENDING) THE NYC?

In conclusion, there is currently no uniform transnational mechanism coordinating setting aside and enforcement of arbitral awards. The NYC does not contain sufficient detail, and the various domestic approaches are by definition not uniform. Do we have to simply accept this status quo?

We submit that the only viable solution to improve the status quo, assuming that, as we have argued in the introduction, further coordination of setting aside and enforcement decisions (although not necessarily further coordination of

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127 On which see in detail e.g. Georgios Petrochilos, Procedural Law in International Arbitration §§ 3.99–3.100 (Oxford University Press 2004).
128 BGH [German Supreme Court], judgment of 1 Feb. 2001, III ZR 332/99 c. 4b. However, BGH, judgment of 16 Dec. 2010, III ZB 100/09, reversed this approach. It now no longer requires a request for setting aside at the seat.
129 Whether such a choice would have to be respected under all circumstances by the court of enforcement is another question. Specifically, in cases where patently unacceptable behaviour such as bribery (or otherwise a lack of independence) lead to the setting aside judgment, or where the judicial system of a country has dramatically changed after the conclusion of the arbitration agreement, it would seem doubtful that, even when ‘may’ was supposed to mean ‘must’, the choice of the parties should still immunize the setting aside judgment from a comprehensive scrutiny by the enforcement court.
enforcement decisions) is considered an improvement, would be an international treaty (or comparable instrument) complementing the NYC.

Our proposal (merely) to complement the existing NYC regime means in particular that we do not suggest a ‘revolution’ as regards the somewhat prominent role of the courts at the seat, nor do we suggest to abolish setting aside altogether. Any revolution concerning the NYC regime risks jeopardizing the successes of the past, whereas an evolutionary improvement leaves the status quo intact while offering the possibility to whichever jurisdiction is interested to further improve that status quo.

An amendment of the Convention, although conceivable, is likely to fail in practice, not least due to the requirement of a unanimous decision. It might even jeopardize the success of the NYC. A new and separate treaty is more realistic (infra 5.1). Even if such a treaty may remain difficult to implement on a global scale, such solution could considerably improve the arbitration landscape in a regional context, such as for instance within EU law (infra 5.2).

5.1 Proposed ‘Treaty Coordinating Setting Aside and Enforcement of Arbitral Awards in Transnational Cases’

5.1[a] General Approach and Scope of the Proposed Treaty

The proposed treaty should address the aforementioned deficiencies of unilateral solutions at a domestic level and provide the parties with certainty. Following the analysis under sections 2 to 4, this concerns the questions of (1) how often and under what circumstances an award debtor should be allowed or required to defend himself, in court proceedings, against an unfavourable award; and (2) whether it should only be the grounds in Article V(2) NYC that may always be taken into account, or whether the grounds in Article V(1) NYC should be treated in the same way under all circumstances.

The subject matter of the proposed treaty must hence primarily cover the effect of an omitted (‘Snooze’ Scenario 1) and the effect of an unsuccessful (‘Second Bite’ Scenario 2) request for setting aside in the context of enforcement

[130] In contrast, Philippe Fouchard, Suggestions pour accroître l’efficacité internationale des sentences arbitrales, Revue de l’Arbitrage 653–672 passim (1998) had proposed such a revolution by suggesting ‘to reduce the role of the law and of the Courts of the seat of arbitration’.

[131] For increasing rather than decreasing the weight of decisions of the (setting aside) court at the seat, see also Herrmann, supra n. 22, §§ 13.93–13.94.

[132] Similarly already Poudret, supra n. 1, at 779.


proceedings abroad. In addition, while the need for expressly regulating the ‘Incorrigibility’ Scenario 3 may appear less pressing, given that Article V(1)(e) NYC already contains a coordination mechanism, the differing and sometimes unclear approaches to interpreting this provision seem to make it recommendable to also include a provision clarifying the effect of a successful setting aside request for enforcement authorities abroad.

5.1[b] Specific Provisions Relating to Scenarios 1, 2, and 3

As regards the ‘Snooze’ Scenario 1, in order to reduce incentives to initiate a multitude of state court proceedings without any legitimate reason, the proposed treaty should provide for preclusion of the award debtor at the stage of enforcement with grounds not previously raised in setting aside proceedings, whether or not setting aside was requested at all or limited to certain grounds. Such preclusion must, however, be limited to the grounds mentioned in Article V(1) NYC, as only those are at the disposition of the parties. There are two justifications for this approach.

First, this approach improves the overall efficiency of the dispute process and helps prevent unjustified obstructive behaviour. All the domestic regimes discussed in this article (with the exception of Singapore) follow a similar approach.

Second, the choice of a seat of arbitration must be viewed as an implicit choice of court agreement designating a ‘supervisory’ jurisdiction, i.e. the forum for primarily seeking relief against an award. By choosing this ‘supervisory’ jurisdiction, parties agree to seek, at least primarily, relief directly through setting aside proceedings, not indirectly from an enforcement court. A party should be held to its bargain and obliged to participate in legal proceedings before the state courts at the seat.

The second argument admittedly fails in cases where a party denies the validity and/or the existence of an arbitration agreement, and also where the parties have agreed to arbitrate but have not themselves chosen a seat. The choice of seat by another authority (e.g. an arbitral institution or the arbitral tribunal) may raise

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135 On this objective see 1.1 supra.
136 For a similar approach see Santomauro, supra n. 26, at 185–188.
137 Kröll, supra n. 26, at 435; Ohara & Lane, supra n. 1, at 376.
138 Compare 2.1 supra. Also in favour of treating domestic and transnational cases equally, inter alia based on considerations of efficiency, Harbst, supra n. 78, at 30.
139 Ye, supra n. 18, at 372 with reference to Gao Hayan & others v. Keeneye Holdings Ltd. CACV 79/2011 (2 Dec. 2011) and Minmetals Germany GmbH v. Ferro Steel Ltd. [1999] C.L.C. 647; compare further for this idea, German CCP, s. 1062.
doubts as to whether it is justified to oblige a party to apply for setting aside at the forum chosen by someone else. However, obliging a party to request setting aside first has still the benefit of clarity. As the proposed provision would only relate to the grounds mentioned in Article V(1) NYC, enforcement might still be refused elsewhere based on the grounds in Article V(2) NYC, and this provides, possibly together with a public policy exception, a safety-valve also for cases where it is questionable to oblige a party to address the courts at the seat designated by a third party, or where states have serious doubts as to how the court at the seat applied the grounds relating to Article V(1) NYC.

Regarding the ‘Second Bite’ Scenario 2 and the ‘Incorrigibility’ Scenario 3, the proposed treaty should foresee that a setting aside decision binds enforcement courts with regard to all grounds that were or could, with reasonable diligence, have been raised in setting aside proceedings, although again limited to the grounds in Article V(1) NYC and possibly subject to a public policy exception. In contrast, the grounds in Article V(2) NYC cannot be adjudicated at the seat, given that different laws apply to arbitrability and public policy in different jurisdictions, and given that states will always want a safety-valve for being able to refuse enforcement.\textsuperscript{141}

Relevant provisions of the proposed treaty could thus read:

1. \textit{The courts at the seat of arbitration have exclusive jurisdiction for dealing with requests to set aside an arbitral award. The internal allocation of jurisdiction among the courts of a Contracting State is governed by domestic law of said State.}

[Commentary: This provision would provide clarity to prevent a multiplicity of setting aside proceedings and decisions. It should be in line with the current understanding of most arbitration laws worldwide and thus fairly uncontroversial.]

2. \textit{Authorities of other Contracting States competent to enforce said arbitral award shall recognize and enforce setting aside decisions rendered by the competent courts at the seat of arbitration as per the following:}

[Commentary: The reference to ‘other’ Contracting States makes it clear that the domestic enforcement of awards rendered within the respective country is not governed by the proposed treaty.]

a. \textit{If the competent courts at the seat of arbitration set aside the award on the basis of grounds corresponding to any of the grounds listed in Article V(1) NYC, other Contracting States must refuse enforcement of said award, unless the recognition of the foreign setting aside decision would be manifestly incompatible with the public policy of the Contracting State requested to enforce.}

\textsuperscript{141} See the same idea that underlies Lugano Convention, Art. 34(1).
[Commentary: This provision intentionally deviates from the probably prevailing reading of Article (V)(1)(e) NYC. It also works only to the extent that (necessarily) domestic grounds for setting aside (that are by definition not covered by the NYC) correspond to the grounds for refusing enforcement listed in Article V(1) NYC. While not necessarily, this is in practice quite frequently so; see, e.g. the parallel wording in Articles 34 and 35 of the UNCITRAL Model Law. In case the award is set aside, there is no need for any additional protection of the award debtor. The award creditor must live with the choice it made with regard to the seat. Insofar as the seat was determined by a third party, the provision still has the benefit of simplicity and clarity. The reservation of public policy of the Contracting State requested to enforce is a standard feature in international treaties dealing with the recognition and enforcement of foreign court decisions and should provide an appropriate safety-valve to address patently unacceptable behaviour such as that mentioned supra n. 129, while clarifying that not recognizing the (positive) foreign setting aside decision should be the rare exception.]

b. If the competent courts at the seat of arbitration set aside the award on the basis of grounds corresponding to any of the grounds listed in Article V(2) NYC, the decision has no binding effect for other Contracting States and they remain free to review any of the grounds listed in Article V NYC when dealing with a request for enforcement.

[Commentary: This provision makes it clear that awards set aside at the seat do not vanish into thin air. Rather, the effect of such (domestic) setting aside decision is limited to the respective jurisdiction of the setting aside court. This is already the position under the NYC. On the other hand, jurisdictions that wish to refuse enforcement of awards that were set aside at the seat for any reason may still do so under the proposed treaty. Furthermore, the provision clarifies that, if the award was set aside by application of grounds listed in Article V(2) NYC, the enforcement court may review the award also with regard to grounds listed in Article V(1) NYC. The justification for this solution is that those grounds may not have been reviewed, or not thoroughly reviewed, by the setting aside court. Even though an enforcement court might not object to the award on the basis of arbitrability or public policy (applying the law of the enforcement court), notwithstanding the fact that the court at the seat did object in light of its own concepts of arbitrability and public policy, the
enforcement court may still take issue with the award on the basis of any of the grounds listed in Article V(1) NYC.

c. If the competent courts at the seat of arbitration refuse to set aside the award, other Contracting States must not review any of the grounds listed in Article V(1) NYC when dealing with a request for enforcement. This applies irrespective of whether the competent courts at the seat of arbitration have dealt with grounds corresponding to a ground listed in Article V(1) NYC. This does not affect the right of other Contracting States to review the award based on the grounds listed in Article V(2) NYC.

[Commentary: In case the award is upheld by the setting aside courts, it is in the interest of the award creditor to limit the review of such award in foreign (enforcement) courts. The provision clarifies that all potential Article V(1) NYC defences must be raised before the setting aside court, or else the award debtor is precluded from raising those defences in subsequent enforcement proceedings. The award debtor must live with its choice of the seat. Insofar as the seat was determined by a third party, the provision still has the benefit of simplicity and clarity. Further protection can still be awarded to the award debtor (only) within the confines of the public policy or, possibly, arbitrability concepts of the enforcement court, which renders any additional public policy exception superfluous.]

3. If a request for setting aside of an arbitral award is no longer possible before the courts at the seat of arbitration in accordance with their law, other Contracting States must not review any of the grounds listed in Article V(1) NYC when dealing with a request for enforcement. This does not affect the right of other Contracting States to review the award based on the grounds listed in Article V(2) NYC.

[Commentary: This provision will often ensure that setting aside is sought immediately by the award debtor. Otherwise the award debtor risks not being heard on grounds listed in Article V(1) NYC when resisting enforcement.]

4. The Contracting States are not bound by decisions rendered by any competent authority of another Contracting State in the context of enforcement proceedings, unless the law of the forum, and subject to the above provisions, provides otherwise.

[Commentary: The proposed treaty seeks to coordinate setting aside and enforcement. It does not seek to coordinate various enforcement decisions. While some jurisdictions discuss whether an enforcement decision could result in an issue estoppel in subsequent enforcement decisions abroad, other jurisdictions are sceptical of such concept. The proposed treaty

142 For such a preclusive effect expressly, see also Herrmann, supra n. 22, § 13.94.
therefore leaves the respective decision to domestic law. On the other hand, this provision clarifies that (‘subject to the above provisions’) the setting aside decision, within the scope of the proposed treaty, always takes precedence over any decisions rendered in an enforcement context. Example: An award is enforced in jurisdiction A and subsequently a setting aside decision rendered in jurisdiction B. The courts of jurisdiction C must, as a starting point, follow B. They need not follow A but may do so, provided there is no conflict with B.]

5.2 Critical evaluation of the feasibility of the proposed treaty

Comprehensively coordinating setting aside and enforcement would seem to benefit the parties in that they obtain certainty as to whether they must request setting aside, and what the consequences of a particular setting aside decision will be when subsequently enforcing the award elsewhere. Overall, commercial arbitration could be rendered more efficient in that a party loses the opportunity to have several and potentially incoherent bites at the cherry, while the award debtor is still afforded sufficient protection.

Yet there are some hurdles that need to be taken in order for such a treaty to be concluded. Is such a proposal even realistic? The current political climate in many jurisdictions in the world may suggest otherwise, but the recent conclusion, on 2 July 2019, of the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters could be reason for more optimism.

5.2[a] Trust Between the States as the Key Requirement?

First and foremost, the willingness of states to enter into the proposed treaty is likely not the same regarding provisions dealing with the ‘Snooze’ Scenario 1 on the one hand, and those dealing with the ‘Second Bite’ Scenario 2 and the ‘Incorrigibility’ Scenario 3 on the other. Yet it would probably be of little benefit, and even counterproductive, to only conclude a treaty regarding the preclusive effect of an omitted request for setting aside (‘Snooze’ Scenario 1) without simultaneously agreeing that a setting aside decision carries at least some binding effect in other states. If an award judgment dealing with a request to set aside is of no use in enforcement proceedings abroad, because it will not be recognized
elsewhere, there is no justification for requesting the award debtor to initiate setting aside proceedings in the first place.

The reason for the varying degrees of feasibility is that Scenario 1 relates to party behaviour, whereas Scenarios 2 and 3 require trust in foreign courts. We suspect that it is easier for states to agree on a uniform qualification of the behaviour of a party – ultimately they can say that they simply implement a parties’ choice – than to convince them to commit to trusting foreign judgments. Specifically, trusting foreign courts entails renouncing a part of a state’s judicial sovereignty.

States might agree more easily to trust foreign judgments if they know exactly who will sign up to the treaty. Yet that would still require safeguards against the rule of law standards deteriorating in a certain country, and it does not solve the problem of how to admit new signatories. States might only sign up to such a treaty if they control the admission process, for instance by requiring that a state be admitted only if all existing contracting states unanimously agree that the judiciary of the new candidate is sufficiently trustworthy and comparable to the judiciary of existing contracting states. In other words, a closed or half-open treaty, such as the Lugano Convention,147 would be a more realistic option than an open treaty like the NYC.148

For a closed or a half-open treaty, however, it is difficult to see how such treaty could receive global support comparable to that of the NYC. Rather, it seems that such a treaty could primarily be successful amongst states that already have multilateral treaties regulating the recognition and enforcement of non-arbitration related judgments, such as the Lugano Convention. It could also work in the context of judicial cooperation within regional economic integration organizations such as, most prominently, the EU and its Brussels Regime – an idea already raised previously by Jean-François Poudret150 and, more recently, by Giulio Palermo.151 A more elaborate solution, such as the one proposed here,

144 See e.g. Yukos Capital S.a.r.l. v. OAO Rosneft, Gerechtshof Amsterdam [Amsterdam Court of Appeal], judgment of 28 Apr. 2009, 200.005.269/01 (ECLI:NL:PHR:2010:BM1679). The Dutch court distrusted the Russian judiciary and therefore decided to disregard a Russian decision setting aside the award.
146 ‘Closed’ meaning that eligible Contracting States are more narrowly defined such as states of a certain region or Member States of international organizations, and ‘half-open’ meaning that any state may become a member subject to the approval of all current Member States; compare Schnyder & Liatowitsch, supra n. 145, § 54.
147 Lugano Convention, Art. 70 para. 1 lit. c in connection with Art. 72.
148 Compare Arts VIII and IX NYC.
149 The term is borrowed from Art. 29 of the Hague Convention on Choice of Court Agreements of 30 June 2005.
150 Similarly Poudret, supra n. 1, at 779.
whether implemented through a treaty or a European statute (EU Regulation),
would be needed in particular in the context of the Brussels Regime. Merely
dropping the arbitration exception contained therein (Article 1(2)(d)) would create
more problems than it solves, given that the Brussels I Regulation, according to its
Article 73(2), was explicitly made subject to the NYC, i.e. the above-mentioned
weaknesses of the status quo under the NYC would be cemented.

Notwithstanding all this, we submit that the proposed treaty does not even
require that the signatories trust each other’s judiciary. Rather, the choice of
the seat must be interpreted as an implicit choice of court agreement regarding
the ‘supervisory’ setting aside jurisdiction. Other signatories enforce the deci-
sions of the ‘supervisory’ jurisdictions not because they particularly trust them,
but because the parties chose that forum. The states signing the Hague
Convention on Choice of Court Agreements, concluded on 30 June 2005,
agreed to enforce, subject to cer-
tain safeguards in Article 9, any ‘judgment
given by a court of a Contracting State designated in an exclusive choice of
court agreement’ (Article 8(1)). Accepting to give effect to decisions rendered
by the ‘supervisory’ jurisdiction would have a similar effect – giving effect to a
foreign decision rendered on the basis of a parties’ choice of forum. Our
proposal also contains a public policy excep-
tion that is inspired by Article 9 (e) of this Hague Convention.

5.2[b] General Reservations in Light of the Choice of Remedies Doctrine?

Critics might argue that the proposed treaty contradicts the currently prevailing
choice of remedies doctrine under the NYC, i.e. the view that an award debtor
may choose without limits and adverse consequences between initiating setting
aside proceedings and resisting enforcement. Yet considering that the treaty has the
potential of limiting repetitive proceedings that disproportionately favour obstruc-
tive award debtors, increased efficiency might be a persuasive argument to re-
evaluate whether an unfettered choice of remedies is even a beneficial approach to
begin with.

It is submitted that the interplay of setting aside and (transnational) enforce-
ment should balance the parties’ interests and promote the resolution of disputes
instead of creating novel uncertainties. The proposed treaty would, to a significant
extent, achieve such purpose.

152 Er, Hsu & Vickneson, supra n. 11.
5.2[c] General Reservations with Regard to the Judgment Route?

Finally, the proposed treaty goes a considerable way down the so-called judgment route. Is this a good idea to begin with?

In a thorough analysis, Maxi Scherer argued in general against giving binding effect to award judgments, suggesting that the focus must always be on the respective award. Her argument is, inter alia, that award judgments are not based on the evidence of the underlying dispute. Since award judgments should not be given more weight than the awards themselves, a state where enforcement is sought should primarily examine the award itself, not the binding effect of a foreign judgment. In addition, Scherer voiced concerns of potential forum shopping by the award debtor by trying to have the award set aside in a jurisdiction exercising a strict judicial control, or that the award creditor might seek enforcement in a jurisdiction exercising a limited judicial control.153

While these are valid points against following the judgment route unrestrictedly, we submit that they do not speak against the specific provisions proposed above. First, our proposal would provide the courts at the seat with exclusive jurisdiction to set aside. Forum shopping by the award debtor with regard to setting aside would be rendered impossible. Second, our proposal binds the enforcement courts only to the setting aside court’s decision with regard to grounds corresponding to the grounds listed in Article V(1) NYC. The foreign award judgment has thus no additional substantive value when compared to the adjudication by the arbitral tribunal (a review of the substance in view of public policy grounds still remaining possible). Instead, the proposal merely eliminates double proceedings in case the grounds for setting aside coincide with Article V(1) NYC grounds. Third, enforcement decisions have no binding effect abroad, which avoids any risk of ‘forum shopping’ by the award creditor. ‘Forum shopping’ simply in order to find a jurisdiction to enforce is not abusive, as already highlighted in the introduction: the award debtor, when signing the arbitration agreement, usually agrees to honouring resulting arbitral awards. If the award debtor fails to do so without good reasons, it is perfectly justified that the award creditor be provided with options to enforce.154

153 Scherer, supra n. 6, at 610–611.
CONCLUDING THOUGHTS: COMPATIBILITY OF THE PROPOSED TREATY WITH THE NYC

The foregoing analysis was an account of the current system of coordinating setting aside and enforcement of arbitral awards. On the transnational level, the status quo has notable weaknesses (which is of course an assessment raised and shared by many others). Drawing upon solutions already in place at the domestic level, a treaty regulating preclusion between setting aside and enforcement proceedings on a transnational level might therefore be a valid proposal in that it would limit the existing uncertainty and risk of contradictory decisions. While the proposed treaty arguably changes parts of the traditional understanding of how arbitration inter-relates with domestic legal orders, or at least takes sides in this debate, it would nevertheless be compatible with the NYC.

The NYC allows states to refuse enforcement (‘may’) if the requirements of Article V NYC are met, but it does not oblige them to do so. If, under the proposed treaty, a party is precluded from resisting enforcement due to a failure to apply for setting aside, or due to a failure to raise certain objections in the setting aside proceedings, this would only mean that signatories to the proposed treaty would exercise with even more caution their discretion (‘may’) as to whether to enforce an award despite the requirements of Article V NYC being met. Adopting the proposed treaty would thus reinforce the pro-enforcement stance characterizing the NYC.

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155 Nadia Darwazeh, Article V(1)(e), in Recognition and Enforcement of Foreign Arbitral Awards: A Global Commentary on the New York Convention 301, 319 (Herbert Kronke, Patricia Nacimiento & Nicola Christine Port eds, Kluwer Law International 2010); Paulsson, supra n. 44, § 6.08(N).